**[Cite as *State v. Thompson*, 2010-Ohio-1680.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 22984 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 2006-CR-3214 |
| v. | : | |
| | : | (Criminal Appeal from |
| BRANDON M. THOMPSON | : | Common Pleas Court) |
| | : | |
| Defendant-Appellant | : | |
| | : | |

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**O P I N I O N**

Rendered on the 16th day of April, 2010.

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BROGAN, J.,

**{¶ 1}** Defendant-appellant Brandon M. Thompson appeals his conviction and sentence for one count of recklessly abusing a child under the age of eighteen resulting in serious physical harm, in violation of R.C. § 2919.22(B)(1) and (E)(2)(d), a felony of the

second degree.

**{¶ 2}** On August 9, 2006, Thompson was charged by indictment with one count of recklessly abusing a child under the age of eighteen (serious physical harm). Thompson was arraigned on August 24, 2006, and plead not guilty to the single count in the indictment.

**{¶ 3}** Following a trial which lasted from April 15, 2008, until April 18, 2008, the jury informed the court that it was unable to reach a verdict, and the trial judge declared a mistrial. A second jury was empaneled, and Thompson was retried on September 9, 2008. Thompson was subsequently found guilty of one count of endangering children resulting in serious physical harm. On October 1, 2008, the trial court sentenced Thompson to six years in prison, as well as three years of post-release control. Thompson filed a timely notice of appeal with this Court on October 10, 2008.

I

**{¶ 4}** At the time he was injured, E.I., an eleven-month old infant, was living with his mother, Tabitha Ignaffo, and his two-year old sister, R.I., at Thompson's residence in Englewood. Tabitha, who had been separated from her husband, Jason Ignaffo, since December of 2005[1], met Thompson through an online dating service in February of 2006. Thompson and Tabitha eventually began dating, and Tabitha moved into Thompson's house approximately one month later. Jason testified that he began noticing random bruises appearing on E.I.'s body shortly after Tabitha moved in with Thompson. Jason took pictures of the bruising on E.I. and showed the pictures to a doctor who stated that

[1]After they separated, Jason testified that they agreed that Tabitha would have primary custody of R.I. and E.I., and Jason would have visitation with the children on Wednesdays and every other weekend.

the bruises were nothing to be concerned about. Jason also asked Tabitha about the bruises, but she stated that E.I. probably got the bruises from simple accidents and falling down.

**{¶ 5}** Tabitha and Thompson planned a trip to Gatlinburg, Tennessee, in May of 2006. Tabitha left E.I. and R.I. in the care of Jason from May 7, 2006, to May 21, 2006. E.I. and R.I. stayed with Tabitha's grandmother, Noretta Delk from May 21, 2006, to May 24, 2006. Tabitha's aunt, Theresa Howerton, watched both children from 3:00 p.m. on May 24, 2006, until 5:30 p.m. that day when Tabitha arrived to retrieve them.

**{¶ 6}** According to Delk, during the day of May 24, 2006, R.I. had bumped her head against E.I.'s head, but Delk did not notice any bruising on E.I. from the impact. Delk further testified that E.I. did not cry nor did he seem injured in any way. The "head-butt" occurred immediately before E.I. and R.I. were taken to Howerton's residence. Tabitha picked E.I. and R.I. up from Howerton's residence and returned to Thompson's residence at approximately 6:00 p.m. At that time, she noticed a small yellow bruise around E.I.'s right eye that she attributed to the collision with R.I., but was not concerned about it.

**{¶ 7}** Upon returning home from work at approximately 7:30 p.m., Thompson greeted everyone, removed E.I. from his booster seat, and took the baby to a separate room in the house where E.I.'s playpen was located. After placing E.I. in the playpen, Thompson took a shower while Tabitha and R.I. watched television in the living room. Tabitha testified that she did not check on E.I. during this time because the baby was quiet. Tabitha also testified that Thompson was "moody" when he got home that night.

**{¶ 8}** After he finished showering, Thompson went to check on E.I. Tabitha

testified that Thompson told her that he thought E.I.'s gums were bleeding because the baby was teething. Tabitha prepared a wet washrag for E.I. Thompson took the rag from Tabitha and placed it in E.I.'s mouth. Thompson then took the baby back to the room where the playpen was located. Thompson returned to the living room alone and sat down to watch a movie with Tabitha and R.I.

**{¶ 9}** At some point, Thompson went to go check on E.I. Tabitha testified that she did not hear any noises, but she later went to check on E.I. as well. Upon approaching the room, Tabitha observed the playpen on its side, and E.I.'s legs were pinned underneath under one of the top rails of the playpen. She also observed Thompson attempting to pick E.I. up from under the playpen. Tabitha took E.I. from Thompson and immediately noticed some new bruising around the baby's eyes. Tabitha testified that E.I. was not crying, but the baby was acting very tired so she placed him back in the playpen.

**{¶ 10}** Tabitha testified that she gave R.I. a bath, and Thompson suggested that they give E.I. a bath, too. After both children were bathed, Thompson and Tabitha returned to the living room with E.I. and R.I. in order to dress the children for bed. Tabitha testified that E.I. was still acting very tired and lethargic. She observed E.I. attempt to stand up and walk, but he fell down and laid on the floor, not moving. Tabitha testified that at this point she was concerned that E.I. might be injured, and she expressed her concerns to Thompson who told her that E.I. was tired and needed to go to bed. Tabitha agreed, and Thompson placed E.I. back in the playpen. After she blow-dried R.I.'s hair, Tabitha returned to the living room for a short time with Thompson before putting R.I. to bed. At approximately 10:00 p.m., Tabitha and Thompson went to bed and

began watching another movie.

**{¶ 11}** Shortly thereafter, Thompson went to check on E.I. Thompson returned and informed Tabitha that he thought the baby was hot and needed to be changed into different pajamas. Tabitha disagreed, and Thompson went back to E.I.'s room to change his diaper. Thompson returned with E.I. lying limp on his chest and told Tabitha that the baby had "seized up on him" and was unresponsive.

**{¶ 12}** At approximately 11:00 p.m., Tabitha called paramedics to provide emergency support to E.I. whom she reported to be unresponsive and breathing irregularly. Thompson and Tabitha told the paramedics that E.I. sustained injuries when he attempted to climb out of his playpen and fell on the floor. EMT James Shade testified that he noticed that E.I. had extensive bruising around his head and shoulders, and that the baby's eyes were swelling shut. Based on the injuries he observed, Shade testified that he believed that E.I. had not suffered said injuries in a short fall, but rather had been abused.

**{¶ 13}** Once he arrived at the hospital, E.I.'s body temperature was found to be three degrees lower than normal, he had a great deal of bruising on his head and shoulders, and he was suffering from retinal hemorrhaging. Further evaluation established that E.I.'s left pupil was enlarged and unresponsive. Based on the severity of E.I.'s injuries, a CAT scan was ordered. The scan revealed that E.I. had a subdural hematoma, or bleeding on his brain, the pressure from which was causing a decrease in his breathing and reflexes, as well as other potentially life threatening symptoms. Emergency surgery was performed on E.I. in order to relieve the pressure on his brain and stop the bleeding. The surgery was ultimately successful, but E.I. spent

approximately two weeks in the hospital before being sent to a rehabilitation facility where he spent an additional seven weeks. Testimony was adduced that E.I. still suffered from the effects of his injuries at the time of the second trial.

**{¶ 14}** At the hospital, E.I. was treated by Dr. William Matre, an emergency pediatric physician, and Dr. Laurence Kleiner, a pediatric neurosurgeon. Both doctors testified that E.I.'s injuries were not consistent with a short fall from a playpen, rather they opined that E.I. had been abused. After listening to the explanation of E.I.'s injuries provided by Thompson and speaking with Tabitha, Detective Alan Meade of the Englewood Police Department also concluded that E.I. had been abused. After completing his interviews and investigating the scene, Det. Meade concluded that Thompson had abused E.I.

**{¶ 15}** After the second trial in the instant case, Thompson was convicted of one count of reckless abuse of a child under the age of eighteen which resulted in serious physical harm, and the trial court sentenced him accordingly. It is from this judgment that Thompson now appeals.

II

**{¶ 16}** Thompson's first assignment of error is as follows:

**{¶ 17}** "THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OF MRS. IGNAFFO'S POSTPARTUM DEPRESSION AND MARITAL BREAK-UP THEREBY DENYING MR. THOMPSON HIS RIGHTS TO PRESENT A COMPLETE DEFENSE AND TO CONFRONT WITNESSES AND HIS RIGHT TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION."

**{¶ 18}** In his first assignment, Thompson contends that the trial court erred when it prohibited Thompson from cross-examining witnesses in regards to Tabitha's alleged postpartum depression, as well as the reasons surrounding the break-up of her marriage with Jason. Specifically, Thompson argues that he should have been allowed to cross-examine social worker Destry Fallen regarding certain statements made to him by Jason with respect to Tabitha's postpartum depression. Thompson asserts that evidence of Tabitha's postpartum depression would have aided in demonstrating that she, not Thompson, was the individual who abused E.I. Additionally, Thompson argues that Tabitha's medical history and past or present mental symptoms, as reported by Jason to Fallen were admissible under Evid. R. 803(4), which states in pertinent part:

**{¶ 19}** "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

**{¶ 20}** "The exception set forth in Evid. R. 803(4) extends to statements made to social workers so long as the purpose of the statement is part of initiation of medical diagnosis or treatment." *State v. Jordan*, Franklin App. No. 06AP-96, 2006-Ohio-6224, citing, *State v. Nasser*, Franklin App. No. 02AP-1112, 2003-Ohio-5947.

**{¶ 21}** "The determination of the admissibility of expert testimony is within the discretion of the trial court. Evid. R. 104(A). Such decisions will not be disturbed absent abuse of discretion. *** 'Abuse of discretion' suggests unreasonableness, arbitrariness, or unconscionability. Without those elements, it is not the role of this court to substitute its judgment for that of the trial court. *** (Citations omitted)." *Valentine v. Conrad*, 110

Ohio St.3d 42, 43.

**{¶ 22}** It should be noted, however, that Thompson did not object to the court's restriction of Fallen's testimony at any time during the trial. Accordingly, Defendant has waived all but plain error. *State v. Coben*, Greene App. No. 2001CA8, 2002-Ohio-914. Plain error does not exist unless, but for the error, the outcome of Defendant's trial would clearly have been different; that is, he would not have been convicted. *Id*.

**{¶ 23}** During his cross-examination, Jason was specifically asked whether he witnessed any signs of depression from Tabitha following the birth of E.I., and Jason unequivocally stated that he had not. Jason also testified that he had no problems or concerns regarding Tabitha's care of E.I. and R.I. before or after they separated. Moreover, Jason testified that Tabitha babysat for six children after R.I. was born and that there were never any problems in regards to her care of the children. According to his testimony, Jason did not start noticing any injuries to E.I. until after Tabitha, R.I., and E.I. moved in with Thompson.

**{¶ 24}** "[Evid. R.] 803(4) encompasses statements made by persons who bring the patient to the hospital or doctor's office, as long as the third person's statements are in subjective contemplation of treatment or diagnosis. *** Where, however, circumstances indicate the third [person] *** is merely speculating as to facts relating to the injury, exclusion may be warranted since the essential element of reliability is not present." Weissenberger, Ohio Evidence 2008 Courtroom Manual, at p. 583.

**{¶ 25}** It is clear from the record that Jason's statements to Fallen were not made for the purposes of the medical diagnosis or treatment of E.I., as Evid. R. 803(4) requires, nor were Jason's statements regarding Tabitha's alleged mental condition made in

subjective contemplation of any treatment or diagnosis of Tabitha. Thus, defense counsel impermissibly attempted to adduce evidence of Tabitha's alleged postpartum depression under Evid. R. 803(4), and the trial court did not err by limiting defense counsel's cross-examination.

**{¶ 26}** Thompson's first assignment of error is overruled.

III

**{¶ 27}** "THE TRIAL COURT ERRED IN PERMITTING IMPROPER EXPERT OPINION TESTIMONY THEREBY DENYING MR. THOMPSON HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

**{¶ 28}** In his second assignment, Thompson contends that the trial court erred when it allowed the expert opinion testimony of David Galambos and Dr. Laurence Kleiner pursuant to Evid. R. 702. Galambos testified for the State as a safety and compliance expert in Graco children's products, specifically the type of playpen at issue in this case. Thompson challenges Galambos' testimony that an 18 pound, 11 month old child would have been unable to climb out of the playpen at issue. As previously noted, Dr. Kleiner was the pediatric neurosurgeon who operated on E.I. to relieve the pressure from the subdural hematoma. Thompson asserts that Dr. Kleiner was not qualified to testify that E.I.'s injuries were inflicted rather than accidental.

**{¶ 29}** Evid. R. 702 states in pertinent part:

**{¶ 30}** "A witness may testify as an expert if all of the following apply:

**{¶ 31}** "(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;

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

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

**{¶ 34}** David Galambos

**{¶ 35}** As a basis for offering his expert opinion, Galambos testified that he had worked at Graco as a compliance and safety manager for approximately four years, a manufacturing safety and compliance manager for two years before that, and as a quality assurance manager for four years prior to that. Before he worked at Graco, Galambos testified that he worked at a company called Century Products which also manufactured products for children. Century was eventually acquired by Graco. At Century Products, Galambos testified that he was employed as the quality assurance manager, a quality engineer, and a quality control engineer since 1991. Galambos also testified that he graduated from the University of Akron with a degree in mechanical engineering. After stating his qualifications, Galambos was accepted by the court, without objection from Thompson, as an expert in Graco children's products, specifically the playpen in which Thompson alleges that E.I. was injured.

**{¶ 36}** In regards to the playpen, Galambos testified that he was familiar with the industry standards for the playpen, and that the playpen had height, weight, and activity levels governing its appropriate use. For instance, Galambos testified that the playpen in question would be appropriate for use with children weighing 30 pounds or less and

standing 35 inches tall or less. Based on his expertise in the field of child product safety compliance and his own experience as a parent, Galambos testified that an 11 month old child weighing approximately 18 pounds who could not yet walk would be unable to lift his leg over the 20 to 24 inch walls of the playpen, and thus, not be able to tip it over. Thompson argues that Galambos did not possess the requisite expertise to render this opinion because he was not an expert in child development.

**{¶ 37}** We agree with Thompson that Galambos may not have possessed the requisite expertise in child development in order to opine as to whether a child fitting E.I.'s physical description would have been able to throw his leg over the edge of the playpen in order to climb out. Galambos, however, also testified that an 11 month old child weighing 18 pounds, *even if he were able to climb up onto the edge of the playpen,* would not physically be able to tip over the playpen based on its engineering design. Thus, regardless of whether E.I. had been able to climb onto the edge of the playpen, which is certainly doubtful given prior testimony that E.I. was not able to walk or pull himself up onto furniture without assistance, the child would not have been able to tip the playpen over because of its design and weight distribution characteristics. As Graco's safety and compliance manager with a degree in mechanical engineering, Galambos clearly possessed the requisite expertise to render this opinion, and the trial court did not err in admitting his testimony in this regard.

**{¶ 38}** B. Dr. Laurence Kleiner

**{¶ 39}** Thompson argues that Dr. Kleiner was not qualified to testify that the injuries suffered by E.I. were inflicted rather than accidental. Thompson asserts Dr. Kleiner's experience as a pediatric neurosurgeon did not provide him him with the

expertise and knowledge to render the determination that E.I.'s injuries were the result of child abuse. As the State correctly notes, Thompson did not object to Dr. Kleiner's testimony at trial, and as a result, he has waived all but plain error.

**{¶ 40}** Dr. Kleiner testified that he had been a neurosurgeon since 1986. During his career, Dr. Kleiner testified that he had treated thousands of children with head injuries, and that he performed surgery on approximately 200 children every year.

**{¶ 41}** In regards to his treatment of E.I., Dr. Kleiner observed extensive bruising around his eyes, face, neck shoulder, back, and arm, as well as retinal hemorrhaging in both eyes. Dr. Kleiner identified all of the bruising as "acute," emphasizing that the bruising occurred recently and was sustained at approximately the same time. After analyzing the results of E.I.'s CAT scan, Dr. Kleiner observed the existence of a subdural hematoma. Based on the number and type of injuries suffered by E.I., Dr. Kleiner provided the following testimony:

**{¶ 42}** "The State: Now, in this particular case with regard to [E.I.], were there injuries that [E.I.] suffered that alerted you to a possible shaking in this case?

**{¶ 43}** "Dr. Kleiner: The constellation of bruising about the shoulders and face and arm, along with the subdural hematoma and the retinal hemorrhages, is highly classic for an inflicted injury. We're kind of getting away from accidental trauma versus non-accidental trauma to we're calling it [what] it is. It's an inflicted injury. It's abuse."

**{¶ 44}** ***

**{¶ 45}** "The State: In your opinion, would a headbutt between an 11-month old by another child cause the injuries that [E.I.] suffered?

**{¶ 46}** "Dr. Kleiner: No.

**{¶ 47}** "The State: And why is that?

**{¶ 48}** "Dr. Kleiner: His injuries are widespread involving both orbits - both eyes - his arm, his back, as well as enough torque to create a subdural hematoma. And a headbutt would not do that and would not result in retinal hemorrhages.

**{¶ 49}** "The State: And why is – why are the retinal hemorrhages important to you?

**{¶ 50}** "Dr. Kleiner: It takes a great deal of force and impact and increased pressures to create retinal hemorrhages. Retinal hemorrhages are what we call a 'sine qua non' or the absolute indicator in the absence of a very significant head injury of abuse. That's something we teach our first-year medical students and our first-year residents and first-year neurological residents."

**{¶ 51}** ***

**{¶ 52}** "The State: All right. Now, based on your training and experience, can you offer an opinion to a reasonable degree of medical certainty with regard to the injuries suffered by [E.I.]?

**{¶ 53}** "Dr. Kleiner: I believe these injuries were a result of significant force and it does not correlate with the history we were given.

**{¶ 54}** "The State: Would these injuries correlate with an accident?

**{¶ 55}** "Dr. Kleiner: An accident that would be paramount to falling out of a multi-storied building or a car accident.

**{¶ 56}** "The State: But not – what about an accident of falling from a Pack 'n Play?

**{¶ 57}** "Dr. Kleiner: No, I don't believe they correlate with that at all.

**{¶ 58}** "The State: What about an accident with a history that was provided of a headbutt by another small child?

**{¶ 59}** "Dr. Kleiner: Would not account for all these injuries and the constellation that they present, no."

**{¶ 60}** Contrary to Thompson's assertions in his merit brief, Dr. Kleiner did not opine as to Thompson's state of mind. Dr. Kleiner only testified that he believed that E.I.'s "constellation" of injuries were not accidental in nature and were not the result of a headbutt from another small child or a fall from a playpen. In other words, the injuries could not be sustained in the manner claimed by Thompson. Based upon his education and knowledge as a pediatric neurosurgeon who operated on hundreds of children every year, Dr. Kleiner was qualified to testify that the injuries suffered by E.I. were consistent with abuse and not accidental. The trial court did not err when it admitted Dr. Kleiner's testimony.

**{¶ 61}** Thompson's second assignment of error is overruled.

IV

**{¶ 62}** Thompson's third assignment of error is as follows:

**{¶ 63}** "THE TRIAL COURT ERRED BY PERMITTING PREJUDICIAL OPINION TESTIMONY VIOLATIVE OF EVID.R. 701 THEREBY DENYING MR. THOMPSON HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

**{¶ 64}** In his third assignment, Thompson contends that the trial court erred when it permitted lay opinion testimony from Det. Meade regarding the lack of injuries to E.I.'s legs when the playpen allegedly tipped over and pinned his legs. Thompson also argues that the trial court erred by allowing Theresa Howerton to testify that she did not see any

injuries on E.I. after she admitted that she did not hold E.I. out and look over his face and body. Defense counsel objected to Howerton's testimony that she would have seen a bruise on E.I. if she had been looking for it.

**{¶ 65}** We review the decision whether to exclude or admit testimony of a lay witness pursuant to Evid. R. 701 under an abuse of discretion standard. *City of Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113. This standard implies "more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Steiner v. Custer* (1940), 137 Ohio St. 448, paragraph two of the syllabus.

**{¶ 66}** Evid. R. 701 states:

**{¶ 67}** "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

**{¶ 68}** "Evid. R. 701 requires that lay testimony in the form of opinion be rationally based on the perception of the witness. Perception connotes sense: visual, auditory, olfactory, etc. Thus, opinion testimony under Evid. R. 701 must be based on firsthand, sensory based knowledge." *Sec. Natl. Bank & Trust Co. v. Reynolds*, Greene App. No. 2007 CA 66, 2008-Ohio-4145.

**{¶ 69}** Detective Alan Meade

**{¶ 70}** During his interview with Thompson, Det. Meade testified that the appellant stated that he discovered E.I. on the floor with both of his legs pinned under the playpen. After E.I. arrived at the hospital, Det. Meade requested that the hospital staff take a

picture of the back of E.I.'s legs in order to document the fact that there were no bruises or injuries to that area of E.I.'s body. Det. Meade testified that he thought it was important to note that fact since, according to Thompson's account of events, it was E.I.'s fall from the playpen that caused the numerous severe injuries to his shoulders, face, and eyes.

**{¶ 71}** Det. Meade testified that he had been a police officer for approximately nine years, and during that time, he had been investigating child abuse cases for six years. Based on his own perception, he testified that he did not observe any bruising on the back of E.I.'s legs. In his experience as a detective investigating child abuse cases, Det. Meade felt that there should have been injuries to the back of E.I.'s legs in light of the explanation provided by Thompson for all of E.I.'s other injuries. Although not a medical professional, Det. Meade was qualified to assess whether there were any visible injuries to E.I.'s legs.

**{¶ 72}** Det. Meade explained his reasoning in the following portion of the transcript:

**{¶ 73}** "The State: For what purpose – first of all, who took this photograph?

**{¶ 74}** "Det. Meade: The hospital took the photograph but I requested the photograph be taken.

**{¶ 75}** "The State: Could you tell the members of the jury why you asked the hospital to take this photograph in particular?

**{¶ 76}** "Det. Meade: Yes. Because [Thompson] had told me in his statement to me that the Pack n' Play fell on [E.I.]'s legs and described [E.I.] as being pinned down on the floor in-between the Pack n' Play. So I felt that if that had occurred, there should've been injuries to the back of the legs so I wanted it to be documented that there were no

injuries to the back of the legs."

**{¶ 77}** Det. Meade's testimony in this regard fulfills all of the requirements of Evid. R. 701 insofar as the lack of injuries to the back of E.I.'s legs was based on the perception of an experienced detective. Det. Meade's testimony was also helpful to a determination of a fact directly at issue in this case; i.e., whether the playpen had actually fallen onto E.I.'s legs as Thompson asserted.

**{¶ 78}** B. Theresa Howerton

**{¶ 79}** Thompson argues that the following testimony offered by Howerton was improper and speculative:

**{¶ 80}** "The State: All right. So from three o' clock until five or 5:30 when Tabitha came to get him, you were awake?

**{¶ 81}** "Howerton: Yes.

**{¶ 82}** "The State: All right. Now, during that time, did you hold [E.I.] out and look at his face and look his body over?

**{¶ 83}** "Howerton: No.

**{¶ 84}** "The State: All right. Now, if you had done that and you had been looking for a bruise, do you believe you would have seen one?

**{¶ 85}** "Defense Counsel: Objection.

**{¶ 86}** "The Court: Overruled.

**{¶ 87}** "The State: Do you understand the question?

**{¶ 88}** ***

**{¶ 89}** "The State: If you had looked him over and had been looking for bruise, specifically looking for bruise –

**{¶ 90}** "Howerton: If I was looking for a bruise, I – yes, I – probably, yes.

**{¶ 91}** "The State: Okay.

**{¶ 92}** "Howerton: I would say I would see it.

**{¶ 93}** "The State: So let me ask this: When you got him, were you looking at him for injuries?

**{¶ 94}** "Howerton: No.

**{¶ 95}** "The State: And when [sic] the time that you did see him, you didn't notice anything. "Howerton: No."

**{¶ 96}** We agree with Thompson that the prosecutor's line of questioning required Howerton to speculate about what she may have seen if inspecting the child for injury. The trial court abused its discretion in overruling defense counsel's objection to the prosecutor's question; however, the error committed by the court was harmless in light of the fact Tabitha, E.I.'s mother, clearly testified that she had observed a small yellowish bruise under E.I.'s eye when she brought him home from Howerton's that night. Tabitha testified that she thought the bruise from R.I.'s earlier headbutt was "no big deal," and she did not worry about it. Whether Howerton would have noticed a bruise had she been actively looking for an injury is irrelevant in light of Tabitha's testimony that a minor bruise existed before the more severe injuries occurred.

**{¶ 97}** Thompson's third assignment of error is overruled.

V

**{¶ 98}** Thompson's fourth assignment of error is as follows:

**{¶ 99}** "THE TRIAL COURT ERRED BY IMPROPERLY AND PREJUDICIALLY LIMITING CROSS-EXAMINATION THEREBY DENYING MR. THOMPSON HIS RIGHT

TO PRESENT A COMPLETE DEFENSE, HIS RIGHT TO CONFRONT WITNESSES AND HIS RIGHT TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION."

**{¶ 100}** In his fourth assignment, Thompson contends that the trial court erred by limiting defense counsel's cross-examination of three of the witnesses testifying against him: to wit, Det. Meade, Noretta Delk, and Dr. Kleiner.

**{¶ 101}** "The constitutional right of cross-examination includes the right to impeach a witness's credibility. *State v. Green,* 66 Ohio St.3d 141, 1993-Ohio-26; *State v. Brewer* (August 24, 1994), Montgomery App. No. 13866; Evid.R. 611(B). Unlike Federal Crim.R. 611, which generally limits cross-examination to matters raised during direct, Ohio Crim.R. 611(B) permits cross-examination on all relevant issues and matters relating to credibility. Weissenberger, Ohio Evidence 2005 Courtroom Manual, at p. 245-246. Possible bias, prejudice, pecuniary interest in the litigation or motive to misrepresent facts, are matters that may affect credibility. Evid.R. 616(A); *State v. Ferguson* (1983), 5 Ohio St.3d 160, 450 N.E.2d 265. The denial of full and effective cross-examination of any witness who identifies Defendant as the perpetrator of the offense, is the denial of the fundamental constitutional right of confrontation essential to a fair trial. *State v. Hannah* (1978), 54 Ohio St.2d 84, 374 N.E.2d 1359; *Brewer, supra.*

**{¶ 102}** "On the other hand, trial courts have wide latitude in imposing reasonable limits on the scope of cross-examination based upon concerns about harassment, prejudice, confusion of the issues, the witness's safety, or repetitive, marginally relevant interrogation. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106

S.Ct. 1431, 89 L.Ed.2d 674. It is within the trial court's broad discretion to determine whether testimony is relevant, and to balance its potential probative value against the danger of unfair prejudice. *In re Fugate* (2000), Darke App. No. 1512. We will not interfere with the trial court's decision in those matters absent an abuse of discretion. *Id.* An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *Id*." *State v. Pillow*, Greene App. No. 07CA095, 2008-Ohio-6046, citing, *State v. Foust*, Montgomery App. No. CA20470, 2005-Ohio-440.

**{¶ 103}** Det. Meade

**{¶ 104}** Thompson argues that the trial court abused its discretion by prohibiting defense counsel from cross-examining Det. Meade in regards to whether Tabitha had ever changed her story concerning the events surrounding E.I.'s injuries on May 24, 2006. During her testimony, Tabitha provided the following information during re-direct by the State:

**{¶ 105}** "The State: Now you had originally given a statement to Detective Meade and Destry Fallen. Detective Meade you had indicated had left the left the room and then you corrected yourself and gave a different sequence of events to clarify things

**{¶ 106}** "Tabitha: Correct.

**{¶ 107}** "The State: In that first statement to Detective Meade and Destry Fallen – as [defense counsel] had asked – did you have the bath and the Pack n' Play incident transposed or switched?

**{¶ 108}** "Tabitha: Yes.

**{¶ 109}** "The State: Okay. Now, once you had time to think about it, did you

tell these individuals the correct sequence of events or the best you could remember?

**{¶ 110}** "Tabitha: Yes."

**{¶ 111}** Det. Meade testified to the following during re-cross-examination:

**{¶ 112}** "Defense Counsel: And as far as you were concerned you had your person. It's all right, you already told me once.

**{¶ 113}** "Det. Meade: Yes.

**{¶ 114}** "Defense Counsel: And then you went ahead and decided you might as well hear what he's got to say, right?

**{¶ 115}** "Det. Meade: It's my job to interview him.

**{¶ 116}** "Defense Counsel: People that you've already determined –

**{¶ 117}** "Det. Meade: People under suspicion, yes. That's my job.

**{¶ 118}** "Defense Counsel: *And despite the fact that Tabitha changed her story on you, didn't she?*

**{¶ 119}** "The State: Objection, your Honor.

**{¶ 120}** "Defense Counsel: I didn't ask what was said.

**{¶ 121}** ***

**{¶ 122}** "The Court: Sustained."

**{¶ 123}** It is clear from her own testimony that Tabitha changed her story regarding the events of May 24, 2006 when she was interviewed by Det. Meade and Fallen. Defense counsel's leading question to Det. Meade was, therefore, proper under the circumstances. Thus, the trial court erred when it sustained the State's objection to the question posed by defense counsel to Det. Meade; however, the error was harmless in light of the fact that Tabitha acknowledged that she changed her story to Det. Meade

when she testified regarding the sequence of events culminating in E.I.'s surgery for the subdural hematoma.

**{¶ 124}** B. Noretta Delk

**{¶ 125}** Thompson argues that the trial court abused its discretion when it sustained an objection to defense counsel's line of questioning to Delk regarding whether she had ever had a bruise or seen bruises discolor over time. In its objection, the State argued that defense counsel's line of questioning went too far outside the scope of the State's original direct.

**{¶ 126}** Specifically, Thompson contends that he was somehow prevented from establishing that E.I. had sustained an injury from bumping heads with R.I. shortly before Delk dropped the children off at Howerton's. Delk testified that she was aware that R.I. and E.I. had bumped heads. She also testified that she did not see any bruising on or around E.I.'s face as a result of the impact with R.I. Delk further stated that E.I. did not cry or seem bothered by the collision with his sister, and returned to playing immediately.

**{¶ 127}** Initially, we fail to see how Delk's personal knowledge of bruises and the time it takes for bruises to change color is relevant to whether E.I. was injured by the headbutt with R.I. More importantly, Drs. Matre and Kleiner both testified that the minor bruise that E.I. may have had from the headbutt from his sister could not have caused the "constellation" of severe injuries that E.I. presented with when he arrived at the hospital on the night of May 24, 2006. Simply put, the existence of the minor bruise from the headbutt was of minor relevance, and the trial court did not abuse its discretion when it limited the cross-examination of Delk on the subject of bruising.

**{¶ 128}** C. Dr. Kleiner

**{¶ 129}** Thompson argues that the trial court abused its discretion when it sustained the State's objection to the introduction of a written report prepared by Dr. Rowin. Dr. Kleiner testified that he read about E.I.'s headbutt in Dr. Rowin's report. Thompson asserts that the defense was unreasonably prevented from establishing that no mention of the headbutt was made in Dr. Rowin's report, and therefore, not a part of the history Dr. Kleiner considered before rendering his opinion.

**{¶ 130}** The following excerpt is from the transcript of the sidebar conference on the State's objection:

**{¶ 131}** "Defense Counsel: The only injury you were told was the falling out of the Pack n' Play, correct?

**{¶ 132}** "Dr. Kleiner: And also the reporting that there had been a head bonk by a niece.

**{¶ 133}** "Q: When were you told that?

**{¶ 134}** "A: From Doctor – upon reading Dr. Rowin's consultation and his dictation when the patient came back from the operating room.

**{¶ 135}** "Q: Dr. Rowin's dictation?

**{¶ 136}** "A: Yeah.

**{¶ 137}** "Q: All right. I'm handing you now a copy of Dr. Rowin's report.

**{¶ 138}** "Unidentified Speaker: Which one –

**{¶ 139}** "The State: Your honor, may we approach?

**{¶ 140}** "The Court: You may.

**{¶ 141}** ***

**{¶ 142}** "The State: I mean if we're going to get in – I'm just saying – I mean I understand what you're doing. If we're going to get into that then I'm going to need some time to go through and pull out every single one of those reports because if he's going to try and imply that there's only one report, there's multiple reports."

**{¶ 143}** After the sidebar conference was concluded, the trial court prevented defense counsel from entering Dr. Rowin's report into evidence. Subsequently, defense counsel questioned Dr. Kleiner regarding his failure to mention the headbutt in his own official report.

**{¶ 144}** After a thorough review of the record, we find that the trial court erred when it prevented defense counsel from introducing the written report prepared by Dr. Rowin in order to impeach Dr. Kleiner's testimony. The error, however, was harmless since where Dr. Kleiner learned of the headbutt was of minimal relevance in light of his ultimate conclusion that the headbutt could not have caused the severe injuries suffered by E.I.

**{¶ 145}** Thompson's fourth assignment of error is overruled.

VI

**{¶ 146}** Thompson's fifth assignment of error is as follows:

**{¶ 147}** "THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING POST-SURGERY PHOTOGRAPHS OF THE CHILD THEREBY DENYING MR. THOMPSON HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

**{¶ 148}** In his fifth assignment, Thompson argues that the trial court erred by

allowing the jury to view post-operative photographs of E.I.'s face, specifically exhibits 9, 10, and 11. Thompson asserts that the probative value of the photographs was outweighed by their prejudicial value. Thompson contends that the photographs were prejudicial since they were taken after surgery which exacerbated any injuries to E.I.'s face. Thompson also asserts that admission of the photographs into evidence was cumulative.

**{¶ 149}** It should be noted that Thompson did not object to the court's admission of the post-operative photographs at any time during the second trial. Accordingly, Defendant has waived all but plain error. *State v. Coben*, Greene App. No. 2001CA8, 2002-Ohio-914. Plain error does not exist unless, but for the error, the outcome of Defendant's trial would clearly have been different; that is, he would not have been convicted. *Id*.

**{¶ 150}** In *State v. Reeves* (March 12, 1999), Montgomery App. No. 16987, this court stated:

**{¶ 151}** "In determining the admissibility of a photograph under Evid.R. 403, 'a trial court may reject an otherwise admissible photograph which, because of its inflammatory nature, creates a danger of prejudicial impact that substantially outweighs the probative value of the photograph as evidence.' *State v. Morales* (1987), 32 Ohio St.3d 252, 257. Absent such a danger, the photograph is admissible. *Id.* at 257. The trial court has broad discretion in balancing the probative value against the danger of unfair prejudice, and its determination will not be disturbed on appeal absent a clear abuse of discretion. *State v. Harcourt* (1988), 46 Ohio App.3d 52, 55."

**{¶ 152}** With respect to the post-operative photographs of E.I. admitted at

trial, Dr. Kleiner testified that the surgery to relieve E.I.'s subdural hematoma did not exacerbate his injuries in any way. Dr Kleiner testified that the injuries as depicted in the photographs appeared the same after surgery as they did before surgery.

**{¶ 153}** The photographs corroborated Drs. Kleiner and Matre's testimony regarding the severity and nature of the injuries. The photographs appropriately assisted the jury in understanding Drs. Kleiner and Matre's testimony. Finally, a review of the photographs establishes that the photographs were not cumulative since each of the photographs focused on a different injury visible on E.I.'s face from various angles. Thus, the trial court did not commit plain error by admitting the post-operative photographs into evidence. The fifth assignment of error is overruled.

VII

**{¶ 154}** Thompson's sixth assignment of error is as follows:

**{¶ 155}** "THE TRIAL COURT ERRED IN IMPROPERLY AND PREJUDICIALLY INSTRUCTING THE JURY ON VERDICT FORMS AND SUBMITTING IMPROPER VERDICT FORMS THEREBY DENYING MR. THOMPSON HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION."

**{¶ 156}** In his sixth assignment, Thompson contends that the trial court improperly instructed the jury regarding the three verdict forms which were provided to the jury. Specifically, Thompson argues that the jury was improperly steered toward a guilty verdict when the court failed to a provide a verdict form which gave the jury a "not guilty" alternative when considering the serious physical harm enhancement. Thompson

additionally asserts that the court's instructions regarding the verdict forms were improper because they were confusing with respect to the order in which to consider the charge and the felony enhancement, failed to correlate to what the verdict forms actually stated, and omitted the essential elements of "recklessly" and "causation."

**{¶ 157}** A criminal defendant "is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged." *State v. Manley* (1994), 71 Ohio St.3d 342, 347. Thompson did not object to the jury instructions or the verdict forms, and Crim.R. 30(A) provides that, "[o]n appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Failure to timely object waives all but plain error. *State v. Moore*, Mont. App. No. 20465, 2005-Ohio-4531. As an initial matter, we note that contrary to Thompson's assertion, the court did instruct on recklessness and causation.

**{¶ 158}** Initially the trial court provided the following oral instruction in pertinent part:

**{¶ 159}** "Now, if you find that the State proved beyond a reasonable doubt all of the essential elements of endangering children, your verdict must be guilty as to such offense.

**{¶ 160}** "You will then separately consider whether this offense resulted in serious physical harm. If you find that the State proved beyond a reasonable doubt that the offense resulted in serious physical harm, then you will include that in your findings.

**{¶ 161}** "If you find that the State failed to prove beyond a reasonable doubt that any one of the essential elements of endangering children, your verdict must be not

guilty to such offense and then you will not consider the matter of serious physical harm."

**{¶ 162}** Later, the court addressed the jury regarding the verdict forms they would receive upon retiring to deliberate. The court stated as follows:

**{¶ 163}** "Now, the verdict forms, you'll have three of them. One will be, one will state that we, the jury find the defendant guilty of child abuse – I'm sorry – of abuse of a child under the age of 18. One will say we find the defendant guilty of abuse of a child under the age of 18 and further we find that the child suffered serious physical harm. Another will say we find the defendant not guilty of the crime of child abuse – or abuse of a child under the age of 18.

**{¶ 164}** "Those three forms will be available to you. There'll be 12 signature lines on each one of those forms. And when you reach your verdict, whatever it might be, all 12 of you must sign that form in ink. All 12 have to agree.

**{¶ 165}** "Once you're sure of your verdict, make sure you don't sign – if it's guilty, don't sign the not guilty verdict form – all 12 of you and vice versa. If it's not guilty, please don't sign the guilty verdict, all 12 of you. We need to be certain of your decision on this matter."

**{¶ 166}** At the conclusion of the instructions, the court had a bench conference out of the hearing of the jury. The court then addressed the jury as follows:

**{¶ 167}** THE COURT: "It was just a suggestion has been offered to me that, so that there's less confusion, that we offer three verdict forms. One will be guilty of the abuse; one will be guilty of the serious physical harm; and one will be not guilty. So you'll consider the abuse separate from the physical harm and, of course, there'll be a not guilty form. If you sign the not guilty form, the other two forms will not be signed.

**{¶ 168}** "If you sign the guilty form of abuse, then you must consider the serious physical harm. You can either sign that form, all12 of you, if it's been proven beyond a reasonable doubt that there is serious physical harm **or you can not sign that form if you do not believe that it's been proven beyond a reasonable doubt that there's serious physical harm in this case**.

**{¶ 169}** "Now, does that satisfy you?

**{¶ 170}** MR. BARRENTINE: "Yes, thank you, sir.

**{¶ 171}** THE COURT: "Okay.

**{¶ 172}** MR. LENNEN: **Yes, your Honor**.

**{¶ 173}** THE COURT: "Thank you."

**{¶ 174}** Ohio Jury Instructions is a compendium of standard instructions prepared by the Jury Instructions Committee of the Ohio Judicial Conference, and is generally followed and applied by Ohio's courts. *State v. Kucharski* (Dec. 9, 2005), Mont. App. No. 20815, 2005-Ohio-6541. With respect to jury instructions, a trial court is required to provide the jury a plain, distinct, and unambiguous statement of the law applicable to the evidence presented by the parties to the trier of fact. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. Ordinarily, requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instructions. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. An appellate court must review the challenged or omitted instructions within the context of the entire charge and not in and of itself. *State v. Hardy* (1971), 28 Ohio St.2d 89, 92.

**{¶ 175}** Thompson asserts that the jury was improperly steered toward a

guilty verdict when the court failed to a provide a verdict form which gave the jury a "not guilty" alternative when considering the serious physical harm enhancement. Thompson points out that the sample verdict forms for "serious physical harm" set forth in OJI, CR 425.21, provide an example verdict form wherein the jury would be appropriately provided both alternatives with the following instruction:

**{¶ 176}** "CR 425.21 Physical harm specification R.C. 2941.143

**{¶ 177}** "1. If your verdict is guilty, you will separately determine whether the defendant:

**{¶ 178}** "(A) caused physical harm to _____ (specify the person).

**{¶ 179}** ***

**{¶ 180}** "5. SAMPLE VERDICT FORM

**{¶ 181}** "We, the jury, further find that the defendant (*) ..... caused physical harm to "(**) .....

**{¶ 182}** "(*) Insert in ink: **'did' or 'did not'**

**{¶ 183}** "(**) Insert in ink the name of the victim."

**{¶ 184}** The State, for its part, argues that the trial court properly followed O.J.I. CR 425.25 in treating the jury's finding of serious physical harm as a specification. The State notes that the commentator specifically recommends the trial court provide the jury with three verdict forms, to-wit: (1) guilty of the offense, (2) guilty of the offense and the special finding (e.g., "serious physical harm") and (3) not guilty.

**{¶ 185}** The comment provides the following:

**{¶ 186}** "A single verdict form that contains an additional finding about the existence or non-existence of the additional element is one method of submission. Such

a verdict provides a blank space in each of two sentences or paragraphs in which the jury enters its findings. The first sentence or paragraph provides for a statement that the defendant 'is' or 'is not' guilty of the offense. The second sentence or paragraph contains a statement that the additional element 'was' or 'was not' present, and the jury is instructed either to write in the appropriate word or words or to strike those that do not express their findings."

**{¶ 187}** Although a single verdict form may be used to indicate the jury's finding on the existence or non-existence of the serious physical harm enhancement or specification, the verdict form should provide for a not guilty finding of the additional element as well as a guilty finding. The verdict form used by the court in this case did not so provide.

**{¶ 188}** The written instructions provided in part:

**{¶ 189}** "If you find that the state proved beyond a reasonable doubt all the essential elements of endangering children, your verdict must be guilty as to such offense. You will then separately consider whether this offense resulted in serious physical harm. If you find the state proved beyond a reasonable doubt that the offense resulted in serious physical harm you will include that in your findings.

**{¶ 190}** "If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of endangering children, your verdict must be not guilty as to such offense. And you will not consider the matter of serious physical harm." (Ex. XII.)

**{¶ 191}** The appellant argues that the failure of the trial court to provide a not guilty verdict form regarding the serious physical harm element of the child endangering

charge amounted to the court directing a verdict on that finding. The appellant argues that the court's error amounted to structural error.

**{¶ 192}** Clearly, the trial court's failure to provide a written verdict form that included a not guilty option for the serious harm enhancement finding was error. See Crim.R.30(A), Crim.R. 31(A), and R.C. 2945.71. It is important to note, however, that the trial court orally instructed the jury to consider the serious physical harm element separately and not to sign the verdict form regarding that finding if the State failed to prove that the child's injury rose to that level.

**{¶ 193}** The Ohio Supreme Court has admonished trial courts to apply "structural error" with caution. Structural error must put into question the reliability of the trial court in serving its function as a vehicle for the determination of guilt or innocence. *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, at § 24; see also *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, at § 21. Where a defendant is tried by an impartial adjudicator, there is a strong presumption that constitutional errors are subject to a harmless error analysis, i.e., they are not structural. *Wamsley*, supra, at ¶ 16. Structural error applies to a very limited class of cases. Id. Unlike the compound errors in *Colon*, supra, the error here did not permeate the entire proceeding. The omission did not transform the trial into an unreliable vehicle for determining whether Thompson inflicted serious physical harm upon the child. The error did not impact the jury's ability to sort out "who done it." The error relates solely to the degree of harm that occurred. And in fact, neither on appeal nor at trial did Thompson seriously question the State's evidence on that issue. In light of the court's oral instruction to the jury not to sign the enhancement verdict form if the evidence did not support it, we conclude the jury reliably

performed its role of determining the severity of the child's injuries.

**{¶ 194}** The Supreme Court has also cautioned against applying a structural error analysis where, as here, the case would otherwise be governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. *State v. Hill* (2001), 92 Ohio St.3d 191, at 199.

**{¶ 195}** Crim.R. 52(B) provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. This type of error does not exist unless it can be said that, but for the error, outcome of the trial would clearly have been otherwise. *State v. Biros* (1997), 78 Ohio St.3d 426.

**{¶ 196}** Under the evidence introduced here, no reasonable juror could conclude that the injuries amounted to anything less than serious physical harm. The uncontroverted evidence established the child suffered: 1) extensive bruising around the eyes, face, and neck; 2) retinal hemorrhaging in both eyes; 3) a subdural hematoma, which Dr. Kleiner testified would likely have resulted in E.I.'s death if it had gone untreated; 4) emergency surgery; and 5) extensive hospitalization and rehabilitation. Accordingly, Thompson cannot establish that, but for the error, the outcome clearly would have been different.

**{¶ 197}** Thompson also contends the court's instruction led the jury to believe they could find him guilty of abusing E.I. without the State proving that he did so recklessly. The verdict form that the trial court referred to however did include the necessary jury finding that Thompson recklessly abused the victim and in any event, the instruction was not the subject of an objection and is also reviewed under the plain error

analysis. It was not plain error. The appellant's sixth assignment is Overruled.

VIII

**{¶ 198}** Because they are interrelated, Thompson's seventh and eighth assignments of error will be discussed together as follows:

**{¶ 199}** "THE TRIAL COURT ERRED BY OVERRULING MR. THOMPSON'S CRIMINAL RULE 29 MOTION THEREBY DENYING HIM HIS RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE OHIO CONSTITUTION."

**{¶ 200}** "THE MANIFEST WEIGHT OF THE EVIDENCE DOES NOT SUPPORT MR. THOMPSON'S CONVICTION FOR RECKLESSLY ABUSING A CHILD (SERIOUS PHYSICAL HARM)."

**{¶ 201}** In his seventh assignment, Thompson contends that the trial court erred when it failed to sustain his Crim. R. 29 motion for acquittal which he made at the close of the State's case. In particular, Thompson argues that the State adduced insufficient evidence from which a jury could reasonably infer that he recklessly or intentionally abused E.I. Thompson asserts that the evidence failed to establish that he was with the child, and had sole access to the child, at the time E.I.'s injuries were intentionally inflicted. In his eighth assignment, Thompson argues that his conviction was against the manifest weight of the evidence.

**{¶ 202}** Crim. R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction for the charged offense. "Reviewing the denial of a Crim. R. 29 motion therefore requires an appellate court to use the same standard as is used to review a sufficiency of the evidence claim." *State v.*

*Witcher*, Lucas App. No. L-06-1039, 2007-Ohio-3960.

**{¶ 203}** "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' (Internal citations omitted)." *State v. Crowley*, Clark App. No. 2007 CA 99, 2008-Ohio-4636. "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046. "A claim that a jury verdict is against the manifest weight of the evidence involves a different test. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id. (Internal citations omitted).

**{¶ 204}** 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* (1967), 10 Ohio St.2d 230, 231. "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.

**{¶ 205}** 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.

**{¶ 206}** As Thompson correctly notes, to prove a violation of R.C. 2919.22(B)(1), the State was required to prove the following elements beyond a reasonable doubt:

**{¶ 207}** "(1) the child is under 18 years of age;

**{¶ 208}** "(2) an affirmative act of abuse occurred; and

**{¶ 209}** "(3) the defendant recklessly committed the act of abuse."

**{¶ 210}** Where such abuse results in serious physical harm to the child, the offense is a felony of the second degree. R.C. 2919.22(E)(2)(d). The State established that E.I. suffered serious physical harm on the night of May 24, 2006. In fact, Dr. Kleiner testified that if E.I.'s subdural hematoma had been left untreated, it would likely have resulted in E.I.'s death.

**{¶ 211}** The evidence adduced at trial was also sufficient to establish that E.I.'s injuries were recklessly inflicted rather than merely accidental, as Thompson claimed. Initially, we note that every witness with personal firsthand knowledge of E.I.'s abilities and habits testified that he could not walk on his own and would have been unable to pull himself out of the playpen. In fact, testimony was given that E.I. could barely see out of the playpen. Tabitha testified that she never witnessed E.I. crawl out of the playpen. Tabitha also never observed E.I. rock or tip the playpen. As previously

noted, Galambos testified that an eleven-month old child who weighed approximately 18 pounds would have been physically unable to tip the playpen over, even if the child could have climbed up on the top rail of the playpen.

**{¶ 212}** More importantly, however, Drs. Kleiner and Matre testified to a reasonable degree of medical certainty that E.I.'s injuries were not consistent with a fall from the top rail of a playpen, a headbutt from another young child, or a combination of both minor traumas. Rather, Dr. Kleiner testified that the multiple severe traumas E.I. suffered were consistent with a car accident or a fall from a multi-story building. Dr. Kleiner further testified that it requires a great deal of force to cause the retinal hemorrhaging suffered by E.I. in both of his eyes. In the absence of an obvious accidental head injury, retinal hemorrhages are the "sine qua non or absolute indicator *** of abuse." Clearly, sufficient evidence was adduced which established that the injuries E.I. suffered were the result of abuse, rather than merely accidental as Thompson claimed at trial.

**{¶ 213}** After a thorough review of the record, we also find that sufficient evidence was adduced at trial which established that Thompson caused the injuries suffered by E.I. Expert testimony provided at trial established that E.I.'s injuries were "acute," which meant that all of the severe traumas occurred at roughly the same point in time. Moreover, the testimony provided by Tabitha, as well as other witnesses who had the opportunity to closely observe E.I. on May 24, 2006, establishes that E.I. was not suffering from any injuries, except possibly a small bruise under one of his eyes from an earlier headbutt from his sister, when the child was brought home that night. Even Thompson, in his interview with Det. Meade, stated that E.I. seemed fine when Thompson

got home from work at around 7:30 p.m. that night. Thompson told Det. Meade that he noticed a small bruise under one of E.I.'s eyes, but that was all. Thus, the evidence warrants the conclusion that E.I.'s severe injuries were inflicted at some point after 7:30 p.m. when the only people present in the house were R.I., Tabitha, and Thompson.

**{¶ 214}** As stated previously, Thompson told Det. Meade that "he ha[d] never seen [Tabitha] discipline the kids or hit the kids," and that "he ha[d] never seen her get frustrated with the kids and *** that the she was a good mother." These statements made by Thompson clearly undermine any suggestion that Tabitha was the individual who caused the injuries to E.I. Tabitha's testimony establishes that Thompson was repeatedly alone with E.I. on the night that the abuse occurred. Immediately upon returning home from work, Thompson removed E.I. from his booster seat, told him to "hush," took the child into the back room where E.I.'s playpen was located, and shut the door. After his shower, Thompson went back to E.I.'s room. When he returned to the living room, he informed Tabitha that E.I.'s gums were bleeding. Thompson was again alone with E.I. for a brief time when he returned to E.I.'s room and purportedly discovered that the child had somehow tipped the playpen over and was pinned underneath it. Another time that evening when Thompson had sole access to E.I. occurred when Tabitha was blow-drying R.I.'s hair in the living room, and Thompson went into E.I.'s room and shut the door. Tabitha testified that she could neither see nor hear Thompson and E.I. during this time. Thompson's last opportunity occurred when he left Tabitha in their bedroom to go check on E.I. Tabitha testified that Thompson did not return for approximately ten minutes when he came back and stated that E.I. felt hot.

**{¶ 215}** It should also be noted that Jason testified that he did not begin to

notice bruising on E.I. until after Tabitha took the kids and moved in with Thompson. Jason further testified that the bruising has stopped since Tabitha is no longer living with Thompson. Interestingly, when he was interviewed by Fallen, Thompson stated that he had very little interaction or parenting contact with the either R.I. or E.I. On the night of May 24, 2006, however, Thompson repeatedly checked on E.I. and was alone with the child for relatively substantial lengths of time. The evidence adduced affirmatively establishes that Thompson had sole access to the E.I. at numerous points throughout the evening during which time the abuse had to have occurred according to the medical experts and other witnesses who testified at trial. Thus, the trial court did not err when it overruled Thompson's Crim. R. 29 motion for acquittal made at the close of the State's evidence.

**{¶ 216}** Lastly, Thompson's conviction is also not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve. Thompson presented only minimal evidence in the form of the testimony of the paramedics who initially treated E.I. and transported him to the hospital after Tabitha called 911. The jury did not lose its way simply because it chose to believe the multitude of State's witnesses who testified at trial. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

**{¶ 217}** Thompson's seventh and eighth assignments of error are overruled.

IX and XI

**{¶ 218}** Thompson's ninth and eleventh assignments of error are as follows:

**{¶ 219}** "MR. THOMPSON WAS DENIED HIS RIGHT TO THE EFFECTIVE

ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTIONS AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

**{¶ 220}** "THE CUMULATIVE EFFECT OF NUMEROUS ERRORS OCCURRING DURING THE PROCEEDINGS RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL."

**{¶ 221}** In his ninth assignment of error, Thompson argues that he was deprived of the effective assistance of counsel for the following reasons: (1) his counsel did not object to or otherwise challenge Dr. Kleiner's testimony that E.I.'s injuries were inflicted and not accidental; (2) his counsel did not object to the jury instructions and verdict forms; (3) his counsel did not renew his Crim.R. 29 motion for acquittal; and (4) his counsel did not object to or otherwise challenge the admission of the post-surgery photos of E.I.

**{¶ 222}** To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104, S.Ct. 2052, 30 L.Ed.2d 674. To demonstrate deficiency, a defendant must show that counsel's representation fell below an objective standard of reasonableness. Id. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. Id. Assuming that counsel's performance was deficient, a defendant must still show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where a defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would

have been different. Id.

**{¶ 223}** Dr. Kleiner

**{¶ 224}** As we stated in our resolution of Thompson's second assignment of error, Dr. Kleiner's opinion that E.I.'s injuries were inflicted and not accidental was permissible expert testimony based on his examination of the injuries sustained by E.I. and his specialized knowledge as a pediatric neurosurgeon of the amount of force needed to cause those injuries. This evidence was admissible and, therefore, not objectionable.

**{¶ 225}** II. Jury Instructions

**{¶ 226}** Appellant next argues that he was denied the effective assistance of counsel for his defense counsel's failure to object to the jury instructions and verdict forms used by the jury at trial. The trial court properly instructed the jury on the elements of recklessness and causation. Although the trial court erred in providing the jury three verdict forms instead of four, there is no reasonable probability that Thompson would have been acquitted of the charges against him had the court not done so.

**{¶ 227}** III. Crim.R. 29

**{¶ 228}** Appellant further claims that he was denied the effective assistance of counsel for his trial counsel's failure to renew his Crim.R. 29 motion for acquittal. Because of resolution of appellant's seventh assignment of error, this claim has no merit.

**{¶ 229}** IV. Post-Surgery Photos

**{¶ 230}** Because of our resolution of the fifth assignment of error, counsel was not ineffective in not objecting to the admission of these photographs.

**{¶ 231}** In his eleventh assignment of error, appellant claims that the

accumulation of errors throughout his trial amounted to a denial of a fair trial. This court has previously recognized that "[otherwise] harmless errors may violate a defendant's right to a fair trial when the errors are considered together." *State v. Carr*, Montgomery App. No. 22603, 2009-Ohio-1942, citing *State v. Madrigal*, 87 Ohio St.3d 378, 397, 2000-Ohio-448. However, to find cumulative error present, a reviewing court first must find multiple errors committed at trial. Id. Numerous errors were not committed at Thompson's trial and therefore this assignment must necessarily be overruled.

X

**{¶ 232}** Thompson's tenth assignment of error is as follows:

**{¶ 233}** "THE LOWER COURT ERRED BY FAILING TO SUPPLY A DECIPHERABLE RECORD OF THE PROCEEDINGS THEREBY DENYING MR. THOMPSON HIS RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

**{¶ 234}** In his tenth assignment, Thompson points out the trial transcript contains numerous indecipherable bench conferences between the court and opposing counsel. Thompson asserts that if we determine there is insufficient clarity in the transcript, we should exercise our inherent power to remand for further compilation of the record pursuant to App. R 9(E).

**{¶ 235}** While our review of the trial transcript has revealed multiple places where the record is indecipherable during bench conferences, none of the instances is so egregious or confusing so as to require a remand in this case. Moreover, the burden was on Thompson to provide a complete record. Pursuant to App. R. 9(C), Thompson

could have prepared a statement of the indiscernible portions of the transcript "from the best available means, including the appellant's recollection," and submitted the statement to the court in order to settle any objections from the opposing party. In the alternative, Thompson could have sought, with input from the State, an agreed statement regarding the indiscernible portions of the record.

**{¶ 236}** Thompson's tenth assignment of error is overruled.

XI

**{¶ 237}** The judgment of the trial court is Affirmed.

FAIN, J., concurring in judgment:

I concur in the judgment, but write separately for two, unrelated purposes.

I

First, I wish to state my opinion that the error in the submission of the single, guilty verdict form for the serious physical harm finding is a structural error, but it is an error that has been waived.

It is useful to recall the essential distinction between plain error and structural error. Plain error is an error having such an strong likelihood of producing an unjust result (i.e., such a strong quantum of prejudice) that the error need not be preserved for appellate review. Structural errors are "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," so that prejudice need not be shown, as contrasted with ordinary "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.' " *Sullivan v. Lousiana* (1993), 508 U.S. 275, 281, 113 S.Ct. 2078,

2082-2083, 124 L.Ed. 2d 182 (quoting from *Arizona v. Fulminante* (1991), 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 302). See, also, *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, 148, 126 S.Ct. 2557, 2563-2564, 165 L.Ed. 2d 409.

The deprivation of a right to a trial by jury, for example, has "consequences that are necessarily unquantifiable and indeterminate, [and] unquestionably qualifies as a 'structural error.' " *Sullivan v. Louisiana*, supra, at 508 U.S. 281-282. And yet, while the deprivation of the right to a trial by jury need not be shown to have affected the outcome of the trial, it is surely a right that can be waived.

We have held that a serious defect in a verdict form is a structural error, because it takes an issue from the jury, thereby depriving a defendant of the right to a jury trial on that issue. *State v. Boykin*, Montgomery App. No. 19896, 2004-Ohio-1701.

A jury trial involves the submission of evidence to a jury for adjudication pursuant to instructions of law. The mechanism whereby the jury communicates to the world the adjudication it has made is the verdict form or forms that it signs and returns in open court. A significant error in a verdict form interferes with that mechanism. The process by which the jurors perform their duties as neutral adjudicators is deliberately hidden from external view, from the time the case is submitted to them, until the time their verdicts are returned in open court, in order to assure that the jury's verdict is not subject to pressures external to the courtroom. Therefore, an error in a verdict form having a significant potential to interfere with the communication of the jury's verdict to the outside world, is part of the structural framework of the trial that is not accessible to external evaluation under a harmless-error analysis.

In this case, the jury was not given a means of communicating, other than through

inaction, a finding of not guilty with respect to the serious physical harm element of the greater offense with which Thompson was charged. (I would distinguish the case of a single verdict form in which the jury would have to circle, or otherwise select, either "guilty" or "not guilty" as to a finding, since that process would involve a clear action to register and communicate a not-guilty finding.) In my view, the error in the verdict form significantly interfered with the mechanism by which the jury was to register and communicate its finding as to the serious-physical-harm element. Accordingly, in my view, the error was structural.

But structural errors can be waived. For example, if a juror who states during voir dire that he doubts that he can conscientiously follow the instructions given by the court, and who is not rehabilitated on this point, is nevertheless seated on the jury, that would be a classic example of a structural error, where prejudice is presumed and need not be shown. But if both parties pass the juror for cause, the error is waived. Here, I am satisfied that Thompson waived the error in the verdict form when his trial counsel, responding to an inquiry from the court, said he was satisfied both with this particular verdict form, and with the procedure by which the jury's method of registering a verdict of not guilty as to this element would be its failure to return the guilty verdict form.[2]

II

Secondly, I write separately to renew my war against that unhappy phrase: "The term 'abuse of discretion' means more than an error of law or of judgment."

I have traced this offensive formulation as far back as *Steiner v. Custer* (1940), 137

[2]It does seem a bit odd to me that the State was comfortable with this procedure, since, if the jury correctly understood it, a single juror, by not agreeing that the serious-physical-harm element was proven beyond reasonable doubt, would cause, under this procedure, a verdict convicting Thompson of the less serious offense, but acquitting him of the more serious offense, when, in fact, the jury would have been hung on the more serious offense.

Ohio St. 448, 450, which, in turn, cites Black's Law Dictionary (2 Ed.), 11 as authority. The definition of "abuse of discretion" in Black's Law Dictionary, Eighth Edition (2004), at 11, offers no support for the offensive formulation:

"1. An adjudicator's failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."

Interestingly, the definition of "abuse of discretion" in Black's Law Dictionary, Fourth Edition (1968), which was the edition of Black's Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

" 'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion. * * * * . *It is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances*. * * * * . And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; *an error of law*. * * * * .

"A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. * * * * . Unreasonable departure from considered precedents and settled judicial custom, *constituting error of law*. * * * * . The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a

lower court and is said by some authorities to imply not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. * * * * . Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. * * * * . Difference in judicial opinion is not synonymous with 'abuse of discretion' as respects setting aside verdict as against evidence. * * * * ." (Citations omitted; emphasis added.)

I can only speculate that the origins of the offending formulation lay in an attempt to make the following point too succinctly:

When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error.[3] By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.

I know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But I am not aware of any Ohio appellate decisions, and I hope I never become aware of any, in which it is declared, as part of the *holding,* that a trial court may, in the exercise of its discretion, commit an error of law.

I will save the enterprising researcher the trouble of combing through opinions in which I appear as the author by freely admitting that, on numerous occasions, I have been

[3]Of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review.

too lazy to delete a quotation or paraphrase of the offending formulation from a staff attorney's draft. I am confident, however, that in none of the opinions I have authored is it part of the *holding* that a trial court may, in the exercise of its discretion, commit an error of law.

So let me close by boldly declaring that no court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.[4]

. . . . . .

HARSHA, J., concurring:

I whole heartedly agree with Judge Fain's assessment of the abuse of discretion standard of review. I also agree with him that denying an accused the right to a trial by jury results in a structural error. However, I do not share the concurring opinion's conclusion that the failure to provide a written not guilty verdict form for the serious physical harm enhancement effectively deprived Thompson of that right and amounted to structural error.

Here, the trial court verbally instructed the jury not to sign the verdict form dealing with serious physical harm if the State's evidence failed to establish that element by proof beyond a reasonable doubt. Clearly the trial court advised the jury that it was solely their duty to determine whether the State proved the enhancing element. Although the method the court used to allow the jury to communicate its decision was flawed under state law, it did not amount to a constitutional violation such as directing a verdict, i.e.,

[4]This does not, of course, obviate the existence of frequent and lively disagreements between courts and individual judges as to what the law is.

removing the issue from the jury's consideration. In light of the court's oral instructions, I cannot conclude this error prevented Thompson's trial from being a reliable mechanism for determining whether the infant suffered serious physical harm. In order to find structural error, I would have to assume that the jury disregarded the court's two verbal instructions to consider the issue of serious physical harm and its specific admonishment not to sign the enhancement guilty verdict form if the State had not proven it. Although I readily admit the failure to include a written not guilty verdict form was clearly improper, it is just as clear in my mind that the error did not cause the jury to abdicate its role as finder of fact. Thus, there is no structural error. See, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶58, admonishing courts not to apply a structural error analysis to a plain error context. And any effort by Thompson to rely on plain error is doomed by virtue of the overwhelming evidence on the issue of serious physical harm, i.e., he cannot establish that but for the error, the outcome of the trial clearly would have been different.

. . . . . .

(Hon. William H. Harsha, from the Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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