

IN THE SUPREME COURT OF OHIO

JOHN K. O'TOOLE, Personal
Representative and Administrator
for the Estate of Sydney Sawyer,

Appellee,

v.

WILLIAM K. DENIHAN, et al.,

Appellants.

Case No. 07-0056

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District
Case No. CA-06-87476

APPENDIX TO APPELLEE'S MERIT BRIEF

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 OHIO MONTHLY RECORD

Rules filed for the month are printed in numerical order. Rules are published exactly as filed.

Emergency rules are printed with a vertical line in the margin and are effective for 90 days.

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Issue No. 6

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the Administrative Code when meeting the requirements of this rule.

HISTORY: Eff. 12-30-97
1997-98 OMR 1050 (E*), eff. 10-1-97

RC 119.032 rule review date: 12-30-02

Note: Effective 12-30-97, 5101:2-33-07 contains provisions of former 5101:2-42-05.

CROSS REFERENCES

- RC 5103.03, Powers and duties of department in certification of institutions for children
- RC 5153.16, Powers and duties of county children services board; annual evaluation

5101:2-33-08 Administration of services under state child welfare subsidy—Repealed

HISTORY: Eff. 12-30-97
1997-98 OMR 1050 (R*), eff. 10-1-97; 1983-84 OMR 671 (E), eff. 2-1-84; 1983-84 OMR 501 (E), eff. 11-11-83

5101:2-33-09 State child welfare subsidy caseload reduction—Repealed

HISTORY: Eff. 12-30-97
1997-98 OMR 1050 (R*), eff. 10-1-97; 1989-90 OMR 899 (E), eff. 2-10-90; 1989-90 OMR 763 (E), eff. 12-1-89

5101:2-34-06 Screening child abuse and neglect reports

(A) At a minimum, a report of child abuse and neglect should contain, if known:

- (1) The names and addresses of the child and his parents or the person or persons having custody of the child;
- (2) The child's age;
- (3) The type, extent, and duration of the abuse or neglect;
- (4) Circumstances regarding the abuse or neglect, including any evidence of previous injuries, abuse, or neglect;
- (5) The child's current condition, and
- (6) Any other information that might be helpful in establishing the cause of the known or suspected injury, abuse, or neglect or the known or suspected threat of injury, abuse, or neglect.

(B) When the PCSA determines the information received does not constitute a report, the PCSA may:

- (1) Decline to accept the information as a report;
- (2) Request the individual providing the information to submit the allegations in writing;
- (3) Refer the individual to the county prosecutor pursuant to the child abuse and neglect memorandum of understanding; or
- (4) Refer the reporter to an appropriate agency or service provider;

³⁸Prior and current versions differ; although no amendment to this language was indicated in the 12-30-97 or 1997-98 OMR 1051 version, "or until the PCSA is required" appeared as "or

(C) The PCSA shall develop standards for logging and maintaining information not accepted as a report.

HISTORY: Eff. 12-30-97
1997-98 OMR 1050 (A*), eff. 10-1-97; 1996-97 OMR 2289 (E), eff. 6-1-97; 1995-96 OMR 569 (R), eff. 10-1-95; 1986-87 OMR 761 (E), eff. 1-1-87

RC 119.032 rule review date: 12-30-02

Note: Effective 12-30-97, 5101:2-34-06 contains provisions of former 5101:2-34-32.

CROSS REFERENCES

- RC 2151.421, Persons required to report injury or neglect; procedures on receipt of report

5101:2-34-32 PCSA requirements for assessments and investigations

(A) Upon receipt of a report of a child at risk of abuse and neglect, the PCSA shall determine the degree of risk to the child through collecting information from the following sources:

- (1) The content of the report;
 - (2) Agency records for the family; and
 - (3) Information obtained from collateral sources.
- (B) The PCSA may request assistance of law enforcement at any time during an assessment/investigation for any reason including, but not limited to, worker safety.
- (C) The PCSA shall consider the report an emergency when it is determined that there is imminent risk to the child's safety or there is insufficient information to determine whether or not the child is safe at the time of the report.

(D) For emergency reports, the PCSA shall attempt a face-to-face contact with the alleged child victim within one hour of the receipt of the report.

(E) For all other reports, the PCSA shall attempt a face-to-face or telephone contact within twenty-four hours with a principal or collateral source to ensure that the child is safe and attempt a face-to-face contact with the alleged child victim within three calendar days of receipt of the report.

(F) If the PCSA has attempted a face-to-face contact with the alleged child victim and the child was unavailable, the PCSA shall continue making attempts at least every five working days until the child is seen or until the PCSA is required³⁸ to make a case resolution or case disposition pursuant to paragraphs (R) and (S) of this rule.

(G) The PCSA shall conduct:

- (1) Face to face interviews with all adults residing in the home of the alleged child victim and the alleged perpetrator (unless law enforcement or the county prosecutor will interview the alleged perpetrator pursuant to the procedures delineated in the child abuse and neglect memorandum of understanding) in order to:
 - (a) Assess their knowledge of the allegation;
 - (b) Observe the interaction of the alleged child victim and caretaker; and
 - (c) Obtain relevant information regarding the risk to the child.
- (2) Face to face interviews with all children residing within the home to evaluate the child's condition and obtain the child's explanation of the allegations contained in the report,

at least every five working days until the PCSA is required³⁸ in the 1996-97 OMR 2289 version.

unless the child does not have sufficient verbal skills or has been previously interviewed and additional interviewing would be detrimental. When possible, the child should be interviewed separately from the alleged perpetrator (should a child residing in the home not be interviewed, the PCSA must document the justification in the case record).

(3) Face to face interviews or telephone contacts with any persons identified as possible information sources during the assessment to obtain relevant information regarding the risk to the children. Discretion shall be exercised in the selection of collateral sources to protect the family or out-of-home care setting's right to privacy. To protect the confidentiality of the principals, persons shall not be randomly interviewed.

(H) The PCSA shall take any other actions necessary to assess the risk to the child including, but not limited to:

(1) Taking photographs of areas of trauma on the child's body;

(2) Taking photographs of the child's environment (with the caretaker's consent);

(3) Securing a medical, and/or psychological examination/evaluation of the child (with consent of the child, parent, guardian, or custodian; or with a court order); or

(4) Securing any relevant records (including but not limited to school, mental health, medical, incident reports in an out-of-home care setting).

(I) At any time the PCSA determines a child to be at imminent risk of harm, the PCSA shall:

(1) Immediately enact a safety plan, pursuant to rule 5101:2-34-37 of the Administrative Code, utilizing the ODHS 1510, "Family Risk Assessment Model, Safety Plan for Children"; and/or

(2) Contact law enforcement; and/or

(3) Remove the child pursuant to rule 5101:2-39-12 of the Administrative Code.

(J) The PCSA shall request assistance from law enforcement, the county prosecutor, the PCSA's legal counsel, or the court when refused access to the alleged child victim or any records required to conduct the assessment/investigation.

(K) The PCSA shall have an interpreter present for all interviews when the PCSA has determined that a principal of the case has a language or any other impairment that causes a barrier in communication (i.e., principal is deaf or hearing impaired or speaks a language other than English or is developmentally delayed or autistic).

(L) The PCSA shall notify the child (unless the child is not of an age or developmental capacity to understand), the child's parent, guardian or custodian, and the alleged perpetrator of the case resolution/case disposition within three calendar days upon completion of the assessment/investigation. The PCSA shall document in the case record, the date and method of notification.

(M) The PCSA located within the county in which the child's parent, guardian, or custodian resides shall lead assessment efforts when two or more Ohio PCSAs are involved. In situations of joint custody or shared parenting, the PCSA in the county in which the child's residential parent at the time of the incident resides shall lead the assessment efforts.

(N) If a report of child abuse and neglect involves a child who is living in a shelter for victims of domestic violence or a homeless shelter the PCSA who received the report shall:

(1) Determine if the child was brought to the shelter pursuant to an agreement with a shelter in another county. If a determination is made that there was an agreement in place, the PCSA in the county from which the child was brought shall lead the investigation/assessment and provide the required supportive services or petition the court for custody of the child, if necessary.

(2) Lead the investigation when a determination was made that the child was not brought to the shelter under an agree-

ment with a shelter in another county. When two or more PCSA's are involved the non-lead PCSA shall be responsible for following procedures outlined in paragraph (O) of this rule.

(3) Commence the investigation/assessment if a determination can not [sic] be made immediately if an agreement is in effect. The PCSA shall continue to determine if an agreement is in effect and then follow procedures outlined in paragraph (N)(1) or (N)(2) of this rule.

(O) When requested by the lead PCSA (either verbally or in writing), the non-lead PCSA shall conduct interviews of any principals and collateral sources presently located within its jurisdiction and assist in the completion of a family risk assessment (unless the lead PCSA notifies the other PCSA that they will interview these parties) within a time frame that will allow the lead PCSA to fulfill their time frames outlined in this rule. All PCSAs involved shall document the request in the case record.

(P) The Ohio PCSA shall cooperate with the out-of-state PCSA, including, when necessary, leading investigative efforts when the child is located within Ohio or when the abuse or neglect is alleged to have occurred within Ohio.

(Q) The PCSA shall contact other PCSAs immediately but no later than the next working day to share information in accordance with rule 5101:2-34-38 of the Administrative Code and to coordinate investigative efforts in accordance with rules 5101:2-34-33 to 5101:2-34-36 of the Administrative Code.

(R) The PCSA shall follow procedures set forth in rule 5101:2-35-77 of the Administrative Code when the report of neglect involves alleged withholding of appropriate nutrition, hydration, medication, or medically indicated treatment from a disabled infant with a life-threatening condition.

(S) The PCSA shall complete a case resolution by completing the structured decision making steps 1 through 6 of the ODHS 1500, "Family Risk Assessment Model, Part I: Family Risk Assessment Matrix" at the completion of the family risk assessment, but no later than thirty days from the receipt of the report (forty-five days when information needed to determine the case resolution cannot be completed within thirty days and the reasons are documented in the case record).

(T) The PCSA shall complete a case disposition at the completion of the out-of-home care and third party investigation, but no later than thirty days from the receipt of the report (forty-five days when information needed to determine the case disposition cannot be completed within thirty days and the reasons are documented in the case record).

(U) The PCSA shall enter into the central registry, pursuant to rule 5101:2-35-16 of the Administrative Code, the case resolution/case disposition at the completion of the assessment/investigation.

(V) The assessment/investigation documentation and any material obtained as a result of the assessment/investigation, shall be maintained in the case record. If any information gathering activity cannot be completed, justification and written approval of the executive director or his designee shall be filed in the case record. The PCSA may not waive the case resolution/case disposition or the time frame for making the case resolution/case disposition. The PCSA shall document in the case record the date, time, and with whom the assessment/investigation began.

HISTORY: Eff. 12-30-97

1997-98 OMR 1051 (A*), eff. 10-1-97; 1996-97 OMR 2289 (R-E), eff. 6-1-97; 1995-96 OMR 2593 (A), eff. 6-1-96; 1995-96 OMR 569 (R-E), eff. 10-1-95; 1989-90 OMR 768 (A), eff. 1-1-90; 1987-88 OMR 747 (A), eff. 1-1-88; 1986-87 OMR 763 (E), eff. 1-1-87

RC 119.032 rule review date: 12-30-02

Note: Effective 12-30-97, see 5101:2-34-06 for provisions of former 5101:2-34-32.

CROSS REFERENCES

RC 2151.421, Persons required to report injury or neglect; procedures on receipt of report

RC 5153.16, Powers and duties of county children services board; annual evaluation

5101:2-34-38 Confidentiality and dissemination of information relating to child abuse or neglect

(A) Each report and investigation of alleged child abuse or neglect is confidential and may be shared only when dissemination is authorized by this rule.

(B) The identities of the reporter and any person providing information during the course of a child abuse or neglect investigation shall remain confidential. The identities of these individuals shall not be released or affirmed by the PCSA to any party except for those listed in paragraphs (B)(1) to (B)(4) of this rule, without the written consent of the individuals involved. The PCSA shall inform the reporter and any person providing information that a subpoena for judicial testimony may be issued if court intervention is deemed necessary. The PCSA shall release identities only to the following:

(1) ODHS staff with supervisory responsibility for children's protective services;

(2) Law enforcement officials who are investigating a report of child abuse or neglect or a report that a person violated section 2921.14 of the Revised Code (knowingly making or causing another person to make a false report);

(3) The county prosecutor who is investigating a report of child abuse or neglect or a report that a person violated section 2921.14 of the Revised Code (knowingly making or causing another person to make a false report); and

(4) Any PCSA (in-state or out-of-state) investigating a child abuse or neglect report involving a principal of the case.

(C) The PCSA shall promptly disseminate any information requested by ODHS staff with supervisory responsibility for children's protective services or children services licensing.

(D) The PCSA shall disseminate information to the central registry on child abuse and neglect as required by rule 5101:2-35-16 of the Administrative Code.

(E) The PCSA shall promptly disseminate all information it determines to be relevant to the following:

(1) Any federal, state, or local governmental entity, or any agent of such entity, with a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect including but not limited to:

(a) Law enforcement officials, as set forth in the child abuse and neglect memorandum of understanding, to investigate a report of child abuse or neglect, a report of a missing child, or a report that a person has violated section 2921.14 of the Revised Code (knowingly making or causing another person to make a false report of child abuse or neglect).

(b) The county prosecutor, to provide legal advice or initiate legal action on behalf of an alleged child victim; and to prosecute any person who has violated section 2921.14 of the Revised Code (knowingly making or causing another person to make a false report of child abuse or neglect).

(c) A guardian ad litem or court appointed special advocate.

(d) Any PCSA (in-state or out-of-state) which is currently investigating a report of child abuse or neglect involving a principal of the case or providing service to a principal of the case.

(e) A coroner, to assist in the evaluation of a child's death due to alleged child abuse or neglect.

(f) Child abuse and neglect multidisciplinary team members, for consultation regarding investigative findings or the case plan.

(g) Public service providers working with caretakers or children of the family about whom the information is being provided, including but not limited to:

(i) Probation officers and caseworkers employed with the court, adult parole authority, rehabilitation and corrections, or the department of youth services.

(ii) Casemanagers employed with the local boards of mental retardation and developmental disabilities or the local boards of alcohol drug addiction and mental health.

(h) A school administrator or designee.

(i) The licensing and supervising authorities of a public or nonpublic out-of-home care setting in which child abuse or neglect is alleged to have occurred.

(j) Administrators of public out-of-home care settings in which child abuse or neglect is alleged to have occurred including but not limited to:

(i) Psychiatric hospitals managed by the Ohio department of mental health;

(ii) Institutions managed by county courts for unruly or delinquent children;

(iii) Institutions managed by the Ohio department of youth services;

(iv) Institutions or programs managed by the Ohio department of mental retardation and developmental disabilities or local boards of mental retardation and developmental disabilities.

(k) Child abuse citizen review panels recognized by ODHS, upon request.

(l) Child fatality review panels recognized by ODHS, upon request.

(m) A grand jury or court, as ordered.

(2) Any of the following individuals or nonpublic agencies with a need for information:

(a) A mandated reporter who makes a report of child abuse or neglect. The reporter shall be informed of the following:

(i) Whether the PCSA has initiated an investigation;

(ii) Whether the PCSA is continuing to investigate;

(iii) Whether the PCSA is otherwise involved with the child who is the subject of the report;

(iv) The general status of the health and safety of the child who is the subject of the report; and

(v) Whether the report has resulted in the filing of a complaint in juvenile court or of criminal charges in another court.

(b) Principals of the case, in accordance with rule 5101:2-34-32 of the Administrative Code, to inform them of:

(i) The allegation contained in the report, and

(ii) The disposition/resolution of the investigation/assessment.

(c) A non-custodial parent of the alleged child victim when the PCSA believes such sharing to be in the best interest of the child.

(d) A physician, for the diagnostic assessment of a child where there is reason to believe the child may be a victim of abuse or neglect.

(e) Private service providers, for diagnostic evaluations of and service provision to the alleged child victim and the family or the caretaker.

(f) The administrator of a nonpublic out-of-home care setting in which child abuse or neglect is alleged to have occurred.

(g) An individual, agency, or organization conducting research in the area of child welfare. The PCSA shall determine what information is appropriate to make available to the researcher. Prior to disseminating information to the

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Issue No. 11

In This Issue

Proposed rules and the agencies filing them may be found in the "Public Hearings on Proposed Rules" chart on page 2181. The following agencies have adopted rules this month; a summary of the changes appears following the agency name:

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5101:2-34-36 PCSA requirements for conducting out-of-home perpetrator investigations and alleged child victim assessments

(A) An out-of-home perpetrator report is defined as a report to the PCSA alleging a criminal act against a child of assault or sexual activity as defined under Chapter 2907. of the Revised Code when the alleged perpetrator:

- (1) Is not a member of the alleged child victim's family;
- (2) Has no sanctioned or continued access to the alleged child victim;
- (3) Has no relationship with the alleged child victim; and
- (4) Is not involved in daily or regular out-of-home care for the alleged child victim.

(B) When a PCSA receives a report alleging a criminal act against a child of assault or sexual activity involving an out-of-home perpetrator, the PCSA shall:

(1) Establish police jurisdiction and refer the report to the appropriate law enforcement authority within twenty-four hours of receipt of the report.

(2) Attempt a face-to-face or telephone contact within twenty-four hours of receipt of the report with a principal or collateral source to ensure that the child is safe and attempt a face-to-face contact with the alleged child victim as soon as possible.

(3) Should the PCSA not be able to have a face-to-face contact with the alleged child victim, the PCSA shall continue to attempt a face-to-face contact never less than every five working days until the child is seen or until the PCSA is required to make a case resolution pursuant to paragraph (R) of rule 5101:2-34-32 of the Administrative Code. All attempts shall be documented in the case record.

(C) The PCSA shall conduct a family risk assessment of all children residing in the home of the alleged perpetrator upon the request of law enforcement. The PCSA shall provide appropriate services to the children, if necessary.

(D) The PCSA shall notify the prosecuting attorney should there be any reason to believe the alleged perpetrator has not been investigated by law enforcement.

(E) At a minimum, the PCSA shall attempt face-to-face interviews with the alleged child victim's parents/caretakers pursuant to paragraph (G) of rule 5101:2-34-32 of the Administrative Code in order to:

(1) Assess the safety of the alleged child victim by determining the access of the alleged perpetrator to the alleged child victim;

(2) Assess the parents, caretakers or guardian's ability and willingness to protect the child by evaluating:

- (a) Caretaker's intellectual, physical or psychological impairment;
- (b) Parenting skills and knowledge;
- (c) Parental ability to cope with problems in the family;
- (d) Protection of the child; and
- (e) Frequency of acts or conditions to which children have been exposed.

(3) Assess the alleged child victim's:

- (a) Knowledge of incident;
- (b) Age;
- (c) Physical, intellectual, emotional development;
- (d) Self protection; and
- (e) Adequacy of supervision.

(F) At any time the PCSA determines the family of the alleged child victim is unable or unwilling to protect the child, a family risk assessment shall be completed pursuant to rule 5101:2-34-33 of the Administrative Code. The PCSA will assess and determine whether the family and/or child is in need of supportive services by the PCSA or the community.

(G) The PCSA shall complete the case resolution concerning the alleged child victim no later than thirty days after

receipt of the report (forty-five days when a component of the assessment cannot be completed within thirty days and the reasons are documented in the case record) pursuant to paragraph (R) of rule 5101:2-34-32 of the Administrative Code.

(H) Prior to completion of the case resolution, the PCSA shall contact law enforcement and document in the case record information regarding the status of their criminal investigation.

(I) The PCSA shall document in the case record the date, time and with whom the assessment began.

HISTORY: Eff. 6-1-97

RC 119.032 rule review date: 6-1-02

CROSS REFERENCES

RC 2151.421, Persons required to report injury or neglect; procedures on receipt of report

5101:2-34-37 PCSA requirements for completing the ODHS 1510, "Family Risk Assessment Model: Safety Plan for Children"

(A) The PCSA shall immediately implement an ODHS 1510, "Family Risk Assessment Model: Safety Plan for Children" when a family risk assessment shows imminent risk of harm to a child or to prevent future risk of harm to a child.

(B) At a minimum, the PCSA shall consider the following elements to determine the degree of intervention necessary to protect the child:

- (1) The degree and frequency of maltreatment;
- (2) The vulnerability of the child;
- (3) The child's role in the family;
- (4) The ability and willingness of the caretaker to protect the child; and
- (5) The accessibility of the perpetrator.

(C) When developing the ODHS 1510, the PCSA shall consider, at a minimum, the following:

- (1) Involvement of parents, extended family, and community resources;
- (2) Least restrictive and least disruptive strategies possible while securing the safety of the child; and
- (3) Methods of obtaining feedback from other responsible persons/agencies involved.

(D) The PCSA shall obtain signatures from all responsible persons indicating their willingness to be responsible for an action step identified on the ODHS 1510.

(E) The PCSA shall provide a copy of the ODHS 1510 to all responsible persons.

(F) The PCSA shall implement other safety measures when a responsible person is unwilling to sign the ODHS 1510.

(G) The PCSA may implement an action step with a verbal commitment when the responsible person is unavailable to sign the ODHS 1510. The verbal commitment shall be solidified with a signature within one day from when the verbal commitment was received. The PCSA shall document the date and time the verbal commitment was given by the responsible person.

(H) The PCSA shall maintain the ODHS 1510 in the case record.

HISTORY: Eff. 6-1-97

RC 119.032 rule review date: 6-1-02

CROSS REFERENCES

RC 2151.421, Persons required to report injury or neglect; procedures on receipt of report

Const. Art. I, § 16

Baldwin's Ohio Revised Code Annotated Currentness

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Article I. Bill of Rights (Refs & Annos)

➔O Const I Sec. 16 Redress for injury; due process

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

Const. Art. I, § 5

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
^ Article I, Bill of Rights (Refs & Annos)
➔ **O Const I Sec. 5 Right of trial by jury**

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

<< OH ST § 2744.02 >>

Sec. 2744.02. (A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or <<-in->> answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) <<-Political->> <<+Except as otherwise provided in section 3746.24 of the Revised Code, political+>> subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) <<-Political->> <<+Except as otherwise provided in section 3746.24 of the Revised Code, political+>> subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) <<-Political->> <<+Except as otherwise provided in section 3746.24 of the Revised Code, political+>> subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

<< OH ST § 2744.03 >>

Sec. 2744.03. (A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

- (1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.
 - (2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.
 - (3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.
 - (4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability <<-,->> resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of his sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2151.355 of the Revised Code, and if, at the time of his injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.
 - (5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources <<-,->> unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.
 - (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division <<+or section 3746.24 of the Revised Code,+>> the employee is immune from liability unless one of the following applies:
 - (a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;
 - (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
 - (c) Liability is expressly imposed upon the employee by a section of the Revised Code.
 - (7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state <<-,->> is entitled to any defense or immunity available at common law or established by the Revised Code.
- (B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

<< OH ST § 2151.421 >>

Sec. 2151.421. (A)(1)(a) No person described <<-listed->> in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine <<-or surgery->> as <<-defined->> <<+specified+>> in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; or a person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion.

(2) An attorney or a physician is not required to make a report pursuant to division (A)(1) of this section concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding, except that the client or patient is deemed to have waived any testimonial privilege under division (A) or (B) of section 2317.02 of the Revised Code with respect to that communication and the attorney or physician shall make a report pursuant to division (A)(1) of this section with respect to that communication, if all of the following apply:

(a) The client or patient, at the time of the communication, is either a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age.

(b) The attorney <<-of->> <<+or+>> physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(c) The attorney-client or physician-patient relationship does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(B) Anyone, who knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child, may report or cause reports to be made of that knowledge or suspicion to the public children services agency or to a municipal or county peace officer.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;

(2) The child's age and the nature and extent of the child's known or suspected injuries, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information that might be helpful in establishing the cause of the known or suspected injury, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect.

Any person, who is required by division (A) of this section to report known or suspected child abuse or child neglect, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D)(1) Upon the receipt of a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, the municipal or county peace officer who receives the

report shall refer the report to the appropriate public children services agency.

(2) On receipt of a report pursuant to this division or division (A) or (B) of this section, the public children services agency shall comply with section 2151.422 of the Revised Code.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 of the Revised Code.

(F)(1) Except as provided in section 2151.422 of the Revised Code, the public children services agency shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect and of a known or suspected threat of child abuse or child neglect that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to a central registry which the state department of human services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The public children services agency shall submit a report of its investigation, in writing<<+,+>> to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G)(1)<<+(a)+>> Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division (B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding. <<-Notwithstanding->>

<<+(b) Notwithstanding+>> section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(H)(1) Except as provided in divisions (H)(4), (M), and (N) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

(I) Any report that is required by this section shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 of the Revised Code.

(J)(1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

(a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;

(b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;

(c) The county peace officer;

(d) All chief municipal peace officers within the county;

(e) Other law enforcement officers handling child abuse and neglect cases in the county;

(f) The prosecuting attorney of the county; <<-public->>

(g) If the public children services agency is not the county department of human services <<-agency->>, the county department of human services.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and non-emergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(K)(1) Except as provided in division (K)(4) of this section <<+, +>> a person who is required to make a report pursuant to division (A) of this section may make a reasonable number of requests of the public children services agency that receives or is referred the report to be provided with the following information:

(a) Whether the agency has initiated an investigation of the report;

(b) Whether the agency is continuing to investigate the report;

(c) Whether the agency is otherwise involved with the child who is the subject of the report;

(d) The general status of the health and safety of the child who is the subject of the report;

(e) Whether the report has resulted in the filing of a complaint in juvenile court or of criminal charges in another court.

(2) A person may request the information specified in division (K)(1) of this section only if, at the time the report is made, the person's name, address, and telephone number are provided to the person who receives the report.

When a municipal or county peace officer or employee of a public children services agency receives a report pursuant to division (A) or (B) of this section the recipient of the report shall inform the

person of the right to request the information described in division (K)(1) of this section. The recipient of the report shall include in the initial child abuse or child neglect report that the person making the report was so informed and, if provided at the time of the making of the report, shall include the person's name, address, and telephone number in the report.

Each request is subject to verification of the identity of the person making the report. If that person's identity is verified, the agency shall provide the person with the information described in division (K)(1) of this section a reasonable number of times, except that the agency shall not disclose any confidential information regarding the child who is the subject of the report other than the information described in those divisions.

(3) A request made pursuant to division (K)(1) of this section is not a substitute for any report required to be made pursuant to division (A) of this section.

(4) If an agency other than the agency that received or was referred the report is conducting the investigation of the report pursuant to section 2151.422 of the Revised Code, the agency conducting the investigation shall comply with the requirements of division (K) <<+of this section+>>.

(L) The department of human services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(M) No later than the end of the day following the day on which a public children services agency receives a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall provide written notice of the allegations contained in and the person named as the alleged perpetrator in the report to the administrator, director, or other chief administrative officer of the out-of-home care entity that is the subject of the report unless the administrator, director, or other chief administrative officer is named as an alleged perpetrator in the report. If the administrator, director, or other chief administrative officer of an out-of-home care entity is named as an alleged perpetrator in a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved the out-of-home care entity, the agency shall provide the written notice to the owner or governing board of the out-of-home care entity that is the subject of the report. The agency shall not provide witness statements or police or other investigative reports.

(N) No later than three days after the day on which a public children services agency that conducted the investigation as determined pursuant to section 2151.422 of the Revised Code makes a disposition of an investigation involving a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall send written notice of the disposition of the investigation to the administrator, director, or other chief administrative officer and the owner or governing board of the out-of-home care entity. The agency shall not provide witness statements or police or other investigative reports.

<< OH ST § 2919.22 >>

Sec. 2919.22. (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 mentally or physically handicapped child 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 defect 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 mentally or physically handicapped child 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.

(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 section 4511.191 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 alcohol and a drug of abuse or for operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine.

(2) As used in division (C)(1) of this section, "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, <<- clergyman->> <<+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:

- (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.
- (3) If the offender violates division (B)(2), (3), or (4) 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.
- (4) If the offender violates division (B)(5) of this section, endangering children is a felony of the second degree.
- (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<<- , 2903.07,->> or 2903.08 of the Revised Code, <<+section 2903.07 of the Revised Code as it existed prior to the effective date of this amendment,+>> 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, the court also may impose upon the offender one or both of the following sanctions:
- (i) It may require the offender, as part of the offender's sentence and in the manner described in division (F) of this section, to perform not more than two hundred hours of supervised community service work under the authority of any agency, political subdivision, or charitable organization of the type described in division (F)(1) of section 2951.02 of the Revised Code, provided that the court shall not require the offender to perform supervised community service work under this division unless the offender agrees to perform the supervised community service work.
- (ii) It may suspend the driver's or commercial driver's license or permit or nonresident operating privilege of the offender for up to ninety days, in addition to any suspension or revocation of the offender's driver's or commercial driver's license or permit or nonresident operating privilege under Chapter 4506., 4507., 4509., or 4511. of the Revised Code or under any other provision of law.
- (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 4511.99 of the Revised Code, for that violation of division (A) of section 4511.19 of the Revised Code and also shall be subject to all other sanctions that are required or authorized by any provision of law for that violation of division (A) of section 4511.19 of the Revised Code.
- (F)(1)(a) If a court, pursuant to division (E)(5)(d)(i) of this section, requires an offender to perform 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 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 (F)(1)(a) to (c) of section 2951.02 of the Revised Code.

(iii) The community service work shall be supervised in the manner described in division (F)(1)(d) 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 this division and division (E)(5)(d)(i) 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) Divisions (E)(5)(d)(i) and (F)(1) of this section do not limit or affect the authority of the court to suspend the sentence imposed upon a misdemeanor offender and place the offender on probation or otherwise suspend the sentence pursuant to sections 2929.51 and 2951.02 of the Revised Code, to require the misdemeanor offender, as a condition of the offender's probation or of otherwise suspending the offender's sentence, to perform supervised community service work in accordance with division (F) of section 2951.02 of the Revised Code, or to place a felony offender under a community control sanction.

(G) 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)(ii) of this section, the period of the suspension shall be consecutive to, and commence after, the period of suspension or revocation of the offender's driver's or commercial driver's license or permit or nonresident operating privilege that is imposed under Chapter 4506., 4507., 4509., 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)(ii) 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.

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

<<+(a) Division+>> (C) of this section<<-, division->><<+;+>>

<<+(b) Division+>> (A) or (B) of section 4511.19 of the Revised Code<<-, a->><<+;+>>

<<+(c) A+>> municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse<<-, a->><<+;+>>

<<+(d) A+>> municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine<<-, section->><<+;+>>

<<+(e) 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<<-, ->> <<+;+>>

(f) <<+Division (A)(1) of section 2903.06 or division (A)(1) of section 2903.08 of the Revised Code or a municipal ordinance that is substantially similar to either of those divisions;+>>

<<+(g) Division (A) 2), (3), or (4) of+>> section 2903.06, <<-2903.07, or->> <<+division (A)(2) of section+>> 2903.08<<+, or former section 2903.07+>> of the Revised Code<<+,+>> or a municipal ordinance that is substantially similar to <<+any of those divisions or that former+>> section <<-2903.07 of the Revised Code->><<+,+>> in a case in which the jury or judge found that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse<<-, or a->><<+;+>>

<<+(h) A+>> statute of the United States or of any other state or a municipal ordinance of a municipal corporation located in any other state that is substantially similar to division (A) or (B) of section 4511.19 of the Revised Code<<-, the offender is not entitled to request, and the court shall not grant to the offender, occupational driving privileges under this division. Any->><<+;+>>

(3) <<+Any+>> other offender <<+who is not described in division (G)(2) of this section and+>> whose license, permit, or nonresident operating privilege has been suspended under division (E)(5)(d)(ii) of this section may file with the sentencing court a petition alleging that the suspension would seriously affect the offender's ability to continue employment. Upon satisfactory proof that there is reasonable cause to believe that the suspension would seriously affect the offender's ability to continue employment, the court may grant the offender occupational driving privileges during the period during which the suspension otherwise would be imposed, except that the court shall not grant occupational driving privileges for employment as a driver of commercial motor vehicles to any person who is disqualified from operating a commercial motor vehicle under section 2301.374 or 4506.16 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 4511.99 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, "community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

THE STATE OF OHIO

VOLUME CXXX

LEGISLATIVE ACTS

(EXCEPTING APPROPRIATION ACTS)

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

ONE HUNDRED AND FIFTH GENERAL ASSEMBLY
OF OHIO

At Its Regular Session

JANUARY 7, 1963, TO DECEMBER 10, 1963, INCLUSIVE

Issued by

TED W. BROWN

Secretary of State



Columbus Blank Book Company
Columbus 7, Ohio
1963

Bound by the State of Ohio

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(Amended in Amended House Bill No. 879)

When jurisdiction of court ceases.

Sec. 2151.38. When a child is committed to the *** youth commission, or to the Ohio state reformatory, or to the permanent custody of the department of public welfare, or to the division of social administration in said department, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, the order shall state that such commitment is permanent and the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of commitment; except that if the division or any county department, board, or certified organization having such permanent custody makes application to the court for the termination of such custody, the court upon such application, after notice and hearing and for good cause shown, may terminate such custody at any time prior to the child becoming of age. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for such period as designated by the court in its order, or until terminated or modified by the court, or until a child attains the age of twenty-one years. (Amended in Amended Substitute House Bill No. 299)

Prohibition against neglecting or mistreating child.

Sec. 2151.42. No person charged with the care, support, maintenance, or education of a legitimate or illegitimate child or no person being the father of an illegitimate child under eighteen years of age shall fail to care for, support, maintain, or educate such child, or shall abandon such child, or shall beat, neglect, injure, or otherwise ill-treat such child, or cause or allow him to engage in common begging. No person charged with the care, support, maintenance, or education of a legitimate or illegitimate child under twenty-one years of age who is physically or mentally handicapped shall fail to care for, support, maintain, or educate such child. Such neglect, nonsupport, or abandonment shall be deemed to have been committed in the county in which such child may be at the time of such neglect, nonsupport, or abandonment. Each day of such failure, neglect, or refusal shall constitute a separate offense. (Amended in Substitute House Bill No. 89)

Physician's report of injury or neglect.

Sec. 2151.421. Any physician, including a hospital intern or

resident physician, whose examination of any child less than eighteen years of age discloses evidence of injury or physical neglect not explained by the available medical history as being accidental in nature, shall immediately report or cause reports to be made of such information to a municipal or county peace officer. Such reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report. Such reports shall contain:

(A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;

(B) The child's age and the nature and extent of the child's injuries or physical neglect, including any evidence of previous injuries or physical neglect;

(C) Any other information that the physician believes might be helpful in establishing the cause of the injury or physical neglect.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

Anyone participating in the making of such reports, or anyone participating in a judicial proceeding resulting from such reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries or physical neglect, or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section. (*Enacted in Amended House Bill No. 765*)

Sec. 2151.55. Existing section repealed in Amended Substitute House Bill No. 299.

Single-county and joint-county juvenile facilities.

Sec. 2151.65. Upon the advice and recommendation of the juvenile judge, the board of county commissioners may provide by purchase, lease, construction, or otherwise a school, forestry camp, or other facility or facilities where delinquent, dependent, or neglected children or juvenile traffic offenders may be held for training, treatment, and rehabilitation. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties may form themselves into a joint board and proceed to organize a district for the establishment and support of a school,

THE STATE OF OHIO

VOLUME CXXXI

LEGISLATIVE ACTS

(EXCEPTING APPROPRIATION ACTS)

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

ONE HUNDRED AND SIXTH GENERAL ASSEMBLY
OF OHIO

At Its Regular Session

JANUARY 4, 1965, TO SEPTEMBER 1, 1965, INCLUSIVE

Issued by

TED W. BROWN

Secretary of State



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1965

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Physician or physicians's agent's report of injury or neglect.

Sec. 2151.421. Any physician, including a hospital intern or resident physician, *** *examining, attending, or treating a child less than eighteen years of age, or any registered nurse, visiting nurse, school teacher, or social worker, acting in his official capacity, having reason to believe that a child less than eighteen years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child,* shall immediately report or cause reports to be made of such information to a municipal or county peace officer. Such reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report. Such reports shall contain:

(A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;

(B) The child's age and the nature and extent of the child's injuries or physical neglect, including any evidence of previous injuries or physical neglect;

(C) Any other information *** *which* might be helpful in establishing the cause of the injury or physical neglect.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

Upon the receipt of a report concerning the possible non-accidental infliction of a physical injury upon a child, the municipal or county peace officer shall refer such report to the appropriate county department of welfare or child welfare board in charge of children's services.

No child upon whom a report is made shall be removed from his parents, stepparents, guardian, or other persons having custody by a municipal or county peace officer without consultation with the county department of welfare unless, in the judgment of the reporting physician and the officer, immediate removal is considered essential to protect the child from further injury or abuse.

The county department of welfare or child welfare board shall investigate each report referred to it by a law enforcement officer to determine the circumstances surrounding the injury or injuries, the cause thereof, and the person or persons responsible. Such investigation shall be made in cooperation with the law enforcement agency which shall have the primary responsibility for such investigations. The department or board shall submit a report of its investigation, in writing, to the law enforcement agency and

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shall provide such social services as are necessary to protect the child and preserve the family.

The county department of welfare or child welfare board shall make such recommendations to the county prosecutor or city attorney as it deems necessary to protect such children as are brought to its attention.

Anyone participating in the making of such reports, or anyone participating in a judicial proceeding resulting from such reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries or physical neglect, or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

Nothing in this section shall be construed to define as a physically neglected child, any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to such child. (Amended in Amended House Bill No. 218)

State assistance for juvenile facilities.

Sec. 2151.651. The board of county commissioners of a county which, either separately or as part of a district, is planning to establish a school, forestry camp, or other facility under section 2151.65 of the Revised Code, to be used exclusively for the rehabilitation of male children between the ages of ten to eighteen years or female children between the ages of twelve to eighteen years, other than psychotic or mentally retarded children, who are designated delinquent by order of a juvenile court as the result of having violated any law of this state, or the United States, or any ordinance of a subdivision of this state, may make application to the youth commission, created under division (B) of section 5139.01 of the Revised Code, for financial assistance in defraying the county's share of the cost of acquisition or construction of such school, camp, or other facility, as provided in section 5139.27 of the Revised Code. Such application shall be made on forms prescribed and furnished by the youth commission. (Enacted in Amended Substitute House Bill No. 943)

State assistance for operation and maintenance.

Sec. 2151.652. The board of county commissioners of a county or the board of trustees of a district maintaining a school,

JOURNAL

OF THE



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HOUSE OF
REPRESENTATIVES

OF THE

ONE HUNDRED SIXTH
GENERAL ASSEMBLY
OF THE STATE OF OHIO

REGULAR SESSION

Monday, January 4, 1965 to
Wednesday, September 1, 1965, incl.

VOLUME CXXXI



The F. J. Heer Printing Company
Columbus, Ohio 43216
1965

FEBRUARY 17, 1965

Columbus, Ohio

1965, 1:30 o'clock p.m.

Mr. Kerns-Elliott was taken

amended—yeas 125, nays 2, as

Those who voted in the affirmative were: Representatives

- Reilly
- Riffe
- Riley
- Roderer
- Romer
- Russo
- Rychener
- Scherer
- Shawan
- Shoemaker
- Slagle
- Stocksdale
- Stokes
- Strader
- Swanbeck
- Sweeney
- Taber
- Tablack
- Thomas
- Thurston
- Turner
- Valiquette
- Weis
- Weisenborn
- Weissert
- Welker
- Wetzel
- White
- Wilhelm
- Wilson
- Wiseman
- Woodard
- Wylie—125.

2. voted in the negative—

Am. H. B. No. 55—Mr. Slagle was taken up for consideration and read the third time.

The question being, "Shall the bill pass?"

The yeas and nays were taken and resulted—yeas 127, nays none, as follows:

Those who voted in the affirmative were: Representatives

Albritton	Evans	Katterheinrich	Riffe
Allmon	of Coshocton	Kerns	Riley
Ankeney	Evans	Knight	Roderer
Applegate	of Guernsey	Kohnen	Romer
Armstrong	Feighan	Krupansky	Russo
Aronoff	Fisher	Kruse	Rychener
Banks	Frost	Kurfess	Scherer
Beckley	Fuerst	Lampson	Shawan
Belt	Games	Lancione	Shoemaker
Bevens	Gilliland	Levitt	Slagle
Broughton	Gindlesberger	Locker	Stocksdale
Brown	Goddard	Long	Stokes
Cadwallader	Gorman	Lusk	Strader
Calabrese	of Cuyahoga	Mackenzie	Swanbeck
Carlier	Gorman	Malone	Sweeney
Carney	of Hamilton	Martin	Taber
Carpenter	Hadley	McDonald	Tablack
Cassel	Hall	McElree	Thomas
Celebrezze	Heft	McGowan	Thurston
Christiansen	Henderson	McIlwain	Turner
Cole	Herbert	McNamara	Valiquette
Collins	Hiestand	Metcalf	Weis
Cooper	Hildebrand	Mooney	Weisenborn
Creasy	Hinig	Netzley	Weissert
Dannley	Holmes	Nixon	Welker
Davidson	Holzemer	Nye	Wetzel
DeChant	Horvath	O'Shaughnessy	White
Dennison	Huffer	Ostrovsky	Wilhelm
Dombrowski	James	Panno	Wilson
Donnelly	Jeffery	Petrash	Wiseman
Donovan	Jones	Pottenger	Woodard
Drake	Jump	Regula	Wylie—127.
Elliott	Kainrad	Reilly	

The bill passed.

The title was agreed to.

The following bills were introduced and read the first time:

H. B. No. 213—Mr. James.

To amend sections 5739.21, 5739.22, and 5739.23 of the Revised Code relative to the allocations to and distribution of the local government fund.

H. B. No. 214—Messrs. Kerns-Kruse-Katterheinrich-Cassel.

To amend section 3769.082 of the Revised Code to exclude non Ohio horses from participation in Ohio colt stakes.

H. B. No. 215—Messrs. Kerns-Riley-Woodard.

To amend sections 4507.02 and 4507.05 of the Revised Code, relative to temporary instruction permits and surrender of out-of-state license prior to receiving an Ohio operator's or chauffeur's license.

H. B. No. 216—Mr. Reilly.

To amend section 1901.30 of the Revised Code, relative to appeals from the municipal court.

H. B. No. 217—Mr. Reilly.

To amend section 1901.10 of the Revised Code to increase the compensation for each judge while holding court outside his territory.

H. B. No. 218—Mrs. MacKenzie-Messrs. Allmon-Gorman of Hamilton.

To amend section 2151.421 of the Revised Code to require municipal or county peace officers who receive a report of possible child abuse from a physician to refer such report to the appropriate county department of welfare.

H. B. No. 219—Messrs. Hadley-Rychener-Huffer-Long-Christian-sen.

To amend section 4103.01 of the Revised Code relative to boiler inspection.

H. B. No. 220—Mr. McElree.

To amend section 5735.14 of the Revised Code relative to applications for the refund of motor vehicle fuel tax.

H. B. No. 221—Mr. Carney.

To amend section 4115.02 of the Revised Code relative to the maximum number of hours firemen in the fire department of a municipality shall be required to work.

H. B. No. 222—Messrs. Calabrese, Jr.-Ostrovsky-Russo.

To amend section 5121.04 of the Revised Code to change the time a person must be a patient, in an institution controlled by the department of mental hygiene, before his relatives are relieved from support charges.

H. B. No. 223—Mr. Shawan.

To amend section 145.58 of the Revised Code, relative to the public employees retirement system.

H. B. No. 224—Mr. Shawan.

To amend section 145.33 of the Revised Code, relative to the public employees retirement system.

H. B. No. 225—Mr. Shawan.

To amend sections 145.01, 145.11, 145.20, 145.33, 145.34, 145.381, 145.45, 145.47 and 145.48, and to enact sections 145.29 and 145.36, and to repeal sections 145.29 and 145.36 of the Revised Code, relative to the public employees retirement system.

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l Code to provide a salary
the criminally insane.

Mr. Applegate reports for the Reference committee, recommending that the following House Resolutions and House bills be read the second time, printed and referred to the following committees for consideration, unless otherwise noted:

H. B. No. 210—Messrs. Holmes-Shoemaker-Powell.
To the committee on Education.

H. B. No. 255—Messrs. Kohnen-Woodard-Romer.
To the committee on Education.

H. B. No. 227—Messrs. Armstrong-Cassel-Kerns-Hiestand.
To the committee on Elections and Federal Relations.

H. B. No. 213—Mr. James.
To the committee on Finance.

H. B. No. 230—Messrs. Lusk-Wilhelm-Kruse-Hadley-Welker.
To the committee on Government Operations.

H. B. No. 237—Mr. Wylie.
To the committee on Government Operations.

H. B. No. 215—Messrs. Kerns-Riley-Woodard.
To the committee on Highways.

H. B. No. 219—Messrs. Hadley-Rychener-Huffer-Long-Christian-
sen.
To the committee on Industry and Labor.

H. B. No. 223—Mr. Shawan.
To the committee on Insurance.

H. B. No. 224—Mr. Shawan.
To the committee on Insurance.

H. B. No. 225—Mr. Shawan.
To the committee on Insurance.

H. B. No. 226—Mr. Calabrese, Jr.
To the committee on Insurance.

H. B. No. 235—Mr. McIlwain.
To the committee on Insurance.

H. B. No. 56—Messrs. Taber-Games-Drake.
To the committee on Interstate Cooperation. (Previously printed)

H. B. No. 216—Mr. Reilly.
To the committee on Judiciary.

H. B. No. 218—Mrs. MacKenzie - Messrs. Allmon - Gorman of Hamilton.
To the committee on Judiciary.

H. B. No. 231—Mr. Nye.
To the committee on Judiciary.

H. B. No. 234—Messrs. Armstrong-Cooper-Cassel-Knight-Weisert-Brown-Belt.
To the committee on Mines and Natural Resources.

H. R. No. 31—Mmes. Weisenborn-Swanbeck-Donnelly-Dennison-MacKenzie-Misses McGowan-Valiquette.
To the committee on Taxation.

H. J. R. No. 19—Messrs. Frost-Shoemaker-Mrs. Swanbeck- Miss Valiquette.
To the committee on Education.

RALPH D. COLE, JR.
HARRY V. JUMP
HOWARD A. KNIGHT
WALTER E. POWELL
CHALMERS P. WYLIE

DOUGLAS APPLGATE
WRAY BEVENS
WILLIAM J. DONOVAN
MICHAEL A. SWEENEY

On motion of Mr. Cole the House and constitutional rules requiring bills to be read on three legislative days were suspended as to the second reading of all bills contained in the report of the committee on Reference.

The report was agreed to, House bills and resolutions ordered printed unless otherwise noted, and all bills and resolutions referred as recommended.

Mr. Drake submitted the following report:

The standing committee on Rules to which was referred **S. Con. R. No. 6**—Mr. Gray having had the same under consideration, reports it back with the following amendments, and recommends its adoption when so amended:

Mr. Reckman moved to amend as follows:

In the title delete "weekly".

In line 4, after "session" insert "of"; after "each" insert "alternate".

At the end of line 4, delete the last word "weekly".

berger-White-Cole.
Relations.

MERS P. WYLIE
LAS APPLGATE
7 BEVENS
IAM J. DONOVAN
AEL A. SWEENEY

stitutional rules requiring
suspended as to the second
committee on Reference.
resolutions ordered printed
itions referred as recom-

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its passage.

ION M. SCHERER
H. HUFFER, JR.
D WEISSERT
H D. COLE, JR.
MOND E. WOODARD
S. A. MOONEY
RENCE W. CARLIER
MERS P. WYLIE

read the third time in its

nt Operations to which
d having had the same
ollowing amendments, and

mployee".

"; delete "municipality".

Mr. Gorman of Cuyahoga moved to amend as follows:

In line 54, delete "ten" and insert "*** thirty".

JAMES P. CELEBREZZE	ROY H. HUFFER, JR.
JOSEPH F. HIESTAND	DAVID WEISSERT
ROBERT L. WILHELM	RALPH D. COLE, JR.
SCOTT BELT	RAYMOND E. WOODARD
FRANK J. GORMAN	CHARLES A. MOONEY
CHAS. E. FRY	LAWRENCE W. CARLIER
BERNICE K. MacKENZIE	CHALMERS P. WYLIE
GORDON M. SCHERER	

The report was agreed to.

The bill was ordered to be engrossed and read the third time in its regular order.

Mr. Pokorny submitted the following report:

The standing committee on Government Operations to which was referred **H. B. No. 117**—Messrs. Hall-Russo having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Mr. Mooney moved to amend the title as follows:

Add the name "HIESTAND".

In the third line of the title delete "monthly" and insert "fifty times each year".

Mr. Mooney moved to amend as follows:

In line 4, delete "twelve" and insert "fifty".

In line 6, delete ", commencing, respectively, on the first" and insert "****".

In line 7, delete "Monday of **2** each month".

JAMES P. CELEBREZZE	GILBERT THURSTON
JOSEPH F. HIESTAND	GORDON M. SCHERER
ROBERT L. WILHELM	RAYMOND E. WOODARD
SCOTT BELT	CHAS. A. MOONEY
FRANK J. GORMAN	FRANK R. POKORNY
CHAS. E. FRY	CHALMERS P. WYLIE
BERNICE K. MacKENZIE	

The report was agreed to.

The bill was ordered to be engrossed and read the third time in its regular order.

Mr. McDonald submitted the following report:

The standing committee on Judiciary to which was referred **H. B. No. 218**—Mrs. MacKenzie-Messrs. Allmon-Gorman of Hamilton having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Mrs. MacKenzie moved to amend as follows:

In the line above the title, delete "of Hamilton".

In line 27, delete "it shall be".

In line 28, delete "*the duty of*"; following "*officer*" delete "*to*" and insert "*shall*".

In line 29, after "*welfare*" insert "*or child welfare board in charge of children's services*".

In line 37, after "*welfare*" insert "*or child welfare board*".

In line 40, after "*department*" insert "*or board*".

In line 44, after "*welfare*" insert "*or child welfare board*".

In line 46, after "*prosecutor*" insert "*or city attorney*".

JOHN C. McDONALD
WILLIAM T. ALLMON
ROBERT H. GORMAN
GORDON M. SCHERER
H. DENNIS DANNLEY
JOHN F. CORRIGAN
ROBERT E. LEVITT
W. R. CADWALLADER

JOHN L. BECKLEY
LAWRENCE W. CARLIER
SAMUEL M. JONES, III
BERNICE K. MacKENZIE
THOMAS M. HERBERT
ROY J. GILLILAND
EDMUND G. JAMES

The report was agreed to.

The bill was ordered to be engrossed and read the third time in its regular order.

Mr. McDonald submitted the following report:

The standing committee on Judiciary to which was referred **H. B. No. 229**—Messrs. Calabrese, Jr.-Gorman of Cuyahoga having had the same under consideration, reports it back and recommends that it be indefinitely postponed.

WILLIAM T. ALLMON
ROBERT H. GORMAN
GORDON M. SCHERER
H. DENNIS DANNLEY
JOHN F. CORRIGAN
ROBERT E. LEVITT
W. R. CADWALLADER

JOHN L. BECKLEY
THOMAS M. HERBERT
LAWRENCE W. CARLIER
BERNICE K. MacKENZIE
JOHN C. McDONALD
ROY J. GILLILAND
EDMUND G. JAMES

The report was agreed to.

The bill was indefinitely postponed.

Mr. McDonald submitted the following report:

The standing committee on Judiciary to which was referred **H. B. No. 242**—Messrs. Sweeney-Gilliland-Mrs. Donnelly having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Mr. Corrigan moved to amend as follows:

In line 15, delete "*provided that*".

In line 23, delete "*Arbitration*" and insert "*arbitration*".

In line 24, delete "*Association*" and insert "*association*".

In line 29, delete "*in the following sentence*." and insert "*as follows*."; delete the "*The*" and insert "*the*".

Resolved, That the Clerk of the House of Representatives transmit a duly authenticated copy of this Resolution to his widow, Mrs. Jess C. Dempster, his sisters, Mrs. Roy Wells and Mrs. Raymond Dickinson, to the mayor of Uhrichsville, and The Evening Chronicle of Uhrichsville-Dennison, Ohio.

The question being, "Shall the resolution be adopted?"

The resolution was adopted.

On motion of Mr. Jump the House adjourned until Wednesday, March 31, 1965 at 1:30 o'clock p.m.

Attest:

CARL GUESS,
Clerk.

THIRTY-NINTH DAY

Hall of the House of Representatives, Columbus, Ohio

Wednesday, March 31, 1965, 1:30 o'clock p.m.

The House met pursuant to adjournment.

Prayer was offered by the Reverend Terry Smith.

The journal of yesterday was read and approved.

Am. H. B. No. 218—Mrs. MacKenzie-Messrs. Allmon-Gorman of Hamilton was taken up for consideration and read the third time.

The question being, "Shall the bill pass?"

The yeas and nays were taken and resulted—yeas 131, nays none, as follows:

Those who voted in the affirmative were: Representatives

Albritton	Dannley	Gorman	Kruse
Allmon	Davidson	of Hamilton	Kurfess
Ankeney	DeChant	Hadley	Lampson
Applegate	Dennison	Hall	Lancione
Armstrong	Dombrowski	Heft	Landes
Aronoff	Donnelly	Henderson	Levey
Banks	Donovan	Herbert	Levitt
Beckley	Drake	Hiestand	Locker
Belt	Elliott	Hildebrand	Long
Bevens	Evans	Hinig	Lusk
Broughton	of Coshocton	Holmes	MacKeuzie
Brown	Evans	Holzemer	Malone
Cadwallader	of Guernsey	Horvath	Martin
Calabrese	Feighan	Huffer	McDonald
Carlier	Fisher	James	McElree
Carney	Frost	Jeffery	McGowan
Carpenter	Fry	Jones	McIlwain
Cassel	Fuerst	Jump	McNamara
Celebrezze	Games	Kainrad	Metcalf
Christiansen	Gilliland	Katterheinrich	Mooney
Cole	Gindlesberger	Kerns	Netzley
Collins	Goddard	Kilpatrick	Nixon
Cooper	Gorman	Knight	Nye
Corrigan	of Cuyahoga	Kolmen	O'Shaughnessy
Creasy		Krupansky	Ostrovsky

MARCH 31, 1965

Representatives transmit a
his widow, Mrs. Jess C.
s. Raymond Dickinson, to
Chronicle of Uhrichville-

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CARL GUESS,
Clerk.

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Columbus, Ohio

965, 1:30 o'clock p.m.

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McGowan
McIlwain
McNamara
Metcalfe
Mooney
Netzley
Nixon
Nye
O'Shaughnessy
Ostrofsky

ich

Those who voted in the affirmative were: Representatives—Concluded

Panno	Roderer	Strader	Weis
Petrash	Romer	Swanbeck	Weissert
Pokorny	Russo	Sweeny	Weiker
Pottenger	Rychener	Taber	Wetzel
Powell	Scherer	Tablack	White
Reckman	Shawan	Thomas	Wilhelm
Regula	Shoemaker	Thurston	Wilson
Riffe	Slagle	Turner	Wiseman
Riley	Stocksdale	Valiquette	Woodard—131.

The bill passed.

The title was agreed to.

H. B. No. 265—Messrs. Fry-Thurston was taken up for con-
sideration and read the third time.

The question being, "Shall the bill pass?"

Mr. Fry moved to amend as follows:

In the title, do not capitalize "Export-Import Bank".

In line 29, delete "percent" and insert "per cent".

In line 43, insert a comma after "Code".

In line 50, insert a comma after "person".

In line 66, do not capitalize "Export-Import Bank".

In line 68, do not italicize the semicolon; insert an italicized comma
after "1945" but before the quotation marks.

In line 79, delete "banks'" and insert "bankers'".

In line 96, delete the semicolon and insert "****".

In line 99, delete "copartnership" and insert "**** copartnership".

In line 113, delete "percent" and insert "per cent".

The motion was agreed to and the bill so amended.

The question being, "Shall the bill as amended pass?"

The yeas and nays were taken and resulted—yeas 129, nays none, as
follows:

Those who voted in the affirmative were: Representatives

Albritton	Cole	Frost	Holzemer
Allmon	Collins	Fry	Horvath
Ankeney	Cooper	Fuerst	Huffer
Applegate	Corrigan	Games	James
Armstrong	Creasy	Gilliland	Jeffery
Aronoff	Dannley	Gindlesberger	Jones
Banks	Davidson	Goddard	Jump
Beckley	DeChant	Gorman	Kainrad
Belt	Dennison	of Cuyahoga	Katterheinrich
Bevens	Dombrowski	Gorman	Kerns
Broughton	Donnelly	of Hamilton	Knight
Brown	Donovan	Hadley	Kohnen
Cadwallader	Drake	Hall	Krupansky
Calabrese	Elliott	Heft	Kruse
Carlier	Evans	Henderson	Kurfess
Carney	of Coshocton	Herbert	Lampson
Carpenter	Evans	Hiestand	Lancione
Cassel	of Guernsey	Hildebrand	Levey
Celebrezze	Feighan	Hinig	Levitt
Christiansen	Fisher	Holmes	Locker

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1 Am. Sub. S. B. No.

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of expenses incurred
official examinations.

Am. H. B. No. 78--Messrs. Wylie-Collins-Novak-Sullivan-Garrigan-Stockdale.

To amend section 5503.21 of the Revised Code to increase the number of driver's license examiners from one hundred fifty to one hundred sixty.

Attest:

THOS. E. BATEMAN,
Clerk.

MESSAGE FROM THE SENATE

Mr. Speaker:

I am directed to inform the House of Representatives that the Senate has concurred in the passage of the following bill:

Am. H. B. No. 218--Mrs. MacKenzie-et al.

To amend section 2151.421 of the Revised Code to require municipal or county peace officers who receive a report of possible child abuse from a physician to refer such report to the appropriate county department of welfare.

With the following amendments in which the concurrence of the House is requested:

In line 5, strike out "whose examination of any child less than" and insert "****".

Strike out lines 6 and 7.

In line 8, strike out "dental in nature" and insert "examining, attending, or treating a child less than eighteen years of age, or any registered nurse, visiting nurse, school teacher, or social worker, acting in his official capacity, having reason to believe that a child less than eighteen years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child".

In line 18, strike out "that the physician believes" and insert "**** which".

In line 40, strike out "The department or board shall ad-" and insert "Such investigation shall be made in cooperation with the law enforcement agency which shall have the primary responsibility for such investigations. The department or board shall submit a report of its investigation, in writing, to the law enforcement agency".

Strike out line 41.

In line 42, strike out "gation".

In line 44, strike out "In the event that the" and insert "The"; strike out "determines".

Strike out lines 45 and 46, and insert "shall make such recommendations to the county prosecutor or city attorney as it deems necessary to protect such children as are brought to its attention".

Between lines 55 and 56, insert "Nothing in this section shall be construed to define as a physically neglected child, any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to such child".

Attest:

THOS. E. BATEMAN,
Clerk.

The Senate amendments were laid over under the rule.

Am. S. B. No. 340—Messrs. Sullivan-Shaw-Gorman of Cuyahoga-Wiseman.

Am. S. B. No. 352—Messrs. Garrigan-Matia-Regula-Heft-Cooper.

Am. S. J. R. No. 21—Mr. Hoffman.

The Senate amendments to **Am. H. B. No. 218**—Mrs. MacKenzie et al. were taken up for consideration.

The question being, "Shall the Senate amendments be concurred in?"

The yeas and nays were taken, and resulted—yeas 120, nays none, as follows:

Those who voted in the affirmative were: Representatives

Aibritton	Elliott	Kainrad	Reckman
Allmon	Evans	Katterheinrich	Reilly
Ankeney	of Coshocton	Kerns	Riffe
Applegate	Fisher	Knight	Roderer
Aronoff	Frost	Kohnen	Romer
Banks	Fry	Krupansky	Rychener
Beckley	Fuerst	Kruse	Scherer
Belt	Games	Kurfess	Shoemaker
Bevens	Gilliland	Lampson	Slagle
Broughton	Gindlesberger	Lancione	Stocksdale
Brown	Goddard	Levitt	Stokes
Cadwallader	Gorman	Locker	Strader
Calabrese	of Cuyahoga	Long	Swanbeck
Carlier	Gorman	Lusk	Sweeney
Carney	of Hamilton	MacKenzie	Taber
Carpenter	Hadley	Malone	Tablack
Cassel	Hall	Martin	Thomas
Celebrezze	Heft	McDonald	Thurston
Christiansen	Henderson	McElree	Turner
Cole	Herbert	McGowan	Valiquette
Collins	Hiestand	McIlwain	Weis
Cooper	Hildebrand	Metcalf	Weissert
Corrigan	Hinig	Mooney	Welker
Creasy	Holmes	Netzley	Wetzel
Dannley	Holzemer	Nye	White
Davidson	Horvath	O'Shaughnessy	Wilhelm
DeChant	Huffer	Ostrovsky	Wilson
Dombrowski	James	Panno	Wiseman
Donnelly	Jeffery	Pierson	Woodard
Donovan	Jones	Pokorny	Wylie--120.
Drake	Jump	Pottenger	

The Senate amendments were concurred in.

The Senate amendments to **Am. H. B. No. 297**—Messrs. Holmes-Knight-Garrigan were taken up for consideration.

The question being, "Shall the Senate amendments be concurred in?"

The yeas and nays were taken, and resulted—yeas 121, nays 1, as follows:

Those who voted in the affirmative were: Representatives

Aibritton	Armstrong	Belt	Cadwallader
Allmon	Aronoff	Bevens	Calabrese
Ankeney	Banks	Broughton	Carlier
Applegate	Beckley	Brown	Carney

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Cassel
Celebrezze
Christiansen
Cole
Collins
Corrigan

Tuesday session: Messrs. Games, Pottenger.

Thursday session: Mr. Pottenger.

Sessions of the week: Mrs. Weisenborn, Messrs. McNamara, Nixon.

Unanimous consent was granted.

Mr. Christiansen asked unanimous consent of the House to have the following members excused from the:

Friday session: Mr. Henderson.

Sessions of the week: Mr. Kilpatrick.

Unanimous consent was granted.

On motion of Mr. Reckman the House adjourned until Monday, August 9, 1965, at 1:30 o'clock p.m.

Attest:

CARL GUESS,
Clerk.

ONE HUNDRED ELEVENTH DAY

Hall of the House of Representatives, Columbus, Ohio

Monday, August 9, 1965, 1:30 o'clock p.m.

The House met pursuant to adjournment.

Prayer was offered by the Reverend Walter C. Peters, followed by the pledge of allegiance to the flag.

The journal of the last legislative day was read and approved.

The speaker of the House, in the presence of the House, signed the following bills and joint resolutions:

Am. H. B. No. 1—Messrs. Wylie-Davidson-Fry-Holmes-Russo-Shoemaker - Evans of Coshocton - Reams - Dennis - Collins - Calabrese-Carney-Corrigan.

Am. H. B. No. 20—Messrs. Drake-Wetzel-Taber-Games-Kurfess-DeChant-Riffe-Guyer-Collins.

Am. H. B. No. 125—Messrs. Shawan-Garrigan.

H. B. No. 138—Messrs. Cadwallader-Swecney-Reilly-Pancake-Whalen.

Am. H. B. No. 141—Messrs. Slagle-Metcalf.

Am. H. B. No. 150—Messrs. Evans of Coshocton-Strader-Gilliland-Nixon-Slagle-Gindlesberger-Garrigan.

Am. Sub. H. B. No. 165—Mr. Nye - Miss McGowan - Messrs. Turner - Woodard - Daunley - Carpenter - Carlier - Evans of Guernsey-Gilliland - McDonald - Thomas - Collins - Cadwallader - Aronoff - Scherer-Kolunen - McIlwain - Gorman of Hamilton - Hoffman - Pease - Garrigan-Thorpe-Matia-Ocasek.

Am. H. B. No. 183—Messrs. Rychener - Pottenger - Metcalf - Thorpe-Johnson.

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AUGUST 9, 1965

HOUSE JOURNAL, MONDAY, AUGUST 9, 1965

1859

Messrs. McNamara, Nixon.

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adjourned until Monday,

CARL GUESS,
Clerk.

TH DAY

, Columbus, Ohio

1965, 1:30 o'clock p.m.

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Am. H. B. No. 218—Mrs. MacKenzie-Messrs. Allmon-Gorman of Hamilton-Johnson-Thorpe-Sargus.

Am. H. B. No. 260—Messrs. Katterheinrich-Shaw-Guyer-Carney.

Am. H. B. No. 292—Messrs. Heft-Rychener-Martin-Collins.

Am. H. B. No. 297—Messrs. Holmes-Knight-Garrigan.

Am. H. B. No. 362—Messrs. Stokes - Sweeney - White - Johnson - Matia.

Am. H. B. No. 449—Messrs. Hildebrand-Cassel-Regula-Metcalf-Carney.

Am. Sub. H. B. No. 497—Messrs. Holmes-Shaw.

Am. H. B. No. 561—Messrs. Thurston-Landes - Garrigan - Calabrese.

Am. Sub. H. B. No. 577—Messrs. Holmes-Heft-Jeffery-Cooper-Martin - Garrigan - Guyer - Collins - Sargus - Corrigan - Stockdale.

Am. Sub. H. B. No. 584—Messrs. Fry-Thurston-Cole-Mrs. MacKenzie-Messrs. Pokorny-Deddens-Johnson.

Am. H. B. No. 627—Messrs. Katterheinrich-Cassel-Drake-Collins-Dennis.

Am. H. B. No. 656—Messrs. Katterheinrich-Cassel-Drake-Wetzel-Pokorny-Kerns-Carney.

Am. Sub. H. B. No. 659—Messrs. Mooney - Albritton - Netzley - Hinig - McIlwain - Deddens - Calabrese - Garrigan - Guyer - Johnson.

Am. H. B. No. 686—Mr. Pottenger.

Am. H. B. No. 703—Messrs. Stocksdales-Romer-Netzley-Beckley-Cadwallader-Gorman of Hamilton-Jones-Gray-Johnson.

Am. Sub. H. B. No. 705—Messrs. Cole-White-Jones-Reams.

Am. H. B. No. 708—Messrs. Collins-Gorman of Hamilton-Thorpe.

Am. Sub. H. B. No. 714—Messrs. Scherer - Weis - Levitt - Frost - Slagle-Guyer-Carney-Shaw-King.

Am. H. B. No. 745—Messrs. Hildebrand - Jones - McNamara - Stokes-Donovan-Metcalf-Reams.

Am. H. B. No. 760—Messrs. Kruse-Shoemaker-Wetzel-Metcalf-Kerns - Martin - Regula - Fisher - Locker - Celebrezze - Stocksdales - Collins-Ocasek-Whalen-Pease-Stockdales-Pancake-Dennis-Johnson.

Am. Sub. H. B. No. 761—Messrs. Locker - Kohnen - Holzemer - Stockdales-Collins.

Am. H. B. No. 764—Messrs. Holmes - Collins - Guyer - Garrigan - Sargus.

Am. H. B. No. 788—Messrs. Levey-Reams-Jones.

Am. H. B. No. 796—Messrs. Kainrad-Turner-Matia-Sullivan-Corrigan-Hoffman-Stockdale-Pepple.

HOUSE BILLS—Continued.

Number	Author and Title	Introduction and First Reading	Second Reading— Referred	Reported	Third Reading	Amended
215	Messrs. Kerns-Riley-Woodard. To amend sections 4507.02 and 4507.05 of the Revised Code, relative to temporary instruction permits and surrender of out-of-state license prior to receiving an Ohio operator's or chauffeur's license	131	159	285	319	31
216	Mr. Reilly. To amend section 1901.30 of the Revised Code, relative to appeals from the municipal court	132	160	222	253	25
217	Mr. Reilly. To amend section 1901.10 of the Revised Code to increase the compensation for each judge while holding court outside his territory ..	132	185- 1383	681	.....	68
218	Mrs. MacKenzie-Messrs. Allmon-Gorman of Hamilton. To amend section 2151.421 of the Revised Code to require municipal or county peace officers who receive a report of possible child abuse from a physician to refer such report to the appropriate county department of welfare	132	160	259	368	259-260 1741
219	Messrs. Hadley-Rychener-Huffer-Long-Christian-sen. To amend section 4103.01 of the Revised Code relative to boiler inspection	132	159	285	346	.....
220	Mr. McElree. To amend section 5735.14 of the Revised Code relative to applications for the refund of motor vehicle fuel tax	132	186	.....	.....	.....
221	Mr. Carney. To amend section 4115.02 of the Revised Code relative to the maximum number of hours firemen in the fire department of a municipality shall be required to work	132	1088	.....	.....	.....
222	Messrs. Calabrese, Jr.-Ostrovsky-Russo. To amend section 5121.04 of the Revised Code to change the time a person must be a patient, in an institution controlled by the department of mental hygiene, before his relatives are relieved from support charges	132	169	525	.....	.....
223	Mr. Shawan. To amend section 145.58 of the Revised Code, relative to the public employes retirement system	132	159	.....	.....	.....
224	Mr. Shawan. To amend section 145.33 of the Revised Code, relative to the public employes retirement system	132	159	.....	.....	.....

HOUSE BILLS—Continued.

Reported	Third Reading	Amended	Other Proceedings	Passed	Lost, or Indefinitely Postponed	Reconsidered	Action in Senate	Enrolled and Signed	Action of the Governor	Effective Date
285	319	319		319			1601	1666	Approved 7-30-65	10-30-65
222	253	253		254	1888					
681		681			1888					
259	368	259-260- 1741	1758	369			1741	1859	Approved 8-12-65	11-11-65
285	346			347	1888					
					1837					
					1456					
225					525					
					1349					
					1349					

THE STATE OF OHIO

VOLUME CXXXVI

LEGISLATIVE ACTS

(EXCEPTING APPROPRIATION ACTS)

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

ONE HUNDRED AND ELEVENTH GENERAL ASSEMBLY
OF OHIO

At The Regular Sessions

JANUARY 1, 1975 TO DECEMBER 14, 1976 INCLUSIVE

Issued by

TED W. BROWN

Secretary of State

The National Graphics Corporation
Columbus, Ohio 43216

2014-1

(Amended Substitute House Bill No. 85)

AN ACT

To amend sections 2151.05, 2151.10, 2151.18, 2151.23, 2151.24, 2151.27, 2151.28, 2151.281, 2151.312, 2151.34, 2151.35, 2151.351, 2151.353, 2151.359, 2151.36, 2151.40, 2151.421, 2151.54, 2151.65, 2501.02, 2505.17, 2919.23, 5103.04, 5123.93, and 5139.05 and to enact section 2151.031 of the Revised Code to establish a separate classification for abused children under juvenile court law, expand the occupations of persons required to report suspected cases of child abuse and neglect, require a county plan of action in such cases, and to make other changes in the child abuse and neglect reporting law.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2151.05, 2151.10, 2151.18, 2151.23, 2151.24, 2151.27, 2151.28, 2151.281, 2151.312, 2151.34, 2151.35, 2151.351, 2151.353, 2151.359, 2151.36, 2151.40, 2151.421, 2151.54, 2151.65, 2501.02, 2505.17, 2919.23, 5103.04, 5123.93, and 5139.05 be amended and section 2151.031 of the Revised Code be enacted to read as follows:

Sec. 2151.031. AS USED IN SECTIONS 2151.01 TO 2151.54 OF THE REVISED CODE, AN "ABUSED CHILD" INCLUDES ANY CHILD WHO:

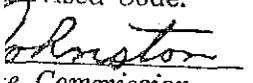
(A) IS THE VICTIM OF "SEXUAL ACTIVITY" AS DEFINED UNDER CHAPTER 2907. OF THE REVISED CODE, WHERE SUCH ACTIVITY WOULD CONSTITUTE AN OFFENSE UNDER THAT CHAPTER, EXCEPT THAT THE COURT NEED NOT FIND THAT ANY PERSON HAS BEEN CONVICTED OF

4 of the Revised Code

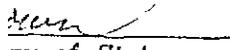

 Representatives.


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 ry of State.

October 8, 1975.

ment for the money due and enforce such judgment by execution as in the court of common pleas.

Any expenses incurred for the care, support, maintenance, education, medical or surgical treatment, special care of a child, which has a legal settlement in another county, shall be at the expense of the county of legal settlement, if the consent of the juvenile judge of the county of legal settlement is first obtained. When such consent is obtained, the board of county commissioners of the county in which such child has a legal settlement shall reimburse the committing court for such expense out of its general fund. If the department of public welfare deems it to be in the best interest of any delinquent, dependent, unruly, ABUSED, or neglected child which has a legal settlement in a foreign state or country, that such child be returned to the state or country of legal settlement, such child may be committed to the department for such return.

Any expense ordered by the court for the care, maintenance, and education of dependent, neglected, ABUSED, unruly, or delinquent children, or for orthopedic, medical or surgical treatment, or special care of such children under sections 2151.01 to 2151.54, inclusive, of the Revised Code, except such part thereof as may be paid by the state or federal government, shall be paid from the county treasury upon specifically itemized vouchers, certified to by the judge. The court shall not be responsible for any expense resulting from the commitment of children to any home, county department of welfare which has assumed the administration of child welfare, county children services board, certified organization, or other institution, association, or agency, unless such expense has been authorized by the court at the time of commitment.

Sec. 2151.40. Every county, township, or municipal official or department, including the prosecuting attorney, shall render all assistance and co-operation within his jurisdictional power which may further the objects of sections 2151.01 to 2151.54, inclusive, of the Revised Code. All institutions or agencies to which the juvenile court sends any child shall give to the court or to any officer appointed by it such information concerning such child as said court or officer requires. The court may seek the co-operation of all societies or organizations having for their object the protection or aid of children.

On the request of the judge, when the child is represented by an attorney, or when a trial is requested the prosecuting attorney shall assist the court in presenting the evidence at any hearing or proceeding concerning an alleged or adjudicated delinquent, unruly, ABUSED, neglected, or dependent child or juvenile traffic offender.

Sec. 2151.421. Any ATTORNEY, physician, including a hospital intern or resident, dentist, podiatrist, practitioner of a limited branch of medicine or surgery as defined in section 4731.15

of the Revised Code, registered OR LICENSED PRACTICAL nurse, visiting nurse, OR OTHER HEALTH CARE PROFESSIONAL, LICENSED PSYCHOLOGIST, SPEECH PATHOLOGIST OR AUDIOLOGIST, CORONER, ADMINISTRATOR OR EMPLOYEE OF A CHILD DAY-CARE CENTER, OR ADMINISTRATOR OR EMPLOYEE OF A CERTIFIED CHILD CARE AGENCY OR OTHER PUBLIC OR PRIVATE CHILDREN SERVICES AGENCY, school teacher or school authority, or social worker, or person rendering spiritual treatment through prayer in accordance with the tenets of a well recognized religion, acting in his official or professional capacity, having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child, shall immediately report or cause reports to be made of such information to THE CHILDREN SERVICES BOARD OR THE COUNTY DEPARTMENT OF WELFARE EXERCISING THE CHILDREN SERVICES FUNCTION, OR a municipal or county peace officer IN THE COUNTY IN WHICH THE CHILD RESIDES OR IN WHICH THE ABUSE OR NEGLECT IS OCCURRING OR HAS OCCURRED.

ANYONE HAVING REASON TO BELIEVE THAT A CHILD LESS THAN EIGHTEEN YEARS OF AGE OR ANY CRIPPLED OR OTHERWISE PHYSICALLY OR MENTALLY HANDICAPPED CHILD UNDER TWENTY-ONE YEARS OF AGE HAS SUFFERED ANY WOUND, INJURY, DISABILITY, OR OTHER CONDITION OF SUCH NATURE AS TO REASONABLY INDICATE ABUSE OR NEGLECT OF SUCH CHILD MAY REPORT OR CAUSE REPORTS TO BE MADE OF SUCH INFORMATION TO THE CHILDREN SERVICES BOARD OR THE COUNTY DEPARTMENT OF WELFARE EXERCISING THE CHILDREN SERVICES FUNCTION, OR TO A MUNICIPAL OR COUNTY PEACE OFFICER.

Such reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report : Such reports , IF REQUESTED BY THE RECEIVING AGENCY OR OFFICER. THE WRITTEN REPORT shall contain:

- (A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;
- (B) The child's age and the nature and extent of the child's injuries, ABUSE, or physical neglect, including any evidence of previous injuries, ABUSE, or physical neglect;
- (C) Any other information which might be helpful in establishing the cause of the injury, ABUSE, or physical neglect.

ANY PERSON WHO IS REQUIRED TO REPORT CASES OF CHILD ABUSE OR NEGLECT MAY TAKE OR CAUSE TO BE TAKEN COLOR PHOTOGRAPHS OF AREAS OF TRAUMA VISIBLE ON A CHILD AND, IF MEDICALLY INDICATED

CAUSE TO BE PERFORMED RADIOLOGICAL EXAMINATIONS OF THE CHILD.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

Upon the receipt of a report concerning the possible ~~non-~~accidental infliction of a physical injury upon ABUSE OR NEGLECT OF a child, the municipal or county peace officer shall refer such report to the appropriate county department of welfare or children services board ~~in charge of children's services.~~

No child upon whom a report is made shall be removed from his parents, step-parents, guardian, or other persons having custody by a municipal or county peace officer without consultation with THE CHILDREN SERVICES BOARD OR the county department of welfare EXERCISING THE CHILDREN SERVICES FUNCTION unless, in the judgment of the reporting physician and the officer, immediate removal is considered essential to protect the child from further injury ~~or~~ abuse OR NEGLECT.

The county department of welfare or children services board shall investigate, WITHIN TWENTY-FOUR HOURS, each report referred to it by a law enforcement officer UNDER THIS SECTION to determine the circumstances surrounding the injury or injuries, ABUSE, OR NEGLECT, the cause thereof, and the person or persons responsible. Such investigation shall be made in cooperation with the law enforcement agency which shall have the primary responsibility for such investigations. The county DEPARTMENT OF welfare department or children services board shall report each case to a central registry which the state welfare department OF PUBLIC WELFARE shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The department or board shall submit a report of its investigation, in writing to the law enforcement agency and shall provide such social services as are necessary to protect the child and preserve the family.

The county department of welfare or children services board shall make such recommendations to the county prosecutor or city attorney as it deems necessary to protect such children as are brought to its attention.

Anyone or any hospital, institution, school, health department, or agency participating in the making of such reports, or anyone participating in a judicial proceeding resulting from such reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, ABUSE, or ~~physical~~ neglect, or the cause thereof in any judicial proceeding resulting from a report submitted

pursuant to this section.

Nothing in this section shall be construed to define as a physically AN ABUSED OR neglected child, any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to such child.

ANY REPORT MADE UNDER THIS SECTION IS CONFIDENTIAL, AND ANY PERSON WHO PERMITS OR ENCOURAGES THE UNAUTHORIZED DISSEMINATION OF ITS CONTENTS IS GUILTY OF A MISDEMEANOR OF THE FOURTH DEGREE.

REPORTS REQUIRED BY THIS SECTION SHALL RESULT IN PROTECTIVE SERVICES AND EMERGENCY SUPPORTIVE SERVICES BEING MADE AVAILABLE BY THE COUNTY DEPARTMENT OF WELFARE OR CHILDREN SERVICES BOARD ON BEHALF OF CHILDREN ABOUT WHOM SUCH REPORTS ARE MADE, IN AN EFFORT TO PREVENT FURTHER NEGLECT OR ABUSE, TO ENHANCE THEIR WELFARE, AND, WHENEVER POSSIBLE, TO PRESERVE THE FAMILY UNIT INTACT. THE DEPARTMENT OF PUBLIC WELFARE SHALL EXERCISE RULE-MAKING AUTHORITY UNDER CHAPTER 119. OF THE REVISED CODE TO AID IN THE IMPLEMENTATION OF THIS SECTION.

THERE SHALL BE PLACED ON FILE WITH THE JUVENILE COURT IN EACH COUNTY AND THE DEPARTMENT OF PUBLIC WELFARE AN INITIAL PLAN OF COOPERATION JOINTLY PREPARED AND SUBSCRIBED TO BY A COMMITTEE CONSISTING OF THE COUNTY PEACE OFFICER, ALL CHIEF MUNICIPAL PEACE OFFICERS WITHIN THE COUNTY, THE PROSECUTING ATTORNEY OF THE COUNTY AND EACH CITY, AND THE CHILDREN SERVICES BOARD OR COUNTY WELFARE DEPARTMENT EXERCISING THE CHILDREN SERVICES FUNCTION AS CONVENED BY THE COUNTY WELFARE DIRECTOR NO LATER THAN SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT. SUCH PLAN SHALL SET FORTH THE NORMAL OPERATING PROCEDURE TO BE EMPLOYED BY ALL CONCERNED OFFICIALS IN THE EXECUTION OF THEIR RESPECTIVE RESPONSIBILITIES UNDER THIS SECTION AND SECTION 2151.41 OF THE REVISED CODE. SUCH PLAN SHALL INCLUDE A SYSTEM FOR CROSS-REFERRAL OF REPORTED CASES OF ABUSE AND NEGLECT AS NECESSARY, AND SHALL ALSO INCLUDE THE NAME AND TITLE OF THE OFFICIAL DIRECTLY RESPONSIBLE FOR MAKING REPORTS TO THE CENTRAL REGISTRY.

Sec. 2151.54. The juvenile court shall tax and collect the same fees and costs as are allowed the clerk of the court of common pleas for similar services. No fees or costs shall be taxed in cases of delinquent, unruly, dependent, ABUSED, or neglected children except when specifically ordered by the court. The expense of trans-

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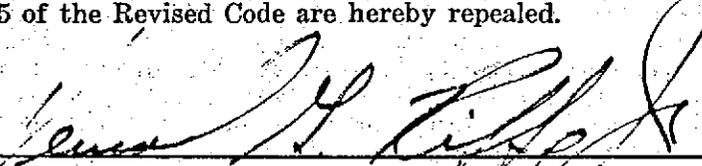
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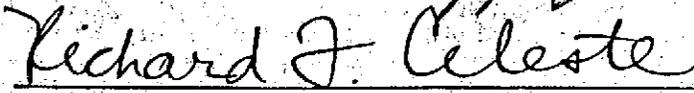
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2151.35, 2151.351, 2151.353, 2151.359, 2151.36, 2151.40, 2151.421, 2151.54, 2151.65, 2501.02, 2505.17, 2919.23, 5103.04, 5123.93, and 5139.05 of the Revised Code are hereby repealed.



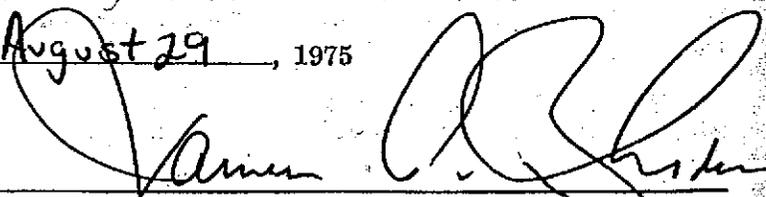
Speaker _____ of the House of Representatives.



President _____ of the Senate.

Passed July 31, 1975

Approved August 29, 1975



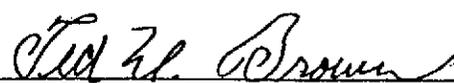
Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.



Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 29th day of August, A. D. 1975.



Secretary of State.

File No. 144

Effective Date November 28, 1975

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State v. Stout
 Ohio App. 3 Dist., 2006.

{¶ 3} Specifically, the indictment provided, in pertinent part:

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Third District, Logan
 County.

STATE of Ohio, Plaintiff-Appellant,

v.

Jon C. STOUT, Defendant-Appellee.

No. 8-06-12.

Decided Nov. 20, 2006.

Criminal Appeal from Common Pleas Court.

Erin G. Rosen, Assistant Attorney General,
 Columbus, OH, for appellant.

Eric E. Willison, Attorney at Law, Columbus, OH,
 for appellee.

ROGERS, J.

*1 {¶ 1} Plaintiff-Appellant, the State of Ohio, appeals the judgment of the Logan County Court of Common Pleas, granting Defendant-Appellee's, Jon C. Stout's, pretrial motion to dismiss. The State asserts that the trial court erred in granting Stout's pretrial motion to dismiss because the indictment and amended bill of particulars were legally sufficient to put Stout on notice of the charges against him and that the trial court erred in granting Stout's pretrial motion to dismiss based upon factual determinations that should have been decided by the trier of fact at trial. Based on the following, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

{¶ 2} In January of 2006, the Logan County Grand Jury indicted Stout under a six count indictment, which included one count of Child Endangering in violation of R.C. 2919.22(A), a misdemeanor of the first degree, and two counts of Sexual Battery in violation of R.C. 2907.03(A)(5), felonies of the third degree.

COUNT II.

Jon C. Stout, between the dates of August 17, 2006 and October 31, 2005, at the county of Logan aforesaid, did as a guardian, custodian, or person having custody or control, or person in loco parentis, of a child under the age of eighteen, to wit: date of birth 09/14/89; created a substantial risk to the health or safety to the child under the age of eighteen years of age or a mentally or physically handicapped child under the age of twenty-one years of age by violating a duty of care, protection, or support, in violation of Ohio Revised Code § 2919.22(A), Endangering Children, a misdemeanor of the first degree.

COUNT V.

Jon C. Stout, on or about the 30th day of September, 2005, at the county of Logan aforesaid, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian, or custodian of the child, to wit: cunnilingus with a child, date of birth 09/14/89; in violation of Ohio Revised Code § 2907.03(A)(5), Sexual Battery, a felony of the third degree.

COUNT VI.

Jon C. Stout, on or about the 30th day of September, 2005, at the county of Logan aforesaid, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian, or custodian of the child, to wit: digital penetration with a child, date of birth 09/14/89; in violation of Ohio Revised Code § 2907.03(A)(5), Sexual Battery, a felony of the third degree.

{¶ 4} In February of 2006, the State filed a bill of particulars. Stout later filed a Crim.R. 12 motion to dismiss the aforementioned counts of the

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indictment. In his motion, Stout argued that the indictment was legally insufficient for failing to explain basic facts upon which his status of "in loco parentis" is based and that he is not a person in loco parentis under R.C. 2907.03(A)(5) or R.C. 2919.22(A).

*2 {¶ 5} In March of 2006, the State filed a motion in opposition of Stout's Crim.R. 12 motion to dismiss and an amended bill of particulars. In its amended bill of particulars, the State provided:

Count Two:

On or about or between August 17, 2005 and October 31, 2005, the Defendant, Jon C. Stout, in Logan County, Ohio, did, as a guardian, custodian, or person having custody or control, or person *in loco parentis*, of a child under the age of eighteen, to wit: S.M. (DOB 9/14/89), created a substantial risk to the health or safety to the child under the age of eighteen years of age by violating a duty of care, protection or support, in violation of ORC 2919.22(A), Endangering Children, a misdemeanor of the first degree. Specifically, the Defendant did during the time period alleged, while he was investigating a case that involved S.M. (DOB 9/14/89), drive her in his Logan County detective vehicle at speeds reaching in excess of one hundred miles per hour. The Defendant was acting as more than a detective, he was acting *in loco parentis*. He was the person S.M. confided to about her problems and issues. He was entrusted with her care and protection, given her medical issues. The parents of S.M. relied upon the Defendant to help with the emotional, psychological and physical healing process of S.M.

Count Five:

On or about September 30, 2005, the Defendant, Jon C. Stout, in Logan County, Ohio, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian or custodian of the child, to wit: S.M. (DOB 9/14/89), in violation of ORC 2907.03(A)(5), Sexual Battery, a felony of the third degree. Specifically, the Defendant did

engage in cunnilingus with S.M. (DOB 9/14/89), while they were in his sheriff's office issued vehicle. The Defendant was acting *in loco parentis* at the time of this event. He was the person S.M. confided to about her problems and issues. He was entrusted with her care and protection, given her medical issues. The parents of S.M. relied upon the Defendant to help with the emotional, psychological and physical healing process of S.M.

Count Six:

On or about September 30, 2005, the Defendant, Jon C. Stout, in Logan County, Ohio, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian or custodian of the child, to wit: S.M. (DOB 9/14/89), in violation of ORC 2907.03(A)(5), Sexual Battery, a felony of the third degree. Specifically, the Defendant did digitally penetrate the vagina of S.M. (DOB 9/14/89), while they were in his sheriff's office issued vehicle. The Defendant was acting *in loco parentis* at the time of this event. He was the person S.M. confided to about her problems and issues. He was entrusted with her car and protection, given her medical issues. The parents of S.M. relied upon the Defendant to help with the emotional, psychological and physical healing process of S.M.

*3 {¶ 6} In April of 2006, Stout filed a reply to the State's opposition to his motion to dismiss. Subsequently, without hearing, the trial court granted Stout's Crim.R. 12 motion to dismiss.

{¶ 7} It is from this judgment the State appeals, presenting the following assignments of error for our review:

Assignment of Error No. 1

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S PRE-TRIAL MOTION TO DISMISS BECAUSE THE INDICTMENT AND AMENDED BILL OF PARTICULARS WERE LEGALLY SUFFICIENT TO GIVE

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court's dismissal. Accordingly, the judgment of the appellate court is affirmed.

Id. at 34. Based upon *Noggle*, Stout argues that the indictment does not provide the very basic facts upon which his status as in loco parentis is based in the aforementioned counts. Conversely, the State argues that its amended bill of particulars meets *Noggle's* special pleading requirement, relying on the language in the *Noggle* decision, "In this case the amended bill of particulars served the purpose of stating the basic facts supporting the allegation that *Noggle* was a person in loco parentis." Thus, under the State's interpretation, we would be required to interpret the Court's *Noggle* opinion in conflict with its second paragraph of the syllabus.

{¶ 13} However, the purpose of a bill of particulars is to provide a defendant with greater detail of the nature and causes of the charges against him. *State v. Lewis* (1993), 85 Ohio App.3d 29, 32, citing *State v. Gingell* (1982), 7 Ohio App.3d 364. And, it is well settled that a bill of particulars cannot save an invalid indictment, since a defendant cannot be "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell v. U.S.* (1962), 369 U.S. 749, 770; see, also, *United States v. Norris* (1930), 281 U.S. 619, 622, *Lewis*, 85 Ohio App.3d at 32 citing *Gingell*, 7 Ohio App.3d 364.

{¶ 14} Therefore, we must reject the State's interpretation of *Noggle* and determine whether the indictment provided the "very basic facts" upon which Stout is alleged to be in loco parentis. We begin with the fifth and sixth counts of the indictment returned against Stout, which alleged that Stout committed sexual battery in violation of R.C. 2907.03(A)(5). The fifth and sixth counts of the indictment specified, in pertinent part,

COUNT V.

***5 Jon C. Stout, * * * did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis * * *, to wit: cunnilingus with a child, date of birth 09/14/89 * * *.**

COUNT VI.

Jon C. Stout, * * * did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, * * * to wit: digital penetration with a child, date of birth 09/14/89 * * *.

{¶ 15} Upon review of the indictment, we cannot find that counts five and six of the indictment returned against Stout provided "the very basic facts" upon which his alleged status as a person in loco parentis is based. Accordingly, we find that counts five and six of the indictment did not comply with the special pleading requirement as stated in *Noggle* and that the trial court did not err in granting Stout's motion to dismiss with respect to counts five and six of the indictment returned against Stout.

{¶ 16} Next, we turn to the second count of the indictment returned against Stout, which alleged that Stout committed endangering children in violation of R.C. 2919.22(A). The second count of the indictment specified, in pertinent part:

COUNT II.

Jon C. Stout, * * * did as a guardian, custodian, or person having custody or control, or person in loco parentis, of a child under the age of eighteen, to wit: date of birth 09/14/89; created a substantial risk to the health or safety to the child under the age of eighteen years of age * * * by violating a duty of care, protection, or support.

{¶ 17} Upon review of the indictment, we note that the second count states the charge against Stout in the words of R.C. 2919.22(A). *Noggle*, 67 Ohio St.3d at 34. Also, unlike R.C. 2907.03(A)(5), R.C. 2919.22(A) includes "person[s] having custody or control" over the other person as potential offenders of endangering children. "Custody and control" as used in R.C. 2919.22(A) has been defined as more than a casual relationship but something less than being in loco parentis. *State v. Schoolcraft* (May 29, 1992), 11th Dist. No. 91-P-2340; *State v. Kirk* (Mar. 24, 1994), 10th Dist.

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No. 93AP-726; *State v. Smith* (Jan. 25, 1996), 8th Dist. No. 68745. Therefore, even if we were to extend the requirements of *Noggle* to require that the indictment provide “the very basic facts” upon which Stout is alleged to be in loco parentis, the indictment would still satisfy the requirements of Crim.R. 7(B) because the language of the indictment states the charge against Stout using the words of R.C. 2919.22(A) and Stout could have had “custody or control” over the child without being a person in loco parentis to the child. Thus, the trial court erred in granting Stout's motion to dismiss the second count of the indictment.

BRYANT, P.J., concurs.
 SHAW, J., concurs in Judgment Only.
 Ohio App. 3 Dist., 2006.
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{¶ 18} Having found that the trial court did not err in granting Stout's motion to dismiss with respect to the fifth and sixth counts of the indictment, but did err in granting Stout's motion to dismiss with respect to the second count of the indictment, the State's assignment of error is overruled in part and is sustained in part.

Assignment of Error No. II

*6 {¶ 19} In its second assignment of error, the State argues that the trial court erred in granting Stout's motion to dismiss based upon factual determinations that should be decided by the trier of fact. Our disposition of the State's first assignment of error renders the second assignment of error moot and we decline to address it. App.R. 12(A)(1)(c).

{¶ 20} Having found no error prejudicial to Appellant herein in the particulars assigned and argued in the first assignment of error with respect to the fifth and sixth counts of the indictment against Stout, but having found error prejudicial to Appellant herein in the particulars assigned and argued in the first assignment of error with respect to the second count of the indictment against Stout, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

Judgment Affirmed in Part, Reversed in Part and Cause Remanded.

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 Not Reported in N.E.2d, 1997 WL 711303 (Ohio App. 8 Dist.)
 (Cite as: Not Reported in N.E.2d)

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to the Day Care Center. Ms. Butler also left a diaper bag containing extra clothes, disposable diapers, a bottle of tea and a bottle of Pedialyte which had been prescribed for Aaron by a doctor to prevent dehydration. (T. 223.) On the day in question, Aaron was suffering from diarrhea, congestion and labored breathing. (T. 223.)

*2 Later that day, Ms. Butler returned to the Day Care Center to pick up her children, she was accompanied by her friend and neighbor Joy Foree. Upon entering the room, Ms. Butler was met by her eldest son Samuel as defendant-appellant left the room. Shortly thereafter, defendant-appellant returned holding Aaron and laid him on the couch indicating that he had been sleeping for two hours. (T. 231, 237.)

As Ms. Butler proceeded to dress Aaron, she realized that his feet were cold and he was not breathing. (T. 232.) At this point, a woman named Janice Lester, who Ms. Butler described as a nurse, took Aaron into the hallway and began performing CPR on the child. (T. 238.)

During this time, Jeffrey Jordan, defendant-appellant's six-year-old grandson, allegedly stated to Ms. Butler, "Granny put tape over his mouth because he would not stop crying." (T. 245.) Ms. Butler questioned Jeffrey who repeated, "Granny put tape over his mouth because he would not stop crying." Jeffrey Jordan's alleged statement was admitted into evidence pursuant to Evid.R. 803(1), the present sense impression exception to the hearsay rule. (T. 241-244.)

Aaron Butler was transported to Rainbow Babies and Childrens Hospital by EMS. After approximately fifteen minutes of unsuccessful resuscitation, Aaron Butler was pronounced dead by the hospital. (T. 250.) Soon After, Ms. Butler informed police of Jeffrey Jordan's alleged statements. (T. 252.)

On cross-examination, Ms. Butler disputed school records which allegedly indicated that she had missed twenty-nine days of school during the time Aaron had been at defendant-appellant's Day Care

Center. (T. 261.) She testified further that the only complete physical examination Aaron had received was one day after his birth on August 7, 1994. (T. 266.)

Ms. Butler maintained that she always took Aaron to the emergency room whenever he was sick including February 1, 1995 when he was diagnosed with congestion and swimmer's ear for which he was prescribed amoxicillin for ten days. (T. 279.) On March 20, 1995, Ms. Butler again took Aaron to the emergency room as a result of defendant-appellant's contention that Aaron was suffering from diarrhea.

The state's second witness, Kay May, an employee of the Cuyahoga County Coroner's Office Trace Evidence Department, testified that she tested State's Exhibit 2, a piece of blue tissue paper with gray duct tape, and State's Exhibit 3, a piece of gray duct tape, for the presence of body fluids. (T. 357.) Ms. May was unable to obtain a positive result from State's Exhibit 3. However, State's Exhibit 2 did contain body fluid that was consistent with Aaron Butler's blood type. (T. 360.)

On cross-examination, Ms. May stated that the body fluid obtained from State's Exhibit 2 could have come from either the duct tape or the facial tissue. The tissue was never independently tested for the presence of body fluids. (T. 366.)

The state's third witness, Linda Luke, also of the Cuyahoga County Coroner's Trace Evidence Department, testified that she conducted the DNA testing of the saliva discovered in State's Exhibit 2 and also tested blood and saliva samples from Aaron Butler. Ms. Luke found the saliva sample on State's Exhibit 2 to be consistent with Aaron Butler's DNA. Ms. Luke concluded that one out of every 66,127 African-Americans would be consistent with the DNA found on State's Exhibit 2. (T. 373-374.)

*3 The state's fourth witness, Dr. Stela Miron, a deputy coroner with the Cuyahoga County Coroner's Office testified that she performed the autopsy on Aaron Butler. Dr. Miron concluded that

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nothing unusual was present with respect to Aaron's internal organs, however, his lungs were "very congested." (T. 395.) In Dr. Miron's opinion, based upon a reasonable degree of medical certainty, Aaron's death was caused by asphyxia by upper respiratory infection and the application of duct tape on the mouth, and ruled the death a homicide accordingly. (T. 396-97.) Dr. Miron's opinion was based upon her own observations as well as information from the Trace Evidence Department of her office.

The state's fifth witness, Sharon Rosenberg, from the Cuyahoga County Coroner's Trace Evidence Unit, testified that she removed certain materials from the face of Aaron Butler, but was unable to determine if the particles removed matched the duct tape samples removed from the Day Care Center. (T. 444.) The microscopic material was subsequently sent to the State Bureau of Criminal Identification and Investigation for additional comparison. A specialist in micro-analysis at the Bureau determined that the submitted material did not match the tape. (T. 468.)

Cindy Duke, a staff therapist in the Pediatric Respiratory Care Department at University Hospital testified for the state that she had been working in the emergency room on the day that EMS brought in Aaron Butler. At that time, Aaron was in full cardiac arrest, pulseless and not breathing. (T. 480.) In an effort to revive Aaron, Ms. Duke attended a physician who attempted to place an endotracheal tube in Aaron's airway. Once the tube was in place, Ms. Duke taped the tube to Aaron's upper lip with white surgical tape. (T. 484.) The tape was placed below Aaron's nose and no higher. (T. 496.)

Joy Foree testified for the state that she had accompanied Venisha Butler to defendant-appellant's Day Care Center on April 6, 1995. Foree testified further that she overheard Jeffrey Jordan's alleged statements concerning defendant-appellant and taping the baby's mouth because he would not stop crying. (T. 504.)

Officer Ray Kaloczi of the Cleveland Police

Department testified for the state that he was on duty April 6, 1995 when he was dispatched to Rainbow Babies and Childrens Hospital regarding the death of Aaron Butler. As part of the investigation, Officer Kaloczi spoke with Venisha Butler and Joy Foree who both told him about the alleged statements of Jeffrey Jordan. Officer Kaloczi then proceeded to defendant-appellant's Day Care Center in order to inspect the scene and interview witnesses. (T. 615.) Once at the scene, Officer Kaloczi encountered a small child who was later identified as Jeffrey Jordan. After a number of questions, Jordan led Officer Kaloczi to an upstairs bedroom where he observed two strips of gray duct tape laying on the ground. This tape was introduced into evidence as State's Exhibit 1 and State's Exhibit 2.

*4 The next significant witness for the state was Dr. John Smialek, Chief Medical Examiner for the State of Maryland. Dr. Smialek testified that, after examining all of the medical records and toxicology results provided to him by the state, it was his opinion that Aaron Butler did not die as a result of sudden infant death syndrome but rather, died as a result of an obstruction of the airway caused by the application of duct tape to his mouth. (T. 692.) Dr. Smialek found no evidence of pneumonia or any other respiratory infection. (T. 720.)

At this point in the proceedings, the trial court allowed defense counsel to call a witness "out-of-order" to accommodate the witness' schedule. Dr. Gregory Kauffman testified that initially he believed that Aaron Butler died of SIDS. However, after reviewing the relevant tissue slides Dr. Kaufman radically changed his opinion on the ultimate cause of death to untreated viral pneumonia. (T. 798 .) In Dr. Kaufman's opinion, the alleged application of duct tape and resultant asphyxia did not cause the condition in Aaron Butler's lungs. (T. 808.)

The state then continued with its case-in-chief offering the testimony of various police officers and investigators regarding the gathering of evidence, photographs and exhibits relating to this

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case.

The state's twentieth witness, Marjorie Nolan, an EMS technician with the City of Cleveland, testified that she was dispatched to Guardian Angel Day Care Center on April 6, 1995. Upon her arrival, Ms. Nolan stated that she was unable to intubate the child as his neck was clenched and his body was stiff. (T. 931.) Ms. Nolan noted that her efforts at resuscitation were clearly unsuccessful as the baby's chest was not rising and falling as it would have if air had been entering the lungs. While at the Day Care Center, Ms. Nolan heard one of the other children present mention something about "taping up a pacifier." (T. 931.)

The final witness for the state was Detective George Stitt of the Cleveland Police Department. Detective Stitt testified that Jeffrey Jordan had allegedly stated to him that Granny (i.e. defendant-appellant) had put tape over the baby's mouth. (T. 967.) Initially, Detective Stitt speculated that either defendant-appellant or Jeffrey Jordan could have placed tape over the baby's mouth but Jeffrey was eventually eliminated as a suspect because he doubted that a six-year-old could tear a piece of duct tape. (T. 1026.)

The defense case consisted of the testimony of six witnesses. Anita Laster, the first defense witness, testified that on April 6, 1995 she was employed as an assistant prosecutor for the City of Cleveland. During this period, defendant-appellant provided daycare services for her daughter. Ms. Laster maintained that she never had any complaints or found anything unusual about defendant-appellant's Day Care Center. (T. 1133.)

The final defense witness, Janice Lester, testified that on April 6, 1995 she was training to become a nurse. Ms. Lester's daughter also attended defendant-appellant's Day Care Center where she was "very well" cared for. (T. 1222.) Ms. Lester testified further that she was present when Ms. Butler discovered that Aaron was not breathing. Ms. Lester began performing CPR on Aaron until EMS personnel arrived on the scene. (T. 1236.) Ms.

Lester maintained that at no time during the episode did she hear any mention of tape being placed over the baby's mouth. (T. 1237.)

*5 The state called one rebuttal witness, Dr. Elizabeth Balraj, Chief Coroner for Cuyahoga County. After reviewing the relevant medical evidence, Dr. Balraj determined that Aaron Butler was not suffering from viral pneumonia at the time of his death. (T. 1272.)

Following closing arguments and the trial court's jury instructions, jury deliberations commenced on April 19, 1996. That same day, the jury returned a verdict of not guilty of involuntary manslaughter, R.C. 2903.04, as charged in count one of the indictment, guilty of endangering children, R.C. 2919.22(B)(2), as charged in count two of the indictment, and guilty of endangering children, R.C. 2919.22(A), as charged in count three of the indictment. The jury also determined that the violence specifications contained in counts two and three of the indictment had been proven beyond a reasonable doubt.

On May 9, 1996, the trial court proceeded with defendant-appellant's sentencing. At this time, defense counsel renewed its original motion for acquittal which had previously been denied. In the alternative, defense counsel moved to merge the convictions for counts two and three of the indictment. The trial court denied defendant-appellant's renewed motion for acquittal but granted the merger of counts two and three for purposes of sentencing. The trial court then sentenced defendant-appellant to three to fifteen years on the second count of the indictment.

On June 7, 1996, defendant-appellant filed a timely notice of appeal from the judgment of the trial court.

Geraldine Jordan's, defendant-appellant's, first assignment of error states:
 THE TRIAL COURT COMMITTED
 PREJUDICIAL ERROR BY FAILING TO
 EXCLUDE HEARSAY STATEMENTS OF A

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NON-TESTIFYING DECLARANT WITHOUT A FINDING OF UNAVAILABILITY OR "INDICIA OF RELIABILITY" IN VIOLATION OF EVID.R. 801, EVID.R. 803 AND THE CONFRONTATION CLAUSE OF SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION.

A. THE ISSUE RAISED: ADMISSION OF HEARSAY STATEMENTS.

Defendant-appellant argues, through her first assignment of error, that the trial court improperly admitted into evidence testimony relating to the statement of Jeffrey Jordan, defendant-appellant's six-year-old grandson, regarding the allegation that defendant-appellant put tape over Aaron Butler's mouth because he would not stop crying. It is defendant-appellant's position that Jordan's hearsay statement should not have been allowed into evidence since it failed to satisfy the necessary conditions under Evid.R. 803(2), the "excited utterance" exception to the hearsay rule. Specifically, defendant-appellant argues that the trial court never inquired into the requisite "stress or excitement" prong of the excited utterance exception. In addition, defendant-appellant maintains that, since there was no showing that Jeffrey Jordan was unavailable to testify, the admission of his hearsay statements violated the confrontation clause of the Ohio Constitution.

*6 The state maintains that the trial court properly allowed the disputed statements into evidence pursuant to Evid.R. 803(1), the present sense impression exception to the hearsay rule. The state argues further that Evid.R. 803 allows admission of the statements even though the declarant is available as a witness at trial.

Defendant-appellant's first assignment of error is not well taken.

B. STANDARD OF REVIEW FOR PRESENT SENSE IMPRESSION.

Evid.R. 803(1), the present sense impression to the hearsay rule, provides in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is available.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

A present sense impression bears a high degree of trustworthiness because the declarant described the event and uttered in close temporal proximity to the event. *State v. Wages* (1993), 87 Ohio App.3d 780, 787, 623 N.E.2d 193 (where declarant described the event during a phone call). See, also *State v. Nichols* (Mar. 27, 1986), Cuyahoga App. No. 50275, unreported. The key to a statement's trustworthiness is its spontaneity. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28, 36, 534 N.E.2d 855; *State v. Masood Moimuddin* (July 10, 1997), Cuyahoga App. No. 70785, unreported.

Both the present sense impression exception and the similar excited utterance exception originated as part of the older *res gestae* (spontaneous exclamations) hearsay exception. Evid.R. 803(1) Staff Notes, *State v. Lester* (Dec. 14, 1994), Summit App. No. 16691, unreported. Unlike an excited utterance, a present sense impression need not be made while the declarant is under the influence of emotion or trauma. Fabrication and faulty recollection are generally precluded by the fact that present sense impressions are limited to those statements describing or explaining an event made while or immediately after the declarant witnesses the event. *Id.* One of the central questions a trial court should consider in its assessment of the circumstances surrounding a statement is whether the declarant made the statement to a person that was in a position to verify the statement. However, corroboration is not necessarily required. *Wages, supra* at 788, 623 N.E.2d 193.

C. THE TRIAL COURT DID NOT ERR BY ALLOWING THE STATEMENTS ATTRIBUTED TO JEFFREY JORDAN INTO EVIDENCE.

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In this case, the statements of Jeffrey Jordan regarding the allegation that defendant-appellant had taped Aaron Butler's mouth closed to stop him from crying were made in conjunction with the realization that the baby had stopped breathing and were both spontaneous and unsolicited. Jeffrey Jordan was not questioned in any way prior to making the statement and he voluntarily repeated the statement a number of times to various people. In fact, Jordan led police to the bedroom where Aaron Butler had been sleeping. In the bedroom, the police discovered duct tape and tissue which were later tested and determined to contain samples of Aaron Butler's DNA. Under these circumstances, it is apparent that the trial court properly allowed the statements into evidence pursuant to Evid.R. 803(1), the present sense exception to the hearsay rule.

*7 In addition, it is well established that a valid exception to the hearsay rule does not violate an accused's confrontation rights. *State v. Stewart* (1991), 75 Ohio App.3d 141, 151, 598 N.E.2d 1275; *City of Mayfield Heights v. Albert* (May 26, 1994), Cuyahoga App. No. 65318, unreported. Clearly, present sense impression constitutes such an exception. Evid.R. 803(1). Therefore, the trial court did not violate defendant-appellant's confrontation rights by admitting the statement even though Jeffrey Jordan did not testify at trial. *State v. Dever* (1992), 64 Ohio St.3d 401, 417, 596 N.E.2d 436.

Accordingly, defendant-appellant's first assignment of error is not well taken.

Geraldine Jordan's, defendant-appellant's, second assignment of error states:

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICT OF GUILTY AS TO THE CHARGE OF ENDANGERING CHILDREN, R.C. 2919.22.

A. THE ISSUE RAISED: SUFFICIENCY OF THE EVIDENCE.

Defendant-appellant argues, through her second assignment of error, that her conviction of the offense of endangering children was improper. Specifically, defendant-appellant maintains that a review of the record demonstrates that the state failed to prove the essential elements of endangering children, *i.e.*, torture or cruel abuse as set forth in R.C. 2919.22(B)(2), by legally sufficient evidence. It is defendant-appellant's position that since the jury acquitted her of involuntary manslaughter, it logically must have rejected the state's contention that defendant-appellant placed tape over the mouth of Aaron Butler. Therefore, reasonable minds could not properly conclude that defendant-appellant took any affirmative actions to torture or cruelly abuse Aaron Butler and her conviction was based upon insufficient evidence.

Defendant-appellant's second assignment of error is not well taken.

B. STANDARD OF REVIEW FOR SUFFICIENCY OF THE EVIDENCE.

In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court re-examined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence.

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.

State v. Jenks, supra, paragraph two of the syllabus.

A judgment will not be reversed upon insufficient or conflicting evidence if it is supported by

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competent credible evidence which goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407. Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the jury as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

**C. THE EVIDENCE ADDUCED AT TRIAL
 WAS SUFFICIENT TO SUPPORT
 DEFENDANT-APPELLANT'S CONVICTIONS.**

*8 In this case, both direct and circumstantial evidence was presented by the state in an attempt to prove the elements of the offense of endangering children, in violation of R.C. 2919.22(B)(2), along with the attendant violence specification. R.C. 2919.22(B)(2) sets forth the following elements of the offense of endangering children:

- 1) torture or cruelly abuse;
- 2) a child under the age of eighteen;
- 3) causing serious physical harm.

At trial, it is clear that, when viewing the evidence presented in a light most favorable to the prosecution, the testimony of the victim's mother Venisha Butler; Cuyahoga County Coroner Trace Evidence Department employee Linda Luke; Dr. Stela Miron, Deputy Coroner; and Cuyahoga County Coroner Dr. Elizabeth Balraj supports the verdict that defendant-appellant did, in fact, commit the offense of endangering children as indicted. Ms. Butler testified that, upon arriving at the Day Care Center, she quickly discovered that Aaron was cold and no longer breathing. While waiting for the EMS ambulance, Ms. Butler overheard defendant-appellant's grandson say that defendant-appellant had taped the baby's mouth closed to stop him from crying. Linda Luke testified that she personally performed DNA testing on a piece of duct tape and tissue found in a bedroom at the Day Care Center

determining that material on the samples matched the DNA sample taken from the victim. Similarly Dr. Miron and Dr. Balraj each testified that the duct tape played a major role in the death of Aaron Butler. Clearly, the evidence was sufficient to allow the trier of fact to return a verdict of guilty as to the offense of endangering children. Contrary to defendant-appellant's assertion, the fact that defendant-appellant was acquitted of the charge of involuntary manslaughter does not demonstrate that the jury rejected all evidence relating to the alleged use of duct tape on the baby's mouth. It merely reveals that the jury was not convinced that defendant-appellant's use of the tape was the sole cause of the victim's death. This is consistent with the testimony of defense expert Dr. Gregory Kaufman who believed that Aaron Butler's death was caused by untreated viral pneumonia. Even if the victim did suffer from viral pneumonia, a fact vigorously disputed by the state, the use of duct tape in the manner alleged clearly constituted torture or cruel abuse of a child pursuant to R.C. 2919.22(B)(2).

Defendant-appellant's second assignment of error is not well taken.

Geraldine Jordan's, defendant-appellant's, third and final assignment of error states:

**THE VERDICT IS AGAINST THE MANIFEST
 WEIGHT OF THE EVIDENCE WHEN THERE IS
 NO SUBSTANTIAL EVIDENCE UPON WHICH
 A TRIER OF FACT COULD REASONABLY
 CONCLUDE THAT THE ELEMENTS OF THE
 OFFENSE HAD BEEN PROVEN BEYOND A
 REASONABLE DOUBT.**

**A. THE ISSUE RAISED: MANIFEST WEIGHT
 OF THE EVIDENCE.**

Defendant-appellant argues, through her third and final assignment of error, that her convictions for endangering children returned by the jury were against the manifest weight of the evidence. Specifically, defendant-appellant argues that the state's evidence was vague, fragmented and

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contradictory as to the actual cause of death of Aaron Butler and that the state completely failed to prove beyond a reasonable doubt that defendant-appellant took any affirmative steps to torture or cruelly abuse the baby in any way.

*9 Defendant-appellant's third and final assignment of error is not well taken.

B. STANDARD OF REVIEW FOR MANIFEST WEIGHT OF THE EVIDENCE.

State v. Martin (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.*** See *Tibbs v. Florida* (1982), 457 U.S. 31, 38, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

State v. Martin, supra, at 175, 485 N.E.2d 717. Moreover, the weight of the evidence and credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *State v. Martin, supra*.

In determining whether a judgment of conviction is against the manifest weight of the evidence, this court in *State v. Wilson* (June 9, 1994), Cuyahoga App. Nos. 64442/64443, unreported, adopted the guidelines set forth in *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926, syllabus. These factors, which this court noted are in no way

exhaustive, include:

- 1) Knowledge that even a reviewing court is not required to accept the incredible as true;
- 2) Whether evidence is uncontradicted;
- 3) Whether a witness was impeached;
- 4) Attention to what was not proved;
- 5) The certainty of the evidence;
- 6) The reliability of the evidence;
- 7) The extent to which a witness may have a personal interest to advance or defend their testimony; and
- 8) The extent to which the evidence is vague, uncertain, conflicting or fragmentary.

A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

C. DEFENDANT-APPELLANT'S CONVICTIONS WERE NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

As this court determined in its disposition of defendant-appellant's second assignment of error, ample evidence was adduced at trial through the testimony of the victim's mother, three doctors and a number of police officers to support the finding of guilt rendered by the jury in this case. In addition, the state presented DNA testing matching DNA samples taken from the victim with DNA found on a piece of duct tape and tissue discovered in a bedroom at the Day Care Center where Aaron Butler was sleeping on the day in question. Since the weight to be given the evidence and the credibility of the witnesses are primarily matters for the finder of fact to determine and that it is not the function of the appellate court to substitute its judgment for that of the fact-finder, *State v. Grant* (1993), 67 Ohio St.3d 415; *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 616 N.E.2d 909, this court cannot now say that the jury's verdict in this case is against the manifest weight of the evidence. Accordingly, a review of the record demonstrates that the jury did not lose its way and create a manifest miscarriage of justice by finding defendant-appellant guilty of

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endangering children. Defendant-appellant's convictions were supported by substantial and credible evidence upon which the trier of fact could reasonably conclude that defendant-appellant was guilty of the offenses as charged in counts two and three of the indictment.

*10 Defendant-appellant's third and final assignment of error is not well taken.

Judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

O'DONNELL, and SPELLACY, JJ., concur.
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State v. Brooks
 Ohio App. 8 Dist., 2000.
 Only the Westlaw citation is currently available.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
 Cuyahoga County.

STATE of Ohio Plaintiff-Appellee

v.

Quamaine BROOKS (# 75711) and Geraldine
 Brooks (# 75712) Defendants-Appellants
 No. 75711, 75712.

March 30, 2000.

Character of Proceeding: Criminal Appeal from the
 Common Pleas Court Case No. CR-
 363440. Affirmed.

William D. Mason, Cuyahoga County Prosecutor,
 By Deborah Naiman (# 0039772), Assistant County
 Prosecutor, Cleveland, for Plaintiff-Appellee.
 Anthony T. Nici (# 0067725), Anthony T. Nici &
 Associates, LLC, Bedford Heights, for Defendants-
 Appellants.

JOURNAL ENTRY AND OPINION
 SPELLACY, J.

*1 In appellate case number 75711, defendant-
 appellant Quamaine Brooks appeals from his
 conviction for one count of felonious assault in
 violation of R.C. 2903.11 and for one count of
 child endangering in violation of R.C. 2919.22. In
 appellate case number 75712, defendant-appellant
 Geraldine Brooks appeals from her conviction for
 one count of child endangering in violation of R.C.
 2919.22. The two appeals have been consolidated
 for purposes of briefing and disposition.

Appellants assign the following errors for review:

I. THE TRIAL COURT COMMITTED
 PREJUDICIAL ERROR BY PERMITTING THE
 JURY TO CONTINUE DELIBERATIONS WITH
 ONLY ELEVEN JURORS WHEN ONE JUROR IS

EITHER UNABLE OR UNWILLING TO
 PERFORM HIS DUTY, THEREBY VIOLATING
 THE DEFENDANTS' RIGHTS UNDER THE
 FIFTH, SIXTH AND FOURTEENTH
 AMENDMENTS TO THE UNITED STATES
 CONSTITUTION.

II. THE DEFENDANTS WERE DENIED
 EFFECTIVE ASSISTANCE OF COUNSEL
 GUARANTEED BY THE FIFTH, SIXTH, AND
 FOURTEENTH AMENDMENTS TO THE
 CONSTITUTION OF THE UNITED STATES
 AND ARTICLE I, SECTION TEN OF THE OHIO
 CONSTITUTION, BECAUSE TRIAL COUNSEL
 WAIVED THE REQUIREMENT OF TWELVE
 JURORS ON BEHALF OF HIS CLIENTS AND
 NO VOLUNTARY, INTELLIGENT, AND
 KNOWING WAIVER WAS OBTAINED IN
 WRITING.

III. BOTH DEFENDANTS' CONVICTIONS ARE
 AGAINST THE MANIFEST WEIGHT OF THE
 EVIDENCE AND SHOULD BE REVERSED.

Finding the appeals to lack merit, the judgment of
 the trial court is affirmed.

I.

On March 7, 1998, Donald Stratford brought his
 three-month old daughter Angelique to Fairview
 Hospital. The infant had an elevated temperature,
 questionable mental status, lethargy, and twitching
 in her lower extremities. The emergency room
 physician noted that Angelique had bulging
 fontanelles, abrasions on her left cheek and
 abdomen, and a blank stare. After discovering
 blood in her spinal fluid, a CAT scan of the child's
 head was ordered. Fairview Hospital contacted
 Rainbow Babies and Children's Hospital, a level
 one trauma center, and the decision was made to
 transfer the infant to that facility.

The baby arrived at Rainbow Babies and Children's
 Hospital in a coma with a breathing tube inserted.
 Angelique Stratford was diagnosed with significant
 trauma, most of which was centered on the brain.

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The CAT scan showed skull fractures above each ear and edema or swelling within Angelique's brain. There were several areas of bleeding within the brain. Fluid was noted on the outside of her brain. Fluid will fill the space between the skull and brain after shrinkage caused by death of brain tissue. Angelique's brain eventually shrank to the size of a walnut. The bone sutures in her skull were split apart. The cranial pressure measured at four times the normal amount. Strokes occurred on both sides of the brain. The doctors discovered evidence of hemorrhages in the retinas. The baby suffered significant neurological damage to both sides of her brain. The damage must have been inflicted upon the infant as least twenty-four hours before the CAT scan was taken at Fairview Hospital at 7:53 p.m. on March 7, 1998.

*2 The physicians who examined Angelique agreed that the cause of her injuries was inflicted trauma, most likely the result of having been severely shaken. It was their opinion that a significant amount of force would be required to cause the amount of edema and injury suffered by Angelique. The injuries could not have been caused by a fall from a couch, by striking a coffee table, or by riding in a car. The pattern of trauma demonstrated in Angelique's case did not fit the pattern of minor head injury common for children in this age group. Instead, the sort of major injury to the head suffered by Angelique might be seen if the child was involved in a major motor vehicle accident in a car traveling in excess of fifty miles per hour or if the baby fell out of a tenth floor window. However, the most likely cause remained inflicted trauma entailing significant shaking by a person strong enough to disrupt the blood vessels in the brain. It is unlikely that an eight-year old child would be capable of causing this severe an injury to Angelique.

Once a child sustains this kind of injury, the level of consciousness becomes clouded. The child would not eat normally and might vomit. The child becomes progressively sleepier until falling into a coma. Seizures or epilepsy can occur. Most likely, the child's condition would rapidly deteriorate

although the symptoms might develop over a period of time. Because Angelique's injuries were massive, it would be expected that some of the symptoms would have manifested themselves immediately after the injury occurred.

The Cleveland police were called to investigate the assault case. The police detectives learned Angelique had been in the care of her maternal grandmother, appellant Geraldine Brooks, for the two weeks preceding March 7, 1998. Geraldine Brooks told the detectives that Angelique had been at her home for two weeks but that the baby had been fine the entire time. Geraldine Brooks had no knowledge of how Angelique came to be injured but stated it did not happen at the Brooks' home.

Other members of the Brooks family were living in the house during the time Angelique stayed there. Those family members were Geraldine Brooks' mother, Minnie, Geraldine's sister Elaine, Elaine's son Michael, and Geraldine's twenty-year old son Quamaine. Geraldine's oldest son resided in the upstairs portion of the duplex with Wadell Jefferson and their three children.

Geraldine Brooks maintained that the only injury she noticed on Angelique were some scratches on the child's abdomen. Geraldine Brooks surmised that the scratches were caused by the zipper on one of the couch cushions. The Brooks family offered various explanations as to how the infant may have been injured, ranging from a fall from the couch in which she hit her head on the coffee table to being hit by eight-year old Michael. None of the scenarios offered by any of the Brooks family could have resulted in the severe injuries sustained by the baby.

*3 The police questioned Quamaine Brooks. He denied any involvement, stating he never was home because of attending school and work. Quamaine Brooks told the police he went to school every day for the week of March 2 through March 6, 1998, and worked at Burger King each day except for Thursday. Attendance records from the Cleveland Public Schools established that Quamaine Brooks

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had unexcused absences for March 4 and March 6, 1998. Quamaine Brooks did not work on March 4, 5, or 6, 1998.

Geraldine Brooks gave an oral statement to the police. Geraldine Brooks maintained that the only injuries she observed on Angelique were some scratches on the child's abdomen. Geraldine Brooks took Angelique to the child's father, Donald Stratford, on March 7, 1998. Stratford asked what was wrong with the baby because Angelique's eyes were glassy and she appeared to be having difficulty breathing. Geraldine Brooks told Stratford the baby had been fine at her house and left to shop.

Donald Stratford agreed that Geraldine Brooks brought Angelique to his home on March 7, 1998, between 11:30 a.m. and 12:30 p.m. Geraldine Brooks provided child care because both parents worked the same shift and did not have their own automobile. Angelique had been with Geraldine Brooks since February 22, 1998, and Stratford had not expected the child to be returned on March 7, 1998. Geraldine Brooks telephoned that morning to inform Stratford that she planned on shopping near his home and would bring the baby. Stratford noticed that the infant seemed sleepy. While undressing Angelique, Stratford saw the scratches on her abdomen and asked Geraldine Brooks about the injury. Brooks stated that the zipper from a couch cushion caused the scratches and that it happened while her daughter Billie Jo was with Angelique. Billie Jo Isom is the mother of Angelique.

After Geraldine Brooks left, Stratford began to notice differences in Angelique's behavior. The child was not responsive and had difficulty eating. Stratford attempted to contact Geraldine Brooks to find out if anything happened to the baby but was unsuccessful until sometime between 3:30 and 4:30 p.m. Brooks again denied anything happened and said Angelique had been fine. Victoria Mayfield, Stratford's grandmother, was present and observed the changes in the baby's behavior. Angelique did not cry, had a fixed stare, and her legs were

twitching. Mayfield told her grandson to take Angelique to the hospital.

Shortly before 6:00 p.m., Stratford called for a cab to take Angelique to the hospital. While awaiting its arrival, Stratford took some photographs of Angelique in order to document her condition. Billie Jo Isom joined Stratford at the hospital. Geraldine Brooks arrived right before Angelique was taken to Rainbow Babies and Children's Hospital. Geraldine Brooks told Stratford and Isom that eight-year old Michael might have dropped or hit the baby.

The police arrested Geraldine, Quamaine, and Elaine Brooks for child endangering. The police later dropped the charge against Elaine Brooks. The grand jury indicted Quamaine Brooks on charges of attempted murder, felonious assault, and child endangering. Geraldine Brooks was indicted for one count of child endangering. The state dismissed the attempted murder charge prior to the commencement of trial.

*4 At trial, Geraldine Brooks testified that she never noticed anything wrong with Angelique prior to taking the child to Stratford. Geraldine Brooks averred that on Friday, March 6, 1998, Angelique was active and acting normally. Geraldine Brooks did not observe any differences in Angelique the following morning either. Geraldine Brooks agreed that Angelique was not injured accidentally but that someone intentionally inflicted the injuries on the infant.

Quamaine Brooks testified that he did not see Angelique the entire week before March 7, 1998. Brooks averred that he spent the morning of March 6, 1998, with his brother Rasheed and the rest of the day and night shopping and attending a movie. Quamaine claimed he first learned of Angelique's condition when the police arrived on Sunday, March 8, 1998.

Nine-year old Michael Brooks testified that he lived in the same house as Geraldine and Quamaine Brooks during the first week of March in 1998. Cuyahoga County placed Michael in foster care

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soon after Angelique was injured. Michael eventually identified both defendants in court, apparently after some efforts to intimidate the child at trial. Michael testified that he observed Quamaine Brooks punch Angelique in the back, stomach, and side. Michael also saw Quamaine grasp the baby by the leg so she hung upside down before being dropped to the floor. Michael stated these events occurred on different days.

The jury began deliberations on Thursday, October 29, 1998. The jury sent a number of communications to the trial judge while deliberating. On Wednesday, November 4, 1998, one juror failed to appear for service because of the death of a parent. The following exchange took place in open court:

THE COURT: Mr. Jordan, have you discussed this situation with your clients?

MR. JORDAN: I have discussed the situation with my clients, your Honor. It's our position to let the 11 continue with their deliberations.

THE COURT: And then your clients are waiving the absence of the twelfth juror?

MR. JORDAN: Yes, they are.

THE COURT: They are waiving all their rights to have a jury of 12 decide the guilt or innocence in these particular charges?

MR. JORDAN: Yes, they are.

THE COURT: Okay. Please bring the jury in.

(Tr. 679-680).

The jury continued its deliberations with the remaining eleven jurors. That day, November 4, 1998, the jury found Quamaine Brooks guilty of felonious assault and child endangering but did not find "serious physical harm" on the child endangering count. The jury convicted Geraldine Brooks of child endangering and did find that serious physical harm resulted.

II.

In their first assignment of error, appellants contend the trial court erred by permitting the jury to continue to deliberate after one juror did not return for jury duty. Appellants assert that they did not

personally assent, orally or in writing, to the waiver of their right to a twelve person panel. Appellants argue that, without an affirmative waiver of a jury of twelve, their convictions should be reversed.

*5 The record reflects that defense counsel was given time to discuss the situation with appellants. Both appellants were present in court when their attorney waived their right to be tried by a twelve member jury. Therefore, appellants agreed to proceed with eleven jurors and have waived any assertion of error. This court will review the assignment of error under the plain error standard. "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). Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent the manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111.

Crim.R. 23(B) states that a twelve member jury be provided for felony cases. Although a trial court has a legal duty to comply with the dictates of Crim.R. 23(B), the rule is not absolute. See *State v. Thomas* (1980), 61 Ohio St.2d 223. The United States Supreme Court has held that a twelve person jury is not a necessary ingredient to a defendant's right to trial by jury. The use of a twelve member jury is the result of a historical accident and not an indispensable component of the Sixth Amendment right to a trial by jury. *Williams v. Florida* (1970), 399 U.S. 78. A particular number of jurors is not required for a jury to fulfill its role of providing an interposition of the commonsense judgment of an accused's peers between the defendant and the state. *Id.* at 100. A criminal defendant may waive constitutional and statutory trial rights. *State v. Girts* (1997), 121 Ohio App.3d 539. The number of jurors permitted at felony and misdemeanor trials is not absolute as it is a matter of procedure and not a substantive right. *Id.*

In *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, the Supreme Court of Ohio held that a defendant "may, with the approval of the trial court, consent to be tried by a jury composed of less than

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twelve men.”*Id.* at paragraph two of the syllabus. A trial court may not try a person with less than twelve persons under the Ohio Constitution. However, the defendant may waive this right and, if he does so, cannot raise the issue on appeal. *Id.* at paragraph three of the syllabus. The court in *Easler v. State* (1927), 25 Ohio App. 273, relied upon *Baer* in upholding the conviction of two defendants for grand larceny. The defendants agreed to be tried by eleven jurors. The court held that a defendant may waive, or their counsel may waive in the defendant's presence, trial by a twelve person jury.

A more recent example occurred in *State v. Capan* (April 19, 1995), Summit App. No. 16892, unreported, in which the trial court dismissed a juror immediately before jury instructions were given. Because no alternate jurors were available, the remaining eleven jurors deliberated. The defendant offered no objection to the eleven member jury at the trial court level but asserted plain error on appeal. The Ninth District Court of Appeals noted that defense counsel affirmatively agreed to the diminished jury. The court, citing to *Baer*, stated that a defendant has the ability to waive his right to a full twelve person jury. The court held that plain error was not present because the defendant agreed to the eleven member jury.

*6 In the instant case, defense counsel discussed the matter with both appellants and informed the trial court that appellants wished to proceed with the remaining eleven members of the jury. Although it may have been the better practice for the trial court to directly ask the defendants if they agreed to proceeding with the diminished jury, the oral waiver by defense counsel on the record and in the presence of appellants is sufficient. Appellants waived their right to have their case determined by a twelve member jury. There is no indication in the record that the result of the trial was a manifest miscarriage of justice requiring the imposition of the plain error doctrine.

Appellants' first assignment of error is overruled.

III.

In their second assignment of error, appellants assert their counsel was ineffective for agreeing to proceed with the eleven member jury. Appellants point out that, before the one juror failed to return for deliberations, the jury apparently was having difficulty reaching a consensus. The trial court received numerous communications from the jury requesting definitions or clarifications of the terms “knowingly,” “circumstantial evidence,” “reasonable doubt,” and “in loco parentis.” The jury deadlocked on the charge of child endangering against Quamaine Brooks. Later, the jury reported that it had arrived at a verdict on the charges of felonious assault and child endangering regarding Quamaine Brooks but that there was a change in the verdict on the count of child endangering against Geraldine Brooks. One juror did not agree with the concept of “in loco parentis.” All of these communications occurred prior to the dismissal of the twelfth juror.

The eleven member jury sent two further communications to the trial court. In one, the jury asked if the trial court could reevaluate a juror's willingness to serve. The second communication stated that the jury was hopelessly deadlocked. The jury then arrived at its verdict.

Appellants argue that defense counsel's decision to proceed with the diminished jury created a risk that the jury would reach an unjust result. Appellants contend that their right to a full deliberative body was sacrificed for the sake of expediency.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. A properly licensed attorney is presumed to execute his duties in an ethical and competent manner. *State v. Smith* (1987), 36 Ohio App.3d 162. Ineffectiveness is demonstrated by showing that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Hamblin* (1988), 37 Ohio St.3d 153. To establish prejudice, a defendant must

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show that there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. *Strickland, supra*. at 694.

*7 In *Girts, supra*, the trial court permitted two alternates to remain in the jury room during deliberations. On appeal, Girts complained that his attorney's failure to object to the presence of the alternate jurors denied Girts effective assistance of counsel. This court stated that if the attorney was satisfied with the composition of the jury but concerned that a juror might have to be excused during deliberations, then the desire to keep the jury together would fall within the realm of trial strategy. Further, even if the attorney's performance was deficient, this court found no probability that, but for the error, the result of the trial would have been different. The court in *Baer, supra*, when considering a similar situation as occurred in the instant case, stated:

It is not claimed in this case that the state gained any advantage by proceeding with only eleven jurors, except the proper advantage of saving time and expense; neither is it claimed that any disadvantage resulted to the accused, except the possibility that the juror who was excused might have caused a disagreement. This remote possibility takes us into the realm of conjecture, and if we are to indulge in conjecture it may be conjectured that the defendant and his counsel believed it to be to their advantage to go on with eleven jurors. The excused juror might have been objectionable; the defense may have been well prepared, with witnesses assembled who could not be assembled at a later date; the defendant may have considered the expense which would accrue to himself from another trial. These and numerous other tactical advantages, known perhaps only to himself and counsel, might make it very important to him to proceed with the trial. To declare as a principle of law that he may not waive his constitutional privileges, and to compel him to forfeit any tactical advantages, would defeat the purposes which the constitutional provisions were designed to serve.

Id. at 611-612.

Prior to the dismissal of the juror, the jury sent a number of communications to the trial court which appeared to indicate the jury was having difficulty reaching a determination regarding the guilt of appellants for the offenses charged. It may be, to indulge in some conjecture, that defense counsel and appellants felt there was a high probability for a defense verdict being reached with that particular jury. The record is clear that defense counsel consulted with appellants before agreeing to proceed with the eleven member jury. Appellants and their attorney may have felt it was to their advantage to continue the trial instead of risking a new trial. That decision is one of trial strategy which a reviewing court ordinarily will not second-guess on appeal.

Also, appellants have not demonstrated any prejudice. After the dismissal of the juror, the jury still deadlocked for a time before reaching a verdict. Appellants cannot show that there was a reasonable possibility that, but for the decision to allow the diminished jury to continue deliberating, appellants would have been acquitted.

*8 Appellants' second assignment of error lacks merit.

IV.

Appellants' third assignment of error challenges the weight of the evidence admitted at trial in support of their convictions. Appellants assert that little, if any, of the evidence adduced at trial supports a finding of guilt beyond a reasonable doubt for the offenses charged.

To determine whether a conviction is against the manifest weight of the evidence:

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence

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weighs heavily against the conviction.

Thompkins, supra, at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Quamaine Brooks asserts that the only person who allegedly witnessed Quamaine abusing Angelique was his eight-year old cousin, Michael. Michael testified Quamaine struck Angelique in the stomach and back. The medical testimony admitted at trial indicated that Angelique's injuries resulted from being severely shaken and not from being hit or dropped. Quamaine Brooks argues that no direct evidence was admitted at trial showing that he caused the injuries to Angelique.

Quamaine Brooks was convicted of felonious assault in violation of R.C. 2903.11, which proscribes a person from causing or attempting to cause serious physical harm to another. "Serious physical harm" includes any physical harm that carries a substantial risk of death or which involves some permanent incapacity or physical harm involving substantial suffering. R.C. 2901.01(A)(5).

There is no argument that Angelique suffered serious physical harm. Quamaine Brooks disputes that he caused the harm to Angelique. The record reflects that Quamaine Brooks lied to the police about his attendance at work and school. The prevarications apparently were used to support Quamaine Brooks' contention that he could not have been responsible for the infant's injuries because he was never in the home. Quamaine Brooks even testified he did not know the child had been injured until Sunday night, one day after she was taken to the hospital. He stated that the police who arrived at the house on Saturday never said they were there to investigate anything with regard to the baby. Quamaine Brooks also stated that his mother did not mention that Angelique was hurt.

The record is clear that, with the exception of eight-year old Michael, the entire Brooks family neither saw nor heard anything that could have caused the severe injuries suffered by three-month old Angelique while she stayed in their home. Geraldine Brooks and Wadell Jefferson claimed the

baby acted normally past a point where it would have been likely from a medical standpoint. Instead, the emphasis seemed to be to blame an eight-year old child, whom the medical experts agreed would not have had the strength to inflict the massive injuries on the baby.

*9 The state presented evidence that Quamaine Brooks changed his story regarding his whereabouts on Friday, March 6, 1998. He possessed the strength to injure the child. Further, Quamaine Brooks claimed to have been unaware of Angelique's condition until the day after she was taken to the hospital. His mother went to the hospital the day before to see the baby and the police were at the Brooks' home on March 7, 1998. The jury certainly would have been justified in discounting Quamaine Brooks' testimony as being incredible. The jury's verdict of guilty on the charge of felonious assault did not result in a manifest miscarriage of justice.

The jury also convicted Quamaine Brooks of child endangering in violation of R.C. 2919.22(B)(2), which forbids a person from torturing or cruelly abusing a child. The testimony of Michael showed that he observed Quamaine Brooks strike Angelique on more than one occasion. Michael Brooks saw his cousin Quamaine hit Angelique more than once and drop the infant onto the floor. The abuse Michael witnessed would not have caused the injury to Angelique's brain but would be evidence of cruel abuse of an infant. There also was evidence the baby had been scratched. The pattern of the scratches was not consistent with an accidental scratching caused by the zipper of a couch cushion. This evidence does not reflect that serious physical harm was inflicted upon Angelique for those instances but is evidence she was severely abused.

Quamaine Brooks contends that there is an inconsistency between his conviction for felonious assault, R.C. 2903.11, which proscribes knowingly causing "serious physical harm to another," and the jury's additional finding that his conduct did not result in serious physical injury to enhance, under

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R.C. 2919.22(E), his conviction for child endangerment, R.C. 2919.22(B). In *State v. Lovejoy* (1997), 79 Ohio St.3d 440, the first syllabus reads: The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count. (*Browning v. State* [1929], 120 Ohio St. 62; *State v. Adams* [1978], 53 Ohio St.2d 223, paragraph two of the syllabus, *vacated on other grounds* [1978], 439 U.S. 811; *State v. Brown* [1984], 12 Ohio St.3d 147; and *State v. Hicks* [1989], 43 Ohio St.3d 72, approved and followed.)

Because any inconsistency here was not in response to the same count but arose out of different counts, it does not undermine the correctness of the jury's verdict.

Geraldine Brooks argues that her conviction for child endangerment was against the manifest weight of the evidence. Geraldine Brooks contends there is no evidence she created a substantial risk of serious physical harm to her granddaughter. Geraldine Brooks maintains she could not have known the child was being abused or prevented the abuse from taking place.

*10 R.C. 2919.22(A) provides in pertinent part: 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 mentally or physically handicapped child 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.

R.C. 2919.22(A) applies not only to parents and guardians, but to anyone having **temporary control** of a child. See *State v. Johnson* (Sept. 24, 1997), Lorain App. No. 96CA006506, unreported. This statute is concerned with neglect, which is generally characterized by acts of omission. *State v. Kamel* (1984), 12 Ohio St.3d 306, 308. The term "substantial risk" is defined by R.C. 2901.01(A)(8) as meaning "a strong possibility, as contrasted with

a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." The defendant must violate a duty of care, protection, or support, thereby creating a substantial risk to the health and safety of the child. A parent, guardian, or person in loco parentis must protect the child from abuse and provide care for the child's injuries. See *State v. Sammons* (1979), 58 Ohio St.2d 460.

The culpable mental state is one of recklessness. *State v. McGee* (1997), 79 Ohio St.3d 193.

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

R.C. 2901.22(C).

Medical testimony admitted at trial showed that Angelique most likely would have begun exhibiting symptoms soon after being injured. She probably would have had symptoms of an altered state of consciousness, difficulty eating, vomiting and seizures and would have seemed listless and sleepy. It is known that Angelique displayed symptoms of sleepiness, twitching, unresponsiveness, and difficulty eating at the time Geraldine Brooks took the baby to Donald Stratford. Upon being questioned, Brooks insisted the baby was fine during the drive over to the Stratford home. Brooks brought the baby to Stratford after apparently making a sudden decision to shop on the other side of town. The jury certainly could infer that Brooks knew something was wrong with Angelique but, instead of seeking medical attention, decided to take the baby to someone else. This behavior was reckless because the failure to provide prompt medical attention exacerbated the severity of the injuries as the child's brain continued to swell. Further, the unbelievable series of explanations offered by Geraldine Brooks in response to inquiries regarding how the injuries occurred

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undercut any notion that Geraldine Brooks did not realize the baby was badly hurt but showed that she chose to attempt to cover-up the crime instead of aiding her granddaughter.

*11 Geraldine Brooks' conviction for child endangerment was not against the manifest weight of the evidence.

Appellants' third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

DIANE KARPINSKI, P.J. and JAMES D. SWEENEY, J., concur.

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

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 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Lorain
 County.

STATE of Ohio, Appellee

v.

Deborah JOHNSON, Appellant
 No. 96CA006506.

Sept. 24, 1997.

Appeal from Judgment Entered in the Common
 Pleas Court County of Lorain, Ohio, No.
 95CRO47169.

David J. Berta, Attorney at Law, Lorain, Ohio, for
 appellant Deborah Johnson.

Gregory A. White, Prosecuting Attorney, and
 Jonathan E. Rosenbaum, Chief Counsel, Elyria,
 Ohio, for appellee.

DECISION AND JOURNAL ENTRY

SLABY, J.

*1 This cause was heard upon the record in the trial
 court. Each error assigned has been reviewed and
 the following disposition is made:

Appellant, Deborah Johnson, appeals from her
 conviction of three counts of endangering children,
 one of which included a physical harm
 specification. We affirm Johnson's conviction and
 sentence of incarceration, but reverse that portion
 of her sentence that imposed a requirement that she
 be placed in isolation on the birthdays of each of
 her victims.

For a two-and-a-half-week period during the Spring
 of 1995, Johnson's son, Brian Coffelt, his girlfriend,
 Velda Batton, and Batton's three children, C.B.,
 W.B. and P.B., stayed with Johnson at her
 apartment in Sheffield Lake. The children's stay at

Johnson's apartment came to an end after Johnson's
 fifteen-year-old daughter reported to Lorain County
 Children Services that Batton's children were being
 abused.

On May 3, 1995, Dave Kryz of Children Services
 came to Johnson's apartment to investigate the
 allegations of abuse. When he arrived, Batton
 attempted to flee with her children. Kryz was able
 to catch up with them in the parking lot and detain
 them until the police arrived. Johnson, Batton, and
 Coffelt were arrested and Batton's three children
 were taken into protective custody.

On May 4, 1995, C.B. and W.B. were questioned
 by Kryz and their statements were tape recorded.
 During this and later questioning by the authorities,
 the children revealed that, during their stay at
 Johnson's apartment, they had not been given
 enough to eat and were frequently hungry. The
 adults often refused their requests for food. At
 times, C.B. and W.B. were so hungry that they
 resorted to sneaking cake mix, butter, and Coffee
 Rich to eat. When C.B. and W.B. were caught
 sneaking food by Johnson, Batton, and Coffelt, they
 received extreme punishment. Each boy was
 repeatedly "tied up," as they put it, which involved
 one or more of these adults binding the child's
 hands and feet with shoe laces and gagging them
 with a bandana. Although Johnson was recovering
 from back surgery, she was physically able to
 punish the boys in this manner on repeated
 occasions. Each boy had been left "tied up" for
 hours at a time, and even had to sleep while bound
 and gagged. In fact, on the morning that Kryz came
 to the apartment, W.B. was bound, still being
 punished by Johnson for sneaking food the night
 before.

Johnson was indicted on three counts of
 endangering children, each with a physical harm
 specification. Johnson and Batton were tried jointly
 before a jury. Johnson was convicted of all three
 counts of endangering children, with a physical
 harm specification attached to the third count.

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Johnson appeals and raises five assignments of error.

Assignments of Error

I. The trial court erred to the prejudice of appellant when it admitted taped prior statements of the alleged victims despite the non-authentication of the same in violation of Ohio Rule of Evidence 901.

*2 II. The trial court erred to the prejudice of appellant when it admitted taped prior statements of the alleged victims ruling the statements admissible as per Ohio Evidence Rule 801(D)(1)(b).

Johnson's first and second assignments of error will be addressed jointly because they are closely related. Johnson argues that the trial court abused its discretion by admitting into evidence taped statements, and the typed transcripts of those recordings, that C.B. and W.B. made to Dave Kryz. Johnson contends that the tape and transcripts were inadmissible because they did not fall within any exception to the hearsay rule and because they were not properly authenticated.

Johnson's first objection to the admission of this evidence was that it was inadmissible hearsay. The state asserted, and the trial court agreed, that the children's prior statements were admissible pursuant to Evid.R. 801(D)(1)(b), which provides:

A statement is not hearsay if:

The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is *** consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

During cross-examination of C.B. and W.B., defense counsel for both Batton and Johnson asked the boys about the statements they had made to Kryz, and asked them whether they had rehearsed their testimony with Children Services, the prosecutor, the police, or their foster mother. C.B., in particular, was asked whether he had been told what to say on the witness stand. Defense counsel

asked C.B. several times why he was looking around the room, and even suggested that C.B. was being prompted while testifying. Defense counsel's cross-examination of both C.B. and W.B. implied that the boys had been coached, which suggested recent fabrication or improper influence.

The trial court admitted the children's prior statements for the limited purpose of proving that the statements were consistent with their testimony to rebut any implication of recent fabrication or improper influence. The trial court instructed the jury that the evidence was to be considered for this limited purpose only. We find no violation of the hearsay rule by the trial court admitting the children's prior statements for this limited purpose.

Next, Johnson argues that the tape and transcripts of the children's statements were inadmissible because they were not properly authenticated pursuant to Evid.R. 901. Evidence is adequately authenticated if there is sufficient evidence to support a finding "that the matter in question is what its proponent claims ."Evid.R. 901. Joseph Monia of the Sheffield Lake Police Department identified the tape and transcripts and testified that the statements were those of C.B. and W.B. Neither defense counsel raised any objection to the adequacy of this identification.

Moreover, it was clear from the conduct of defense counsel that they believed that the statements introduced were those of C.B. and W.B. Prior to the state offering the statements into evidence, defense counsel requested the trial court, pursuant to Crim.R. 16(B)(1)(g), to conduct an in camera inspection of the children's statements to determine whether there were any inconsistencies between the prior statements and the testimony of C.B. and W.B. Because they asked the court to examine the statements contained in the tape and transcripts, defense counsel must have believed that these statements were, in fact, those of C.B. and W.B. Johnson further demonstrated her belief that the state's tape and transcripts were authentic when she used that evidence to cross-examine W.B. and C.B. about inconsistencies between their trial testimony

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and their prior recorded statements. The first and second assignments of error are overruled.

Assignment of Error III

*3 The trial court erred when it failed to grant appellant's motion for acquittal as to count three of appellant's indictment as appellant could not as a matter of law be in loco parentis with the alleged victims.

Johnson's third assignment of error is that the trial court erred in failing to grant her Crim.R. 29 motion for judgment of acquittal on count three of the indictment. Count three charged Johnson with endangering children in violation of R.C. 2919.22(A), which provides, in relevant part, that no person "having custody or control or person in loco parentis of" a child under the age of eighteen shall create a substantial risk to the health or safety of a child by violating a duty of care, protection, or support.

Johnson argues that the state presented insufficient evidence that she was in custody or control or in loco parentis with the alleged victims. She argues that, because the children were merely guests at her apartment, she had no responsibility for them and owed them no duty of care. We disagree.

R.C. 2919.22(A) applies not only to parents and guardians, but to anyone having temporary control of a child. See 1974 Committee Comment to H 511. For instance, R.C. 2919.22(A) has been applied to babysitters. See *State v. Wright* (1986), 31 Ohio App.3d 232, 510 N.E.2d 827. The relationship that Johnson had with Batton's children was, at certain times during this period, akin to a babysitting relationship. The state presented evidence that Batton worked at night. While she was at work, the children were left in the care of Coffelt and Johnson. According to the children, Johnson exerted control over them while their mother was at work. While in Johnson's care, the children's requests for food were often denied and they resorted to sneaking food from the kitchen. When Johnson caught them, she punished them by binding and gagging them. She often tied the

children up in her bedroom and forced them to stay there over night. The control Johnson exerted over C.B. and W.B. was sufficient to bring her conduct within the operation of R.C. 2919.22(A). The third assignment of error is overruled.

Assignment of Error IV

The trial court erred to the prejudice of appellant when it overruled appellant's objection to the joinder of parties for trial.

Johnson's fourth assignment of error is that the trial court erred in trying her jointly with co-defendant Velda Batton. Pursuant to Crim.R. 14, a defendant may move for relief from prejudicial joinder of defendants for trial. To convince the trial court to order separate trials, the defendant must affirmatively demonstrate prejudice due to the joinder. *State v. Miller* (1995), 105 Ohio App.3d 679, 691, 664 N.E.2d 1309.

In response to the state's motion to consolidate Johnson and Batton's trials, Johnson filed an objection, contending that she and Johnson planned to assert different defenses and that they had not participated in the same course of criminal conduct. The trial court granted the state's motion and went forward with the joint trial.

*4 Because Johnson failed to preserve this issue for appeal, we need not determine whether the trial court ruled correctly on the merits. To preserve the issue of prejudicial joinder for appeal, Johnson was required to renew her Crim.R. 14 objection at the close of the state's case or at the conclusion of all the evidence. *State v. Miller* (1995), 105 Ohio App.3d 679, 691, 664 N.E.2d 1309. Johnson failed to renew her objection at either of the appropriate times. Therefore, she waived her right to raise this issue on appeal. The fourth assignment of error is overruled.

Assignment of Error V

Appellant was denied due process of law when the court imposed solitary confinement as part of appellant's sentence.

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Johnson's fifth assignment of error is that the trial court was without authority to impose the portion of her sentence that required her to be placed in isolation on each of her victim's birthdays. The state concedes, and we agree, that the trial court had no authority to impose this aspect of Johnson's sentence. The fifth assignment of error is sustained.

Judgment accordingly.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Exceptions.

QUILLIN, P.J. and REECE, J., concur.
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 Only the Westlaw citation is currently available.
 CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.

STATE of Ohio, Plaintiff-Appellee,

v.

Garey Kirk, Defendant-Appellant.
 No. 93AP-726.

March 24, 1994.

APPEAL from the Franklin County Court of
 Common Pleas.

Michael Miller, Prosecuting Attorney, and
 Katherine Press, for appellee.
 Sarah H. Beauchamp, for appellant.
 BOWMAN, J.

*1 On November 1, 1991, appellant, Garey Kirk, was indicted and charged with one count of involuntary manslaughter, a violation of R.C. 2903.04, and two counts of child endangering, violations of R.C. 2919.22(A) and (B). The charges arose as a result of the death of Brent Michael Nelson, the three-year-old biological son of appellant's wife, Laura. Although Brent had been legally adopted by Laura's parents, Wilma and Bob Nelson, Brent knew that Laura was his mother and called her "mommy." Early in their marriage, Laura and appellant lived with the Nelsons and Brent and, even though Laura and appellant no longer lived with the Nelsons, they saw Brent almost every day. There had been some discussion that, when Laura and appellant's lives stabilized, Laura might be able to obtain custody of Brent.

On April 27, 1991, Wilma and Bob Nelson, their daughter, Patty, and their adopted son, Brent, were at the Nelson's home when Laura, appellant and Brenda Taupe arrived to pick up some fishing

poles. Wilma asked Laura if she would pick up David, the Nelson's younger son, from work. When Laura left, the Nelsons and Patty were on the front porch and appellant and Brent were at the swing set in the backyard, she observed Brent sitting on the glider and appellant pushing him. Because appellant was pushing Brent higher than she would have pushed him, Laura yelled to appellant not to swing Brent so high.

After Laura left, the Nelsons and Patty went in to the house to put some doors back on their hinges. Because they were not having any success, Wilma decided to get appellant to help them. As she stepped into the hallway, appellant came through the front door with Brent over his shoulder and stated that Brent was hurt because he fell from the swing. As appellant handed Brent to Wilma, Brent stiffened in her arms. Because Brent's breathing was very shallow, Wilma instructed Patty to call the emergency squad. Brent was taken to Children's Hospital where he died three days later as a result of a brainstem herniation secondary to cerebral edema and a subdural hematoma.

While Brent was hospitalized, appellant, along with other family members, was interviewed by Detective James McCoskey of the Columbus Police Department. Appellant told McCoskey that, he was watching Brent when Brent attempted to climb onto a swing, which was approximately one foot off the ground, and fell onto his back, into grass that was approximately four to five inches high. Appellant stated that, when Brent fell, he did not hit his head on either the gravel driveway or the railroad ties near the driveway and the swing set. Appellant said that he was not touching Brent at the time the fall occurred.

After completing the interviews, McCoskey contacted the Crime Scene Search Unit and they went to the Nelsons' home where they observed the swing set. The swing in question was fourteen inches off of the ground and the grass was the approximate length that appellant had indicated.

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*2 After Brent died, Dr. Fardal, Chief Forensic Pathologist and Deputy Coroner for Franklin County, granted the request of Dr. Steven Qualman, Chief of the Department of Laboratory Medicine at Children's Hospital, to perform an autopsy on Brent. Fardal received a copy of the autopsy and found Brent's injuries to be inconsistent with appellant's version of the events, as Brent would have had to have fallen from a higher distance than one foot in order to sustain the injuries he experienced.

After a jury trial on the charges, appellant was found not guilty of endangering children pursuant to R.C. 2919.22(B), but guilty of both child endangering pursuant to R.C. 2919.22(A) and involuntary manslaughter. Appellant now brings this appeal and asserts the following assignments of error:

"ASSIGNMENT OF ERROR I

"THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL UNDER CRIMINAL RULE 29 AT THE CONCLUSION OF THE STATE'S CASE AND AT THE CONCLUSION OF THE TESTIMONY WHEN THE STATE HAD FAILED TO PRESENT ANY EVIDENCE ON AN ESSENTIAL ELEMENT OF THE CRIME OF CHILD ENDANGERING, I.E., A LEGAL DUTY TO PROTECT THE CHILD.

"ASSIGNMENT OF ERROR II

"THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL UNDER CRIMINAL RULE 29 AT THE CONCLUSION OF THE STATE'S CASE AND AT THE CONCLUSION OF THE TESTIMONY WHEN THE STATE HAD FAILED TO PRESENT EVIDENCE OF THE CORPUS DELICTI OF THE CRIME CHARGED.

"ASSIGNMENT OF ERROR III

"THE CONVICTIONS OF THE DEFENDANT MUST BE REVERSED BECAUSE THE EVIDENCE ADMITTED AGAINST THE DEFENDANT WAS INSUFFICIENT TO SUPPORT A CONVICTION.

"ASSIGNMENT OF ERROR IV

"OHIO REVISED CODE SECTION 2919.22 IS

UNCONSTITUTIONALLY VOID AND OVERBROAD, AND DEFENDANT'S CONVICTIONS MUST BE REVERSED."

Appellant's first two assignments of error allege that the trial court erred by denying appellant's motions for acquittal pursuant to Crim.R. 29 at the conclusion of the state's case and at the conclusion of all of the testimony.

In ruling on a defendant's motion for judgment of acquittal, the trial court is required to construe the evidence most strongly in favor of the state, the party against whom the motion has been directed. *Cincinnati v. Robben* (1982), 8 Ohio App.3d 203. Crim.R. 29(A) provides that the trial court, upon motion of a defendant after the evidence on either side has closed, shall order the entry of a judgment of acquittal of the offense charged in the indictment if the evidence is insufficient to sustain a conviction. The state is required to prove all of the elements of the crime beyond a reasonable doubt, including those elements relating to the body or the substance of the crime and act and criminal agency of the act. *State v. Scott* (1983), 8 Ohio App.3d 1. A defendant is not entitled to a judgment of acquittal if, after viewing the evidence in a light most favorable to the state, reasonable minds could differ as to whether each material element of the crime has been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261.

*3 In his first assignment of error, appellant asserts that the state failed to present any evidence on an essential element of the crime of child endangering in that it failed to show appellant was within the class of persons set forth in the statute who had a duty to protect Brent.

R.C. 2919.22(A) provides:

"(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 mentally or physically handicapped child 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,

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or support. * * * ”

In *State v. Barton* (1991), 71 Ohio App.3d 455, the court stated that R.C. 2919.22(A) requires proof that the defendant, as the parent, guardian, custodian, person **having custody or control**, or person in loco parentis of a **child** under eighteen years of age, or handicapped **child** under the age of twenty-one, recklessly created a substantial risk to the health or safety of the **child** by violating a duty of protection, care or support and that the defendant's conduct resulted in serious physical harm to the **child**. This includes proof that the defendant acted in the capacity of the parent, guardian, custodian, person **having custody or control**, or person in loco parentis, and that, in dereliction of a duty imposed by that status, the defendant created a risk to the health or safety of the **child**.

The Committee Comment to R.C. 2919.22 provides: “This section is aimed at **child** neglect and abuse which causes, or poses a serious risk to the mental or physical health or safety of the victim.” “The first part of the section defines the offense of neglect as the violation of a duty of care, protection, or support of a child which results in a substantial risk to his health or safety. * * * In addition to the natural parents of a child, the first part of the section also covers guardians and custodians, persons having temporary control of a child, and persons standing in the place of parents.”

In his first assignment of error, appellant contends that he had no legal relationship to the child, was a guest of the family and had no duty of care towards Brent. Based on the facts of this case, we disagree. The statute does not focus only on those individuals having a legal relationship to the child, such as a parent or guardian, but also includes a “person having * * * control” of a child under eighteen years of age. Appellant was married to Brent's biological mother, appellant had for a period of time lived in the same household as Brent, appellant saw Brent on an almost daily basis, played with him regularly and Brent referred to

appellant as his “buddy.” Appellant was clearly more than a guest in his in-laws' home and had more than a casual relationship to Brent. By listing in the alternative various individuals who come into contact with a child, the statute includes within its scope those individuals who have something less than a legal relationship to a child. The phrase “person having custody or control,” can apply to someone physically entrusted with the care of a child as well as a person who stands in a legal relationship to that child.

*4 Based on these facts, this court finds that reasonable minds could determine that appellant had custody or control of Brent while he was playing on the swing set. Appellant owed Brent a reasonable standard of duty of care and protection of Brent. Simply because there is no legal relationship between appellant and Brent does not mean that appellant did not have control over Brent. This is much like a situation where a babysitter has been found guilty of endangering children when an injury befell the child while the child was under the babysitter's control. See, for example, *State v. Wright* (1986), 31 Ohio App.3d 232. Appellant's first assignment of error is not well-taken.

Appellant's second and third assignments of error are related and will be addressed together.

In his second assignment of error, appellant asserts that the state failed to present evidence of the *corpus delicti* of the crime charged. In his third assignment of error, appellant asserts that the evidence admitted was insufficient to support his conviction.

Corpus delicti was defined in *State v. Edwards* (1976), 49 Ohio St.2d 31, vacated in part on other grounds (1978), 438 U.S. 911, paragraph 1a of the syllabus:

“The *corpus delicti* of a crime is the body or substance of the crime, included in which are usually two elements: (1) the act and (2) the criminal agency of the act.”

Establishing the *corpus delicti* means no more than proving that the crime charged has been committed.

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Although *corpus delicti* refers to the commission of the crime by someone, it does not include the identity of the perpetrator. Rather, it is sufficient to show that the act charged was committed through the criminal agency of someone, regardless of whether or not the identity of that someone is known. *State v. Johnson* (Mar. 3, 1992), Franklin App. No. 91AP-919, unreported (1992 Opinions 800).

In this case, Brent's death is undisputed. It is also undisputed that appellant was the last person to be with Brent before he received the injury which resulted in his death. Although no one knows the exact circumstances of Brent's injury, it is sufficient to show that the act charged was committed through the criminal agency of a person without knowing how that person committed the crime.

In *State v. Schultz* (1982), 8 Ohio App.3d 352, the court stated that a knowing failure to protect a child was itself sufficient to breach the duty required. In *Schultz*, it was unknown who struck the fatal blows that caused the death of the child; however, it was the person's failure to act, or attempt to act, that constituted the failure to protect under R.C. 2919.22.

Dr. Fardal testified that, in order to acquire the injuries that Brent did, he would have had to have sustained a moderate to severe amount of force on the brain and skull. Such amount of force could have occurred had Brent fallen from a height of four or more feet, sustained a blow to the head like boxers receive, or been in an automobile accident. Dr. Fardal stated that, although there were no signs on Brent's body to lead him to believe child abuse had occurred, there was also nothing to lead him to the exact cause of the trauma Brent sustained.

*5 Dr. Qualman, who also indicated that Brent's injuries were inconsistent with a normal childhood fall or accident, stated that the injuries Brent sustained were caused by a fairly hard, direct external impact, force or blow.

Because Brent sustained a major brain injury, the injury did not qualify as sudden infant death

syndrome. The injuries Brent sustained could have come from a fall from a second or third story, or a height of approximately ten feet, being hit on the head strongly by a broad object, being banged against something, a blow from the palm or side of someone's hand, or shaking, although an injury from shaking would more likely occur in a child younger than Brent. Qualman stated that Brent's injuries occurred within one hour of his admission to Children's Hospital and that, when Brent was brought to the hospital, he was essentially dead.

Dr. Charles Johnson, Director of the Child Abuse Program at Children's Hospital, was asked to consult on Brent's case and reviewed his medical records. After his review, he opined that Brent's history was incompatible with the injury he suffered and that it was consistent with child abuse.

Here, the medical evidence presented shows the injuries sustained by Brent were inconsistent with the explanation of an accidental fall, as described by appellant. Based on the foregoing, the trial court did not err in overruling appellant's Crim.R. 29(A) motion for acquittal, and his second assignment of error is not well-taken.

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259.

A reviewing court may not reverse a judgment of conviction in a criminal case where the guilty verdict was returned by the trier of fact on sufficient evidence and no prejudicial error occurred in the trial of the case. *State v. DeHass* (1967), 10 Ohio St.2d 230. The determination of the credibility of the witness is the responsibility of

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the trier of fact, and this court may not reverse a judgment where reasonable minds could reach different conclusions upon the evidence offered at trial. *State v. Antill* (1964), 176 Ohio St. 61. The verdict will not be disturbed unless this court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks*.

In this case, appellant was the last person to be seen with Brent when Brent was alive. Brent was in appellant's custody and control, and appellant owed him the duty of care of protection. Prior to leaving to pick up her brother, Laura requested that appellant stop swinging Brent so high. The next time anyone, beside appellant, saw Brent was when appellant brought him into the house after he had been injured. The medical evidence at trial demonstrated that appellant's description of what caused Brent's injuries was inconsistent with the injuries themselves.

***6** Based on the foregoing, this court finds that any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The evidence was sufficient to support a finding of appellant's guilt under R.C. 2919.22(A) and, based upon the definition of involuntary manslaughter as set forth in R.C. 2903.04(A), appellant's conviction for that offense was also warranted. Accordingly, appellant's third assignment of error is not well-taken.

In his fourth assignment of error, appellant challenges the constitutionality of R.C. 2919.22, stating that the statute is void and overbroad.

There is no indication in the record that the issue of the constitutionality of the statute was raised in the trial court. Issues such as the constitutionality of a statute which are not raised in the trial court cannot be raised for the first time on appeal. *Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St.3d 76. Regardless, there is no substance to this argument as R.C. 2919.22(A) is clear, understandable and has been determined to be constitutional. *State v. Sammons* (1979), 58 Ohio St.2d 460. Accordingly, appellant's fourth assignment of error is not well-

taken.

Based on the foregoing, appellant's four assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

PETREE and STRAUSBAUGH, JJ., concur.
 STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

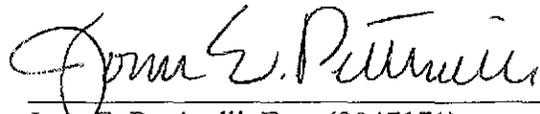
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Respectfully submitted,



Joan E. Pettinelli, Esq. (0047171)
Counsel for Appellee John K. O'Toole

CERTIFICATE OF SERVICE

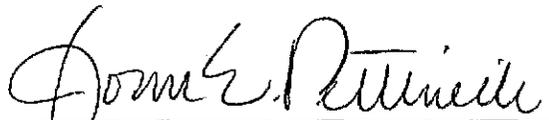
I certify that a copy of the Appendix to Appellee's Merit Brief was sent by U.S. mail, postage prepaid, on ~~September 28, 2007~~ ^{OCTOBER 1, 2007} to the following:

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