[Cite as *State v. Blanda*, 2011-Ohio-411.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-03-050
	:	O P I N I O N
- vs -		1/31/2011
	:	
VINCENT J. BLANDA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-04-0579

Robin N. Piper III, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45012-0515, for plaintiff-appellee

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HENDRICKSON, J.

{¶1} Defendant-appellant, Vincent Blanda, appeals a decision of the Butler County Court of Common Pleas sentencing him following his convictions for murder, child endangering, and domestic violence. For the reasons outlined below, we reverse the decision of the trial court in part and remand.

{¶2} On the morning of March 24, 2008, Carmen Vanscyoc departed for work and left the children in the care of her husband, appellant. Around 7:00 a.m., appellant

awoke to the cries of five-month-old Brooklyn. He attempted to feed the baby, checked her diaper, and attempted to console her. He became frustrated and tried to awaken 13-year-old Mercedes, who would not arise to help him.

{¶3} Appellant phoned Carmen for advice. Carmen suggested that appellant wrap Brooklyn in a blanket, give her a pacifier, and walk around until she fell asleep. After these efforts also failed, appellant "snapped." He held Brooklyn in front of him, shouted at her, and shook her until she stopped crying. The infant slowly began going limp and regurgitated a white fluid from her mouth and nose. She remained quiet, except for gurgling sounds.

{¶4} Appellant, growing concerned, phoned Carmen and told her he "did something stupid" and shook the baby. An alarmed Carmen asked to speak to Mercedes. After observing that Brooklyn was growing pale, appellant called a nonemergency number for the Butler County Sheriff. He was transferred to a police dispatcher for the city of Hamilton, who sent police and paramedics to the Blanda residence.

{¶5} Brooklyn was first transported to Fort Hamilton Hospital, and then to Cincinnati Children's Medical Center. She died the next day. An autopsy revealed that Brooklyn suffered an intracranial hemorrhage due to cranial cerebral trauma. The coroner opined that the manner of death was homicide.

{¶6} On May 7, 2008 appellant was indicted on felony murder in violation of R.C. 2903.02(B) (based upon the predicate offense of child endangering), an unclassified felony; child endangering in violation of R.C. 2919.22(B)(1), a second-degree felony; and domestic violence in violation of R.C. 2919.25(A), a first-degree misdemeanor. Following a jury trial, appellant was found guilty and convicted on all counts.

{¶7} The trial court sentenced appellant to a six-month jail term on the domestic violence conviction, an eight-year prison term on the child endangering conviction (to be served concurrent with the six-month term), and an indefinite prison term of 15 years to life on the felony murder conviction (to be served consecutive to the eight-year term). Appellant timely appeals, raising a single assignment of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN IMPOSING MULTIPLE PUNISHMENTS FOR ALLIED OFFENSES OF SIMILAR IMPORT CONTRARY TO R.C. 2941.25 AND THE DOUBLE JEOPARDY CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS."

{¶10} Appellant argues that the trial court erred in sentencing him on his convictions for child endangering and felony murder because these offenses are allied offenses of similar import under R.C. 2941.25. Appellant does not argue that his conviction for domestic violence is also an allied offense.

{¶11} 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:

{¶12} "(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.

{¶13} "(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."

{¶14} The Ohio Supreme Court established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314 (overruling *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291). The first inquiry focuses on whether it is possible to commit both offenses with the same conduct. Id. at ¶48. It is not necessary that the commission of one offense will *always* result in the commission of the other. Id. Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct. Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119. Conversely, if the commission of one offense will *never* result in the commission of the other, the offenses will not merge. *Johnson* at ¶51.

{¶15} If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind. Id. at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50 (Lanzinger, J., concurring in judgment only). If so, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. Id. at ¶51.

{¶16} We employ the *Johnson* analysis to determine whether child endangering under R.C. 2919.22(B)(1) and felony murder are allied offenses similar import within the meaning of R.C. 2941.25. First we examine whether it is possible to commit both offenses with the same conduct. *Johnson* at ¶48.

{¶17} The offense of second-degree child endangering under R.C. 2919.22(B)(1) requires proof that the defendant recklessly abused a minor child, resulting in serious physical harm. The offense of felony murder under R.C. 2903.02(B) requires proof that a person caused the death of another as a proximate result of the offender's committing

or attempting to commit an offense of violence that is a first or second-degree felony that is not voluntary or involuntary manslaughter. Child endangering under R.C. 2919.22(B)(1) is considered an "offense of violence" within the meaning of R.C. 2903.02(B), and may therefore serve as a predicate offense for felony murder. R.C. 2901.01(A).

{¶18} We conclude that it is possible to commit the offenses of second-degree child endangering under R.C. 2919.22(B)(1) and felony murder with the same conduct. *Johnson* at ¶48. Where, as here, a person abuses a minor child and inflicts serious physical harm, proximately resulting in the child's death, it is possible for him to have committed both offenses. Because we answer the first inquiry in the affirmative, we must next examine whether appellant in fact committed these offenses by way of a single act, performed with a single state of mind. Id. at ¶49.

{¶19} The offenses were based upon the following conduct. Appellant shook his infant daughter, Brooklyn, directly causing serious injury to the infant and, ultimately, her death. Appellant's convictions for both offenses were generally based on this single shaking incident. In fact, the shaking incident served as the basis for the offense of child endangering, which in turn served as the predicate offense for appellant's felony murder conviction. See id. Clearly, the state relied upon the same conduct to prove both offenses. *Johnson* at ¶56. Consequently, the offenses are allied offenses of similar import and must be merged. Id. at ¶50.

{¶20} Appellant failed to argue at the trial court level or on appeal that his conviction for domestic violence was also an offense of similar import allied to his other convictions. However, it is within this court's discretion to sua sponte consider whether the trial court committed plain error. *State v. Byrd*, Warren App. No. CA2008-10-124, 2009-Ohio-1722, ¶21, fn. 1. See, also, *State v. Derov*, Mahoning App. No. 07 MA 71,

2009-Ohio-5513, ¶12-13. Plain error under Crim.R. 52(B) exists where there is an obvious deviation from a legal rule which affected the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. The Ohio Supreme Court has held that imposition of multiple sentences for allied offenses of similar import amounts to plain error under Crim.R. 52(B). *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶21} The offense of domestic violence under R.C. 2919.25(A) requires proof that the defendant knowingly caused or attempted to cause physical harm to a family or household member. Felony murder under R.C. 2903.02(B) requires a violent predicate offense that is a first or second-degree felony. Appellant's conviction for domestic violence under R.C. 2919.25(A) was a first-degree misdemeanor. The commission of misdemeanor domestic violence will never result in the commission of felony murder. Therefore, these two offenses do not merge. *Johnson* at ¶51.

{¶22} On the other hand, where a person knowingly abuses a family or household member who is a minor child and thereby causes serious physical harm, it is possible for him to have committed the offenses of domestic violence and second-degree child endangering under R.C. 2919.22(B)(1). *Johnson* at ¶48. We must then examine whether appellant in fact committed these two offenses by way of a single act, performed with a single state of mind. Id. at ¶49.

{¶23} After reviewing the record, it is evident that the state relied upon the same conduct to prove the offenses of domestic violence and child endangering. Appellant's single act of shaking Brooklyn formed the basis for both charges. Therefore, appellant's convictions for domestic violence and child endangering in this case were allied offenses of similar import and the failure to merge them amounted to plain error. Id. at ¶50.

{¶24} We note that, because this was a pre-*Johnson* case, the charges were pursued collectively in contemplation of the now-overruled *Rance* analysis for allied offenses of similar import. Following *Johnson*, it is likely that criminal cases will proceed differently from the indictment forward. In the present matter, neither the parties nor the trial court could have anticipated the *Johnson* decision and its impact on the allied offenses analysis. However, because *Johnson* is now the law and this case cannot be retried due to Double Jeopardy concerns, we are compelled to view the record as it stands in addressing the issue.

{¶25} Because the trial court erred in failing to merge appellant's convictions, his sole assignment of error is sustained. As far as we can discern, the state retains the right to elect which allied offense to pursue at sentencing following a remand to the trial court, and the trial court is still bound by the state's election. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶24.

{¶26} Insofar as the trial court failed to merge appellant's convictions, the judgment of the trial court is reversed and this matter is remanded for further proceedings according to law and consistent with this opinion.

{¶27} Judgment affirmed in part, reversed in part, and remanded.

POWELL, P.J., and RINGLAND, J., concur.