[Cite as *In re B.M.*, 2003-Ohio-870.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80909

IN RE: B.M., Minor Child	:	
	:	JOURNAL ENTRY
	:	
	:	AND
	:	
	:	OPINION
	:	
	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 27, 2003
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from the Common Pleas Court – Juvenile Court Division Case No. DL-01103081
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	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For appellee, State of Ohio:

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JOSEPH J. NAHRA, J.:

{¶1} Appellant, B.M., a minor, appeals from the trial court finding him to be delinquent due to having committed the murder (R.C. 2903.02[B]) of his two-month-old male child.[1] For the reasons adduced below, we affirm.

{¶2} A review of the voluminous record herein, which includes (i) twelve separate hearing transcripts totaling approximately one thousand pages and (ii) three boxes of exhibits, indicates that the police responded to 3350 East 139 Street, Apartment 2, Cleveland, Ohio, on April 29, 2001, based on a call that a baby there was in full arrest.

{¶3} Appellant, who was thirteen years of age at the time, answered the door and told the police that the baby, who had been transported by EMS to the hospital with the baby's fourteen-year-old mother prior to the police reaching the scene, had stopped breathing. Appellant further told the police that he had checked on the baby, who was sleeping between the bed and a wall, and had determined that the baby had rolled off the bed. Appellant also claimed that appellant's younger brother was also sleeping in the bedroom, but examination by the responding police revealed no brother. Appellant next claimed that he brought the baby into the living room where the baby vomited. Appellant claimed to the officers that the baby was not breathing at that point so appellant woke the baby's mother, who called EMS.

{¶4} While the responding police waited for the homicide and scientific investigation units to arrive, appellant's mother returned home. She telephoned the hospital and passed the telephone to

[1]Pursuant to the policy of this court, the initials of the child have been used in place of his name. In fact, names of parties and witnesses will likewise not be used.

appellant. At that point, appellant was informed that the baby had died. Appellant then fled the scene.

{¶5} The homicide detective who investigated the case testified that he interviewed appellant's mother. Appellant's mother had been out of the house at the time the police arrived. Appellant's mother told the homicide detective that everything was fine at the house before she left. Finally, appellant's mother told the detective, ominously, that "this baby just didn't die." Tr. 12-3-01 at 64.

{¶6} The homicide detective next interviewed appellant who claimed that he had found the baby trapped face down between the bed and the wall. Appellant claimed that he attempted to comfort the baby, but it vomited on appellant. After the vomiting episode, appellant claimed that he woke the baby's mother, who called EMS. EMS performed CPR on the baby at the scene and transported the child and mother to the hospital.

{¶7} The coroner ruled the baby's death a homicide. The coroner observed a multitude of extensive injuries on the baby, including: (1) bruising under the scalp; (2) several areas of brain hemorrhaging; (3) brain contusions; (4) retinal hemorrhages in both eyes; (5) bruising to the back, spine, buttocks, spleen, intestines, adrenal glands and liver; (6) lacerations to the liver; and (7) blood in the abdominal cavity. The coroner characterized the extent of trauma as severe. Bruising on the baby's body and the observed injuries were, according to the coroner, inflicted within 24 hours of death. Death was caused by the following three factors: (1) hemorrhaging in the abdominal cavity; (2) head injury; and (3) traumatic shock. The coroner testified that it was her expert opinion that death was not due to the following defense hypothetical situations: (1) an adult falling asleep on the

baby; (2) the baby being trapped between the bed and the wall; or (3) the baby being wedged between two objects.

{¶8} When notified that the coroner had ruled the death a homicide, the investigating homicide detective and his partner went to appellant's apartment. Appellant let them in at which time he was informed that the death was ruled a homicide. Appellant was placed under arrest and informed of his constitutional rights; according to the detective, the appellant indicated that he understood these rights. At that point appellant's emotions began to come into play; his eyes began to tear up, his lips began to quiver, and his body started to shake. The detectives transported appellant to police headquarters for processing and further questioning.

{¶9} On the ride to police headquarters, appellant engaged one of the detectives in conversation as that detective attempted to calm the appellant. Appellant asked this detective what had happened to the baby; the detective told appellant that the baby had been beaten severely and told appellant that they could talk more about this at the headquarters once his mother arrived. Despite this admonition, appellant volunteered that he had lost his temper and struck the baby because the baby would not stop crying. Tr. 12-3-01 at 81. As appellant volunteered this statement, he gestured to demonstrate what he had done to the baby. The detective repeatedly asked appellant to stop talking, but appellant kept making verbal incriminating statements indicating that he had a problem with his temper on at least two prior occasions. While in the police car, the detective informed appellant of his constitutional rights two times.

{¶10} At police headquarters, the homicide detective attempted to contact appellant's mother, but the baby's mother answered the phone. While waiting for his mother to arrive at police headquarters, appellant, who was in an interview room and after being advised of his rights,

volunteered to the detectives that they had to understand the situation, that he was only thirteen years old, had lost his temper and did not mean to do it, and that he was not ready to be a father. Tr. 12-3-01 at 83-89.

{¶11} The appellant's mother questioned appellant in the presence of the detectives after she arrived at police headquarters. According to the detectives, appellant's mother asked appellant if he had done it; appellant answered yes. Appellant's mother asked appellant why he had done it; appellant answered because the baby would not stop crying. Appellant's grandmother, who was with appellant's mother at the headquarters, similarly questioned appellant in the presence of the detectives; appellant gave the same answers as he had given his mother. When asked by his grandmother why, if the baby would not stop crying, he hadn't given the baby to the baby's mother, appellant gave no answer and just shrugged his shoulders.

{¶12} The baby's mother, who was appellant's teenaged girlfriend, also questioned appellant at police headquarters in the presence of the detectives. According to the detectives, appellant admitted to the baby's mother that he struck the baby and had commenced beating, striking the baby in the head and chest, after the baby would not stop crying. Appellant also told the baby's mother that the baby vomited on appellant after the beatings had started. The baby's mother then recounted to appellant that she had warned appellant in the past about controlling his temper.

{¶13} Appellant's father also questioned appellant at police headquarters in the presence of the detectives. According to the detectives, appellant repeated the answers he had given his mother, grandmother and girlfriend. Appellant's father then chastised appellant that he had warned appellant to control his temper, and that appellant should have given the baby to the mother or called for help rather than strike the baby.

{¶14} Finally, appellant's grandfather and aunt also questioned appellant at police headquarters in the presence of the detectives. According to the detectives, appellant told them that he had struck the baby because it would not stop crying.

{¶15} Appellant was arraigned May 1, 2001, at which time he denied the complaints of (1) being delinquent by causing the death of the baby, in violation of R.C. 2903.02(A), and (2) creating a substantial risk to the health and safety of the baby while acting in loco parentis by violating a duty of care which resulted in serious physical harm to the baby, in violation of R.C. 2919.22(A) and (E)(2)(c).

{¶16} Trial was held during early December of 2001, and appellant was adjudicated delinquent of murder under R.C. 2903.02(B) on December 12, 2001. There was no objection to the amendment of the charge from R.C. 2903.02(A) to R.C. 2903.02(B). Appellant was then referred to the court's psychological clinic in anticipation of the upcoming dispositional hearing.

{¶17} At the dispositional hearing conducted on January 3, 2002, the trial court, on its own motion at the commencement of the hearing, indicated that it had amended the complaint for murder to be a violation of R.C. 2903.02(B), which is murder by committing another felony. There was no objection raised by defense counsel with regard to this amendment, and the defense failed to argue any prejudice at that time as a result of the amendment. Appellant was committed to the Ohio Department of Youth Services until he reaches 21 years of age.

{¶18} Two assignments of error are presented for review.

I

{¶19} The first assignment of error states: "The juvenile court erred when he found the appellant delinquent of murder pursuant to R.C. 2903.02(B) where the evidence was insufficient to sustain such a finding."

{¶20} In analyzing an argument alleging insufficiency of the evidence, we are guided by the following:

{¶21} "In a test for sufficiency, 'the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (Emphasis sic.) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. Therefore, we will examine the evidence to determine whether the average mind would be convinced of defendant's guilt beyond a reasonable doubt. *Jenks* at paragraph two of the syllabus." *State v. Stallings*, 89 Ohio St.3d 280, 289, 2000-Ohio-164, 731 N.E.2d 159, 171.

{¶22} The offense in issue, murder, is defined in R.C. 2903.02(B): "(B) 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 and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶23} Therefore, in order for appellant to be convicted of murder under this section, it is necessary that the death of the baby herein was (1) the "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*," and (2) the offense of violence which forms the proximate cause in answering number (1) cannot be a

violation of R.C. 2903.03 (voluntary manslaughter) or R.C. 2903.04 (involuntary manslaughter). (Emphasis added.)

{¶24} By severely beating the baby and inflicting the injuries which, in the end, proximately caused the death of the infant, appellant committed felonious assault (R.C. 2903.11[A][1]) against the baby, in that appellant knowingly caused serious physical harm to another. Felonious assault is classified as an "offense of violence," see R.C. 2901.01(A)(9)(a), and under the present facts, would be a second degree felony pursuant to R.C. 2903.11(B).

{¶25} Based on the evidence presented in a light most favorable to the prosecution, we conclude that the average mind would be convinced of appellant's guilt beyond a reasonable doubt.

{¶26} The first assignment of error is overruled.

II

{¶27} The second assignment of error states: "A complaint that fails to set forth each and every element of the charged offense is in violation of the Due Process Clause of both the State and Federal Constitution."

{¶28} In this assignment, appellant argues that the trial court erred when it amended the murder charge at the dispositional hearing from R.C. 2903.02(A) to R.C. 2903.02(B).[2]

{¶29} As noted in *In re Smith* (Cuyahoga, 2001), 142 Ohio App.3d 16, 24: "Juv.R. 22(B) permits the court to amend a pleading, on its own order, after the commencement of the adjudicatory hearing. The court needs permission to amend a complaint alleging delinquency only if the

[2]R.C. 2903.02(A) states, in relevant part, that "[N]o person shall purposely cause the death of another ***."

amendment would change the name or identity of the offense. Id."[3] Amending pleadings pursuant to Juv.R. 22(B) essentially corresponds to Crim.R. 7(D).

{¶30} In the present case, the failure of the defense to make a timely objection to the amendment waived error therein. See *City of Brooklyn v. Ritter* (Aug. 17, 2000), Cuyahoga App. No. 76979, citing *State v. Vega* (July 10, 1997), Cuyahoga App. No. 70600. Additionally, amending the specific paragraph section of the murder charge, from R.C. 2903.02(A) to R.C. 2903.02(B), to conform to the evidence did not change the name or identity of the offense; the offense remained murder.

{¶31} The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Common Pleas Court -- Juvenile Court Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate

pursuant to Rule 27 of the Rules of Appellate Procedure.

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[3]**{a}** Juv.R. 22(B) states:

{b} "Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties or, if the interests of justice require, upon order of the court. A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult. Where requested, a court order shall grant a party reasonable time in which to respond to an amendment."

JOSEPH J. NAHRA*

JUDGE

PATRICIA A. BLACKMON, P.J., and

COLLEEN CONWAY COONEY, J., CONCUR.

(*SITTING BY ASSIGNMENT: Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).