IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

STATE OF TENNESSEE.	*	No. 01C01-9801-CR-00021
Appellee	*	Davidson County
	*	Hon. J. Randall Wyatt, Jr.
DANIELLE JORDAN	*	(Aggravated Child Abuse, Reckless Homicide)
Appellant.	*	

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OPINION FILED:

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

The appellant, Danielle Jordan, was convicted by a Davidson County jury of one (1) count of aggravated child abuse and one (1) count of reckless

homicide. The trial court sentenced her as a Range I offender to concurrent terms of twenty-five (25) years incarceration for aggravated child abuse and four (4) years incarceration for reckless homicide. On appeal, the appellant raises the following issues for this court's review:

(1) whether the State's failure to provide the defense with a witness' statement constituted a due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963);

(2) whether prosecutorial misconduct deprived the appellant of a fair trial;

(3) whether the trial court erred in allowing the jury to take certain exhibits into the jury room during deliberations pursuant to Tenn. R. Crim. P. 30.1;

(4) whether the State properly established venue;

(5) whether the evidence was sufficient to support the appellant's convictions of aggravated child abuse and reckless homicide;

(6) whether the trial court properly sentenced the appellant; and

(7) whether the cumulative effect of these errors denied the appellant a fair trial.

After a thorough review of the record before this court, we conclude that there is no reversible error and affirm the judgment of the trial court.

FACTS

At approximately 12:00 p.m. on February 4, 1996, emergency personnel were dispatched to the appellant's home at 517 Summer Place, an apartment in the James Cayce Homes housing development in Nashville, in response to a call that the appellant's seven-month old son, Tyshean Jordan, was not breathing. The paramedics found the baby lying on a bed in an upstairs bedroom and, after attempting to revive him, determined that he was dead.

The room in which Tyshean was found was cold, dirty, and damp. The windows were covered in ice, and condensation had formed on the walls and ceiling. Although the day was very cold,[1] the baby was dressed in a "summer outfit"

[1] The parties entered into a stipulation that on February 4, 1996, the maximum temperature outside was 14° and the minimum temperature was -3°.

with no pants or socks. His diaper was fully saturated, and his clothing and blankets were wet, soiled, and smelled of urine. Moreover, the baby's diaper, clothing, and blankets were partially frozen, so that they were "crunchy."

Emergency personnel additionally observed that the baby was cold, wet, and extremely thin. His eyes and cheeks were hollow and sunken, and his skin was an "ashy-grayish" color and appeared to have the texture of leather. Indeed, Tyshean's body was in such an emaciated condition that his bones were visible. A bottle containing a milky-looking substance that appeared to be either frozen or dried was found next to him.

In contrast, the appellant was well-dressed, her hair was fixed, and her nails were manicured. Although she was crying, the appellant appeared calm and rational and did not want to hold or touch her child. She informed emergency personnel that Tyshean had slept alone in the upstairs bedroom while she slept downstairs. She indicated that she had checked on the baby about two (2) hours prior to his death. She further advised them that Tyshean had had pneumonia approximately one month prior to his death but had not had any recent medical problems.

Police officers noted that the apartment was very cold when they arrived on the scene; however, the temperature inside the residence began to increase during their stay. Law enforcement authorities also observed little or no food in the kitchen and refrigerator.

Later that afternoon, the appellant gave a tape-recorded statement to the police. She acknowledged that she had stayed at the home of her friend Tasha Phillips the night before Tyshean's death and had only returned home when her younger brother came to Phillips' apartment and told her that Tyshean was not breathing. However, she asserted that the baby had been fed at approximately 11:00 a.m. by her sister, Tonette. She told the detective that, generally, she fed Tyshean evaporated milk, because he was not tolerating formula well. She claimed that her child's weight fluctuated greatly and that doctors had informed her that Tyshean's esophagus was too small. She stated that she was informed that her child's medical condition might require surgery. However, she stated that Tyshean

was not ill the night before his death. She further told the detective that the heater in her apartment was not working properly, which explained the cold temperature in her home.

Approximately ten (10) days later, the appellant provided a second statement to the police. In this statement, she told the detective that she was Tyshean's primary care giver and fed him approximately three (3) to four (4) times each day. She stated that she held her baby when she fed him, but she also acknowledged that she frequently propped a bottle to his mouth in order to feed him. She expressed shock and disbelief at her baby's death, again explaining that Tyshean was not sick before his death. She stated that she did not understand what had caused Tyshean to die.

Dr. Ann Bucholtz, a forensic pathologist with the Davidson County Medical Examiner's Office, performed the autopsy on seven-month old Tyshean Jordan. At the time of Tyshean's death, he weighed nine point six (9.6) pounds and appeared thin and emaciated. Tyshean's ribs were prominent, and his abdomen was sunken even though the abdomen typically protrudes after death. His head was disproportionately large to the rest of his body, his eyes were sunken, and his skin was dry and wrinkled. Also, Tyshean had healing ulcers on his nose and ankle, his ears were soiled, and his scalp was dry, flaky, and had a red discoloration. Dr. Bucholtz further noted that the baby's diaper contained "rock-like excrement," and his genitals were encrusted in feces. Dr. Bucholtz similarly found dried fecal material on Tyshean's backside and buttocks. Upon examination, Dr. Bucholtz determined that the baby's small intestine was empty, but "rock hard" feces was impacted in his rectum. Finally, Tyshean's thighs had a red discoloration, which Dr. Bucholtz referred to as a form of diaper rash caused by the care giver's failure to change the baby's diaper for extended periods of time.

Dr. Bucholtz concluded that the baby's body was "wasted" due to a loss of body fat. Tyshean had a "minimal to unmeasurable" amount of fat, the fat on his abdomen equaling the thickness of his skin. The doctor further opined that, at the time of his death, the baby would not have had much strength due to severe muscle atrophy. She described Tyshean's physical development as "grossly delayed."

Dr. Bucholtz observed no organic causes for Tyshean's loss of body fat and concluded that the baby suffered from malnutrition due to a lack of caloric intake. She also noted that the lack of fat on Tyshean's body could have caused him to succumb to hypothermia quickly. Moreover, the doctor found that, at the time of Tyshean's death, he had been suffering from the recent onset of acute pneumonia. Dr. Bucholtz concluded that the cause of Tyshean's death was pneumonia, probable hypothermia, and malnutrition.

The appellant and her mother, Marilyn Jordan, were subsequently arrested in connection with Tyshean's death. They were indicted on one (1) count of murder in the perpetration of aggravated child abuse and one (1) count of aggravated child abuse. Upon Marilyn Jordan's motion, the trials were severed, and the appellant's case proceeded to trial.[2]

The State's evidence established the chronology of events that transpired from Tyshean's birth until his death in February 1996. Tyshean was born at Centennial Medical Center on June 17, 1995, and weighed eight (8) pounds and six (6) ounces. The child had no reported health problems at birth and had no significant problems with his feedings. However, nurses at Centennial observed that the appellant did not wish to see or hold her baby and noted "slow bonding" between mother and child. Because of the poor interaction between the appellant and her baby, the nurses notified social services.

Jennifer Horsley, a student intern social worker at Centennial, met with the appellant to inform her about the various social services available. She and the appellant discussed the Women, Infants and Children (WIC) program, which provides food and formula for pregnant mothers and their children. Horsley also informed the appellant about the HUGS program, a program for mothers and infants in which a HUGS nurse periodically checks on the baby's weight and development, teaches new mothers how to care for their children, and ensures that the baby is regularly seeing a pediatrician and receiving his immunization shots.

The appellant informed Horsley that she was not interested in the

[2] Following the appellant's trial, Marilyn Jordan pled guilty to facilitation of aggravated child abuse and received a sentence of ten (10) years.

HUGS program but did participate in the WIC program. She initially qualified for the WIC program when she was pregnant with Tyshean in March 1995 and was recertified in June. The appellant received vouchers for infant formula; however, she only redeemed the vouchers through August of 1995. Because the appellant never returned to receive more vouchers after August, Melissa Overton, the Director for the Supplemental Food Programs of the Nashville Metropolitan Health Department, attempted to follow up with her. However, Overton could not reach the appellant and subsequently closed her file.

Tyshean's pediatrician, Dr. Churku Mohan Reddy, recommended that the appellant schedule Tyshean's first medical appointment within one (1) week to ten (10) days of his birth. The appellant scheduled an appointment for July 5 but did not bring her child in as scheduled. Dr. Reddy's office scheduled another appointment for July 25, which was kept by the appellant. At this time, the baby weighed nine (9) pounds, and the appellant reported that the child was eating well. Dr. Reddy found no indication of heart problems, vomiting, or diarrhea. Another appointment was scheduled for August 22, during which the child was to receive his immunization shots; however, the appellant did not bring the child to Dr. Reddy's office as scheduled.

Rather, on August 18, 1995, the appellant brought Tyshean to the Pediatric Clinic at Nashville General Hospital, complaining that the child had been vomiting for three (3) days. The treating physicians determined that the child should be admitted to the Pediatric Ward at the hospital; once Tyshean was admitted, the appellant left the hospital. Prior to her departure, the appellant reported that the baby was consuming 26 ounces of Prosobee formula per day, but, because the child had been vomiting, she had treated him with Pedialyte and Gatorade for twenty-four (24) hours.

Dr. Danny Wayne Futtrell, the attending physician in the Pediatric Ward, noted that Tyshean was extremely thin, almost "cachectic." The child weighed eight (8) pounds and nine (9) ounces, which was only three (3) ounces above his birth weight. The child was fussy, but consolable with a bottle. The doctors diagnosed the child with "failure to thrive" but initially questioned whether the

failure to thrive was social or organic.[3]

In treating Tyshean, the pediatric staff began feeding him Pedialyte to determine if he could ingest fluids from the bottle. When no vomiting occurred, the staff fed him half-strength infant formula and eventually progressed to full-strength formula. The baby tolerated his feedings well, with little or no vomiting. Indeed, Tyshean consumed approximately eight (8) ounces at each feeding, which is double the amount that an infant his age would be expected to consume.

During his hospital stay, Tyshean interacted well with the nursing staff and gained weight. By the time he was discharged from the hospital on August 22, Tyshean had gained one (1) pound and two point eight (2.8) ounces. Neither Dr. Futtrell nor Dr. Clerissa Arthur, a resident physician at Nashville General Hospital, saw anything organically wrong with the baby and both testified at trial that, based upon their observations during Tyshean's hospital stay, the baby had not been fed as reported by the appellant. Moreover, the staff noted that no family members visited Tyshean until August 21, approximately four (4) days after he was admitted to the Pediatric Ward. Accordingly, upon Tyshean's discharge, Dr. Futtrell diagnosed him with social failure to thrive due to an inadequate caloric intake and requested a social services consult.

The appellant was referred to the HUGS program on August 22 due to Tyshean's diagnosis of failure to thrive. Lynn Harbison, a registered nurse working with the HUGS program, was assigned to Tyshean's case. On August 24, Harbison visited the home of the appellant's aunt, Era Jordan, with whom the appellant had been staying; however, she was unable to see the baby, because no one was home.

On August 25, the appellant failed to show up for another appointment with Dr. Reddy, Tyshean's pediatrician. Moreover, the appellant did not schedule any other appointments with her baby's pediatrician in 1995.

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[3] Dr. Futtrell testified at trial that "organic failure to thrive" is a "medical condition that interferes with the child's ability to either take in foods and nutrients or to utilize those -- the food and nutrients once they are – are inside the child's body." On the other hand, "social failure to thrive" means that the child is not getting enough to eat.

On August 28, Lynn Harbison made another HUGS visit to Jordan's home. Jordan, the appellant, and Tyshean were present on this occasion. Harbison discussed with the appellant her failure to keep the August 25 appointment with Dr. Reddy. The appellant informed Harbison that she did not keep the appointment, because she could not arrange for transportation. The appellant also reported that the baby was being fed approximately 30 ounces of Prosobee formula per day, was feeding well, and was experiencing no problems with spitting up or vomiting. Harbison noted that Tyshean weighed ten (10) pounds and four (4) ounces.

Harbison made another visit on September 7; Jordan and Tyshean were at home, but the appellant was not present. Harbison noted that Tyshean weighed approximately ten (10) pounds and twelve (12) ounces. Harbison next attempted to visit Jordan's home on September 15, 18, and 21, but no one answered the door on these occasions. Each time, Harbison left a note asking that someone contact her, but she received no response. Harbison also attempted to page Jordan, but the appellant's aunt did not return her calls. When Harbison again returned to Jordan's home on September 26, she was informed that the appellant and Tyshean no longer resided at that address and that no one knew where they could be reached. Harbison left another message asking that the appellant contact her but received no response. Because Harbison was unable to reach the appellant, she subsequently closed the appellant's HUGS file.

As a result of her failure to keep Tyshean's appointment with Dr. Reddy on August 25, the appellant was also referred to Kerry Moore, a child abuse investigator with the Department of Human Services (DHS). Moore initially attempted to contact the appellant through her pager number but was informed that the number was incorrect. Moore then visited the appellant's residence at 517 Summer Place on September 5, but no one responded at the door. The appellant's neighbors informed Moore that no one lived at that address. Moore nevertheless left a message on the door, but the appellant failed to contact him. Following additional unsuccessful efforts to contact the appellant, Moore mailed a certified letter to 517 Summer Place on October 22, 1995. The letter was returned as undeliverable on November 22, 1995, and Moore prepared to close the appellant's file with DHS.

On December 17, 1995, the appellant brought Tyshean to the emergency room at Centennial Medical Center. The appellant stated that she and Tyshean had returned to Tennessee after living in Atlanta for five months, and the baby was now coughing, had nasal congestion, and was suffering a chronic rash. Hospital staff recorded that, at six (6) months old, Tyshean weighed eleven (11) pounds, not even three (3) pounds above his birth weight, and had not received any immunization shots. Moreover, Dr. David Stanton Goldberg, an emergency room physician, diagnosed Tyshean with pneumonia. Although Dr. Goldberg was concerned that Tyshean was underweight, he prescribed Amoxicillin and released the baby. However, Dr. Goldberg insisted that the appellant take Tyshean to his pediatrician within a couple of days for follow-up care.

The appellant had a scheduled appointment with Dr. Reddy, Tyshean's pediatrician, on January 17, 1996. However, the appellant once again did not bring her child to see the doctor as scheduled.

In late January 1996, DHS received an anonymous complaint that Tyshean was grossly underweight and that the baby had been observed lying on the floor in vomit. Michael Hughes, a DHS investigator, was assigned to investigate the appellant's case. Hughes visited the appellant's home on January 25 but did not recommend that DHS remove the baby from the appellant's home. Approximately ten (10) days later, Tyshean died.

At trial, Lori Counts testified that she lived next door to the appellant while Tyshean was alive. Counts stated that approximately eight (8) or nine (9) people lived in the appellant's apartment. The children who lived with the appellant frequently came to her apartment and asked for food. Although the appellant lived only one and one-half blocks from the grocery store, Counts observed the appellant bring food into her apartment only once. Counts also testified that the appellant's home was only two and one-half blocks from a medical clinic which accepted Access Med Plus insurance.[4] She further stated that, once reported, maintenance workers at James Cayce Homes would make repairs within one (1) or two (2) days.

[4] The State presented testimony that the appellant received approximately $185 per month from Aid to Families with Dependent Children (AFDC) and received food stamps. Further, Tyshean had health insurance with Access Med Plus, which paid claims for Tyshean's hospital visits to Nashville General Hospital in August 1995 and Centennial in December 1995.

Yet, Counts testified that she never saw the appellant bring Tyshean outside of the home.

On the morning of Tyshean's death, Counts' mother, Jean Lassiter, heard a woman scream but did not see emergency personnel until approximately one (1) hour later. Counts stated that when the appellant asked to use her phone on the day of the baby's death the appellant appeared calm. On the evening of Tyshean's death, Counts heard what sounded like a party in the appellant's home. She described the sounds as "[l]oud music, blasting, cutting up, horseplaying, running around the house." Another neighbor, Kendra Stewart, testified that, approximately one (1) week after Tyshean's death, the appellant spoke to her about "going out" that weekend.

Tasha Phillips, a friend and neighbor of the appellant, also testified for the State at trial. She stated that the appellant lived with her for a short time in August of 1995 until the appellant moved in with Era Jordan. In October, the appellant moved into the apartment at 517 Summer Place along with approximately eight (8) other people. Phillips noticed that, soon after the appellant moved into her Summer Place apartment, Tyshean began to lose weight. Phillips encouraged the appellant to take Tyshean to the doctor, but the appellant told her to mind her own business. Moreover, although Phillips observed the appellant buy clothing for her daughter, Tiara, Phillips never saw the appellant buy clothing for Tyshean. Approximately two (2) months prior to Tyshean's death, the appellant told Phillips that she believed the baby would die.

Phillips testified that the appellant spent most of her time at Phillips' home and kept many of her belongings there. While the appellant was at Phillips' home, she would leave Tyshean in the care of her mother and sisters at the apartment on Summer Place. After Tyshean was treated for pneumonia in December 1995, the appellant began spending in excess of fifteen (15) hours each day at Phillips' apartment.

Phillips reiterated Counts' testimony that maintenance workers at James Cayce Homes would make repairs in a timely manner and testified that, at the time of the child's death in February 1996, the heat in the appellant's apartment

had not worked since November 1995. On the night before Tyshean died, the appellant, along with her boyfriend, slept in Phillips' apartment where the heat was working.

Toni and Tonette Jordan, the appellant's twin sisters,[5] testified that they lived with the appellant at her apartment on Summer Place. According to the sisters, the appellant spent much of her day at Tasha Phillips' home, leaving Tyshean at the Summer Place apartment. Tonette cared for the baby by feeding him, bathing him, and changing his diaper. The appellant rarely fed her child, and, when she did, she would merely "prop a bottle" to her child's mouth. Additionally, although the appellant received food stamps, she seldom bought food for the baby. The appellant also used her welfare check to buy "hair supplies" and clothing for herself and her daughter, Tiara. Tonette testified that, near the end of Tyshean's life, she never saw the appellant hold him.

On the night before Tyshean died, the heat was not working in the appellant's apartment. Although the appellant knew that the heat had not been working for a long time, she left Tyshean in the unheated apartment and slept at Tasha Phillips' heated apartment. After learning that her child was not breathing, the appellant rushed to her apartment and directed Toni to change the baby's clothes and diaper before the ambulance arrived.

After Tyshean's death, the manager of the James Cayce Homes, as well as maintenance personnel, investigated the circumstances surrounding the extremely cold temperature in the appellant's apartment. Notwithstanding claims by the appellant and Marilyn Jordan that they had requested maintenance for the malfunctioning heater, a "maintenance history" revealed that no such requests had been submitted. Moreover, Bobby Lee Chatman, a maintenance mechanic with the James Cayce Homes, inspected the heater in the appellant's apartment and did not find any mechanical problems which would prevent the heater from working properly.

David Degrella, an employee of DHS, testified for the defense at trial. He stated that he was present at the appellant's home on the afternoon of February

[5] Toni and Tonette were fifteen (15) years old at the time of trial.

4, 1996, after Tyshean's body was found. While he was at the appellant's apartment, he observed the maintenance mechanic replace a "thermal coupler" in the heating system, and the heat began working shortly thereafter.

Michael Hughes, an investigator for DHS, also testified for the defense. He visited the appellant's home on January 25 in response to a complaint about Tyshean. Hughes testified that the appellant's home was warm and clean, and he found food in the home for the baby and the rest of the family. Although Tyshean appeared to be underweight, Hughes did not find him to be "drastically underweight." Moreover, according to Hughes, the appellant explained that Tyshean had trouble holding down his food, and doctors had advised her that there was something medically wrong with her child. Hughes stated that he attempted to verify this information with Tyshean's doctors but was unable to get a response from them. He also testified that no one complained to him about any heater malfunction in the apartment.

Hughes conceded that he did not write his report detailing these findings until February 12, eight (8) days after Tyshean's death. Subsequently, Hughes was asked to resign from DHS.

The appellant testified on her own behalf at trial. She was born on October 9, 1975, and dropped out of high school in the tenth grade. In late 1995 and early 1996, she lived at her apartment on Summer Place with her two children, her mother, and five brothers and sisters. She testified that, throughout his life, Tyshean was unable to hold his food down. In August 1995, she took the baby to General Hospital, because he had been vomiting and had diarrhea. She testified that the doctors diagnosed her child with failure to thrive, but they advised her that Tyshean's esophagus was too small and that he needed surgery to enlarge his esophagus. She asserted that she visited her child regularly while he was in the hospital.

After Tyshean was released from the hospital, he continued to vomit on a regular basis; however, his vomiting was not as severe as before the hospitalization. The baby seemed in better health for some time until December, when he was diagnosed with pneumonia. The appellant testified that she believed

Tyshean was underweight, but, because the emergency room physician at Centennial did not express concern over the child's weight, she was not overly troubled. After she administered the medicine prescribed by the emergency room physician, Tyshean's health improved.

The weekend before Tyshean died, the appellant intended to take him to a doctor, because his hand was "curling in." Tyshean had also been vomiting after every feeding. However, because it was snowing at the time, she was unable to arrange for transportation to the doctor's office.

The night prior to Tyshean's death, the appellant went to Tasha Phillips' apartment at approximately 9:00 p.m. She stayed there until 4:00 a.m., at which time she returned home and checked on her son. She remained home for a couple of hours before returning to Phillips' apartment, where she went to sleep. At approximately 11:00 a.m., her younger brother came over and informed her that Tyshean was not breathing. She rushed home and asked that someone call for medical assistance.

The appellant testified that her child was never left alone. She also claimed that the heat in her apartment was not working in late January and early February. Although she had contacted maintenance to repair the heater, no one ever fixed the heater until after Tyshean's death. She did acknowledged that there was no food in her apartment at the time of her baby's death.

Following the presentation of proof, the jury found the appellant guilty of the lesser included offense of reckless homicide in Count One and aggravated child abuse as charged in Count Two. As previously noted, the trial court sentenced the appellant as a Range I offender to concurrent terms of four (4) years for the reckless homicide conviction and twenty-five (25) years for the aggravated child abuse conviction. From her convictions and sentences, the appellant now brings this appeal.

ANALYSIS

I. BRADY VIOLATION

In her first issue on appeal, the appellant asserts that the trial court

should have granted a mistrial due to the State's suppression of exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Specifically, the appellant argues that the State violated her right to due process by failing to provide defense counsel prior to trial with Tonette Jordan's tape-recorded statement to police.

During the trial, on the day before Tonette was scheduled to testify, the State provided defense counsel with Tonette's tape-recorded statement as Jencks material.[6] In the statement, Tonette recounted that she had changed and fed Tyshean on the morning of his death. Moreover, when asked why the apartment was cold at the time of Tyshean's death, Tonette responded that "the maintenance man was supposed to have been coming to fix the heater, but they never did come and fix the heater."

Upon receiving this statement, defense counsel immediately submitted a motion for a mistrial. The trial court listened to the statement and determined that it was "borderline exculpatory" and that the State should have provided the evidence to defense counsel prior to trial. However, the court concluded that a mistrial was unnecessary, because Tonette Jordan and the maintenance employees were scheduled to testify on behalf of the State and would be subject to cross-examination by defense counsel.

A mistrial in a criminal case should only be declared in the event of "manifest necessity." State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998), cert. denied, __ U.S. __, 119 S.Ct. 1501 (1999). In other words, the entry of a mistrial is appropriate only if a miscarriage of justice will otherwise occur. State v. Allen, 976 S.W.2d 661, 668 (Tenn. Crim. App. 1997). Moreover, on appeal, our supreme court has observed that

> "[w]hether an occurrence during the course of a trial warrants the entry of a mistrial is a matter which addresses itself to the sound discretion of the trial court; and this court will not interfere with the exercise of this discretion absent clear abuse appearing on the face of the record."

State v. Burns, 979 S.W.2d 276, 293 (Tenn. 1998), cert. denied, __ U.S. __, 119 S.Ct. 2402 (1999)(citation omitted). See also Hall, 976 S.W.2d at 147; Allen, 976

[6] *See* Tenn. R. Crim. P. 26.2.

S.W.2d at 668.

In Brady v. Maryland, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-97; see also Hartman v. State, 896 S.W.2d 94, 101 (Tenn.1995). A criminal defendant carries the burden of proving a Brady violation by a preponderance of the evidence. State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995); State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). In order to carry her burden, a defendant must establish the following prerequisites:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
>
> 2. The State must have suppressed the information;
>
> 3. The information must have been favorable to the accused; and
>
> 4. The information must have been material.

Edgin, 902 S.W.2d at 389.

The State does not contest defense counsel's representation to the trial court that he had previously requested all tape-recorded statements by State witnesses favorable to the accused. It is similarly undisputed that the State withheld Tonette's tape-recorded statement from defense counsel until the day before Tonette's testimony. However, the information in Tonette's statement does not tend to exculpate the appellant in this case. Even if the appellant's heater was malfunctioning and the management at James Cayce Homes was negligent in failing to repair the heater, the appellant had a duty as Tyshean's parent to provide adequate shelter for her child. Yet, Tyshean slept alone in a bedroom where the walls and windows were encrusted in ice. The room was so cold that the child's clothing, blankets, and diaper were described by emergency personnel as "crunchy." Meanwhile, although the appellant knew that the heat was not operating in her apartment on this frigid night, she slept comfortably with her boyfriend in a heated neighboring apartment. Moreover, whether Tonette happened to feed and change Tyshean on the morning of his death did not negate the gross neglect otherwise and overwhelmingly established by the evidence.

Additionally, even assuming that the withheld information was favorable to the appellant, we do not believe that it was "material" under Brady and its progeny. In determining the materiality of undisclosed information, a reviewing court must establish whether "in [the] absence [of the information] [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566 (1995). In other words, evidence is considered material only if there is a reasonable probability that the results of the proceeding would have been different had the evidence been disclosed to the defense. Kyles, 514 U.S. at 433, 115 S.Ct. at 1565; Edgin, 902 S.W.2d at 390. Moreover, "if there is only a delayed disclosure of information, in contrast to a complete failure to disclose exculpatory information, Brady normally does not apply, unless the delay itself causes prejudice." State v. Hall, No. 01C01-9710-CC-00503, 1999 WL 34782, at *9 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1999) (emphasis in original).

The appellant has failed to demonstrate how she was prejudiced by the delayed production of the tape-recorded statement. In this case, the State produced the tape-recorded statement prior to Tonette's testimony and the testimony of the maintenance personnel. Tonette testified in accordance with her pre-trial statement that she had fed and changed the baby on the morning of his death and that the heat was not working properly at that time. Finally, the record reflects that the appellant was aware prior to trial of the information contained in the statement. Accordingly, we decline to disturb the trial court's exercise of discretion in denying the appellant's motion for a mistrial. This issue has no merit.

II. PROSECUTORIAL MISCONDUCT

In her next issue the appellant alleges that the State committed various instances of prosecutorial misconduct, depriving her of a fair trial. Specifically, she contends that the State committed prosecutorial misconduct when: (1) the State failed to provide Tonette Jordan's tape-recorded statement until the day before she testified; (2) the prosecutor characterized a defense witness' testimony as perjury before the witness testified; (3) the prosecutor characterized Tyshean's weight of nine (9) pounds as "starving"; (4) the prosecutor referred to a ruling by the trial court that certain portions of a report were inadmissible; (5) agents of the State emptied the contents of the bottle found next to the baby on the day of

his death; (6) agents of the State misplaced photographs taken of the outside of the windows of the appellant's apartment; and (7) the State provided a detective's report to the defense in pre-trial discovery which contained blank pages.

Initially, as the State correctly notes, the appellant only raised the issues of the delayed production of Tonette Jordan's tape-recorded statement, the "perjured" testimony, and the empty baby bottle in her motion for new trial. Because the other issues were not raised in the motion for new trial, they are waived. Tenn. R. App. P. 3(e). Moreover, we have previously addressed the State's failure to produce Tonette Jordan's tape-recorded statement. Accordingly, this court need only address the appellant's allegations of prosecutorial misconduct with regard to the "perjured" testimony and the empty baby bottle.

In order to prevail on a claim of prosecutorial misconduct, the appellant must demonstrate that the conduct committed by the prosecution was so inflammatory or improper that it affected the verdict to his detriment. Harrington v. State, 385 S.W.2d 758, 759 (1965); State v. Gray, 960 S.W.2d 598, 609 (Tenn. Crim. App. 1997). In making this determination, this court is guided by five factors:

> 1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
>
> 2. The curative measures undertaken by the court and the prosecution.
>
> 3. The intent of the prosecution.
>
> 4. The cumulative effect of the improper conduct and any other errors in the record.
>
> 5. The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); see also State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

A. "Perjured" Testimony

In its case-in-chief, the State called Vicki Bradley Lawson, a supervisor at DHS, to testify concerning the report prepared by Michael Hughes after his visit to the appellant's home in January 1996. The trial court interrupted Lawson's testimony, and the following colloquy occurred in the jury's presence:

THE COURT: Is he here as a witness?

GEN. LANCE: I'm sorry, Your Honor.

THE COURT: Is he here as a witness, Michael Hughes?

GEN. LANCE: Is he here? No, Your Honor. We're calling Vicki Bradley as the keeper of the records.

MR. JOHNSON: I believe the State has released him, Your Honor.

GEN. LANCE: Your Honor, if we may approach, we would be more than happy to explain that.

MR. JOHNSON: I think we need to approach, also, Judge, on a matter --

GEN. LANCE: Well, Your Honor, actually, we don't even need to approach. The State is not allowed to put on perjured testimony. So we have decided to put on Vicki Bradley instead of putting on Michael Hughes in the belief that he will be putting on perjured testimony if he testifies that he does these things. And because we have an obligation not to do that, we're putting on Vicki Bradley to merely state what he said he did, rather than Michael Hughes, who's saying he did it, when we believe that to be perjured testimony.

THE COURT: So did you have him under subpoena?

GEN. LANCE: We did. And then, when we realized that he would be putting on what we believed to be perjured testimony, we decided to call the keeper of the records, instead.

THE COURT: Let's step in here for a minute. Give me a minute, Members of the Jury.

The trial court then met with the attorneys in chambers and, subsequently, gave the following curative instruction to the jury:

> All right. Members of the Jury, . . . completely disregard any remarks that were made by the Assistant District Attorney, Ms. Lance, about a witness, who I believe you'll hear from in the morning. Apparently his name is Michael Hughes. It was inappropriate for her to say that she didn't put this witness on because it would be perjured testimony. And so I want you to absolutely disregard those remarks. You'll have your chance to listen to this witness and -- and consider what he has to say and -- and consider the credibility of it tomorrow, itself, because he will be here as a witness in the

> morning. And so, if you would, please disregard the remark by Ms. Lance. It wasn't appropriate. And you'll have your chance to consider it.

Clearly, the assistant district attorney's characterization of Michael Hughes' proposed testimony as "perjured" was inappropriate, particularly in light of her knowledge that the defense intended to call Hughes as a witness.[7] A lawyer should not assert his or her personal opinion as to the credibility of a witness. State v. Henley, 774 S.W.2d 908, 911 (Tenn. 1989). That having been said, this court is reluctant to find that the comments about Hughes "perjured" testimony were uttered with malicious intent. Moreover, after considering the other Judge factors, we conclude that the improper comments did not affect the jury's verdict to the detriment of the appellant. The State's evidence against the appellant was, indeed, overwhelming. Furthermore, the trial court gave both a contemporaneous curative instruction that the jury disregard the improper comments as well as another instruction at the conclusion of the proof that the members of the jury were the exclusive judges of the witnesses' credibility. Absent evidence to the contrary, the law presumes that the jury followed the instructions of the trial court. State v. Alvarado, 961 S.W.2d 136, 147 (Tenn. Crim. App. 1996); State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). This issue is without merit.

B. Empty Baby Bottle

The appellant additionally claims that unknown agents of the State tampered with evidence. She contends that the baby bottle that was found next to Tyshean's body contained a milky liquid. Yet, after the bottle was collected as evidence, the fluid in the bottle mysteriously disappeared. The appellant argues that this "disappearing evidence" constitutes misconduct on the part of the State.

Initially, the record is devoid of evidence that any agent of the State tampered with evidence. A photograph of the bottle taken on February 4 was introduced at trial and does reflect that the bottle contained a white substance. However, the amount of that substance was negligible, and the liquid could have easily evaporated, spilled, or simply dried out and disintegrated over time.

[7] During the conference in chambers, General Lance told the court that "I'm certain that Justin Johnson may . . . want to put him on as a witness."

In any event, the appellant has not demonstrated how this "prejudicial behavior" affected the jury's verdict. Even if the proof substantiated the appellant's claim that agents of the State deliberately emptied the contents of the bottle, the contents were established by other proof introduced at trial. Moreover, the bottle's contents were largely irrelevant at trial. The State did not allege that the child was poisoned by the appellant but rather that the child died from pneumonia, possible hypothermia, and malnutrition. Dr. Bucholtz testified that, even if the bottle had contained milk, this fact would not have changed her determination of the cause of death. Finally, we have already observed that evidence of a single feeding of this baby in no way negated the overwhelming evidence of gross neglect in this case. The appellant has patently failed to demonstrate that the alleged improper conduct affected the jury's verdict in any way. This issue is without merit.

III. TENN. R. CRIM. P. 30.1

The appellant next alleges that she was denied her right to a fair trial when the trial court allowed the jury to take certain exhibits into the jury room during deliberations. The appellant argues that the jury's exposure to these exhibits during deliberations placed undue emphasis upon portions of testimony by witnesses for the State.

At the appellant's trial, nine (9) of the prosecution witnesses made notations on blank note cards concerning a date or dates relevant to their testimony and then noted corresponding details concerning Tyshean's health, such as his weight and physical appearance and the appellant's interactions with both her son and social services and agencies, including the HUGS program and DHS. The information on the note cards was largely drawn from records introduced into evidence in their entirety. The prosecutor asked that the note cards also be admitted into evidence as exhibits, explaining that the State was attempting to create a time line of Tyshean's life for the purpose of assisting the jury in understanding the State's case. Over the appellant's objection, the trial court admitted the note cards into evidence, observing that the cards were demonstrative evidence and analogous to a diagram of a crime scene on which different witnesses make notations as aids to their testimony. During closing argument, the State placed the note cards on a calendar to demonstrate the progression of Tyshean's health and the appellant's behavior during the seven (7) months of her baby's life.

On appeal, the appellant does not challenge the admissibility at trial of the note cards or the State's use of the note cards during closing argument. Rather, she challenges the submission of the note cards to the jury during deliberations. Under Tenn. R. Crim. P. 30.1, "the jury shall take to the jury room all exhibits and writings which have been received in evidence, except depositions, for their examination during deliberations . . . ." This rule is mandatory unless the trial court determines, as relevant to this case, that submission of a particular exhibit would be unduly prejudicial. Tenn. R. Crim. P. 30.1, Advisory Commission Comments. Again, the appellant argues that submission of the State's time line was prejudicial, because, like the submission of a deposition, it emphasized only one portion of testimony by witnesses for the State. See State v. Young, No. 01C01-9605-CC-00208, 1998 WL 258466, at *20 (Tenn. Crim. App. at Nashville, May 22, 1998). Regardless, in light of the undisputed accuracy of the note cards and the overwhelming evidence of the appellant's guilt, we believe that any error was harmless beyond a reasonable doubt. This issue has no merit.

IV. VENUE

In her next issue, the appellant argues that the State failed to prove venue. She claims that the State presented no proof that the crime occurred in Davidson County, and, therefore, the trial court was without jurisdiction to hear this matter.

Article I, § 9 of the Tennessee Constitution provides that, "in all criminal prosecutions, the accused hath the right to. . . a speedy public trial, by an impartial jury of the County in which the crime shall have been committed. . . ." See also Tenn. R. Crim. P. 18(a) ("Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed"). Venue is a jurisdictional fact and not an element of the charged offense. State v. Bloodsaw, 746 S.W.2d 722, 723-24 (Tenn. Crim. App. 1987). Thus, while the prosecution must satisfy its burden of proving that the offense was committed in the county alleged in the indictment, State v. Smith, 926 S.W.2d 267, 269 (Tenn. Crim. App. 1995), the burden of proof is a preponderance of the evidence. Tenn. Code Ann. § 39-11-201(e) (1997); State v. Marbury, 908 S.W.2d 405, 407 (Tenn. Crim. App. 1995); Davis, 872 S.W.2d at 952. This evidence may be either direct, circumstantial, or both. Smith, 926 S.W.2d at 269.

Contrary to appellant's claim, the evidence adduced at trial established that the appellant lived with Tyshean at 517 Summer Place for at least four months prior to the baby's death. Melissa Veazey, a paramedic with the Nashville Metropolitan Fire Department, testified on behalf of the State that, on February 4, 1996, she was dispatched to 517 Summer Place where she discovered Tyshean's body in an upstairs bedroom of the appellant's apartment. Ms. Veazey testified that 517 Summer Place is located in Davidson County. In sum, the State amply established venue. This issue has no merit.

V. SUFFICIENCY OF THE EVIDENCE

The appellant also challenges the sufficiency of the evidence underlying her convictions of reckless homicide and aggravated child abuse. Specifically, she claims that the record is devoid of evidence that she acted "knowingly" as required by the aggravated child abuse statute. Additionally, she contends that the jury's verdict of guilt of the lesser included offense of reckless homicide is inconsistent with its verdict of guilt of aggravated child abuse.

A. Standard of Review

When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). However, because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561

(Tenn. 1990). Moreover, this court may not substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 286 S.W.2d 856, 859 (1956).

B. Statutory Definitions

A person commits the offense of aggravated child abuse, as charged in this case, when that person "knowingly, other than by accidental means, treats a child under [six (6) 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." Tenn. Code Ann. § 39-15-401(a) (1995); Tenn. Code Ann. § 39-15-402(a)(1) and (b) (1995).

Reckless homicide is defined as a "reckless killing of another." Tenn. Code Ann. § 39-13-215(a) (1997).

C. "Knowingly"

Again, the appellant claims that the record is devoid of evidence that she acted "knowingly" as required by the aggravated child abuse statute. She argues that there was "overwhelming testimony . . . that . . . [she] did everything she was told to do concerning the child." We disagree.

Tyshean Jordan was found lying on a bed in a room where the walls and windows were encrusted in ice. The appellant readily admitted that she had not been with her child the night before but had stayed at the heated home of her friend, Tasha Phillips. The baby was cold, dirty, and soaked in his own urine. Although the maximum temperature was below freezing on that day, the child was not wearing pants or socks in the unheated apartment. It appeared that the child's diaper had not been changed for some time, as it contained "rock-hard" excrement.

Dr. Ann Bucholtz determined that the cause of the child's death was pneumonia, possible hypothermia, and malnutrition. A mere examination of the photographs of the child supports Dr. Bucholtz's finding of malnutrition. The child's body was virtually skeletal, his bones protruding and easily visible. The baby's skin was dry, wrinkled, loose, and hung from his bones. His abdomen was sunken, and his backside and buttocks were wasted. The child had healing sores on his nose

and ankle, and his eyes appeared sunken and hollow.

The testimony at trial further showed that the appellant sought medical attention for her child only three (3) times during his seven-month life. Although she testified that the baby's esophagus was too small to take in the necessary nutrients, all of the medical testimony refuted that claim. None of the doctors charged with treating the child found any organic cause for the child's malnutrition. To the contrary, the pediatric staff at Nashville General Hospital determined that, although Tyshean was able to consume his nutrients orally, he simply had not been properly fed.

Moreover, the State's evidence demonstrated the appellant's apathetic attitude towards her child. The appellant was not interested in social services that could assist her in raising her child. She never took her child to the doctor so that he could receive the necessary immunization shots. Neighbors, family, and friends testified that the appellant rarely fed, clothed, or even held her child and that she described her baby as "ugly." In the appellant's statement to the police, she conceded that she frequently fed her child by propping the bottle to his mouth.[8] Much of the money the appellant received in governmental assistance was spent on "hair supplies" and clothing for the appellant and her daughter, Tiara. The appellant rarely spent time with her son and instead left him in the care of her fourteen-year old sister while she stayed at Phillips' house.

The above summary of the State's evidence is merely a fragment of the overwhelming proof against the appellant. The appellant's contention that she did everything she could for her son is disingenuous, at best. After thoroughly reviewing the record, this court is convinced that a rational trier of fact could have found that the appellant acted "knowingly." This issue has no merit.

D. Inconsistent Verdicts

The appellant also argues that the evidence supporting her convictions is insufficient, because the jury's verdicts are inconsistent. Specifically, she alleges that the jury's failure to find her guilty of first degree murder in the perpetration of an

[8] Apparently, the child was put in his infant seat, and then the appellant would put the bottle into his mouth and place something underneath the end of the bottle so that the bottle would tilt into the child's mouth.

aggravated child abuse is inconsistent with the jury's finding that she committed aggravated child abuse. We disagree.

The appellant was indicted in Count One with first degree murder in the perpetration of an aggravated child abuse. Pursuant to Tenn. Code Ann. § 39-13-202(b) (1995), the jury was instructed that, in order to find the appellant guilty of felony murder, they must find that the appellant intended to commit the underlying crime of aggravated child abuse. In contrast, the requisite culpable mental state for aggravated child abuse is "knowingly." See Tenn. Code Ann. § 39-11-106(a)(18) and (20) (1995); Tenn. Code Ann. § 39-15-401(a); Tenn. Code Ann. § 39-15-402(a). Accordingly, the jury could have found that the appellant knowingly committed the crime of aggravated child abuse, but did not do so intentionally, precluding a conviction of felony murder.

In any case, inconsistent verdicts are not fatal to a conviction. State v. Gennoe, 851 S.W.2d 833, 836 (Tenn. Crim. App. 1992). In Wiggins v. State, 498 S.W.2d 92 (Tenn. 1973), our supreme court adopted the United States Supreme Court's holding in Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932), in finding that consistency in verdicts for multiple-count indictments is not necessary. Our supreme court reasoned:

> Consistency in verdicts for multiple count indictments is unnecessary as each count is a separate indictment. Therein lies the essential reasoning. An acquittal on one count cannot be considered res judicata to another count even though both counts stem from the same criminal transaction. This Court will not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned.

Wiggins, 498 S.W.2d at 93-94.

Because the evidence is sufficient to sustain the appellant's convictions of reckless homicide and aggravated child abuse, we decline to disturb the jury's verdicts. This issue is without merit.

VI. SENTENCING

In her next issue, the appellant contends that the trial court imposed excessive sentences for her convictions of reckless homicide and aggravated child abuse. Initially, with respect to her sentences for both reckless homicide and

aggravated child abuse, she challenges the trial court's application of the enhancement factors that the victim was treated with exceptional cruelty, Tenn. Code Ann. § 40-35-114 (5) (1995), and that the appellant had no hesitation about committing a crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114 (10). She also claims that the trial court erred in applying Tenn. Code Ann. § 40-35-114 (6) to her sentence for aggravated child abuse. Finally, she contends that the trial court erred in rejecting several proposed mitigating factors, namely Tenn. Code Ann. § 40-35-113 (3), (11), and (13) (1997).

A. Standard of Review

This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1997). The presumption of correctness is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In any case, in conducting our review, we are required to consider the following factors:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing;
>
> (2) [t]he presentence report;
>
> (3) [t]he principles of sentencing and arguments as to sentencing alternatives;
>
> (4) [t]he nature and characteristics of the criminal conduct involved;
>
> (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
>
> (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

Tenn. Code Ann. § 40-35-210 (1997). The burden is upon the appellant to show that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Additionally, under the 1989 Sentencing Act, the presumptive sentence for a class A felony is the midpoint within the applicable range if no mitigating or enhancement factors are present. Tenn. Code Ann. § 40-35-210(c). In contrast, the presumptive sentence for a class B, C, D, or E felony is the minimum within the applicable range. Id. However, if mitigating and enhancement factors exist, a trial court should start at the presumptive sentence, enhance the sentence

within the range for enhancement factors and then reduce the sentence within the range for the mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute. Rather, the weight assigned to each factor is left to the discretion of the trial court as long as its findings are supported by the record. State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995); see Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments.

B. Trial Court's Findings

In determining the appellant's sentences for aggravated child abuse and reckless homicide, the trial court found that the following enhancement factors applied to both convictions: (1) the appellant treated the victim with exceptional cruelty during the commission of the offense, Tenn. Code Ann. § 40-35-114 (5); (2) the appellant had no hesitation about committing a crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114 (10); and (3) the appellant abused a position of private trust, Tenn. Code Ann. § 40-35-114 (15). With respect to the appellant's conviction of aggravated child abuse, the trial court also found that the personal injuries inflicted upon the victim were particularly great. Tenn. Code Ann. § 40-35-114 (6).

In mitigation, the trial court found that, because of the appellant's youth, she lacked substantial judgment in committing the offense. Tenn. Code Ann. § 40-35-113 (6). The trial court rejected the appellant's proposed mitigating factors that: (1) substantial grounds existed tending to excuse or justify the appellant's criminal conduct, Tenn. Code Ann. § 40-35-113 (3); (2) the appellant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct, Tenn. Code Ann. § 40-35-113 (11); and (3) other factors, including the appellant's trial testimony. Tenn. Code Ann. § 40-35-113 (13).

After balancing the enhancement and mitigating factors, the trial court sentenced the appellant as a Range I offender to the maximum sentence of twenty-five (25) years for aggravated child abuse, a class A felony. The trial court also imposed a concurrent sentence of four (4) years for reckless homicide, the maximum sentence within the range for the class D felony.

C. Enhancement Factors

The appellant does not challenge the applicability of enhancement factor (15) to her convictions of aggravated child abuse and reckless homicide, and we agree that this enhancement factor is entitled to great weight. However, as already noted, the appellant does challenge the trial court's finding that, in committing both aggravated child abuse and reckless homicide, the appellant allowed the victim to be treated with exceptional cruelty. Tenn. Code Ann. § 40-35-114 (5). In order to justify application of this enhancement factor, the facts of the case must "'demonstrate a culpability distinct from and appreciably greater than that incident to' the crime . . . ." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997). In this case, the record shows that the appellant allowed her child to starve to death over several months. Moreover, the child died in an icy cold room wearing a thin shirt and a diaper. The child was soaked in urine, and his diaper, blanket, and clothing were partially frozen. In short, the record amply reflects the requisite, additional culpability.

We agree with the appellant that the trial court erred in applying Tenn. Code Ann. § 40-35-114 (10) in sentencing her for aggravated child abuse and reckless homicide. As in the case of exceptional cruelty, enhancement factor (10) is properly applied only when a defendant exhibits "a culpability distinct from and appreciably greater than that incident to the offense for which he was convicted." State v. Jones, 883 S.W.2d 597, 603 (Tenn. 1994). Accordingly, this court has previously observed that enhancement factor (10) should not be considered when "a fair review of the record clearly shows that proof of 'a substantial risk of death' was one of the factors relied upon by the State in proving 'serious bodily injury' to sustain a conviction of aggravated child abuse." State v. Pendergrass, No. 03C01-9608-CC-00310, 1997 WL 760724, at *11 (Tenn. Crim. App. at Knoxville, December 11, 1997), perm. to appeal denied, (Tenn. 1998). Moreover, factor (10) is inherent in every homicide case relative to the victim, and there is no proof in the record that the appellant endangered the life of any other individual. See, e.g., State v. Russell, No. 03C01-9608-CR-00319, 1997 WL 573475, at *6 (Tenn. Crim. App. at Knoxville, September 16, 1997), perm. to appeal denied, (Tenn. 1998).

We also agree with the appellant that the trial court erred in applying enhancement factor (6) in sentencing her for the offense of aggravated child abuse.

Tenn. Code Ann. § 40-35-114 (6). Our supreme court has held that enhancement factor (6) is inapplicable when "serious bodily injury" is an element of an offense. Poole, 945 S.W.2d at 98. See also State v. Naughton, No. 02C01-9612-CR-00449, 1998 WL 119509, at *6 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1998).

Finally, pursuant to our de novo review, we find that the enhancement factor set forth in Tenn. Code Ann. § 40-35-114 (4), that the victim was particularly vulnerable due to his age or mental or physical disability, is applicable to the appellant's convictions of reckless homicide and aggravated child abuse. In so finding, we acknowledge that the aggravated child abuse statute enhances the penalty for the offense when, as in the instant case, the victim is less than six (6) years of age. Tenn. Code Ann. § 39-15-402(b). Nevertheless, even when age is an essential element of an offense, a court may apply factor (4) if the record demonstrates that, due to his age or physical or mental disability, the victim was incapable of resisting, summoning help, or testifying against the perpetrator. State v. Walton, 958 S.W.2d 724, 729 (Tenn. 1997). See also State v. Holder, No. 01C01-9801-CC-00044, 1999 WL 61055, at **5-6 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1999). The circumstances of this case warrant the application of this factor.

D. Mitigating Factors

As previously noted, the trial court applied mitigating factor (6), Tenn. Code Ann. § 40-35-113 (6), that, due to her age, the appellant lacked substantial judgment in committing the instant offenses. The appellant was approximately twenty years of age at the time of these offenses. However, the trial court accorded this factor very little weight, an assessment that this court will not disturb.

On appeal, the appellant claims that the trial court erred in rejecting several other proposed mitigating factors. Specifically, she alleges that the trial court should have applied Tenn. Code Ann. § 40-35-113 (3), that substantial grounds exist tending to excuse or justify the appellant's criminal conduct; Tenn. Code Ann. § 40-35-113 (11), that the appellant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct; and Tenn. Code Ann. § 40-35-113 (13), other

factors, including the appellant's trial testimony.

First, we observe that, aside from a bald assertion of error, the appellant presents no argument concerning the trial court's failure to accord any weight to these factors. This constitutes a waiver of the issue. Tenn. Ct. of Crim. App. Rule 10(b). Moreover, the appellant's claim is without merit. There is no evidence in the record of "substantial grounds" tending to excuse or justify the appellant's conduct nor does the appellant provide us with those grounds in her brief. We agree with the trial court that the appellant's actions were not only inexcusable, but "unconscionable, outrageous, disgusting." Additionally, there is substantial evidence that the appellant possessed a sustained intent to violate the law. Indeed, the crime was committed over a period of months, during which the appellant had ample opportunity to adequately provide for her child. Finally, we decline to reassess both the jury's and the trial court's evaluation of the testimony presented at trial.

E. Conclusion

Although the trial court erred in applying enhancement factors (6) and (10), the appellant is not necessarily entitled to a reduction in her sentences for aggravated child abuse and reckless homicide. State v. Lavender, 967 S.W.2d 803, 809 (Tenn. 1998). Rather, we conclude that the remaining enhancement factors support the imposition of maximum sentences. The appellant is entitled to no relief.

VII. CUMULATIVE ERROR

In her final claim of error, the appellant insists that she was denied a fair trial based upon cumulative error. Taking the record as a whole, having evaluated each issue, and finding any error to be harmless, we conclude that the appellant was not denied a fair trial.

CONCLUSION

After a thorough review of the record before this court, we affirm the judgment of the trial court.

Norma McGee Ogle, Judge

CONCUR:

_____
Jerry L. Smith, Judge

_____
Thomas T. Woodall, Judge