IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	Case No. 2025-0066
Plaintiff-Appellant,	:	
	:	On appeal from the Hamilton County
vs.	:	Court of Appeals
	:	First Appellate District
AMY RODRIGUEZ	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. C-2400075
	:	
	:	
	:	

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

CONNIE PILLICH (0069968P)
Hamilton County Prosecuting Attorney

JON VOGT (0090781P) (Counsel of Record)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, OH 45202
Phone # 513-946-3228
jon.vogt@hcpros.org

COUNSEL FOR PLAINTIFF-APPELLANT STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

CRAIG M. JACQUITH (0052997) (Counsel of Record)
Assistant Public Defender

250 East Broad Street – Suite 1400
Columbus, OH 43215
Phone # 614-466-5394
craig.jacquith@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLEE AMY RODRIGUEZ

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Statutes

III. INTRODUCTION

Defendant-Appellee Amy Rodriguez ("Rodriguez") was charged with 11 counts of endangering children against her stepson (identified hereafter as "C.D.") and ultimately convicted of Count 2, for forcing C.D. to stand in a corner for up to 14 hours a day for multiple days in a row; Count 4, for forcing C.D. to lean against a wall for extended periods of time holding himself up with only his fingertips; Count 6, for confining C.D. to his room without physical human contact over the course of many days; and Count 10, for withholding food from C.D. causing him to suffer unhealthy weight loss as a result. At trial, every allegation made by C.D. related to these counts was either corroborated by other witnesses, other evidence, or even Rodriguez herself. At multiple instances, the State delineated the separate allegations that were the basis for the charges. Post-conviction, Rodriguez had no trouble addressing the allegations from Counts 2, 4, 6, and 10 in a Crim.R. 29(C) motion for acquittal, and chose to argue not that she hadn't done those things, but that her actions did not constitute endangering children pursuant to R.C. 2919.22.

Nevertheless, the First District Court of Appeals held that the trial court committed plain error by failing to provide the jury with final instructions "and/or" verdict forms that specified which conduct was the basis of each count of the indictment. *State v. Rodriguez*, 2025-Ohio-53, ¶ 76 (1st Dist.). To create this new and distinct rule for proving carbon-copy indictments, the First District relied on a case from Kentucky and nonbinding federal authority that has itself been functionally overruled and broadly criticized by other Ohio courts. *Id.* at ¶ 37; *see also Coles v. Smith*, 577 Fed.Appx. 502 (6th Cir. 2014). The First District itself acknowledged, "there is no binding case law from this court or the Ohio Supreme Court on the issue." *Id*. at ¶ 56.

Despite its irrelevance to her assignment of error below regarding the sufficiency of the verdict forms and/or jury instructions, Rodriguez repeatedly attacked C.D.'s character and

highlighted his supposed untrustworthiness and disciplinary issues. This case is not about C.D.'s consistency as a witness or whether he was a bad kid. The State wholeheartedly contends he was not and is not a bad kid. He is simply what a jury of Rodriguez's peers found him to be: a victim. The fact is that the jury listened to C.D.'s testimony over three days and made its own credibility determination; that ship has sailed.

The State agrees with Rodriguez, who argued in her memorandum in opposition to jurisdiction, that its propositions of law relate to "established Ohio law." That makes the First District's deviation from them below all the more troubling and underscores the need for this Court to answer with finality 1) whether the State complied with existing Ohio law and introduced sufficient and separately identifiable evidence supporting the counts for which Rodriguez was convicted, and 2) whether an appellate court conducting plain error review should be limited to applying controlling authority.

IV. STATEMENT OF THE CASE AND FACTS

On February 25, 2022, the State indicted Rodriguez with eleven counts of second-degree felony endangering children in violation of R.C. 2919.22(B)(2) for offenses committed against her stepson, C.D. (T.d. 1). Count 5 for Rodriguez charged that the offense occurred "from on or about" January 1 to January 2, 2021, and each of the remaining counts (1-4 and 6-10) charged that the offense occurred "on an undetermined date between" January 2018 and April 2021. *Id.* The record at trial is replete with testimony and evidence regarding the general lasting effects of the abuse C.D. suffered that was relevant to proving Rodriguez committed the offenses for which she was convicted. However, for efficiency the State will focus on delineation of Counts 2, 4, 6, and 10 at trial, and the specific evidence and testimony presented that supported Rodriguez's convictions for those counts.

A. Pre-Trial

On March 11, 2022, the State filed its Bill of Particulars. (T.d. 11). Though unnumbered, the Bill of Particulars contained precisely 11 allegations against Rodriguez, one for each count. *Id*. The second specific allegation against Rodriguez read, "C.D. was forced to stand in a corner facing the wall for up to 14 hours per day for multiple days in a row." *Id*. The fourth specific allegation against Rodriguez read, "C.D. was also forced to lean against a wall for extended periods of time holding himself up with only his fingertips causing serious discomfort and pain." *Id*. The sixth specific allegation against Rodriguez read, "Eventually C.D. was confined to his room without physical human contact over a course of many days. An alarm was on the door and he was monitored by 3 cameras for the purpose of preventing C.D.'s escape." *Id*. The tenth specific allegation against Rodriguez read, "Food was restricted from C.D. as a form of punishment. He was denied access to food by it being locked away in the kitchen. He suffered unhealthy weight loss as a result." *Id*. These second, fourth, sixth, and tenth particular allegations line up exactly with the counts for which Rodriguez was eventually convicted.

The case was continued repeatedly throughout the remainder of 2022 and into 2023. On January 17, 2023, Rodriguez filed a "Request for a More Specific Bill of Particulars" with the Court. (T.d. 66). The record does not contain a written entry from the Court ruling on Rodriguez's request either way, but the Court schedule filed along with Rodriguez's Docket Statement below indicates the Court held two "Motion" settings on February 1 and February 21, 2023. Both the State and Rodriguez had pending motions before the Court at the time. (T.d. 67, 68).

B. Count 2 – Standing in the Corner

On October 17, 2023, the State brought Rodriguez to trial. (T.p. 610). C.D. took the stand to testify against Rodriguez. (T.p. 727). He testified how he was forced to just stand and stare into

the corner all day long. (T.p. 764, 766). He would eat his meals by holding a plate and facing the corner. (T.p. 767). A couple of times a week C.D., being unable to leave the corner, would accidentally pee on himself. (T.p. 768).

Sometimes C.D. would get headaches from the fatigue of being forced to stand and stare at the corner all day. (T.p. 769). Eventually Rodriguez put a camera right over him to watch him and make sure he stayed in the corner. *Id*. She also made sure that C.D. never tried to nap or rest his eyes while standing all day. *Id*. Eventually Rodriguez made C.D., who was a 12-year-old at the time, wear pull-up diapers while he stood in the corner. (T.p. 770). C.D. was forced to stand in the corner from 6:00 a.m. or 7:00 a.m. until whenever bedtime was, occasionally as late as midnight. (T.p. 782). On cross-examination, regarding the punishment of being forced to stand in the corner, one of Rodriguez's attorneys opined, "Well, it seems to me like that was a punishment for not following one of the three rules, be respectful, don't talk back, and listen." (T.p. 1001). The State also introduced a small chart created by C.D. that he called his trauma timeline on which he wrote, "Standing in corner for hours." St. Ex. 2.

Other witnesses also observed this punishment. Rodriguez's niece, Angela Rodriguez, briefly worked as a nanny to help Rodriguez take care of the kids between approximately September 2017 until February 2018. (T.p. 1149). Angela witnessed C.D. being made to stand in the corner. (T.p. 1158). C.D.'s little brother, identified as "P.D.," also saw C.D. being made to stand in the corner. (T.p. 1233, 1242). P.D. said C.D. would get sent to the corner for not doing what Rodriguez asked or wanted, but that consequence was not the same for everybody. (T.p. 1243). P.D. had to stand in the corner for maybe three minutes or even thirty minutes when he got in trouble, but for C.D., "Like it got to the point where he'd stand like days – days straight but most of the time like hours." (T.p. 1245).

P.D. said Rodriguez would make C.D. stand in the corner right when he got up in the morning. (T.p. 1248). P.D. witnessed C.D. being made to eat his meals while standing in the corner. *Id*. P.D. saw C.D. stand in the corner from morning until night. (T.p. 1277) P.D. also remembered Rodriguez installed a camera directly over C.D. in the corner and would watch him to make sure he didn't close his eyes or fall asleep. (T.p. 1252). P.D. saw C.D. forced to stand in the corner and eat his different meals by himself when the family went on vacations. (T.p. 1301).

Rodriguez's biological daughter from her previous marriage (identified hereafter as "K.S.") also testified for the State. (T.p. 1396). K.S. explained, "C.D. just wasn't treated the same way as we were. Restrictions on food. He was on the bench pretty much all day long or in the corner on his fingertips or just standing there for hours at a time. He was not allowed to go to the bathroom. Sometimes he would pee on himself." (T.p. 1399). K.S. remembered the corner C.D. had to stand in was the one between Rodriguez's bedroom and the bathroom. (T.p. 1415). However, he was not allowed to use the bathroom. *Id*.

C.D.'s biological father (referred to hereafter as "A.D."), testified that discipline for children included standing in the corner, but that things got worse for C.D. (T.p. 2349) A.D. also told the jury about a photo of C.D. standing in the corner. (T.p. 2362, St. Ex. 2G). According to A.D., Rodriguez made C.D. stand in the corner for "up to an hour" multiple times every day. (T.p. 2362-2363). A.D. would occasionally argue with Rodriguez about her discipline of C.D., including making him stand in the corner for too long. (T.p. 2386).

Although Rodriguez did not testify, the jury heard from her in the form of a lengthy police interview the State introduced as Exhibit 7A. For supposedly harming his little brother P.D., Rodriguez told how she disciplined C.D., "He went into the corner." (St. Ex. 7A 1:21:13, Prof. St. Ex. 7B, T.p. 106). When asked what's the longest she ever had C.D. stand in the corner, Rodriguez

told police, "I don't know. He stood in the corner probably 45 minutes to an hour." *Id*. When the police followed up by asking her if it was ever any longer than that, Rodriguez started her reply by saying, "Well, this would be throughout the day. If you count up all the times throughout the day…" *Id*.

C. Count 4 – Fingertips Against the Wall

Eventually Rodriguez escalated the punishment of standing in the corner to force C.D. to lean against the wall and hold his bodyweight up with just his fingertips. C.D. explained, "I'd be forced to take my fingertips and put them up against the wall and then be forced to scoot my feet really far back to the only points of contact were my toes and fingerprints and forced to stand there like that I was getting yelled at." (T.p. 794). C.D. demonstrated this position for the jury. *Id*. C.D. also reported this form of punishment to staff at Cincinnati Children's Hospital Medical Center ("CCHMC") when he was admitted the first time. (T.p. 1784, 2028).

P.D. also remembered that C.D. had to lean against the wall using his fingertips. (T.p. 1264). P.D. remembered seeing C.D. being made to do that approximately six times. (T.p. 1265). By P.D.'s estimation, C.D. would have to stand in that position for around 45 minutes. *Id*. On the family camping trips they took, P.D. also remembers Rodriguez forcing C.D. to lean against the wall with just his fingertips if he got in trouble. (T.p. 1299). K.S. also remembered that in addition to standing in the corner, C.D. would be holding himself up by leaning against the wall with his fingertips. (T.p. 1399, 1415).

D. Count 6 – Confinement and Isolation

Most fundamentally, Rodriguez admitted to sometimes keeping C.D. in his room all day. (St. Ex. 7A 1:40:45, Prof. St. Ex. 7B, T.p. 140). She also admitted to having cameras that monitored C.D. (St. Ex. 7A 2:59:48, Prof. St. Ex. 7B, T.p. 246). According to C.D., after K.S.

became uncomfortable with Rodriguez's forcing C.D. to stand in the corner all day, Rodriguez decided to isolate C.D. in his room away from everyone else. (T.p. 771). C.D. told the jury, "I had no human contact." (T.p. 878). C.D. also included "being forced in room/no human contact" on his trauma timeline. St. Ex. 2. He explained to the jury that towards the end of the timeline, "I never really left my room." (T.p. 885).

P.D. described C.D. being kept in his room "all day." (T.p. 1258). Rodriguez installed those multiple surveillance cameras and alarm on the door to alert her if C.D. ever tried to leave. (T.p. 775). Rodriguez would monitor these cameras to ensure that other children in the household wouldn't talk with him when she had them deliver C.D. food. (T.p. 779). P.D. also remembered that Rodriguez would yell at him if she ever caught him trying to interact with C.D. when he delivered food. (T.p. 1262). P.D. reported this detail to CCHMC abuse investigators. (T.p. 2026). This isolation lasted, according to C.D., for "definitely over a month." (T.p. 782).

On New Year's Day 2021, when the alarm was off, C.D. ran away from the house but was located shortly thereafter by Rodriguez's brother-in-law and eventual witness, Brandon Evans. (T.p. 879). After Evans brought C.D. back to the house, C.D. told the jury, "They made sure the alarm was on." (T.p. 796). Nine days later, C.D. was admitted to CCHMC for the first time. *Id*. When C.D. was released, Rodriguez put him right back in his room full time as C.D. explained:

> The dynamic was slightly different in the sense that the – they took down one camera that was facing behind me, they took the door alarm off, and they had bolted the window shut because I had threatened to run away through the window, not jump out the window.

(T.p. 838-839).

K.S. also knew about the cameras Rodriguez put in C.D.'s bedroom to surveil him. (T.p. 1434). Mark Switzer, a counselor and therapist with CCHMC, learned about cameras in the house. (T.p. 1794). Switzer also testified about his awareness regarding C.D.'s general confinement,

"When he was grounded, he was isolated to his room and not permitted to do anything in his room besides be in there and perhaps read a book or something like that." (T.p. 1651). When CCHMC began to inquire into possible abuse, C.D. told other staff about his isolation as well. (T.p. 2027). Stephanie Helton, a forensic interviewer for CCHMC, testified, "[C.D.] talked about being in his bedroom all day long, that was very concerning to me." (T.p. 2027). C.D. also reported his isolation to police. (T.p. 2234, 2632).

A.D. was also aware that Rodriguez would confine C.D. to his room for the entire day and specifically make him stand in a spot "between the walk-in closet and bathroom." (T.p. 2366-2367). According to A.D., Rodriguez would make C.D. face the middle of the room and watched him on two cameras. (T.p. 2368, 2371). He knew that Rodriguez also placed alarms on the windows and door to the room. (T.p. 2373). One of Rodriguez's own witnesses, a teenage son of family friends, recalled an instance where he was over at Rodriguez's house but didn't see C.D. because he was being confined to his room for punishment. (T.p. 2898).

E. Count 10 – Withholding Food

At the A.D./Rodriguez household, everyone would gather together for the same hot meal at dinner—everyone, that is, but C.D.

On C.D.'s trauma timeline, he noted "no access to food/inadequate clothing" for its entire duration. St. Ex. 2. Before he was made to stand in the corner and eventually isolated in his room, C.D. was originally forced to sit on a bench but could get up to do chores. (T.p. 758). But, once Rodriguez discovered that C.D. would occasionally sneak food when doing his chores, C.D. lost his privilege to do chores and was "just told to sit on the bench." *Id*. Shortly thereafter, Rodriguez placed locks on the house's pantries and refrigerator. (T.p. 760, 980). A photo of the locks Rodriguez put on the refrigerator was received into evidence as State's Exhibit 1C. Rodriguez

regularly searched C.D. to make sure he wasn't hiding additional food. (T.p. 797). Other witnesses consistently testified to Rodriguez's penchant for withholding food from C.D.

Angela Rodriguez witnessed C.D. being forced to eat just plain cereal while the rest of the family ate regular breakfast. (T.p. 1158). Angela recalled a specific incident where the family was helping Rodriguez's other sister move and the whole family ordered food from Dunkin Donuts. (T.p. 1160). Everyone was allowed to order something but C.D. *Id*. Angela witnessed Rodriguez tell C.D. he wasn't allowed to order anything. (T.p. 1185). Angela remembered everyone had eaten cereal three to four hours earlier for breakfast and that she was hungry helping with the move for that amount of time. (T.p. 1161). During lunch, another family member tried to sneak C.D. some food but got caught by Rodriguez and C.D. got in trouble. (T.p. 1162).

P.D. recalled that he and C.D. did not receive the same sort of meals; P.D.'s were hot meals and cooked, whereas C.D.'s were, "Like bland stuff, like a sandwich or something, like corn flakes." (T.p. 1237). P.D. remembered Rodriguez putting locks on the pantry and refrigerator, "Because like [C.D.] was hungry and was trying to like take food without her knowing." (T.p. 1239-1240). P.D. remembered that Rodriguez would yell at or spank C.D. if she found out that C.D. ate the school lunch instead of the meager lunch she packed for him. (T.p. 1274). When the family occasionally went out to restaurants, P.D. and everyone else got to order the food they wanted but C.D. would have to eat packed carrots and sandwiches. *Id*. K.S. also remembered that C.D. would never get a snack from Rodriguez if he asked, whereas the other children always would. (T.p. 1422). K.S. recalled, "Well, he wasn't – he wouldn't have the same dinners as us. He got a sandwich and carrots. For breakfast he'd have just a thing of oatmeal. For lunch it was the same sandwich and carrots. There wasn't any snacks in between." *Id*.

A.D. also testified that Rodriguez used food as a punishment, and primarily for C.D. (T.p. 2353). A.D. remembered the last couple of months before C.D. left the house that most of the time C.D. would have to eat just a sandwich instead of the family meal. *Id*. A.D. also confirmed their pantry and refrigerator were locked, and that it was Rodriguez's decision to do so. (T.p. 2355-2356). A.D. also confirmed that C.D. wasn't allowed to have more food than Rodriguez gave him most of the time, that C.D. wasn't allowed to ask for more food, and that Rodriguez patted C.D. down to look for food. (T.p. 2357). Through A.D., the state introduced a video showing Rodriguez patting C.D. down for food. (T.p. 2357, St. Ex. 6).

CCHMC staff testified about the alarming physical consequences of Rodriguez's food discipline tactics. When C.D. was brought to CCHMC for the first time for a potential psychiatric ward intake, doctors noted he was hypothermic. (T.p. 1840). After arriving at CCHMC's psychiatric ward in College Hill, C.D. was actually sent back to CCHMC's main campus because of low phosphorous levels. (T.p. 1841). Sustained low phosphorous levels can cause long-standing effects, including skeletal and neurological issues. (T.p. 1842). CCHMC's hypothesis was that C.D.'s low phosphorus levels could have been caused by the hypothermia or malnutrition. (T.p. 1843). CCHMC Dr. Trisha Marshall explained to the court, "One thing that can cause a low phosphorus level is if you are chronically malnourished, so not getting enough calories in or food to eat on the scale of months, even years." (T.p. 1844).

Dr. Marshall guided the jury through C.D.'s medical records. In January of 2012, C.D.'s weight was 18.8 kilograms or 41.4 pounds, in the 91st percentile for his age at the time. (T.p. 1845, St. Ex. 10A-J p. 453). Almost nine years later, in October 2020, C.D. weighed just 30.8 kilograms or 67 pounds, in the 2.5th percentile for twelve-year-old boys. (T.p. 1846). By the time of his admission to CCHMC in January 2021, and three months shy of his 13th birthday, C.D.'s weight

dropped to 28.1 kilograms or 61.9 pounds, in the *0.29th percentile*. (T.p. 1847). Over a period of four days at CCHMC, C.D. was able to gain 6.6 pounds. (T.p. 2073, St. Ex. 10A-J p. 1175). When C.D. left the hospital in late January 2021, he weighed 77 pounds. (T.p. 2267). When was readmitted just two months later in March 2021, his weight was back down to 68 pounds. *Id*. C.D. also had abnormally low phosphorous levels again, but no indication of hypothermia this time. *Id*.

The State also presented medical records that documented CCHMC staff's concern with Rodriguez's *lack of concern* for C.D.'s physical condition, and her insistence on continuing to limit C.D.'s food intake. Dr. Anitka Utsi, a child psychiatrist for CCHMC, read from one of the notes, "Mom thinks that the team is not listening to them about his food intake and that he is not typically a big child and that he does not need to have that much food now that he has gained weight." (T.p. 1930, St. Ex. 10A-J p. 1177). The CCHMC medical records further noted, "Mom indicated resistance during our family centered rounds to adjust patient's diet even if medically indicated *even though patient is malnourished*." *Id.* (Emphasis added.)

In her interview with police, Rodriguez said that everyone who had reported to them that C.D. was only provided with a sandwich and maybe some carrot sticks at meals was lying. (St. Ex. 7A 1:01:18, Prof. St. Ex. 7B, T.p. 75). She also denied there were ever instances where C.D. was given different food than what the family was eating at home. (St. Ex. 7A 1:02:15, Prof. St. Ex. 7B, T.p. 76). However, she admitted that when the family went out to eat for dinner, she would sometimes make a child bring a packed lunch as a form of discipline, "They'd have – it just – whether it's lunch meat sandwich or – you know, whatever we have." (St. Ex. 7A 1:03:30, Prof. St. Ex. 7B, T.p. 77-78).

At multiple points throughout the trial, both sides asked questions about whether C.D. ever ate food out of the trash. C.D. denied doing so. (T.p. 798). Rodriguez also told the police that C.D.

ate out of the garbage and claimed she didn't know why. (St. Ex. 7A 1:00:25, Prof. St. Ex. 7B, T.p. 73). She also claimed that C.D. was actually feeding P.D. food out of the garbage and making him sick. (St. Ex. 7A 1:05:00, Prof. St. Ex. 7B, T.p. 80). Later in the interview, however, Rodriguez *admitted to inviting C.D. to eat out of the garbage*, but attempted to minimize her behavior:

> "The beans were right on top, and I said well, if you want to eat out of the garbage, why don't you eat those? I wasn't really making him eat out of the garbage. I did like say, eat – here. Here's a spoon. Eat those. They – they hadn't touched anything. They were literally right on top of something."

(St. Ex. 7A 1:57:36, Prof. St. Ex. 7B, T.p. 169). Rodriguez also told police, "[C.D.] also is the same child who it doesn't matter how much you give him he's going to keep eating. He would hide food in his – under his – in his underwear." (St. Ex. 7A 1:04:00, Prof. St. Ex. 7B, T.p. 79). Rodriguez said that C.D. was "sneaking everything" when it came to food at her house, and that she locked the pantries and the refrigerator. (St. Ex. 7A 1:05:20, Prof. St. Ex. 7B, T.p. 81).

Despite just admitting to locking the pantries and refrigerator, and that C.D. sneaked food and hid it in his underwear, Rodriguez nonetheless told the police that at some point C.D.'s weight became a concern for her and her husband, and that they bought protein shakes to try and help. (St. Ex. 7A 1:06:00, Prof. St. Ex. 7B, T.p. 82). Rodriguez told the police she didn't know why C.D.'s weight was dropping, but said his "electrolytes were off too." (St. Ex. 7A 1:07:00, Prof. St. Ex. 7B, T.p. 84).

When asked about C.D. getting caught stealing snacks when he ran away on New Year's Day 2021 because he was hungry, Rodriguez said, "He's not hungry. I understand – I understand how that looks for you." (St. Ex. 7A 1:34:05, Prof. St. Ex. 7B, T.p. 128). Rodriguez initially denied crossing the line when it came to disciplining C.D. but eventually told police, "I'm sure I have, yeah. Not intentionally." (St. Ex. 7A 2:30:40, Prof. St. Ex. 7B, T.p. 139). When the detectives asked her why C.D. would be hiding food if she was giving him what he wanted to eat, Rodriguez

replied, "I don't know. That's a really good question." (St. Ex. 7A 1:04:30, Prof. St. Ex. 7B, T.p. 79). The State agrees.

F. Closing and Post-Conviction

At the close of the State's case in Rodriguez's trial, Rodriguez and her co-defendants each moved for acquittal under Crim.R. 29. (T.p. 2741, 2742, 2745). The trial prosecutor went through each count to explain while the defendants' Rule 29 motions should be denied:

> On Count 1, with regard to [Rodriguez], indicates – it corresponds that kind of endangering children was that he was forced to set on the bench every day, all day, and being restricted to using the bathroom.…Count 2 is standing in the corner for hours upon end.…Count 3, standing in an imaginary box in the bedroom with minimal clothing and classical music playing.…Count 4, leaning into the wall using only his fingertips as balance.…Count 5, tying [C.D.] to the bed.
>
> Count 6, being confined to the bed without physical human contact for days while being monitored by cameras and alarms.…Count 7, intentionally failing to provide adequate clothing, blankets, and bedding in a cold room.…Count 8, beating [C.D.] with a belt, causing his legs to bleed.…Count 9, beating [C.D.] with a spoon 75-plus times.…Count 10, preventing [C.D.] from having access to food as punishment.…And Count 11 is preventing him from being allowed to use the restroom.

(T.p. 2750-2752). The trial court denied each Rule 29 motion. (T.p. 2754). At the close of trial and over Rodriguez's objection, the trial court permitted the State pursuant to Crim.R. 7(D) to amend counts 1 and 4 from second-degree felonies to third-degree felonies based on Rodriguez causing physical harm, rather than serious physical harm. (T.p. 2922-2935).

During her closing argument to the jury, the prosecutor went through each count at length and used a demonstrative chart for the jury's benefit:

> We've got Count 1, Count 1 relates to this behavior right here where he was forced to sit on the bench. And Count 1 stretches over to the next timeline where he was tied to the bench. So that's the behavior there.…Count 2, he was then forced to stand in the corner. He was forced to stand in the corner all day 14 plus hours a day.…We have Count 3. This is after [C.D.] was put in the Children's Hospital after he ran away.…Then we move to Count 4, and I think he indicated to you that a form of punishment that he had to engage in a lot of different times was standing

> against the wall using his fingertips.…Now, we go to Count 5, and this is him being restrained to the bed using the child restraints. He indicates that he was tied with both hands above him and both hands below him - - or both feet below him in an x.
>
> Let me go to Count 6, and this is before he ran away when he was in his bedroom.…Count 7 goes across the entire course of this - - this timeline. Food was - - oh, I'm sorry -- 7 is the inadequate clothing, I believe. Let me just double check this to make sure I have it right. Yes, 7 is the abuse he suffered by not being provided adequate clothing.…Count 8 is being hit with a spoon and a belt. That's Count 8 and 9. He was hit with a spoon and a belt many times, but he specifically testified about an occasion in which Amy started out with a wooden spoon, hit him so much with it that the spoon broke, and she continued to go forward with a belt. The belt buckle struck him, and it caused him to bleed.…Count 10 was carried throughout this entire time. And that was the inadequate food.…Count 11 are these two here. You heard much testimony about his use of the bathroom being restricted. He wasn't allowed to use the bathroom when he wanted to.

(T.p. 2942-2947). Rodriguez's attorney acknowledged this detailed breakdown to the jury, but said she was not going to address it: "But there's no police report, there's no testimony from the detectives about Count 1 is this, Count 2 is that, Count 2, 3. [The prosecutor] just testified—or argued to the jury about that. The only demonstrative we have is this progress that [C.D.] made before court with their office." (T.p. 3012). Despite her stated refusal to engage the individual counts set forth by the prosecutor in the demonstrative chart, Rodriguez's trial attorney proceeded to do just that for Count 1: "The first is the child restraints in public…They tried it once. She didn't deny that. That's not against the law. So that's Count 1." (T.p. 3012-3013). The jury evidently agreed and acquitted Rodriguez of that count. (T.d. 239).

After closing arguments, the trial court instructed the jury, "The charge set forth in each count of the indictment constitutes a separate and distinct matter. You must consider each count and the evidence applicable to each count separately and you must state your findings as to each count uninfluenced by your verdicts on the other counts." (T.p. 3120-3121). The trial court then went through each individual count for Rodriguez and her co-defendants. (T.p. 3122-3156). After

deliberating for some time the next morning, the jury had a question for the trial court, "For [Rodriguez]'s 11 counts, which punishment corresponds to which count?" (T.p. 3160). The trial court indicated, "You must refer to the jury instructions and the testimony and the evidence that was presented to you. That is my answer." *Id*.

Rodriguez's trial counsel stated, "I have no objection on behalf of Amy Rodriguez to that response, Your Honor." (T.p. 3159). The prosecutor offered to send back the demonstrative chart used at closing but the trial court indicated it was too late. *Id*. The next day of deliberations, the jury once again came back with a question for the court, "Which count aligns with each separate and distinct matter? We are referencing Page 6 under 'multiple counts' in the jury instructions." (T.p. 3165). The trial court replied, "My answer is the same as it was on Friday; refer to the instructions, and use your collective memories to apply to the testimony and evidence that was presented to the instructions." *Id*. Shortly thereafter, the jury returned with verdicts of guilty against Rodriguez for count 2, amended count 4, count 6, and count 10, and acquittals for all other counts against Rodriguez and her co-defendants. (T.p. 3166-3169, T.d. 239-250).

After the verdict but prior to sentencing, Rodriguez filed a renewed motion for acquittal pursuant to Crim.R. 29(C). (T.d. 252). Despite implying she did not have clarity as to what conduct corresponded to which count, Rodriguez nonetheless addressed each specific count for which she was found guilty and made arguments why those convictions merited reversal. *Id*. Post-conviction, Rodriguez filed a detailed Crim.R. 29(C) motion for acquittal related to the specific factual allegations from counts 2, 4, 6, and 10. (T.d 252). In response to the State's allegation in Count 2 that she committed endangering children by forcing C.D. to stand in the corner for hours at time, Rodriguez argued, "A parent sending their child to the corner is not torture or abuse." *Id*. In response to the State's allegation in Count 4 that she committed endangering children by making

C.D. lean against the wall using only his fingertips to balance, Rodriguez argued, "A parent having their child stand with their fingertips on the wall is not torture or cruel abuse nor does it cause serious physical harm." *Id*. In response to the State's allegation in Count 6 that she committed endangering children by confining C.D. to his bedroom, Rodriguez argued, "A parent sending a child to his bedroom is not torture or cruel abuse nor does it cause serious physical harm." *Id*. In response to the State's allegation in Count 10 that she committed endangering children by denying C.D. access to food, Rodriguez argued, "And finally, no access to food as a punishment does not cause serious physical harm." *Id*.

When the trial court convened for a hearing on Rodriguez's motion for acquittal, Rodriguez's counsel did not emphasize their supposed inability to determine which conduct was the subject of the jury's guilty findings. Rather, Rodriguez's counsel argued for a reduction from second-degree felony endangering children to third-degree felony endangering children, "But I think our main points that I just wanted to draw the Court's attention to was the sufficiency of the evidence in light of that rule, but mainly the serious physical harm based on the four counts the jury returned." (T.p. 3175). The trial court denied Rodriguez's motion, "The Court finds that a reasonable jury, based upon the evidence presented, could find the elements of the offense of Endangering Children (Counts 2, 4, 6, and 10) have been established beyond a reasonable doubt." (T.d. 258).

V. ARGUMENT

Proposition of Law I: When an individual is charged with multiple counts of the same crime, to sustain a conviction for each count the State must only present evidence of discernible facts to substantiate the separate counts.

***

When it comes to "carbon-copy" indictments for multiple counts of the same offense, there is no controlling authority from this Court or any other Ohio law to indicate specifically what level of differentiation, if any, needs to be provided during a criminal proceeding and particularly at what stage of a criminal proceeding. However, the law regarding the sufficiency of indictments in general is well-established. The First District was wrong to rely on *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005) and Kentucky caselaw to create a new rule for jury instructions "and/or" verdict forms. The collective body of caselaw that has distinguished *Valentine* over the years stands for the commonsense proposition that to sustain convictions for "carbon-copy" indictments the State must only present evidence of discernible facts to substantiate the separate counts. Even if *Valentine* did apply to this case, the State provided ample "minimal differentiation" throughout the proceedings between the charges Rodriguez was facing.

A. *Valentine* is no longer good law.

Individuals charged with felonies in Ohio have the right to indictments that present the nature and cause of the accusations against them. Ohio Const., art. I, § 10, U.S. Const., amend. VI. An indictment "may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged." R.C. 2941.05. "An indictment is sufficient if it can be understood therefrom…[t]hat the offense was committed at some time prior to the time of finding of the indictment or filing of the information." R.C. 2941.03(E). Upon written request, a defendant is entitled to a bill of particulars that sets up "specifically the nature of the offense

charged and the conduct of the defendant which is alleged to constitute the offense." R.C. 2941.07, *see also* Crim.R. 7(E). However, "Ordinarily, precise times and dates are not essential elements of offenses." *State v. Sellards*, 17 Ohio St.3d 169, 171 (1985). And even where a bill of particulars is not timely provided, reviewing courts must determine whether a defendant was actually prejudiced. *State v. Chinn*, 85 Ohio St.3d 548, 569 (1999).

Additionally, this Court has previously followed a United States Supreme Court two-part test for determining the sufficiency of indictments and protections against double jeopardy:

> (1) Whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet,' and, (2) 'in case any other proceedings are taken against him for a similar offence [sic], whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'

State v. Frazier, 73 Ohio St.3d 323, 332 (1995), citing *Russell v. United States*, 369 U.S. 749, 763-764 (1962). However, since this Court decided *Frazier*, the United States Supreme Court has narrowed the applicability of *Russell*. In a habeas case alleging insufficient notice of a charging document, the United States Supreme Court cautioned lower courts against "framing our precedents at such a high level of generality," and highlighted that *Russell* involved the rare charge of refusal to answer questions pertinent to a Congressional inquiry. *Lopez v. Smith*, 574 U.S. 1, 6 (2014). *See also United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007) (noting that guilt for the refusal to testify in front of Congress statute at issue in *Russell* required a special need for particularity).

The Court stated that the Federal Rules of Criminal Procedure "were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure," and that Fed Crim.R. 7(c)(1) only required a "plain, concise, and definite written statement of the essential facts constituting the offense charged." *Id.* citing *United States v. Debrow*, 346 U.S. 374,

376 (1953). Ohio Crim.R. 7(B) similarly only requires an indictment "contain a statement that the defendant has committed a public offense specified in the indictment" and may be made "in ordinary and concise language without technical averments or allegations not essential to be proved." Prior to the decisions in *Lopez* and *Resendiz-Ponce*, the Sixth Circuit applied *Russell* and held:

> The Constitution does, however, demand that if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding. Without such differentiation, these prosecutions would reduce to nothing the constitutional protections of the Fifth and Fourteenth Amendments.

Valentine v. Konteh, 395 F.3d 626, 638 (6th Cir. 2005). Since *Valentine*, many appellate courts in Ohio have declined to follow it and the First District appears to be the first to have relied on it to reverse a conviction since 2016. *See State v. Apanovitch*, 2016-Ohio-2831, ¶ 61 (8th Dist.), *reversed on other grounds* ("[T]he indictment itself did not differentiate, there was no bill of particulars, the jury instructions did not differentiate, and neither the state's opening or closing statements made the distinction.") Seventeen years ago, the Second District also applied *Valentine* to overturn "carbon-copy" convictions where it found no minimal differentiation between the charges before or during trial. *State v. Shaw*, 2008-Ohio-1317 (2d Dist.). Specifically relying on *Valentine* and its application via *Shaw*, the First District wrote, "Where an offender is charged with multiple, identical counts of the same offense, the trial court must provide some basis for a jury to differentiate the offenses." *Rodriguez*, 2025-Ohio-53, at ¶ 37. The First District extended this obligation to specifically include jury instructions "and/or" verdict forms. *Id*. at ¶ 49, 51.

The problem with any reliance on *Valentine* is that the federal courts and the Sixth Circuit recognize it was wrongly decided. In 2010, the United States Supreme Court decided *Renico v. Lett*, 559 U.S. 766 (2010), which limited the phrase "clearly established federal law" in the context

of habeas corpus to mean specifically United States Supreme Court caselaw. *Renico*'s impact meant that *Valentine* itself could not be relied on for future habeas cases, and also that *Valentine*'s own double jeopardy analysis that relied on circuit court opinions was wrong. *Lawwill v. Pineda*, 2011 U.S. Dist. LEXIS 52419, at *16 (N.D.Ohio May 16, 2011). As one district court put it:

> The Supreme Court has never held that a state indictment must be so precise as to preclude a second indictment while examining only the face of the first indictment. *Valentine*, which reaches that conclusion, is not Supreme Court precedent and has never been followed by the Sixth Circuit itself in a habeas corpus case.

Armengau v. Warden, London Corr. Inst., 2021 U.S. Dist. LEXIS 212260, at *109 (S.D.Ohio Nov. 2, 2021).

The Sixth Circuit itself all but overruled *Valentine* in *Coles v. Smith*, 577 Fed.Appx. 502 (6th Cir. 2014). While one of the main points of *Coles* was the Sixth Circuit declining to apply *Valentine* in light of *Renico*, the Sixth Circuit could have nonetheless interpreted *Russell* in the same manner as it had in *Valentine* but chose not to. The Sixth Circuit observed that *Russell* concerned a federal indictment subject to heightened requirements to "descend into particulars" under U.S. Const., amend. V, requirements that the Supreme Court has *not* imposed on the states. *Id*. at 506. In *Coles*, the Sixth Circuit essentially declared *Valentine* and its interpretation of *Russell* as wrongly decided and explicitly noted, "No Supreme Court case has ever found the use of identically worded and factually indistinguishable [state] indictments unconstitutional." *Id*. at 507-508, citing *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting).

In *Coles*, the Sixth Circuit denied Coles' habeas corpus petition he filed after the Eighth District Court of Appeals affirmed his convictions for 43 counts of rape and 43 counts of gross sexual imposition. *Id.*, *see also State v. Coles*, 2008-Ohio-5129 (8th Dist.). In declining to follow *Valentine*, the Sixth Circuit extensively and favorably quoted the Eighth District and its rationale for upholding Coles' convictions:

> The state appellate court reviewed its own case law, noting that in cases of sexual assault against children, "indictments need not state with specificity the dates of the alleged abuse, so long as the prosecution establishes that the offense was committed within the time frame alleged."…Specific times and dates are not elements of the crimes charged, and many children cannot recall exact dates and times…The difficulty in obtaining factual specificity is increased when the accused and the victim live in the same residence and the circumstances permit extended periods of abuse…As a result, allowances for "reasonableness and inexactitude" must be made.

Id. The Sixth Circuit continued:

> The state appellate court further determined that "the State attempted to set forth the factual basis for each incident of molestation that occurred over a three and one-half year period." The court pointed to the bill of particulars, which "identified the victim, her date of birth, and the places the crimes occurred." In addition, *the victim described the sexual abuse to the jury in specific factual detail.*

Id. (Emphasis added.).

Ohio courts have also distinguished *Valentine* in this manner and endorsed looking to the record and the victim's testimony to determine the sufficiency of individual "carbon-copy" counts, some overtly questioning *Valentine*'s legitimacy:

> The factors weighing against the persuasive value of *Valentine*, however, are overwhelming: the *Valentine* decision does not rely on applicable law; the reasoning used by the court has been discredited under AEDPA ("Antiterrorism and Effective Death Penalty Act of 1996" (28 USC 2254)); and the decision has been distinguished in every subsequent Sixth Circuit decision that cites it on this issue.

State v. Billman, 2013-Ohio-5774, ¶ 34 (7th Dist.). *See also State v. Lawson*, 2018-Ohio-4673, ¶ 43 (5th Dist.), citing *State v. Stefka*, 2012-Ohio-3004, ¶ 49 (7th Dist.) ("[T]he evidence presented at trial demonstrated that there were more instances of the crimes than were charged, not less."); *State v. Triplett*, 2018-Ohio-5405, ¶ 83 (7th Dist.) ("[T]here is no indication the jury would believe its finding of guilt on one count of endangering children would require a conviction on another count of endangering children merely because it contained the same elements and the same date range."); *State v. Bryant*, 2021-Ohio-2806, ¶ 21-23 (9th Dist.); *State v. Stanforth*, 2017-Ohio-4040,

¶ 43 (12th Dist.) ("This case is unlike the situations presented in *Valentine* and *Hemphill* where the state presented the evidence in an 'all or nothing' fashion and generically described a sexual act with an estimated number of times the act occurred. Instead, the state presented evidence tied to each count.").

Prior to *Rodriguez*, the First District had distinguished *Valentine*. *See State v. Webster*, 2013-Ohio-4142, ¶ 26 (1st Dist.) (finding that the State did not try the defendant in an "all or nothing" fashion, and that the evidence presented against the defendant provided the ability to defend against each count separately). Even the Second District, whose decision in *Shaw* was so central to both Rodriguez and the First District, has since walked back its previous adherence to *Valentine*: "For our part, we have recognized that '*Valentine* has no binding effect on Ohio courts' while nevertheless citing it regarding 'the need to differentiate multiple counts of abuse at trial or through a bill of particulars.'" *State v. Perry*, 2025-Ohio-1486, ¶ 41 (2d Dist.), citing *State v. Artz*, 2015-Ohio-5291, ¶ 34 (2d Dist.). The Second District also noted, "In the years following *Valentine*, Ohio's state courts frequently have distinguished it or simply declined to follow it." *Id*. at ¶ 40. The State asks this Court to continue this trend and put an end to *Valentine*'s intrusion into Ohio law once and for all.

B. The State presented sufficient and discernible evidence to substantiate each count for which Rodriguez was convicted.

It is important to note that the First District never found that the indictments in this case were invalid or otherwise defective. In the context of cases involving child victims, the rationale for permitting flexibility in indictments is plain to see. "It is well established that, particularly in cases involving sexual misconduct with a child, the precise times and dates of the alleged offense or offenses oftentimes cannot be determined with specificity." *State v. Daniel*, 97 Ohio App.3d 548, 556 (10th Dist. 1994). "In many cases involving child sexual abuse, the victims are children

of tender years who are simply unable to remember exact dates and times, particularly where the crimes involve a repeated course of conduct over an extended period of time." *State v. Mundy*, 99 Ohio App.3d 275, 296 (2d Dist. 1994). *See also State v. Barnecut*, 44 Ohio App.3d 149, 151 (5th Dist. 1988), *overruled on other grounds*; *State v. Gingell*, 7 Ohio App.3d 364, 368 (1st Dist. 1982).

The cases involving "carbon-copy" indictments that have that have distinguished *Valentine* did so by looking primarily at the record developed at trial, rather than the face of the indictment itself, the bill of particulars, or the verdict forms "and/or" jury instructions have essentially operated as sufficiency of the evidence reviews. The court in *Jones v. Secy., Dept. of Corr.,* 778 Fed.Appx. 626, 636 (11th Cir. 2019) (as cited by Rodriguez in her Response in Opposition to the State's Memorandum in Support of Jurisdiction as finding *Valentine* "instructive") wrote that:

> Nothing in the record—not the information, not the jury instructions, not the prosecutor's closing argument, and not the jury's general verdict—identify which two instances the jury found Mr. Jones guilty of.

Even though it described what it called a "double jeopardy problem" in Jones's case, the Eleventh Circuit nonetheless *still declined to grant habeas relief on the basis of Valentine* because there was "sufficient evidence that Mr. Jones had unlawful sexual contact" with the victim. *Id*. at 639. Following this body of caselaw, this Court should clarify then that convictions for otherwise valid "carbon-copy" indictments need only be sustained by the introduction of discernible evidence to substantiate each count.

In *State v. Sowell*, 2016-Ohio-8025, in one of 18 propositions of law, this Court briefly considered *Valentine* and concluded it did not apply to a defendant's rape convictions: "Unlike *Valentine*, the record in this case does not leave the court 'unable to discern the evidence that supports each individual conviction.'" *Id*. at ¶ 123. This Court noted, "And the state's evidence at trial showed that four specific, different acts of rape took place." *Id*. at ¶ 122. The State asks this

Court to review the record in this case under the same lens, where it will see that the evidence showed Rodriguez committed four specific, different acts of endangering children.

For Count 2, C.D. testified about being brutally made to the stand in the corner all day, including eating his meals while standing up in the corner, and being monitored by camera. (T.p. 764-770, 782). He included this allegation in a chart he made called his trauma timeline. St. Ex. 2. Rodriguez's niece recalled C.D. being made to stand in the corner. (T.p. 1158). C.D.'s little brother P.D. remembered C.D. being made to stand in the corner for days. (T.p. 1233, 1242, 1243, 1245, 1248). K.S., Rodriguez's biological daughter, remembered that C.D. stood in the corner for hours at a time and the specific corner in the house where he was forced to stand. (T.p. 1399, 1415). The State introduced a photo of C.D. standing in the corner. St. Ex. 2G. C.D.'s father told the jury how he used to argue with Rodriguez about her discipline of C.D., including making C.D. stand in the corner for too long. (T.p. 2386). Rodriguez herself admitted in a police interview to making C.D. stand in the corner for up to an hour multiple times a day. (St. Ex. 7A 1:21:13, Prof. St. Ex. 7B, T.p. 106).

For Count 4, C.D. told the jury, "I'd be forced to take my fingertips and put them up against the wall and then be forced to scoot my feet really far back to the only points of contact were my toes and fingerprints and forced to stand there like that while I was getting yelled at." (T.p. 794). He demonstrated this position for jury. *Id*. Both P.D. and K.S. remember Rodriguez forcing C.D. to hold this position, which P.D. estimated lasted for up to 45 minutes. (T.p. 1264, 1265, 1399, 1415).

For Count 6, Rodriguez admitted to sometimes keeping C.D. in his room all day and monitoring him on cameras. (St. Ex. 7A 1:40:45, 2:59:48, Prof. St. Ex. 7B, T.p. 140, 246). C.D. told jury about how he had "no human contact" and included this allegation in his trauma timeline.

(T.p. 878), St. Ex. 2. K.S. knew about the cameras in C.D.'s room. (T.p. 1434). P.D. said that C.D. was kept in his room "all day," and that Rodriguez would yell at him if she caught him trying to interact with C.D. (T.p. 775). P.D. reported this to CCHMC abuse investigators. (T.p. 2026). CCHMC staff members were aware of the allegations that C.D. was being isolated in his room. (T.p. 1651, 2027). A.D. also knew that Rodriguez would confine C.D. to his room all day and monitor him on camera. (T.p. 2366-2371). Rodriguez's own witness reported being at her house and not seeing C.D. because he was confined to his room. (T.p. 2898).

For Count 10, C.D. wrote on his trauma timeline he had "no access to food" for the entire duration of his abuse. St. Ex 2. Rodriguez admitted to police to locking the pantries and refrigerator in the house, and a photo of the locks was admitted into evidence. St. Ex. 1C, (St. Ex. 7A 1:05:20, Prof. St. Ex. 7B, T.p. 81). Angela Rodriguez, P.D., K.S., and A.D. all recalled that Rodriguez used food as a punishment against C.D. (T.p. 1158, 1160, 1237, 1274, 1422, 2353-2357). The State presented a video of Rodriguez searching C.D. for food. St. Ex. 6. By the time of C.D.'s admission to CCHMC in January 2021, and three months shy of his 13th birthday, C.D.'s weight dropped to 28.1 kilograms or 61.9 pounds, in the 0.29th percentile. (T.p. 1847). CCHMC medical records noted, "Mom indicated resistance during our family centered rounds to adjust patient's diet even if medically indicated even though patient is malnourished." (T.p. 1930, St. Ex. 10A-J p. 1177). In her interview with police, Rodriguez admitted to sometimes making C.D. eat just a packed sandwich when the family went out to dinner. (T.p. 77-78, 1:03:30). She also admitted to on one occasion inviting C.D. to eat out of the garbage. (St. Ex. 7A 1:57:36, Prof. St. Ex. 7B, T.p. 169).

At trial, the court instructed the jury, "The charge set forth in each count of the indictment constitutes a separate and distinct matter. You must consider each count and the evidence applicable to each count separately and you must state your findings as to each count uninfluenced

by your verdicts on the other counts." (T.p. 3120-3121). Of course, the jury twice asked which punishment corresponded to which count. (T.p. 3160, 3165). But "[a] reversal of a conviction based upon a trial court's response to a jury question requires a showing that the trial court abused its discretion." *State v. Carter*, 72 Ohio St.3d 545, 553 (1995). Each time, the trial court responded, "You must refer to the jury instructions and the testimony and the evidence that was presented to you." *Id.* That is exactly the right answer and what we ask juries to do in every case that involves multiple counts. Rodriguez's trial attorney agreed that was the correct response, telling the trial court, "I have no objection on behalf of Amy Rodriguez to that response, Your Honor." (T.p. 3159).

It is a fundamental precept of the United States legal system that jurors are presumed to "attend closely the particular language of instructions in a criminal case and strive to understand, make sense of, and follow them." *Samia v. United States*, 599 U.S. 635, 646 (2023), citing *United States v. Olano*, 507 U.S. 725, 740 (1993). That presumption extends to a court's responses to a jury's questions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). It is Rodriguez's burden to overcome this presumption and demonstrate there was an "overwhelming probability" the jury was unable to follow the court's instructions. *Greer v. Miller*, 483 U.S. 756, 766 (1987), fn. 8. Several Ohio appellate districts have also observed that it is not a function of a reviewing court to speculate as to *why* a jury asks a question during its deliberation. *State v. Wood*, 2020-Ohio-4895, ¶ 40 (10th Dist.); *see also State v. Horn*, 2015-Ohio-3625, ¶ 17 (5th Dist.). Nothing in the record in this case demonstrates an "overwhelming probability" the jury was unable to follow the trial court's instructions. On the contrary, the jury came to the right conclusion.

As the trial court said when it denied Rodriguez's Crim.R. 29(C) motion for acquittal, "The Court finds that a reasonable jury, based upon the evidence presented, could find the elements of

the offense of Endangering Children (Counts 2, 4, 6, and 10) have been established beyond a reasonable doubt." (T.d. 258). In light of the indisputably constitutional indictments in this case and of "carbon-copy indictments" in general, the voluminous evidence the State presented at trial, and the unrebutted presumption that the jury was able to follow the trial court's instructions, this Court should find that the State met its burden of presenting sufficient and discernible evidence to substantiate each count for which Rodriguez was convicted.

C. The State provided minimal differentiation between the counts facing Rodriguez.

Even if *Valentine* were to apply to this case, the State absolutely complied with its requirement of minimal differentiation. The Sixth Circuit explained the problem with the prosecution's case:

> The problem in this case is not the fact that the prosecution did not provide the defendant with exact times and places. If there had been singular counts of each offense, the lack of particularity would not have presented the same problem. Instead, the problem is that within each set of 20 counts, there are absolutely no distinctions made. Valentine was prosecuted for two criminal acts that occurred twenty times each, rather than for forty separate criminal acts. In its charges *and in its evidence before the jury*, the prosecution did not attempt to lay out the factual bases of forty separate incidents that took place.

(Emphasis added.) *Valentine*, 395 F.3d at 632. As the 40 criminal counts were not anchored to 40 distinguishable criminal offenses, Valentine had little ability to defend himself. *Id.* at 633. This case is easily distinguishable from the facts in *Valentine*.

The issue in *Valentine* was that the prosecuting witness twice alleged 20 counts of two separate sexual offenses and at trial offered no factual differentiation between the same counts, and provided only a general estimate of the number of offenses over a certain range. In this case, the State charged Rodriguez with 11 counts of endangering children, but at trial outlined 11 separate factual allegations of how Rodriguez committed endangering children. In other words, whereas the prosecution alleged Valentine committed his offenses by doing the same two things

20 times each, here the State alleged Rodriguez committed her offenses by doing different things 11 times. For example, the State *did not* allege Rodriguez committed eleven counts of endangering children by withholding food from C.D. on 11 different occasions. As the First District said:

> "The State charged Rodriguez with 11 counts of endangering children and presented evidence of 11 different instances and types of abuse. In closing argument, the State linked each count to a specific allegation of abuse."

Rodriguez, 2025-Ohio-53 at ¶ 48 (1st Dist.). Each allegation was different than the last. And as shown in the Statement of Facts, in its evidence before the jury, the State laid out the separate bases of the separate counts facing Rodriguez.

Valentine was charged with 20 counts of identically worded child rape, and 20 counts of identically worded felonious sexual penetration. *Id.* at 628. In this case, the State indicted Rodriguez with 11 counts of second-degree felony endangering children in violation of R.C. 2919.22(B)(2) for offenses committed against her stepson, "C.D." (T.d. 1). Count 5 for Rodriguez charged that the offense occurred "from on or about" January 1 to January 2, 2021, and each of the remaining counts (1-4 and 6-10) charged that the offense occurred "on an undetermined date between" January 2018 and April 2021. *Id*.

In *Valentine*, the prosecution's bill of particulars "did not offer further differentiation among the counts. Instead, it merely restated the allegations and identified the family home as the location of all forty offenses." *Id.* at 629. In the present case, the State's Bill of Particulars listed eleven specific and different allegations of how Rodriguez committed endangering children. (T.d. 11). In her response to Rodriguez's Crim.R. 29 motion at the close of the State's case, the prosecutor went through these eleven specific allegations in the exact same order, labeling them Count 1, Count 2, etc., and asked the trial court to deny Rodriguez's motion. (T.p. 2750-2752). At the close of trial and over Rodriguez's objection, the trial court permitted the State pursuant to

Crim.R. 7(D) to amend counts 1 and 4 from second-degree felonies to third-degree felonies based on Rodriguez causing physical harm, rather than serious physical harm. (T.p. 2922-2935). The jury therefore received identically worded counts 2, 3, 6-11, differently charged counts 1 and 4, and uniquely dated count 5. Finally, in her closing argument, the trial prosecutor went through each specific numbered count and argued how the State had proven its case. (T.p. 2942-2947).

The First District cited *State v. Asp*, 2023-Ohio-290, ¶ 59 (5th Dist.) for the maxim that, "Closing arguments are not evidence." *Rodriguez*, 2025-Ohio-53 at ¶ 48. That's true enough, but *Asp* concerned a defendant who was originally found incompetent, represented himself at trial, did not testify or present any evidence at trial, and only spoke at all in his closing arguments. *Asp* at ¶ 10, 13, 25, 59. The Fifth District's review of the record to determine whether any evidence existed that would tend to support self-defense and require a jury instruction when the only "evidence" the defendant presented was during closing argument is not relevant to this case.

To also discount the trial prosecutor's closing arguments in this case, the First District and Rodriguez also relied on *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). However, the main thrust of *Harp* concerned Kentucky's distinct requirement for differentiation in jury instructions:

> In a case involving multiple counts of the same offense, a trial court is obliged to include some sort of identifying characteristic in each instruction that will require the jury to determine whether it is satisfied from the evidence the existence of facts proving that each of the separately charged offenses occurred.

Id. at 818., *see also Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002), *Bell v. Commonwealth*, 245 S.W.3d 738, 744 (Ky. 2008). It was within the context of this stringent and a previously established Kentucky rule that the *Harp* court found the prosecutor's attempt to "flesh out" the generic instructions in their closing argument by linking acts to counts as insufficient to cure erroneous jury instructions. *Id.* at 819.

This Court should afford the *Harp* decision zero weight. Kentucky law does not apply in this case or any case in Ohio. And the First District's decision below is the first in Ohio to ever consider the rule from *Harp*, *Bell*, and *Miller*, let alone follow it. None of those cases had ever been referenced in any Ohio decision at any level up until this point.

The reality is that *Harp* and *Valentine* are in conflict with each other. The rule from *Harp* specifically and explicitly requires a trial court to adjust jury instructions, whereas *Valentine* only requires "minimal differentiation *at some point in the proceeding*." (Emphasis added.) *Valentine,* 395 F.3d at 638. And the First District's misplaced and literally unprecedented reliance on *Harp* to additionally discount the prosecutor's closing remarks in this case is distinguished by cases that have considered a prosecutor's closing arguments looking for "minimal differentiation" in the context of *Valentine*. *State v. Bell*, 2008-Ohio-2578, ¶ 111 (2d Dist.) ("The record indicates that the State differentiated between the two sexual battery counts in its closing argument."); *see also Perry*, 2025-Ohio-1486 at ¶ 33; *Jones*, 778 Fed.Appx. at 636. The First District also declined to follow one of its own cases that rejected a unanimous jury verdict challenge in part because the prosecutor wrote the allegations against the defendant on a "large white poster paper at trial for the jury." *State v. White*, 2021-Ohio-1644, ¶ 99 (1st Dist.).

To reiterate, Ohio law presumes that "carbon-copy" indictments are valid. The State met its burden in this case of presenting sufficient, specific, and discernible evidence of each count for which Rodriguez was convicted. Even if this Court holds that "minimal differentiation" is required elsewhere in the proceedings outside the evidence presented at trial, the State met its burden to provide that as well. For the foregoing reasons, this Court should adopt the State's first proposition of law, reverse the First District and reinstate Rodriguez's convictions and sentence for endangering children.

Proposition of Law II: A reviewing court may not find plain error in the absence of binding authority that clearly demonstrates an obvious defect in the proceedings below.

***

Because the trial court was not bound by *Valentine* to begin with, let alone a Kentucky requirement for jury instructions and verdict forms, it simply could not have committed plain error. This Court should formally adopt the prevailing standard already applied in both federal and Ohio courts that plain error may not be found in the absence of controlling authority. Finally, if there was any error in this case, the record contains no evidence that Rodriguez was prejudiced in any way by supposed deficiencies in the indictment, bill of particulars, jury instructions, or verdict forms.

A. A finding of plain error should require the application of controlling authority.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). The application of this rule is subject to four limitations: 1) there must be an error, i.e., a deviation from a legal rule; 2) the error must be a plain and obvious defect in the proceedings; 3) the error must have affected the substantial rights of the defendant; and 4) plain error should only be corrected "to prevent a manifest miscarriage of justice" or where the plain error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), citing *United States v. Olano*, 507 U.S. 725, 736 (1993). In order for a defendant's substantial rights to have been affected, they must demonstrate there is a reasonable probability that but for the error, the outcome of the trial would have been different. *Greer v. United States*, 593 U.S. 503, 508 (2021). "Meeting all

four prongs [of plain error] is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135 (2009), citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

By failing to object to jury instructions at trial, Rodriguez waived all but plain error. Crim.R. 30(A). Below, all parties agreed that this was indeed a case that merited plain error review and *not* structural error analysis. *Rodriguez,* 2025-Ohio-53 at ¶ 27, 65 (1st Dist.). The First District further acknowledged courts usually decline to find errors plain and obvious "in the absence of a bright-line rule that would establish the obviousness of the defect in the proceedings." *Id.* at ¶ 55, citing *State v. Walker*, 2017-Ohio-9255, ¶ 30 (1st Dist.). The First District even cited this Court's plain error analysis in *Barnes,* a case that also dealt with jury instructions, which found that, "The lack of a definitive pronouncement from this court and the disagreement among the lower courts preclude us from finding plain error." *State v. Barnes*, 94 Ohio St.3d 21, 28 (2002). The First District also noted federal courts typically address the "plain and obvious" requirement of plain error the same way. *Id.*, citing *United States v. Turner*, 2024 U.S. App. LEXIS 30968 (6th Cir. Dec. 6, 2024). *See also United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) ("A lack of binding case law that answers the question presented will also preclude our finding of plain error.").

Despite this overwhelming jurisprudence limiting the application of plain error and acknowledging there wasn't any controlling authority related to "carbon-copy" indictments, the First District nonetheless found the error plain and obvious. *Rodriguez,* 2025-Ohio-53 at ¶ 60 (1st Dist.). Once again, the First District cited a Kentucky case, and this time an unpublished appellate opinion, "However, some courts have elected to find plain error in the absence of binding case law." *Id.* ¶ 56, citing *Davidson v. Kentucky*, 2006 Ky. App. Unpub. LEXIS 1224, *1-2 (Feb. 3, 2006). To find plain error in the absence of "clear, binding precedent," the court in *Davidson*

followed *United States v. Lachowski*, 405 F.3d 696, 698 (8th Cir. 2005), which followed *United States v. Ruiz-Gea*, 340 F.3d 1181, 1187 (10th Cir. 2003), which followed *United States v. Brown*, 316 F.3d 1151 (10th Cir. 2003), which followed *United States v. Evans*, 155 F.3d 245, 252 (3d Cir. 1998). All the way at the beginning in *Evans*, the court found plain error in the absence of precedent when there was a "clearly erroneous application of statutory law." *Id*.

None of the federal cases on which the courts in *Davidson* or *Rodriguez* relied stand for the proposition that a court can apply plain error in the absence of *any* binding law. Every one of them considered the application of binding statutory authority. Specifically, each case was asked to consider whether the trial court followed binding federal sentencing law. This limited federal exception to plain error's normal requirement of controlling precedent is in line with Ohio's own review of whether trial courts comply with explicit statutory obligations for trial and sentencing procedures. *See State v. Jones*, 2014-Ohio-3740, ¶ 16 (10th Dist.); *see also State v. Steele*, 2013-Ohio-2470, ¶ 30 ("Because there was no explicit case law or *statutory guidance* in Ohio on the standard of proving a police officer's loss of privilege to arrest, it would be difficult to conclude that the trial court's failure to invent such an instruction constitutes an obvious error.") (Emphasis added.) In the present case, Rodriguez has not pointed to any statutory guidance with which the State allegedly failed to comply, let alone explicit guidance. And she has only generally alleged the trial court failed to fully and completely provide necessary instructions to the jury. *See State v. Comen*, 50 Ohio St.3d 206 (1990).

It is undisputed that the jury asked the trial court two questions regarding individual counts. But for plain error review, it is the existence or lack thereof of controlling authority, not the existence of a question or even presumed jury confusion, which is dispositive. If there was an issue at trial, unless an appellant can actually point to a specific controlling rule, case, or law *that existed*

at the time of trial the court should have applied but did not, an appellate court should be precluded from assigning error to that issue. Put another way, was it plain and obvious to the trial court that it should have applied the functionally overruled authority that is *Valentine* and conflicting Kentucky caselaw to explicitly go through each count in either the jury instructions or verdict forms? The answer is of course not. *Rodriguez* is the first and only Ohio case to ever apply *Valentine* and/or *Harp* to affirmatively require a trial court to amend jury instructions or verdict forms.

In the context of plain error analysis, it is not reasonable for a reviewing court to create new authority and apply it ex post facto to the trial court. "[A]n appellate court may not simply substitute its judgment for that of a trial court under the guise of plain error, which affords limited power." *State v. Pugh*, 2022-Ohio-3038, ¶ 21 (8th Dist.). Forty-seven years ago, this Court cautioned that overapplication of plain error "would undermine and impair the administration of justice and detract from the advantages derived from orderly rules of procedure." *State v. Long*, 53 Ohio St.2d 91, 96 (1978), citing *Gendron v. United States*, 295 F. 2d 897, 902 (8th Cir. 1961). That is exactly what happened in this case. The prosecution, criminal defendants, and any party that appears before a trial court must be afforded the ability to litigate their positions with the general expectation that the law that exists at the time of trial will be the same law that a reviewing court will apply in the event of an appeal. This Court should adopt the State's second proposition of law and clarify that controlling, explicit authority is a necessary predicate for a finding of plain error.

B. Even if there was error in this case, the record contains no evidence that Rodriguez was prejudiced in any way by supposed deficiencies in the indictment, bill of particulars, jury instructions, or verdict forms

The First District's opinion conflates the prejudice Rodriguez claims she suffered with the "outcome of the proceedings." They are not the same thing. Rodriguez did not meet her burden to show a reasonable probability that but for the error, the outcome of the trial would have been different. *Greer*, 593 U.S. at 508. Assuming for the sake of argument the trial court did issue curative instructions that lined the counts up, Rodriguez has not explained how the jury would have come to a different conclusion or how her sentence would have been different. The reasonable probability is that the jury would have found her guilty of the exact same counts again: 2, 4, 6, and 10. There is nothing in the record to suggest otherwise. Rodriguez was acquitted of seven of the 11 counts against her, and does not assert the jury would have acquitted her of the remaining four counts had they been instructed as she would have liked. Rather, she asserts, and the First District agreed, that "she does not know which acts were included in the guilty verdicts and which acts she was acquitted of." *Rodriguez,* 2025-Ohio-53 at ¶ 73 (1st Dist.).

The First District's rote acceptance of this assertion of prejudice failed to apply the requisite analysis for determining whether deficiencies in multiple-count indictments or bill of particulars prejudiced a defendant's ability to prepare a defense. According to *Russell*, relied on in *Valentine* and previously cited by this Court, an indictment must "contain the elements of the offense" and "sufficiently apprise the defendant of what he must be prepared to meet." *Russell*, 369 U.S. at 763. Rodriguez's claim that she was prejudiced is simply supported by the record. At every stage of the trial, she was absolutely able to differentiate between the charges against her. And further, her theory of the case precludes her from claiming prejudice due to any lack of

specificity in the counts. It was only when the matter made its way to the appeal that she changed her tune.

The Court in *Valentine* also considered a similar case where a defendant was charged with similarly generic counts of molestation. *Parks v. Hargett*, 1999 U.S. App. LEXIS 5133, at *3 (10th Cir. Mar. 23, 1999). In *Parks*, the State provided the defendant with the identity of the victim and the locations where each count of molestation was alleged to have occurred, which the court found constituted "actual notice of sufficiently specific facts to respond to the charges and prepare an adequate defense." *Id*. Other federal courts and one Ohio court have also favorably cited that "actual notice" may cure a potentially defective indictment. *See State v. Eal*, 2012-Ohio-1373, ¶ 80 (10th Dist.); *Parks v. Bobby*, 2011 U.S. Dist. LEXIS 15686, at *13 (N.D.Ohio Feb. 16, 2011); *Hulstine v. Morris*, 819 F.2d 861, 864 (8th Cir. 1987); *United States v. Pfeifer*, 371 F.3d 430, 438 (8th Cir. 2004).

Other courts in Ohio have distinguished *Valentine* by declining to find prejudice due to a lack of specificity in the counts where the defendant's theory was that they did not commit the acts at all. *See State v. Yaacov*, 2006-Ohio-5321, ¶ 24 (8th Dist.) (finding the failure to alleged specific dates did not prejudice the defendant where the defendant denied criminal culpability regardless of the date); *State v. Crosky*, 2008-Ohio-145, ¶ 98 (10th Dist.) ("Because appellant denied any acts of sexual abuse, appellant cannot show that he was prejudiced by his failure to receive a bill of particulars that identified the specific type of sexual behavior that constituted each charge.").

In the present case, the State amended counts 1 and 4 to third-degree felonies based on Rodriguez causing physical harm, rather than serious physical harm. (T.p. 2922-2935). They were the only third-degree felonies that Rodriguez was facing. The trial prosecutor indicated multiple times that Count 1 related to C.D. being tied to a bench. (T.p. 2750-2752, 2942-2947). In her

closing argument, Rodriguez's trial counsel *agreed with the State* about the subject matter of Count 1, "The first is the child restraints in public…They tried it once. She didn't deny that. That's not against the law. So that's Count 1." (T.p. 3012-3013). The jury also agreed and acquitted Rodriguez of this count. (T.d. 239). Surely Rodriguez does not argue that the jury got it wrong for this specific count. If the jury was capable of looking at this specific count in the way her attorney asked them to, why weren't they able to do so for the other ten counts?

Post-conviction, Rodriguez filed a detailed Crim.R. 29(C) motion for acquittal related to the specific factual allegations from Counts 2, 4, 6, and 10. (T.d 252). Rodriguez *did not* argue in her motion for acquittal that neither she nor the jury could differentiate the charges against her. Nor did she argue that she did not commit the acts the State alleged for Counts 2, 4, 6, and 10. Instead, she went through each count to simply claim that her conduct could not have constituted endangering children, "A parent sending their child to the corner is not torture or abuse…A parent having their child stand with their finger tips on the wall is not torture or cruel abuse nor does it cause serious physical harm…A parent sending a child to his bedroom is not torture or cruel abuse nor does it cause serious physical harm…And finally, no access to food as a punishment does not cause serious physical harm." *Id*. When the trial court convened for a hearing on Rodriguez's motion for acquittal, Rodriguez's counsel did not emphasize an inability to determine which conduct was the subject of the jury's guilty findings. Rather, Rodriguez's counsel argued for a reduction from second-degree felony endangering children to third-degree felony endangering children for Counts, 2, 6, and 10, "But I think our main points that I just wanted to draw the Court's attention to was the sufficiency of the evidence in light of that rule, but mainly the serious physical harm based on the four counts the jury returned." (T.p. 3175). Finally, at sentencing, Rodriguez's attorney went through the charges individually:

> "Count Two, forced to stand in corner. Count Four is an F3, standing with fingertips on the wall. Count Six, being sent to bedroom. And Count Ten, inadequate access to food. I want the Court to remember these four acts in considering my next argument."

(T.p. 3196). In arguing for Rodriguez to receive probation instead of a prison sentence, Rodriguez's trial attorney continued:

> "So in addition to Amy on paper being probably the best candidate for probation I have ever represented or will represent, the four acts I read are in absolutely no way more serious than other felonies of the second degree, and that must be taken into consideration."

(T.p. 3197).

Rodriguez and her attorneys clearly had no trouble at trial differentiating between which charges she faced. Their ease at doing so at a minimum demonstrates they had actual notice of sufficiently specific facts to enable the preparation of her defense. The jury agreed with her attorney's theory regarding Count 1. And her stated basis for acquittal for Counts 2, 4, 6, and 10 was not that evidence showed she did *not* commit the acts that constituted those counts, and not that she did *not* know which acts were the basis for those counts. She simply disagreed those acts constituted endangering children. It is difficult to see then how she might have been prejudiced by any lack of specificity in these counts. Only on appeal did Rodriguez claim that she was unable to determine what conduct constituted the bases for her convictions under Counts 2, 4, 6, and 10. And that belated claim is directly contradicted by the arguments she and her attorneys made at trial.

VI. CONCLUSION

Valentine and *Harp* have no place in Ohio law. No case from this Court or the United States Supreme Court has ever held that the use of "carbon-copy" indictments is unconstitutional. This Court should clarify then that to sustain convictions for "carbon-copy" indictments, the State must only present evidence of discernible facts to substantiate the separate counts

And because *Valentine* and *Harp* have no place in Ohio law, the trial court simply could not have committed plain error when it failed to apply them. The First District was wrong to rely on additional Kentucky caselaw to apply plain error in the absence of authority, especially when the genesis of that caselaw concerned the application of binding statutory authority. This Court should hold that a reviewing court may not find plain error in the absence of binding authority that clearly demonstrates an obvious defect in the proceedings below.

For the foregoing reasons, this Court should adopt the State's propositions of law, reverse the First District, and reinstate Rodriguez's convictions and sentence for endangering children.

Respectfully Submitted,

CONNIE PILLICH (0069968P)
Hamilton County Prosecuting Attorney

/s/ Jon Vogt
JON VOGT (0090781P) (Counsel of Record)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202
Phone # 513-946-3228
jon.vogt@hcpros.org

VII. CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing document was served upon counsel for Defendant-Appellee, Assistant Public Defender Craig Jacquith, by electronic mail on this 7th day of July, 2025.

/s/ Jon Vogt
JON VOGT (0090781P)

APPENDIX

ENTERED
JAN 10 2025

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-240075 TRIAL NO. B-2200636-A
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY*
AMY RODRIGUEZ,	:	
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and appellant is discharged for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App.R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

To the clerk:
Enter upon the journal of the court on 1/10/2025 per order of the court.

By: Jennifer A. Hensley
Administrative Judge

D143668217

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-240075 TRIAL NO. B-2200636-A
Plaintiff-Appellee,	:	
vs.	:	*OPINION*
AMY RODRIGUEZ,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Appellant Discharged

Date of Judgment Entry on Appeal: January 10, 2025

Connie Pillich, Hamilton County Prosecuting Attorney, and *Keith Sauter*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Arenstein & Gallagher and *Elizabeth Conkin*, for Defendant-Appellant.

CROUSE, Judge.

{¶1} Where a defendant is charged with 11 nearly identical counts of endangering children, and where each count corresponds to a specific act of torture or abuse that the defendant is alleged to have committed against the victim, must the trial court provide the jury with instructions and/or verdict forms for each count that specify the conduct that was the basis of the count?

{¶2} Defendant-appellant Amy Rodriguez argues that we must answer this question in the affirmative and that the trial court erred in failing to do so. On the record before us, we agree. We hold that where Rodriguez was convicted of some, but not all, of the charged offenses, and where the jury was indisputably confused as to which act of torture or abuse committed by Rodriguez corresponded with each count of endangering children, the trial court committed plain error when it failed to provide the jury with instructions and/or verdict forms that specified the conduct that was the basis of each count.

{¶3} Because the jury instructions and/or verdict forms failed to distinguish the conduct that applied to each count, it is impossible to determine which offenses the jury found Rodriguez to have committed and which charged offenses resulted in acquittals. And because if we order a new trial, Rodriguez might be retried for acts of which the jury found her not guilty, we must hold that the trial court's error precludes retrial for the underlying offenses. For the reasons set forth in this opinion, the trial court's judgment is reversed and Rodriguez is discharged from further prosecution for the conduct at issue in this case.

I. Factual and Procedural History

{¶4} On February 25, 2022, Rodriguez was indicted for 11 counts of endangering children in violation of R.C. 2919.22(B)(2). Each count was a felony of

the second degree, and the alleged victim of each count was Rodriguez's stepson C.D. Except for Count 5, each count provided that:

> The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **AMY M RODRIGUEZ, on an undetermined date between January in the year Two Thousand Eighteen and April in the Year Two Thousand Twenty-One** at the County of Hamilton and State of Ohio aforesaid, **recklessly tortured or cruelly abused C.D., a child under eighteen years of age, or a mentally or physically handicapped child under twenty-one years of age, and the violation resulted in serious physical harm to C.D.**, in violation of Section 2919.22(B)(2) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

(Emphasis sic.) Count 5 was nearly identical to the other ten counts, but for the date upon which the offense was alleged to have been committed. Count 5 alleged that the offense was committed "from on or about the 1st day of January, Two Thousand Twenty-One to on or about the 2nd day of January, Two Thousand Twenty-One."

{¶5} The indictment additionally charged C.D.'s father, A.D., with one count of endangering children in violation of R.C. 2919.22(A). A separate indictment was issued against Rodriguez's parents, Armin and Susan Rodriguez,[1] in the case numbered B-2202282. That indictment charged both Armin and Susan with one count of endangering children in violation of R.C. 2919.22(B)(2), and additionally charged Armin with complicity in the commission of the offense of endangering children.

[1] We refer to Armin and Susan by their first names because they have the same surname as Rodriguez.

{¶6} The bill of particulars, filed on March 11, 2022, set forth additional allegations regarding the charged offenses. As relevant to Rodriguez, it provided that:

> Specifically, C.D. was forced to sit on a bench for multiple hours and days at a time. At times he was tethered to the bench with locked restraints making it impossible for him to leave.
>
> C.D. was forced to stand in a corner facing the wall for up to 14 hours per day for multiple days in a row.
>
> C.D.'s punishments were moved to his bedroom where he was forced to stand in an imaginary box for the entire day while classical music blared from an alarm clock in the room. At the time he was only allowed to wear his little brother's shorts. This took place continuously for multiple weeks.
>
> C.D. was also forced to lean against a wall for extended periods of time holding himself up with only his fingertips causing serious discomfort and pain.
>
> Between 1/1/21 and 1/2/21 C.D. was strapped to his bed with locked restraints on his wrists and ankles throughout the night.
>
> Eventually C.D. was confined to his room without physical human contact over a course of many days. An alarm was on the door and he was monitored by 3 cameras for the purpose of preventing C.D.'s escape.
>
> C.D. was not provided appropriate warm clothing or bedding. Often he was permitted only to wear a pair of his young brother's shorts and was provided only 1 baby size blanket.
>
> C.D. was beaten by [Rodriguez] with a belt on many occasions.

> On one occasion he was hit so severely [Rodriguez] caused his legs to bleed.
>
> C.D. was also beaten by [Rodriguez] using a spoon on many occasions. On one occasion he was struck more than 70 times.
>
> Food was restricted from C.D. as a form of punishment. He was denied access to food by it being locked away in the kitchen. He suffered unhealthy weight loss as a result.
>
> C.D. was restricted from using the restroom for extensive periods of time. C.D. was forced to wear a diaper. He could not ask to use the restroom. If C.D. had an accident and urinated on himself [Rodriguez] forced C.D. to take a cold shower.

{¶7} While the bill of particulars set forth 11 specific acts of torture or abuse committed by Rodriguez, it did not link any of those allegations to a specific count in the indictment.

{¶8} On January 17, 2023, Rodriguez filed a request for a more specific bill of particulars. The request stated that the bill of particulars "fails to identified [sic] which indicted count corresponds to the instances of Defendant's alleged conduct otherwise detailed in the State's bill of particulars." The State did not file a response to this motion.

{¶9} A.D. filed a motion to have his charge tried separately from Rodriguez. The State, in turn, filed a motion to consolidate the charges against Rodriguez with the related charges filed against Armin and Susan in the case numbered B-2202282. The trial court granted both motions.

{¶10} A jury trial was held on the charges against Rodriguez, Armin, and Susan. Over the course of the approximately two-and-a-half-week trial, the State

presented testimony from C.D. regarding the various acts of torture and abuse that he had experienced at the hands of Rodriguez. C.D.'s testimony addressed each of the allegations set forth in the bill of particulars. He utilized a "trauma timeline" that he had prepared to explain the progression of abuse. This timeline was admitted into evidence.

{¶11} The State presented additional testimony from persons that had witnessed particular acts of torture, abuse, and/or punishment committed by Rodriguez against C.D., including C.D.'s younger brother P.D., Rodriguez's daughter and niece, and A.D. Testimony was presented from several detectives concerning the investigation of the charges that were ultimately filed against Rodriguez. The State also called various social workers, therapists, physicians, and a former teacher of C.D. to the stand. These witnesses discussed the family dynamic and the mental and physical condition of C.D. during the period that the child endangering was alleged to have occurred.

{¶12} At the close of the State's presentation of evidence, it moved to amend the charges in Counts 1 and 4 from felonies of the second degree to felonies of the third degree. The State argued that this amendment would conform the charges to the evidence presented, which the State believed established physical harm, rather than serious physical harm. The trial court allowed the amendment over Rodriguez's objection.

{¶13} Rodriguez presented testimony from multiple witnesses regarding her treatment of C.D. Collectively, these witnesses testified about C.D.'s problematic behavior and that they never saw Rodriguez utilize excessive or extreme punishments on C.D.

{¶14} In closing argument, the State linked each count in the indictment to a

specific act of torture or abuse committed by Rodriguez, and it utilized the trauma timeline that C.D. had prepared while doing so. The prosecutor stated:

> Now, when I tell you that there's 11 different counts, we need to sort that out a little bit so we know specifically actions or activities or behaviors that Amy engaged in that were corresponding with each count, and I will explain that to you.
>
> . . .
>
> So what specific things am I talking about that relate to each allegation. Well, you probably recognize this. This is [C.D.'s] trauma timeline. And I wish that these counts went chronologically; however, as you've heard, trauma sometimes makes kids get a little bit confused as to the dates in the chronology of things.
>
> . . .
>
> We've got Count 1, Count 1 relates to this behavior right here where he was forced to sit on the bench. And Count 1 stretches over to the next timeline where he was tied to the bench. So that's that behavior there.
>
> Count 2, he was then forced to stand in the corner. He was forced to stand in the corner all day 14 plus hours a day.
>
> He was not allowed to use the bathroom, he had to eat his meals there, he had a camera on him in case he would have closed his eyes or fallen asleep so that he could be woken up.
>
> We have Count 3. This is after [C.D.] was put in the Children's Hospital after he ran away.
>
> He came back—he came back—I'm sorry—to [Rodriguez's]

house, and he was immediately put right back up into his bedroom, but there were a few little differences he remembered about being putting [sic] back in his bedroom at this time and the time that he was put up there before.

He remembers only two cameras were on him at this time. And he also remembers that he was now put in his brother's little shorts, rather than having to wear a diaper.

And he also remembers classical music was blasting, and he attributes that to the fact that he ran away at one point in time because he could follow the foot patterns of the people in the house to know when they might be occupied and he could get out there, and he remembered that now the music was put on him so that he couldn't follow the foot patterns of everybody anymore.

Then we move to Count 4, and I think he indicated to you that a form of punishment that he had to engage in a lot of different times was standing against the wall using his fingertips.

He said it happened at [sic] lot of times, but the one time he really remembered was when he ran away and he came back home.

Now, we go to Count 5, and this is him being restrained to the bed using the child restraints. He indicates that he was tied with both hands above him and both hands below him—or both feet below him in an X.

Let me go to Count 6, and this is before he ran away when he was in his bedroom. He was up there all day long, no human contact, three cameras on him, a door alarm, he had to stand in an invisible square,

keep on moving, his meals were served to him up there, and he was isolated in that fashion for days on end.

Count 7 goes across the entire course of this—this timeline. Food was—oh, I'm sorry—7 is the inadequate clothing, I believe.

Let me just double check this to make sure I have it right.

Yes, 7 is the abuse he suffered by not being provided adequate clothing. And he testified throughout that he was either standing in nothing but a diaper, his brother's shorts, he was not given pajamas to wear. He only had a little baby blanket to use. He didn't have any sort of bedding or pillow or anything like that to help clothe him or give him warmth.

Count 8 is being hit with a spoon and a belt. That's Count 8 and 9. He was hit with a spoon and a belt many times, but he specifically testified about an occasion in which [Rodriguez] started out with a wooden spoon, hit him so much with it that the spoon broke, and she continued to go forward with a belt. The belt buckle struck him, and it caused him to bleed. And so he talked about that time.

And then he also talked about just being hit with a spoon over and over and over again, and that's the time when [stepsister and stepbrother] counted 75 strikes to his person. And so those are two different episodes that we're talking about there.

Count 10 was carried out throughout this entire time. And that was the inadequate food. And you've heard over and over and over again that during the course of this time food was used as a punishment, he was restricted from what food he could eat, and as a result he suffered

malnourishment because of it.

Count 11 are these two here. You heard much testimony about his use of the bathroom being restricted. He wasn't allowed to use the bathroom when he wanted to. If he asked, he could get into trouble. He had to wait until he was given permission.

And so he was then told to wear diapers, and if he had an accident he would be thrown in a cold shower as punishment for having the accident.

So those are the counts as it relates to [Rodriguez]. Those different activities or those different punishments each relate to a different count.

{¶15} Although the prosecutor's comments during closing argument linked a specific act of torture or abuse committed by Rodriguez to each count, the jury instructions did not similarly do so. Nor did the verdict forms. Rather, the jury instructions for each count of the indictment generally set forth the statutory elements of the offense of endangering children, absent any factual allegations specific to an individual count. And the verdict forms for each count simply stated that the jury either found Rodriguez guilty or not guilty of that particular count of endangering children.

{¶16} Included in the jury instructions was an instruction on "Multiple Counts," which stated, "The charge[s] set forth in each Count of the indictment constitute a separate and distinct matter. You must consider each Count and the evidence applicable to each Count separately and you must state your finding as to each Count uninfluenced by your verdict as to the other Counts. The defendants may be found guilty or not guilty of any one or all of the offenses charged."

{¶17} The trial court did not allow the jury to take notes during the trial. Further, the trauma timeline that the prosecutor referred to during her closing argument and that had been admitted into evidence did not set forth the abuse conduct in the same order as the prosecutor explained in her closing argument.

{¶18} On the first day of deliberations, the jury sent a question to the court asking, "For Amy's 11 counts, which punishment corresponds to each count?" The trial court responded, "You must refer to the jury instructions and the testimony and the evidence that was presented to you."

{¶19} On the second day of deliberations, the jury sent another question to the court asking, "Which count aligns with each separate and distinct matter? We are referencing Page 6 under 'multiple counts' in the jury instructions." The trial court answered, "My answer is the same as it was on Friday; refer to the jury instructions, use your collective memories to apply [] the testimony and evidence that was presented to the instructions."

{¶20} Later that day, the jury returned verdicts of guilty on Counts 2, 4, 6, and 10. It found Rodriguez not guilty of the remaining charges. The trial court sentenced Rodriguez to an indefinite sentence of three years to four years and six months of imprisonment.

{¶21} Rodriguez now appeals.

II. Jury Instructions and Verdict Forms

{¶22} In her first assignment of error, Rodriguez argues that the trial court committed plain error when it failed to provide the jury with final instructions and/or verdict forms that specified which conduct was the basis of each count of the indictment, thereby violating her constitutional rights to due-process and double-jeopardy protections.

{¶23} While the instructions provided to the jury for each count of endangering children set forth the elements of the offense that the jury was required to find, they did not specify the conduct that served as the basis for each count. For example, the instruction provided to the jury concerning Count 1 stated:

> The Defendant, AMY RODRIGUEZ, is charged with Endangering Children. Before you can find the Defendant guilty, you must find beyond a reasonable doubt that on an undetermined date between January 2018 and April 2021, and in Hamilton County, Ohio, the Defendant, AMY RODRIGUEZ, recklessly tortured or cruelly abused a child, C.D., in violation of Section 2919.22(B)(2) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

{¶24} The instructions were nearly identical for the ten remaining counts against Rodriguez, with two exceptions. First, Counts 1 and 4 were third-degree felonies, but the remaining counts were second-degree felonies. The instructions given to the jury concerning these more serious counts provided that the jury must additionally find that Rodriguez's actions "resulted in serious physical harm to C.D." Second, in accordance with the indictment, the instruction given on Count 5 provided that the offense occurred "from on or about [] January 1, 2021 and January 2, 2021," rather than on an undetermined date in the specified range.

{¶25} Similarly, the verdict forms simply listed the count at the top of the page and stated that the jury found Rodriguez either guilty or not guilty of endangering children in violation of R.C. 2919.22(B)(2). They did not contain any identifying information specific to that count.

{¶26} Rodriguez contends that the jury instructions provided by the trial court were misleading because they were insufficient to identify which alleged conduct

related to each count of the indictment. She argues that either the jury instructions or the verdict forms should have contained this identifying information.

{¶27} Rodriguez and the State agree that this court is limited to a plain-error review because she failed to object below to either the jury instructions or the verdict forms. *See State v. Gasper*, 2024-Ohio-4782, ¶ 14 ("A defendant who fails to object to jury instructions waives all but plain error."); *accord State v. Chasteen*, 2024-Ohio-909, ¶ 10-11 (1st Dist.). To establish plain error, a defendant must show that an error occurred, that the error was plain, meaning "obvious," and that it affected the defendant's substantial rights, i.e., that it affected the outcome of the trial. *State v. Sowders*, 2023-Ohio-4498, ¶ 11 (1st Dist.). Even if an obvious error is found to have impacted substantial rights, the error should only be corrected where it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" or when necessary "to prevent a manifest miscarriage of justice." *State v. Bond*, 2022-Ohio-4150, ¶ 35.

{¶28} In furtherance of her plain-error argument, Rodriguez contends that the error in the jury instructions was obvious. She asserts that the jury's two questions submitted during deliberations evinced the jury's inability to determine what conduct served as the basis for each count.

{¶29} As to the third prong of the plain-error analysis, Rodriguez argues that the erroneous jury instructions impacted her substantial rights. She asserts that she is unable to determine which conduct the jury found her guilty of and which conduct she was acquitted of, and that she is consequently unable to challenge the sufficiency or the weight of the evidence supporting her convictions on appeal. Rodriguez suggests that this deprivation of the means to an effective appeal is in violation of her due-process rights. She further argues that, in the event a new trial is granted, there is a

substantial risk that she could be retried for a crime for which she has already been acquitted in violation of her right to be free from double jeopardy.

{¶30} We address each prong of the plain-error analysis in turn.

A. The Jury Instructions and/or Verdict Forms Were Insufficient

{¶31} As previously set forth, Rodriguez argues that the trial court should have provided the jury with final instructions and/or verdict forms that specified which conduct was the basis of each count of the indictment.

{¶32} The law is well settled that "[a] trial court must fully and completely provide the jury with all instructions that are relevant and necessary for it to weigh the evidence and to discharge its duty as the factfinder." *State v. Rainey*, 2023-Ohio-4666, ¶ 29 (1st Dist.). An instruction must be viewed in the context of the overall charge provided and not in isolation. *Id.* "An appellate court's duty is to review the instructions as a whole, and, if taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled." *State v. Jones*, 2015-Ohio-5029, ¶ 12 (12th Dist.).

{¶33} Although there is no authority from either the Ohio Supreme Court or this district regarding what information must be contained in the jury instructions and verdict forms in a situation where a defendant is charged with multiple carbon-copy counts of the same offense, the Second District has addressed the sufficiency of the jury instructions that were provided in a factually similar case in *State v. Shaw*, 2008-Ohio-1317 (2d Dist.). Shaw was indicted on 15 counts of rape of a minor child under the age of 13 and ten counts of sexual battery. His three daughters were the victims of all offenses. *Id.* at ¶ 3. Following a jury trial, Shaw was found guilty of three counts of rape (one count for each daughter) and two counts of sexual battery. He was acquitted

of the remaining charges. *Id.* at ¶ 6.

{¶34} Shaw argued on appeal that he was denied his right to due process because the offenses were not charged with sufficient specificity. *Id.* at ¶ 17-18. While the Second District found that Shaw's indictment was sufficient because it tracked the language of the statutes under which he was charged, it found error in the lack of differentiation at trial as to which facts applied to which charges. *Id.* at ¶ 18. The court explained:

> The only difference in the language of the indictment regarding each of the fifteen counts of Rape and each of the ten counts of Sexual Battery was some variation in dates. In addition to complying with the local rules of discovery providing extensive information, including police reports, the State also filed a bill of particulars wherein the State identified which counts applied to which child and which general acts were encompassed within each group of charges. For example, "The victim in Counts 1, 2, 3, 4, and 5 is JX. The sexual conduct includes, but is not limited to, oral sex and vaginal intercourse." However, there was no way for Shaw to know which particular facts applied to which charge. *This deficiency was never rectified during the trial, by jury instructions, or on the verdict forms.*
>
> The confusion regarding matching events with charges is illustrated by the jury's request early during their deliberations for "clarification on difference between each of the counts." The court merely responded by telling the jury that it already had all of the evidence and law that it needed. In other cases confusion has been avoided by the trial court's use of jury instructions and verdict forms

wherein the court identifies charges by using brief labels indicating location or some other identifying fact. *See, e.g., State v. Russell*, 2007-Ohio-2108 [8th Dist.]; *Valentine v. Konteh*, 395 F.3d 626, 634, 637-638 [6th Cir. 2005].

In this case the court did not differentiate the charges, instead instructing the jury as follows: "You must consider each count and the evidence applicable to each count separately, and you must state your finding as to each count uninfluenced by your verdict as to any other count." When the indictment covered extensive spans of up to five years, and each girl testified to multiple incidents of abuse, the jury needed guidance as to which facts the State was alleging to apply to which charges.

While the indictment itself was sufficient, there was never any differentiation of which specific events applied to each charge either before or during trial. Such clarification is necessary for the jury and for the defendant to be able to ensure that he is not indicted on the same incidents at some point in the future. "The Constitution does demand that if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding." *Valentine* at 638. Moreover, in a case like this one, where Shaw was acquitted of most of the charges against him, clarification is necessary in order to know what evidence may be presented at a retrial. *See, e.g., id.* at 634-636.

(Emphasis added.) (Cleaned up.) *Id.* at ¶ 21-24. Because neither the trial testimony, jury instructions, or verdict forms differentiated between which acts committed by

Shaw corresponded to which charge, the court held that "there is no way to know upon which of the charges Shaw was convicted and upon which of the charges he was acquitted." *Id.* at ¶ 25. The court accordingly reversed Shaw's convictions and held that "the Double Jeopardy clause of the Fifth Amendment to the United States Constitution precludes retrial for any offenses against the same three victims that occurred during the extensive time span covered by the indictment." *Id.*

{¶35} The importance of distinguishing between multiple "carbon-copy" counts of the same offense was recognized by the Sixth Circuit in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), in which the court considered a petition for a writ of habeas corpus in a case that originated in Cuyahoga County, Ohio. Valentine was charged with 20 identical counts of rape and 20 identical counts of felonious sexual penetration. *Id.* at 628. The factual bases supporting each of these counts was not distinguished in the indictment, in the bill of particulars, or during trial. *Id.* Valentine was convicted of all 40 offenses, and 15 of those convictions were affirmed on direct appeal. *Id.* at 629. Valentine then filed a petition for a writ of habeas corpus in the federal district court. That court issued the writ based on a finding that Valentine's due-process rights were violated by the identical counts in the indictment. *Id.* at 630.

{¶36} On appeal to the Sixth Circuit, the district court's judgment was affirmed with respect to all but two of Valentine's convictions. The Sixth Circuit held that Valentine's due-process rights were violated where "[t]he indictment, the bill of particulars, and even the evidence at trial failed to apprise the defendant of what occurrences formed the bases of the criminal charges he faced." *Id.* at 634. It explained, "The Constitution does, however, demand that if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding." *Id.* at 638. The

court plainly stated that "[c]ourts cannot uphold multiple convictions when they are unable to discern the evidence that supports each individual conviction." *Id.* at 636-637.

{¶37} Collectively, *Shaw* and *Valentine* stand for the proposition that where an offender is charged with multiple, identical counts of the same offense, the trial court must provide some basis for a jury to differentiate the offenses.

{¶38} For additional support of her argument, Rodriguez directs us to *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008). The defendant in *Harp* was charged via indictment with multiple offenses, including seven counts of sexual abuse. The victim of all offenses was the daughter of Harp's girlfriend. *Id.* at 816-817. Harp was convicted of all seven sexual-abuse offenses. *Id.* at 817. On appeal, he challenged the jury instructions that had been provided for those offenses, arguing that "it was error for the trial court not to add language to each of the seven sexual abuse instructions so that the jury would be required to distinguish from the evidence one count from another." *Id.*

{¶39} The jury in *Harp* had been provided with identical instructions for each count of sexual abuse. The challenged instructions stated that the jury should find Harp guilty if it believed, beyond a reasonable doubt, that he had engaged in sexual contact with a victim under 12 years of age on a specified date range. *Id.* The court held that the seven identical sexual-abuse instructions provided during Harp's trial were erroneous, *id.* at 818, and that they did not comply with Kentucky law requiring, in a case involving multiple offenses, the instructions "factually [to] differentiate between the separate offenses." (Bracketed text in original.) *Id.* at 817, quoting *Combs v. Commonwealth*, 198 S.W.3d 574, 580 (Ky. 2006). The court stated that, "in a case involving multiple counts of the same offense, a trial court is obliged to include some

sort of identifying characteristic in each instruction that will require the jury to determine whether it is satisfied from the evidence the existence of facts proving that each of the separately charged offenses occurred." *Id.* at 818.

{¶40} The *Harp* court further held that any error resulting from the instructions could not be deemed harmless. *Id.* at 818. It held that the prosecutor's attempt to "flesh out" the generic instructions in closing argument by linking each specific act of sexual abuse to a specific count did not "rehabilitate erroneous jury instructions." *Id.* at 819-820. The court ultimately vacated Harp's convictions for sexual abuse and remanded those offenses to the trial court for further proceedings. *Id.* at 825.

{¶41} The State argues that the jury instructions and verdict forms in this case were not erroneous, and that Rodriguez's argument should be overruled on the authority of *State v. White*, 2021-Ohio-1644 (1st Dist.). In *White*, the defendant was charged with multiple offenses, including 17 counts of endangering children. *Id.* at ¶ 1. At trial, the State separately discussed each offense and the evidence that it believed supported that offense. *Id.* at ¶ 40. While deliberating, the jury asked for written documentation as to which acts committed by White were connected to each charge of endangering children. In response, the trial court instructed the jury that it should rely on its collective memory. *Id.* White was ultimately convicted of all charges. *Id.* at ¶ 41.

{¶42} White argued on appeal that he was deprived of his right to due process and a unanimous jury verdict on the charges of endangering children. In support of his argument, White relied on what he described as a "hodgepodge" of allegations presented by the State at trial, the 17 identically charged counts of child endangering in the indictment, and the jury's request for an explanation of what acts supported each count of child endangering. *Id.* at ¶ 97.

{¶43} This court rejected White's argument, stating:

> White argues this is a "multiples acts" case under *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 37. *Gardner* involved juror unanimity and made a distinction between alternate-means cases and multiple-acts cases. In alternative-means cases, an offense may be committed in more than one way and jury unanimity is required for the crime itself, but not the means by which it was committed. *Id.* at ¶ 49. In multiple-acts cases, several different acts can constitute the charged crime and jury unanimity is required as to which act or incident supports each crime. *Id.* at ¶ 50. To ensure unanimity, the state must specify the particular criminal act upon which it relies for conviction. *Id.*
>
> We find no merit to White's theory that the jury's findings of guilt on each count were not unanimous. The state connected specific acts with each count in the bill of particulars and wrote them on large white poster paper at trial for the jury. After the jurors requested written documentation of which act supported which count, the trial court told the jurors to rely on their collective memories. There is nothing in the record to indicate that the jury did not do that or did not reach a unanimous verdict on each count.

Id. at ¶ 98-99.

{¶44} Both *White* and the case at bar involve a defendant who was charged with multiple, identical counts of endangering children and a jury that requested guidance as to which of the defendant's acts corresponded to each count in the indictment. But that is where the similarity between the two cases ends. White was

charged with 17 counts of endangering children and was convicted of each count. Rodriguez, in contrast, was charged with 11 counts of endangering children, but was only convicted of four of those counts. Unlike Rodriguez, White was left with no question about which offenses he was convicted of.

{¶45} Further, at issue in *White* was the unanimity, or lack thereof, of a jury verdict. In contrast, Rodriguez has challenged the jury instructions and has not raised an argument concerning unanimity. Rodriguez has made no argument that this is a multiple-acts or alternative-means case. And to be clear, it is not. The State charged Rodriguez with 11 counts of endangering children and presented evidence of 11 different instances and types of abuse. In closing argument, the State linked each count to a specific allegation of abuse. The issue for this court to determine is whether either the jury instructions or the verdict forms had to similarly link each count with a specific act committed by Rodriguez, not whether the jury unanimously reached a verdict. Accordingly, *White* does not dictate the outcome in this case.

{¶46} Turning to the case before us, the indictment issued against Rodriguez contained 11 nearly identical counts of endangering children. It set forth the elements of the offenses but did not contain any specific acts that Rodriguez was alleged to have committed. *Compare Shaw*, 2008-Ohio-1317, at ¶ 20 (2d Dist.). And while the bill of particulars described 11 different acts of torture or abuse that Rodriguez committed against C.D., it did not link those acts to specific counts in the indictment. *Compare id.* at ¶ 21. During closing argument, for the first time in the case, the State linked each count with a specific act committed by Rodriguez. It referred to C.D.'s trauma timeline while doing so. While the jury was instructed that it must consider the evidence applicable to each count separately and that Rodriguez could be found guilty or not guilty of any or all of the charged offenses, the instructions did not link an alleged act

of torture or abuse to a specific count. Rather, for each count of the indictment, the instructions generally set forth the statutory elements of the offense of endangering children, absent any specific factual allegations. And the verdict forms for each count simply stated that the jury either found Rodriguez guilty or not guilty of that particular count of endangering children.

{¶47} The jury instructions and verdict forms left the jury with no way to differentiate between the charges or to determine which act corresponded to each count. *See id.* at ¶ 21 and 23; *Valentine*, 395 F.3d at 638; *Harp*, 266 S.W.3d at 818. And the jury undeniably struggled with making this determination. During deliberations, it sent two separate questions to the trial court asking for clarification regarding which act committed by Rodriguez corresponded to each count in the indictment. In response to these questions, the trial court instructed to the jury to "refer to the jury instructions and the testimony and the evidence that was presented to you" and to "use your collective memories to apply [] the testimony and evidence that was presented to the instructions."

{¶48} The problem with this response was that the jury instructions did not link a specific act with a specific count in the indictment. So even if the jury referred to the instructions, as it was directed by the trial court to do, it received no guidance. The same is true of the trial court's suggestion that the jury utilize its "collective memories to apply [] the testimony and evidence that was presented to the instructions." While the evidence, including the trauma timeline, delineated 11 specific acts of torture or abuse committee against C.D., it did not link those acts to a specific count in the indictment. The only time in the entire trial that a punishment or act committed by Rodriguez was linked to a specific count was during closing argument. But "closing arguments are not evidence." *State v. Asp*, 2023-Ohio-290, ¶ 59 (5th

Dist.).

{¶49} This case involved multiple counts of the same offense against the same victim, and each count concerned a *specific* act committed by the defendant. We agree with the *Harp* court that in such cases, "a trial court is obliged to include some sort of identifying characteristic," whether that be in the jury instructions or in the verdict forms, to help the jury "determine whether it is satisfied from the evidence the existence of facts proving that each of the separately charged offenses occurred." *Harp* at 818; *see also Valentine* at 638 ("The Constitution does, however, demand that if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts at some point in the proceeding.").

{¶50} And as stated above, the jury was not permitted to take notes during the trial. The jury could not reasonably have been expected to remember, based solely on the State's comments during closing argument, which of 11 specific acts corresponded to each count. In fact, the State itself misspoke at one point during closing argument about which act was tied to which count. The jury, quite simply, "needed guidance as to which facts the State was alleging to apply to which charges." *See Shaw*, 2008-Ohio-1317, at ¶ 23 (2d Dist.); *see also State v. Martinez*, 2015 ND 173, ¶ 16-20 (where the defendant was charged with three counts of gross sexual imposition against the same victim based on three separate and distinct incidents, the provided jury instructions were erroneous because "the instructions and the verdict forms provided no way to differentiate or distinguish between the counts"). Neither the jury instructions nor the verdict forms provided that guidance in the case at bar.

{¶51} For the foregoing reasons, we hold that the trial court erred in failing to instruct the jury as to which alleged act of torture or abuse committed by Rodriguez

corresponded to each count in the indictment. The jury was not given "all instructions that [we]re relevant and necessary for it to weigh the evidence and to discharge its duty as the factfinder." *See Rainey*, 2023-Ohio-4666, at ¶ 29 (1st Dist.). The trial court could alternatively have included this information in the verdict forms, rather than the jury instructions, but it did not.

{¶52} We further hold that the defects in the jury instructions and verdict forms were not cured by the State's comments during closing argument discussing which act corresponded to each count. "[A]rguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488-489 (1978) (the trial court's failure to give a jury instruction on the presumption of innocence was not cured by defense counsel arguing the presumption in opening and closing statements). Nor were the defects cured by the State's use of the trauma timeline in closing argument. While the timeline set forth each type of abuse or punishment experienced by C.D., it did not link those acts to counts in the indictment and was in a different order than the acts described by the prosecutor in her closing argument.

B. The Error was Plain and Obvious

{¶53} The second prong of our analysis requires us to determine whether the error that occurred below was plain or obvious. *Sowders*, 2023-Ohio-4498, at ¶ 11 (1st Dist.). Courts applying a plain-error analysis do not always elaborate upon this prong or explain when an error will be considered plain. *See id.; Bond*, 2022-Ohio-4150, at ¶ 17; *State v. Mohamed*, 2017-Ohio-7468, ¶ 26; *Chasteen*, 2024-Ohio-909, at ¶ 11 (1st Dist.). In some cases, courts have explained that an error will be considered plain when it constitutes "an obvious defect in the trial proceedings." *State v. Browner*, 2024-Ohio-1547, ¶ 8 (1st Dist.); *accord State v. Morgan*, 2017-Ohio-7565, ¶ 35, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶54} Where Rodriguez was charged with multiple counts of the same offense and where each count correlated to a specific act committed by Rodriguez, the trial court's failure to provide the jury with final instructions and/or verdict forms that linked each act to a specific count constituted an "obvious defect in the trial proceedings." *See Browner* at ¶ 8; *Morgan* at ¶ 35. The defect is apparent on the record, as the jury asked two separate questions about how to determine which act corresponded to which count. Absent further guidance, the jury was unable to make this determination.

{¶55} But an obvious defect in the trial proceedings notwithstanding, more may be necessary to establish the second prong of the plain-error test. In several cases, both the Ohio Supreme Court and this court have elaborated further and indicated that this prong cannot be satisfied in the absence of a bright-line, binding rule that would establish the obviousness of the defect in the proceedings. *State v. Steele*, 2013-Ohio-2470, ¶ 30 ("Because there was no explicit case law or statutory guidance in Ohio on the standard of proving a police officer's loss of privilege to arrest, it would be difficult to conclude that the trial court's failure to invent such an instruction constitutes an obvious error."); *Barnes* at 28 (explaining that even though the trial court incorrectly instructed the jury with respect to whether the offense of felonious assault with a deadly weapon constituted a lesser included offense of the charged offense of attempted murder, the error was not plain because of "[t]he lack of a definitive pronouncement from this court [on this issue] and the disagreement among the lower courts."); *State v. Walker*, 2017-Ohio-9255, ¶ 30 (1st Dist.) (declining to find plain error in the absence of "a bright-line rule that would have clearly demonstrated an obvious defect").This reasoning comports with how plain error is addressed by federal courts. *See United States v. Turner*, 2024 U.S. App. LEXIS 30968, *3 (6th Cir.

Dec. 6, 2024) (to establish plain error, the appellant "must identify a case in our court or the Supreme Court evidencing the error"); *United States v. Vaughn*, 119 F.4th 1084, 1090 (6th Cir. 2024), citing *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (a finding of plain error will be precluded by both a circuit split and a "lack of binding case law").

{¶56} While the trial court's failure to provide the jury in this case with final instructions and/or verdict forms that specified which act committed by Rodriguez correlated to each count of the indictment was erroneous under both *Shaw* and *Valentine*, there is no binding case law from this court or the Ohio Supreme Court on the issue. Under the law set forth in this latter group of cases, this would preclude a finding of plain error.

{¶57} However, some courts have elected to find plain error in the absence of binding case law. In *Davidson v. Kentucky*, 2006 Ky.App.Unpub. LEXIS 1224, *1-2 (Feb. 3, 2006), Davidson appealed a conviction for second-degree assault for causing physical injury to another with a deadly weapon or dangerous instrument. He argued that his fists could not constitute a "dangerous instrument" and that the trial court erred by instructing the jury otherwise. *Id.* at 13-14. Davidson had not objected to this jury instruction below. *Id.*

{¶58} While acknowledging that "[a]n error may be readily noticeable and palpable where the trial court fails to follow clear, binding precedent," the court recognized that whether fists constituted a dangerous instrument was an issue of first impression, and that "Kentucky courts have not addressed whether a trial court's erroneous statutory construction can be considered a palpable error when it concerns an issue of first impression." *Id.* at 25. In electing to find plain, or palpable, error in the jury instructions in the absence of binding precedent, *id.* at 27, the court relied on

federal law stating, "The lack of such precedent, however, does not prevent a finding of plain error if the error was, in fact, clear or obvious based on the materials available to the district court." *Id.* at 25, quoting *United States v. Lachowski*, 405 F.3d 696, 698-699 (8th Cir. 2005).

{¶59} The purpose of the plain-error rule is to encourage parties to raise objections in a timely manner so that the trial court has an opportunity to fix the error. *See In re A.J.O.*, 2019-Ohio-975, ¶ 27 (1st Dist.). Although the error in the jury instructions and/or verdict forms in this case was not brought to the court's attention by either of the parties, it was nonetheless brought to the court's attention at a time when the court could have fixed the error. *See State v. Rutledge*, 2019-Ohio-3460, ¶ 45 (10th Dist.) (in response to a question submitted by the jury during deliberations, the court may issue a response or clarification that is consistent with or supplements the previously provided instructions).

{¶60} Here, the two questions submitted by the jury during deliberations established that, based on the jury instructions and verdict forms that it was provided, the jury was unable to differentiate between the charges or to determine which act corresponded to each count. The obvious nature of the defect in the proceedings that was brought to the court's attention, coupled with the holdings of *Shaw* and *Valentine* and the lack of conflicting authority from either this court, the Ohio Supreme Court, or any other lower court in Ohio, lead us to conclude that the error in this case was plain and obvious and that the second prong of the plain-error analysis has been satisfied.

C. Rodriguez's Substantial Rights Were Impacted

{¶61} The third prong of the plain-error analysis requires Rodriguez to establish that the error impacted her substantial rights. *Sowders*, 2023-Ohio-4498, at

¶ 11 (1st Dist.). Rodriguez contends that she is unable to determine which conduct the jury found her guilty of and which conduct she was acquitted of, and that she is consequently unable to challenge the sufficiency or the weight of the evidence supporting her convictions on appeal. She argues that this deprivation of the means to an effective appeal is in violation of her due-process rights. She further argues that, in the event a new trial is granted, there is a substantial risk that she could be retried for a crime of which she has already been acquitted in violation of her right to be free from double jeopardy.

{¶62} The concerns noted by Rodriguez are valid in light of the error that occurred below. But Ohio courts have historically interpreted the third prong of the plain-error analysis as requiring the appellant to show that the error "'affected the outcome of the trial.'" *Id.*, quoting *Barnes*, 94 Ohio St.3d at 27; *State v. Jones*, 2020-Ohio-3051, ¶ 18 ("Whether the defendant's substantial rights were affected depends on whether the error was prejudicial, i.e., whether it affected the outcome of the trial."); *Bond*, 2022-Ohio-4150, at ¶ 17. An appellant meets this requirement by demonstrating a "reasonable probability" that, but for the error, the outcome of the trial would have been different. *State v. Mounts*, 2023-Ohio-3861, ¶ 52 (1st Dist.).

{¶63} Recently, the Ohio Supreme Court made an exception to this outcome-determinative requirement in a plain-error analysis, but only in cases involving structural error. *Bond* at ¶ 32. In *Bond*, the appellant argued on appeal that a courtroom closure in the trial court violated his right to a public trial under both the United States and Ohio Constitutions. *Id.* at ¶ 1. The Court recognized that this alleged error was a structural error, and that because Bond had failed to object to the closure in the trial court, the closure was subject to a plain-error review. *Id.* at ¶ 7.

{¶64} The Court directly confronted the issue of whether structural errors

were subject to an outcome-determinative analysis under a plain-error review. It explained that the language of Crim.R. 52(B), which codifies plain-error review, does not require that the error affect the outcome of the trial. *Id.* at ¶ 25. Rather, the rule "simply states that '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'" (Bracketed text in original.) *Id.*, quoting Crim.R. 52(B). The Court further explained that "[s]tructural errors are constitutional defects that defy analysis by harmless-error standards because they 'affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" (Second bracketed text in original.) *Id.* at ¶ 26, quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). The Court ultimately determined that:

> [A] structural error may affect substantial rights even if the defendant cannot show that the outcome of the trial would have been different had the error not occurred. To conclude otherwise would be to ignore the long-standing structural-error doctrine, the purpose of which "is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."

Id. at ¶ 32, quoting *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017).

{¶65} The Court's expansion of the third prong of the plain-error analysis was based on the unique nature of structural errors and was incontrovertibly limited to cases involving structural error. And there is no question that a structural error is not implicated in the case at bar. Accordingly, to establish that her substantial rights have been impacted, Rodriguez must show a "reasonable probability" that the outcome of the proceedings would have been different but for the trial court's error. *See Mounts*, 2023-Ohio-3861, at ¶ 52 (1st Dist.). That the error had an impact on her rights to due

process and to be free from double jeopardy does not seem to be sufficient under current case law to satisfy this third prong, despite the fact that Crim.R. 52(B) does not require that the error affect the outcome of the trial.

{¶66} Rodriguez's underlying argument with respect to the alleged due-process violation is nonetheless relevant to our consideration of whether there is a reasonable probability that the outcome of the proceedings would have been different. As set forth above, Rodriguez contends that she is unable to challenge the sufficiency or the weight of the evidence supporting her convictions on appeal because she cannot determine which conduct the jury found her guilty of and which conduct she was acquitted of. The jury's confusion in determining which act of torture or abuse corresponded to each count of the indictment was clearly documented in the two questions it submitted during deliberations. And the response given by the trial court to the jury's questions did not provide the jury with a direct answer or provide them with guidance or the means to find the answer.

{¶67} In *State v. Gardner*, 2008-Ohio-2787, the Court suggested that jury confusion could amount to plain error. In *Gardner*, the defendant was charged with aggravated burglary and the jury instruction for that offense failed to specify that the jury needed to unanimously agree as to what criminal act the defendant intended to commit during the course of the burglary. *Id.* at ¶ 24-27. The Court declined to find plain error where "[t]here [was] no suggestion of jury confusion" and "[t]he jury did not question the meaning of the 'any criminal offense' element." *Id.* at ¶ 79.

{¶68} The record establishes jury confusion in this case. It does not establish that the jury understood or was aware of what actions were associated with the counts for which it returned guilty verdicts. We therefore hold that there is a reasonable probability that, but for the trial court's error in failing to provide the jury with final

instructions and/or verdict forms that specified which conduct was the basis of each count, there is a reasonable probability that the outcome of the proceedings would have been different.

{¶69} We must stress that we likely would reach a different outcome had the jury, like the jury in *White*, found Rodriguez guilty of all charged offenses. In such a situation, despite the failure of the jury instructions or verdict forms to specify which act corresponded to which count, there would be no question as to which acts the jury found the defendant to have committed. But where the jury returns a guilty verdict as to some, but not all, of the charged offenses, and where the jury exhibits confusion as to which actions correlate to each count, there is no way for the defendant or a reviewing court to effectively determine upon which acts the convictions were based.

{¶70} Finally, even if a reviewing court finds plain error, the error should only be corrected where it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" or when necessary "to prevent a manifest miscarriage of justice." *Bond*, 2022-Ohio-4150, at ¶ 35. Correction of the error is necessary in this case to prevent a manifest miscarriage of justice. Rodriguez was found guilty of four counts of endangering children but is unable to challenge the sufficiency or the weight of the evidence supporting those convictions on appeal because, as a result of the error that occurred below, she does not know what acts she stands convicted of. *See State v. Marcum*, 166 Wis.2d 908, 925 (Wis.App. 1992) (where defendant was charged with multiple counts of sexual assault of a juvenile but was only convicted of one count, and where the jury instructions and verdict forms did not distinguish the defendant's illegal acts, the defendant was "prejudiced by not knowing what act he stands convicted of"); *see also Valentine*, 395 F.3d at 638 ("The Constitution . . . demand[s] that if a defendant is going to be charged with multiple counts of the same crime, there

must be some minimal differentiation between the counts at some point in the proceeding."). We accordingly hold that the trial court committed plain error when it failed to provide the jury with final instructions and/or verdict forms that specified which conduct was the basis of each count of the indictment. Rodriguez's first assignment of error is sustained.

D. Retrial is Precluded

{¶71} Rodriguez argues that, as a remedy for the trial court's error, we must reverse the trial court's judgment and hold that retrial is precluded under the doctrine of double jeopardy. We are constrained to agree.

{¶72} Both the Double Jeopardy Clause, set forth in the Fifth Amendment to the United States Constitution and applied to Ohio by the Fourteenth Amendment, and its twin provision in Article 1, Section 10 of the Ohio Constitution, prohibit prosecuting an individual multiple times for the same offense. *State v. Mutter*, 2017-Ohio-2928, ¶ 2. The Double Jeopardy Clause protects against three different types of abuses: (1) the prosecution of an individual for the same offense after an acquittal, (2) the prosecution of an individual for the same offense after a conviction, and (3) the imposition of multiple punishments for the same offense. *Id.* at ¶ 15, quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

{¶73} As a result of the trial court's error, Rodriguez does not know which acts were included in the guilty verdicts and which acts she was acquitted of. As such, if we were to reverse and remand for a new trial, Rodriguez would face a potential retrial for acts upon which she has already been acquitted. *See Shaw*, 2008-Ohio-317, at ¶ 25 (2d Dist.) (Double Jeopardy Clause precluded retrial where "there [was] no way to know upon which of the charges [defendant] was convicted and upon which of the

charges he was acquitted"); *Marcum*, 166 Wis.2d at 925 ("Part of our problem is that we cannot reverse and remand for a new trial on count six because we do not know what acts were included in the not guilty verdicts of counts four and five. We cannot order a new trial because Marcum might be retried for acts on which the jury has already adjudged him not guilty.").

{¶74} As in *Shaw* and *Marcum*, it is not possible to "eliminate the possibility" that Rodriguez would be retried for an offense upon which she has already been acquitted. *See Shaw* at ¶ 25; *see also Marcum* at 925. We accordingly hold that the Double Jeopardy Clause precludes retrial for the offenses that are the subject of this appeal.

III. Ineffective Assistance

{¶75} In her second assignment of error, Rodriguez argues that her trial counsel was ineffective for failing to object to the jury instructions and verdict forms. This assignment of error has been rendered moot by our resolution of Rodriguez's first assignment of error, and we decline to address it.

IV. Conclusion

{¶76} The trial court committed plain error when it failed to provide the jury with final instructions and/or verdict forms that specified which conduct was the basis of each count of the indictment. Because it is impossible to determine which offenses the jury found Rodriguez to have committed and which offenses resulted in acquittals, a retrial is precluded by the Double Jeopardy Clause. The trial court's judgment is reversed, and Rodriguez is discharged from further prosecution for the offenses that are the subject of this appeal.

Judgment accordingly.

BERGERON, P.J., concurs.

WINKLER, J., dissents.

WINKLER, J., dissenting.

{¶77} Because Ohio law does not require a trial court to include a defendant's alleged conduct in the jury instructions or in the verdict forms in order to differentiate counts of the indictment, and because the State's closing argument in this case included a count-by-count reiteration of the defendant's conduct for the jury without any objection by the defendant, the trial court did not commit plain error in failing to include the defendant's alleged conduct in the jury instructions or the verdict forms. Therefore, I dissent.

{¶78} The State indicted defendant-appellant Amy Rodriguez on 11 counts of child endangering with respect to her stepson, C.D. The bill of particulars listed 11 different "punishments" that Rodriguez had imposed on C.D., but other than one punishment that differed temporally from the others, the bill of particulars did not correlate any specific punishment to any specific count in the indictment. The matter proceeded to a lengthy jury trial where Rodriguez was tried along with her parents. The jury ultimately acquitted Rodriguez of Counts 1, 3, 5, 7, 8, 9, and 11, and found her guilty of Counts 2, 4, 6, and 10. Counts 2, 4, 6, and 10 contained the allegations that Rodriguez had committed child endangering sometime between January 2018 and April 2021.

{¶79} On appeal, Rodriguez argues that the trial court committed plain error when it failed to delineate the conduct that allegedly formed the basis of each child-endangering count either in the jury instructions or the verdict forms. Although Rodriguez argues that the trial court committed an obvious error in failing to instruct the jury as to what alleged criminal conduct related to each of the 11 counts, Rodriguez

fails to point to any Ohio law requiring the trial court to do so. Ohio courts have recognized that due process requires that "'if a defendant is going to be charged with multiple counts of the same crime, there must be some minimal differentiation between the counts *at some point in the proceeding*[,]'" but that is exactly what happened in this case when the prosecutor identified the conduct associated with each count in closing argument. (Emphasis in original.) *See State v. Barrett*, 2008-Ohio-2370, ¶ 22 (8th Dist.), quoting *Valentine v. Konteh*, 395 F.3d 626, 638 (6th Cir.2005); *compare People v. Filipiak*, 2023 IL App (3d) 220024, ¶ 16 ("Two sets of identical verdicts forms were submitted to the jury pertaining to the predatory criminal sexual assault charges for [the victim], which were not differentiated, except with parentheticals indicating ("1") and ("2"). Nor did the State in any way suggest to the jury at closing which of the verdict forms pertained to which of the alleged acts of penetration.").

{¶80} Rodriguez relies on a case from Kentucky, *Harp v. Commonwealth*, 266 S.W.3d 813, 817 (Ky.2008). In *Harp*, the Kentucky Supreme Court held that the trial court erred in instructing the jury on seven identical sexual-abuse charges without differentiating the counts with testimony from the trial. The *Harp* court reasoned that it had "clearly held—before Harp's trial—that a trial court errs in a case involving multiple charges if its instructions to the jury fail 'factually [to] differentiate between the separate offenses.'" *Id.*, quoting *Combs v. Commonwealth*, 198 S.W.3d 574, 580 (Ky. 2006). The *Harp* court also reasoned that "a failure to include proper identifying characteristics in jury instructions is reversible error, provided that a timely objection to the error has been made." *Id.* at 818.

{¶81} The Ohio Supreme Court has never held that a trial court commits error when it fails to include the defendant's alleged conduct in the jury instructions or

verdict forms in order to differentiate identical counts in the indictment, particularly where, as here, the State differentiated the counts in closing argument in its review of the detailed testimony of the various forms of abuse to which the victim was subjected. Even the Kentucky Supreme Court in *Harp* recognized that the trial court's failure to include differentiating facts in the jury instructions constituted reversible error where the defendant objected at trial. *Id.* Here, no objection was made.

{¶82} The only Ohio case relied on by the majority is *State v. Shaw*, 2008-Ohio-1317 (2d Dist.). In *Shaw*, the State indicted the defendant on 15 counts of rape and ten counts of sexual battery related to his three minor daughters. The jury found the defendant guilty of some charges and not guilty on most of the charges. The appellate court sustained Shaw's first assignment of error on the basis of prejudicial, other-acts evidence admitted at trial. In Shaw's second assignment of error, he argued that his due-process rights were violated because his offenses were not charged with sufficient specificity. The appellate court rejected Shaw's argument that the indictment was insufficient, but the court nevertheless determined that it would be impossible on retrial to ensure that Shaw was not being tried for an offense of which he had been acquitted, because the proceedings did not differentiate which specific facts applied to which charge either before or during trial. Unlike *Shaw*, any double-jeopardy concern in this case is purely speculative.

{¶83} Rodriguez argues that her due-process rights have been violated because she has lost the means to effectively appeal her convictions on manifest-weight or sufficiency grounds. First, Rodriguez can rely on the State's theory of the case in closing argument to correlate the counts in the indictment with the verdicts. Second, Rodriguez has not even attempted to formulate any challenges to the weight or sufficiency of the evidence with respect to any of the counts. Rodriguez's defense at

trial was that none of these "punishments" occurred, and that C.D. was lying.

{¶84} In conclusion, I would hold that the trial court did not commit plain error by failing to include Rodriguez's alleged conduct in the jury instructions or verdict forms. I would also overrule Rodriguez's second assignment of error pertaining to ineffective assistance of counsel. Therefore, I would affirm Rodriguez's convictions, and I respectfully dissent.

Please note:

The court has recorded its entry on the date of the release of this opinion.

*** Current through the 2022 general election. ***

§ 10 Trial for crimes; witness.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

History

As amended September 3, 1912.

Current through the ratification of the 27th Amendment on May 7, 1992.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Current through the ratification of the 27th Amendment on May 7, 1992.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ORC Ann. 2941.03

Current through File 11 of the 136th General Assembly (2025-2026).

Page's Ohio Revised Code Annotated > ***Title 29: Crimes — Procedure (Chs. 2901 — 2981)*** > ***Chapter 2941: Indictment (§§ 2941.01 — 2941.63)*** > ***Form and Sufficiency (§§ 2941.01 — 2941.35)***

§ 2941.03 Sufficiency of indictments or informations.

An indictment or information is sufficient if it can be understood therefrom:

(A) That it is entitled in a court having authority to receive it, though the name of the court is not stated;

(B) If it is an indictment, that it was found by a grand jury of the county in which the court was held, or if it is an information, that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held;

(C) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is unknown to the jury or prosecuting attorney, but no name shall be stated in addition to one necessary to identify the accused;

(D) That an offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;

(E) That the offense was committed at some time prior to the time of finding of the indictment or filing of the information.

History

GC § 13437-2; 113 v 123(162), ch 16, § 2; Bureau of Code Revision. Eff 10-1-53.

End of Document

ORC Ann. 2941.05

Current through File 11 of the 136th General Assembly (2025-2026).

Page's Ohio Revised Code Annotated > ***Title 29: Crimes — Procedure (Chs. 2901 — 2981)*** > ***Chapter 2941: Indictment (§§ 2941.01 — 2941.63)*** > ***Form and Sufficiency (§§ 2941.01 — 2941.35)***

§ 2941.05 Statement charging an offense.

In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

History

GC § 13437-4; 113 v 123(163), ch 16, § 4; Bureau of Code Revision, 10-1-53; 126 v 392. Eff 3-17-55.

End of Document

ORC Ann. 2941.07

Current through File 11 of the 136th General Assembly (2025-2026).

Page's Ohio Revised Code Annotated **>** ***Title 29: Crimes — Procedure (Chs. 2901 — 2981)*** **>** ***Chapter 2941: Indictment (§§ 2941.01 — 2941.63)*** **>** ***Form and Sufficiency (§§ 2941.01 — 2941.35)***

§ 2941.07 Bill of particulars.

Upon written request of the defendant made not later than five days prior to the date set for trial, or upon order of the court, the prosecuting attorney shall furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense.

History

GC § 13437-6; 113 v 123(164), ch 16, § 6; Bureau of Code Revision, 10-1-53; 134 v H 511. Eff 1-1-74.

End of Document

ORC Ann. 2919.22

Current through File 11 of the 136th General Assembly (2025-2026).

Page's Ohio Revised Code Annotated > ***Title 29: Crimes — Procedure (Chs. 2901 — 2981)*** > ***Chapter 2919: Offenses Against the Family (§§ 2919.01 — 2919.272)*** > ***Nonsupport and Related Offenses (§§ 2919.21 — 2919.222)***

Notice

This section has more than one version with varying effective dates.

§ 2919.22 Endangering children.

(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 or a child with a mental or physical disability under twenty-one 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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or disability of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen years of age or a child with a mental or physical disability under twenty-one 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;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(5) Entice, coerce, permit, encourage, compel, hire, employ, use, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter;

(6) Allow the child to be on the same parcel of real property and within one hundred feet of, or, in the case of more than one housing unit on the same parcel of real property, in the same

housing unit and within one hundred feet of, any act in violation of section 2925.04 or 2925.041 of the Revised Code when the person knows that the act is occurring, whether or not any person is prosecuted for or convicted of the violation of section 2925.04 or 2925.041 of the Revised Code that is the basis of the violation of this division.

(C)

(1) No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code when one or more children under eighteen years of age are in the vehicle, streetcar, or trackless trolley. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that constitutes the basis of the charge of the violation of this division. For purposes of sections 4511.191 to 4511.197 of the Revised Code and all related provisions of law, a person arrested for a violation of this division shall be considered to be under arrest for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them or for operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine.

(2) As used in division (C)(1) of this section:

(a) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(b) "Vehicle," "streetcar," and "trackless trolley" have the same meanings as in section 4511.01 of the Revised Code.

(D)

(1) Division (B)(5) of this section does not apply to any material or performance that is produced, presented, or disseminated for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under division (B)(5) of this section.

(3) In a prosecution under division (B)(5) of this section, the trier of fact may infer that an actor, model, or participant in the material or performance involved is a juvenile if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the actor, model, or participant as a juvenile.

(4) As used in this division and division (B)(5) of this section:

(a) "Material," "performance," "obscene," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(b) "Nudity-oriented matter" means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest.

(c) "Sexually oriented matter" means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(E)

(1) Whoever violates this section is guilty of endangering children.

(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following, and, in the circumstances described in division (E)(2)(e) of this section, that division applies:

(a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;

(b) If the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) or (d) of this section, a felony of the fourth 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.

(e) If the violation is a felony violation of division (B)(1) of this section and the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (B) (7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code.

(3) If the offender violates division (B)(2), (3), (4), or (6) of this section, except as otherwise provided in this division, endangering children is a felony of the third degree. If the violation results in serious physical harm to the child involved, or if the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the second degree. If the offender violates division (B)(2), (3), or (4) of this section and the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code. If the offender violates division (B)(6) of this section and the drug involved is methamphetamine, the court shall impose a mandatory prison term on the offender as follows:

(a) If the violation is a violation of division (B)(6) of this section that is a felony of the third degree under division (E)(3) of this section and the drug involved is methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years. If the violation is a violation of division (B)(6) of this

section that is a felony of the third degree under division (E) (3) of this section, if the drug involved is methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(6) of this section, a violation of division (A) of section 2925.04 of the Revised Code, or a violation of division (A) of section 2925.041 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.

(b) If the violation is a violation of division (B)(6) of this section that is a felony of the second degree under division (E)(3) of this section and the drug involved is methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the definite prison terms prescribed for a felony of the second degree in division (A)(2)(b) of section 2929.14 of the Revised Code that is not less than three years, except that if the violation is committed on or after the effective date of this amendment, the court shall impose as the minimum prison term for the offense a mandatory prison term that is one of the minimum terms prescribed for a felony of the second degree in division (A)(2)(a) of that section that is not less than three years. If the violation is a violation of division (B)(6) of this section that is a felony of the second degree under division (E)(3) of this section, if the drug involved is methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(6) of this section, a violation of division (A) of section 2925.04 of the Revised Code, or a violation of division (A) of section 2925.041 of the Revised Code, the court shall impose as a mandatory prison term one of the definite prison terms prescribed for a felony of the second degree in division (A)(2)(b) of section 2929.14 of the Revised Code that is not less than five years, except that if the violation is committed on or after the March 22, 2019, the court shall impose as the minimum prison term for the offense a mandatory prison term that is one of the terms prescribed for a felony of the second degree in division (A)(2)(a) of that section that is not less than five years.

(4) If the offender violates division (B)(5) of this section, endangering children is a felony of the second degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code.

(5) If the offender violates division (C) of this section, the offender shall be punished as follows:

(a) Except as otherwise provided in division (E)(5)(b) or (c) of this section, endangering children in violation of division (C) of this section is a misdemeanor of the first degree.

(b) If the violation results in serious physical harm to the child involved or the offender previously has been convicted of an offense under this section or any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(5)(c) of this section, endangering children in violation of division (C) of this section is a felony of the fifth degree.

(c) If the violation results in serious physical harm to the child involved and if the offender previously has been convicted of a violation of division (C) of this section, section 2903.06 or 2903.08 of the Revised Code, section 2903.07 of the Revised Code as it existed prior to March 23, 2000, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, endangering children in violation of division (C) of this section is a felony of the fourth degree.

(d) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction it imposes upon the offender pursuant to division (E)(5)(a), (b), or (c) of this section or pursuant to any other provision of law and in addition to any suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law, the court also may impose upon the offender a class seven suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code.

(e) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction imposed upon the offender pursuant to division (E)(5)(a), (b), (c), or (d) of this section or pursuant to any other provision of law for the violation of division (C) of this section, if as part of the same trial or proceeding the offender also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the offender also shall be sentenced in accordance with section 4511.19 of the Revised Code for that violation of division (A) of section 4511.19 of the Revised Code.

(F)

(1)

(a) A court may require an offender to perform not more than two hundred hours of supervised community service work under the authority of an agency, subdivision, or charitable organization. The requirement shall be part of the community control sanction or sentence of the offender, and the court shall impose the community service in accordance with and subject to divisions (F)(1)(a) and (b) of this section. The court may require an offender whom it requires to perform supervised community service work as part of the offender's community control sanction or sentence to pay the court a reasonable fee to cover the costs of the offender's participation in the work, including, but not limited to, the costs of procuring a policy or policies of liability insurance to cover the period during which the offender will perform the work. If the court requires the offender to perform supervised community service work as part of the offender's community control sanction or sentence, the court shall do so in accordance with the following limitations and criteria:

(i) The court shall require that the community service work be performed after completion of the term of imprisonment or jail term imposed upon the offender for the violation of division (C) of this section, if applicable.

(ii) The supervised community service work shall be subject to the limitations set forth in divisions (B)(1), (2), and (3) of section 2951.02 of the Revised Code.

(iii) The community service work shall be supervised in the manner described in division (B) (4) of section 2951.02 of the Revised Code by an official or person with the qualifications described in that division. The official or person periodically shall report in writing to the court concerning the conduct of the offender in performing the work.

(iv) The court shall inform the offender in writing that if the offender does not adequately perform, as determined by the court, all of the required community service work, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code, and that, if the court orders that the offender be so committed, the court is authorized, but not required, to grant the offender credit upon the period of the commitment for the community service work that the offender adequately performed.

(b) If a court, pursuant to division (F)(1)(a) of this section, orders an offender to perform community service work as part of the offender's community control sanction or sentence and if the offender does not adequately perform all of the required community service work, as determined by the court, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code. The court may order that a person committed pursuant to this division shall receive hour-for-hour credit upon the period of the commitment for the community service work that the offender adequately performed. No commitment pursuant to this division shall exceed the period of the term of imprisonment that the sentencing court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under that sentence or term and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code.

(2) Division (F)(1) of this section does not limit or affect the authority of the court to suspend the sentence imposed upon a misdemeanor offender and place the offender under a community control sanction pursuant to section 2929.25 of the Revised Code, to require a misdemeanor or felony offender to perform supervised community service work in accordance with division (B) of section 2951.02 of the Revised Code, or to place a felony offender under a community control sanction.

(G)

(1) If a court suspends an offender's driver's or commercial driver's license or permit or nonresident operating privilege under division (E)(5)(d) of this section, the period of the suspension shall be consecutive to, and commence after, the period of suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege that is imposed under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law in relation to the violation of division (C) of this section that is the basis of the suspension under division (E)(5)(d) of this section or in relation to the violation of division (A) of section 4511.19 of the Revised Code that is the basis for that violation of division (C) of this section.

(2) An offender is not entitled to request, and the court shall not grant to the offender, limited driving privileges if the offender's license, permit, or privilege has been suspended under division (E) (5)(d) of this section and the offender, within the preceding six years, has been convicted of or pleaded guilty to three or more violations of one or more of the following:

(a) Division (C) of this section;

(b) Any equivalent offense, as defined in section 4511.181 of the Revised Code.

(H)

(1) If a person violates division (C) of this section and if, at the time of the violation, there were two or more children under eighteen years of age in the motor vehicle involved in the violation, the offender may be convicted of a violation of division (C) of this section for each of the children, but the court may sentence the offender for only one of the violations.

(2)

(a) If a person is convicted of or pleads guilty to a violation of division (C) of this section but the person is not also convicted of and does not also plead guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, both of the following apply:

(i) For purposes of the provisions of section 4511.19 of the Revised Code that set forth the penalties and sanctions for a violation of division (A) of section 4511.19 of the Revised Code, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute a violation of division (A) of section 4511.19 of the Revised Code;

(ii) For purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code and that is not described in division (H)(2)(a)(i) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall constitute a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(b) If a person is convicted of or pleads guilty to a violation of division (C) of this section and the person also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the conviction of or plea of guilty to

the violation of division (C) of this section shall not constitute, for purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code, a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(I) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code;

(2) "Limited driving privileges" has the same meaning as in section 4501.01 of the Revised Code;

(3) "Methamphetamine" has the same meaning as in section 2925.01 of the Revised Code.

History

134 v H 511 (Eff 1-1-74); 137 v S 243 (Eff 11-17-77); 140 v H 44 (Eff 9-27-84); 140 v S 321 (Eff 4-9-85); 141 v H 349 (Eff 3-6-86); 142 v H 51 (Eff 3-17-89); *145 v H 236* (Eff 9-29-94); *146 v S 2* (Eff 7-1-96); *146 v S 269*, § 1 (Eff 7-1-96); *146 v H 353*, § 1 (Eff 9-17-96); *146 v H 167* (Eff 5-15-97); *146 v S 269*, § 8 (Eff 5-15-97); *146 v H 353*, § 4 (Eff 5-15-97); *147 v S 60* (Eff 10-21-97); *148 v H 162* (Eff 8-25-99); *148 v S 107* (Eff 3-23-2000); *148 v S 180*. Eff 3-22-2001; *149 v H 490*, § 1, eff. 1-1-04; *149 v S 123*, § 1, eff. 1-1-04; *150 v S 58*, § 1, eff. 8-11-04; *151 v S 53*, § 1, eff. 5-17-06; *151 v S 8*, § 1, eff. 8-17-06; *152 v H 280*, § 1, eff. 4-7-09; *2011 HB 86*, § 1, eff. Sept. 30, 2011; *2018 sb201*, § 1, effective March 22, 2019; *2022 hb281*, § 1, effective April 6, 2023.

End of Document