

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2009-0678
)	
Plaintiff-Appellant,)	On Appeal from the
)	Lake County Court of Appeals,
v.)	Eleventh Appellate District
)	
JOSEPH PEPKA)	
)	
Defendant-Appellee.)	Court of Appeals Case No. 2008-L-016

MERIT BRIEF OF APPELLANT STATE OF OHIO

CHARLES E. COULSON (0008667)
PROSECUTING ATTORNEY
LAKE COUNTY, OHIO

Joshua S. Horacek (0080574) (COUNSEL OF RECORD)
ASSISTANT PROSECUTING ATTORNEY
Administration Building
105 Main Street, P.O. Box 490
Painesville Ohio 44077
(440) 350-2683 Fax (440) 350-2585

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COUNSEL FOR APPELLANT, STATE OF OHIO

Albert L. Purola, Esquire
38108 Third Street
Willoughby, OH 44094
(440) 951-2323
purola@hotmail.com

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COUNSEL FOR APPELLEE, JOSEPH PEPKA

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STATEMENT OF THE CASE AND FACTS

In March of 2007, paramedics arrived at the apartment of Appellee Joseph Pepka to find an eight-month-old baby lying half-dressed in wet clothes on a wet towel on the floor. (Trial T.p. 103, 221). Her entire body was wet. (Trial T.p. 103, 221). She was bluish-grey and not responsive. (Trial T.p. 105, 226-228). Immediately the paramedics noted her temperature, and it was of such urgent concern that the paramedics were in the apartment for only three minutes. (Trial T.p. 110). In the ambulance on the way to the hospital, the baby's temperature was only 85.7° F. (Trial T.p. 115). As the paramedics warmed the baby up in the ambulance, she began to regain consciousness and become more responsive. (Trial T.p. 122). Dr. Lolita McDavid testified that, when she arrived at the hospital, the baby had superficial to partial-thickness burns. (Trial T.p. 427). Her temperature had dropped to a dangerously low level, lower than Dr. McDavid had ever seen in a living person. (Trial T.p. 418, 443-444). The baby also had retinal hemorrhages in both of her eyes and a sub-dural bleed, indicative of shaken baby syndrome. (Trial T.p. 426, 435, 443-444).

At that time, Pepka lived with his girlfriend Kaysie Perry and her baby daughter, the victim in this case. (Trial T.p. 253, 691). Earlier that March morning Pepka went into the baby's room and woke her up. (Trial T.p. 257, 691). He brought the baby into the room he shared with Perry, and Perry visited with the baby (Trial T.p. 257, 691-692). The baby was playful and happy that morning. (Trial T.p. 257-258). Pepka gave the baby her ear medicine, and spilled the medicine on the baby, forcing Perry to change the baby's clothes. (Trial T.p. 257, 692). The baby then went back to sleep for a while. (Trial T.p. 257).

Later that morning Perry was going to go to the home of Pepka's sister to do laundry. (Trial T.p. 263, 694). Since Perry was running late, Pepka offered to assist by giving the baby a bath. (Trial T.p. 259, 694). Pepka took the baby into the bathroom, and Perry heard the water running for a few seconds. (Trial T.p. 259). Pepka stated that he ran the water, then put the baby in without testing the temperature. (Trial T.p. 695). When he realized the water was too hot, he took her out and added cold water. (Trial T.p. 695). Perry then heard the baby crying, which she never does in the bath. (Trial T.p. 259). Perry went into the bathroom and checked the water, which she found to be too hot. (Trial T.p. 259, 694-695). Perry then ran some cold water to cool the bath down. (Trial T.p. 260). Pepka then proceeded to bathe the baby. (Trial T.p. 260).

When he was done, Pepka brought the baby back into the bedroom where Perry dressed her. (Trial T.p. 262). While dressing her, Perry noticed that the baby's feet were pink – they had not been pink before the bath. (Trial T.p. 262). On the stand, Pepka also said that her feet were pink after the bath. (Trial T.p. 696). But Pepka previously told the police that the baby's feet were "red like a [expletive] tomato." (State's Exhibit 7). The baby was then placed back into her playpen, and eventually she was given a bottle. (Trial T.p. 263, 698). Pepka and Perry then argued over Pepka not handling the baby correctly and his perception that the baby hated him. (Trial T.p. 264). After the argument was resolved, Perry left to go do laundry. (Trial T.p. 263).

It took Perry about 20 minutes to get to Pepka's sister's house. (Trial T.p. 268). When Perry arrived, Pepka's sister, Jennifer Fazekas, was on the phone with Pepka. (Trial T.p. 268). Pepka told Perry that the baby appeared to be having a seizure and asked if he should call 9-1-1. (Trial T.p. 268). Before Perry answered, Fazekas called the on-call nurse

at Lake West Hospital, who told them that the baby needed to go to urgent care or the emergency room. (Trial T.p. 268). Pepka then resumed talking to Fazekas while Perry left. (Trial T.p. 268). Though there is some conflicting testimony as to who decided to call 9-1-1, Pepka did, eventually, call 9-1-1.

On June 25, 2007, an indictment was filed against Pepka charging him with three counts of endangering children, in violation of R.C. 2919.22(A). (T.d. 8). The indictment specified that each count was a felony of the third degree. *Id.* In preparing for trial, the state provided full, open-file discovery, including medical records. (T.d. 15, 21). On December 11, 2007, the state moved the trial court to amend the indictment. (T.d. 66). The state sought to clarify the indictment by adding the words “[w]hich resulted in serious physical harm to the said female minor victim[.]” to each count of the indictment. *Id.* The state’s motion to amend the indictment was granted the next day. (T.d. 75). On December 17, a trial commenced on all three charges. (T.d. 77). The jury found Pepka to be “guilty” on all three charges, each with a special finding that on the jury form that Pepka’s actions resulted in serious physical harm to the victim. (T.d. 78). Pepka was later sentenced to serve two years in prison on Count 1, three years in prison on Count 2, and four years in prison on Count 3. (T.d. 99). All of the prison terms were to be served concurrently for a total of four years in prison. (T.d. 99).

Pepka appealed his convictions to the Eleventh District Court of Appeals, where he raised three assignments of error. Pepka argued, *inter alia*, that, “[t]he purported amendment of the indictment by the trial court by adding a material element that elevated the charge from a first degree misdemeanor to a third-degree-felony is unauthorized by law, and is a nullity.” *State v. Pepka*, 11th Dist No. 2008-L-016, 2009-Ohio-1440, at ¶24.

The Court of Appeals found merit in his contention that the indictment was improperly amended, but rejected Pepka's second and third assignment of error, finding that Pepka's statement to the police was not taken in violation of this Constitutional rights, and that the verdict was supported by sufficient evidence. Id. at ¶38. The case was remanded back to the trial court so that his three third-degree felony convictions could be "converted to first-degree misdemeanors." Id. at ¶41.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

AN INDICTMENT THAT CHARGES A DEFENDANT WITH ENDANGERING CHILDREN IN VIOLATION OF R.C. 2919.22(A) AS A FELONY OF THE THIRD DEGREE IS SUFFICIENT REGARDLESS OF WHETHER IT INDICATES THAT THE VICTIM SUFFERED SERIOUS PHYSICAL HARM.

In order to be sufficient, an indictment must do two things: (1) inform the defendant of the charge which he faces, giving him notice of all the elements of that offense; and (2) allow a defendant to protect himself from any future prosecution based upon the same event. See, e.g., *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162. The offense of endangering children in violation of R.C. 2919.22(A) can only be charged as a felony of the third degree if the victim suffered serious physical harm as a result of the defendant's actions. The question presented here is whether an indictment that explicitly charges endangering children as a felony of the third degree sufficiently includes a finding that the victim suffered serious physical harm, even though the indictment does not mention serious physical harm.

Pepka was charged with three counts of endangering children. Each charge in Pepka's three count indictment stated:

On or about the 3rd day of March, 2007, in the City of Eastlake, Lake County, State of Ohio, one JOSEPH PEPKA did recklessly, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a minor victim, a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, to-wit: eight months of age, create a substantial risk to the health or safety of the said female minor victim, by violating a duty of care, protection, or support.

This act, to-wit: Endangering Children, constitutes a Felony of the Third degree, contrary to and in violation of the Ohio Revised Code, Title 29 § 2919.22(A) and against the peace and dignity of the State of Ohio.

Pepka at ¶12-13. Thus, the indictment charged Pepka with endangering children and declared that the act for which he stood accused constituted a felony of the third degree. In an effort to clarify the indictment, it was later amended to include additional language in each count which specified that Pepka's actions "resulted in serious physical harm to said female minor victim." *Id.* at ¶15. The resolution of the question of whether this amendment was proper rests on the analysis of whether the original indictment sufficiently charged Pepka with endangering children as a felony of the third degree.

This Court has been clear on when an amendment to an indictment is proper. In *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144, at paragraph two of the syllabus, this Court construed Crim R. 7(D), holding that "[a]n indictment, which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment." More recently, this Court held that "Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense." *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 90. N.E.2d 609, at syllabus.

The state concedes that, had the original indictment not charged Pepka with third-degree-felony endangering children, then it would have been improper to add the clarification that Pepka's actions resulted in serious physical harm to the victim. Conversely, if the original indictment did sufficiently charge Pepka with third-degree-felony endangering children, the amendment would not change the name or identity of the offense charged. Thus, the analysis turns from the propriety of the amendment to the sufficiency of the original indictment.

"The sufficiency of an indictment is subject to the requirements of Crim.R. 7 and the constitutional protections of the Ohio and federal Constitutions." *State v. Childs* (2000), 88 Ohio St.3d 558, 564-565, 728 N.E.2d 379. "An indictment meets constitutional requirements if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id.* at 565, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887. Under Crim.R. 7(B), an indictment "may be made in ordinary and concise language without technical averments or allegations not essential to be proved." Crim.R. 7(B) also notes that the statement that a defendant committed a public offense "may be in the words of the applicable section of the statute, provided the words to that statute charge an offense, or in words *sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged.*" (Emphasis added).

When both paragraphs of each charge in the original indictment are read together, the indictment sufficiently charges Pepka with third-degree-felony endangering children. The indictment stated that Pepka was being charged with a felony of the third degree, and

the only way that endangering children can be a felony of the third degree is if the victim suffered serious physical harm. This situation was concisely explained by the dissenting judge at the Court of Appeals:

[T]he original indictment described the actions of [Pepka] which constituted endangering children and specifically stated [Pepka] was being charged with a third-degree-felony. The only way a defendant charged with endangering children may be convicted of a third-degree-felony is by proof that the victim(s) suffered serious physical harm. R.C. 2919.22(E)(2)(c). The pre-amended indictment was therefore sufficient to put [Pepka] on notice of the crime, its elements, and its degree. The amendment was merely a clarification adding nothing to the crime charged that was not already apparent on its original face.

Pepka at ¶189 (Rice, J. dissenting)(emphasis sic). Moreover, Judge Rice recognized that “[t]he ‘[t]his act’ language demonstrates there can be no confusion as to what alleged behavior is being charged under the specific statutory subsection prohibiting endangering children, a felony of the third degree.” *Id.* at ¶192 (Rice, J., dissenting).

As this Court has noted that “[t]he purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecution for the same incident.” *Buehner* at ¶7, citing *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417, 183 N.E.2d 373. In this case, the unamended indictment met these purposes. There is no doubt that Pepka subjectively knew what he was facing; his defense attorney indicated that they understood Pepka was facing third-degree felonies “[f]rom the beginning.” (Trial T.p. 15). But even viewing the indictment objectively, it provided sufficient notice because it clearly charged Pepka with a felony of the third degree, a charge that could only have been proper if the victim suffered serious physical harm. Moreover, the indictment was specific enough as to Pepka’s actions to bar the state from initiating a subsequent prosecution.

The Court of Appeals discounted the second paragraph in each count of the original indictment that specified Pepka was being charged with a felony of the third degree, instead finding that “* * * there is no way to tell, from the face of the unamended indictment, whether the Lake County Grand Jury considered this element, since that indictment failed to contain the language specifying that third-degree felony endangering children must be conduct resulting in serious physical harm.” *Pepka* at ¶32. The face of the unamended indictment did, however, indicate that the grand jury considered whether the victim suffered serious physical harm. The only way that the grand jury could have properly charged Pepka with a third-degree felony, as the unamended indictment did, was to consider serious physical harm.

Admittedly, the indictment did not explicitly state that the victim in this case suffered serious physical harm. But such an explicit statement is not required in this situation, where there is only one possible meaning to the grand jury’s indication that Pepka was facing a felony of the third degree. This Court has repeatedly found that “ ‘there is no requirement that the indictment demonstrate the basis for the grand jury’s findings. The bill of particulars serves this function.’ ” *Buehner* at ¶10, quoting *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, at ¶30. The situation in this case is similar to an indictment that charges a crime incumbent upon a predicate offense and only identifies the predicate offense by reference to the statute number. Both situations involve indictments that identify elements without explicit reference to the conduct of the defendant.

This Court has approved the identification of a predicate offense by statute number, finding that “[t]he state’s failure to list the elements of a predicate offense in the indictment in no way prevents the accused from receiving adequate notice of the charges against

him.” *Buehner* at ¶11. Specifically, this Court approved of an indictment that charged ethnic intimidation in violation of R.C. 2927.12, which only stated that the defendant “did violate Section 2903.21 of the Revised Code by reason of race, color, religion, or national origin of another person or group of persons.” *Id.* at ¶1. Though a violation of R.C. 2903.21 was a required element of R.C. 2927.12, the indictment did not set out the elements of R.C. 2903.21. This Court arrived at this conclusion despite concerns identical to those expressed by the Court of Appeals in this case: that, because the elements of the predicate offense were not explicitly stated in the indictment, “there is no evidence that the grand jury found probable cause for each of them.” *Id.* at ¶16 (Moyer, C.J., dissenting). This Court passed up those concerns, instead specifically holding that “[a]n indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment.” *Id.* at syllabus.

Though it did not specifically state that Pepka’s actions resulted in serious physical harm to the victim, the original indictment was sufficient to charge endangering children as a felony of the third degree. The original indictment gave Pepka notice of the crime with which he was charged, and defense counsel admitted as much when questioned by the trial court. Furthermore, as each count of the original indictment only specified one crime, it was specific enough to bar future prosecutions based on that crime. Thus, when each count is read as a whole, the original indictment charged Pepka with third-degree endangering children, and the subsequent amendment of the indictment did not change the name or identity of the crime, and did not violate Pepka’s constitutional rights.

PROPOSITION OF LAW NO. II

THE ELEMENTS OF ENDANGERING CHILDREN DO NOT INCLUDE SERIOUS PHYSICAL HARM SUFFERED BY THE VICTIM. RATHER, SERIOUS PHYSICAL HARM IS A SPECIAL FINDING TO DETERMINE THE DEGREE OF THE OFFENSE, BUT IS NOT PART OF THE DEFINITION OF THE CRIME.

The unamended indictment in this case was sufficient to charge Pepka with endangering children as a felony of the third degree even if this Court should decide that the unamended indictment did not sufficiently indicate that the grand jury considered whether the victim suffered serious physical harm. Thus the amendment did not change the name or identity of the crime. R.C. 2919.22 classifies endangering children as a felony of the third degree only if a defendant's actions result in serious physical harm to the victim. R.C. 2919.22(E)(2)(c). By virtue of this "results in" language, and the placement in the penalty portion of the statute, the finding of serious physical harm is not an element of endangering children and, therefore, need not be charged by the grand jury.

The Court of Appeals essentially chose to view first-degree-misdemeanor endangering children and third-degree-felony endangering children as two separate crimes with third-degree-felony endangering children requiring an element that first-degree-misdemeanor endangering children did not require. This view is contrary to the plain reading of the statute. R.C. 2919.22 states:

(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.

* * *

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

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

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

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

(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;

(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree.

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

* * *

This statute is specific as to what conduct is prohibited:

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.*

(Emphasis added). Later in the statute, but prior to ever mentioning serious physical harm to the victim, the statute states that "whoever violates this section is guilty of endangering

children.” R.C. 2919.22(E)(1). Still further on in the statute, it provides that, if the violation of division (A) results in serious physical harm to the child involved, it is a felony of the third degree. R.C. 2919.22(E)(2)(c).

First-degree-misdemeanor endangering children and third-degree-felony endangering children proscribe the same *conduct*, and the extent of the conduct proscribed is encapsulated within R.C. 2919.22(A). Thus, every element necessary for a grand jury to charge an individual derives solely from that section. First-degree-misdemeanor endangering children and third-degree-felony endangering children are not separate crimes with separate elements, but rather the same crime with differing levels of punishment based on the result of an individual’s conduct.

It was inappropriate for the Court of Appeals to view serious physical harm to the victim as an element of third-degree-felony endangering children. In the Revised Code, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42. The requirement of serious physical harm is not included within the operative section of the statute which prohibits certain conduct, but rather in the penalty section of the statute. This context indicates that serious physical harm to a victim determines the level of offense but is not an element of endangering children. First-degree-misdemeanor endangering children and third-degree-felony endangering children prohibit the exact same conduct and intent to cause serious physical harm is not a requirement of either degree of offense.

The results-oriented findings that exist in R.C. 2919.22 are distinguishable from statutes where the identity of the crime is incumbent on elements outside of the operative

prohibition of the statute. For example, the operative portion of R.C. 2925.03 prohibits trafficking in drugs:

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

Whereas R.C. 2919.22 specifies that any person who violates the operative portion of the statute "is guilty of endangering children," R.C. 2925.03 specifies that "[w]hoever violates division (A) of this section is guilty of one of the following," and then establishes the identity of the crime based on additional factors such as schedule and amount of the drug involved. R.C. 2919.22(E)(1) and 2925.03(C). This Court has recognized that "it is evident that R.C. 2925.03 sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance involved. As such, the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment." *State v. Headley* (1983), 6 Ohio St.3d 475, 479, 453 N.E.2d 716. Conversely, R.C. 2919.22 defines only one offense: endangering children.

R.C. 2919.22 is also distinguished from statutes where serious physical harm is an element of a crime by virtue of its placement in the operative section of the statute. For example, R.C. 2903.11 specifically prohibits an individual from knowingly causing serious physical harm to another:

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

* * *

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

As this statute is set-up, knowingly causing serious physical harm to another is established as an element of felonious assault because it is included in the operative prohibition of the statute. In other words, it is the conduct that is specifically prohibited. The distinction in the construction of these two statutes is important. R.C. 2903.11(A)(1) prohibits the act of causing serious physical harm with an associated mental state, whereas R.C. 2919.22(E)(2)(c) enhances the degree of an offense based on the result of otherwise prohibited conduct.

This Court has highlighted the important distinction between a conduct-oriented prohibition and a result-oriented enhancement in determining what constitutes an element of a crime. In *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, this Court analyzed whether the creation of a substantial risk of serious physical harm to persons or property was an element of third-degree-felony failure to comply with order or signal of police officer. This Court found that it was not:

In this case, R.C. 2921.331(C)(5)(a)(ii) is not an element that has a specified culpable mental state. Instead, the penalty enhancement is contingent upon a factual finding with respect to the result or consequence of the defendant's willful conduct. Whether the result or consequence was intended by the defendant is of no import. If the trier of fact finds beyond a reasonable doubt that a substantial risk of serious physical harm to persons or property actually resulted from the defendant's conduct, then the enhancement is established. This is purely a question of fact concerning the consequences flowing from the defendant's failure to comply. It involves no issue of intent or culpability, and no inquiry into the defendant's state of mind with respect

to that element is contemplated or necessary. It is analogous to determining whether the offense occurred in daylight or in darkness or whether the place where it occurred was dusty or wet. It is simply a finding of the presence or absence of a condition.

Fairbanks at ¶11.

This analysis is directly applicable to endangering children in violation of R.C. 2919.22. R.C. 2919.22(A) prohibits specific willful conduct, namely the creation of “a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.” This Court has found that these actions must be done with a culpable mental state of recklessness. *State v. McGee* (1997), 79 Ohio St.3d 193, 680 N.E.2d 975, at syllabus. Subsequently, in the penalty section, the statute provides that the crime is a felony of the third degree “[i]f the violation is a violation of division (A) of this section and results in serious physical harm to the child involved[.]” R.C. 2919.22(E)(2)(c). Thus, whether the crime constitutes a third-degree felony is “contingent upon a factual finding with respect to the result or consequence of the defendant's willful conduct.” *Fairbanks* at ¶11. As with the statute at issue in *Fairbanks*, under R.C. 2919.22(A) and (E)(2)(c), “[w]hether the result or consequence was intended by the defendant is of no import.” *Id.* The question of whether a defendant's actions resulted in serious physical harm to a child is “simply a finding of the presence or absence of a condition.” *Id.*

Fairbanks dealt with issues relating to double jeopardy, but this Court has since extended its rationale to indictments. Theft, in violation of R.C. 2913.02, is constructed in a manner similar to R.C. 2919.22. The operative section of the statute commands that “[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services,” in a manner of ways. R.C. 2913.02(A).

The statute subsequently notes that “[w]hoever violates this section is guilty of theft.” R.C. 2913.03(B)(1). The statute then sets forth a degree for the offense based upon the value of the stolen property. R.C. 2913.03(B)(2)-(10).

Regarding R.C. 2913.02, this Court found that “the elements of theft do *not* include value. Rather, value is a special finding to determine the degree of the offense, but is not part of the definition of the crime.” *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, at ¶31 (emphasis sic)(“*Smith I*”). On reconsideration of this opinion, this Court further explained that, while the value of the property stolen affected punishment, it did not constitute an element of the actual offense:

R.C. 2913.02(A) defines theft without reference to value and sets forth all that the state must prove to secure a conviction. Subsection (B)(2) of the statute classifies theft as a misdemeanor of the first degree but also states, “If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree.”

While the special findings identified in R.C. 2913.02(B)(2) affect the punishment available upon conviction for the offense, they are not part of the definition of the crime of theft set forth in R.C. 2913.02(A).

State v. Smith, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 151, at ¶6-7 (“*Smith II*”).

The endangering children statute at issue in this case is structurally aligned with the theft statute at issue in *Smith*. R.C. 2919.22(A) defines endangering children without reference to the degree of harm caused to the child. R.C. 2919.22(E)(2)(a) then classifies a violation of this statute as a misdemeanor of the first degree. The (E)(2) subsection also provides that a violation which “results in serious physical harm to the child involved,” is a felony of the third degree. R.C. 2919.22(E)(2)(c).

In *Smith II*, this Court illustrated how the special finding of value related to the indictment. The defendant was convicted of fifth-degree felony theft. *Smith II* at ¶1. But that defendant had originally been indicted on the greater charge of robbery. *Id.* at ¶3. Therefore, this Court concluded that “because theft is a lesser included offense of robbery, the indictment for robbery necessarily included all of the elements of all lesser included offenses, together with any of the special, statutory findings dictated by the evidence produced in the case.” *Id.* at ¶14. But this Court noted that “had the grand jury returned an indictment against Smith for theft, due process would require that the indictment contain notice of the value of the property involved *or the degree of the offense alleged.*” *Id.* at ¶13 (emphasis added). In this case, the original indictment met this requirement as it clearly stated that Pepka was charged with a felony of the third degree.

The question of whether a victim suffered serious physical harm as a result of a defendant's actions is a special finding by the jury and not an element of endangering children. In this case, this special finding was included separately on the jury form. (T.d. 78). Because the finding of serious physical harm is a special finding, and not an element, an indictment need not charge that a victim suffered serious physical harm so long as it states the degree of offense charged.

CONCLUSION

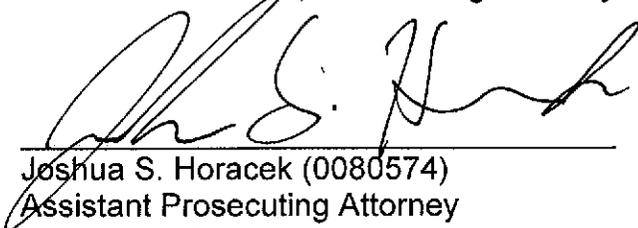
The indictment in this case properly charged three counts of endangering children as felonies of the third-degree. The addition of language to each charge that indicated that Pepka's actions "resulted in serious physical harm to the said female minor victim," may have clarified the indictment but, it did not change the degree of the offense originally charged, nor did it change the penalty from what Pepka originally faced.

For these reasons, the state requests, and justice requires, that this Honorable Court reverse the decision of the Eleventh District Court of Appeals.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By:

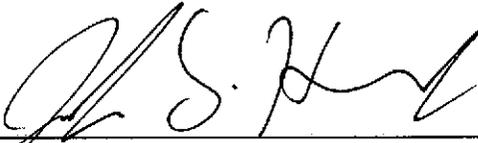


Joshua S. Horacek (0080574)
Assistant Prosecuting Attorney
Counsel of Record

COUNSEL FOR APPELLANT
STATE OF OHIO
Administration Building
105 Main Street
P.O. Box 490
Painesville, Ohio 44077
(440) 350-2683 Fax (440) 350-2585

PROOF OF SERVICE

A copy of the foregoing Merit Brief of Appellant, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Albert L. Purola, Esquire, 38108 Third Street, Willoughby, OH 44094, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Timothy Young, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 1st day of October, 2009.



Joshua S. Horacek (0080574)
Assistant Prosecuting Attorney

JSH/klb

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
)
Plaintiff-Appellant,)
)
v.)
)
JOSEPH PEPKA,)
)
Defendant-Appellee.)

Case No. **09-0678**
On Appeal from the
Lake County Court of Appeals,
Eleventh Appellate District

Court of Appeals Case No. 2008-L-016

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

CHARLES E. COULSON (0008667)
PROSECUTING ATTORNEY
LAKE COUNTY, OHIO

**LAKE COUNTY PROSECUTOR
CHARLES E. COULSON**

JOSHUA S. HORACEK (0080574) (COUNSEL OF RECORD)
ASSISTANT PROSECUTING ATTORNEY
Administration Building
105 Main Street, P.O. Box 490
Painesville Ohio 44077
(440) 350-2683 Fax (440) 350-2585
jhoracek@lakecountyohio.gov

APR 1 6 2009

TIME _____

COUNSEL FOR APPELLANT, STATE OF OHIO

ALBERT L. PUROLA (0010275)
38108 Third Street
Willoughby, Ohio 44094
(440) 951-2323

COUNSEL FOR APPELLEE, JOSEPH PEPKA

FILED
APR 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
APR 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the opinion judgment entry of the Lake County Court of Appeals, Eleventh Appellate District, entered in *State v. Pepka*, 11th Dist. No. 2008-L-016, 2009-Ohio-1440, on March 30, 2009.

This case is a Claimed Appeal of Right, pursuant to S.Ct. R. II, Section 1(A)(2) as it involves a substantial constitutional question, and/or this case is a Discretionary Appeal, pursuant to S.Ct. R. II, Section 1(A)(3) as it involves a felony and raises issues of public or great general interest.

Respectfully submitted,

By: Charles E. Coulson (0008667)
Lake County Prosecuting Attorney

By:



Joshua S. Horacek (0080574)
Assistant Prosecuting Attorney
Counsel of Record

COUNSEL FOR APPELLANT
STATE OF OHIO

Administration Building
105 Main Street
P.O. Box 490
Painesville, Ohio 44077
(440) 350-2683 Fax (440) 350-2585

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Mr. Albert L. Purola, Esquire, 38108 Third Street, Willoughby, Ohio 44094, and, pursuant to S.Ct.R. XIV, Section 2(A)(3), the Ohio Public Defender, Mr. Timothy Young, Esquire, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 13th day of April, 2009.



Joshua S. Horacek (0080574)
Assistant Prosecuting Attorney

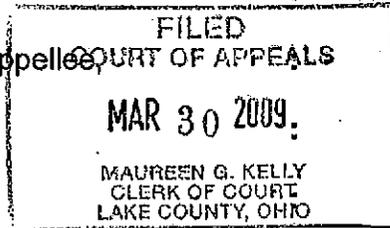
JSH/klb

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO,

OPINION

Plaintiff-Appellee,



CASE NO. 2008-L-016

- vs -

JOSEPH PEPKA,

Defendant-Appellant.

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000245.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Albert L. Purola, 38108 Third Street, Willoughby, OH 44094 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Joseph Pepka, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced Pepka to an aggregate prison term of four years for his convictions on three counts of endangering children.

{¶2} In March 2007, Pepka was living with his girlfriend, Kaysie Perry, and her eight-month-old daughter, M.P.,¹ at his apartment in Eastlake, Ohio. On the morning of March 3, 2007, Perry was going to do laundry at the home of Pepka's sister, Jennifer

1. We will refer to the victim by her initials.

Fazekas, so Pepka offered to give M.P. a bath. With Perry still in the apartment, Pepka ran some water in the bathtub and then placed M.P. in it. The water was too hot, and M.P. began crying. Pepka took her out and added some cold water, but Perry intervened, determined the water was still too hot, and added more cold water to the bathtub.

{¶3} After completing the bath, Pepka brought M.P. to the bedroom for Perry to dress her. Both noticed that her feet were pink. M.P. was put in her playpen, and Perry and Pepka evidently argued about his inability to properly care for M.P. Perry then went to Fazekas' house, about 20 minutes away.

{¶4} Upon arriving at Fazekas' home, Perry found Fazekas on the phone with Pepka. He said M.P. was having seizures and asked if he should call 9-1-1. Fazekas called Lake West Hospital, where the on-call nurse instructed that M.P. needed to be brought to the emergency room. Perry left for home, and Pepka called 9-1-1.

{¶5} According to Pepka, shortly after Perry left for Fazekas' home, M.P. stopped crying and he thought she was having a seizure. Failing to contact Perry, he called Fazekas. When he hung up, he testified he removed M.P.'s clothes and put her in an eighth of an inch of cold water to revive her; she woke up and commenced crying. He then claims to have wrapped her in two towels and placed her on the living room floor while he called 9-1-1.

{¶6} Responding paramedics described a different scene. They testified to finding M.P. lying half-dressed in wet clothes, on a wet blanket, in the living room, her entire body wet. She was blue-grey and unresponsive. Since her body temperature was so low, they transported her almost immediately to Hillcrest Hospital. While in the

ambulance, the paramedics determined her body temperature was only 85.7 degrees Fahrenheit. They did manage to restore her to consciousness.

{¶7} M.P. was transferred from Hillcrest to Rainbow Babies and Children's Hospital. Dr. Lolita McDavid testified that M.P.'s body temperature had dropped dangerously low; that her left foot was burned from immersion in something hot; and that she suffered from a subdural hematoma and retinal hemorrhages in each eye. She testified these last injuries were consistent with shaking.

{¶8} A social worker from the hospital contacted Eastlake police. Lieutenant Garbo and Detective Bergant went to Pepka's apartment in the evening. Pepka was asleep when they arrived, but he let them in. Eventually, he agreed to speak with them at the station. Pepka signed a *Miranda* waiver at the station and agreed to a recorded interview.

{¶9} There are discrepancies in Pepka's testimony about that interview, compared to that of the police. Testifying at the suppression hearing for the state, Lieutenant Garbo claimed that the atmosphere was generally cordial. Detective Bergant conducted the principal part of the interview. Lieutenant Garbo testified that at no time was Pepka threatened in any way and that no promises were made to him to gain his cooperation. He testified that at one time Pepka requested an attorney, at which point the interview immediately ceased, and the tape recorder was turned off. He further testified that Pepka then spontaneously admitted that he had burnt M.P.'s feet while bathing her and that Pepka insisted on continuing the interview. He recalled Pepka requesting a cigarette break at one point and accompanying Pepka to the

garage. He admitted that they talked about the case while Pepka smoked, and he warned Pepka that his account did not appear to explain M.P.'s injuries.

{¶10} Testifying on his own behalf at the suppression hearing, Pepka agreed that he accompanied the officers to the police station voluntarily. However, he testified that when he requested counsel and the tape recorder was turned off, Detective Bergant yelled at him and verbally abused him, calling him a liar. He further testified that he did not request a cigarette break, but that he smoked in the garage in the company of Lieutenant Garbo when Detective Bergant insisted on a break to check with his supervisor whether to arrest Pepka or send him home. Pepka further stated that prior to having his cigarette, he was taken to a different room than the one in which the interview took place and locked in it for five minutes. He testified that while smoking his cigarette, Lieutenant Garbo urged him to admit to shaking M.P., because the judge might go easier on him. He testified to requesting an attorney not once, but three or four times.

{¶11} On June 25, 2007, an indictment in three counts was filed against Pepka. Each count read as follows:

{¶12} "On or about the 3rd day of March, 2007, in the City of Eastlake, Lake County, State of Ohio, one **JOSEPH PEPKA** did recklessly, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a minor victim, a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, to-wit: eight months of age, create a substantial risk to the health or safety of the said female minor victim, by violating a duty of care, protection, or support.

{¶13} "This act, to-wit: **Endangering Children**, constitutes a Felony of the Third degree, contrary to and in violation of the Ohio Revised Code, Title 29 §2919.22(A) and against the peace and dignity of the State of Ohio."

{¶14} On July 13, 2007, Pepka filed a written waiver of his right to appear at arraignment and a written plea of "not guilty" to the charges against him. The matter was set for trial on December 17, 2007. Pepka moved to suppress the statements he made to Lieutenant Garbo and Detective Bergant. A suppression hearing was held on October 18, 2007, and, on November 29, 2007, the motion was overruled.

{¶15} On December 11, 2007, the state moved the trial court to amend the indictment to add this additional language, following the first paragraph in each count: "Which resulted in serious physical harm to the said female minor victim." The state requested this amendment due to the provisions of R.C. 2919.22(E). Pursuant to R.C. 2919.22(E)(2)(a), endangering children pursuant to R.C. 2919.22(A), with which Pepka was charged, is normally a first-degree misdemeanor. The state had charged in the indictment that he had committed third-degree felonies. Violations of R.C. 2919.22(A) rise to third-degree felonies if they involve "serious physical harm to the child" pursuant to R.C. 2919.22(E)(2)(c).

{¶16} On December 12, 2007, the trial court filed its judgment entry, granting the motion to amend.

{¶17} On December 17, 2007, trial commenced. Prior to opening statements, the trial court met with counsel on the record, in chambers. Counsel for Pepka objected to the amendment or, alternatively, requested a two-week continuance. Defense counsel argued that he had not prepared the case with a view to defending the issue of

serious physical harm to M.P. as a principal matter, though he admitted assuming the state might argue the point. He argued that the amendment, however, would put the issue of the seriousness of the injuries sustained squarely to the forefront of the jury's attention. On questioning by the trial court, he admitted knowing the charges brought were for third-degree felonies, not misdemeanors. Defense counsel stated that, in view of the amendment, he wished to obtain expert medical testimony regarding the severity of M.P.'s injuries. The trial court denied the objection to the amendment and denied the continuance request.

{¶18} The state presented several witnesses, including Perry, Dr. McDavid, and Lieutenant Garbo. Following the state's case-in-chief, Pepka moved for acquittal on all three counts pursuant to Crim.R. 29. The trial court denied this motion. Pepka presented two witnesses, as well as testifying in his own defense. After the defense rested, Pepka renewed his Crim.R. 29 motion. The trial court denied his renewed motion. The jury returned verdicts of "guilty" on each count.

{¶19} Prior to commencing the sentencing hearing, the trial court placed the following statement on the record:

{¶20} "The Court will also note that I spoke extensively with counsel in chambers as to the issue of sentencing, and specifically as to the issue of the proper level, or proper degree of the offense of endangering children. And unfortunately that conversation wasn't on the record, but I will summarize right now what we discussed. The Defendant objects to this case being sentenced, the Defendant in this case being sentenced in this case on three felony 3 counts rather than three misdemeanor 1 counts. The argument being that this Court should not have allowed, and this Court

should therefore reverse its decision allowing the State to amend the indictment prior to trial. The Court allowed the state to amend the indictment by making the allegation that serious physical harm was a result of the endangering children. Without that language, the counts would be misdemeanor 1's. With that language the counts are felony 3's. The reason why I allowed the amendment was that it was before trial. That the Defendant was not prejudiced because the indictment states that he was being charged with felonies of the third degree rather than misdemeanors of the first degree. And that the discovery provided and the discussions between counsel at all times leading up to trial was that the child sustained serious physical harm as a result of the endangering children. Had I not permitted the amendment, the State, because it was prior to trial that they moved this, that they moved for the amendment, jeopardy had not yet attached. The State could have dismissed the charges, and then immediately re-indicted and re-filed with that. So I believed at the time that it was harmless error, because the Defendant was fully apprised that the State was pursuing the additional finding. Or if one wants to call it an element, of serious physical harm. I still feel that way, despite the Defendant's raising the issue again. Mr. Patterson did timely object to that amendment and argument was taken at the time prior to trial. And those discussions are on the record. So at this time the Court affirms what its decision was when I allowed the amendment, and the Court does deny the request to convert the convictions from three felony 3's to three misdemeanor 1 level penalties. Have I adequately stated our conversation in chambers, Mr. Purola?

{¶21} "[Mr. Purola]: Yes. A shortened version, but I think it covers all the important points, yes."

{¶22} Thereafter, the trial court sentenced Pepka to serve a two-year term of imprisonment on the first count, three years on the second count, and four years on the third count. The trial court ordered the terms to run concurrently.

{¶23} Pepka raises three assignments of error. His first assignment of error is:

{¶24} "The purported amendment of the indictment by the trial court by adding a material element that elevated the charge from a first degree misdemeanor to a third degree felony is unauthorized by law, and is a nullity."

{¶25} Pepka contends the indictment against him was fatally flawed in charging third-degree felony child endangering, since it did not, prior to amendment, allege the necessary element of his conduct causing serious physical harm to M.P. R.C. 2919.22(E)(2)(c). Consequently, he argues that he could only have been convicted of first-degree misdemeanor child endangering. The state replies that each count of the original indictment alleged Pepka's crimes constituted third-degree felony child endangering, which can only occur if serious physical harm results to the victim, making the amendment, in effect, surplusage.

{¶26} "Section 10 of Article I of the Ohio Constitution provides that, '*** no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury ***.' This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment by the grand jury. *Harris v. State* (1932), 125 Ohio St. 257, 264. Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge different from that found by the grand jury. *Id.*; *State v.*

Wozniak (1961), 172 Ohio St. 517, 520 ***." *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479. (Parallel citation omitted.)

{¶27} "An indictment is sufficient if it contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States* (1974), 418 U.S. 87, 117, ***

{¶28} "Crim.R. 7(D) states: 'The court may at any time before, during, or after trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, *provided no change is made in the name or identity of the crime charged*. If any amendment is made to the substance of the indictment *** the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it appears clearly from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial ***.

{¶29} "An amendment to the indictment that changes the name or identity of the crime is unlawful whether or not the defendant was granted a continuance to prepare for trial; further, a defendant need not demonstrate that he suffered any prejudice as a result of the forbidden amendment. *Middletown v. Blevins* (1987), 35 Ohio App.3d 65, 67, ***. A trial court commits reversible error when it permits an amendment that changes the name or identity of the crime charged. [*State v. Kittle*, 4th Dist. No.

04CA41, 2005-Ohio-3198, at ¶12; *State v. Headley*, 6 Ohio St. 3d at 478-479.]” *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117, at ¶15-17. (Parallel citations omitted and emphasis added by Twelfth Appellate District.)

{¶30} “Whether an amendment changes the name or identity of the crime charged is a matter of law.” *State v. Cooper* (June 25, 1998), Ross App. No. 97CA2326, 1998 Ohio App. LEXIS 2958, citing *State v. Jackson* (1992), 78 Ohio App.3d 479, ***. Hence, we review this question de novo.” *State v. Kittle*, 2005-Ohio-3198, at ¶12. (Parallel citation omitted.)

{¶31} Thus, amendments to an indictment changing the name or identity of the crime alleged are flatly forbidden, even when a defendant is not prejudiced thereby. In this case, the name of the crimes alleged was never amended; Pepka was always charged with “endangering children.” The question is whether the amendment adding the language specifying the alleged crimes resulted in serious physical harm to the victim – the necessary element for lifting those crimes from first-degree misdemeanors to third-degree felonies – changed the identity of the crimes. As the Supreme Court of Ohio made clear in *Headley*, the identity of a crime is changed where an amendment purports to add an element that results in subjecting the defendant to a more serious penalty. *State v. Headley*, 6 Ohio St. 3d at 479.

{¶32} The state argues that the identity of the crime was never changed because the original indictment specified, in the body of each count, that Pepka was being charged with third-degree felony endangering children, a crime which only exists when serious physical harm is suffered by the victim. The problem with this argument is there is no way to tell, from the face of the unamended indictment, whether the Lake

County Grand Jury considered this element, since that indictment failed to contain the language specifying that third-degree felony endangering children must be conduct resulting in serious physical harm. In *State v. Colon*, the Supreme Court of Ohio emphatically reiterated that a defendant's constitutional right to have each and every necessary element of a crime found by presentment to the grand jury is not to be infringed. See, e.g., *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. In addition, the Supreme Court of Ohio has again noted, "Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense." *State v. Davis*; Slip Opinion No. 2008-Ohio-4537, syllabus.

{¶33} The case sub judice is closely analogous to the Twelfth District's decision in *State v. Fairbanks*, supra. In *Fairbanks*, the appellant was charged with two counts of intimidation. *State v. Fairbanks*, 2007-Ohio-4117, at ¶5. The caption of the indictment specified that the charges were third-degree felonies brought pursuant to R.C. 2921.04(B), which prohibits attempting to intimidate a witness through "force or unlawful threat of harm to any person or property." *Id.* at ¶5, 7. However, the body of the indictment simply referred to R.C. 2921.04. *Id.* at ¶6. On the day of trial, before opening statements, the state moved to amend the indictment by adding the appropriate "force or threat of harm" language; and, the trial court granted the motion on the basis that the appellant knew, through discovery, that force or threats were at issue. *Id.* at ¶9. The appellant's objection was noted for the record; but not made part of it. *Id.*

{¶34} The appellant was convicted on each count of intimidation. *Id.* at ¶10. On appeal, the appellant assigned as error the trial court's granting of the amendment to

the indictment. The Twelfth District found the assignment well-taken. *Id.* at ¶23. It stated:

{¶35} “We are aware that the caption or heading of the indictment listed the felony subsection and indicated that the charge was a felony of the third degree. However, the text or body of the indictment did not list the level of the offense or the specific statutory subsection, *and most importantly, contained no ‘force or unlawful threat of harm’ element to constitute the felony charge.*” *Id.* at ¶24. (Emphasis added.)

{¶36} In this case, each count of the original indictment specified the charge was for third-degree felony child endangering – but, the counts lacked the “serious physical harm” specification or element necessary to constitute the felony. Because of that, there is no way to know whether the grand jury found probable cause as to this necessary element of the crime. The indictment was fatally defective. *State v. Headley*, 6 Ohio St. 3d at 479.

{¶37} Moreover, the Supreme Court of Ohio has recently held that “an indictment that omits an essential element is defective; [and] a court cannot allow an amendment that would allow the court to convict the accused on a charge different from that found by the grand jury.” *State v. Davis*, Slip Opinion No. 2008-Ohio-4537, at ¶10. In this matter, there is nothing in the record to establish the grand jury made a finding that there was probable cause the victim suffered *serious* physical harm. We disagree with the trial court’s conclusion that Pepka was not prejudiced by the amendment to the indictment. The addition of the *serious* physical harm element was the difference between the offense being a first-degree misdemeanor or a third-degree felony. Thus, the trial court permitted Pepka to be convicted of a charge that was “essentially

different from that found by the grand jury.” *State v. Davis*, at ¶12, quoting *State v. Headley*, 6 Ohio St.3d at 478-479.

{¶38} The trial court erred in amending the indictment.

{¶39} Pepka argues that, in light of the defective amendment to the indictment, he has actually only been convicted of three counts of first-degree misdemeanor endangering children. Thus, he essentially proposes a remedy of amending his convictions from third-degree felonies to first-degree misdemeanors. While the state contends the amendment of the indictment was proper, it does not specifically set forth an alternative argument objecting to Pepka’s proposed remedy. In addition, we note Pepka’s proposed remedy is consistent with that taken by the Seventh Appellate District:

{¶40} “As in [*State v. Hous*, 2d Dist. No. 02CA116, 2004-Ohio-666], the indictment here failed to set out the element that elevated the offense charged from a misdemeanor to a felony. Therefore, the indictment did not properly charge a felony offense. However, also like in *Hous*, the misdemeanor here was a lesser-included offense of the improperly charged felony. Misdemeanor tampering with records is a lesser-included offense of felony tampering with records. The state must prove all of the same elements with the exception of the record belonging to a governmental entity. The jury found that the state proved all of the elements of felony tampering with records beyond a reasonable doubt. Therefore, it necessarily also found that appellant committed misdemeanor tampering with records. Consequently, the result here is the same as it was in *Hous*. Appellant had notice of the misdemeanor tampering with records charge and the jury’s verdict necessarily found her guilty of committing all the

essential elements of misdemeanor tampering with records. Therefore, the proper remedy here is to reverse appellant's convictions for felony tampering with records and return the case to the trial court to enter judgments of conviction and sentence against her for misdemeanor tampering with records." *State v. Hayes*, 7th Dist. No. 07-MA-134, 2008-Ohio-4813, at ¶42.

{¶41} Accordingly, we adopt Pepka's proposed remedy and his convictions will be converted to first-degree misdemeanors.

{¶42} Pepka's first assignment of error has merit.

{¶43} Pepka's second assignment of error is:

{¶44} "The trial court erred in overruling the motion to suppress the defendant's statements and allowing them to be heard by the jury because they were obtained in violation of the Fourth and Fifth Amendments of the United States Constitution."

{¶45} We have found merit in Pepka's first assignment of error. However, this finding does not render Pepka's second assignment of error moot. If this court finds that the trial court erred in denying Pepka's motion to suppress, his convictions would be reversed; this matter would be returned to the trial court's docket at the point where the error occurred; and the state would be barred from using the suppressed evidence in a subsequent retrial. See, e.g., *State v. Slocum*, 11th Dist. No. 2007-A-0081, 2008-Ohio-4157, at ¶53-54.

{¶46} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning* (1982), 1 Ohio St.3d 19.

Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard. *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶47} Pepka asserts the trial court erred in denying his motion to suppress. He argues that it is inherently unbelievable that he would have admitted to burning M.P.'s feet, after requesting an attorney, and while the tape recorder was turned off. He cites to his own testimony at the suppression hearing that Detective Bergant verbally abused him while the tape recorder was off; that he was locked in another room for five minutes while Detective Bergant allegedly spoke to a superior about arresting Pepka; that Lieutenant Garbo urged him to admit shaking M.P. when he smoked his cigarette so the judge would go easier on him; and that he requested an attorney multiple times. Pepka contends that, under this scenario, his statements to the police must be considered coerced.

{¶48} Pepka's arguments are based solely on his version of the police interview in question. Lieutenant Garbo's version removes the interview from the realm of police coercion. As trier of fact, the trial court was entitled to credit Lieutenant Garbo's testimony.

{¶49} Pepka's second assignment of error lacks merit.

{¶50} Pepka's third assignment of error is:

{¶51} "Since there was no evidence any of Joseph Pepka's conduct caused any of the child's injuries, or that he 'perversely disregard[ed] a known risk', the evidence is insufficient as a matter of law."

{¶52} We have found merit in Pepka's first assignment of error. However, this finding does not render Pepka's sufficiency argument moot. Should we find merit in Pepka's sufficiency argument, he would be entitled to acquittal and the state would be barred from retrying him due to double jeopardy protections. See *State v. Freeman* (2000), 138 Ohio App.3d 408, 424, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In addition, we note that we are adopting Pepka's proposed remedy of converting his felony endangering children convictions to misdemeanor convictions. In spite of this, we will address his sufficiency argument in relation to the felony offenses. There are two reasons for this approach: (1) when the trial court ruled on Pepka's Crim.R. 29 motion, it was in the context of the felony offenses and (2) by statutory definition, if there is sufficient evidence to support the felony convictions, there is sufficient evidence to support the corresponding misdemeanor convictions.

{¶53} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he 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, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶54} Pepka was charged with endangering children in violation of R.C. 2919.22, which provides, in pertinent part:

{¶55} "(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. ***

{¶56} "(E)(1) Whoever violates this section is guilty of endangering children.

{¶57} ****

{¶58} "(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, [endangering children is] a felony of the third degree[.]"

{¶59} The state presented evidence that M.P. was eight months old at the time of these incidents. In addition, there was evidence presented that Pepka was the live-in boyfriend of M.P.'s mother at the time of the offense. Thus, he stood in loco parentis to M.P. *State v. Huff*, 5th Dist. No. 2002CA00012, 2003-Ohio-130, at ¶18. Moreover, at the time of M.P.'s injuries, the evidence demonstrated Pepka had "control" of M.P., since he was caring for M.P. while Perry was gone from the apartment. Accordingly, the state presented sufficient evidence that Pepka was in control of, or a person in loco parentis of, M.P., who was under 18 years old at the time of her injuries.

{¶60} Pepka argues that none of the evidence relates his conduct directly to M.P.'s injuries. He further argues that the state failed to prove his conduct, if any, was "reckless," which is the required mens rea for endangering children. *State v. Swain* (Jan. 23, 2002), 4th Dist. No. 01CA2591, 2002 Ohio App. LEXIS 327, at *18. The third element of endangering children requires the state to present evidence that the conduct complained of "recklessly created a substantial risk to the health or safety of the child[.]" *Id.* R.C. 2901.22(C) defines "recklessly":

{¶61} "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."

{¶62} Pepka was solely responsible for bathing M.P. at the time he placed her in the bathtub, evidently burning her feet. In his statement to the police, Pepka admitted that he did not check the temperature of the water prior to placing M.P. in the bathtub. The Eighth Appellate District has held that "[i]t is reckless to put a child into bath water that has not been tested." *State v. Parker* (July 8, 1999), 8th Dist. No 74294, 1999 Ohio App. LEXIS 3231, at *14. We agree. In the case-sub judice, there was evidence presented that Pepka failed to check the temperature of the bath water, thereby disregarding a known risk of burning M.P. by placing her into bath water hot enough to cause burns. This conduct could be found to be reckless under R.C. 2901.22(C).

{¶63} Pepka was alone with M.P. in the apartment when she developed hypothermia. In his interview with the police, Pepka admitted that he put M.P. in cold water in an attempt to revive her. Further, the testimony of the responding paramedics, who found M.P. soaking wet and grayish-blue, was sufficient for a jury to infer that Pepka had plunged M.P. in cold water, causing severe hypothermia. The same testimony, along with that of Dr. McDavid, established that M.P.'s body temperature was only 85.7 degrees Fahrenheit, and that she might have died from the hypothermia. The jury could clearly find that plunging a baby into cold water sufficient to cause severe hypothermia is reckless conduct pursuant to R.C. 2901.22(C).

{¶64} The testimony of Dr. McDavid, along with various medical records introduced, provided evidence that M.P. had suffered a subdural hematoma and retinal bleeding, probably due to severe shaking. In his oral statement to the police, Pepka admitted that he shook M.P. in an attempt to wake her up. Shaking a baby sufficiently to cause such injuries is evidence of recklessness.

{¶65} In regard to all three charges, the state presented sufficient evidence that Pepka "recklessly created a substantial risk to the health or safety of the child." *State v. Swain*, supra, at *18.

{¶66} Next, we will address whether the state presented sufficient evidence on the element of serious physical harm.

{¶67} "Serious physical harm to persons," means any of the following:

{¶68} ****

{¶69} "(b) Any physical harm that carries a substantial risk of death;

{¶70} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶71} ****

{¶72} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5).

{¶73} There was evidence presented that M.P.'s feet were severely burned. Dr. McDavid testified that M.P. suffered partial thickness burns, which are burns "through the epidermis." Further, she testified that she classified some of M.P.'s injuries to her feet as "denuded. Meaning the top layer of skin is off." Finally, Dr. McDavid testified

that the burns to M.P.'s feet would have been painful. Taken together, the evidence presented by the state was sufficient for a jury to find that Pepka's conduct of submerging M.P. into the hot water caused M.P. serious physical harm under either R.C. 2901.01(A)(5)(c) or (e).

{¶74} Further, the state presented evidence indicating the violent shaking M.P. suffered caused subdural hematoma and retinal damage. At the time of trial, Perry testified that M.P., who was 18 months old at that time, had not started talking, wore eyeglasses, and took physical and speech therapy. The state presented evidence that the injuries resulting from the shaking constituted serious physical harm pursuant to R.C. 2901.01(A)(5)(c) and (e).

{¶75} Finally, there was evidence presented that M.P.'s body temperature was only 85.7 degrees Fahrenheit when the paramedics transferred her to the hospital, resulting in hypothermia. Dr. McDavid testified that a person could enter a coma or die from being in a hypothermic state. As such, the state presented sufficient evidence that Pepka's actions caused M.P. serious physical harm due to the hypothermia pursuant to R.C. 2901.01(A)(5)(b), (c), and (e).

{¶76} The state presented sufficient evidence on each of the elements of third-degree felony endangering children to allow a rational jury to conclude Pepka had committed the crimes for which he was charged beyond a reasonable doubt.

{¶77} Pepka's third assignment of error is without merit.

{¶78} The judgment of the Lake County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion. Specifically, the trial court is to vacate Pepka's felony endangering children convictions.

Thereafter, the trial court is to enter judgments of conviction on three counts of first-degree misdemeanor endangering children. See *State v. Hayes*, 2008-Ohio-4813, at ¶¶92. Finally, the trial court shall resentence Pepka on the misdemeanor convictions. Id.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

{¶79} I concur fully with the well-reasoned disposition of the three assignments of error, as well as requiring the trial court to enter judgments of conviction for first-degree misdemeanor endangering children. I dissent insofar as the majority orders the trial court to resentence Mr. Pepka. He was originally sentenced to concurrent terms of two, three, and four years for third-degree felony endangering children. As the appropriate charges were for first-degree misdemeanor endangering children, carrying maximum sentences of one hundred eighty days imprisonment, and his sentences ran concurrently, I would hold that the term of his imprisonment has expired.

{¶80} I further note my concern that we are not issuing a valid judgment. Section 3(A), Article IV, of the Ohio Constitution provides that three judges are necessary to hear an appeal. Section 3(B)(3), Article IV, of the Ohio Constitution provides, in pertinent part: "A majority of the judges hearing the cause shall be necessary to render a judgment." Judge Cannon and I agree that Mr. Pepka's

indictment was fatally flawed, and have voted to reverse on that basis. However, we cannot agree on whether Mr. Pepka should be resentenced, or released. Judge Rice, on the other hand, dissents regarding the dispositive assignment of error, and would affirm the trial court's judgment entirely. Nevertheless, she has voted to remand the cause to the trial court for resentencing upon reversal. It appears to me that we may be rendering an illusory judgment, since our decision to remand for resentencing depends upon the vote of a judge who has voted to affirm the trial court. I think we may be violating the Ohio Constitution's mandate that at least two judges of an appellate panel must agree in order to render a judgment. Despite earnest research, I have been unable to find a case where an Ohio appellate judge has voted both to affirm a trial court's judgment of sentence, and to reverse that judgment and remand for resentencing, all based on a single assignment of error.

{¶81} Consequently, I respectfully concur in part, and dissent in part.

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

{¶82} I concur with the majority, as to the second and third assignments of error. I also concur with the disposition by the writing judge. Although I dissent in part, I concur that this case should be remanded to the trial court for re-sentencing.

{¶83} The majority maintains that even though the indictment specified that the charge of child endangerment was a felony of the third degree, the amendment to include the "serious physical harm" specification was improper and constitutes

reversible error. For the reasons set forth below, I respectfully dissent, as to the first assignment of error.

{¶84} In *State v. O'Brien* (1987), 30 Ohio St.3d 122, the Supreme Court established the following principle of law:

{¶85} "An indictment, which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment (Crim.R. 7[D], construed and applied.)" *O'Brien*, supra, at paragraph two of the syllabus.

{¶86} In *O'Brien*, the state moved to amend an indictment subsequent to the close of its case-in-chief, to specify the mens rea element of "recklessness" for the charge of endangering children. The Court pointed out that the indictment was properly amended to include this essential element because: "*[n]either the penalty nor the degree of the offense was changed as a result of the amendment.* Since the addition of the culpable mental state of 'recklessness' did not change the name or identity of the crime of endangering children, the amendment was proper pursuant to Crim.R. 7(D)." (Emphasis added). *O'Brien*, supra, at 126.

{¶87} In *State v. Headley* (1983), 6 Ohio St.3d 475, upon motion, the trial court amended an indictment to specify the type of controlled substance involved in a drug-trafficking charge, when the original indictment had not identified it. Although the issue was whether the original indictment was fatally flawed (not whether the amendment was proper), the Supreme Court analyzed the omission and subsequent amendment under Crim.R. 7(D). The court observed "[t]he severity of the offense is dependent upon the

type of drug involved," and in particular, that possession of certain controlled substances merits a charge of aggravated trafficking, while possession of others merits a charge of trafficking in drugs, a lesser offense. *Id.* at 479. Pursuant to this analysis, the Court concluded that an amendment to specify the type of drugs involved was improper because changing the type of drug involved would "change the very identity of the offense charged." *Id.*

{¶88} Most recently, in *State v. Davis*, Slip Opinion No. 2008-Ohio-4537, the Supreme Court revisited the issue. In *Davis*, the defendant was indicted on several drug-related charges, including two counts of aggravated trafficking in drugs. Unlike the indictment in the case at bar, the indictment in *Davis* apparently did not expressly state the felony level with which the defendant was charged. However, the statute under which the defendant was charged reflected that the charge was a felony of the fourth degree. During trial, the court amended the charge and increased the amount of controlled substances involved. As amended, the charge was a felony of the second degree. The Supreme Court determined, pursuant to *O'Brien* and *Headley*, such an amendment was improper, holding that "**** amending the indictment to change the penalty or degree changes the identity of the offense." *Id.* at ¶9.

{¶89} With this guidance in mind, I would hold the amendment under consideration was proper. To wit, the amendment neither altered the identity of the crime nor did it enhance or change the penalty or degree of the charged offense. Further, the original indictment described the actions of appellant which constituted endangering children and *specifically stated* appellant was being charged with a third degree felony. The only way a defendant charged with endangering children may be

convicted of a third degree felony is by proof that the victim(s) suffered serious physical harm. R.C. 2919.22(E)(2)(c). The pre-amended indictment was therefore sufficient to put appellant on notice of the crime, its elements, and its degree. The amendment was merely a clarification adding nothing to the crime charged that was not already apparent on its original face.

{¶90} I would also point out that the caption of the crime (the portion of the indictment listing the crime, statutory subsection, and felony degree) was specifically incorporated into the "text or body" of the indictment. This observation is relevant because the majority relies upon the Twelfth Appellate District's holding in *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117.

{¶91} In that case, the indictment provided a caption stating the crime charged, the statutory subsection, and the felony degree. Below and separate from the caption was the text or body of the indictment setting forth the date of the crime, the defendant's alleged prohibited conduct, and the elements of the crime charged. The caption and body of that indictment were set forth in the instrument with nothing indicating the crime alleged in the caption was specifically connected to the alleged prohibited conduct in the body. As a result, the Twelfth District determined the state's attempt to amend the indictment changed the identity of the crime. That is, because the caption and body were fundamentally disconnected *and* the indictment did not include the level of the offense or specific statutory subsection in the body, adding an essential element to the body of the indictment functioned to facially alter the level of the offense from a misdemeanor to a felony.

{¶92} Here, alternatively, the indictment sets forth the alleged prohibited conduct within the body which is necessarily connected to the following caption: "This act, to-wit: **Endangering Children**, constitutes a Felony of the Third degree, contrary to and in violation of the Ohio Revised Code, Title 29, [Section] 2919.22(A) and against the peace and dignity of the State of Ohio." The "[t]his act" language demonstrates there can be no confusion as to what alleged behavior is being charged under the specific statutory subsection prohibiting endangering children, a felony of the third degree. Because there is unequivocal language incorporating the charged offense, statutory subsection, and felony level to the alleged prohibited conduct, the instant matter is distinguishable from *Fairbanks*.

{¶93} Finally, I would point out this court has recently stated:

{¶94} "It is well settled that under Ohio law, a criminal indictment is intended to serve two basic purposes: (1) it compels the state to aver all material elements of the charged offense so that the defendant can have proper notice and a reasonable opportunity to defend himself; and (2) by properly identifying the charged offense, it protects the defendant from future prosecutions for the same crime." *State v. Batich*, 11th Dist. No. 2006-A-0031, 2007-Ohio-2305, at ¶31, quoting *State ex rel. Smith*, 11th Dist. No. 2004-A-0080, 2005-Ohio-825, at ¶5.

{¶95} In *Batich*, the state failed to amend an indictment to include the mens rea element of recklessness in a child endangering case. However, this court held the omission did not render the indictment plainly defective because the reference to the statute in the indictment sufficiently "apprised [the defendant] of the charged offense." *Id.*

{¶96} The amendment neither changed the name or identity of the crime charged in the original indictment. Moreover, it did not alter the potential penalty with which appellant was faced. From the inception of the underlying prosecution, appellant was aware of the charged offense and was on notice of the essential elements the state was required to prove. I would therefore hold the trial court did not err in amending the indictment to include the "serious physical harm" specification and accordingly affirm its judgment.

STATE OF OHIO
COUNTY OF LAKE

IN THE COURT OF APPEALS

FILED
COURT OF APPEALS ELEVENTH DISTRICT

MAR 30 2009

MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

JUDGMENT ENTRY

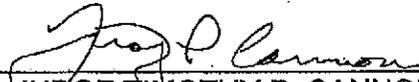
- vs -

CASE NO. 2008-L-016

JOSEPH PEPKA,

Defendant-Appellant.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with the opinion. Costs to be taxed against appellee.


JUDGE TIMOTHY P. CANNON

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

Crim.R. 7

(A) Use of indictment or information. A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment shall be signed in accordance with Crim. R. 6(C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's

rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

R.C. 1.42

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

R.C. 2903.11

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly

weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

R.C. 2903.21

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family.

(B) Whoever violates this section is guilty of aggravated menacing. Except as otherwise provided in this division, aggravated menacing is a misdemeanor of the first degree. If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, aggravated menacing is a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

R.C. 2913.02

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

- (1) Without the consent of the owner or person authorized to give consent;
- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception;
- (4) By threat;
- (5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to section 2929.18 or 2929.28 of the Revised Code. Restitution may include, but is not limited to, the cost of repairing or replacing the

stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of section 2913.72 of the Revised Code.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

R.C. 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;

(6) Allow the child to be on the same parcel of real property and within one hundred feet of, or, in the case of more than one housing unit on the same parcel of real property, in the same housing unit and within one hundred feet of, any act in violation of section 2925.04 or 2925.041 of the Revised Code when the person knows that the act is occurring, whether or not any person is prosecuted for or convicted of the violation of section 2925.04 or 2925.041 of the Revised Code that is the basis of the violation of this division.

(C)(1) No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code when one or more children under eighteen years of age are in the vehicle, streetcar, or trackless trolley. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that constitutes the basis of the charge of the violation of this division. For purposes of sections 4511.191 to 4511.197 of the Revised Code and all related

provisions of law, a person arrested for a violation of this division shall be considered to be under arrest for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them or for operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;

(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree.

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

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

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

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

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

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

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

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

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

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

offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code.

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

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

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

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

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

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

if the court orders that the offender be so committed, the court is authorized, but not required, to grant the offender credit upon the period of the commitment for the community service work that the offender adequately performed.

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

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

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

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

(a) Division (C) of this section;

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

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

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

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

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

(b) If a person is convicted of or pleads guilty to a violation of division (C) of this section and the person also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute, for purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code, a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(I) As used in this section:

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

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

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

R.C. 2925.03

(A) No person shall knowingly do any of the following:

2. (1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), (e), or (f) of this section, aggravated trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(1)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs is a felony of the third degree, and the court shall impose as a

mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), (d), or (e) of this section, trafficking in drugs is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(2)(c), (d), or (e) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, trafficking in drugs is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was

committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty times the bulk amount, trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds fifty times the bulk amount and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, trafficking in marihuana is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(3)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, trafficking in

marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, trafficking in marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds twenty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds twenty thousand grams and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(g) Except as otherwise provided in this division, if the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor upon a first offense and a misdemeanor of the third degree upon a subsequent offense. If the offense involves a gift of twenty grams or less of marihuana and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a misdemeanor of the third degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), (f), or (g) of this section, trafficking in cocaine is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(4)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine that is not crack cocaine or

equals or exceeds one gram but is less than five grams of crack cocaine, trafficking in cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, trafficking in cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D. or a compound, mixture, preparation, or substance containing L.S.D., whoever violates division (A) of this section is guilty of trafficking in L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), (f), or (g) of this section, trafficking in L.S.D. is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(5)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first

degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), (f), or (g) of this section, trafficking in heroin is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(6)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, trafficking in heroin is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, trafficking in heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of

a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of trafficking in hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, trafficking in hashish is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(7)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in

determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(D) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, and in addition to any other sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) If the violation of division (A) of this section is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent. Except as otherwise provided in division (H)(1) of this section, a mandatory fine or any other fine imposed for a violation of this section is subject to division (F) of this section. If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk of the court shall pay the forfeited bail pursuant to divisions (D)(1) and (F) of this section, as if the forfeited bail was a fine imposed for a violation of this section. If any amount of the forfeited bail remains after that payment and if a fine is imposed under division (H)(1) of this section, the clerk of the court shall pay the remaining amount of the forfeited bail pursuant to divisions (H)(2) and (3) of this section, as if that remaining amount was a fine imposed under division (H)(1) of this section.

(2) The court shall suspend the driver's or commercial driver's license or permit of the offender in accordance with division (G) of this section.

(3) If the offender is a professionally licensed person, the court immediately shall comply with section 2925.38 of the Revised Code.

(E) When a person is charged with the sale of or offer to sell a bulk amount or a multiple of a bulk amount of a controlled substance, the jury, or the court trying the accused, shall determine the amount of the controlled substance involved at the time of the offense and, if a guilty verdict is returned, shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance involved, and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is the requisite amount, or that the amount of the controlled substance involved is less than the requisite amount.

(F)(1) Notwithstanding any contrary provision of section 3719.21 of the Revised Code and except as provided in division (H) of this section, the clerk of the court shall pay any mandatory fine imposed pursuant to division (D)(1) of this section and any fine other than a mandatory fine that is imposed for a violation of this section pursuant to division (A) or (B)(5) of section 2929.18 of the Revised Code to the county, township, municipal corporation, park district, as created pursuant to section 511.18 or 1545.04 of the Revised Code, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender. However, the clerk shall not pay a mandatory fine so imposed to a law enforcement agency unless the agency has adopted a written internal control policy under division (F)(2) of this section that addresses the use of the fine moneys that it receives. Each agency shall use the mandatory fines so paid to subsidize the agency's law enforcement efforts that pertain to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under division (F)(2) of this section.

(2)(a) Prior to receiving any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code, a law enforcement agency shall adopt a written internal control policy that addresses the agency's use and disposition of all fine moneys so received and that provides for the keeping of detailed financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure. The policy shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation. All financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure by an agency are public records open for inspection under section 149.43 of the Revised Code. Additionally, a written internal control policy adopted under this division is such a public record, and the agency that adopted it shall comply with it.

(b) Each law enforcement agency that receives in any calendar year any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code shall prepare a report covering the calendar year that cumulates all of the information

contained in all of the public financial records kept by the agency pursuant to division (F)(2)(a) of this section for that calendar year, and shall send a copy of the cumulative report, no later than the first day of March in the calendar year following the calendar year covered by the report, to the attorney general. Each report received by the attorney general is a public record open for inspection under section 149.43 of the Revised Code. Not later than the fifteenth day of April in the calendar year in which the reports are received, the attorney general shall send to the president of the senate and the speaker of the house of representatives a written notification that does all of the following:

(i) Indicates that the attorney general has received from law enforcement agencies reports of the type described in this division that cover the previous calendar year and indicates that the reports were received under this division;

(ii) Indicates that the reports are open for inspection under section 149.43 of the Revised Code;

(iii) Indicates that the attorney general will provide a copy of any or all of the reports to the president of the senate or the speaker of the house of representatives upon request.

(3) As used in division (F) of this section:

(a) "Law enforcement agencies" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(b) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(G) When required under division (D)(2) of this section or any other provision of this chapter, the court shall suspend for not less than six months or more than five years the driver's or commercial driver's license or permit of any person who is convicted of or pleads guilty to any violation of this section or any other specified provision of this chapter. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension; upon the filing of such a motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(H)(1) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, in addition to any other penalty or sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section may impose upon the offender an additional fine specified for the offense in division (B)(4) of section 2929.18 of the Revised Code. A fine imposed under division (H)(1) of this section is not subject to division (F) of this section and shall be used solely for the support of one

or more eligible alcohol and drug addiction programs in accordance with divisions (H)(2) and (3) of this section.

(2) The court that imposes a fine under division (H)(1) of this section shall specify in the judgment that imposes the fine one or more eligible alcohol and drug addiction programs for the support of which the fine money is to be used. No alcohol and drug addiction program shall receive or use money paid or collected in satisfaction of a fine imposed under division (H)(1) of this section unless the program is specified in the judgment that imposes the fine. No alcohol and drug addiction program shall be specified in the judgment unless the program is an eligible alcohol and drug addiction program and, except as otherwise provided in division (H)(2) of this section, unless the program is located in the county in which the court that imposes the fine is located or in a county that is immediately contiguous to the county in which that court is located. If no eligible alcohol and drug addiction program is located in any of those counties, the judgment may specify an eligible alcohol and drug addiction program that is located anywhere within this state.

(3) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay any fine imposed under division (H)(1) of this section to the eligible alcohol and drug addiction program specified pursuant to division (H)(2) of this section in the judgment. The eligible alcohol and drug addiction program that receives the fine moneys shall use the moneys only for the alcohol and drug addiction services identified in the application for certification under section 3793.06 of the Revised Code or in the application for a license under section 3793.11 of the Revised Code filed with the department of alcohol and drug addiction services by the alcohol and drug addiction program specified in the judgment.

(4) Each alcohol and drug addiction program that receives in a calendar year any fine moneys under division (H)(3) of this section shall file an annual report covering that calendar year with the court of common pleas and the board of county commissioners of the county in which the program is located, with the court of common pleas and the board of county commissioners of each county from which the program received the moneys if that county is different from the county in which the program is located, and with the attorney general. The alcohol and drug addiction program shall file the report no later than the first day of March in the calendar year following the calendar year in which the program received the fine moneys. The report shall include statistics on the number of persons served by the alcohol and drug addiction program, identify the types of alcohol and drug addiction services provided to those persons, and include a specific accounting of the purposes for which the fine moneys received were used. No information contained in the report shall identify, or enable a person to determine the identity of, any person served by the alcohol and drug addiction program. Each report received by a court of common pleas, a board of county commissioners, or the attorney general is a public record open for inspection under section 149.43 of the Revised Code.

(5) As used in divisions (H)(1) to (5) of this section:

(a) "Alcohol and drug addiction program" and "alcohol and drug addiction services" have the same meanings as in section 3793.01 of the Revised Code.

(b) "Eligible alcohol and drug addiction program" means an alcohol and drug addiction program that is certified under section 3793.06 of the Revised Code or licensed under section 3793.11 of the Revised Code by the department of alcohol and drug addiction services.

(l) As used in this section, "drug" includes any substance that is represented to be a drug.

R.C. 2927.12

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.