IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1995

FILED

June 5, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9503-CR-00076
Appellee	)	
	)	SULLIVAN COUNTY
vs.	)	
	)	Hon. R. Jerry Beck, Judge
BETTY LEVANDOWSKI,	)	
	)	(Aggravated Child Abuse; False Report)
Appellant	)	

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED IN PART

David G. Hayes
Judge

OPINION

The appellant, Betty Levandowski, appeals from her jury convictions for the offenses of aggravated child abuse, a class B felony, and making a false report to a law enforcement officer, a class A misdemeanor. In this appeal, the appellant raises two issues for our review. First, the appellant argues that the evidence was insufficient for the jury to find her guilty of aggravated child abuse. Second, the appellant contends that Tenn. Code Ann. § 39-16-502(a)(1) (1991), the statutory provision setting forth the offense of false reporting to a law enforcement officer, is void because it is unconstitutionally overbroad and vague.

After a review of the record, we affirm the appellant's conviction for aggravated child abuse but reverse her conviction for false reporting.

I. Factual Background

On June 22, 1994, the Sullivan County Grand Jury returned a three count presentment against the appellant charging her with aggravated child abuse, false reporting, and assault. On September 16, 1994, a jury found the appellant guilty of aggravated child abuse and false reporting. On October 21, 1994, the trial court sentenced the appellant to eight years for the aggravated child abuse conviction and eleven months and twenty-nine days for the false reporting conviction. The trial court ordered that the sentences be served concurrently.

The evidence presented at trial revealed that, on May 19, 1994, Officer Clifton Ferguson of the Kingsport Police Department responded to a call regarding suspected child abuse at 390 Barnett Drive, the appellant's mobile home. When he arrived at the appellant's residence, Ferguson informed the

appellant that he was investigating a potential child abuse incident and that he wished to see the child reportedly living with the appellant in the mobile home.[1] The appellant told Ferguson that "she put the boy on the 4:45 bus back to Chicago and if [Ferguson] didn't believe her, [he] could look around."[2] The neighbors, who had reported the incident, told Ferguson that they had not seen anyone leave the appellant's residence all day and suggested that Ferguson look in the mobile home next door at Lot 35.[3]

Once inside the mobile home at Lot 35, Ferguson found the two and a half year old victim, DS,[4] lying on a couch in the dark.[5] Ferguson testified that, when he first spotted the child, he noticed "dried blood out the corner of [his] mouth, down a jaw, and [he] had a bruise on his forehead, and a scrape." The neighbors identified the child as the one who had been living with the appellant. According to Ferguson, the child "was real[ly] dirty, and he smelled really bad." Ferguson further testified that "[b]esides the [bruises] on his head, he had a large cut on his head which . . . was scabbed over, it was a real thick scab on the top of his head. . . it looked like it was a pretty good warp on the head, whatever it was." The officer stated that DS "had what appeared to be a cigarette burn [and]

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[1]The appellant testified that she is not related to the victim. The child is the son of a friend of the appellant's daughter. The child's parents lived in Chicago. The appellant offered to care for the child, because the child's father was extremely ill and his mother is disabled. The victim had resided with the appellant for approximately six weeks.

[2]This statement by the appellant is the basis for the charge of false reporting and the resultant conviction.

[3]The evidence revealed that the appellant and the victim lived at Lot 34, while her grandsons lived at Lot 35.

[4]Consistent with the policy of this court, we will withhold the identity of young children, using only their initials. See State v. Schimpf, 782 S.W.2d 188, *note* 1 (Tenn. Crim. App. 1989).

[5]Two other children, ages thirteen and fifteen, were also found at Lot 35. These children were later identified as the appellant's grandchildren. These two children lived at Lot 35 with the appellant's eighteen year old grandson.

. . . he didn't look like he had been well fed. . . ."

Detective Darla Anderson, the child abuse investigator with the Kingsport Police Department, was also called to the scene. At trial, she testified:

> I saw a series of bruises on the child's arms, and on his legs, and there was a bald spot on top of the child's head that I could see. And also to the back side, there was a scab. The child also had what appeared to be a busted lip, and had dried blood to the side of his mouth. . . . I saw several bruises on the child's back, what looked to be dried feces on the child's back side and down the back side of his legs. I saw what appeared to be small red marks that appeared to me to be burn marks. That was on his wrist, and I believe one to his side.

Anderson added that she accompanied DS to Holston Valley Hospital where Dr. Robin Peavler examined the child. During this examination, Anderson took photographs of DS's injuries. Anderson testified that she stayed at the hospital for about an hour and a half to two hours and then returned to the jail.

At the jail, Anderson went to the appellant's cell, at which time the appellant was advised of her rights. The appellant declined to make any statement, informing Anderson that she wanted to speak with an attorney. No further questioning occurred. Anderson remained in the cell block filling out the advisement form. Anderson testified that, during this time, the appellant volunteered the statement that "she went bezerk, and hit him harder than she thought."

Jason McLain, a jailer with the Kingsport Police Department, testified that he advised the appellant of the charges she faced and asked the appellant if she wanted to make a phone call. The appellant responded that "she did not want to make a phone call and that this is where she needed to be, that she lost her temper and evidently hit the child too hard." After this statement, the appellant began to cry.

Cora Murray, the appellant's neighbor, testified, "I was awakened at 1:00 o'clock Thursday morning with Betty a screaming [sic], 'get up, get up here and shut up.'" She stated that the voice was coming from the appellant's mobile home. According to Murray, she and her husband sat up for two hours listening to "her screaming at him, screaming at the baby, . . . and the baby would scream as loud as - - I reckon, as loud as he could scream, and cry, scream and cry." The next morning, Murray's husband decided to call the Department of Human Services and told her to watch the appellant's home. At 5:30 that afternoon, because DHS had not yet arrived, Murray decided to call Jenny McClain, another neighbor. McClain went to the appellant's residence to see "what was wrong with the baby," but the appellant would not allow her to see him.

Jenny McClain lives directly across the road from the appellant's mobile home. She testified that, after she was informed of Murray's suspicions of child abuse, she went to the appellant's home to check on DS. McClain asked the appellant if DS could play with her son, Justin. The appellant stated that "[DS] had just been laid down for a nap, and that [he] couldn't come out to play with Justin because he was shy, and that he didn't like to be around other people because of being shy." Later that evening, McClain returned to the appellant's residence and informed the appellant that she felt "that [the appellant] was mistreating [DS], and I want to see him." The appellant responded, "Who in the h--- do you think that you are? . . . Get the f--- out of my trailer." The appellant slammed her front door, and McClain went home and called the police.

Dr. Robin Peavler examined DS at Holston Valley Hospital. When asked if the photographs taken by Detective Anderson accurately depict the condition of the victim at the time of Peavler's examination, he responded, "[DS] appeared even worse than the pictures proclaim." Regarding DS's condition, Peavler

testified:

> This child . . . was not acting like . . . what I would consider a normal two and a half year old. He was very forlorn, very submissive, very withdrawn, and cooperated in every aspect, unlike any two year old . . . that you would normally see. . . . [H]e was very flat, meaning he was emotionless. . . The main thing you can see around his mouth here, there is an abrasion there; but there was also some fairly fresh, meaning within an hour or so, type blood dripping down the right side of his face. The bruises up on his forehead may have been caused that night, but my guess is that they. . . there were bruises in various stages meaning that they did not all occur at the same time.

Referring to the wound on DS's mouth, Peavler opined that it occurred "anywhere from 30 minutes to an hour up to three or four hours" prior to the examination. With respect to injuries on DS's right buttock and hip area, Peavler testified that there was an abrasion which had occurred within twelve hours of the examination. Referring to scabs on DS's buttocks, Peavler stated that they were possibly more than twenty-four hours old. Overall, Peavler found that the injuries had occurred from "within a day to ten days" of the examination.

Peavler also described the child's poor hygienic condition: “He was not well kept. . . his hair was not well washed. . . . The other thing, he did have a fair amount of loose stool or feces on his buttock, bilaterally as well as going down into the back of his thigh.” He was unable to explain how DS had lost hair, resulting in a bald spot on the top of his head. Peavler guessed that the bald spot could have resulted from pulling, a fungal infection, or "a lot of other things."

Finally, with respect to his overall diagnosis of the child, Dr. Peavler stated:

> It would take a fair amount of force to cause that much bleeding under the skin of tissue. . . that's a fair amount of force that it takes to have that large a bruise, or especially that many bruises. [The injuries could not be the result of accidental falls] because there were multiple injuries of multiple time intervals. . . My diagnosis was aggravated child abuse. Multiple physical injury of the child, but also a large

> factor is that his emotional state was very flat, he was very submissive, forlorn. . . . He had multiple contusions and abrasions, but I felt like they could not have been based solely upon multiple falls or other accidental means. . . . He definitely had bodily injury and force inflicted upon him. And even though his, the physical injury that I saw, may not be permanent, there may be small scars here and there, I am more concerned about the child's emotional and psychological well being for years to come that obviously can't be measured.

He added that any two and a half year old child with that much bruising and cutting would experience considerable pain.

To counter the State's proof, the appellant introduced the testimony of Christopher Kazak, the appellant's grandson. Kazak lived next door to the appellant with his two cousins. He testified that the appellant's dog, a Chihuahua, pulled out DS's hair, and that DS was covered in bruises because he fell a lot due to the uncovered vents in the appellant's trailer.

The appellant denied any abuse of DS. She acknowledged that she had spanked DS on occasion and, in particular, on the night that Murray heard her screaming and DS crying. She explained that, on that night, DS was in the bathroom "spreading [his] stool around on the rug, and all over him" and that she "slapped him on the butt." The appellant further stated that when she removed the rug, DS slipped and hit his chin on the edge of the toilet, causing the injury to his mouth. Because she was upset, the appellant forgot to wash the feces off of DS. She did remember to throw the rug in the bathtub.

The appellant attempted to explain the victim's other injuries. She blamed bruises, abrasions, and scabs on various accidents, including "skidd[ing] into a wooded [sic] chair," "tripping and falling into a wicker basket," falling over rocks on the path to the Cherokee Market, and falling in the mobile home due to the open vent holes. She admitted that she never attempted to cover the open vent holes. The appellant additionally claimed that DS would "throw out one foot

when he walked," often causing him to fall. She assumed that DS was imitating his mother, who is disabled. Explaining the bald spot on the victim's head, the appellant stated that her Chihuahua had pulled out DS's hair while he was asleep. The appellant also asserted that DS possessed a limited ability to communicate with others.

The appellant admitted that, because she was afraid, she lied to Officer Ferguson about placing DS on a bus to Chicago. She also admitted that she had threatened Jenny McClain with violence if McClain ever returned to her home raising questions about the child's condition. However, she denied making any statement concerning her culpability to either Jason McLain or Detective Anderson.

The State called Renee Yates and Joe Testerman in rebuttal. Yates testified that she had lived in the mobile home at Lot 34 before it was sold to the appellant. She stated that, when she vacated the home, she was unaware of any open vent holes . Yates also testified that she had witnessed the appellant cursing, threatening, and otherwise being harsh with DS. Yates recalled that, on one occasion, the appellant bragged about "beating the s--- out of him [DS]" because he had "peed the bed." Testerman, an acquaintance of the appellant's oldest grandson, testified that he also had witnessed the appellant strike DS and "smack him in the mouth."

II. Sufficiency of Evidence for Aggravated Child Abuse

The appellant first argues that the evidence introduced at trial was insufficient to support her conviction for aggravated child abuse. Specifically, the appellant contends that the State failed to prove the necessary element of

"serious bodily injury," as defined in Tenn. Code Ann. § 39-11-106(a)(33)(1991). We disagree.

A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). It is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e).

The jury found the appellant guilty of aggravated child abuse pursuant to Tenn. Code Ann. § 39-15-402 (1994 Supp.). In order to obtain a conviction under this statute, the State must prove that the appellant committed the act of child abuse, as defined in §39-15-401 (1994 Supp.),[6] and the following:

> (1) The act of abuse result[ed] in serious bodily injury to the child; or
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> (2) A deadly weapon [was] used to accomplish the act of abuse.

Id. "Serious bodily injury" is defined as "bodily injury which involves:

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[6]Tenn. Code Ann. § 39-15-401 makes it an offense for a person to "knowingly other than by accidental means, treat[] a child under eighteen years of age in such a manner as to inflict injury or neglect[] such a child so as to adversely affect the child's health and welfare . . . ."

(A) A substantial risk of death;
(B) Protracted unconsciousness;
(C) Extreme physical pain;
(D) Protracted or obvious disfigurement; or
(E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty."

Tenn. Code Ann. § 39-11-106(a)(33). Although, during the trial, the appellant denied any abuse of the victim, for purposes of her appeal, she acknowledges that the record supports proof of misdemeanor child abuse. Thus, the only issue is whether a jury could find that the victim's injuries amounted to "serious bodily injury" to support a conviction for aggravated child abuse.

The evidence, comprising the testimony of witnesses and photographs of the victim, clearly establishes that the victim was covered with bruises, abrasions, scabs, and human feces when discovered by Officer Ferguson. The examining physician, Dr. Peavler, testified that DS had been abused within twelve hours prior to DS's arrival at the Holston Valley Hospital. Peavler also testified that DS had injuries symptomatic of trauma occurring as long ago as three weeks before the day of the examination. He added that the bruises were caused by "a fair amount of force" and that a child of DS's age would have experienced a considerable amount of pain. Peavler also remarked that "[DS] was very flat, meaning he was emotionless. . . . He was very forlorn, very submissive, very withdrawn. . . ." These observations of DS's behavior coupled with the obvious physical abuse led Peavler to state: "I am more concerned about the child's emotional and psychological well being for years to come. . . ." The appellant has failed to show that the evidence does not establish the elements of this crime, including "extreme physical pain" indicating "serious bodily injury." The testimony, including medical evidence and photographs presented at the trial, supports a finding from which a rational trier of fact could

properly infer that the victim had sustained serious bodily injury. Tenn. R. App. P. 13(e). Accordingly, this issue is without merit.

III. Analysis of Tenn. Code Ann. § 39-16-502(a)(1)

Additionally, the appellant challenges her conviction for false reporting pursuant to the statutory provisions of Tenn. Code Ann. § 39-16-502(a)(1)(C).[7] The appellant contends that Tenn. Code Ann. § 39-16-502(a)(1) is void because it is "overly broad and vague." Tenn. Code Ann. § 39-16-502(a)(1)(C) provides: "(a) It is unlawful for any person to: (1) Report to a law enforcement officer an offense or incident within the officer's concern: (C) Knowing the information relating to the offense is false." With respect to the doctrine of vagueness, the appellant argues that the meaning of "report" is unclear. The question posed is whether the "[r]eport to a law enforcement officer" encompasses only volunteered reports of false information by a citizen or whether it also encompasses false "reports" given in response to an inquiry by a law enforcement officer. With respect to the overbreadth doctrine, the appellant asserts that, if the statute's prohibition encompasses a false response to police questioning, then "every person who denied any question asked them by a police officer, if later proven to be true, would be guilty under the statute."

The State asserts that the appellant has waived this issue, because she has failed to adequately argue the issue presented, she has failed to cite to authority, and she has failed to make appropriate references to the record.[8] We agree. Moreover, we note that this issue was not raised pretrial as required

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[7] See *supra* note 2.

[8] See Tenn. Ct. Crim. R. App. 10(b); Tenn. R. App. P. 27(a), (g), (h); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).

by Tenn. R. Crim. P. 12(b)(2).[9] Nevertheless, we elect to address this issue due to the constitutional challenge levied against the validity of the statute. Moreover, in attacking the validity of Tenn. Code Ann. § 39-16-502(a)(1), the appellant raises an issue of first impression.

Initially, we note that, when reviewing a statute for a possible constitutional infirmity, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. Petition of Burson, 909 S.W.2d 768, 775 (Tenn. 1995) (citation omitted). To survive a challenge for vagueness, "[a penal] statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" State v. Lakatos, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994), perm. to appeal, (Tenn. 1995) (citing Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972)). See also Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993); State v. Lyons, 802 S.W.2d 590, 591 (Tenn. 1990). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939). Moreover, the statute should not encourage arbitrary or discriminatory enforcement. Lakatos, 900 S.W.2d at 701. See also

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[9]Tenn. R. Crim. P. 12(b)(2) provides in part:
(b) Pretrial motions. -- Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following may be raised prior to trial:

(2) Defenses and objections based on defects in the indictment, presentment or information. . . .

Tenn. R. Crim. P. 12(f) provides in part:
Effect of Failure to Raise Defenses or Objections. -- Failure by a party to raise offenses or objections or to make requests which must be made prior to trial. . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

Kolender, 461 U.S. at 357, 103 S.Ct. at 1858; Davis-Kidd, 866 S.W.2d at 532; Lyons, 802 S.W.2d at 591. Finally, the standard of certainty required in criminal statutes is generally more exacting than in noncriminal statutes. Leech v. American Booksellers Ass'n, Inc., 582 S.W.2d 738, 746 (Tenn. 1979) (citation omitted).

Nevertheless, where the language of the statute permits, this court must adopt a construction which will not run afoul of constitutional limitations. Lakatos, 900 S.W.2d at 701. Furthermore, the "void for vagueness" doctrine "is not designed to convert into a constitutional dilemma the practical difficulties inherent in drafting statutes." Phillips v. State Board of Regents, 863 S.W.2d 45, 49 (Tenn. 1993). Thus, "[t]he vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words." Lyons, 802 S.W.2d at 592. See also State v. Lunati, 665 S.W.2d 739 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1983), cert. denied, 466 U.S. 938, 104 S.Ct. 1913 (1984). Accordingly, we conclude that Tenn. Code Ann. § 39-16-502(a)(1) delimits the proscribed offense with sufficient clarity to encompass statements volunteered by the declarant and to exclude false responses to police inquiries.[10] But see, e.g., State v. Jenkins, No. 01C01-9204-CC-00142 (Tenn. Crim. App. at Nashville, Sept. 24, 1992).

> Tenn. Code Ann. § 39-16-502 provides:
>
> (a) It is unlawful for any person to:
>
> (1) *Report* to a law enforcement officer an offense or incident within the officer's concern:
>
> (A) Knowing the offense or incident did not occur;
>
> (B) Knowing the person reporting has no information

[10]Because we narrowly construe the statutory provision, we need not address the appellant's contention that the statute is overbroad.

relating to the offense or incident; or

(C) Knowing the information relating to the offense is false; or

(2) Intentionally initiate or circulate a report of a past, present, or impending bombing, fire or other emergency, knowing that the report is false or baseless ...

In construing the meaning of "report" in Tenn. Code Ann. § 39-16-502(a)(1), our primary role is to ascertain and give effect to the legislative intent without unduly restricting or expanding the statute's coverage beyond its intended scope. Roseman v. Roseman, 890 S.W.2d 27, 29 (Tenn. 1994) (citation omitted). Moreover, we are guided by Tenn. Code Ann. § 39-11-104(1991) which states: "The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code."

In determining legislative intent, we look first to the statute itself, and rely, when possible, upon the ordinary meaning of the language and terms used, refraining from any forced or subtle construction to limit or extend the statute's meaning. State v. Smith, 893 S.W.2d 908, 917 (Tenn. 1994), reh'g denied, (Tenn. 1995), cert. denied, --U.S.--, 116 S.Ct. 99 (1995). The plain language of Tenn. Code Ann. § 39-16-502(a)(1) does not, by itself, indicate whether a "report" must constitute a statement provided to law enforcement officers on the initiative of the declarant, or whether a "report" may include a response to a police initiated inquiry.

However, if the language alone does not indicate the intent of the legislature, we may look to the "plain language of the statute 'read in the context of the entire statute.'"[11] Roseman, 890 S.W.2d at 29 (citing National Gas

[11]Statutes *in pari materia*, those relating to the same subject or having a common purpose, must be construed together, and the construction of one, if doubtful, may be aided by consideration of the language and legislative intent of the other. State v. Blouvett, 904 S.W.2d 111, 113 (Tenn. 1995); Lyons v. Rasar,

Distribs. v. State, 804 S.W.2d 66, 67 (Tenn. 1971)). See also West American Ins. Co. v. Montgomery, 861 S.W.2d 230, 231 (Tenn. 1993). Tenn. Code Ann. §39-16-502(a)(2) makes it an offense to intentionally circulate or initiate a report of past, present, or future bombing, fire, or other emergency, knowing that the report is false. The term "report," as used in subsection (2), contemplates a statement delivered on the declarant's initiative. Thus, subsection (2) does not provide for false responses to police initiated inquiries. Accordingly, subsection (1) read in conjunction with subsection (2) does not appear to include false responses to police inquiries.[12]

Additionally, in determining the legislative intent behind Tenn. Code Ann. § 39-16-502(a)(1), we consider the Sentencing Commission Comments for this section.[13] The Sentencing Commission Comments provide:

> Section 39-16-502, punishing persons who intentionally and knowingly give false reports to law enforcement officers or make false bomb threats and the like, is similar to Tenn. Code Ann. § 39-5-524. The Commission believes the offense is necessary because the false reports can jeopardize public safety and order, and compromise the efficient allocation of scarce law enforcement resources.

From this comment, we can determine the purpose behind the statute, although a definition of "reports" cannot clearly be ascertained. The Comments also

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872 S.W.2d 895, 897 (Tenn. 1994); see also State v. Banks, 875 S.W.2d 303, 308 (Tenn. Crim. App. 1993).

[12]We may also look to the title and headings to ascertain the legislative intent. Medic Ambulance Service, Inc. v. McAdams, 392 S.W.2d 103, 109 (Tenn. 1965). The title may only aid in limiting the scope of the act. 82 C.J.S. *Statutes* § 350 (1953). The act cannot be extended beyond the scope of its title. Id. The title of Tenn. Code Ann. § 39-16-502, False Reports, infers a volunteered non-responsive statement and not a false statement in reply to a police initiated interrogation.

[13]The Sentencing Commission Comments attached to the Proposed Revised Criminal Code for 1989 were available to the 96th General Assembly prior to the enactment of Tenn. Code Ann. § 39-16-502. However, the Sentencing Commission Comments were not included as part of the 1989 revision.

reveal that 39-16-502 is a derivation of the 1973 Draft Section 39-2209(a)[14] and Tenn. Code Ann. § 39-5-524 (1983).[15] The Comments to 39-2209 state:

> Subsection (a)(1) of this section deals with reports of fictitious crimes, while subsection (a)(2) reaches the person who, when a real crime receives publicity, impedes law enforcement by volunteering fictitious leads. Reports of "incidents" cover matters that may not be offenses in themselves, but are nevertheless within the scope of police investigations, e.g., suicide or drowning. Subsection (a)(2) does not apply, however, to anyone who makes a report in good faith, even if the report is based on unreliable hearsay.

(Emphasis added). This comment adds the word "volunteering" as an element of the offense. Therefore, we can infer that the report must be "volunteered" by the person committing the offense. Moreover, Section 39-2209 is a derivation of

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[14]1973 Draft Section 39-2209 provides:

(a) An individual, corporation, or association commits an offense if:

(1) he reports to a peace officer an offense or incident within the officer's concern knowing that the offense or incident did not occur; or

(2) he makes a report to a peace officer relating to an offense or incident within the officer's concern knowing that he has no information relating to the offense or incident.

(b) An offense under this section is a class B misdemeanor.

[15]Tenn. Code Ann. § 39-5-524 (1983) provides in pertinent part:

(a) A person commits the offense of false reporting to authorities if he:

(1) Knowingly causes a false alarm of fire or other emergency to be transmitted to or within an official or volunteer fire department, ambulance service, or any other governmental agency which deals with emergencies involving danger to life or property;

(2) Makes a report or intentionally causes the transmission of a report to law enforcement authorities of a crime or other incident within their official concern, if he knows such crime or incident did not occur;

(3) Makes a report, purposely cases the transmission of a report or furnishes information to law enforcement authorities concerning a crime or other incident within their official concern if he knows that he has no such information relating to such crime or incident or he knows that the information is false;

(4) Knowingly gives false information to a law enforcement officer with the intent to implicate another; or

(5) Initiates or circulates a report or warning of the alleged occurrence or impending occurrence of a fire or other emergency under circumstances likely to cause public inconvenience or alarm if he knows the information reported, conveyed or circulates is false or baseless.

MODEL PENAL CODE § 241.5.[16] Thus, we look to the Model Penal Code and to statutes derived from the Model Penal Code for guidance.

Section 241.5 of the MODEL PENAL CODE originates from the holding in King v. Manley, 1 K.B. 529 (1933). In Manley, the Court of Criminal Appeal affirmed the conviction of a woman who falsely reported that she had been robbed and gave a description of her fictitious assailant. Model Penal Code § 241.5, Comment (1980). The Court reasoned that her false report caused "police maintained at public expense . . . to devote their time and services to the investigation of false allegations, thereby, temporarily depriving the public of the services of these public officers, and rendering liege subjects of the King liable to suspicion, accusation and arrest." Id. As it was based upon the reasoning of Manley, MODEL PENAL CODE § 241.5 clearly was intended to prevent citizen initiated false reports thereby curtailing the waste in time, energy, and expense involved in having law enforcement officers running down false leads concerning criminal conduct, and to protect private citizens from false accusations and resultant aggravation, embarrassment, and annoyance. 67 C.J.S. *Obstructing Justice* §20.

Moreover, generally, a statute proscribing interference with governmental administration (as in Tenn. Code Ann. § 39-16-502) is not violated by a person

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[16] MODEL PENAL CODE § 241.5 provides:

(1) Falsely Incriminating Another. A person who knowingly gives false information to any law enforcement officer with purpose to implicate another commits a misdemeanor.

(2) Fictitious Reports. A person commits a petty misdemeanor if he:

(a) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or

(b) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to an offense or incident when he knows he has no information relating to such offense or incident.

who does not have a legal obligation to provide accurate information regarding himself to an arresting officer. Id. Accordingly, it is not an offense to make a false report of an incident where the accused did not initiate the conversation with an officer but merely responded to his inquiry.[17] Id. The exclusion of oral statements in response to police questioning from punishable conduct is premised in part on the fear that a broader construction of such false reporting statutes would invite abusive charges by the police against persons interviewed in the course of criminal investigations and would encourage coercive inquisition techniques.[18] See Valentin, 519 A.2d at 325-26; 58 Am. Jur. 2d *Obstructing Justice* §40, § 41.

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[17] Several states that follow the Model Penal Code have interpreted their false report statutes to exclude responses to police initiated inquiry. See State v. Brandstetter, 908 P.2d 578, 581 (Idaho Ct. App. 1995); Johnson v. State, 542 A.2d 429, 438 (Md. App. 1988), cert. denied, 561 A.2d 215 (Md. 1989); State v. McMasters, 815 S.W.2d 116, 118 (Mo. Ct. App. 1991); State v. Valentin, 519 A.2d 322, 325-26 (N.J. 1987); People v. Claiborne, 323 N.Y.S. 2d 527, 528 (N.Y. App. Div. 1971), rev'd on other grounds, 329 N.Y.S. 2d 580 (N.Y. 1972); Commonwealth v. Neckerauer, 617 A.2d 1281, 1285 (Pa. Super. Ct. 1992). See contra State v. Terrell, 811 P.2d 364, 365 (Ariz. Ct. App. 1991); People v. Lawson, 161 Cal. Rptr. 7, 11 (Cal. Ct. App. 1979); State v. Nissen, 395 N.W.2d 560, 563 (Neb. 1986); State v. Bailey, 644 N.E.2d 314, 318 (Ohio 1994).

Although slowly being rejected, the federal "exculpatory no" exception to 18 U.S.C. § 1001 is the equivalent to the exclusion of false responses to police inquiries. The "exculpatory no" exception is based on the fact that "§1001 is intended to protect the government from the affirmative or aggressive and voluntary actions of persons." United States v. Stark, 131 F.Supp. 190, 205 (D.Md. 1955). Thus, Congress did not intend the statute to reach false statements that were not volunteered. Nevertheless, even without this interpretation, a criminal prosecution for denying guilt to a law enforcement officer is offensively close to a prosecution for a statement protected by the constitutional privilege against self-incrimination. United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988). See also *infra* note 19.

[18] The possible consequences resulting from criminalizing false responses to police inquiries comes uncomfortably close to violating the 5th Amendment. Although there is no constitutional right to give an untruthful statement, see Bryson v. United States, 396 U.S. 64, 74, 90 S.Ct. 355, 361 (1969), a target of an investigation, not yet protected by the Miranda decision, is given three choices when responding to a police initiated inquiry: (1) tell the truth and incriminate herself; (2) lie and be charged in violation of a false reporting statute; or (3) remain silent. However, it is unlikely that the ordinary person believes she can remain silent. Thus, if the target responds to the inquiry, it cannot be assumed that the target feels she is volunteering answers to the officer's inquiries. See Valentin, 519 A.2d at 324.

Therefore, in giving meaning to the term "report" as used in Tenn. Code Ann. § 39-16-502(a)(1), we agree with the interpretation applied in Brandstetter, 908 P.2d at 578. In Brandstetter, the Idaho Court of Appeals adopted the definition of “report” set forth in People v. Smith, 281 P.2d 103 (Cal. App. 1955). The court, in Smith, interpreted the word "report," when used "in the context of an obstruction of justice statute, to connote a statement written or oral made upon the initiative of one who resorts to the police department for the specific purpose of having some action taken with respect thereto rather than by way of response to the question of an officer." Brandstetter, 908 P.2d at 581 (emphasis added) (citing Smith, 281 P.2d at 104) .

The language of Tenn. Code Ann. § 39-16-502(a)(1) in the context of the entire statute, the Sentencing Commission Comments to both Tenn. Code Ann. § 39-16-502 and 1973 Draft Section 39-2209, and the purpose, policy, and interpretation of false reporting statutes following MODEL PENAL CODE § 241.5 establish a legislative intent to exclude false responses to police initiated inquiries from the scope of Tenn. Code Ann. § 39-16-502(a)(1). Accordingly, before one can be found in violation of Tenn. Code Ann. § 39-16-502(a)(1), the State must show that the "offender" voluntarily initiated contact with law enforcement officials with the intent to supply such officials with false information. Thus, because the appellant falsely answered a police initiated inquiry, she did not commit a crime as contemplated by Tenn. Code Ann. § 39-16-502(a)(1). Tenn. Code Ann. § 39-16-502 (a)(1)(C) is not applicable to the facts of the present case. The appellant's conviction for false reporting is reversed.

IV. Conclusion

After a review of the evidence presented at trial, we conclude that a rational trier of fact could have found the appellant guilty of aggravated child abuse in violation of Tenn. Code Ann. § 39-15-402. Accordingly, the appellant's conviction for this offense is affirmed. However, as we have concluded that the prohibition set forth in Tenn. Code Ann. § 39-16-502(a)(1) does not encompass false responses to police initiated inquiries, the appellant's conviction for false reporting is reversed and dismissed.

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DAVID G. HAYES, Judge

CONCUR:

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WILLIAM M. BARKER, Judge

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JERRY L. SMITH, Judge