No. _____

_____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

_____

**GENARO EDGAR ESPINOSA DORANTES – PETITIONER**

**Vs.**

**KEVIN MYERS, Acting Warden – RESPONDENT**

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APPENDIX 1

Opinion 6th Circuit Court of Appeals (May 5, 2020)

1(a)

Order Denying Re-Hearing (June 17, 2020)

1(b)

Order Denying Re-Hearing *En Banc* (July 2, 2020)

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 05, 2020

Mr. Zachary Lewis Barker
Office of the Attorney General
of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207

Mr. Genaro Edgar Espinosa Dorantes
Turney Center Industrial Complex
1499 R.W. Moore Memorial Highway
Only, TN 37140

Re: Case No. 20-5013, *Genaro Dorantes v. Kevin Genovese*
Originating Case No. 3:19-cv-00543

Dear Counsel and Mr. Dorantes:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Monica M. Page
Case Manager
Direct Dial No. 513-564-7021

cc: Mr. Kirk L. Davies

Enclosure

No mandate to issue

No. 20-5013

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



GENARO EDGAR ESPINOSA DORANTES, )
)
Petitioner-Appellant, )
)
v. ) ORDER
)
KEVIN GENOVESE, Warden, )
)
Respondent-Appellee. )
)

Before: WHITE, Circuit Judge.

Genaro Edgar Espinosa Dorantes, a Tennessee prisoner proceeding pro se, appeals the district court's judgment dismissing as untimely his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Dorantes has moved for a certificate of appealability and for leave to proceed in forma pauperis.

A jury found Dorantes guilty of first-degree felony murder and aggravated child abuse, and the trial court sentenced him to consecutive prison terms of life and 22 years. The Tennessee Court of Criminal Appeals reversed the aggravated child abuse conviction but otherwise affirmed the trial court's judgment. *State v. Dorantes*, No. M2007-01918-CCA-R3-CD, 2009 WL 4250431 (Tenn. Crim. App. Nov. 30, 2009). On January 25, 2011, the Tennessee Supreme Court reinstated the conviction and sentence for aggravated child abuse. *State v. Dorantes*, 331 S.W.3d 370 (Tenn. 2011).

In June 2019, Dorantes filed a § 2254 petition, arguing that there was insufficient evidence to support his convictions. The district court dismissed the petition as untimely and declined to issue a certificate of appealability.

Dorantes now moves this court for a certificate of appealability, arguing that his habeas petition is timely because he is entitled to a later start date for the limitations period due to a state-

created impediment, *see* 28 U.S.C. § 2244(d)(1)(B), and he is entitled to equitable tolling. Dorantes bases both arguments on his limited ability to speak and understand English, the fact that he could not understand the translator appointed in his state-court proceedings, the State's failure to provide him with an adequate translator, and his appellate counsel's failure to advise him of his right to seek review in the United States Supreme Court, file a state post-conviction petition, and file a § 2254 petition.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court denies a petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's determination that Dorantes's habeas petition is untimely. Under 28 U.S.C. § 2244(d)(1)(A), the applicable one-year limitations period began running 90 days after the Tennessee Supreme Court issued its opinion in Dorantes's direct appeal. *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). Dorantes does not argue, and nothing in the record shows, that he is entitled to a later start date under § 2244(d)(1)(C) or (D) or statutory tolling under § 2244(d)(2). And Dorantes is not entitled to a later start date under § 2244(d)(1)(B) because he has not shown that the State created an impediment that actually prevented him from filing a federal petition. *See Colwell v. Tanner*, 79 F. App'x 89, 93 (6th Cir. 2003). Thus, absent equitable tolling, the limitations period expired in April 2012, and Dorantes's petition is untimely.

A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently; and (2) that an extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Dorantes has not made the required showing because he has not shown that he exercised reasonable diligence in pursuing his rights,

*see id.* at 653, and none of his arguments for equitable tolling establish that an extraordinary circumstance prevented him from filing a timely federal petition.

Accordingly, Dorantes's motion for a certificate of appealability is **DENIED**, and his motion for leave to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-5013

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Jun 17, 2020
DEBORAH S. HUNT, Clerk

GENARO EDGAR ESPINOSA DORANTES,

Petitioner-Appellant,

v.

KEVIN GENOVESE, WARDEN,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, GILMAN, and LARSEN, Circuit Judges.

Genaro Edgar Espinosa Dorantes, a Tennessee prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-5013

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Jul 02, 2020
DEBORAH S. HUNT, Clerk

GENARO EDGAR ESPINOSA DORANTES,

Petitioner-Appellant,

v.

KEVIN GENOVESE, WARDEN,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, GILMAN, and LARSEN, Circuit Judges.

Genaro Edgar Espinosa Dorantes petitions for rehearing en banc of this court's order entered on May 5, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

GENARO EDGAR ESPINOSA DORANTES – PETITIONER

Vs.

KEVIN MYERS, Acting Warden – RESPONDENT

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APPENDIX 2

Order, U.S. District Court M.D. Tenn. (December 3, 2019)

**GENARO EDGAR ESPINOSA DORANTES # 420728, Petitioner, v. KEVIN GENOVESE, Respondent.**
United States District Court, M.D. Tennessee, Nashville Division. December 3, 2019 Slip Copy 2019 WL 6524888 *(Approx. 5 pages)*

2019 WL 6524888
Only the Westlaw citation is currently available.
United States District Court, M.D. Tennessee, Nashville Division.

GENARO EDGAR ESPINOSA **DORANTES** # 420728, Petitioner,

v.

KEVIN GENOVESE, Respondent.

NO. 3:19-cv-00543
12/03/2019

JUDGE RICHARDSON

**MEMORANDUM OPINION**

*1 Respondent moves to dismiss this habeas corpus action as untimely. (Doc. No. 11.) Petitioner has responded in opposition to the motion (Doc. No. 13), and Respondent has replied. (Doc. No. 15.) The Court has reviewed the parties' filings and agrees with Respondent that Petitioner is not entitled to equitable tolling of the statute of limitations and that his petition is therefore untimely.

**I. BACKGROUND AND PROCEDURAL HISTORY**

Petitioner was convicted by a Davidson County jury of felony murder and aggravated child abuse on April 12, 2007. (Doc. No. 10-1 at 131, 136.) The trial court sentenced him to life and 22 years in prison, respectively, and ordered the sentences to run consecutively. (*Id.*) The trial court denied Petitioner's motion for new trial on July 20, 2007.

On November 30, 2009, the Tennessee Court of Criminal Appeals vacated Petitioner's conviction for aggravated child abuse but affirmed the felony murder conviction and modified his sentence to life in prison. (Doc. No. 10-10.) In an opinion entered January 25, 2011, the Tennessee Supreme Court reversed that judgment in part, affirmed the conviction and life sentence for felony murder, and reinstated the conviction and sentence for aggravated child abuse. (Doc. No. 10-20.)

Petitioner did not file any further challenges to his convictions or sentences until he placed the pending habeas petition in the prison mail system on June 17, 2019. (Doc. No. 1 at 20.) On July 9, 2019, the Court ordered Respondent to file an answer or motion in response to the petition (Doc. No. 4), and on August 30, 2019, Respondent filed the pending motion to dismiss along with a memorandum in support and the relevant portions of the state-court record. (Doc. No. 10–12.) Petitioner responded to the motion to dismiss on September 17, 2019, (Doc. No. 13), and Respondent filed a reply on October 3, 2019, at the Court's direction. (Doc. Nos. 14–15.)

**II. ANALYSIS**

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year limitations period for habeas petitions brought by prisoners challenging state-court convictions. 28 U.S.C. § 2244(d). Under this provision, the limitations period runs from the latest of four enumerated events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> *2 (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Petitioner does not allege any circumstances triggering subsections (B)– (D). Accordingly, his limitations period began to run on Monday, April 25, 2011, 90 days after the Tennessee Supreme Court ruled on his direct appeal, when the time within which he could have sought review by the United States Supreme Court expired. *See Jimenez v. Quarterman*, 555 U.S. 113, 119–120 (2009) (holding that state convictions are final under § 2244(d)(1)(A) when Supreme Court certiorari is exhausted or when the time for filing a certiorari petition expires); S. Ct. R. 13.3 (providing 90 days from date of entry of the judgment or order sought to be reviewed).

Although the running of the period is tolled under § 2244(d)(2) while any "properly filed" collateral review petition is pending in state court, Petitioner never filed such a petition in state court. His one-year limitations period, therefore, ran without interruption until it expired on Wednesday, April 25, 2012. His federal habeas petition filed on June 17, 2019, is therefore time-barred unless he can establish a basis for tolling the limitations period for more than seven years.

AEDPA's one-year statute of limitations may be subject to equitable tolling when the failure to file in a timely fashion "unavoidably arose from circumstances beyond that litigant's control." *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 461 (6th Cir. 2012); *accord Holland v. Florida*, 460 U.S. 631, 645 (2010). To be entitled to equitable tolling, a petitioner must show: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (citation and internal quotation marks omitted). This is a fact-intensive inquiry to be evaluated on a case-by-case basis, and Petitioner carries "the ultimate burden of persuading the court that he or she is entitled to equitable tolling." *Keeling*, 673 F.3d at 462.

Petitioner argues that he is entitled to equitable tolling because his former counsel did not tell him about additional remedies available after his direct appeal and because a language barrier prevented him from learning about or pursuing those remedies on his own. (Doc. No. 1 at 19; Doc. No. 13.) Specifically, Petitioner asserts that he is a citizen of Mexico and "does not speak English proficiently enough to communicate with other inmates or staff." (Doc. No. 13 at 5.) He says that he "gets by" in daily prison life by using single words and hand signals to communicate. (*Id.*) He asserts that the prison does not have legal materials in his native language and that he has not "had access to a translator until January of this year when an inmate, capable of speaking [Petitioner's] language, arrived at the Turney Center Industrial Complex." (*Id.*)

The alleged fact that Petitioner's counsel did not advise him of his post-conviction or habeas remedies does not excuse his late filing. The law is clear that a prisoner's lack of actual knowledge about available legal remedies or the time limits for pursuing them is not a sufficient basis for equitable tolling. *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (lack of actual knowledge of § 2244 deadline insufficient to toll); *Reed v. United States*, 13 F. App'x 311, 313 (6th Cir. 2001) (holding that "ignorance about filing a § 2255 motion did not toll the limitations period"); *Clinton v. Bauman*, No. 10-11528, 2011 WL 282384 (E.D. Mich. Jan. 25, 2011) (ignorance of state post-conviction remedies did not warrant tolling); *Williams v. Warden of Lieber Corr. Inst.*, No. 0:12-1705, 2013 WL 1857268 (D.S.C. May 2, 2013) (petitioner's unawareness that he could file a federal habeas petition not grounds for equitable tolling).

*3 Serious attorney misconduct such as abandonment may constitute extraordinary circumstances in this analysis, and "a client [cannot] be faulted for failing to act on his behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Maples v. Thomas*, 132 S. Ct. 912, 923–24 (2012). But Petitioner does not allege that he was never informed that his direct appeal had concluded; nor does he allege that he believed counsel would continue to act on his behalf after that juncture. Thus, he does not allege facts constituting attorney abandonment or other egregious misconduct; he simply alleges that counsel did not advise him about additional remedies he could pursue in the future. However, ignorance of the available remedies does not warrant equitable tolling even when it is the result of lack of advice from counsel: "[i]nsufficient legal advice is not enough to support equitable tolling in the Sixth Circuit." *Steward v. Moore*, 555 F. Supp. 2d 858, 872 (N.D. Ohio 2008) (citing *Jurado v. Burt*, 337 F.3d 638, 644–45 (6th Cir. 2003)).

Nor does Petitioner's alleged language barrier necessarily warrant equitable tolling. In *Cobas v. Burgess*, the Sixth Circuit held that an untimely habeas petitioner's being raised in Cuba and "unable to understand, read or write the English language" did not automatically entitle him to equitable tolling. 306 F.3d 441 (6th Cir. 2002). The court announced the

following guideline to be applied to equitable tolling claims by non-English-speaking petitioners:

> We hold that where a petitioner's alleged lack of proficiency in English has not prevented the petitioner from accessing the courts, that lack of proficiency is insufficient to justify an equitable tolling of the statute of limitations. An inability to speak, write and/or understand English, in and of itself, does not automatically give a petitioner reasonable cause for failing to know about the legal requirements for filing his claims.
>
> In general, the existence of a translator who can read and write English and who assists a petitioner during his appellate proceedings implies that a petitioner will not have reasonable cause for "remaining ignorant of the legal requirement for filing his claim." In announcing this rule, we should note that the translator acting on behalf of a non-English speaking petitioner need have no qualification other than the ability to communicate in English. Since a petitioner does not have a right to assistance of counsel on a habeas appeal, and because an inmate's lack of legal training, his poor education, or even his illiteracy does not give a court reason to toll the statute of limitations, we are loath to impose any standards of competency on the English language translator utilized by the non-English speaking habeas petitioner.

*Id.* at 444 (internal citations omitted). *Cobas* has been construed to mean that "a non-English-speaking petitioner seeking equitable tolling must, at a minimum, demonstrate that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel or other source." *Mendoza v. Carey*, 449F.3d 1065, 1070 (9th Cir. 2006). Accordingly, an inmate colorably asserts entitlement to equitable tolling when he alleges that "he is wholly incapable of reading, writing, or speaking English, had no access to Spanish language legal materials, and attempted on numerous occasions to obtain assistance in pursuing his claims." *Planes v. Berghuis*, No. 07-cv-14000, 2009 WL 2382006, at *5 (E.D. Mich. July 31, 2009).

Petitioner's allegations here do not rise to that level. He asserts that he is incapable of significant communication in English, that he lacked access to legal materials in his own language, and that he did not have access to another inmate capable of translating for him until January 2019.[2] But even so, Petitioner does not allege a single occasion throughout all those years on which he ***requested*** translation services from the prison or from any contacts outside the prison. *Cobas* expressly disavows any requirement that the person translating for a petitioner have any "qualification other than the ability to communicate in English" or meet any other "standards of competency." *Cobas*, 306 F.3d at 444. All Petitioner needed was to have someone translate or act as go-between with the English-speaking library staff and explain the library materials to him in order to have the same information to which any other inmates had access. There is no indication that Petitioner asked for such assistance even once, as compared to the "numerous occasions" on which the petitioner in *Planes* sought assistance.

*4 Even aside from his failure to establish an extraordinary circumstance, Petitioner's failure to make any attempt to obtain translation services to research his available remedies clearly demonstrates his lack of due diligence in this matter. In another case involving a non-English-speaking petitioner, the Sixth Circuit recently explained that to establish diligence such a petitioner "must show that 'he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel, or other source.' " *Levy v. Osborne*, 734 F. App'x 960, 963 (6th Cir.), *cert. denied sub nom. Levy v. Parris*, 139 S. Ct. 293, (2018) (quoting *Mendoza*, 449 F.3d at 1070). The court compared cases from other circuits in the context of what constitutes "diligent efforts":

> A review of cases addressing the diligence requirement from our sister circuits places Levy's actions into perspective. For example, the Second Circuit has held that petitioners who "claimed nothing more than the unavailability of personnel within their prisons who could translate for them during the applicable limitations periods" failed to act with due diligence. *Diaz* [*v. Kelly*], 515 F.3d [149,] 154 [ (2d Cir. 2008) ]. In *Diaz*, the court found particularly relevant that there was "no allegation of any efforts to contact anyone outside the prison who might assist in making them aware, in their language, of legal requirements for filing a habeas corpus petition, nor what efforts were made to learn of such requirements within their places of confinement." *Id.*
>
> At the other end of the spectrum, the Third Circuit has held that a petitioner who "attempted to pursue his claims repeatedly" did satisfy the diligence requirement. Pabon

> [v. Mahanoy], 654 F.3d [385,] 403 [ (3rd Cir. 2011) ]. Indeed, that court noted that it "count [ed] ten or more efforts where [the petitioner] sought assistance, both before and after the AEDPA deadline." *Id.* at 402.

*Levy*, 734 F. App'x at 963.[3] It went on to affirm this Court's determination that the petitioner had not exercised diligence by asking for translation assistance "only one time," which the Sixth Circuit characterized as "minimal efforts...to pursue his rights." *Id.* at 963–64. Petitioner in this case does not allege any effort whatsoever to obtain translation assistance to pursue his remedies. Based on his petition and reply, it appears that Petitioner sat passively and did nothing at all to discover or pursue any legal remedies for the eight years between the Tennessee Supreme Court's ruling in his case and the arrival of a bilingual inmate at Turney Center.

Moreover, even upon gaining access to a bilingual translator in January, Petitioner did not promptly file his habeas petition. Instead, Petitioner says he began contacting the Innocence Project in New York and the Consular of Mexico at the Embassy of the United Mexican States in Little Rock, Arkansas. (Doc. No. 13 at 4.)[4] Approximately five more months passed before Petitioner submitted his habeas petition. This additional significant delay—after the alleged impediment to timely filing was cured by the arrival of a translator, and after Petitioner clearly knew or should have known that his habeas corpus petition was already many years late—is further confirmation that Petitioner was not diligent in the pursuit of his rights.

## III. CONCLUSION

***5** For the reasons explained above, Petitioner has not established either the extraordinary circumstances or the diligence required to warrant equitable tolling in this case. Accordingly, Respondent's motion to dismiss will be granted.

An appropriate Order shall be entered.

ELI RICHARDSON

UNITED STATES DISTRICT JUDGE

### All Citations

Slip Copy, 2019 WL 6524888

### Footnotes

1 Under the prison mailbox rule, the petition is deemed to have been filed when it was delivered to prison authorities for mailing to the federal court. *Houston v. Lack*, 487 U.S. 266, 270 (1988) (pro se prisoner's notice of appeal deemed "filed" on date notice is deposited in prison mailbox for forwarding to clerk of court).

2 The Court sets aside its skepticism that Petitioner did not encounter a bilingual inmate in more than a decade of incarceration and presumes his allegation to be true for the purpose of ruling on the pending motion.

3 This Sixth Circuit case may explain the inapt reference to Petitioner as "Levy" in Petitioner's reply to Respondent's answer. (Doc. No. 13 at 3). Perhaps that reference was the result of a (mistakenly) unchanged cut-and-paste from briefing in the *Levy* case. In any event, *Levy* is indeed applicable and instructive in this case.

4 Petitioner does not actually specify when these contacts occurred. If he was able to communicate effectively with outside entities before the January 2019 arrival of the bilingual inmate, that fact is even more damaging to his claim of diligence. In order to construe the pleadings in the light most favorable to Petitioner, the Court presumes that he required the assistance of the bilingual inmate to initiate these contacts and that he would have been unable to do so before January 2019.

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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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GENARO EDGAR ESPINOSA DORANTES – PETITIONER

Vs.

KEVIN MYERS, Acting Warden – RESPONDENT

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APPENDIX 3

Opinion, Tennessee Supreme Court (January 25, 2011)

**State v. Dorantes**
Supreme Court of Tennessee, at Nashville. January 25, 2011 331 S.W.3d 370 *(Approx. 27 pages)*

331 S.W.3d 370
Supreme Court of Tennessee,
at Nashville.

STATE of Tennessee
v.
Genaro DORANTES.

No. M2007-01918-SC-R11-CD.
Oct. 7, 2010 Session Heard at Centerville.[1]
Jan. 25, 2011.

## Synopsis

**Background:** Defendant was convicted in the Criminal Court, Davidson County, Steve R. Dozier, J., of aggravated child abuse and felony murder by aggravated child abuse. Defendant appealed. The Court of Criminal Appeals, 2009 WL 4250431, affirmed in part and reversed in part. The State appealed.

**Holdings:** The Supreme Court, Gary R. Wade, J., held that:
1 evidence was sufficient to support convictions for aggravated child abuse and felony murder by aggravated child abuse;
2 the trial court's refusal to provide defendant's supplemental jury instruction did not constitute reversible error; and
3 sentence of 22 years for aggravated child abuse was proper.

Affirmed in part and reversed in part.

## West Headnotes (23)

Change View

1 **Criminal Law** Construction in favor of government, state, or prosecution
**Criminal Law** Inferences or deductions from evidence
When considering a sufficiency of the evidence question on appeal, the State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom.

397 Cases that cite this headnote

2 **Criminal Law** Credibility of Witnesses
**Criminal Law** Conflicting evidence
The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact.

63 Cases that cite this headnote

3 **Criminal Law** Construction in favor of government, state, or prosecution
**Criminal Law** Reasonable doubt
When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

959 Cases that cite this headnote

4 **Criminal Law** Innocence
**Criminal Law** Burden of showing error
Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict.

164 Cases that cite this headnote

5 **Criminal Law** Circumstantial Evidence
In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence.

280 Cases that cite this headnote

6 **Criminal Law** Circumstantial evidence
**Criminal Law** Inferences from evidence
The jury decides the weight to be given to circumstantial evidence, and the inferences to be drawn from such evidence, and, moreover, the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.

583 Cases that cite this headnote

7 **Criminal Law** Circumstantial evidence
On appeal, the court may not substitute its inferences for those drawn by the trier of fact in circumstantial evidence cases.

395 Cases that cite this headnote

8 **Criminal Law** Circumstantial evidence
The standard of review is the same whether the conviction is based upon direct or circumstantial evidence.

1800 Cases that cite this headnote

9 **Homicide** Predicate offenses or conduct
**Infants** Physical abuse and cruelty
Evidence was sufficient to support convictions for aggravated child abuse and felony murder by aggravated child abuse; defendant and the victim's mother abducted the victim, who was four years old, defendant, the victim's mother, and victim lived in defendant's van, prior to the victim's death his mother asked her sisters for money to buy medication for the victim, defendant demonstrated no desire to help the victim and was evasive when asked about the nature of the victim's condition, when the victim's aunt told defendant to take the victim to a doctor he expressed a disregard for the victim's welfare and said he never wanted custody of victim, the last time mother's sisters saw the victim he was thin, unable to communicate, and suffering from injury, the victim's body was found shortly thereafter in a park, the victim had serious burns on his feet, buttocks, and upper thighs, and the victim's cause of death was blunt trauma injury to the brain and skull. West's T.C.A. §§ 39–11–302(b), 39–11–401(a), 39–15–401(a); T.C.A. § 39–13–202(a)(2) (2001); § 39–15–402(a, b) (2004).

4 Cases that cite this headnote

10 **Criminal Law** Criminal act or omission
A "nature-of-conduct offense" seeks principally to proscribe the nature of the defendant's conduct, as opposed to the result that the defendant's conduct achieves.

1 Case that cites this headnote

11 **Criminal Law** Criminal Intent and Malice
The mental state required for a result-of-conduct offense accompanies only its resulting harm.

12 **Infants** Assault, battery, and physical abuse
Aggravated child abuse is classified as a nature-of-conduct offense.

11 Cases that cite this headnote

13 **Criminal Law** Principals, Aiders. Abettors, and Accomplices in General

Criminal responsibility, while not a separate crime, is an alternative theory under which the State may establish guilt based upon the conduct of another.

28 Cases that cite this headnote

14 **Criminal Law** Presence

Under the theory of criminal responsibility, presence and companionship with the perpetrator of a felony before and after the commission of the crime are circumstances from which an individual's participation may be inferred. West's T.C.A. § 39–11–401(a).

8 Cases that cite this headnote

15 **Criminal Law** Community of unlawful intent

**Criminal Law** Aiding, abetting, or other participation in offense

In order to be convicted of the crime under the theory of criminal responsibility, the evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission. West's T.C.A. § 39–11–401(a).

35 Cases that cite this headnote

16 **Criminal Law** Flight or refusal to flee

Flight and attempts to evade arrest are relevant as circumstances from which, when considered with other facts and circumstances in evidence, a jury can properly draw an inference of guilt.

9 Cases that cite this headnote

17 **Criminal Law** Elements and incidents of offense

The trial court's refusal to provide defendant's supplemental jury instruction, which provided "For you to find the accused guilty of aggravated child abuse the State must prove that the Defendant affirmatively committed an abusive action which resulted in serious bodily injury to the victim. Failure by either defendant to protect or seek treatment is not proof of abuse as to satisfy the elements of child abuse," did not constitute reversible error, in prosecution for aggravated child abuse and felony murder by aggravated child abuse; the pattern jury instruction in aggravated child abuse adequately informed the jury of the State's obligation to prove the knowing infliction of an injury and resulting bodily injury. West's T.C.A. §§ 39–15–401(a); T.C.A. § 39–15–402(b) (2004).

17 Cases that cite this headnote

18 **Criminal Law** Duty of judge in general

A defendant has a constitutional right to a complete and correct charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions.

62 Cases that cite this headnote

19 **Criminal Law** Necessity in General

It is the duty of the trial judge without request to give the jury proper instructions as to the law governing the issues raised by the nature of the proceedings and the evidence introduced during trial.

34 Cases that cite this headnote

20 **Criminal Law** Construction and Effect of Charge as a Whole

**Criminal Law** Instructions Already Given

The refusal to grant a special request for an instruction is error only when the general charge fails to fully and fairly provide the applicable law, considering the instructions in their entirety and reading them as a whole rather than in isolation.

7 Cases that cite this headnote

21 **Infants** Child abuse, neglect, endangerment, or cruelty

**Sentencing and Punishment** Nature, degree, or seriousness of other misconduct

Sentence of 22 years for aggravated child abuse was proper, even though the sentence was enhanced two-years above the midpoint of the range for aggravated child abuse; the court relied on defendant's prior criminal history, which included three prior misdemeanor convictions, to enhance the sentence. West's T.C.A. §§ 40–35–112(a)(1), 40–35–114(2, 6, 7, 16), 40–35–210(c); T.C.A. § 39–15–402(b) (2004).

22 **Sentencing and Punishment** Discretion of court

Whether sentences are to be served concurrently or consecutively is primarily within the discretion of the trial court.

8 Cases that cite this headnote

23 **Sentencing and Punishment** Plea bargain or other agreement

The trial court's imposition of consecutive sentences was proper, in prosecution for aggravated child abuse and felony murder by aggravated child abuse; defendant constituted a dangerous offender as his actions in abusing four-year-old victim, his stepson, and causing his death demonstrated extreme callousness toward the health and welfare of the victim. West's T.C.A. § 40–35–115(b), 40–35–115(b)(4).

13 Cases that cite this headnote

### Attorneys and Law Firms

*372 Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball and John H. Bledsoe, Assistant Attorneys General; Victor S. Johnson, III, District Attorney General; Katrin N. Miller and Brian Holmgren, Assistant District Attorneys General, for the appellant, State of Tennessee.

Jeffery Allen Devasher (on appeal), Nashville, Tennessee, and Amy D. Harwell and Ross Alderman (at trial), Nashville, Tennessee, for the appellee, Genaro Dorantes.

**OPINION**

GARY R. WADE, J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., JANICE M. HOLDER, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

### Opinion

GARY R. WADE, J.

The defendant, who was extradited from Mexico to face charges for aggravated child abuse and felony murder by aggravated child abuse, was convicted for each offense. The trial court imposed sentences of twenty-two years and life, respectively, to be served consecutively. The Court of Criminal Appeals reversed the conviction for aggravated child abuse, finding the evidence to be insufficient, but upheld the felony murder conviction. This Court granted applications for permission to appeal by both the State and the defendant. Because the circumstantial evidence *373 was sufficient to support the convictions for both aggravated child abuse and felony murder, the judgment of the Court of Criminal Appeals is reversed in part and affirmed in part. More specifically, the conviction for felony murder is affirmed, and the conviction for aggravated child abuse is reinstated. No other issues warrant the grant of a new trial on either offense. The sentences imposed by the trial court for each of the two offenses are affirmed.

**Facts and Procedural History**

Luis Osvaldo Cisneros (the "victim") was born in Mexico on July 16, 1998, the fourth child of Jose Luis Cisneros Servantes ("Cisneros") and his wife, Martha Patlan–Cano ("Patlan"). Shortly after the victim's birth, the parents separated, and Cisneros moved to Houston, Texas, leaving his family in Mexico. In 2001, the victim and the three other children joined Cisneros in Houston. On June 18, 2002, one of the children, Martha Bernece Cisneros Patlan, observed Patlan and Genaro Edgar Espinosa Dorantes (the "defendant") abduct the victim from Cisneros' yard, place him in a black vehicle, and drive away. At the time, the victim, not yet four years of age, was described as "normal and healthy." He no longer wore

diapers. Cisneros reported the abduction to the Houston police and, about two months later, traveled to Nashville in an unsuccessful effort to find the victim.

Patlan, who had given birth to a son fathered by the defendant on October 20, 2001, in Nashville, was "supposedly" staying at the apartment of the defendant's mother, but much of her time involved travel with the defendant. They had no established residence. In February of 2003, Patlan visited the apartment of her sister, Antonia Patlan ("Antonia"),[2] who had lived in Nashville for some nine years. Appearing concerned about the victim, Patlan asked Antonia for "money to buy a cream" to treat his injuries, explaining that while she was in the bathroom, "she heard her child crying out" when he "burned himself with some corn cobs that she was cooking." Antonia gave Patlan forty dollars to purchase medicine. One week later, Patlan returned to the apartment and asked Antonia for permission to store some toys, stating that she was about to take a trip to Florida. When Antonia asked to see the victim, Patlan led her to a white van parked outside and driven by the defendant. Antonia entered the van and saw the victim lying on his side in an apparent effort to protect the area around his buttocks—"in a position like maybe not to hurt himself." She touched his head and asked, "what happened to you, my child?" The victim provided an unintelligible response. At that point, the defendant interrupted, saying "let's go, let's go woman, let's go, woman" to Patlan before driving away. In consequence, Antonia was unable to determine the nature or extent of the victim's injuries.

A few days later, on February 20, 2003, Patlan approached another one of her sisters, Maria Patlan–Cano ("Maria"), at the Nashville restaurant where she worked, claiming that the victim "was very sick" and in need of medication. Patlan was accompanied by the victim, her baby by the defendant, and her ten-year-old daughter by Cisneros, who by that time was somehow in Patlan's physical custody. After tearfully explaining that the victim had been burned while she had been cooking corn on the cob, Patlan expressed her fear to Maria that the victim might die. In response, Maria gave Patlan food and two ***374*** hundred dollars, but insisted upon seeing the victim. When Maria went outside, however, the defendant, who was driving the white van, was reluctant to allow her to see the victim, claiming that he was blocking traffic. After the defendant moved the vehicle out of the street, Maria opened the door, observed the victim, and screamed, "why [is] the child like that?" Maria, who had described the victim as "chubbier" and "very happy" when she had last seen him in Mexico, noticed that he was very thin and that a foot was bandaged. He was positioned "[o]n his knees with his feet behind him" but did not move. When Maria asked the defendant why he had not provided medicine to the victim or taken him to the doctor, the defendant replied that "since he wasn't his father[,] he didn't have any reason to want to make him get better." Maria then asked why the defendant had taken the victim away from his father if he did not intend to provide for his care. According to Maria, the defendant replied that "he didn't want to bring him[,] but that bitch [Patlan] wanted it to happen." At that point, Patlan directed Maria to get out of the van because the defendant was angry. When Maria complied, the defendant drove away "really fast."

Maria tried to get the license plate number in order to provide it to the police, but, because of the defendant's sudden departure, was unable to do so. Afterward, she asked her brother-in-law, Juan Sanchez ("Sanchez"), to contact the police and report her observations about the victim's health. Sanchez called 911; however, because of the language barrier, there was a delay in the processing of the information to the proper authorities within the department. Initially, in addition to an unidentified male child, Patlan was also thought to be a victim. After the report, patrol officers were notified, but the matter was not immediately assigned as a high priority.

Detective Sara Bruner of the Youth Services Division of the Metro Police Department had the responsibility for investigating child abuse and neglect cases and deaths of children twelve and under. She contacted Sanchez, who provided her with the victim's name and urged her "to find him." As a result of their conversation, on February 21, 2003, Detective Bruner issued a notice for officers to be on the lookout for the van being driven by the defendant. Her investigation was to include not only the victim, but also the other two minors in the custody of Patlan and the defendant.

On February 23, 2003, three days after the initial report to the police, Jerry Moore of the Metropolitan Park Police was approached by a visibly shaken woman who had observed the body of a child on a grassy surface behind a mound of dirt in West Park in Nashville. The mound blocked the view of the body from the road and parking lot. Officer Moore found the body and secured the scene before Metro Police Detective Brad Corcoran of the Homicide Division arrived to conduct the investigation. No shoes were on the body, which was

otherwise clothed. Because no grass stains were on the socks or pants and the body was not covered by the snow that had fallen during the night, Detective Corcoran deduced that the body had been placed at that location only a short time before its discovery. Later, Sanchez identified the body as that of the victim. On the following day, arrest warrants were issued for the defendant and Patlan. Despite substantial media coverage, including the mention of the crime on the "America's Most Wanted" television show, which resulted in several tips, the police were unable to locate either the defendant or Patlan.

*375 Dr. Amy McMaster, the Deputy Chief Medical Examiner for Davidson County, who had special training in the interpretation of injuries, performed the autopsy the day after the body was found. She discovered that the victim was wearing a diaper at the time of his death and had bandages and a piece of cloth wrapped around his feet. The autopsy indicated that the victim had received "multiple, multiple" injuries to "virtually every surface of [his] body," and had also suffered serious burns to entire areas of his feet, which were wrapped in elastic bandages and covered by socks. The nature of the numerous injuries, including horrific burns of "full and partial thickness," [3] was illustrated by graphic photographs taken during the autopsy. After examining the contents of the diaper, which concealed the more severe burns, Dr. McMaster speculated that its primary purpose was to absorb blood that was probably caused by the scabbing and infection of the extreme burns to the entire area of the buttocks, rear upper thighs, and genitals.

According to Dr. McMaster, the burns were altogether inconsistent with injuries caused by a cooking accident and were consistent with "burn [im]mersion," the result of the victim, likely in a sitting position with knees raised, having been intentionally forced into a liquid over 150 degrees for at least one second. The pattern of some of the "satellite" or splash burns suggested that the victim kicked and resisted as his buttocks and feet entered the water. In Dr. McMaster's opinion, the burns, between days and weeks old, were so serious that the victim could not have been able to walk or sit without painful consequences. The infection caused by the burns and loss of skin had damaged the victim's internal organs, which were failing at the time of his death. Dr. McMaster also found scars on the victim's face and multiple bruises and puncture wounds on other areas of his body. In her opinion, the puncture wounds were the result of "some type of pointed instrument." The injuries to the skin, dozens in number, were at different stages of healing at the time of the victim's death.

The examination also revealed that the victim had sustained blunt trauma injuries to the brain and skull. According to Dr. McMaster, the swelling to the brain indicated that the head injuries had been recently inflicted. She determined that the skull fracture, which involved internal and external bleeding, was the most serious of his injuries. In her opinion, the victim lived no more than two hours after being struck by the blow. Because the victim was immobile due to the extensive nature of the burns, she concluded that the blunt force had to have been inflicted by another individual rather than being accidental in nature. Dr. McMaster expressed the further view that the victim had suffered a blunt trauma to his hand, which was swollen and discolored. This injury was consistent with the victim attempting to protect himself and shield his body from attack. She also found an older contusion on the front portion of his brain, which was likely sustained six to seven weeks earlier.

Dr. McMaster found a therapeutic level of naproxen—possibly Aleve or Antiprox—in the victim's body. She believed that the "fluid accumulated in different body spaces" indicated that the victim would have ultimately died from the infection due to the burns; she speculated, however, *376 that "with immediate treatment, he likely could have survived" the burns. She also found that he was malnourished, weighing only thirty-four pounds at the time of his death, which was far less than the average weight for a child his age. "[H]is ribs were very easily seen beneath the skin," and only a small amount of brown and gray thick fluid was found in his stomach. Dr. McMaster classified the cause of death as battered child syndrome, a term "used to describe a child ... subjected to repeated bouts of severe physical abuse."

Carla Aaron, the Regional Administrator for the Department of Children's Services in Davidson County, who had training and experience in child abuse cases and a familiarity with the procedures involved in reporting the suspected abuse or neglect of children to law enforcement, the Juvenile Court, or the District Attorney's Office, confirmed that her department had not received any notification of the victim's circumstances until after his death. After reviewing the autopsy photographs, she concluded that if any medical provider had been called on to treat the injuries the victim had sustained, they would have "absolutely" reported the incident to her department for investigation.

Approximately four months after the discovery of the body, a Davidson County Grand Jury returned a two-count indictment for felony murder during the perpetration of aggravated child abuse. Count One alleged that the defendant and Patlan "did kill [the victim] during the perpetration of or attempt to perpetrate Aggravated Child Abuse, in violation of Tennessee Code Annotated § 39–13–202." Count Two alleged that the defendant and Patlan "did knowingly, other than by accidental means, treat [the victim], a child six (6) years of age or less in such a manner as to inflict injury, and the act of abuse resulted in serious bodily injury to the child, in violation of Tennessee Code Annotated § 39–15–402."

On February 13, 2006, almost three years after the victim's death, Sanchez reported to Detective Bruner that Patlan was in Mexico. On April 5, 2006, Katrin Miller, Assistant District Attorney General for the 20th Judicial District, submitted applications for the extradition of the defendant and Patlan, based specifically upon the charges for felony murder committed in the perpetration of or the attempt to perpetrate aggravated child abuse and for aggravated child abuse. The affidavit in support of the request to extradite also included the following language:

> Both [the defendant and Patlan] are criminally responsible as a party to the offenses of felony murder and aggravated child abuse if the offenses were committed by the defendants' own conduct, by the conduct of another for which the defendants are criminally responsible, or by both.

The extradition agreement, executed by the appropriate authorities on May 30, 2006, made specific reference to the charges in the indictment. The terms authorized and directed the extradition of the defendant to face charges of "homicide in violation of criminal code 39–13–202 and ... child abuse described by criminal code 39–15–402." The Federal Bureau of Investigation assisted in the extradition process and, in July of 2006, the defendant and Patlan were returned to Nashville.

Some five months later, on December 7, 2006, the District Attorney General's Office filed a superceding indictment against the defendant and Patlan that included two additional counts for felony murder by aggravated child neglect, an offense not specified in the extradition request or in the extradition agreement. Upon motion by the defense, however, and a concession by the office of the District Attorney General ***377** that the new charges were prohibited by the terms of the extradition agreement, the trial court entered an order of dismissal as to those two counts.[4]

The defendant and Patlan were tried jointly on the charges set out in the original indictment. The State, through the witnesses previously identified in this opinion, prosecuted the offenses based entirely upon circumstantial evidence, including expert testimony. There were no eyewitnesses to any of the allegations of abuse. Moreover, neither the defendant nor Patlan made incriminating statements to the police which were admitted as evidence. Further, the defense elected not to offer proof at the trial.

During closing argument, the State, precluded from prosecution based upon aggravated child neglect, argued that the death of the victim was the result of abuse and relied upon the surrounding circumstances to establish that the defendant and Patlan either caused or were mutually culpable for his death under the alternative theory of criminal responsibility. In response, the defense argued that the State had proved little more than the mere presence of the defendant some three days before the body was found and, further, had offered no evidence of the requisite shared intent to support the theory of criminal responsibility for the conduct of another. At the conclusion of the proof and the arguments of counsel, the trial court instructed the jury as to felony murder, aggravated child abuse, and criminal responsibility.[5]

***378** Following its deliberations, the jury found Patlan and the defendant guilty of both aggravated child abuse and first degree felony murder by aggravated child abuse. As to the defendant, whose appeal is separate from the Patlan case,[6] the trial court imposed a mandatory life sentence for first degree murder and a consecutive sentence of twenty-two years for the aggravated child abuse conviction.

On direct appeal, the Court of Criminal Appeals reversed the defendant's conviction for aggravated child abuse, finding the evidence to be insufficient and more specifically observing that the State had failed to offer any proof that the defendant had actually inflicted the injuries causing the death of the victim. The Court of Criminal Appeals, however,

affirmed the first degree murder convictions, concluding that the crime of aggravated child abuse, although different from child neglect, included "aggravated child abuse through neglect":

> Our review of the record shows that the State never argued that [the defendant] inflicted the victim's fatal injuries and did not offer any proof in support of this theory.... Accordingly, the conviction for felony murder based on a theory of aggravated child abuse through infliction of injury and the conviction for aggravated child abuse are not supported by the proof in this case.
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> ....
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> [T]he evidence[, however,] was sufficient to support [the] conviction for felony murder during the perpetration of aggravated child abuse through neglect. The evidence showed that [the defendant] knowingly failed to provide the victim with any medical assistance which resulted in the victim's serious bodily injuries.

*State v. Dorantes*, No. M2007–01918–CCA–R3–CD, 2009 WL 4250431, at *9–10 (Tenn.Crim.App. Nov. 30, 2009). In summary, our intermediate court ruled unanimously that the circumstantial evidence was insufficient to support a conviction of aggravated child abuse. On the other hand, the majority of the panel of the Court of Criminal Appeals, over the dissent of Presiding Judge Joseph M. Tipton, held that a murder during the commission of aggravated child abuse included murder during the commission of aggravated child abuse "through neglect," relying on *State v. Hodges*, 7 S.W.3d 609 (Tenn.Crim.App.1998), a case involving the interpretation of the 1995 version of the felony murder statute, which was amended prior to the victim's death.

The State applied for permission to appeal to this Court, arguing that the Court of Criminal Appeals had erred by holding that the evidence was insufficient to support a conviction for aggravated child abuse. The defendant also filed an application for permission to appeal, arguing that when the evidence is insufficient to support a conviction for aggravated child abuse, as determined by the Court of Criminal Appeals, a conviction for felony murder based upon aggravated child abuse cannot stand; secondly, the defendant asserted that a 1998 amendment to the felony murder statute, which made a distinction ***379*** between a felony murder based upon aggravated child abuse and a felony murder based upon aggravated child neglect, precluded the extension of the former to the latter; and, thirdly, the defendant asked this Court to determine the propriety of a conviction for felony murder based upon aggravated child abuse absent any instructions defining aggravated child abuse by neglect. This Court granted both of the applications.

**Standard of Review**

1 2 3 4 "When considering a sufficiency of the evidence question on appeal, the State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn.2007). "The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn.2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn.Crim.App.1978)). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* Tenn. R.App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn.2009).

5 6 7 8 In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn.1973); *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451, 456–58 (1958). Ultimately, however, "[t]he jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and[, moreover,] the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.' " *State v. Rice*, 184 S.W.3d 646, 662 (Tenn.2006) (quoting *Marable*, 313 S.W.2d at 457 (citations omitted)). On appeal, the court may not substitute its inferences for those drawn by the trier of fact in circumstantial evidence cases. *State v. Lewter*, 313 S.W.3d 745, 748 (Tenn.2010); *Liakas v. State*, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). The standard of review "is the same whether the conviction is based upon direct or

circumstantial evidence." *Hanson*, 279 S.W.3d at 275 (quoting *State v. Sutton*, 166 S.W.3d 686, 689 (Tenn.2005)).

Years ago, Special Justice Erby Lee Jenkins wrote expressively on behalf of this Court, admonishing the finder of fact in criminal cases to exercise particular caution in the prosecution of cases based entirely upon circumstantial evidence:

> In order to convict on circumstantial evidence alone, the facts and circumstances must be so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone. 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. Mere suspicion and straws in the wind are not enough for circumstances take strange forms. Under our form of government and the administration of criminal justice, the defendant is clothed with a ***380** mantle of innocence and that presumption of innocence hovers over and protects him throughout the trial. Until this is overturned by strong proof of his guilt beyond a reasonable doubt, not an imaginary or captious doubt but an honest doubt engendered after a consideration of all the evidence so that the minds of the jurors cannot rest easy as to the certainty of guilt, he is entitled to an acquittal.

*State v. Crawford*, 225 Tenn. 478, 470 S.W.2d 610, 613 (1971). The *Crawford* standard purportedly required the State to prove facts and circumstances "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *Id.* at 612. This language has long been applied in Tennessee to criminal cases, particularly those cases in which the sufficiency of the circumstantial evidence is at issue. Recently, however, this Court pointed out the inconsistency between the terminology employed in *Crawford* and its progeny and the standard of proof applied by the United States Supreme Court when the evidence is solely circumstantial. *See State v. James*, 315 S.W.3d 440, 455 n. 14 (Tenn.2010) (observing that, while the *Crawford* standard has been used repeatedly in this state, the federal courts have held that the government has no duty to exclude every other hypothesis except that of guilt).

Significantly, the Supreme Court has specifically rejected the notion "that the prosecution [i]s under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 326, 99 S.Ct. 2781.[7] In *Jackson*, the Supreme Court cited with approval *Holland v. United States*, 348 U.S. 121, 139–40, 75 S.Ct. 127, 99 L.Ed. 150 (1954), a case holding "that where the jury is properly instructed on the standards for reasonable doubt," an additional instruction that circumstantial evidence "must be such as to exclude every reasonable hypothesis other than that of guilt ... is confusing and incorrect." In *Holland*, our highest Court made the following observation:

> Circumstantial evidence ... is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.
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> *Id.* at 140, 75 S.Ct. 127; *see also* 2A Charles Alan Wright & Peter J. Henning, ***381** *Federal Practice & Procedure: Criminal* § 411 n. 1 (2009) (hereinafter "Wright & Henning") (observing that the phrase "direct evidence" is now more commonly used than the traditional phrase "testimonial evidence").

The federal courts of appeal have followed the Supreme Court's directive, consistently holding that direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence. *See, e.g., United States v. Kelley*, 461 F.3d 817, 825 (6th Cir.2006) ("Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt."); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982) ("It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence

establishes guilt beyond a reasonable doubt."); *United States v. Nelson,* 419 F.2d 1237, 1241 (9th Cir.1969) ("Since circumstantial and testimonial evidence are indistinguishable so far as the jury's fact-finding function is concerned, *all* that is to be required of the jury is that it weigh all of the evidence, direct or circumstantial, against the standard of reasonable doubt."). "Thus, though it is said that circumstantial evidence is to be scrutinized with the utmost care, and nonlawyers are suspicious of it, the courts reject the view that circumstantial evidence has less probative value than direct evidence." Wright & Henning, § 411.

We specifically adopt the standard enunciated by the United States Supreme Court as applicable to prosecutions in this state. In practice, the distinction between the federal standard and the "reasonable hypothesis" language used in our state has rarely made a difference; therefore, there has been little reason to refine our standard of review by voicing disapproval of much of the terminology used in *Crawford.*[9] This case, however, may qualify as one of those rare instances where the application of the federal and state standards could result in a different outcome, particularly in view of the State's election to extradite the defendant based upon the two counts founded in aggravated child abuse rather than aggravated child neglect.

**Development of the Law Applicable to Child Abuse and Neglect**

Prior to the Criminal Sentencing Reform Act of 1989, the statute governing cases of child abuse and child neglect provided as follows: "Any person who maliciously, purposely, or knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such manner as to inflict injury or neglects such a child so as to adversely affect its health and welfare is guilty of a misdemeanor...." Tenn.Code Ann. § 39–4–401(a) (1982) (repealed by Act of May 24, 1989, ch. 591, § 1, 1989 Tenn. Pub. Acts 1169). Our courts treated abuse and neglect as two separate offenses. *See State v. Smith,* C.C.A. No. 1153, 1990 WL 134934, at *3 (Tenn.Crim.App. Sept. 20, 1990), *no Tenn. R.App. P. 11 app.* filed.[3]

***382** In 1988, our first degree murder statute included death as a result of child abuse, providing, in part, as follows:

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

Tenn.Code Ann. § 39–2–202(2) (Supp.1988) (repealed by Act of May 24, 1989, ch. 591, § 1, 1989 Tenn. Pub. Acts 1169).[10] In 1992, however, this Court ruled that this statute was unconstitutional. *State v. Hale,* 840 S.W.2d 307, 313 (Tenn.1992).[11] In response, the General Assembly amended the first degree murder statute to provide, in part, as follows: "First degree murder is: ... (4) A reckless killing of a child less than thirteen (13) years of age, if the child's death results from aggravated child abuse, as defined by section 39–15–402, committed by the defendant against the child." Act of May 6, 1993, ch. 338, § 1, 1993 Tenn. Pub. Acts 537 (codified at Tenn.Code. Ann. § 39–13–202(a) (Supp.1993)). Effective in 1995, however, the legislature again amended the first degree murder statute to provide in part as follows: "First degree murder is: ... (2) A killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, *aggravated child abuse* or aircraft piracy[.]" Act of May 24, 1995, ch. 460, § 1, 1995 Tenn. Pub. Acts 801 (codified at Tenn.Code Ann. § 39–13–202(a) (Supp.1995)) (emphasis added).

In *Hodges,* the Court of Criminal Appeals interpreted the 1995 statute. In that case, a two-year-old died of intentional blunt force trauma to the head and torso inflicted by either the mother or the stepfather—the sole custodians of the victim. *Hodges,* 7 S.W.3d at 614. Much like the case before us, the State was unable to prove which of the two administered the fatal blows, but, as in this case; "there [could] be no mistake that an act of abuse" caused the victim's death. *Id.* at 620. While affirming convictions for felony murder and aggravated child abuse, the Court of Criminal Appeals interpreted Tennessee Code Annotated section 39–15–202(a) (Supp.1995) and addressed "child abuse as defined in § 39–15–401" when serious bodily injury results, as described in section 39–15–402(a)(1). The holding in *Hodges* stood for the proposition that a prosecution for a killing that occurred during the commission of "aggravated child abuse" encompassed a death caused by either abuse

through the infliction of injury or *383 abuse through neglect of a child " 'so as to adversely affect the child's health and welfare,' resulting in serious bodily injury." 7 S.W.3d at 622–23.[12] Obviously, the majority of the Court of Criminal Appeals in the case before us relied on the *Hodges* ruling.

Effective July 1, 1998, however, our General Assembly amended the felony murder statute by adding aggravated child neglect to the list of felonies upon which a felony murder charge could be based: "First degree murder is: ... (2) A killing of another in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, *aggravated child abuse, aggravated child neglect* or aircraft piracy[.]" Act of Apr. 29, 1998, ch. 1040, § 3, 1998 Tenn. Pub. Acts 911 (codified at Tenn.Code Ann. § 39–13–202(a) (Supp.1998)) (emphasis added).[13] This statute was in effect at all times pertinent to the prosecution ***384** of the defendant and Patlan. Importantly:

> When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Tenn.Code Ann. § 39–11–112 (2010). Thus, even though the law changed between the commission of the charged offenses and the trial of the defendant, the law applicable at the time of the events leading to the victim's death governs.

In his dissent to the Court of Criminal Appeals' opinion in this case, Judge Tipton observed that the 1998 amendment by the General Assembly was

> significant in the context of separating aggravated child abuse from aggravated child neglect when considering what constitutes a particular felony murder.... [U]nder that provision, murder in the perpetration of aggravated child abuse is a separate offense from murder in the perpetration of aggravated child neglect, no different than murder during the perpetration of air piracy, for example.... I believe that under the statute, charging murder in the perpetration of aggravated child abuse did not charge murder in the perpetration of aggravated child neglect.

*Dorantes*, 2009 WL 4250431, at *17 (Tipton, P.J., dissenting). We agree with his assessment. Plainly, our General Assembly chose to provide two separate and distinct courses of conduct, aggravated child abuse and aggravated child neglect, upon which a felony murder may be predicated.

## Analysis

### 1. Sufficiency of the Evidence

Because one may assume the responsibilities of a parent under the doctrine of in loco parentis, the defendant's failure to seek medical assistance for the victim's injuries may have supported convictions for aggravated child neglect and felony murder by aggravated child neglect. *See State v. Sherman*, 266 S.W.3d 395, 406 (Tenn.2008). As we have observed, however, the State was precluded from charging the defendant with those particular crimes by the terms of the extradition agreement and the doctrine of specialty. Indeed, as the defendant argues, the trial court did not instruct the jury as to aggravated child neglect and, therefore, a felony murder conviction for "aggravated child abuse by neglect" would not have been proper.[14] *See* T.P.I.—Crim. 21.01(a) (for offenses committed prior to July 1, 2005); *see also Dorantes*, 2009 WL 4250431, at *17 (Tipton, P.J., dissenting).

9 The defendant's argument, however, relies on the premise that the evidence was insufficient to support convictions based upon the crime of aggravated child abuse. As the State set forth in its response to the defendant:

> The State has never argued and does not now argue that the defendant is guilty of aggravated child abuse by neglect. Rather, the State's argument is that the proof shows that the defendant knowingly treated the child in such a manner as to inflict injury, either as principal or as one criminally responsible *385 for the conduct of another. The State takes the position that ... the evidence, in this instance, is sufficient to establish that the defendant either

> committed the offenses or is criminally responsible for Patlan's commission of the offenses.

Thus, even though we disagree with the majority of the Court of Criminal Appeals that evidence of aggravated child neglect may support a conviction for the offense of felony murder in the perpetration of or attempt to perpetrate aggravated child abuse, the critical question before us is whether the circumstantial evidence, when considered as equal in stature with direct evidence, is sufficient to have persuaded a rational jury, by the proper "use [of] its experience with people and events in weighing the probabilities," of the defendant's guilt beyond a reasonable doubt of aggravated child abuse and felony murder by aggravated child abuse. *Holland*, 348 U.S. at 140, 75 S.Ct. 127. Criminal responsibility for the conduct of another, while not a separate crime, may serve as a basis for conviction—working "in synergy with the charged offense." *Sherman*, 266 S.W.3d at 408.

As stated, at the time of the victim's death, the statute for aggravated child abuse and neglect provided that "[a] person commits the offense of aggravated child abuse or aggravated child neglect who commits the offense of child abuse or neglect as defined in § 39–15–401 and ... [t]he act of abuse or neglect results in serious bodily injury to the child[.]" Tenn.Code Ann. § 39–15–402(a) (Supp.2002). Moreover, "if the abused or neglected child is six (6) years of age or less, the penalty is a Class A felony." Tenn.Code Ann. § 39–15–402 (b).[15] First degree felony murder may be committed by the killing of another in the perpetration of or the attempt to perpetrate aggravated child abuse. Tenn.Code Ann. § 39 –13–202(a)(2) (Supp.2002).

10 11 12 The mental state required for the offense of child abuse and neglect is "knowingly, other than by accidental means." Tenn.Code Ann. § 39–15–401(a) (Supp.2002). The term "knowing," as it appears in our statutory scheme, refers to one of four culpable mental states—*mens rea*—adopted by the General Assembly for use throughout the state's criminal code. *See* Tenn.Code Ann. § 39–11–302 (1997); *Hanson*, 279 S.W.3d at 276; *State v. Page*, 81 S.W.3d 781, 786 (Tenn.Crim.App.2002) ( "There are four culpable mental states in Tennessee: intentional, knowing, reckless and criminal negligence."). "Knowing" is defined as follows:

> "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that ***386** the conduct is reasonably certain to cause the result.

Tenn.Code Ann. § 39–11–302(b). This definition contemplates that the term "knowing" may be applied to the following: (1) the nature of the defendant's conduct, (2) the circumstances surrounding the defendant's conduct, and (3) the result of the defendant's conduct. *Hanson*, 279 S.W.3d at 276. A nature-of-conduct offense "seeks principally to proscribe the nature of the defendant's conduct, as opposed to the result that the defendant's conduct achieves." *Mateyko*, 53 S.W.3d at 673. In contrast, the mental state required for a result-of-conduct offense accompanies only its resulting harm. *Hanson*, 279 S.W.3d at 276. Aggravated child abuse is classified as a nature-of-conduct offense. *Id.* at 276–77 (quoting *State v. Ducker*, 27 S.W.3d 889, 897 (Tenn.2000)). As a nature-of-conduct offense, the evidence must be sufficient for a rational jury to have concluded, beyond a reasonable doubt, that the defendant was aware of the nature of his conduct when he treated the victim in such a manner as to inflict injury, and that, in so doing, he acted other than by accidental means. *Hanson*, 279 S.W.3d at 277.

13 Further, our statute provides that one "is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." Tenn.Code Ann. § 39–11–401(a) (1997). "Each party to an offense may be charged with commission of the offense." Tenn.Code Ann. § 39–11–401(b). Criminal responsibility, while not a separate crime, is an alternative theory under which the State may establish guilt based upon the conduct of another. *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn.1999). A person may be criminally responsible for an offense committed by the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense [.]" Tenn.Code Ann. § 39–11–402(2) (1997).

14 15 "[U]nder the theory of criminal responsibility, presence and companionship with the perpetrator of a felony before and after the commission of the crime are circumstances from which an individual's participation may be inferred." *State v. Phillips*, 76 S.W.3d 1, 9 (Tenn.Crim.App.2001). Further, no specific act or deed need be demonstrated. *State v. Ball*, 973 S.W.2d 288, 293 (Tenn.Crim.App.1998). In order to be convicted of the crime, the evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission. *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn.Crim.App.1994); *State v. Foster*, 755 S.W.2d 846, 848 (Tenn.Crim.App.1988). The legislative intent behind the criminal responsibility statutes was clearly to "embrace the common law principles governing aiders and abettors and accessories before the fact." *State v. Carson*, 950 S.W.2d 951, 955 (Tenn.1997).

Viewed in the light most favorable to the State, the proof at trial established that the defendant participated in the abduction of the victim on June 18, 2002, and that he shared physical custody with Patlan until the death of the victim, who was then four years of age. During this time, the defendant had an itinerant existence and typically had control of the van, which, by all indications, also served as a place of habitation. When Patlan demonstrated some concern for the victim just prior to his death by asking her sisters for money to buy medicine in order to treat his injuries, the defendant demonstrated no desire to ***387*** help and was evasive when questions arose about the nature of the victim's condition. For example, when Antonia asked Patlan what had happened to the victim, the defendant interrupted the conversation, directing Patlan to leave before she had the opportunity to explain. Further, Patlan later sought help from her sister Maria, expressing her fear that the victim might die; Maria, after seeing the condition of the victim, confronted the defendant directly, asking why the boy had not been taken to a doctor. In response, the defendant expressed a disregard for the victim's welfare, explaining that he never wanted to take custody of the victim, and angrily blamed Patlan for undertaking the obligation while referring to her in derogatory terms. The defendant hurriedly drove away after Maria's inquiries, avoiding further explanation. Moreover, a diaper and clothing hid the burns to the victim's buttocks and rear upper thighs. Wrapped elastic bandages around the feet were covered by socks. From all of this, a jury could have reasonably inferred that the defendant was not willing to allow others to either observe the seriousness of the victim's injuries or ascertain his need for intensive medical treatment.

The victim was normal and healthy at the time of his abduction. When last seen by Antonia and Maria, he was in a van driven by the defendant, and was thin, unable to communicate, and obviously suffering from illness and injury. Shortly thereafter, the victim's body, horribly burned on the feet, the buttocks, and the upper thighs, was found in West Park, obviously abandoned there. The body had been discarded behind a mound, which obscured its view from the parking area. The evidence suggests that the victim's clothes had not been changed from the time he was seen by Maria until his death some three days later. In the meantime, the defendant and Patlan had fled the jurisdiction.

The autopsy established that the major injuries were second and third degree burns, sustained as the result of being placed in scalding hot water, and a fractured skull from blunt force trauma. The pattern of the burns, suffered by the victim within two weeks of his death, indicated that he had been immersed in scalding water, buttocks and feet first, in a fetal-like position. Dr. McMaster, who conducted the autopsy, was resolute in her conclusion that the burns could not have been accidental. While her autopsy established the immediate cause of death as a blunt trauma injury to the brain and skull, the infections from the burns, in her opinion, would have inevitably been fatal absent medical treatment. Dr. McMaster also determined that the blow to the victim's head could not have been accidental. There was a wound to the right hand of the victim that was consistent with an effort by the victim to protect himself from attack. There were dozens of other injuries, some recent and some older, which were inflicted over a period of time and which were in various stages of healing. Photographs of the body were not only gruesome, but also particularly probative of aggravated child abuse. According to an administrator with the Department of Children's Services, the victim's injuries were so severe that any medical worker, had treatment been sought, would have reported the injuries to authorities. The defendant not only fled the state but hid out after the death of the victim, avoiding arrest for over three years until found and extradited from Mexico.

The circumstantial evidence presented to the jury, in our view, led to the reasonable inference that the defendant either knowingly, other than by accidental means, committed aggravated child abuse as the primary actor or, at a minimum, intentionally ***388*** solicited, directed, aided, or attempted to aid Patlan in the commission of the offenses. *See*

Tenn.Code Ann. § 39–11–402(2). As stated, physical participation in the crime is not an essential element under the criminal responsibility theory; encouragement of the crime is enough.

16 Moreover, "flight and attempts to evade arrest are relevant as circumstances from which, when considered with other facts and circumstances in evidence, a jury can properly draw an inference of guilt." *State v. Zagorski*, 701 S.W.2d 808, 813 (Tenn.1985). After the body of the victim, last seen alive in a van driven by the defendant, was disposed of in West Park, the defendant and Patlan fled to Mexico, and neither could be found, even with prominent mention of the crime on the "America's Most Wanted" television show. This is especially probative of guilt. Prior to jury deliberations, the trial court properly instructed the jury as to how to interpret flight from prosecution:

> The flight of a person accused of a crime is a circumstance which, when considered with all the facts of the case, may justify an inference of guilt. Flight is the voluntary withdrawal of oneself for the purpose of evading arrest or prosecution for the crime charged. Whether the evidence presented proves beyond a reasonable doubt that the defendant fled is a question for your determination.
>
> The law makes no precise distinction as to the manner or method of flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown, to constitute flight.
>
> If flight is proved, the fact of flight alone does not allow you to find that the defendant is guilty of the crime alleged. However, since flight by a defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant. On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered, or by the facts and circumstances of the case.
>
> Whether there was flight by the defendant, the reasons for it, and the weight to be given to it, are questions for you to determine.

*See* T.P.I.-Crim. 42.18 (10th ed.2006); *see also State v. Kendricks*, 947 S.W.2d 875, 885–86 (Tenn.Crim.App.1996). Any inference of guilt by virtue of the defendant's departure from this jurisdiction was clearly warranted. [16]

***389** Because the evidence is not conclusive as to whether the defendant or Patlan inflicted the injuries that led to the victim's death, the defendant cites *State v. Hix*, 696 S.W.2d 22 (Tenn.Crim.App.1984), *overruled on other grounds by State v. Messamore*, 937 S.W.2d 916, 919 n. 3 (Tenn.1996), as authority that one parent cannot be convicted of child abuse on the basis that he or she is one of two possible custodians responsible for the death. In *Hix*, a husband and wife were convicted of abuse and battery and child abuse against their six-week old child, who had a fractured thigh and broken ribs. 696 S.W.2d at 24. Because the evidence did not prove beyond a reasonable doubt which parent committed the crimes, the Court of Criminal Appeals found the evidence insufficient to support the convictions. *Id.* at 24–25. As argued by the State, however, the case before us is readily distinguishable from *Hix*. Because the offenses in *Hix* occurred prior to the 1989 Sentencing Reform Act, resolution of the appeal in that case did not involve consideration of criminal responsibility for the conduct of another, as set forth in Tennessee Code Annotated sections 39–11–401 and –402. *Cf. Lemacks*, 996 S.W.2d at 171 (sustaining a conviction under a theory of criminal responsibility when the jury was instructed that the defendant could be found guilty of driving under the influence if he was found to either have been the driver or have allowed another who was under the influence to operate the vehicle).

Further, our Court of Criminal Appeals has more recently considered similar circumstances under the version of the statute applicable to the defendant. In *State v. Nunn*, No. E2007–02333–CCA–R3–CD, 2009 WL 4790211 (Tenn.Crim.App. Dec. 14, 2009), *perm. app. denied* (Tenn.2010), the defendants, parents of a nine-month-old child, were the sole custodians during a period in which the child suffered severe internal injuries and fractures to his skull, arm, and leg. The parents were both convicted of aggravated child abuse under a theory of criminal responsibility, absent any direct evidence that the two inflicted the injuries. *Id.* at *21–22. Our intermediate court properly held that the jury was under no obligation "to determine unanimously whether a defendant is either directly liable or

criminally responsible for the harm inflicted." *Id.* at *25. As in *Nunn,* and unlike in *Hix,* the jury in this case was instructed on a theory of criminal responsibility.

In summary, the evidence, even though entirely circumstantial, is sufficient to support the jury's finding of guilt beyond a ***390** reasonable doubt of each of the offenses charged. The autopsy report, photographs of the injuries, and the defendant's flight from this jurisdiction and hiding out for three years were especially probative. The jury had a rational basis for the verdicts of guilt as to each count.

**2. Request for Special Jury Instruction**

17 During the course of the trial, the defendant proposed a special request for the trial court to supplement the jury instructions as follows:

> For you to find the accused guilty of aggravated child abuse the State must prove that the Defendant affirmatively committed an abusive action which resulted in serious bodily injury to the victim. Failure by either defendant to protect or seek treatment is not proof of abuse as to satisfy the elements of child abuse.

The trial court denied the request, holding that the statutory language on child abuse and neglect and aggravated child abuse sufficiently explained that the State was required to prove, beyond a reasonable doubt, that the defendant "knowingly, other than by accidental means, treat[ed] a child under [six] years of age in such a manner as to inflict injury," and that such action resulted in serious bodily injury to the child. *See* Tenn.Code Ann. §§ 39–15 –401 & –402. The defendant contends that he is entitled to a new trial because the instruction would have clarified the obligation of the State to prove aggravated child abuse through infliction of injury rather than aggravated child abuse through neglect. In response, the State submits that the instruction sought by the defendant regarding "[f]ailure ... to protect or seek treatment" was far too broad and, for example, could have been interpreted to preclude a conviction for a defendant who actively prevented medical treatment for a severely injured victim. The State further argues that the jury charge was adequate to protect the defendant from a conviction based upon "mere neglect."

18 19 20 It is well-settled that a defendant has a constitutional right to a complete and correct charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *State v. Faulkner,* 154 S.W.3d 48, 58 (Tenn.2005); *State v. Farner,* 66 S.W.3d 188, 204 (Tenn.2001); *State v. Garrison,* 40 S.W.3d 426, 432 (Tenn.2000). "It is the duty of the trial judge without request to give the jury proper instructions as to the law governing the issues raised by the nature of the proceedings and the evidence introduced during trial...." *State v. Teel,* 793 S.W.2d 236, 249 (Tenn.1990). The purpose "of a special instruction is to supply an omission or correct a mistake made in the general charge, to present a material question not treated in the general charge, or to limit, extend, eliminate, or more accurately define a proposition already submitted to the jury." *State v. Cozart,* 54 S.W.3d 242, 245 (Tenn.2001). The refusal to grant a special request for an instruction is error only when the general charge fails to fully and fairly provide the applicable law, considering the instructions in their entirety and reading them as a whole rather than in isolation. *Hanson,* 279 S.W.3d at 280.

The trial court, which concluded that the pattern instruction on aggravated child abuse adequately informed the jury of the State's obligation to prove the knowing infliction of an injury and resulting bodily injury, provided the following instruction on aggravated child abuse:

> For you to find the defendant guilty ... the state must have proven beyond a ***391** reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant did knowingly, other than by accidental means, treat a child in such a manner as to inflict injury;
>
> (2) that the act of abuse resulted in serious bodily injury to the child; and
>
> (3) that the child was six (6) years of age or less.

In our view, the trial court's charge was adequate.[12] "Knowingly" and "other than by accidental means" inflicting injury on a child less than six qualifies as terminology which can

be readily understood. The trial court's refusal to supplement the pattern instruction did not constitute reversible error.

**3. Sentencing**

21 The trial court imposed a mandatory sentence of life imprisonment for felony murder and a sentence of twenty-two years for the aggravated child abuse conviction. The sentences were ordered to be served consecutively. As we have observed, aggravated child abuse is a Class A felony when the child is less than 6 years old. Tenn.Code Ann. § 39–15–402(b). As a Range I offender, the defendant is subject to a sentence of between 15 and 25 years. Tenn.Code Ann. § 40–35–112(a)(1) (1997). The presumptive sentence for a Class A felony, at the time of offense, is the midpoint of the range. *See* Tenn.Code Ann. § 40–35–210(c) (1997 & Supp.2002). The trial court found four enhancement factors: (1) the defendant had prior misdemeanor convictions; (2) the defendant treated or allowed the victim to be treated with exceptional cruelty; (3) the personal injuries inflicted on the victim were particularly great; and (4) the defendant abused a position of private trust. *See* Tenn.Code Ann. § 40–35–114(2), (6), (7), (16) (Supp.2002). The trial court found no mitigating factors.

In *State v. Gomez,* 239 S.W.3d 733, 740 (Tenn.2007), this Court held that an imposition of a greater sentence based upon factual determinations made by the trial judge rather than a jury violates the Sixth Amendment. *See Cunningham v. California,* 549 U.S. 270, 290, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); *Blakely v. Washington,* 542 U.S. 296, 305, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Based upon our holding in *Gomez,* three of the enhancement factors cannot apply. Prior criminal history, however, is an enhancement factor that does not offend the Sixth Amendment absent submission of the issue to a jury. *Gomez,* 239 S.W.3d at 740; *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Because the defendant had three prior misdemeanor convictions, two for theft and one for assault, it is our view that a two-year enhancement above the midpoint of the range for the aggravated child abuse conviction is warranted. The length of the sentence for the aggravated child abuse conviction is, therefore, affirmed.

22 23 Further, the trial court ordered the sentences to be served consecutively on the basis that the defendant qualified as a dangerous offender. *See* Tenn.Code Ann. § 40–35–115(b)(4) (1997) (describing a "dangerous offender" as one "whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high"). The trial court ***392** specifically found that the aggregate term of confinement was reasonably related to the severity of the offenses and was necessary to protect society from the defendant's criminal behavior. *See State v. Wilkerson,* 905 S.W.2d 933, 939 (Tenn.1995). While the Criminal Sentencing Reform Act of 1989 requires a principled justification for every sentence, including, of course, consecutive sentences, sentencing is a human process that is not subject to a set of mechanical rules. *Id.* at 938. Whether sentences are to be served concurrently or consecutively is primarily within the discretion of the trial court. *See State v. Hastings,* 25 S.W.3d 178, 181 (Tenn.Crim.App.1999); *see also* Tenn.Code Ann. § 40–35–115(b) (providing that "[t]he [trial] court *may* order sentences to run consecutively if the court finds by a preponderance of the evidence that" one or more of the statutory criteria exist) (emphasis added). Because the defendant, at a minimum, demonstrated extreme callousness toward the health and welfare of the victim, and the results were fatal, the trial court, in our view, had a reasonable basis for imposing consecutive sentences.

**Conclusion**

The judgment of the Court of Criminal Appeals is reversed in part and affirmed in part, and the sentences imposed by the trial court for each of the two offenses are reinstated. It appearing that the defendant is indigent, costs of this appeal shall be taxed to the State of Tennessee.

**All Citations**

331 S.W.3d 370

**Footnotes**

1 Oral argument was heard in this case on October 7, 2010, in Centerville, Hickman County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

2

Antonia Patlan, Maria Patlan–Cano, Jose Luis Cisneros Servantes, and Martha Bernece Cisneros Patlan testified at trial with the assistance of an interpreter.

3 Partial thickness burns, according to Dr. McMaster, are second degree burns, which do not destroy the cells capable of regenerating the skin. Full thickness, or third degree burns, involve the destruction of nerve endings, and the skin will not regenerate.

4 In *United States v. Rauscher*, 119 U.S. 407, 429–30, 7 S.Ct. 234, 30 L.Ed. 425 (1886), the United States Supreme Court held that the courts of the United States may not try a defendant who was extradited from another country for a crime not listed in the extradition agreement. This doctrine of specialty prohibits the prosecution for crimes which were not the basis for extradition. *United States v. Levy*, 947 F.2d 1032, 1034 (2d Cir.1991). Further, Article 17 of the extradition treaty between the United States and Mexico specifically provides that an individual extradited under the treaty "shall not be detained, tried, or punished ... for an offense other than that for which extradition has been granted" absent an exception, none of which apply to these circumstances. Extradition Treaty, U.S.-Mex., art. 17, ¶ 1, May 4, 1978, 31 U.S.T. 5059.

5 After instructing the jury on the elements necessary to support a conviction for felony murder and aggravated child abuse, the trial court charged the jury using language in substantial compliance with the statutes governing criminal responsibility, Tenn.Code Ann. §§ 39–11–401 & –402 (1997), and facilitation of a felony, Tenn.Code Ann. § 39–11–403 (1997):

> The defendant is criminally responsible as a party to an offense if the offense was committed by the defendant's own conduct, by the conduct of another for which the person is criminally responsible, or by both. Each party to the offense may be charged with the commission of the offense.
>
> The defendant is criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the defendant solicits, directs, aids, or attempts to aid another person to commit the offense. Mere presence is not sufficient to find a defendant guilty for being criminally responsible for an offense committed by the conduct of another. However, presence of the defendant is not required.
>
> A person who commits the offense of facilitation of a felony is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant knew that another person intended to commit the specific offense, but did not have the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense; and
>
> (2) that the defendant furnished substantial assistance to that person in the commission of the felony; and
>
> ( [3] ) that the defendant furnished such assistance knowingly.

The jury was also instructed on lesser included offenses, including second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide under Count 1. As to Count 2, the trial court also charged aggravated assault, reckless aggravated assault, child abuse, assault, and facilitation.

6 The appeal of Martha Patlan–Cano, *State v. Patlan*, M2008–02515–CCA–R3 –CD, was heard by the Court of Criminal Appeals on June 22, 2010.

7 While recognizing that convictions for criminal offenses might be based entirely upon circumstantial evidence, our Court of Criminal Appeals recited

what has become standard language in practically all of our reported cases that address the sufficiency of circumstantial evidence:

> In such a case, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." In addition the evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt." In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt."

*Dorantes*, 2009 WL 4250431, at *7 (citations omitted).

8 The trial court instructed the jury on circumstantial evidence using some of the language from *Crawford*: "the facts must exclude every other reasonable theory or hypothesis except that of guilt; and the facts must establish such a certainty of guilt of the defendant as to convince beyond a reasonable doubt that the defendant is the one who committed the offense."

9 The 1989 Act included the earlier version of the child abuse and neglect statute but also created a statute defining aggravated child abuse, a felony, for those committing child abuse resulting in severe bodily injury or with a deadly weapon. *See* 1989 Tenn. Pub. Acts at 1235–36 (codified at Tenn.Code Ann. §§ 39–15–401 & –402 (1991)).

10 After the 1989 Act and a subsequent amendment in 1991, *see* Act of May 8, 1991, ch. 377, § 2, 1991 Tenn. Pub. Acts 610, the relevant portion of the first degree murder statute read as follows:

> First degree murder is: ... (4) A killing of a child less than thirteen (13) years of age, if the child's death results from a protracted pattern or multiple incidents of bodily injury committed by the defendant against such child and the death is caused either by the last injury or the cumulative effect of such injuries.

Tenn.Code Ann. § 39–13–202(a) (1991).

11 In *State v. Maupin*, 859 S.W.2d 313 (Tenn.1993), after the Court of Criminal Appeals had reversed a conviction for child abuse murder under the 1988 statute because the proof showed neglect rather than abuse, this Court specifically acknowledged "that the evidence [wa]s insufficient to sustain a conviction of murder in the first degree" even if the statute had been upheld as constitutional. *Id.* at 315.

12 In *State v. Mateyko*, 53 S.W.3d 666 (Tenn.2001), which involved charges filed in 1997 and an interpretation of the legislation in existence at that time, this Court cited *Hodges* with approval and held that

> child abuse and neglect [under the statute] is a single offense that may be committed through one of two courses of conduct: child abuse through injury and child abuse through neglect. Although *the criminal code [in 1997] contains no specific offense labeled "child neglect,"* we will generally refer to the child abuse through neglect prong of [the statute] as "child neglect" for ease of reference.

*Id.* at 668–69 n. 1 (citing *Hodges*, 7 S.W.3d at 622) (emphasis added).

13 House Bill 3154 was "brought to [the legislature] by the District Attorneys General Conference [to] *separate[ ] the offense of aggravated child abuse and neglect into two separate offenses* [and] make [ ] it clear that aggravated child neglect is punishable by the same penalty as aggravated child abuse." Statement of Rep. John Hood, House Judiciary Committee, Feb. 25, 1998 (emphasis added). The original version stated in section 1(a)(2) that "[a] deadly weapon is used to accomplish the act of abuse or neglect," but Representative Hood successfully introduced an amendment to delete the phrase "or neglect," explaining that a deadly weapon would only be used in the

context of abuse, not neglect. *Id.* When the proposal reached the floor of the House, Representative Hood stated that the legislation ensured "that aggravated child neglect is punishable by the same penalty as aggravated child abuse; also that child neglect is punishable by the same penalty as child abuse and that aggravated child neglect is an offense that triggers the felony murder rule." Statement of Rep. Hood, House Session, Mar. 9, 1998. The bill, as amended, passed 97–0.

> Senator Joe Haynes introduced Senate Bill 2932 in the Senate Judiciary Committee on March 31, 1998, and the same amendment adopted by the House was approved by the committee. There was no discussion of the bill in committee, other than to note that it passed the House 97–0. When the bill reached the floor of the Senate, Senator Haynes withdrew the amendment because it was in the House bill, which already had been substituted for the Senate bill. He described the bill just as Representative Hood had on the House floor a few weeks earlier. Statement of Sen. Haynes, Senate Session, Apr. 6, 1998. The bill passed the Senate 30–0.
>
> On April 16, 1998, the sponsors successfully recalled the bill from the Governor's desk in order to fix a typographical error in the reference to the Tennessee Code Annotated. On April 23, 1998, the Senate corrected the bill and returned it to the House by a vote of 32–0. Five days later, the amended version of HB 3154 reached the House floor. Representative Hood stated that the bill "made more specific the language separating the two offenses of aggravated child abuse and aggravated child neglect." Statement of Rep. Hood, House Session, Apr. 28, 1998. The amended bill passed the House 92–0.
>
> The statute has been further amended since 1998. The current version continues to list aggravated child abuse and aggravated child neglect separately: "First degree murder is: ... (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy[.]" Tenn.Code Ann. § 39–13–202(a) (2010).

14 In the instructions to the jury, the trial court defined "aggravated child abuse" as requiring that the defendant: (1) "knowingly, other than by accidental means, treat[ed] a child in such a manner as to inflict injury; and (2) that the act of abuse resulted in serious bodily injury to the child; and (3) that the child was six (6) years of age or less."

15 We have held that the offense of child abuse and neglect described in Tennessee Code Annotated section 39–15–401 is a single offense that may be committed through one of two courses of conduct. *Mateyko,* 53 S.W.3d at 668–69, n. 1. As we have observed, however, the 1998 amendment replaced the language of Tennessee Code Annotated section 39–15–402 in its entirety, with the purpose of establishing aggravated child abuse and aggravated child neglect as separate offenses. *Compare* Tenn.Code Ann. § 39–15–402(a) (1997) (referring to "the offense of aggravated child abuse and neglect") *with* Tenn.Code Ann. § 39–15–402(a) (Supp.2002) (referring to "the offense of aggravated child abuse or aggravated child neglect"). The revisions are not in tension with the *Mateyko* ruling because they address different statutes, and because of the requirement that the State provide, at the defendant's request, details of the charges necessary to the preparation of the defense. *See State v. Byrd,* 820 S.W.2d 739, 741 (Tenn.1991).

16 The Court of Criminal Appeals has quoted *American Jurisprudence 2d* on the issue of flight:

> The fact that a defendant after the commission of a crime concealed himself or fled from the vicinity where the crime was committed, with knowledge that he was likely to be arrested for the crime or charged with its commission, may be shown as a circumstance tending to indicate guilt.

*Hall v. State,* 584 S.W.2d 819, 821 (Tenn.Crim.App.1979) (quoting 29 Am.Jur.[2d] Evidence § 280).

Earlier, in *Rogers v. State*, 2 Tenn.Crim.App. 491, 455 S.W.2d 182 (1970), our intermediate court adopted the view set out in *Corpus Juris Secundum* on the subject:

> The law makes no nice or refined distinction as to the manner or method of a flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown, to constitute flight.

*Id.* at 187 (quoting 22A C.J.S. *Criminal Law* § 625); *see also State v. Whittenmeir*, 725 S.W.2d 686, 688 (Tenn.Crim.App.1986).

"A minority of the states have either done away with or limited the instances in which the jury is charged on the law of flight." *State v. Kyger*, 787 S.W.2d 13, 28 (Tenn.Crim.App.1989). For example, in *State v. Humbolt*, 1 Kan.App.2d 137, 562 P.2d 123, 127 (1977), the Court of Appeals of Kansas held that "[t]he weight to be given any evidence [of flight] is a matter for counsel to argue and for the jury to determine." *See also People v. Larson*, 194 Colo. 338, 572 P.2d 815, 817–18 (1977) (holding that an instruction on flight "should be sparingly given" "because it gives undue influence to one item of evidence"); *State v. Wrenn*, 99 Idaho 506, 584 P.2d 1231, 1233 (1978) ("[B]ecause of the debatable significance of flight as evidence of guilt, an instruction on flight should not ordinarily be given. It should be left to argument to the jury by the parties, unless the trial judge because of the peculiar facts in the particular case feels it is essential to the jury's deliberations."); *State v. McCormick*, 280 Or. 417, 571 P.2d 499, 501 (1977) ("[T]he debatable significance of flight can in most cases be left to argument by the parties...."). Tennessee subscribes to the majority view among the states, which is to charge the jury regarding flight where appropriate. *Kyger*, 787 S.W.2d at 29.

17 In *Nunn*, our Court of Criminal Appeals determined that "[a] rational jury could find beyond a reasonable doubt that ... one or both [parents] inflicted the injuries," and, if not, that each parent "was criminally responsible because he or she failed to make a reasonable effort to prevent the beating." 2009 WL 4790211, at *24.

End of Document

No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

_____

GENARO EDGAR ESPINOSA DORANTES – PETITIONER

Vs.

KEVIN MYERS, Acting Warden – RESPONDENT

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APPENDIX 4

Opinion, Tennessee Court of Criminal Appeals (November 30, 2009)

State v. Dorantes
Court of Criminal Appeals of Tennessee, at Nashville. November 30, 2009 Slip Copy 2009 WL 4250431 (Approx. 14 pages)

Judgment Affirmed in Part, Reversed in Part by State v. Dorantes, Tenn., January 25, 2011

2009 WL 4250431
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Nashville.

STATE of Tennessee
v.
Genaro Edgar **Espinosa DORANTES**.

No. M2007-01918-CCA-R3-CD.
Assigned on Briefs Aug. 20, 2008.
Nov. 30, 2009.
Application for Permission to Appeal
Granted by Supreme Court
May 13, 2010.

Direct Appeal from the Criminal Court for Davidson County, No.2006-D-3184; Steve R. Dozier, Judge.

### Attorneys and Law Firms

Jeffrey A. DeVasher, Assistant Public Defender (on appeal); Ross E. Alderman, District Public Defender (at trial) and Amy D. Harwell, Assistant Public Defender (at trial), Nashville, Tennessee, for the Defendant-Appellant, Genaro Edgar Espinosa Dorantes.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Katrin N. Miller and Brian K. Holmgren, Assistant District Attorneys General, for the Appellee, State of Tennessee.

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., J., joined. JOSEPH M. TIPTON, P.J., filed a concurring and dissenting opinion.

**OPINION**

CAMILLE R. McMULLEN, J.

*1 Defendant-Appellant, Genaro Edgar Espinosa Dorantes ("Dorantes") was convicted by a Davidson County jury of first degree felony murder during the perpetration of aggravated child abuse and aggravated child abuse by infliction of injury. For the felony murder conviction, Dorantes received a mandatory sentence of life imprisonment. The trial court later sentenced him as Range I. standard offender to a consecutive term of twenty-two years' incarceration for the aggravated child abuse conviction. Dorantes argues: (1) the record is insufficient to support both his conviction for first degree felony murder based on aggravated child abuse and his conviction for aggravated child abuse; (2) the trial court erred in admitting certain photographs of the victim's body; (3) the trial court erred when it refused to provide a special jury instruction that ensured that the verdicts were based on acts of abuse rather than a continuing course of neglect; (4) the trial court erred in denying his motion to require the State to make an election of offenses; and (5) his sentence of twenty-two years for the aggravated child abuse conviction was excessive. After a careful review of the record and the issues presented, we conclude the evidence is insufficient to support the aggravated child abuse conviction; therefore, we reverse and vacate the conviction for the aggravated child abuse and modify Dorantes' sentence to life imprisonment. The judgment of the trial court for the felony murder conviction is affirmed.

On June 27, 2003, Dorantes and Martha L. Patlan-Cano ("Patlan") were indicted as codefendants by the Davidson County Grand Jury and charged with first degree felony

murder during the perpetration of aggravated child abuse (count one) and aggravated child abuse (count two). After extradition from Mexico, Dorantes and Patlan were also charged in a superseding indictment with first degree felony murder during the perpetration of aggravated child neglect (count three) and aggravated child neglect (count four). Dorantes moved to dismiss the additional counts in the superseding indictment because they were not part of the terms in the extradition agreement between the United States and Mexico pursuant to their extradition treaty. Under the Doctrine of Specialty, Dorantes maintained the State could not detain, try, or punish him for any offenses not listed in the agreement. *See, e.g, United State v. Alvarez-Machain,* 504 U.S. 655, 659-60, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). The State did not oppose the motion, and the trial court dismissed counts three and four. Dorantes was convicted as charged by the jury and received a mandatory life sentence for the felony murder during the perpetration of aggravated child abuse conviction and a consecutive twenty-two-year sentence for the aggravated child abuse conviction.

***Trial.*** On the morning of February 23, 2003, the body of a four-year-old child was found in a park in Nashville, Tennessee. After being alerted by a jogger in the park, Officer Jerry Moore with the Metropolitan Park Police located the child's body behind an earthen mound between 8:30 a.m. and 8:45 a.m. Officer Moore drove to the area, secured the scene, and called for a detective on his radio. The body was later identified as Luis Cisneros, the victim in this case.

*2 Jose Luis Cisneros Servantes ("Jose"), [1] Patlan's husband, testified that he and the co-defendant, along with their other three children, lived in Mexico when the victim was born. After Jose and the co-defendant separated, Jose left the children with his wife and moved to Houston, Texas. In 2001, Jose took the children from Mexico and moved them to Texas with him. In June 2002, while the victim was at Jose's home in Texas, the victim "went missing." Jose never saw his son alive again. Jose stated that the victim was physically "one hundred percent normal and healthy," did not have any mental difficulties, and did not wear diapers before he disappeared. Jose identified a photograph of the victim taken prior to his death which was admitted into evidence.

On cross-examination by Patlan's counsel, [2] Jose testified that he went to Nashville to search for the victim approximately two months after he disappeared. Jose stated that the children were originally with his wife in Mexico before they moved to Houston with him.

Martha Bernece Cisneros Patlan ("Bernece"), Patlan's and Jose's oldest child, testified that she was present when Patlan took the victim from their father's residence in Texas. Bernece stated that Dorantes was with Patlan at the time the victim was taken. She saw Patlan put the victim in a black car, which was the last time she had seen the victim alive. Bernece identified both Patlan and Dorantes in open court at trial.

On cross-examination by Dorantes' counsel, Bernece testified that she did not know Dorantes' identity at the time the victim was taken. Bernece was only able to identify Dorantes after she saw photographs of Dorantes on the news and learned of the victim's death several months later.

Antonia Patlan ("Antonia"), Patlan's sister, testified that in February of 2003, Patlan came to her apartment in Nashville and asked for money. Patlan told her that she needed the money "to buy a cream because [the victim] had been burned." Patlan told Antonia that the victim "had burned himself with some corn cobs that she was cooking." Antonia gave Patlan forty dollars to buy the medicine. A week later, Patlan returned to Antonia's apartment to store some items and told Antonia that she was going on a trip. Antonia then asked to see the victim, who was waiting inside a white van driven by Dorantes. Upon seeing the victim, Antonia touched his head and asked "what happened to you, my child?" She was unable to understand the victim's response. Antonia stated that the victim appeared to be sitting "in a position like maybe not to hurt himself," protecting his buttock area. Dorantes then said, " 'Let's go, let's go woman, let's go, woman.' " Antonia stated that she could not distinguish the color of the victim's clothes at the time because it was dark outside. She only remembered that he was fully clothed in dark clothing and did not see his feet.

On cross-examination by Dorantes' counsel, Antonia testified that Patlan and her family traveled frequently and never rented an apartment or stayed in one place. On cross-examination by Patlan's counsel, Antonia testified that Patlan seemed concerned and worried when she asked for the money to buy the medicine for the victim and that Dorantes was in a hurry to leave for the trip.

*3 Maria Patlan-Cano ("Maria"), Patlan's other sister, testified that she observed the victim's appearance while he was in Mexico and in Nashville. While in Mexico, the victim was

"chubbier" and "very happy." When Maria saw him in Nashville, the victim was "very thin and very crestfallen." Maria stated that on February 20, 2003, Patlan came to her job crying and asking for money because the victim was very sick and needed medicine. Maria stated that Patlan told her that the victim had been burned from corn on the cob and that she was very afraid that he was going to die. Maria went outside and asked to see the victim, who was inside a white van driven by Dorantes. Dorantes declined her request, stating that he had to move the van because he was blocking traffic. After Dorantes moved the van away from traffic, Maria went into the van. Upon entry, she screamed "why was the child like this, why was the child like that?" Maria stated that the victim did not move when she called his name. She noticed that the victim was "very skinny" and that his foot was bandaged. Patlan then told Maria to leave the vehicle because Dorantes was angry. While Patlan was crying, Dorantes told Patlan to get in the van. As Maria was getting out of the van, the van began to move. Maria stated that she was able to get the license plate number of the van to give to the police. In a photograph taken of the victim at the park, Maria identified the victim's body and stated that he was wearing the same clothes when she saw him on February 20, 2003.

On cross-examination by Patlan's counsel, Maria testified that Patlan was scared when Dorantes became angry at her. She stated that Dorantes asked her (Maria) to leave the van when she was asking questions about the victim.

Maria was recalled to testify by the State. She testified that she asked Dorantes why he did not give the victim any medicine or take the victim to the doctor. Dorantes replied that "since he wasn't [the victim's] father he didn't have any reason to want to make [the victim] get better." Maria then asked Dorantes why he took the victim away from his father. Dorantes said that "he didn't want to bring [the victim] but that [expletive referring to Patlan] wanted it to happen."

On cross-examination by Dorantes' counsel, Maria acknowledged that she did not mention the above conversation with Dorantes in her sworn affidavit.

Juan Sanchez ("Juan"), Maria's brother-in-law, testified that Maria asked him to call the police after her encounter with Dorantes and Patlan. Juan also officially identified the victim's body when it was found in the park.

Keith Sutherland, a detective with the Metropolitan Nashville Police Department, testified that fugitive extradition warrants were issued for Dorantes and Patlan. Detective Sutherland stated that he assisted in transporting Dorantes and Patlan from Mexico back to Nashville.

Sara Bruner, a detective with the Youth Services Division of the Metropolitan Nashville Police Department, testified that she was assigned to investigate the victim's death. She received a report taken by patrol officers that some children were "in poor condition" and "in a state of shock". On February 21, 2003, as part of Det. Bruner's investigation, she telephoned Juan Sanchez whose number was listed in the report. Based on her conversation with Sanchez, Det. Bruner issued a notice to other police officers to be on the look out for the van Dorantes and Patlan were driving. Days later, Det. Bruner learned that the victim was found dead in a park. She stated that Dorantes and Patlan were the only suspects in the case. In 2006, Det. Bruner learned that Patlan was in Mexico.

*4 Brad Corcoran, a detective with the Homicide Division of the Metropolitan Nashville Police Department, testified that he responded to a call that a child's body was found in West Park. Detective Corcoran stated that the victim's body "appeared [as though] it had been placed [in the park] rather than [having] walked there" because the victim did not have any debris on the bottom of his socks and there was no debris or vegetation around the victim that had been moved. He noticed that the body was fully clothed except for shoes or a jacket. Detective Corcoran stated that the body was behind a dirt mound and would not have been seen by anyone from the road or the park's parking lot. Detective Corcoran concluded that the body had not been there long because it had snowed the night before, and no snow was present on the body. There were also several people present in the park on the previous day. On February 24, 2003, Dorantes and Patlan were named as suspects, and warrants were issued for their arrest. After approximately three years of media coverage and tips, Dorantes and Patlan were arrested in Mexico and brought back to Nashville.

Carla Aaron with the Department of Children's Services testified that all caregivers are responsible for providing proper nutrition, medical treatment, and a safe environment for a child. After becoming aware of the victim's death, Aaron inquired about past complaints involving the victim and his siblings, but none were found. She testified that if a medical

provider had seen the victim's condition, the provider should have reported it to the Department of Children's Services.

Amy R. McMaster, the Deputy Chief Medical Examiner for Davidson County and a practicing physician, testified that on February 24, 2003, she performed an autopsy of the victim's body. Dr. McMaster outlined the injuries sustained by the victim that were consistent with child abuse. The external examination of the victim revealed "multiple injuries of varied ages over virtually every surface of [the victim's] body." The victim had bandages wrapped around his feet and was wearing a diaper. Dr. McMaster concluded that the diaper was used to absorb blood caused by scabbing over burns that were on his buttocks and genitals. She explained the victim had sustained extensive burn injuries to his feet, buttocks, scrotum, and penis. The burn injuries were consistent with the victim having been intentionally placed in water over 150 degrees by an adult caregiver. She stated that the burns were inconsistent with injuries caused by cooking corn cobs. The burns to the victim's feet would have prevented him from walking and the burns to his buttocks would have prevented him from sitting comfortably. The burns were from a couple of days to a couple of weeks old. Dr. McMaster stated that the victim had sustained scars on his face and multiple bruises and puncture wounds on other areas of his body. The puncture wounds were consistent with having been poked with "some type of pointed instrument." The injuries on the skin were at different stages of healing.

***5*** Examination of the victim's internal injuries revealed that he had sustained blunt trauma to his brain and skull. Changes to his organs "suggested [that] he had an infection throughout his body." Dr. McMaster stated that the victim had "fluid that accumulated in different body spaces, which could indicate that because of the infection or for other reasons his organs began to fail," and that he would have died from the infection. Dr. McMaster stated that the most significant injury to the victim was the blunt force trauma to his head consisting of an abrasion on a portion of his left ear, a skull fracture, and bleeding around the brain caused by something striking his head. The swelling of the victim's brain indicated that the brain injuries were more recently sustained. Dr. McMaster stated that the victim likely died within "a couple of hours after the head injury was inflicted." She opined that the blunt force head trauma was "non-accidental." She reasoned that the victim "was not able to get up and walk around, interact with his surroundings. [The victim] basically, from his burns, would have been immobile. He would have been ... lying [sic] in one place. So there's really no mechanism for him getting this blunt trauma to his head unless it's inflicted by another individual." She further opined that bruises found on the victim's right hand possibly indicated that he attempted to protect his head or other body parts from the blunt force trauma. Dr. McMaster also discovered an old contusion on the right side of the victim's brain, indicating that he had previously sustained blunt force head trauma.

In order to assist the medical examiner in explaining the autopsy, the following photographs of the victim's body illustrating his injuries were admitted into evidence and displayed to the jury: (1) a photograph of the victim's lower back, Exhibit No. 7-E; (2) a photograph of the burns on the victim's back, buttocks, right hand, and elbow, Exhibit No. 7-O; (3) a photograph of the burns on the victim's buttocks, legs, and feet, Exhibit No. 7-P; (4) a photograph of the burns on the victim's legs and feet, Exhibit No. 7-J; (5) a photograph of the burns on the victim's right leg and foot, Exhibit No. 7-N; (6) a photograph of the burns on the bottom of the victim's left foot, Exhibit No. 7-X; and (7) a photograph of the injury to the victim's elbow, Exhibit No. 7-R.

Dr. McMaster also testified that the victim's injuries indicated that he had been physically neglected. She stated that the victim had untreated, infected burns on his body, and the bacteria from these infections had spread throughout his body. She also stated that the victim was "very thin" and "malnourished.... [H]is ribs were very easily seen beneath his skin." At the time of the victim's death, he weighed thirty-four pounds with "just a little bit of thick fluid" in his stomach. Dr. McMaster did not recall examining the victim's colon or large bowel contents to determine if he had recently eaten. Despite the victim's blunt trauma to his head, Dr. McMaster stated the victim would have died if the infections from the burns remained untreated. Based on the combination of these injuries, Dr. McMaster concluded the victim's cause of death was Battered Child Syndrome, "a medical diagnosis used to describe a child who has been subjected to repeated bouts of severe physical child abuse." The term is also used to characterize injuries involving neglect. Dr. McMaster stated that the manner of the victim's death was homicide.

***6*** Neither Dorantes nor Patlan presented any proof at trial.

At the conclusion of the trial, the jury found Dorantes guilty of first degree felony murder and aggravated child abuse. The trial court imposed a mandatory life sentence for the first degree murder conviction and set a date for a sentencing hearing for the aggravated assault conviction.

***Sentencing Hearing.*** At the sentencing hearing, the presentence report was admitted into evidence, which showed that Dorantes had been previously convicted in Texas for misdemeanor offenses consisting of assault and theft charges. Neither the State nor Dorantes presented any live testimony. Following a detailed review of the evidence presented at trial and the sentencing hearing, the trial court imposed a sentence of twenty-two years at 100% for the aggravated child abuse conviction to be served consecutively to a mandatory life sentence for the first degree felony murder conviction.

***ANALYSIS***

**I. *Sufficiency of the Evidence.*** Dorantes argues the record is insufficient to support both his convictions for first degree felony murder based on aggravated child abuse and his conviction for aggravated child abuse. He contends that the above convictions were based solely upon circumstantial evidence that does not exclude every reasonable hypothesis except that of his guilt. He claims "while any of the State's theories of guilt are possible, a conviction based on any such theory would be contrary to this Court's decision in *State v. Hix,* 696 S.W.2d 22, 25 (Tenn.Crim.App.1994) [overruled on unrelated issue by *State v. Messamore,* 937 S.W.2d 916, 919 (Tenn.1996).]" He lastly argues the evidence is insufficient as a matter of law to establish beyond a reasonable doubt that he knowingly committed or attempted to treat the victim in such a manner as to inflict injury. The State argues the evidence is sufficient to support the convictions. Because the record is devoid of any proof showing Dorantes inflicted physical injury upon the victim, his conviction for aggravated child abuse must be reversed and vacated. However, we conclude that the evidence was sufficient for the jury to find Dorantes guilty of first degree felony murder by aggravated child abuse through neglect.

Our analysis of the above issue is guided by the well-established rule that the State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997). When a defendant challenges the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 442 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Similarly, Rule 13(e) of the Tennessee Rules of Appellate Procedure states, "Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Guilt may be found beyond a reasonable doubt in cases where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Matthews,* 805 S.W.2d 776, 779 (Tenn.Crim.App.1990) (citing *State v. Brown,* 551 S.W.2d 329, 331 (Tenn.1977); *Farmer v. State,* 208 Tenn. 75, 343 S.W.2d 895, 897 (Tenn.1961)). The trier of fact must evaluate the credibility of the witnesses, must determine the weight given to witnesses' testimony, and must reconcile all conflicts in the evidence. *State v. Odom,* 923 S.W .2d 18, 23 (Tenn.1996). When reviewing issues regarding the sufficiency of the evidence, this court shall not "reweigh or reevaluate the evidence." *State v. Philpott,* 882 S.W.2d 394, 398 (Tenn.Crim.App.1994) (citing *State v. Cabbage,* 571 S.W.2d 832, 836 (Tenn.1978), *superseded by statute on other grounds as stated in State v. Barone,* 852 S.W.2d 216, 218 (Tenn.1993)). This Court has often stated that "[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 prosecution's theory." *State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997) (citation omitted). A guilty verdict also "removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." *Id.* (citing *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982)).

***7** We also recognize that "[i]n the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence." *State v. Hanson,* 279 S.W.3d 265, 275 (Tenn.2009) (citing *Duchac v. State,* 505 S.W.2d 237, 241 (Tenn.1973); *Marable v. State,* 203 Tenn. 440, 313 S.W.2d 451, 456-58 (Tenn.1958)). In such a case, the evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford,* 225 Tenn. 478, 470 S.W.2d 610, 612 (Tenn.1971). In addition, the evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude

every other reasonable theory or hypothesis except that of guilt." *Pruitt v. State*, 3 Tenn.Crim.App. 256, 460 S.W.2d 385, 390 (Tenn.Crim.App.1970). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Crawford*, 470 S.W.2d at 613. The trier of fact decides the weight to be given to circumstantial evidence, and " '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.' " *Marable*, 313 S.W.2d at 457 (quoting 2 Wharton's *Criminal Evidence* 1605-06).

We will address the first degree felony murder in the perpetration of aggravated child abuse first. As previously stated, Dorantes was initially indicted for first degree felony murder in the perpetration of aggravated child abuse. Following his extradition from Mexico, the State superseded the indictment and additionally charged Dorantes with first degree felony murder based on aggravated child neglect. By consent from the State, Dorantes' motion to dismiss the felony murder based on child neglect offense in count three was granted because it violated the extradition agreement. The remaining felony murder indictment charged, in count one, that Dorantes "did kill Luis Osvaldo Cisneros (d.o.b.7/16/98), during the perpetration of or attempt to perpetrate Aggravated Child Abuse, in violation of Tennessee Code Annotated § 39-13-202." Interpreting the indictment as charging felony murder during the perpetration of aggravated child abuse based on serious bodily injury by physical abuse alone, Dorantes contends that the indictment should be dismissed as a matter of law because there was no proof at trial that he was the person who inflicted the victim's fatal injuries. In other words, Dorantes argues the indictment varied fatally from the proof presented at trial. In response, the State emphasizes that the victim was at all pertinent times in Dorantes' care and that the jury resolved the issue of identity against Dorantes; therefore, the evidence is sufficient to support both of Dorantes' convictions.

***8** Because the law governing child abuse changed between the commission of the offenses charged in this case and Dorantes' trial and sentencing, a discussion of the child abuse and neglect law applicable at the time of the instant offense is necessary. *See* T.C.A. § 39-11-112 (1997) ("When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense."). Tennessee Code Annotated section 39-13-202, in relevant part, defined first degree murder as "[a] killing of another committed in the perpetration of or attempt to perpetrate any ... aggravated child abuse." T.C.A. § 39-13-202(a)(2) (Supp.2002). The statute governing aggravated child abuse stated, in relevant part:

> (a) A person commits the offense of aggravated child abuse or aggravated child neglect who commits the offense of child abuse or neglect as defined in § 39-15-401 and:
>
> (1) The act of abuse or neglect results in serious bodily injury to the child; or
>
> (2) A deadly weapon is used to accomplish the act of abuse.

T.C.A. § 39-15-402(a) (Supp.2002). Finally, Tennessee Code Annotated section 39-15-401 (a) (Supp.2002),[3] the statute governing child abuse and neglect at the time of the instant offense, provided:

> Any person who knowingly, other than by accidental means, treats a child under eighteen (18) 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 commits a Class A misdemeanor; provided, however, that if the abused or neglected child is six (6) years of age or less, the penalty is a Class D felony.

" 'Serious bodily injury' means bodily injury which involves a substantial risk of death; protracted unconsciousness; extreme physical pain; protracted or obvious disfigurement; or protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." T.C.A. § 39-11-106(a)(34). " 'Bodily injury' includes a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty[.]" *Id.* § -106(a)(2).

In *State v. Mateyko*, the Tennessee Supreme Court described the above version of the child abuse and neglect statute as "a single offense that may be committed through one of two courses of conduct: child abuse through injury and child abuse through neglect." 53 S.W.3d

666, 668 n. 1 (Tenn.2001); *State v. Hodges*, 7 S.W.3d 609, 622 (Tenn.Crim.App.1998). Aggravated child abuse is similarly established by either of these methods, plus serious bodily injury to the child. T.C.A. § 39-15-402(a)(1) (Supp.2002); *Hodges*, 7 S.W.3d at 622-23; *State v. Ducker*, 27 S.W.3d 889, 895-96 (Tenn.2000). More specifically, in *Hodges*, this court held that the term "child abuse," as charged in an indictment, included child neglect. *Hodges*, 7 S.W.3d at 622-23. The *Hodges* court reasoned, "[c]hild abuse as defined in § 39-15-401 encompasses § 39-15-401(a) in its entirety[.]" We have also previously concluded that "the legislature fully intended for aggravated child abuse to include child abuse through neglect that results in serious bodily injury. The language of the statute supports such an interpretation." *State v. John and Rita Adams*, No. 02C01-9707-CR-00246, 1998 WL 389066, at *4 (Tenn.Crim.App., at Jackson, July 14, 1998), aff'd, 24 S.W.3d 289 (Tenn. June 30, 2000); *but see State v. Denise Maupin*, No. 272, 1991 WL 197420, at * 5 (Tenn.Crim.App., at Knoxville, Oct. 7, 1991), (stating that child abuse as proscribed in a child abuse murder statute did not include child neglect) *aff'd*, 859 S.W.2d 313 (Tenn. Aug.2, 1993).

***9** Based on the above authority, when the term "child neglect" is not expressly included within the indictment, a defendant remains on notice "that he could be convicted for both felony murder with the underlying felony of aggravated child abuse through injury, as well as for the underlying felony of aggravated child abuse through neglect, regardless of whether the jury convict [s] him based on the theory of child abuse or child neglect." *State v. Blake Delaney Tallant*, No. E2006-02273-CCA-R3-CD, 2008 WL 115818, at *23 (Tenn.Crim.App., at Knoxville, Jan. 14, 2008). Accordingly, Dorantes' fatal variance argument must fail because the indictment under which he was convicted embraced both modes or courses of conduct for the commission of child abuse. *See also* T.C.A. § 40-13-206 (1997) ("When the offense may be committed by different forms, by different means or with different intents, the forms, means or intents may be alleged in the same count in the alternative.").

In light of the above conclusion, we must now determine whether the evidence is sufficient for a jury to find Dorantes guilty of felony murder based on aggravated child abuse through infliction of physical injury or felony murder based on aggravated child abuse through neglect, and aggravated child abuse. First, we agree with Dorantes and conclude that his convictions for felony murder based on a theory of child abuse through infliction of injury and aggravated child abuse cannot be sustained. Unlike the felony murder count in the indictment, the aggravated child abuse count expressly provided that Dorantes "did knowingly, other than by accidental means, treat [the victim], a child six (6) years of age or less in such a manner as to inflict injury [.]" Our review of the record shows that the State never argued that Dorantes inflicted the victim's fatal injuries and did not offer any proof in support of this theory. Although poorly articulated, the State argued throughout trial and during closing argument that Dorantes failed to provide the victim with necessary medical treatment. Accordingly, the conviction for felony murder based on a theory of aggravated child abuse through infliction of injury and the conviction for aggravated child abuse are not supported by the proof in this case. As such, the aggravated child abuse conviction must be reversed and vacated.

With the above conclusion, *State v. Hix* becomes inapplicable. It is important to note that the defendants in *Hix* were convicted of one count of assault and battery and one count of child abuse.[4] Rather than evidence showing abuse by neglect, the only proof presented by the State in *Hix* supported a theory that either or both of the defendants committed the abuse by inflicting injuries upon the child. In reversing, this court held that because the defendants' convictions were based upon circumstantial evidence alone, the evidence was insufficient to prove beyond a reasonable doubt which defendant committed the offense; that is, inflicted the injuries upon the child. In contrast, the proof presented in this case showed that the co-defendant was responsible for inflicting the burn injuries upon the child. Accordingly, the holding in *Hix* does not apply because the evidence presented by the State against Dorantes supported a theory of abuse based on neglect. As such, Dorantes is not entitled to relief on this issue.

***10** We must now examine the sufficiency of the convicting evidence supporting the felony murder by aggravated child abuse conviction under a theory of neglect. Prior to being taken by the co-defendant and Dorantes, the victim lived with his biological father and was "one hundred percent normal and healthy." Sometime in February 2003, the co-defendant went to her sister's apartment and asked for money because the victim "had burned himself with some corn cobs that she was cooking." A week later, the co-defendant returned to the same apartment, and the victim was observed sitting inside a van driven by Dorantes "in a position like maybe not to hurt himself," protecting his buttock area. Maria, the co-defendant's other

sister, testified that on February 20, 2003, the co-defendant came to her job crying and asked for money because the victim was very sick and needed medicine. Maria then observed the victim inside a van driven by Dorantes. When Maria saw the victim's condition, she screamed "why was the child like this ... ?" She asked Dorantes why he did not give the victim any medicine or take the victim to the doctor, and Dorantes replied "since he wasn't [the victim's] father he didn't have any reason to want to make [the victim] get better." She then asked Dorantes why he took the victim away from his father, and Dorantes said that "he didn't want to bring [the victim] but that [expletive referring to Patlan] wanted it to happen." Maria called the victim's name when she saw him in the van, and the victim did not move. She also confirmed that the clothes the victim was wearing when she saw him that day, were the same clothes he was wearing when his body was found three days later.

In addition, the medical examiner testified that the victim had been physically neglected. She testified that the burns to the victim's body had become infected, which indicated they were between two days to two weeks old. She explained that given the combination of the victim's injuries, the victim's cause of death was Battered Child Syndrome, "a medical diagnosis used to describe a child who has been subjected to repeated bouts of severe physical child abuse." She further explained that this term is also used to characterize injuries involving neglect. Finally, despite the victim's blunt trauma to his head, the medical examiner testified that the victim would have soon died had the infections from the burns remained untreated.

Based on the above proof, we conclude that the evidence was sufficient to support Dorantes' conviction for felony murder during the perpetration of aggravated child abuse through neglect. The evidence showed that Dorantes knowingly failed to provide the victim with any medical assistance which resulted in the victim's serious bodily injuries. *See e.g. State v. Kathryn Lee Adler,* No. W2001-00951-CCA-R3CD, 2002 WL 1482704 at * 5 (Tenn.Crim.App., at Jackson, Feb. 19, 2002) (stating that although evidence did not show that the victim's injury "was a result of the convicted offense of aggravated child neglect rather than child abuse, it clearly establishe[d] that the victim was subjected to "a substantial risk of death" and "extreme physical pain" due to the defendant's neglecting to seek prompt medical attention.") *app. denied* (Tenn. Sept. 9, 2002). The record shows the facts presented by the State support a jury verdict of felony murder during the perpetration of aggravated child abuse based upon the neglect of the victim "so as to adversely affect the child's health and welfare," resulting in serious bodily injury. Accordingly, Dorantes is not entitled to relief on this issue.

*11 **II. *Photographs of Victim's Injuries.*** Dorantes contends the trial court erred in allowing the State to introduce certain photographs of the victim's body because "they were not relevant to prove any fact at issue in this case, or, even if relevant, were so gruesome as to cause distress to any juror and prejudice him." The State argues that the probative value of the photographs outweighed any prejudicial effect.

The trial court has discretion regarding the admissibility of photographs, and a ruling on this issue "will not be overturned on appeal except upon a clear showing of an abuse of discretion." *State v. Banks,* 564 S.W.2d 947, 949 (Tenn.1978), *cert. denied,* 526 U.S. 1071 (1999). A photograph must be "verified and authenticated by a witness with knowledge of the facts" before it can be admitted into evidence. *Id.* In addition, a photograph must be relevant to an issue that the jury must determine before it may be admitted. *State v. Vann,* 976 S.W.2d 93, 102 (Tenn.1998) (citing *State v. Stephenson,* 878 S.W.2d 530, 542 (Tenn.1994); *Banks,* 564 S.W.2d at 951.). However, if the photograph's "prejudicial effect outweighs its probative value," it should not be admitted. *See* Tenn. R. Evid. 401 and 403; *Banks,* 564 S.W.2d at 951. A relevant photograph "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Banks,* 564 S.W.2d at 951. Unfair prejudice has been defined by the Tennessee Supreme Court as "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* Photographs must never be used "solely to inflame the jury and prejudice them against the defendant." *Id.*

Dr. McMaster testified that the autopsy photos were necessary to explain her medical testimony. The record reflects that a total of thirty-nine (39) photographs were submitted for the trial court to review. Although the trial court engaged in a lengthy discussion, considering the relevance of the photos as well as weighing their probative value against any unfair prejudicial effect, the trial court did not specify which photos it referred to on the record. Nevertheless, the trial court excluded twenty-six (26) of the thirty-nine (39) photographs. We have also specifically reviewed the photographs admitted during the medical examiner's

testimony and conclude that the trial court did not abuse its discretion by their admission. Accordingly, Dorantes is not entitled to relief on this issue.

**III. *Denial of Special Jury Instruction on Aggravated Child Abuse.*** Dorantes argues that the trial court erred when it refused to provide the jury with a special instruction that "would have ensured that the jury ... returned verdicts based on acts of abuse, and not a continuing course of neglect." The State argues that the trial court did not err in refusing the special instruction, that this court has previously rejected the same argument in *Hodges*, 7 S.W.3d at 622, and that the supplemental jury instruction was unwarranted because the trial court's instruction was a proper statement of the law and was consistent with the indictment.

***12** The right to trial by jury is guaranteed by the United States and Tennessee Constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 6. It follows that a defendant also has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn.2000). Additionally, special instructions are given "to supply an omission or correct a mistake made in the general charge, to present a material question not treated in the general charge, or to limit, extend, eliminate, or more accurately define a proposition already submitted to the jury." *State v. Cozart*, 54 S.W.3d 242, 245 (Tenn.2001). The refusal to grant a special request for instruction is error only when the general charge does not fully and fairly state the applicable law. *Id.* On appellate review, a jury instruction must be considered in its entirety and read as a whole rather than in isolation. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn.2004).

Here, Dorantes requested the trial court to instruct the jury as follows:

> For you to find the accused guilty of aggravated child abuse the State must prove that the defendant affirmatively committed an abusive action which resulted in serious bodily injury to the victim. Failure by either defendant to protect or seek treatment is not proof of abuse as to satisfy the elements of child abuse.

The trial court declined to provide the jury with the above instruction and instead instructed them, in relevant part, as follows:

> Any person who commits the offense of aggravated child abuse is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: (1) that the defendant did knowingly, other than by accidental means, treat a child in such a manner as to inflict injury; and (2) that the act of abuse resulted in serious bodily injury[.]

We acknowledge that following the 2005 amendment to the child abuse and neglect statute, this Court noted that when a defendant is charged with both aggravated child abuse and aggravated child neglect, the trial court should issue a jury instruction that jurors may find the defendant guilty of one of the two charged offenses, but not both. *State v. Vernita Freeman*, No. W2005-0294-CCA-R3-CD, 2007 WL 426710, at *9 (Tenn.Crim.App., at Jackson, Feb. 6, 2007). This Court specifically stated:

> The determination of whether the State is preceding upon alternative theories of prosecution or upon separate and distinct crimes should be resolved at a jury instruction conference in order that the jury may be properly instructed with regard to their verdict. Obviously, if the State is proceeding upon alternative theories, the jury should be instructed that they can find the defendant guilty of one or the other of the theories, but not both.

***13** *Id.; see also State v. Randy Lee Ownby*, No. M2007-01367-CCA-R3-CD, 2009 WL 112582, at *17 (Tenn.Crim.App., at Nashville, Jan. 14, 2009). However, based on our prior discussion of the law applicable at the time of the instant offense, we conclude that the trial court provided the jury with a correct and complete charge of the law. Dorantes is not entitled to relief on this issue.

**IV. *Election of Offenses.*** Here, Dorantes argues that the trial court erred in denying his request to require the State to make an election of offenses because the State presented

evidence that the victim sustained head trauma as well as infected burns, bruises, abrasions, and puncture wounds. Relying on *State v. Adams*, 24 S.W.3d 289, 294 (Tenn.2000), the State argues the trial court properly denied Dorantes' request because the evidence at trial did not establish multiple discrete acts but instead "established an ongoing pattern of abuse that ultimately claimed the victim's life."

The Tennessee Supreme Court has previously held:

> [W]hen the evidence indicates the defendant has committed multiple offenses against a victim, the prosecution must elect the particular offense as charged in the indictment for which the conviction is sought. This election requirement serves several purposes. First, it ensures that a defendant is able to prepare for and make a defense for a specific charge. Second, election protects a defendant against double jeopardy by prohibiting retrial on the same specific charge. Third, it enables the trial court and the appellate courts to review the legal sufficiency of the evidence. The most important reason for the election requirement, however, is that it ensures that the jurors deliberate over and render a verdict on the same offense. This right to a unanimous verdict has been characterized by this Court as fundamental, immediately touching on the constitutional rights of an accused....

*Adams*, 24 S.W.3d at 294 (internal citations and quotations omitted).

In addition, "[w]here the State presents evidence of numerous offenses, the trial court must augment the general jury unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts." *State v. Hodge*, 989 S.W.2d 717, 721 (Tenn.Crim.App.1998). Failure to issue a jury instruction on election to insure unanimity constitutes reversible error. *Id.*

We conclude that election was not required in this case. As discussed in *Hodges, supra*, a defendant convicted of felony murder by aggravated child abuse "could only have been convicted of the same offense: a killing committed in perpetration of or attempt to perpetrate aggravated child abuse...." *Hodges*, 7 S.W.3d at 624. Presenting two alternative means for culpability for a single offense does not pose a threat to the defendant's constitutional rights. *Id.* Accordingly, under the law at the time of the instant offense, the State was not required to elect a theory of prosecution. *Id.* at 625. Dorantes is not entitled to relief on this issue.

***14 V. Sentencing.** Dorantes contends that his twenty-two-year sentence for aggravated child abuse was excessive. Specifically, Dorantes argues the trial court applied enhancement factors based on facts not found by a jury in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In addition, Dorantes claims the trial court further erred by ordering the twenty-two-year aggravated child abuse sentence to be served consecutively to the previously imposed sentence of life imprisonment for first degree felony murder based on aggravated child abuse. In response, the State concedes the trial court erred when it applied certain enhancement factors but maintains that Dorantes' sentence is sufficiently supported by his criminal history. The State also contends the trial court properly imposed a consecutive sentence. We have already determined that the aggravated child abuse conviction must be reversed and vacated. Nevertheless, we hold that *Blakely* was violated and reduce the aggravated child abuse conviction sentence to twenty-one years. We further conclude that consecutive sentencing was proper.

***Conclusion***

We conclude that the evidence was insufficient to support Dorantes' aggravated child abuse conviction. However, we also conclude that the evidence was sufficient to support Dorantes' conviction of felony murder by aggravated child abuse through neglect. We further conclude that the trial court properly denied Dorantes' motions to require the state to elect which prosecution theory it was relying upon at trial and to provide the jury with a special jury instruction. Accordingly, we reverse the judgment of the trial court in regard to the aggravated child abuse conviction. The judgment of the trial court in regard to the felony murder conviction is affirmed.

JOSEPH M. TIPTON, P.J., filed a concurring and dissenting opinion.

JOSEPH M. TIPTON, P.J., concurring and dissenting.

I concur with most of the decisions and reasoning in the majority opinion, including the reversal of the aggravated child abuse conviction for insufficient evidence. I respectfully dissent, however, from the opinion's affirming the felony murder conviction. I would reverse and vacate the felony murder conviction, as well.

My position stems from the legislative intent regarding the first degree murder statute and regarding child abuse and child neglect. *See* T.C.A. § 39-15-401(a) (Supp.1998) (Amended 2005, 2006). Before 1989, Tennessee Code Annotated section 39-4-401(a) (1982) (repealed by 1989 Tenn. Pub. Acts ch. 591 § 1) provided as follows:

> *Child abuse and neglect-Penalty-Procedure-Relation of section to other law.*-(a) Any person who maliciously, purposely, or knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such manner as to inflict injury or neglects such a child so as to adversely affect its health and welfare is guilty of a misdemeanor....

***15** In *State v. Cynthia Denise Smith,* No. 1153, Hamilton County (Tenn.Crim.App. Sept. 20, 1990), this court stated that the 1982 child abuse statute created "two separate ways (abuse and neglect) by which the offense could be committed and that two separate verdicts would be appropriate." Slip op. at 6.

In 1989, the child abuse and neglect statute was re-enacted in the 1989 Code with a similar definition. At that time, the legislature also created the aggravated child abuse statute which provided in part:

> Aggravated child abuse.-(a) A person is guilty of the offense of aggravated child abuse who commits the offense of child abuse as defined in § 39-15-401 and:
>
> (1) The act of abuse results in serious bodily injury to the child....

T.C.A. § 39-15-401(a) (1991). I note that the Sentencing Commission Comments to this provision view both abuse and neglect offenses to be covered under -402(a).

Beginning in 1988, the first degree murder statute provided in part:

> *First-degree murder.*-... (2) It shall also be murder in the first degree to kill a child less than thirteen (13) years of age if the child's death results from one (1) or more incidents of a protracted pattern or a multiple incident of child abuse committed by the defendant against such child, or if such death results from the cumulative effects of such pattern or incidents.

T.C.A. § 39-2-202 (1988 Supp.) (repealed by 1989 Tenn. Pub. Acts, ch. 591, § 1).

Noting *Smith,* this court reversed a conviction for child abuse murder under the 1988 first degree murder statute, when the proof showed only, if anything, neglect. *State v. Denise Maupin*, No. 272, Washington County (Tenn.Crim.App. Oct. 7, 1991), *aff'd* 859 S.W.2d 313, 315 (Tenn.1993) (agreeing with court of criminal appeals that evidence was insufficient). In so doing, this court concluded that "the legislature did not intend for criminal neglect to be covered by the child abuse murder statute." Slip op. at 10. "Mere proof of child neglect is not proof of child abuse so as to sustain a conviction for child abuse murder." *Id.*

In 1992, our supreme court ruled that the child murder statute discussed in *Maupin* was unconstitutional. *State v. Hale,* 840 S.W.2d 307, 313 (Tenn.1992). In response, the legislature amended the first degree murder statute in part as follows:

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

T.C.A. § 39-13-202(a)(4) (Supp.1993). Effective in 1995, however, the legislature amended the first degree murder statute to provide in part as follows:

> *First degree murder.*-(a) First degree murder is: ...
>
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, or aircraft piracy....

*16 T.C.A. § 39-13-202(a)(2) (Supp.1995) (Amended 1998, 2002, 2007). Relevant and applicable to this case, the legislature again amended the first degree murder statute in 1998 to provide as follows:

> *First degree murder.*-(a) First degree murder is: ...
>
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, *aggravated child neglect,* or aircraft piracy....

T.C.A. § 39-13-202(a)(2) (Supp.1998) (emphasis added) (amended 2002, 2007). At the same time, the legislature amended the child abuse and neglect statutes to add the terms "neglected," "neglect," and "aggravated child neglect." For example, Tennessee Code Annotated section 39-15-402(a) (Supp.1998) (Amended 2005) provided in part:

> *Aggravated child abuse and neglect.*-(a) A person commits the offense of aggravated child abuse or *aggravated child neglect* who commits the offense of child abuse or neglect as defined in § 39-15-401 and;
>
> (1) The act of abuse or *neglect* results in serious bodily injury to the child....

(Emphasis added).

Our supreme court has stated that Tennessee Code Annotated section 39-15-401(a) (1997) proscribed "a single offense that may be committed through one of two courses of conduct: child abuse through injury and child abuse through neglect." *State v. Mateyko,* 53 S.W.3d 666, 668 n. 1 (Tenn.2001). For "ease of reference," the court referred to child abuse through neglect as "child neglect." The fact that the offense could be committed in separate ways has carried significance in the context of charging instruments. In *State v. John E. Parnell,* No. W1999-00562-CCA-R3-CD, Shelby County (Tenn.Crim.App. Feb. 6, 2001), count one alleged aggravated child abuse by treating the child in a manner so as to inflict injury and count two charged aggravated child abuse by neglecting the child so as to adversely affect his health and welfare. The trial court instructed the jury that if it found guilt under count one, it was not to consider count two. The jury convicted the defendant on count one. This court concluded that the evidence was insufficient under count one but that the evidence overwhelmingly established neglect as alleged in count two. Under these circumstances, this court reversed the conviction for aggravated child abuse in count one but remanded count two for a new trial.

Obviously, the majority opinion in this case thinks significant the fact that the aggravated child abuse count specified that the Defendant treated the victim in such a manner as to inflict serious bodily injury but did not allege anything regarding neglect. In reversing the abuse conviction for insufficient evidence, it is apparent that my colleagues concluded that the specific allegation distinguishes this count from the murder count which alleged "generally" that the Defendant killed the victim "during the perpetration of or attempt to perpetrate aggravated child abuse, in violation of Tennessee Code Annotated § 39-13-202."

*17 No case has analyzed the significance of the 1998 addition of aggravated child neglect to the predicate felonies for first degree felony murder. However, I view it to be significant in the context of separating aggravated child abuse from aggravated child neglect when considering what constitutes a particular felony murder. In other words, under that provision, murder in the perpetration of aggravated child abuse is a separate offense from murder in the perpetration of aggravated child neglect, no different than murder during the perpetration of air piracy, for example. In this regard, even though the aggravated child abuse statute is viewed to cover both abuse and neglect, such is not the case under the 1998 first degree murder statute.

I assume that if the murder count in the present case had specified that the killing occurred in the perpetration of the Defendant's knowingly treating the victim in a manner as to cause serious bodily injury, my colleagues would then conclude that the evidence did not prove the crime charged. The 1998 first degree murder statute, however, already distinguished aggravated child abuse from aggravated child neglect. I believe that under the statute, charging murder in the perpetration of aggravated child abuse did not charge murder in the perpetration of aggravated child neglect. The very fact that the State in this case chose to allege aggravated child neglect in a separate count reflects the same belief. Also, the State did not argue to the jury that the Defendant was guilty of child abuse through neglecting the injured victim's need for treatment. Rather, the State assailed the Defendant regarding the injuries inflicted upon the victim, including the final blow the victim received near the time of

his death. The State's one or two references to the Defendant's concealing the victim's injuries without obtaining treatment were not in the context of child neglect but in the context of concealing the injuries inflicted upon the victim, i.e., child abuse through injury.

Last, and material to this issue, I note that the aggravated child abuse instruction given to the jury by the trial court provided that an essential element was "that the defendant did knowingly, other than by accidental means, treat a child in such a manner as to inflict injury." It did not provide the jury with the alternative of aggravated child neglect or of aggravated abuse through child neglect. Under these circumstances, I do not believe we are in a position to replace a jury finding regarding one offense with a judicial finding of another offense that was not submitted to the jury. I would reverse both the felony murder and aggravated child abuse judgments of conviction and dismiss the charges.

**All Citations**

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**Footnotes**

1 Due to several witnesses having similar names, some of the witnesses will be referred to by their first or middle name. No disrespect is intended by this format.

2 Although Genaro Dorantes and Martha L. Patlan-Cano were tried together, this appeal relates only to Dorantes.

3 Effective July 1, 2005 the child abuse and child neglect statute was amended to provide:

> (a) Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury commits a Class A misdemeanor; provided, however, that, if the abused child is six (6) years of age or less, the penalty is a Class D felony.
>
> (b) Any person who knowingly abuses or neglects a child under thirteen (13) years of age, so as to adversely affect the child's health and welfare, commits a Class A misdemeanor; provided, that, if the abused or neglected child is six (6) years of age or less, the penalty is a Class E felony.

T.C.A. § 39-15-401(a), (b) (Supp.2005). On June 20, 2006, in Public Acts chapter 939, section 1, the legislature again amended the statute by changing subsection (b) to read:

> Any person who knowingly abuses or neglects a child under eighteen (18) years of age, so as to adversely affect the child's health and welfare, commits a Class A misdemeanor....

T.C.A. § 39-15-401(b) (2006).

4 Tennessee Code Annotated Section 39-4-401(a) (1982) [repealed 1989, replaced by T.C.A. § 39-15-401(a) (Supp.1989) ] provided:

> (a)Any person who maliciously, purposely, or knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such manner as to inflict injury or neglects such a child so as to adversely affect its health and welfare is guilty of a misdemeanor and upon conviction may be fined not more than one thousand dollars ($1,000) or imprisoned for not more than eleven (11) months and twenty-nine (29) days or both.

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