

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

<p>FILED</p> <p>December 28, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 CYNTHIA ROBERSON)
 AND)
 RHODNEY ROBERSON,)
)
 Appellants)

NO. 02C01-9503-CC-00059
 GIBSON COUNTY
 HON. DICK JERMAN, JR.,
 JUDGE
 (First-Degree Murder)

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OPINION FILED: _____

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

The appellants, Cynthia Roberson and her husband, Rhodney Roberson, were found guilty by a Gibson County jury of first-degree murder in connection with the death of two-year old Tiffany McCaig, the natural daughter of Cynthia Roberson and the step-daughter of Rhodney Roberson. The jury found that the child died as a result of aggravated child abuse.¹ The appellants were each sentenced to life in prison and were fined twenty five thousand (\$25,000.00) dollars.

The appellants have presented the following issues in this appeal:

- (1) The evidence was insufficient to support the convictions;
- (2) The trial court erred in allowing the State to prove injuries sustained by the victim which did not contribute to the cause of death;
- (3) The trial court erred in allowing the introduction into evidence of certain photographs of the victim;
- (4) The trial court erred in its charge to the jury by failing to charge the lesser included offense of misdemeanor child abuse; and
- (5) The trial court erred in charging the jury pertaining to parole eligibility.

In addition, Rhodney Roberson complains that the trial court erred in allowing the prosecution to cross-examine a defense witness in a manner which violated the rule of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 28 L. Ed. 476 (1968), thus denying him his constitutional right of confrontation.

Following a thorough review of the record, the applicable law, and arguments of the parties, we conclude that reversible error exists. Accordingly, the convictions are reversed and the case is remanded to the trial court for a new trial.

Factual Background

¹Tenn. Code Ann. § 39-13-202(a)(4)(1994Supp.).

At approximately 12:00 p.m. on November 19, 1993, Dean Miller, a paramedic with the Gibson County Emergency Medical Services, responded to a 911 call placed by the appellant, Cynthia Roberson. When Miller arrived at the Roberson home, Cynthia Roberson said something was wrong with her daughter. When Miller first saw the child, Tiffany McCaig, she was not breathing and her body was still warm. Although Miller performed CPR, the resuscitation procedures were unsuccessful, and the child was transported by ambulance to Dyersburg Methodist Hospital. She was pronounced dead at 12:55 p.m. Miller did not notice any bruising on the child's face, but did observe bruises on her neck.

The Gibson County Sheriff's Department was notified, and Sheriff Joe Shepard and Chief Deputy Sheriff Chuck Arnold arrived at the hospital in Dyersburg, at approximately 1:15 p.m. They took photographs of the body and interviewed Cynthia Roberson. Thereafter, the victim's body was transported to a hospital in Gibson County and then to the Shelby County Medical Examiner's office in Memphis.

Dr. Sandra Elkins, a forensic pathologist, conducted the autopsy on November 22, 1993. She observed over twenty bruises on various areas of the child's body, including her face, head, neck, chest, back, buttocks, and left thigh. Additionally, Dr. Elkins found abrasions on the child's right ear and left side of the neck, and a tear inside of her mouth. Several photographs taken by Dr. Elkins were introduced into evidence, which depicted some of the bruises and abrasions found on the victim's body and described to the jury by Dr. Elkins. Additionally, an autopsy photograph was permitted into evidence which revealed the child's skull after her scalp had been dissected and partially removed from her head. That photograph depicted a series of deep bruises to the head which were described by Dr. Elkins as going all the way through the scalp to the skull surface. Dr. Elkins testified that because there were so many bruises on the child's head, a fall was not the likely cause.

Dr. Elkins was of the opinion that the cause of death was blunt abdominal trauma which had lacerated the duodenum. This injury caused the child's stomach

contents to leak into the abdominal cavity, leading to a condition known as peritonitis. According to Dr. Elkins, massive force would have been required to lacerate the duodenum, and it was unlikely that such massive force could have occurred by accidental means such as falling, unless the fall was from a height of at least twenty feet. The main symptom of a ruptured duodenum and resulting peritonitis is excruciating pain. The pathologist estimated that the child's intestine had ruptured approximately eighteen (18) to thirty-six (36) hours prior to the child's death. The last twelve hours of the child's life would have been extremely painful, and she would have been lying very still, virtually lifeless.

Jane Lowery, an eligibility counselor at the Department of Human Services, testified that she saw Tiffany McCaig and her mother on November 18, 1993, at 1:00 to 1:30 p.m., which was approximately twenty-two or twenty-three hours prior to Tiffany's death. Lowery testified that the child appeared to be normal, and she observed no bruises or marks on that occasion.

Cynthia Roberson gave a statement to Susan Hamm, a Department of Human Services employee, on November 19, 1993, at 3:40 p.m. at the Dyersburg Methodist Hospital. She told Ms. Hamm that her husband, Rhodney, awoke at approximately 8:00 a.m. on the morning of the child's death and prepared for work. Tiffany was awake at that time and told Rhodney goodbye. Mrs. Roberson said that after her husband left for work, she and Tiffany went back to sleep. At about 11:00 a.m., Mrs. Roberson awoke and discovered Tiffany lying lifeless in the hallway. Mrs. Roberson told Ms. Hamm that Tiffany had been coughing and throwing-up the night before. She also said that Tiffany had fallen in the bathtub and had two bruises "just like fingerprints" on her jawline as a result. Mrs. Roberson said that other bruises must have "come up to the surface after I put her sleeper on her. I don't know, but I didn't see."

Sheriff Shepard took a statement from Mrs. Roberson on November 19, 1993. She told Sheriff Shepard that when she awakened that morning, she found Tiffany

dead in the hallway. She had given Tiffany a bath the night before and the child fell on some toys in the bathtub. Sheriff Shepard said that Cynthia Roberson was "sort of nonchalant about the whole thing."

Three days later, on November 22, 1993, Cynthia Roberson gave Sheriff Shepard a second statement. She indicated that her husband, Rhodney Roberson, had been the one to give Tiffany the bath on the evening prior to Tiffany's death. She said that she was in the living room and did not see what happened in the bathroom. She heard what she thought was a fall, and she said that Rhodney had taken Tiffany to the bathroom two times on the evening of November 18 because Tiffany was throwing-up. Again, she told Sheriff Shepard that Tiffany awoke the morning of her death and said goodbye to Rhodney as he was leaving for work. She said that was the last time she saw Tiffany alive. Later on November 22, 1993, Mrs. Roberson gave a third statement to Sheriff Shepard, in which she denied hitting Tiffany or doing anything to hurt her. She also said she did not know of anything that could have harmed her.

The next day, November 23, 1993, Mrs. Roberson gave a fourth statement to Sheriff Shepard. She said that on November 18, 1993, she accidentally ran into Tiffany as she was turning to sit down. She also said that on the night of November 18, 1993, while her husband Rhodney was giving Tiffany the bath, she heard two thuds from the bathroom. Rhodney told her that he had been taking off his boots and "that's what made the noise." She also advised Sheriff Shepard that on Wednesday, November 17, 1993, as Tiffany was climbing over the side of a chair, she fell on the fireplace hearth against the rock surface.

On November 24, 1993, Mrs. Roberson gave Sheriff Shepard a fifth statement. She indicated that on Thursday evening, November 18, 1993, Tiffany became sick after supper and threw-up. She again said that Rhodney had given Tiffany a bath, and that it was during the bath that she heard the two thuds in the bathroom. She said that she observed no bruises on the child the night before her

death and that she had never seen Rhodney hit Tiffany. She also indicated that Rhodney was very worried about the child's condition on Thursday evening.

Rhodney Roberson gave three statements to Sheriff Shepard. On November 19, 1993, Rhodney Roberson said that when he came home after work the previous evening, Cynthia had the family's supper ready; after eating, Tiffany became sick and Cynthia gave her a bath. As they were walking to the bathroom, Tiffany fell because of a table in the bathroom with some toys underneath it. He said that was how Tiffany got "the bruise."

On November 22, 1993, Rhodney Roberson told Sheriff Shepard that when he dressed for work on Friday morning, Tiffany was awake. The child gave him a kiss and a hug and said, "Daddy go to work." He told the child that he loved her and the child said, "I love you, Daddy." Roberson indicated that he had arrived home the previous evening around 6:00 p.m. He played with Tiffany and the appellants' ten month old son for awhile, ate dinner, and then began watching the television. Tiffany lay down for a nap, and later got sick and threw up on herself, and needed a bath. He heard Tiffany scream while she was in the bathroom, and she wanted someone to pick her up. He picked her up and told his wife that she was sick. He said that Cynthia gave Tiffany a bath, and they laid her on her beanbag and kept an eye on her. He advised that although the child did not have a temperature, she continued to vomit. Around 11:00 or 11:30 p.m., his wife put Tiffany on her pallet next to the bed.

On November 24, 1993, Rhodney Roberson gave a third statement to Sheriff Shepard. In that statement he said that when he gave Tiffany a bath on Thursday evening he observed no bruises on her. He said that Tiffany was sick when he got home from work; as she was sitting in her highchair and eating, he heard her throw-up. He told Cynthia she needed to do something, and Cynthia gave Tiffany some Pepto Bismol, but Tiffany vomited it too. She vomited on her sleeper and needed a bath to be cleaned up. He ran some bath water, and Cynthia took Tiffany's sleeper off. As Tiffany was walking toward the bathtub she fell, and he thought that she had

fallen against the toilet. He said that Tiffany yelled, "Daddy, pick me up," and he picked her up and told his wife that Tiffany was sick. He said she was pale and had no color. He said the only bruise he noticed on Tiffany while she was having her bath was one bruise on her forehead which had been there for a while. He indicated that she generally had little bruises as the result of running and playing, and he paid no attention to them. He said he saw no large bruises. He said that after Tiffany finished her bath, his wife took her out of the bathtub, dried her off, and put her sleeper on her. They laid the child on a beanbag, put a cold rag on her forehead, and took her temperature. She later threw-up a couple of more times after being placed on the beanbag, but she did not have a fever. He and his wife retired about 11:00 or 11:30 p.m.

Mr. Roberson said that as he was preparing to leave for work the next morning, Tiffany was awake and got up and gave him a kiss. He saw no bruises as depicted in photographs, and Tiffany was "fine" when he left for work. He further said that his wife told him that after he had left for work, Tiffany stayed up until around 9:00 or 9:30 a.m., during which time she was running from room to room in the house, giggling and talking baby talk to her half-brother. Cynthia told Rhodney that she and Tiffany went back to sleep at about 9:30. When Cynthia got up later that morning, she called Rhodney at work and told him that she was going to the post office while the children were still asleep. Shortly thereafter, she called her husband and told him he needed to come home because Tiffany was dead. Mr. Roberson denied harming Tiffany. Although he played with both of the children, he never hit Tiffany at all.

Cynthia Roberson's mother, Marca Lenz, testifying for the defense, said that on November 18, 1993, at 7:39 p.m., she had a telephone conversation with her daughter. Cynthia told Mrs. Lenz that Tiffany was sick at her stomach and Mrs. Lenz advised Cynthia to give the child some Pepto Bismol. On cross-examination, Mrs. Lenz acknowledged that she was unaware that her daughter had told Sheriff Shepard that the telephone conversation occurred before Tiffany got sick.

Cynthia Roberson's father, Jack Lenz, testified that he was present at the Dyersburg Methodist Hospital when the ambulance arrived with Tiffany's body. After Tiffany was pronounced dead, he was given permission by the hospital staff to view his granddaughter's body. He lifted the sheet from the body and saw one IV mark on the child's neck and one old bruise on the back. He did not see any of the bruises on the child which were depicted in the photographs previously admitted into evidence.

W. I. Sherbit, Rhodney Roberson's grandfather, testified that on November 17, 1993, he was present in the Roberson's home for approximately two hours. He saw Tiffany trip over some toys and fall onto the fireplace hearth. Mr. Sherbit said that Tiffany cried for ten to fifteen minutes after her fall but then seemed all right after being comforted by her mother.

The State's rebuttal evidence consisted of the testimony of James L. Skinner, a detective investigator for the Gibson County Sheriff's Department. He testified that he took photographs of Tiffany McCaig at the Dyersburg Methodist Hospital. Two of the photographs, which showed bruising about the child's face and neck, were introduced into evidence.

Finally, Reverend Lynn Drumwright testified as a rebuttal witness for the appellants. He, too, indicated that he observed the body of Tiffany McCaig at the Dyersburg Methodist Hospital. Although he observed a bruise on Tiffany's right neck and a small amount of blood at her mouth, he indicated that the photographs previously introduced into evidence did not accurately depict the condition of the body when he observed it.

Sufficiency of the Evidence

Both appellants argue that the evidence is insufficient to support their convictions of first-degree murder. Having reviewed the entire record, we conclude that the evidence in this case is sufficient to convict both of the appellants for first-degree aggravated child-abuse murder.

A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves any conflicts in favor of the State's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after consideration of the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); T.R.A.P 13 (e).

A criminal offense may be proven through direct evidence, circumstantial evidence, or a combination of the two. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987). Before an accused may be convicted of a criminal offense based upon circumstantial evidence, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971). "A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id. at 484, 470 S.W.2d at 613.

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this Court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., 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). “This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt.” State v. Matthews, 805 S.W.2d 776, 780 (Tenn. Crim. App. 1990).

The crime of first-degree murder may be committed by the reckless killing of a child if the child's death results from aggravated child abuse. Tenn. Code Ann. § 39-13-202(a)(4). Aggravated child abuse is committed when a person knowingly, other than by accidental means, treats a child 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, 402 (1994 Supp.).

The undisputed evidence in this case established that eighteen (18) to thirty-six (36) hours before two-year old Tiffany McCaig died, she was hit with massive force causing the rupture of her duodenum. As a result, all the stomach contents and contents within the duodenum itself leaked freely into the abdominal cavity, resulting in peritonitis, and ultimately death.

Young Tiffany appeared normal at 1:30 p.m. on November 18, 1993. After that, the only people she was with were her mother, Cynthia Roberson, her step-father, Rhodney Roberson, and her baby brother. Tiffany was pronounced dead at 12:55 p.m. on November 19, 1993, but had probably died an hour and a half to two hours earlier.

The undisputed evidence further revealed that the massive blow to her abdomen would not likely have occurred as a result of a fall unless it were a fall from a

height of at least twenty (20) feet. There was no evidence in the record that such a fall occurred. Further, the evidence was undisputed that excruciating pain would have occurred immediately after the blow which caused the rupture of the small intestine. Despite the statements of both appellants, Tiffany would not have been awake and cheerful at 8:00 a.m., but instead would have been lifeless, perhaps in a coma.

The evidence also showed that there were a number of bruises on Tiffany's body, including bruises sustained within six (6) hours before her death. The bruising did not fit a fall pattern. In fact, Tiffany sustained bruising to her head that went all the way through her scalp to the skull surface. Both Cynthia Roberson and Rhodney Roberson told the Sheriff that they had seen no bruises on Tiffany on November 18 or 19 except for one on her forehead and two on her face, and that they had no idea where the other bruises came from. Cynthia Roberson described the two face bruises as "just like fingerprints."

Additionally, both Cynthia and Rhodney Roberson gave a number of statements to authorities, which contained major inconsistencies as to who had bathed Tiffany, how she may have been bruised, and other facts regarding Tiffany's condition. The jury obviously chose not to believe those statements. However, the evidence established that although Tiffany had multiple bruises all over her body, and her distress must have been apparent, she was never taken for medical treatment.

This evidence is clearly sufficient to support the convictions of both appellants for first-degree child abuse murder.

Evidence of Other Injuries

Both appellants next argue that the trial court committed prejudicial error in allowing the jury to hear evidence of other injuries sustained by the victim for which neither appellant has been convicted or accused. The appellants argue that this evidence is inadmissible based on State v. Hale, 840 S.W.2d 307 (Tenn. 1992). We disagree that Hale is controlling of the evidentiary issue presented in this case. In Hale, our Supreme Court held that the previous child abuse murder statute, commonly

known as the "Scotty Trexler Law," violated the "'concept of fundamental fairness embodied in due process of law' and violates the law of the land provisions of Article I, § 8, of the Tennessee Constitution." Id. at 313. The child abuse first-degree murder statute under which these appellants were convicted was enacted by the Tennessee General Assembly after the Hale decision, and the unconstitutional portion of the old statute denounced by the Supreme Court was deleted. See State v. James Dubose, No. 01C01-9405-CC-00160 (Tenn. Crim. App., at Nashville, August 25 1995).

Prior to receiving any evidence in the trial, and in the absence of the jury, counsel for the appellants each moved in limine to exclude any testimony and photographs relating to any injuries sustained by the victim other than the fatal injury. Pursuant to Rule 403 of the Tennessee Rules of Evidence, the trial court conducted a hearing outside of the jury's presence before ruling upon the admissibility of such evidence which included six (6) autopsy photographs. The court concluded that the evidence was relevant and that its probative value was not substantially outweighed by the risk of an unfair prejudicial effect on the defense. We agree as to the pathologist's testimony and all but one of the autopsy photographs.

The theory of the State was that young Tiffany McCaig appeared to be a normal healthy child at 1:30 p.m. on November 17, 1993, when she was seen by Jane Lowery of the Department of Human Services. Less than twenty-four hours later, the child was dead as a result of massive abdominal trauma which had been intentionally inflicted by one or both of the appellants, the only adults present with Tiffany during that twenty-two or twenty-three hour period. The appellants denied any wrongdoing and further denied seeing the massive numbers of bruises on the child's body.

The objected-to testimony and photographs were clearly material to two (2) essential elements of the aggravated child abuse murder statute under which the appellants were indicted. Aggravated child abuse is committed when a person knowingly, other than by accidental means, treats a child in such a manner as to inflict

injury or neglects such a child, and the act of abuse results in serious bodily injury to the child. Tenn. Code Ann. § 39-15-401, 402. The evidence was material to show the absence of mistake or accident, the physical condition of the child, the child's obvious need for medical attention and the neglect thereof by the appellants, and to attack the credibility of both of the appellants. Simply put, the testimony of the forensic pathologist, Dr. Elkins, and the photographs of the child's body refuted the appellants' statements that there was nothing wrong with the child other than an upset stomach. The pathologist's description of the bruises unequivocally established that they were not the kind of bruises one associates with a toddler's expected spills and falls. The evidence of other injuries was properly introduced to rebut the ideas that the Robersons were unaware of the child's injuries, mistook them for minor injuries, or that the fatal blow occurred accidentally.

Autopsy Photographs

As noted above, we agree that five (5) of the six (6) autopsy photographs were properly introduced into evidence. Nonetheless, the photograph which showed the victim's head after the scalp had been dissected and partially pulled away to reveal the cranial bone of the victim (exhibit 6) should have been excluded because its probative value was substantially outweighed by the danger of its unfair prejudicial effect. Tenn. R. Evid. 403; see also State v. Banks, 564 S.W.2d 947 (Tenn. 1978); State v. Aucoin, 756 S.W.2d 705 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084 (1989); State v. Washington, 658 S.W.2d 144 (Tenn. Crim. App. 1983); State v. Brown, 756 S.W.2d 700 (Tenn. Crim. App. 1988).

As a general rule, where medical testimony adequately describes the degree or extent of the injury, gruesome and graphic photographs should not be admitted. See State v. Duncan, 698 S.W.2d 63 (Tenn. 1985), cert. denied, 475 U.S. 1031 (1986). In this case, the pathologist's testimony adequately described the deep bruising on the child's head. This Court held in Gladson v. State, 577 S.W.2d 686

(Tenn. Crim. App. 1978), that it was error to admit photographs of the victim's head after autopsy which showed the scalp and revealed the cranial bone. While the evidence in this case was more than sufficient to support the convictions of both of the appellants, like the court in Gladson, we are unable to say that the undue prejudicial effect of this gruesome photograph did not affect the jury's findings of guilt. Accordingly, we conclude that the trial court abused its discretion when it allowed this photograph to be introduced into evidence.

We are mindful that in the recent case of State v. James Dubose, CCA No. 01C01-9405-CC-00160 (Tenn. Crim. App. at Nashville, August 25, 1995), a panel of this Court held that the trial court did not commit error in allowing the introduction of an autopsy photograph of a sixteen (16) month old victim. In that case, like this, the murder victim died as a result of massive abdominal trauma which ruptured the intestines. The challenged autopsy photograph revealed the victim's ruptured intestines and was introduced to support the pathologist's testimony that sixty per cent (60%) of the victim's blood had accumulated in the abdominal cavity following the rupture of the intestine. In this case, however, the autopsy photograph did not depict the injury which produced the victim's death, but rather, it showed the injuries which she received to her head. Therefore, the challenged photograph did not have the probative value of the autopsy photograph in Dubose; moreover, the especially gruesome and inflammatory nature of the photograph substantially outweighed any probative value it had. Tenn. R. Evid. 403.

Jury Charge

The appellants next argue that the trial judge committed prejudicial error when he charged the jury as to their parole eligibility if convicted of first-degree murder or lesser included offenses pursuant to Tennessee Code Annotated section 40-35-201 (b) (2) (A) (i) and (ii).

Tennessee Code Annotated section 40-35-201(b) allows a trial court, in non-capital cases, upon request of either of the parties, to charge the jury with possible

penalties for the offense charged as well as all lesser included offenses. In 1994, the Tennessee General Assembly amended Tennessee Code Annotated section 40-35-201 (b) by designating the then existing language in (b) as item (b) (1) and by adding the following language as (b) (2) (A):

(i) When a charge as to possible penalties has been requested pursuant to subdivision (b)(1), the judge shall also include in the instructions for the jury to weigh and consider the meaning of a sentence of imprisonment for the offense charged and any lesser included offenses. Such instruction shall include an approximate calculation of the minimum number of years a person sentenced to imprisonment for the offense charged and lesser included offenses must serve before reaching such person's earliest release eligibility date. Such calculation shall include such factors as the release eligibility percentage established by § 40-35-501, maximum and minimum sentence reduction credits authorized by § 41-21-236 and the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, if applicable.

(ii) Such instructions to the jury shall also include a statement that whether a defendant is actually released from incarceration on the date when such defendant is first eligible for release is a discretionary decision made by the board of paroles based upon many factors, and that such board has the authority to require the defendant to serve the entire sentence imposed by the court.

Tenn. Code Ann. § 40-35-201(b)(2)(A)(i) and (ii) (1994 Supp).

In amending the above code section, the General Assembly made the new section (b) (2) effective July 1, 1994, and expressly applied it "to all persons committing offenses on or after such date." Public Acts 1994 chapter 847 § 3, July 1, 1994. (Emphasis added.) The offense for which the appellants were charged occurred on or about November 19, 1993, thus exempting them from an instruction for the jury to weigh and consider an approximate calculation of the minimum number of years a person sentenced to imprisonment must serve before reaching the earliest release eligibility date. Upon retrial of the appellants this charge should not be given.

Each of the appellants also argue that the provisions of Tennessee Code Annotated section 40-35-201(b)(2)(A)(i)(ii) are unconstitutional and cite Farris v. State,

535 S.W.2d 608 (Tenn. 1976), as authority for that position. Because we find the trial judge committed error in charging the jury pursuant to the 1994 amendment since it did not by its terms apply to offenses committed prior to July 1, 1994, we do not reach the constitutional issue. It is axiomatic that appellate courts should not rule on the constitutionality of legislation unless necessary to a determination of the litigation. Clearly such is not the case here.

The appellants also complain that the trial court committed prejudicial error in refusing to instruct the jury regarding the misdemeanor offense of child abuse as defined in Tennessee Code Annotated section 39-15-401. In charging a jury, the trial court has the obligation "to charge the applicable law." State v. Collins, 528 S.W.2d 814, 817 (Tenn. 1975). The charge should be "applicable to the facts of the case." State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975). The trial court is not required to instruct on matters not raised by the evidence. State v. Davis, 649 S.W.2d 12, 14 (Tenn. Crim. App. 1982).

In this case the trial judge instructed the jury regarding first-degree murder, and the lesser included offenses of aggravated child abuse, aggravated assault, and criminally negligent homicide. The child abuse and neglect statute found in Tennessee Code Annotated section 39-15-401 provides in pertinent part as follows:

A violation of this section 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 the charge under this section.

Tenn. Code Ann. § 39-15-401(d) (1994 Supp.).

The statute recognizes misdemeanor child abuse as a lesser included offense of first-degree murder if such lesser included offense is fairly raised by the evidence. There was evidence introduced of non-life-threatening injuries sustained by the victim, Tiffany McCaig. We conclude, therefore, that it was error for the trial court to fail to charge the misdemeanor child abuse offense; thus if the evidence upon retrial is similar, the trial court should include the misdemeanor child abuse offense. However,

in light of the fact that the jury rejected the other lesser included offenses, it is clear that the appellants were not prejudiced by the omission of the misdemeanor child abuse charge in this case.

Bruton Rule Issue

Finally, appellant Rodney Roberson complains that the trial court committed prejudicial error by allowing the prosecution to question Cynthia Roberson's father, Jack Lenz, regarding a statement purportedly made by Cynthia Roberson which implicated Rodney Roberson in wrongdoing. Neither of the appellants testified at trial.

Mr. Lenz testified that his granddaughter, Tiffany, "had never been beaten by anybody " and that she "had never even had a whipping." On cross-examination, the following colloquy occurred:

Q. Can you explain then why Cynthia Roberson, your daughter, would say that when Rodney spanked her that he was really rough with her?

A. No, I can't explain that. I've never --

MR. MOSIER: I object. That's --

A. That I don't know anything about.

Q. You don't know anything about that then?

A. No.

THE COURT: Just a minute.

MR. MOSIER: I object. I'm not sure the jury needs to hear why but --

THE COURT: Are you through with this --

GENERAL BROWN: Yes, sir.

THE COURT: -- this line of questioning? All right. I'm going to let your objection be overruled at this point. Any further questions of this witness?

GENERAL BROWN: No.

THE COURT: All right. You can step aside.

While conceding that the purported statement of Cynthia Roberson did not implicate Rhodney Roberson directly in the offense for which he was being tried, the appellant does argue that the question sought to elicit testimony violative of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 28 L. Ed. 476 (1968) and Rule 404 (a) of the Tennessee Rules of Evidence. In Bruton, the United States Supreme Court held that the entry of a non-testifying co-defendant's statement implicating the defendant violates the latter's right to confrontation. 391 U.S. at 126, 88 S. Ct. at 1622.

In this case, it appears that the parties agreed to redact from Cynthia's and Rhodney's statements any material which implicated the other. This was done to avoid Bruton problems and to allow a joint trial without violating either's right to confrontation. It further appears, however, that the prosecutor's question used information that had been redacted from Cynthia's statement. Although not directly related to this offense, Cynthia's purported statement is highly incriminating of Rhodney. Moreover, there was no way for Rhodney to cross-examine Cynthia with regard to the statement. We conclude, therefore, that the prosecutor's question, absent any limiting instructions to the jury, sought to do indirectly what Burton forbids directly--the admission of one defendant's incriminating statement regarding the other.

Moreover, the question was improper for other reasons as well. First, it was based on inadmissible hearsay. Tenn. R. Evid. 802. Second, it attempted to use a prior bad act by Rhodney, or a negative trait of Rhodney's, to prove his guilt for the offense on trial. Tenn. R. Evid. 404(a) and (b). There was no foundation for either shown by the prosecutor, and the objection should have been sustained.

Conclusion

In sum, while the evidence was sufficient to support the convictions for first-degree aggravated child abuse murder, we conclude that several errors were committed during the trial. While each error standing alone might not merit a reversal in this case, their cumulative effect more probably than not affected the judgment and resulted in prejudice to the judicial process. Tenn. R. App. P. 36 (b). State v. Benson,

645 S.W.2d 423, 424-425 (Tenn. Crim. App. 1983); See State v. Hicks, 618 S.W.2d 510, 521 (Tenn. Crim. App. 1981); Judge v. State, 539 S.W.2d 340, 346 (Tenn. Crim. App. 1976).

Accordingly, the convictions are reversed, and this case is remanded to the trial court for a new trial consistent with this opinion.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

PAUL G. SUMMERS, JUDGE

MARY BETH LEIBOWITZ, SPECIAL JUDGE