COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2013 CR 00416**
vs.	:	**Judge McBride**
JOHN A. KELLEY	:	**DECISION/ENTRY**
Defendant	:	

Scott O'Reilly, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Montgomery Law Office, LLC, George Montgomery, counsel for the defendant John A. Kelley, 45 N. Market Street, Batavia, Ohio 45103.

This cause came before the court for trial from December 16th through December 18th and on December 20, 2013. At the conclusion of the trial, the court took the issues raised during the trial under advisement.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

The defendant is charged in a three-count indictment with the following: (1) one count of endangering children in violation of R.C. 2919.22(B)(1), a felony of the second degree; (2) one count of endangering children in violation of R.C. 2919.22(B)(3), a

felony of the second degree; and (3) one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree.

FINDINGS OF FACT

Having heard the testimony and having reviewed the evidence in the present case, the court makes the following findings of fact:

M.K., a minor (d.o.b. February 12, 2004), went to live with the defendant John A. Kelley and his family as a foster child sometime in 2011. The defendant and his wife began the adoption process in approximately December 2011, and M.K. was legally adopted by them on November 7, 2012.

M.K. had been removed from his biological family in 2008 and was placed in the foster care system. During his time in the foster care system, he went through at least four placements.

Greg Rausch, a clinical social worker with a Master's Degree in Clinical Social Work and Social Work who is currently employed by the Counseling Source, worked with M.K. as his counselor from March 2009 to October 2009 and from September 2011 until December 2012. The gap in M.K.'s treatment with Greg Rausch between October 2009 and September 2011 was due to M.K. being placed in foster homes outside of Clermont County during which time he received therapy through another program.

In 2009, Rausch diagnosed M.K. with post-traumatic stress disorder (PTSD) as a result of his witnessing domestic violence in his biological home and the behaviors that he exhibited thereafter, including rage reactions and emotional outbursts. In 2011, Greg

Rausch diagnosed M.K. with adjustment disorder with anxiety, which is diagnosed when there is a significant change in a person's life to which they are struggling to adjust and which creates anxiety.

At the time of the latter diagnosis, M.K. had been placed in a new foster home with the defendant and his family. Rausch's counseling sessions with M.K. were terminated in December 2012 when the defendant indicated that he believed that M.K. going to the Clermont County Child Protective Services (CPS) offices, which is where Rausch has his office as well, might be a trauma trigger for M.K. since it was the same place he had supervised visits with his biological family and where sometimes his biological parents had a visit scheduled but would fail to appear for that visit. Rausch and the defendant, along with his wife, agreed that the CPS office could be a trauma trigger for M.K., and they mutually agreed to terminate his counseling sessions with Rausch.

All of the information regarding M.K.'s social, medical, and psychological history was provided to the Kelleys as part of the "presentation" stage of the adoption. Clermont County CPS provides all foster parents with a placement packet, which includes an explanation of the child's rights. Included therein is the following provision regarding discipline: "There shall be no threat of physical punishment * * * ."[1]

In this regard, corporal punishment is not permitted to be utilized by foster parents. This topic is covered for three hours during the required thirty-six hours of training to become a foster parent. This rule is in place because children who come into the custody of CPS have been abused and/or neglected and need to be protected from further trauma.

[1] State's Exhibit 8.

While M.K. lived in the defendant's home as a foster child, he displayed behaviors such as throwing tantrums and throwing items in the home, and, on a few occasions, swinging or hitting the defendant's wife in the side or arm and hitting the defendant in the genitals. M.K. was also suspected of urinating in the home, including urinating on the carpets and in the air vents.

This urination problem was reported to Bobbi Grooms, the Clermont County CPS adoption social worker who took over M.K.'s case in May 2012 when it was still in the adoption process. As a result of all the behavioral issues, including the urination, the adoption, which was ready to be finalized in June or July 2012, was slowed down. Although the urination issues were still occurring in October 2012, the defendant and his wife chose to go forward with the adoption.

During this time, the defendant and his wife engaged in various disciplinary techniques such as putting M.K. in time out, sending him to his room, taking away television and video game privileges, and depriving M.K. of the right to participate fully in family outings. On one occasion in 2012, the defendant took M.K. on a day trip to Michigan with a family friend in the hopes that they all could talk about the urination problem and find a solution.

While these same forms of discipline were still employed after M.K.'s adoption, it was also only several days after the adoption was finalized that the defendant began to use corporal punishment. The corporal punishment occurred on multiple occasions. The defendant administered this corporal punishment by hitting M.K. several times on each occasion, either with a leather belt[2] or with a ping pong paddle. This generally occurred in response to M.K. urinating in the home or lying about urinating in the home.

[2] State's Exhibit 1.

M.K.'s pants were removed for these spankings[3], allowing the belt and paddle to strike his bare skin. The defendant's wife would sometimes hold M.K. down while these spankings occurred.

M.K. testified that these spankings would happen a lot and would hurt a lot, sometimes for up to two or three weeks. He experienced pain and would cry as a result. For more than a day after these spankings, it would hurt M.K. to sit down.

In April 2013, M.K. was forced to wear a sandwich-board-type sign in Kroger's which read on the front "I pee on my family if I don't get my way!"[4] A Kroger's employee called Clermont County CPS upon seeing this incident, which resulted in a Family In Need of Services (FINS) report. Greg Cottrill of Clermont County CPS spoke with the Kelleys and suggested that mental health services would benefit M.K., but no further action was taken. Around this same time, the defendant and his wife briefly used plastic locking underwear on M.K., which required an adult to unlock the underwear in order for M.K. to go to the bathroom.

Also sometime around April 2013, Josh Kelley, the defendant's son, was at the defendant's home and learned that M.K. was going to receive a spanking consisting of two or three swats with a ping pong paddle. Josh Kelley volunteered to take one of the swats for M.K., and M.K. himself received two swats. Both M.K. and Josh Kelley took off their pants and the swats were on their bare skin. This was one of two sessions of corporal punishment that occurred on that day, but the only one that Josh Kelley

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[3] "Spank" is defined as "to strike with or as if with the open hand." Webster's Third New International Dictionary 2182 (1993). Although the defendant used an implement in this case and not an open hand, the court will use the word "spanking" to describe the punishments because it was the word most commonly used throughout the trial. Use of the word "spanking" does not reflect the court's opinion of the severity of the pain or punishment inflicted.
[4] State's Exhibit 5A.

personally observed. When the defendant hit Josh Kelley with the ping pong paddle, he used such force that the paddle he was using broke.

The corporal punishment continued throughout M.K.'s time in the home as the defendant's adopted child. In the days leading up to June 20, 2013, M.K. was spanked multiple times. On June 20, 2013, M.K. was again told that he was going to receive a spanking, and the defendant went in a back room to get the ping pong paddle. M.K. was scared and didn't want to be spanked again, so he ran away from the home while he was barefoot. M.K. ran at least 0.29 miles from his home[5], and more if he did not go in a straight line, knocking on the doors of homes along the way but getting no answer. He ultimately reached the home of Lee Powers, where the door was unlocked. Although M.K. did not know Powers, he let himself into the home and, when he was discovered by Powers, was attempting to dial the phone because he needed "to get to Clermont County."

Powers noted that M.K. was wearing a T-shirt and shorts but no socks or shoes and that one of his feet had a sliver of glass in it. She observed that M.K. was very controlled but very agitated and hyper-vigilant and that he exhibited signs of tension, stress, and fear.

Powers called 9-1-1 and, approximately ten minutes later, Deputies Sean Schubert and Gary Summers of the Clermont County Sheriff's Office arrived separately at Powers's home. They spoke with Lee Powers and then walked M.K. out to the cruiser, talking to him along the way about the fact that parents have the right to discipline their children as long as it is not excessive, in an attempt to get more information about what M.K. was saying had happened.

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[5] State's Exhibit 6A.

M.K. asked the deputies to look at his leg and both deputies observed a mark on M.K.'s right lower calf consistent with a belt mark.[6] As a result, they both became more concerned at that point. Deputy Schubert took a picture of the mark and asked M.K. if he had any other marks on him. In response, M.K. pulled up his shorts and showed the deputies the marks on his right thigh.[7] The welts that the deputies observed were raised. When Deputy Schubert asked if there were any marks on his back, M.K. pulled up his shirt, revealing no marks on his back, but bruising could be seen along his waistline and side.

Before the deputies asked M.K. to show them any further marks, they called CPS and waited for CPS workers to arrive. Deputy Schubert noted that M.K. was calm, quiet, scared, and trembling. While sitting in the cruiser, there was a dispatch indicating that the defendant had reported that M.K. had run away because he didn't like how he was being disciplined, and, upon hearing that dispatch, M.K. started visibly shaking.

Opal Anderson, a Social Services Worker III, and Paige Chandler, an investigator, both with Clermont County CPS, arrived at Lee Powers' home a short time later. After they arrived, M.K. removed his shorts to reveal severe bruising on his buttocks and upper thighs.[8]

More photographs of M.K. were taken by Paige Chandler and then the deputies and Opal Anderson went to the defendant's home to speak with him. Paige Chandler took M.K. to a local store to wait for Opal Anderson to later meet them there. At that point, Chandler and Anderson had decided that M.K. was going to be removed from the defendant's home due to abuse.

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[6] State's Exhibit 4A.
[7] State's Exhibits 4C and 4J.
[8] State's Exhibits 4F through 4I.

When the deputies and Opal Anderson arrived at the defendant's home, they began to speak with the defendant's wife, who was waiting outside, and the defendant came out of the home shortly after their arrival. Opal Anderson began to explain why they were there and inquired about the marks on M.K.'s body. The defendant became very defensive and said "I spanked him and I'm not going to stop." When Deputy Schubert asked the defendant if he had seen the bruises they were talking about, the defendant said "I've seen them. I put them there. He's my son."

While Deputy Summers continued to speak to the defendant, Deputy Schubert retrieved the camera from his cruiser to show the pictures of the marks and bruises to the defendant. However, the defendant refused to look at the photos and said he knew what his son's body looked like and that those injuries were caused by him spanking M.K.. The defendant reiterated that he would continue to discipline his son.

When the defendant was asked if he thought the bruising and injuries were excessive, the defendant said "maybe by county standards, but not by mine." The defendant stated he used a belt for these spankings and, when asked about a paddle, he said he also used a paddle but it didn't work. The defendant produced the belt he used but claimed that he no longer had the paddle. The defendant said that the only thing he felt worked were the spankings, although by everyone's agreement the urination problem had not lessened or ceased, so it is unclear what the defendant believed was effective about these spankings.

M.K. was taken to Children's Hospital that same day. The medical findings note in pertinent part as follows: "* * * multiple large ecchymoses on the lower half of body. A very large older appearing confluent bruise over the left hip and thigh. Newer appearing

red patterned bruises on the right lower extremity. Multiple of these appear to have been made by a long object that would be 2-3 cm wide. * * * "[9]

Dr. Robert Shapiro, the Director of the Mayerson Center at Children's Hospital, did not treat M.K. on June 20th but he did go through the medical records and photographs taken on the day in question and noted that the injuries observed in State's Exhibit 4, namely the severe bruising on the buttocks and thighs, were the result of a huge amount of battering that he characterized as repeated blows causing a lot of bleeding under the skin. He opined that the injuries seen throughout State's Exhibit 4 were acute injuries and that a child who was struck in this manner would suffer and experience a significant amount of pain, including pain when he sat down and walked. He further noted that the marks seen in State's Exhibits 4A and 4C are consistent with a belt and that the mark in State's Exhibit 4A was made with enough force to break the blood vessels under the skin. He opined that the injuries seen throughout State's Exhibit 4 are the result of serious physical abuse and would take some time to resolve.

Greg Rausch also looked through State's Exhibit 4 and opined that, if those injuries were inflicted by the defendant, it would negatively affect M.K.'s mental health, as this would exacerbate past mental health issues and create new ones. Rausch noted that trauma such as that seen in State's Exhibit 4 would have a high likelihood of retriggering M.K.'s PTSD symptoms, making them worse. Rausch also opined that this abuse would have long-term negative mental health consequences for M.K..

[9] State's Exhibit 3 at pg. 15.

LEGAL ANALYSIS

(A) COUNTS ONE AND TWO

R.C. 2919.22(B) states in pertinent part as follows:

> "(B) No person shall do any of the following to a child under eighteen years of age * * *:
>
> (1) Abuse the child;
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> * * *
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> (3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child[.]"

The defendant is charged in count one of the indictment with endangering children in violation of R.C. 2919.22(B)(1), which prohibits abusing a child. The defendant was indicted for a second degree felony, which requires a finding that the abuse at issue resulted in serious physical harm to the child involved.[10]

"The requisite culpable mental state for the crime of child endangering is recklessness."[11] R.C. 2901.22(C) states as follows:

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

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[10] R.C. 2919.22(E)(2)(d).

[11] *State v. Hickman* (Sept. 26, 2013), 8th Dist. No. 99442, 2013-Ohio-4192, ¶ 16, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 153, 404 N.E.2d 144.

"The word 'abuse' is not defined by the criminal statutes."[12] " 'The Legislative Service Commission Commentary to R.C. 2919.22 explains that child endangering under R.C. 2919.22(B) 'deals with actual physical abuse of a child, whether through physical cruelty or through improper discipline or restraint, and regardless of by whom the offense is committed.' "[13] The Ohio Supreme Court has held that " ' * * * excessive acts of corporal punishment or disciplinary measures are expressly covered under division (B) of the section.' "[14] Therefore, "discipline that is excessive under the circumstances will be deemed to be reckless abuse."[15]

In *State v. Hickman* (Sept. 26, 2013), 8th Dist. No. 99442, 2013-Ohio-4192, the defendant's conviction under R.C. 2919.22(B)(1) was affirmed.[16] The defendant argued at trial that he simply administered appropriate corporal punishment to the child in question for her act of flushing baby wipes down the toilet.[17] The defendant struck the child on her right thigh five to ten times with his cloth belt, which also contained a metal belt buckle, and that resulted in bruises and raised welts on the child.[18] The trial court was presented with testimony that this punishment was excessive under the circumstances.[19] The appellate court noted that the defendant did not "simply 'spank' [the child] a few times with an open hand on her bottom; rather, he struck her numerous times with a thick cloth belt that had a metal buckle, leaving red welts and bruises."[20]

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[12] Id. at ¶ 19.
[13] Id. at ¶ 20, quoting *State v. Mabrey* (Aug, 4, 2011), 8th Dist. No. 96048, 2011-Ohio-3849, ¶ 11.
[14] Id. at ¶ 21, quoting *State v. Kamel* (1984), 12 Ohio St.3d 306, 308-309, 466 N.E.2d 860.
[15] Id., citing, e.g., *Cleveland v. Callahan* (Oct. 26, 2006), 8th Dist. No. 87497, 2006-Ohio-5565, ¶ 29; and *State v. Gray* (July 29, 2005), 6th Dist. No. L-04-1126, 2005-Ohio-3861.
[16] Id. at ¶ 29.
[17] Id. at ¶¶ 13 and 23.
[18] Id. at ¶¶ 23-24.
[19] Id. at ¶ 22.
[20] Id. at ¶ 26.

The court upheld the finding that the defendant "recklessly used a manner and means of 'correction' that, under the circumstances, constituted abuse."[21]

Similarly, a defendant's conviction under R.C. 2919.22(B)(1) was affirmed when the evidence demonstrated that he caused bruising to the child's buttocks, took a heavy board and struck the child several times on her already bruised buttocks later that same day, and, that evening, took the same heavy board and struck the child over twenty-five times on the buttocks until she ceased crying.[22]

In *State v. Burdine-Justice*, 125 Ohio App.3d 707, 709 N.E.2d 551 (Ohio App. 12th Dist., 1998), the court noted that "[i]n making the determination of abuse, the trial court must look at the circumstances giving rise to the harm to the child, the disciplinary measures employed by the parent, the child's past history, and any other potential relevant factors."[23] In that case, the child was found to have bruises on her buttocks and right hip and those bruises were purple with red and a little black in them.[24] The defendant said that she must have made those bruises and that she did not realize she hit the child so hard.[25] The reviewing court found that the defendant's conviction under R.C. 2919.22(B)(1) was not against the manifest weight of the evidence and that the evidence showed that she had endangered her child.[26]

A parent has the right to use reasonable physical discipline, or corporal punishment, to prevent and punish a child's misconduct.[27] A " 'child does not have any

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[21] Id. at ¶ 27.
[22] *State v. Sommerfeld* (Nov. 18, 2004), 8th Dist. No. 84154, 2004-Ohio-6101, ¶¶ 28-31 and 32.
[23] *Burdine-Justice*, supra, 125 Ohio App.3d at 714, citing, *State v. Ivey*, 98 Ohio App.3d 249, 258, 648 N.E.2d 519 (Ohio App 8th Dist., 1994).
[24] Id. at 714-715.
[25] Id. at 715.
[26] Id. at 716-717.
[27] See, e.g., *State v. Rosa* (Dec. 19, 2013), 7th Dist. No. 12-MA-60, 2013-Ohio-5867, ¶ 32; and *In re Horton* (Nov. 23, 2004), 10th Dist. No. 03AP-1181, 2004-Ohio-6249, ¶ 14.

legally protected interest which is invaded by proper and reasonable parental discipline.'"[28] "However, such punishment must be reasonable and must not exceed the bounds of moderation * * *."[29] The question raised in these cases is whether the corporal punishment is excessive under the circumstances such that it rises to the level of abuse.

The court finds in the present case that the corporal punishment used by the defendant on M.K. was excessive under the circumstances and, as such, rose to the level of abuse. M.K. testified that these instances of corporal punishment hurt a lot. He further testified that the bruises would hurt at times for up to two weeks and that it would sometimes hurt to sit down for more than a day.

The bruises depicted on M.K.'s body in the pictures are various colors, including red, purple and yellow, and cover most of his buttocks and rear waistline, as well as a large portion of his rear left thigh. These bruises are consistent with being struck repeatedly with a ping pong paddle. The welts on M.K.'s lower right calf and upper right thigh are somewhat raised and are extremely red. These welts are consistent with marks from the leather belt introduced into evidence. M.K. testified that at the time he ran away, the defendant had hit him recently with the paddle multiple times. Dr. Shapiro opined that a child with these bruises and marks would suffer and experience a significant amount of pain, including pain when he sat down and walked. Dr. Shapiro further testified that these marks are the result of a huge amount of battering that he characterized as repeated blows causing a lot of bleeding under the skin.

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[28] *In re Horton*, supra, at ¶ 14, quoting *State v. Suchomski* (1991), 58 Ohio St.3d 74, 75, 567 N.E.2d 1304.
[29] Id.

The defendant admitted to causing these marks and stated that they were inflicted during the course of physical discipline. The defendant was clear that these marks were inflicted by him during the course of his corporal punishment of M.K. and that he saw nothing wrong with the marks on his child. Therefore, the force used by the defendant was intentional and he knowingly inflicted these marks, which more than meets the requisite mental state of recklessness.

Therefore, the court finds that the defendant's physical discipline of his adopted son M.K., who was nine years old at the time, was clearly excessive and constituted abuse.

Having determined that the state has proven the elements of R.C. 2919.22(B)(1), the court must examine whether the offense rises to the level of a second-degree felony. As set forth above, in order to be convicted of a second-degree felony under this statute, the state must prove that the abuse at issue resulted in serious physical harm to the child.

R.C. 2901.01(A)(5) defines "serious physical harm" as follows:

> "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

The state indicated at trial that it was proceeding primarily under subsections (a) and (e).

Greg Rausch testified at trial that M.K. had previously been diagnosed with post-traumatic stress disorder and that this trauma would have a high likelihood of retriggering M.K.'s PTSD symptoms and making them worse. He also opined that this abuse would have long-term negative mental health consequences for M.K. and that the fact that the defendant inflicted these injuries would negatively affect M.K.'s mental health.

While this is a somewhat close question, the court does not find that the evidence in this case, which is slightly vague and unspecific on this issue, supports a finding of serious physical harm under R.C. 2901.01(A)(5)(a). Although it is reasonable to assume that there will be long-term mental health consequences to M.K. resulting from receiving severe physical beatings from his father, the court cannot speculate, and there is insufficient evidence to show, that these consequences will be "of such gravity as would normally require hospitalization or prolonged psychiatric treatment."

As set forth above, R.C. 2901.01(A)(5)(e) defines "serious physical harm" as "[a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." The defendant argues that the bruising and welt marks on M.K. do not meet this definition of serious physical harm.

In *State v. Krull*, 154 Ohio App.3d 219, 796 N.E.2d 979, 2003-Ohio-4611 (Ohio App. 12th Dist., 2003), the child was found to have slashes that were raised inside of a bruise on his buttocks as well as a mark with blood on his leg.[30] The defendant admitted to hitting the child two to three times with a switch and holding the child down while her boyfriend hit the child four to six more times.[31] The doctor in that case testified that these blows had to be at least moderately hard and that a significant blow would be necessary to make the contusions found on the child.[32] The doctor further testified that it was without doubt that the contusions were painful when inflicted and would continue to be painful for several days when the child moved around.[33] The court found this evidence sufficient to establish the elements of child endangering, including the element of serious physical harm.[34]

In *State v. Burdine-Justice*, supra, the court found that the evidence of bruises on the child's buttocks and right hip, which were purple with red and a little black in them, demonstrated serious physical harm.[35] The court noted that the photographs of the injuries showed "profuse bruising across the child's buttocks extending into her back area[,]" and that the "force necessary to create such bruising must have been great * * * ."[36]

While the appearance of just one bruise generally does not constitute serious physical harm, the Twelfth District Court of Appeals has consistently held that a series of profuse bruising across a child's buttocks, thighs, and back constitutes serious

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[30] *Krull*, supra, at ¶ 4.
[31] Id. at ¶ 5.
[32] Id. at ¶ 6.
[33] Id.
[34] Id. at ¶¶ 23 and 26.
[35] *Burdine-Justice*, supra, 125 Ohio App.3d at 715.
[36] Id.

physical harm.[37] Other courts have also found that severe bruising can constitute serious physical harm, although those courts usually find as such under R.C. 2901.01(A)(5)(d), which deals with a temporary, serious disfigurement.[38]

The court finds that the evidence before it establishes that the bruising and welts sustained by M.K. are sufficient to constitute serious physical harm. The bruising seen in the photographs is severe and profuse, covering most of M.K.'s buttocks and rear waistline, as well as his left thigh. M.K. testified that his spankings hurt a lot, and Dr. Shapiro testified that these are acute injuries and that a child struck in this manner would suffer and experience a significant amount of pain, including pain when he sat down and walked. Based on the case law set forth above, this evidence is sufficient to prove that M.K. suffered serious physical harm, either under subsection (e), which deals with acute pain of such duration as to result in substantial suffering, or under subsection (d), which deals with some temporary, serious disfigurement.

Based on this analysis, the court finds that the state has proven the defendant's guilt beyond a reasonable doubt of the offense of endangering children in violation of R.C. 2919.22(B)(1) and has also proven beyond a reasonable doubt that M.K. suffered serious physical harm, making this offense a felony of the second degree.

As set forth above, count two of the indictment charges the defendant with endangering children in violation of R.C. 2919.22(B)(3) which prohibits one from "[a]dminister[ing] corporal punishment or other physical disciplinary measure * * * which

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[37] See, *Krull*, supra; *Burdine-Justice*, supra; and *City of Middletown* (April 17, 2006), 12th Dist. No. CA2005-06-154, 2006-Ohio-1899, ¶ 17.

[38] See, e.g., *State v. Worrell* (March 31, 2005), 10th Dist. No. 04AP-410, 2005-Ohio-1521, ¶¶ 48-51, reversed in part on other grounds, *In re Ohio Criminal Sentencing Statutes Cases* (2006), 109 Ohio St.3d 313, 847 N.E.2d 1174, 2006-Ohio-2109; *State v. Jarrell* (July 23, 2009), 4th Dist. No. 08CA3250, 2009-Ohio-3753, ¶¶ 14-15; and *State v. Bootes* (Feb. 25, 2011), 2nd Dist. No. 23712, 2011-Ohio-874, ¶ 19.

punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child[,]" who is under eighteen years of age.

"Substantial risk" is defined as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur of that certain circumstances may exist."[39]

This court has already found that the corporal punishment administered to M.K. when he was nine years old by the defendant was excessive under the circumstances and that it not only created a substantial risk of serious physical harm, but that it actually caused serious physical harm. As such, the state has proven the defendant's guilt of the offense of child endangering in violation of R.C. 2919.22(B)(3) beyond a reasonable doubt. Further, since the court has found that the offense resulted in serious physical harm to M.K., this offense is a felony of the second degree.[40]

(B) COUNT THREE

In count three of the indictment, the defendant is charged with felonious assault in violation of R.C. 2903.11(A)(1), which provides that "[n]o person shall knowingly * * * [c]ause serious physical harm to another * * * ." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or

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[39] R.C. 2901.01(A)(8).
[40] R.C. 2919.22(E)(3).

will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."[41]

In *State v. Lee*, 162 Ohio App.3d 648, 834 N.E.2d 825, 2005-Ohio-3395 (Ohio App. 1st Dist., 2005), the defendant hit her child on multiple occasions with a hard comb and an extension cord.[42] The beatings resulted in injuries such as severe bruises all over her body and a permanent scar on her chest.[43] The court noted that the defendant admitted to hitting the child as a form of punishment and also admitted to hitting her harder to have an effect.[44] The court found that the defendant "had to realize that whipping a child with an extension cord so hard that it left permanent marks and hitting her to the point that she was bruised from head to toe would probably cause serious physical harm."[45] The court upheld her convictions for felonious assault and endangering children.[46]

The defendant's conviction for felonious assault was also upheld in *State v. Worrell* (March 31, 2005), 10th Dist. No. 04AP-410, 2005-Ohio-1521, when the evidence demonstrated that the defendant's wife sustained extensive bruising on her lower back and hip which would have generally taken two to three weeks to heal.[47] The court found this severe bruising to constitute a temporary, serious disfigurement.[48]

As set forth in the section above, this court has already found that the defendant, in the course of excessive corporal punishment, inflicted serious physical harm on his adopted son, in the form of extensive bruising across his buttocks, thighs, and waistline,

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[41] R.C. 2901.22(B).
[42] *Lee*, supra, at ¶ 2.
[43] Id. at ¶¶ 2-3.
[44] Id. at ¶ 31.
[45] Id. at ¶ 33.
[46] Id. at ¶¶ 30 and 36.
[47] *Worrell*, supra, at ¶¶ 47-51.
[48] Id. at ¶ 51.

which would have involved, according to Dr. Shapiro, an “excessive amount of battering” and repeated blows. M.K. testified that these incidents of corporal punishment hurt a lot, and Dr. Shapiro testified that the injuries seen in the photographs would cause a child to suffer and experience significant pain, including pain when he sat down or walked. Dr. Shapiro further opined that these injuries were the result of serious physical abuse and would take some time to resolve themselves.

Further, the defendant said he was aware of the marks on M.K.’s body, that he put those marks there, and that he did so in the course of corporal punishment. He said that the bruising and marks on M.K.’s body were not excessive by his standards and that he would continue to discipline the child in this manner. The evidence of the injuries, combined with the defendant’s statements, demonstrate that he acted knowingly as that term is defined by R.C. 2901.22(B) when causing this serious physical harm to M.K..

Consistent with the analysis above and the available case law, the court finds that the state has proven beyond a reasonable doubt that the defendant knowingly caused serious physical harm to M.K. and, as such, the state has proven the defendant’s guilt of the crime of felonious assault in violation of R.C. 2903.11(A)(1) beyond a reasonable doubt. This offense is a felony of the second degree.[49]

CONCLUSION

Based on the above findings and analysis, the court hereby finds that the state has proven the defendant’s guilt beyond a reasonable doubt of the three offenses set

[49] R.C. 2903.11(D)(1)(a).

forth in the indictment, which are as follows: (1) one count of endangering children in violation of R.C. 2919.22(B)(1), a felony of the second degree; (2) one count of endangering children in violation of R.C. 2919.22(B)(3), a felony of the second degree; and (3) one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree.

The Probation Department is hereby ordered to complete a presentence investigation and to submit to the court a presentence report.

Counsel are hereby ordered to conference within three days of the date of this decision and to call the Assignment Commissioner (732-7108) in order to obtain a date for sentencing. The sentencing date should be set approximately four weeks from the date of this decision but in no event later than five weeks for the date of the decision.

The court anticipates that there may be a merger issue raised in this case. If the defendant wishes to raise a merger argument, defense counsel is hereby directed to file a memorandum on that issue by January 27, 2014. The state may file its memorandum on the issue of merger by February 3, 2014.

IT IS SO ORDERED.

DATED:______________________ ________________________________

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 17th day of January 2014 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride