IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 27, 2000 Session

STATE OF TENNESSEE v. WILLIAM PIERRE TORRES

Direct Appeal from the Criminal Court for Knox County
No. 56073 Ray L. Jenkins, Judge

No. E1999-00866-CCA-R3-DD
March 13, 2001

The appellant, William Pierre Torres, was convicted by a jury in the Knox County Criminal Court of one count of first degree murder by aggravated child abuse and was sentenced by the jury to death by electrocution. In this appeal as of right, the appellant challenges both his conviction and his sentence, raising the following issues for our consideration: (1) whether the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) violates the United States and Tennessee constitutions; (2) whether the indictment in this case is defective due to the State's failure to charge a separate count of aggravated child abuse; (3) whether, during a competency hearing conducted prior to the appellant's trial, the trial court erred in ruling that a licensed clinical social worker was qualified to render an opinion concerning the appellant's competence to stand trial; (4) whether, during the guilt/innocence phase of the appellant's trial, the trial court erred by declining to admit into evidence a redacted video cassette recording of an interview of the appellant by police investigators; (5) whether, during the guilt/innocence phase, the trial court erred in admitting testimony concerning the appellant's demeanor at East Tennessee Baptist Hospital following his offense; (6) whether, during the guilt/innocence phase, the trial court erred in admitting evidence concerning healed scars and old bruises found on the victim's body; (7) whether Tenn. Code Ann. § 39-13-204 (1993) and Tenn. Code Ann. § 39-13-206 (1993), Tennessee's death penalty statutes, violate the United States and Tennessee constitutions; (8) whether, under the United States and Tennessee constitutions, the application of the aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(l) to the offense of first degree murder by aggravated child abuse fails to adequately narrow the class of death-eligible defendants; (9) whether, during the sentencing phase of the appellant's trial, the trial court erred in providing a Kersey instruction to the jury; and (10) whether, under the United States and Tennessee Constitutions, the appellant's sentence of death is disproportionate to the penalty imposed in similar cases. Following a thorough review of the entire record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JAMES CURWOOD WITT, JR., JJ., joined.

William C. Talman and Susan E. Shipley, Knoxville, Tennessee, for the appellant, William Pierre Torres.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, Amy L. Tarkington, Senior Counsel, Randall E. Nichols, District Attorney General, and Robert L. Jolley, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On August 9, 1994, a Knox County Grand Jury returned an indictment charging the appellant with the first degree murder by aggravated child abuse of his fifteen-month-old son, Quintyn Pierre James Wilson. On March 1, 1996, the State filed a notice of its intent to seek the death penalty. In its notice, the State indicated its reliance upon the aggravating circumstances that the victim, Quintyn, was less than twelve years of age, and the appellant was eighteen years of age or older, Tenn. Code Ann. § 39-13-204(i)(1) (1993), and that the murder was "especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," id. at (i)(5). Subsequently, on October 27, 1997, the trial court ordered an evaluation of the appellant by the Helen Ross McNabb Mental Health Center for the purpose of determining the appellant's competency to stand trial and his mental condition at the time of this offense. Tenn. Code Ann. § 33-7-301(a) (1994). Dr. Sharon Norwood Arnold, a psychiatrist employed by the Center, evaluated the appellant and concluded that the appellant was competent to stand trial and that a defense of insanity was not viable. Moreover, on February 17, 1999, upon the appellant's motion, the trial court conducted a competency hearing. At the conclusion of the hearing, the trial court determined that the appellant was competent, and the appellant's case proceeded to trial, concluding on February 25, 1999.

A. Guilt/Innocence Phase

During the guilt/innocence phase of the appellant's trial, the State established that on June 29, 1994, at approximately 12:43 p.m., Jasma Nishee Wilson called Knox County 911 from the Knoxville apartment that she shared with the appellant and their two children. Wilson was hysterical and largely unable to communicate with the 911 operator. Accordingly, the appellant took the telephone receiver from Wilson and reported to the operator that his infant son, Quintyn, had fallen from his crib and was no longer breathing. The operator immediately dispatched an ambulance to the appellant's residence. Additionally, the operator instructed the appellant to perform cardiopulmonary resuscitation (CPR) on Quintyn by alternately breathing into the child's mouth and compressing the child's chest. Soon thereafter, the ambulance arrived and transported Quintyn to the East Tennessee Baptist Hospital while paramedics continued efforts to resuscitate him. Officer Rick Abbott of the Knoxville Police Department was also dispatched to the appellant's residence and transported both the appellant and Wilson to the hospital. Abbott confirmed that Wilson was hysterical and further noted that the appellant, although calm, appeared to be "a little bit upset."

At the hospital, Dr. Todd Mitchell Rice, an emergency room physician, examined Quintyn and observed that he "showed no signs of life, no cardiac activity, no spontaneous breathing, no spontaneous movement of any kind." Nevertheless, Doctor Rice also attempted, unsuccessfully, to resuscitate the child. Finally, at 1:33 p.m., the doctor pronounced Quintyn dead.

While he was attempting to resuscitate Quintyn, Dr. Rice noted "several very suspicious marks" on the child's body. The doctor recalled at the appellant's trial that

> some areas [of the child's body] . . . were - - were intensely bruised and swollen. There was a variety of different bruises on the child that - - some new and some - - some not so new. There was an area on the child that appeared to have possibly been caused by a recent cigarette burn, another area which was suspicious for a bite mark. The last thing I remember doing was looking at the child's anal area, and there I found some suspicious scarring around the anus, which is - - which I didn't feel was normal for a child this age, to have this scarred appearance to the outside of their anus. And so I marked that down as a suspicious marker of possible sexual abuse.[1]

Specifically addressing the bruises, Dr. Rice noted extensive bruising and swelling on the left side of Quintyn's face and on the left side of his scalp. The child also had bruises or abrasions on the front of his left shoulder, on his upper back, including his left posterior shoulder and his right posterior chest, on his lower back and buttocks, in the area of his right hip and thigh, and in the area of his left groin and thigh. Dr. Rice further related that the child's left lower chest was "suspicious for bruising."

In response to questioning by defense counsel, Dr. Rice did concede that the "bruises" on Quintyn's lower back and buttocks could have been merely birthmarks because "that area is a fairly characteristic location for - - for a particular type of birthmark." However, he maintained with a reasonable degree of medical certainty that the other marks on the child were bruises. Indeed, he asserted that, overall, the bruising found on Quintyn's body suggested a physical assault. He particularly observed that the bruising on Quintyn's upper back was

> very suspicious for - - for marks that could have been caused by someone grabbing the child and the ends of the fingers actually

---

[1] During her opening statement, defense counsel asserted that

> Dr. Rice mistakenly thought this child had been sexually abused. Now, the autopsy of this child conclusively determined that he had not been sexually abused, that this initial mistake by the emergency room physician caused the investigators to be distorted.

The pathologist's report does indicate, "The anus and rectum display no evidence of trauma; no blood is present within the anorectal canal." However, during the pathologist's testimony, defense counsel successfully objected to the introduction into evidence of her report, and defense counsel failed to elicit testimony from the pathologist concerning the condition of Quintyn's anus and rectum.

> digging into the - - into the ribs of the child, potentially, as someone was shaking them.

While cautioning that dating bruises is a "extraordinarily inexact science," Dr. Rice nevertheless opined that the bruises on Quintyn's face and scalp and the bruises on the child's upper back had been inflicted within the twenty-four hours preceding his examination of the child. The bruise in the area of the child's right hip and thigh could have been hours old or days old. The bruise in the area of the child's left groin and thigh was two or three days old. The remaining bruises were perhaps as much as one or two days old, "maybe less."

Dr. Rice also examined the child's eyes with an opthalmoscope and observed retinal hemorrhaging in both eyes. The doctor testified at trial that retinal hemorrhaging could be a sign of "subarachnoid hemorrhag[ing]," which, in turn, is often associated with "shaken baby syndrome." He explained, "That's a syndrome which an infant or a very small child is shaken so violently that the blood vessels on the surface of the brain actually rupture." He offered to the jury the following illustration of the violence with which one would need to shake a baby in order to cause subarachnoid hemorrhaging:

> [I]f I was to have a soda pop can half full of - - of soft drink and try to get it to - - to foam over high up into the air, I'd have to - - to shake it pretty violently and for a fairly - - for a long period of time . . . . [W]hen I say violent, I - - I think that really expresses how intensely and how vigorously one would have to shake a child for that to happen.

On the basis of his observations, Dr. Rice concluded that the cause of the child's death was "a combination of - - of being violently shaken and a severe blow to the left side of the head." In this regard, the doctor noted that the blow to the left side of Quintyn's head could, alone, have caused instantaneous death. Alternatively, such a blow could merely have caused bruising or the loss of consciousness. In any event, the retinal hemorrhaging indicated "some type of brain damage of high severity," i.e., "[l]ikely resulting in death," whether caused by violent shaking, a blow to the head, or both.

Finally, Dr. Rice testified that the child's father reported at the hospital that Quintyn had fallen from his crib. However, Dr. Rice rejected this account of Quintyn's injuries. The doctor stated, "Children fall out of bed every day in America and do not receive the severity and the types and the numerous locations of the type of injuries that this child had."

Jimmie Elizabeth Cupp, a registered nurse, was also working in the emergency room at East Tennessee Baptist Hospital on June 29, 1994. She testified at the appellant's trial that she observed Quintyn arrive at the emergency room and overheard the appellant inform the doctor that Quintyn had fallen from his crib. Specifically, the appellant recounted to the doctor that he was preparing his son's food when he heard a noise in the child's room. Upon investigating, the

appellant discovered that the side of his son's crib had come loose and the child had fallen to the floor.

Cupp further recalled that, during the doctor's attempts to resuscitate Quintyn, the appellant was unwilling to provide the child's medical history to the nurses, instead pacing in the hallway outside the emergency room. Cupp opined that, at this time, the appellant appeared arrogant and unconcerned about his child. Subsequently, the doctor met with both the appellant and Wilson in the "family room" and notified them of Quintyn's death. During this interview, Wilson sat beside the hospital chaplain "with her head on his shoulder and just cried real quiet and real softly." The appellant remained standing in the doorway.

Dr. Frances K. Patterson, a pathologist with the University of Tennessee, performed an autopsy on Quintyn on June 30, 1994. She testified at the appellant's trial that an external examination of the child revealed multiple bruises on the surface of his skin, one small laceration over his left eye, and several old scars that were fully or partially healed.

> With respect to the multiple bruises, Dr. Patterson testified:
> [Quintyn] had what we call hematomas, which are areas in which bleeding has gone into the tissue, in the scalp, several of those. And then he had a large hematoma on the left cheek and side of the face. The right cheek, I believe also, saw one or two. On the lower back, the buttocks, the left anterior lower leg, the right posterior thigh.

The doctor also observed bruising on Quintyn's chest.

Like Dr. Rice, Dr. Patterson did concede that the "bruises" on Quintyn's lower back and buttocks could have been birthmarks. Moreover, she conceded that some of the bruising on the child's chest had likely resulted from the administration of CPR. However, she noted additional bruising underneath the bruising caused by CPR. Also, the doctor specifically recalled that bruising on Quintyn's cheek was in the shape of a hand print and was consistent with someone "striking a normal child very hard."

With respect to the scarring, Dr. Patterson testified that she observed circular wounds on Quintyn's arms, legs, and upper back. These wounds were healed or partially healed. She recalled that they were "about the size of what you might expect a bite to look like, but we weren't, you know, positive." She also observed several smaller wounds that were healed or partially healed. The doctor recalled that these wounds appeared to be cigarette burns.

An internal examination of the child's body further revealed subdural and subarachnoid hemorrhaging in his brain and hemorrhaging in his abdomen. With respect to the hemorrhaging in Quintyn's brain, Dr. Patterson testified that the subdural and subarachnoid hemorrhaging occurred both in the left area and in the right posterior area of the child's head. With respect to the abdominal hemorrhaging, Dr. Patterson testified that there were three separate areas of injury. First, Quintyn had suffered an injury to the lining of his stomach. Second, he had suffered

an injury between his stomach and his small intestine. Third, he had suffered an injury to the muscle underneath his kidney.

Dr. Rice opined that the injuries to Quintyn's head and abdomen, including the bruising on Quintyn's scalp and face, "were definitely all very recent." Moreover, like Dr. Rice, Dr. Patterson asserted that all of these injuries could not have resulted from a single fall because "[t]here were too many of them, and they were in all different parts of the body." In contrast to Dr. Rice's testimony, Dr. Patterson opined that most of Quintyn's injuries appeared to have resulted from "blunt-force trauma" and "were consistent with the use of a human hand." The doctor specifically rejected CPR as a possible source of the head and abdominal injuries.

As to the number and severity of the blows inflicted upon Quintyn, Dr. Patterson asserted that the child's head injuries were the result of at least four "very, very hard blows," "maybe more." She similarly opined that the injuries to the child's abdomen had likely been caused by three separate blows, although she conceded the possibility that they had been caused by a single blow. Specifically, she stated that, "if someone with a very large fist was to hit a child in the abdomen very hard, it's possible that those three hemorrhages could all occur at one time." Similarly, she stated that a single blow with a baseball bat could cause the abdominal hemorrhaging. She emphasized, however, that the single blow would have to be "very, very hard." She explained that Quintyn's abdominal injuries were similar to "seat belt injuries. . . . automobile accident[] [injuries]. Very severe blows, not just falling out of bed or, you know, falling down and tripping."

Dr. Patterson concluded that Quintyn's death resulted from "the subarachnoid and the subdural hemorrhages with close head injury to the brain." She observed that Quintyn's death was probably not instantaneous, instead occurring over at least several minutes. She explained that she had measured approximately five ounces of blood in Quintyn's brain tissue, and "there would have had to been a few minutes there for [that] blood to seep out of the blood vessels into the [brain] tissue."

Jasma Nishee Wilson, Quintyn's mother, testified at the appellant's trial that she met the appellant seven or eight years prior to this offense when she was living in New York. Subsequently, she had two children with the appellant, including Quintyn, who was born on March 7, 1993. In May 1993, Wilson moved to Knoxville, Tennessee, with her two children and lived for some time with her sister, Marion Carter, and her sister's boyfriend, Clayton Martin, Jr. In October 1993, the appellant joined Wilson and their children in Tennessee, and, in May 1994, the appellant and his family moved into their own apartment.

Following the family's move, Wilson worked during the day at a Kroger's grocery store while the appellant cared for the children. Conversely, at night, the appellant worked as a janitor for the University of Tennessee hospital while Wilson remained at home with the children. This arrangement continued until Wilson placed her children in daycare shortly before this offense. However, on June 29, 1994, the day of this offense, Wilson awakened late and did not have time to take the children to the daycare before going to work at Kroger's. Accordingly, when the appellant

returned home from work, he agreed to care for Quintyn. Although not entirely clear from the record, Wilson apparently made other arrangements for the care of their daughter. Wilson recalled that the appellant appeared to be unusually tired on that morning.

Later on the same day, at approximately 12:00 p.m. or 12:30 p.m., Wilson received a call at work from the appellant, who informed her that Quintyn had fallen from his crib and was not breathing. Wilson immediately returned home. Upon her arrival, she discovered that Quintyn was lying on a bed in one of the bedrooms and was very still. When she learned that the appellant had not yet called for medical assistance, Wilson called 911.

Wilson recalled at trial that, prior to going to work on June 29, she did not notice any bruises on her son or observe any strange behavior by her son. She confirmed, however, that her son had a birthmark or discoloration of the skin on his lower back. She also testified that her son had been bitten by a tick on the back of one knee, and the wound had left a scar. Moreover, in late 1993, her son had received medical treatment for flea bites, skin inflammation, and eczema. Wilson concluded that she had never abused her son, nor had she ever suspected the appellant of abusing her son.

Ron Humphrey, an officer with the Knoxville Police Department, testified at the appellant's trial that, in June 1994, he was a child sexual abuse investigator and participated in the questioning of the appellant on June 29, 1994. According to Humphrey, the investigator advised the appellant of his Miranda rights at approximately 4:11 p.m., whereupon the appellant agreed to provide a statement to the police. Specifically, the appellant recounted to police that, on the day of this offense, he returned home from work at approximately 7:00 a.m. or 7:30 a.m. At that time, Quintyn was sleeping in his crib, and Wilson was preparing to go to work. Sometime after Wilson's departure, at approximately 11:30 a.m. or 12:00 p.m., Quintyn awoke, and the appellant changed the child's diaper and gave him a bottle of milk. The appellant then left his son in his crib and went to the kitchen to prepare cream of wheat for the child. The appellant recalled:

> And I was putting the cream of wheat in and I just heard the rumble in the back and I just ran to the back and you know, he was on the floor. And he was like, like a, a cry that he's never had before. I've never heard him cry like that before. So you know, I got kind of panic. I picked him up. I asked him what was going on you know, I, I . . . see if he was alright, you know? He was still he, he just like stiffened up on me for a minute you know, stiffened all out and then he just relaxed again and you know, I thought he was alright. But then I looked at him and you know, like his palms, his hands was turning purple or something like that.

The appellant carried the child into his daughter's bedroom and placed him on the bed. The child continued to cry for at least one minute. At some point, the child stopped crying and began to breathe heavily. The child appeared to be weak and was making "whining noise[s]."

Realizing that "something was wrong," the appellant called Wilson. According to the appellant, approximately ten or fifteen minutes elapsed between his telephone call to Wilson and her arrival at the apartment. He initially suggested to police that he called 911 during this time interval. However, he ultimately conceded that he only called 911 following Wilson's arrival. In any event, the appellant asserted that at no time prior to Wilson's arrival at the apartment did he realize that his son had stopped breathing. The appellant further asserted that, subsequently, at the direction of the 911 operator, he attempted to administer CPR to Quintyn by pushing on the child's stomach.

The appellant admitted that, immediately after his son fell from the crib, he shook Quintyn to determine if the child was alright. However, the appellant denied shaking the child violently. Indeed, he denied any abuse of his son, including sexual abuse. The appellant did state that his mountain bike had fallen on Quintyn one or two weeks prior to Quintyn's death. Moreover, the appellant asserted that Quintyn had frequently fallen from his crib in the past. He explained that a screw, which fastened the side of the crib to the frame, periodically came loose. The appellant related that the crib was approximately four feet above a tile floor, which was partially covered by a small rug. Finally, the appellant conceded that he had previously bitten Quintyn in play.

Following the appellant's initial statement, Humphrey again interviewed the appellant at 6:26 p.m., re-administering to the appellant the Miranda warning. During this interview, the appellant provided a different account of his son's death:

> He was left with me you know, to take care of him. He was supposed to go to daycare center and I told them . . . that, I told my girl I could handle him you know, because he cries a lot so I told them . . . I could handle him, you know? And then she left him there. She left him with me. And she left. So I slept until about, I don't know what time and he, he got up and he, he woke up you know, crying. He had s**t in . . . , doo-doo in his pants so I changed him, gave him his milk and stuff and you know, he kept crying and I kind of losed it and you know, I shook him and let him know you know, it was alright, that I didn't know that I had harmed him. And you know, I guess when I saw that I had harmed him, I got kind of nervous and stuff like that and tried to do something but you know, I guess it was too late.

In short, the appellant admitted that Quintyn had not fallen from his crib and that, instead, the appellant had held the child under the arms and had shaken Quintyn approximately two times "front to back." The appellant related that, after he shook Quintyn, the child appeared to be in pain. Moreover, the appellant recalled:

> I didn't know what to do . . . I was nervous. All types of things just going through my head. I was going to jail, this that and the other. I didn't know what to do. All I could do was call [Wilson] and tell her to come home.

The appellant conceded that Quintyn stopped breathing "a little bit before" Wilson's arrival at the apartment. The appellant concluded that he never intended to harm his child and complained that Quintyn had cried because his mother had spoiled him.

Clayton Martin, Jr., testified at the appellant's trial that, at the time of this offense, he was living with Wilson's sister, Marion Carter. He recounted that, following Quintyn's death, he removed furniture from Wilson's apartment, including the baby's crib. He asserted that, at that time, the crib was in good condition.

Finally, Karlene Heck, a registered nurse employed by the Knox County Health Department, testified at the appellant's trial that she saw Quintyn Wilson on June 13, 1994, during a "therapeutic visit" required by the Women, Infants, and Children (WIC) program. Heck further stated that her records of the visit do not include any reference to injuries on the child. She noted that she was required by law to report any injuries.

Following the presentation of the State's case-in-chief, the defense rested without presenting any evidence. On the basis of the State's evidence, the jury returned a verdict of guilt of first degree murder by aggravated child abuse. The court immediately proceeded to the sentencing phase of the appellant's trial.

B. Sentencing Phase

At the sentencing phase, the State relied in its case-in-chief upon the proof adduced during the guilt/innocence phase to establish the aggravating circumstances that (1) the murder was committed against a person less than twelve years of age, and the defendant was eighteen years of age or older, Tenn. Code Ann. § 39-13-204(i)(1); and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death, id. at (i)(5).

The appellant, in turn, presented proof in support of the following statutory and non-statutory mitigating circumstances, including (1) the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance; (2) the youth of the appellant; (3) the capacity of the appellant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect that was insufficient to establish a defense to the crime but substantially affected his judgment; (4) the appellant has the potential to make a contribution to society during his incarceration; (5) the appellant's conduct and behavior during his incarceration pending trial; and (6) the appellant's opportunity or lack thereof to develop as a fully functioning member of society because of a history of child abuse, abandonment, or neglect. See Tenn. Code Ann. § 39-13-204(j).[2]

[2] At the close of the sentencing phase, the trial court also instructed the jury in accordance with Tenn. Code Ann. § 39-13-204(j)(9) that it could consider any other mitigating circumstance raised by either the prosecution or the defense during both the guilt/innocence phase of the trial and the sentencing phase.

The appellant first presented the testimony of Dr. Peter B. Young, a clinical psychologist and a neuropsychologist. Dr. Young testified that he had interviewed the appellant on six different occasions in 1997. During these interviews, the psychologist obtained an extensive history of the appellant. Specifically, Dr. Young learned that the appellant was born in New York on October 7, 1968. The appellant's mother's name was Sonia Clark, but the appellant did not know the identity of his father. In any event, soon after the appellant's birth, the appellant's mother initiated a relationship with Wilfredo Torres, Sr., and bore a second child, Wilfredo Torres, Jr. Subsequently, the appellant's mother disappeared, and Torres, Sr., placed the appellant and his half-brother in the care of their "grandparents," i.e., Torres, Sr.'s mother and step-father. At some point, the appellant's grandfather also departed, leaving the children in the sole care of their grandmother.

The appellant and his half-brother lived in New York with their grandmother until 1978, at which time the appellant's grandmother became ill and moved to Puerto Rico, taking the children with her. During his grandmother's illness and until her death in 1982, the appellant was her primary care-giver. Following her death, the appellant's grandfather resumed custody of the children until June 1983, at which time he sent the children back to New York to live with various relatives. In May 1984, the appellant and his half-brother recommenced living with Torres, Sr., who now also had a five-year-old son. Soon thereafter, the appellant and his half-brother pled guilty to sexually abusing the child and were placed in a juvenile detention center.

Upon their release from the juvenile detention center, the appellant and his half-brother lived with yet another relative before being placed in the care of a foster parent named Lawrence Jennings. According to the appellant, Jennings was a good man and cared for the children. However, in 1987, Jennings died of a heart attack, and the appellant "started doing more and more things that were delinquent," including becoming "involved in the gangs and the violence that was going on in New York." In 1990, the appellant was convicted of possession of a firearm and was incarcerated in prison until 1992. Upon his release, the appellant pursued a relationship with Jasma Wilson, with whom he ultimately had two children, including Quintyn. Shortly before this offense, the appellant moved with Wilson and their two children to Knoxville, Tennessee. As to the instant offense, the appellant informed Dr. Young, in essence, that he had "inadvertently" dropped his son.

During the course of his interviews with the appellant, Dr. Young also performed various psychological tests, including the Minnesota Multiphasic Personality Inventory, Second Edition (MMPI II), the Millon Clinical Multi-Axial Inventory, Third Edition, the Coolidge Axis II Inventory, the Rorschach, and the Carlson Psychological Survey. On the basis of these tests, the psychologist opined that the appellant was suffering from paranoid schizophrenia. He explained to the jury that paranoid schizophrenia

> is a - - a zone of existence or an area of adaptation in life where one has experiences - - they're highly discrepant from what most people experience. One can hear voices, one can see things that aren't there, one has breaks with normal consensual reality, one doesn't experience the world the way most of us do.

Dr. Young further observed that people suffering from paranoid schizophrenia strive to maintain an appearance of normality and that, therefore, the disorder is frequently difficult to detect without psychological testing.

As to the validity of his diagnosis of paranoid schizophrenia, Dr. Young conceded that the results of the Rorschach test did not support his diagnosis. Moreover, the psychologist conceded that false responses by a test subject might skew test results. In this regard, he acknowledged that, on the Coolidge Axis II Inventory, the appellant claimed that he had never been physically cruel in his relationships with other people and that, on the contrary, he was the one who was usually hurt in his relationships. Moreover, the appellant denied juvenile delinquency. Dr. Young also conceded that, although the overall results of the MMPI II supported his diagnosis, the portion of the Inventory designed to detect fabrication by a test subject suggested that the overall results had "questionable validity." However, Dr. Young noted that the portion of the Inventory designed to detect fabrication was directed toward test subjects with low cognitive functioning, a characteristic which the appellant does not possess. Finally, Dr. Young conceded that the appellant did not meet the criteria for paranoid schizophrenia set forth in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV").

In addition to his diagnosis of paranoid schizophrenia, Dr. Young observed that the appellant "did report on two occasions being hit in the head with a baseball bat, and it's a high probability that that had some negative effect on him." Specifically, he noted that psychological testing had revealed that the appellant experienced difficulties in "visual processing" and "abstract reasoning."

The appellant next presented the testimony of Deanna Lamb, an officer with the Knox County Sheriff's Department. Lamb testified that, since the appellant's incarceration in the Knox County Jail for the instant offense, she had never observed any indication that the appellant was suffering from a mental illness. She also related that the appellant had committed relatively few rule infractions during his incarceration. Indeed, she testified that, since 1998, the appellant had been participating in the Legal Lives Program at the Knox County Jail, a program designed to teach children the consequences of criminal behavior. Mary Manis, an employee of the Knoxville News-Sentinel and South Doyle High School, testified that she attended the Legal Lives Program and observed the appellant speaking with a group of school children, including her son. She stated that the appellant's speech "really impacted" the children.

Brenda Lindsay-McDaniel, the Judicial Commissioner for Knox County, also testified on behalf of the appellant. She testified that, since his incarceration in the Knox County Jail, the appellant had frequently volunteered to act as an interpreter for Spanish-speaking defendants during arraignment proceedings. According to Lindsay-McDaniel, she never noticed any sign that the appellant was suffering from a mental illness. Rather, she described the appellant as "very articulate," "nice," and "polite."

Finally, the appellant presented the testimony of Florencio Cirino, an assistant pastor of a church in Puerto Rico and a former neighbor of the appellant. Cirino testified that he knew the appellant when the appellant was between the ages of eight and fourteen years old. At that time, the appellant was living with his grandparents in Cirino's neighborhood. According to Cirino, the appellant frequently attended church with the Cirino family and played with the Cirino children. Cirino recalled that the appellant was a "very nice boy." However, Cirino also recalled that, following the death of the appellant's grandmother, the appellant's grandfather frequently locked the appellant out of his house. On these occasions, Cirino would allow the appellant to accompany him home and would ensure that the appellant had enough to eat.

In rebuttal of the appellant's proof, the State presented the testimony of Sharon Norwood Arnold, the psychiatrist at the Helen Ross McNabb Center. She testified that she interviewed the appellant for one hour on November 13, 1997. During her interview, she conducted a mental status examination, including testing the appellant's memory and his ability to concentrate. Moreover, she compiled a history of the appellant by gathering information from the appellant, his employer at the time of this offense, and the police. She concluded that, notwithstanding the appellant's prior diagnosis as paranoid schizophrenic, there was no evidence that the appellant was suffering from a mental illness. She specifically confirmed that the DSM-IV is a standard diagnostic tool of psychologists and psychiatrists and that the appellant did not meet the criteria for paranoid schizophrenia set forth in the DSM-IV.

The State also presented the testimony of Salvador Ruiz, an inmate of the Knox County Jail. He testified that he had briefly shared a cell with the appellant following this offense. Ruiz related to the jury that, on one occasion, the appellant informed his cell mate that he was participating in the Legal Lives Program in order to "juke [i.e., mislead] the people, whoever was charging him." Ruiz also recalled that the appellant frequently referred to himself as "a chameleon."

At the conclusion of the sentencing phase, the jury found beyond a reasonable doubt that the State had proved the aggravating circumstances set forth in Tenn. Code Ann. § 39-13-204(i)(1) and (5) and that these aggravating circumstances outweighed any mitigating circumstances. On the basis of these findings, the jury imposed a sentence of death by electrocution.

II. Analysis

A. Guilt/Innocence Phase

i. Constitutionality of Tenn. Code Ann. § 39-13-202(a)(4) (1993)[3]

In disputing his conviction of first degree murder by aggravated child abuse, the appellant first contests the trial court's denial of his pre-trial motion challenging the constitutionality of the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4). On appeal, as in the trial court, the appellant argues that the statute "is unconstitutionally vague and contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 8 and 16 of the Tennessee

[3] Appellant's issue V.

Constitution, in that it has two culpable mental states and fails to properly narrow the class of defendants who will be exposed to a sentence of death."

As recognized by the State in its response, the appellant's statement of the issue and his supporting argument are an amalgam of several different claims. For purposes of clarity, we have attempted to identify each claim and address it individually. Preliminarily, however, it is useful to review the history of Tenn. Code Ann. § 39-13-202(a)(4) (1993).

a. History of Tenn. Code Ann. § 39-13-202(a)(4) (1993)

> Prior to 1988, the first degree murder statute in Tennessee proscribed [e]very murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

Tenn. Code Ann. § 39-2-202(a) (1987). In 1987, however, Kerry Phillip Bowers was charged with the first degree murder of Scotty Trexler, the twenty-one-month-old child of Bowers' girlfriend. State v. Kerry Phillip Bowers, No. 115, 1989 WL 86576, at **1 & 5 (Tenn. Crim. App. at Knoxville, August 2, 1989). At trial, "[t]he State's evidence established that the defendant [had] committed a series of brutal and sadistic assaults over a period of several months against the victim, . . . which ultimately led to the child's death." Id. at *1. Nevertheless, the jury returned a verdict of guilt of second degree murder, apparently unable to find beyond a reasonable doubt that the defendant had premeditated and deliberated Scotty's death. Id. The jury's verdict provoked considerable public outrage, directly resulting in the amendment of the first degree murder statute by the Tennessee General Assembly in 1988 to include first degree murder by child abuse. Gary R. Wade, The Trexler Saga: Hale and Middlebrooks, 23 Mem. St. U. L. Rev. 319, 320 (1993); see also State v. Hale, 840 S.W.2d 307, 310 n.3 (Tenn. 1992).

Specifically, the General Assembly added the following language to Tenn. Code Ann. § 39-2-202:

> It shall also be murder in the first degree to kill a child less than thirteen (13) years of age if the child's death results from one (1) or more incidents of a protracted pattern or multiple incidents of child abuse committed by the defendant against such child or if such death results from the cumulative effects of such pattern or incidents.

Act of April 14, 1988, Ch. 802, 1988 Tenn. Pub. Acts 575, 576 (codified as Tenn. Code Ann. § 39-2-202(a)(2) (1988)). The amendment was popularly known as the "Scotty Trexler Law."

Subsequently, in 1989, the General Assembly revised the criminal code, temporarily omitting the Scotty Trexler Law from the definition of first degree murder. Tennessee Criminal Sentencing Reform Act of 1989, Ch. 591, § 1, 1989 Tenn. Pub. Acts 1169, 1197. From 1989 until 1991, the offense of first degree murder was defined as an intentional, premeditated, and deliberate

killing of another or a reckless killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb. Id. In 1991, the legislature again added to the first degree murder statute the offense of first degree murder by child abuse, employing language substantially identical to the original Scotty Trexler Law. Tenn. Act of May 21, 1991, Ch. 377, § 2 (West, WESTLAW 1991 Sess.)(codified as Tenn. Code Ann. § 39-13-202(a)(4) (1991)).[4]

In 1992, however, in Hale, 840 S.W.2d at 313, our supreme court held that the original Scotty Trexler Law violated principles of due process embodied in Article I, Section 8 of the Tennessee Constitution because the statute permitted a conviction of first degree murder on the basis of a defendant's guilt of prior, uncharged instances of child abuse. Additionally, the court concluded that "death eligibility under the provisions of Tenn. Code Ann. § 39-2-202(a)(2) (Supp. 1988) [was] constitutionally disproportionate punishment violative of Article 1, § 16 of the Tennessee Constitution" because death eligibility under the statute could result from a defendant's commission of misdemeanor child abuse. Hale, 840 S.W.2d at 315.

Hale effectively invalidated the legislature's 1991 reinsertion of the Scotty Trexler Law into the first degree murder statute. Accordingly, following Hale, the public "bombarded our legislature with demands to 'fix' the statute." Wade, supra, at 321. As noted by our presiding judge, "The Scotty Trexler legacy [was] the overwhelming public mandate that an aggravated instance of abuse resulting in the death of a child qualif[ied] not only as first degree murder but also for capital punishment." Id. at 324.

In 1993, in response to this public mandate, the legislature once again attempted to proscribe first degree murder by child abuse. Act of May 6, 1993, Ch. 338, 1993 Tenn. Pub. Acts 537. The newly amended first degree murder statute, which was in effect at the time of the instant offense, stated, in full, as follows:

> (a) First degree murder is:
> (1) An intentional, premeditated and deliberate killing of another; or
> (2) A reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy;
> (3) A reckless killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb; or

[4] Instead of requiring proof of prior "child abuse," the new statute defined first degree murder, in relevant part, as "[a] killing of a child less than thirteen (13) years of age, if the child's death results from a protracted pattern or multiple incidents of *bodily injury* committed by the defendant against such child and the death is caused either by the last injury or the cumulative effect of such injuries." Tenn. Code Ann. § 39-13-202(a)(4) (1991)(emphasis added); see also Hale, 840 S.W.2d at 317 n. 5.

> (4) A reckless killing of a child less than thirteen (13) years of age, if the child's death results from aggravated child abuse, as defined by § 39-15-402, committed by the defendant against the child.

Tenn. Code Ann. § 39-13-202 (1993). Tenn. Code Ann. § 39-15-402 (1993), in turn, provides that a person is guilty of aggravated child abuse who knowingly, other than by accidental means, treats a child under eighteen years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare, and the act of abuse results in serious bodily injury to the child or the perpetrator employs a deadly weapon to accomplish the act of abuse. See also Tenn. Code Ann. § 39-15-401 (1993).

Following the offense in this case, in 1994, the General Assembly further amended subsection (a)(4) of Tenn. Code Ann. § 39-13-202 to increase the requisite age of a child-victim from less than thirteen to less than sixteen. Tenn. Act of May 2, 1994, Ch. 883, § 1 (West, WESTLAW 1994 Sess.). Finally, in 1995, the legislature repealed Tenn. Code Ann. § 39-13-202(a)(4) and simply added aggravated child abuse to the enumerated felonies capable of supporting a felony murder conviction. Act of May 24, 1995, Ch. 460, § 1, 1995 Tenn. Pub. Acts 801, 802 (codified as Tenn. Code Ann. § 39-13-202(a)(2)(1997)). Additionally, the legislature eliminated the felony murder statute's mens rea requirement that the killing be reckless. Id.

b. Vagueness

In challenging the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4), the appellant first asserts that, on its face and as applied in his case, the statute is violative of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Tennessee Constitution because the statute is vague. In support of this contention, the appellant appears to argue that the statute requires "two conflicting culpable mental states," i.e., the statute simultaneously requires a "reckless" killing and "knowing" child abuse. The State, in turn, disputes that the statute is vague in a general sense or that the statute failed to "put Torres on notice that his behavior was prohibited."

The appellant offers very little argument or citation to authority in support of this specific contention. Tenn. R. App. P. 27(a)(7); Tenn. Ct. of Crim. App. Rule 10(b). In any event, the appellant's contention is without merit. Due process requires that a statute describe an offense with sufficient clarity to provide both fair notice to citizens of prohibited conduct and minimal guidelines for law enforcement officials and the courts. Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 2298 (1972); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993); State v. Forbes, 918 S.W.2d 431, 448 (Tenn. Crim. App. 1995); State v. Rhonda Leigh Burkhart, No. 01C01-9804-CC-00174, 1999 WL 1096051, at *3 (Tenn. Crim. App. at Nashville, December 6, 1999), perm. to appeal granted, (Tenn. 2000). Therefore, a statute is unconstitutionally vague "[i]f people of common intelligence must necessarily guess at the meaning of a statute and differ as to its application." State v. Boyd, 925 S.W.2d 237, 243 (Tenn. Crim. App. 1995); see also Davis-Kidd Booksellers, Inc., 866 S.W.2d at 532; Forbes, 918 S.W.2d at 447-448; Burkhart, No. 01C01-9804-CC-00174, 1999 WL 1096051, at *3. In determining whether a criminal statute is unconstitutionally

vague, courts in Tennessee engage in both a general evaluation of the statute in question and an examination of its application to a particular defendant. Burkhart, No. 01C01-9804-CC-00174, 1999 WL 618861, at *11. However, "absent vagueness as to all its applications, a defendant's challenge to a statute is limited to the defendant's own conduct." State v. Kena Hodges, No. 01C01-9804-CR-00170, 1999 WL 618861, at *11 (Tenn. Crim. App. at Nashville, August 11, 1999), perm. to appeal denied, (Tenn. 2000).

We conclude that the requirement of two different mental states in the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) renders the statute neither vague on its face nor vague as applied to the appellant's case. Viewing the statute in a general sense, "[t]here is nothing inconsistent about a reckless killing being committed in the course of knowing child abuse." State v. Roberson, 988 S.W.2d 690, 693 (Tenn. Crim. App. 1998). Our supreme court implicitly agreed with this observation in State v. Ducker, 27 S.W.3d 889, 895 (Tenn. 2000), in the context of determining whether aggravated child abuse was a lesser included offense of the 1994 version of first degree murder by aggravated child abuse. Quoting the statutory definition of "reckless" in Tenn. Code Ann. § 39-11-302(c) (1994),[5] the court observed:

> The child murder statute criminalizes the reckless killing of a child less than sixteen if the child's death results from aggravated child abuse, which is the knowing treatment or neglect of a child so as to cause injury or adversely affect the child's health. In other words, the more serious charge simply requires an additional element that, along with the knowing act of child abuse or neglect, the person consciously disregards a substantial and unjustifiable risk that death could occur.

Ducker, 27 S.W.3d at 895. Later in the opinion, the court further clarified that the mens rea of "knowing" contained in the child abuse statute refers only to the conduct elements of treatment or neglect of a child and not to any result of that conduct. Id. at 897. In contrast, the mens rea of "reckless" in Tenn. Code Ann. § 39-13-202(a)(4) refers to the result, i.e., the killing of the child.

Turning to an evaluation of the statute in relation to the appellant's conduct, the evidence adduced at trial in this case, when viewed in a light most favorable to the State, established that the appellant struck his fifteen-month-old child in the head a minimum of four times with sufficient force to cause severe hemorrhaging in the child's brain. Additionally, the appellant stuck Quintyn at least once, but likely three times, in the abdomen with such force that the resulting

---

[5] The definition of reckless at the time of the instant offense was identical to the definition of reckless in 1994. Specifically, the mental state of reckless was defined as follows:

> "Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302(c) (1993).

injuries were comparable to automobile accident injuries. The appellant inflicted this abuse in order to stop the child from crying. He achieved his aim when Quintyn died as a result of the abuse. The statute clearly provided fair notice to the appellant that this conduct was prohibited.

c. Narrowing and Proportionality

The appellant next appears to argue that the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) is violative of the prohibition against cruel and unusual punishment embodied in Article I, Section 16 of the Tennessee Constitution both because it fails to adequately narrow the class of death-eligible defendants and because, in any event, it authorizes punishment that is per se disproportionate to the offense of first degree murder by aggravated child abuse. In support of these contentions, the appellant relies upon the statute's authorization of the death penalty for an unintentional killing committed during the perpetration of a felony that is "incidental" to the killing.

The State responds to the appellant's argument by noting that, in Tennessee, the legislature has chosen to narrow the class of death-eligible defendants by requiring a finding of additional aggravating circumstances rather than by narrowly defining first degree murder.[6] Moreover, the State analogizes the offense of first degree murder by aggravated child abuse to the offense of felony murder and cites our supreme court's decision in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), for the proposition that the death penalty is not per se disproportionate to the offense of felony murder.

I. Merger Doctrine

As noted above, in challenging the constitutionality of the statute under Article I, Section 16 of the Tennessee Constitution, the appellant relies in part upon the statute's prohibition of a killing committed during an "incidental" felony, i.e., aggravated child abuse. At oral argument, the appellant's attorneys appeared to concede that, absent the eligibility of an offender for a sentence of death, the legislature could so define first degree murder. In any event, we wish to clearly distinguish from the appellant's constitutional challenge a principle commonly referred to as the "merger" doctrine.

> The merger doctrine was
> developed . . . as a shorthand explanation for the conclusion that the felony-murder rule should not be applied in circumstances where the only underlying (or "predicate") felony committed by the defendant was assault. The name of the doctrine derived from the characterization of the assault as an offense that "merged" with the resulting homicide.

[6] However, we note that, in response to the appellant's challenge to the application of the aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(1)(1993) to the offense of first degree murder by aggravated child abuse, the State argues that the definition of the offense is itself a constitutionally adequate narrowing device. See infra section II(B)(ii). As subsequently discussed, we must agree.

People v. Hansen, 885 P.2d 1022, 1028 (Cal. 1994). More broadly, "the merger doctrine bars the use of the felony murder rule when the underlying felony directly results in, or is an integral part of, the homicide." Andrae Barnett v. State, No. CR-98-2018, 2000 WL 218166, at *3 (Ala. Crim. App. February 25, 2000)(publication pending); see also State v. Campos, 921 P.2d 1266, 1270-1272 (N.M. 1996)(outlining varying applications of the merger doctrine in different jurisdictions).

Courts have generally declined to hold that the merger doctrine implicates any principle of constitutional law. See e.g., Rhode v. Olk-Long, 84 F.3d 284, 289 (8th Cir. 1996)(rejecting the defendant's due process challenge to her conviction of felony murder predicated upon her commission of the offense of child endangerment because her argument lacked a constitutional basis, depending instead upon the merger doctrine); State v. Lopez, 847 P.2d 1078, 1089 (Ariz. 1992)(observing that the court could conceive of no constitutional impediment "precluding the legislature from classifying child abuse that results in the death of the child as a predicate felony that triggers the felony-murder statute"); Mapps v. State, 520 So.2d 92, 93-94 (Fla. Dist. Ct. App. 1988)(rejecting the defendant's argument that a felony murder statute that included aggravated child abuse as a predicate offense was unconstitutional); State v. Tremblay, 479 P.2d 507, 511 (Or. Ct. App. 1971)(observing that the merger doctrine does not implicate any principle of constitutional law). Instead, courts have approached the merger doctrine as a matter of discerning legislative intent and, more specifically, as a matter of "preserving some meaningful domain in which the Legislature's careful graduation of homicide offenses can be implemented." Hansen, 885 P.2d at 1028. Accordingly, the merger doctrine has been applied largely, if not entirely, in those states in which the felony murder statute at issue failed to specifically define the predicate felonies capable of supporting a conviction.[7] Alternatively, "if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no 'merger' occurs." Lopez, 847 P.2d at 1089; see also Mapps, 520 So.2d at 93; State v. Rhomberg, 516 N.W.2d 803, 805 (Iowa 1994); State v. Smallwood, 955 P.2d 1209, 1226-1228 (Kan. 1998); People v. Jones, 530 N.W.2d 128, 129 (Mich. Ct. App. 1995); Faraga v. State, 514 So.2d 295, 302-303 (Miss. 1987); State v. Williams, 24 S.W.3d

[7] See, e.g., Barnett, No. CR-98-2018, 2000 WL 218166, at *2 (applying the merger doctrine in the context of a first degree felony murder statute that authorized a conviction when the offender caused the death of a person during the commission of certain enumerated felonies and "any other felony clearly dangerous to human life"); Hansen, 885 P.2d at 1025-1026 (applying the merger doctrine in the context of a second degree felony murder statute authorizing a conviction for a killing committed during the perpetration of any felony inherently dangerous to human life); Foster v. State, 444 S.E.2d 296, 297 (Ga. 1994)(applying the merger doctrine in the context of a first degree felony murder statute authorizing a conviction for a killing committed during the perpetration of "a felony"); People v. Morgan, 718 N.E.2d 206, 209 (Ill. App. Ct. 1999)(applying the merger doctrine in the context of a first degree felony murder statute authorizing a conviction for a killing committed during the perpetration of any forcible felony); Commonwealth v. Wade, 697 N.E.2d 541, 545-546 (Mass. 1998)(considering application of the merger doctrine in the context of a first degree felony murder statute authorizing conviction for a killing committed during the perpetration of any felony punishable by life imprisonment, apparently a relatively broad category of felonies in Massachusetts); Campos, 921 P.2d at 1270-1272 (applying the merger doctrine in the context of a first degree felony murder statute that did not enumerate possible predicate felonies); State v. Branch, 415 P.2d 766, 767 (Or. 1966)(applying the merger doctrine in the context of a second degree felony murder statute that authorized conviction for a killing committed during the perpetration of any felony other than those specifically designated by the legislature as capable of supporting a first degree felony murder conviction).

101, 115-117 (Mo. Ct. App. 2000); State v. McCann, 907 P.2d 239, 241 (Okla. Crim. App. 1995); Tremblay, 479 P.2d at 511.

Thus, in State v. Bobby G. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **10-13 (Tenn. Crim. App. at Knoxville, September 18, 2000), this court declined to apply the merger doctrine to the legislature's 1995 amendment to Tenn. Code Ann. § 39-13-202, which amendment added aggravated child abuse to the list of felonies capable of supporting a felony murder conviction. In reaching our conclusion in Godsey, this court essentially agreed that the application of the merger doctrine depended upon legislative intent, and "constitutional due process safeguards" did not prevent the legislature from abandoning the doctrine. Id. Citing "[t]he course of events . . . since the ruling in State v. Bowers," we further observed that "the General Assembly has expressed an unmistakable intent to have aggravated child abuse resulting in death qualify as felony murder" and that "[t]he legislature does not intend for the merger doctrine to preclude a first degree murder conviction where death is the consequence of an aggravated child abuse." Id. at *12.

Because the legislative intent underlying the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) is identical to the legislative intent underlying the 1995 amendment at issue in Godsey, the doctrine of merger is similarly inapplicable in this case. To the extent the appellant suggests otherwise in his brief, we disagree. With that in mind, we now turn to the appellant's contention that the statute is violative of Article I, Section 16 of the Tennessee Constitution because it fails to adequately narrow the class of death-eligible defendants and because it authorizes punishment that is per se disproportionate to the offense of first degree murder by aggravated child abuse.

II. Narrowing

The federal constitution provides the minimum standard or the floor of constitutional protection in a State's criminal justice system. State v. Black, 815 S.W.2d 166, 192 (Tenn. 1991). Accordingly, we note that the federal prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution and applicable to the states through the Due Process Clause of the Fourteenth Amendment, limits the permissible reach of substantive criminal law in three ways:

> (1) it limits the methods which may be used to inflict punishment; (2) it limits the amount of punishment which may be prescribed for various offenses; and (3) it bars any and all penal sanctions in certain situations.

1 WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.14(f), at 248-249 (West Publishing Co. ed., 1986).

As to the first limitation, the United States Supreme Court has held that the death penalty is a permissible method of punishment. See, e.g., Gregg v. Georgia, 428 U.S. 153, 157, 226, 96 S. Ct. 2909, 2918, 2949 (1976)(rejecting the argument that "the death penalty, however imposed and for whatever crime, is cruel and unusual punishment"). However, in Furman v. Georgia, 408 U.S. 238, 310, 92 S. Ct. 2726, 2763 (1972)(Stewart, J., concurring), Justice Stewart expressed the consensus of a majority of the Court that, at a minimum, "the Eighth and Fourteenth Amendments

cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed." Rather, a state must

> channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764 (1980) (footnotes omitted); see also Lewis v. Jeffers, 497 U.S. 764, 774, 110 S. Ct. 3092, 3099 (1990). In this case, the appellant asserts that the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) fails to satisfy this requirement.

In order to adequately channel the sentencer's discretion, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983); see also Jones v. United States, 527 U.S. 373, 380, 119 S. Ct. 2090, 2098 (1999). In Lowenfield v. Phelps, 484 U.S. 231, 246, 108 S. Ct. 546, 555 (1988), the Supreme Court clarified that

> [t]he narrowing function required for a regime of capital punishment may be provided in either of . . . two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

See also Tuilaepa v. California, 512 U.S. 967, 971-972, 114 S. Ct. 2630, 2634-2635 (1994); State v. Harris, 989 S.W.2d 307, 315 (Tenn. 1999). In other words, under the federal constitution, in order to render a defendant death-eligible in a homicide case, "the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase" or both. Tuilaepa, 512 U.S. at 972, 114 S. Ct. at 2634-2635.

Of course, "although the Eighth Amendment to the Federal Constitution and Article I, § 16 [of the Tennessee Constitution], are textually parallel, this does not foreclose an interpretation of the language of Article I, § 16, more expansive than that of the similar federal provision." Black, 815 S.W.2d at 188. Nevertheless, our supreme court has likewise declined to hold that the state constitution prohibits the imposition of the death penalty under any circumstances. See, e.g., State v. Middlebrooks, 840 S.W.2d 317, 335 (Tenn. 1992); Black, 815 S.W.2d at 185. Moreover, our supreme court has never suggested that the Tennessee Constitution, in contrast to the United States Constitution, requires the legislature to narrow the class of death-eligible defendants by re-defining the offense of first degree murder rather than by requiring jury findings of aggravating circumstances at the sentencing phase.

Instead, our supreme court has previously rejected claims that Tennessee's first degree murder statute, in particular the felony murder provision, is a constitutionally adequate narrowing device and has emphasized the consequent importance in Tennessee of jury findings of aggravating circumstances at the sentencing phase. This conclusion underlay our supreme court's holding in Middlebrooks, 840 S.W.2d at 346-347, that, when a defendant is convicted of first degree murder

solely on the basis of felony murder, the State's reliance upon an identical felony murder aggravating circumstance at the sentencing hearing does not adequately narrow the class of death-eligible defendants under either the federal or state constitutions. See also State v. Bigbee, 885 S.W.2d 797, 815-816 (Tenn. 1994).

Indeed, in Middlebrooks, 840 S.W.2d at 344, our supreme court remarked, seemingly without perturbation, "Recognizing that Tennessee has not chosen to narrow at the definitional stage, it should be noted that the legislature has, in fact, broadened its first-degree murder statute by adding death by child abuse, which makes the class even larger than pre-Furman." The court was specifically referring to the adoption of the Scotty Trexler Law, which, as noted earlier, permitted a conviction of first degree murder on the basis of a defendant's guilt of prior, uncharged instances of misdemeanor child abuse. Although our supreme court later concluded in State v. Hale, 840 S.W.2d 307, 313 & 315 (Tenn. 1992), that the Scotty Trexler Law was unconstitutional, the court did not base its decision upon the constitutional requirement of narrowing. Again, the court found that the Scotty Trexler Law violated Article I, Section 8 of the Tennessee Constitution because the statute permitted a jury to consider uncharged instances of abuse in convicting a defendant of first degree murder, and the statute violated Article I, Section 16 of the Tennessee Constitution because the death penalty was per se disproportionate punishment for a killing resulting from the commission of misdemeanor child abuse.[8]

Thus, the constitutionality of the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) does not depend upon its efficacy as a constitutionally adequate narrowing device. That having been said, we conclude that the 1993 statutory provision, in contrast to the Scotty Trexler Law, does adequately narrow the class of death-eligible defendants under the federal and state constitutions. We reach this conclusion in light of our recent decision in State v. Bobby G. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **13-15 (Tenn. Crim. App. at Knoxville, September 18, 2000).

In Godsey, this court evaluated both a defendant's conviction of first degree murder by aggravated child abuse under the 1995 amendments to Tenn. Code Ann. § 39-13-202 and the defendant's resultant death sentence. Again, under the 1995 amendments, first degree murder by aggravated child abuse is simply "[a] killing of another committed in the perpetration of . . . aggravated child abuse." Tenn. Code Ann. § 39-13-202(a)(2) (1997). Tenn. Code Ann. § 39-15-402 (1995), in turn, provides that a person is guilty of aggravated child abuse who knowingly, other than by accidental means, treats a child under eighteen years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare, and the act of abuse results in serious bodily injury to the child or the perpetrator employs a deadly weapon to accomplish the act of abuse. See also Tenn. Code Ann. § 39-15-401 (1995). As relevant to our current

[8] We acknowledge that, in addressing the proportionality of a sentence of death to a killing resulting from the commission of misdemeanor child abuse, our supreme court inquired whether the provisions of the Scotty Trexler Law provided a "'"meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not."'" Id. However, we would respectfully submit that the issues of narrowing and proportionality, although related, are distinct.

discussion, we held in Godsey that the application of the aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(1) (1995) to the offense of first degree murder by aggravated child abuse adequately narrows the class of death-eligible defendants. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **13-15.

The (i)(1) circumstance renders a defendant death-eligible when "the murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older." Tenn. Code Ann. § 39-13-204. Because, under Tenn. Code Ann. § 37-1-134(a)(1) (1995), defendants under eighteen years of age are not subject to the death penalty, see, e.g., State v. Karen R. Howell, No. 03C01-9811-CR-00415, 2000 WL 223660, at *9 (Tenn. Crim. App. at Knoxville, February 29, 2000), perm. to appeal denied, (Tenn. 2000), the (i)(1) circumstance effectively narrows the class of death-eligible defendants by limiting the age of the victim. But see State v. Lacy, 983 S.W.2d 686, 696 (Tenn. Crim. App. 1997). Thus, in approving the class of death-eligible defendants resulting from the application of the (i)(1) circumstance to the offense of first degree murder by aggravated child abuse, this court in Godsey explained that the aggravating circumstance

> recognizes that victims under twelve years of age are typically more vulnerable to abuse than those between thirteen and seventeen. The younger the victim, the less likely it is that he or she is capable of defending him or herself or fleeing. . . . In our view, there is a legitimate state interest in affording heightened protection to those most vulnerable in our society.

No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at *15.

Turning to the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4), that statutory provision defines first degree murder by aggravated child abuse as "[a] reckless killing of a child less than thirteen (13) years of age, if the child's death results from aggravated child abuse, as defined by § 39-15-402, committed by the defendant against the child." The definition of aggravated child abuse in 1993 was substantially identical to the definition in effect at the time of Godsey's offense. See Tenn. Code Ann. § 39-15-401 (1993); Tenn. Code Ann. § 39-15-402 (1993). Moreover, as at the time of Godsey's offense, Tenn. Code Ann. § 37-1-134(a)(1) (1993) limited the application of the death penalty to defendants eighteen years of age or older. Accordingly, the 1993 definition of the offense of first degree murder by aggravated child abuse creates a class of death-eligible defendants substantially identical to the class approved in Godsey. The principal difference lies in the placement of the "limiting circumstance," i.e., the age of the victim, in the definition of the offense rather than in a separate sentencing factor. This difference has no constitutional significance.

In sum, the appellant's claim, that the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) is unconstitutional because it does not adequately narrow the class of death-eligible defendants, must fail. First, narrowing is not constitutionally required at the definitional stage. Second, although narrowing need not occur at the definitional stage, Tenn. Code Ann. § 39-13-202(a)(4) is, in fact, a constitutionally adequate narrowing device. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **13-15.

III. Proportionality

In any event, the appellant's challenge to the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) appears to rest most heavily upon constitutional limitations on the *amount* of punishment which may be prescribed for a particular offense. As noted earlier, the appellant asserts that the statute violates Article I, Section 16 of the Tennessee Constitution because it authorizes punishment that is "disproportionate" to the offense of first degree murder by aggravated child abuse under any circumstances. In other words, the appellant is asserting that death is never an appropriate punishment for the offense of first degree murder by aggravated child abuse as set forth in the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4). Again, the appellant relies upon the statute's authorization of the death penalty for an unintentional killing committed during the perpetration of a felony that is "incidental" to the killing.

In addressing the appellant's claim, we initially wish to emphasize that we are concerned here with "'the abstract evaluation of the appropriateness of a sentence for a particular crime'" and *not* with the appropriateness of the penalty imposed in this particular case when compared with the punishment imposed on others convicted of the same crime. State v. Bland, 958 S.W.2d 651, 661-662 (Tenn. 1997)(citation omitted). As required by Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993), we conduct a comparative proportionality review later in this opinion. As to our abstract evaluation of the appropriateness of the death penalty for the offense of first degree murder by aggravated child abuse, we once again find our supreme court's decision in State v. Middlebrooks, 840 S.W.2d 317, 335-341 (Tenn. 1992), and our decision in State v. Bobby G. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **10-13 (Tenn. Crim. App. at Knoxville, September 18, 2000), to be instructive.

In Middlebrooks, 840 S.W.2d at 335-341, our supreme court addressed the issue of whether, in the abstract, the imposition of the death penalty for the offense of felony murder, as defined in Tennessee prior to 1989, is cruel and unusual punishment under Article I, Section 16 of the Tennessee Constitution. As noted previously, under the pre-1989 law, first degree murder was defined as

> [e]very murder perpetrated by means of poison, lying in wait, or by other kind[] of willful, deliberate, malicious, and premeditated killing, *or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.*

Id. at 335-336 (quoting Tenn. Code Ann. § 39-2-202(a)(1987))(emphasis added).

In conducting its abstract evaluation of the appropriateness of the ultimate penalty for the offense of felony murder, the court in Middlebrooks acknowledged that the felony murder doctrine has been subject to the most criticism when used to render a defendant death-eligible. Id. at 337. The court explained that

> [t]he result of the felony murder doctrine in Tennessee is . . . to impose a rule of strict liability allowing the underlying felonious intent to supply the required mens rea for the homicidal actus reus and to impose vicarious liability for the acts of another. Therefore, Tennessee's statute allows convictions for first-degree felony murder of those who commit accidental killings, and of persons who did not kill the victim and may not have intended that the victim be killed or suffer any physical harm.
>
> Courts have often stated that the purpose of the felony murder rule is to deter felons from accidentally or negligently killing in the course of felonies by holding them strictly liable for the results of their dangerous conduct.

Id. at 336 (citations omitted).

Keeping in mind the felony murder statute's imposition of strict liability, the court then utilized the analytical framework it had adopted in State v. Black, 815 S.W.2d 166, 189 (Tenn. 1991). Middlebrooks, 840 S.W.2d at 338. Specifically, the court engaged in the following three inquiries: (1) whether the punishment for the crime conforms with contemporary standards of decency; (2) whether the punishment is grossly disproportionate to the offense; and (3) whether the punishment goes beyond what is necessary to accomplish any legitimate, penological objective. Id.; Black, 815 S.W.2d at 189.

Applying the above analysis, the court concluded that the imposition of the death penalty for felony murder does not per se violate Article I, Section 16 of the Tennessee Constitution. First, the court observed that the imposition of the death penalty for the offense of felony murder generally conforms with contemporary standards of decency. Middlebrooks, 840 S.W.2d at 338. In support of this observation, the court cited the prevailing opinion in Tennessee, as reflected in the actions of the Tennessee General Assembly and the judgments of juries, and also cited the laws of other states. Id. at 338-339. Second, the court held that the penalty of death is not grossly disproportionate to the offense of felony murder merely because the definition of the offense dispenses with any requirement that a perpetrator intend to kill. Id. at 339-340. The court cited with approval the United States Supreme Court's observation in Tison v. Arizona, 481 U.S. 137, 157, 107 S. Ct. 1676, 1688 (1987), that "some nonintentional murderers may be among the most dangerous and inhumane of all." Middlebrooks, 840 S.W.2d at 339. Third and finally, the court concluded that the imposition of the penalty of death for the offense of felony murder serves the legitimate, penological objectives of retribution and deterrence. Id. at 340-341.

In reaching its conclusion, the court in Middlebrooks acknowledged the minimum federal standards set forth in Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982), and Tison, 481 U.S. at 137, 107 S. Ct. at 1676, for determining the proportionality of the death penalty to the offense of felony murder. Middlebrooks, 840 S.W.2d at 337. The court observed that, under those cases, the death penalty can only be imposed for the offense of felony murder when (1) the defendant

himself killed, attempted to kill, or intended that a killing take place or that lethal force be imposed; or (2) the defendant's involvement in the underlying felony was substantial, and the defendant exhibited a reckless disregard or indifference to the value of human life. Id. at 338; see also Tison, 481 U.S. at 158, 107 S. Ct. at 1688; Enmund, 458 U.S. at 797, 102 S. Ct. at 3376. Significantly, notwithstanding the felony murder provision's lack of specific guidelines for ascertaining the degree of culpability warranting the imposition of the death penalty under Enmund and Tison, the court concluded that its statutory duty of comparative proportionality review cured any constitutional shortcoming. Middlebrooks, 840 S.W.2d at 339-340. In sum, Middlebrooks clearly established that the penalty of death is, in the abstract, an appropriate penalty for the offense of felony murder despite the felony murder doctrine's effective imposition of strict liability for a killing committed in the perpetration of another felony.

More recently, in Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **10-13, this court rejected the appellant's claim that the 1995 amendments to Tenn. Code Ann. § 39-13-202 authorize cruel and unusual punishment because the amendments effectively authorize a sentence of death while imposing strict liability for a killing committed in the perpetration of an "incidental" felony, i.e., aggravated child abuse. We can conceive of no reason why this court should reach a different result in this case merely because first degree murder by aggravated child abuse was proscribed by a different subsection of the first degree murder statute at the time of this offense. In any event, applying the analytical framework of Middlebrooks and Black to the instant case, we likewise conclude that the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4), to the extent the statute renders an offender death-eligible for an unintentional killing committed during the perpetration of an "incidental" felony, is consistent with Article I, § 16 of the Tennessee Constitution.

First, in assessing whether the imposition of the death penalty for the offense of first degree murder by aggravated child abuse comports with contemporary standards of decency, we acknowledge that, in Tennessee, few juries have imposed the ultimate penalty for this offense, and the judgments of those few juries have been reversed by our supreme court or this court. See, e.g., State v. Hale, 840 S.W.2d 307, 308 (Tenn. 1992); Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at *1. Nevertheless, the overwhelming public demand for the enactment of Tenn. Code Ann. § 39-13-202(a)(4) (1993) following our supreme court's decision in Hale belies any assertion that Tennessee society objects to death eligibility pursuant to this provision. Moreover, by enacting the 1995 amendments to Tenn. Code Ann. § 39-13-202, the General Assembly reaffirmed the public's view that the offense of first degree murder by aggravated child abuse may warrant a sentence of death. We also note that statutes in a significant number of states, albeit a minority, would authorize death eligibility for comparable offenses.[9]

---

[9] For example, the following states would render a defendant death-eligible for a killing committed during the course of some form of abuse of or assault upon a child: ARIZ. REV. STAT. ANN. § 13-1105(a)(2) (West, WESTLAW through 2000 2d Reg. Sess. & 5th Special Sess.); FLA. STAT. ANN. ch. 782.04(1)(a)(2)(h) (West, WESTLAW through 2000 2d Reg. Sess.); KAN. STAT. ANN. § 21-3401(b) (WESTLAW through 1999 Reg. Sess.); LA. REV. STAT. ANN. § 14:30(A)(5)(West Supp. 2001); MISS. CODE ANN. § 97-3-19(2)(f) (West, WESTLAW through 2000 3d Ex. Sess.); NEV. (continued...)

Second, we decline to hold that, in the abstract, the penalty of death is grossly disproportionate to the offense of first degree murder by aggravated child abuse in the absence of any requirement of an intentional killing and absent the commission of another felony entirely independent of the killing. In light of our supreme court's conclusion in Middlebrooks that the imposition of the death penalty for a killing committed during the perpetration of felonies such as, for example, larceny does not constitute grossly disproportionate punishment, we find it difficult to comprehend why the imposition of the death penalty for a reckless killing resulting from a defendant's commission of aggravated child abuse should be grossly disproportionate merely because the end result flows more naturally and foreseeably from the underlying felony. As our supreme court did in Middlebrooks and as we did in Godsey, we rely upon our statutory duty of comparative proportionality review.

Finally, imposition of the penalty of death for the offense of first degree murder by aggravated child abuse serves the legitimate, penological objectives of retribution and deterrence. With respect to retribution, our supreme court in Middlebrooks expressed its approval of the general principle that retribution may constitute a legitimate objective of the State in imposing the death penalty. In particular, the court quoted the following observation by a plurality of the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976)(footnote omitted):

> [C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

See Middlebrooks, 840 S.W.2d at 340. We simply cannot say that recklessly killing a child by inflicting an aggravated form of abuse may not be among those crimes that "are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184, 96 S. Ct. at 2930. As to deterrence, we agree with the following observation by the Oklahoma Court of Criminal Appeals:

> Child abuse does not always result in death, but death is the result often enough that the death penalty should be considered as a justifiable deterrent to the felony itself. Children are the most vulnerable citizens in our communities. They are dependent on parents, and others charged in their care, for sustenance, protection, care and guidance. Depending on age and physical development they tend to be more susceptible to physical harm, and even death, if unreasonable force is inflicted upon them. Within this context,

---

[9](...continued)

REV. STAT. § 200.030 (WESTLAW through 1999 Reg. Sess.); OKLA. STAT. ANN. tit. 21, § 701.7(C) (West, WESTLAW through Ch. 9 of 2000 1st Ex. Sess.); UTAH CODE ANN. § 76-5-202(1)(d) (Matthew Bender & Co., WESTLAW through 2000 General Sess.); WYO. STAT. § 6-2-101(a)(WESTLAW through 2000 Budget Sess.). Additionally, Montana would render a defendant death-eligible for a killing committed during the course of "an assault with a weapon, aggravated assault, or any other forcible felony." MONT CODE ANN. § 45-5-102 (1)(b) (WESTLAW through 2000 Special Sess.).

> legislative action to address the specific crime of child abuse murder is legally justified.

Gilson v. State, 8 P.3d 883, 923 (Okla. Crim. App. 2000). Accordingly, we conclude that death-eligibility pursuant to the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4) does not per se violate Article I, § 16 of the Tennessee Constitution. Cf. Hale, 840 S.W.2d at 314-315.

ii. Indictment[10]

The appellant next alleges that the indictment in his case charging him with one count of first degree murder by aggravated child abuse is defective due to the State's failure to charge aggravated child abuse in a separate count of the indictment. The State disagrees, essentially arguing that it "is not aware of . . . any authority for the proposition that a defendant must be indicted for the underlying felony in order for the felony murder indictment to be proper."

We initially note that the appellant has failed in his brief to present with any clarity an argument or citation to authority in support of this specific contention. Accordingly, this issue has been waived. Tenn. R. App. P. 27(a)(7); Tenn. Ct. of Crim. App. Rule 10(b). In this regard, we do note that the appellant includes this issue as a sub-issue of his challenge to the constitutionality of the 1993 version of Tenn. Code Ann. § 39-13-202(a)(4). However, the appellant never explicitly relates his bald complaint concerning the form of the indictment to the constitutional challenge addressed above.

Moreover, aside from objections that assert a lack of jurisdiction in the trial court and objections contending that the indictment failed to charge an offense, all objections to an indictment must be raised prior to trial. State v. Nixon, 977 S.W.2d 119, 120-121 (Tenn. Crim. App. 1997); Tenn. R. Crim. P. 12(b). The appellant did not proffer an objection prior to trial to the State's failure to charge aggravated child abuse in a separate count of the indictment. Of course, because the appellant has declined to share with the court the basis of his objection, in particular the correlation of his objection to the adequacy of his indictment for first degree murder by aggravated child abuse, we are unable to discern whether the appellant was required to proffer his objection prior to trial.

Notwithstanding waiver and contrary to the suggestion of the State, we doubt that the appellant is contesting the State's failure to prosecute him for aggravated child abuse in addition to first degree murder by aggravated child abuse. In any event, not only was the State not required to prosecute the appellant for both first degree murder by aggravated child abuse and aggravated child abuse, cf., e.g., State v. Roberson, 988 S.W.2d 690, 692-693 (Tenn. Crim. App. 1998); State v. Lee Russell Townes, No. W1999-01126-CCA-R3-CD, 2000 WL 1229062, at *5 (Tenn. Crim. App. at Jackson, August 18, 2000), but our supreme court recently observed that

> a legislative intent to permit dual convictions and sentences for both felony murder and the predicate felony does not appear to be present under the reckless killing of a child provision in Tenn. Code Ann. § 39-13-202(a)(4) (1994). The legislature originally codified the

[10] Appellant's issue V(A).

> reckless killing of a child by aggravated child abuse in response to [the public outcry following the conviction of Kerry Phillip Bowers of the offense of second degree murder of Scotty Trexler. See State v. Kerry Phillip Bowers, No. 115, 1989 WL 86576 (Tenn. Crim. App. at Knoxville, August 2, 1989).] This codification was known as the "Scotty Trexler Law." The intent of the Scotty Trexler Law was not to permit dual convictions but to punish the reckless killing of a child as first degree murder.

State v. Ducker, 27 S.W.3d 889, 893 (Tenn. 2000). Similarly, in State v. Bobby G. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at **27-30 (Tenn. Crim. App. at Knoxville, September 18, 2000), a case in which the defendant was convicted of both first degree murder by aggravated child abuse and aggravated child abuse, this court interpreted the successor statute to Tenn. Code Ann. § 39-13-202(a)(4) (1994) in light of Tenn. Code Ann. § 39-15-401(d) (1995)[11] and concluded that, "[b]ecause the legislature did not clearly intend a cumulative punishment for aggravated child abuse where there is a conviction and punishment for first degree felony murder arising out of the same aggravated child abuse, the defendant's conviction for the former must be set aside." See also State v. Benjamin Brown, No. W1999-00327-CCA-R3-CD, 2000 WL 1664226, at **7-8 (Tenn. Crim. App. at Jackson, October 24, 2000)(defendant's convictions of both first degree felony murder committed during the perpetration of aggravated child abuse and aggravated child abuse violated principles of double jeopardy relating to multiple convictions).

The appellant's complaint more likely lies in the adequacy of the State's notice to him concerning the charged offense of first degree murder by aggravated child abuse. The indictment in this case provides:

> The Grand Jurors for the State of Tennessee, upon their oaths, present that WILLIAM PIERRE TORRES, . . . heretofore, to-wit: On or about the __ day of June, 1994, in the State and County aforesaid, did unlawfully and recklessly kill QUINTYN PIERRE JAMES WILSON, a child under thirteen (13) years of age, said QUINTYN PIERRE JAMES WILSON'S death resulting from aggravated child abuse; that is, said defendant WILLIAM PIERRE TORRES, . . . knowingly and other than by accidental means treated QUINTYN PIERRE JAMES WILSON in such a manner as to inflict serious bodily injury on QUINTYN PIERRE JAMES WILSON and caused the death of QUINTYN PIERRE JAMES WILSON in violation of T.C.A. § 39-13-202 . . . .

---

[11] Tenn. Code Ann. § 39-15-401(d) provides

> A violation of this section [proscribing child abuse and neglect] may be a lesser included offense of any kind of homicide, statutory assault, or sexual offense if the victim is a child and the evidence supports a charge under this section. In any case in which conduct violating this section also constitutes assault, the conduct may be prosecuted under this section or under [Tenn. Code Ann.] § 39-13-101.

Subsection (d) remained unchanged from the time of the appellant's offense to the time of Godsey's offense.

Under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Tennessee Constitution, an accused is entitled to notice of the nature and cause of an accusation by the State. State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997). In order to satisfy this constitutional mandate, an indictment must provide a defendant with notice of the offense charged, provide the court with an adequate ground upon which a proper judgment may be entered, and provide the defendant with protection against double jeopardy. State v. Lemacks, 996 S.W.2d 166, 172 (Tenn. 1999); Hill, 954 S.W.2d at 727; State v. Byrd, 820 S.W.2d 739, 740-741 (Tenn. 1991). Tenn. Code Ann. § 40-13-202 (1997) similarly requires that

> [t]he indictment . . . state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment.

"[A]llegations couched in the pertinent language of the [applicable] statute . . . ordinarily [are] sufficient for constitutional and statutory purposes . . . ." State v. Hammonds, 30 S.W.3d 294, 302 (Tenn. 2000); see also State v. Griffis, 964 S.W.2d 577, 591 (Tenn. Crim. App. 1997).

The indictment in this case not only tracks the language of the statute proscribing first degree murder by aggravated child abuse, Tenn. Code Ann. § 39-13-202(a)(4) (1993), but also tracks the language of the relevant child abuse statutes, Tenn. Code Ann. § 39-15-401 (1993); Tenn. Code Ann. § 39-15-402 (1993). Cf. Roberson, 988 S.W.2d at 692-693 (holding that the indictments for first degree murder by aggravated child abuse in that case were sufficient when the indictments tracked the language of the statute proscribing first degree murder by aggravated child abuse; because the defendants were not indicted for aggravated child abuse, the indictments did not have to allege the elements of aggravated child abuse, including the mens rea of "knowing"). Moreover, the indictment sets forth the name of the victim, the victim's approximate age, and the month and year of the offense. We conclude that this indictment more than adequately satisfies constitutional and statutory mandates. See, e.g., Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at *39; Torry Caldwell v. State, No. 01C01-9703-CC-00115, 1999 WL 97915, at *3 (Tenn. Crim. App. at Nashville, February 18, 1999), perm. to appeal denied, (Tenn. 1999).

iii. Testimony of the Licensed Clinical Social Worker[12]

The appellant also argues that the trial court erred in ruling at the appellant's competency hearing that a licensed clinical social worker was qualified to render an opinion concerning the appellant's competence to stand trial. The State responds that the witness at issue did not proffer an opinion concerning the appellant's competency and, in any event, was qualified to testify as an expert on the issue of the appellant's competency.

As noted previously, on October 27, 1997, the trial court ordered an evaluation of the appellant by the Helen Ross McNabb Mental Health Center pursuant to Tenn. Code Ann. § 33-7-301 (1994). Moreover, upon the appellant's motion, the trial court conducted a competency hearing on

[12] Appellant's issue VII.

February 17, 1999. At the competency hearing, the appellant presented the testimony of Dr. Jerry Lemler, a psychiatrist engaged in private practice, who had interviewed the appellant on two occasions in 1997 for a total of three hours and twenty minutes. On the basis of these interviews and the results of various psychological tests, including the Minnesota Multiphasic Personality Inventory, Second Edition, Dr. Lemler opined that the appellant was suffering from paranoid schizophrenia and severe to extreme depression and was not competent to stand trial. In rebuttal, the State presented the testimony of Dr. Arnold, the psychiatrist employed by the Helen Ross McNabb Mental Health Center who later also testified at the sentencing phase of the appellant's trial. At the competency hearing, Dr. Arnold stated that she had interviewed the appellant on one occasion for approximately one hour. During this interview, she did not find any evidence to support Dr. Lemler's diagnoses, and, moreover, she concluded that the appellant was competent to stand trial.

In addition to Dr. Arnold's testimony, the State presented the testimony of Rick Sawyer, a licensed clinical social worker employed by the Helen Ross McNabb Mental Health Center as the coordinator of the Adult Corrections Department and as a forensic examiner. Sawyer specifically noted that he was certified by the Tennessee Department of Mental Health and Retardation in March 1990 to evaluate a defendant's competency to stand trial. Sawyer related to the trial court that, in order to obtain certification, he had undergone two days of training. Additionally, in order to maintain his certification, Sawyer participated in one day of training every two years. According to Sawyer, he had participated in two or three hundred competency evaluations since his initial certification.

On the basis of the above testimony, the State tendered Sawyer to the trial court as an expert "in the area of competency alone." The appellant immediately objected to Sawyer's qualification to proffer an opinion concerning his competency. The trial court overruled the appellant's objection.

Subsequently, notwithstanding the trial court's ruling, Sawyer testified that he did not perform a competency evaluation in this particular case. Rather, he collected information from the appellant and various other sources in order to assist Dr. Arnold. Moreover, following Dr. Arnold's evaluation and immediately prior to the competency hearing, he briefly interviewed the appellant once again in order to determine whether another competency evaluation was needed. On the basis of this interview, Sawyer declined to recommend another competency evaluation.

In addressing the appellant's challenge to the admission of Sawyer's testimony, we initially note that the appellant does not challenge the trial court's ultimate competency determination. Accordingly, even if this court were to agree with the appellant's challenge to Sawyer's testimony, our agreement would afford him no relief. Moreover, the State correctly notes that Sawyer did not perform a competency evaluation in this case and did not offer an opinion concerning the appellant's competence to stand trial. He merely testified that, during his interviews with the appellant, he did not observe any signs of incompetence.

In any event, the State correctly notes this court's prior observation that the substantially similar predecessor statute to Tenn. Code Ann. § 33-7-301 did "not specify that the examination to determine a defendant's competency to stand trial cannot be done by a clinical social worker." State v. Mackey, 638 S.W.2d 830, 834 (Tenn. Crim. App. 1982). Additionally, we cannot say that the trial court abused its discretion under Tenn. R. Evid. 702.[13]

> Tenn. R. Evid. 702 provides:
> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Under the above rule, determining the qualifications of an expert is a predicate to admitting his testimony. State v. Tiffany Lafonzo Betts, No. 02C01-9709-CC-00337, 1999 WL 38267, at *4 (Tenn. Crim. App. at Jackson, January 29, 1999). Specifically, the trial court must determine whether the witness is "particularly skilled or experienced in a field that is not within the scope of the common knowledge and experience of the average person." Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 406 (Tenn. 1991); see also State v. John R. Farner, Jr., No. E1999-00491-CCA-R3-CD, 2000 WL 872488, at *18 (Tenn. Crim. App. at Knoxville, June 30, 2000). There is no established college degree or professional certification that provides the threshold for qualification as an expert. NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 702.3, at 460 (Michie ed., 3d ed. 1995). Moreover, on appeal, the trial court's determination concerning the qualification of an expert will not be reversed absent a clear showing of an abuse of discretion. State v. Hall, 958 S.W.2d 679, 689 (Tenn. 1997); State v. Lacy, 983 S.W.2d 686, 694 (Tenn. Crim. App. 1997); State v. Davis, 872 S.W.2d 950, 954 (Tenn. Crim. App. 1993). Again, Sawyer testified that he was a licensed clinical social worker trained and certified by the Department of Mental Health and Retardation to perform competency evaluations and that he had previously participated in two or three hundred evaluations over a period of approximately nine years. This issue is without merit.

iv. Redacted Video Cassette Recording of Interview of Appellant by Police Investigators[14]

The appellant further contends that, during the guilt/innocence phase of his trial, the trial court erred by declining to admit into evidence a redacted video cassette recording of an interview of the appellant by police investigators. The appellant predicates his claim for relief upon the following arguments: (1) the trial court was required under Tenn. R. Evid. 103 to review redacted

---

[13] In the closely analogous context of a hearing to determine a defendant's competency to be executed, our supreme court has noted that the rules of evidence should not be applied to limit the admissibility of evidence that is relevant to the issue of competency. Coe v. State, 17 S.W.3d 193, 226 (Tenn.), cert. denied, __ U.S. __, 120 S. Ct. 1460 (2000); Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999), cert. denied, __ U.S. __, 120 S. Ct. 1728 (2000). However, the court has also acknowledged the utility of Tenn. R. Evid. 702 and 703 in ensuring that scientific evidence admitted at a competency hearing is both reliable and relevant to competency. Coe, 17 S.W.3d at 226.

[14] Appellant's issue I and II.

and unredacted video cassette recordings before ruling the redacted recording inadmissible; (2) the redacted recording was admissible pursuant to the "rule of completeness;" and (3) the trial court violated the appellant's right of confrontation under the United States and Tennessee constitutions by prohibiting the introduction of the redacted recording during defense counsel's cross-examination of Investigator Ron Humphrey.

The State, in response, contends that the contents of the redacted recording were irrelevant. Moreover, the State also relies upon the rule of completeness in arguing that the redacted recording was inadmissible. In particular, the State argues that the redaction of any reference to a polygraph test administered to the appellant precluded the admission of the recording. Finally, the State notes that the appellant was permitted to cross-examine Humphrey concerning the interview and contends that the appellant could have elicited the desired information directly from Humphrey. Accordingly, the State concludes that the appellant has forfeited any claim for relief. Tenn. R. App. P. 36(a)("Nothing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

As noted previously, Knoxville Police Department Investigator Ron Humphrey testified on behalf of the State during the guilt/innocence phase of the appellant's trial concerning two separate statements that were made by the appellant to the police following this offense and that provided two different explanations for Quintyn's fatal injuries. The appellant began making his first statement at approximately 4:11 p.m. on the day of his offense, concluding at approximately 4:42 p.m. In this first statement, the appellant claimed that Quintyn had fallen from his crib. The appellant made the second statement less than two hours later, at approximately 6:26 p.m. In the second statement, the appellant admitted that Quintyn had not fallen from his crib and that the appellant had shaken the child. During cross-examination of the investigator, defense counsel attempted to elicit testimony concerning a video-taped interview between the appellant and investigators that occurred during the time interval between the appellant's two statements. At this point, the prosecutor asked to approach the bench.

Outside of the jury's hearing, the prosecutor noted that, at the time of the intervening interview, the appellant also underwent and failed a polygraph test and that, prior to trial, defense counsel had successfully submitted a motion to the trial court to exclude from evidence any reference to the test. In essence, the prosecutor invoked the "rule of completeness" and argued that defense counsel should not be permitted to question Humphrey concerning this interview or introduce a video cassette recording of the interview without placing the interview in the context of the polygraph test. The prosecutor additionally asserted that the video cassette recording of the interview constituted "self-serving hearsay" and questioned the relevance of the interview. Finally, the prosecutor complained that the appellant had failed to provide to the State a copy of any video cassette recording of the interview prior to trial.

Defense counsel responded that the State had itself provided the video cassette recording of the interview to the defense and that, according to the recording, the polygraph test and

the interview were entirely separate. Defense counsel further argued that the interview was highly relevant to the jury's assessment of the weight to be accorded the appellant's second statement and, therefore, to the appellant's guilt or innocence of the charged offense. More specifically, defense counsel themselves invoked the rule of completeness in support of the trial court's admission of a recording of the interview from which the administration of the polygraph test and any reference to the test had been redacted. Defense counsel explained that, during the interview shown in the redacted recording, the investigators used coercive tactics that directly prompted the appellant's second statement to the police in which he confessed to shaking his son. Counsel proffered unredacted and redacted recordings for the court's consideration.

Ultimately, the State agreed that it would not object to inquiry by defense counsel on cross-examination concerning any specific question or statement directed by Humphrey to the appellant during the course of the interview at issue. However, the State maintained its objection to the admission of the redacted recording. Without viewing the recordings proffered by the appellant, the trial court ruled in favor of the State. The trial court did not explicitly state on the record the basis of its ruling.

Following the above jury-out hearing, defense counsel engaged in the following exchange with Humphrey in the presence of the jury:

Defense counsel:	Detective, you told Mr. Torres that you would call the District Attorney on his behalf if he would just say that he shook this child.
Humphrey:	I don't recall ever saying that.
Defense counsel:	You don't recall ever saying that?
Humphrey:	I do not recall ever saying that.
Defense counsel:	And you told Mr. Torres that all the evidence was that this was an accident.
Humphrey:	That's - - I don't believe that's in my statement that I have here. I don't recall saying that. This is a case that you're taking something out that I have a copy of.
Defense counsel:	In fact, you - - you told Mr. Torres that you didn't want him to spend the rest of his life in prison.
Humphrey:	Again, I don't ever recall ever saying that to Mr. Torres.
. . . .	
Defense Counsel:	In fact, at one point, you told Mr. Torres, "I don't think you intended to kill him. Nobody here does."
Humphrey:	Again, Ms. Shipley, I don't recall saying that to Mr. Torres.

Defense counsel:	You're not denying that you said it, though, are you?
Humphrey:	I'm not saying that I didn't say it; I'm not saying I did say it. I said I do not recall if I ever said that to him.

Following this exchange, defense counsel concluded her cross-examination of the investigator.

The unredacted video cassette recording, proffered by the appellant and included in the record for purposes of appellate review, begins with the administration of a polygraph test to the appellant, during which test the appellant was questioned concerning the cause of his son's death. The administration of the test lasted approximately fifty-six minutes. Following the examination, the appellant and the examiner temporarily left the interview room, returning approximately seven minutes later, at which time the examiner informed the appellant that he had failed the polygraph examination. Investigator Humphrey and another officer soon joined the appellant and the examiner. During the ensuing interview, which lasted approximately twenty-six minutes, the three officers strongly encouraged the appellant to tell the truth.

In particular, Humphrey informed the appellant that the evidence possessed by the police refuted the appellant's earlier claim that Quintyn had merely fallen from his crib. Humphrey further stated that the evidence suggested, instead, that the appellant had at least shaken Quintyn, thereby causing his injuries, and that the appellant had acted intentionally. One of the other officers, apparently Investigator Tom Stiles, noted that the appellant could possibly receive the death penalty on the basis of the evidence possessed by police. Humphrey, however, asserted that he did not wish to see the appellant even serve a sentence of life imprisonment because he believed that Quintyn's death had been accidental. Humphrey advised the appellant that he could only improve his current situation by explaining to the police the circumstances of Quintyn's death and assured the appellant that he would convey to the district attorney general any cooperation provided by the appellant. The officers, including Humphrey, conceded to the appellant that they could not provide any guarantees concerning the outcome of the appellant's case.

The appellant was silent during much of this interview, although he cried during the interview and asserted that he never intended to harm Quintyn. He also asserted that he had previously encountered the criminal justice system in New York and, therefore, did not believe that the officers would help him in this case. He stated his belief that he would be imprisoned for the rest of his life. Nevertheless, he ultimately agreed to provide another statement to the police.

Upon the appellant's agreement, Humphrey informed the appellant that he was going to take the appellant to another office for the purpose of recording the statement. The investigator briefly described the procedure by which he intended to elicit the statement, noting that he would prefer to avoid asking detailed questions of the appellant and that the appellant, instead, should use his own words in describing what had happened to Quintyn. Following this explanation, the video cassette recording concludes. The redacted version of the recording is substantially identical with the exception of the omission of the polygraph test and any reference to the test.

a. Offer of Proof

We first address the appellant's contention that the trial court erred in failing to review the proffered video cassette recordings prior to ruling that the redacted recording was inadmissible. In Alley v. State, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994)(citations omitted), this court observed that

> [t]he general rule is that "assuming an offer of proof has been seasonably made, it is error for the trial court to refuse to permit counsel to state what evidence he is offering." The purpose of an offer is two-fold. First, the proof informs the trial court what the party intends to prove so that the court may rule intelligently. Second, an offer creates a record so that an appellate court can determine whether there was reversible error in excluding the evidence.

See also State v. Paul Anthony Dejongh, No. 03C01-9806-CR-00211, 1999 WL 71796, at *3 (Tenn. Crim. App. at Knoxville, February 16, 1999). Moreover, the court observed that Tenn. R. Evid. 103 specifically requires trial courts, "in appropriate circumstances, to allow offers of proof when evidence is excluded so as to enable consideration of the issue on appeal." Alley, 882 S.W.2d at 815-816.[15] The sole exception to the policy favoring offers of proof lies when it is obvious that the evidence could not possibly be competent. Id. at 816; see also Michael Eugene McBee v. State, No. 03C01-9509-CR-00276, 1997 WL 677952, at *4 (Tenn. Crim. App. at Knoxville, October 31, 1997).

In this case, although the trial court declined to review the video cassette recordings prior to ruling on the admissibility of the redacted recording, the trial court included the recordings in the record for purposes of appellate review. Moreover, the State correctly notes that, prior to the trial court's ruling, defense counsel briefly described to the trial court the contents of the recordings. On appeal, the question of whether this description of the recordings provided an adequate basis upon which to "intelligently" determine the admissibility of the redacted recording is necessarily submerged in the question of whether the trial court properly excluded the recording from evidence.

b. Rule of Completeness

Again, both the appellant and the State rely in part upon the rule of completeness, currently embodied in Tenn. R. Evid. 106, in adopting their respective positions concerning the admissibility of the redacted recording during the State's case-in-chief. Tenn. R. Evid. 106 provides:

---

[15] Tenn. R. Evid. 103 provides in relevant part:

> (a) Effect of Erroneous Ruling. - Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> > (2) . . . In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.
>
> (b) . . . The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling. It shall permit the making of an offer in question and answer form.

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

This rule "allows the trier of fact to 'assess related information at the same time rather than piecemeal,'" State v. Keough, 18 S.W.3d 175, 182 (Tenn.), cert. denied, __ U.S. __, 121 S. Ct. 205 (2000), and is based upon two considerations, including (1) the misleading impression created by taking matters out of context; and (2) the inadequacy of repair work when the admission of the disputed proof is delayed to a point later in the trial, United States v. Pendas-Martinez, 845 F.2d 938, 943 (11th Cir. 1988)(interpreting the substantially identical federal rule).

Rule 106 is circumscribed, however, by two qualifications: (1) evidence proffered pursuant to this rule must be relevant to issues in the case; and (2) the evidence must explain or qualify already-admitted proof. United States v. Glover, 101 F.3d 1183, 1190 (7th Cir. 1996); Pendas-Martinez, 845 F.2d at 944. Some courts have addressed the second qualification by asking whether the proffered evidence accomplishes one of the following objectives: (1) explains the admitted proof; (2) places the admitted proof in context; (3) avoids misleading the trier of fact; or (4) ensures a fair and impartial understanding of the admitted proof. United States v. Jackson, 180 F.3d 55, 73 (2d Cir. 1999); Glover, 101 F.3d at 1190; United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984). Ultimately, the standard is one of "fairness," and "in assessing whether 'fairness' under Rule 106 requires the admission of additional evidence offered by a criminal defendant, a . . . judge should be sensitive to the defendant's right to present evidence on his own behalf, as well as his right not to testify." Glover, 101 F.2d at 1192. On appeal, a trial court's determination under Rule 106 will be reversed only for an abuse of discretion. Keough, 18 S.W.3d at 182-183; State v. Charles Eddie Hartman, No. M1998-00803-CCA-R3-DD, 2000 WL 631400, at *9 (Tenn. Crim. App. at Nashville, May 17, 2000).

In this case, the "recorded statement" that was already admitted into evidence and that triggered the appellant's invocation of Rule 106 was the recorded statement of the appellant in which he confessed to shaking Quintyn. The record indicates that the appellant provided this confession at the conclusion of one continuous period of interrogation by police, albeit portions of the interrogation occurred in different rooms, involved the participation of different officers, and were recorded by varying means. The "recorded statements" proffered by the appellant pursuant to Rule 106 largely comprised the recorded statements of three officers who interrogated the appellant immediately prior to his confession, although the redacted recording additionally includes several statements by the appellant.

> Prior to the adoption of the Tennessee Rule of Evidence, this court observed that "[w]hen a confession is admissible, the whole of what the accused said upon the subject at the time of making the confession is admissible and should be taken together; and if the prosecution failed to prove the whole statement, the accused is entitled to put in

> evidence all that was said *to him* and by him at the time which bears upon the subject of controversy."

State v. Robinson, 622 S.W.2d 62, 71 (Tenn. Crim. App. 1980)(quoting Espitia v. State, 288 S.W.2d 731, 733 (Tenn. 1956))(emphasis added). Robinson and Espitia appear to reflect the general principle that, if the prosecution admits into evidence a statement of the accused that constitutes part of a conversation or correspondence, the accused is generally entitled to have admitted into evidence all that was said or written by or to the accused during the conversation or correspondence, provided that the additional evidence is relevant and bears upon the already admitted portion. See 29A AM. JUR. 2D Evidence § 759, at 122 (1994). Although Robinson and Espitia were decided prior to the adoption of the Tennessee Rules of Evidence, the Advisory Commission Comments to Tenn. R. Evid. 106 explicitly provide that "[t]he rule restates settled law." Moreover, our supreme court in Keough, 18 S.W.3d at 182, while noting that both Robinson and Espitia predate the enactment of the Tennessee Rules of Evidence, observed that "Rule 106 reflects the concern for fairness found in cases such as Espitia - - that the trier of fact be permitted to access related information without being misled by hearing only certain portions of evidence."

That having been said, we note that the general principle set forth in Robinson and Espitia and tacitly approved by our supreme court in Keough, 18 S.W.3d at 182, would permit the introduction of hearsay, in particular the self-serving statements of a defendant. See also, e.g., State v. Paul Anthony Dejongh, No. 03C01-9806-CR-00211, 1999 WL 71796, at **4-5 (Tenn. Crim. App. at Knoxville, February 16, 1999). One commentator has noted that, although Rule 106 clearly alters the timing of the admission of evidence, it is debatable whether the rule affects the admissibility of otherwise inadmissible evidence. NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 106.2, at 34 (Michie ed., 3d ed. 1995); see also Pendas-Martinez, 845 F.2d at 944 n.10, and authorities cited therein. Moreover, this court has previously noted that

> [Tenn. R. Evid. 106] is one of timing rather than admissibility. The remainder of the statement or writing is to be admitted at the time that the portion is admitted. The rule assumes that the remaining portion of the statement would ultimately be admissible.

Denton v. State, 945 S.W.2d 793, 801 (Tenn. Crim. App. 1996). Suffice it to say that the supreme court's opinion in Keough casts doubt upon our interpretation of Rule 106 in Denton.

In any event, regardless of whether Rule 106 affects the admissibility of otherwise inadmissible evidence, we conclude that the contents of the redacted recording, in large part, would have been "ultimately" admissible during the appellant's case-in-chief, assuming proper authentication of the recording. The statements of the three officers were not hearsay, as the appellant was not introducing the statements for the purpose of proving the truth of the matters asserted therein but rather for the purpose of demonstrating the coercive atmosphere in which the appellant agreed to provide a confession. Tenn. R. Evid. 801(c).

Moreover, under Rule 106, the disputed interview was relevant to the jury's assessment of the weight to be accorded the appellant's second statement or confession and, accordingly, to the appellant's guilt or innocence of the charged offense. The circumstances

surrounding the making of a confession generally bear upon the confession's reliability and credibility. Crane v. Kentucky, 476 U.S. 683, 688-691, 106 S. Ct. 2142, 2145-2147 (1986)(holding that a requirement that the trial court make any pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge a confession's reliability during the course of his trial); see also State v. Pursley, 550 S.W.2d 949, 950-951 (Tenn. 1977); State v. Burns, 29 S.W.3d 40, 48 (Tenn. Crim. App. 1999), perm. to appeal denied, (Tenn. 2000); State v. Tony Jamerson, No. W1999-00935-CCA-R3-CD, 2000 WL 1224764, at *6 (Tenn. Crim. App. at Jackson, August 28, 2000).

Finally, under Rule 106, the contents of the redacted recording explain or qualify the appellant's confession to shaking his child. In this regard, we agree with the appellant that his second statement to the police was the culmination of the disputed interview contained in the redacted recording. At the conclusion of the disputed interview, due to the persuasive efforts of three officers, the appellant agreed to provide the second statement. The appellant was also advised concerning the procedure that would be employed in recording the second statement. Although the parties changed location and mode of recording, the pertinent time frame suggests that the appellant provided his second statement immediately thereafter. Finally, two of the officers who had participated in the disputed interview, including Investigator Humphrey, participated in the elicitation and recording of the appellant's second statement. Cf. Keough, 18 S.W.3d at 182-183. In sum, the rule of completeness required the introduction of, at least, a redacted recording of the disputed interview containing the statements of the three officers. We now turn to the question posed by the State of whether the rule also required the introduction of the omitted portion of the recording containing the polygraph test and references to the polygraph test.

The results of a polygraph test and the circumstances surrounding the taking or not taking of such tests are inadmissible in evidence. State v. Land, 681 S.W.2d 589, 592 (Tenn. Crim. App. 1984); see also State v. Adkins, 710 S.W.2d 525, 528-529 (Tenn. Crim. App. 1985); State v. Stanley Blackwood, No. W1999-01221-CCA-R3-CD, 2000 WL 1672343, at *12 (Tenn. Crim. App. at Jackson, November 2, 2000). The reason for this "'unwavering principle'" is that the results of polygraph tests are inherently unreliable. Id. Accordingly, evidence concerning polygraph tests is generally irrelevant to any issue in a criminal case. In this regard, courts have carved out an exception to the aforementioned rule that the circumstances surrounding the making of a confession generally bear upon the confession's reliability and credibility. In short, the State has not explained to this court how the polygraph test was relevant to any issue in the appellant's case. Thus, even assuming that Rule 106 permits the introduction of otherwise inadmissible evidence, the omitted portion of the recording did not satisfy the threshold qualification of relevance, and fairness did not dictate its admission. See, e.g., Hartman, No. M1998-00803-CCA-R3-DD, 2000 WL 631400, at **9-10.

c. Right of Confrontation

Having concluded that the trial court erred under Tenn. R. Evid. 106 in excluding from evidence during the State's case-in-chief a redacted video cassette recording of the disputed interview, we next address the appellant's claim that the trial court thereby limited his ability to

cross-examine Humphrey concerning the circumstances of his confession and denied the appellant his right of confrontation. The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution "provide two protections for criminal defendants: the right to physically face witnesses and the right to cross-examine witnesses." State v. Brown, 29 S.W.3d 427, 430-431 (Tenn.), cert. denied, __ U.S. __, 121 S. Ct. 275 (2000)(citing Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998 (1987), and State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992)). The appellant acknowledges that he was in fact permitted to cross-examine Humphrey concerning the circumstances of his confession, including the disputed interview. However, he asserts that, because the trial court excluded from evidence the redacted recording, "Humphrey was allowed the luxury of a failing memory to avoid the ramifications of the real nature of the defendant's interrogation." The State responds that the appellant "should have asked for a jury out hearing and attempted to refresh Officer Humphrey's recollection by having him view the videotape." We must agree with the State.

The Tennessee Rules of Evidence address the problem of refreshing a witness' memory in Tenn. R. Evid. 612, entitled "Writing Used to Refresh Memory." Interestingly, Rule 612 and the Advisory Commission Comments do not refer to the use of other materials to refresh a witness' memory, and this court has previously observed that it is unclear whether Rule 612 extends to the use of recordings. State v. Harrison Pearson, No. 03C01-9802-CR-00076, 1999 WL 692877, at*5 (Tenn. Crim. App. at Knoxville, August 31, 1999), perm. to appeal denied, (Tenn. 2000). In any case, Rule 612 does not explicitly prohibit the use of other materials, including recordings, to refresh a witness' memory, and, arguably, a recording such as the one at issue in this case is simply a modern substitute for handwritten notes. Moreover, this court has approved the use of a transcript of a recording to refresh a witness' memory under Tenn. R. Evid. 612. State v. David Eric Price, No. E1999-02684-CCA-R3-CD, 2000 WL 1015914, at *21 (Tenn. Crim. App. at Knoxville, July 25, 2000); see also State v. Elrod, 721 S.W.2d 820, 822-823 (Tenn. Crim. App. 1986). In short, the appellant possessed the means to effectively cross-examine Humphrey.

d. Relief

Finally, we must determine whether the appellant is entitled to relief from the trial court's error in prohibiting the introduction during the State's case-in-chief of a recording of the investigators' statements to the appellant immediately prior to his confession. We have already noted that the appellant could have mitigated the effect of the error by refreshing Humphrey's memory of the disputed interview. Moreover, the appellant did not attempt to call as a witness any other officer who participated in the interview. Finally, contrary to the appellant's assertion in his brief, the specific basis of the trial court's ruling excluding the redacted recording is not clear from the record, and the appellant made no effort to clarify the trial court's ruling or to determine whether the ruling would likewise exclude the introduction of the recording during the *appellant's* case-in-chief. See Tenn. R. App. P. 36(a). In any event, in light of the evidence adduced at trial during the

guilt/innocence phase of the appellant's trial, the trial court's error does not appear to have affirmatively affected the jury's verdict. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).[16]

v. The Appellant's Demeanor at East Tennessee Baptist Hospital[17]

The appellant next argues that the trial court erred in admitting Jimmie Cupp's testimony concerning the appellant's apparent "arrogance" at East Tennessee Baptist Hospital during Dr. Rice's attempts to resuscitate Quintyn. The appellant asserts that Cupp's testimony was inadmissible pursuant to Tenn. R. Evid. 401 and 402 as it was irrelevant to any issue in his case. Moreover, the appellant asserts that "[t]he only purpose in introducing the 'evidence' concerning . . . [his] 'arrogance' was to place his perceived character in issue," thereby violating Tenn. R. Evid. 403 and 404. The State responds that the appellant's conduct and demeanor at the hospital were relevant in establishing the appellant's consciousness of guilt.

Initially, we note that, during his trial, the appellant objected to Cupp's testimony solely on the basis of its relevance or lack thereof under Tenn. R. Evid. 401 and 402. At no time did the appellant argue to the trial court that any relevance of Cupp's testimony was substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury under Tenn. R. Evid. 403 or that the testimony constituted character evidence within the meaning of Tenn. R. Evid. 404.[18] The appellant raised his Rule 403 and 404 objections for the first time in his motion

---

[16]Defense counsel argued for the first time during oral argument before this court that the redacted recording of the interview was also relevant because the appellant was crying during the interview. Defense counsel asserted that the recording thereby rebutted the State's proof that the appellant did not express sorrow or remorse following his son's death. To the extent defense counsel's argument implicates the sentencing phase of the appellant's trial, we note that the appellant did not attempt to introduce the recording during the sentencing phase. Tenn. Code Ann. § 39-13-204 (c) (1993); State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), cert. denied, __ U.S. __, 121 S. Ct. 98 (2000); Owens v. State, 13 S.W.3d 742, 756 (Tenn. Crim. App. 1999), perm. to appeal denied, (Tenn.), cert. denied, __ U.S. __, 121 S. Ct. 116 (2000); State v. Vincent C. Sims, No. W1998-00634-CCA-R3-DD, 2000 WL 298901, at *19 (Tenn. Crim. App. at Jackson, March 14, 2000); see also Tenn. R. App. P. 36(a). Moreover, we note in passing that the appellant's emotional reaction to police interrogation did not necessarily reflect his emotions concerning his son's death or his commission of the instant offense, and any error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); State v. Cauthern, 967 S.W.2d 726, 739 (Tenn. 1998).

[17]Appellant's issue VIII.

[18]We note in passing that the appellant also did not object to Cupp's characterization of the appellant's behavior at the hospital on the basis of Tenn. R. Evid. 701. Tenn. R. Evid. 701 provides:

> (a) . . . If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (1) rationally based on the perception of the witness and
>
> (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Clearly, Cupp's characterization was rationally based on her perceptions. Moreover, "[t]he types of general opinion testimony that might, if relevant, be . . . [helpful to a clear understanding of the witness's testimony] include[] [opinion testimony] that an individual is . . . angry, upset, . . . happy," or, presumably, arrogant. NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 701.3, at 71 (Michie ed., 3d ed. 1999 Supp.); see also, e.g., Asplundh Manufacturing Division of

(continued...)

for new trial. "[A] party is bound by the ground asserted when making an objection. The party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court." State v. Adkisson, 899 S.W.2d 626, 634-635 (Tenn. Crim. App. 1994); see also State v. Richard Korsakov, E1999-01530-CCA-R3-CD, 2000 WL 968812, at *11 (Tenn. Crim. App. at Knoxville, July 13, 2000); State v. Lamont Lee Harper, No. M1999-00451-CCA-R3-CD, 2000 WL 739672, at *2 (Tenn. Crim. App. at Nashville, June 9, 2000); State v. Claude Shropshire, No. 03C01-9303-CR-00078, 1994 WL 421395, at *2 (Tenn. Crim. App. at Knoxville, August 12, 1994). Thus, the appellant's Rule 403 and 404 objections have been waived, and this court will not address them absent plain error. Tenn. R. Evid. 103(d); Tenn. R. Crim. P. 52(b); State v. Smith, 24 S.W.3d 274, 282-283 (Tenn. 2000).

In Smith, 24 S.W.3d at 282-283, our supreme court formally adopted the plain error analysis set forth in Adkisson, 899 S.W.2d at 641-642. Specifically, the court approved the consideration of the following five factors in determining

> whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'"

Smith, 24 S.W.3d at 282 (citing Adkisson, 899 S.W.2d at 641-642). The court emphasized that the presence of all five factors must be established by the record, and "complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Id. at 283. We conclude that neither Tenn. R. Evid. 401 and 402 nor any other "clear and unequivocal rule of law" was breached by the introduction of Cupp's testimony.

Tenn. R. Evid. 401 broadly provides that "'[r]elevant 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." Relevant evidence need not be sufficient to satisfy a party's burden of proof; rather, "[e]ach item of proof may make a small, incremental contribution to a party's total efforts to meet its proof obligations." NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 401.4, at 86 (Michie ed., 3d ed. 1995).

Relevant evidence is generally admissible pursuant to Tenn. R. Evid. 402. However, Tenn. R. Evid. 403 prohibits the introduction of even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Prejudice becomes unfair when the primary purpose of the evidence at issue is to elicit

---

[18](...continued)
Asplundh Tree Expert Co. v. Benton Harbor Engineering, 57 F.3d 1190, 1196 (3d Cir. 1995)(interpreting the identically worded federal rule and noting that "[t]he prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons . . . the manner of conduct . . ."). Thus, the determinative question is the relevance of Cupp's testimony, a question we address below.

emotions of 'bias, sympathy, hatred, contempt, retribution, or horror.'" State v. Collins, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998). Moreover, Tenn. R. Evid. 404 precludes the introduction of character evidence, including "other crimes, wrongs, or acts," for the purpose of proving action in conformity with a particular character trait. If evidence of "other crimes, wrongs, or acts" is admissible for another purpose, the evidence will nevertheless be excluded if its probative value is outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404 (b)(3). The test in Rule 404(b) for balancing probative value against prejudicial effect is more stringent than the test set forth in Rule 403. See State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997).

On appeal, this court will not reverse a trial court's admission of evidence pursuant to these rules absent an abuse of discretion. Id. at 652. In this case, we cannot say that the trial court abused its discretion in concluding that Cupp's testimony was relevant. Moreover, we cannot say that the admission of the testimony would have constituted such an abuse had the appellant presented his Rule 403 and 404 objections to the trial court for determination.

> Within the context of the above rules, it is a well-established principle of law that [a]t least insofar as they tend to connect [a defendant] with the crime and are not merely self-serving, and are inconsistent with a theory of innocence, and tend to show consciousness of guilt, the conduct and general demeanor of accused after the crime, his language, oral and written, his attitude and relations toward the crime, and his actions in the presence of those engaged in endeavoring to detect the criminal are relevant [and admissible].

22A C.J.S. Criminal Law § 742(a), at 387 (1989)(footnotes omitted). In Tennessee, the "consciousness of guilt" rule has most often been applied to "'ex post facto indication[s] by [the] accused of a desire to evade prosecution.'" Marable v. State, 313 S.W.2d 451, 459 (Tenn. 1958). For example, our supreme court has held that "[a] defendant's flight and attempts to evade arrest are relevant as circumstances from which, when considered with the other facts and circumstances in evidence, a jury can properly draw an inference of guilt." State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985). Similarly, attempts by a defendant to conceal or destroy evidence, including attempts to suppress the testimony of witnesses, are relevant circumstances from which a jury may infer guilt. Tillery v. State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978). A defendant's refusal to provide handwriting samples is a circumstance from which a jury may infer guilt. State v. Harris, 839 S.W.2d 54, 71 (Tenn. 1992). Inconsistent statements by a defendant following an offense can also raise an inference of guilt. Hackney v. State, 551 S.W.2d 335, 339 (Tenn. Crim. App. 1977); Otha Bomar v. State, No. 01C01-9808-CR-00342, 2000 WL 19763, at *3 (Tenn. Crim. App. at Nashville, January 13, 2000), perm. to appeal denied, (Tenn. 2000).

In addition to the above applications of the "consciousness of guilt" rule, this court has applied the rule to, arguably, more ambiguous circumstances. For example, this court has previously observed that even a defendant's attempted suicide can be considered by a jury as a circumstance tending in some degree to show a consciousness of guilt, State v. White, 649 S.W.2d 598, 601 (Tenn. Crim. App. 1982); State v. Robert Wayne Seffens, No. 01C01-9107-CR-00190,

1992 WL 75831, at *4 (Tenn. Crim. App. at Nashville, March 16, 1992), as can a defendant's "apparent unconcern" about a victim, Hackney, 551 S.W.2d at 339; see also Marable, 313 S.W.2d at 459 (observing that a defendant's demeanor following an offense may raise an inference of guilt). Thus, consistent with the observation that relevant evidence need not be sufficient to satisfy a party's burden of proof, the admissibility of evidence pursuant to the "consciousness of guilt" rule does not require that there be no other conceivable rationale for a defendant's conduct or demeanor. See, e.g., People v. Butler, 90 Cal. Rptr. 497, 499 (Cal. Ct. App. 1970). But see State v. Pindale, 592 A.2d 300, 310 (N.J. Super. Ct. App. Div. 1991)("The rule applies only to such conduct as is intrinsically indicative of a consciousness of guilt . . . .").

In this case, as noted earlier, Cupp testified during the guilt innocence phase of the appellant's trial that the appellant appeared arrogant during Quintyn's treatment at the East Tennessee Baptist Hospital. She also testified that the appellant appeared unconcerned about Quintyn. Cupp's opinions concerning the appellant's demeanor were based in part upon the appellant's refusal to cooperate with the nurses at the hospital by providing Quintyn's medical history. We note that the appellant's behavior at the hospital, including his demeanor, was consistent with his earlier hesitation in calling 911 upon observing his child's critical condition. In sum, the evidence adduced at trial reflected a deficit in the appellant's concern for his son and in his efforts to ensure his son's receipt of proper medical assistance, a deficit that was inconsistent with his simultaneous claims of accidental injury. We must agree with the State that this deficit was one circumstance from which, when considered with the other facts and circumstances in evidence, the jury could legitimately infer a consciousness of guilt, nor was the disputed evidence unduly prejudicial. This issue is without merit.

vi. Healed Scars and Old Bruises[19]

The appellant further argues that the trial court erred in admitting evidence during the guilt/innocence phase of his trial concerning old bruises and healed scars found on Quintyn's body. Specifically, the appellant predicates his complaint upon the following two grounds: (1) because there was no evidence linking the appellant to these old injuries, the introduction of this evidence violated principles of due process embodied in Article I, Section 9 of the Tennessee Constitution and the Fifth and Fourteenth Amendments to the United States Constitution; and (2) the introduction of evidence of prior abuse of Quintyn denied the appellant his right to an impartial jury under Article I, Section 9 of the Tennessee Constitution.

The State responds that the appellant has waived this issue due to his failure to make a contemporaneous objection. Additionally, the State notes that, because there was no evidence linking the appellant to any prior abuse of Quintyn, testimony concerning old bruises and healed scars was admissible pursuant to Tenn. R. Evid. 401 and 403 for the purpose of providing the jury a "complete picture" of Quintyn's physical condition at the time of his death.

[19] Appellant's issue IX.

We agree with the State that, absent plain error, the appellant has waived this issue. Tenn. R. App. P. 36(a). Moreover, it is clear from the record that at least one of the prerequisites to a finding of plain error cannot be established. State v. Smith, 24 S.W.3d 274, 282-283 (Tenn. 2000). Specifically, it cannot be established that defense counsel did not waive the issue for tactical reasons. Indeed, the record strongly suggests a contrary conclusion.

Prior to trial, defense counsel submitted a motion to the trial court to exclude evidence of any injuries other than those allegedly inflicted by the appellant on the date of Quintyn's death. At that time, the State responded that evidence of old bruises and healed or partially healed scars was relevant to the issue of whether the appellant inflicted fatal injuries on Quintyn by other than accidental means. Upon hearing argument, the trial court asked that defense counsel again bring their objection to the court's attention at the appropriate time during trial.

Notwithstanding defense counsel's knowledge of and consideration of the appropriate objection and despite the trial court's invitation, defense counsel failed to object to the State's presentation of testimony by both Dr. Rice and Dr. Patterson concerning older bruises and healed or partially healed scars observed on Quintyn's body.[20] Indeed, defense counsel cross-examined the witnesses concerning older injuries. See Smith 24 S.W.2d at 283 (citing Marable v. State, 313 S.W.2d 451, 458-459 (Tenn. 1958))("When the State places objectionable evidence before the jury, and defense counsel inquires at length about the evidence on cross-examination, any error in admitting the evidence is generally cured."). More significantly, defense counsel repeatedly referred to older injuries during closing argument.

In particular, defense counsel explored a theory during closing argument that Quintyn's mother, rather than the appellant, had abused the child. In exploring this theory, defense counsel conceded that Quintyn had suffered multiple injuries but asserted that the experts' testimony concerning the precise timing of the fatal injuries was uncertain. Defense counsel suggested that, therefore, the child's mother might have inflicted those and other injuries. Defense counsel emphasized the contradiction between the experts' testimony concerning the presence of demonstrably older injuries on the child and Wilson's testimony concerning the absence of any significant injuries on Quintyn prior to her departure for work on June 29, 1994.

In reviewing the above record, we find the following observation by our supreme court particularly apt:

> Whether a second-guessing appellate court thinks a tactical decision is inspired or poor is not the issue on direct appeal. The issue is whether the action, or in this case, the inaction, was the result of a deliberate, tactical decision.

---

[20] As previously noted, defense counsel did object to the introduction into evidence of Dr. Patterson's autopsy report in light of detailed references to bite marks and cigarette burns found on Quintyn's body. Defense counsel appeared to base his objection on the ground that the report contained statements concerning these injuries that were not contained in Dr. Patterson's testimony. Again, defense counsel in no way indicated any objection to Dr. Patterson's *testimony*.

State v. Walker, 910 S.W.2d 381, 400 (Tenn. 1995). Because we conclude that counsel's failure to object to the testimony at issue was precisely the result of such a decision, the appellant is not entitled to relief.

B. Sentencing Phase

i. Constitutionality of Tenn. Code Ann. § § 39-13-204 (1993) and 39-13-206 (1993), Tennessee's Death Penalty Statutes[21]

In challenging his sentence of death, the appellant first asserts that certain practices or procedures utilized in capital cases in Tennessee result in the arbitrary and capricious application of Tennessee's death penalty statutes and, accordingly, the arbitrary and capricious imposition of the death penalty. The appellant's complaints, however, have been considered by our supreme court and rejected. Specifically, our supreme court has frequently rejected complaints that, in Tennessee, a prosecutor possesses "sole and unlimited" discretion in deciding whether to seek the death penalty. State v. Vann, 976 S.W.2d 93, 118 (Tenn. 1998); State v. Hall, 958 S.W.2d 679, 716 (Tenn. 1997); State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995); State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994); State v. Smith, 893 S.W.2d 908, 926 (Tenn. 1994). Our supreme court has also rejected complaints that the "death qualification" process in Tennessee results in a "guilt-prone" jury. Vann, 976 S.W.2d at 118; State v. Cribbs, 967 S.W.2d 773, 796 (Tenn. 1998); Hall, 958 S.W.2d at 717; Hines, 919 S.W.2d at 582; Keen, 926 S.W.2d at 742; State v. Teel, 793 S.W.2d 236, 246 (Tenn. 1990). Finally, our supreme court has rejected the appellant's argument that "the Tennessee Pattern Jury Instructions create a reasonable likelihood that jurors would believe they must unanimously agree on the existence of any mitigating factors." Hall, 958 S.W.2d at 718.[22]

The appellant additionally contends that the statutes, on their face, foster the arbitrary and capricious imposition of the death penalty. In this regard, the appellant argues that the statutes fail to adequately narrow the class of death-eligible defendants in Tennessee because the aggravating circumstances set forth in Tenn. Code Ann. § 39-13-204(i) (1993) "encompass virtually all criminal homicides." In particular, the appellant complains of the broad reach of the aggravating factor that the murder was "especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." Tenn. Code Ann. § 39-13-204(i)(5). This claim is without merit. See, e.g., State v. Smith, 993 S.W.2d 6, 33 (Tenn.), cert. denied, 528 U.S. 1023, 120 S. Ct. 536 (1999)(rejecting the defendant's argument that the death penalty statutes, as a whole, fail to meaningfully narrow the class of death-eligible defendants); Vann, 976 S.W.2d at 117-118 (holding that the aggravating circumstances set forth in Tenn. Code Ann. § 39-13-204(i), including the (i)(5) circumstance, adequately narrow the class of death-eligible defendants); Hall, 958 S.W.2d at 715 (rejecting the defendant's constitutional challenge that the (i)(5) circumstance was either vague or overbroad or otherwise failed in combination with other aggravating circumstances to adequately narrow the class of death-eligible defendants); State v. Odom, 928 S.W.2d 18, 26 (Tenn.

---

[21] Appellant's issue VI(A), (B), and (C).

[22] As in Hall, id., the trial court in this case instructed the jury that "[t]here is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance." We presume that the jury followed the instructions of the trial court. Id.

1996)(holding that the (i)(5) circumstance was constitutionally sufficient to narrow the class of offenders subject to the death penalty); State v. Keen, 31 S.W.3d 196, 211 (Tenn. 2000)(reaffirming the court's rejection of arguments that the (i)(5) aggravating circumstance applies to every defendant convicted of first degree murder and is unconstitutionally vague or overbroad).

The appellant also complains that the comparative proportionality review mandated by Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993) is "constitutionally inadequate" in the following ways: (1) the comparative proportionality review does not include those cases in which the State has declined to seek the death penalty; (2) the report required by Tenn. Sup. Ct. Rule 12 "is not uniformly completed or required by all judicial districts" and "includes only cursory information;" and (3) any review is impeded by the absence of written findings concerning mitigating circumstances. Initially, we note our supreme court's recent observation that "[p]roportionality review is not the sole, or even the constitutionally necessary, protection against imposition of arbitrary death sentences." Keen, 31 S.W.3d at 224. Moreover, numerous cases have held that, in fact, Tennessee's comparative proportionality review satisfies constitutional standards. Vann, 976 S.W.2d at 118; Keen, 926 S.W.2d at 743-744; State v. Cazes, 875 S.W.2d 253, 270-271 (Tenn. 1994); see also Keen, 31 S.W.3d at 223-224(rejecting the dissent's conclusion that, "because of perceived shortcomings in our comparative proportionality review protocol, the death sentence in this case - - and perhaps in all cases - - should be set aside").

ii. Middlebrooks Error[23]

The appellant further contends that our supreme court's decision in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), precluded the application of the aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(l) (1993) to his offense of first degree murder by aggravated child abuse. Specifically, the appellant contends that "[t]he aggravating circumstance of the victim's age duplicates the age element of the offense of aggravated child abuse, and, therefore, does not sufficiently narrow the class of death-eligible defendants under the Eighth Amendment to the United States Constitution and Article I, § 16 of the Tennessee Constitution." The State disputes that the (i)(1) aggravating circumstance duplicates any element of the offense of first degree murder by aggravated child abuse. The State also argues that the age element of the offense of first degree murder by aggravated child abuse is itself a constitutionally adequate narrowing device. Because we have already agreed with the State that the definition of the offense adequately narrows the class of death-eligible defendants under the federal and state constitutions, this issue is without merit.

iii. Kersey Instruction[24]

The appellant next asserts that the trial court erred during the sentencing phase of his trial in providing to the jury the instruction set forth in Kersey v. State, 525 S.W.2d 139 (Tenn. 1975). Specifically, the appellant argues that Tenn. Code Ann. § 39-13-204(h) (1993) expressly

[23] Appellant's issue IV.

[24] Appellant's issue III.

prohibits the provision of a Kersey charge during the sentencing phase of a capital trial. The appellant argues that, when a jury is undecided concerning the imposition of a sentence of death, Tenn. Code Ann. § 39-13-204(h) requires the trial court instead to instruct the jury to choose between the punishments of life imprisonment without parole and life imprisonment. Moreover, the appellant asserts that "where there was unequivocal communication by a juror 'that he will not change his mind,' the imposition of a jury charge requiring him to reconsider his verdict was grossly coercive."

In response, the State argues that Tenn. Code Ann. § 39-13-204(h) only requires the trial court to remove the death penalty from the jury's consideration when the jury cannot "ultimately" agree on the imposition of the death penalty, and the statutory provision "does not circumvent the trial court's discretion to determine whether there is an ultimate disagreement on punishment." Additionally, the State disagrees with the appellant's assertion that the disputed instruction was coercive, arguing that "[n]othing in the Kersey instruction is directed at the minority, nor does it force any person to abandon his or her convictions."

At the conclusion of the sentencing hearing, following approximately seven hours of deliberation, the jury submitted the following note to the trial court: "We are at a deadlock, 11 for death and 1 for life imprisonment. What do we do at this point? The one for life imprisonment has stated that he will not change his mind." Defense counsel immediately asked that the trial court instruct the jury to choose between sentences of life imprisonment without parole and life imprisonment. The State, in turn, requested a Kersey charge. In agreement with the State's position, the trial court provided the following instruction to the jury:

> It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your own individual judgment. Each of you must decide the case for yourself, but you should do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> All right. Please continue your deliberations.

The above supplemental instruction was a repetition of an instruction provided in the main charge during the guilt/innocence phase of the trial but not provided in the main charge during the sentencing phase. Following the supplemental instruction and after approximately one additional hour of deliberation, the jury returned a unanimous verdict of death by electrocution.

In Kersey, 525 S.W.2d at 140, the jury reported to the trial court during deliberation that it did not appear that they would be able to reach a verdict. Accordingly, the trial court inquired concerning the division amongst the jurors, whereupon the foreman reported that the jury was hung

eleven to one. Id. At this point, the trial court provided a variation of the instruction set forth by the United States Supreme Court in Allen v. United States, 164 U.S. 492, 17 S. Ct. 154 (1896), encouraging each juror to listen to his fellow jurors "'with a disposition to be convinced'" and noting that "'[i]f the larger number are for conviction or acquittal, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many other men, equally honest, and equally intelligent with himself.'" Kersey, 525 S.W.2d at 140. The variation of the Allen charge employed by the court had previously been approved by the Tennessee Supreme Court in Simmons v. State, 281 S.W.2d 487 (Tenn. 1955).

In reviewing the trial court's actions, our supreme court first held that the court's inquiry concerning the division of the jurors was "not a proper practice." Kersey, 525 S.W.2d at 141. The court stated that

> [u]nder the inherent and the statutory supervisory power of this Court, we advise the trial bench that when a jury's deli[b]erations have not produced a verdict, and it returns to the courtroom and so reports, the presiding judge should admonish the jury, at the very outset, not to disclose their division or whether they have entertained a prevailing view. The only permissive inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations. If the trial judge feels that further deliberations might be productive, he may give supplemental instructions in accordance with subsequent portions of this opinion.

Id.

Second, the court rejected both the Allen charge and the Allen-Simmons variation, holding that the charges "operate to embarrass, impair and violate" the right of trial by jury guaranteed by the Tennessee Constitution. Kersey, 525 S.W.2d at 144. The court explained that

> [a]ny undue intrusion by the trial judge into this exclusive province of the jury, is an error of the first magnitude. We recognize that the trial judge has a legitimate concern in the administration of justice and that he labors under a duty to lend guidance to the jury through instructions as to the governing principles of the law. However, when the effort to secure a verdict reaches the point that a single juror may be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is diluted.

Id.

Having concluded that the Allen charge and the Allen-Simmons variation were unconstitutional, the court further exercised its statutory and inherent supervisory power by directing trial courts, when faced with deadlocked juries, to provide an instruction identical to the one provided by the trial court in this case with the exception of three prefatory sentences, which were

omitted by the trial court. Kersey, 525 S.W.2d at 145.[25] The court stated that the instruction should be included in the "main charge" and repeated in the event of a deadlocked jury. Id. Our supreme court emphasized that trial courts should strictly adhere to the language of the instruction and variations would not be permissible. Id.

Subsequently, in State v. Caruthers, 676 S.W.2d 935 (Tenn. 1984), our supreme court addressed the applicability of its decision in Kersey in the context of the sentencing phase of a capital trial. In Caruthers, as in the instant case, the appellant argued that the trial court erred in providing a Kersey instruction to the jurors during the sentencing phase of his capital trial following the court's receipt of the following note:

> "No unanimous decision has been reached in our determining punishment for Walter Lee Caruthers. As of now the jury stands at eleven to one, with no foreseeable change. Please advise."

Id. at 942. The Kersey charge had been included in the main jury instructions at the guilt/innocence phase but had not been included in the main instructions at the sentencing phase. Id. As in the instant case, the appellant in Caruthers argued that the death penalty statute in effect at that time, Tenn. Code Ann. § 39-2-203(h) (repealed 1989), precluded the provision of a Kersey instruction to a deadlocked jury during the sentencing phase of a capital trial and also argued that the instruction was coercive under the circumstances of his case. Caruthers, 676 S.W.2d at 942.

In addition to rather summarily rejecting any claim that the instruction was coercive under the circumstances of the appellant's case, the court in Caruthers more extensively explored the appellant's argument concerning Tenn. Code Ann. § 39-2-203(h). The court acknowledged that the statute "provide[d] that if a jury in a capital case 'cannot ultimately agree as to punishment, the judge shall dismiss the jury and . . . shall impose a sentence of life imprisonment.'" Caruthers, 676 S.W.2d at 942 (alteration in original). However, the court concluded:

> The use of the adverb "u[l]timately" indicates the Legislature anticipated a jury's tentative inability to agree on punishment. In such a case, the trial judge should exercise his discretion in determining whether there is an ultimate disagreement as to punishment. . . . No such abuse is shown here . . . .

Id.

Having carefully reviewed the above cases, we find our supreme court's decision in Caruthers to be controlling. In this regard, we note that, at the time of the appellant's offense, the statute in Caruthers had since been repealed and replaced with Tenn. Code Ann. § 39-13-204(h) (1993). That statute provides:

> If the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreman of the jury whether the jury is divided over

[25] The prefatory sentences state: "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." Id. These prefatory sentences *were* included in the main charge during the guilt/innocence phase of the appellant's trial.

> imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and such judge shall impose a sentence of imprisonment for life.

Id. As correctly noted by the State, in replacing the repealed statute, the legislature retained the language "ultimately" that was the subject of our supreme court's construction in Caruthers. "A rule of statutory construction provides that when the legislature reenacts an earlier statute, we presume that it knows and approves of prior judicial constructions of that statute by the courts of that state." State v. Rhodes, 917 S.W.2d 708, 712 (Tenn. Crim. App. 1995). Thus, we may assume that, in enacting Tenn. Code Ann. § 39-13-204(h), the legislature was aware of our supreme court's decision in Caruthers and approved the court's construction of the language "ultimately" under the circumstances of that case.

In applying Caruthers to the instant case, we conclude that there is no substantive difference between providing the Kersey instruction in the context of a jury deadlocked "eleven to one, with no foreseeable change" and providing the Kersey instruction in the context of a jury deadlocked eleven to one when the one "state[s] that he will not change his mind." If no abuse of discretion is shown in the one context, surely none is shown in the other. That having been said, the trial court in this case did not precisely comply with the mandates of Kersey. As in Caruthers, the court in this case did not provide a Kersey instruction during its main charge to the jury in the sentencing phase, although the instruction was included in the main charge in the guilt/innocence phase. Moreover, as previously noted, the trial court omitted three prefatory sentences from its supplemental instruction. Nevertheless, there is no indication that the supplemental instruction was coercive, thereby violating constitutional mandates, and we cannot conclude that the trial court's omissions from the Kersey instruction otherwise affirmatively affected the jury's verdict. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

iv. Review Mandated by Tenn. Code Ann. § 39-13-206(c) (1993)[26]

Pursuant to Tenn. Code Ann. § 39-13-206(c) (1993), this court must also make the following determinations: (1) whether the sentence of death was imposed in an arbitrary fashion; (2) whether the evidence supports the jury's findings of statutory aggravating circumstances; (3) whether the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances; and (4) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering the nature of the crime and the defendant.

a. Review of Aggravating and Mitigating Circumstances

As noted earlier, at the conclusion of the sentencing phase of the appellant's trial and in accordance with Tenn. Code Ann. § 39-13-204 (1993), the jury found the aggravating

[26] Appellant's issue VI(D).

circumstances that the victim was less than twelve years of age and the defendant was eighteen years of age or older, id. at (i)(1), and the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death, id. at (i)(5). We believe that the evidence adduced at the appellant's trial supports the jury's findings of these aggravating circumstances. In making this determination, we have reviewed the evidence supporting the jury's findings in a light most favorable to the State and have considered "whether . . . 'a rational trier of fact could have found the existence of the aggravating circumstance[s] beyond a reasonable doubt.'" State v. Keen, 31 S.W.3d 196, 205 (Tenn. 2000)(quoting State v. Henderson, 24 S.W.3d 307, 313 (Tenn.), cert. denied, __ U.S. __, 121 S. Ct. 320 (2000)).

First, Jasma Wilson's testimony during the guilt/innocence phase, statements by the appellant to the police admitted into evidence during the guilt/innocence phase, photographs of Quintyn admitted during the guilt/innocence phase, and testimony by Dr. Young during the sentencing phase clearly established that Quintyn was almost sixteen months old, and the appellant was twenty-five years old. Tenn. Code Ann. § 39-13-204(i)(1). Second, testimony by both Dr. Rice and Dr. Patterson during the guilt/innocence phase and the appellant's statements to the police established the heinous, atrocious, and cruel nature of Quintyn's murder. Tenn. Code Ann. § 39-13-204(i)(5).

With respect to the "heinous, atrocious, and cruel" aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(5),[27] evidence of either torture or serious physical abuse beyond that necessary to produce death will suffice. State v. Hall, 8 S.W.3d 593, 601 (Tenn. 1999), cert. denied, __ U.S. __, 121 S. Ct. 98 (2000). Our supreme court has defined torture as "'the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.'" Id. (quoting State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985)); see also State v. Morris, 24 S.W.3d 788, 797 (Tenn. 2000), cert. denied, __ U.S. __, 121 S. Ct. 786 (2001); Keen, 31 S.W.3d at 206. In other words, the torture prong of the (i)(5) circumstance "requires a jury finding that the victim remained conscious and sustained severe physical or mental pain between the infliction of the

---

[27] Although not raised by the appellant, we note that in State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996), in the context of a defendant's conviction of felony murder in the perpetration of a rape, our supreme court observed that rape, as defined by the legislature, did not *necessarily* entail "torture" or "serious physical abuse" within the meaning of Tenn. Code Ann. § 39-13-204(i)(5). The court explained that,

> [w]ere we to hold otherwise, every murder committed in the perpetration of rape could be classified as a death-eligible offense. Such a result, obviously, would not sufficiently narrow the class of perpetrators, nor would it distinguish the "worst of the worst" for whom the ultimate penalty must be reserved.

Id. In light of that decision and notwithstanding our prior conclusion that the definition of the offense in this case was itself a constitutionally adequate narrowing device, we simply note that aggravated child abuse, as defined by our legislature in Tenn. Code Ann. §§ 39-15-401 (1993) and 39-15-402 (1993), does not necessarily entail "torture" or "physical abuse beyond that necessary to produce death" within the meaning of Tenn. Code Ann. § 39-13-204(i)(5). See, e.g., Malicoat v. State, 992 P.2d 383, 399 (Okla. Crim. App.), cert. denied, __ U.S. __, 121 S. Ct. 208 (2000)(holding in the context of similar statutes that "[a] defendant may be convicted of child abuse murder although the victim did not consciously suffer before death, [and,] [a]s conscious suffering is necessary for a valid finding that a murder is heinous, atrocious or cruel, that aggravating circumstance does not merely duplicate the elements of child abuse murder").

wounds and the time of death." State v. Carter, 988 S.W.2d 145, 150 (Tenn. 1999). In establishing torture, the State need not offer expert testimony concerning the precise level of pain inflicted upon a victim. State v. Nesbit, 978 S.W.2d 872, 886 (Tenn. 1998). Rather, "jurors are free to use their common knowledge and judgment derived from experience, observation, and reflection to decide whether a fact is logically deducible or reasonably inferred from the evidence." Id. Our supreme court has also defined "serious physical abuse beyond that necessary to produce death" in the following manner:

> "The word 'serious' alludes to a matter of degree. The abuse must be physical, as opposed to mental, and it must be 'beyond that' or more than what is 'necessary to produce death.' 'Abuse' is defined as an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.'"

Morris, 24 S.W.3d at 797 (quoting State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996)); see also Keen, 31 S.W.3d at 206; Hall, 8 S.W.3d at 601.

We conclude that the facts in the instant case satisfy both of the above definitions. Again, the appellant struck his son "very, very hard" in the head at least four times, causing brain hemorrhaging, and struck his son at least once, but likely three times, in the abdomen with a similarly great amount of force, causing hemorrhaging in three different locations. Additionally, bruising on Quintyn's upper back suggested that "someone [had] grabb[ed] the child and the ends of the fingers [had] actually [dug] into the - - into the ribs of the child." According to the appellant's own statement to the police, Quintyn was conscious during the infliction of his injuries and for some time thereafter. Indeed, following the infliction of his injuries, Quintyn cried for at least one minute, after which he began to breathe heavily and make "whining noise[s]." According to the appellant, Quintyn appeared to be suffering pain. Finally, the blows to Quintyn's head alone caused the child's death. Accordingly, the undeniably serious injuries to his abdomen were "beyond that necessary to produce death."

Having determined that a rational jury could have found the presence of two aggravating circumstances beyond a reasonable doubt, our review of the mitigating evidence presented on behalf of the appellant at the sentencing hearing, in the context of the record as a whole, further convinces us that a rational jury could have found that these aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.

b. Arbitrariness and Proportionality

Finally, based upon our review of the entire record, we conclude that the sentence of death was not imposed in any arbitrary fashion. Moreover, we have conducted a comparative proportionality review, the precise purposes of which "are to eliminate the possibility that a person will be sentenced to death by the action of an aberrant jury and to guard against the capricious or random imposition of the death penalty." State v. Bland, 958 S.W.2d 651, 665 (Tenn. 1997). Upon conducting this review, we conclude that the appellant is not entitled to relief from his sentence.

A comparative proportionality review begins with the presumption that the death penalty is proportionate to the crime of first-degree murder. State v. Henderson, 24 S.W.3d 307, 315 (Tenn.), cert. denied, __ U.S. __, 121 S. Ct. 320 (2000); Bland, 958 S.W.2d at 662. Indeed, we have already held that, in the abstract, the imposition of the death penalty for the offense of first degree murder by aggravated child abuse does not violate prohibitions against cruel and unusual punishment contained in either the federal or state constitutions. Nevertheless, we must further determine whether the penalty in this particular case is disproportionate to the punishment imposed on others convicted of the same or a similar crime. In this regard, our supreme court has "'not chosen to formulate a rigid objective test' as the 'standard of review for all cases.'" State v. Cazes, 875 S.W.2d 253, 270 (Tenn. 1994). Rather, our determination is governed by the principle that, "[i]f the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate." Bland, 958 S.W.2d at 665 and 668; see also State v. Keen, 31 S.W.3d 196, 219 (Tenn. 2000). In applying this principle, we look at a pool of cases including all "those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death by electrocution, regardless of the sentence actually imposed." Bland, 958 S.W.2d at 666. In selecting similar cases, we examine the application of aggravating and mitigating circumstances and otherwise compare the characteristics of both offenses and defendants. Id. at 667; Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993).

Characteristics relevant to the identification and comparison of similar offenses include the following: (1) the means of death; (2) the manner of death (i.e., whether the death was violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances, including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects of the murder on nondecedent victims. Bland, 958 S.W.2d at 667. Characteristics relevant to the identification and comparison of similar defendants include the following: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional, or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of the helplessness of the victim(s); and (8) the defendant's capacity for rehabilitation. Id. These factors are not exhaustive, and the reviewing court may consider other characteristics or factors in comparing the characteristics of the offense and the appellant in this case with offenses and defendants in the pool of cases. Keen, 31 S.W.3d at 220.

With respect to the instant case, we initially note that the appellant is African-American. In State v. Chalmers, 28 S.W.3d 913, 920 (Tenn. 2000), our supreme court reaffirmed that race is one of the factors to be considered when comparing characteristics of defendants. However, as in Chalmers, the appellant in this case does not allege and there is no indication in the record that the jury's sentencing determination was based upon race.

Rather, the jury in this case applied two aggravating circumstances to the appellant's conviction of first degree murder by aggravated child abuse: (1) the victim was less than twelve years of age, and the defendant was eighteen years of age or older, Tenn. Code Ann. § 39-13-204(i)(1) (1993); and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death, id. at (i)(5). The underlying facts and circumstances in this case have been detailed above. In summary, the appellant was the father of the fifteen-month-old victim and shared caretaking responsibilities for both Quintyn and his sister with the children's mother. On the day of the murder, the appellant was caring for Quintyn while the child's mother was at work. The child slept for several hours but, upon awakening, began to cry. The appellant changed Quintyn and gave him a bottle of milk, but the child continued to cry, at which point the appellant struck the child a minimum of five times in the head and abdomen with extreme force. According to the appellant's own statement to the police, the child was conscious during and after the abuse and appeared to be in pain. A medical examination and an autopsy of the child revealed multiple bruises on Quintyn's body and severe internal injuries including hemorrhaging in Quintyn's brain and abdomen. There was no proof that the appellant premeditated his son's death; there was also no proof of adequate provocation or justification for the murder.

The twenty-five-year-old appellant was solely responsible for Quintyn's death. Moreover, following his assault upon Quintyn, although the appellant was aware that he had severely harmed the child, the appellant neglected to call 911, instead calling the child's mother and awaiting her arrival. Indeed, the appellant failed to call 911 even when the child stopped breathing sometime prior to Wilson's arrival. The appellant's statement to the police reflects that his primary concern at this point was the possibility that he might face legal consequences for his abuse of Quintyn.

The appellant did later attempt to perform CPR upon Quintyn. However, at the East Tennessee Baptist Hospital, the appellant refused to cooperate with nurses in the emergency room by providing medical information concerning his son and, indeed, appeared unconcerned about his son. The record further establishes that the appellant was not candid in his statements to medical personnel concerning the cause of Quintyn's fatal injuries, nor was the appellant candid in his statements to the police or even to the defense psychologist, Dr. Young.

At the appellant's trial, the sole evidence that the appellant was suffering a mental condition at the time of this offense consisted of Dr. Young's testimony during the sentencing phase that the appellant was suffering from paranoid schizophrenia. However, the psychologist conceded that psychological testing performed on the appellant did not uniformly support his diagnosis, and the appellant did not satisfy the criteria for paranoid schizophrenia set forth in the DSM-IV, the standard diagnostic tool of psychologists and psychiatrists. Moreover, other witnesses testifying on behalf of the appellant, including Officer Lamb and Ms. Lindsay-McDaniel, stated that they had never noticed any sign that the appellant was suffering from a mental illness. The State's psychiatrist, Dr. Arnold, also examined the appellant and found no evidence of any mental disorder.

The record additionally indicates that the appellant's childhood, while undeniably lacking in stability and marked by periods of neglect, was not devoid of positive role models. Yet,

the appellant possesses a prior history of abusive behavior toward young children, having pled guilty at the approximate age of fifteen years to sexually abusing his five-year-old "step-brother."[28] The appellant's prior criminal history otherwise consists of a conviction in New York of illegally possessing a weapon.

Finally, the appellant demonstrated little, if any, remorse for his offense and, in a statement to the police, essentially blamed Quintyn's mother for spoiling the child and thereby encouraging the child to cry. The appellant's amenability to rehabilitation was also cast into doubt by the testimony of his fellow inmate in the Knox County Jail, Salvador Ruiz, who, as noted earlier, stated that the appellant had informed Ruiz that he was participating in the Legal Lives Program in order to "juke [, i.e., mislead] the people, whoever was charging him."

In light of the above facts and circumstances, we have attempted to conduct a comparative proportionality review of cases which share, among others, the following characteristics: (1) the defendant was convicted of the murder of a young child; (2) the defendant was a caretaker of the child; (3) the defendant used a similar method to cause the child's death, i.e., child abuse; (4) the defendant failed to immediately seek medical assistance for the child; (5) the jury applied the (i)(5) aggravator; (6) the defendant did not premeditate the murder; (7) the defendant exhibited little, if any, remorse for the crime; (8) the defendant presented evidence of a mental condition; and (9) the defendant possessed some history of abusive behavior toward young children.

We initially distinguish the recent case of State v. Bobby G. Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at *26 (Tenn. Crim. App. at Knoxville, September 18, 2000), in which this court held that the defendant's sentence of death for the offense of first degree felony murder during the perpetration of aggravated child abuse was disproportionate. In Godsey, the jury found only one aggravating circumstance, that the victim was less than twelve years of age, and the defendant was eighteen years of age or older. Tenn. Code Ann. § 39-13-204(i)(1) (1995). As to the underlying facts and circumstances of the case, the record in Godsey, No. E1997-00207-CCA-R3-DD, 2000 WL 1337655, at *2, established that the twenty-two-year-old defendant served as a caretaker of his girlfriend's seven-month-old child. Id. at *17. As in the instant case, the defendant in Godsey reacted violently to the child's persistent crying. Id. As a result, the child suffered fractures to his skull and one arm, ultimately dying due to cerebral edema or swelling of the brain. Id. at *2. As in the instant case, the defendant in Godsey delayed seeking treatment. Id. at **3-4. Unlike the instant case, expert testimony at Godsey's trial indicated that the victim's injuries were consistent with a single act of violence. Id. at **5-6. Unlike the instant case, a mistake in medical treatment may have lessened the victim's chances of survival. Id. at *26. Also unlike the instant case, the Godsey defendant had no prior history of abusive behavior toward children, and his criminal record consisted solely of misdemeanor convictions. Id. at **18 and 26. Finally, unlike

[28] Again, during the sentencing phase, the appellant introduced testimony concerning his juvenile conviction of sexually abusing his step-brother. The jury could consider the appellant's juvenile record in assessing the weight to be accorded mitigating factors. See, e.g., Strouth v. State, 999 S.W.2d 759, 767 (Tenn. 1999), cert. denied, __ U.S. __, 120 S. Ct. 1437 (2000).

the instant case, the Godsey defendant demonstrated genuine remorse for the victim at the hospital upon learning of his death, and this court noted the defendant's amenability to rehabilitation. Id. at *18.

In short, having compared the offense and the defendant in Godsey with the offense and the appellant in the instant case, we must conclude that Godsey does not control the result in this case. Nevertheless, we take note of another case in which a jury declined to impose a sentence of death upon a defendant for the offense of first degree murder by aggravated child abuse. In State v. Terrence L. Davis, No. 02C01-9511-CR-00343, 1997 WL 287646 (Tenn. Crim. App. at Jackson, June 2, 1997), the twenty-year-old defendant was convicted of the first degree murder by aggravated child abuse of his girlfriend's twenty-two-month-old daughter. As in Godsey, the sole aggravating circumstance applied by the jury was the age of the victim. At trial, the evidence established that, during the week in which the victim died, the defendant was caring for the victim during the day while her mother worked at Cracker Barrel. Id. at *2. According to the defendant's confession, he "whipped" the victim several days prior to her death for breaking a glass. Id. at *3. Additionally, he "spanked" the victim on the day of her death. Id. When the victim stopped breathing, he called 911. Id. at *2. An autopsy of the victim revealed that she had died of "multiple blunt force injuries," including abrasions, contusions, and broken ribs. Id. at *3. The pathologist noted more than fifty impact sites on the child's body. Id. The victim's mother testified that she had never previously observed the defendant abuse the child. Id. at *2. The defendant had no prior criminal record.

Some might argue that the murder in the Davis case was "worse" than the instant murder due to the greater number of impact sites on the victim's body. We simply note that we are not required to find that a jury has never imposed a sentence less than death in a case involving a similar murder or even a more atrocious murder. State v. Smith, 993 S.W.2d 6, 21 (Tenn.), cert. denied, 528 U.S. 1023, 120 S. Ct. 536 (1999); see also Henderson, 24 S.W.3d at 315. In other words, "the isolated decision of a jury to afford mercy does not render a death sentence disproportionate." Id.; see also Keen, 31 S.W.3d at 222. "[O]ur [exclusive] duty 'is to assure that no aberrant death sentence is affirmed.'" Henderson, 24 S.W.3d at 315. Moreover, we have found cases in Tennessee, similar to the instant case, in which the death penalty has been imposed:

In State v. Hale, 840 S.W.2d 307, 308 (Tenn. 1992), the twenty-one-year-old defendant was convicted under the original Scotty Trexler Law of the first degree murder by aggravated child abuse of his girlfriend's two-year-old son. In imposing a sentence of death, the jury applied aggravating circumstances including the age of the victim and the heinous, atrocious, and cruel nature of the murder. Id. The evidence adduced at trial indicated that the defendant had repeatedly struck the victim for defecating and urinating in his clothes. Id. at 310. A blow to the child's abdomen or a "severe squeeze" caused a deep tear in the liver and a tear in the small bowel mesentery, as a result of which injuries the child bled to death. Id. An autopsy also revealed numerous fresh bruises and abrasions. Id. Moreover, the evidence established that the defendant had previously abused the child. Id. at 309. Otherwise, the defendant possessed a criminal record of misdemeanor and felony convictions of passing worthless and forged checks. The defendant

possessed average intelligence but was suffering from a borderline personality disorder with marked anti-social features and a disassociative personality disorder.

As noted earlier, our supreme court in Hale, 840 S.W.2d at 314, concluded that "punishment [was] disproportionate to the crime on which the jury was charged." However, it is apparent from the opinion that the court reached this conclusion in light of its earlier holding that the Scotty Trexler Law on its face encompassed killings committed during the course of any child abuse, including misdemeanor child abuse, id. at 312, and not as a result of its examination of the facts of the particular case, which would have supported a finding of aggravated child abuse. See Tenn. Code Ann. § 39-4-401 (1988); Tenn. Code Ann. § 39-4-402 (1988). In other words, the court was concerned with "the 'abstract evaluation of the appropriateness of a sentence for a particular crime'" and *not* with the appropriateness of the penalty imposed in that particular case when compared with the punishment imposed on others convicted of the same crime. Bland, 958 S.W.2d at 661-662.

In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the defendant was convicted of the first degree, premeditated murder of his four-year-old son and was sentenced to death. Id. at 533. It is unclear which aggravating circumstances the jury applied in sentencing the defendant. Nevertheless, the evidence adduced at trial revealed that the defendant had inflicted repeated blows to his son's head, resulting in fractures of the victim's skull and cerebral edema or swelling of the brain. Id. at 534. The "pressure in the skull resulted in [the victim's] aspiration of his own vomit and his ultimate death." Id. Additionally, an autopsy revealed that the victim had suffered blows to the abdomen, liver, and kidneys. Id. at 535. Older bruises and injuries reflected past abuse of the child. Id. The defendant was "probably borderline mentally retarded" and suffered from recurrent major depression and a dependent personality disorder. Id. at 536. Our supreme court reduced the appellant's conviction of first degree murder to second degree murder due to a lack of evidence of premeditation. Id. at 543. The offense in Brown occurred prior to the enactment of the Scotty Trexler Law and its successors.

Other cases in Tennessee in which a defendant has murdered a young child have largely involved an accompanying rape rather than the offense of aggravated child abuse:

For example, in State v. Keen, 31 S.W.3d at 201-202, the twenty-seven-year-old defendant was convicted of first degree felony murder of his girlfriend's eight-year-old daughter, committed during the perpetration of a rape. In sentencing the defendant, the jury considered aggravating circumstances including the age of the victim and the heinous, atrocious, and cruel nature of the murder. Id. at 205. The evidence adduced at trial established that the defendant raped the child while choking her, possibly with a shoelace. Id. at 203-204. When the child stopped breathing, the defendant threw her into a river. Id. at 203. An autopsy of the victim's body revealed multiple scrapes and bruises to the child's face and neck and a deep ligature mark around the front of her neck. Id. at 204. The autopsy further indicated that the child was alive when she was thrown into the river. Id. The defendant possessed high intelligence but was suffering from attention deficit disorder, post-traumatic stress disorder, and serious depression. Id. Additionally, the appellant had

been sexually abused as a child. Id. at 205. The defendant possessed no criminal record. Finally, the defendant demonstrated remorse following the offense. Id. at 221. Our supreme court concluded that a sentence of death was proportionate to the offense. Id. at 223. See also State v. Vann, 976 S.W.2d 93 (Tenn. 1998); State v. Irick, 762 S.W.2d 121 (Tenn. 1988); State v. Coe, 655 S.W.2d 903 (Tenn. 1983).

In the category of cases involving the murder of a young child during the perpetration of a rape, as in the category of cases involving murder by aggravated child abuse, we acknowledge that some juries have declined to impose a sentence of death. However, in the two cases discussed below, we note that the defendants, unlike the appellant, did not abuse a position of trust. Moreover, the defendants' intoxication at the time of the offense may have played an important role in the juries' decisions. There is no evidence in the instant case that the defendant was under the influence of any intoxicant.

In State v. Paul William Ware, No. 03C01-9705-CR-00164, 1999 WL 233592, at *1 (Tenn. Crim. App. at Knoxville, April 20, 1999), perm. to appeal denied, (Tenn. 1999), the twenty-five-year-old defendant was convicted of the first degree felony murder of a four-year-old child during the perpetration of rape. The jury found aggravating circumstances including the age of the victim and the heinous, atrocious, and cruel nature of the murder. Nevertheless, the jury chose to impose a sentence of life imprisonment without parole. Id. The evidence adduced at the defendant's trial established that the defendant was an acquaintance of the victim's family and was found in the victim's apartment lying nude and unconscious beside the nude body of the victim. Id. at **1 and 4. An autopsy revealed that the child had been vaginally and anally raped and had died as a result of asphyxiation. Id. at **4 and 6. There was evidence that the defendant was extremely intoxicated at the time of the offense. Id. at **2-3. The defendant had no prior record of criminal convictions.

In State v. James Lloyd Julian, II, No. 03C01-9511-CV-00371, 1997 WL 412539, at *1 (Tenn. Crim. App. at Knoxville, July 24, 1997), the twenty-three-year-old defendant was convicted of first degree felony murder of the three-year-old victim, committed during the perpetration of a kidnapping and rape. The jury found aggravating circumstances including the age of the victim and the heinous, atrocious, and cruel nature of the murder but imposed a sentence of life imprisonment without parole. Id. The evidence adduced at trial established that the defendant was a friend of the victim's parents. Id. He raped the victim and choked her to death. Id. at *2. At the time of the offense, the defendant had consumed a fifth of bourbon and smoked marijuana. Moreover, the defendant had himself been sexually abused as a child by his grandfather and was suffering from a mixed personality disorder and a depressive disorder. He possessed a prior criminal record including convictions of drug possession, driving under the influence of an intoxicant, assault, evading arrest, and reckless endangerment.

Finally, as in Godsey, No. E1997000207-CCA-R3-DD, 2000 WL 1337655, at **21-25, we find a review of cases from other jurisdictions to be helpful in conducting our comparative proportionality review:

For example, in State v. Lopez, 847 P.2d 1078, 1081 (Ariz. 1992), the defendant was convicted of the first degree felony murder of his one-year-old son, committed during the perpetration of child abuse. In imposing a sentence of death, the jury found aggravating circumstances including the age of the victim and the heinous, cruel, and depraved nature of the murder. Id. at 1083-1084. The evidence adduced at the defendant's trial revealed that the child had died as a result of blunt force trauma to the head, chest, and abdomen, causing a fractured skull, hemorrhaging of the brain, hemorrhaging of the spleen and adrenal gland, a tom pancreas, and a lacerated bowel. Id. at 1083. Additionally, the doctor who performed the autopsy on the victim noted numerous bruises of varying ages on the child's face, chest, back, and buttocks. The defendant providing several different accounts of the child's injuries. Id. at 1081-1083. In one account, the defendant claimed that the child had pulled a night stand down on top of him. Id. at 1081. In another account, he admitted that he hit the child because he was angered when the child urinated following a bath. Id. at 1082. The defendant refused to take the child to the hospital following the abuse. Id. The defendant claimed that he was unaware of the severity of the child's injuries. Id. The defendant had a prior conviction of child molestation. Id. at 1092.

In State v. Jones, 937 P.2d 310, 313 (Ariz. 1997), the defendant was convicted of the felony murder of the four-year-old victim, committed during the perpetration of child abuse. The jury imposed a sentence of death on the basis of aggravating circumstances including the age of the victim and the heinous, cruel, and depraved nature of the murder. Id. The evidence adduced at trial established that, at the time of this offense, the defendant was sharing a trailer with the victim, the victim's mother, and her siblings. Id. The victim died of peritonitis. Id. An autopsy revealed that, on the day prior to her death, she had suffered multiple blows, including a blow to her abdomen that caused her small intestine to rupture. Id. She had also suffered a sexual assault. Id. The defendant delayed the provision of medical treatment to the child. Id. The defendant apparently possessed no prior criminal record although "the defendant began using drugs when he was a teen and was a heavy user of methamphetamine at the time of the murder." Id. at 322.

In Andrew Lukehart v. State, No. SC90507, 2000 WL 1424534, at *1 (Fla. September 28, 2000)(publication pending), the twenty-two-year-old defendant was convicted of the first degree murder of his girlfriend's five-month-old daughter and was sentenced to death. The court clarified that the defendant's first degree murder conviction was supported by a theory of felony murder during the commission of aggravated child abuse. Id. at *14. Moreover, the court clarified that the defendant's sentence of death was supported by aggravating circumstances including the defendant's commission of a prior violent felony and the defendant's commission of felony murder during aggravated child abuse, the latter aggravating circumstance requiring consideration of the victim's especially young age. Id. at *18. The evidence adduced at trial established that the defendant inflicted at least five blows to the head of the victim, two of which caused fractures in the child's skull. Id. The state medical examiner also noted bruises on the child's head and arm that had occurred shortly before the child's death. Id. At trial, the defendant testified that, at the time of the offense, he was changing the child's diaper, and she repeatedly pushed herself up onto her elbows. Id. at *2. The defendant responded angrily by pushing the child's head and neck onto the floor. Id. When the baby stopped breathing, he attempted to perform CPR. Id. However, his efforts proved

unsuccessful, and he panicked, transporting the child's body to a nearby pond and throwing the body into the pond. Id. The appellant's criminal record included a prior conviction of felony child abuse relating to another child, for which conviction he was on probation at the time of the instant offense. Id. With respect to the victim in this case, the evidence suggested that the defendant had previously been an "affectionate father figure." Id. at *14. The evidence further indicated that the defendant had himself suffered child abuse, including sexual abuse, as a child. Id. at *2.

In State v. Elliot, 475 S.E.2d 202, 207 (N.C. 1996), the defendant was convicted of the first degree premeditated murder of his girlfriend's two-year-old daughter. He was sentenced to death on the basis of the heinous, atrocious, or cruel nature of the murder. Id. at 224. The evidence adduced at trial established that the defendant slammed the child's head into the floor six or seven times. Id. at 207. The child died as a result of massive head injuries. Id. at 208. Additionally, an autopsy of the child revealed bruises on the child's cheeks, eyes, pubic area, buttocks, feet, and chest, a fracture to the left wrist, and a rupture in the membrane attaching the child's lip to her gum. Id. Additionally, thirty percent of the child's hair had been pulled from her head. Id. There was evidence of prior abuse. Id. at 207. The defendant was "coming off" cocaine at the time of the murder. Id. at 208. The defendant possessed no prior criminal record. Id. at 224.

In Malicoat v. State, 992 P.2d 383, 391 (Okla. Crim. App.), cert. denied, __ U.S. __, 121 S. Ct. 208 (2000), the defendant was convicted of the first degree felony murder of his thirteen-month-old child. Id. at 391-392. The jury imposed a sentence of death on the basis of the heinous, atrocious, or cruel nature of the murder and the probability that the defendant would commit future criminal acts of violence. Id. The evidence adduced at trial established that the victim died as a result of a head injury and abdominal hemorrhaging. Id. at 392. Additionally, the child's face and body were covered with bruises, her body had three bite marks, and she had broken ribs. Id. The defendant worked at night and cared for the victim during the day while the victim's mother was at work. Id. The defendant admitted to previously poking the child in the chest and biting her. Id. Additionally, he admitted that he had hit her head on a bed frame and punched her twice in the stomach. Id. According to the appellant, when he punched the child in the stomach, she stopped breathing. Id. He successfully administered CPR but otherwise failed to seek medical attention. Id. The child subsequently died. Id. The appellant asserted at trial that, at the time of the offense, he was exhausted due to his work schedule. Id. Additionally, the evidence established that the defendant had himself been severely abused as a child. Id. The defendant did not have a prior criminal record. Id. at 397. However, the defendant's estranged wife testified concerning her abuse by the defendant. Id. The court noted the defendant's lack of remorse for his offense. Id. at 398.

In Fairchild v. State, 998 P.2d 611, 615 (Okla. Crim. App. 1999), the defendant was convicted of murder by child abuse of his girlfriend's three-year-old son. The jury imposed a sentence of death on the basis of the especially heinous, atrocious, or cruel aggravating circumstance. Id. The evidence adduced at trial established that the defendant died as a result of brain damage caused when the defendant threw the child "against the vertical surface of the folded-down wing of a drop-leaf table." Id. The defendant was enraged because the victim was crying. Accordingly, he held the victim's buttocks against a hot wall heater, struck the victim multiple times, and threw him

against the table. Id. at 616. Overall, the child suffered twenty-six blows to his body. Id. When the child stopped breathing, the defendant immediately called 911. Id. Apparently, the defendant had no prior criminal record.

No two cases are identical with respect to either circumstances or defendants. Henderson, 24 S.W.3d at 315. With that in mind and after reviewing the cases discussed above and many other cases not herein detailed, we are of the opinion that the penalty imposed by the jury in this case is not disproportionate to the penalty imposed in similar cases.

III. Conclusion

In summary, following a careful and extensive review of the record and the parties' briefs and upon making the determinations required by Tenn. Code Ann. § 39-13-206(c)(1) (1993), we affirm both the appellant's conviction of first degree murder by aggravated child abuse and his sentence of death.

_____

NORMA McGEE OGLE, JUDGE