IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
November 7, 2017 Session

STATE OF TENNESSEE v. BRYAN AUSTIN DEMEZA

Appeal from the Circuit Court for Tipton County
No. 7807 Joe H. Walker, III, Judge

No. W2016-02086-CCA-R3-CD

The Tipton County Grand Jury indicted the Defendant, Bryan Austin DeMeza, on charges of aggravated child neglect, first degree felony murder, and three counts of aggravated child abuse. The Defendant filed a motion to suppress his statements to law enforcement, which the trial court denied. The jury convicted the Defendant as charged and sentenced him to life for the first degree murder conviction. At a sentencing hearing, the trial court merged the Defendant's convictions for three counts of aggravated child abuse into his conviction for aggravated child neglect and sentenced the Defendant to twenty years to be served concurrently with his life sentence.[1] The trial court denied the Defendant's motion for new trial. On appeal, the Defendant argues that: (1) the trial court erred in denying his motion to suppress his statements because he was subject to custodial interrogations without being informed of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); (2) the trial court erred in admitting extrinsic evidence of the Defendant's prior false statements under Tennessee Rules of Evidence 401 and 608(b); and (3) the evidence was insufficient for a rational juror to have found the Defendant guilty beyond a reasonable doubt. The State argues that the trial court erred in merging the Defendant's three aggravated child abuse convictions into his aggravated child neglect conviction. After a thorough review of the evidence and applicable case law, we affirm the Defendant's convictions for felony murder and three counts of aggravated child abuse. Because the evidence at trial was insufficient for a rational juror to have found the Defendant guilty of aggravated child neglect beyond a reasonable doubt but was sufficient for a finding of guilt of child neglect, we reduce the Defendant's aggravated child neglect conviction to child neglect and remand for sentencing on the child neglect conviction. We also conclude that the trial court erred in merging the three aggravated child abuse convictions into the aggravated child neglect conviction and remand for sentencing on the Defendant's three aggravated child abuse convictions.

[1] The trial court did not sentence the Defendant on the aggravated child abuse convictions.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part, Reversed in Part and Remanded

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Bo G. Burk, District Public Defender; David A. Stowers (on appeal and at trial) and David S. Stockon (at trial), Assistant Public Defenders, for the appellant, Bryan Austin DeMeza.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Mike Dunavant, District Attorney General; and James Walter Freeland, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural History

On December 6, 2012, emergency responders arrived at the Defendant's home in response to a call about an unresponsive infant. The Defendant, the stepfather of the victim, Zayne DeMeza,[2] informed emergency responders that he had tripped and fallen onto Zayne. The emergency responders transported Zayne to a local hospital where the emergency room physician pronounced him deceased. Zayne was nineteen days old at the time of his death.

Suppression Hearing

The Defendant filed a motion to suppress his statements to law enforcement because his interviews with law enforcement were custodial interrogations and he was not informed of his rights under *Miranda*. At the suppression hearing, Special Agent Kira Johnson[3] of the Tennessee Bureau of Investigation ("TBI") testified that she investigated Zayne's death. On December 6, 2012, she went to the Baptist Memorial Hospital-Tipton, where a nurse informed her that Zayne had died of respiratory failure and had also sustained "bruising around the neck, what appeared to be bruising around the buttocks, red [striation] of the back of his head, and a bruise on the forehead." After

[2] Because the victim and his family members share the same surnames, we will refer to the victim, his mother, and his grandparents by their first names. We intend no disrespect.

[3] We note that Special Agent Johnson is also referred to as "Hayden-Johnson" in the transcripts. For purposes of consistency, we will refer to her as Special Agent Johnson.

Special Agent Johnson completed her investigation at the hospital, she went to the Tipton County Sheriff's Office ("TCSO") to meet with Zayne's family. She explained that the Defendant "voluntarily came into the interview room to speak" with her and TCSO Detective Sherri Wassel "in reference to what occurred the night prior to Zayne's death and also the incident that caused his death." Special Agent Johnson recorded her interview of the Defendant. She stated that the Defendant had not been arrested, was not in custody, and was free to leave at any time. The Defendant informed Special Agent Johnson that he was not under the influence of alcohol or drugs. Special Agent Johnson testified that she did not promise any leniency to the Defendant or threaten or coerce him to make a statement. Her first interview with the Defendant on December 6, 2012, lasted between an hour and an hour and a half. The Defendant made a sworn written statement[4] during this interview.

During her interview with the Defendant, Special Agent Johnson learned that the Defendant lived with the following individuals in a house on Drummonds Road in Tipton County: Zayne; Zayne's mother, Chelsea Whitesides; Chelsea's father, Billy Whitesides; and Chelsea's step-mother, Donna Whitesides. After the interview, the Defendant agreed to go to the Drummonds Road residence and reenact the events that led to Zayne's injury and death. The Defendant rode in the front passenger seat of Special Agent Johnson's unmarked vehicle and was not handcuffed or in custody. Detective Wassel also rode in Special Agent Johnson's vehicle and other detectives accompanied them in a separate vehicle. When they arrived at the Drummonds Road residence, Special Agent Johnson, Detective Wassel, and the other detectives made a video of the residence, photographed the residence, and collected items of evidence. Later, the Defendant reenacted the events of the evening of December 5 and morning of December 6 while law enforcement filmed the reenactment. The Defendant and law enforcement then returned to the TCSO, and the Defendant gave a second statement in the interview room. In his second statement, the Defendant "remembered another incident that occurred the week before in reference to him holding Zayne De[M]eza in his arms and [Zayne's] head colliding into the door frame."

Special Agent Johnson interviewed the Defendant again on August 7, 2013. She decided to ask the Defendant to speak with her again because she had received the autopsy report on Zayne's death. She stated that the Defendant drove to the TCSO, did not appear to be under the influence of drugs or alcohol, and was not in custody during the interview. She did not threaten the Defendant to give a statement and did not know of anyone else who threatened the Defendant. She stated that the Defendant "started" the interview on August 7 and "wanted to talk about work" and "mentioned he was abused by his stepfathers." The Defendant gave a third written statement during the recorded

[4] The Defendant's statements are set out later in this opinion.

interview and left. Special Agent Johnson did not inform the Defendant of his *Miranda* rights on December 6, 2012, or August 7, 2013.

On cross-examination, Special Agent Johnson testified that, when she first interacted with the Defendant at the TCSO on December 6, 2012, he was in the lobby of the TCSO office. She stated that she spoke with the Defendant for thirty to forty minutes before the Defendant gave a sworn written statement. She explained that this interview was voluntary and that the Defendant could have left the TCSO at any time. Special Agent Johnson stated that, when she first interviewed the Defendant, she knew that Zayne had been in the Defendant's care before his death, but she was "still gathering information" and had not formed an opinion about Zayne's death or possible suspects. She explained that she asked the Defendant to provide a second statement after the Defendant reenacted the events that led to Zayne's death because she wanted to show the Defendant some photographs and to clarify his initial statement. She explained that she did not inform the Defendant of his *Miranda* rights on August 7, 2013, because she "wanted to speak with him in reference to the findings of the investigation and also the medical information [that] [law enforcement] received." The Defendant did not ask to speak with an attorney or ask to leave. She explained that she also discussed the autopsy and investigative findings with Chelsea on August 7, 2013. Special Agent Johnson testified that she began to consider the Defendant a suspect in Zayne's homicide on August 8, 2013, when she arrested the Defendant and informed him of his *Miranda* rights. The Defendant then asked for an attorney and did not give any more statements.

Detective Wassel testified that, on December 6, 2013, she worked as a detective for the TCSO. On that day, she reported to the emergency department of the Baptist Memorial Hospital-Tipton to investigate Zayne's death. She stated that the Defendant, Chelsea, Billy, and Donna all traveled from the hospital to the TCSO in their own vehicles. They stayed in the lobby until they were taken to the interview room. Detective Wassel informed Zayne's family members that they could leave if they wanted to. She found Zayne's death suspicious and believed it could have been non-accidental. Detective Wassel stated that Chelsea, Billy, and Donna informed her that the Defendant was the last person that saw Zayne alive. She was present when the Defendant gave his first statement around noon on December 6. Detective Wassel explained that she did not inform the Defendant of his *Miranda* rights during his interview because he was not in custody. She stated that another deputy was "standing by" at the Defendant's house while the Defendant reenacted the events leading to Zayne's death to assist with processing the crime scene. Detective Wassel testified that the Defendant did not ask to leave or ask for an attorney on December 6.

Detective Wassel explained that she interviewed the Defendant on August 7, 2013, after Zayne's autopsy report was released "[t]o see if there was a difference in the story,

because there were different injuries that were not visible the day of the incident . . . ." She considered that the Defendant or Chelsea could have abused Zayne. She explained that she did not inform the Defendant of his *Miranda* rights on this occasion because he was not in custody and was free to leave.

Vickie Huffman, the Defendant's mother, testified that she accompanied the Defendant to the TCSO on August 7, 2013. She stated that law enforcement wanted to speak with the Defendant because they had learned new information about the victim's case. The Defendant agreed to speak with law enforcement at the TCSO because Chelsea "wanted to know what [law enforcement] had found out." Ms. Huffman sat with the Defendant in the waiting room of the TCSO until a man wearing "black khaki combat-looking pants" and a "polo shirt" called for the Defendant. The Defendant "looked at [Ms. Huffman] and said, [']I don't want to go.[']" Ms. Huffman testified that the man said "[']You don't have a choice. You need to come talk to me.[']" Ms. Huffman saw the Defendant approximately three hours later after he finished speaking with the TCSO.

The trial court found that the Defendant was not in custody during the December 6, 2012, or August 7, 2013 interviews. In its order, the trial court found the following:

> In this case, the Defendant arrived at each meeting at the office voluntarily, he was not under arrest, and he agreed to speak with investigators. The investigators informed the Defendant that he could leave. Agent Johnson told the Defendant the subject matter of the interview, and, at that time, the Defendant agreed to the conversations and to ride to the scene and perform a re-enactment of the events as he stated occurred. The [D]efendant was not in custody or Mirandized and rode in the front seat of the unmarked vehicle to go to the house.

The trial court found that "there was a point in time where the officers investigating the incident were unsure if a crime had been committed or if accidental injuries occurred because of death." Further, the trial court found that "[a]fter [law enforcement] received the autopsy report, which revealed additional injuries, then the [D]efendant became a suspect in a suspected crime." The trial court also found that "there was no behavior by the State's officials such to overbear the [D]efendant's will to resist to bring about confessions or statements that were not freely and voluntarily given." The trial court denied the Defendant's motion to suppress.

The State's Proof

Aubrey Stoddard testified that, in December 2012, he lived on Drummonds Road in Tipton County, and he was Billy and Donna's neighbor. He stated that, at that time, Chelsea and the Defendant also lived with Billy and Donna. On December 6, 2012, Mr. Stoddard woke up around 3:00 a.m. and let his dog go outside. He noticed that "all the lights" were on at his neighbors' house. He walked outside and "heard a loud noise [that] sounded like a door slammed real hard." Mr. Stoddard heard this noise "about five or six times with maybe five or ten second intervals in between." When he heard the last noise, he also heard "a loud squeal[.]" Mr. Stoddard estimated that he was approximately sixty to seventy-five feet away from his neighbors' house when he heard the noises. He stated that his hearing was "normal" and that the noises were "very loud."

Jeannie Exley testified that, in December 2012, she worked as a paramedic in Tipton County. Ms. Exley responded to a call shortly after 3:00 a.m. concerning a nineteen-day-old child that was not breathing. She stated that Chelsea and the Defendant were standing on the porch of the residence when she arrived; she described their demeanor as "very nonchalant." Ms. Exley found Zayne in Billy and Donna's bedroom. As she walked into the bedroom, she noticed a "ring around his neck" that "looked like a ligature mark from like somebody had been hung." She also stated that Zayne was "bluish pale," was not breathing, and did not have a pulse. She also observed bruises on Zayne's right shoulder and on his buttock area. Ms. Exley immediately picked up Zayne and began performing cardiopulmonary resuscitation ("CPR") and "rescue breathing" while she walked towards the ambulance. She also spoke with the Defendant, Chelsea, Billy, and Donna. She stated that the Defendant informed her that:

> he got up with the baby to feed the baby and take care of the baby. They had been lying on the couch in the living room, and I guess when he was done feeding the baby he got up to go put the baby to bed and tripped over the carpet and fell on the baby. And then he picked the baby up, put the baby to bed, went ahead and put the baby to bed. A few minutes later, . . . he went to check on the baby, and that's when he said he noticed the baby wasn't breathing.

Ms. Exley testified that none of the life-saving measures that she performed at the crime scene or during the ride to the hospital visibly affected Zayne's condition.

Madalyn Mason testified that, in December 2012, she was an Emergency Department Charge Nurse at Baptist Memorial Hospital-Tipton. Around 3:00 a.m. on

December 6, 2012, Ms. Mason observed Ms. Exley come into the emergency department while performing CPR on an infant; she noticed that the infant "was cold[] [and] did not have a pulse . . . ." Ms. Mason also observed bruises on the infant's neck and buttocks.

Dr. Buffy Cook testified that he was a board certified family physician and that he was the Tipton County medical examiner. He investigated Zayne's death. Around 4:29 a.m. on December 6, 2012, Dr. Cook was notified that Zayne's death "seemed to be suspicious because there was some bruising around the neck." After the trial court declared Dr. Cook to be an expert in the area of family medicine, he testified that, at the time of his death, Zayne weighed approximately twelve percent less than he did at his birth. Dr. Cook stated that, if he had examined Zayne as a healthy child at that age, the weight loss would have raised his concern about abuse or neglect. He also stated that he examined Zayne's birth records and found "zero risk factors for birth injury . . . ." Dr. Cook testified that it was normal for a hospital to discharge an infant two days after birth when the mother had received late prenatal care and had tested positive for a bacterial infection, as Chelsea had. When Dr. Cook examined Zayne on December 6, 2012, he observed a red mark around Zayne's neck and injury to his buttock area. However, he did not observe any injuries to Zayne's ribs.

Dr. Cook reviewed Zayne's autopsy report and noted that "[t]here were fractures of the left first and right first to fourth ribs[,]" which were "acute" or fresh. The autopsy report also noted that Zayne sustained "calluses of the left third and fourth ribs, which mean[t] that those [we]re old[,]" on the posterior side of those ribs. [5] Dr. Cook estimated that the older rib fractures occurred between Zayne's birth and nine or ten days of age. Dr. Cook explained that rib fractures in infants occur three ways: the broken ribs could have been caused by "fingers digging in from behind the child, putting excessive pressure on the back. And then basically you have the bone up against an immovable object such as that wall, and then it snaps at the back of the rib." Additionally, an anterior rib fracture is caused "whenever someone falls with a child because the force is coming to the front of the child." A lateral, or side, rib fracture is caused when the infant is squeezed on its sides. He explained that the various stages of healing indicated three possible sources of the injuries:

> It could either be birth, which effectively that's ruled out, not only in my mind but in the medical literature, medical knowledge as a whole.

[5] Dr. Cook later explained that "a callus on a rib is basically where the fracture is trying to heal itself, and so it's like calcium that has built up on that rib."

> It could be that it was some type of accidental trauma. Again, in this study that required typically falls from greater than six feet or excessive force such as falling with a child directly onto concrete, something like that.
>
> The other is that it would be consistent with abuse.

Dr. Cook testified that Zayne's "rib fractures in various stages of healing" were "a very, very, very high indicator of abuse" and that the fact that Zayne's injuries were at various stages of healing indicated that he had been in multiple incidents of injury. Dr. Cook also cited a medical study that conducted "the largest known review of posterior rib . . . fractures in children to date" and found that "the vast majority of these, [thirty-two] out of the [thirty-nine], were attributable to abuse, and the vast majority of those that were attributable to abuse had rib fractures in various stages of healing." The study also found that sixty percent of rib fractures in abused infants occurred in the posterior region.

Dr. Cook also noted that Zayne's autopsy revealed bleeding under the scalp and spots of bleeding in the temporo-occipital area of the brain. Dr. Cook explained that these injuries appeared to be seven to ten days old and could have been caused three ways: blunt force trauma from birth, lack of blood flow from birth, or temporary suffocation. Because Zayne exhibited no birth risk factors, Dr. Cook believed that the injuries were caused by temporary suffocation. Zayne was also diagnosed with focal axonal spheroids of the brainstem; Dr. Cook explained that this was "basically [an] injury that you would see possibly from shaking or lack of blood flow or some type of force." Additionally, Zayne sustained bleeding under the skin at the back of his neck and bleeding in the epidural area of the thoracic region of the spine. Zayne's autopsy report also revealed that Zayne had fat in his liver; Dr. Cook explained that this could have been "residual from birth" or from malnutrition. Based on his observations of Zayne and his review of the birth records, hospital records, and the autopsy report, Dr. Cook believed that the injuries to Zayne's ribs were non-accidental.

On cross-examination, Dr. Cook clarified that rib fractures in infants can also be caused by "bone fragility." He also explained that the medical study that he cited concluded that, for an infant to fracture a rib from an accidental fall, "the fall had to be more than six feet in nature and also had to be of tremendous force to sustain rib fractures." Dr. Cook also stated that an infant in utero could not sustain a posterior rib fracture if the pregnant mother was in a car accident. Dr. Cook recommended that a pregnant mother should begin her prenatal care as soon as she confirms the pregnancy, but he stated that infants are "perfectly fine" when a pregnant mother begins prenatal care eight months pregnant. In Zayne's case, Dr. Cook stated that there was no indication that Zayne had any complications from Chelsea's late prenatal care. He noted that Zayne "was born in a very rapid time, only four hours[,]" which meant that "there wasn't very

much time for any injury to occur." Dr. Cook also noted that Zayne "went home within two days of being born." Regarding the autopsy report's conclusion that the manner of Zayne's death was "undetermined[,]" Dr. Cook explained that he spoke several times with the forensic pathologist who performed Zayne's autopsy, and the forensic pathologist could not determine whether Zayne's death was caused by abuse or birth injury. However, Dr. Cook disagreed and stated that birth injury was "effectively ruled out" in Zayne's case.

Dr. Lisa Piercey testified that she specialized in child abuse pediatrics. She reviewed Chelsea's prenatal records, Zayne's birth records, a Sudden Unexplained Infant Death Investigation ("SUIDI")[6] packet, as well as the following:

> a case file from the Tipton County Sheriff's Office, the local medical examiner's records, the ER records from Baptist-Tipton on the day of [Zayne's] death, the autopsy report dated the day after [Zayne's] death, various pathology reports from the autopsy samples, six pages with multiple photographs on each page of [Zayne], and then another page of photographs of the ribs where they actually removed them from the body and took sections of those.

After the trial court declared Dr. Piercey an expert in pediatric child abuse and child maltreatment, she testified that none of the records that she reviewed showed any birth risk factors except Chelsea's late prenatal care. She noted that Zayne's delivery was "uneventful" and that he stayed in the hospital for an extra day of observation because Chelsea tested positive for a bacteria. She stated that it was normal for an infant to be discharged two days after birth and that Zayne's APGAR scores were eight and nine.[7] Regarding Zayne's weight at death, Dr. Piercey stated the following:

> [Zayne] was born weighing six pounds[,] [fifteen] or so ounces, and when he died he was six pounds[,] one ounce . . . . So he lost almost a pound from the time he was born. And that doesn't sound like a lot, but for a baby that size that's about [fifteen] percent of his entire body mass.
>
> . . . .

[6] Dr. Piercey explained that a SUIDI packet is "a series of several papers that law enforcement typically fills out when they go into the home for a scene investigation."

[7] Dr. Piercey explained that "APGARs is a scoring system that [doctors] use. It's a ten-point scale that measures how well the baby tolerated delivery. So [doctors] measure that one minute after birth and five minutes after birth."

> [T]he fact that almost three weeks after birth he was a pound under his birth weight and hadn't even gotten back to his birth weight, so his weight in addition to the appearance, which is his appearance on the photographs, were pretty consistent with malnutrition.

Dr. Piercey also noted that Zayne's autopsy report showed several findings of skin trauma. She explained that Zayne's "bottom was raw and red [due to] really bad diaper rash. There was a history that he had some diarrhea, which is pretty common with malnutrition." However, she believed that the bad diaper rash was unrelated to Zayne's other skin trauma. She noted that Zayne had "a couple of bruises on his forehead on either side of his forehead[,]" "a bruise in front of his left ear[,]" and "bruising all the way around his neck." Dr. Piercey observed that the bruising was "more prominent" on the right side of Zayne's head, that the bruising "went down over his collar bone on the right side[,]" and that "there was a larger distinct bruise in the very back of his neck underneath the hairline." Dr. Piercey also explained that Zayne suffered bleeding in the brain, brain damage, deep bruising in the back of his neck, and bleeding and bruising in his spinal cord.

Regarding Zayne's rib fractures, Dr. Piercey stated the following:

> . . . [T]he first rib is in the neck, and it's really difficult to break the first rib because it's protected by pretty much everything. And so the medical literature is very clear that when you have a first rib fracture, . . . you have to be worried about very significant high impact trauma, things like major car wreck, falling out of a multiple story window, major, major trauma. First rib fractures are pretty unusual.
>
> And so [Zayne] had first rib fractures on both sides, and then he had fractures of the number two, three, and four ribs on the right side. And if you remember what I said earlier, the bruising was deeper and more prominent on the right side, and so that's not surprising that the rib fractures were more on that side.

Dr. Piercey noted that Zayne had older fractures on his left third and fourth ribs and that there were no notations in Zayne's birth records which indicated that his rib fractures were sustained during his birth. Dr. Piercey explained that rib fractures sustained during birth are usually caused when the infant is delivered using a vacuum or forceps or when the infant is large. She noted that none of these factors applied to Zayne. She could not exclude the possibility that Zayne sustained the older rib fractures during birth, but she believed it was "very, very, unlikely" and noted that the older rib fractures did not cause Zayne's death. Dr. Piercey explained that squeezing Zayne would be consistent with his

rib fractures "[b]ecause the shaking itself doesn't cause rib fractures, but holding the baby and squeezing and holding the baby while shaking causes rib fractures." Dr. Piercey stated that Zayne's injuries were not consistent with an accidental fall because a fall "doesn't cause bruises all the way around your neck and on both sides of your head and neck. And a simple fall is not going to cause these very high impact rib fractures [that] [Zayne] had." Dr. Piercey concluded that Zayne "was severely abused, likely on multiple occasions, and the final incident of abuse resulted in his death." She stated that "the shaking of his neck and body caused his spinal cord injury, the brain injury, and the bleeding" and explained that an individual stops breathing when their brain stem and spinal cord are injured, which resulted in Zayne's brain damage and eventual death.

Billy testified that, in November and December 2012, he lived on Drummonds Road with his wife, Donna, the Defendant, Chelsea, and Chelsea's other minor child, K.Y.[8] He stated that Zayne's biological father lived with Chelsea from February to August 2012. The Defendant began dating Chelsea at some point after that and eventually moved into Billy's house. The Defendant and Chelsea were married on November 5, 2012, and Zayne was born on November 17, 2012. Billy stated that the Defendant worked for Federal Express while he lived at Billy's house and that the Defendant generally worked in the afternoon.

Prior to Zayne's death, Billy was aware that the Defendant and Chelsea had been treating Zayne's diaper rash. Billy offered to take Zayne and Chelsea to the doctor, but Chelsea declined because they were not currently covered by health insurance. Billy testified that, on December 5, 2012, he went to sleep around 9:00 p.m. Around 9:30 p.m., he heard Zayne crying, so he got up and took Zayne into the living room. The Defendant also came into the living room and fixed a bottle for Zayne. Chelsea was in her room at this time, and Donna was asleep. Billy fed Zayne and then Zayne fell asleep while Billy and the Defendant watched television and talked. Billy did not see any red mark around Zayne's neck while he was holding Zayne. Around 11:00 p.m., Billy gave Zayne to the Defendant and went to bed. Shortly before 3:00 a.m., Billy heard a knock on his bedroom door. The Defendant came into the room carrying Zayne and told Billy and Donna that he had fallen and that he did not think Zayne was alive. The Defendant was "fairly calm" while he spoke with Billy and Donna. Billy called 911 while Donna performed CPR on Zayne. Billy stated that the Defendant had a cellular telephone and also noted that the Defendant walked past the landline in the residence to get to Billy's bedroom. Chelsea woke up as Billy spoke with the 911 dispatchers. Billy then told the Defendant and Chelsea to wait outside for the ambulance. After the ambulance arrived, a female EMT walked into the bedroom, checked Zayne, and "immediately" picked him up

[8] Because Chelsea's child is a minor, we will use her initials to protect her identity, as is the custom of this court. We intend no disrespect.

and took him to the ambulance. Billy testified that, at that time, he was not aware of any prior incidents of the Defendant dropping Zayne or falling with Zayne. He stated that he did not hear a loud knocking noise or a squeal that night.

On cross-examination, Billy testified that the Defendant helped to care for K.Y. and that he had never observed the Defendant mistreat K.Y. He stated that the Defendant generally had a calm demeanor. Billy agreed that he gave a statement to law enforcement on December 6, 2012, and another statement in September 2013. On redirect examination, Billy stated that the Defendant told him that he received medical training while he was in the U.S. Navy.

Chelsea testified that she met the Defendant in August 2012, the Defendant moved in with her at the end of September or beginning of October, and they were married on November 5, 2012. In October 2012, Chelsea had an ultrasound and confirmed her pregnancy with Zayne. The Defendant accompanied Chelsea to her doctor on this visit and "was a little upset" that Chelsea was expecting a boy. After Zayne's birth, Chelsea was not aware of any health problems that Zayne experienced besides diaper rash. At some point between Zayne's birth and death, Chelsea noticed a bruise on Zayne's forehead and asked the Defendant about it. At first, the Defendant told Chelsea that he "couldn't remember" what happened. Later, the Defendant told Chelsea that he was holding Zayne while he walked through a door and that Zayne's head hit the door frame.

On December 5, 2012, Chelsea went to bed between 10:00 and 11:00 p.m.; Zayne was in the living room with the Defendant and Billy. Around 2:30 a.m., Chelsea woke up to the sound of the Defendant talking with Billy and Donna. She heard the Defendant say "Call 911. I think Zayne's dead." Chelsea went into Billy and Donna's room where she saw Donna performing CPR on Zayne. Billy had already called 911, so Chelsea "ran outside to flag the ambulance down." The Defendant later joined her outside to wait on the ambulance. After the emergency responders left with Zayne, Chelsea and the Defendant followed the ambulance to the hospital. Billy, Donna, and K.Y. also followed in a separate vehicle. While they were driving to the hospital, Chelsea asked the Defendant how Zayne was injured. The Defendant told her that he had fallen. Shortly after she arrived at the hospital, Chelsea learned that Zayne was deceased. Law enforcement officers then informed Chelsea and her family members that they needed to go to the TCSO. While at the TCSO, Chelsea gave a statement.

The Defendant continued to live with Chelsea and her family until he was arrested in August 2013. During that time, Chelsea asked the Defendant "multiple times" about how Zayne was injured, and the Defendant told her that "he had gotten up off the couch and [had] fallen over the chair on top of [Zayne]." After the Defendant's arrest, Chelsea learned that, according to the Defendant, Zayne had been injured another time when

Zayne slipped out of the Defendant's arms, hit the Defendant's knee, and then hit the kitchen floor.

On cross-examination, Chelsea stated that she gave two statements to law enforcement regarding Zayne's death. She gave one statement on December 6, 2012, and another statement on July 30, 2015. She agreed that, when Zayne was on the bed and Donna was giving him CPR, the Defendant was "in a panic." Chelsea stated that Zayne was in good health except for having diarrhea since he was discharged from the hospital. She stated that she did not hear a loud noise on the night of Zayne's death. She explained that the Defendant would care for Zayne during the night while she slept. She considered the Defendant to be a father figure to Zayne, and she never observed him be abusive towards K.Y. Chelsea stated that she did not receive prenatal care other than her ultrasound during her pregnancy with Zayne. She testified that she had two minor car accidents during her pregnancy with Zayne. She also stated that the Defendant's cellular telephone did not get good reception at Billy's house. Chelsea stated that, in her opinion, Zayne appeared to be gaining weight before his death.

On redirect examination, Chelsea explained that her first car accident while pregnant occurred in September 2012; she stated that the vehicles were not damaged, and she did not need medical attention. The second accident occurred in October 2012, and she received medical attention from EMTs, who determined that she was not injured. Chelsea was wearing her seatbelt during both accidents.

Vickie Huffman testified the Defendant enlisted in the U.S. Navy shortly after he graduated from high school in 2010. The Defendant told her that he was being trained as a field medic in the Navy. He also told her that he was looking into becoming a Navy Seal. Ms. Huffman testified that she learned of Zayne's death several hours after he passed away, while the Defendant was still at the TCSO. Two or three days after Zayne's death, the Defendant or Chelsea told Ms. Huffman that, prior to Zayne's death, Zayne hit his head on a door frame while the Defendant was carrying him.

Special Agent Johnson testified that she worked as a Special Agent and Criminal Investigator with the Tennessee Bureau of Investigation. On December 6, 2012, Special Agent Johnson was assigned to investigate Zayne's death. At the Baptist Memorial Hospital-Tipton, she spoke with law enforcement, examined Zayne, and photographed his injuries. She observed bruising on Zayne's neck, red marks on the base of his skull, and red marks on his buttocks. Between 7:00 and 8:00 a.m., she went to the TCSO, where she and Detective Wassel interviewed the Defendant, Chelsea, Billy, Donna, and Zayne's biological father. At this point, Special Agent Johnson was aware that the Defendant was the last adult that cared for Zayne prior to his death. The Defendant's first statement consisted of the following:

On December 5, 2012, I woke up at 6:50 a.m. I called in to work at FedEx. Zayne w[oke] up so I change[d] his diaper. Then I took Zayne with me into the kitchen. I began to feed Zayne in the bedroom and realized the time and hand[ed] him to Chelsea. At 7:40 a.m. or 8:00 a.m.[,] I started to get ready. I left the house at 8:30 a.m. and [went] to work. At 4:30 p.m. I [went] to Walmart to pick up baby wipes and drinks. I got home at 4:50 p.m. and put the pizza in the oven. [K.Y.] was walking across the floor as Billy was mopping them. I took two pieces of pizza back to Chelsea in our bedroom. Then I went to Dollar General to get V8 smoothie, Hawaiian Punch, and Sunkist drinks. I returned to the house in about 30 minutes. Chelsea was preparing the water for [K.Y.]'s bath. I was in the kitchen eating pizza. Billy gave [K.Y.] a bath. Chelsea had Zayne in her arms and was walking around doing things. Then Chelsea and I sat on the bed watching TV. Then five minutes later Billy walk[ed] in with [K.Y.]. I help[ed] Billy get [K.Y.] dressed. It was about 7:00 p.m. or 8:00 p.m. Billy took [K.Y.] to living room to watch TV[,] and Chelsea and I were in the room watching TV. Zayne was asleep in the bassinet. Then at 8:30 p.m. or 9:00 p.m., Zayne woke up. I took him into the kitchen[,] and as I was feeding Zayne, Billy walk[ed] in. When I got done feeding him[,] Billy took Zayne into the living room and then I followed. We talked for about 45 minutes to two hours. Billy said he was going to bed. Then I took [Zayne] back to the bassinet at 11:00 p.m. or 11:30 p.m. Zayne slept for about an hour and a half to two hours. Zayne started crying. I fed him and changed his diaper twice. It was about 1:30 a.m., and [I] put Zayne back into his bassinet, and he was asleep. He slept for [thirty] to [forty] minutes. Zayne woke up about 2:00 a.m. or 2:10 a.m. I took Zayne back into the living room and made a bottle and f[ed] him. I had Zayne in my arms holding him in my left arm, face down with my palm to brace his head so it [was] not bobbing around. Zayne fell asleep, and I was walking to take Zayne to his bassinet and I tripped. I tripped over the recliner chair. I fell onto the floor, and I pulled my other hand back underneath. My right was covering the face and my left hand was covering his throat and head. I did CPR on the floor of the living room next to the chair. I did [thirty] pumps, which was [thirty] compressions with two fingers with my right hand. I also did two breaths and I covered his mouth and nose with my mouth. I did not count how many times. I kept going until I realized he was not coming back. Zayne was not doing anything. He was dead. I checked for his artery to see if his blood was pulsing to see if his heart was beating. I also put my face to his face to check for his breath. I took Zayne back to my room, and I put Zayne in the bassinet and got my phone off the bed.

> Then I picked Zayne back up and took him into Billy's room. I told them[,] ["]I don't think he's alive.["] Billy called 911. I just sat there and watched. I did not know what to do. Then me and Chelsea went outside to the porch and waited for the ambulance to arrive.

The Defendant, Special Agent Johnson, and Detective Wassel then returned to Billy's residence to film the Defendant's reenactment of how Zayne was injured. When the Defendant, Special Agent Johnson, and Detective Wassel returned to the TCSO, Special Agent Johnson asked the Defendant to clarify how Zayne sustained the bruises on his body. The Defendant gave a second statement:

> On Thursday, December 6, 2012, I was walking to the back room. I had Zayne in my left arm with his legs tucked underneath his stomach and his butt was in the air. When we fell I had my left arm covering his face and neck. I brought my right arm towards his face and slid my left arm down, towards his chest. The base of my palm was mid-chest. On impact of falling on the ground I heard a double crack. I don't know where the crack came from, I did not feel it. I guess it came from his neck. I got up as fast as I could and checked to see if he was breathing and alive. I pulled my arms from up under him and push[ed] my body up off of him. I put my right hand on Zayne's back and my left hand under his body and turned him over to have his face facing in the air. I saw Zayne's head drop down as I was turning him over. That's when I knew something was wrong. Last week when I was holding Zayne in my left arm in a side cradle position[,] I was walking out of the bedroom door and Chelsea called me. I turned around and hit his head on the door frame. Zayne did not bruise right away. It was the next [day] that [I] and Chelsea noticed bruising in the mid-forehead to the left forehead area. Zayne cried badly after hitting his head. It happened around 11:00 p.m. I can't remember what day it was.

On August 7, 2013, Special Agent Johnson discussed the autopsy report with the Defendant. The Defendant then gave his third statement:

> This is a sworn statement given by [the Defendant] on August 7, 2013[.] On December 6, 2012, . . . me and Billy were sitting in the living room after work. . . . I was feeding [Zayne] in the kitchen and Billy asked me to give [Zayne] to him[,] and we sat in the living room talking. We were talking about random things. I don't know how long we were talking. I don't remember what happened after that. I can't remember if he was saying he was going to bed because he worked in the morning or because he was just going to bed. [Billy] gave [Zayne] back to me.

I went back to the bedroom and put him in the bassinet. [Zayne] was asleep at this point. I laid down in the bed until he cried again. I don't remember what time it was. I got back up with him. And I tried getting him back to sleep. Nothing would work. I was just standing in the room and rocking him.

I went to get a bottle of food and came back and sat in the floor with him. In the bedroom. I am not sure how long he laid down for that time. It was a little while later he started crying again so I picked him up and went to get another bottle. [I] sat on the couch with him[,] feeding him[] [u]ntil he fell asleep. I don't know how long that took. When he fell asleep[,] I just sat there watching TV, and he was on my chest sleeping. His head was facing my chest.

I saw the black. I remember [] rolling a little bit towards the right and coffee table[,] and he just rolled onto my right arm and bicep. Last thing I remember was opening my eyes and being on the floor with him underneath me. His body was under my body on my left side with [his] head towards the collar bone. I leaned back and noticed he wasn't moving or crying. He was not crying or moving.

I shook him towards my body and away from my body [eight] to [ten] times. I was on my knees with my back [against] the table and [my] buttocks on my heels. He was at my lower chest area while I was shaking him to get a response. I got nothing. There was no heartbeat. I didn't even check. His head was all the way back.

Midway to the end of shaking[,] I heard a thud. I didn't know what that was. I panic[k]ed and started to run back to the bedroom with Zayne. . . . I hit something and fell next to the chair. He was underneath my left chest and side. I had [my] left arm underneath his butt and [my] right arm under his back. I fell and he was in same position but underneath me. His head was at my collar bone, and all I could see [wa]s the top of his head. I remembered that I knew how to do CPR. I panicked and thought that it might help. He wasn't breathing and there was no heartbeat.

The CPR was [one] finger pushing on his chest[,] doing compressions and breathing into him to push air through his lungs. I am not sure how many times I did that. His eyes were closed. It wasn't working so I stopped. I thought I had a heartbeat, but it wasn't a heartbeat.

So I picked him up quickly and picked up underneath his armpits and put his head on my shoulder. I ran to the back. I set him in the bassinet and grabbed my phone. Chelsea was sleeping the whole time. After I grabbed my phone[,] I grabbed Zayne out of the bassinet and ran to Donna's room. Donna did CPR and we called 911. We both called, but she got through first. The ambulance arrived[,] and I went outside and I cried. I didn't know what happened at that time. I was in shock.

Friday, November 23, 2012, around midnight I was in the kitchen with [Zayne] in my arms. I went to tighten the bottle[,] and he slid from my arms. On the way down[,] he hit my knee. Then he hit the cabinet and then the floor. He cried very loudly. He didn't cry very long because I started rocking him. I stayed in the kitchen and rocked him. I was wearing shorts. I didn't notice any red marks on me or him. I was more concerned with him being okay. I didn't tell anyone about this because I was afraid of being yelled at.

Wednesday, November 28, 2012, I had [Zayne] in my arms walking out of our bedroom door. I had him cradled[,] [a]nd Chelsea called my name[,] and when I turned around[,] he bumped his head on the door frame. He cried a little bit. Chelsea was right there. She yelled at me for it. She didn't take him from me. I saw a light pink area on his right forehead. It was pink and bruised the next day. We watched the bruising, and it went away like [two] days later. She was going to take him to the hospital if it didn't go away. The same day we used cornstarch to dry up the rash on his anal section.

I feel a lot better than when I came in here.

Special Agent Johnson testified that, prior to this statement, the Defendant had never informed Special Agent Johnson that he had passed out or that he shook Zayne. The Defendant had also never mentioned the November 23, 2012, event.

On cross-examination, Special Agent Johnson testified that, on December 6, 2012, she interviewed Chelsea first, then Billy, Donna, and lastly, the Defendant. She explained that, in her investigations, if an individual died of natural causes, she did not always ask a medical examiner to determine the cause of death. She also stated that it was "not out of the ordinary" to not seek the cause of death in a homicide case. In Zayne's case, Special Agent Johnson stated that the local medical examiner wrote a report on Zayne's death and requested an autopsy. In 2012, Special Agent Johnson

provided the medical examiner with the reenactment video, Zayne's birth records, and the Defendant's recorded interviews. In May 2013, the medical examiner released the autopsy report, which stated that the cause of Zayne's death was undetermined. Special Agent Johnson asked Dr. Piercey to conduct a second examination based on the autopsy report and Zayne's medical records. Special Agent Johnson then contacted the medical examiner who performed Zayne's autopsy and provided the examiner with the results of Dr. Piercey's examination. She asked the medical examiner to "review the case" while "taking into consideration" Dr. Piercey's findings.

The Defendant's Proof

Dr. Marco Ross testified that he was the Deputy Chief Medical Examiner for the West Tennessee Regional Forensic Center in Memphis. After the trial court declared Dr. Ross an expert in the field of medical examination, he stated that, in his examination of Zayne's death, he viewed the Defendant's reenactment video and considered it in reaching his conclusion that the cause of Zayne's death was undetermined. He explained that Zayne's acute injuries were consistent with the Defendant's reenactment. He noted that Zayne had lost weight since his birth and had a severe diaper rash. Dr. Ross testified that Zayne's severe diaper rash was consistent with an infant who had diarrhea since birth and that "severe, prolonged diarrhea can certainly result in dehydration and malnutrition." Dr. Ross testified that he had not learned any new information that caused him to change his initial findings of an undetermined cause of death.

On cross-examination, Dr. Ross explained that "[t]he cause of death refers to the specific disease, entity, or injury or abnormality that resulted in the death" whereas "[t]he manner of death refers . . . to how that may have occurred[.]" He further explained that the possible manners of death include "a natural death, an accidental death, suicide, homicide, or undetermined." He agreed that he found some injuries on Zayne that occurred near to his time of death and some injuries that were older. Dr. Ross stated that the older injuries included lesions on the temporal lobes of Zayne's brain; these lesions were either caused by a lack of oxygen to those areas of the brain or bruising. However, he stated that, because the lesions appeared on both sides of Zayne's brain, it was more likely that the lesions were caused by a lack of oxygen to the brain. Regarding when the lesions occurred, Dr. Ross stated the lesions "possibly could have dated from the time of birth up until a couple of weeks prior to death." He explained that he could not "entirely rule . . . out" the possibility that the lesions occurred when Zayne allegedly slipped out of the Defendant's arms, hit the Defendant's knee, and then hit the floor. He stated that "[t]ypically dropping of a baby on that, if it doesn't cause a skull fracture, it frequently doesn't cause internal injury to the brain such as that" and suggested that, if the lesions were caused by a blunt impact, then it "probably would be something more forceful than

just dropping the baby." He also stated that the lesions were probably not caused when the Defendant allegedly walked through a door and Zayne's head bumped the frame.

Zayne's other older injuries also included calluses on his left third and fourth ribs; Dr. Ross estimated that these ribs were fractured when Zayne was "about ten days to two weeks old and possibly older than that." Dr. Ross also observed "microscopic lesions in certain areas of [Zayne's] brain that [we]re a result of some type of injury or damage to the axons." He explained that the injury to Zayne's axons could have resulted from trauma, lack of oxygen, or from certain types of infection. He further explained that the injury could have been caused by shaking or squeezing Zayne. However, he stated that the injury would have required "a more considerable force" than falling to the floor or hitting a door frame. He also stated that these lesions could have happened twenty-four hours before Zayne's death or "days to weeks prior to that." Dr. Ross agreed that it was possible that Zayne sustained the older injuries to his ribs at the same time as he sustained the injury to the axons in his brain, or Zayne was involved in a fourth event.

Dr. Ross testified that Zayne sustained "areas of bleeding in the tissues . . . between the skin and the skull surface." He stated that some of these injuries were new, but some tested positive for iron, which indicated that they were older. He agreed that the older hemorrhages were consistent with Zayne being dropped approximately ten days before his death. Zayne sustained "hemorrhaging in the deep tissues on the lower part of the back of the neck" and bleeding in the epidural tissue surrounding the spinal cord, which were "consistent with the final event at the time of death." Zayne also sustained fractures to his left first and right first rib near the time of his death. Lastly, Dr. Ross observed that Zayne had excess fat in his liver, which could have been the result of stress, malnutrition, weight loss, or an "underlying disorder[] of metabolism . . . ."

Dr. Ross testified that he determined that the cause of Zayne's death was undetermined based on "factors related to the birth of the child, subsequent care, but most specifically relating to potential injuries to the child that may have been sustained." He noted that the Defendant reported that he dropped Zayne and Zayne's head hit the door frame and that the Defendant admitted to tripping and falling on Zayne. Dr. Ross stated that Zayne's older injuries to his brain and ribs could have resulted from the incident where the Defendant dropped Zayne. He was also aware that the Defendant reported shaking Zayne numerous times after he fell on Zayne. However, he stated that "typically shaking forceful enough to cause those kinds of injuries [that Zayne sustained] would also cause some retinal hemorrhages, and [he] didn't find any evidence either of recent, new, or old retinal hemorrhages." Additionally, Dr. Ross testified that when an infant is shaken "[t]here's usually an impact of the head with an object that then results in some type of underlying injury to the brain and/or the neck." He stated that Zayne's hemorrhages in the lower part of his neck could have been caused by shaking. However,

he stated that the neck hemorrhages were more consistent with the Defendant's grabbing and squeezing Zayne or falling on him. He testified that he could not determine the manner of Zayne's death because it was unclear whether the three incidents where the Defendant admitted to dropping Zayne, hitting Zayne's head on a door frame, and falling on Zayne were accidental or non-accidental.

Dr. Brian Frist testified that he was currently retired but that he formerly worked as the Chief Medical Examiner in Cobb County, Georgia. After the trial court declared Dr. Frist to be an expert in forensic pathology, Dr. Frist stated that he had reviewed Dr. Ross's autopsy report on Zayne's death and that he agreed with its findings and conclusions. He explained that brain injuries can occur multiple ways. He stated that brain matter can be injured when "someone is struck with a fist or an object by another individual . . . ." He also stated that, when an individual falls or their "head is slammed into something hard," the individual's skull hits the hard object and stops, but the individual's brain "is not attached to the bone so it moves towards the skull, the inside of the skull, and then it stops." This movement stretches the blood vessels that are attached to the brain and injures the brain. Dr. Frist noted that the injury on the side of the head that impacts the blunt object is usually small, "but the injury on the opposite side is bigger." He stated that Zayne's brain injury did not come from being struck with a fist and instead "c[a]me from either falling or with somebody taking the head and smacking it against something hard." Dr. Frist testified that he did not believe that Zayne was suffocated or strangled because the autopsy did not show any bleeding in Zayne's eyes. Regarding the possibility that Zayne's injuries were the result of sudden impact syndrome, Dr. Frist noted that the main injuries associated with sudden impact syndrome were retinal hemorrhage, or bleeding around the retina and along the optic nerve, and subarachnoid hemorrhage, or bleeding around the brain. He noted that the autopsy report showed bleeding around Zayne's brain, but it did not show any retinal or optic nerve hemorrhage.

On cross-examination, Dr. Frist testified that he reviewed the medical examiner's report, Zayne's medical records, witness statements, and Dr. Piercey's report to make his determination that accidental death could not be ruled out as Zayne's cause of death. Dr. Frist testified that Zayne's older injuries did not cause his death. Dr. Frist acknowledged that he was not aware that the Defendant admitted that, approximately thirteen days before Zayne's death, the Defendant dropped Zayne onto the kitchen floor. However, Dr. Frist stated that this information "ha[d] no relevance" to his conclusions. He testified that Zayne's brain hemorrhages could have been caused by low blood flow during his birth. He stated that, even if Zayne sustained the older rib fractures during his birth, Zayne "could have looked totally normal." Dr. Frist stated that the older rib fractures could have also occurred if Zayne was "picked up wrong" or "manipulated wrong." He

testified that he could never tell by looking at an infant's fractured ribs alone whether the injury was accidental or non-accidental.

The jury found the Defendant guilty of aggravated child neglect of a child less than eight years old, three counts of aggravated child abuse of a child less than eight years old, and first degree felony murder in the perpetration of or attempt to perpetrate aggravated child abuse. The jury sentenced the Defendant to life for his conviction of first degree felony murder. At a later sentencing hearing, the trial court merged the Defendant's aggravated child abuse convictions in counts two, three, and four into his aggravated child neglect conviction in count one. The trial court sentenced the Defendant to twenty years to be served concurrently with his life sentence. The Defendant filed a timely motion for new trial, which the trial court denied. The Defendant now timely appeals.

II. Analysis

The Defendant asserts that the trial court erred in denying his motion to suppress his statements to law enforcement. Further, he contends that the trial court erred in admitting extrinsic evidence of his prior false statements. The Defendant also argues that the evidence at trial was insufficient for a rational juror to have found him guilty of felony murder, aggravated child abuse, and aggravated child neglect.

The State contends that the trial court properly admitted the Defendant's statements because he was not in custody when he gave the statements. The State also asserts that the trial court properly admitted extrinsic evidence of the Defendant's prior false statements under Tennessee Rule of Evidence 806 and that the evidence was sufficient for a rational juror to have convicted the Defendant of felony murder, aggravated child abuse, and aggravated child neglect. Lastly, the State argues that the trial court erred in merging the Defendant's convictions for aggravated child abuse in counts two, three, and four into his conviction for aggravated child neglect in count one.

Denial of Motion to Suppress

When reviewing a motion to suppress, this court is bound by the trial court's findings of fact unless the evidence preponderates otherwise. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Questions of credibility, the weight and value of the evidence, and resolutions of conflicts in the evidence are resolved by the trial court. *Id.* The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. *Id.* We review the trial court's conclusions of law de novo. *State v. Carter*, 160 S.W.3d 526, 531 (Tenn. 2005) (citing *State v. Daniel*, 12 S.W. 2d 18, 23 (Tenn. 1996)).

Both the United States and Tennessee Constitutions protect against compelled self-incrimination. U.S. Const. amend. V; Tenn. Const. art. I, § 9. In order to protect criminal defendants from self-incrimination, the United States Supreme Court has ruled that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444; *State v. Walton*, 41 S.W.3d 75, 82 (Tenn. 2001). As part of those safeguards, police are required to inform persons who are subjected to custodial interrogation: (1) that they have the right to remain silent; (2) that any statement made may be used as evidence against them; (3) that they have the right to the presence of an attorney during questioning; and (4) that if they cannot afford an attorney, one will be appointed for them prior to questioning, if so desired. *See Miranda*, 384 U.S. at 444.

Our supreme court has stated that the test to determine whether a defendant was in custody is "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn. 1996). Our supreme court set out the following non-exclusive factors to assist in this determination:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id. (internal citations omitted). Our supreme court also reiterated in *Anderson* that the Supreme Court of the United States "explicitly repudiated" recognition of the "focus factor"[9] in custodial interrogation determination, *see Beckwith v. United States*, 425 U.S. 341 (1976), and the Tennessee Supreme Court has followed suit. *Id.* at 854 (citing *State v. Smith*, 868 S.W.2d 561, 569-571 (Tenn. 1993); *State v. Brown*, 836 S.W.2d 530 (Tenn.

[9] The "focus" factor looks at whether the defendant at issue was the "focus" of law enforcement's investigation at the time of the interview. *See Anderson*, 937 S.W.2d at 853.

1992)). The Supreme Court of the United States has recognized that "*Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'" *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). With this legal background in mind, we will examine each of the Defendant's statements individually.

The trial court found that the Defendant was not in custody during the December 6, 2012 or August 7, 2013 interviews. In its order, the trial court found the following:

> In this case, the Defendant arrived at each meeting at the office voluntarily, he was not under arrest, and he agreed to speak with investigators. The investigators informed the Defendant that he could leave. [Special] Agent Johnson told the Defendant the subject matter of the interview, and, at that time, the Defendant agreed to the conversations and to ride to the scene and perform a re-enactment of the events as he stated occurred. The [D]efendant was not in custody or Mirandized and rode in the front seat of the unmarked vehicle to go to the house.

The trial court found that "there was no behavior by the State's officials such to overbear the [D]efendant's will to resist to bring about confessions or statements that were not freely and voluntarily given."

First Statement

The Defendant argues that, while he willingly went to the TCSO to speak with law enforcement on December 6, 2012, "he was effectively in custody for the remainder of the day." At the suppression hearing, Special Agent Johnson testified that, on December 6, 2012, the Defendant "voluntarily came into the interview room to speak with [her] and Tipton County Sheriff's Office Detective Wassel in reference to what occurred the night prior to Za[y]ne's death and also the incident that caused his death." She stated that the Defendant had not been arrested, was not in custody, and was free to leave at any time. The Defendant informed Special Agent Johnson that he was not under the influence of alcohol or drugs. Special Agent Johnson testified that she did not promise any leniency to the Defendant or threaten or coerce him to make a statement. Her first interview with the Defendant on December 6, 2012 lasted between an hour and an hour and a half. Special Agent Johnson stated that, when she first interviewed the Defendant, she knew that Zayne had been in the Defendant's care before his death, but she was "still gathering information" and had not formed an opinion about Zayne's death or possible suspects.

Detective Wassel stated that the Defendant, Chelsea, Billy, and Donna all traveled from the hospital to TCSO in their own vehicles and stayed in the lobby until they were taken to the jury room. Detective Wassel informed the Defendant, Chelsea, Billy, and Donna that they could leave if they wanted to. She found Zayne's death suspicious and believed it could have been non-accidental. Detective Wassel stated that Chelsea, Billy, and Donna informed her that the Defendant was the last person that saw Zayne alive. Detective Wassel explained that she did not inform the Defendant of his *Miranda* rights during his interview because he was not in custody. Detective Wassel testified that the Defendant did not ask to leave or ask for an attorney on December 6.

Based on the factors that our supreme court set out in *Anderson*, we conclude that the trial court properly denied suppression of the Defendant's first statement. In *State v. Smith*, law enforcement asked to transport the Defendant to police headquarters to speak with him. 868 S.W.2d 561, 570 (Tenn. 1993). Law enforcement did not inform the defendant of his *Miranda* rights because he was not in custody. *Id.* The defendant returned to his residence after he requested to speak with an attorney. *Id.* The Tennessee Supreme Court concluded that the defendant was not in custody when law enforcement interviewed him because "[t]he [d]efendant knew that he was free to go at any time, wanted to cooperate, went willingly with the police, gave a voluntary (and exculpatory) statement, and was allowed to go when he asserted his rights." *Id.* The supreme court also noted that "[t]he interview occurred early in the investigation, shortly after the victims were found, when the police were still asking general questions and sorting out the victims' activities prior to their deaths." *Id.*

Here, the Defendant's first interview with law enforcement occurred in the interview room at the TCSO and lasted between an hour and an hour and a half. Law enforcement did not transport the Defendant to or from the TCSO, and Detective Wassel informed him that he was not in custody. The record reflects that the Defendant remained in the lobby area of the TCSO until he was interviewed; the lobby area was not secured, and the Defendant could have left at any time. Like the investigation in *Smith*, this interview of the Defendant occurred shortly after Zayne's death, and Special Agent Johnson and Detective Wassel interviewed the Defendant to learn "what occurred the night prior to Za[y]ne's death and also the incident that caused his death." We conclude that, based on the totality of the circumstances, a reasonable person in the Defendant's position would have felt free to terminate the interview and leave.

Second Statement

The Defendant argues that his second statement should be suppressed because "[a] reasonable person surrounded by law enforcement officials being transported in that official's vehicle would not think he was free to go." After the Defendant made his first

statement on December 6, 2012, he agreed to go to the Drummonds Road residence that same day and reenact the events leading up to Zayne's injury and death. The Defendant rode in the front passenger seat of Special Agent Johnson's unmarked vehicle and was not handcuffed or in custody. Detective Wassel also rode in Special Agent Johnson's vehicle and other detectives accompanied them in a separate vehicle. The Defendant and law enforcement then returned to the TCSO, and the Defendant gave a second statement in the interview room. Special Agent Johnson asked the Defendant to provide a second statement after the Defendant reenacted the events that led to Zayne's death because she wanted to show the Defendant some photographs and to clarify his initial statement.

In *State v. Lindsey Brooke Lowe*, No. M2014-00472-CCA-R3-CD, 2016 WL 4909455, at *18 (Tenn. Crim. App. July 12, 2016), *perm. app. granted* (Tenn. Jan. 18, 2017), an investigator met the defendant at her workplace, asked to speak with her, and offered to drive her to the police station. The defendant was not handcuffed or frisked and rode in the front passenger seat. *Id.* The interview occurred during normal work hours, and the defendant was left alone at times. *Id.* Additionally, this court noted on appeal that "[a]lthough Detective Malach asked about the possibility that the defendant harmed the babies and although he indicated that trauma would be discovered in the autopsy, he did not question the defendant in an overly accusatory way." *Id.* This court concluded that the defendant was not in custody when law enforcement interviewed her. *Id.*

Similarly, the Defendant in this case agreed to return to his residence to reenact the events that lead to Zayne's death and then agreed to return to the TCSO to make a second statement. Law enforcement transported the Defendant to and from his residence in a patrol car. However, the Defendant was not in handcuffs and rode in the front passenger seat of the patrol car. Additionally, Detective Wassel and Special Agent Johnson's questioning of the Defendant was for investigative purposes and to clarify his initial statement. When the evidence is viewed in the totality of the circumstances, we conclude that a reasonable person in the Defendant's position would have felt free to leave.

Third Statement

The Defendant argues that his third statement should be suppressed because "although he went to the Sheriff's office voluntarily on August 7, 2013, that voluntariness turned to compulsion when the official who called [the Defendant]'s name told him 'you don't have a choice. You need to come talk to me.'" The Defendant also notes that, after he was arrested and informed of his *Miranda* rights on August 8, he declined to make any more statements.

Special Agent Johnson interviewed the Defendant again on August 7, 2013, because she had received the autopsy report on Zayne's death. The Defendant drove himself to the TCSO, did not appear to be under the influence of drugs or alcohol, and was not in custody during the interview. Special Agent Johnson did not threaten the Defendant to give a statement and did not know of anyone else who threatened the Defendant. She stated that the Defendant "started" the interview on August 7 and "wanted to talk about work" and "mentioned he was abused by his stepfathers." The Defendant gave a third written statement during the recorded interview and left. Special Agent Johnson testified that she began to consider the Defendant a suspect in Zayne's homicide on August 8, 2013. She arrested the Defendant and informed him of his *Miranda* rights on August 8, 2013. The Defendant then asked for an attorney and did not give any more statements.

Detective Wassel explained that she interviewed the Defendant on August 7 after Zayne's autopsy report was released "[t]o see if there was a difference in the story, because there were different injuries that were not visible the day of the incident . . . ." She explained that she did not inform the Defendant of his *Miranda* rights on this occasion because he was not in custody and was free to leave.

Ms. Huffman accompanied the Defendant to the TCSO on August 7, 2013. Ms. Huffman sat with the Defendant in the waiting room of the TCSO until a man wearing "black khaki combat-looking pants" and a "polo shirt" called for the Defendant. The Defendant "looked at [Ms. Huffman] and said, ['']I don't want to go.['']" Ms. Huffman testified that the man said "['']You don't have a choice. You need to come talk to me.['']" Ms. Huffman saw the Defendant approximately three hours later after he finished speaking with the TCSO.

In *State v. Mark Tracy Looney*, No. M2014-01168-CCA-R3-CD, 2016 WL 1399344, at *22 (Tenn. Crim. App. Apr. 7, 2016), *perm. app. denied* (Tenn. Aug. 18, 2016), law enforcement interviewed the defendant three times concerning allegations of physical abuse and sexual contact with three minor children. This court noted that the defendant transported himself to the police station each time at law enforcement's request. *Id.* This court also noted that law enforcement did not force the defendant to answer questions, told the Defendant that he was free to leave, and "did not restrain the [d]efendant's freedom of movement during any of the interviews." *Id.* This court concluded that "a reasonable person in the [d]efendant's position would not have considered himself deprived of freedom of movement to a degree associated with a formal arrest." *Id.*

Similarly, the Defendant transported himself to the TCSO on August 7 after he agreed to speak with law enforcement again to discuss the autopsy results. Special Agent

Johnson testified that the Defendant "started" the interview on August 7 and "wanted to talk about work" and "mentioned he was abused by his stepfathers." While Ms. Huffman testified that an alleged employee of the TCSO told the Defendant that he had to give a statement, Special Agent Johnson testified that no one threatened or coerced the Defendant to give a statement. After Special Agent Johnson arrested the Defendant on August 8 and informed him of his *Miranda* rights, he declined to make other statements and requested an attorney. We conclude that a reasonable person in the Defendant's position on August 7 would have felt free to terminate the interview and leave the TCSO at any time. The Defendant is not entitled to relief on this issue.

Admission of extrinsic evidence of prior false statements

The Defendant contends that the trial court erred in admitting extrinsic evidence of his prior false statements about being a Navy SEAL.

Generally, "questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this [c]ourt will not interfere in the absence of abuse appearing on the face of the record." *State v. Plyant*, 263 S.W.3d 854, 870 (Tenn. 2008). A trial court abuses its discretion when it "applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *Id.* (citing *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

Prior to Mr. Stoddard's testimony, the following bench conference occurred:

> [DEFENSE COUNSEL]: I know generally what [Mr. Stoddard is] going to testify to. . . . [T]here w[as] some . . . statement about [the Defendant] telling him that he was like in Special Forces. And if [the State] intended to introduce that, then we would object to that, I guess in a prophylactic movement[.]
>
> [THE STATE]: That's part of the conversation [that] [Mr. Stoddard] had. The proof will be that not only did he say he was in Special Forces, but he told his wife that he was a Navy S[EAL], and at that time he was [not] a Navy S[EAL].
>
> And part of the State's position is, whether or not [the Defendant] testifies or not, that the statements he gave are not necessarily confessions; they're admissions; they're not necessarily the whole truth. And his credibility is at issue, and that someone that lies about something as significant as whether he's Special Forces in combat or that he's a Navy

S[EAL] when he never left the United States, goes to his credibility which we move, whether he testifies or not, is important.

[DEFENSE COUNSEL]: Well, that might be for rebuttal, Your Honor, but if he's going to use it as his case-in-chief, then we would object to that.

. . . .

[DEFENSE COUNSEL]: . . . [I]t's irrelevant. And . . . it's . . . put into character that he's untruthful. But that's not at issue right now.

[TRIAL COURT]: The objection will be overruled for this reason: . . . I'm not in a position to piecemeal what a defendant has said to someone and say part of the statement can come in and part can't on the basis that defense counsel feels part of its truthful and part of its not truthful. That's a decision for the jury to make.

In the following exchange, Mr. Stoddard discussed a previous encounter with the Defendant at Billy's residence:

[MR. STODDARD]: Yes, sir. I was in the back yard, and he come [sic]out in the back yard and almost immediately started talking about him being in the Special Forces in Afghanistan. And I just thought that was unusual for him to be talking about it because most of them people that's in the SEALS or Army Rangers, they don't talk about it. I just thought that was strange.

. . . .

[THE STATE]: Okay. Now, was this conversation you had with, whether you knew him by name or not, [the Defendant], was it relevant to anything? Or did he just lead off –

[MR. STODDARD]: No, sir, he just come [sic] out. He saw me over there, and he come [sic] over there and introduced himself. And like I say, he almost immediately started talking about Special Forces, being in the Special Forces.

The State also brought up the Defendant's statement that he was a Navy SEAL during Chelsea's testimony:

[THE STATE]: Well, let me ask you about the things you thought you knew. Did you know or had you been told by him that he was in the military?

[CHELSEA]: Yes.

[THE STATE]: And what did he say in that regard?

[CHELSEA]: That he was a Navy SEAL.

. . . .

[DEFENSE COUNSEL]: This is just my same objection. I understand the Navy SEAL, but I objected on relevance with Aubrey Stoddard. It appears that now he's trying to get this in as extrinsic evidence of dishonesty or a dishonest act. And I think if you're going to use that for rebuttal, that's fine. But I think it's improper to do it now.

. . . .

[DEFENSE COUNSEL]: And I'm – I'm sorry. And I'm basing that on Rule 608.

[THE STATE]: Your Honor, it has to do with credibility of his statements. We anticipate to get in various statements that [the Defendant] made. The State's position and argument will be that these statements are true only to show that he had interactions which were to the detriment of the baby, but they were untrue as to the details; that is, we're attacking the credibility of his version of events which he characterizes in his statements basically as accidents. So I think a pattern of his lying is important to judge the full truthfulness of statements he gave to law enforcement as to the accidental nature of these events.

[DEFENSE COUNSEL]: And once again I object about using extrinsic evidence, you know, whether he's said or not said that he was a Navy SEAL and he wasn't in fact a Navy SEAL. They're trying to use extrinsic evidence to get that in.

T[RIAL] COURT: Okay. The objection will be overruled.

On appeal, the Defendant argues that Mr. Stoddard's and Chelsea's statements were not admissible under Tennessee Rules of Evidence 608(b) and 404(b). The State argues that, under Tennessee Rule of Evidence 806, "the State was allowed to attack [the] Defendant's credibility as the declarant of his statements to the police, and it did not need to wait for the possibility of his live testimony to do so." In a reply brief, the Defendant responds that the State was allowed to attack his credibility under Tennessee Rule of Evidence 806, but he contends that the trial court should have excluded the statement under Tennessee Rule of Evidence 403 because the prejudice of the statement substantially outweighed its probative value.

"It is elementary that a party may not take one position regarding an issue in the trial court, change his strategy or position in mid-stream, and advocate a different ground or reason in this [c]ourt." *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988) (citing *State v. Van Zant*, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983); *State v. Leaphart*, 673 S.W.2d 870, 873 (Tenn. Crim. App. 1983); *State v. Brock*, 678 S.W.2d 486, 489-90 (Tenn. Crim. App. 1984); *State v. Galloway*, 696 S.W.2d 364, 368 (Tenn. Crim. App. 1985)). Because the Defendant did not argue that the statements were inadmissible under Rule 404(b) or Rule 403 and the State did not argue that the statements were admissible under Rule 806 at trial, we have no ruling from the trial court regarding these rules to review, and we must conclude that these arguments are waived. *See id.*

The Defendant objected to Mr. Stoddard's and Chelsea's testimony under Tennessee Rules of Evidence 401 and 608(b). Tennessee Rule of Evidence 401 states that evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence is generally admissible. *See* Tenn. R. Evid. 402. We conclude that Mr. Stoddard's and Chelsea's statements were relevant because evidence that the Defendant falsely told Mr. Stoddard and Chelsea that he was a Navy SEAL has a tendency to make the existence of the fact that the Defendant included false information in his statements to law enforcement more probable. Whether the Defendant included false information in his statements is an issue of consequence to the determination of whether the Defendant was guilty as charged because it was within the jury's province, as the factfinder, to determine whether the Defendant's statements were credible.

However, we conclude that the statements were not admissible under Tennessee Rule of Evidence 608(b). Rule 608(b) states the following, in pertinent part:

> (b) Specific Instances of Conduct. Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character

for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

> (1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;
>
> (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, . . . and
>
> (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Tenn. R. Evid. 608(b).

Under the plain language of Tennessee Rule of Evidence 608, extrinsic evidence of a witness' character for untruthfulness should be elicited on cross-examination. Here, the Defendant was not a witness at trial, and the Defendant's character for untruthfulness was discussed during Mr. Stoddard's and Chelsea's direct testimony and not on cross-examination. While the trial court held a jury-out hearing prior to Mr. Stoddard's testimony to determine the admissibility of his statement, there is no evidence that the trial court determined that the probative value of the Defendant's untruthful statement

outweighed its unfair prejudicial effect on the substantive issues or that a reasonable factual basis existed for the inquiry into the Defendant's character for untruthfulness. Additionally, it appears from the record that the State did not provide written notice to the Defendant of its intent to impeach the Defendant's character with instances of untruthful conduct. Thus, we conclude that the trial court abused its discretion by admitting Mr. Stoddard's and Chelsea's statements under Tennessee Rule of Evidence 608(b). *See State v. Charles Edward Day*, No. E2016-00632-CCA-R3-CD, 2017 WL 3206605, at *6 (Tenn. Crim. App. July 27, 2017) (concluding that "the evidence of the defendant's cocaine and marijuana use was not properly admitted as impeachment evidence under" Rule 608(b) because the trial court did not find that the probative value outweighed the danger of unfair prejudice and because the State failed to give pretrial written notice), *perm. app. denied* (Tenn. Dec. 6, 2017).

When a trial court errs in admitting evidence, we must determine whether the error was harmless. *See State v. Rodriguez*, 254 S.W.3d 361, 375 (Tenn. 2008) (applying Tennessee Rule of Appellate Procedure 36(b) because "errors in the admission of evidence do not normally take on constitutional dimensions"). "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b). Here, we conclude that the trial court's error in admitting Mr. Stoddard's and Chelsea's testimony of the Defendant's statement that he was a Navy SEAL was harmless. The main issue at trial was whether the Defendant's actions that injured Zayne were accidental or non-accidental. Whether the Defendant had previously been untruthful in his conversations with Mr. Stoddard and Chelsea was only a tangential facet of the case. Additionally, Ms. Huffman discussed the Defendant's service in the U.S. Navy and testified that he told her that he was looking into becoming a Navy SEAL. He is not entitled to relief on this ground.

Sufficiency of the Evidence

Our standard of review for a sufficiency of the evidence challenge is "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*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id.* Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn.

2009)) (internal quotation marks omitted), 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. 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).

Count One - Aggravated Child Neglect

A person commits aggravated child neglect when they commit child neglect and the act of neglect results in serious bodily injury to the child. Tenn. Code Ann. § 39-15-402(a)(1) (2012). A person commits child neglect when they "knowingly abuse[] or neglect[] a child . . . , so as to adversely affect the child's health and welfare[.]" Tenn. Code Ann. § 39-15-401(b) (2012). Tennessee Code Annotated defines "serious bodily injury to the child" as including but not limited to the following: "second- or third-degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by whipping children with objects." Tenn. Code Ann. § 39-15-402(d) (2012). "[B]efore a conviction for child neglect may be sustained, the State must show that the defendant's neglect produced an actual, deleterious effect or harm upon the child's health and welfare." *State v. Mateyko*, 53 S.W.3d 666, 671-72 (Tenn. 2001). This court has previously reversed an aggravated child neglect conviction when the evidence at trial did not establish that "it was the act of neglect, or failure to seek medical treatment, which resulted in serious bodily injury" to the victim. *State v. Denise Wiggins*, No. W2006-01516-CCA-R3-CD, 2007 WL 3254716, at *5 (Tenn. Crim. App. Nov. 2, 2007), *perm. app. denied* (Tenn. Mar. 3, 2008) Aggravated child neglect when the victim is eight years old or younger is a Class A felony. Tenn. Code Ann. § 39-15-402(b) (2012).

Here, the Defendant was charged with neglecting Zayne between November 23, and December 5, 2012. In its closing argument, the State argued that the Defendant "would have been the only one that would have known about [Zayne's injuries], . . . and he did nothing about seeing that the baby got to the doctor." The State also argued that the Defendant committed child neglect by being aware of Zayne's severe case of diarrhea and diaper rash and failing to obtain medical treatment for Zayne.

Dr. Piercey noted that Zayne weighed less at his death than he did at his birth. She also stated that Zayne's "bottom was raw and red [due to] really bad diaper rash. There was a history that he had some diarrhea, which is pretty common with malnutrition." Dr. Ross noted that Zayne had lost weight since his birth and had a severe diaper rash. He testified that Zayne's severe diaper rash was consistent with an infant who had diarrhea since birth and that "severe, prolonged diarrhea can certainly result in dehydration and malnutrition." Dr. Ross also observed that Zayne had excess fat in his liver, which could have been the result of stress, malnutrition, weight loss, or an "underlying disorder[] of metabolism . . . ." We conclude that severe diaper rash and diarrhea do not rise to the level of serious bodily injuries. However, Zayne's severe diaper rash and diarrhea are medical conditions that "adversely affect[ed] [his] health and welfare[.]" Tennessee Code Annotated section 39-15-201(b) (2012). Based on the evidence introduced at trial, we conclude that a rational juror could have found the Defendant guilty beyond a reasonable doubt of child neglect of a child eight years old or younger, a Class E felony. *Id.* Therefore, we reduce the Defendant's aggravated child neglect conviction to child neglect and remand for resentencing on this count.

Counts Two, Three, and Four - Aggravated Child Abuse

A person commits aggravated child abuse when they commit child abuse and "[t]he act of abuse . . . results in serious bodily injury to the child[.]" Tenn. Code Ann. § 39-15-402(a)(1) (2012). An individual commits child abuse when they "knowingly, other than by accidental means, treat[] a child . . . in such a manner as to inflict injury[.]" Tenn. Code Ann. § 39-15-401(a) (2012). As noted above, Tennessee Code Annotated defines "serious bodily injury to the child" as including but not limited to the following: "second- or third-degree burns, a fracture of any bone, a concussion, subdural or subarachnoid bleeding, retinal hemorrhage, cerebral edema, brain contusion, injuries to the skin that involve severe bruising or the likelihood of permanent or protracted disfigurement, including those sustained by whipping children with objects." Tenn. Code Ann. § 39-15-402(d) (2012). Aggravated child abuse when the victim is eight years old or younger is a Class A felony. Tenn. Code Ann. § 39-15-402(b) (2012). Aggravated child abuse is a nature-of-conduct offense. *Dorantes*, 331 S.W.3d at 386 (citing *State v. Hanson*, 279 S.W.3d 265, 276-77 (Tenn. 2009)).

Here, when the evidence is viewed in the light most favorable to the State, a rational juror could have found the Defendant guilty of aggravated child abuse beyond a reasonable doubt. The State alleged that the Defendant abused Zayne, a nineteen-day-old child at the time of his death, on three distinct occasions. In its closing argument, the State argued that, on or around November 23, 2012, the Defendant committed aggravated child abuse by dropping Zayne onto the kitchen floor, which caused serious bodily injuries to Zayne. Additionally, the State argued that, on or around November 28, 2012,

the Defendant committed aggravated child abuse by hitting Zayne's head on a door frame, which caused serious bodily injuries to Zayne. Finally, the State argued that, on or around December 6, 2012, the Defendant committed aggravated child abuse by falling onto Zayne and shaking him, which caused Zayne to suffer broken ribs, brain damage, and hemorrhaging.

In the Defendant's third statement, he admitted that, on November 23, 2012, he was holding Zayne in the kitchen. Zayne "slid" from the Defendant's arm and hit the Defendant's knee, the cabinet, and the floor. The Defendant stated that Zayne "cried very loudly" but "didn't cry very long . . . ." Dr. Ross testified that the lesions on Zayne's temporal lobes could have occurred when the Defendant dropped Zayne in the kitchen on November 23. He also stated that Zayne's left third and fourth ribs were likely broken when Zayne was ten to fourteen days old. Dr. Cook concluded that Zayne's older rib fractures occurred at some point between Zayne's birth and when he was nine or ten days old. The jury could have inferred that Zayne's left third and fourth ribs were broken and he incurred damage to his temporal lobes during the November 23 incident.

The Defendant also admitted that, on November 28, 2012, he held Zayne "in [his] left arm in a side cradle position" and "walk[ed] out of the bedroom door [when] Chelsea called [him]." The Defendant "turned around and hit [Zayne's] head on the door frame." Zayne "cried badly" after this incident, and Chelsea and the Defendant noticed that Zayne's forehead was bruised the next day. Zayne did not bruise right away. Dr. Cook concluded that Zayne's bleeding under his scalp and in his brain occurred when he was seven to ten days old. The jury could have inferred that this injury occurred during the November 28th incident.

The Defendant also admitted that, in the early morning of December 6th, he tripped or fell off of the couch and landed on top of Zayne. The Defendant then "shook [Zayne] towards [his] body and away from [his] body eight to ten times." The medical experts agreed that Zayne suffered the following acute injuries on December 6, 2012: bleeding in deep tissue in lower back neck, bleeding in epidural tissue of spinal cord, broken left first rib and right first through fourth ribs, bruising on the forehead, bruising on the back of the neck. It was the jury's prerogative to find that the Defendant knowingly treated Zayne in a manner that caused these injuries. It was also within the purview of the jury to credit the testimony of Dr. Cook and Dr. Piercey that Zayne's injuries were not accidental in nature. The evidence introduced at trial was sufficient for a rational juror to have found the Defendant guilty beyond a reasonable doubt of three counts of aggravated child abuse.

Count Five - Felony Murder

The Defendant asserts that the evidence was insufficient for a rational juror to find him guilty of felony murder beyond a reasonable doubt because "two medical examiners testified that they simply could not determine the manner of death even when presented with [the Defendant]'s statements and the medical records of Zayne DeMeza." He also points out that "the State presented no testimony that [the Defendant] treated [Zayne] in any manner other than that of a caring father." The State contends that "[t]he evidence that [the] Defendant neglected, abused, and killed [Zayne] was overwhelming."

As relevant here, first degree felony murder is the "killing of another committed in the perpetration of or attempt to perpetrate any . . . aggravated child abuse[.]" Tenn. Code Ann. § 39-13-202(a)(2) (2012). A conviction for felony murder requires no culpable mental state "except the intent to commit the enumerated offenses." Tenn. Code Ann. § 39-13-202(b) (2012).

> The felony murder rule applies when the killing is done in pursuance of the unlawful act, and not collateral to it. The killing must have had an intimate relation and close connection with the felony . . . and not be separate, distinct, and independent from it. The killing may precede, coincide with, or follow the felony and still be considered as occurring in the perpetration of the felony offense, so long as there is a connection in time, place, and continuity of action.

State v. Rice, 184 S.W.3d 646, 663 (Tenn. 2006) (internal citations and quotation marks omitted). The intent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim, and whether such intent existed is a question of fact to be decided by the jury. *State v. Buggs*, 995 S.W.2d 102, 107 (Tenn. 1999). "[A] jury may reasonably infer from a defendant's actions immediately after a killing that the defendant had the intent to commit the felony prior to, or concurrent with, the killing." *Id.* at 108.

When we view the evidence in the light most favorable to the State, we conclude that a rational juror could have found the Defendant guilty of felony murder committed in the perpetration of or attempted perpetration of aggravated child abuse beyond a reasonable doubt. We have previously discussed the Defendant's aggravated child abuse convictions and held that the evidence was sufficient for a rational juror to find the Defendant guilty of three counts of aggravated child abuse beyond a reasonable doubt. The evidence at trial also established that Zayne died on December 6, 2012. The Defendant is not entitled to relief on this ground.

Merger of the aggravated child abuse counts

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, states, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, the Tennessee Constitution guarantees "[t]hat no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Cost. art. I, § 10. Both clauses provide three distinct protections: "(1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense." *State v. Watkins*, 362 S.W.3d 530, 541 (Tenn. 2012).

With respect to the third category, the double jeopardy prohibition operates to prevent prosecutors and courts from imposing punishment that exceeds that authorized by the legislature. *Id.* at 542. Such single prosecution, multiple punishment claims ordinarily fall into one of two categories: (1) "unit-of-prosecution" or (2) "multiple description" claims. *Id.* at 543. Multiple description claims arise in cases where the defendant had been convicted of multiple criminal offenses under different statutes but alleges that the statutes punish the same offense. *Id.* at 544. We conclude that the merger of the Defendant's aggravated child abuse convictions into his aggravated child neglect convictions presents a multiple description claim because child abuse and child neglect are separate offenses. *See State v. Dorantes*, 331 S.W.3d 370, 385 n.15 (Tenn. 2011) (The 1998 amendment to Tenn. Code Ann. § 39-15-402 established aggravated child abuse and aggravated child neglect as separate offenses).

When reviewing multiple description cases, courts must determine whether the defendant committed two offenses or only one. *Id.* at 544. To do so, courts apply the test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932). *Blockburger*, 284 U.S. at 304; *Watkins*, 362 S.W.3d at 544. Under *Blockburger*, if each offense includes an element that the other does not, then double jeopardy does not prohibit prosecution of both offenses even if there is "a substantial overlap in the proof offered to establish the crimes." *Watkins*, 362 S.W.3d at 544 (quoting *Ianneli v. United States*, 420 U.S. 770, 775 (1975)) (internal quotation marks omitted); *see also Blockburger*, 284 U.S. at 304. A *Blockburger* analysis requires two steps: (1) determine whether the statutory violations arose "from the same act or transaction" and (2) if they did arise from the same act or transaction, determine whether the offenses for which the Defendant was convicted constitute the same offense by comparing the elements of the offenses for which the defendant was convicted. *Watkins*, 362 S.W.3d at 545. If each offense contains an element that the other does not, the statutes are treated as distinct and courts presumed that the legislature intended that the offenses be punished separately. *Id.* at 545-46.

In the case sub judice, we conclude that the trial court improperly merged the Defendant's three aggravated child abuse convictions into his aggravated child neglect convictions. The State's theories for the aggravated child abuse counts were based on ***three distinct episodes of abuse***: the Defendant's dropping of Zayne on November 23, 2012, the Defendant's hitting of Zayne's head on a door frame on November 28, 2012, and the Defendant's actions of falling on Zayne and shaking him on December 6, 2012. The State's theory for the aggravated child neglect count was based on the Defendant's ***failure to obtain medical care*** for Zayne after the first two episodes of child abuse and for Zayne's sever diaper rash, diarrhea, and malnutrition. Thus, under the test set out by the United State Supreme Court in *Blockburger*, the Defendant's statutory violations did not arise from the same act and merger was improper. Because the trial court did not sentence the Defendant for his three aggravated child abuse convictions, we remand the case for sentencing on the Defendant's three aggravated child abuse convictions.

III. Conclusion

Based on the aforementioned reasons, we affirm the Defendant's convictions for felony murder and three counts of aggravated child abuse. We also conclude that the trial court erred in merging the three aggravated child abuse convictions into the aggravated child neglect conviction. Because the evidence at trial was insufficient for a rational juror to have found the Defendant guilty of aggravated child neglect beyond a reasonable doubt but was sufficient for a finding of guilt of child neglect, we reduce the Defendant's aggravated child neglect conviction to child neglect and remand for sentencing on the Defendant's three aggravated child abuse convictions and child neglect conviction.

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ROBERT L. HOLLOWAY, JR., JUDGE