

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2012-0657
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
GARY WEST	:	Court of Appeals Case Number C-1100337
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

West attempts to restrict the state from indicting on a charge of felony murder based upon felonious assault and on a charge of involuntary manslaughter based upon the predicate offense of child endangering, whether by violating a duty of care or through abuse. The legislature has never evinced such an intent and R.C. 1.51 does not apply.

For West's argument to even apply, the statutes called into question must not be allied offenses. As stated by this Court, the analysis for whether offenses are allied ultimately requires an examination of the conduct of the accused. See *State v. Johnson*, 128 Ohio St.3d 107, 2010–Ohio–6314, 942 N.E.2d 1061, ¶ 51. And as found the by First District Court of Appeals, the crimes charged here require different conduct to commit.

While West argues that the legislature never intended the above-cited statutes to exist coextensively, a reading of the child endangering statute shows quite the opposite. The Committee Comments refer to the felonious assault statute for guidance in sentencing and state that child endangering may be a lesser included offense of felonious assault. The statute makes *no* explicit comment about *any* subsection being mutually exclusive with another; indictment under both subsections is not prohibited. For these reasons, this case does not involve a case of public or great general interest, and does not involve a constitutional question, and jurisdiction should be denied.

STATEMENT OF THE CASE AND FACTS

Gary West and co-defendant Jill Hull were indicted on the following charges:

1. Felony Murder with a predicate offense of felonious assault
2. Felony Murder with a predicate offense of child endangering by abuse
3. Involuntary Manslaughter with a predicate offense of child endangering by violating a duty of care

The case was tried to the bench, after which Gary West was found guilty of two counts of murder. The court acquitted him of the involuntary manslaughter charge. He was sentenced to serve 15 years to life in prison. On appeal, West's conviction for felony murder with the predicate offense of felonious assault was affirmed. The conviction for felony murder based upon child endangering was reversed based on an insufficiency of the evidence.

a) Facts:

Rachael West was born on September 14, 2008. Although her parents received financial assistance and free formula, this baby, born petite, smiling and healthy, was left to sit for hours on end in a car seat. At times, a bottle too heavy for a newborn to hold was propped up near her lips. The only bottle found at the scene was dirty and filled with what looked like curdled formula. The manner in which the bones in Rachael's skull overlapped, rather than remaining separated to allow for brain growth, silently told the tale of the endless hours she remained curled up in the seat without being fed or held by human hands. By Thanksgiving, eleven weeks later, Rachael was dead. When paramedics arrived at her house, Rachael's body was cold, drawn and emaciated, weighing more than a pound less than she had at birth. Full cans of unopened formula were strewn about her home.

Baby Rachael: From Birth to Death

Jill Hull and Gary West lived together with their three children, Gabriel, five years old, Emily, just under three years, and Rebecca, almost eighteen months. On September 14, 2008, Jill

Hull gave birth to their fourth child, Rachael, who was a full-term baby weighing six pounds and fourteen ounces. While at the hospital, a maternity ward nurse visited Ms. Hull and reviewed pertinent information about how to care for a newborn. During this discussion, Jill told the nurse that the baby's father was Gary Lee West, with whom she lived. West later confirmed this. Before Jill was discharged, the nurse met with Jill Hull and Gary West and read through a list of topics, point by point, to be sure that they understood crucial information. They were instructed in the amount of formula they should feed Rachael and how often, and on numerous issues regarding the health and safety of a newborn. Before her discharge, Jill told a social worker that there were no financial or social issues that needed to be addressed. She said that she would be taking Rachael to a pediatrician, and that Gary West was involved in her baby's life. When the couple left the hospital, nurses gave them at least eight bottles, nipples, a diaper bag and formula.

Rachael's parents did not take her to any doctor's appointments, well-baby or otherwise, after being discharged. Eight weeks after her birth, Jill Hull visited the Price Hill Medical Clinic. At this visit, Rachael weighed seven pounds, which was under the 5th percentile. The couple was given government coupons for free formula. Gary West picked up seven bottles of formula on November 13, 2008 and signed the accompanying coupons when he did.

On November 26, 2008, paramedics received a call for a "baby not breathing" at the West household. The child was emaciated and unmistakably dead: her cheeks were sunken in, her soft spot was actually depressed inwards, her mouth was open and rigor mortis had set in. A Coroner's Office investigator, described Rachael as malnourished and "emaciated, starved, very bony, thin, drawn really." Despite this, investigators found five full cans and one partially full can of Similac in the house (along with soda, cigarettes, video games and other food.)

Karen Looman, forensic pathologist, conducted an autopsy on Rachael's body and concluded that Rachael was intentionally starved to death. She testified that Rachael was in the last stage of starvation. In the first and second state, her body used all of the sugar in her system and all of the fat on her body to sustain life. The chubby face at birth had withered to a state where her cheeks were collapsed, her eyelids touched bone, and her abdomen was concave. Looman testified that during the third stage, Rachael's body devoured her muscles in its search for protein in order to live. Leg and arm bones protruded, her ribs and spine jutted out, and she was protected only by loose, wrinkly skin. Despite Jill Hull's claim that she had fed Rachael hours before her death, the condition of her liver proved that she had not. Child abuse expert Dr. Robert Shapiro concluded, after examining all of Rachael's records, that the signs of Rachael's malnourishment were so severe, they would have been obvious weeks before her death.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: 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. Different conduct supported the crimes of involuntary manslaughter, which are not allied offenses.

West argues that under R.C. 1.51, the state was prohibited at the outset from charging him with any crime other than involuntary manslaughter predicated upon the commission of child endangering under R.C. 2919.22(A), violating a duty of care. But West committed separate acts with a separate animus, and the crimes charged are not allied. Further, nothing in R.C. 2919.22 implicates R.C. 1.51.

Indictments under Special or General Provisions

R.C. 1.51 was enacted in 1972 to codify a statutory rule of construction. As explained by the Ohio Supreme Court: “It has been a long-standing rule that courts will not hold prior legislation to be impliedly repealed by the enactment of subsequent legislation unless the subsequent legislation clearly requires that holding.” *State v. Frost*, 57 Ohio St.2d 121, 387 N.E.2d 235 (1979). R.C. 1.51, recognizing that two statutes may prohibit the same conduct, codified this rule. R.C. 1.51 states: “Where it is clear that a general provision of the Criminal Code applies coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both. Conversely, where it is clear that a special provision prevails over a general provision or the Criminal Code is silent or ambiguous on the matter, under R.C. 1.51, a prosecutor may charge only on the special provision.”

An analysis under this statute arises when an offender is charged with two crimes that are punishable by different penalties under different statutes. It must first be determined whether the two crimes are allied offenses, and if they are, whether the crimes were committed separately or committed with a separate animus. *State v. Chippendale*, 52 Ohio St.3d 118, 556 N.E.2d 1134

(1990). If allied offenses are committed separately or with a separate animus, R.C. 1.51 does not apply. *Id.* See also *Chippendale*, supra; *State v. Barton*, 71 Ohio App.3d 455, 594 N.E.2d 702 (1991); *State v. Volpe*. 38 Ohio St.3d 191, 527 N.E.2d 818 (1988).

Here, West was charged with involuntary manslaughter with a predicate offense of child endangering by violating a duty of care. He was also charged with felony-murder based on felonious assault. These crimes clearly contain separate elements and are not allied offenses. As the First District Court of Appeals ruled, the charges were not allied offenses “because different conduct supported each charge.” *State v. West*, 1st Dist. No. C-1100337, pgs. 3-4.

The state presented evidence at trial that Gary West knowingly caused serious physical harm to Rachael by leaving her in her car seat for the majority of her life, resulting in a deformed skull, feeding her formula that caused vomiting, feeding inappropriate substances that are harmful to infants, and caring for her inadequately. Rachael cried nearly every day before her death; starvation is known to cause severe pain. Gary West’s actions carried a substantial risk of death, incapacity and acute pain that resulted in substantial suffering. R.C. 2901.01(5)(b),(c), (e). West also withheld the proper formula from his baby and failed to ever seek medical attention for excessive crying, excessive vomiting, loss of weight and starvation, even when its effects were stark, dramatic and obvious to anyone who laid eyes on her. That this was done with heedless indifference is evident by the eleven weeks it took for Rachael to reach the stage of decomposition that she did. At nearly any time before death, this could have been alleviated.

These varied acts constituted evidence of each different types of conduct that supported the separate charges. The state did not charge West with allied offenses. Having said that, the analysis under R.C. 1.51 ends.

Proposition of Law No. 2: The analysis of whether a clear legislative intent exists in order to apply the mandate of R.C. 1.51 only comes in to play where the two statutes in question are allied offenses. In this case, the statutes are not.

West argues that the legislature did not intend for the felonious assault statute to coexist with the child endangering statute, R.C. 2919.22. But a review of R.C. 2919.22 and the committee comments show the weakness of that argument.

Even if two offenses are allied and committed at the same time with a single animus, under R.C. 1.51, they may exist coextensively. If the legislature enacts or amends a general provision after the special provision is enacted, and “manifests its intent to have the general provision apply coextensively with the special provision,” the state may charge under both statutes. *State v. Sofronko*, 105 Ohio App.3d 504, 664 N.E.2d 596 (1995). “A ‘special’ statute is defined as one that applies to ‘particular subject matter,’ * * *; a general statute is one with uniform operation in all contexts.” *State v. Davis*, 11th Dist. No. 88-A-1391 (July 28, 1989).

The language of R.C. 2919.22 and the Legislative Service Commission notes show that the child endangering statute exists coextensively with many other statutes. It states specifically that a person may be convicted of child endangering and driving while intoxicated; it allows for a conviction for child endangering “whether or not” the offender is prosecuted for or convicted of manufacturing methamphetamines, or assembling or possessing the chemicals used to produce it; it states that there may be convictions for both child endangering and under the specification for human trafficking. See: R.C. 2919.22(C)(1), R.C. 2919.22(6), R.C. 2919.22(E)(3)(a) and (b); R.C. 2919.22(E)(2)(e). The comments also state that a conviction for Nonsupport of Dependents “is cognizable” under R.C. 2919.21, as well as a conviction under the child endangering statute when the failure to support results in a substantial risk to the health or safety of the child.

And even more telling, the Committee Comments refer to the felonious assault statute for guidance in sentencing. It refers to the fact that child endangering may be a lesser included offense of felonious assault. Legislative Service Commission notes, final paragraph, for R.C. 2919.22 and R.C. 2919.22 (E)(2)(c). The statute makes no explicit comment about any subsection being mutually exclusive with another; indictment under both subsections is not prohibited. For this reason, there is no merit to this proposition of law.

Proposition of Law No.3: Involuntary manslaughter is not a lesser included offense of felony murder caused by felonious assault because different conduct supported each offense. A conviction for felony murder caused by felonious assault was proper despite an acquittal on the charge involuntary manslaughter based on child endangering.

West argues that an acquittal on the involuntary manslaughter with the predicate offense of child endangering necessarily mandated an acquittal on the charge of felony-murder based upon felonious assault. But the two charges contain different elements and required different proof. As the First District Court of Appeals noted, the involuntary manslaughter charge in this case “is not a lesser included offense of felony murder caused by felonious assault, because different conduct supported each offense.” *Id.* at pg. 4.

In the direct appeal, West relied on *State v. Thomas* to support his claim that the judge’s acquittal on the manslaughter charge proves a failure of the state’s proof on the elements of the murder charges. *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988). Thomas stated only that involuntary manslaughter is a lesser included offense of *aggravated* murder under R.C. 2903.01(B) in the context of a jury instruction argument. Similarly, West’s quote below from *United States v. DeFrancesco*, taken from *United States v. Martin Linen Supply Co.*, showed only that the double jeopardy clause barred a government appeal from Crim. R. 29 judgments of acquittal following the discharge of a hung jury. *United States v. DeFrancesco* (1988), 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328; *United States v. Martin Linen Supply Co.* (1977), 430 U.S.

564, 97 S. Ct. 1349, 51 L. Ed. 2d 642. When the judge announced her denial of the Crim. R. 29 motion, she was adamant that the state had proven the elements of all three crimes sufficiently. Nothing in the record indicates that the judge found a failure of proof on the part of the state. One acquittal does not call for the other. Based upon this, the proposition of law is meritless.

Proposition of Law No.4: The evidence established beyond a reasonable doubt that Gary West was guilty of the felony murder of his infant.

Starvation does not happen in a solitary moment. It is not a condition that can be hidden from view by a fluffy blanket. One look at a photograph of Rachael West at the time of her death tells the story not only of starvation, but of a deliberate choice to withhold any medical attention to alleviate her pain, discomfort and hunger. And the severity of the decomposition of her body, while still alive, belies the defense theory that Rachael died because of her parent's ignorance. West's argument to the contrary is baseless.

The trial court found West guilty of causing the death of Rachael as a proximate result of recklessly committing or attempting to commit child endangering under R.C. 2919.22(B)(1), abuse of a child, and of also doing the same by committing or attempting to commit felonious assault under R.C. 2903.11. See R.C. 2903.02(B). To convict under R.C. 2919.22(B)(1), the state must prove that the defendant recklessly committed an affirmative act of abuse, "that is, perpetrated with heedless indifference to the consequences of the action," on a child under the age of eighteen. *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, 709 N.E.2d 551. See also *State v. Ivey* (1994), 98 Ohio App.3d 249, 648 N.E.2d 519. "The statute does not specifically define what constitutes abuse of a child, and this determination must be made on a case-by-case basis." *State v. Overton*, 10th District No. 09AP-858, 2011-Ohio-4204, ¶8. To convict under R.C. 2903.11, a person must cause serious physical harm to another, or cause or attempt to cause physical harm to another. R.C. 2903.11(A)(1) and (2). The mens rea for the

murder charge is knowingly. For the child endangering statute, it is recklessly. R.C. 2901.22(B) and (C).

After Rachael was born, a maternity ward nurse April Murdock reviewed all safety and health information pertaining to the care of a newborn with Jill Hull, just as had been done after the birth of their three other children. This information, and more, was included in a packet given to the couple upon discharge.¹ It also warned parents to never prop a bottle up by a baby's mouth due to the risk of choking. Both Jill Hull and Gary West stated they understood all that was provided and needed no other information. Jill Hull turned down an offer of assistance with heat and energy bills, grocery bills, transportation to doctor's offices, baby clothes, formula and diapers. At all times, she stated that West was the father of the baby.

The couple was told to arrange for a home visit from a nurse within 48 hours, and to take Rachael to a pediatrician for an examination. They did neither. Although an appointment was scheduled at the Price Hill Medical Clinic for September 25, 2008, neither Jill Hull nor Gary West appeared. Records admitted at trial showed that they kept appointments with their other children, and regularly sought medical attention when needed.

On November 13, about eight weeks after Rachael's birth, Jill Hull went to the Price Hill Clinic and applied for benefits through the federally-funded Women, Infant's and Children's Program (WIC). When asked if there were problems with the formula or the baby's health, Jill answered "no." She indicated on her application that she propped Rachael's bottle for feeding and dipped her pacifier in Kool-Aid. She also indicated that there was a working stove or

¹ This included: safety and feeding issues, the proper sleeping position for a baby to avoid SIDS, vaccinations, a feeding schedule with amounts of formula and how often to feed a newborn, and a list of situations that would require an immediate call to the baby's doctor, such as a fever over 100 degrees, difficulty breathing, severe loss of appetite, repeated vomiting, excessive drowsiness, crying or fussiness.

microwave, and refrigerator, at her home. In reality, there was not. There was not even a kitchen sink.

Although Jill Hull said that she fed Rachael five ounces of formula every three to four hours, her weight at that visit showed that she had gained no weight since birth. Taking into account two ounces for her clothes, she weighed six pounds and 14 ounces, the same as at birth. The dietician issued coupons for free formula from that date until February 25, 2009. That same day, Gary West cashed them in and signed for seven bottles of powdered formula. Each contained 12.9 ounces of powder, which would make 95 ounces of formula. From August to September, 2008, Jill Hull and Gary West received \$2,993 in food assistance benefits from the government.

Jill Hull's cousin, Amber Campos, visited Jill several times after Rachael's birth. She went shopping for Jill, who said that she had no clothes for Rachael. Throughout each visit, Rachael lay in the car seat without ever being held. On the only occasion she saw Jill feed the baby, it was from a dirty bottle that looked as if it had been sitting so long, the formula inside was old and crusted. Amber said she would never feed her own children out of a bottle in such a filthy condition. Gary West was at the home, and with their other children, on several of these visits.

Amber babysat a week later, and fed Rachael the formula Jill had supplied. It was Similac with iron. Rachael vomited all of the formula she took. Amber called Jill and asked why the baby was vomiting. Jill told her Rachael did this "all the time" and was a very fussy baby. With her permission, Amber fed Rachael Isomil, a non-milk based product. Rachael ate well, was happy and content, and slept peacefully. In Amber's view, Rachael was clearly small for her age. The premie clothes she had bought hung off of Rachael's body, and the newborn diapers at

the West household were “kind of big.” Amber gave Jill two phone numbers for agencies that would provide anything she needed for the baby for free. She also bought new bottles, nipples and several cans of liquid Isomil for Rachael. Amber said the Isomil was available in a store across the street from West’s Gracely address.

On the morning of November 26, 2008, paramedics were called to the West household because Rachael was dead. Jason Weber, a Coroner’s Office investigator at the scene, described her as malnourished and “emaciated, starved, very bony, thin, drawn really.” Jill Hull told Weber that Rachael normally cried at night, but that during the prior night, she did not. She said she fed Rachael about 10:00 a.m., but that she did not drink the full amount in her six-ounce bottle. After placing Rachael in her car seat near a space heater, Jill Hull took a nap. When she awoke, Rachael was not breathing. When asked, she said she did not know the name of Rachael’s doctor, and that she had not taken her to any well-baby visits. Investigators found five full cans and one partially full can of Similac in the house.

Karen Looman, forensic pathologist, conducted the autopsy on Rachael’s body. She determined that Rachael died from severe malnutrition due to intentional neglect. She testified that Rachael had not eaten recently before her death, as evidenced by a back-up of bile into her liver. Bile is used to digest food, and the back-up showed that nothing had been available to digest. The fact that there was no stool or feces in her large intestine also confirmed this. Looman’s investigation and testing showed no evidence of any condition, such as gluten intolerance, sugar intolerance, thyroid or adrenal gland problems, or genetic diseases that would have caused Rachael to be unable to digest food. Similarly, Looman was able to rule out other major illnesses and conditions as causing or leading to death. Looman said that a comparison of her age, weight and height at birth and death showed “nutritional wasting.” Rachael’s body was a

textbook example of an infant in the third stage of starvation, during which the body searches for protein to turn into sugar in an attempt to sustain life. All the fat was used up in stages one and two; Rachael's body then attacked her muscles. All that was left behind was bones, organs and skin. During the third stage of starvation, Rachael would have eaten voraciously if given the opportunity, cried incessantly from being hungry, and been visibly irritated. Her skin would have been cool if touched. When she became too weak to even cry, she may have made a noise from her throat to indicate discomfort or unhappiness. Looman testified that a death by starvation is "very painful" until just before death, when a child "is simply in a coma and doesn't experience sensation much at all." The pathologist found that the bones in Rachael's skull, which had been normal at birth, were laying one on top of the other. She said that when a baby lays in one position for extended periods of time, when he or she is weak, for example, the bones can "reform * * * and then freeze there as they start to join together." The skin on Rachael's lips and the edges of her ears was red and dry. Looman said this occurs postmortem as tissue starts to decompose after death. Heat, such as that from a space heater, can advance decomposition and cause the lips and the rim of the ears to dry more quickly, thus "mummifying" the body.

Dr. Robert Shapiro, an expert in pediatrics, child abuse and pediatric emergency medicine, reviewed all pertinent records and found that Rachael's starved condition would have been obvious "to anybody" at least a few weeks before death. Her condition was "dire," and when looking at the photographs after death, stated that "I can't really imagine how anyone could change this child's diaper without noticing or being alarmed." He ruled out dehydration and lactose intolerance as causes of death.²

² Shapiro even testified that Rachael's 1.5cm growth in length did *not* prove she had been fed.

The defense presented Werner Spitz as an expert in pediatric death. After reviewing the pertinent records, Spitz opined that Rachael died from dehydration due to her parents' ignorance and unconventional lifestyle as evidenced by the condition of their home. On cross-examination, Spitz backed down from almost all of these conclusions. He admitted that they were based in part on a letter he received from defense counsel after he had rendered his original report. When asked whether his opinion would change if he knew that Rachael urinated and defecated normally, and had no bloody stools or diarrhea, he answered that “* * * I would have significant doubt as to the veracity of those opinions based on how the child looked on September 26th.”

The above-stated evidence showed that Gary West knowingly caused serious physical harm to Rachael by leaving her in her car seat for the majority of her life, resulting in a deformed skull, feeding her formula that caused vomiting, feeding inappropriate substances that are harmful to infants, and caring for her inadequately. These acts were committed repeatedly over a period of weeks, and were separate, conscious decisions made each day. Rachael cried nearly every day before her death; starvation is known to cause severe pain. Gary West's actions carried a substantial risk of death, incapacity and acute pain that resulted in substantial suffering. R.C. 2901.01(5)(b),(c), (e). West also withheld the proper formula from his baby and failed to ever seek medical attention for excessive crying, excessive vomiting, loss of weight and starvation, even when its effects were stark, dramatic and obvious to anyone who laid eyes on her. That this was done with heedless indifference is evident by the eleven weeks it took for Rachael to reach the stage of decomposition that she did. At nearly any time before death, this could have been alleviated.

Despite the state's argument, the First District Court of Appeals held that there was insufficient evidence to prove an overt act of physical abuse or an act of commission to support

the conviction under R.C. 2919.22 (B)(1). The court did find that the felony murder conviction was supported by sufficient evidence. The record showed that West knew that Rachel was emaciated and despite this, knowingly failed to take her to a doctor “which resulted in Rachel’s death.” *Id. at* pg. 2. The record demonstrates that this proposition of law lacks merit.

CONCLUSION

The First District Court of Appeals correctly affirmed West’s conviction for felony-murder. Nothing in the legislature evinces an intent to restrict the state from indicting on charges of felony-murder and involuntary manslaughter based upon child endangering when separate conduct supports each charge. For the reasons stated above, this case is not appropriate for consideration by this Court and jurisdiction should be denied.

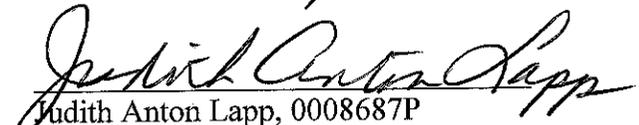
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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Brief of Plaintiff-Appellee, by United States mail, addressed to Elizabeth E. Agar, 1208 Sycamore Street Olde Sycamore Square, Cincinnati, Ohio 45202, counsel of record, this 14th day of May, 2012.


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