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 is before the court for consideration of the issue of merger as it applies to the facts of this case.

The court set forth a briefing schedule for counsel to submit written memoranda on the issue of merger in the conclusion section of its written decision on the court trial filed on January 17, 2014. Counsel for the defendant submitted a written memorandum as directed and the state did not file any memorandum on this issue.

Upon consideration of the record of the proceeding, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

In a written decision filed of record on January 14, 2014, this court held that the state had met its burden of proving the defendant's guilt beyond a reasonable doubt to the offenses charged in the indictment, which were 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.

For the purposes of consideration of the issue of merger, the court hereby incorporates the findings of fact and analysis set forth in that decision into the present written decision.

LEGAL ANALYSIS

"R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct."[1] That statute states as follows:

> "(A) Where the same conduct by 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.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in

[1] *State v. Craycraft*, 193 Ohio App.3d 594, 953 N.E.2d 337, 2011-Ohio-314, ¶ 8 (Ohio App. 12th Dist., 2011), citing *State v. Brown*, 186 Ohio App.3d 437, 928 N.E.2d 782, 2010-Ohio-324, ¶ 7 (Ohio App. 12th Dist., 2010).

> 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."

In *State v. Johnson* (2010), 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, the Ohio Supreme Court established a "two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 * * * ."[2] "The first inquiry focuses on whether it is possible to commit both offenses with the same conduct."[3] "It is not necessary that the commission of one offense will *always* result in the commission of the other."[4] "Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct."[5] "Conversely, if the commission of one offense will *never* result in the commission of the other, the offenses will not merge."[6]

"If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind."[7] "If so, the offenses are allied offenses of similar import and must be merged."[8] "On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge."[9]

In *State v. Craycraft*, 193 Ohio App.3d 594, 953 N.E.2d 337, 2011-Ohio-314 (Ohio App. 12th Dist., 2011), the Twelfth District Court of Appeals concluded that it was possible to commit the offenses of felonious assault and second-degree child

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[2] Id. at ¶ 11.
[3] Id., citing *Johnson*, supra, at ¶ 48.
[4] Id.
[5] Id.
[6] Id., citing *Johnson* at ¶ 51.
[7] Id. at ¶ 12, citing *Johnson* at ¶ 49, citing *State v. Brown* (2008), 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., concurring in judgment only).
[8] Id., citing *Johnson* at ¶ 50.
[9] Id., citing *Johnson* at ¶ 51.

endangering with the same conduct where "a parent violates his duty of care and thereby knowingly inflicts serious physical harm upon a minor child * * * ."[10] As such, the first inquiry of the *Johnson* analysis is answered in the affirmative in the case at bar, which requires that the court then examine whether the defendant, in fact, committed the offenses by way of a single act, performed with a single state of mind.[11]

In the *Craycraft* case, the appellate court noted that there were various injuries sustained to the two victims.[12] However, the court noted that "the evidence at trial was generally presented and was not allocated to specific counts in the indictment."[13] The "state relied upon the same conduct to prove the offenses of felonious assault, second- and third-degree child endangering, and domestic violence."[14] As a result, the appellate court found that it was impossible to parse out which allegations of the appellant's conduct were meant to support which charges and, consequently, held that the offenses were of similar import and required to be merged.[15] While the court acknowledged that there were separate injuries, and likely separate incidents of abuse, the "appellant's convictions for all of the offenses were generally based on the series of events that resulted in the [victims'] injuries."[16]

The court finds that the present case is indistinguishable from the *Craycraft* case with regard to application of the *Johnson* analysis. In the case at bar, although M.K. was hit with the paddle and belt multiple times during the applicable time period in June 2013, the evidence at trial was presented in a general manner and was not allocated to

[10] Id. at ¶ 15, citing *Johnson* at ¶ 48.
[11] Id., citing *Johnson* at ¶ 49.
[12] Id. at ¶ 16.
[13] Id. at ¶ 17.
[14] Id. at ¶ 18, citing *Johnson* at ¶ 56.
[15] Id. at ¶¶ 18 and 20.
[16] Id. at ¶ 18.

specific counts in the indictment. The court's finding that the state proved the defendant's guilt to the three counts beyond a reasonable doubt was generally based on this series of events that resulted in M.K.'s injuries. The state relied on the same conduct and the same resulting serious physical harm (specifically, the bruises and lacerations seen in the State's Exhibit 4) to prove the offenses of felonious assault and second-degree child endangering. This court has no mechanism by which it can parse which incidences of the appellant's conduct were meant to support which of the three charges.

As such, the court must find that the three offenses in this case are allied offenses of similar import and must be merged for the purpose of conviction and sentencing.

CONCLUSION

Based on the above analysis, the court hereby finds that the three offenses in the present case are allied offenses of similar import and must be merged for the purposes of conviction and sentencing. The state shall elect which offense the defendant shall be convicted of and sentenced for based on the court's finding that the defendant

committed all three offenses.

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 14th day of February 2014 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride