[Cite as *State v. Wilson*, 2015-Ohio-2016.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA3542
vs.	:	
BRANDON J. WILSON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Bryan Scott Hicks, P.O. Box 359, Lebanon, Ohio 45036

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Julie Hutchinson, Scioto County Assistant Prosecuting Attorney, 612 6th Street, Portsmouth, Ohio 45662

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-12-15
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. The jury found Brandon Wilson, defendant below and appellant herein, guilty of (1) murder in violation of R.C. 2903.02(B); and (2) child endangering in violation of R.C. 2919.22(A). The court sentenced appellant to serve consecutive prison terms of fifteen years to life for murder and three years for child endangering.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE COURT ERRED IN REFUSING TO CHARGE THE JURY WITH LESSER INCLUDED OFFENSES."

SECOND ASSIGNMENT OF ERROR:

"THE COURT ERRED BY NOT MERGING THE CONVICTIONS FOR PURPOSES OF SENTENCING."

THIRD ASSIGNMENT OF ERROR:

"THE COURT ERRED IN RULING THAT [M.W.]'S

STATEMENTS WERE EXCITED UTTERANCES."

{¶ 3} On November 19, 2012, around 2:00 a.m., Tierra Simeona called 911 and requested an ambulance. She informed the dispatcher that her ten-month old child (N.W.) appeared to be "having a seizure or something," i.e., he had his fists closed and curled up to his chest, his legs were stiff, and his feet were out-stretched.

{¶ 4} Just after 2:00 a.m., paramedics arrived at Tierra's home and immediately noted that the child was in critical condition. The child was "posturing," which indicated that the child had a severe brain injury. They rushed the child to Southern Ohio Medical Center. When the emergency room doctor examined the child, he quickly assessed that the child was "near death." The doctor then stabilized the child for transfer to Nationwide Children's Hospital in Columbus. Subsequent testing at Nationwide revealed that the child had a fresh subdural hemorrhage, a skull fracture, severe retinal hemorrhaging in both eyes, and severe brain swelling. Despite efforts to save the child, he did not survive.

{¶ 5} After the child arrived at Nationwide, Dr. Mary Leder spoke with appellant (Tierra's live-in boyfriend) and Tierra to obtain a history. Tierra reported that the child had fallen down

three or four stairs earlier in the month. Tierra was not home when it happened, but appellant explained that he heard the child fall and then found the child on his back. Tierra and appellant told Dr. Leder that approximately two weeks earlier, the child fell from the seat of a grocery cart into the basket. Neither appellant nor Tierra informed Dr. Leder of any injuries or falls that had occurred during the past twenty-four hours.

{¶ 6} Scioto County Sheriff's detectives arrived at Nationwide and spoke with Tierra and appellant. They learned that appellant had been alone with the child during the approximately nine hours before Tierra called 911. Appellant stated that the child had been asleep at 1 a.m. and was fine. He explained that the child had fallen down the stairs a few weeks earlier, on November 1, and that the child had fallen from a grocery cart seat into the basket a couple of weeks earlier. Appellant stated that the child had been "a little out of it * * * the past couple of weeks" and was "not himself, just real tired acting." Appellant informed the detectives that on the night of the incident, he had given the child Pedialyte, and the child vomited. Appellant then gave the child a bath and placed him in his crib to sleep. Appellant claimed that the child was fine, except he was "wheezing a lot, and having trouble breathing." Appellant stated that after Tierra arrived home from work, he heard the child breathing heavily and went to check on him. When he saw the child, he thought the child was "seizing. Like his arms were curled in and his feet were straight out."

{¶ 7} Detective Jodi Conkle advised appellant that the medical evidence showed that the child had recently sustained the injuries and that the injuries were not from two weeks ago. She asked him if the child had hit his head on anything, if he fell, or if he was dropped. Appellant responded, "Not that I can remember." He continued, "He might have fallen when I wasn't in the

room * * * but if he had fallen when I was out I would have heard him cry or I would have known about it." Detective Conkle asked appellant on three occasions if the child had suffered any recent falls, drops, etc., and each time, appellant responded negatively. During this initial interview, appellant offered no explanation whatsoever as to how the child could have sustained the recent fatal injuries.

{¶ 8} Detective Conkle interviewed appellant again on December 3, 2012. Appellant explained that on the evening of November 18, the child had acted fussy. Appellant stated that he gave the child a bottle, and the child vomited. Appellant later placed the child in his crib, and the child fell asleep. He stated that when Tierra arrived home from work, she checked on the child and the child was fine. Appellant stated that approximately thirty minutes later, he heard the child breathing heavily and walked into the room. He found the child "seized up."

{¶ 9} Appellant eventually stated that the child fell off the couch during the evening of November 18. He explained that he had gone outside to smoke a cigarette and, when he returned, he found the child laying on the floor by the couch. Appellant comforted the child, but he did not observe any injuries that required medical assistance. Appellant denied shaking the child.

{¶ 10} During another interview with detectives, appellant claimed that "ever since [the child] fell off the couch * * * he was throwing up and * * * acting really weird." Appellant stated that when he found the child unresponsive in the early morning hours of November 19, he shook the child in an attempt to arouse him. Appellant did not remember how he shook the child but did not believe he shook him in a manner that would hurt him.

{¶ 11} The detectives also spoke with the child's doctors and learned that appellant's explanations could not possibly explain the child's severe and fatal injuries. Doctors surmised

that the fatal injuries occurred somewhere in the six to twenty-four hours before the child presented to the emergency room.

{¶ 12} On December 18, 2012, a Scioto County grand jury returned an indictment that charged appellant with (1) aggravated murder in violation of R.C. 2903.01(C); (2) murder in violation of R.C. 2903.02(B); and (3) child endangering in violation of R.C. 2919.22(A). Appellant entered a not guilty plea, and on February 25, 2013, and continuing through March 5, 2013, the trial court held a jury trial.

{¶ 13} At trial, all of the state's medical experts testified that the child's pattern of injuries resulted from abusive head trauma and that the child's injuries—when considered in combination—could not have resulted from a fall from the couch.

{¶ 14} Dr. Mary Leder testified that she examined the child upon his arrival at Nationwide Children's Hospital. She unequivocally stated that the child's injuries were non-accidental. Dr. Leder explained: "The mechanism for producing subdural hemorrhages and retinal hemorrhages together is acceleration[-]deceleration in[jury] of the type that we see in forceful violent shaking." The prosecutor asked Dr. Leder if the injuries could have resulted from an accidental cause, and Dr. Leder responded:

> "This child had severe retinal hemorrhages in all layers of the retina, not just in the center of the retina, but also to the * * * periphery of the retina. There have been numerous studies that have shown that this pattern of retinal injury, with splitting of the retinal layers, is strongly, highly, very strongly associated with abusive head trauma."

Dr. Leder further explained that "in the absence of a history of a severe motor vehicle crash * * * or a crush injury to the head, the only explanation for this type of retinal hemorrhaging is abusive head trauma."

{¶ 15} Dr. Leder testified that she has never seen a child's death result from a fall down the stairs, from a fall into a grocery cart basket, or from a fall off a couch that is eighteen inches high. When asked whether the child could have sustained the fatal injuries if he had pulled himself to a standing position while on the couch and then fell and hit his head, Dr. Leder stated that the child "would not have the massive retinal hemorrhages that this child had, nor would [the child] have the significant brain injuries that this child had." Dr. Leder testified that the studies of children who have had falls under four-feet high show that they do not suffer serious or fatal head trauma and that the chance of fatality from a short-distance fall is less than one in a million. Dr. Leder further explained that the child's eye injuries were not consistent with a short-distance fall and that a short-distance fall would not produce "massive, fatal head injury." She stated that a short-distance fall could cause a skull fracture or a small hemorrhage, "[b]ut [the child] could not have had the massive—the pattern of injury that he had."

{¶ 16} Dr. Leder further testified that "several hundred clinical studies" have "show[n] that when you have massive subdural hemorrhage, severe retinal hemorrhage, and a child who is in life threatening conditions, and nobody had any explanation for it, child abuse abusive head trauma, should be the number one diagnosis." Dr. Leder stated that the "child's pattern of injury, with the skull fracture, the subdural hemorrhage and the massive retinal hemorrhages was caused by shaking with impact." She explained that blunt impact alone will not cause "retinal hemorrhages with splitting of the" retinal layers.

{¶ 17} Dr. Brent Adler reviewed the child's x-rays and head CT scan and stated that the child suffered a significant trauma. He testified that the "findings [were] consistent with a

traumatic injury that caused a skull fracture and a hemorrhage on * * * the surface of the brain, and resulted in edema of the brain and anoxic injury to the brain." Dr. Adler stated that the child suffered a traumatic injury within the twenty-four hours prior to his examination and that the injuries could not have occurred nineteen days earlier (when the child allegedly fell down the steps).

{¶ 18} Dr. Katherine Jordan, a pediatric ophthalmologist, examined the child's eyes. She testified that when a child under the age of five presents with "severe retinal hemorrhage, retinoschisis, the hemorrhage extending in all four quadrants, up, down, left and right, in all three layers of the retina [it] is 83 percent of the time or 85 percent of the time due to abusive head trauma." Dr. Jordan stated that very few accidental injuries—such as fatal, roll-over motor vehicle accidents—could result in these types of injuries. Dr. Jordan testified that the mechanism that causes this type of damage to the eye "is an acceleration-deceleration type of trauma with or without a crush injury to the head." She explained that these types of injuries would not result if a child fell down stairs, fell off a couch, or fell into a grocery cart basket. Dr. Jordan also stated that even though brain swelling may cause the optic nerve to swell, brain swelling will not cause optic nerve swelling to "the extreme level of hemorrhage" that the child had. She explained that she sees "many children on an almost weekly basis with high intracranial pressure and optic nerve edema that do not have hemorrhages, and if they do, they do not have hemorrhages to this extent." Dr. Jordan testified that ophthalmology has "pattern recognition, and this pattern is very, very, very specific for abusive head trauma." She stated:

> "The * * * published medical literature has determined that this pattern of extensive retinal hemorrhages in all four quadrants and all three layers of the macula extending to the ora with retinoschisis is * * * almost certainly abusive head trauma,

> unless there's other scenarios, such as roll over motor vehicle accidents with severe head trauma in a fatal circumstance."

{¶ 19} Dr. Kenneth Gerston performed the autopsy and determined the cause of death resulted from blunt impacts to the head that were inflicted and non-accidental. He found that the manner of death was homicide. Dr. Gerston testified that he did not discover evidence of previous fractures to suggest that the child's death resulted from aggravating a pre-existing fracture. Dr. Gerston agreed that a skull fracture might result from a fall from a couch, but he stated that "hemorrhages in the optic nerves" would not. He explained that hemorrhages in the optic nerve sheath "require[] a great deal of force delivered * * * probably over a very short period of time."

{¶ 20} Dr. Carl Boesel performed a post-mortem examination of the child's eyes. He concluded that the child had hemorrhages in all layers of the retina and that these types of injuries are highly suggestive of abusive trauma. Dr. Boesel also found that the retina was torn away from the underlying tissue, which he stated is "even more suggestive" of abusive trauma. He stated that the right eye had "peripapillary sclera hemorrhage," which is "pathognomonic, meaning that it's absolutely indicative of abusive trauma." Dr. Boesel testified that he found an instance of this type of injury occurring in an infant that suffered a cranial crush injury from a television falling on its head. He explained: "[U]nless it was a fall from extreme heights or a crush injury, or in one case it was an adult that tripped and fell and crushed the infants [sic] head. And we don't have that kind of history, so I would conclude it was abusive injury."

{¶ 21} Tierra testified that appellant took care of M.W. and N.W. while she worked. She explained that although appellant is the biological child of her three-year old daughter, M.W., appellant is not the biological father of N.W. Tierra believed that appellant resented N.W.

because appellant was not the father. Tierra stated that appellant would "throw it up in [her] face every time that [they] would get into an argument."

{¶ 22} Tierra testified that on November 1, the child vomited. She asked appellant if the child had been sick at all during the day. Appellant did not immediately answer. After approximately forty-five minutes, appellant told Tierra that the child had fallen down a couple of stairs. Tierra told appellant that they should take the child to the doctor, but appellant did not believe it was necessary. They nevertheless took the child to an urgent care center.

{¶ 23} Tierra testified that appellant did not want her to tell the urgent care doctor that the child had fallen down the stairs. She decided not to tell the doctor about the fall, because she was afraid it would look like child abuse.

{¶ 24} Tierra stated that on November 19, she left work at 1:08 a.m. When she returned home from work, appellant's "eyes were really open, like he was on something." Tierra explained: "The only time [she has] ever seen him look like [that] is whenever he was high on meth." Tierra stated that she and appellant talked for fifteen to twenty minutes, and then Tierra showered. Tierra testified that after she showered, appellant went to check on the sleeping children. She explained that appellant does not usually check on the children when they are sleeping. Tierra stated that as soon as appellant opened the door to the children's room, Tierra heard N.W., like he was gasping for air. She went to his room and he appeared "lifeless." Tierra thought he was having a seizure–his body was stiff, his hands were curled up, and his feet were stiffened out–and she called 911. Tierra testified that while she was calling 911, appellant told her not to call and stated that the child "was doing this earlier."

{¶ 25} Tierra stated that on November 18, around 11:00 or 11:30 p.m., she had spoken to

appellant when she was at work, and appellant had not mentioned anything about the child falling off the couch.

{¶ 26} Tierra testified that when she and appellant were at the hospital with N.W., she became upset with appellant and "kind of put[] the blame on him already." Tierra thought appellant should have told her that N.W. had been sick earlier in the day. She later asked appellant what happened, and appellant stated that he did not remember. Again, appellant did not say anything about a fall from the couch.

{¶ 27} Tierra's next door neighbor, Tana Thompson, testified that around midnight on November 19, she went to Tierra's apartment to return some DVDs. Appellant let her inside and he then went upstairs. Thompson stated that N.W. was crying throughout the time that she was there. She explained that N.W. "sounded like he was having a fit, like a tantrum." Thompson "thought something was wrong" with N.W. She yelled upstairs and asked appellant if everything was okay. Appellant then told Thompson to "get out, with a firm voice."

{¶ 28} The prosecution sought to introduce hearsay testimony from Tierra and appellant's three-year old daughter, M.W. The court held a hearing to consider whether M.W.'s statement fell within the excited utterance exception to the hearsay rule. Kelly Feeman, Celeste Dalton, and Detective Conkle testified at this hearing.

{¶ 29} Feeman stated that on November 19, around 3 or 4 p.m., she and Dalton went to appellant's mother's house to pick up M.W. M.W. stated that "her bubby was dead." Feeman responded, "No, he's sick. He is at the hospital." Feeman testified that M.W. looked anxious, like she "just want[ed] to spill it out." M.W. then stated, "My daddy slapped [N.W.] in the head." Feeman stated that M.W. looked worried when she made this statement. Feeman also explained

that at the time the child made this statement, Feeman was unaware of any allegations that appellant may have caused N.W.'s injuries.

{¶ 30} Dalton testified that M.W. was "very chatty" when she and Feeman picked her up. As Dalton buckled M.W. in her seat, M.W. stated, "Did you know my bubby hurt his head?" Dalton tried to reassure M.W. that N.W. was okay, but M.W. was "very excited" and "[h]er eyes were huge." M.W. informed Dalton that N.W. sometimes falls off the couch and that he fell down the stairs one time. M.W. then stated that N.W. did not hurt his head by falling off the couch or down the stairs. When Dalton asked M.W. how the child hurt his head, M.W. stated "Daddy just slapped him in the face."

{¶ 31} Detective Conkle stated that she spoke with M.W. during the evening hours of November 19. Detective Conkle testified that M.W. was drawing and "out of the blue," she stated, "Daddy hit bubby." M.W. explained: "Daddy was mad. He was screaming and bubby was crying, and daddy hit bubby." Detective Conkle stated that M.W.'s "eyes were all big and bugged out" when she made this statement. Detective Conkle testified that M.W. did not appear excited until she blurted out that appellant hit N.W.

{¶ 32} The court subsequently determined that M.W.'s statements constituted excited utterances and allowed the state to present hearsay testimony regarding M.W.'s statement.

{¶ 33} Appellant testified in his defense. He stated that he did not violently shake the child and that he did not apply any blunt force trauma to the child's head. Appellant explained the events preceding the 911 call and claimed that the child had been acting sick during the week leading up to November 18. The child appeared tired and vomited periodically. Appellant stated that before Tierra left for work on November 18, she informed appellant that the child had been

having breathing problems and that the child was using a breathing treatment. Tierra showed appellant how to operate the breathing instrument.[1]

{¶ 34} Around 7 p.m, appellant went outside to smoke a cigarette. When he returned, he found N.W. laying on the floor and crying. He did not notice any physical injuries. Appellant held the child until he stopped crying.

{¶ 35} Around 9 p.m., appellant thought the child looked dehydrated, so he gave the child Pedialyte. While drinking the Pedialyte, the child vomited. Appellant then gave the child a bath, and the child seemed fussy. Appellant held the child and walked with him until he appeared calm. Appellant then placed the child in his crib.

{¶ 36} Appellant stated that when Tierra returned home from work, they talked for five to ten minutes and then Tierra went upstairs. Appellant claimed that Tierra checked on the children and then showered. Appellant stated that when Tierra opened the door to check on the children, he did not hear any noises coming from the room.

{¶ 37} Shortly after Tierra showered, appellant went to the bathroom to wash his hands. As he walked by the children's room, appellant heard N.W. breathing heavily and walked into the room. He found the child in obvious distress and picked him up. Appellant stated that the child was "lifeless" and that his head "kind of [fell] back." Appellant yelled to Tierra and told her to call 911. Appellant stated that he shook N.W. in an attempt to arouse him and denied that he shook him in a manner that would hurt him.

{¶ 38} On cross-examination, appellant admitted that he and Tierra had an argument the

[1] No other testimony or evidence exists about this breathing treatment, and apparently, the first time the prosecution heard about it was during appellant's direct examination at trial.

week before November 19. He stated that Tierra asked him to move out of the apartment. During the argument, appellant pushed the television and the television made a hole in the wall. Appellant stated that he moved out of the apartment for a few days.

{¶ 39} The prosecutor also questioned appellant regarding the inconsistencies in the various stories he told about the circumstances surrounding the child's injuries. The prosecutor asked appellant why he responded "no" approximately thirty-eight times when Detective Conkle asked him during interviews whether he shook N.W. or did anything to hurt him. Appellant explained that Detective Conkle indicated that "it was shaken baby all the way." Appellant stated that he interpreted "shaken baby" to mean "somebody violently shaking their kid." He stated he did not shake the child in that manner. Appellant stated that he does not know how the child suffered the fatal injuries.

{¶ 40} On March 7, 2013, the jury found appellant not guilty of aggravated murder, but guilty of murder and child endangering. The trial court sentenced appellant to serve consecutive terms of imprisonment of fifteen years to life for murder and three years for child endangering. This appeal followed.

I

{¶ 41} In his first assignment of error, appellant asserts that the trial court erred by refusing to give the jury an involuntary manslaughter instruction. He contends that sufficient evidence exists to indicate that the child's skull fracture resulted from an accidental fall from the couch. Appellant additionally asserts that sufficient evidence exists that the retinal hemorrhaging resulted when he shook the child in an attempt to awaken him.

{¶ 42} Determining whether a lesser included offense instruction is warranted involves a

two-part test. State v. Deanda, 136 Ohio St.3d 18, 2013–Ohio–1722, 989 N.E.2d 986, ¶6. First, a trial court must determine if the requested charge is a lesser included offense of the charged crime. Id.; State v. Kidder, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). Second, the court must consider the evidence:

> "The trial court, after reviewing the evidence, determines whether an instruction on lesser included offenses is appropriate. The trial court must give an instruction on a lesser included offense if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense."

State v. Wine, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶34. However, "[t]he mere fact that an offense can be a lesser included offense of another offense does not mean that a court must instruct on both offenses where the greater offense is charged." Id. at ¶22. Instead, "the quality of the evidence offered * * * determines whether a lesser-included-offense charge should be given to a jury." Id. at ¶26. A lesser included offense instruction requires more than "some evidence" that a defendant may have acted in such a way as to satisfy the elements of the lesser offense. State v. Shane, 63 Ohio St.3d 630, 633, 590 N.E.2d 272 (1992). "To require an instruction * * * every time 'some evidence,' however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense." Id. at 633. Furthermore, a court must not allow a jury to consider "'compromise offenses which could not possibly be sustained by the adduced facts.'" Wine at ¶22, quoting State v. Wilkins, 64 Ohio St.2d 382, 387, 415 N.E.2d 303 (1980).

{¶ 43} When a court reviews the quality of the evidence offered, the court must consider "[t]he whole of the state's case." State v. Bethel, 110 Ohio St.3d 416, 2006-Ohio-4853, 854

N.E.2d 150, ¶141 (2006), citing State v. Goodwin, 84 Ohio St.3d 331, 345, 703 N.E.2d 1251 (1999). Thus, simply because "each witness does not provide testimony conclusively proving every element of a crime does not mean that a defendant is entitled to instructions on every lesser included offense." Id.

{¶ 44} The trial court has discretion to determine whether a record contains sufficient evidence to support a lesser-included-offense instruction. State v. McFadden, 4th Dist. Washington No. 14CA5, 2014-Ohio-5294, ¶6; see Wine at ¶21 (explaining that "[t]he law, the evidence presented, and the discretion of the trial judge play a role in whether lesser-included-offense instructions are appropriate"). Thus, we will not reverse that determination absent an abuse of discretion. An abuse of discretion connotes more than a mere error of judgment; rather, it implies that a court's attitude is arbitrary, unreasonable, or unconscionable. E.g., State v. Herring, — Ohio St.3d —, 2014-Ohio-5228, — N.E.3d —, ¶139; State v. Adams, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 45} In the case at bar, the jury found appellant guilty of murder and child endangering. Appellant asserted that the trial court should have given the jury an involuntary manslaughter instruction as a lesser included offense of murder. Appellant claims that the child's death resulted from a combined accidental fall from the couch and appellant's panicked shaking of the child upon finding the child unresponsive. Appellant asserts that these facts "would not amount to murder, but they could result in the jury convicting on involuntary manslaughter."

{¶ 46} Initially, we note that involuntary manslaughter is a lesser included offense of murder under R.C. 2903.02(B). State v. Lynch, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶79; State v. Thomas, 40 Ohio St.3d 213, 216, 533 N.E.2d 286 (1988). Having determined

that involuntary manslaughter is a lesser included offense of murder, we next consider whether under any reasonable view of the evidence, the trier of fact could have found appellant not guilty of murder but guilty of involuntary manslaughter.

{¶ 47} "Ordinarily, when a defendant presents a complete defense to the substantive elements of the crime * * * an instruction on a lesser included offense is improper." Bethel at ¶137. Thus, when a defendant presents an accident defense, an instruction on involuntary manslaughter ordinarily is inappropriate. State v. Cutts, 5th Dist. Stark No. 2008CA-79, 2009-Ohio-3563, ¶122 ("Where the theory of the defense is predicated on an accident * * * an instruction on involuntary manslaughter is inappropriate); State v. Mathis, 8th Dist. Cuyahoga No. 91830, 2009-Ohio-3289, ¶17(holding that trial court did not err by refusing to provide involuntary manslaughter instruction when defendant asserted accident defense); see State v. Underwood, 3 Ohio St.3d 12, 14, 444 N.E.2d 1332 (1983) (observing that accident defense is a complete defense). Nevertheless, in certain circumstances a defendant presenting a complete defense may be entitled to a lesser included offense instruction. Wine at ¶33. As the Wine court explained:

> Whether or not a defendant raises a complete defense to the charged crime, the state has the burden to prove beyond a reasonable doubt all of the elements of the crime charged. The fact that the evidence could be interpreted by the jury as questionable on a single element does not mean that the defendant committed no crime. Simply put, a jury can both reject [a complete] defense * * * and find that the state has failed to meet its evidentiary burden on an element of the charged crime. In such a case, 'if due to some ambiguity in the state's version of the events involved in a case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense, an instruction on the lesser included offense is ordinarily warranted.'"

Id., quoting State v. Solomon, 66 Ohio St.2d 214, 221, 421 N.E.2d 139 (1981); accord Bethel at

¶138; State v. Hughes, 4th Dist. Ross No. 1463 (Nov. 29, 1988). Thus, appellant's accident defense does not necessarily preclude a lesser included offense instruction. Instead, even when a defendant raises a complete defense, a lesser included offense instruction ordinarily is warranted "'if due to some ambiguity in the state's version of the events involved in [the] case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense." Wine at ¶33. With this framework in mind, we now consider whether the trial court should have given the jury an involuntary manslaughter instruction as a lesser included offense of murder.

{¶ 48} R.C. 2903.02(B) sets forth the offense of felony-murder: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *." The state charged that appellant committed second-degree-felony felonious assault, in violation of R.C. 2903.11(A), as the predicate offense for felony-murder. R.C. 2903.11(A)(1) sets forth the offense of felonious assault and provides: "No person shall knowingly * * * [c]ause serious physical harm to another * * *."

{¶ 49} R.C. 2903.04 defines the offense of involuntary manslaughter and provides as follows:

> (A) No person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony.
>
> (B) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree * * *.

{¶ 50} In the case at bar, appellant does not specify whether the trial court should have

instructed the jury pursuant to R.C. 2903.04(A) or (B). Appellant also does not specify what underlying felony or misdemeanor he committed or attempted to commit in order to support an involuntary manslaughter charge. We could, therefore, overrule his first assignment of error on this basis alone. See State v. Hubbard, 10th Dist. Franklin No. 11AP-945, 2014-Ohio-122, ¶21 ("As defendant has not identified what predicate offense he believes the involuntary manslaughter instruction should have been based on, we cannot determine whether involuntary manslaughter would be a lesser-included offense of felony murder in this case."). Moreover, appellant's defense at trial appeared to be based upon his assertion that the child's death resulted from an unfortunate accident/unintentional shaking, and not from his actions. Thus, we question what underlying felony or misdemeanor appellant believes supports an involuntary manslaughter instruction. In the interest of justice, however, we will consider whether the evidence offered at trial reasonably warranted a jury instruction under R.C. 2903.04(A) or (B). Also, in the interest of justice, we construe appellant's argument to be that the underlying felony or misdemeanor to support an involuntary manslaughter instruction is child endangering.

{¶ 51} R.C. 2919.22 sets forth the offense of endangering children and states, in relevant part, as follows:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * * *
>
> (B) No person shall do any of the following to a child under eighteen years of age * * *:
>
> (1) Abuse the child;
>
> (2) Torture or cruelly abuse the child;

> (3) Administer corporal punishment or other physical 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
> * * * *

R.C. 2919.22(E)(2) defines the penalties for committing child endangering:

> (a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;
> * * *
> (c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;
>
> (d) If the violation is a violation of division (B)(1) of this
>
> section and results in serious physical harm to the
>
> child involved, a felony of the second degree.

{¶ 52} In the case sub judice, the only division appellant could have violated to support an involuntary manslaughter conviction is R.C. 2919.22(A) as a third degree felony. It is beyond dispute that the child suffered serious physical harm. Moreover, if appellant is claiming that he violated R.C. 2919.22(B), then he would most certainly not be entitled to an involuntary manslaughter instruction–an R.C. 2919.22(B) violation that results in serious physical harm to the child is a second degree felony. Thus, our focus is upon whether the evidence reasonably supports a finding that appellant caused the child's death as a proximate result of committing or attempting to commit child endangering under R.C. 2919.22(A) and a finding that he did not cause the child's death as a proximate result of committing or attempting to commit a felonious assault.

{¶ 53} Neither R.C. 2903.02(B) nor R.C. 2903.04 contains a mens rea component. State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶43, citing State v. Miller, 96 Ohio

St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶¶31-33. Instead, "the predicate offense contains the mens rea element." Id. Consequently, a defendant can be found guilty of felony-murder R.C. 2903.02(B) or involuntary manslaughter even if the defendant did not intend to cause the victim's death. Id.; State v. Irvin, 4th Dist. Hocking Nos. 03CA13 and 03CA14, 2004-Ohio-1129, ¶18.

{¶ 54} The mental state for felonious assault is "knowingly." R.C. 2903.11(A)(1). The mental state for child endangering is "recklessly." State v. McGee, 79 Ohio St.3d 193, 195, 680 N.E.2d 975 (1997). "A person acts knowingly, regardless of purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "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 be of a certain nature." R.C. 2901.22(C).

{¶ 55} To find appellant guilty of felony-murder under R.C. 2903.02(B), the jury must find that appellant caused the child's death as a proximate result of knowingly causing the child to suffer serious physical harm. To be found guilty of involuntary manslaughter under R.C. 2903.04(A), the evidence must show that appellant caused the child's death as a proximate result of recklessly creating a substantial risk to the child's health or safety by violating a duty of care, protection, or support, therefore, for the trial court to have been required to provide the jury with an involuntary manslaughter instruction, the evidence reasonably must support (1) a finding that appellant did not commit one or more of the elements necessary to prove murder with second-degree-felony felonious assault as the predicate offense, and (2) a finding that appellant committed involuntary manslaughter with third-degree-felony child endangering as the predicate

offense.

{¶ 56} Many courts have denied requests for involuntary manslaughter instructions when the evidence shows that an infant child sustained blunt force trauma to the head and that a fall could not explain the injury. See, e.g., State v. Johnson, 8th Dist. Cuyahoga No. 94813, 2011-Ohio-1919; State v. Finley, 1st Dist. Hamilton No. C-061952, 2010-Ohio-5203. In Johnson, the defendant was charged with aggravated murder and child endangering. At trial, the defendant requested the trial court to also give the jury both murder and involuntary manslaughter instructions. The court granted the defendant's request for a murder instruction, but denied his request for an involuntary manslaughter conviction. The jury subsequently found the defendant guilty of murder and child endangering. On appeal, the defendant argued that the trial court erred by failing to give the jury an involuntary manslaughter instruction. The appellate court disagreed and explained:

> "[T]he evidence in this case did not support a finding that Johnson acted recklessly. The evidence presented was that [the baby] died as a result of blunt impacts with excessive force to his head, face, trunk, and extremities that occurred while the baby was in Johnson's care. The injuries were not caused by a fall. Some of the injuries were observed by Johnson's brother on the evening of August 12. Johnson, however, did not take Anthony to the hospital until the evening of August 13, and even then was 'almost reluctant' to bring him into the examining room. Moreover, the treating physician believed that baby Anthony was dead upon arrival at the hospital, and that he had died six to 12 hours prior to when Johnson brought him in."

Id. at ¶56.

{¶ 57} In Finley, the court similarly upheld the trial court's decision to deny a murder defendant's request for an involuntary manslaughter instruction. In Finley, a one-year-old child "had been beaten from head to toe and suffered a severe blunt-force injury to his head." Id. at ¶30.

The court reasoned that "no jury could reasonably have concluded that [the defendant] inflicted these injuries recklessly." The court thus concluded that the evidence did not reasonably support an acquittal on the murder charge and a conviction for involuntary manslaughter.

{¶ 58} In the case sub judice, we believe that under any reasonable view of the evidence, the jury could not have acquitted appellant of felony-murder and convicted him of involuntary manslaughter. Absolutely no ambiguity exists in the state's evidence. Each and every medical witness that testified at trial unequivocally stated that the child's injury pattern is indicative of abusive head trauma, and could not have been accidental or due to appellant's claimed shaking of the child upon finding the child unresponsive. Not one expert agreed that the child could have sustained the pattern of severe, fatal injuries from falling off a couch or from being shaken once appellant found him unresponsive. Rather, all the experts agreed that the child's injuries were inflicted. The medical evidence shows that the only explanation for the child's injury pattern–other than a crushing head injury or a severe, fatal, roll-over motor vehicle accident–was abusive head trauma, i.e., blunt force impacts to the head with acceleration-deceleration movement. Nothing about the child's injuries demonstrates a reckless action. The medical witnesses were clear that the extent of the child's retinal hemorrhaging in all layers of the retina had only one logical explanation given the child's history and that explanation was abusive head trauma. Not a shred of evidence exists that appellant's panicked shaking of the child upon finding him unresponsive caused the massive retinal hemorrhages. Although appellant admits that he shook the child, he does not claim that he shook the child in a violent manner. Obviously, the child's massive retinal hemorrhaging resulted from an extremely violent act rather than from some panicked, confused, or unintended shaking. Appellant cannot reasonably claim that the evidence

shows that he recklessly created a substantial risk to the child's health or safety by violating a duty of care, protection or support, but not a finding that he caused the child's death as a proximate result of knowingly causing the child to suffer serious physical harm. We cannot fathom how one would classify the force necessary to cause the child's injuries as reckless behavior. Instead, the medical experts agree that abusive head trauma is the only logical explanation for the child's injury pattern. Even viewing the evidence in the light most favorable to appellant, the severity of the child's injuries would compel any reasonable fact-finder to conclude that they were, at a minimum, knowingly inflicted. Thus, an involuntary manslaughter instruction was not appropriate in the case sub judice.

{¶ 59} Moreover, even if appellant is correct that some medical evidence exists that the child could have sustained a skull fracture from falling off the couch, no evidence exists that the child's injury pattern–the skull fracture, the brain injury, the massive retinal hemorrhaging–could have resulted from a fall off the couch. Appellant's attempt to explain the child's injuries as accidental and totally unintentional is wholly inconsistent with the evidence.

{¶ 60} We further note that appellant's testimony provided the only potential support for an involuntary manslaughter instruction. His explanation of the events is again, however, inconsistent with the evidence. See State v. Palmer, 80 Ohio St.3d 543, 563, 687 N.E.2d 685 (1997) (explaining that defendant's "claims of accident, panic, and confusion are wholly inconsistent with the evidence"); State v. Grube, 2013-Ohio-692, 987 N.E.2d 287, ¶38 (4th Dist.) (stating that defendant's self-serving testimony does not entitle defendant to a lesser included offense instruction unless the evidence on the whole reasonably supports an acquittal on the greater offense and a conviction on the lesser offense).

{¶ 61} Consequently, we disagree with appellant that the trial court should have instructed the jury on involuntary manslaughter. Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 62} In his second assignment of error, appellant asserts that the trial court erred by not merging his murder and child endangering convictions.

{¶ 63} Initially, we note that during the trial court proceedings, appellant failed to argue that his murder and child endangering convictions should merge. Therefore, appellant waived all but plain error. E.g., State v. Linkous, 4th Dist. Scioto No. 12CA3517, 2013-Ohio-5853, ¶41. The Ohio Supreme Court previously recognized, however, that a trial court plainly errs when it imposes multiple sentences for allied offenses of similar import.[2] State v. Underwood, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31; accord State v. Black, 8th Dist. Cuyahoga No. 99421, 2013-Ohio-4908, ¶¶13-14, appeal allowed, 138 Ohio St.3d 1447, 2014-Ohio-1182, 5 N.E.3d 666; Grube at ¶44; State v. Creech, 188 Ohio App.3d 513, 2010-Ohio-2553, 936 N.E.2d 79 (4th Dist.), ¶17.

{¶ 64} "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth

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[2] The Ohio Supreme Court accepted a case in which it will decide:

> "(1) Whether a trial court commits plain error where multiple offenses present a facial question of allied offenses of similar import, yet the trial court fails to determine whether those offenses should merge under R.C. 2941.25 at sentencing; and
>
> (2) Whether the failure of a defendant to raise an allied-offense issue or to object in the trial court can constitute an effective waiver or forfeiture of a defendant's constitutional rights against double jeopardy and a bar to appellate review of the issue when the record is silent on the defendant's conduct."

State v. Rogers, 137 Ohio St.3d 1456, 2013-Ohio-4657, 1 N.E.3d 423.

Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." Underwood at ¶23; accord State v. Miranda, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603; State v. Washington, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶11. The statute provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 65} The Ohio Supreme Court has "consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence." State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (2010), ¶43, citing Maumee v. Geiger, 45 Ohio St.2d 238, 242, 344 N.E.2d 133 (1976). Thus, when "in substance and effect but one offense has been committed," the defendant may be convicted of only one offense. Id., quoting State v. Botta, 27 Ohio St.2d 196, 203, 271 N.E.2d 776 (1971). R.C. 2941.25 does not, however, prohibit multiple punishments unless the defendant demonstrates that the state relied upon the same conduct to prove the multiple offenses. State v. Cooper, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, ¶20, citing State v. Logan, 60 Ohio St.2d 126, 128, 397 N.E.2d 1345 (1979).

{¶ 66} In determining whether a defendant committed allied offenses of similar import, R.C. 2941.25 "requires the sentencing court to first determine 'whether it is possible to commit one

offense and commit the other with the same conduct.'" Miranda at ¶8, quoting Johnson at ¶48. If the court determines that it is possible to commit one offense and commit the other with the same conduct, "the court must then decide whether the offenses were committed with a single state of mind, i.e., a single animus." Id. If the defendant committed the offenses with a single animus, then "the offenses are allied offenses of similar import that must be merged, and the defendant can be punished for only one." Id.. Conversely, "offenses do not merge if they were 'committed separately' or if the offenses have a 'dissimilar import.'" Washington at ¶12; accord Miranda at ¶9.

{¶ 67} A court that must consider whether offenses are allied offenses of similar import "must review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus." Washington at syllabus. Whether offenses constitute allied offenses of similar import subject to merger under R.C. 2941.25 is a question of law that appellate courts review de novo. State v. Delawder, 4th Dist. Scioto App. No. 10CA3344, 2012–Ohio–1923, ¶38; accord State v. Williams, 134 Ohio St.3d 482, 2012–Ohio–5699, 983 N.E.2d 1245, ¶¶26–28.

{¶ 68} In the case at bar, appellant contends that felony-murder with felonious assault as the predicate offense and third-degree felony child endangering under R.C. 2919.22(A) are allied offenses of similar import. R.C. 2903.02(B) sets forth the offense of felony-murder: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *."

{¶ 69} R.C. 2919.22(A) sets forth the offense of endangering children as charged in the indictment and states, in relevant part, as follows:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * * *

{¶ 70} We find a series of cases involving child endangering convictions and murder or felonious assault convictions to be helpful to determine whether appellant's felony-murder and child endangering convictions merge. In Johnson, supra, the Ohio Supreme Court held that felony-murder with child endangering as the predicate offense and R.C. 2919.22(B)(1) child endangering were allied offenses of similar import. In Johnson, the defendant beat a seven-year-old child to death. The evidence showed that the defendant was alone in a room with the child. The child's mother heard a "'thump' or 'stomping,' and went to investigate." Id. at ¶54. The mother discovered the defendant yelling at the child and saw him push the child to the floor. The mother then left the room. A short while later, "she heard another loud 'thump' or 'stomp.'" Id. She returned to the room and saw the child shaking on the floor. Additionally, neighbors testified that they heard the child crying and heard the defendant "'whooping' the [child] and yelling, 'Do you want pain? You want pain? I'll give you pain!'" Id.

{¶ 71} The medical evidence showed that the child died from blunt impact to the head and that the child had "older injuries indicative of multiple incidents of child abuse." Id. at ¶55.

{¶ 72} The supreme court determined that the evidence showed "that the state relied upon the same conduct to prove child endangering under R.C. 2919.22(B)(1) and felony murder." Id. at ¶56. The court stated that even though "two separate incidents of abuse, separated by time and brief intervention by [the child's mother]" arguably occurred, the state nonetheless relied upon the same sequence of events to support both the child endangering offense and the felony murder

offense. Id. The court explained:

> "[T]he state obtained a conviction for the first sequence of abuse under R.C. 2919.22(B)(3) for administering excessive physical discipline. It was the second sequence of abuse for which the state obtained a conviction under R.C. 2919.22(B)(1) for abuse that caused serious physical harm. And the conviction for the second sequence of events under R.C. 2919.22(B)(1) is the basis for the predicate offense of felony murder under R.C. 2903.02(B). Thus, the two offenses were based upon the same conduct for purposes of R.C. 2941.25. We decline the invitation of the state to parse [the defendant]'s conduct into a blow-by-blow in order to sustain multiple convictions for the second beating. This beating was a discrete act that resulted in the simultaneous commission of allied offenses, child abuse and felony murder.
>
> [The defendant]'s beating of [the child] constituted child abuse under R.C. 2919.22(B)(1). That child abuse formed the predicate offense for the felony murder under R.C. 2903.02(B). The conduct that qualified as the commission of child abuse resulted in Milton's death, thereby qualifying as the commission of felony murder."

Id. at ¶¶56-67.

{¶ 73} The lower court in Johnson determined that the defendant's R.C. 2919.22(A) child endangering conviction did not merge with the defendant's felony-murder conviction. State v. Johnson, 1st Dist. Hamilton Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶92. The court observed that the state did not rely upon the same conduct to prove both R.C. 2919.22(A) child endangering and felony-murder. Instead, the R.C. 2919.22(A) child endangering conviction was based upon the following evidence:

> "* * * [A]fter beating [the child], [the defendant] had failed to call for emergency assistance, had attempted to treat [the child] at home, and had delayed treatment and hospital care for [the child] by driving needlessly to a distant hospital instead of one closer to their home. The state argued that this conduct corresponded to count five of the indictment, which charged that [the defendant], while acting in loco parentis, had violated R.C. 2919.22(A) by creating a substantial risk of harm to [the child]'s health or safety by violating a duty of care, protection, or support, and that the violation had resulted in serious physical harm to [the

child]."[3]
Id. at ¶89.

{¶ 74} In Cooper, supra, the court held that involuntary manslaughter with child endangering as the predicate offense and child endangering in violation of R.C. 2919.22 are not allied offenses of similar import when the state did not rely upon the same conduct to prove both offenses. The state asserted that the defendant committed two acts of violence against the child—"slamming his head against a hard surface and shaking him." Id. at ¶27. The evidence showed that the child sustained several blunt impacts to the head with soft tissue and brain injuries and had signs of "shaken-baby syndrome." Id. at ¶21. The child also had "two skull fractures, a bruise on the left forehead, another bruise below the chin, an abrasion on the right forehead, a bruise on the right cheek, another bruise on the right forehead, and one bruise under the scalp, between the scalp and skull." The coroner explained that the child's injuries

> "could have occurred in two ways. The first part is the shaking of the shaken baby syndrome. When you shake a kid very vigorously—and kids' heads, as I said, are heavy. Their necks are weak. And the head bounces back and forth and gives this acceleration/deceleration in the skull.
>
> Then, finally, there is the impact phase. When the shaking is finished, the baby is limp and unconscious and lands against a hard surface."

Id. at ¶¶24-25. The coroner further testified that the "retinal hemorrhaging in the pattern that [he]

[3] The appellate court's decision that the defendant's R.C. 2919.22(A) child endangering and felony-murder convictions did not merge was not an issue on appeal to the Ohio Supreme Court. Instead, the Ohio Supreme Court considered only the appellate court's decision regarding R.C. 2919.22(B)(1) child endangering and felony-murder. Johnson, 128 Ohio St.3d 153, 1 (stating certified issue as: "'Are the elements of child endangering [set forth in R.C. 2919.22(B)(1)] sufficiently similar to the elements of felony murder with child endangering as the predicate offense that the commission of the murder logically and necessarily also results in the commission of the child endangering?'") (alteration in original). Thus, the Ohio Supreme Court's judgment reversing the appellate court on this issue did not affect the appellate court's decision regarding R.C. 2919.22(A) child endangering and felony-murder. Consequently, we believe that we may properly consider the Johnson appellate court's allied offense analysis of R.C. 2919.22(A) child endangering and felony-murder.

saw in [the child], throughout the back of the retina, is considered to be pathognomonic, proof positive, of shaken impact syndrome." Id. at ¶26. An ophthalmologist likewise testified that the child's injuries were "consistent with shaken baby syndrome." Id.

{¶ 75} The Supreme Court determined that the defendant "committed two distinct acts of child endangering"–one that resulted in the child's death, and another act that did not result in the child's death. Id. at ¶20. The court explained:

> "* * * [T]he record reflects that the state presented evidence at trial demonstrating that [the defendant] committed two separate acts, slamming [the child] against a hard surface and shaking him; accordingly, the state did not rely on the same conduct to prove two offenses. Additionally, the court instructed the jury to consider the evidence pertaining to each count separately. The jurors returned verdicts finding [the defendant] guilty of both offenses.
>
> Here, [the defendant]'s convictions did not originate from a single act, but rather, in accordance with the evidence, from his separate acts of slamming [the child] against a hard surface, which provided the basis of the underlying offense of child endangering in connection with the involuntary manslaughter conviction, and shaking [the child], as a separate count of child endangering."

Id. at ¶¶28-29.

{¶ 76} In State v. Overton, 10th Dist. Franklin No. 09AP-858, 2011-Ohio-4204, the court determined that felonious assault and child endangering were not allied offenses of similar import. The court determined that although it is possible to commit both felonious assault and child endangering under R.C. 2919.22(B)(1) with the same conduct, the facts in Overton showed that the defendant committed the offenses separately. Id. at ¶9. The appellate court found:

> "[T]he state presented evidence that [the defendant] committed at least two acts of violence against [the child] that caused serious physical harm—striking him in the

> head while [the child] was in the shower, which resulted in the bruise on his head, and striking him in the chest after he was removed from the shower, which resulted in the bruises on his chest and death."

Id. at ¶12. The court further determined that the two incidents were separated in time and that the state did not rely upon the same incident to prove child endangering and felonious assault. The court explained:

> "The state clearly relied on the blows to the chest as the basis for the felonious assault conviction, with the prosecutor explicitly making that connection in closing argument. The argument for child endangering, by contrast, was only based on the fact that [the defendant] struck [the child], without indicating whether this was the blow to the head delivered in the shower or the later blows to the chest. There was sufficient evidence for the jury to conclude that appellant committed child endangering through child abuse by striking [the child] in the head while he was in the shower. [The defendant] has not established that the state relied on the punches to the chest to support both the felonious assault charge and the child endangering charge * * *."

Id. at ¶15.

{¶ 77} In State v. Porosky, 8th Dist. Cuyahoga No. 94705, 2011-Ohio-330, ¶11, the court determined that the defendant's child endangering and felonious assault convictions did not merge when the evidence showed that the defendant committed the offenses with a separate animus. The court explained: "[The defendant] first harmed his son (felonious assault) and then endangered him by failing to seek medical attention for the baby for approximately 12 hours, even though he knew

the child was injured." Id. at ¶11.

{¶ 78} In State v. Craycraft, 193 Ohio App.3d 594, 2011-Ohio-413, 953 N.E.2d 337 (12th Dist.), the court held that felonious assault and R.C. 2919.22(A) child endangering are allied offenses. The court explained:

> "The offense of felonious assault under R.C. 2903.11(A)(1) requires proof that the defendant knowingly caused serious physical harm. * * * * Third-degree felony child endangering under R.C. 2919.22(A) requires proof that a parent or other actor listed in the statute recklessly created a substantial risk to the health or safety of a minor child by violating a duty of care, protection, or support, resulting in serious physical harm. * * * *
>
> We conclude that it is possible to commit the offenses of felonious assault * * * and third-degree child endangering * * * with the same conduct. Johnson at ¶ 48. Where, as here, a parent violates his duty of care and thereby knowingly inflicts serious physical harm upon a minor child, it is possible for him to have committed all of these offenses."

Id. at ¶¶14-15. The court ultimately determined that the state relied upon the same conduct to prove the offenses and thus, that the offenses merged. The court explained:

> "Although the testimony indicates that there were separate injuries and, in all likelihood, separate incidents of abuse, appellant's convictions for all of the offenses were generally based on the series of events that resulted in the twins' injuries. The charges were never connected to particular instances of appellant's conduct.
>
> Because this was a pre-Johnson case, the charges were pursued collectively in contemplation of the now overruled Rance analysis for allied offenses of similar import."

Id. at ¶¶18-19.

{¶ 79} In the case at bar, even if felony-murder with felonious assault as the predicate

offense and R.C. 2919.22(A) child endangering are allied offenses, the prosecution did not rely upon the same conduct to prove both offenses. Instead, similar to Porosky and Johnson I, the prosecution asserted that appellant committed R.C. 2919.22(A) child endangering by failing to seek medical attention for the child following the traumatic brain injury. The evidence is clear that the child suffered a traumatic brain injury before appellant discovered the child unresponsive around 2 a.m. The child simply could not have been "fine" when appellant placed the child in his crib that night. Thus, before appellant found the child unresponsive, appellant had to have known that the child required medical attention. Appellant did not, however, seek medical attention until 2 a.m. Instead, appellant left the child to suffer with a traumatic brain injury. Thus, appellant possessed an animus independent of the felony-murder: Appellant recklessly created a substantial risk to the child by waiting until 2 a.m. to seek medical attention when the evidence showed that the child had to have suffered a traumatic brain injury while awake and in appellant's care. Additionally, appellant knowingly caused serious physical harm to the child, which proximately resulted in the child's death. Thus, appellant had two separate animuses: (1) he knowingly caused serious physical harm to the child; and (2) he failed to seek medical attention for the child.

{¶ 80} Consequently, we believe that the evidence in the case sub judice shows that appellant committed two distinct acts - the first occurred when he caused the child's severe brain injury, and the second occurred after he caused the child's severe brain injury and appellant failed to seek medical attention for the child. Instead, appellant placed the child in his crib while he suffered from a traumatic brain injury. Therefore, because the prosecution did not rely upon the same conduct to prove both R.C. 2919.22(A) child endangering and felony-murder, appellant's convictions for those offenses are not allied offenses of similar import subject to merger.

{¶ 81} Appellant nevertheless asserts that our decision in Grube, supra, controls our disposition of his second assignment of error and requires us to remand this matter to the trial court so that it can first determine whether the two offenses are subject to merger. In Grube, the defendant asserted that the trial court should have merged her aggravated murder and R.C. 2919.22(B)(1) child endangering convictions. We agreed with the defendant that the two offenses are allied in that they both can be committed with the same conduct. We did not, however, determine whether the defendant committed the two offenses separately. Instead, we remanded the issue to the trial court so that it could review the evidence and ascertain whether the defendant possessed a separate animus as to each. We specifically noted that determining whether the defendant possessed a separate animus "may be a difficult determination to make, based on our review of the evidence contained in the record." Id. at ¶52.

{¶ 82} We do not find Grube controlling in the case at bar. First, we observe that the opinion did not garner a majority vote. Instead, one judge concurred in judgment only and another judge specifically dissented from the decision to remand to the trial court. Second, in Grube we explicitly noted that the evidence did not clearly indicate whether the defendant possessed a separate animus as to each offense. Here, by contrast, as we explained above, we believe that the evidence does clearly indicate that the defendant committed two separate acts and had a separate animus as to each. Moreover, we observe that other appellate courts have independently reviewed whether a defendant committed offenses separately even if the trial court failed to first consider the issue. State v. Yarbough, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶¶96-102 (holding that trial court's failure to consider merger issue at sentencing constituted plain error and independently reviewing evidence to determine whether defendant committed offenses separately

without remanding to trial court); State v. Temaj-Felix, 1st Dist. Hamilton No. C-120040, 2013-Ohio-4463. Thus, we do not believe that a trial court's failure to consider the merger issue mandates a remand in all cases. Instead, a remand is unnecessary when the evidence in the record sufficiently allows for independent review. State v. Whitaker, — Ohio App.3d —, 2013-Ohio-4434, 999 N.E.2d 278, (12th Dist.), ¶66 (explaining that remand for allied offense analysis unnecessary when record contains sufficient facts for appellate court to decide the issue); State v. Rogers, — Ohio App.3d —, 2013-Ohio-3235, 994 N.E.2d 499, (8th Dist.) ¶57, motion to certify allowed, 136 Ohio St.3d 1508, 2013-Ohio-4657, 995 N.E.2d 1212 (noting that "[e]ven when trial courts fail to address the [merger] issue, there are often facts in the record that allow for resolution of the issue by de novo review on appeal"). When the evidence sufficiently allows for appellate review, a remand to the trial court would frustrate principles of judicial economy and the public's interests in the prompt administration of justice. See generally Stamco, L.L.C. v. United Tel. Co. Of Ohio, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶16 (Moyer, J., concurring in part and dissenting in part) ("Judicial economy would be served by deciding these issues now, rather than allowing the issues to lurk on remand and resurface in a new appeal"). Consequently, we disagree with appellant that Grube requires us to remand the merger issue to the trial court.

{¶ 83} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 84} In his third assignment of error, appellant argues that the trial court erred by admitting three-year-old M.W.'s out-of-court statements under the excited utterance exception to the hearsay rule.

{¶ 85} The admission or exclusion of evidence generally rests within a trial court's sound discretion. E.g., State v. Robb, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000); State v. Johnson, 71 Ohio St.3d 332, 338, 643 N.E.2d 1098, 1104 (1994). Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the admissibility of evidence. E.g., State v. Martin, 19 Ohio St.3d 122, 129, 483 N.E.2d 1157 (1985). Generally, an abuse of discretion connotes more than an error of law or judgment; rather, it implies that a court's attitude is unreasonable, arbitrary, or unconscionable. E.g., State v. Adams, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980); see also State v. Taylor, 66 Ohio St.3d 295, 304-305, 612 N.E.2d 316 (1993) (stating that reviewing court will uphold trial court's ruling allowing excited utterance into evidence as long as court's decision "reasonable").

{¶ 86} Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is inadmissible at trial, unless it falls under an exception to the Rules of Evidence. Evid.R. 802; State v. Maxwell, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930 (2014), ¶129.

{¶ 87} Evid.R. 803(2) contains the excited utterance exception and permits a trial court to admit a hearsay statement into evidence "if it relates 'to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶100, quoting Evid.R. 803(2). A court may admit a hearsay statement under the excited utterance exception under the following circumstances:

"'(a) there was some occurrence startling enough to produce a nervous excitement

> in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement of declaration spontaneous and unreflective,
> (b) the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs,
> (c) the statement or declaration related to such startling occurrence or the circumstances of such starling occurrence, and
> (d) the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.'"

State v. Jones, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, (2012), ¶166, quoting Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140 (1955), paragraph two of the syllabus; accord Taylor at fn. 2.

{¶ 88} In the case at bar, appellant challenges the trial court's finding that M.W. made the statement while still under nervous excitement. Appellant asserts that M.W. did not make the statements until at least fourteen hours after the alleged startling event and that the evidence fails to show that M.W.'s nervous excitement continued until the time of her statements.

{¶ 89} The amount of time that elapses "between the statement and the event is relevant but not dispositive of" whether a declarant's statement occurred while still under the stress of the startling occurrence. Jones at ¶168, quoting Taylor, 66 Ohio St.3d at 303; State v. Wallace, 37 Ohio St.3d 87, 90, 524 N.E.2d 466 (1988). "'There is no per se amount of time after which a statement can no longer be considered to be an excited utterance.'" Jones at ¶168, quoting Taylor, 66 Ohio St.3d at 303. Instead, "'[t]he central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of

reflective thought.'" Id., quoting Taylor, 66 Ohio St.3d at 303; Stough v. Indus. Comm., 142 Ohio St. 446, 52 N.E.2d 992 (1944), paragraph one of the syllabus ("A declaration or statement, to be admissible as part of the res gestae, is not required to be exactly simultaneous with the primary fact in controversy, but it must be a spontaneous or an impulsive declaration or statement and not the mere narration of a past transaction"). A court that is determining whether a declarant's statement occurred while still under the stress of the startling occurrence must examine the particular facts of the case and not "'attempt to formulate an inelastic rule delimiting the time limits within which an oral utterance must be made in order that it be terms a spontaneous exclamation.'" Jones at ¶168, quoting Taylor, 66 Ohio St.3d at 303.

{¶ 90} Additionally, "[t]he scrutiny for the child declarant is less than that for an adult. The liberal scrutiny is based on the * * * recognition that young children are more trustworthy because of their limited reflective powers." In re D.M., 158 Ohio App.3d 780, 2004-Ohio-5858, 822 N.E.2d 433 (8th Dist.), ¶13, citing Taylor, supra, 66 Ohio St.3d at 304; State v. Wagner, 30 Ohio App.3d 261, 264, 508 N.E.2d 164 (1986). As one court noted with respect to young children:

> " * * * The limited reflective powers of a three-year-old coupled with his inability to understand the enormity or ramifications of the attack upon him, sustain the trustworthiness of his communications. As a three-year-old, truly in the age of innocence, he lacked the motive or reflective capacities to prevaricate the circumstances of the attack. Furthermore, the immediacy of each communication, considered in light of the available opportunities to express himself, satisfies the requirement of spontaneity."

State v. Duke, 8th Dist. Cuyahoga No. 52604 (Aug. 25, 1988), quoting Wagner, 30 Ohio App.3d at 264. Moreover, "children are likely to remain in a state of nervous excitement longer than would an adult in cases involving hearsay statements by a child declarant." Taylor, 66 Ohio St.3d at 304. Thus, "courts have considered the passage of time between the upsetting event and the disclosure relating to it less indicative of the presence or absence of stress where young children are involved." State v. Street, 122 Ohio App.3d 79, 86, 701 N.E.2d 50 (9th Dist. 1997). Courts have instead focused "on the spontaneity of the statement, not the progression of a startling event or occurrence." D.M. at ¶13. "This does not mean, however, that the exception should swallow the rule. The dispositive inquiry is still whether the declarant remains under the stress of nervous excitement at the time the disclosure is made." Street, 122 Ohio App.3d at 86. Thus, courts have upheld the admission of child declarant's statements "even when made after a substantial lapse of time." Taylor, 66 Ohio St.3d at 304, citing State v. Boston, 46 Ohio St.3d 108, 118, 545 N.E.2d 1220, 1231 (upholding admission of two-and-one-half-year-old child's statement as excited utterance even though child made statement in the middle of the night and hours after startling event); State v. McCarley, 9th Dist. Summit No. 23607, 2008-Ohio-552 (determining that child's statements made four days after event were admissible as excited utterances); In re C.C., 8th Dist. Cuyahoga Nos. 88320 and 88321, 2007-Ohio-2226, ¶53 (concluding that children's statements made twenty-seven days after incident qualified as excited utterances); D.M. at ¶¶17-18 (determining that three-year-old child's statement made day after event admissible as excited utterance); State v. Fox, 66 Ohio App.3d 481, 489, 585 N.E.2d 561 (6th Dist. 1990) (determining that the child's statement qualified as an excited utterance even when the child made it the day after the startling event); State v. Duke, 8th Dist. Cuyahoga No. 52604 (Aug. 25, 1988) (upholding

admission of three-year-old child's statement as excited utterance when made ten days after event). But see State v. Butcher, 170 Ohio App.3d 52, 2007-Ohio-118, 866 N.E.2d 12, 29 (11th Dist.) (concluding children's statements did not qualify as excited utterances when statements made more than two months after event and when evidence "clearly" showed that the children "deliberated before they disclosed the alleged sexual assault * * * as evidenced by the children's debating back and forth").

{¶ 91} In D.M., for example, the court determined that a three-year-old child's statement qualified as an excited utterance even though the child made the statement the day after the event and "while calmly playing with his trucks." Id. at ¶12. The court explained:

> "* * * [T]he victim was three years old, he was calm in telling his mother what happened, his statement was spontaneous, and his mother had not prompted him by asking questions. Additionally, the statement concerned a subject ordinarily foreign to a three-year-old child.
>
> We understand that each excited utterance must be reviewed on a case-by-case basis. We conclude, based on the circumstances of this case, that because the victim was of such a young age, and the statement was spontaneous and did not indicate a reflective process, the statement constituted an excited utterance."

Id. at ¶¶17-18.

{¶ 92} Likewise, in McCarley the court determined that the trial court did not abuse its discretion by allowing a three-year-old's hearsay statements into evidence as excited utterances. In McCarley, the child made the statements four days after the event while playing with a toy telephone at his grandmother's house. The court reasoned:

> "[The child] was clearly still under the stress of his mother's murder, which he may have actually witnessed by virtue of being in the apartment when it occurred.

> Although four days elapsed between the murder and [the child]'s statements, the passage of time is only one factor in an excited utterance analysis. There is no evidence in the record that [the child], a three year old, fabricated these statements or even made them due to another's influence. Indeed, [the declarant] testified that [the child] made the statements spontaneously, quickly, and with tears in his eyes."

Id. at ¶11 (citation omitted).

{¶ 93} In the case sub judice, we do not believe that the trial court's finding that M.W. made the statement while still under the stress of the event, and its decision to allow M.W.'s statement into evidence as an excited utterance is unreasonable, arbitrary, or capricious. Even though M.W.'s statement did not occur contemporaneously with the startling event, the circumstances show that she made her statement spontaneously, and while under stress from the startling event. Two witnesses heard M.W.'s statement and collectively described the child as anxious, worried, and very excited. One witness stated that the child's "eyes were huge," and another stated that the child acted like she wanted to "spill it out." Both also indicated that the child made the statements spontaneously.

{¶ 94} Thus, even though M.W. made the statements more than twelve hours after the child suffered his fatal injuries, the circumstances show that M.W. was still under the stress of nervous excitement. She had been awoken in the middle of the night and noticed that the child was "blue." She thought the child was dead. Even into the next afternoon, she believed that the child was dead. Obviously, believing that her baby brother was dead would cause distress in a three-year-old child and an extended state of nervous excitement. Moreover, M.W. claims to have witnessed appellant hitting the child. If M.W. witnessed the acts that caused the child's fatal brain

injury, she understandably and reasonably would have been in a state of nervous excitement that could have lasted well into the next day. See McCarley, supra. Given the medical testimony regarding the force necessary to inflict the child's injuries, witnessing that act certainly would cause a three-year-old child to become distressed. M.W.'s belief that the child was dead exacerbated that stress. Thus, we do not find it unreasonable for the trial court to have found that M.W. remained under the stress of the event and in a state of nervous excitement when she made the statements.[4]

{¶ 95} Appellant also argues that the trial court should have excluded Feeman's and Dalton's hearsay testimony because they did not testify consistently with one another as to the events surrounding the child's statement. Appellant further claims that Detective Conkle, Feeman, and Dalton all offered differing accounts of M.W.'s precise statement: (1) "Daddy hit Bubby" vs. "Daddy hurt Bubby"; (2) "My daddy slapped [the child] in the head" vs. "Daddy hit Bubby in the head"; and (3) "Daddy just slapped him in the face" vs. "Daddy just hit him in the head–in the face." However, the reliability of a hearsay witness is a jury question and does not affect the admissibility of the statement. State v. Landrum, 53 Ohio St.3d 107, 114-15, 559 N.E.2d 710 (1990) (stating that hearsay witness's credibility "does not affect the statement's admissibility" and that "jury was responsible for assessing" witness's credibility); State v. Cohen, 11th Dist. Lake No. 12-011 (Apr. 29, 1988) ("The subject statement was properly admitted under

[4] We note that even though a hearsay statement may fall within the excited utterance exception, it may nonetheless be inadmissible as a violation of the Confrontation Clause. State v. Siler, 164 Ohio App.3d 680, 2005—Ohio—6591, 843 N.E.2d 863. Because appellant did not raise a Confrontation Clause issue during the trial court proceedings or on appeal, we will not consider this issue. State v. Jones, 4th Dist. Gallia No. 09CA1, 2010-Ohio-865, ¶21; State v. Bennett, 4th Dist. Scioto No. 05CA2997, 2006-Ohio-2757, ¶17.

the Rules of Evidence, the weight to be accorded the same being an issue for jury determination."); see State v. Troisi, 124 Ohio St.3d 404, 2010-Ohio-275, 922 N.E.2d 957, ¶40 ("The jury's duty is to weigh the credibility of any witness * * *."). Moreover, during cross-examination, appellant's counsel questioned the witnesses about inconsistencies. Thus, we do not agree that any such inconsistencies rendered the hearsay testimony inadmissible and the trial court's decision to allow M.W.'s statements into evidence did not constitute an abuse of its discretion.

{¶ 96} Moreover, even if we, for the purposes of argument, could state that the trial court erred by allowing M.W.'s statement into evidence, we do not believe that M.W.'s statement is so crucial to the state's case that appellant's conviction could not stand without it. Instead, any arguable error by admitting the statement into evidence was harmless beyond a reasonable doubt. State v. Kidder, 32 Ohio St.3d 279, 284, 513 N.E.2d 311, 317 (1987) (stating that error admitting hearsay not prejudicial when remaining evidence "so overwhelming that the admission of those statements was harmless beyond a reasonable doubt"); accord State v. Nichols, 85 Ohio App.3d 65, 73, 619 N.E.2d 80 (4th Dist.1993), fn.6.

{¶ 97} In the case sub judice, the medical testimony overwhelmingly demonstrates that the child's injuries resulted from abusive head trauma while in appellant's care. The child's injuries did not result from an accidental fall off the couch or down the stairs. Appellant was the only person with the child who was capable of inflicting the injuries. Sadly, the record contains no other rational explanation for the child's pattern of injuries. Thus, even without M.W.'s statements, the jury had more than substantial evidence upon which to find appellant guilty of the offenses.

{¶ 98} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third

assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

{¶ 99} I concur in judgment and opinion on the first assignment of error but concur in judgment only on assignments of error two and three. In dealing with the merger issue (assignment of error two), I question the continued viability of *State v. Cooper, supra*, as applied at pp. 37-38 in light of *State v. Johnson's, supra*, admonition against "parsing" the evidence to find separate conduct. And I concur with Judge Hoover's analysis of assignment of error three.

Hoover, P.J.: Concurs in part and dissents in part.

{¶ 100} I concur in judgment and opinion with respect to the first and second assignments of error.

{¶ 101} As for the third assignment of error, I dissent in part with the reasoning, but concur in the judgment. M.W. made her statements in front of three different people, Celeste Dalton, Kelly Feeman, and Detective Jodi Conkel. The principal opinion does not make a distinction among the laypersons and the detective. I believe that M.W.'s statements that were made to the investigating officer, Detective Conkel, were not excited utterances and were not admissible under the hearsay exception set forth in Evid.R. 803(2).

{¶ 102} M.W. had made the statements to Dalton and Feeman during the afternoon of November 19, 2012, more than twelve hours after N.W. suffered his fatal injuries. Detective Conkel was at Nationwide Children's Hospital in Columbus, Ohio when she was informed of M.W.'s statements to Dalton and Feeman. Detective Conkel returned to Portsmouth, Ohio around

8:30 p.m. to 9:00 p.m. At that time, M.W. was taken to the Sheriff's Department to give her statement to Detective Conkel. At the hearing to determine whether the statements would be admissible, Detective Conkel testified that M.W. "wasn't real excitable..."

{¶ 103} I would find that M.W.'s statements to Detective Conkel were not excited utterances. M.W. had already had conversations with Dalton and Feeman earlier that day; approximately four hours elapsed between the conversations between Dalton, Feeman, and M.W.; and Detective Conkel even testified that M.W. "wasn't real excitable..." The child was brought to the Sheriff's Department for the sole purpose of being interviewed. The interview took place in an investigative setting. The interview of M.W. by Detective Conkel was a structured police interrogation and constituted testimonial evidence.[5] *See State v. Siler*, 164 Ohio App.3d 680, 2005-Ohio-6591, 843 N.E.2d 863 (5th Dist.)

{¶ 104} However, even assuming arguendo that M.W.'s statements to Dalton, Feeman, and Detective Conkel were excluded by the trial court, I agree with the principal opinion that the medical testimony overwhelmingly demonstrates that N.W. suffered from fractures of the skull as well as hemorrhaging of both eyes. The state of Ohio questioned numerous physicians including Dr. Mary Leder who was employed at Nationwide Children's Hospital.

> Q. Okay. And what--what was he actually diagnosed with as far as actual injuries?
>
> A. The baby had bleeding on the surface of his brain. It's called a

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1 Neither trial counsel nor appellate counsel made the argument that the admission of M.W.'s statements may have deprived appellant of his constitutional right to confront witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Even reviewing this under a plain error standard, I would find that the admission of the testimony was harmless beyond a reasonable doubt.

subdural hemorrhage. You imagine the brain, there's a tuff covering the brain and the skull, and there are blood vessels that run from the brain to the skull, through that membrane, and those blood vessels can rupture, and when they--when they tear, there can be bleeding in that subdural space. So the baby had a fresh subdural hemorrhage. He also had a fracture of his skull at the top of his skull extending down on both sides of his head. He had severe retinal hemorrhaging in the area of--of the retina, which is the--the back of the eyes, in both eyes such that there are different layers of the retina. The retina had actually split and there was blood accumulating and pooling in the layers of--of the retina in his eye. And then he had the bruising that I described.

* * *

Q. I'm sorry, Dr. Leder, I think I had asked you in your experience what the most likely mechanism for these types of brain injuries and retinal hemorrhages is?

A. The mechanism for producing subdural hemorrages and retinal hemorrhages together is acceleration deceleration injury of the type that we see in forceful violent shaking.

{¶ 105} Appellant testified that he was the only adult present caring for the child the night of November 18, 2012 into the early morning hours of November 19, 2012. The circumstantial evidence against the appellant is overwhelming. Even without the admission of M.W.'s statements, I would affirm the judgment of the trial court.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment & Opinion as to Assignment of Error I; Concurs in Judgment Only as to Assignments of Error II & III with Opinion

Hoover, P.J.: Concurs in Judgment & Opinion as to Assignments of Error I & II; Concurs in Part and Dissents in Part with Opinion as to Assignment of Error III

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.