ORIGINAL

IN THE SUPREME COURT

OF THE

STATE OF OHIO

STATE OF OHIO	:	CASE NO. 12-0657
Plaintiff-Appellee	:	
vs.	:	on Appeal from the First District Court of Appeals
GARY WEST	:	For Hamilton County
Defendant-Appellant	:	Court of Appeals Case No. C1100337

MEMORANDUM IN SUPPORT OF JURISDICTION

ON BEHALF OF DEFENDANT-APPELLANT

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Felonious assault under R.C. 2903.11, child endangering under both R.C. 2919.22(A) and (B), and felony murder or involuntary manslaughter based on those predicate offenses are all allied under this Court's recent decision in *Johnson*, unless committed separately or with a separate animus. This Court overruled *Rance* and its progeny for the specific purpose of avoiding 'shotgun' convictions and absurd results. As the Court recognized at the time, these absurd results were often occurred when trial courts engaged in "artificial and academic equivocation regarding the similarities of the crimes" instead of the "commonsense mandate" provided by R.C. 2941.25.[1]

Unfortunately, the temptation to equivocation still occasionally overcomes commonsense. In the instant case, the First District holds that felony murder predicated on felonious assault and felony murder or manslaughter based on child endangering are not allied offenses, even though the only conduct alleged is parental neglect of the duty to provide adequate food and medical care. Thus Defendant can be convicted of felony murder on the theory that his failure to provide adequate care is a "act or failure to act" which proximately caused death (serious physical harm), even though he was acquitted of Involuntary Manslaughter predicated on child endangering under R.C. 2919.22(A), and felony murder predicated on child endangering under R.C. 2919.22(B).

The possibility of this absurd result is the fault, in part, of the state's refusal to follow

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[1]*State v. Johnson*, 128 Ohio St.3d 153, 161-162, 2010-Ohio-6314, 942 N.E.2d 1061.

the dictates of R.C. 1.51 when it disagrees with the legislature's clear intent. Here, R.C. 2919.22(A) provides a specific offense to be charged when a parent or guardian neglects a legal duty of care resulting in serious physical harm to a child. It addresses acts of omission, while R.C. 2919.22(B) addresses acts of commission. Both are more specific than the general prohibition against knowingly causing serious physical harm contained in R.C. 2903.11, and only one applies to the conduct charged here. Yet the state charged Defendant in two separate indictments with murder or manslaughter predicated on all three statutes, then provided a bill of particulars that failed to even differentiate between the counts and alleged only that Defendant intentionally neglected to provide adequate food, water and medical care over an 11 week period, leading to death from starvation and dehydration.

The trial court acquitted him of Involuntary Manslaughter. The Court of Appeals reversed the conviction for Murder predicated on Child Endangering, but affirmed the conviction for Murder predicated on Felonious Assault, an outcome that is clearly contradictory. The lower courts clearly still need more guidance on application of R.C. 2941.25 and R.C. 1.51 to prevent repetition of these absurd results.

For all these reasons, Appellant respectfully suggests that this Court exercise jurisdiction.

STATEMENT OF THE CASE

1) PROCEDURAL POSTURE

This matter comes before the Court on appeal from the judgment of the Court of Appeals, First Appellate District of Ohio. Defendant Gary West was originally tried on two indictments. B0809371-B charged Murder with predicate offense of felonious assault under R.C. 2903.11, and Involuntary Manslaughter under R.C. 2903.04(A), with a predicate offense of child endangering under R.C. 2919.22(A). B 0902376-B charged Murder with a predicate offense of child endangering under R.C. 2919.22(B). The Bill of Particulars for both indictments alleged that Defendant intentionally neglected to provide adequate food, water and medical care to a newborn infant over an 11 week period, leading to death from starvation and dehydration.

The case was tried to the court beginning April 6, 2011.The judge found Defendant guilty of two counts of murder and not guilty of involuntary manslaughter, merged the two counts, and sentenced him to a term of 15-life.

The Court of Appeals reversed Defendant's conviction for murder under B-0902376, finding insufficient evidence to support the verdict, but affirmed the murder conviction under B0809371, and remanded for resentencing on that count alone.

2) FACTS

On November 26, 2008, at 10:34 am, paramedics were dispatched on call to 6336 Gracely Drive for a medical emergency involving a child. At the scene, the first responders found defendant Jill Hull holding the body of an infant later identified as Rachel West. The body was cold and showed signs of rigor. The infant appeared very thin and emaciated. Defendant Gary West was not present at any point in the treatment or later investigation at the Gracely residence.

There was evidence that the child was heavily swaddled in clothing and blankets, and that the car seat where she slept was placed next to a space heater for warmth.

The coroner established starvation and dehydration as the cause of death, and was allowed to testify that these were due to "intentional neglect." A second state expert in child abuse agreed that both lack of nutrition and dehydration contributed to death, but admitted that the child might have suffered from a food allergy or metabolic disorder that would cause starvation even if the baby was fed an otherwise adequate diet. He also identified the mother's practice of wrapping the baby in multiple layers of clothing and placing her near a space heater for warmth as possibly causing rapid dehydration that could have occurred in hours rather than days.

Dr. Werner Spitz, testifying for the defense, opined that dehydration played a bigger role in the death than lack of nutrition, and that it could have happened fairly quickly and undetectably due to the use of the space heater to keep the baby warm. He found no evidence of intentional abuse or neglect, and attributed the death to the ignorance and lifestyle of the family. He also noted that lactose intolerance or other digestive problems could cause dehydration and death in an infant. All experts agreed that there were no overt signs of physical abuse, or any act of commission that contributed to death.

Medical records indicated that Rachel was healthy at birth, but at the low end of the normal weight range for an infant. On November 13, 2008, mother and child applied for WIC food assistance. As part of that process, they were seen by a dietician and the baby was weighed and measured. The baby showed growth in both length and weight, and no one expressed any concern to Hull about nutrition, although she was directed to make a doctor's appointment for vaccinations. Gary West was not present at this meeting.

A friend who cared for Rachel overnight some weeks after the WIC visit testified that she was small for her age, but didn't appear starved or emaciated. She remembered Rachel vomiting when fed, and gave her a different formula which she tolerated better. She sent extra cans of this formula home with Rachel. She never saw Gary West care for or even hold the baby. She saw him around the building where Hull lived with Rachel a couple times, but never went inside the apartment, or saw him actually inside it.

Although West was identified by various parties as the child's father, he and Hull were not married, and no legal finding of paternity had been made or acknowledged. West did not sign the birth certificate, even though he had done so for his other children. No witness saw him hold or care for the infant. No evidence was offered about how much time he spent at Gracely Drive, whether this was his primary/only residence, or whether he ever bathed or fed Rachel. No evidence or testimony placed him at the residence the last few days of Rachel's life.

Hull admitted propping Rachel's bottle for feeding against the advice she was given about feeding infants, and to dipping the nipples of her bottle in Kool-aid, but reported feeding her appropriate amounts of formula. Cans of formula, including a partially used can, were found at the apartment after Rachel's death. No expert testified that any of these practices would cause starvation or dehydration. There is no evidence that West was aware of, or engaged in, any of these practices.

The state's pediatric abuse expert testified that much of the weight loss which cause Rachel's emaciated appearance in the coroner's photographs was due to dehydration, which could have occurred in hours. He also testified that starvation was a slower process, and could be hard for a parent to detect. He found no medical evidence to rule out food allergies

or other problems with absorption of food as a cause of Rachel's starvation. He testified that dehydration could occur in hours, especially if the child was heavily covered and placed in front of a space heater to sleep.

ARGUMENT

PROPOSITION OF LAW NO. 1

MURDER AND INVOLUNTARY MANSLAUGHTER COUNTS PREDICATED ON FELONIOUS ASSAULT AND ON CHILD ENDANGERING ARE ALLIED OFFENSES OF SIMILAR IMPORT, AND R.C. 1.51 REQUIRES THE STATE TO PROSECUTE UNDER THE SPECIAL RATHER THAN THE GENERAL PROVISION.

In this case, the involuntary manslaughter count is predicated on a special provision–R.C. 2919.22(A)–that was intended by the legislature to address acts of omission which violate a legal duty to care for a child. Both murder counts are charged under more general provisions which address "abuse" or causing serious physical harm to another. The special provision should prevail over both general prohibitions.

On appeal, the state argued that failure to feed and hydrate was a different act than failure to seek medical attention. Therefore, they claim that murder or manslaughter counts were not allied, because they could be based on different types of neglect. This argument cannot be reconciled with the results to date. The trial court acquitted Defendant of Involuntary Manslaughter predicated on R.C. 2919.22(A), which means that it found he did not cause the infant's death by failing to discharge a legal duty of care, support or protection. The Court of Appeals acquitted him of causing the death of the infant as a result of abusing or torturing her because: "There was no overt act of physical abuse or act of commission by West against Rachel." But he remains convicted of knowingly causing her death by an act or failure to act because: "Here, West knew that Rachel appeared emaciated and knowingly failed to take her to the doctor, which resulted in Rachel's death."

The same decision baldly states that Involuntary Manslaughter and Murder predicated on Felonious Assault are not allied offenses because they are based on different

conduct. Yet a failure to seek medical attention in time to address the nutrition problem is part of the course of conduct alleged by the state, and would certainly constitute a failure to discharge a legal duty of care, support or protection.

PROPOSITION OF LAW # 2

THERE IS NO CLEAR EXPRESSION OF LEGISLATIVE INTENT TO APPLY BOTH R.C. 2903.11 AND R.C. 2919.22 TO HARM RESULTING FROM VIOLATING A LEGAL DUTY TO PROVIDE CARE FOR A MINOR CHILD.

In the instant case, there is no clear expression of legislative intent to apply both R.C. 2903.11 and R.C. 2919.22 to harm resulting from violating a legal duty to provide care for a minor child. Where the code is silent or ambiguous, the special provision must be used, unless the general provision is enacted later in time and with the intent of having it apply coextensively.[2] The reverse is true here.

Felonious assault is an older creation than child endangering, and no recent amendment has made it specifically applicable to either abuse or neglect of minors. The only amendment discussing age of the victim was made to specifically include harm to an unborn child. Had the legislature intend this statute to apply coextensively with R.C. 2919.22, it had could have done so then. Since it did not, the special provision which deals specifically with causing harm by a failure to fulfill a legal duty of care, support or protection must prevail over the general prohibition against knowingly causing harm.

PROPOSITION OF LAW NO. 3

AN ACQUITTAL OF THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER REQUIRED THE COURT TO FIND A FAILURE OF PROOF ON AT LEAST ONE ESSENTIAL

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[2]*State v. Chippendale* (1990), 52 Ohio St.3d 118, 120-121, 556 N.E.2d 1134.

ELEMENT OF MURDER, AND REQUIRES ACQUITTAL ON THAT COUNT AS WELL.

When it acquitted Defendant of Involuntary Manslaughter with a predicate offense of child endangering under R.C. 2919.22(A), the Court necessarily found that Defendant did not cause the child's death by any reckless failure to fulfill a legal obligation of care, protection or support. The remaining murder conviction alleges that the child's death was caused by knowingly failing to provide medical care.

If the state failed to prove either element necessary for involuntary manslaughter, it automatically failed in its proof of the murder count as well. It is axiomatic that acquittal of a lesser included offense necessarily results in acquittal of all the greater degrees of the same offense. The Court of Appeals erred in upholding Defendant's conviction for murder based on his alleged failure to provide medical care when the trial court acquitted him of any such failure.

PROPOSITION OF LAW NO. 4

THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO SUPPORT THE REMAINING CONVICTION.

There is no evidence in the record that Defendant knew that Rachel was not being fed or that she had not been seen by a doctor. Defendant personally purchased enough formula to feed the child. He also knew that Rachel's mother had raised other children and had received instructions at the hospital on care and feeding. Although he sometimes listed the their residence as his address, no one placed him at the residence within days of Rachel's death. No one claimed that West ever held, fed, bathed or changed Rachel. He never acknowledged paternity nor had he been adjudicated to be her father. Without parental status, he had no authority to consent to routine medical care for the child.

Without proof that West saw Rachel's condition, or that her condition was even obvious until hours before death, the record is simply insufficient to support even a finding of reckless conduct by this defendant.

CONCLUSION

Defendant did not receive a fair trial or a just result in the instant case. The evidence does not support a conviction for knowingly causing the death of the infant by failing to seek medical attention, and the acquittal on the lesser included offense reflects that lack of evidence. Furthermore, the special provision of child endangering controls over the general provision of felonious assault in this case, and no prosecution for murder based on felonious assault should have been permitted.

For all these reason, Defendant respectfully suggests that this Court accept jurisdiction, and reverse the decision of the Court of Appeals.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing instrument was hand-delivered to the office of the Prosecuting Attorney this 16th day of April, 20 12.

ELIZABETH E. AGAR

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

STATE OF OHIO,	:	APPEAL NOS. C-110337 C-110338
Plaintiff-Appellee,	:	TRIAL NOS. B-0809371B B-0902376B
vs.	:	*JUDGMENT ENTRY.*
GARY WEST,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

Following the death of 11-week old Rachel West from malnutrition and dehydration, defendant-appellant Gary West was indicted for felony murder proximately caused by felonious assault in violation of R.C. 2903.02, felony murder proximately caused by child endangering in violation of R.C. 2903.02, and involuntary manslaughter proximately caused by child endangering in violation of R.C. 2903.04. After a bench trial, West was acquitted of involuntary manslaughter, but convicted of both counts of felony murder. The trial court merged the felony murder counts for sentencing and imposed a prison term of 15 years to life. West now appeals, bringing forth three assignments of error.

We first address West's third assignment of error contesting the sufficiency of the evidence underlying his convictions for felony murder. When reviewing the

sufficiency of the evidence, this court must view all probative evidence and reasonable inferences in the light most favorable to the prosecution to determine whether any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

Upon a review of the record, we hold that there was sufficient evidence to support the conviction for felony murder caused by felonious assault. First, we note that when a child suffers serious physical harm as a result of her parent or guardian "knowingly" failing to act in accordance with his legal duty to the child, the failure to act may constitute the crime of felonious assault. *State v. Elliott*, 104 Ohio App.3d 812, 817-818, 663 N.E.2d 412 (10th Dist.1995). Here, West knew that Rachel appeared emaciated and knowingly failed to take her to the doctor, which resulted in Rachel's death. West, who was not married to Rachel's mother, argues that he was not Rachel's father and thus, had no legal duty to take Rachel to the doctor and protect her from harm. But Detective Jennifer Mitsch testified that West had admitted that he was Rachel's father. Further, although West argued that there was no evidence presented that he knew of Rachel's emaciated state because there was no proof that he lived with Rachel, we note that when he had been questioned about Rachel's death, he had signed a waiver-of-rights form that indicated that his address was on Gracely Drive, where Rachel had lived and was found dead. Finally, West argues that the state did not prove that he had known that Rachel was malnourished. But one of the state's expert witnesses, Dr. Robert Shapiro, testified that Rachel's extreme condition would have been obvious a few weeks before she died. And we find it irrelevant that Dr. Shapiro could not testify to as to a specific date on which West should have recognized Rachel's emaciated state. The medical records of West's three other children with Rachel's

mother, which were admitted into evidence, indicated that those children had been taken to the doctor for well and sick visits, giving rise to the permissible inference that West knew when to take a child to the doctor. All of the foregoing circumstances support West's conviction for felony murder caused by felonious assault.

With respect to the felony-murder conviction premised on child endangering in violation of R.C. 2919.22(B)(1), we hold that there was insufficient evidence to support that conviction. There was no overt act of physical abuse or act of commission by West against Rachel. *See State v. Kamal,* 12 Ohio St.3d 306, 308-309, 466 N.E.2d 860 (1984) (affirmative acts of physical abuse are expressly covered under R.C. 2919.22[B][1]). Even if the state's argument that the act of feeding Rachel with a dirty bottle or feeding her water instead of formula was an overt act of abuse, this was not the act that ultimately caused Rachel's death. Accordingly, we reverse West's conviction for felony murder premised on child-endangering in violation of R.C. 2919.22(B)(1), appealed in the case numbered C-110338.

The third assignment of error is sustained in part and overruled in part.

In his first assignment of error, West contends that the trial court erred by denying his motion to dismiss the two felony murder counts. West argues that R.C. 1.51 required the state to charge him with involuntary manslaughter premised on a violation of child endangering in violation of R.C. 2919.22(A), a special criminal provision, instead of felony murder premised on felonious assault, a general provision. But R.C. 1.51 is only applicable where the crimes charged are allied offenses of similar import, and were not committed separately or with a separate animus. *State v. Chippendale,* 52 Ohio St.3d 118, 120-121, 556 N.E.2d 1134 (1994). Here, the involuntary-manslaughter charge and the felony-murder charge premised on felonious assault were

not allied offenses of similar import because different conduct supported each charge. Accordingly, the first assignment of error is overruled.

In the second assignment of error, West argues that the convictions for felony murder were against the manifest weight of the evidence. Given our resolution of the third assignment of error, this assignment as to the felony-murder conviction based on child endangering is sustained. With respect to the remaining felony-murder conviction, we hold that the jury did not lose its way and create a manifest miscarriage of justice by finding West guilty. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

Under this assignment of error, West also contends that involuntary manslaughter premised on child endangering in violation of R.C. 2919.22(A) was a lesser included offense of felony murder caused by felonious assault. Therefore, he contends, because the trial court acquitted him of involuntary manslaughter he should also have been acquitted of felony murder premised on felonious assault. We disagree. Here, the involuntary-manslaughter charge at issue is not a lesser included offense of felony murder caused by felonious assault, because different conduct supported each offense. Therefore, it was not error for the trial court to convict West of felony murder caused by felonious assault and, at the same time, acquit West for involuntary manslaughter based on child endangering. The second assignment of error is overruled in part and sustained in part.

In sum, we reverse the conviction for felony murder premised on child endangering in violation of R.C. 2919.22(B)(1), appealed under the case numbered C-110338. Because the specific sentence of 15 years to life for the merged felony-murder counts was imposed only on the conviction appealed in the case numbered C-110338, which has now been reversed, we remand this case to the trial court to impose a

sentence for felony murder based on felonious assault, the conviction appealed in the case numbered C-110337. In all other respects, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and **DINKELACKER, JJ.**

To the clerk:

Enter upon the journal of the court on April 4, 2012

per order of the court _____.
Presiding Judge