[Cite as *State v. Arnold*, 2009-Ohio-2773.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22785
v.	:	T.C. NO. 2007 CR 3462/1
TALMADGE ARNOLD	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 12th day of June, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Talmadge Arnold, Sr., filed June 5, 2008. On May 2, 2008, following a jury trial in the Montgomery County Court of Common Pleas, Arnold was convicted of endangering children, in violation of R.C. 2919.22(B)(3). His co-

defendant and girlfriend, Kimberly Barnett, was found not guilty of the same charge. The victim herein was Arnold's son, T.A., who resided with Arnold and Barnett. Arnold was sentenced to five years in prison.

{¶ 2} The events giving rise to this matter began in February, 2007. T.A. was an 11 year old fifth-grader at Orville Wright Elementary School, and on February 23rd, his teacher, Nancy Stone-Rutter observed that T.A. was "very fidgety, couldn't stay on task." According to Stone-Rutter, T.A. "had trouble sitting in his seat and he was kind of being squirmy, and very talkative." Stone-Rutter told T.A. to come to her desk, and she asked him what was wrong. T.A. began to cry, and Stone-Rutter pulled up a chair for him, and she again asked him what was wrong. T.A. said, "I just want my dad to stop hitting me." Stone-Rutter stated that T.A. "was really upset. He looked afraid. He was crying. He was just kind of in shock * * * when he was telling me it was kind of a rush, I just want my dad to stop hitting me."

{¶ 3} Stone-Rutter testified that the day before, T.A. had gotten into some trouble in her classroom, and she had instructed him to call home to report what had happened. T.A. called his maternal grandmother, Mary Moore, and Stone-Rutter spoke to Ms. Moore about T.A.'s behavior. On the 23rd, while sitting at Stone-Rutter's desk, T.A. told her that his father was angry at him for calling Moore. T.A. told Stone-Rutter that "his dad woke him up in the morning * * * by pulling him out of bed and kicking him and punching him and screaming at him that he was not supposed to call this Mary Moore."

{¶ 4} Stone-Rutter stated that T.A. pulled up his pant legs and showed her bruises on his thighs, and he also showed her bruises on his arms. Stone-Rutter also observed "bumps" on T.A.'s head. Stone-Rutter informed the assistant principal, Michelle Riley, of T.A.'s injuries and took him

to the nurse's office. T.A. asked Stone-Rutter, "I don't have to go home, do I?"

{¶ 5} Children's Services was contacted and a worker responded to the school and called the police. Stone-Rutter was asked to leave the room when T.A. removed his shirt for the assistant principal and the Children's Services worker, but she testified that she later learned of other injuries to T.A.'s body. Based upon what she had observed and later learned of his condition, she stated that she "absolutely" expected T.A. to be taken to the hospital. Other than getting into trouble on the 22nd, Stone-Rutter stated that T.A. "has some trouble sometimes staying on task, but he can be easily refocused. He's just very good, a very good child. * * * I'm glad to have him this year as well." Stone-Rutter stated that T.A. "is very truthful and honest with me."

{¶ 6} Michelle Riley testified that she was at Orville Wright on February 23rd, on special assignment as the acting assistant principal, working towards her principal's license. When she learned of T.A.'s injuries, it was near the end of the school day, and she directed Stone-Rutter to take him to the nurse's office so that an assessment could be made as to whether it would be safe to put T.A. on the bus to go home. Riley observed T.A.'s back when he raised his shirt, and she stated it was "really bad. * * * there was no place that I could put my hand that there was not a bad mark, purple, dark purple, red. There was red lines going through it. There was also clearly a hand mark on his neck * * * *." Riley decided not to allow T.A. to go home on the bus. T.A. told Riley that he had "been in trouble with his step-mom and his dad had come home and he hit him. He was in bed and I asked him specifically, is you know, is that a hand? And he said yeah, my dad grabbed me by the back of my neck. He apparently had been on the floor and he had hit him with a belt."

{¶ 7} Riley put the other children in the school on the bus, and she returned to the office where she remained with T.A. as his father, Barnett and T.A.'s mother arrived at the school. Riley

stated that she believed that T.A. went home with Arnold's mother. Riley described T.A.'s injuries as "the second worse case I've ever seen and the other one was parallel to that." Riley testified that when she observed the bruises on T.A.'s back, she noticed that some of them were "squared out," and she believed that they had been inflicted with a belt buckle.

{¶ 8} T.A. next testified. According to T.A., he now lives with his mother. On February 22, 2007, T.A. testified that he got into trouble at school for talking, and that Stone-Rutter told him to call someone in his family. T.A. called his maternal grandmother, Mary Moore, about the behavior problem. After school that day, T.A. went to the home of Barnett's mother to await Barnett's return from work. Arnold was working nights at the time. When Barnett arrived, she asked T.A. if he had been in trouble at school, and he replied that he had not. When Barnett repeated the question, T.A. admitted that he had been in trouble. T.A. testified that he believed that Moore had probably called Barnett to tell her about the incident. After talking with T.A., Barnett "axed for a belt." T.A. testified that Barnett then asked him to pull his pants down, and she gave him "a whooping" with the belt on his back. According to T.A., Barnett did not raise her hand high in the air, and she did not strike him with the buckle. T.A. stated he was crying. Barnett then took T.A. home, where T.A. "got another whooping" on the back of his legs with another belt. According to T.A., both of the belts Barnett used were women's belts. After his second beating, T.A. went upstairs and went to bed.

{¶ 9} T.A. testified that on the next morning, Arnold entered his room and spoke to him about "how I have to learn how to stop * * * acting bad and stop talking." T.A. initially testified that Arnold did not hit him. T.A. testified that he told his teachers that Barnett had beaten him. T.A. stated that he "kind of" remembered telling a police detective that his dad ripped him out of bed and

threw him on the floor, and when he was asked if that had in fact happened, he replied, "Yeah, I think so." T.A. then stated that Arnold "just put out my hand and tapped on my hand a couple times" to punish him.

{¶ 10} T.A. testified since the incident occurred that he had been having supervised visits with his father. On the past weekend before trial, T.A. testified that Arnold told him that he loves him and that he "was sorry it ever happened." T.A. testified that he did not remember telling a detective that Arnold punched T.A.'s arms, stomach and chest, or that Arnold choked him "so hard that things got fuzzy." T.A. did not remember telling his teachers that his dad hit him.

{¶ 11} T.A. was asked about a scar he had on his lip, and he testified that he had fallen into the trunk of the car, "because the lawnmower was in the way." T.A. also stated that he accidently closed the car door on the family dog, and that doing so made Arnold "a little bit" angry. When asked if he remembered telling someone at Children's Hospital that Arnold slammed his face into the car because of the incident with the dog in the car, T.A. responded yes, and he indicated that in fact his father had injured his lip that way after the episode with the dog. T.A. also indicated that Arnold and Barnett called him "the N word."

{¶ 12} The following exchange then occurred:

{¶ 13} "Q. Okay, [T.A.], you love your dad, don't you?

{¶ 14} "A. Yes.

{¶ 15} "Q. You've loved him this entire time, haven't you?

{¶ 16} "A. Yes.

{¶ 17} "Q. Even when your dad was punching you in the stomach holding you up by your neck you loved him then, didn't you?

{¶ 18} "A. Yes.

{¶ 19} "Q. At some point when your dad punched you and it knocked the breath out of you, didn't it?

{¶ 20} "A. Yes.

{¶ 21} "Q. And, when you went to school the next day you had a little trouble walking? Were you limping?

{¶ 22} "A. A little bit.

{¶ 23} "Q. * * * And do you remember being in a lot of pain from what happened to you?

{¶ 24} "A. Yes."

{¶ 25} On cross-examination, T.A. testified that he told his teachers that he wanted both Arnold and Barnett to stop hitting him. According to T.A., both Barnett and Arnold put the marks on his back that were observed at school. T.A. stated that while he has been visiting with his father routinely, he has not seen Barnett in over a year.

{¶ 26} Officer Donnie L. Smith of the Dayton Police Department testified regarding his response to T.A.'s school. Smith stated that T.A. was "very shy * * * just very withdrawn like." After speaking with T.A., Smith took 11 pictures of the boy's injuries. Smith identified the photographs he took at trial, noting that the injuries in the pictures were "actually lighter" and that the injuries appeared worse in person than in the pictures. Smith had also documented T.A.'s injuries on a child endangering injury map, which was shown to the jury. Smith testified that he read Arnold and Barnett their rights and interviewed them. While at the school on February 23rd, Arnold told Smith "that he didn't choke his son. He had gotten upset with his son due to his lack of performance at school and the [sic] what he considered behavioral problems at that time, and while

he was talking to his son had taken his hand and put it around the back of his neck like this while he was talking to his son."

{¶ 27} During Smith's interview of Barnett, she stated "this has been the first time and only time she had whipped him at this time. She had taken the belt, placed it in a U-shape and had him drop his pants where he had his shirt and his underwear on and had whipped him about 10 times. * * * *[A]fter the first couple of times he started moving around and she had a hard time keeping him still." Barnett indicated that it was possible that she may have struck T.A.'s back while he struggled. Smith testified that he did not observe T.A.'s buttock area while at the school. Barnett told Smith that she did not observe anyone else spanking T.A. between the evening of the 22nd and her interview with Smith. Smith stated that Children's Services released T.A. into the custody of his paternal grandmother, Gloria Arnold on February 23rd.

{¶ 28} Dr. Brian Douglas Casto, a deputy coroner and forensic pathologist at the Montgomery County Coroner's Office next testified for the State, over objection, regarding the risks of serious harm that may result from certain injuries. Casto testified that he has never met T.A. and has not seen his medical records or any police reports. Casto first explained the risks involved during the process of strangulation, stating that strangulation may result in "a combination of depriving the brain of oxygen and /or blood supply," and he stated that there is also a risk of brain damage or death. Casto testified that a person could die from being strangled and have no visible injuries, because "the skin is not a great indicator of underlying injury." According to Casto, "you can have very large bruises that are just that. It's just a bruise that only involves the skin and underlying fat, and, you can have very tiny or even non-existent injuries at the surface of the skin and yet beneath that you can have significant fractures of bones or * * * damage to internal organs."

{¶ 29} When Casto was shown a picture of T.A.'s bruised back, he testified as follows: "If in fact these are bruises they're located over much of the back and specifically in * * * *areas that include what we call the flanks. The flanks are directly over lots of important organs. On the right the biggest of significance would be the liver. On the left would be the spleen. You have kidneys on both sides. You also have quite a bit of muscle on both sides. So, when we see extensive bruising to the flank area, I'm going to be particularly interested in what does the spleen look like? What do the kidneys look like? What does the liver look like? And, of course, the ribs and spine. * * * * you can damage the underlying bones in addition to the * * * *muscles themselves."

{¶ 30} Casto described the process of rabdomialysis, in which, if "someone is beat extensively or has sustained a lot of crushing trauma like in say a car crash," the muscles release myoglobin into the blood stream, where it then gains access to the kidneys, damaging the kidneys and perhaps causing renal failure.

{¶ 31} Casto stated that using a weapon, such as a belt, to inflict a spanking "poses a risk of your * * * inflict[ing] a lot more trauma or a lot more force to the victim. * * * The person using the weapon does not have to be a large person to inflict significant trauma with something like a belt or maybe a club * * * *."

{¶ 32} Casto stated the safest area to spank someone is on the buttock area, since "there's a lot of provided fat and muscle in that area that overlies bone that's very deep. There's no major readily injured organs like a kidney or a liver in that area." When asked about a blow to the abdomen, Casto stated, "a punch to the stomach can be pretty dangerous from the standpoint of not only injuring the previous organs we've talked about, but also damaging things like the intestines." When asked about blows to the arms and legs, Casto testified regarding the risk of "muscle damage,

the rabdomialysis, and of course actual boney breaks." Casto stated that fractures of the larger bones, like the femur, can result in bleeding from torn blood vessels, and that bone marrow and fat particles can enter the blood stream, where they may travel to the heart and then to the lungs, where they can form a bone marrow embolus or a fat embolism. Casto stated that a punch to the chest could damage the ribs, "but more importantly underlying things like lungs and heart." Casto stated that if a person is struck in the diaphram, they may not be able to catch their breath immediately and "have that breathless panic type feeling."

{¶ 33} Casto stated that the risks of having one's face slammed into a hard surface include "skull fractures, broken teeth, any kind of tear or bruising to the face * * * then of course most significantly bruising or concussion of the brain and the spinal cord, which can be either a long-term type disability type injury or a fatal injury." Casto stated that repeated assaults in a short period of time have a cumulative effect, "largely from the standpoint of every time you're being assaulted your body has not necessarily recovered from the previous assault." Casto rejected the proposition that if a person's injuries healed without medical treatment, then those specific injuries did not require medical treatment, stating, "I see broken legs that have healed crooked because no doctor was involved."

{¶ 34} Dr. Lori Vavul-Roediger testified next for the State. She is the Medical Director for the Department of Child Advocacy and the Medical Director for Care House at Children's Medical Center, and a pediatrician. Vavul-Roediger testified that she examined T.A. at the hospital on March 7, 2007, at the request of the Dayton Police Department. T.A.'s mother brought him to the hospital that day, and Vavul-Roediger spoke to her before examining T.A. When she asked T.A. how he was feeling, T.A. told her he felt better now, but that he used to hurt a lot. When Vavul-Roediger asked

T.A. why he hurt a lot, he told her that he "had bruises all over." T.A. told Vavul-Roediger that he called his grandmother on the phone, and that his dad was angry about it. T.A. told Vavul-Roediger, "I got punched by my dad." T.A. said his dad used his fist. T.A. also spontaneously stated during the examination, "my dad threw the covers off of me and threw me on the ground and he hurt me really bad." According to Vavul-Roediger, T.A. "did appear to exude an appearance of being anxious and fearful when he made these statements to me."

{¶ 35} T.A. told Vavul-Roediger that he has also been hurt by his step-mom. T.A. stated, "She gave me bruises on my back. She whooped me real hard on my back with a belt." T.A. told Vavul-Roediger that he was "linking sometimes for about four or five days," and Vavul-Roediger understood him to mean that he had been "limping." T.A. told Vavul-Roediger that "he had pain when he tried to walk, run, bend over or lift up stuff after he was physically injured by his father and step-mother." Vavul-Roediger testified, "in my medical opinion it sounds as though the child was describing temporary loss of the ability to perform several functions."

{¶ 36} When asked about the small scar on his lip, T.A. told Vavul-Roediger, "my dad grabbed my face and slammed my face into the trunk of the car." When asked why that happened, Vavul-Roediger testified that T.A. "said, quote, the dog was in the car and I didn't know that the dog was about to get out of the car. My dad got mad at me. My lip got cut open and it was bleeding. It hurt bad, unquote."

{¶ 37} After talking with T.A., Vavul-Roediger began a physical exam. She observed "a small linear or line shaped scar to his upper right lip," along with "several areas of essentially hyperpigmented or darker areas of skin that were marked on various body sites. He had a hyperpigmented mark to his left mid-upper back, to his right mid-back, to his posterior tricep region,

to his overlying left elbow region, to his right posterial [sic] medial thigh, his left mid-chest." Vavul-Roediger testified that she had viewed the police photos before seeing T.A., and that from them "what was most clearly and obviously discernible is that the child had multiple large purple bruises that covered his mid to lower back region." Vavul-Roediger testified that T.A. should have been taken for "immediate medical care" at the time of the injuries. The risks associated with the lack of medical attention include "muscle damage. Children who have severe bruising may have underlying muscle damage from being physically maltreated or harmed. Muscle damage can subsequently cause something call myoglobin, a protein in the muscle to leak essentially into the body, blood system, get into the kidney system and cause injury to the kidneys or kidney dysfunction.

{¶ 38} * * *

{¶ 39} "* * * if this child were to have presented with limping or obvious pain, * * * to a portion of his body, an x-ray may have been completed at the time he presented to verify he didn't have a fracture at that particular time.

{¶ 40} "Other tests such as liver function tests or pancreatic tests may have been obtained to verify that he didn't have trauma to any of his internal organs that may have been concerning again based on his history of being punched or hit in some manner."

{¶ 41} Vavul-Roediger testified that she diagnosed T.A. "with child physical maltreatment, emotional maltreatment, rule out depression, rule out post traumatic stress disorder, and a concern for possible sub-optimal nutrition based on his weight and height measurement and his body mass index." Vavul-Roediger testified that T.A.'s body mass index was just below the 30 percentile for his age. T.A. weighed just under 60 pounds. Vavul-Roediger was "clear that I indicated a rule out diagnosis of depression and a rule out diagnosis of post traumatic stress disorder because I'm not a

psychologist or a psychiatrist, but felt that many of the symptoms that the child presented within his affect or general demeanor * * * obviously raised clear concerns for those potential issues."

{¶ 42} At the conclusion of the State's case, Arnold testified on his own behalf. Arnold testified that he drove a forklift for Jamestown Moraine, working second shift, from 3:45p.m. until 12:15a.m. Arnold stated that he was injured at work in January, 2007, injuring his L-4 and L-5 discs. Arnold testified that he began having problems with the law when he was 13 or 14 years old, due to his group of friends and marijuana. Arnold was incarcerated when T.A. was born in 1996, and he was released from prison in 2001. Four months after he was released, T.A.'s mother dropped T.A. off at Arnold's home, telling him to take care of the boy. T.A. lived with his father until the events giving rise to Arnold's indictment.

{¶ 43} Arnold testified that he has used physical punishment to discipline T.A. "maybe four times." On February 22, 2007, Arnold testified that he called Barnett from work during a break, and that Barnett told him "she whooped my son." Arnold testified, "it was fine. I mean it was the first time and she was basically his mother." Arnold testified that he arrived home around 12:45 a.m. on February 23, 2007, and everybody was asleep. When Arnold later woke up, he testified that he spoke to T.A. while Barnett remained in bed, and that T.A. then rode the bus to school. Arnold testified that T.A. did not complain when he left for school. According to Arnold, he did not learn that his son was injured until he was contacted by someone from Children's Services and asked to report to the school. Arnold did not view the bruises on T.A.'s back at the school.

{¶ 44} After Barnett arrived at the school, Arnold testified that he spoke to Officer Smith. Smith, according to Arnold, asked him if he had ever grabbed T.A. by the neck, and Arnold stated that he did so when his son was attending Edison Elementary School, prior to the incident at issue.

Arnold had been called to the school because T.A. had been skipping class, and Arnold grabbed his neck "so I could have his attention so he can look me in the eye and know that what he's doing is wrong." According to Arnold, he did not want to T.A. to have a criminal history similar to Arnold's.

{¶ 45} Arnold testified that he and Barnett did not discuss the incident, but that he received a letter from her in jail stating "she was sorry for doing what she did." Arnold read a portion of the letter to the jury as follows: "I bet everybody is blaming me for what is happening right now and I'm sorry for whooping him. But, we never once saw any marks on TJ."

{¶ 46} On cross-examination, Arnold testified that T.A. was mistaken when he testified that Arnold slammed his face into the trunk of the car. Arnold testified that he only punches T.A. when they are playing, and that T.A. was mistaken when he told Valvul-Roediger that Arnold punched him. Arnold testified that he told Barnett to "punish" T.A. when he learned that he had gotten in trouble at school, but that he did not tell her how to punish him. Arnold denied throwing T.A. off the bed, saying that he wakes him up every morning for school by shaking him. Arnold denied disciplining T.A. on the morning of the 23rd. He stated that T.A. left the school with Arnold's mother after the incident, and "he was walking with no problem with my mother." Arnold testified that T.A. never complained and never appeared to be sore. Arnold testified, "I didn't whip him period on this occasion."

{¶ 47} Gloria Arnold, Arnold's mother, next testified. Gloria testified that Arnold contacted her and asked her to come to the school on February 23, 2007. A police officer asked Gloria if she was able to take T.A. home with her, and she agreed to do so. According to Gloria, no one indicated to her that T.A. should be taken to the emergency room, and no one indicated the severity of T.A.'s

injuries to her. After they arrived at her home, T.A. took a bath, and Gloria testified, "when he got out of the tub I asked him to come in the kitchen. He had his clothes on. And, I looked at his arm, which I didn't see anything. I didn't look at his neck. I didn't look at his back. And, he never complained about anything the whole time I had him." Gloria stated that T.A. was not limping, and that he played with Gloria's 12 and 13 year old granddaughters. The children played basketball and chased each other in the back yard, according to Gloria. T.A.'s mother picked him up a few days later. Gloria testified that when she later viewed the photographs of T.A.'s back, that she was surprised that Children's Services did not instruct her to take him to the emergency room.

{¶ 48} Keisha Barnett, Barnett's mother, and Barnett testified in Barnett's case-in-chief. Keisha Barnett observed Barnett discipline T.A., and she stated that Barnett kept her hand low, "just whooping him, just an average whooping. It wasn't like she was beating him, but she was like spanking him with the belt." Keisha Barnett stated that Barnett struck T.A. on "his butt" and his legs no more than 10 times.

{¶ 49} Barnett testified that she is 23 years old and about five-one, and she weighs 117 pounds. She stated that she received a call from Arnold after school on the 22nd, asking her to find out what T.A. had done in school that day. After talking to T.A., Barnett called Arnold back and told him that T.A. had called Moore. According to Barnett, Arnold told her to "whoop him." Barnett stated that she had T.A. drop his pants, and she hit T.A.'s "butt and his thighs," not very hard because T.A. jumped away from her to avoid being hit. She stated that T.A. did not cry, but he whined. Barnett took T.A. home afterwards, and he played in the yard, took a shower, and went to bed.

{¶ 50} Around 12:45 a.m., Barnett claimed she woke up. "I heard noises like someone was

getting thrown against the wall. I didn't go and see what happened but I just kind of laid there. I thought I was dreaming. And I just heard a whole bunch of noises like someone banging up against the wall. And, then I just heard Senior say that he was - - you're lucky I'm tired. I'm going to get you in the morning." Barnett stated, "It didn't sound like he was hitting [T.A.]. It sounded like he was throwing him into something." Barnett testified that T.A. "was just screaming."

{¶ 51} Barnett stated that she got out of bed for work around 6:00 a.m. She made breakfast and got into the shower, and then she "heard Junior screaming, crying and his dad was just telling him to shut up, you know, I'm tired of you - -tired of you acting up in school, just was yelling at him.

{¶ 52} * *

{¶ 53} "He was just screaming and hollering and then it sounded like an - - like another bang like he got thrown against something * * * ."

{¶ 54} Barnett entered her room to dress, and she could hear T.A. crying. According to Barnett, "I was getting ready to go down the stairs, [T.A.'s] door was shut and there was a - - a black belt laying on the top of the stairs and * * * Senior was downstairs smoking a cigarette." Barnett testified that she then left for work. Thereafter, Barnett denied that she beat T.A. on the back or caused the significant bruising there. Barnett also denied whipping T.A. a second time at home after she and he left her mother's house.

{¶ 55} Arnold asserts four assignments of error. His first assignment of error has three subparts and is as follows:

{¶ 56} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND THERE EXITS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, THE RESULTS OF THE TRIAL WOULD HAVE BEEN DIFFERENT."

{¶ 57} "1. "Defense Counsel was Ineffective in Failing to Cross-Examine [T.A.] and in Failing to Obtain an Expert Witness to Testify in Regards to the Suggestibility of Child Witnesses."

{¶ 58} According to Arnold, "defense counsel should have brought out, through cross-examination and through introduction of expert evidence, that the child's answers may have been caused by suggestibility and desire to please adults in authority."

{¶ 59} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 60} "Trial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters. *State v. Flors* (1987), 38 Ohio App.3d 133, 139, * * * . Thus decisions regarding cross-examination are within trial counsel's discretion and cannot form the basis for a claim of ineffective assistance of counsel. Id." *State v. Shells*, Montgomery App. No. 20802, 2005-Ohio-5787, ¶ 37. "'[A]n appellate court reviewing an ineffective assistance of counsel claim

must not scrutinize counsel's strategic decision to engage, or not to engage, in a particular line of questioning on cross-examination.' *State v. Dorsey*, Franklin App. No. 04AP-737, 2005-Ohio-2334, at ¶ 2." *State v. Brodbeck*, Franklin App. No. 08AP-134, 2008-Ohio-6961, ¶ 65.

{¶ 61} Further, we have "already held that a claim of ineffective assistance of counsel that is based upon the failure of counsel to call an expert witness cannot properly be the subject of a direct appeal if it relies, for its determination, upon evidence that is outside the record, *i.e.*, that there is favorable testimony that an expert would have been prepared to give, had he been called." *State v. Deleon* (May 25, 2001), Montgomery App. No. 18114; see also, *State v. Brown*, Miami App. No. 2002-CA-23,2003-Ohio-2959,¶ 9 ("Based on the present record, * * * we do not know what useful testimony, if any, an expert might have provided on Brown's behalf or why defense counsel elected not to call an expert. Therefore, a finding of ineffective assistance of counsel in the context of this direct appeal would be purely speculative and inappropriate, as Brown's claim requires proof outside the record. * * * In addition, we note that whether or not to call an expert witness is a matter of trial strategy.")

{¶ 62} The first subpart of Arnold's first assignment of error lacks merit, and we cannot find that his counsel was deficient for failing to cross-examine T.A. Nor does his failure to call an expert constitute ineffective assistance of counsel.

{¶ 63} "2. "Defense Counsel was Ineffective in it's [sic] Cross-Examination of the State's Medical Witnesses."

{¶ 64} As noted above, the extent and scope of cross-examination falls within the ambit of trial strategy and cannot provide the basis for a claim of ineffective assistance. Further, the record reflects that defense counsel asked several questions of both Casto and Vavul-Roediger, and it is

sound trial strategy to refrain from eliciting potentially damaging testimony from these experts for the State.

{¶ 65} "3. "Defense Counsel was Ineffective in Failing to Bring to the Jury's Attention that Reasonable Use of Corporal Punishment is not Criminal and is, in Fact, Protected by the Ohio Constitution."

{¶ 66} According to Arnold, the State's "case was structured in such a way that the jury might be led to believe that the mere act of corporal punishment, by itself, violated the rights of the child in the case."

{¶ 67} The decision whether or not to inform the jury regarding the reasonable use of corporal punishment to discipline a child is a matter of trial strategy. We cannot second guess defense counsel's strategy on this record. It suggests Arnold's strategy was to deny any beating and attribute any injury to Barnett. Further, Arnold was not charged with a "mere act of corporal punishment," but with administering excessive corporal punishment, thereby creating a substantial risk of serious harm to T.A.. The jury viewed photographs depicting T.A.'s back covered in bruises, some of which appeared to have been inflicted with a belt buckle, and the jury also heard about the pain and discomfort T.A. experienced after being punched and kicked and beaten. In light of the evidence, defense counsel may have determined that any discussion of reasonable corporal punishment would have merely focused the jury's attention on the lack of such evidence, thereby strengthening the State's case, which revealed injuries of such a nature that no reasonable juror could find it to be lawful corporal punishment. Defense counsel also may not have wanted to suggest to the jury that Arnold believed that the corporal punishment he employed was reasonable. Finally, Barnett, who admitted to "whooping" T.A. on his buttocks and thighs, as opposed to the flank area in

which there are several internal organs, was found not guilty, suggesting the jury understood the distinction between reasonable corporal punishment and endangering children. We cannot conclude that Arnold's representation fell outside the wide range of professional competent assistance, and Arnold's first assignment of error is accordingly overruled.

{¶ 68} Arnold's second assignment of error is as follows:

{¶ 69} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE COUNTY CORONER TO TESTIFY REGARDING THE VICTIM'S INJURIES."

{¶ 70} At trial, Arnold did not object to Casto's credentials as a forensic pathologist and deputy coroner. Instead, he argued, "our issue to that is that he works on deceased people, and we're using some marks on the body, bad ones can exist in the absence of serious physical harm, and to us that's a most serious harm. * * * it's prejudicial, * * * because essentially what he's going to say is with marks like that on a body there's likelihood of serious physical harm and death. But, you can have marks like that on the body and not have * * * *serious harm * * * ."

{¶ 71} According to Arnold in his brief, Casto's testimony "is not of relevance to the issue of whether or not the victim was at risk of serious physical harm as his testimony could not provide any material guidance as to any risk of harm that the victim faced." Arnold further argues that the testimony was highly prejudicial and an "emotional appeal to the jury by encouraging them to imagine a worse case scenario involving possible death of the victim." Finally, Arnold argues that Casto's testimony confused the issues and misled the jury in that his testimony "mostly relates to speculative injuries that could occur in hypothetical situations where maximum force is employed."

{¶ 72} "A reviewing court will not reverse the trial court's admission of evidence absent an abuse of discretion." *State v. Bellomy*, Montgomery App. No.21452, 2006-Ohio-7087. "An abuse of

discretion connotes more than a mere error of law or judgment. It implies an arbitrary, unreasonable, or unconscionable attitude on the part of the court." Id. (Internal citations omitted).

{¶ 73} "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R.401. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury." Evid.R.403(A).

{¶ 74} Evid.R.702 provides that a "witness may testify as an expert if all of the following apply:

{¶ 75} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶ 76} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 77} "(C) The witness' testimony is based on reliable scientific technical, or other specialized information. * * * ."

{¶ 78} "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid.R. 703. "The expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise." Evid.R.705.

{¶ 79} As the State asserts, it was not required to prove that Arnold seriously injured T.A., only that Arnold endangered T.A. by creating a substantial risk of serious physical harm. Casto

testified solely regarding that risk, without implicating Arnold in any injuries. After viewing the photographs of T.A.'s bruises, Casto identified the locations of T.A.'s internal organs, such as his liver, spleen, kidneys, and his muscle, ribs and spine relative to the location of the bruises. Casto testified regarding the injuries that potentially could result from being struck in those areas, depending on the amount of force used and whether or not a weapon was used to inflict the injuries. Casto was qualified to opine as to the substantial risk of serious physical harm resulting from blows to certain areas of the body, and any concerns on the part of Arnold that the jury might equate visible bruising with internal injury or risk of death was a proper matter for cross-examination. In fact, during cross-examination, Arnold testified that a person can sustain significant external injury and not have internal bleeding and organ damage. Since Casto's testimony was relevant, and its probative value was not outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, the trial court did not abuse its discretion in admitting Casto's testimony, and Arnold's second assignment of error is overruled.

{¶ 80} Arnold's third assignment of error is as follows:

{¶ 81} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 82} Arnold argues, "the fact that in-depth testing was never performed attests to the fact that a substantial risk of serious bodily harm did not actually exist ." Arnold further asserts, "evidence did exist to clearly show that any bruising on the child in this case was caused by the co-defendant," Barnett, who admitted spanking T.A with a belt. Finally, Arnold directs our attention to the "emotional state of the jury," arguing that their "level of emotion combined with the failure of the jury to carfeully weigh and base their decisions solely on the evidence presented at trial deprived"

Arnold of a fair trial.

{¶ 83} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 84} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 85} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 86} Arnold was convicted of violating R.C. 2919.22(B)(3), which provides, "No person shall do any of the following to a child under eighteen years of age * * * :

{¶ 87} "* * *

{¶ 88} "(3) Administer corporal punishment or other disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child."

{¶ 89} "Serious physical harm to persons," pursuant to R.C. 2901.01(A)(5), means any of the following:

{¶ 90} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 91} "(b) Any physical harm that carries a substantial risk of death;

{¶ 92} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 93} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 94} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶ 95} "Substantial risk' means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist. R.C. 2901.01(A)(8).

{¶ 96} The culpable mental state for endangering children is recklessness. "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person

is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶ 97} Having reviewed the entire record, weighed all of the evidence and reasonable inferences, and deferring to the factfinder's determinations of witness credibility, we cannot conclude that the jury lost its way in convicting Arnold of endangering children. In sum, the jury heard evidence, which they clearly believed, that Arnold slammed his son's face into the car because T.A. shut the door on the dog, and that he ripped his son out of bed, choking him, punching him, kicking him, and beating him with a belt, because T.A. called his maternal grandmother from school.

{¶ 98} It was clear from T.A.'s testimony that he did not want to testify against his father, with whom he has continued a relationship and whom he apparently still loves. While T.A. initially testified that Arnold did not hit him on the morning of the 23rd, he later reluctantly admitted that Arnold ripped him out of bed and threw him on the floor. While T.A. initially stated that he tripped and fell into the car, he later admitted telling Vavul-Roediger that Arnold slammed his face into the car because Arnold was angry about the dog, and he testified that Arnold did in fact injure his lip that way.

{¶ 99} In contrast to his trial testimony, and almost immediately after T.A. sustained his injuries, he told Stone-Rutter, without thought or reflection, that he just wanted his dad to stop hitting him, and that Arnold had pulled him out of bed, kicking and punching him. T.A. repeated this version of events to Vavul-Roediger. Riley described extensively the appearance of T.A.'s bruises. Barnett's testimony regarding the noises she heard, and the belt she observed outside of T.A.'s room, corroborates the statements T.A. made to Stone-Rutter and Vavul-Roediger.

{¶ 100} Casto enumerated the substantial risks associated with choking, and with injuries to the internal organs, ribs and spine from blows to the back, as well as the risks associated with blows to the chest and abdomen. Casto also enumerated the risks associated with having someone's face slammed into a hard object. Vavul-Roediger's testimony was largely consistent with Casto's regarding the risks associated with the injuries she observed on T.A.'s body. Casto made it clear to the jury that he had not examined T.A., and the jury was free to weigh his testimony regarding any risks posed by T.A.'s injuries accordingly.

{¶ 101} If believed, the statements of T.A. that his father injured him, along with the testimony of Stone-Rutter, Barnett, her mother, Vavul-Roediger, and Casto, establishes that Arnold recklessly administered excessive corporal punishment under the circumstances, thereby creating a substantial risk or strong possibility of serious physical harm. T.A.'s back was covered in bruises, he had a scar on his lip, and T.A. described his pain, his limping, his inability to perform certain functions. Vavul-Roediger also expressed concerns about the possibility of post-traumatic stress disorder and depression.

{¶ 102} Finally, in the course of the trial, one juror was weeping during testimony about T.A.'s bruises, and counsel for Arnold objected in chambers that her behavior was "tainting" the jury. The trial court overruled the objection. During jury instructions, the trial court advised the jury that they were "not to be influenced by any considerations of sympathy * * * * Consider all the evidence and make your findings with intelligence and impartiality and without bias, sympathy or prejudice * * * ." "A jury is presumed to follow a trial court's instructions." *State v. Houston*, Montgomery App. No. 22755, 2009-Ohio-2179, ¶ 62. We cannot conclude that the jury lost its way such that a manifest injustice occurred, and Arnold's conviction is not against the manifest weight of

the evidence. Arnold's third assignment of error is overruled.

{¶ 103} Arnold's fourth assignment of error is as follows:

{¶ 104} THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT TO THE MAXIMUM TERM OF INCARCERATION PERMITTED FOR THE OFFENSE OF WHICH HE WAS CONVICTED."

{¶ 105} According to Arnold, his sentence is "excessive and contrary to law under Revised Code 2953.08(G)(2)(b)." Arnold asserts that the evidence at trial does not support his sentence, in part because "no serious physical harm was done" to T.A. Arnold argues that T.A. "had serious behavior problems," and Arnold had a "sincere desire to correct his child's behavior so that his child would not himself wind-up in trouble with the law."

{¶ 106} The State responds in part that Arnold failed to include a transcript of the sentencing hearing, and that we are required to presume the regularity of the proceedings. The State further filed a motion to supplement the record with a video transcript of the sentencing. We granted the State's motion, and we viewed the brief sentencing hearing.

{¶ 107} R.C. 2953.08(A) permits appellate review of a sentence where the sentence includes a maximum term for a singe conviction. "In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. 'The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law."' *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio 5775, at ¶ 4, quoting *Kalish* at ¶ 4. 'If this step is satisfied, the second step requires that the trial court's decision be "reviewed under an abuse-of-discretion standard.' Id."' *State v. Marriott*, Montgomery App. No. 2008 CA 48, 2009-Ohio-

2323, ¶ 35.

{¶ 108} Although Arnold asserts that his sentence is contrary to law, his sentence for endangering children is five years, which is within the permissible statutory range for a felony of the third degree. R.C. 2929.14(A)(3). ("For a felony of the third degree, the prison term shall be one, two, three, four, or five years.")

{¶ 109} At sentencing, the trial court noted the extent of the beating T.A. received, and it noted that Arnold's conviction for endangering children was his fifth felony as an adult and that the offense was violent in nature. The trial court further noted that Arnold had previously been revoked while under probation supervision. It was significant to the trial court that Arnold failed to accept responsibility for his actions, and the court noted how difficult it was for T.A. to testify in court. Finally, the trial court stated that it considered the purposes and principles of sentencing under R.C. 2929.11, and the serious and recidivism factors in R.C. 2929.12, before it imposed sentence.

{¶ 110} Arnold's sentence is not contrary to law, and we cannot find that the trial court abused its discretion in sentencing him to five years. There being no merit to Arnold's fourth and final assignment of error, it is overruled.

{¶ 111} The judgment of the trial court is affirmed.

. . . . . .

FAIN, J. and GRADY, J., concur.

Copies mailed to:

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