[Cite as *State v. Craycraft,* 2010-Ohio-596.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-02-013 CA2009-02-014
- vs -	:	O P I N I O N
	:	2/22/2010
JEREMIAH C. CRAYCRAFT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007CR00489 & 2007CR01005

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HENDRICKSON, J.

{¶1} This case is a consolidated appeal in which defendant-appellant, Jeremiah C. Craycraft, challenges two decisions of the Clermont County Court of Common Pleas convicting him of felonious assault, child endangering, and domestic violence. For the reasons outlined below, we affirm the decisions of the trial court.

{¶2} Appellant and his live-in girlfriend, Staci Kraft, were involved in a romantic relationship that was marked by conflict. On March 3, 2007, fraternal twins were born to

the couple. Neither appellant nor Staci was employed at the time. Staci was the primary caregiver for the twins, K.C. and S.C., though appellant would sometimes care for them during Staci's brief stints of employment.

{¶3} When the twins were approximately two months old, Staci took them for a wellness exam. The pediatrician, concerned that the infants showed signs of physical abuse, contacted the authorities. The twins were transported to the hospital, where they were diagnosed with multiple injuries including bruises, broken bones, and subdural hematomas. K.C. and S.C. were removed from the home by the county children's services agency. Appellant denied abusing the infants, claiming that their injuries must have been accidental.

{¶4} On June 13, 2007, appellant was indicted on two counts of felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony; two counts of child endangering in violation of R.C. 2919.22(A), a third-degree felony; and two additional counts of child endangering in violation of R.C. 2919.22(B)(1), a second-degree felony. On December 5, 2007, the grand jury returned a second indictment against appellant. The second indictment repeated the six counts contained in the first indictment and added two counts of domestic violence in violation of R.C. 2919.25(A), a third-degree felony. The two cases were consolidated, with the state proceeding on the six charges in the first indictment and the two domestic violence charges in the second indictment.[1]

{¶5} Following a four-day jury trial, appellant was convicted on all eight counts. The trial court sentenced appellant to an aggregate prison term of 22 years. Appellant timely appeals, raising six assignments of error.

1. Appellant was charged with two counts for each of the four offenses. It is helpful to know that one count always pertained to K.C. and one count to S.C. This applied to all four offenses – felonious assault, third-degree felony child endangering, second-degree felony child endangering, and third-degree felony domestic violence.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY PERMITTING OTHER ACTS TESTIMONY INTO EVIDENCE THUS PREJUDICING APPELLANT'S RIGHT TO A FAIR TRIAL."

{¶8} Appellant argues that the trial court abused its discretion in admitting "other acts" evidence in violation of Evid.R. 404(B). The main items of evidence that appellant challenges are two videotaped interviews in which he was questioned by investigating officers with the Clermont County Sheriff's Office. Appellant claims that the officers improperly elicited facts during the interviews that tended to show he had a history of combative behavior which he acted in conformity with in the present case. This included references to appellant's prior convictions for domestic violence, felony assault, and operating a motor vehicle while under the influence of alcohol. While appellant concedes that the state was permitted to introduce certified copies of his prior domestic violence convictions, he insists that any questioning regarding the facts underlying those convictions was improper and prejudicial.

{¶9} Appellant also challenges all references to his prior treatment for anger management problems, his failure to take the medication prescribed for those problems, and Staci's testimony stating that he was habitually intoxicated. Appellant maintains that this information was improperly elicited to show that he had a propensity to engage in violent behavior. Finally, appellant opposes all references to a confrontation between him and Staci which resulted in domestic violence charges of which he was ultimately acquitted.

{¶10} At the outset, we note that appellant objected to certain items of evidence which he now challenges and failed to object to others. Consequently, we must apply

two different standards of review in examining the challenged evidence.

{¶11} **Evidence that was objected to at trial.** The evidence that was admitted over appellant's objection at trial is subject to an abuse of discretion standard. A trial court has broad discretion in determining whether to admit or exclude evidence. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62. Absent an abuse of discretion and a showing that the accused has suffered material prejudice, an appellate court will not disturb the ruling of the trial court as to the admissibility of relevant evidence. Id. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. Id.

{¶12} ***Videotaped interviews*.** The majority of the evidence which appellant disputes was contained in the two videotaped interviews conducted by members of the Clermont County Sheriff's Office. Prior to trial, appellant sought to exclude the videotaped interviews by filing a motion to suppress/motion in limine. The trial court denied the motions. At trial, defense counsel re-iterated appellant's prior objections to the videotaped interviews on the record, stating that appellant was not waiving his objections by consenting to the playing of the tapes at trial. Defense counsel also reminded the court that it had agreed to give curative instructions regarding the tapes. The court complied, administering limiting instructions before playing both tapes.

{¶13} Prior to playing the videotape of the May 17, 2007 interview, the trial court informed the jury that the tape contained an interview of appellant conducted by Investigator Rick Claypool. The court notified the jury that the interview may contain hypotheses or opinions posited by Investigator Claypool, or relayed to him by others, as to how the twins sustained their injuries. The court instructed the jury that these hypotheses or opinions were to be considered for the limited purpose of giving context

to the questions and answers in the interview, and should not be considered or given any weight as to their truth or as to appellant's guilt or innocence. Further, the court stated that only appellant's responses, and not the officer's statements, should be considered as evidence.

{¶14} The trial court repeated the same curative instructions prior to playing the videotape of the May 31, 2007 interview, with the insertion of Investigator Lori Saylor's name in place of Investigator Claypool's name. The court added that appellant would be dressed in jail clothing in the second interview, and instructed the jury that it was not to give any consideration to that fact during deliberations or in rendering its verdict.

{¶15} Generally, Evid.R. 404 prohibits the admission of evidence of other crimes, wrongs, or acts as character evidence in order to show that the person acted in conformity therewith. *State v. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶10. However, Evid.R. 404(B) permits the admission of evidence of other crimes, wrongs, or acts to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶16} In his opening statement, defense counsel delineated appellant's defense for the jury. Central to that defense was appellant's claim that he did not inflict the serious injuries upon the twins. Counsel noted that the twins were left alone with people other than appellant. Counsel also suggested that the twins' injuries may be attributable to other sources, such as the childbirth process or their visits to a chiropractor. Appellant ascribed a couple of the injuries to household accidents, but maintained that he did not do anything that could have hurt the twins.

{¶17} After the state rested, appellant presented his defense. Appellant called Lisa Miller, the mother of his older son, to testify. Lisa stated that appellant was a good

father who provided for their son. She maintained that she had never observed appellant act inappropriately with their son or with his and Staci's infant twins. Appellant's mother, Loraine Craycraft, also testified at trial. Loraine characterized appellant as a loving father and stated that she never observed him do anything inappropriate with a child or direct his anger towards a child. Loraine also testified that she not did believe appellant did anything wrong in the methods he used to soothe the twins when they cried. So, although appellant himself did not testify, he presented evidence that he was a good and loving father who did not mistreat his children.

{¶18} We find that the videotapes were relevant to appellant's defense. Cf. *State v. Hicks*, Butler App. No. CA2002-08-198, 2003-Ohio-7210, ¶18. As set out in the opening statement, appellant maintained his innocence at trial, depicted himself as a loving and caring father, and suggested that the twins sustained their injuries by accident or while in the care of others. Accordingly, the videotaped interviews and "other acts" described therein were admissible under Evid.R. 404(B) to prove appellant's intent, opportunity, and the absence of mistake or accident. Id.

{¶19} The state was made aware, in the course of its investigation in the case, that appellant attributed the twins' injuries to a number of household "accidents." See *State v. Anderson* (July 21, 1993), Hamilton App. No. C-920733, 1997 WL 271005 at *1. In the interviews, appellant admitted to employing certain techniques in an attempt to get the babies to stop crying. He conceded that he may have handled the twins in ways which inadvertently caused their injuries, but denied inflicting any of their injuries intentionally. Accordingly, the "other acts" described in the videos were material and relevant in that they spoke to appellant's mental state under the charged offenses. See *State v. Picklesimer* (Oct. 15, 1996), Pickaway App. No. 96CA2, 1996 WL 599425 at *4.

{¶20} In view of appellant's admissions regarding how he handled the twins, the "other acts" were also admissible to show lack of accident or mistake. See, e.g., *State v. Grubb* (1996), 111 Ohio App.3d 277, 282. Furthermore, appellant admitted in the interviews that the babies always seemed to sustain their injuries while they were in his care, and that this "looked bad," i.e., tended to suggest he was responsible for their injuries. In view of these considerations, the "other acts" evidence was also admissible to prove appellant had the opportunity to injure the twins.

{¶21} We conclude that the trial court did not abuse its discretion in admitting the two videotaped interviews between appellant and Investigator Claypool and Investigator Saylor, respectively.

{¶22} **Evidence that was not objected to at trial.** Next we address those items of evidence which appellant failed to object to at trial but now challenges on appeal. This includes testimony addressing appellant's prior treatment for anger management issues and his failure to take his medication prescribed for those issues. It also includes testimony referencing appellant's habitual intoxication and a physical altercation that took place between him and Staci.

{¶23} Due to the fact that appellant failed to object to this evidence at trial, his arguments challenging its admission have been forfeited unless we find plain error. See Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111.

{¶24} ***Testimony about appellant's anger issues*.** Appellant's mother Loraine testified on direct examination that she and her husband attempted to help appellant work through his anger issues in high school and had him hospitalized for a time. She also testified that the medication appellant was prescribed for his anger issues made a difference. Loraine acknowledged that appellant took his medication off and on for years, but opined that he was "fine" when he went off the medication and stated that he did not blow up often.

{¶25} Regarding the first prong of the plain error analysis, we do not find that the admission of this evidence constituted an obvious deviation from a legal rule. In accordance with Evid.R. 404(A)(1), an accused "may, at his option, offer evidence of his good character as proof that he did not commit the act charged because such conduct is not in accord with his character." Evid.R. 404(A)(1) Staff Notes. As stated, appellant was charged with felonious assault, child endangering, and domestic violence. All of these offenses involve physical violence to some degree. The evidence in the record suggests that appellant's anger issues were universally known by those close to him. It was therefore highly likely that these issues would be referenced or exposed at a trial involving violent offenses. As a matter of strategy, appellant chose to take responsibility for his anger issues rather than attempting to deny them, and to show that he sought help for these issues and improved his character as a result. Such evidence falls within the purview of Evid.R. 404(A)(1) and, accordingly, it was not error to admit this evidence.

{¶26} ***Testimony about appellant's habitual intoxication and the "body slam."*** During the state's case-in-chief, Staci testified on direct examination that appellant "would go out and get drunk all the time, come home, [and] blow up." When asked to elaborate, she relayed an incident that occurred when she was five months

pregnant with the twins. According to Staci, appellant came home after drinking one night, smashed her laptop, and "body slammed" her on the ground, breaking her collar bone. The state argued that this testimony was demonstrative of appellant's motive to abuse the twins after they were born.

{¶27} "Motive" has been defined as "a mental state which may induce an act." *State v. Young* (1966), 7 Ohio App.2d 194, 196. In order for "other acts" to be admissible to show motive, the other acts must be "of a character so related to the offense for which the defendant is on trial that they have a logical connection therewith and may reasonably disclose a motive or purpose for the commission of such offense." *State v. Moore* (1948), 149 Ohio St. 226, paragraph one of the syllabus (construing a predecessor of R.C. 2945.59, the statutory embodiment of Evid.R. 404(B)).

{¶28} In deciphering the admissibility of Staci's testimony, it is helpful to observe that the "body slam" evidence was revisited at a later point in the trial. The incident was referenced in an exhibit presented by the state which consisted of an internet conversation between appellant and Staci's ex-boyfriend. In that conversation, the speaker (who, as later discussed, had to be appellant) stated that he "tried to shove Staci down and make her lose the babies *so he wouldn't have to be with her*, but it just broke her collar bone." (Emphasis added.)

{¶29} This additional evidence connects Staci's testimony regarding the "body slam" incident with appellant's motive to injure the twins in the present matter. Appellant admitted that he "shoved" Staci in an attempt to induce miscarriage so he would not have to stay in a relationship with her. We find that this incident was so related to the offenses for which appellant was on trial that the evidence had a logical connection therewith and reasonably disclosed appellant's motive or purpose for committing the

offenses. *Moore* at paragraph one of the syllabus. We thus decline to find that the trial court erred in permitting the testimony relating to appellant's intoxication and the "body slam" incident.

{¶30} Appellant's first assignment of error is overruled.

{¶31} Assignment of Error No. 2:

{¶32} "THE TRIAL COURT ERRED BY ADMITTING THE EMAIL EVEN THOUGH IT WAS NOT PROPERLY AUTHENTICATED AND WAS HEARSAY."

{¶33} Appellant contends that the trial court erred in admitting evidence of a conversation which allegedly took place over the internet between appellant and Staci's ex-boyfriend, Joe Lovins. At trial, Staci testified that appellant kicked her out of the house one night after an argument and made her sleep in her van. While in the van she communicated with Lovins by cell phone. Lovins informed her that, at that moment, appellant was speaking with him over the internet in an instant message (IM) conversation using Staci's America Online (AOL) account. According to Lovins, he copied and pasted the IM into an email and sent it to himself in order to show it to Staci (hereinafter referred to as the "IM/email"). The trial court admitted the IM/email into evidence over appellant's objection.

{¶34} On appeal, appellant emphasizes the fact that Lovins could not confirm at trial whether or not he was in fact communicating with appellant, or whether someone else was using Staci's AOL account on the night in question. Appellant also notes that Mark Schneider, a defense witness employed in the field of computer science, testified that he could not confirm which computer sent or received the email and that the email could have been edited. Appellant concludes that the IM/email should have been excluded as hearsay.

{¶35} Because defense counsel objected to the admission of the IM/email, we review the trial court's admission of this evidence for an abuse of discretion. *Krischbaum*, 58 Ohio St.3d at 66. Regarding the authentication issue, Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This rule invokes a very low threshold standard, requiring only sufficient foundational evidence for the trier of fact to conclude that the item is what the proponent claims it to be. See *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶115. This standard is less demanding than a preponderance of the evidence standard. *State v. Winfield* (Feb. 7, 1991), Ross App. No. 1641, 1991 WL 28291 at *2.

{¶36} This court addressed the issue of authenticity of internet conversations in *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335. The defendant in that case was convicted of sexual battery and sexual imposition following allegations that he engaged in sexual acts with his foster children. The trial court admitted printouts of online conversations and emails that were alleged to have taken place between the defendant and one of the victims. In upholding the ruling, this court surveyed the law germane to the issue of authenticity:

{¶37} "[T]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by 'evidence sufficient to support a finding that the matter in question is what its proponent claims.' Evid.R. 901(A). To establish the documents are what the proponent claims them to be, namely computer printouts of conversations between the victim and appellant, the 'proponent need not prove beyond any doubt that the evidence is what it purports to be.' *State v. Aliff* (Apr. 12, 2000),

Lawrence App. No. 99CA8, 2000 WL 378370 at *9. Instead, the proponent must only demonstrate a 'reasonable likelihood' that the evidence is authentic. Id. Such evidence may be supplied by the testimony of a witness with knowledge. Evid.R. 901(B)(1); *State v. Brantley*, Butler App. No. CA2006-08-093, 2008-Ohio-281, ¶34." *Bell* at ¶30.

{¶38} Citing the record, we noted that the victim in *Bell* testified that the disputed documents portrayed online conversations and emails between him and a person he believed to be the defendant. The victim described the manner in which he was able to retrieve and print these documents from his personal MySpace account. In admitting the evidence, the trial court found that any concern regarding whether the disputed documents were fabricated by the victim merely went to the weight of the evidence.

{¶39} Similarly, Lovins testified in the case bar that the IM/email was, in fact, a printout of an online conversation that he engaged in with a person he believed to be appellant. Lovins stated that he was signed on to AOL using his personal account when he engaged in the conversation. The IM/email displays Lovins' unique handle on one end of the conversation and Staci's unique handle on the other end of the conversation. Staci's testimony supports the conclusion that she was not the one using her AOL account at the time. Lovins explained that he copied and pasted the IM conversation into an email and sent it to himself to commemorate the contents of the conversation. We find that Lovins was a witness with knowledge whose testimony demonstrated a reasonable likelihood that the evidence was authentic. Evid.R. 901(B)(1). See, also, *Bell* at ¶30. Any concern regarding whether the IM/email was fabricated by Lovins merely went to the weight of the evidence. Id. at ¶31.

{¶40} Further support for the authenticity of the IM/email may be found in Evid.R. 901(B)(4). This subsection of the authenticity rule illustrates the "distinctive

characteristics" method for showing authenticity and contemplates that a speaker in a conversation may be identified because only he could utter the speech under the circumstances. "A letter or a voice over the telephone may be related to a particular person by the very fact that the matters set forth in the letter or the telephone conversation were known peculiarly to a particular person." Evid.R. 901(B)(4), Staff Notes.

{¶41} The "distinctive characteristics" method for authenticating telephone conversations was employed in *State v. Williams* (1979), 64 Ohio App.2d 271. The *Williams* court observed that the contents of a telephone conversation are properly authenticated when there is "direct and circumstantial evidence which reasonably identifies the defendant as a party to [a] telephone conversation * * *." Id. at paragraph one of the syllabus.

{¶42} The authenticity of a telephone conversation was also at issue in *State v. Wheeler* (July 16, 1993), Montgomery App. No. 12290, 1993 WL 265133. In that case, the Second Appellate District addressed the authenticity of a telephone call that a robbery suspect allegedly made to his brother's hotel room. A police officer answered the call, posing as the suspect's brother. The caller revealed the location of the weapon used in the robbery and also used his brother's nickname and his mother's name. While noting that such details were "perhaps * * * not facts peculiarly within the knowledge" of the defendant, the *Wheeler* court determined that the facts, viewed in conjunction with the other circumstances, authenticated the phone call. Id. at *3. In order to avoid abuse in utilizing Evid.R. 901(B)(4) to authenticate telephone calls, the Second District counseled courts to ensure that the contents of the conversation, the characteristics of the speech itself, or the circumstances of the call rendered it improbable that the caller

could be anyone other than the person the proponent claimed him to be. Id.

{¶43} In the present matter, the circumstances surrounding the IM/email conversation rendered it improbable that the person with whom Lovins was conversing could be anyone other than appellant. Staci testified that appellant kicked her out of the house on the night in question and made her sleep in her van. She called Lovins while she was in the van, which was parked in the driveway of the couple's home. Lovins corroborated this, testifying that he communicated with Staci by way of cell phone conversation or text messages (he could not precisely recall which) on the night she was sleeping in her van in March 2007. Lovins testified that he was signed on to his AOL account, using his unique AOL handle, and communicating with someone using Staci's unique AOL handle. According to Lovins, he knew he it was not Staci because he had communicated with her and knew she was in her van at the time. Lovins testified as to his belief that appellant was using Staci's AOL account on the night in question.

{¶44} In addition, the IM/email conversation contained distinctive characteristics which reasonably identified appellant as the party with whom Lovins was chatting in the IM. *Williams*, 64 Ohio App.2d at paragraph one of the syllabus. Lovins told the speaker that he knew Staci was sleeping in the van. The speaker did not refute or question this assertion, instead stating that he "hoped she was freezing out there" and boasting that he "bought her a van she can sleep in which seems to be doing her good right now." As mentioned, the speaker also said he "tried to shove Staci down and make her lose the babies so he wouldn't have to be with her, but it just broke her collar bone." We find that the totality of the facts and circumstances surrounding the IM/email conversation were sufficient to authenticate that it was a conversation between Lovins and appellant.

{¶45} We now turn to appellant's argument that the IM/email should have been

excluded as hearsay. The hearsay rule provides that out-of-court statements are inadmissible at trial unless they fall under one of the exceptions to the rule. See Evid.R. 801(C), 802, 803, and 804. However, the same fact that authenticates the IM/email conversation – that appellant was the speaker – also renders the contents of the conversation non-hearsay. Under Evid.R. 801(D)(2), statements that are offered against a party and are the party's own statements are not hearsay. *State v. Byrd* (1987), 32 Ohio St.3d 79, 89. Consequently, appellant's statements in IM/email conversation were admissible as admissions by a party-opponent under Evid.R. 801(D)(2)(a).

{¶46} Appellant's second assignment of error is overruled.

{¶47} Assignment of Error No. 3:

{¶48} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS THUS PREJUDICING HIS RIGHT TO A FAIR TRIAL."

{¶49} Appellant maintains that he suffered ineffective assistance of counsel due to trial counsel's failure to object to the prejudicial "other acts" and hearsay evidence discussed in his first and second assignments of error. Appellant also decries trial counsel's performance in questioning his mother about his history of anger problems and in questioning Staci about the facts underlying the "body slam" incident. Appellant insists that these alleged transgressions on the part of trial counsel deprived him of a fair trial.

{¶50} To establish ineffective assistance, appellant must show that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 693, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for

counsel's errors, the result of the trial would have been different. Id. at 694.

{¶51} As the above analysis indicates, trial counsel did object to most of the disputed evidence. Appellant's ineffective assistance argument regarding those items of evidence is thus baseless. The only evidence which trial counsel failed to object to was Loraine Craycraft's testimony addressing appellant's prior treatment for anger management issues and Staci's testimony referencing appellant's habitual intoxication and the "body slam" incident.

{¶52} Regarding the testimony referencing appellant's anger issues and treatment, we believe trial counsel's performance in handling those issues was clearly attributable to trial strategy. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland* at 689. Because the state had a number of witnesses who would testify to appellant's anger problems, defense counsel sought to have appellant take responsibility for his anger issues and show that he sought treatment for them.

{¶53} The questions posed to appellant's mother on this issue garnered favorable information about the topic. As stated, Loraine testified that she and her husband had appellant hospitalized for a time, and that the medication he was prescribed made a difference. She acknowledged that appellant took his medication off and on for years, opined that appellant was "fine" when he went off the medication, and maintained that he did not blow up often. It was not objectively unreasonable for defense counsel to solicit this information.

{¶54} Similarly, defense counsel's decision to question Staci about the facts underlying the "body slam" incident appears to have been the product of trial strategy.

The wisdom in failing to object to Staci's testimony about appellant's habitual drunkenness and the "body slam" may be subject to criticism. However, while the wisdom of this strategy may be debatable, trial tactics, even "debatable trial tactics," do not constitute a denial of effective assistance of counsel. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶146. Having full knowledge of the extent of appellant's anger issues, it is likely that defense counsel sought to avoid placing undue emphasis on incidents which highlighted these issues.

{¶55} Defense counsel's questions posed to Staci about the "body slam" incident can also be categorized as trial strategy. As mentioned, Staci testified on direct examination that appellant came home after drinking and "body slammed" her when she was five months pregnant, breaking her collar bone. Defense counsel probed for details about the incident on cross-examination, and was able to dispel the notion that Staci acted passively during the confrontation. Staci explained that the incident started when appellant punched her laptop and broke it, which prompted her to throw a dish at appellant's computer screen and retort "does that make you feel better." It was then that appellant "body slammed" her. While appellant's violent response certainly was not justified, defense counsel at least attempted to show that Staci was not entirely blameless in the confrontation. Thus, trial counsel solicited information on the incident in an attempt to discredit Staci as part of his trial strategy.

{¶56} Appellant's third assignment of error is overruled.

{¶57} Assignment of Error No. 4:

{¶58} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING THE STATE TO INTRODUCE THE VIDEOTAPE OF APPELLANT'S STATEMENT WHILE WEARING JAIL CLOTHING AND SHACKLES."

{¶59} Appellant contends that the trial court erred in permitting the admission of the May 31, 2007 videotaped interview, which took place while he was in prison. Appellant was depicted in shackles, handcuffs, and jail clothing in the video, and the fact that he was awaiting sentencing on a recent conviction for fifth-degree felony domestic violence was brought up during the interview. Appellant insists that, in declining to exclude the video, the trial court improperly focused on the fact that he was merely being interrogated and not testifying at trial while in jail garb and restraints. Appellant finds this distinction to be irrelevant in view of the fact that the video was played for the jury at his trial. Appellant concludes that the video, practically speaking, amounted to him testifying in jail garb and restraints at trial in violation of his constitutional rights.

{¶60} In order to ensure a fair trial, a defendant cannot be compelled to appear in restraints or jail clothing during the guilt or penalty phase of trial unless the trial court determines that the defendant presents a risk of escape, violence, or disruption of the trial. *Deck v. Missouri* (2005), 544 U.S. 622, 624, 125 S.Ct. 2007; *Estelle v. Williams* (1976), 425 U.S. 501, 504, 96 S.Ct. 1691. These precautions are designed to avoid the risk of diluting the presumption of innocence, to avoid hindering the accused's ability to communicate with his lawyer, and to maintain the formal dignity of the judicial process, a component of which is respectful treatment of the accused. *Deck* at 630.

{¶61} We first observe that *Deck* and its predecessors discuss the use of jail clothing and visible shackles during courtroom proceedings. The record indicates that appellant was not compelled to appear before the jury in jail clothing and, as far as we can discern, was free from restraints at trial. Appellant submits that playing the May 31, 2007 interview for the jury was tantamount to him testifying in jail garb and restraints at trial. Under such circumstances, however, the concerns with having a criminal

defendant appear in jail clothing or restraints in a courtroom proceeding were not directly applicable. Appellant does not argue that he was unable to communicate with his attorney or that he was disrespectfully treated at trial. The only consideration that holds any viability is the risk of diluting the presumption of innocence. Considering the totality of the facts and circumstances, we find that this consideration was tempered by other factors.

{¶62} First, the probative value of the May 31, 2007 interview, particularly the visual component, was very high. Appellant professes his innocence throughout the interviews, admitting only to engaging in certain acts which may have *unintentionally* injured the twins. At certain points in the video, appellant describes some of these acts and demonstrates them on a baby doll. Absent the visual component of the video, it would be difficult to visualize the actions described by appellant in handling the twins. Moreover, this evidence counsels strongly in favor of the conclusion that appellant mishandled the twins.

{¶63} Furthermore, it was reasonable for the jury to infer that appellant was taken into custody when the indictments in the present matter were handed down by the grand jury. See *Holbrook v. Flynn* (1986), 475 U.S. 560, 567, 106 S.Ct. 1340 ("[j]urors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance"). In actuality, however, the grand jury had not yet indicted appellant on the charges in the present matter at the time of the May 31, 2007 interview. Rather, appellant was in custody on unrelated charges at the time, a fact that was raised in the interview itself. The investigating officer mentioned that she knew appellant and Staci had some domestic violence issues, but stated she was not going to go into details because she thought there were pending charges. Appellant then eagerly volunteered a

detailed status report regarding two separate charges of domestic violence recently filed against him. Due to information offered by appellant himself, then, the jury was made aware that appellant was in custody on domestic violence charges unrelated to the present matter at the time of the May 31, 2007 interview.

{¶64} We further note that the video of the May 31, 2007 interview was not made in contemplation of trial. As such, the investigating officer did not compel appellant to appear in prison attire and restraints for the purpose of its prejudicial value. To require law enforcement officials to have a suspect who is in custody change into street clothes and remove or hide all restraints prior to every interrogation would be to impose an inordinate burden on these officials and would certainly not encourage expediency in conducting investigations.

{¶65} Finally, we observe that the trial court, cognizant of the potential prejudicial effect that appellant's jail garb and restraints may have on the jury, gave a limiting instruction prior to playing the tape. *State v. Cline*, Trumbull App. No. 2007-T-0052, 2008-Ohio-1500, ¶39. The court informed the jury that appellant would be dressed in jail clothing in the interview, and instructed the jury not to give any consideration to that fact during deliberations or in reaching its verdict. Absent any indication to the contrary, the jury is presumed to have followed the court's instructions. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶54.

{¶66} Despite our decision in the present matter, we caution trial courts to take every precaution to avoid the display of defendants, who stand presumptively innocent, in jail clothing or restraints which reflect their custodial status at trial. Even so, the facts and circumstances surrounding the depiction of appellant in jail garb and restraints in the May 31, 2007 interview warrant the conclusion that the trial court did not abuse its

discretion in permitting the admission of the videotape.

{¶67} Appellant's fourth assignment of error is overruled.

{¶68} Assignment of Error No. 5:

{¶69} "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS FOR FELONIOUS ASSAULT, CHILD ENDANGERING AND DOMESTIC VIOLENCE."

{¶70} Appellant insists that there was insufficient evidence to support his convictions and that his convictions were against the manifest weight of the evidence. Specifically, appellant urges this court to find that the state failed to prove, beyond a reasonable doubt, that he caused the serious physical harm to the twins. If this court concludes otherwise, appellant submits that the state failed to prove that he caused this harm knowingly regarding his felonious assault and domestic violence convictions.

{¶71} A manifest weight challenge "concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other; weight is not a question of mathematics, but depends on its effect in inducing belief." *State v.* Ghee, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9. To determine whether a conviction is against the manifest weight of the evidence, an appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When reviewing the evidence, an appellate court must be mindful that the weight to be given the evidence and the credibility of the witnesses are

primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶72} As stated, appellant was convicted of two counts of felonious assault in violation of R.C. 2903.11(A)(1). This statute provides, in pertinent part: "No person shall knowingly * * * [c]ause serious physical harm to another * * *[.]" Appellant does not deny that the twins suffered serious physical harm. Instead, appellant specifically disputes the knowledge and causation elements of his felonious assault convictions.

{¶73} Appellant was also convicted of two counts of domestic violence in violation of R.C. 2919.25(A). This statute provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." The charges were accompanied by a specification that appellant had previously pleaded guilty to or been convicted of two or more domestic violence offenses. See R.C. 2919.25(D)(4). The state submitted certified copies of appellant's two prior domestic violence convictions. Appellant does not dispute the validity of these prior convictions, or that K.C. and S.C. were family or household members. Rather, appellant specifically challenges only the knowledge and causation elements of his domestic violence convictions.

{¶74} According to R.C. 2901.22(B), "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." Causation is not statutorily defined. In this case, the trial court defined "cause" in its jury instructions as "an act which in a natural and continuous sequence directly produces the physical harm to a person, and without which it would not have occurred."

{¶75} Finally, appellant was convicted of four counts of child endangering in

violation of R.C. 2919.22. Two of these counts involved a violation of subsection (A), which provides, in pertinent part: "No person, who is the parent * * * of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." The other two counts involved a violation of subsection (B)(1), which provides, in pertinent part: "No person shall do any of the following to a child under eighteen years of age * * *: Abuse the child[.]" Each of the four child endangering counts was accompanied by a specification alleging that appellant had caused the twins serious physical harm. See R.C. 2919.22(E)(2)(c) and (d). Appellant's brief does not specifically challenge any of the elements of the child endangering offenses.

{¶76} At trial, Staci testified that she primarily cared for the twins because appellant got aggravated when he tried to help. According to Staci, about a month after the twins were born, they brought S.C. to the hospital after noticing she was not moving her leg. An exam revealed that S.C.'s femur was fractured. Hospital employees, concerned that S.C. had been abused, interviewed Staci and appellant. Both denied knowing how S.C. received the injury. Staci testified that appellant was angry because the hospital made them keep the babies there overnight for observation.

{¶77} Staci relayed another incident which occurred in mid-April, sometime after S.C.'s broken leg. Staci attained employment and worked for a brief period in April 2007, during which appellant sometimes babysat the twins alone. Staci was at work when appellant sent her a text message on her cell phone saying "oh my gosh, [S.C.] had an accident." S.C. had a swollen upper lip and her frenulum, the piece of tissue which connects the gum to the upper lip, was torn. Appellant initially stated that S.C. rolled off the couch. When Staci expressed doubt about this explanation, appellant

opined that the dog may have pulled S.C. off the couch. Staci testified that she thought this explanation was odd, and she found no chew marks on S.C.'s blanket. Following the incident, Staci noticed a popping or cracking sound in S.C.'s ribs when she breathed or cried. An x-ray at Urgent Care confirmed that S.C. had a broken rib.

{¶78} Staci also testified about another incident, the timing of which is not clear from the record. Staci came home from work one day and noticed that K.C. had an abrasion-like mark on his head. Appellant stated that K.C. got the mark from rubbing his head against the couch. On another occasion, Staci returned home and found that S.C. had a black eye. Appellant explained that S.C. was in her swing and fell forward, hitting her head on the tray of the swing.

{¶79} Staci took the babies to the doctor for their two-month checkup on May 15, 2007. After the babies were examined, the staff told Staci that the police were going to escort her to the hospital because the infants showed signs of abuse. Staci called appellant, who refused to come to the hospital until the detective who was investigating the allegations had departed.

{¶80} Following their two-month wellness exam, the twins were removed from the home by Clermont Children's Protective Services (CPS) and placed into the custody of appellant's mother Loraine. According to Loraine, since the twins' removal, the same group of people who were in their lives while they were in Staci and appellant's care had access to the twins while they were in Loraine's care, appellant being the sole exception. Staci testified that the twins did not sustain any additional injuries while in Loraine's care.

{¶81} Social worker Emily Detrick became involved with the case in April 2007 when S.C. was brought to the doctor for her broken leg. According to Detrick,

appellant's demeanor was flat when she spoke with him and Staci in the hospital. Appellant did not participate much in the conversation. He answered direct questions, but did not offer any explanations for how S.C. could have sustained the femur fracture. Following her investigation, Detrick contacted CPS due to suspected child abuse.

{¶82} Andy Baughey, an investigator with CPS, confirmed that the agency opened an investigation in April 2007 after S.C.'s broken leg was discovered. The day after the twins were rushed to the hospital following their two-month wellness exam, Baughey informed Staci and appellant that CPS would be seeking custody of the twins. Baughey noted that Staci had an appropriate reaction to the news, including crying and sobbing, while appellant showed no emotion whatsoever.

{¶83} Investigator Claypool of the Clermont County Sheriff's Office became involved in the case when the twins' pediatrician contacted the authorities on the day of the wellness exam. He first spoke with Staci, who told him she had no idea how the twins were injured. In speaking with Staci, Investigator Claypool observed that appellant appeared to be babysitting the twins every time there was an injury. Investigator Claypool interviewed appellant on May 17, 2007. The second interview, which took place on May 31, 2007, was conducted by Investigator Lori Saylor.

{¶84} During the interviews, appellant was relatively candid about his anger problems and the medication prescribed therefor. Appellant insisted that he was more verbal than physical when angry. He acknowledged that some of the injuries were sustained by the twins while he was babysitting them alone, but steadfastly maintained that he did not intentionally inflict the injuries. Instead, he described a number of "accidents" which he thought may have accounted for the twins' injuries. For example, he believed S.C. sustained the bruise on her face when she fell forward in her swing.

He thought S.C.'s broken rib may have resulted from her falling off of the couch or being pulled off by the dog. He denied ever force feeding the twins, but admitted to putting a pacifier too far into S.C.'s mouth, causing tears in her frenula. Appellant did not have an explanation for S.C.'s broken leg or her subdural hematoma.

{¶85} Regarding K.C., appellant stated in the interviews that he had no idea how the infant sustained a wrist fracture. He denied picking K.C. up by the wrist. Appellant was also unable to explain how K.C. sustained his serious subdural hematoma. He suggested that K.C. sustained the abrasion-like "rub mark" on his forehead by rubbing his head against the couch. He also admitted to tossing K.C. approximately two feet onto a recliner when the infant urinated on the couch during a diaper change.

{¶86} As referenced above, during May 31, 2007 interview, appellant demonstrated a few moves he did to soothe the babies when they were crying, using a baby doll provided by Investigator Saylor. Appellant said he would sometimes throw the babies up in the air, but stated that they did not leave his hands for long, if ever, while in the air. In another of his moves, appellant would hold the infants up at chest level and let them free fall to his knees and then catch them. Appellant informed the officer that Staci found something on the internet while searching shaken baby syndrome which suggested that this free fall drop could have injured the babies. Investigator Saylor pointed out that none of the doctors said anything about the babies being shaken. In another of his "soothing" moves, appellant "rolled the babies head over heels onto the bed" to distract them when they were crying.

{¶87} Appellant also explained a method he would sometimes employ when one baby was crying and the other was sleeping. He would move the crying baby to his bedroom, turn on the television, and shut the door. Upon questioning, appellant stated

that the purpose of this was to keep the crying baby from waking up the sleeping baby. He later admitted that he did so to avoid getting angry. Appellant denied ever dropping the babies. At most, he conceded, he may have snatched them off the couch, tossed them onto the bed, or jerked them out of their swing too hard when he was frustrated.

{¶88} The trial court also heard testimony from Dr. Kathi Makoroff, a pediatrician at Cincinnati Children's Hospital who evaluates children for physical and sexual abuse. Dr. Makoroff first examined S.C. on April 6, 2007. At the time, S.C. was 28 days old and had a fractured femur. Staci and appellant expressed to the doctor that there was no known history of any kind of trauma to S.C. Dr. Makoroff noted that the injury was a type commonly seen in child abuse victims. While admitting that she could not rule out S.C.'s fracture as a birth injury, she opined that the fracture was a very unusual type to sustain from birth. The doctor also explored and ruled out any conditions that would make S.C.'s bones weaker than usual. Due to her suspicions of child abuse, Dr. Makoroff referred the case to CPS.

{¶89} Dr. Makoroff examined the twins again on May 15, 2007 after receiving a call from their primary care physician. The physician was concerned because each of the twins had a bruise on the head or face, and K.C.'s head size had greatly increased in a short time. The state introduced photographs which depicted a few of the twins' injuries. K.C. had two bruises on his forehead, which Dr. Makoroff opined was not typical for such a young infant who is not yet mobile. The picture also showed K.C.'s abnormally growing head. A CAT scan revealed that K.C. had a large amount of subdural blood within one of the layers covering his brain. She noted that the blood was entering into the space between the two halves of K.C.'s brain, pushing the brain to one side. Dr. Makoroff testified that this type of injury is commonly considered an inflicted

injury, resulting from significant force. She testified that Staci and appellant provided her with no history of accidental trauma which may have accounted for the injury. The examination of K.C. also revealed that he had an arm fracture. Staci and appellant were also unable to provide any accidental trauma history to explain this injury.

{¶90} X-rays revealed that the fracture to S.C.'s femur may have been more severe than initially thought. The photographs introduced by the state also showed that S.C. had a bruise under her eye. Dr. Makoroff noted that S.C. had a torn upper lip frenulum, as well as a tear to the frenulum underneath the tongue. The doctor opined that it was not possible for such a young infant to inflict tears to her own frenula due to her immobility. S.C. also had a subdural hematoma that was much smaller than K.C.'s., three rib fractures, and a new lower leg fracture. Again, Staci and appellant offered no history of accidental trauma to explain these injuries.

{¶91} Dr. Makoroff concluded, to a reasonable degree of medical certainty, that all of the twins' injuries were inflicted injuries resulting from child abuse. She opined that S.C. being pulled off the couch by the dog should not have caused a rib fracture. She stated that the rib fracture could have been caused by appellant squeezing S.C. too hard, but it would require a large and inappropriate amount of force. The doctor also opined that putting a pacifier in S.C.'s mouth could have caused the frenula tears, but it would require a large and inappropriate amount of force. According to Dr. Makoroff, S.C. falling forward in the swing and hitting her head on the tray could have caused the bruise, but not the subdural hematoma. In Dr. Makoroff's opinion, the following actions were not appropriate ways to handle a one to two-month-old infant, but probably would not be sufficient to cause subdural hematomas: flipping the baby head over heels onto a bed, tossing the baby into the air, and tossing the baby onto a recliner. Dr. Makoroff

opined that jerking S.C. up out of a swing could have caused the femur fracture, but it would require a great deal of force.

{¶92} After thoroughly reviewing the record, we conclude that appellant's convictions were not against the manifest weight of the evidence. As the above demonstrates, there is a large amount of credible circumstantial evidence supporting that appellant knowingly caused the twins' injuries. Although appellant claims he did not intentionally injure the twins, there is a significant amount of evidence that speaks to the contrary. Appellant's seemingly innocent explanations for the injuries suffered by the twins were not credible in view of Dr. Makoroff's testimony. The jury was free to, and did, reject appellant's explanations. We find that the jury did not lose its way in finding appellant guilty of felonious assault, child endangering, and domestic violence.

{¶93} A determination that a conviction is supported by the weight of the evidence is also dispositive of the issue of sufficiency. See *State v. Hinojosa*, Butler App. No. CA2003-05-104, 2004-Ohio-1192, ¶12. Accord *State v. McCrory*, Portage App. No. 2006-P-0017, 2006-Ohio-6348, ¶40; *State v. Santana*, Cuyahoga App. No. 87170, 2006-Ohio-3843, ¶25; *State v. Wyrick*, Licking App. No. 2005-CA-89, 2006-Ohio-1919, ¶15; *State v. Braxton*, Franklin App. No. 04AP-725, 2005-Ohio-2198, ¶15; *State v. Williams*, Lucas App. No. L-02-1221, 2004-Ohio-4856, ¶11. Our determination that appellant's convictions are supported by the manifest weight of the evidence therefore disposes of appellant's sufficiency argument.

{¶94} Appellant's fifth assignment of error is overruled.

{¶95} Assignment of Error No. 6:

{¶96} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY SENTENCING APPELLANT AS APPELLANT'S CONVICTIONS FOR FELONIOUS

ASSAULT, CHILD ENDANGERING AND DOMESTIC VIOLENCE WERE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶97} Appellant insists that the trial court erred in sentencing him on his convictions for felonious assault, child endangering, and domestic violence because these offenses are allied offenses of similar import under R.C. 2941.25.

{¶98} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. *State v. Brown*, Butler App. No. CA2009-05-142, 2010-Ohio-324, ¶7. The statute provides the following:

{¶99} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶100} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶101} The Ohio Supreme Court established a two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. The first step requires a reviewing court to compare the elements of the offenses in the abstract without considering the evidence in the case. Id. at paragraph one of the syllabus. If the court finds that the elements of the offenses are so similar that the commission of one will necessarily result in commission of the other, the offenses are deemed allied offenses of similar import

and the court must proceed to the second step in the analysis. Id.

{¶102} The second step requires the court to review the defendant's conduct to decipher whether the crimes were committed separately or with a separate animus for each crime. Id. at ¶14. If so, the defendant may be convicted of both offenses. Id. If the reviewing court concludes that two offenses are allied offenses of similar import under R.C. 2941.25, the state may elect which of the offenses to pursue on resentencing. *State v. Whitfield*, ___ Ohio St.3d ___, 2010-Ohio-2, ¶24. The trial court is bound to accept the state's choice and must merge the offenses into a single conviction for purposes of resentencing. See id.

{¶103} We shall first compare the elements of the offenses in the abstract. *Cabrales* at paragraph one of the syllabus. Felonious assault under R.C. 2903.11(A)(1) requires proof that the defendant (1) knowingly, (2) caused, (3) serious physical harm. Domestic violence under R.C. 2919.25(A) requires proof that the defendant (1) knowingly, (2) caused, (3) physical harm, (4) to a family or household member.

{¶104} In comparing the respective elements of these two offenses, we find that the offenses are not allied offenses of similar import. The offenses do share the elements of knowledge and causation. However, felonious assault entails a finding of serious physical harm committed against any person, whereas domestic violence distinguishes that the victim must be a family or household member and requires a lesser degree of harm. We also note that other courts have determined that the offenses of felonious assault under R.C. 2903.11(A)(1) and domestic violence under R.C. 2919.25(A) are not allied offenses of similar import. See *State v. Robinson*, Logan App. No. 8-08-05, 2008-Ohio-4956, ¶23; *State v. Sandridge*, Cuyahoga App. No. 87321, 2006-Ohio-5243, ¶32-33; *State v. Marshall*, Summit App. No. 22706, 2005-Ohio-5947,

¶46-50; *State v. Yun*, Stark App. No. 2000CA00276, 2001 WL 1082354 at *5.

{¶105} The elements of child endangering are divergent from the respective elements of felonious assault and domestic violence as well. Third-degree felony child endangering under R.C. 2919.22(A) requires proof of (1) a parent, guardian, custodian, person having custody or control, or person in loco parentis, (2) of a minor child, (3) recklessly, (4) creating a substantial risk to the health or safety of the child, (5) by violating a duty of care, protection, or support, (6) resulting in serious physical harm to the child. Notably, this offense requires that the perpetrator be a parent or other custodial figure and the victim a minor child. Felonious assault does not specify a corresponding categorization of the perpetrator and the victim. *State v. Cudgel*, Franklin App. No. 99AP-532, 2000 WL 256181 at *9. While the domestic violence statue mandates that the victim be a family or household member, it also does not require the perpetrator to be a parent and the victim a minor child.

{¶106} Second-degree felony child endangering under R.C. 2919.22(B)(1) requires proof of (1) recklessly, (2) abusing, (3) a minor child, (4) resulting in serious physical harm to the child. Distinguishable from third-degree felony child endangering, the second-degree offense does not require that the perpetrator be a parent or other custodial figure, but it does require an act which rises to the level of affirmative abuse of a minor child. Cf. *State v. Garcia*, Franklin App. No. 03AP-384, 2004-Ohio-1409, ¶40.

{¶107} Once again, second-degree felony child endangering mandates that the victim be a minor child, a requirement that is noticeably absent from the felonious assault and domestic violence statutes. We further observe that the mens rea element of both the second- and third-degree felony child endangering offenses, recklessness, differs from the mens rea element of the felonious assault and domestic violence

offenses, knowledge. Id. at ¶41. "Although proof of knowledge may suffice to prove recklessness, proof of recklessness is not sufficient to prove knowledge." *State v. Barton* (1991), 71 Ohio App.3d 455, 463-64.

{¶108} In addition to the above considerations, we find that the legislature manifested an intention to serve different societal interests in enacting these three statutes. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶35-37. The plain language of R.C. 2919.22, the child endangering statute, reveals that it was designed to protect children under the age of eighteen years and mentally or physically handicapped children from neglect or harm. R.C. 2919.25, the domestic violence statute, generally protects family or household members from physical harm. Finally, R.C. 2903.11, the felonious assault statute, was more broadly wrought to protect any person or unborn child, but the harm sustained by the victim must be serious physical harm.

{¶109} Based upon our abstract comparison of the elements of appellant's convictions for felonious assault, child endangering, and domestic violence, we conclude that the elements are not so similar that the commission of one of these offense will necessarily result in commission of the others. *Cabrales* at paragraph one of the syllabus. Accordingly, there is no need to proceed to the second step in the *Cabrales* analysis, and appellant's convictions did not violate R.C. 2941.25.

{¶110} Appellant's sixth assignment of error is overruled.

{¶111} Judgments affirmed.

BRESSLER, P.J., and POWELL, J., concur.