

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1999

STATE OF TENNESSEE,
NO.M199800245CCA R3CD

Appellee,

DAVIDSON COUNTY
V.

CHERYL BLACKBURN,
MICHAEL SHANE HONEYCUTT,

Appellant.

) C.C.A.

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HON.

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JUDGE

)

)

(AGGRAVATED CHILD ABUSE)

FILED
November 24, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

In April of 1996, the Davidson County Grand Jury indicted Defendant Michael Shane Honeycutt for aggravated child abuse and indicted co-defendant Misty K. Stacey for facilitation of aggravated child abuse and failure to protect a child from aggravated child abuse. On June 4, 1997, the trial court severed the co-defendant from Defendant's case. Following a jury trial on September 22–25, 1997, Defendant was convicted of aggravated child abuse. Defendant filed a motion for a new trial on October 23, 1997. After a sentencing hearing on November 5, 1997, the trial court sentenced Defendant to a term of twenty-four years in the Tennessee Department of Correction. Defendant filed a supplemental motion for a new trial on May 11, 1998, and a second supplemental motion for a new trial on May 26, 1998. On May 26, 1998, the trial court conducted a full evidentiary hearing on each of the claims Defendant asserted in his motion for a new trial. The trial court denied the motion for a new trial on August 7, 1998. Defendant challenges his conviction and his sentence, raising the following issues:

- 1) whether Defendant received ineffective assistance of counsel;
- 2) whether the trial court erred when it failed to instruct the jury on lesser included offenses; and
- 3) whether the trial court imposed an excessive sentence.

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

I. FACTS

Detective Harry Meek of the Nashville Police Department testified that on October 4, 1995, the eleven month old female victim in this case lived in a Nashville apartment with her mother, Misty Stacey, and Stacey's boyfriend, Defendant.

Mike Brooks of the Nashville Fire Department testified that he responded to a call at a Nashville apartment complex on October 4, 1995, at approximately 1:00 p.m. Upon arrival, Brooks observed that the victim was lying on a sofa. After checking the victim's vital signs, Brooks observed that the victim's pupils did not respond to light, her breathing was shallow, and she had a small amount of blood in her mouth. Based on his observations, Brooks opined that the victim had suffered a head injury. In response to Brooks' questions, Defendant stated that the victim had fallen while she was trying to walk.

Lee Darnell testified that while she was working as a paramedic on October 4, 1995, she also responded to the call at the apartment complex. Upon entering the apartment, Darnell observed that the victim was ashen gray, which indicated that she was not getting enough oxygen. Darnell also observed that the victim had dilated pupils, a slow pulse rate, labored breathing, and bruises on her head and trunk. In response to Darnell's questions, Defendant reported that the victim had been watching television and had just fallen over. Darnell also testified that based on her training as a paramedic, the bruises on the victim's trunk would not have come from falling over while walking.

Dr. Joseph Gigante testified that he examined and treated the victim on October 4, 1995. Dr. Gigante testified that when the victim arrived at the hospital, a tube was placed down her mouth and into her lungs in order to treat her decreased heart rate and brain swelling. Shortly thereafter, a CAT scan of the victim revealed that she had significant brain swelling and she also had bleeding on the outside of her brain. During Dr. Gigante's investigation of possible child abuse, he discovered that the victim had two head injuries, retinal hemorrhaging, and multiple bruises on

her body. Dr. Gigante opined that if the victim had not received prompt treatment of her injuries, she probably would have died.

Dr. Gigante testified that in his opinion, the bruises on the victim's forehead were consistent with accidents that occur when a child is learning to walk, but the other bruises were more commonly associated with child abuse than with accidents.

Dr. Gigante talked to several of the victim's family members in order to determine the victim's medical history. He learned that the victim was in the custody of her father during the weekend before she was injured, and she was in the custody of her mother and grandmother on Monday October 2, 1995. Dr. Gigante also learned that on that date, the victim was taken to a physician for treatment of a fever. In addition, Dr. Gigante learned that the victim was in the custody of Defendant on Tuesday October 3, and Wednesday October 4, 1995.

When Dr. Gigante questioned Defendant about the victim's injuries, Defendant stated that the victim had been sitting down playing with toys when she suddenly fell over and began having trouble breathing. Defendant also stated that during the two days before she was injured, the victim had fallen and hit her head on the bathtub and a sofa. In addition, Defendant stated that when the victim had become unconscious, he shook the victim, but he did not shake her in a violent manner. Dr. Gigante also testified that Stacey stated that one or two days before the victim was injured, she had shaken the victim multiple times in a playful manner and she wondered whether the shaking could have caused the victim's injuries.

Dr. Gigante observed that according to the records of the examination of the victim conducted on October 2, 1995, the victim had no symptoms of brain swelling on that date. Dr. Gigante opined that the injuries to the victim's ears were likely caused by some sort of trauma or blow to the head. Dr. Gigante also opined that the

victim's injuries were caused within a few hours of the time that she lost consciousness on October 4, 1995.

Dr. Jeff Creasy aided the treatment of the victim when she was admitted to the hospital. Dr. Creasy testified that based on a review of the victim's medical records, it was his opinion that the victim's injuries were sustained within forty-eight hours before the call for emergency treatment.

Valerie Griffin testified that while she was working as a family nurse practitioner on October, 2, 1995, she examined and treated the victim for a stomach virus. During her examination, Griffin observed that the victim was active and playful. Griffin also testified she examined the entire body of the victim and saw no bruises whatsoever.

Wilma Burke, the victim's grandmother, testified that when she saw the victim on the evening of October 3, 1995, she noticed that the victim had many bruises on her face. Burke also testified that she had been able to observe Defendant's interactions with the victim and she had never seen Defendant get angry with the victim or handle her roughly.

Timothy Mark Groves, the victim's father, testified that he had custody of the victim from Friday September 29, to Sunday October 1, 1995. During that time, Groves noticed that the victim had a severe bruise in her inner ear, but he did not observe any other bruises.

Misty Stacey, the victim's mother, testified that during the week before October 4, 1995, the victim had a fever and was very sick. Stacey also observed that during this time period, the victim had a large bruise on her head and several smaller bruises on her arms and legs. Stacey observed that when Groves returned the

victim on October 1, 1995, there were several bruises on the victim that she had not noticed before.

Stacey testified that Defendant was watching the victim on October 4, 1995. When Stacey came home from work on that date and had lunch, she noticed that the victim was actively playing and walking around. Fifteen minutes after Stacey returned to work, she received a telephone call that the victim had been injured.

Stacey testified that Defendant had actively participated in the care of the victim. Stacey also testified that she and Defendant had both spanked the victim by patting her softly. Stacey testified that Defendant never became upset when the victim cried and he never lost his temper with the victim. In addition, Stacey testified that Defendant was gentle with the victim and he never slapped or beat the victim. Stacey also testified that although Defendant would play with the victim by tossing her in the air, he never shook the victim.

Stacey testified that although Defendant had reported several incidents during which the victim had injured herself, she had never seen any of the incidents. Stacey also testified that Defendant had asked her to lie about seeing one of the incidents. In addition, Stacey testified that Defendant had previously asked her to relinquish custody of the victim so that they could start a new life together.

Christopher Tyler Rahn testified that he lived with Defendant and Stacey during part of 1995. During that time, Rahn never saw Defendant toss the victim into the air and he never saw Defendant strike or even discipline the victim in any manner.

Defendant testified that during the time that he lived with Stacey and the victim, he took an active role in the care of the victim. Defendant testified that even

before he lived with the victim, he was already accustomed to caring for small children.

Defendant further testified that during the week before October 4, 1995, the victim sustained a number of small bruises when she fell while learning to walk and a large bruise when the dog knocked her over. Defendant also testified that when Groves returned the victim on October 1, 1995, Defendant noticed that the victim had bruises on her body that were not there before.

Defendant testified that while he and the victim were watching television on October 4, 1995, the victim fell over. Defendant testified that he then picked the victim up and he noticed that she had some blood in her mouth and she appeared to be unconscious. Defendant then shook the victim to wake her up and when she did not respond, he called 911.

Defendant admitted that he had played with the victim by tossing her in the air even though the victim did not like it. Defendant admitted that he had spanked the victim, but he denied shaking her. Defendant denied that he ever asked Stacey to lie about the victim's injuries.

Defendant admitted that he and Stacey had discussed leaving their kids behind and starting a new life together because they were tired of dealing with their former mates. Defendant also admitted that he was the only person who had access to the victim between the time that Stacey went back to work after lunch and the time that the emergency medical personnel arrived at the apartment.

II. ASSISTANCE OF COUNSEL

Defendant contends that he received ineffective assistance of counsel during his trial and he has cited numerous occurrences in support of this claim. In fact,

Defendant takes issue with almost every single aspect of trial counsel's representation.

Article I, Section 9 of the Tennessee Constitution provides "that in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel." Tenn. Const. art I, § 9. Similarly, the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. "These constitutional provisions afford to the accused in a criminal prosecution the right to effective assistance of counsel." Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997).

In order to obtain relief on the basis of ineffective assistance of counsel, an appellant "bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) the deficient performance was prejudicial." Powers v. State, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to show deficient performance, an appellant must establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In order to show prejudice, an appellant must show a reasonable probability that, but for counsel's ineffective performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). "Because [an appellant] must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." Henley, 960 S.W.2d at 580. "Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component." Id.

A. Challenge to Medical Proof

Although it is not entirely clear, Defendant apparently claims that trial counsel was ineffective because one of his defense theories was that the medical personnel were wrong when they concluded that the victim's injuries were a result of being violently shaken.

Although Defendant argues that trial counsel was deficient in the manner in which he pursued this theory of defense, Defendant has failed to identify any way in which he was prejudiced by this action. Further, the record indicates that during his cross-examination of Dr. Gigante, trial counsel questioned Dr. Gigante about whether the victim's bleeding could have been caused by an aneurism rather than some type of head trauma and Dr. Gigante admitted that, although it was unlikely, it was possible that an aneurism had caused the victim's bleeding. Defendant has failed to provide any explanation for what trial counsel could or should have done differently to advance this theory of defense. In short, Defendant has failed to show that he was prejudiced by trial counsel's actions. Defendant is not entitled to relief on this issue.

B. Failure to Introduce Stacey's Out of Court Statements

Defendant contends that trial counsel was ineffective in failing to introduce several out of court statements made by Stacey. Specifically, Defendant argues that trial counsel should have introduced the following statements:

- 1) a statement by Stacey to Department of Human Services employee Michael Hughes in which Stacey admitted that when the victim was a newborn, Stacey felt like she could "just suffocate" the victim because the victim was always crying and in which Stacey stated that Defendant wanted to adopt the victim;
- 2) a statement by Stacey to Detective E.J. Bernard in which Stacey admitted to shaking and slapping the victim when the victim was very young;

3) a statement by Stacey to Dr. Gigante in which Stacey admitted that she had shaken the victim several times in a playful manner and she wondered whether those actions could have caused the injuries;

4) a statement by Tammy McCoy to Detective Meek in which McCoy claimed that Stacey had previously admitted that the victim got on her nerves so bad that she “could smother her”; and

5) a statement by Stacey to Detective Meek and Detective West in which Stacey admitted that she shook the victim when the victim was a few days old because the crying got on her nerves and in which Stacey also stated that the crying did not bother Defendant.

Initially, we note that Defendant’s argument is not entirely accurate. For instance, Dr. Gigante testified that Stacey told him that one or two days before the victim was injured, she had shaken the victim multiple times in a playful manner and she wondered whether the shaking could have caused the victim’s injuries. In addition, Stacey testified that Defendant was never bothered by the victim’s crying. Thus, Defendant was not prejudiced by the failure to introduce the written portions of these statements because the content of the statements was introduced into evidence.

As for the rest of the statements, it is clear that they are hearsay because they are out of court statements that would have been offered to prove the truth of the matter asserted. See Tenn. R. Evid. 801(c). Therefore, unless an exception to the hearsay rule applied, each of these statements was inadmissible. See Tenn. R. Evid. 802. Defendant has failed to identify any exception to the hearsay rule that would have allowed for the admission of these statements into evidence. Indeed, we conclude that no hearsay exceptions were applicable to these statements. In short, it is evident that even if trial counsel had attempted to introduce the above statements into evidence, they would have been excluded as inadmissible hearsay. Thus, Defendant was not prejudiced by his counsel’s failure to seek admission of this evidence. Defendant is not entitled to relief on this issue.

C. Failure to Interview a Witness

Defendant contends that trial counsel was ineffective in failing to interview McCoy even though he knew about McCoy's statement to Detective Bernard. However, Defendant has failed to identify any information that could have been obtained by interviewing this witness that would have been beneficial to the defense. In addition, Defendant has failed to identify anything that trial counsel could have done differently at trial if he had interviewed this witness. In short, Defendant has failed to identify any prejudice that occurred because of trial counsel's failure to interview McCoy. Defendant is not entitled to relief on this issue.

D. Failure to Introduce Character Evidence

Defendant contends that trial counsel was ineffective in failing to introduce evidence that he does not lose his temper around small children and he is not the kind of person who would violently attack a small child. Specifically, Defendant contends that trial counsel should have called the following witnesses:

- 1) Pam Vandervort would have testified that she has had hundreds of observations of Defendant's interaction with small children and Defendant has always been patient and attentive to their needs;
- 2) Alice Key would have testified that Defendant has a reputation as a kind, loving individual in his dealings with small children;
- 3) Tom Rawls would have testified that in his opinion, Defendant would never harm a child in any way;
- 4) Roger Key would have testified that Defendant is patient and responsible with children and he has never been involved in any incidents of abuse;
- 5) Patrina Rawls would have testified that she knows several parents who have asked Defendant to care for their children; and
- 6) Carolyn Adcock would have testified that in her opinion, Defendant would never hurt a child.

The above named witnesses testified at the hearing on the motion for a new trial that they would have testified at trial that Defendant had a good reputation when it came to his dealings with small children. However, all of these witnesses admitted that they had no knowledge of how Defendant interacted with the victim. Trial

counsel did call several witnesses at trial who were familiar with Defendant's interactions with the victim. Burke testified that she had seen Defendant and the victim together and she had never seen Defendant handle the victim roughly and had never seen Defendant get angry with the victim. Rahn testified that while he was living in the same residence as Defendant and the victim, Defendant actively participated in the care of the victim and he never disciplined the victim in any way. Further, Stacey testified that Defendant never became upset by the victim's crying, Defendant never slapped or beat the victim, Defendant never shook the victim in a violent manner, and Defendant never lost his temper because of the victim.

In light of the fact that trial counsel did call several witnesses who testified that Defendant never hurt or abused the victim in any way, we conclude that Defendant was not prejudiced by any deficiency in failing to call the character witnesses who did not have any knowledge of Defendant's interactions with the victim. In short, Defendant has failed to show that the alleged deficiency had any adverse effect on his defense. Defendant is not entitled to relief on this issue.

E. Failure to Seek Redaction of Defendant's Statement

Defendant contends that trial counsel was ineffective in failing to seek redaction of portions of his pretrial statement to police that was admitted into evidence. Specifically, Defendant argues that trial counsel should have sought redaction of the following statements by Detective Meek and Detective West that occurred during Defendant's interview:

- 1) "I'm not going to beat around the bush with you. Something happened to that child today. We've talked to the doctors";
- 2) "we're tired of you lying to us";
- 3) "I've got enough probable cause right now to arrest you";
- 4) "You're not telling us the truth, Shane . . . we've got so much evidence against you";
- 5) "Now, we have already caught you in several lies";

6) "But then, you lied to us"; and

7) "Because if you were a religious man you couldn't set there and tell us that you didn't have anything to do with that child. And I'm gonna guarantee you, if you can go home, if you can sleep and live with yourself after what you did to that child, you must be an atheist. You must not believe in God at all."

The record indicates that trial counsel cross-examined Detective Meek about whether he had lied to Defendant during the interrogation and whether he had become emotionally involved in the case. Detective Meek then admitted that because he was frustrated and angry with Defendant's consistent assertions of innocence, he had used some interrogation tactics that he should not have used. In addition, the record indicates that the trial court instructed the jury that law enforcement officers are allowed to use artifice, deception, and stratagem when investigating criminal activity. Thus, the jury was clearly aware that the statements of the police officers were merely deceptive interrogation tactics rather than evidence against Defendant. In short, there is no reasonable probability that the result of the proceeding would have been different without trial counsel's alleged deficiency in failing to seek redaction of these portions of Defendant's statement. Defendant is not entitled to relief on this issue.

F. Failure to Use Stacey's Statement to Impeach Detective Meek

Defendant contends that trial counsel was ineffective in failing to use Stacey's statement to police officers to impeach Detective Meek.

The record indicates that when trial counsel was cross-examining Detective Meek, counsel attempted to introduce portions of the statement Stacey had given to police officers to show that when Meek interviewed Defendant, Meek lied to Defendant about what Stacey had told the police officers. The trial court then ruled that Stacey's statement was clearly hearsay, but it would allow trial counsel to question Detective Meek about portions of the statement for the limited purpose of

impeaching his credibility. However, the trial court stated that it would instruct the jury that it could only consider the statement for purposes of impeachment and further, the court stated that it would then allow the State to introduce the entire statement pursuant to Rule 806 of the Tennessee Rules of Evidence. After a brief recess, trial counsel abandoned this line of questioning.

Defendant argues that trial counsel should have pursued this line of questioning because introduction of Stacey's entire statement would have been beneficial to the defense. Specifically, Defendant argues that Stacey's comments that Defendant does not believe in spanking, does not like spanking, does not have an abusive temper, and was not bothered by the victim's crying would support the defense theory that he would not abuse a small child. Further, Defendant argues that Stacey's comments that she had previously left red marks on the victim when she spanked her and that she had shaken the victim a few days after birth would have supported the defense theory that someone else caused the injuries to the victim.

We conclude that Defendant has failed to demonstrate that he was prejudiced by trial counsel's failure to pursue the desired line of questioning. First, Defendant's argument ignores the fact that there is no clear indication in the record that if trial counsel had questioned Detective Meek about portions of Stacey's statement, the State would have introduced the remainder of the statement into evidence. Second, and most importantly, Defendant's argument also ignores the fact that even if the State had introduced Stacey's entire statement, it would not have been admitted as substantive evidence. Rule 806 provides:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

This Court has previously held that a statement admitted pursuant to this rule is not substantive evidence and it can be considered only for impeachment purposes. State v. Zirkle, 910 S.W.2d 874, 891 (Tenn. Crim. App. 1995); see also State v. Adams, 859 S.W.2d 359, 362 (Tenn. Crim. App. 1992). Thus, even if the entire statement had been introduced, it could only have been considered for purposes of impeaching Stacey's credibility and could not have been considered as substantive evidence that supported any defense theory. Therefore, we conclude that Defendant was not prejudiced by this alleged deficiency. Defendant is not entitled to relief on this issue.

G. Evidence of the Victim's Post-assault Condition

Defendant contends that trial counsel was ineffective in failing to object to the State's introduction of evidence regarding the victim's post-assault condition. In addition, Defendant contends that trial counsel was ineffective in failing to seek admission of two post-assault photographs of the victim.

First, Defendant contends that trial counsel should have objected to testimony about the victim's post-assault condition. Although Defendant does not specifically identify the testimony that should have been objected to, he presumably takes issue with the testimony that as a result of the incident on October 4, 1995, the victim's sight and hearing were temporarily affected and the victim still suffers deficits in the left side of her body. Defendant argues that trial counsel should have objected to this evidence because it was not relevant to any issue in the case. However, in order to prove that Defendant had committed the offense of aggravated child abuse, the State had to show that Defendant's actions caused serious bodily injury to the victim. See Tenn. Code Ann. § 39-15-402(a)(1) (1997). Serious bodily injury is defined as "bodily injury which involves . . . [p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. § 39-11-106(a)(34)(E) (1997). The evidence about the victim's post-assault

condition was clearly relevant to establishing this element of the offense. Because an objection to this evidence on the ground that it was irrelevant would have had no merit, we conclude that trial counsel was not ineffective in failing to make such an objection.

Second, Defendant contends that trial counsel was ineffective in failing to introduce two photographs that show the victim at some time after October 4, 1995. However, Defendant has failed to identify any prejudice that resulted from the failure to introduce the photographs. Indeed, we have viewed the photographs and it is clear that they would have added nothing to a claim that the victim did not suffer serious bodily injury and further, they would have had little, if any, value for any other purpose. Defendant is not entitled to relief on this issue.

H. Failure to Request an Instruction on Lesser Included Offenses

Defendant contends that trial counsel was ineffective in failing to ask the trial court to instruct the jury that aggravated assault and reckless endangerment are lesser included offenses of aggravated child abuse. However, as discussed in Part III of this opinion, there would have been no merit to such a request. Thus, trial counsel was not ineffective in failing to request this instruction. Defendant is not entitled to relief on this issue.

I. Failure to Object to Dr. Gigante's Opinion Testimony

Defendant contends that trial counsel was ineffective in failing to object to four instances where Dr. Gigante testified that the victim's injuries were caused by abuse rather than by some kind of accident. Defendant argues that because one of the elements of the crime of aggravated child abuse is that the defendant act

“knowingly”, Dr. Gigante’s testimony amounted to a legal conclusion that Defendant had committed the offense of aggravated child abuse.

We have carefully reviewed the four instances referred to by Defendant. In three of the instances, Dr. Gigante merely testified that although the victim’s injuries could have had any number of causes, they were the kind of injuries that are more commonly associated with child abuse than with accidents. During the fourth instance, Dr. Gigante testified that “I think that when you put all the information together and all the facts together, I don’t think that there is any doubt that [the victim] was abused and this was not accidental trauma.” Rule 704 of the Tennessee Rules of Evidence provides that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” As an expert witness, Dr. Gigante was properly allowed to give his opinion about the nature of the victim’s injuries. That opinion, otherwise admissible, is not objectionable simply because it addresses an ultimate issue in the case. Defendant is not entitled to relief on this issue.

J. Failure to Object to Portions of Darnell’s Testimony

Defendant contends that trial counsel was ineffective in failing to object when Darnell made the following comments during her testimony: “It was the worst I have ever seen a child hurt and not die on me”, “I just know as a paramedic that babies don’t get bruises on their trunk from walking or from falling into things”, and “It was my opinion that there were too many [bruises] in the wrong spots for a child that was just learning to walk”.

Although Defendant argues that trial counsel should have objected to these statements, Defendant has failed to identify any basis upon which the objection could have been based. In addition, Defendant has failed to explain how he was prejudiced by these statements. In short, Defendant has failed to meet his burden of demonstrating that there is a reasonable probability that, but for trial counsel's failure to object to these statements, the result of the proceeding would have been different. Defendant is not entitled to relief on this issue.

K. Failure to Object to the Use of Photographs

Defendant contends that trial counsel was ineffective in failing to object when Groves and Dr. Gigante used the photographs of the victim during their direct examinations. However, Defendant has failed to identify even a single ground for objecting to the use of the photographs by these witnesses. Indeed, Defendant has not cited any authority for his assertion that trial counsel should have objected. In addition, Defendant's only explanation for how he was prejudiced by the use of the photographs by these witnesses is the conclusory statement that prejudice is obvious. In short, Defendant has failed to meet his burden of showing either deficient performance or resulting prejudice. Defendant is not entitled to relief on this issue.

L. Cumulative Effect

Finally, Defendant contends that the cumulative effect of trial counsel's errors amounts to ineffective assistance of counsel. We have carefully reviewed the errors identified by Defendant and we conclude that, while trial counsel could have taken a different approach to several areas of his representation, trial counsel was not ineffective under the standards of Baxter and Strickland. As the Tennessee Supreme Court has stated, "the defense attorney's representation . . . is not to be measured by '20-20 hindsight.'" Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

Indeed, “[i]t cannot be said that incompetent representation has occurred merely because other lawyers, judging from hindsight, could have made a better choice of tactics.” Id. Quite simply, Defendant has failed to meet his burden of showing that trial counsel committed any errors that prejudiced his case. Defendant is not entitled to relief on this issue.

III. LESSER INCLUDED OFFENSES

Defendant contends that the trial court erred when it failed to instruct the jury on lesser included offenses of aggravated child abuse. Specifically, Defendant argues that the trial court should have instructed the jury on the offenses of aggravated assault and reckless endangerment.

Tennessee Code Annotated section 40-18-110(a) provides that a trial judge must charge the jury with all lesser grades or classes of an offense supported by the evidence, without any request on the part of the defendant to do so. Tenn. Code Ann. § 40-18-110(a) (1997). See also State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996). “Generally, an offense qualifies as a lesser included offense only if the elements of the included offense are a subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense.” Trusty, 919 S.W.2d at 310 (citing Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450–51, 103 L.Ed.2d 734 (1989)). “In other words, the lesser offense may not require proof of any element not included in the greater offense as charged in the indictment.” Id. at 311.

The indictment in this case alleges that Defendant

knowingly, other than by accidental means, did treat [the victim] (D.O.B. 11/2/94), 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

The language of this indictment sets forth all of the applicable elements of aggravated child abuse contained in the relevant statutes. See Tenn. Code Ann. §§ 39-15-401 (a); -402(a)(1), (b) (1997).

A. Aggravated Assault

Initially, we note that Tennessee Code Annotated section 39-15-401 provides, in relevant part, that

A violation of this section may be a lesser included offense of any kind of . . . statutory assault . . . if the victim is a child and the evidence supports a charge under this section. In any case in which conduct violating this section constitutes assault, the conduct may be prosecuted under this section or under §39-13-101.

Tenn. Code Ann. § 39-15-401(d) (1997). Although this provision is included in the child abuse statute, this provision is necessarily encompassed by the aggravated child abuse statute. State v. Jennie Bain Ducker, No. 01C01-9704-CC-00143, 1999 WL 160981, at *14 (Tenn. Crim. App., Nashville, March 25, 1999), perm. to appeal granted, (Tenn. 1999). In addition, the offense of assault as defined in section 39-13-101 is statutorily included in the definition of aggravated assault contained in section 39-13-102. Therefore, pursuant to section 39-15-401(d), aggravated child abuse is a lesser included offense of aggravated assault, rather than the other way around. A conclusion that aggravated child abuse and aggravated assault are both lesser included offenses of each other would simply not be logical.

In addition, section 39-15-401(d) states that “[i]n any case in which conduct violating this section constitutes assault, the conduct may be prosecuted under this section or under §39-13-101.” This language manifests a clear legislative intent that prosecutors should have the discretion to prosecute conduct as either child abuse or assault, but not both.

Further, we note that even if aggravated assault were a lesser included offense of aggravated child abuse, the trial court’s failure to instruct the jury on this offense

would still have been proper. As the Tennessee Supreme Court has previously stated, error cannot be predicated on a trial court's failure to charge a lesser included offense when the evidence clearly demonstrates that the defendant is guilty of a greater offense. State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994); see also State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996). Aggravated assault is defined as intentionally, knowingly, or recklessly causing serious bodily injury to another. Tenn. Code Ann. § 39-13-102(a) (1997). Class A felony aggravated child abuse is defined as knowingly treating of a child who is six years old or less in a manner that causes serious bodily injury to the child. Tenn. Code Ann. § 39-15-402 (1997). Essentially, the only difference between the two offenses for purposes of this case is that Class A felony aggravated child abuse requires a "knowing" mental state and a victim who is six years old or less. In this case, the evidence clearly shows that Defendant committed the offense of aggravated child abuse. There is absolutely no question that the State established that the victim was less than six years old. In addition, the evidence about the severe shaking or blows to the head that caused the injuries demonstrated that the offense was committed knowingly rather than recklessly. Therefore, even if aggravated assault was a lesser included offense of aggravated child abuse, failure to instruct the jury on that offense was not error because the evidence clearly showed that Defendant was guilty of the greater offense of aggravated child abuse. Defendant is not entitled to relief on this issue.

B. Reckless Endangerment

Initially, we note that reckless endangerment is one of the "assaultive offenses" included in Tennessee Code Annotated sections 39-13-101 to 39-13-110. Section 39-15-401 (d) states that a violation of the child abuse statutes "may be a lesser included offense of any kind of . . . statutory assault." Therefore, reckless endangerment is not a lesser included offense of aggravated child abuse because the statutory scheme created by the Legislature expressly provides that the child

abuse offenses are lesser included offenses of all assaultive offenses. As previously stated, there is a clear legislative intent that conduct may be prosecuted as either child abuse or as an assaultive offense, but not both.

In addition, we note that the aggravated child abuse and reckless endangerment statutes proscribe different conduct. The aggravated child abuse statute prohibits knowingly treating a specific child in a manner that causes serious bodily injury to that child while the reckless endangerment statute prohibits recklessly engaging in conduct that may place any other person in imminent danger of death or serious bodily injury. See Tenn. Code Ann. §§ 39-13-103(a), 39-15-402(a) (1997). Because reckless conduct that may place any other person in imminent danger of death or serious bodily injury is not an element of aggravated child abuse, reckless endangerment is not a lesser included offense of aggravated child abuse. See Trusty, 919 S.W.2d at 310.

Further, we note that even if reckless endangerment was a lesser included offense of aggravated child abuse, the trial court's failure to instruct the jury on this offense would still have been proper because the evidence in this case clearly shows that Defendant committed the offense of aggravated child abuse. Reckless endangerment is defined as recklessly engaging in conduct that may place any other person in imminent danger of death or serious bodily injury. See Tenn. Code Ann. §§ 39-13-103(a) (1997). Class A felony aggravated child abuse is defined as knowingly treating a child who is six years old or less in a manner that causes serious bodily injury to the child. Tenn. Code Ann. § 39-15-402 (1997). As previously stated, there is no question that the victim was less than six years old and there was overwhelming evidence that the offense was committed knowingly rather than recklessly. In addition, medical personnel testified that the victim's injuries were inflicted within two to forty-eight hours of the call for emergency help. There was absolutely no evidence that Defendant engaged in any reckless conduct during this period that could have been responsible for the victim's injuries. Therefore, even if

reckless endangerment was a lesser included offense of aggravated child abuse, failure to instruct the jury on that offense was not error because the evidence clearly showed that Defendant was guilty of the greater offense of aggravated child abuse. Defendant is not entitled to relief on this issue.

IV. LENGTH OF SENTENCE

Defendant contends that the trial court erroneously imposed a longer sentence than he deserves.

“When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d) (1997). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the defendant’s statements, the nature and character of the offense, and the defendant’s potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1998); Ashby, 823 S.W.2d at 169. “The defendant has the burden of demonstrating that the sentence is improper.” Id.

_____ In this case, Defendant was convicted of aggravated abuse of a child under the age of six years, a Class A felony. See Tenn. Code Ann. § 39-15-402(b) (1997). The sentence for a Range I offender convicted of a Class A felony is between fifteen and twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1) (1997). The presumptive sentence for a Class A felony is the midpoint of the range if there are no

enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c) (1997). If the court finds that enhancement and mitigating factors are applicable, the court must begin with the midpoint and enhance the sentence to appropriately reflect the weight of any statutory enhancement factors and then the court must reduce the sentence to appropriately reflect the weight of any mitigating factors. See State v. Chance, 952 S.W.2d 848, 850–51 (Tenn. Crim. App. 1997).

The record indicates that in determining that Defendant should serve a sentence of twenty-four years, the trial court found that the following enhancement factors applied: (4) the victim was particularly vulnerable because of age or physical or mental disability, (15) Defendant abused a position of private trust in a way that significantly facilitated the commission of the offense, (18) the victim of aggravated child abuse suffered permanent impairment of either physical or mental functions, and (19) a lack of immediate medical treatment would have resulted in the death of the victim of aggravated child abuse. See Tenn. Code Ann. § 40-35-114(4), (15), (18), (19) (1997). The trial court also found that the following mitigating factors applied: (11) it is unlikely that Defendant's criminal conduct resulted from a sustained intent to violate the law, and (13) Defendant had good family support and he made the 911 call that enabled the victim to receive life saving treatment.

Defendant argues that the trial court erred when it applied enhancement factor (4). Specifically, Defendant contends that factor (4) was inapplicable because it is an element of the offense. We conclude that the trial court properly applied factor (4). Defendant is correct that age is an essential element of the offense of aggravated child abuse. See Tenn. Code Ann. §§ 39-13-401, -402 (1997). However, the fact that age is an element of the offense does not preclude application of factor (4) because this factor applies when the victim is "particularly vulnerable," not when the victim is a certain age. State v. Walton, 958 S.W.2d 724, 729 (Tenn. 1997). In determining whether this factor is applicable, a court must consider

(1) whether the victim, because of age or mental or physical attributes, was particularly unable to resist the crime, summon help, or testify at a later date;

(2) whether [the] victim's age (extremely old or extremely young) is entitled to additional weight; and

(3) whether the vulnerability of the victim made the victim more of a target for the offense or, conversely, whether the offense was committed in such a manner as to render the vulnerability of the victim irrelevant.

Id. In this case, there is no question that the victim's age rendered her unable to resist the offense, unable to summon help, unable to testify about the offense, and made her more of a target for the offense. Thus, the trial court properly applied enhancement factor (4). See State v. Rebecca Curevich, No. 01C01-9707-CR-00276, 1998 WL 401720, at *5 (Tenn. Crim. App., Nashville, July 20, 1998), perm. to appeal denied, (Tenn. 1999) (holding that factor (4) was properly applied to enhance the sentence of a defendant convicted of the aggravated child abuse of a six month old victim).

Defendant does not challenge the application of enhancement factor (15), and we conclude that it was properly applied because, as the live-in boyfriend of the victim's mother who was charged with the care and control of the victim, Defendant abused a position of private trust in a way that significantly facilitated the commission of the offense. See Tenn. Code Ann. § 40-35-114(15) (1997). Although Defendant contends that the trial court erroneously gave more weight to this factor than it deserves, it is well-established that the weight to be given to each enhancement and mitigating factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. State v. Zonge, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997); State v. Baxter, 938 S.W.2d 697, 705 (Tenn. Crim. App. 1996). The trial court did not abuse its discretion when it determined the weight of this factor.

Defendant does not challenge the application of enhancement factor (18), and we conclude that it was properly applied. Indeed, Dr. Jill Forbess testified during the sentencing hearing that as a result of the offense in this case, the victim has muscle

atrophy in her left arm and left leg that will never return to a normal condition. Further, we note that this enhancement factor is not an element of the offense of aggravated child abuse because the State is not required to prove that the victim suffered “permanent impairment” in order to establish that a defendant has committed the offense. See Tenn. Code Ann. §§ 39-11-106(a)(34)(E), 39-15-402(a) (1997).

Defendant does not challenge the application of enhancement factor (19), and we conclude that it was properly applied. Indeed, Dr. Gigante testified at trial that without prompt medical attention, the victim would have died from the injuries sustained as a result of the offense in this case.

Defendant contends that the trial court erred when it refused to apply mitigating factor (11). However, contrary to Defendant’s assertion, the record indicates that the trial court did apply this factor, but determined that it was entitled to little weight. As previously stated, the weight to be given to each enhancement and mitigating factor is left to the trial court’s discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Zonge, 973 S.W.2d at 259; Baxter, 938 S.W.2d at 705. The trial court did not abuse its discretion when it determined the weight of this factor.

Finally, neither Defendant nor the State challenges the trial court’s application of mitigating factor (13) or the trial court’s conclusion that the factor was entitled to little weight. We conclude that under the facts of this case, factor (13) was applicable because Defendant does have the support of his family and he did make the 911 call that saved the victim’s life.

In our de novo review, we conclude that the trial court properly applied four enhancement factors and two mitigating factors. Under these circumstances, we conclude that a sentence of twenty-four years is entirely appropriate in this case.

Accordingly, the judgment of the trial court is AFFIRMED.

THOMAS T. WOODALL, Judge

CONCUR:

JERRY L. SMITH, Judge

NORMA McGEE OGLE, Judge