IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 30, 2007 Session

STATE OF TENNESSEE v. BLAKE DELANEY TALLANT

Appeal from the Criminal Court for Knox County
No. 76020 Richard R. Baumgartner, Judge

No. E2006-02273-CCA-R3-CD - Filed January 14, 2008

The defendant, Blake Delaney Tallant, was convicted by a Knox County jury of two counts of first degree felony murder (one count with the underlying felony of aggravated child abuse, the other count with the underlying felony of aggravated child neglect), one count of second degree murder, and two counts of aggravated child abuse (under the alternative theories of aggravated child abuse and aggravated child neglect), a Class A felony. The trial court dismissed the second degree murder charge, merged the two felony murder convictions, and sentenced the defendant to life in prison plus twenty-five years. The defendant appeals his convictions, arguing that (1) the evidence was insufficient to support his convictions; (2) the trial court improperly refused to excuse three jurors that the defendant challenged for cause; (3) the trial court abused its discretion by failing to sequester the jury; (4) the trial court improperly admitted expert testimony regarding the victim's injuries; (5) the aggravated child abuse and neglect statute under which the defendant was convicted was unconstitutionally vague; (6) the trial court improperly admitted evidence of the defendant's possession of methamphetamine; (7) the defendant's dual convictions for felony murder and the underlying felonies of aggravated child abuse and aggravated child neglect constitute double jeopardy; and (8) the trial court imposed an excessive sentence and improperly imposed consecutive sentences. After reviewing the record, we affirm the defendant's convictions and the sentences imposed on each count. However, we conclude that the trial court failed to merge the two convictions for aggravated child abuse based on alternative theories, and that the trial court did not follow proper procedures in imposing consecutive sentences. We therefore remand this case to the trial court for merger of the two aggravated child abuse convictions and for a new sentencing hearing regarding consecutive sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part; Case Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

Mark E. Stephens, District Public Defender; Anna L. Friedberg, Jessica M. Greene, and Mary Ellen Coleman, Assistant District Public Defenders, for the appellant, Blake Delaney Tallant.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; Steven C. Garrett, Marsha Mitchell, and Philip H. Morton, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

At trial, Officer Krista Sheppard with the Knoxville Police Department testified that on August 14, 2002, she responded to a call to go to a residence located on Knott Avenue in Knoxville. Officer Sheppard testified that prior to arriving at the residence, she was told that the call concerned a child who was not breathing. She arrived at the residence at 10:40 p.m. to discover a woman, later identified as Sarah Tallant, screaming about her baby. Ms. Tallant pointed Officer Sheppard to the dining room, where she discovered an infant lying on a table. Officer Sheppard said that the infant, the three-month-old victim in this case, Lex Arson Tallant,[1] appeared "bluish in the lips and grayish colored." Her husband, the child's father, who is also the defendant in this case, stood over the victim.

Shortly after Officer Sheppard discovered the victim, a firefighter arrived, and she and the firefighter gave the victim CPR until paramedics arrived. When she began CPR, Officer Sheppard noticed abrasions on the victim's chin. She asked the victim's parents about the abrasions, to which both parents replied the child was suffering from a rash. After the paramedics began working on the victim, Officer Sheppard spoke with both parents. Ms. Tallant said that she had taken the family's two pit bulls for a walk at a local park around 7:30 that evening and returned at 8:15. Upon returning home, Ms. Tallant noticed the victim lying on the defendant's chest in the bedroom she shared with the defendant. After washing her face, she returned to the bedroom, where she told the defendant that the baby did not appear to be breathing. The defendant replied that he had fed the child earlier in the day, but that the child had only eaten a small amount of food, and that he had spit up some brown substance.

Officer Sheppard asked Ms. Tallant about the victim's medical history. Ms. Tallant replied that the baby had a rash, and the defendant said that once while the family was in Sweetwater, someone had gotten in front of the baby and scared him, causing him to stop breathing. Ms. Tallant elaborated on this incident, stating that while she was changing his diaper, it appeared that the victim had stopped breathing, and she called for her husband to look at the baby. Ms. Tallant said her husband blew into the baby's mouth, and he started breathing again. Ms. Tallant said that she and the defendant did not take their son to the hospital after this incident.

Officer Sheppard recalled that during the questioning, Ms. Tallant seemed "really nervous,

[1] Throughout these proceedings, Sarah Tallant explained that the victim's middle name meant "our son."

kind of like she was just concerned about her child, panicking that her child was not breathing, and she wanted someone to help them." The defendant, on the other hand, acted "spacey." The defendant's demeanor "was very slow and just like nonchalant. . . . like he was not there." After a while, the ambulance took the victim and Ms. Tallant to the hospital. According to Officer Sheppard, when the defendant later learned via telephone that his son had died, the defendant said "Oh, my God" and did not cry or show any emotion.

Kenneth Slagle testified that in August 2002, he was employed as a detective with the Knoxville Police Department when he responded to a call at the Tallant residence. By the time he arrived at the house, the ambulance carrying the victim and Ms. Tallant had already left, so Detective Slagle interviewed the defendant. The defendant told Detective Slagle that he had walked around carrying the baby for six hours. Detective Slagle testified that the defendant was not making much sense while he was speaking, and although the defendant denied being under the influence of drugs or alcohol, Detective Slagle did not believe him. Detective Slagle asked the defendant if he was willing to take a test to prove that he had not been recently using drugs, and the defendant replied that he would take the test. Detective Slagle testified that Officer Rickman with the Knoxville Police Department then arrived and informed the defendant that he would be taking him to the hospital. Officer Rickman then searched the defendant, finding a small package which the defendant admitted contained methamphetamine. On cross-examination, Detective Slagle admitted that in his written report detailing the investigation, he did not indicate that the defendant had carried the victim in his arms for six hours. Officer Slagle also did not recall Ms. Tallant telling him that the defendant had dropped the victim.

Officer Norman Rickman with the Knoxville Police Department testified that he was also called to the Tallant house the night the victim died. Upon his arrival, Officer Rickman told the defendant that he would be transporting him to East Tennessee Children's Hospital. He then asked the defendant if he had anything in his pockets and if the defendant cared whether he (Officer Rickman) looked in his pockets to make sure he did not have any weapons on his person. Officer Rickman testified that the defendant did not object to being searched. Officer Rickman searched the defendant, and upon doing so he located a small bag of what the defendant admitted was methamphetamine. On cross-examination, Officer Rickman admitted that when he initially arrived at the residence, he intended to transport the defendant to Children's Hospital to be with his wife and son. Shortly after Officer Rickman found the drugs on the defendant, he was notified that he was to take the defendant to the University of Tennessee Medical Center for blood testing. When asked whether the defendant was free to leave his house before he was searched, Officer Rickman said that he had no knowledge whether the defendant was free to leave. Officer Rickman also stated that while it was possible that the defendant was notified about his son's death before he was transported to the hospital, he (Officer Rickman) did not know about the child's death before he transported the defendant.

Thomas Hitefield stated that in August 2002, he was employed as a Sergeant with the

Knoxville Police Department. He also responded to the Tallant house the evening the victim died and interviewed the defendant. The defendant told Sergeant Hitefield that he had held the victim tight, wrapped up so that he couldn't move, when he noticed that the victim was gurgling, with "brown stuff" coming out of his mouth. Sergeant Hitefield said that the defendant's demeanor during this time was "distant . . . he didn't show any emotion at all." Sergeant Hitefield testified that he was present when the defendant received a phone call informing him that his son had died. Sergeant Hitefield said that upon receiving this call, the defendant cried for a few seconds but then showed no other emotion.

Three agents with the Tennessee Bureau of Investigation (TBI) testified regarding evidence gathered in connection with this case. Agent Jeff Crews testified that a sample of the victim's blood tested positive for methamphetamine. Agent Michael Lyttle testified that the defendant's blood sample tested positive for methamphetamine and his urine sample tested positive for marijuana. Agent Celeste White testified that the substance taken from the defendant the night of his arrest was in fact methamphetamine.

Dr. Murray Marks, a forensic anthropologist with the University of Tennessee, testified that he examined both x-rays of the victim and bones from the victim's body to evaluate bone trauma suffered by the victim. Dr. Marks testified that his investigation revealed that the victim suffered nine antemortem fractures of his left-side ribs and nine antemortem fractures of his right-side ribs. Dr. Marks explained that antemortem fractures were those that featured bone calluses, which meant that the bone had healed and the fracture occurred prior to death. Dr. Marks said that the victim also suffered two perimortem fractures of his right-side ribs and three perimortem fractures of his left-side ribs, which included one rib being broken in two places. Dr. Marks explained that perimortem fractures were those that were "fresh" and had no signs of healing. Dr. Marks also noted that the victim suffered an antemortem fracture of his femur, or thigh bone. Dr. Marks noted that this break had a particularly large callus, which indicated that the bone "was broken and was never set." Dr. Marks also testified that the victim suffered an antemortem fracture of his right humerus, his upper arm bone.

On cross-examination, Dr. Marks testified that the bones of a child the victim's age tended to heal more quickly than those of an adult, which led him to conclude that the perimortem fractures occurred anywhere between the child's death and ten to fourteen days of his death. Dr. Marks said that he could not testify as to whether the victim's broken leg was a spiral fracture, and he also said that he had never heard of an instance where massaging a child's leg could lead to a spiral fracture. On redirect, Dr. Marks testified that although he stated that the victim's perimortem fractures could have occurred up to two weeks before his death, it was unlikely that the breaks were that old because the bones of a child the victim's age tended to heal quickly. Thus, the perimortem fractures were likely no more than ten days old.

Sarah Tallant, the defendant's wife and the victim's mother, testified that she was originally indicted as a co-defendant in this case, but she reached a plea agreement with the Knox County District Attorney General's office. Pursuant this agreement, she agreed to testify against her husband; in exchange for her testimony, she would receive a twenty-year sentence with a release eligibility date of 30%.

Ms. Tallant testified that she met the defendant in 1995 and married him in 1997. The couple originally lived in Arkansas before moving to Tennessee in March 1999. Ms. Tallant testified that she began using methamphetamine when she was eighteen and used the drug daily until she moved to Tennessee. She also said that the defendant used drugs daily during the early part of their relationship and marriage. She testified that she and her husband moved to Tennessee in an attempt to create a "fresh start" and escape from the drugs. She testified that both she and her husband stayed off methamphetamine until their first son was born in June 2000. Shortly after their first son was born, both the defendant and Ms. Tallant resumed using methamphetamine on a daily basis. Ms. Tallant testified that the couple's daily methamphetamine use continued until the victim died.

Ms. Tallant testified that when the couple first moved to Tennessee, both she and her husband held jobs. However, once the couple's first son was born, she quit work to focus on raising her son while the defendant continued to work. Ms. Tallant testified that the defendant worked eight to ten hours per day, five days a week, with an irrigation business. Ms. Tallant testified that her husband held this job for a "good while" but he had either quit or was laid off once the couple's second son, Arson, the victim in this case, was born on April 27, 2002. Ms. Tallant testified that the defendant, who was not employed after the victim was born, took care of the child eighty to eighty-five percent of the time. Ms. Tallant explained that she and the defendant agreed upon this arrangement because Ms. Tallant had been the primary caregiver for the couple's older son. Ms. Tallant testified that while the defendant was the victim's primary caregiver, she did take the victim to the doctor's office for routine visits "about five times."

Ms. Tallant testified that her older son did not hurt the victim. She also said that the couple had two pit bulls, but that the dogs did not hurt the baby either. She testified that the victim was never left alone, and while one of the defendant's cousins visited the house, this cousin never took care of the victim.

Ms. Tallant testified that the defendant, who she described as a "very hard person to read," did not like being watched. Ms. Tallant said that if she would watch him, the defendant would ask her "why are you always watching me?" She also said that if the victim would cry, the defendant "would always question me why I was always watching him and hovering over him."

Ms. Tallant recalled that the day the victim died, she spent most of the day at home with her two children while the defendant was out retrieving a part for the couple's car. She testified that the

victim seemed fine, though he seemed a little cold and did not eat much. Ms. Tallant recalled that around 6:00 that evening, the defendant returned home. The defendant asked her if she would be taking the dogs for a walk; she replied that she would not because she wanted to stay with her son, who was not feeling well. The defendant insisted that she take the dogs out because she had promised the dogs that she would do so. At that point, Ms. Tallant said that she would walk the dogs. She left the family's residence around 7:30 p.m. and returned between 8:30 and 9:00 p.m.

Upon her return, Ms. Tallant noticed that the defendant held the victim in his lap. Ms. Tallant told her husband that the baby looked blue and "kind of cold." The defendant told her that he had just given the baby a bath and that the baby was fine, though the baby had not eaten when he tried to feed him. Ms. Tallant told the defendant to refrain from feeding the victim if he did not want to eat, and she then took her oldest son into the bathroom and gave him a bath. She then took a bath herself, read to her oldest son for a while before putting him to bed, and then went to the living room. Ms. Tallant noticed that the defendant and the victim were in the couple's bedroom with the light off. She then went into the bedroom, where she noticed the defendant lying on his back on the bed, with the victim lying on top of the defendant's chest. According to Ms. Tallant, the victim looked "lifeless." She asked her husband if anything was wrong and noted that the victim did not appear to be breathing. The defendant replied that everything was fine, and Ms. Tallant exited the bedroom.

A short time later, Ms. Tallant re-entered the bedroom and turned on the light. She looked at the victim, noticed that he "didn't look right to me," and then told her husband that she would call 911. Ms. Tallant said that the defendant, who was angry over this prospect, told her not to call 911 and said that he would divorce her if she did call. Ms. Tallant called 911 anyway. The tape of the 911 call was then played in open court. Although neither the recording nor a transcript of the call appears in the record, the trial transcript indicates that during the call, Ms. Tallant told the defendant, "I don't give a s— what you think. This is my son." Ms. Tallant testified that she told this to her husband because he was upset that she had called. She also testified that during the call, she told her husband that she was serious; she explained that she made this statement because the defendant "laughs at everything. Everything is funny to him." During the call, Ms. Tallant testified that she told the police to hurry to the home. After hanging up, Ms. Tallant went through the house and attempted to hide some drugs that were in the house.

Ms. Tallant testified that she had seen the victim turn blue on one other occasion, when he fell when he was about one month old. Ms. Tallant explained that on this occasion, she returned home from taking her older son to the doctor when the defendant told her that the victim fell. According to Ms. Tallant, the defendant told her that he gave the victim a bottle, and the victim found the bottle to be too hot. At that point, the victim jumped, kicked, and fell from the couch to the floor, a distance of about one foot. Ms. Tallant testified that the floor onto which the victim fell was wooden, with a carpet covering part of it. Ms. Tallant testified that the side of her son's face was bruised, but several hours after she first noticed the bruising, it went away. Ms. Tallant said that neither she nor the defendant took the victim to the doctor in connection with this incident.

Ms. Tallant testified that in the days immediately following this incident, the victim would cry whenever she attempted to pick him up. She then noticed that the victim's right arm was swollen at the elbow. Ms. Tallant told her husband that the arm was swollen, and she wrapped the arm in a bandage. Ms. Tallant also testified that the defendant kept the baby in a car seat for twenty-four consecutive hours so that the baby would not move his arm. Ms. Tallant testified that she did not know at the time that the victim's arm was broken.

Ms. Tallant testified that once, after the child received an inoculation in his left leg, she noticed that the leg was swollen. She then called the doctor's office and asked what to do. She testified that she was told to massage the leg, give the baby some baby Tylenol, and give him a warm bath. Ms. Tallant testified that she followed these instructions, but the baby's leg continued to swell. She also testified that when she massaged the leg, the victim would cry as if he were in pain. Ms. Tallant testified that she did not know at the time that the baby's leg was broken, and she also noted that the defendant did not tell her anything about the baby's leg.

Ms. Tallant testified that shortly after the victim's arm became swollen, the defendant attempted to "x-ray" the victim's arm by taking a lamp with a 500-watt bulb and holding it close to the baby's arm. The defendant told his wife that while he held the lamp in one hand, he held a pillow over the baby's face to keep the light out of his eyes. Ms. Tallant said that the defendant told him that the pillow slipped, and when the baby attempted to grab it, the lamp somehow came into contact with the baby, burning him on his right arm and stomach. After the incident, the baby's parents decided that when they took the child in for his next check-up, they would tell the doctor that the baby had suffered the burns when the lamp was accidentally knocked over and fell on the baby. Ms. Tallant said that at the time she learned about the burns, she believed that they had been accidentally inflicted.

Ms. Tallant acknowledged that some of the scratches that were seen under the victim's chin upon his death probably resulted from when the defendant would hold the victim's mouth shut so that the victim would stop crying. Ms. Tallant said that she saw the defendant hold the baby's mouth shut a couple times. She also recalled that the defendant would toss the victim into the air in a playful manner. Ms. Tallant did not recall whether the defendant did this before or after she noticed the baby's leg had become swollen. She also recalled seeing the defendant throw the victim onto a beanbag chair on two occasions. Ms. Tallant also testified that on one occasion, the defendant placed a wet paper towel into the baby's mouth in an attempt to silence him.

Ms. Tallant said that on some occasions, the defendant would sit the baby on his (the defendant's) knees and bounce the child up and down in an attempt to burp him. Ms. Tallant recalled that when the defendant did so, the baby's head would "kind of dangle because he was only a couple of months old. He didn't have enough strength to hold his own head up." She also testified that about one week before the baby died, she noticed an area of redness on the baby's bottom. Ms. Tallant asked the defendant what was wrong, and the defendant replied that he had put baby powder

on the child's bottom, which led to a rash. Ms. Tallant testified that she did nothing to that part of the child's body to hurt it. She said that when she took the baby's temperature, she did not use a rectal thermometer.

Ms. Tallant testified that approximately one week before the victim died, she and the defendant drove to Sweetwater, Tennessee, with their two children to visit a friend. After arriving at the friend's house, the friend informed Ms. Tallant that the baby had quit breathing. Ms. Tallant gave the baby to the defendant, who then blew into the baby's mouth. According Ms. Tallant, this action "brought [the baby] back." Ms. Tallant testified that neither she nor the defendant sought medical attention for the child after this incident because the defendant told her that the baby would be okay. Ms. Tallant testified that after the family returned to Knoxville, the defendant then went back to Sweetwater, where he spent to two three days making methamphetamine.

Ms. Tallant testified that she was aware that methamphetamine was found in the baby's system at his death. She testified that she took methamphetamine while she was pregnant with the victim, but that she never put methamphetamine in the baby's bottle. She also said she never put the drug up the baby's nose or injected the drug into the baby's body.

On cross-examination, Ms. Tallant testified that the day after the victim died, she gave a statement to police in which she said that neither she nor the defendant had done anything to hurt their child. Ms. Tallant stated that upon returning to her home after giving that statement, investigators from the Department of Children's Services (DCS) arrived at the home and took the couple's older child into state custody. After the DCS visit, Ms. Tallant gave a second statement to police, in which she again stated that neither she nor the defendant had done anything to hurt the victim. At the conclusion of this second statement, Ms. Tallant and Detective Slagle, who took the statement, got into an argument, which led the police to place Ms. Tallant into a police interrogation room. According to the statement, parts of which were read into evidence, the police placed the defendant and Ms. Tallant under arrest for first degree murder at that point, but Ms. Tallant testified that she did not recall being informed that she was under arrest. What Ms. Tallant did recall was that after being placed in the interrogation room, she gave another statement to another police investigator, Wallace Armstrong, in which she implicated her husband in the baby's death. Ms. Tallant testified that this statement was a coerced statement which she made in an attempt to regain custody of her older son. While she stated that this statement was coerced, she claimed that the statement, like the ones she had given earlier, was true. Ms. Tallant testified that at the time she gave her third statement, "I knew all of this stuff was going on, but I didn't think it consisted of death, to me, at the time." Ms. Tallant said that after giving this third statement to police, she was taken into custody, where she remained at the time of this trial.

Ms. Tallant testified that she retained separate counsel, one who was not an employee of the Public Defender's office. She recalled that she, the defendant, and counsel for both parties met monthly from August 2002 to October 2004. During one of these meetings, the parties discussed

Ms. Tallant's statements to police. At that time, she told her husband and the involved attorneys that her statements to police were either lies or grossly exaggerated. At trial, Ms. Tallant testified that she did exaggerate some of her statements to police. However,

> At the time that all this stuff had happened, I didn't think that it was—the way I told the cops was different—I put a different spin on it, as to when I was at home and all this stuff happened. Like on my statement, it sounded mean and evil, and [the defendant] did this . . . [the defendant] did that. But at home, I was not thinking that. I was thinking that everything was fine. Even though a lot of things happened, I still thought that everything was fine. But when I got to the police station, I made it sound like I didn't like none of the things he was doing at the time.

Ms. Tallant stated that she made her statements in the manner she did because the police "had told me I wasn't going home if I didn't blame it on [the defendant]. So I wanted to make it possible that I was going to go home."

During cross-examination, Ms. Tallant admitted that several particular parts of her statement to police were untruthful. She said that her statement to police that the defendant had hit her frequently was a lie. Ms. Tallant said that the defendant never hit her during their marriage. She also admitted that her statement that the defendant would place the baby in a car seat and shake it violently was a lie. Ms. Tallant admitted that the defendant placed the baby in a car seat only once, when the defendant was attempting to keep the baby from moving his injured arm. Ms. Tallant also admitted that she put the baby in a car seat for brief periods while she was performing household chores. Ms. Tallant also said that her statement that the baby would scream whenever the defendant came close to him was a lie. Finally, she admitted that her statement to police that the defendant kept her from seeing the baby was a lie. She testified that the defendant was the baby's primary caretaker, but that arrangement had been agreed upon by both parents.

Ms. Tallant also identified certain parts of her statements to police that had been exaggerated. She said that her statement to police that the defendant would throw the baby into the air was an exaggeration. Rather, the defendant would hold the baby in the air and then drop his hands about six inches. During that time, the defendant would never lose contact with the baby. Also, she admitted that her statement that the defendant would throw the baby into a beanbag chair was an exaggeration. Rather, the defendant would drop the baby onto the chair from a few inches above the chair.

On several occasions during cross-examination, Ms. Tallant said that she never saw the defendant do anything to intentionally hurt the victim. Regarding the scratches under the baby's chin, she noted that she saw them during the three months the baby was alive, though she could not recall the exact date on which she saw them. She also recalled seeing the defendant holding the

baby's mouth shut, but she did not recall the exact dates on which the defendant did this. Ms. Tallant admitted that in her meetings with the defendant and counsel, she had said that the first time she saw the scratches was the day the victim died.

Ms. Tallant testified that she had no idea how methamphetamine was introduced into her son's system. Regarding her own drug use, she said that she used methamphetamine every day during her pregnancy, and that her methamphetamine use increased after the victim was born. She also said that she smoked marijuana during her pregnancy, and that she smoked cigarettes until her fifth or sixth month of pregnancy. Ms. Tallant admitted that she used methamphetamine when she woke up each morning and took a smaller amount in the afternoon. She stated that she did not always wash her hands after using. She also stated that she had previously told the defendant and counsel that she prepared all of the baby's formula bottles.

Ms. Tallant admitted that from August 2002 to October 2004, she frequently wrote letters to her husband. She stated that in those letters, she told her husband that she believed he was innocent, and she told the defendant that she had implicated him in the victim's death so that she could be set free. Ms. Tallant stated that at the time she wrote the letters, she did not believe that her husband did anything to intentionally hurt the victim, and that she still felt the same way at trial.

Ms. Tallant testified that in October 2004, she gave a "statement" to the District Attorney General. Defense counsel asked Ms. Tallant several questions about this statement, actually a deposition, to assess the deposition's validity. Ms. Tallant said that in her deposition, she told the district attorney that she did not know that the victim had suffered any broken bones and had no explanation as to how the victim could have suffered those injuries. She stated that this statement was consisted with her testimony at trial. She also told the district attorney that she was unaware that the child had pneumonia, and that she did not see any evidence of injury to the victim's rectum. She also recalled telling the district attorney that she had never seen a bruise on the child's body except shortly after the defendant told her that the baby had fallen from the sofa. She also noted that she told the district attorney that the only external injuries that she had ever seen on the victim were this bruise and the burns to the baby's stomach and hand.

Ms. Tallant testified that the evening her son died, she may have returned home at 8:15, rather than 8:30 or 9:00 as indicated on direct examination. She admitted that if she did arrive home at 8:15 and the 911 call was not made until 10:40, some two hours passed between her returning home and calling 911. She stated that she "knew" her husband was under the influence of some drug when she returned home, yet she believed her husband when he said that the victim was fine. She said that she believed her husband because when their older son was younger, she was "always" thinking something was wrong with the boy, and the defendant, despite being "high" believed that the boy was okay, and the defendant turned out to be right.

Ms. Tallant testified that during her meetings with the defendant and counsel, she had said that her husband left for Sweetwater to make methamphetamine on the Thursday before the victim died. She said that the defendant remained gone until Monday or Tuesday, and that he was gone most of the day on Wednesday, the day the victim died. At trial, though, Ms. Tallant said that the defendant did not go to Sweetwater by himself until the Saturday or Sunday before the victim died, and that he returned on Monday, two days before the victim died.

Ms. Tallant testified that she changed the victim's diaper several times a day, and in the course of changing the diaper, she never saw any trauma to the child's rectum. She also testified that she never saw any cuts to the victim's groin, though she did notice that the baby had diaper rash. Regarding the broken bones, Ms. Tallant admitted that during her previous meetings with the defendant and counsel, she had stated that she believed that the victims' ribs, arm, and leg were broken in June 2002, when the baby fell. When asked if she still believed this to be true, Ms. Tallant replied, "I guess. Yeah. I don't know if it's true or not."

On redirect, Ms. Tallant said that the police did not tell her to lie to them in an attempt to implicate the defendant. She also testified that her deposition in connection with this case was truthful, and that she was being truthful in her testimony at trial. She also reiterated that her husband did not have regular employment during the victim's life. Ms. Tallant said that the defendant "might have worked one day or a couple of days with a friend of his . . . [installing] central heat and air, but he didn't have a job."

On recross, Ms. Tallant admitted that in addition to massaging the victim's swollen leg, she did some "bicycle type" exercises with the leg in an attempt to ease the pain in the baby's leg and lessen swelling. The court then had the witness answer questions from the jury. When asked why she was "not as protective" of the victim as she had been of her older son, Ms. Tallant replied that she had frequently thought something was wrong with her older son when in fact the child was fine.

Dr. Darinka Mileusnic-Polchan, a forensic pathologist, testified that she performed the autopsy on the victim, who was three and a half months old at his death. Dr. Mileusnic-Polchan first testified as to the thirty-one external injuries she noted on the victim. The first three injuries she noted were on the left side of the baby's face. She identified abrasions on the victim's left lower eyelid, as well as abrasions on the outer corner of the victim's left eye. She also noted a bruise on the victim's nasolabial groove, which she identified as the fold of skin between the nostril and the outer corner of the mouth. Dr. Mileusnic-Polchan testified that each injury, by itself, would not be cause for concern, but the injuries taken together did concern her.

The first injury that particularly concerned Dr. Mileusnic-Polchan was a group of ten "irregular abrasions" under the victim's chin. She noted that the injuries were in "different stages of healing, meaning some [were] fresh, some [were] old." Some of the abrasions were deeper than

others, with some of the injuries reaching down to the subcutaneous tissue. Dr. Mileusnic-Polchan noted that there was also bruising around the abrasions. Dr. Mileusnic-Polchan opined that "10 of them in this area, with a lot of bruising, this is . . . a red flag. This is very, very concerning." She also stated that an injury in this area should "never happen. This is something that you don't inflict upon a baby with the regular care and not even with regular roughhousing. This is something that is inflicted. . . . it's evidence of foul play in addition to some other evidence of injury."

Dr. Mileusnic-Polchan then noted the external injuries present on the back of the victim's head. She noted bulging in the fontanelle, which is the membrane connecting the bones of the scalp before the bones ossify and fuse together. She noted that this injury by itself was insignificant and was not truly an injury, but rather was indicative of swelling within the brain. She also noted a 0.4 inch abrasion on the back of the victim's head, near the top of the head. Dr. Mileusnic-Polchan noted that the injury by itself was not concerning, as this type of injury was often sustained during resuscitation efforts, but the injury was concerning in light of the other injuries.

Dr. Mileusnic-Polchan testified that the victim suffered "multiple horizontal irregular stretch abrasions" on his neck. She noted that babies often have some form of skin irritation in this area, as milk or other liquid can become lodged in skin folds, but these abrasions were not indicative of this activity. Rather, Dr. Mileusnic-Polchan noted that these abrasions were indicative of the skin being stretched "suddenly and extensively," and that these injuries were often common in motor vehicle accidents. Dr. Mileusnic-Polchan also noted the presence of a 0.7 inch abrasion on the left side of the victim's neck. Like many of the other injuries, she noted that this injury by itself was insignificant but worrisome in light of the other injuries.

Dr. Mileusnic-Polchan noted that the victim experienced tearing in both frenula, the membranes connecting his lips to his gums. She noted that these injuries constituted "child abuse until proven otherwise." She noted that this injury is not caused by regular resuscitation. Rather, the injury is caused by something being "forcefully pushed in the baby's mouth, frequently a bottle, forceful feeding or some sort of other object." Dr. Mileusnic-Polchan testified that these injuries were showing signs of healing, meaning that the victim had suffered them several days before he died.

Dr. Mileusnic-Polchan noted several abrasions and areas of abrasions and discoloration on the victim's chest and abdomen. Like many of the injuries, she noted that each of these injuries by itself was "meaningless," but "[t]aken together, they're very, very worrisome. The babies that age don't present with so many injuries in that area. And now taking into account the head and neck region, that's extremely, extremely troublesome."

Dr. Mileusnic-Polchan then testified regarding the injuries on back side of the victim's body. She noted that the victim had a 0.3 inch abrasion on the back of his neck. She opined that the injury

had been there about a week. She then identified a "U-shaped" injury on the victim's back, consisting of two parallel abrasions, one 0.6 inches in length and the other 1.1 inches long. She also identified bruising around the abrasion. Dr. Mileusnic-Polchan testified that this injury was "really well-defined . . . meaning that some sort of object that was shaped, U-shaped or maybe square-shaped" came into contact with the victim's back. As to the cause of the injury, Dr. Mileusnic-Polchan testified that "[e]ither the baby was hit with something or was thrown on the ground that had some U-shaped object on the ground." Dr. Mileusnic-Polchan said that she could not identify the exact cause of the injury, but noted that it was indicative of blunt-force trauma.

Dr. Mileusnic-Polchan noted that the victim had a 0.2 inch abrasion on his left buttock. She also identified an area of abrasions, bruising, and skin tears near the child's anus. Dr. Mileusnic-Polchan noted that some of the skin tears were deep, reaching to the subcutaneous tissue. She also noted the presence of a hematoma. Dr. Mileusnic-Polchan examined skin samples from the anal area under a microscope; when she did so, she noted "extensive" hemorrhaging but little accompanying inflammatory reaction. Dr. Mileusnic-Polchan testified that this meant that the injury occurred within a day of the victim's death. Dr. Mileusnic-Polchan opined that these injuries were caused by blunt-force trauma, though she could not identify what object actually caused the injury.

Dr. Mileusnic-Polchan testified that the victim had some evidence of diaper rash. She also noted a series of abrasions in its groin. Some of these abrasions were of the "normal" variety, while some were stretch abrasions similar to the ones that were evident on the victim's neck. Dr. Mileusnic-Polchan noted that this type of abrasion could only be caused by "the forceful acceleration/deceleration of injury and bending of the skin." She noted that it was unusual to discover this kind of injury except in child abuse cases and motor vehicle accidents.

Dr. Mileusnic-Polchan noted bruising on each of the victim's elbows. She noted that these injuries were troubling because "[t]he elbows are very rare areas for a baby that age to be injured. They're not mobile. They don't move by themselves, and to fall on the elbow or explain elbow region by accident, that's really extremely rare, even if possible."

Dr. Mileusnic-Polchan noted that the child's left thigh was "very swollen, very deformed," and the bruising around the thigh was evident of a "combination of recent and old injury." She later noted that her internal exam of the area surrounding the leg produced "evidence of hemorrhage, fresh and healing, meaning that the leg was reinjured" and that the "additional injury could have [occurred] . . . nonintentionally as opposed to the injury that caused it originally." She also identified two burns, one on the child's abdomen, and the other on the victim's right hand.

Dr. Mileusnic-Polchan then testified regarding the child's internal injuries. She first identified several broken ribs, some which had healed, and others which had not. Regarding the

level of pain accompanying these injuries, Dr. Mileusnic-Polchan testified that bone fractures are among "the most painful pediatric emergencies."

She also identified an area of hemorrhaging and abscess formation on the left side of the victim's chest. Dr. Mileusnic-Polchan noted that "some of those [rib] fractures . . . injured surrounding vessels and muscle [and] induced or produced abscess, meaning infection, meaning pus collection." Dr. Mileusnic-Polchan noted that her microscopic review of these chest injuries led her to conclude that the injuries occurred within a day of the victim's death.

Dr. Mileusnic-Polchan noted that the victim suffered a deep intramuscular hemorrhage in his left upper back. Dr. Mileusnic-Polchan performed a microscopic exam of this hemorrhage, during which she found evidence of "recent hemorrhage with no surrounding inflammatory reaction, suggesting a very recent" injury. She testified that some of the back injuries occurred within a day of the victim's death. Dr. Mileusnic-Polchan also noted that the victim suffered hemorrhaging in his diaphragm. After performing a microscopic review of this injury, Dr. Mileusnic-Polchan concluded that these injuries had occurred three to five days before the victim died.

She also noted a "rusty brown discoloration" around the spinal cord, indicating a hemorrhage that had occurred five to seven days before the victim died. Dr. Mileusnic-Polchan noted that the victim's brain was significantly swollen, which led to hemorrhages in the fontanelle outlined above.

Dr. Mileusnic-Polchan testified that when she examined the victim's lungs, she discovered that the child had been suffering from "infection of the lungs . . . pneumonia, and also pleurities or infection inside the chest cavity." Regarding the infection to the child's lungs, she noted:

> His right lung was completely obliterated with infectious process, and there was no left alveolar space or any area of the lung that he would actually use—could use for breathing, and the—in the left lung, the infection was a slightly lesser degree, but still there was presence of . . . developing infection. . . . [There was] also even focal abscess formation in the lung tissue itself. So the ultimate mechanism of [the victim's] death would be severe pneumonia, inability to breath[e]. However, this pneumonia was brought on by his extensive injuries, particularly the rib fractures.

When asked if these injuries were accidental, Dr. Mileusnic-Polchan noted:

> There was no way that some of the injuries would ever be an accident in a baby three and a half months old, and the multiplicity, the distribution, and severity of some of the injuries completely takes it out of [the] realm of any sort of accident and makes it a homicide and child abuse.

On cross-examination, Dr. Mileusnic-Polchan testified that the injuries under the victim's chin were likely caused by a fingernail. She also testified that she had no way of knowing the exact manner in which the methamphetamine found in the victim's system was ingested, but that it could have been ingested through a formula bottle administered close to the victim's death. Dr. Mileusnic-Polchan also reiterated that some of the external injuries occurred within a day of the victim's death, but some occurred between five and seven days before the victim died.

The defendant presented several witnesses from the Knox County Health Department who interacted with the victim and his parents to varying degrees. Two registered nurses, Joyce McGinley, and Sarah Croley, each testified that they met with the victim once, with McGinley meeting with the victim and both parents on June 10, 2002, and Croley meeting with the victim and his mother on July 31, 2002. Each nurse testified that her meeting consisted of talked to the baby's parent or parents about the victim's general progress. McGinley did not recall whether she physically examined the victim, but she noted that administering physical exams was generally not in her job description. She noted that based on her review of the "crib card" that had been compiled at the time of the child's birth, the victim's health and growth appeared to be normal. Croley testified that the victim did not appear to be in any distress during her meeting with the victim and his mother, but that she did not physically examine the child during the meeting.

Two Women, Infants and Children (WIC) program nutrition educators with the Knox County Health Department, Nina Garton and Autumn McElhaney, testified that they each met the victim once—Garton met with the victim and both parents in either May or June 2002, and McElhaney met with the victim and his mother on July 31, 2002. Both nutrition educators testified that during these meetings, the nutrition educator had general discussions regarding the baby's health with the parent or parents present. Both Garton and McElhaney testified that their notes from these meetings indicated no abnormalities or signs of distress regarding the victim, but both women testified that they had little recollection concerning their visits with the victim.

Karen Goodrick, a nurse practitioner, testified that she was employed by the Knox County Health Department when Sarah Tallant brought the child in for three well-child exams between May and July 2002. During the examinations, Goodrick did not notice any problems with the victim that would have suggested that he was being physically abused. She said that the child did not experience any distressed breathing and did not appear to be in pain during the visits. During the last exam, which took place on July 10, Goodrick performed a test on the victim's legs to check his hip placement. The test involved pushing the child's legs up, out, and back, and although Goodrick said that this exam was "relatively stressful" for most children, the victim did not encounter any pain during the test. Goodrick testified that Sarah Tallant explained that the burns the victim suffered occurred when the defendant (who was not present at any of these three exams) and the victim's older brother were playing on the floor and knocked over a lamp, which fell on the victim. Goodrick said that this answer seemed satisfactory at the time and did not cause her concern. On cross-

examination, Goodrick testified that she had seen the autopsy photographs, and during her examinations of the victim, she did not notice any of the external injuries evident in the photographs. She also admitted that she did not see the victim between his July 10 visit and his death on August 14.

Kathi Zechman, a licensed practical nurse, testified that she gave the victim two rounds of immunizations during two visits to the Knox County Health Department. On May 8, 2002, she administered a hepatitis B shot in the victim's thigh, and on July 10, 2002, she gave the child two shots in his left leg and two shots in the right leg. Zechman testified that she did not notice any swelling in the baby's legs during the visit, and other than a burn on the baby's hand, which she discussed with Goodrick, she noticed no physical problems with the child. Zechman testified that her administration of the immunizations could not have caused the broken leg suffered by the victim, nor could she have caused the rib fractures the victim suffered. She also noted that if the baby were crying or "particularly fussy," she would not have made a note of it.

Jason Turnblazer testified that between April and August 2002, he employed the defendant at his irrigation and landscape lighting business. Turnblazer insisted that although he had no employment or payroll records regarding his now-defunct business, the defendant attended work every day and was a good employee. On cross-examination, Turnblazer admitted that he mainly kept in contact with the foreman on each jobsite, rather than the individual employees. Turnblazer also admitted that he did not recall the defendant informing him about the victim's birth, and that he heard about the victim's death through media reports. Turnblazer also testified that the defendant was no longer working for him when he learned that the victim had died.

Glenn "Sonny" Gish, the defendant's stepfather, testified that he interacted with the victim only once, during a two-day visit to the Tallant home in July 2002. Gish testified that during the two days he and his wife visited with the victim, his parents, and the victim's older brother, he noticed no problems with the victim. Gish testified that the victim did not appear to be in pain during the visit. Gish testified that he saw burns on the victim's hands and stomach, and when he asked the defendant and his wife about the burns, they told him that the defendant and his older son had been playing on the floor when they knocked over a lamp, which fell on the victim. Gish testified that this explanation did not distress him. On cross-examination, Gish testified that the victim's burns were bandaged and he did not see the victim's skin underneath the bandages. Gish also testified that the house was clean and he did not see anyone in the house using drugs, but admitted that because he did not use drugs, he would not have known whether the defendant or his wife were using drugs if in fact they were.

Bettye Tallant, the defendant's mother and Sonny Gish's wife, testified that she visited the defendant, his wife, and their children in July 2002. Like her husband, she also testified that there were no noticeable problems concerning the victim during her visit. She said that the victim did not cry any more than a normal child his age. Ms. Tallant did testify that one of the victim's arms

appeared slightly swollen during the visit, and after she saw the defendant pull the child up by that arm, she told the defendant not to pull the child up by his arm, because the defendant may pull the arm out of its socket. Ms. Tallant testified that she did not seem too concerned by the child's swollen arm or the defendant's pulling the child's arm. On cross-examination, Ms. Tallant admitted that she was not aware that the defendant and his wife were regular methamphetamine users.

Based on the above proof, the jury found the defendant guilty of two counts of felony murder (one count with the underlying felony of aggravated child abuse, one count with the underlying felony of aggravated child neglect), and the jury also convicted the defendant of the two underlying felonies on separate counts. The defendant was found not guilty of premeditated first degree murder but was convicted of the lesser-included offense of second degree murder. This appeal follows.

ANALYSIS

I: Sufficiency of Evidence

The defendant contends that the evidence produced at trial was insufficient to support any of his convictions.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In this case, there was no direct evidence that the defendant inflicted the injuries or neglected the victim in such a way as to lead to his death. However, it is well-settled that circumstantial evidence alone may be sufficient to support a conviction. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Richmond, 7 S.W.3d 90, 91 (Tenn. Crim. App. 1999). To warrant a criminal

conviction on circumstantial evidence alone, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). Our court has held that the evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt." Pruitt v. State, 3 Tenn. Crim. App. 256, 267, 460 S.W.2d 385, 390 (1970). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Crawford, 225 Tenn. at 484, 470 S.W.2d at 613. The trier of fact decides the weight to be given to circumstantial evidence, and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." Marable v. State, 203 Tenn. 440, 452, 313 S.W.2d 451, 457 (1958) (citation omitted).

The defendant was convicted of felony murder with the underlying felony of aggravated child abuse and neglect, and he was also convicted of the underlying felony under alternate theories of abuse and neglect on separate counts of the indictment. To convict the defendant of felony murder, the state was required to prove beyond a reasonable doubt that the defendant killed the victim during "the perpetration of or attempt to perpetrate . . . aggravated child abuse [or] aggravated child neglect." Tenn. Code Ann. § 39-13-202(a)(2) (2003). Regarding felony murder, the state is not required to prove a culpable mental state except that necessary to commit the underlying enumerated offense. Id. § (b). To convict the defendant of aggravated child abuse and neglect, the state was required to prove beyond a reasonable doubt that the defendant "knowingly, other than by accidental means, treat[ed] a child under eighteen (18) years of age in such a manner as to inflict injury or neglect[ed] such a child so as to adversely affect the child's health and welfare," and that such treatment resulted in serious bodily injury. Tenn. Code Ann. §§ 39-15-401(a), -402(a)(1) (2003).

In this case, two medical experts testified to the extensive nature of the victims' injuries. Dr. Marks, the forensic anthropologist, testified that the child suffered twenty-four rib fractures, five of which were perimortem, meaning they likely occurred within two weeks of the victim's death. Dr. Marks also testified that the victim suffered a broken elbow and a broken thigh bone that was never properly set. Dr. Mileusnic-Polchan, who performed the autopsy, noted that broken bones are among the most painful injuries a child could suffer. She also testified that the victim exhibited thirty-one external injuries, most of which were not noticed by the health department medical staff when the victim was brought in for a checkup two weeks before his death. The medical examiner also noted that the victim's internal injuries, particularly the broken ribs, led to infection within the victim's chest cavity and pneumonia within the victim's lungs, which ultimately led to his death. Dr. Mileusnic-Polchan stated that, within a reasonable degree of medical certainty, "[t]here was no way that some of the injuries would ever been an accident in a baby three and a half months old," given the injuries' "multiplicity . . . distribution, and severity." She noted that the nature of the injuries "completely takes [this case] out of [the] realm of any sort of accident and makes it a homicide and child abuse."

While neither of the medical professionals could testify as to who inflicted these injuries, Sarah Tallant testified that her husband, the defendant, was the child's primary caregiver, taking care of the child approximately eighty-five percent of the time. She testified to numerous questionable parenting practices on the defendant's part, including leaving the victim in a car seat for twenty-four consecutive hours in an attempt to immobilize his arm, throwing or dropping him into a beanbag chair, and attempting to "x-ray" his arm by shining a 500-watt bulb close to his arm, which led to the victim's being burned. Ms. Tallant testified that after two incidents—one in which the victim fell off a couch and hit his head on the floor, and another episode less than a week before his death in which the victim stopped breathing—the victim's parents, at the defendant's insistence, did not take the victim to the hospital. Finally, both Ms. Tallant and investigating police officers testified that the night the victim died, the victim's mother was frantic and concerned about the baby's well-being, while the defendant appeared aloof and unconcerned. This evidence, though largely circumstantial, was sufficient for the jury to find beyond a reasonable doubt that the defendant abused and neglected the victim in such a manner that led to serious bodily injury and ultimately death. The mother's testimony that the defendant was the primary caretaker and the medical examiner's testimony that these injuries could not have been accidentally inflicted were particularly significant and could have led the jury to reasonably conclude that the evidence excluded all reasonable hypotheses except for the guilt of the defendant. As such, we affirm the defendant's convictions for felony murder and the underlying felony of aggravated child abuse and neglect.

II: Trial Court's Refusal to Dismiss Jurors Challenged for Cause

The defendant argues that the trial court erred by not excusing three jurors he had challenged for cause during voir dire. We conclude that the trial court did not err in seating those three jurors.

During the voir dire process, the defendant administered a questionnaire to all potential jurors in an attempt to identify the jurors "who were [best] qualified to serve on the jury." Based on these questionnaires, the defendant identified forty-one potential jurors whom he believed were not qualified to serve on the jury. The trial court excluded most of these persons based on the defendant's peremptory challenges and challenges for cause, but three members of this group of forty-one were seated as jurors after the trial court refused to dismiss them despite being challenged for cause by the defendant. The three jurors were Gerald Berney, a former Child Protective Services (CPS) investigator with DCS; Cheryl Norton, who disclosed on her questionnaire that she had been sexually abused as a child; and Donna Kay Mingie, who disclosed on her questionnaire that she "expressed dissatisfaction that her taxpayer dollars [ ] go to pay for a lawyer for somebody."

In Tennessee, a trial judge "may discharge from service a grand or petit juror who does not possess the requisite qualifications, or who is exempt or disqualified for such service, or for any other reasonable or proper cause, to be judged by the court." Tenn. Code Ann. § 22-1-106 (2003). "That a state of mind exists on the juror's part . . . which will prevent the juror from acting impartially shall constitute such a cause." Id. "The qualification of a juror is within the trial judge's

discretion, and [the court's] finding a juror to be qualified will not be disturbed on review except on a clear showing of an abuse of discretion." Burns v. State, 591 S.W.2d 780, 782 (Tenn. Crim. App. 1979); see State v. Mickens, 123 S.W.3d 355, 375 (Tenn. Crim. App. 2003).

In the instant case, the defendant has not included the jury questionnaires in the appellate record. Thus, our ability to review whether the trial court abused its discretion in seating the three challenged jurors is limited. What evidence that does exist leads us to conclude that the trial court's actions in seating these three jurors did not constitute an abuse of discretion. Berney was no longer employed as a CPS investigator at trial, and during voir dire, the defendant did not ask him specific questions about his previous employment or how it might have affected his ability to serve as an impartial juror. Regarding Mingie, during voir dire the defendant only asked her general questions about her ability to perform her duties in light of the "horrific and painful" testimony that would be presented in this case, to which she responded that she could. The defendant did not ask Mingie whether the fact that he was represented by the district public defender would affect her ability to serve as an impartial juror. Norton was questioned in chambers by the trial judge and defense counsel. When questioned about her past sexual abuse, she replied that she had been abused over a period of seven years by her father, but that she had dealt with the experiences of her past and that being abused would not affect her ability to serve impartially on the jury, even if this case involved sexual abuse allegations. The trial court was satisfied with these answers and allowed her to remain on the jury, as was within the trial court's discretion. In light of this evidence, we conclude that the trial court properly allowed these three jurors to remain on the panel, and we accordingly deny the defendant relief on this issue.

III: Trial Court's Refusal to Sequester Jury in Light of Media Publicity

The defendant next contends that the trial court abused its discretion by denying the defendant's motion to sequester the jury. In his brief, the defendant cites to numerous newspaper articles and television broadcasts that appeared before and during the trial. The defendant asserts that in light of this publicity, the impartiality of "any one juror, and . . . possibly all of the jurors, whether intentionally, accidentally, consciously, or unconsciously, was compromised in this case." The defendant also asserts that the news coverage "had the effect of impressing upon the jurors an opinion of the community regarding the guilt of [the defendant] and the community[-]held beliefs regarding punishment, separate from the required impartial and unbiased nature of the criminal setting." We conclude that the trial court did not abuse its discretion in refusing to sequester the jury, and that this decision did not prejudice the defendant.

The sequestration of juries in Tennessee is governed by Tennessee Code Annotated section 40-18-116, which states:

> In all criminal prosecutions, except those in which a death sentence may be rendered, jurors shall only be sequestered at the sound discretion of the trial judge, which shall prohibit the jurors from separating at times when they are not engaged upon actual trial or deliberation of the case.

Tenn. Code Ann. § 40-18-116 (2006). On appeal, "this Court will not find error in a trial court's refusal to grant a sequestered jury absent an abuse of discretion." State v. Larry Walcott, No. E2004-02705-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App. Aug. 22, 2005).

The Sixth Circuit Court of Appeals has held that "the failure to sequester a jury standing alone could rarely, if ever, constitute reversible error. A defendant would have to demonstrate actual prejudice or at least substantial likelihood thereof flowing from the failure to sequester in order to warrant a new trial." United States v. Johnson, 584 F.2d 148, 155 (6th Cir. 1978). Regarding pretrial publicity, our court has held that "[a] prospective juror's mere exposure to pretrial publicity is not constitutional error." State v. Gray, 960 S.W.2d 598, 608 (Tenn. Crim. App. 1997). Jurors who have been exposed to pretrial publicity may sit on the panel if they can demonstrate to the trial court that they can put aside what they have heard and decide the case on the evidence presented at trial. Id. Regarding publicity during trial, the Sixth Circuit has held that "'[w]here a jury has been clearly admonished not to read newspaper accounts of the trial in which they are serving as jurors, it is not to be presumed that they violated that admonition.'" United States v. Metzger, 778 F.2d 1195, 1209 (6th Cir. 1985) (quoting Rizzo v. United States, 304 F.2d 810, 815 (8th Cir. 1962)). The Sixth Circuit in Metzger added, "even when material presented by the news media is prejudicial to the defendant, absent a showing that the jury violated the admonishment, a conviction will not be reversed." Id.

In this case, the record reflects that on three separate occasions prior to trial—at the initial appearance of the venire in open court, at the outset of voir dire, and shortly after empaneling the jury—the trial judge admonished the jury about the importance of "learn[ing] everything about this case from the courtroom" and ordered jurors to avoid exposing themselves to media coverage of the case. At the beginning of jury selection, the trial judge asked potential jurors if they had read anything in the newspapers about the case. None of the potential jurors indicated that the publicity had affected them; one potential juror admitted reading a headline in the newspaper, but after reading the headline, the potential juror read no further. Additionally, during voir dire, defense counsel asked a panel of potential jurors if they were sure that none of them had encountered any media coverage that would cause them to form an opinion about the defendant's guilt. All members of the panel responded in the affirmative. Beyond this general question, however, the defendant did not ask either individual members of the venire or panels of potential jurors if they had seen particular news stories regarding the case. Also, during trial, nobody involved in this case—the state, the defendant, the jury, or the trial court—raised any concern regarding the ability of the jury to perform its duties impartially in light of the media coverage. In light of this evidence, the defendant has failed to show that the media publicity regarding his case prejudiced him or that the trial court

abused its discretion by declining to sequester the jury in light of the publicity. Thus, the defendant is not entitled to relief on this issue.

IV: Admissibility of Expert Testimony Regarding Victim's External Injuries

The defendant next contends that the trial court abused its discretion by allowing Dr. Mileusnic-Polchan to testify regarding the victim's injuries. The defendant asserts that this testimony did not establish that the defendant committed these offenses, that none of the external injuries and most of the internal injuries did not constitute serious bodily injury as defined by statute, and that many of these injuries were inflicted beyond the time frame established in the indictment, namely August 2002. Accordingly, the defendant asserts that the trial court's admission of this testimony was irrelevant and highly prejudicial and should have been excluded pursuant to Tennessee Rules of Evidence 401, 402, and 403. We conclude that the trial court did not abuse its discretion in admitting Dr. Mileusnic-Polchan's testimony.

Where the state seeks to present evidence of prior injury in child abuse and neglect cases, "[t]he initial determination to be made is 'whether the admissibility of the evidence of prior injuries is controlled by Rules 401 and 402 or whether Rule 404(b) is also applicable." State v. Roberson, 988 S.W.2d 690, 694-95 (Tenn. Crim. App. 1998) (quoting State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997)). Where the evidence does not indicate who caused the prior injuries, Rule 404(b)[2] is not applicable and therefore admissibility of the evidence is determined under Rules 401[3] and 402.[4] Id. at 695.

In this case, the testimony regarding the victim's injuries did not indicate who had caused them. Therefore, this court need only determine "whether the evidence was relevant to proving a material issue and, if so, whether it should have been excluded" pursuant to Rule 403 of the Tennessee Rules of Evidence.[5] Id. The standard of review for this determination is an abuse of discretion standard. Dubose, 953 S.W.2d at 654.

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[2] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes."

[3] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[4] "All relevant evidence is admissible except as provided by the [federal and state constitutions], these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible."

[5] Rule 403 holds that otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added).

The facts of this case are similar to those of Roberson, where the medical examiner testified that the two-year-old victim, upon her death, "had about twenty-two bruises in the head and face area and additional bruises on her neck, chest, left hip, and 'the back and buttock region.'" Roberson, 988 S.W.2d at 692. The cause of death was peritonitis, which was attributable to intestinal injuries. Id. In ruling that the trial court properly admitted the medical examiner's testimony regarding the head and neck bruising, this court noted:

> [T]he State was required in this case to prove that [the defendant] either inflicted the fatal injury or so neglected [the victim] as to result in her death. In either event, [the defendant] must have acted "knowingly, other than by accidental means." To the extent that the State was attempting to prove that [the defendant] was guilty of first-degree murder by aggravated child abuse through his neglect of [the victim], the non-fatal bruising was relevant to establish what [the defendant] had known about her physical condition. That is, it was relevant to prove that [the defendant] knew [the victim] was in danger and, further, to negate any ignorance or mistake on his part as to whether she needed medical attention.

Id. at 695. Similarly, Dr. Mileusnic-Polchan's testimony was relevant to establishing that the defendant committed aggravated child abuse and neglect and felony murder through aggravated child abuse and neglect in that the defendant knew about the victim's medical problems and did nothing to aid him, as well as to negate any defense assertion that the defendant's actions were non-intentional or accidental. Thus, the expert's testimony regarding the defendant's external injuries was relevant pursuant to Tennessee Rules of Evidence 401 and 402.

Regarding Rule 403, which states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant, the Roberson court, in examining the testimony regarding the external injuries in that case, noted:

> The evidence of the non-fatal injuries was not gruesome; the injuries were not remote in time from the fatal trauma; they were not life-threatening; and there was no direct proof that [the defendant] had caused them. The dangers and considerations with which Rule 403 is concerned were simply minor when weighed against the probative value of this proof.

Similarly, in the instant case, Dr. Mileusnic-Polchan noted that the individual injuries by themselves were not cause for concern, there was no direct proof that the defendant caused them, and while evidence of injury to a child of the victim's age is difficult to view, the autopsy photographs were not overly gruesome. While there is little evidence regarding when the majority of the external injuries occurred, Sarah Tallant testified that she had not seen the injuries prior to viewing the autopsy photographs, and the health department nurse practitioner who examined the victim on July

31 testified that she did not see these external injuries on the child, which could have led a reasonable juror to conclude that the injuries were inflicted during August 2002, which is the time period established in the indictment. Thus, any dangers of unfair prejudice toward the defendant associated with Dr. Mileusnic-Polchan's testimony did not substantially outweigh the relevance of the expert's testimony. Thus, we conclude that the trial court did not abuse its discretion in admitting the testimony regarding the victim's external injuries.

Regarding the internal injuries, because the defendant could not see these injuries, they could not be admitted under the theory outlined above—namely, that the external injuries were relevant in establishing that the defendant committed aggravated child abuse by neglect. However, in her testimony Dr. Mileusnic-Polchan testified that the pneumonia that ultimately killed the defendant was brought on "by his extensive injuries, particularly the rib fractures," and that these injuries, given their multiplicity, distribution, and severity, could not have been accidentally caused. Furthermore, the expert testified that the internal hemorrhages that she identified occurred within the month of August, which was the identified time frame in the indictment. Thus, Dr. Mileusnic-Polchan's testimony regarding the internal injuries was relevant. The testimony regarding these internal injuries was not overly prejudicial because, as was the case with the external injuries, there was no testimony that the defendant caused the injuries, the testimony established that the injuries occurred within or near the time frame established in the indictment, and there were no accompanying unsettling or gruesome images of the child's internal injuries.

In conclusion, Dr. Mileusnic-Polchan's testimony regarding the child's internal and external injuries was relevant under Rules 401 and 402 of the Tennessee Rules of Evidence, and it was not overly prejudicial pursuant to Rule 403. As such, the trial court did not abuse its discretion in admitting this testimony into evidence. Thus, the defendant is not entitled to relief on this issue.

V: Constitutionality of Aggravated Child Abuse and Neglect Statute

The defendant next contends that because the pre-2005 version of the aggravated child abuse and neglect statute, codified at Tennessee Code Annotated § 39-15-402, included only the definition of aggravated child abuse and failed to include the definition of aggravated child neglect, it is unconstitutionally vague. Therefore, the defendant asserts, his convictions for felony murder by aggravated child neglect and the underlying felony of aggravated child neglect must be vacated. He also asserts that this statute created two separate and distinct offenses, but that the statute failed to "recognize the distinct elements of aggravated child neglect." We conclude that the statute was not unconstitutionally vague and therefore affirm the defendant's convictions. However, because the statute created only one offense with alternate theories, and because the trial court failed to merge

the two aggravated child abuse convictions under those alternate theories into one conviction, we remand this case to the trial court for merger of the two aggravated child abuse convictions.[6]

Appellate courts should strive to uphold the constitutionality of statutes if called upon to do so. State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990); State v. Prater, 137 S.W.3d 25, 31 (Tenn. Crim. App. 2003). On appeal "we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute when reviewing a statute for a possible constitutional infirmity." Prater, 137 S.W.3d at 31 (citing Lyons, 802 S.W.2d at 592 and Petition of Burson, 909 S.W.2d 768, 775 (Tenn. 1995)). "Generally, the language of a penal statute must be clear and concise to give adequate warning so that individuals might avoid the prohibited conduct." Id. (citing State v. Boyd, 925 S.W.2d 237, 242-43 (Tenn. Crim. App. 1995)). However, our supreme court has held that "absolute precision in drafting prohibitory legislation is not required since prosecution could then easily be evaded by schemes and devices." Wilkins, 655 S.W.2d at 916; Burkhart, 58 S.W.3d at 697.

When an appellate court examines a criminal statute for vagueness, the statute "shall be construed according to the fair import of [its] terms." Tenn. Code Ann. § 39-11-104 (2006). "Due process requires that a statute provide 'fair warning' and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have reasonably understood to be proscribed." State v. Burkhart, 58 S.W.3d 694, 697 (Tenn. 2001) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99) (1972)). A statute will not be held to be unconstitutionally vague if, "'by orderly processes of litigation [it] can be rendered sufficiently definite and certain for purposes of judicial decision'" Wilkins, 655 S.W.2d at 916 (quoting Donathan v. McMinn County, 187 Tenn. 220, 228, 213 S.W.2d 173, 176 (1948)).

The defendant was charged with first degree murder by aggravated child abuse, first degree murder by aggravated child neglect, as well as with the underlying felonies of aggravated child abuse and aggravated child neglect. As is relevant to this case, the aggravated child abuse and neglect statute under which the defendant was prosecuted provided that "[a] person commits the offense of aggravated child abuse or aggravated child neglect who commits the offense of child abuse or neglect as defined in § 39-15-401," and "[t]he act of abuse or neglect results in serious bodily injury." Tenn. Code Ann. § 39-15-402(a)(2) (2003). The offense of child abuse or neglect required that a person "knowingly, other than by accidental means, treat[ed] a child under eighteen (18) years of age in such a manner as to inflict injury or neglect[ed] such a child so as to adversely affect the child's health and welfare." Tenn. Code Ann. § 39-15-401(a) (2003).

The defendant argues that the aggravated child abuse and neglect statute created two separate felonies, and by failing to include the requisite elements of aggravated child neglect, the statute was unconstitutionally vague. We disagree. Our court has held that "[a]ggravated child abuse and

[6] The trial court did properly merge the two felony murder convictions.

aggravated child neglect are not separate offenses in our code. Instead, aggravated child abuse and neglect is one crime that can be satisfied by two different courses of conduct, serious bodily injury caused by physical abuse or serious bodily injury caused by neglect." State v. Diallo Jamel Lauderdale, No. W2001-01296-CCA-R3-CD, slip op. at 12 (Tenn. Crim. App. Sept. 5, 2003) (internal citation omitted); see State v. Hodges, 7 S.W.3d 609, 622 (Tenn. Crim. App. 1998); see also State v. Bruce Marvin Vann, No. W2002-00161-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. Mar. 31, 2003) ("Alternative theories of guilt within a single indictment are permissible."). In light of these holdings, we conclude that the aggravated child abuse and neglect statute is not unconstitutionally vague as applied to the defendant, as the statute was clear and concise and put the defendant on adequate notice of the prohibited conduct. The defendant knew that he could be convicted for both felony murder with the underlying felony of aggravated child abuse, as well as for the underlying felony of aggravated child abuse and neglect, regardless of whether the jury convicted him based on the theory of child abuse or child neglect.

This conclusion, however, does not end our analysis. The record reflects that while the trial court, during sentencing, noted that aggravated child abuse and aggravated child neglect are "essentially the same offense," the trial court entered separate judgments of conviction for aggravated child abuse based on the alternative theories of abuse and neglect. In other words, the trial court entered judgments of convictions based on two violations of the same statute. Our review of this case leads us to conclude that these convictions constitute a double jeopardy violation. The defendant committed a single offense of aggravated child abuse. Neither offense (aggravated child abuse by abuse or aggravated child abuse by neglect) required proof of a fact not required in proving the other, and neither time nor location provided a separate and distinguishing commission of the offenses. See, e.g., State v. Easterly, 77 S.W.3d 226, 231 (Tenn. Crim. App. 2001). Accordingly, we remand this case to the trial court for merger of the two aggravated child abuse offenses.

VI: Defendant's Motion to Suppress

The defendant next contends that the trial erred by not granting his motion to suppress evidence of the methamphetamine that was taken from his person the night of his arrest. We conclude that the police lacked probable cause to search the defendant at the time he was searched, and therefore the trial court should have excluded the evidence resulting from the illegal search. However, because we also conclude that this error was harmless beyond a reasonable doubt, we deny the defendant relief on this issue.

Suppression Hearing Testimony

At the suppression hearing, Officer Rickman testified that he originally intended to transport the defendant from his residence to East Tennessee Children's Hospital to be with his wife. Unlike

his trial testimony, Officer Rickman testified that he was aware that the defendant had learned that his son had died prior to the search. Officer Rickman testified that the defendant wanted to go to the hospital to be with his wife, but because the defendant had just learned about his son's death, Officer Rickman thought the defendant would be too overcome with emotion to drive, so the officer decided to transport the defendant to the hospital. Officer Rickman testified that before he searched the defendant, he knew nothing about Detective Slagle's discussion with the defendant or the defendant's consent to be tested for drugs at another hospital. Officer Rickman also said that the defendant was not under arrest at the time he was searched.

Officer Rickman testified that he searched the defendant prior to placing him in the police car because it was the Knoxville Police Department's policy to do so. The officer explained that the reason for this policy was to protect the officers from harm. Officer Rickman testified that he asked the defendant if he had any weapons in his pocket. The defendant replied that he did not. It is unclear from the officer's suppression hearing testimony whether the officer asked the defendant if he could search him, but the officer admitted that he did search the defendant. When asked whether the defendant gave permission for the search, the officer replied, "He didn't say that we couldn't." Officer Rickman initially conducted a pat-down search of the defendant. The officer said that he felt a set of keys and an object with a "baggie[-]type feel," but he also admitted that he did not feel anything that felt like a weapon. Officer Rickman then reached into the defendant's pockets. In one pocket, the officer discovered a small bag of what the defendant admitted was methamphetamine. At that point, the defendant was placed under arrest.

Standard of Review

A trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Id. Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998); State v. Perry, 13 S.W.3d 723, 737 (Tenn. Crim. App. 1999). However, the prevailing party "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence." Odom, 928 S.W.2d at 23. Furthermore, an appellate court's review of the trial court's application of law to the facts is conducted under a de novo standard of review. State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted).

Both the federal and state constitutions offer protection from unreasonable searches and seizures. See U.S. Const. amend. IV, Tenn. Const. art. I, § 7. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few

specifically established and well delineated exceptions.'" Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)); see also State v. Berrios, ___ S.W. 3d ___, No. W2005-01179-SC-R11-CD, slip op. at 4 (Tenn. Aug. 17, 2007). "Exceptions to the warrant requirement include searches incident to arrest, plain view, hot pursuit, exigent circumstances, and others, such as the consent to search." Berrios, slip op. at 4 (citing State v. Cox, 171 S.W.3d 174, 179 (Tenn. 2005)[7]). Fourth Amendment concerns attach to "all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578 (1975) (citation omitted); see Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877 (1968)).

At the motion to suppress hearing, the state argued that the "exigent circumstances" and "search incident to arrest" exceptions justified the warrantless search of the defendant. On appeal, the state also asserts that the defendant consented to the search, and that the officer did not violate the defendant's constitutional rights by conducting a Terry stop and frisk for the officer's protection before placing him in the police vehicle. We find the state's arguments unpersuasive and conclude that the state improperly searched the defendant.

Consent to Search

The Supreme Court has held that "[o]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973). However, such consent must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Simpson, 968 S.W.2d 776, 784 (Tenn. 1998) (quoting State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992)). Here, the officer conducting the search interpreted the defendant's failure to stop the officer from searching him as consent to search. In light of this testimony, the state has failed to show that the defendant gave the officer "unequivocal, specific, [and] intelligently given" consent to search him, as required under Simpson and Brown. Thus, the state's argument that the defendant gave police consent to search him fails.

Exigent Circumstances

This court has previously concluded that the "exigent circumstances" exception to the requirement that all searches be conducted pursuant to a warrant only applies in three situations: "(1) when officers are in 'hot pursuit' of a fleeing suspect; (2) when the suspect presents an immediate threat to the arresting officers or the public; or (3) when immediate police action is necessary to

[7]The Berrios slip opinion accidentally cites to the incorrect West reporter for the Cox opinion. We give the correct citation here.

prevent the destruction of vital evidence or thwart the escape of known criminals." State v. Steven Lloyd Givens, No. M2001-00021-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App. Nov. 29, 2001); see Jones v. Lewis, 874 F.2d 1125, 1130 (6th Cir. 1989). In this case, none of these circumstances apply. The defendant was searched inside his home, where several police officers were also present. Thus, the defendant could not have fled from the scene. While most of the officers who testified regarding the defendant's behavior testified that he was "spacey" or acting strangely the evening his son died, none of the officers testified that the defendant was acting in a manner that threatened anyone present at the scene. Nobody saw the defendant in possession of a weapon, and none of the officers testified that they saw the defendant make any sudden actions, as if he would be reaching for a weapon. Finally, there was no threat regarding the destruction of evidence. Several police officers were present inside the house, and at least one officer was present with the defendant from the time the first officer arrived to the time the defendant was arrested. Thus, the defendant would have been unable to conceal any evidence which the police may have been looking for at the time. Thus, the exigent circumstances exception to the warrant requirement did not apply.

Search Incident to Arrest

Regarding searches incident to arrest, the Supreme Court has held that an officer may make a warrantless search incident to an arrest, provided the arrest itself is lawful. United States v. Robinson, 414 U.S. 218, 234-35, 94 S. Ct. 467, 476 (1973); see State v. Crutcher, 989 S.W.2d 295, 300 (Tenn. 1999). For a warrantless arrest or other seizure to be lawful, the officer must possess "probable cause to believe the person to be arrested has committed [a] crime." State v. Lewis, 36 S.W.3d 88, 98 (Tenn. Crim. App. 2000). For probable cause to exist, the facts and circumstances as they are known to the officer at the time of the arrest must be "'sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.'" State v. Bridges, 963 S.W.2d 487, 491 (Tenn. 1997) (quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964)).

In this case, the defendant was not under arrest at the time he was searched, and even if he was "seized" for Fourth Amendment purposes, no probable cause existed to justify seizing the defendant. At the time the defendant was searched, the police did not have any information to suspect that the victim's death was a homicide, and therefore the defendant was not a suspect in his son's death. Nor did the police suspect him of committing any drug-related offenses. Furthermore, at the time Officer Rickman searched the defendant, he was unaware that the defendant was to be tested for drugs. Rather, the officer only believed that he would be transporting the defendant to the hospital to be with his wife. In short, at the time he was searched, the police did not have any reasonable suspicion that the defendant had committed or was committing a crime, as was necessary to justify an arrest or seizure of the defendant and a search incident to that arrest. Thus, the state's argument that the defendant was searched incident to a valid arrest or seizure fails.

Terry Stop

Finally, the police could not have justified the search based on safety concerns. The United States Supreme Court has held that a law enforcement officer has "narrowly drawn authority to [conduct] a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Terry, 392 U.S. at 27, 88 S. Ct. at 1883. However, the Terry Court warned that in determining whether the individual was in fact armed, the officer could not act on an "inchoate an unparticularized suspicion or 'hunch,'" but could only rely upon "specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Id. (citation omitted). As stated above, the facts of this case are such that the arresting officer could not have had any reasonable suspicion that the defendant was armed. As none of the recognized exceptions to the rule that a person may not be searched without a warrant apply, we conclude that the police improperly searched the defendant prior to placing him in the police vehicle. As such, the trial court erred by failing to grant the defendant's motion to suppress the evidence resulting from that search.

Harmless Error

Our conclusion that the police search of the defendant was improper and that the evidence resulting from that search should have been suppressed does not conclude our analysis. We must determine whether the trial court's ruling regarding the evidence entitles the defendant to relief. Our supreme court has explained the application of the harmless error doctrine to constitutional violations occurring during a criminal trial:

> In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the United States Supreme Court rejected the proposition that all federal constitutional errors that occur in the course of a criminal trial require reversal. The Chapman Court held that the Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of a conviction if the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24, 87 S.Ct. at 828. The Chapman standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial." Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).
>
> Since Chapman, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Id.

Momon v. State, 18 S.W.3d 152, 163-64 (Tenn. 1999).

In light of this standard, we conclude that the trial court's error in admitting the evidence resulting from the search of the defendant was harmless beyond a reasonable doubt. The defendant consented to be tested for drugs prior to the search, and the results of that test, which are not challenged on appeal, indicated that the defendant was under the influence of methamphetamine at the time of his arrest. Perhaps more importantly, the medical examiner testified that the victim's internal injuries, and not the presence of methamphetamine in his system, caused his death. Thus, the fact that the defendant was found in possession of methamphetamine shortly after learning his son had died is of little relevance in this case. As such, the trial court's denial of the defendant's motion to suppress, while error, was harmless beyond a reasonable doubt. The defendant is therefore denied relief on this issue.

VII: Double Jeopardy Concerns

The defendant next contends that his convictions for both felony murder by aggravated child abuse and aggravated child abuse violated his constitutional rights against double jeopardy. However, on appeal, the defendant admits that he "is aware that in State v. Godsey, 60 S.W.3d 759, 776-78 (Tenn. 2001), the [Tennessee Supreme C]ourt upheld convictions for both felony murder and aggravated child abuse despite a claim that convictions and sentences for both . . . crimes violated the right against double jeopardy." The defendant states that he argues this issue on appeal to preserve the issue for potential federal review and to urge a change in the law. The defendant is correct in his assessment of the holing in Godsey. Thus, we conclude that the defendant's convictions for both felony murder and the underlying felonies of aggravated child abuse and neglect did not violate his constitutional protection against double jeopardy, and we deny the defendant relief on this issue.

VIII: Sentencing

The defendant's final issue concerns his sentences for aggravated child abuse and aggravated child neglect. The trial court sentenced the defendant to twenty-five years in prison on each offense, the maximum sentence allowed for a person found guilty of a Class A felony as a Range I, standard offender. See Tenn. Code Ann. § 40-35-112(a)(1) (2006) (providing that the sentence range for person convicted of a Class A felony as a Range I, standard offender is fifteen to twenty-five years). The trial court ordered that the sentences be imposed concurrent to each other but consecutive to the defendant's sentence of life in prison with the possibility of parole for felony murder. The defendant asserts that the trial court's imposed sentences for aggravated child abuse and neglect were excessive, and he also asserts that the trial court improperly imposed consecutive sentences. We affirm the length of the sentences imposed by the trial court, but because the trial court did not state appropriate findings for imposing consecutive sentences when the defendant is sentenced as a

dangerous offender, see State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), we remand the case to the trial court for a new sentencing hearing.

Standard of Review

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994) (citation omitted); see Tenn. Code Ann. § 40-35-210(e) (2006).

Length of Sentence

At the defendant's sentencing hearing, the defendant elected to be sentenced on his aggravated child abuse and neglect convictions under the revised sentencing act as enacted by the Tennessee General Assembly in 2005, thus waiving any ex post facto challenges he might have otherwise had. Tennessee's revised sentencing act provides:

> (c) The court shall impose a sentence within the range of punishment, determined whether the defendant is a mitigated, standard, persistent, career, or repeat violent

offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210 (2006). The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the court's findings are adequately supported by the record. Id. § (d)-(f); State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

While the court can weigh sentence enhancement factors as it chooses, the court may only apply the factors if they are "appropriate for the offense" and "not themselves essential elements of the offense." Tenn. Code Ann. § 40-35-114 (2006). These limitations exclude enhancement factors "based on facts which are used to prove the offense" or "facts which establish the elements of the offense charged." Jones, 883 S.W.2d at 601. Our supreme court has stated that "[t]he purpose of the limitations is to avoid enhancing the length of sentences based on factors the Legislature took into consideration when establishing the range of punishment for the offense." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997); Jones, 883 S.W.2d at 601.

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

We initially note that the state argues that the 2005 amendments to Tennessee's sentencing act eliminated a criminal defendant's right to appeal a trial court's application of one or more statutory enhancement factors in determining the length of the defendant's sentence. As a recent opinion of this court states, we find this argument unpersuasive:

> A defendant has the statutory right to appeal a sentence not imposed in accordance with the Criminal Sentencing Reform Act. T.C.A. § 40-35-401(b)(1). Specifically, a defendant may raise as a ground on appeal that his sentence is excessive under the sentencing considerations set forth in section 40-35-210, which section includes a trial court's consideration of enhancement factors in determining the length of a sentence. *Id*. § 40-35-210(c)(2). . . . Once applied, the chosen enhancement factor becomes a sentencing consideration subject to review under Tennessee Code Annotated section 40-35-401([b])(2). Thus, [a] [d]efendant's challenge to the length of his sentences relate[s] to the sentencing considerations set forth in Tennessee Code Annotation section 40-35-210, and we will consider his issue concerning the trial court's application of enhancement factors.

State v. Eric James Osborne, No. M2006-00888-CCA-R3-CD, slip op. at 22 (Tenn. Crim. App. Aug. 28, 2007).

In this case, the trial court found the following enhancement factors applicable to the defendant's convictions:

> (4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;
>
> (5) The defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense;
>
> (6) The personal injuries inflicted upon . . . the victim [were] particularly great; and
>
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high.

Tenn. Code Ann. § 40-35-114(4)-(6), (10) (2006).

The defendant submitted several proposed mitigating factors at the sentencing hearing, including his lack of prior criminal activity; his capacity to appreciate the wrongfulness of his conduct was substantially impaired by his drug use; his attempts to financially support his family during most of the victim's life; his remorse for the victim's death; the fact that his wife would be eligible for parole within two years, while he would not be eligible for parole until he is eighty-six years old; his close, loving relationships with his older son and other family members; and the fact that he was not a leader in the commission of the offenses for which he was convicted. However, the trial court refused to apply any of these mitigating factors. Based on the enhancement factors and an absence of mitigating factors, the court sentenced the defendant to the maximum sentence of twenty-five years in prison on each offense. See Tenn. Code Ann. § 40-35-112(a)(1).

Regarding enhancement factor (6), particularly great injury, the defendant in his brief does not contend that the trial court applied this enhancement factor, while the state argues that the trial court did apply this enhancement factor, and such application of the factor was appropriate. At the conclusion of testimony in the sentencing hearing, the trial court noted

> In the 14 years that I've been doing this I've seen a number of different child abuse cases . . . I have never seen a case where the extent of the injury was as terrible as it was in this case. . . . . every one of this child's ribs were broken. . . . it had all of these others internal injuries . . . it was the most egregious case of child abuse that I've ever heard or seen. And I think the medical testimony bears that out.

Immediately before imposing its sentence, the trial court noted, "[a]gain, I've never seen a case where the injuries are as great or as numerous as they are in this particular case." This evidence leads us to conclude that the trial court did apply this enhancement factor. However, application of this enhancement factor was inappropriate.

The defendant in this case was indicted and convicted of aggravated child abuse and neglect where the offense was committed by causing serious bodily injury to the victim. See Tenn. Code Ann. § 39-15-402(a)(1)-(2). Thus, serious bodily injury was an essential element of the offense that had to be proven by the state beyond a reasonable doubt. Our supreme court has held that "proof of serious bodily injury will always constitute proof of particularly great injury." Jones, 883 S.W.2d at 602. Accordingly, this court has held that in cases where serious bodily injury is an element of the offense, application of the "particularly great injury" enhancement factor was improper. See State v. Williamson, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995) (vehicular assault); State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995) (especially aggravated robbery). Thus, the trial court's application of enhancement factor (6) to the defendant's aggravated child abuse and neglect sentences was inappropriate.

The defendant asserts that the trial court erred in applying enhancement factor (4), particular vulnerability due to age, because the separate classes of offenses provided in the aggravated child and abuse and neglect statute—the version of Tennessee Code Annotated section 39-15-402(b) under which the defendant was convicted provided that the offense was a Class B felony unless the victim was under six years of age, in which case the offense was a Class A felony—accounted for the victim's vulnerability by imposing a statutorily enhanced sentence. We disagree.

The age of the victim, standing alone, does not justify application of the particular vulnerability enhancement factor. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997). Although the age of the victim is an element of the offense of aggravated child abuse, this does not necessarily preclude the application of this factor. State v. Walton, 958 S.W.2d 724, 728 (Tenn. 1997). Rather,

the trial court should consider: (1) whether, because of age, the victim was particularly unable to resist the crime, summon help, or testify at a later date; (2) whether the victim's age (extremely young or old) is entitled to additional weight; and (3) whether the vulnerability of the victim made the victim more of a target for the offense or, conversely, whether the offense was committed in such a manner as to render the vulnerability of the victim irrelevant. Id.; Poole, 945 S.W.2d at 96-97. Under this analysis, this court has previously affirmed application of the particular vulnerability enhancement factor in an aggravated child abuse case involving a six-month-old victim. State v. Rebecca Curevich, No. 01C01-9707-CR-00276, slip op. at 11 (Tenn. Crim. App. at Nashville, July 20, 1998) (noting that the victim was "completely unable to resist the lethal does of narcotics administered by the defendant" and "unable to call for help.")

In applying this enhancement factor, the trial court noted:

> . . . as it relates to the vulnerability of this child, I think a three month-old child is clearly more vulnerable than a five or six year-old child. I think a five or six year-old child can take some steps, if it's no more than to complain to some other family member, or some playmate, or some teacher at school . . . whereas this child who lived I think 110 days was completely and totally helpless to do anything to protect itself or to complain about, or seek any help for any of the injuries that it incurred. So I think this—the vulnerability of this child is a factor that should be taken into account.

The trial court in this case properly considered the factors enumerated in Walton and Poole and stated on the record its reasons for applying this enhancement factor to the defendant's sentence, and application of the enhancement factor is supported by the evidence contained in the record. As such, we conclude that application of this enhancement factor was proper.

Regarding the exceptional cruelty enhancement factor, we initially note that this court has upheld application of this enhancement factor in an aggravated child abuse case. State v. Hodges, 7 S.W.3d 609, 631 (Tenn. Crim. App. 1998). In so concluding, this court cited to the Tennessee Supreme Court's holding that "the element of 'serious bodily injury,' as included in the offense of especially aggravated robbery, does not necessarily constitute 'exceptional cruelty.'" Id. (quoting Poole, 945 S.W.2d at 98). As the court in Poole noted, "the facts in a case may support a finding of 'exceptional cruelty' that 'demonstrates a culpability distinct from and appreciably greater than that incident to'" the charged offense. Poole, 945 S.W.2d at 98. In this case, testimony of the two medical experts, Dr. Marks and Dr. Mileusnic-Polchan, revealed that the victim suffered twenty-six bone fractures, twenty of which showed signs of healing and five of which occurred shortly before the victim's death, in addition to other internal injuries. The rib fractures led to pneumonia, which ultimately led to the victim's death. Such injuries indicated an ongoing pattern of abuse which demonstrated a culpability on the defendant's part that was "distinct from and appreciably greater

than that incident to" the offense of aggravated child abuse and neglect. Therefore, application of this enhancement factor was appropriate.

Regarding the last enhancement factor, committing a crime when the risk to human life is high, we note that this court has previously concluded that this enhancement factor should not be considered when "a fair review of the record clearly shows that proof of 'a substantial risk of death' was one of the factors relied upon by the State in proving 'serious bodily injury' to sustain a conviction of aggravated child abuse." State v. Tracey Pendergrass, No. 03C01-9608-CC-00310, slip op. at 11 (Tenn. Crim. App. at Knoxville, Dec. 11, 1997) (also noting that "substantial risk of death" is one of the statutory definitions of serious bodily injury). A review of the record in this case indicates that although the state primarily emphasized the intense pain suffered by the victim in proving serious bodily injury, it also relied upon the "substantial risk of death" factor in proving that element of the offense. Therefore, we find that the trial court improperly applied this enhancement factor to the defendant's sentence.

Regarding mitigating factors, the defendant contends that the trial court erred in failing to consider the submitted mitigating factors and failing to apply them to the defendant's sentence. The transcript of the sentencing hearing reflects that the trial court directly addressed only the defendant's proposed "voluntary intoxication" and "strong relationship with family members" mitigators in finding that no mitigating factors applied. Our review of the remaining proposed mitigating factors in light of the evidence presented leads us to conclude that, assuming arguendo that these mitigating factors apply, they are far outweighed by the two remaining enhancement factors, each of which carries substantial weight. In light of this fact, and in consideration of the other principles of sentencing, we conclude that the trial court properly sentenced the defendant to the maximum term on his aggravated child abuse and neglect convictions. Accordingly, the defendant is denied relief on this issue.

Consecutive Sentences

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(5) (2006). When imposing consecutive sentences based on the defendant's status as a dangerous offender, the trial court must, "in addition to the application of general principles of sentencing," find "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In all cases where consecutive sentences are imposed, the trial court is required to "specifically recite [on the record] the reasons" behind imposition of consecutive

sentences. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In ordering that the defendant's concurrent sentences for aggravated child abuse and aggravated child neglect be served consecutive to his felony murder conviction, the trial court stated,

> There is no way you can listen to the proof in this case and arrive at the conclusion that the defendant is not a dangerous offender whose behavior indicates little regard for human life, or no hesitation about committing a crime when the risk to human life is high.

These findings essentially restated the statutory language relevant to imposition of consecutive sentences based upon dangerous offender status without making the requisite findings under Wilkerson. Specifically, the trial court failed to make findings on the record regarding the need to protect society from the defendant and the relationship between the length of the defendant's sentences and the severity of his offenses. Because such findings are critical to our review, we reverse the trial court's judgment as to consecutive sentencing and remand to the trial court for a new sentencing hearing to reconsider whether consecutive sentencing is appropriate.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, we affirm the defendant's guilty verdicts and the trial court's imposed sentences in his convictions for aggravated child abuse and neglect. However, we remand this case to the trial court for merger of the defendant's two aggravated child abuse convictions and a determination of whether consecutive sentences are appropriate in this case.

D. KELLY THOMAS, JR., JUDGE