

[Cite as *State v. Smith*, 2009-Ohio-3727.]

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

STATE OF OHIO,	:	APPEAL NO. C-080126
	:	TRIAL NO. B-0705986
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
DERRIS SMITH,	:	
Defendant-Appellant.	:	

**Criminal Appeal From: Hamilton County Court of Common Pleas**

**Judgment Appealed From Is: Affirmed**

**Date of Judgment Entry on Appeal: July 31, 2009**

*Joseph T. Deters*, Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Michaela Stagnaro*, for Defendant-Appellant.

**Note: We have removed this case from the accelerated calendar.**

*Per Curiam.*

{¶1} Defendant-appellant Derris “D.J.” Smith appeals his convictions for felony murder, felonious assault, and child endangering, resulting from the fatal injuries that he inflicted on 18-month-old Malakai Glenn (“Malakai”). We affirm.

{¶2} On June 27, 2007, at about noon, the Cincinnati Police and Fire Communications Department received a 911 call from Sasha Glenn (“Glenn”) originating from the apartment that Glenn shared with Smith, her boyfriend; Roderick Glenn, her brother; and Malakai, her toddler son. Glenn reported that Malakai was having difficulty breathing. When emergency personnel arrived at Glenn’s apartment, Smith directed them upstairs to a front bedroom where Malakai was lying on the bed. Malakai, barely breathing, exhibited a blank stare and was unresponsive. He soon stopped breathing. Although emergency personnel first believed that Malakai had suffered a seizure, they soon realized that he had not suffered a seizure but instead had a severe head injury. Glenn told them that Malakai had fallen down the steps.

{¶3} Emergency personnel observed that Smith appeared “jittery” and “nervous”; Glenn seemed “abnormally aloof” and “afraid.” At the time, the 20-year-old Glenn was eight months’ pregnant with Smith’s child. Glenn’s brother Roderick was not home when the injuries had occurred, but he returned home after the paramedics arrived.

{¶4} Because Malakai had stopped breathing, the paramedics rushed him to Children’s Hospital. The medical exam indicated that Malakai had suffered severe head trauma that was consistent with child abuse but not consistent with a fall down

the steps. Malakai was later determined to be brain-dead. The family members gave doctors permission to remove him from life support. He died on July 1, 2007.

{¶5} Although Glenn had initially blamed Malakai's injuries on a fall down the steps, she eventually told the police and others that Smith had become angry with Malakai and had grabbed him by his Spiderman pajama top and had slammed his head against the hard surfaces of the wall and closet door of her apartment. The detective investigating Malakai's injuries found a small black hair and an oily mark where Glenn claimed Malakai's head had struck the wall. He also found a substantial crack in the closet door.

{¶6} Smith, a juvenile, was bound over to a Hamilton County grand jury and indicted on one count of aggravated murder; two counts of felony murder, one with the predicate offense of felonious assault and the second with a predicate offense of child endangering; one count of felonious assault; and one count of child endangering.

*The Trial*

{¶7} At Smith's trial, Glenn testified that in the late morning on June 27, while in the front bedroom located on the second floor of the apartment, she and Smith had argued over a "potty" incident involving Malakai. Specifically, Smith had wanted to punish Malakai, because instead of using the training potty that he had been placed upon, he had retrieved a pillow and a stool to rest on and had fallen asleep while sitting on the potty. Glenn testified that after they argued she had gone downstairs and that, when she returned upstairs, she saw Smith "whooping" on Malakai with his hands in the rear bedroom. She told Glenn to stop, and when Malakai came to her, she noticed that Malakai had "white stuff" in his hair. Glenn

wiped Malakai's head clean, and Malakai followed her into the front bedroom. Smith entered the room and insisted that the punishment continue. This time, however, he picked up Malakai by his Spiderman pajama top and slammed his head against a hard surface twice—first against a wall and then against the heavy closet door, leaving a crack in the door. Malakai never cried, kicked, or flailed.

{¶8} After the blows, Smith threw Malakai on the bed. Glenn picked him up and called his name, but he was unresponsive. Smith decided to put him in the shower, and when the water failed to rouse Malakai, Smith told Glenn to call 911 and to tell the dispatcher that Malakai had fallen down the stairs.

{¶9} Glenn further testified that she had been interviewed by the police several times on the day of Malakai's abuse and that some of her statements were not consistent with her trial testimony. Glenn explained that she had first blamed Malakai's injuries on a fall down the stairs because Smith had told her to do so and because she had been "shocked" and "scared."

{¶10} Glenn identified her voice on the recording of the 911 call that she had placed after she had found Malakai unresponsive. On this tape, which was admitted into evidence, an out-of-control Smith can be heard coaching Glenn to say that Malakai had fallen down the steps and warning Glenn about the "police." The medical call taker advised Glenn to calm Smith down or to have him leave the room because of his ranting and raving. Smith can be heard in the background apologizing to Malakai near the end of the recorded call.

{¶11} On direct examination, Glenn was asked why she did not stop Smith as he harmed Malakai. She replied that she was "just shocked." The prosecutor followed up with a question about whether Smith had ever struck her before, and she

responded that he had hit her sometimes when they argued. She testified also that they had argued the day before the incident because Smith was angry that the apartment was dirty.

{¶12} Glenn's neighbor Clifford Barnes testified that he had overheard an altercation in Glenn's apartment in the early morning hours of the day that Malakai was rushed to the hospital. He claimed to have heard banging on walls, a baby crying, and "him" threatening to kill Glenn and slapping her many times. On cross-examination, Barnes testified that Smith smoked hashish and came around him "high" everyday, and that he had often heard Smith threatening and slapping Glenn in the apartment.

{¶13} Dr. Kathi Makoroff, a member of the Children Hospital's child-abuse team, testified about Malakai's injuries and his treatment for those injuries at Children's Hospital. Malakai was essentially in a coma. A CAT scan of his head showed that he was bleeding around his brain and that the right side of his brain had shifted seven to eight millimeters to the left. Malakai suffered massive retinal hemorrhaging in both eyes.

{¶14} Malakai underwent emergency surgery to drain the blood from his cranial cavity and to remove a part of his skull to allow room for his herniating brain. The neurosurgeon discovered, upon opening his skull, that the brain itself was very swollen. The operation had to be stopped, and attempts to reduce the brain swelling failed. Malakai was determined to be brain-dead and was removed from life support several days later.

{¶15} Makoroff testified that, based upon his injuries, Malakai would have been rendered unconscious and unresponsive immediately after the fatal blow to the

head. Makoroff opined that Malakai's severe head injuries were not consistent with a mere fall down the stairs or a child intentionally hitting his head against a hard surface, but that they were consistent with child abuse. She also noted that Malakai had an abrasion on the front of his neck that could have been caused by the hem of a T-shirt that had been pulled too tightly to hold up a toddler who had then been flung against the wall.

{¶16} The coroner testified that the cause of death was intracranial hemorrhage due to cranial cerebral trauma. He added that a significant amount of force was necessary, equivalent to that generated in an automobile collision, to cause the trauma that he had observed. He unequivocally opined that Malakai's injuries were not consistent with a fall down the steps and could not have been caused by just shaking him, although he admitted that Malakai did not have a fractured skull. He identified an autopsy photograph that showed Malakai's short, dark hair.

{¶17} Glenn's brother Roderick testified that he had spent the night in the second bedroom on the evening of June 26, 2007, and that he had seen Malakai in the morning on June 27 before he left for a short time to visit a friend. He said that Malakai was playful but that he was sick, and that he had been sick for several days. Roderick said that when he returned to the apartment, the paramedics were there. Smith, who was "hugging on" Glenn, told him that Malakai had fallen down the steps. Glenn had said nothing.

{¶18} Roderick claimed that Smith and Glenn had argued in the early evening of June 26, 2007, but that he had not heard any argument during the night. He also testified that he had never seen Smith or Glenn harm the child, and that, to his knowledge, Smith had never harmed or threatened Glenn.

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{¶19} Cincinnati Police Detective Michelle Longworth and her partner, Jeffrey Smallwood, investigated Malakai's injuries after the police had learned from the medical staff at Children's Hospital that Malakai's injuries were not consistent with the history provided by the mother. Longworth interviewed Glenn three times on the day the 911 call was placed.

{¶20} Longworth first interviewed Glenn at the hospital within a few hours after the 911 call. Glenn began the interview by telling Longworth that her son had fallen down the steps twice in the past two months but had not required medical treatment. Also, Glenn told her that he had had a cold for several days and had had a habit of banging his head on walls and tables.

{¶21} In this first interview, Glenn had blamed Malakai's injuries on a fall down the stairs. Specifically, she said that she had heard a loud boom while in her bedroom with Smith. Smith ran out of the bedroom and down to the bottom of the stairs, where he found Malakai. She joined Smith, and they discovered that Malakai was unresponsive. Smith told her that Malakai had been reaching for a toy when he fell, although, as Longworth pointed out to Glenn, Smith could not have seen this from where he was sitting in the bedroom.

{¶22} In her second interview, which began at 5:23 p.m. at the hospital, Glenn again insisted that Malakai had fallen down the steps. But about halfway through the interview, she began crying and stated that "D.J. get mad." She then described how Smith had punished Malakai for retrieving a stool to rest his head on while he sat on a toilet-training "potty," first by "whoppin' on him"—spanking his bottom—and then by picking him up by his shirt and striking his head against the

wall two times, once in each bedroom, and then against the door in the front bedroom.

{¶23} Glenn's third interview began at 6:39 p.m. She was asked about several holes that a criminalist had seen in the apartment's walls. She said that none of the holes were related to Malakai's abuse, and that while Smith had hit Malakai other times in the past, he had never before slammed his head against hard surfaces.

{¶24} All three of Glenn's recorded interviews were admitted into evidence at trial without objection.

{¶25} Criminalist Spencer Henderson testified that he had gone to Glenn's apartment about an hour after the 911 call was received to collect evidence concerning an injury to a baby. He had photographed the scene, and these photographs were entered into evidence. The photographs did not depict any toy on the steps or at the bottom of the stairs, but there was a small toy in a pile of shoes and clothes in a corner at the top of the stairs. One photograph depicted a training potty, a pillow, and a child's stool grouped together in the front bedroom. Others depicted holes and indentations in the walls and doors of the apartment, including three-and-one-half-inch intersecting cracks in the heavy closet door of Glenn's bedroom, about five feet and two inches from the floor. Another photograph depicted a damp child's Spiderman pajama top that was located in the front bedroom.

{¶26} Henderson returned to the apartment two more times after June 27, 2007. The third time, which happened a week after the incident, he was accompanied by Glenn. Glenn showed him where Malakai's head had hit the wall in the first bedroom. Henderson directed his attention to that area and located a small

black hair that was stuck to the wall between two small faint grease spots about eight inches from the floor. He removed the hair and preserved it as evidence but did not test to see to whom it belonged. Henderson also observed that the wall in that location consisted of a solid support beam and was not just drywall. The wall was not indented. Glenn also showed Henderson where Malakai's head had hit the closet door, leaving a substantial crack. Henderson removed the door, and it was admitted into evidence.

{¶27} In his defense, Smith presented the testimony of Kelly Glenn, the wife of Sasha Glenn's father. Kelly Glenn testified that Glenn and Malakai had resided with her from his birth through November 2006; that Smith had treated Malakai well when he was around them; and that she had concerns about Malakai's safety when he was around Glenn.

*The Verdict*

{¶28} A jury found Smith guilty of two counts of murder, one count of felonious assault, and one count of child endangering. He was acquitted of aggravated murder. The trial court merged the murder counts and imposed a prison term of 15 years to life for the murder, as well as eight years for the felonious assault and eight years for the child endangering, for a total sentence of 31 years to life in prison. In this appeal, Smith now raises five assignments of error.

*Sufficiency and Weight of the Evidence*

{¶29} In his fourth assignment of error, which we address first, Smith argues that the felony-murder, felonious-assault, and child-endangering convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶30} The test for determining whether the evidence is sufficient to support a criminal conviction is whether any reasonable trier of fact, after viewing the evidence in the light most favorable to the state, could have found the essential elements of the offense proved beyond a reasonable doubt.<sup>1</sup> In determining whether a judgment is against the manifest weight of the evidence, the reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.<sup>2</sup>

{¶31} Smith was convicted of felony murder with the predicate offense of felonious assault. Thus, the state had to prove that Smith had caused the death of Malakai Glenn as a proximate result of his committing or attempting to commit felonious assault. He was also convicted on a separate count of felonious assault under R.C. 2903.11(A)(1), which proscribes knowingly causing serious physical harm to another. Finally, he was convicted on one count of second-degree child endangering under R.C. 2919.22(B)(1) and (E)(2)(d), which prohibit the reckless abuse of a minor that results in serious physical harm.

{¶32} Smith's sufficiency argument is meritless. The medical testimony established that Malakai had suffered serious head injuries from an intentional impact that had immediately rendered him unresponsive and eventually killed him. Glenn's testimony, which was bolstered by the 911 tape and the other physical

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<sup>1</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

<sup>2</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211.

evidence in the case, established that Smith had inflicted the injuries. Thus, we reject Smith's challenge to the sufficiency of the evidence to support his convictions.

{¶33} In challenging the weight of the evidence to support his convictions, Smith argues that Glenn's testimony was inconsistent and suspect because she could have inflicted the injuries on Malakai. As we have already noted, however, Glenn's testimony was corroborated by other evidence presented in the case, including the 911 tape. The weight to be given the evidence and the credibility to be afforded her testimony were issues for the jury to determine.<sup>3</sup> After a thorough review of the record under the weight-of-the-evidence standard, we are not convinced that the trier of fact clearly lost its way, or that there was a manifest miscarriage of justice. Accordingly, we overrule the fourth assignment of error.

*Prior Bad Acts*

{¶34} In his first assignment of error, which we address next, Smith argues that testimony that he had previously committed acts of domestic violence against Sasha Glenn and that he had used drugs was erroneously admitted into evidence to show that Smith had acted in conformity with these prior acts, in violation of Evid.R. 404(B).

{¶35} Evid.R. 404(B) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

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<sup>3</sup> *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶36} Smith cites three instances where alleged other-acts testimony was admitted. Smith cites Glenn’s testimony given immediately after she relayed what had happened on the morning that Malakai was injured. Glenn, after stating that Smith had grabbed Malakai and slammed the back of his head against the wall and door while she silently observed, was asked by the prosecutor why she had not protested. She stated that she was “shocked” and that Smith had never struck Malakai’s head in the past. The prosecutor followed Glenn’s response by asking if Smith had ever struck her. She replied that he sometimes had after an argument. Smith did not object to this testimony.

{¶37} The other two instances came during the testimony of Clifford Barnes, a resident in the apartment adjoining Glenn’s. First, Barnes testified that he had overheard noise and commotion coming from Glenn’s apartment in the early morning hours on the day that Malakai was fatally injured. Barnes testified that he knew Smith’s voice and that he had heard “him” threaten to kill Glenn and slap her 8 to 12 times. Second, on cross-examination, Barnes added that Smith was “high every day” and that although Smith and Glenn seemed “cool” at first, he often heard Smith threatening and slapping Glenn. Smith did not object to this testimony or request that it be stricken.

{¶38} Smith’s failure to object to the admission of these statements at trial has waived all but plain error.<sup>4</sup> For there to be plain error, there must be a plain or obvious error that affects “substantial rights,” a phrase that has been interpreted to mean that, “but for” the error, the outcome of the trial clearly would have been different.<sup>5</sup>

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<sup>4</sup> See Crim.R. 52(B); *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

<sup>5</sup> *Barnes* at 27.

{¶39} The state argues that the testimony was not “other acts” testimony that was barred by Evid.R. 404(B), and that even if it was, the admission of the testimony did not rise to the level of plain error in light of the other evidence presented.

{¶40} According to the state, Glenn’s testimony was not impermissible other-acts evidence, but relevant background information, because it showed that Glenn feared Smith and explained why she had not intervened when Smith slammed Malakai into the wall and closet door of her apartment and why she had first lied about his involvement.

{¶41} We agree that the testimony was not elicited to establish the forbidden inference—that Smith had a propensity for violence and acted in conformity with that propensity—but to give context to Glenn’s actions. The state had anticipated a question in the mind of the jurors, fostered by the defense, about why Malakai’s mother had not intervened and why she had first lied about the cause of the injuries. Where defense counsel did not request a limiting instruction, and the state did not rely on the forbidden inference to establish guilt, and where the evidence in the case does not convince us that Smith would not have been convicted but for Glenn’s challenged testimony, Smith has failed to demonstrate plain error.

{¶42} We next address Barnes’s testimony. According to the state, Barnes’s testimony on direct examination about overhearing “him” slap and threaten Glenn only inferentially implicated Smith, and for this reason the testimony did not qualify as other-acts evidence. We are not persuaded by this argument, as Barnes clearly identified “him” as Smith.

{¶43} We also reject the state’s argument that Barnes’s testimony elicited on direct examination was admissible because it provided the “immediate” background

for, and was inextricably related to, the crimes. In this respect, the state notes that Barnes also testified that in the early morning when he had heard the threats and slapping, he also heard banging on the walls and a baby crying. We reject this argument because the time frame identified by Barnes, between midnight and 4:00 a.m., was so far removed from the fatal incident that these acts were wholly independent of the offenses.<sup>6</sup>

{¶44} Barnes's testimony, however, was not elicited to provide the forbidden inference but, as with Glenn's testimony, to give context to Glenn's actions. Moreover, the testimony was less than credible, as it conflicted with the testimony of Glenn and her brother and appeared contrived upon cross-examination. Where defense counsel did not request a limiting instruction, and the state did not rely on the forbidden inference to establish guilt, and where the evidence in the case does not convince us that Smith would not have been convicted but for Barnes's challenged testimony on direct examination, Smith has failed to demonstrate plain error.

{¶45} Finally, we address the testimony elicited from Barnes on cross-examination about Smith's drug use and his frequent prior altercations with Smith. The state argues that the admission of this testimony was not plain error because the testimony was elicited during cross-examination and was clearly used by defense counsel to discredit Barnes. Barnes was discredited because he acknowledged his own frequent drug use and appeared to be an overzealous witness with an inaccurate recollection of events. Thus, the state contends, and we agree, that since defense counsel used the testimony to discredit Barnes, and the jury acquitted Smith of the

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<sup>6</sup> See, generally, *State v. Lowe*, 69 Ohio St.3d 527, 531, 1994-Ohio-345, 643 N.E.2d 616.

most serious charge, aggravated murder, the impact, if any, of the testimony on the jury was favorable to Smith. For these reasons, and because of the strength of the state's evidence, we conclude that the admission of this testimony did not rise to the level of plain error.

{¶46} Accordingly, we overrule the first assignment of error.

*Prosecutorial Misconduct*

{¶47} In his second assignment of error, Smith argues that prosecutorial misconduct occurring during closing argument deprived him of a fair trial. First, Smith contends that the prosecutor improperly sent a message to the jury that he did not present any evidence, as indicated by the following passage: “And what do we know separate and apart from Sasha that tells us, hey, that story is believable, it's true, and it is indeed what caused this child's death? First, the medical testimony. Dr. Makoroff, Doctor Kenny (the coroner), **with absolutely nothing to discredit what they said to you to or leave them also unbelievable, nothing, no evidence presented whatsoever to counter what they tell you about these injuries to this child.** That no way, no whatsoever, could this child have fallen down the steps to cause this severe brain hemorrhaging, brain death. That no repeated hitting of his own head over a period of time could have culminated in this injury. This was an injury in the now. **Nothing, not a single shred of evidence to contradict that.**” (Emphasis added.)

{¶48} Smith argues additionally that the prosecutor improperly stated on four occasions that the jury should put itself in Glenn's position to understand why she reacted the way she did. Although Smith acknowledges that the court sustained Smith's objections to these remarks, he notes that the prosecutor was allowed to

state that Glenn was afraid of Smith and that he had “forced” her to lie, which was not reflected in the evidence.

{¶49} While some latitude is granted to both parties in closing argument, a closing argument that goes beyond the evidence may constitute prejudicial error.<sup>7</sup> We must consider the argument as a whole to determine whether prejudice resulted from the prosecutor’s remarks in final argument.<sup>8</sup>

{¶50} A review of the entire closing argument in this case reveals that the prosecutor asked the jury to decide the case on the evidence presented, not on improper considerations. The state’s first contested remark asked the jury only to note that the state’s medical testimony was unrefuted, which was accurate.

{¶51} The prosecutor’s statement that Glenn had lied and had not stopped Smith because she was afraid of him was an inference fairly supported by the evidence, even though Glenn’s testimony did not express this precisely: emergency personnel described Glenn as quiet and afraid; an uncontrolled Smith can be heard ranting and raving on the 911 tape, revealing his temperament; Glenn testified that Smith had hit her sometimes when they argued; and Glenn herself testified that she had given false information because she was “scared.”

{¶52} Moreover, Smith’s allegation that the prosecutor told the jury that Smith had “forced” her to lie is not borne out by the record. Instead, the record demonstrates that the prosecutor, after citing Glenn’s professed love for Smith, argued that “[h]e made her lie. She was lying to protect him.”

{¶53} The prosecutor’s closing argument, when considered in context, was not improper. Accordingly, we overrule the second assignment of error.

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<sup>7</sup> *State v. Byrd* (1987), 32 Ohio St.3d 79, 82, 512 N.E.2d 611.

<sup>8</sup> *Id.*

*Ineffective Assistance of Counsel*

{¶54} In his third assignment of error, Smith argues that he was denied the effective assistance of counsel. Smith claims that trial counsel was ineffective for eliciting and failing to object to prejudicial other-acts evidence and for failing to object to the allegedly improper prosecutorial remarks that were discussed in the first and second assignments of error.

{¶55} To prevail on his argument, Smith “must show that [his] counsel’s representation fell below an objective standard of reasonableness”<sup>9</sup> and that he was prejudiced by counsel’s deficient performance.<sup>10</sup> Prejudice is demonstrated by showing “that there is a reasonable probability that, but for \* \* \* [the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>11</sup>

{¶56} Trial counsel’s representation is presumed effective,<sup>12</sup> and this presumption is not overcome here. We have already held that the prosecutor’s comments did not exceed the bounds of reasonable argument. Thus counsel was not ineffective for failing to object. Likewise, trial counsel’s conduct with regard to Smith’s alleged “other acts” testimony was likely tactical and designed to discredit Barnes. One theory of the defense was that all the state’s evidence, especially Glenn’s and Barnes’s testimony, was contrived and designed by the witnesses to conform to pieces of evidence that they had learned about from the police.

{¶57} Trial counsel’s failure at least to request a limiting instruction regarding Glenn’s testimony that Smith had sometimes slapped her after an

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<sup>9</sup> *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052.

<sup>10</sup> *Id.* at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

<sup>11</sup> *Strickland* at 694; *Bradley* at paragraph three of the syllabus.

<sup>12</sup> *Strickland* at 690.

argument is problematic, but Smith cannot prevail on this aspect of his claim because he cannot show the requisite prejudice. Based upon the strength of the state's evidence, there is not a reasonable probability that, but for counsel's allegedly defective performance, the result of the proceeding would have been different. The evidence established that Malakai's fatal injury was inflicted with great force. Only Glenn and Smith were with him when he was injured, and Glenn was eight months' pregnant. Glenn's testimony that Smith had lifted the toddler by his pajama top and slammed the back of his head against the wall and door was corroborated by the other evidence in the case, including the 911 recording of an out-of-control Smith coaching and warning Glenn while also apologizing to Malakai. Accordingly, we overrule the third assignment of error.

*Allied Offenses*

{¶58} In Smith's fifth assignment of error, he argues that the trial court erred in sentencing him for felony murder, felonious assault, and child endangering because they are allied offenses of similar import under R.C. 2941.25. He maintains that there was one act, one victim, and one animus, and that all his offenses should have merged into one offense of felony murder with a sentence of 15 years to life in prison. The state argues that none of the offenses are allied and that it relied upon separate conduct to prove the offenses.

{¶59} Ohio's multiple-count statute, R.C. 2941.25, provides the following:

{¶60} "(A) Where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶61} “(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

{¶62} R.C. 2941.25 indicates the General Assembly’s intent “to permit cumulative sentencing for the commission of certain offenses of dissimilar import.”<sup>13</sup> Where, however, the offenses are of similar import, the defendant may be convicted (found guilty and punished) of only one, unless the offenses are committed separately or with a separate animus as to each.<sup>14</sup>

{¶63} The Ohio Supreme Court has held that under R.C. 2941.25 courts should apply a two-part test to determine the lawfulness of multiple convictions.<sup>15</sup> In the first step, a court must compare the statutorily defined elements of the offenses in the abstract, without considering the particular facts in the case.<sup>16</sup> If the elements of the offenses correspond—not exactly, but to such a degree that the commission of one crime will “necessarily” result in the commission of the other—then the offenses are allied.<sup>17</sup> If they do not, the court’s inquiry ends and multiple convictions are permitted.<sup>18</sup>

{¶64} If the offenses are allied, the court must then proceed to the second step.<sup>19</sup> In the second step, the defendant’s conduct is reviewed. If the court

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<sup>13</sup> *State v. Rance*, 85 Ohio St.3d 632, 635-636, 1999-Ohio-291, 710 N.E.2d 699 (internal citation omitted).

<sup>14</sup> *Id.* at 636.

<sup>15</sup> *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; *State v. Cabrales*, 118 Ohio St.3d 54, 208-Ohio-1625, 886 N.E.2d 181, at ¶14.

<sup>16</sup> *Rance* at 638.

<sup>17</sup> *Cabrales* at paragraph one of the syllabus, clarifying *Rance*, *supra*; *State v. Harris*, 2009-Ohio-3323, at ¶13.

<sup>18</sup> *Rance* at 636, citing R.C. 2941.25 (B).

<sup>19</sup> *Cabrales* at ¶14, citing *Blankenship*, 38 Ohio St.3d at 117.

determines either that the offenses were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.<sup>20</sup>

{¶65} Two allied offenses of similar import must be merged into a single conviction.<sup>21</sup> The prosecution must elect which offense it will pursue after a finding of guilt but prior to sentencing.<sup>22</sup>

{¶66} Recently, in *State v. Brown*, the Ohio Supreme Court held that resort to the two-step test may be preempted where the legislature's intent to allow or not to allow separate convictions is clear from the language of the statutes under review.<sup>23</sup>

### 1. Felony Murder and Felonious Assault

{¶67} This court has already determined that felony murder under R.C. 2903.02(B) and felonious assault under R.C. 2903.11(A)(1) are not allied offenses of similar import. With the elements of the offenses compared in the abstract, one could commit one without committing the other, and vice versa.<sup>24</sup> We have also rejected the contention that a felonious assault must merge with a felony murder where the assault was the predicate offense for the felony murder.<sup>25</sup> Relying on this precedent, we reject Smith's claim that felony murder and felonious assault are allied offenses of similar import.

### 2. Child Endangering—Unique Societal Interest

{¶68} Smith was convicted of child endangering in addition to felonious assault and felony murder. Specifically, Smith was convicted of child endangering

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<sup>20</sup> *Id.*

<sup>21</sup> *Harris*, 2009-Ohio-3323, at ¶21.

<sup>22</sup> *Id.*, at ¶23, citing *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244, 344 N.E.2d 133.

<sup>23</sup> *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

<sup>24</sup> *State v. Finley*, 1st Dist. No. C-061052, 2008-Ohio-4904, ¶42; *State v. Nesbitt*, 1st Dist. No. C-080010, 2009-Ohio-972, ¶33.

<sup>25</sup> *Finley* at ¶43.

under R.C. 2919.22(B)(1), which provides that “[n]o person shall do any of the following to a child under eighteen years of age \* \* \*: [a]buse the child.”

{¶69} This court in *State v. Johnson*<sup>26</sup> held that child endangering under R.C. 2919.22(B)(1) and felony murder under R.C. 2903.02(B)<sup>27</sup> are offenses of dissimilar import without regard to the comparison-of-the-elements test, based upon the preemptive exception set forth in *Brown*. We determined that the legislature clearly intended the child-endangering statute to protect a different societal interest—“to ‘bestow special protection upon children,’ ”—than the societal interest protected by the felony-murder statute—to protect human life—and that the distinction permitted separated punishments for both.<sup>28</sup>

{¶70} This court in *State v. Klein*<sup>29</sup> followed the rationale of *Johnson* to hold that child endangering under former R.C. 2919.22(B)(3) and felonious assault under former R.C. 2903.02(B) were offenses of dissimilar import because the societal interests protected by the statutes differed.<sup>30</sup> Although Klein was convicted under a different subsection of R.C. 2919.22(B) than the one under which Smith was convicted in this case, we hold that the same analysis should apply because the unique societal interest protected by the child-endangering statute extends to the subsection at issue here.

{¶71} Thus, we conclude that the General Assembly intended to distinguish child endangering from the other two offenses in this case and to permit separate punishments for the commission of these crimes.

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<sup>26</sup> 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568.

<sup>27</sup> *Johnson*, 2009-Ohio-2568, at ¶96.

<sup>28</sup> *Id.* at ¶95-96, quoting from and following the analysis of the Fifth Appellate District in *State v. Morin*, 5th Dist. No. 2008-CA-10, 2008-Ohio-6707.

<sup>29</sup> 1st Dist. No. C-080470, 2009-Ohio-2886.

<sup>30</sup> *Klein*, 2009-Ohio-2886, at ¶33.

{¶72} Consequently, we hold that none of Smith’s convictions involved allied offenses of similar import, and that the trial court did not err in convicting Smith of felony murder, felonious assault, and child endangering. Accordingly, we overrule the fifth assignment of error.

{¶73} Finally, we reject the state’s argument that it relied upon separate conduct—a blow against the wall and a blow against the door—to prove child endangering and felony murder. This argument is not supported by the record, as the state grouped the acts as part of the same course of conduct in the proceedings below and failed to develop the evidence to support convictions based upon separate conduct.

{¶74} For example, the medical testimony demonstrated that Malakai was rendered unconscious immediately after the infliction of the head injury that eventually caused his death, but the testimony did not distinguish between the two blows. And Glenn testified that Malakai did not cry or otherwise respond after the first blow.

{¶75} This case is distinguishable from the Ohio Supreme Court’s decision in *State v. Cooper*,<sup>31</sup> which involved convictions for involuntary manslaughter and child endangering resulting from violence against one child. In *Cooper*, the record established that the state had proceeded under a theory of separate conduct and had presented evidence of separate conduct—shaking the child and then slamming his head against a hard object—to prove each offense, thus permitting separate convictions without applying the comparison-of-the-elements test.<sup>32</sup>

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<sup>31</sup> 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657.

<sup>32</sup> *Id.* at ¶27-30. See, also, *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶87-89.

*Summary*

{¶76} We find no merit to Smith's five assignments of error. Accordingly, we affirm the trial court's judgment.

Judgment affirmed.

**HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.**

*Please Note:*

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