In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2018-1592, 2018-1501
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE DELAWARE
v.	}	COUNTY COURT OF APPEALS
	}	FIFTH APPELLATE DISTRICT
CLINTON D. FAGGS, III,	}	
	}	COURT OF APPEALS CASE NO.
Defendant-Appellant.	}	17 CAA 10 0072

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT CLINTON D. FAGGS, III

JONATHAN T. TYACK (0066329)
(COUNSEL OF RECORD)
HOLLY B. CLINE (0096806)
The Tyack Law Firm Co., L.P.A.
536 South High Street
Columbus, OH 43215
Telephone: (614) 221-1341
jon@tyacklaw.com
holly@tyacklaw.com

COUNSEL FOR APPELLANT

RUSSELL S. BENSING (0010602)
1360 East Ninth Street, Suite 600
Cleveland, OH 44114
(216) 241-6650
rbensing@ameritech.net

COUNSEL FOR *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE

CAROL HAMILTON O'BRIEN (0026965)
Delaware County Prosecuting Attorney
KIMBERLY BURROUGHS (0095694)
(COUNSEL OF RECORD)
Assistant Prosecuting Attorney
140 North Sandusky St., 3rd Floor
Delaware, OH 43015
(740) 833-2690

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS 1

STATEMENT OF THE CASE AND THE FACTS 1

ARGUMENT 1

APPELLANT'S PROPOSITION OF LAW: In a prosecution under the domestic violence statute, R.C. §2929.25, or the assault statute, R.C. §2903.13, of a parent or adult acting *in loco parentis* while disciplining a child, the State bears the burden of proving unreasonable parental discipline as part of the physical harm element of the offense. 1

Summary of Argument. 1

1. An overview of the Ohio statute. 2
2. The Court's decision in *Ireland*. 3
3. Parental discipline is not an "excuse" or "justification." 4
4. The reasonableness of the discipline is not a fact "peculiarly within the knowledge of the defendant." 6
5. The reasonableness of the discipline is not something for which the accused can fairly be required to produce supporting evidence. 6
6. Treating parental discipline as an affirmative defense precludes an appellate court from reviewing the sufficiency of the evidence regarding whether the discipline was reasonable. 7

CONCLUSION 8

SERVICE 10

TABLE OF AUTHORITIES

Cases

Doe v. Heck, 327 F.3d 492, 523 (7th Cir. 2003) 5

Hamilton v. Lethem, 126 Haw. 294, 270 P.3d 1024 (2012) 5

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) 5

State v. Adaranijo, 153 Ohio App.3d 266, 2003-Ohio-3822, 792 N.E.2d 1138 (2nd Dist.) 9

State v. Bundy, 4th Dist. Pike No. 11CA818, 2012-Ohio-3934, ¶30, 974 N.E.2d 139 8

State v. Dickson, 5th Dist. Holmes No. CA-478, 1993 Ohio App. Lexis 5152 6

State v. Elmore, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547 8

State v. Faggs, 5th Dist. No. 17 CAA 10 0072, 2018-Ohio-3643 8

State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032 8

State v. Ireland, Slip Op. 2018-Ohio-4494 ..... passim

State v. McClure, 2nd Dist. No. 92-CA-0078, 1993 Ohio App. LEXIS 3060 7

State v. Norris, 8th Dist. Cuyahoga No. 95542. 2005-Ohio-6025 4

State v. Poole, 33 Ohio St.2d 18, 294 N.E.2d 288 (1973) 4, 5

State v. Suchomski, 58 Ohio St.3d 74, 567 N.E.2d 1304 (1991) 7

Statutes

R.C. §2901.05 2

R.C. §2903.13 1

R.C. §2929.25 1

STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

ARGUMENT

APPELLANT'S PROPOSITION OF LAW: In a prosecution under the domestic violence statute, R.C. §2929.25, or the assault statute, R.C. §2903.13, of a parent or adult acting *in loco parentis* while disciplining a child, the State bears the burden of proving unreasonable parental discipline as part of the physical harm element of the offense.

Summary of Argument. Every parent[1] will discipline their child. Some will eschew

---

[1] In this case, Mr. Faggs was not the biological parent, but had assumed the role of the child's father.

corporal punishment; others will not. Discipline of a child which is excessive and unreasonable is punishable. This case requires this Court to resolve the conflict between the lower courts as to which party bears the burden of proof on this issue.

The State's position would hold that the defendant bears the burden: that once the State demonstrates that the parent physically disciplined the child, whether the discipline was reasonable is an affirmative defense to the charge, and it becomes the parent's obligation to prove it.

As this Court concluded in *State v. Ireland*, Slip Op. 2018-Ohio-4494, ¶19, in determining whether a defense position can be labeled an affirmative defense, "[w]e are bound by the language of R.C. 2901.05(D)(1)(b) ..." That statute provides a three-part definition of what constitutes an affirmative defense under Ohio law. Simply put, parental discipline does not meet any of the statutory requirements, and thus cannot be characterized as an affirmative defense.

1. An overview of the Ohio statute. R.C. §2901.05 provides the definition of an affirmative defense.

> (D) As used in this section:
>
> (1) An "affirmative defense" is either of the following:
>
> (a) A defense expressly designated as affirmative;
>
> (b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

Nothing in the Ohio statutes expressly designates parental discipline as an affirmative defense. Thus, if parental discipline is deemed to be an affirmative defense, it must meet the requirements of §2901.05(D)(1)(b): parental discipline is not an affirmative defense unless it can

be shown that it is "(1) an excuse or justification that is (2) peculiarly within the knowledge of the accused and (3) on which the accused can fairly be required to adduce supporting evidence." *Ireland*, ¶19.

2. The Court's decision in *Ireland*. *Ireland* provides a classic example of the required analysis. Ireland was charged with felonious assault, and sought to introduce evidence that he suffered from post-traumatic stress disorder which caused him to "black out" during the incident. He contended that since his act was not a voluntary one because of the black out, he could not be punished for it.

In concluding that Ireland's assertion was an affirmative defense for which he bore the burden of proof, the Court looked to the three prongs of the statute. First, it examined the definitions of excuse and justification:

> Black's Law Dictionary defines "excuse" as a "reason that justifies an act or omission or that relieves a person of a duty" or a "defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal." [Citations omitted.] "[J]ustification" is defined as a "lawful or sufficient reason for one's acts or omissions; any fact that prevents an act from being wrongful" or a "showing, in court, of a sufficient reason why a defendant acted in a way that, in the absence of the reason, would constitute the offense with which the defendant is charged."

The Court next concluded that "[a] blackout excuse is 'peculiarly within the knowledge of the accused,' … because only the accused could know or be able to describe his or her feelings and experiences during the alleged blackout." ¶22.

This led to the Court's conclusion that the third prong was satisfied as well:

> The accused will be aware of the circumstances surrounding his or her blackout and will not be disadvantaged if required to relay his or her version of events to the fact-finder … Only Ireland knows whether he was aware of the actions he took at the time of the incident; Ireland is the only person who could know the

> way that he felt and what he experienced during the alleged PTSD dissociative episode. ¶23, 25.

None of the factors which led the Court to conclude that blackout is an affirmative defense apply to parental discipline.

3. Parental discipline is not an "excuse" or "justification." As the court explained in *State v. Norris*, 8th Dist. Cuyahoga No. 95542. 2005-Ohio-6025, ¶32, "[a]n affirmative defense is in the nature of a confession and avoidance, in which the defendant admits the elements of the crime, but seeks to prove some additional fact that absolves the defendant of guilt." In short, where an affirmative defense is employed, the law proceeds from the assumption that the defendant committed acts which were wrong, and the defendant assumes the burden of proving to the contrary.

This Court's decision in *State v. Poole*, 33 Ohio St.2d 18, 294 N.E.2d 288 (1973) is instructive. Poole was charged with murder, and argued that the shooting was accidental. The trial judge instructed the jury that accident was an affirmative defense, and Poole was convicted.

> The Court began with an analysis of affirmative defenses generally: those defenses
>
> represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but, rather, they represent a substantive or independent matter which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true. 33 Ohio St.2d at 19.

The Court, in concluding that accident was not an affirmative defense, found that "[b]y raising the defense of accident, the defendant … denies that he committed an unlawful act and says that the result is accidental."

> The intent or purpose, to kill, being an essential constituent of the offense, should be averred and proven. This purpose, like every other material averment of the

> indictment, is put in issue by the plea of not guilty and to authorize a conviction must be proven beyond a reasonable doubt. Where the state has shown that the death was the result of design, purpose, or intent … then the notion of accident is necessarily excluded … Therefore, when the plaintiff in error introduced evidence tending to prove that the gun was accidentally discharged, he was merely controverting the truth of the averment in the indictment that it was purposely discharged. 33 Ohio St.2d at 20.

By contrast, defenses like entrapment, insanity, and duress are classic examples of affirmative defenses: the defendant admits the acts constituting the crime, but offers additional argument and evidence which excuses the offense. This comports with the definition of "excuse" and "justification" contained in *Ireland.*

Logically, in order to hold that it is the defendant's burden to prove that parental discipline was reasonable,[2] we must start with the proposition that *any* use of physical discipline by a parent toward a child is criminal. In short, proof that the parent had physically disciplined the child would constitute the elements of the crime, and the defendant would then have to prove the "additional fact" – that the discipline was reasonable – in order to avoid culpability.

But that is not the law. The Supreme Court concluded almost a century ago in *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), that the 14th Amendment's liberty guarantee includes the right to "establish a home and bring up children." "The fundamental right of parents to direct the upbringing of their children necessarily includes the right to discipline them." *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003). *See also Hamilton v. Lethem*, 126 Haw. 294, 270 P.3d 1024 (2012) (parent has constitutional right to discipline child).

---

[2] The terms "reasonable," "unreasonable," and "excessive" in this context are largely interchangeable; if the discipline meted out is excessive, it is *ipso facto* unreasonable.

To be sure, that constitutional right does not extend to discipline which is unreasonable. But the crime of domestic violence is not established merely by the fact that the parent used physical discipline. It is the State's burden to prove that discipline was unreasonable; given the parent's inherent right to discipline the child, the unreasonableness of that discipline is an element of the offense.

4. The reasonableness of the discipline is not a fact "peculiarly within the knowledge of the defendant." As noted, in *Ireland* the Court found the evidence of blackout was peculiarly within the knowledge of the defendant "because only the accused could know or be able to describe his or her feelings and experiences during the alleged blackout."

This case presents a far different situation. The facts surrounding the incident will be amply laid out by the evidence; the defendant brings nothing more to the table. There can be no real dispute that the defendant's conduct in *State v. Dickson*, 5th Dist. Holmes No. CA-478, 1993 Ohio App. Lexis 5152 – the defendant, wearing work boots, kicked his three-year-old daughter in the back, causing her to fly five feet in the air – was unreasonable. But there was nothing within Dickson's knowledge that would have affected that result.

5. The reasonableness of the discipline is not something for which the accused can fairly be required to produce supporting evidence. This dovetails, to an extent, with the preceding requirement. In *Ireland*, the Court found it appropriate to require Ireland to produce supporting evidence of the blackout, because only he "could know the way that he felt and what he experienced during the alleged PTSD dissociative episode." ¶25.

Again, this is nothing like the situation presented by a case involving parental discipline. Whether the discipline was unreasonable is the true crux of any such case. There are certainly a variety of factors which come into play in making that determination – the age of the child, the

nature of the injuries – but whatever the defendant knows or believes is not one of those factors. Regardless of what Dickson was thinking when he kicked his three-year old daughter in the back with sufficient force to launch her five feet, there was nothing he knew, believed, or thought which could have justified such an act.

The same can be said for other cases where the defendant was convicted of domestic violence involving parental discipline. In *State v. Suchomski*, 58 Ohio St.3d 74, 567 N.E.2d 1304 (1991), the intoxicated defendant had pulled his eight-year old sleeping child from his bed, punched him, repeatedly pounded his head against a wall, and bloodied his lip. In *State v. McClure*, 2nd Dist. No. 92-CA-0078, 1993 Ohio App. LEXIS 3060, the facts demonstrated the following:

> Angela McClure testified that she called the police because she was being attacked by her father. She testified that he was upset because she wanted to see her biological father. She attempted to leave the house, and McClure threw her over the couch. McClure then proceeded to hit and kick Angela as she was lying on the floor. She had difficulty breathing.
>
> Angela ran outside through the screen door. McClure chased Angela and threw her to the ground. He then began pounding her head on the ground three or four times. McClure dragged her back into the house.

As in *Dickson*, there was no "supporting evidence" the defendants in *Suchomski* or *McClure* could have submitted which would have changed that result. The facts are the facts, and in a parental discipline case, the relevant facts can easily be determined from the State's evidence. The accused cannot be fairly expected to produce additional evidence, because no evidence he could produce would affect the outcome of the trial.

6. Treating parental discipline as an affirmative defense precludes an appellate court from reviewing the sufficiency of the evidence regarding whether the discipline was

reasonable. As noted, resolution of a domestic violence charge involving parental discipline will depend upon the reasonableness of the discipline. While these cases are largely fact-dependent, appellate review of the sufficiency of the evidence could lead to the establishment of certain criteria that trial courts could use in future cases.

Treating parental discipline as an affirmative defense, however, precludes that review. "The sufficiency-of-the-evidence standard is inapplicable when a defendant raises an affirmative defense as justification for the crime." *State v. Bundy*, 4th Dist. Pike No. 11CA818, 2012-Ohio-3934, ¶30, 974 N.E.2d 139. As this Court explained in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶37, 840 N.E.2d 1032, "the due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." In fact, that is precisely what the court below found here, in refusing to engage in a sufficiency analysis. *State v. Faggs*, 5th Dist. No. 17 CAA 10 0072, 2018-Ohio-3643, ¶16.

To be sure, an appellate court can review the evidence on a manifest weight argument, although that is an extremely daunting task: the defendant must show that the fact-finder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶44, 857 N.E.2d 547. But treating the reasonableness of the discipline as an affirmative defense largely immunizes that issue from appellate review.

CONCLUSION

The issue of parental discipline is not a static one; standards regarding the appropriateness of corporal punishment have substantially evolved in recent years. Disciplinary

methods which were common-place even fifty years ago would be regarded as child abuse today. Some parents today regard anything beyond a time-out as excessive and cruel, while others believe that some occasions call for physical correction of the child's behavior.

In the context of the debate about the appropriateness and nature of parental discipline, it is wise to remember the words of the court in *State v. Adaranijo*, 153 Ohio App.3d 266, 2003-Ohio-3822, 792 N.E.2d 1138 (2nd Dist.):

> Courts should be slow to intervene between parent and child. The criminal court is not the place to resolve petty issues of discipline. The domestic violence laws are meant to protect against abuse, not to punish parental discipline.

The role of discipline lies at the very heart of the fundamental relationship between parent and child. Presuming that every imposition of corporal punishment is unlawful, and placing upon the defendant the burden of proving the contrary, is not consistent with that relationship.

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse the decision of the Delaware County Court of Appeals, vacate the Appellant's conviction, and remand the case to the common pleas court for trial.

Respectfully submitted,

/s/Russell S. Bensing
Russell S. Bensing (0010602)
600 IMG Building
1360 East Ninth Street
Cleveland, OH 44114
(216) 241-6650
rbensing@ameritech.net

ATTORNEY FOR *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was sent by ordinary U.S. mail, postage prepaid, to Counsel for the State of Ohio, Assistant Prosecuting Attorneys, Carolyn Hamilton O'Brien and Kimberly Burroughs, 140 North Sandusky St., 3rd Floor, Delaware, OH 43015; and to Counsel for Defendant-Appellant, Jonathan T. Tyack and Holly B. Cline, The Tyack Law Firm Co., L.P.A., 536 South High Street, Columbus, OH 43215, this 1st day of April, 2019.

/s/Russell S. Bensing
Russell S. Bensing