IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE, Appellant, v. TIMOTHY GUILFOY, Appellee.	)	DAVIDSON COUNTY No. M2012-00600-CCA-R3-CD

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE DAVIDSON COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

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STATEMENT OF THE CASE

On 22 June 2009, the Davidson County Grand Jury returned a true bill of indictment against the defendant, charging him with nine counts of aggravated sexual battery involving three different children (three counts on J.A.; two counts on T.A.; and four counts on A.A.) in Counts One through Nine in violation of Tenn. Code Ann. § 39-13-504; and four counts of rape of the child A.A. in Counts Ten through Thirteen in violation of Tenn. Code Ann. § 39-13-522. (TR1, pp. 1-14.)[1] On 12 August 2009, the defendant was arraigned and entered pleas of "not guilty" to all the counts of the indictment. (TR1, p. 15.)

On 8 March 2011, a superseding indictment was filed, charging the defendant with five counts of aggravated sexual battery on two children (four counts on J.A.; and one count on T.A.) in Counts One through Five; and three counts of rape of the child T.A. in Counts Six through Eight. (TR1, pp. 38-46.) The defendant was arraigned on the new charges on 30 March 2011. (TR1, p. 49.)

On 30 March 2011, the State entered a *nolle prosequi* on Count Five of the indictment, charging aggravated sexual battery of T.A. (TR1, p. 50; TR3, p. 260.)

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[1]The record on appeal consists of a three-volume technical record, referred to herein at "TR1" through "TR3," three volumes of trial transcript, referred to as "Trial I" through "Trial III," and transcripts of the opening and closing statements, referred to "Opening," and "Closing." Exhibits from the various proceedings are also included in the record. Trial exhibits are referred to as they were marked at trial, "Trial Ex. __." The appellant will be referred to as "the defendant" and the appellee will be referred to as "the State." The defendant's brief will be referred to as "Def. Brief."

The trial of this case was conducted 24-28 October 2011. (TR3, pp. 255-26, 259, 261-62.) The defendant was found guilty of aggravated sexual battery as charged in Counts One, Two and Three; guilty of assault as a lesser-included offense of aggravated sexual battery in Count Four; guilty of child rape as charged in Counts Six and Seven; and guilty of aggravated sexual battery as a lesser-included offense of child rape in Count Eight. (TR3, p. 262.)

On 13 January 2012, the defendant was sentenced to ten years for each conviction of aggravated sexual battery in Counts One, Two and Three, and Eight; six months for assault in Count Four; and twenty years for each conviction of child rape in Counts Six and Seven. The sentences in Counts One, Two, Three, Six and Seven were ordered to be served consecutively for a total effective sentence of seventy years. (TR3, pp. 266-69, 271-73.)

On 31 January 2012, the defendant filed a motion for judgment of acquittal and a motion for new trial. (TR3, pp. 276-80.) He filed a supplement to the motion for new trial on 7 March 2012. (TR3, pp. 281-313.) He filed a second supplement to the motion for new trial on 9 March 2012. (TR3, pp. 314-16.) An order denying the motion was entered on 13 March 2012. (TR3, p. 318.)

Notice of appeal was filed on 20 March 2012. (TR3, pp. 319-20.)

STATEMENT OF THE FACTS

J.A., eleven years old at the time of trial, was born on 22 May 2000. She is the youngest of three sisters who, with their mother, lived in an apartment with their grandfather when they first moved to Nashville several years earlier. The defendant was their next door neighbor. (Trial I, pp. 6-8.) Later, her grandfather bought a small house for them all to live in and they moved out of the apartment. Her grandfather lived in the basement and at times, her mother stayed in the attic. On the main floor, J.A. and her sisters used the dining room as a bedroom for a time. They had a bunk bed and a regular bed that they slept in. J.A., being the smallest, slept in the top bunk. (Trial I, pp. 9-16.)

After the family moved into the house, the defendant sometimes spent the night there, and sometimes slept on the top bunk with J.A. (Trial I, p. 16.) J.A. testified of a time when she was laying in bed at night and was halfway asleep. The defendant "hung out" with J.A.'s mother for awhile, then he came and got in the bed and touched her "private" "on the skin." (Trial I, pp. 17-18.) J.A. testified that the defendant put his hand down the front of her pants and moved it on the outside of her private. She got up and went to the bathroom, then went to sleep with her sister. (Trial I, pp. 20-21.)

J.A. testified that this "happened some other times, too." (Trial I, p. 22.) She spoke of a time when the defendant was in her bed and again put his hand in the front

Sometime later, J.A. and her sisters and mother moved out of her grandfather's house to Clarksville, where they lived in a house owned by the defendant. During a later visit to Nashville, her grandfather took J.A. and her friend to McDonald's. It was there that she told her grandfather about what the defendant had done. Although the grandfather told her to tell her mother, several days passed and she still didn't tell her, because she was afraid her mother wouldn't believe her. (Trial I, pp. 33-36.) Later, the grandfather told her mother about what J.A. had said, but "he didn't say the name, I told her." J.A. testified:

> Me and [T.A.] were going to go to school. And she—I guess [my grandfather] called. And she came outside and asked me and [T.A.] what happened.
>
> And [T.A.]—and we didn't want to tell her, but then I ended up telling her.

(Trial I, p. 37.)

J.A. explained that she and her sister were waiting for the school bus near their home when their mother asked them what happened. Their mother started crying and called her boyfriend. The girls went on to school and their mother came and took them out a short time later. They went home and their mother called the police. (Trial I, pp. 38-39, 114-16.) Each of the girls spoke with Anne Fisher and told her about what the defendant had done. The interviews were recorded and each of the girls watched her interview before trial and marked the video tape of her interview. (Trial I, pp. 40-41, 116-18.)

was either on the futon or the bunk bed. I'm not too sure. He had climbed in the bed, and I was already laying down. And he rolled me over and put his hand down my pants." T.A. testified that the defendant touched her "on my skin, my private part" with his finger. "He did it like—just like pull the pants because it was stretchy, the waistband was elastic." (Trial I, pp. 99-100.) When he touched her private, "his finger went inside [her] private part." (Trial I, p. 101.) When it ended, T.A. left and went to sleep in her older sister's bed. (Trial I, p. 102.)

On another occasion, T.A. was lying on her bunk bed and the defendant came in and started touching her. "And I tried to get up, but his hand just went over me and like held me so I couldn't get up. . . . He just started doing it again. And I just started crying." He was touching her private part on the skin with his finger. (Trial I, p. 103.) He put his hand down her pants through the waist band. (Trial I, p. 104.)

There was a time when the defendant touched her when T.A. felt sick. She got up and said she had to go to the bathroom, then stayed away from the defendant. On that occasion, the defendant touched her on the inside of her private part with his finger. (Trial I, pp. 104-05.)

At some point, T.A. started wearing her khaki uniform pants to bed because instead of an elastic band around the waist, they were buttoned and zipped up. T.A. did not want the abuse to happen again. (Trial I, p. 106.)

of her pants and touched her private on the skin while her sisters slept in their beds. On this occasion, she got up and got in bed with her sister, A.A. (Trial I, pp. 23-25.)

On another occasion, J.A. was sitting on the defendant's lap on the couch and "[h]e put his hand like in the back, and then like went to the front. . . . Like in the back of my pants. . . . And then he went to the front, like under my legs." (Trial I, p. 25.) He touched her on the skin, on the outside of her "private." (Trial I, p. 27.)

T.A. was twelve years old at the time of trial, born on 26 February 1999. She used to live in Nashville and moved there when she was five years old. She lived with her mother, her two sisters, and her grandfather. At the time of trial, T.A.'s sister, J.A., was eleven years old and A.A. was fourteen. (Trial I, pp. 88-89.)

When they first moved to Nashville, T.A. and her family lived in her grandfather's apartment. The defendant lived in the apartment next door with a roommate. Later, they moved with their grandfather to a house on Saturn Drive in Nashville. (Trial I, pp. 90-92.) At one time, they had a bunk bed and a queen bed in the dining room. T.A. slept on the bottom bunk, J.A. slept on the top bunk, and A.A. slept on the queen. There was also a futon in the family room where T.A. slept at times. (Trial I, pp. 93-95.) During the time that they lived in the house on Saturn Drive, the defendant slept there "maybe three times." (Trial I, p. 96.) When he stayed the night, he slept in the family room or in the dining room with the girls. (Trial I, pp. 98-99.) T.A. testified about one specific time when the defendant was visiting overnight: "I was about to go to bed. It

The girls' mother, **Jennifer Astle**, testified that in 2005, she and her three daughters left Indiana and moved to the Biltmore Apartments in Nashville and shared a two-bedroom apartment with Mrs. Astle's father. "It was pretty crunched." (Trial II, pp. 172-74.) About a year later, Mrs. Astle's father bought a house at 1243 Saturn Drive, about a quarter mile down the street and everyone moved into it. (Trial II, p 175.)

While living at the Biltmore Apartments, Mrs. Astle came to know the defendant, who lived next door with a roommate. (Trial II, pp. 176-77.) Mrs. Astle's daughters, particularly J.A. and T.A., got close to the defendant, visiting his apartment where he had a small music studio. (Trial II, p. 178.) Mrs. Astle and the defendant were "[n]ever anything but friends." (Trial II, p. 181.)

After moving to the house on Saturn Drive, Mrs. Astle kept in touch with the defendant. On occasion she cooked or shared meals with him. (Trial II, p. 182.) The girls liked the defendant.

> They would be excited when they knew he was coming. Asked where he was. Types of things like that.
>
> If I told them he was planning on coming or even when he left town and was coming from out of town for a while there, they were excited that he was coming. He brought them gifts.

(Trial II, p. 183.)

A few months after Mrs. Astle and her daughters moved to the Saturn Drive house, the defendant moved home to Missouri. They stayed in touch through telephone calls and e-mails. (Trial II, p. 185.)

The defendant came to Nashville on occasion with his work. Mrs. Astle explained:

> First he was doing a marketing tour for the Shell Gas Company, where he would drive around and do events for Shell. And then it switched over to the BP marketing company, or Ignition, or whatever, for a different company, but the same kind of business.

(Trial II, p. 199.) He did events, such as the Country Music Awards Festival. He would set up a tent, give out information about BP gas, and try to sign people up for credit cards. "He would come and have other people that were previously hired. And if he could use an extra person to work, or help me out with money, he would call and say, do you want to work this event." (Trial II, p. 200.) When the defendant came in for such events, he stayed at the house with Mrs. Astle's family. (Trial II, p. 201) Mrs. Astle and her daughters liked having him at their home on these occasions. There was always a place for the defendant to sleep, but Mrs. Astle did not anticipate him sleeping with her daughters. However, she knew that he was sleeping with them because she would "[w]ake up in the morning, and he would be already in the bed," sometimes in one bed and sometimes in another. (Trial II, p. 202.) Over the course of a couple years, on multiple occasions, she find him "[i]n each one of those. Top. Bottom. Futon. Probably the pull-out couch too." (Trial II, p. 203.) On one or two occasions, the

In the course of the investigation, Mrs. Astle, under the direction of law enforcement, had four telephone conversations with the defendant, which were recorded with Mrs. Astle's consent. (Trial II, pp. 226-28; Trial Ex. 15-18.) Mrs. Astle admitted that during those conversations, she told the defendant some untruths. She told the defendant that she had not called the police and that she wasn't going to call the police. After police became involved and Mrs. Astle made the telephone calls to the defendant, she moved out of the Clarksville house about a month later. (Trial II, pp. 229-30.)

Chris Gilmore was working as a patrol officer for the Clarksville Police Department when he received a call on 18 March 2009 to take a report from Mrs. Astle. (Trial II, pp. 259-61.) Officer Gilmore explained that as an ordinary patrol officer, he did not make inquiries of the children or further investigate the claims of sexual abuse. He simply took a report and forwarded it for action by the Child Protective Investigation Team (CPIT). (Trial II, pp. 263-66.)

Detective **Ginger Fleischer** of the Clarksville City Police Department was contacted by Officer Gilmore to advise her of the situation with the Astle children. (Trial II, pp. 268-70.) She testified:

> I was notified when Officer Gilmore was actually at the scene. He contacted me to let me know the situation that had been presented to him and basically to get my okay to—he was going to do a report and call it in to DCS. And then we would take it from there.

(Trial II, p. 272.)

defendant stayed at a hotel when he came to town and Mrs. Astle's daughters went swimming with him one time. (Trial II, pp. 204-05.)

There came a time when Mrs. Astle's family moved to Clarksville. (Trial II, p. 206.) Mrs. Astle explained:

> Around the—about the same time he had been—I had been wanting to get out of my dad's, and out of that particular area and school that the girls were. Had two out of elementary.
>
> . . .
>
> I had a couple of friends that lived in Clarksville, and we visited often. And I talked to them about the schools and, you know, just the neighborhoods and everything. And I thought about moving there.
>
> I talked to [the defendant] multiple times about getting out of Nashville. And at some point during that time, he had talked about investing in a home. Never really had a particular place that he wanted to invest in this home. And he considered investing in Clarksville.

(Trial II, p. 207.)

Mrs. Astle was present when the defendant closed on a house in Clarksville, although she "was not involved in any of it" and had no financial stake in the house. She lived in the house and took responsibility for the general upkeep of the home. Rent was "about seven hundred a month" and the defendant assured her that she "wouldn't ever have to worry about just being kicked out of the house." (Trial II, pp. 208-09.) There was an understanding that the defendant would be welcome to spend the night in the house when he came to town, and "[h]e was aware that [Mrs. Astle] might not always be able to come up with seven hundred dollars. . . . I made the move because I

was told that even if I had a hard time, I wouldn't be kicked out of my house with my kids." (Trial II, p. 209.)

Mrs. Astle testified about how she learned about the abuse of her daughters:

> I found out in the morning. It was a school day. The girls were getting ready for school. They went to school.
>
> My dad had been calling, probably three days in a row, every morning.
>
> The first two days, I don't guess I thought anything of it. But by the third day, I thought something was kind of weird. He had called every morning for about three days.
>
> . . .
>
> Encouraging my daughters to come to me.
>
> . . .
>
> They got off the phone with my dad. And I yelled, it's time to get off the phone; time to get on the bus.
>
> They got on the bus. About as soon as they got on the bus, he was calling back.
>
> They were scared to tell me. And he was trying to give them an opportunity to tell me because [J.A.] had told him what happened.
>
> After about three days of trying to get them to tell me and they didn't, he finally called and said, I have to tell you.

(Trial II, pp. 218-20.)

Mrs. Astle removed her three daughters from school, then called police and made a report. (Trial II, pp. 220-21.) The girls were interviewed and physically examined. (Trial II, pp. 223-24.)

In the course of the investigation, Detective Fleischer worked with Detective Fleming in Davidson County to arrange a controlled telephone call between Mrs. Astle and the defendant. (Trial II, p. 277.) Detective Fleischer explained the process and purpose of a controlled telephone call:

> A controlled phone call is basically one party is aware that the line is being recorded. We use a device that will stick in our ear, where it will record both parts of the conversation.
>
> It's basically used to get the perpetrator's side of the story, to see if he will admit to it; see if he will make admissions about it; basically to see what he will actually say about it; see if we can get any of the elements of crime—for what you charge, you have certain elements you have to meet—to see if he will basically admit to any of the elements leading up to that crime.
>
> And also, to corroborate the children's story. If they say they're in a certain place, the perpetrator may put themselves in a certain place and make admissions about their crime.

(Trial II, pp. 277-78.)

The first controlled telephone call took place "[t]he day after the forensic interviews on the 24th" of March, 2009. (Trial II, pp. 280-81.) Before the call, Detective Fleischer gave Mrs. Astle some basic guidance:

> Her and I sat down for a little bit before the phone call. And I basically explained to her what I needed him to make admissions about or attempt to admit, to kind of gear the questions toward that, because we have to have certain elements of the crime be met. So we did talk about that.
>
> Basically, she knew better than I did whatever it was going to get to get him to talk to—you know, free phrase questions with him and things of that nature.

(Trial II, p. 282.)

Detective Fleischer explained why there were three telephone calls on 24 March 2009:

> The first phone call, a phone died, and so that went into the second phone call after the phone—I believe it was her home phone that had died.
>
> We went into the second call with it. At the end of the second call, there was no progress being made. Jennifer was extremely upset, as anxiety. She was nervous. She was shaking. We needed to take a break and basically regroup.
>
> So she had gotten off the phone with him. And then I believe about ten minutes later, another phone call was made, once she got calmed down. And basically we regrouped and kind of got back on the direction we needed to go.

(Trial II, pp. 282-83.)

A compact disk containing a recording of the first telephone call of 24 March 2009, along with a transcript of the call, was admitted into evidence. (Trial II, p. 285; Trial Ex. 15A and 15B.)

During the first telephone call of 24 March 2009, Mrs. Astle confronted the defendant with her daughters' claims and the defendant, showing apparent concern for the girls, asserted that "something happened." But at the same time, he denied any knowing misconduct. (Trial Ex. 15A at 20:50- 22:05; Trial Ex. 15B, p. 22.) He strongly claimed, "I don't re—I don't—I, I, I, ah, I've never ever done a—anything on, on purpose, I know that, I know that, dear God, no, a—and if, God damn . . ." (Trial Ex. 15A at 26:55-27:15; Trial Ex. 15B, p. 26.) Throughout the conversation, he continued to proclaim his innocence, while acknowledging that the girls should be believed.

> And, I, I, I, I, I—if there was anything done, which I'm sure, ah, this is—Jesus Christ—I'm sure at this point there was, that, I mean, and it adds up, it adds up because in the— . . . Because it all does add up. . . . I'm telling you the truth. I'm not, the, the, I—I didn't, I never did anything on purpose, I never looked to hurt those girls ever—I never, ever . . .

(Trial Ex. 15A at 28:40-29:13; Trial Ex. 15B, pp. 28-29.) When Mrs. Astle insisted that her daughters would not lie, that she knew something happened, the defendant insisted in return that "I would be lying if I said that I remember doing anything. I would be, I'd be lying." (Trial Ex. 15A at 31:25-31:32; Trial Ex. 15B, p. 31.) The defendant told Mrs. Astle to tell her daughters whatever was necessary to help them deal with their abuse:

> If you, if you, then you need to tell them whatever you need to tell, if you need to tell them that I re—that I, I, I'm—so sorry for anything I did, and it will, and I will never ever do anything ever again, anywhere close to anything like they, they were doing, she—you need to tell them whatever, that's fine, but, between you and me, if you're asking me to be hon—I mean, I, I don't—

(Trial Ex. 15A at 38:44-39:09; Trial Ex. 15B, p. 38.) He offered to take responsibility, but still maintained his innocence:

> If it happened, it happened in my sleep, and I don't remember it, and I can't tell you that I remember it, because I don't. I'm sorry. I'm—I'm so—I'm so—and you know what? And, I'm not even trying to get, if, if something needs to happen, I, for whatever responsibility I have, I will, I will, it's—me, it's, it's, I will take the responsibility. I will, I—if, if, if, if I am liable, because I was, even though I was asleep—

Trial Ex. 15A at 46:42-47:15; Trial Ex. 15B, p. 45.) The defendant accepted the girls' claims as true: "Sure—yes, yeah, if they, yes, if they say so, then it happened. . . . I've known them to exaggerate, but I've never known them to lie, on huge things like that."

(Trial Ex. 15A at 53:22-53:35; Trial Ex. 15B, p. 50.) When Mrs. Astle asked specifically, "Did your hand ever go in their pants?" the defendant again denied any knowing wrongdoing, while still accrediting the veracity of the children: "No, I, if they say it did, it did. On purpose, I don't remember ever waking up with . . . my hand, with my hand down . . ." (Trial Ex. 15A at 58:10-58:26; Trial Ex. 15B, p. 55.) The defendant persistently resisted admitting any knowing misconduct: "Even if, if I tell you that I remember something, it's gonna be a lie, even if I tell you I remember something, even if I tell you I woke up, and my hand was down one of their pants." (Trial Ex. 15A at 1:02:15-1:02:30; Trial Ex. 15B, pp. 57-58.) The defendant continued to maintain that he was being honest, but resisted taking responsibility for touching the girls: "You can ask, you can ask me anything you want, and I will answer completely fucking honestly. Staying out of trouble is not my concern now. If I deserve to fucking go to jail, I should go to jail. Holy shit. . . . If I still did something, even if I was asleep, that's still my fault. I don't give a shit if I was asleep or not." (Trial Ex. 15A at 1:08:00-1:08:30; Trial Ex. 15B, p. 61.)

After the connection was lost in the first call, Mrs. Astle called the defendant again and their conversation continued. In spite of the defendant's denials of any memory, Mrs. Astle insisted, "I know you weren't sleeping when this happened. I know you have some kind of recollection." The defendant responded, "God, if I wasn't—if I wasn't sleeping, then I've—then I've—I, I have some sort of a problem." When Mrs.

Astle asked if the defendant was attracted to young girls, he vehemently denied any attraction to young girls, to teenage girls, and even claimed, "I don't even necessarily really like kids that much." (Trial Ex. 16A at 1:10-2:16; Trial Ex. 16B, pp. 1-2.) Throughout this call, the defendant continued to deny any memory while professing his belief that the girls were truthful. Meanwhile, Mrs. Astle maintained that the defendant was not being truthful, that he must remember something. At the end of the call, Mrs. Astle said, "Me trying to be nice and help you is not working. I'm done. You want to call me back in ten minutes and think about this, that's fine. If not, I'm going to do what I need to do. You understand me?" (Trial Ex. 16A at 11:58-12:12; Trial Ex. 16B, pp. 1-2.)

Later the same day, another conversation took place and the defendant told Mrs. Astle of something that happened with T.A.:

> Okay, okay, okay, okay, this is the one thing, the only fucking thing, the only time, and what I'm scared about, I'm scared that you're going to take something one time and go to sleep tonight and wake up tomorrow and say, oh, well, if it's one time, it must have been every time, because I—I swear, I'm not lying to you about the fact that I don't remember doing anything except one time. That's it. And—and the reason I didn't want to bring it up is because it sounds like I'm blaming someone else.
>
> . . .
>
> But it happened.
>
> . . .
>
> It happened, and I'm not going to say it's not my fault, it's just, I woke up. I woke up and I was—I was in my—I was in my shorts, whatever. I just sleep in my shorts all the time, and [T.A.] was on top of me.
>
> . . .

> And, I kind of pushed her off, not violently, kind of like understanding, pushed her off. And, and, and I pushed her off as soon as I figured out what was going on, I did. I'm not—I mean, I was just fucking terrified. And you know what? I did go back to sleep. I went back to sleep so I wouldn't have to fucking deal with it, and I—the next morning I was going to say something to you, but you weren't there and I would have had to call you and—I tried to, I tried—I tried to talk to [T.A.] about it.
>
> . . .
>
> And—and I—I—I hate—I hate—the reason I didn't—the two reasons I didn't want to bring it up is, number one, because I—I'm completely fucking honest with you and especially the other girls, if anything happened, I do not remember, I do not remember, other than—other than—other than [J.A.] hitting me, and [T.A.] waking up and puking one time, and, and, and, I know, and somebody who, you know, starts breaking up and saying oh, their story is not what they—what they said it was earlier. And the other reason is that I—I was—I woke up when she was on top of me. I assumed—I didn't even think that like, it was—she was—she was—she was awake, she was not asleep. If I was asleep before I woke up, then she was on top of me. She crawled up there.

(Trial Ex. 17A at 10:05-13:51; Trial Ex. 17B, pp. 5-6.)

On the next day, 25 March 2009, Mrs. Astle called the defendant again, and continued to confront him and seek the defendant's admission that he touched the girls. During that conversation, the defendant again maintained that he had no memory of committing the abuse:

> I—I don't know anything more than what you've told me. I don't. I really, really don't. And that's not to get myself out of it. That's to say that I understand what you're saying. I understand that honest is the only thing now that can save anybody, me, you, your kids, Brian. And I—you know, I don't know where everything's going to end up, and if my life is ruined, that's one—that's one thing, but I can't—I can't make something up. I can't. And I'm not saying that—I'm not saying that they're lying to you. I'm not. And I'm not saying that they're exaggerating. I'm not. I'm

> saying that—that—I—that—that—in my position, I mean, imagine, I know, this is—this is fucked, I know, but imagine that you had contact with someone else's kids and they—and an adult came to you and said they—they—they say that—that you acted a certain way or you had done something.

(Trial Ex. 18A at 13:52-15:25; Trial Ex. 18B, p. 10.) Mrs. Astle persisted in her demand that the defendant tell her what happened. She insisted that the defendant touched her daughters and she wanted to hear the defendant admit it—that he remembered and that he did it knowingly. She demanded, "Well, until you tell me what I want to hear, I don't want to talk to you." The defendant responded, "But what you want to hear, I don't—is not honest. I—I just—it's not, I don't have—" (Trial Ex. 18A at 21:25-21:36; Trial Ex. 18B, p. 15.) Mrs. Astle asked the defendant straight forwardly, "But did you touch her, Tim? Did you touch her when we were in Nashville like she said?" (Referring to her daughter, J.A.) The defendant responded,

> The closest I can think of anything happening is those kids cuddling up to me and me with my arm around them. I don't—I don't—I—I—I don't—I never woke up with my hand down their—my hand down their pants. I never woke up with them—I would, I would, God, I would have had to waken up, if it was something—if it was something that—I don't, I can't imagine just putting my—if—if it happened, it was definitely an accident.

(Trial Ex. 18A at 22:03-22:58; Trial Ex. 18B, pp. 15-16.) Later, she asked him again,

> Mrs. Astle: I'm asking if you touched my fucking daughter in Nashville. I'm not asking you are you attracted to children or anything.
>
> The defendant: "Did I wake up and touch them? No.
>
> Mrs. Astle: Did you touch them while you thought you were sleeping?

The defendant: If I did, I don't remember.

(Trial Ex. 18A at 32:53-33:10; Trial Ex. 18B, p. 24.)

ARGUMENT

I. THE STATE'S ELECTION OF OFFENSES WAS ADEQUATE TO ENSURE THE UNANIMITY OF THE JURY'S VERDICT IN COUNTS ONE, TWO, SIX, SEVEN AND EIGHT.

The defendant argues that his right to a unanimous jury verdict was violated by the inadequate election of offenses provided by the State. (Def. Brief, pp. 24-38.)

When evidence is presented of multiple offenses that would fit the allegations of the charge, the trial court must require the State to elect the particular offense for which a conviction is sought and must instruct the jury as to the need for jury unanimity regarding the finding of the particular offense elected. *See, e.g ., State v. Brown,* 762 S.W.2d 135, 137 (Tenn. 1998); *State v. Walton,* 958 S.W.2d 724, 727 (Tenn. 1997); *State v. Shelton,* 851 S.W.2d 134, 136 (Tenn. 1993); *Burlison v. State,* 501 S.W.2d 801, 804 (Tenn. 1973).

> This election requirement serves several purposes. First, it ensures that a defendant is able to prepare for and make a defense for a specific charge. Second, election protects a defendant against double jeopardy by prohibiting retrial on the same specific charge. Third, it enables the trial court and the appellate courts to review the legal sufficiency of the evidence. The most important reason for the election requirement, however, is that it ensures that the jurors deliberate over and render a verdict on the same offense.

State v. Adams, 24 S.W.3d 289, 294 (Tenn. 2000). The requirements of election and a jury unanimity instruction exist even though the defendant has not requested them. *See Burlison,* 501 S.W.2d at 804. Failure to follow the procedures is considered to be of constitutional magnitude and will result in reversal of the conviction absent the error

being harmless beyond a reasonable doubt. *See Adams,* 24 S.W.3d at 294; *see, e.g., Shelton,* 851 S.W.2d at 138.

In Counts One through Four, the defendant was charged with the aggravated sexual battery of J.A. "on a date between October 1, 2005 and September 30, 2008, in Davidson County, Tennessee[.]" (TR1, pp. 39-42.) The State elected the offenses as follows:

> Count One: The defendant touched [J.A.] on the outside of her genitals on the skin, when he put his hand down the front of her sleeping pants. The incident occurred on the top bunk of the bunk beds in the dining room, and the incident concluded when [J.A.] got up and went to the bathroom.
>
> Count Two: The defendant touched J.A. on the outside of her genitals, on the skin, when he put his hand down the front of her sleeping pants. The incident occurred on the top bunk of the bunk beds in the dining room, and the incident concluded when [J.A.] got up and moved to her sister's bed.
>
> Count Three: The defendant touched [J.A.'s] buttocks on the skin when he put his hand down the back of her pants as she sat on his lap in the living room.
>
> Count Four: The defendant touched [J.A.'s] genitals on the skin when he put his hand down the back of her pants and moved his hand under her buttocks to touch her genitals as she sat on his lap in the living room.

(Trial III, pp. 368-69.)

At trial, J.A. testified that the defendant started spending the night with the family after they moved into their house in Nashville. She was unsure how many times he slept over, but it was more than three times. (Trial I, p. 16.) She testified of one

occasion when the defendant came into the dining room where she was sleeping on the top bunk of a bunk bed and touched her "private" on the skin. She was unsure what she was wearing. (Trial I, pp. 17-19.) She testified that the defendant put his hand down the front of her pants and put it on the outside of her private, and she "got up and went to the bathroom one time." (Trial I, pp. 20-21.) This testimony corresponds with the election for Count One of the indictment.

J.A. testified that on another occasion, the defendant came and touched her while she was sleeping on the top bunk in the dining room, again putting his hand down the front of her pants and touching her private on the skin. On this occasion, J.A. got up and went to get in bed with her sister, A.A. (Trial I, pp. 22-24.) This testimony corresponds with the election for Count Two of the indictment.

J.A. testified of another occasion in the house in Nashville when she was sitting on the couch on the defendant's lap and he put his hand "[l]ike in the back of [her] pants." "And then he went to the front, like under [her] legs." (Trial I, p. 25.) She testified that the defendant first touched her "butt," then the outside of her "private" on the skin. (Trial I, pp. 26-27.) This testimony corresponds with the elections for Counts Three and Four[2] of the indictment.

J.A. testified that all the acts constituting Counts One through Four occurred prior to her eighth birthday camping trip. (Trial I, pp. 28-29.) J.A. was born on 22 May

[2] The defendant was convicted of the lesser-included offense of assault in Count Four. (TR3, p. 269.)

2008. (Trial I, p. 6.) J.A.'s mother testified that she and her father and daughters moved into an apartment with her father in Nashville at some time in 2005 and within a year, moved into the house where the abuse took place. (Trial II, pp. 172-76.) Mrs. Astle's testimony supports the time frame for the events of sexual abuse on J.A. as between October 1, 2005 and September 30, 2008.

In Count Six, the defendant was charged with the aggravated sexual battery of T.A., and in Counts Seven and Eight, he was charged with the rape of T.A. The dates of the offenses in Counts Six and Seven were "between October 1, 2005 and September 30, 2008." In Count Eight, the date of the offense was "between July 1, 2007 and September 30, 2008." (TR, pp. 44-46.) The State elected the offenses as follows:

> Count Six: The defendant touched [T.A.] on the inside of her genitals after she tried to get up from her bed, and he held her down by putting his arm across her torso. The defendant put his hand down the front of her sleeping pants and moved it around, and she started to cry. This incident occurred on the bottom bunk of the bunk beds.
>
> Count Seven: The defendant touched [T.A.] on the inside of her genitals, when he put his hand down the front of her sleep pants and moved it around. This incident concluded when she felt like she was going to, quote, puke, and she got up and went to the bathroom.
>
> Count Eight: The defendant touched [T.A.] on the inside of her genitals after he unbuttoned and unzipped her, quote, uniform pants and put his hand down the front of her pants.

(Trial III, pp. 369-70.)

At trial, T.A. testified that when she and her family moved to Nashville, they lived in an apartment with her grandfather and met the defendant, who lived next door.

Later, the family moved to a house on Saturn Drive. (Trial I, pp. 90-92.) For most of the two-and-a-half to three years that they lived in that house, T.A. slept in the "family room" of the house, where T.A. slept on a bunk bed or a futon. At some point, the bunk bed was moved into the dining room. (Trial I, pp. 93-94.) T.A. slept on the bottom bunk, T.A.'s younger sister, J.A., slept on the top bunk, and T.A.'s older sister, A.A., slept on a queen-size bed in the same room. The futon remained in the family room and T.A. sometimes slept there. (Trial I, p. 95.)

After moving into the house on Saturn Drive, the defendant sometimes spent the night. T.A. estimated that is was at "[t]he most, maybe three times." He may have come more often than that. When he came to visit, he slept in the family room, and sometimes in the same room with T.A. and her sisters. (Trial I, pp. 96-98.)

Sometimes the defendant would sleep in the bed with T.A. She described one occasion: "I was about to go to bed. It was either on the futon or the bunk bed. I'm not too sure. He had climbed in the bed, and I was already laying down. And he rolled me over and put his hand down my pants." T.A. testified that the defendant touched her on her "private part" on the skin with his finger. She was wearing basketball shorts with a stretchy waistband. (Trial I, pp. 99-100.) When he touched her, his finger went inside her "private part." (Trial I, p. 101.) This particular incident was not included in the State's election of offenses.

On another occasion, T.A. was lying on her bunk bed and the defendant came in and started touching her. "And I tried to get up, but his hand just went over me and like held me so I couldn't get up." The defendant stared touching her and she "just started crying." He touched her private part on the skin with his finger. T.A. was wearing "[e]lastic band pants, pajama pants." The defendant put his hand through the waistband inside her pants. This incident ended when "[h]e just stopped, I guess, or I went to bed." (Trial I, p. 103-04.) This testimony corresponds with the election for Count Six of the indictment.

On another occasion, after the defendant touched T.A., it made her "want to puke." When it was over, T.A. "got up and said [she] had to go to the bathroom and left and stayed away." On that occasion, the defendant touched T.A. on the inside of her private part on the skin with his finger. (Trial I, pp. 104-05.) This testimony corresponds with the election for Count Seven of the indictment.

T.A. testified that she started wearing khaki pants, which were part of her school uniform, to bed when the defendant visited. "They don't have the elastic and they are buttoned up and zipped up." She explained that she wore them because "I didn't want it to happen again." (Trial I, p. 106.) But in spite of her efforts, the defendant touched her again. He just "unzipped my pants and unbuttoned them." He touched her on her private part on the inside. (Trial I, p. 107.) This testimony corresponds with the election for Count Eight of the indictment.

T.A. testified that the events when the defendant touched her occurred before the camping trip for her sister's eighth birthday. (Trial I, p. 112.) As noted earlier, T.A.'s mother testified that she and her father and daughters moved into an apartment with her father in Nashville at some time in 2005 and within a year, moved into the house where the abuse took place. (Trial II, pp. 172-76.) Mrs. Astle's testimony supports the time frame for the events of sexual abuse on T.A. as between October 1, 2005 and September 30, 2008 in Counts Six and Seven and prior to 30 September 30, 2008 in Count Eight.

The doctrine of election is established to protect a defendant from the unclear allegations of a victim lacking clarity of memory. Election of offenses is a mechanism whereby the nebulous memories of a child may be identified and specified in such a way as to assure unanimity of verdicts and avoid double jeopardy. Here, the allegations of the children were sufficiently specified to identify the offenses and protect the defendant from double jeopardy. The defendant is not entitled to relief.

II. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICTS AGAINST THE DEFENDANT.

The defendant argues that "the only proof in support of the allegations made by J.A. and T.A. was their testimony." (Def. Brief, p. 17.) However, this court has held that victim testimony alone is sufficient to support a conviction. In *State v. James Theron Hale*, No. M2004-00870-CCA-R3-CD, 2005 WL 711908 (Tenn. Crim. App. March 29, 2005), this Court explained:

> The Defendant's claim that a victim's testimony must be corroborated by additional evidence before a defendant can be convicted of assault is unsupported by Tennessee law. A similar claim was rejected by this Court in a sexual assault case in which the defendant asserted there was insufficient evidence to support his assault conviction because the child victim's "testimony was not corroborated by any independent evidence." *State v. Smith,* 42 S.W.3d 101, 106 (Tenn. Crim. App. 2001). In rejecting this argument, we noted that there "is no requirement that a victim's testimony be corroborated. . . ." *Id.* Indeed, it is well established law that the testimony of a victim alone is sufficient to support a conviction. *See State v. Strickland,* 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). Here, a jury heard the witnesses' testimony first-hand and chose to accredit the testimony of the victim—as is the jury's prerogative. *See State v. Wright,* 836 S.W.2d 130, 134 (Tenn. Crim. App. 1992). As noted above, questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. *See* [*State v.*] *Evans,* 108 S.W.3d [231] at 236 [(Tenn. 2003)]. Therefore we conclude that the victim's testimony alone was sufficient evidence for a jury to find the Defendant guilty of the offense with which he was charged.

Hale at *4.

When the sufficiency of the evidence is challenged on appeal, the standard of review is whether any "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); Tenn. R. App. P. 13(e). In other words, the appellant carries the burden of demonstrating to this Court why the evidence will not support the jury's findings. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). In contrast, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983). Questions

concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Nesbit*, 978 S.W.2d 872, 898 (Tenn. 1998), *cert. denied*, 526 U.S. 1052 (1999).

In order to prove the defendant's commission of the offense of aggravated sexual battery, the State was required to establish beyond a reasonable doubt that (1) unlawful sexual contact occurred between the defendant and the victim; and (2) the victims were less than thirteen years of age. Tenn. Code Ann. § 39-13-504.

In order to prove the defendant's commission of the offense of rape of a child, the State was required to establish beyond a reasonable doubt that (1) the defendant engaged in sexual penetration of the victims, or that the victims engaged in sexual penetration of the defendant; (2) the victims were less than thirteen years of age; and (3) the defendant acted intentionally, knowingly, or recklessly. Tenn. Code Ann. § 39-13-522.

As noted above in the discussion of election of offenses, the testimony of the victims established that on each occasion, the defendant unlawfully touched and/or penetrated the victims. The victims verified their ages by their birthdates, J.A. born on 22 May 2000 (Trial I, p. 6), and T.A. born on 26 February 1999 (Trial I, p. 88). Where

the offenses are alleged to have occurred prior to 30 September 2008, J.A. would have been no older than eight years and five months at the time of any offense committed during the stated timeframe. T.A. would have been no older than nine years and eight months.

The evidence was sufficient, based on the testimonies of the victims alone, to support jury's verdicts. The defendant is not entitled to relief.

III. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO USE LEADING QUESTIONS ON DIRECT EXAMINATION TO FULLY DEVELOP THE TESTIMONY OF A CHILD WITNESS.

The defendant complains that the State was allowed to use leading questions during the direct examination of J.A. (Def. Brief, pp. 39-40.)

Tenn. R. Evid. 611 vests the trial court with wide discretion in controlling the presentation of evidence, which includes the use of leading questions on direct examination to develop a witness's testimony. This Court reviews the trial court's decision under an abuse of discretion standard. *See State v. Caughron,* 855 S.W.2d 526, 540 (Tenn. 1993). Trial courts may permit leading questions of child sex offense victims on direct examination when necessary to fully develop the witness's testimony. *Swafford v. State,* 529 S.W.2d 748, 749 (Tenn. Crim. App. 1975); *see also* Tenn. R. Evid. 611(c)(1) ("Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness's testimony.")

On direct examination, eleven-year-old J.A. testified about an occasion when the defendant came into the dining room where she was sleeping on the top bunk, and he touched her private. (Trial I, pp. 6, 17-18.) J.A. testified that she "got up and went to the bathroom one time." Then she went to sleep with her sister. (Trial I, p. 20.) She then testified that this happened more than once. The State then asked J.A. about other times when the defendant touched her:

> Q. Well, let me ask you this first: You described him coming and getting on the top bunk with you and touching your private. Did that happen that one time that you told us about, or did that happen some other times at Brian's house in Nashville?
>
> A. It happened some other times, too.
>
> Q. You told us about a time that you remember saying you had to go to the bathroom and getting up and going to the bathroom. Do you remember a time when that happened that you did something else after it happened?
>
> A. No.
>
> Q. It has been about four years ago that this happened, right, or three—almost three to four years ago. Right?
>
> A. Yes.
>
> Q. Right after it happened, you talked to a lady named Anne?
>
> A. Yes.
>
> Q. Or a lot sooner or a lot closer to the time?
>
> A. Yes.

Q. And you've also talked to me about it before, a long time ago. Right?

A. Yes.

Q. Do you remember telling Anne or telling me about a time—

MR. McEVOY: Judge, I would object. This is a leading question.

THE COURT: Well, she has to lead somewhat because of the age of the child. But try to limit as much as you can.

MS. REDDICK: Well, this is yes or no question.

Q. (By Ms. Reddick:) Do you remember telling Anne or telling me about a time that he did that, and you got up and went and got in your sister's bed?

A. Yes. But I am not quite sure like what happened.

Q. What do you remember about getting out of your bed and going and getting in your sister's bed?

A. I'm not really sure what happened.

Q. Was [the defendant] in your bed?

A. Yes.

Q. And had he touched your private?

A. Yes.

Q. And do you remember what he touched your private with?

A. His hand.

Q. And did his hand touch your private on the skin or over your clothes?

A. Skin.

Q. How was it that he was able to touch your private on the skin that time?

A. He put his hand in the front of my pants.

Q. Did his hand move or stay still or something else?

A. No.

Q. Now, when you got up and got in bed with your sister, which sister are you talking about?

A. I think it was [A.A.]

Q. And do you remember where [A.A.] was sleeping when you got up and got in her bed?

A. In her bed.

Q. Was her bed in the dining room, also?

A. Yes.

(Trial I, pp. 22-24.)

The State was careful to distinguish between the two similar events when the defendant touched J.A. The first time, J.A. got up afterwards, went to the bathroom, then went to sleep with her sister. That was "one time." (Trial I, p. 20.) On another occasion, J.A. was not sure what happened, but she remembered the defendant touching her, and she remembered getting up and getting into bed with her sister. The two events were similar, but distinct. Although the memories of the child, from several years earlier,

were not completely clear, the State questioned the child witness about what she remembered and the defendant was not unfairly prejudiced by the process.

Additionally, it should be noted that although the defendant raised an objection when the State asked whether J.A. remembered "telling Anne or telling me about a time—," the defendant raised no other objection to the nature of the questions. Having failed to reassert the objection when the defendant deemed the manner of questioning to be a violation of his right to due process rather than a harmless violation of a procedural rule, the objection should be considered waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

IV. THE DEFENDANT FAILED TO OBJECT TO THE TESTIMONY OF HOLLYE GALLION THAT DIGITAL PENETRATION WOULD NOT NECESSARILY RESULT IN PHYSICAL INJURY TO THE CHILD VICTIMS AND THE CLAIM IS WAIVED.

The defendant complains that the trial court erred by allowing Hollye Gallion, a pediatric nurse practitioner at the Our Kids Center, to testify that digital penetration of a child's vagina would not necessarily result in any physical injury or evidence of trauma. (Def. Brief, pp. 41-47.)

At trial, the parties stipulated that Ms. Gallion should be recognized as an expert in the area of pediatric nursing and forensic examinations of children. (Trial III, p. 328.) She testified that T.A. and J.A. were examined at the Our Kids Center on 21 April 2009.

(Trial III, p. 337.) She testified that J.A. reported that the defendant had touched her private parts on the outside. (Trial III, pp. 339-40.) She testified that "[J.A.] had a complete head-to-toe physical. . . . Her exam was normal. I didn't find any injuries or concerns of infection when I did her physical exam." The State then asked, "Was there anything inconsistent about what you observed during her medical exam, with that history given?" She replied: "No. Her exam was completely consistent with her history." When asked what injuries she would expect to find as a result of "touching the genitals on the outside with the hand, more than seventy-two hours ago," Ms. Gallion answered: "I wouldn't. It's just like if I touched your arm, or your ear, you are not going to be able to tell that I did that in ten minutes or a minute later. Touching typically doesn't leave any sort of evidence or injury." (Trial III, pp. 341-43.)

Ms. Gallion testified that T.A. also reported that the defendant had touched her private area on the outside on more than one occasion. (Trial III, pp. 343-44.) Regarding T.A.'s physical examination, Ms. Gallion testified that her "genital area and her bottom . . . looked completely healthy and normal." She added that "her physical exam was very consistent with what her history was." (Trial III, p. 345.) She described the female anatomy and explained:

> The anatomy of a female is very different than most of us are raised to believe. I have been a nurse twenty-six years, and I am embarrassed at times to say that I had really no idea, until I started working in this field eleven years ago.

> You have the outside of your genital area, with your labia, the small labia, the large labia where the hair grows.
>
> The inside, you have [a] piece of tissue called the hymen, old-timey word. A lot of families will say the cherry. Basically, it's just a ring of tissue that almost looks a little like a hair scrunchy. And it surrounds the opening to the vagina.
>
> But there is an opening there for the blood to come out when you have your period. And that tissue is really stretchy. Even in smaller children, it has elasticity, and there's an opening.
>
> So you can certainly have digital . . . penetration with a finger and that not cause any injury. It's not a covering that completely covers the opening to the vagina, which is, I think, how a lot of—certainly how I was raised, and that with your first sexual contact, the hymen tears and you're not a virgin and there's bleeding. And that's just not reality. That's not the way we're really made, but most of us don't know that, including me for a long time.
>
> . . .
>
> Genital penetration would be anything inside the labia, so the outside of the labia where the hair grows at the top of that, and then anything on the inside.
>
> Vaginal penetration, you actually have to go through the labia, through the hymen, into the vagina. So there is a fair amount of space between the outside of your body, if you're a female, and all the way inside your vagina.

(Trial III, pp. 348-49.)

The defendant raised no objection to the testimony of Ms. Gallion at trial, yet on appeal, he complains that the trial court should not have admitted the testimony as an expert opinion. (Def. Brief, p. 43.) Having failed to object to Ms. Gallion's testimony at trial, the objection should be considered waived. *See* Tenn. R. App. P. 36(a) (Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an

error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). But even if the objection had been properly raised, it has no merit.

The admission of evidence at trial is entrusted to the broad discretion of the trial court, and as such, a trial court's ruling on the admission of evidence may only be disturbed upon a showing of an abuse of that discretion. *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004) (*citing State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)). This Court may not reverse a trial court's exercise of discretion unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997). For evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Relevant evidence is "evidence having 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.

The essence of Ms. Gallion's testimony was that penetration of a child is not necessarily manifested in a physical finding of injury. Contrary to the defendant's assertion, Ms. Gallion's expert testimony assisted the jury in determining whether penetration occurred or not. If the jury were under the mistaken belief that penetration would necessarily result in some physical injury, the jury would operate under a false factual presumption. Where the testimony of the children was that the defendant

touched them on the inside of the children's private parts, a finding of physical injury was not required. Ms. Gallion's uncontested testimony was relevant and probative and the trial court committed no error in allowing it without any objection by the defense.

V. BY FAILING TO OBJECT TO THE TESTIMONY OF ANNE FISHER POST, AFFIRMING THAT IT WAS NOT REALISTIC TO EXPECT CHILDREN TO REMEMBER DETAILS OF EVENTS, THE DEFENDANT WAIVED THE ISSUE.

The defendant complains that the trial court improperly allowed forensic interviewer Anne Fisher Post to testify "that it was not realistic to expect children to remember details of events." He argues that "Ms. Post was not competent to offer such testimony" and that it was in violation of his rights under both the federal and state constitutions and Tennessee Rules of Evidence. (Def. Brief, pp. 43-44.)

Anne Fisher Post is a forensic interviewer at the Montgomery County Child Advocacy Center. (Trial III, pp. 360-61.) She interviewed J.A. and T.A. in the spring of 2009. (Trial III, p. 365.) In the course of her testimony, the State asked Ms. Post whether when interviewing children who have been subjected to numerous instances of abuse, "Is it realistic to expect that you'll get every detail from every incident?" Ms. Post responded:

> Certainly not. It depends, too, on the age of the child. Very little children, we expect to capture only very limited information about any event that happens in their lives. And there are lots of things that can disrupt a kid's memory of an abuse event. Trauma can disrupt memory, for example.

> And events that are very similar can be very hard to separate. I think we all know that for our own experience. If you have the same event over and over in your own life, it can be very difficult to provide a narrative detailed account of one specific incident of the same event.

(Trial III, pp. 364-65.)

The defendant raised no objection and asked no questions on cross-examination. (Trial III, pp. 364-67.) As before, having failed to object to Ms. Fisher's testimony at trial, the objection should be considered waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). But even if the objection had been properly raised, it has no merit.

As before noted, the trial court's ruling on the admission of evidence may only be disturbed upon a showing of an abuse of that discretion. *Robinson*, 146 S.W.3d at 490. Ms. Fisher's testimony was certainly relevant, "having [a] 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. The essence of Ms. Fisher's testimony to which the defendant now objects is that children cannot always remember all the details of a traumatic event. While the lack of memory does not necessarily mean that an event did not happen, the State still maintains the burden to prove that a crime was committed by bringing forth evidence sufficient for a trier of fact to conclude beyond a reasonable doubt that a defendant

committed the crime. Ms. Fisher's comments/conclusions regarding the capacity of a child to remember certain events neither bolsters nor weakens the testimonies of the child witnesses, but allows the jury to consider all the evidence in a proper context. The relevance of the testimony could be questioned, but the defendant failed to question the relevance or admissibility of Ms. Fisher's testimony at trial and any issue on that point is waived. The defendant is not entitled to relief.

VI. BY FAILING TO OBJECT TO THE ADMISSION OF THE VIDEO RECORDINGS OF THE VICTIMS' FORENSIC INTERVIEWS, THE DEFENDANT WAIVED THE ISSUE.

The defendant complains that the trial court erred by admitting into evidence the video recorded statements of the victims as substantive evidence. (Def. Brief, p. 48.)

At trial, each of the child witnesses was asked whether she had reviewed her video recorded statements she had made previously when interviewed by Anne Fisher. The physical recordings were then marked for identification only. (Trial I, pp. 39-40, 117-18.) Later, Anne Fisher Post also identified the physical recordings and testified that she reviewed them in preparation for her testimony, without testifying to the content of the statements. They were both entered as exhibits to Ms. Fisher's testimony without objection or cross-examination from the defense. (Trial III, pp. 365-67.)

Once again, having failed to object to the admission of the recordings, the objection raised at this late date should be considered waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party

responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

The defendant argues that although he did not object to the admission of the videotaped forensic interviews at trial, this Court should nonetheless consider this claim as "plain error."

Prior to trial, the defendant filed a motion pursuant to Tenn. R. Evid. 404 to exclude reference to alleged acts by the defendant which took place at times or places outside the scope of the indictment. Specifically, in a motion filed on 2 February 2011, the defendant made the following claim:

> In the investigation of this case, the three alleged victims were interviewed at the Montgomery County Child Advocacy Center. In these interviews, the alleged victims were questioned about events that occurred in Davidson County. They were also questioned about events that occurred in Montgomery County and outside the time frame of this indictment. The Defendant submits that evidence of events occurring in Montgomery County and outside the time frame of this indictment should be excluded. Further, the Defendant submits that IF recordings of such interviews are to be admitted into evidence, any references to such events should be redacted.

(TR1, p. 36.) On 21 July 2011, the trial court granted the defendant's "motion to redact statement and a motion to exclude references[.]" (TR3, p. 250.) Later, as indicated above, the victim's testified and authenticated the recordings, the forensic interviewer also authenticated the recordings, and they were admitted into evidence without objection. The recordings were not played in open court, but during closing argument, the State made these comments:

> And yes, there are exhibits, things that you can take back into the jury room with you. Actually, everything that we have introduced can be taken back, looked through, so that's why I'm not going to put everything up and say, oh, look, remember this, we saw this.
>
> One thing I do want to mention is, remember the forensic interviews, those tapes, that we did not play those. For one thing, we're lucky to get these to work to play the ones that we did. But those are video. And we don't have the capability out here.
>
> In the back, in the jury room, should you—obviously, it's your decision whether you want to watch them or not, but should you decide to, we have the capability, or the Court does, to get a TV and all that to play those, those forensic interviews, the girls by themselves, with the interviewer in March, April, 2009, when that occurred.
>
> I just mention that sort of as, well, if you wonder why didn't we watch those or hear those, that's the reason.

(Closing, pp. 3-4.) The record does not indicate whether the jurors viewed the recordings or not.

Tenn. R. App. P. 36(b) provides:

> 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. When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.
>
> All of the following five factors must be proven for plain error to exist:
>
> (a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282-83 (Tenn. 2000) (adopting the test in *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994)). It is the defendant's burden to show that the trial court committed plain error. *State v. Gomez,* 163 S.W.3d 632, 646 (Tenn. 2005). Moreover, a court need not consider all five factors when it is clear from the record that at least one of them cannot be satisfied. *Smith,* 24 S.W.3d at 283.

First, it should be noted that the record does not indicate whether the jury ever viewed the recorded statements of the victims. The record does not "clearly establish what occurred in the trial court" in this respect.

Second, a clear and equivocal rule of law was not breached. Considered as evidence of the victims' prior consistent statements, the video recordings may be admitted when the credibility of the victims has been impeached through the introduction of a prior inconsistent statement that suggests that the witness's "trial testimony was either fabricated or based upon faulty recollection." *State v. Meeks,* 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993). "Under such circumstances, the [witness's] statement made before the inconsistent statement but which was consistent with [the witness's] trial testimony" is admissible to rehabilitate the witness's credibility. *Id.* The prior consistent statement is not offered for the truth of the matter asserted, and it is proper for the trial court to issue a limiting instruction to the jury to that effect. *See State v. Livingston,* 907 S.W.2d 392, 398 (Tenn. 1995); *State v. Braggs,* 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980).

At trial, both victims were cross-examined extensively regarding the times, places and circumstances of their alleged abuse, and regarding their relationship with the defendant. (Trial I, pp. 46-80, 130-50; Trial II, pp. 151-61.) Consideration of their statements was not a breach of a clear and unequivocal rule of law in that regard.

Further, although there was (apparently) no limiting instruction given regarding the jury's consideration of the recordings, the failure to give such a limiting instruction does not constitute a breach of a clear and unequivocal rule of law. In *State v. Smith*, 24 S.W.3d 274 (Tenn. 2000), our supreme court noted that "[a] trial court . . . generally has no duty to exclude evidence or provide a limiting instruction to the jury in the absence of a timely objection." *Id.* at 279. In *State v. Joseph Shaw, Jr.*, No. W2009-02326-CCA-R3-CD, 2010 WL 3384988 (Tenn. Crim. App. Aug. 27, 2010) (app. denied Jan. 13, 2011), this Court determined that the failure to give a limiting instruction, thus precluding the jury from considering the recordings as substantive evidence, did not constitute a breach of a clear and unequivocal rule of law, as it is not an absolute requirement for the admission of a prior consistent statement. *Id.* at *8.

Third, the defendant fails to establish that a substantial right was affected. He had the opportunity to cross-examine the victims in court and nothing in the record indicates that the jury ever actually viewed the recordings.

Fourth, it is not clear that the defendant did not waive the jury's exposure to the recorded statements as a tactical measure. Counsel clearly noted in his motion 2

February 2011 the possibility that the recordings of the interviews might not be deemed admissible. (TR1, p. 36 ("The Defendant submits that IF recordings of such interviews are to be admitted into evidence, any references to such events should be redacted.").)

Finally, the defendant fails to show that consideration of the error is "necessary to do substantial justice," considering the consistency of the children's factual statements as related to each other, the lack of any apparent motivation by the children to fabricate their stories, and no motivation by the mother of the children to coach them to lie.

The defendant is not entitled to relief under "plain error" review.

VII. BY FAILING TO OBJECT TO THE ADMISSION OF THE RECORDINGS OF THE CONTROLLED TELEPHONE CALLS BETWEEN THE VICTIMS' MOTHER AND THE DEFENDANT, THE DEFENDANT HAS WAIVED THE ISSUE ON DIRECT APPEAL.

The defendant argues that he is entitled to a new trial because the trial court erroneously admitted into evidence the recordings of controlled telephone calls between the mother of the victims and the defendant. The defendant argues that Mrs. Astle "was a state actor and that her conduct during the conversation overbore [the defendant's] will to resist implicating himself in the offense." (Def. Brief, p. 56.)

Prior to trial, the defendant filed motions to redact portions of the recorded telephone calls which referred to misconduct not charged in that court. (TR1, pp. 51-62; TR2, pp. 63-234; TR3, pp. 236-49.) The trial court granted the motions. (TR3, p. 250.) The record does not include any motion to suppress the controlled telephone call and no contemporaneous objection was made to the playing of the recordings at trial.

During the defense case, the defendant recalled Detective Ginger Fleischer and cross-examined her extensively with regard to Detective Fleischer's role in the controlled telephone calls. Detective Fleischer conceded that during the calls, she suggested a number of questions for Mrs. Astle to ask the defendant.[3] (Trial III, pp. 375-84.)

Having failed to object to the admission of the recordings, the objection raised at this late date should be considered waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Indeed, it appears that counsel for the defendant examined and carefully considered the content of the controlled telephone calls and moved for redaction of portions of the calls, but as a tactical decision, opted not to move for suppression. In any event, the issue is waived for direct appeal.

The defendant argues that this Court should consider this claim as plain error. However, the defendant fails to show that Mrs. Astle acted improperly. Mrs. Astle made no threats to the defendant beyond curtailing their friendship and the defendant's association with the family. Further, the defendant never admitted any improper touching on the audio recordings played for the jury. To the contrary, the defendant

[3] It should be noted that during the defendant's cross-examination of Detective Fleischer, counsel for the defendant referred to notes of questions Detective Fleischer suggested for Mrs. Astle to ask during the controlled telephone call. One question was "Do you think when you stuck your finger into [T.L.], you did any damage inside, because she is still growing?" (Trial III, p. 380.) A careful examination of the record reveals no such question ever asked of the defendant. (Trial Ex. 15B, 16B, 17B, 18B.)

consistently maintained that he never knowingly touched the girls inappropriately. To his credit, he insisted that if the girls said something happened, it must be true, but he steadfastly denied any knowing misconduct, allowing only for the possibility that he may have done something while asleep, for which he had no memory. (*See, e.g.*, Trial Ex. 15A at 28:40-29:13, 46:42-47:15; Trial Ex. 15B, pp. 28-29, 45.) Although the defendant now suggests that Mrs. Astle, as a state actor, overbore his will to resist her questions, he fails to show anything in the record to support his claim that he confessed to a crime or admitted any criminal misconduct.

Considered under the factors of plain view analysis previously set forth, first, the State concedes that the record clearly establishes what occurred at trial, but under the second factor, no clear and unequivocal rule of law was breached. Mrs. Astle spoke with the defendant as a friend and a mother. She made no threats or promises to associate her with any law enforcement authority and she did not overbear the will of the defendant to resist the urge to make a confession. Third, no substantial right of the defendant was affected. Again, he steadfastly maintained his innocence throughout the discussion as heard by the jury. Fourth, it is clear that the defendant was well aware of the recording before trial and he moved to redact certain portions of it from the jury's consideration. The remaining portions of the recording are filled with the defendant's assertions of innocence. The defendant may have foregone any objection to the admission of the recording as a tactical decision. Finally, considering all the

circumstances, there is no error where consideration is "necessary to do substantial justice." By allowing the recording to be heard by the jury, the defendant was able to present his defense without enduring cross-examination by the assistant attorney general.

The defendant is not entitled to plain error consideration of this issue.

VIII. BECAUSE THERE IS NO INDIVIDUAL REVERSIBLE ERROR, THERE IS NO CUMULATIVE EFFECT THAT DEPRIVED THE DEFENDANT OF THE RIGHT TO A FAIR TRIAL.

The defendant contends that the cumulative effect of numerous errors at trial warrant the granting of a new trial. (Def. Brief, pp. 66-67.) While the cumulative effect of a trial court's errors might, under some circumstances, operate to deny a defendant of a meaningful trial, there is no cumulative error in this case mandating a new trial because the trial court committed no individual reversible error, as discussed hereinbefore. *State v. Taylor,* 968 S.W.2d 900, 912 (Tenn. Crim. App. 1997).

Even if this court concludes that error has occurred, considered in the context of the evidence as a whole, any error, whether individually or in cumulation, cannot be said to have deprived the defendant of a fair trial. The jury's decision to convict the defendant of lesser offenses than that charged by the State in two counts of the indictment (TR3, p. 262) militates against a finding that its judgment was overwhelmed by an accumulation of errors. To the contrary, the jury's verdict demonstrates that it was able to parse the proof and arrived at a correct factual and legal conclusion. This issue has no merit.

IX. BY FAILING TO INCLUDE A TRANSRIPT OF THE SENTENCING HEARING IN THE RECORD, THE DEFENDANT HAS WAIVED ANY SENTENCING ISSUE.

The defendant was sentenced to ten years for each conviction of aggravated sexual battery in Counts One, Two and Three, and Eight; six months for assault in Count Four; and twenty years for each conviction of child rape in Counts Six and Seven. The sentences in Counts One, Two, Three, Six and Seven were ordered to be served consecutively for a total effective sentence of seventy years. (TR3, pp. 266-69, 271-73.)

The defendant concedes that consecutive sentences in this case was permissible under Tenn. Code Ann. § 40-35-115(b)(5), which allows consecutive sentences where the defendant is convicted of two or more offenses involving sexual abuse of a minor. However, the defendant contends that the sentence "is not in keeping with the foremost porpose of the sentencing act which is to promote justice." (Def. Brief, p. 70.)

An appellate court's review of sentencing is *de novo* on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; *see also State v. Goodwin*, 143 S.W.3d 771, 783 (Tenn. 2004). This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are

relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991); *see also State v. Carter*, 254 S.W.3d 335 (Tenn. 2008).

The record does not include a transcript of the sentencing hearing or a written sentencing order in this case. Therefore, it is impossible to determine from the record what the trial court considered in determining the appropriate sentence, and the issue is waived. This Court recently noted in *State v. Timothy Eugene Kelly, Jr.*, No. M2011-01260-CCA-R3-CD, 2012 WL 5193401 (Tenn. Crim. App. Oct. 22, 2012):

> It is well-established that "[w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993); *see also* Tenn. R. App. P. 24(b); *Thompson v. State*, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Without the transcript of the sentencing hearing, we are unable to perform a *de novo* review of the appellant's sentencing issues, and we presume the trial court correctly sentenced the appellant.

Kelly at *7.

The defendant has waived his sentencing issue and is not entitled to relief.

CONCLUSION

For these reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

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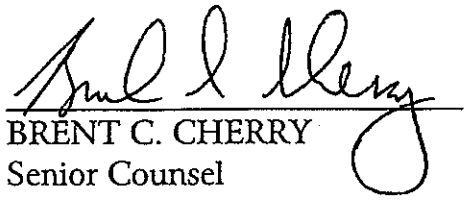
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first class mail, postage prepaid, to James O. Martin, III, 414 Union Street, Suite 904, Nashville, Tennessee 37219, on this the 7th day of December, 2012



BRENT C. CHERRY
Senior Counsel

Not Reported in S.W.3d, 2005 WL 711908 (Tenn.Crim.App.)
(Cite as: 2005 WL 711908 (Tenn.Crim.App.))

Court of Criminal Appeals of Tennessee,
at Nashville.
STATE of Tennessee
v.
James Theron HALE.

No. M2004-00870-CCA-R3-CD.
Jan. 26, 2005 Session.
March 29, 2005.

Direct Appeal from the Circuit Court for Montgomery County, No. 40300430; Michael R. Jones, Judge.
Steven T. Richardson, Clarksville, Tennessee, for the appellant, James Theron Hale.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; John Carney, District Attorney General; and C. Daniel Brollier, Assistant District Attorney General, for the appellee, State of Tennessee.

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

OPINION

DAVID H. WELLES, J.

*1 The Defendant was found guilty by jury verdict of domestic assault, a Class A misdemeanor. He was sentenced to eleven months and twenty-nine days with the sentence suspended, conditioned upon his successful completion of probation. The Defendant now appeals, raising three issues: (1) there was insufficient evidence to support his conviction for domestic assault; (2) the trial court erred by not instructing the jury to elect the particular offense the Defendant was guilty of; and (3) the Defendant suffered a due process right violation when he was denied immediate access to his personal property. We affirm the judgment of the trial court.

FACTS

The record reflects that on May 1, 2003, the police responded to a report of a domestic disturbance at Ms. Joanne Hale's (the victim) home in Clarksville. The Defendant, James Hale, was arrested and removed from the residence he shared with the victim, his seventy-year-old mother. The Defendant was released on bond subject to certain conditions in an Order Granting Bail for Domestic Abuse, which included the proviso that he stay away from the victim's residence. In August of 2003, the Defendant was indicted by a grand jury on three charges: (1) possession of marijuana, (2) possession of drug paraphernalia, and (3) domestic assault. The Defendant requested and was granted severance of offenses, and received a jury trial on the assault charge in January of 2004.[FN1]

FN1. The matter before this Court concerns only the domestic assault charge.

At trial, the victim testified that the Defendant-her son-had lived with her from1987 until his arrest in May of 2003. She then described two separate incidents which led to the Defendant's conviction in this case. The victim first described an incident that "occurred a couple of days prior to May 1, 2003," in which the two parties argued over a blanket. The victim took a blanket from the Defendant's bedroom, which she said belonged to her. The Defendant disputed the victim's assertion of ownership and called the victim a "thief." The victim further testified that when she initially refused to surrender the blanket to the Defendant, the Defendant "told her that if he didn't get the blanket back in three (3) minutes, he was going to hit her." The victim stated that at the time she did not believe the Defendant

would actually hit her, but shortly after his threat he "picked up a metal globe and hit her on the head with it three (3) times." Thereafter, as the victim backed out of the Defendant's room, he "threw the globe at her and hit her in the stomach with the globe."

At trial the victim also testified about a second incident which took place at her residence on May 1, 2003. Again, the victim and the Defendant became embroiled in an argument over a blanket, and at some point the Defendant pushed the victim. The victim stated that she became fearful and called her daughter. The victim's daughter called the Clarksville Police. Officer Mike Caver testified at trial that he responded to the report of a domestic disturbance and arrested the Defendant based upon the victim's statement regarding the altercation. Officer Caver also stated that he did not observe any visible injuries on the victim, and discovered no physical evidence of an assault.

*2 The defense called several character witnesses who testified about the rocky relationship the victim and Defendant shared. Chris Chaney, a friend of both the victim and the Defendant, testified that the two often had minor altercations, and he once observed the victim throw an ashtray at the Defendant. Jason Bell, also a friend of both the Defendant and the victim, testified that he had seen the two involved in altercations in the past. According to his testimony, the victim usually started the altercations while the Defendant normally tried to defuse the situation, often by encouraging the victim to "take her medication."

The Defendant declined to testify on his own behalf. The State, in closing statements, informed the jury that it need only prove fear of bodily harm for a Defendant to be found guilty of assault, and argued that the Defendant's act of throwing of the metal globe caused the victim the requisite fear. The trial court instructed the jury on the charge of assault, and after deliberation the jury returned a verdict of guilty of assault. The trial court next instructed the jury on domestic assault, and after further deliberation the jury returned a verdict of guilty of domestic assault.

A sentencing hearing was conducted immediately after the trial. The trial court sentenced the Defendant to eleven months and twenty-nine days, but suspended the sentence and granted the Defendant probation. The Defendant filed a petition for post-trial diversion and a motion for a new trial, both of which were denied by the trial court. The Defendant timely filed a notice of appeal.

ANALYSIS

On appeal, the Defendant now argues the following three issues: (1) the evidence was insufficient to sustain a verdict of guilt on the charge of domestic assault; (2) the trial court erred in failing to instruct the jury that they must decide upon a particular offense that the Defendant was guilty of in order to protect his right to a unanimous jury verdict; and (3) that the Defendant's due process rights were violated by the State's failure to provide immediate access to the Defendant's personal property. We disagree with the Defendant as to his first claim, and conclude that the remaining two issues are waived.

I. Sufficiency

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. *See State v. Evans,* 108 S.W.3d 231, 237 (Tenn.2003); *State v. Carruthers,* 35 S.W.3d 516, 557-58 (Tenn.2000); *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any ra-

tional trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *State v. Hall,* 8 S.W.3d 593, 599 (Tenn.1999).

*3 On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers,* 35 S.W.3d at 558; *Hall,* 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. *See Evans,* 108 S.W.3d at 236; *Bland,* 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans,* 108 S.W.3d at 236-37; *Carruthers,* 35 S.W.3d at 557.

The Defendant was convicted of domestic assault pursuant to Tennessee Code Annotated section 39-13-111. Domestic assault is the commission of "an assault as defined in [Tennessee Code Annotated section] 39-13-101 against a person who is that person's family or household member." Tenn.Code Ann. § 39-13-111(b). "Family or household member" includes a "person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family...." *Id.* at § 39-13-111(a). A person commits an assault who "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." *Id.* at § 39-13-101(a)(2). Thus, at trial, the State carried the burden of proving beyond a reasonable doubt that the Defendant: (1) intentionally or knowingly (2) caused the victim to reasonably fear imminent bodily injury, and (3) the Defendant and the victim were related by blood or resided together as if a family.

The Defendant claims the State presented insufficient evidence at trial to prove he assaulted the victim.[FN2] Specifically, the Defendant argues that the only evidence presented against him was the victim's own testimony, and this alone, without additional "corroborating evidence," was not sufficient to find him guilty. The Defendant also appears to argue that because he was charged with domestic assault-a conviction of which would abrogate his "fundamental" right to bear arms-he had more at stake than a defendant convicted of simple assault and therefore the burden of proving his guilt should have been higher. We disagree.

> FN2. The Defendant does not challenge the State's assertion that his relationship to the victim would establish the offense as a domestic assault if simple assault had been proved beyond a reasonable doubt.

We first note that a transcript of the trial is not included in the record. However, pursuant to Rule 24(c) of the Tennessee Rules of Appellate Procedure, the Defendant has filed a statement of the evidence presented at trial. As reflected in the statement of evidence, the victim testified that the Defendant hit her in the head with a metal globe three times and then threw it at her, hitting her in the stomach. The victim also testified that she was afraid the Defendant was going to hurt her. The Defendant argues that because no physical or circumstantial evidence supporting the victim's testimony of an assault was presented at trial, a reasonable jury could not have found him guilty.

*4 The Defendant's claim that a victim's testimony must be corroborated by additional evidence before a defendant can be convicted of assault is unsupported by Tennessee law. A similar claim was rejected by this Court in a sexual assault case in which the defendant asserted there was insufficient evidence to support his assault conviction because the child victim's "testimony was not corroborated by any independent evidence." *State v. Smith,* 42 S.W.3d 101, 106 (Tenn.Crim.App.2001). In rejecting this argument, we noted that there "is no re-

quirement that a victim's testimony be corroborated...." *Id.* Indeed, it is well established law that the testimony of a victim alone is sufficient to support a conviction. *See State v. Strickland,* 885 S.W.2d 85, 87 (Tenn.Crim.App.1993). Here, a jury heard the witnesses' testimony first-hand and chose to accredit the testimony of the victim-as is the jury's prerogative. *See State v. Wright,* 836 S.W.2d 130, 134 (Tenn.Crim.App.1992). As noted above, questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. *See Evans,* 108 S.W.3d at 236. Therefore we conclude that the victim's testimony alone was sufficient evidence for a jury to find the Defendant guilty of the offense with which he was charged.

While not entirely clear, the Defendant also seems to argue that because federal law prevents those convicted of a domestic assault from possessing firearms, *see* 18 U.S.C.A. § 921(33), his "loss of a fundamental right" would mandate the State be charged with a higher burden of proof when seeking to convict him of domestic assault. The Defendant claims that he should not be stripped of his right to bear arms due to a domestic assault conviction unless his "use of physical force has been proven by something other than the testimony of the victim alone." While this may be an original argument, we note that the Defendant has failed to cite any legal authority in support of this argument as required by our rules. *See* Tenn Ct.Crim.App. R. 10(b); Tenn. R.App. P. 27(a)(7). Failure to comply with these rules will ordinarily constitute a waiver of the issue. *See State v. Thompson,* 36 S.W.3d 102, 108 (Tenn.Crim.App.2000). We find the Defendant has waived this argument.

Accordingly, we conclude that the Defendant has failed to demonstrate that the evidence was insufficient to support his conviction. After considering all the evidence presented in the light most favorable to the State, we conclude that the evidence was sufficient to support the Defendant's conviction for domestic assault beyond a reasonable doubt. This issue has no merit.

II. Election Issue

The Defendant asserts that the trial judge erred when it failed to instruct the jury to elect the particular offense the Defendant was guilty of, if any, in order to ensure the Defendant received a unanimous jury verdict. Specifically, the Defendant claims that he was denied his right to a unanimous jury verdict when the victim testified of two separate incidents at trial, and the court subsequently failed to instruct the jury to elect the incident or set of facts upon which it based its verdict.

*5 Where there is evidence of multiple offenses, the precaution is the doctrine of election, which requires the state to elect and identify at the end of its case in chief the exact offense for which it seeks conviction. Where there is technically one offense, but evidence of multiple acts which would constitute the offense, a defendant is still entitled to the protection of unanimity ... to a particular set of facts.

State v. Forbes, 918 S.W.2d 431, 446 (Tenn.Crim.App.1995) (internal citations omitted). We briefly note that in this case, the indictment specifies an assault with a globe. According to the "statement of evidence," the State, in its closing arguments, clearly described the sole offense of assault for which it sought a conviction as the incident in which the Defendant hit the victim with a metal globe. Thus, it appears that the Defendant's claim of an election error is without merit. However, we need not analyze the substantive claim as presented because we find the Defendant has procedurally waived the issue by failing to raise it in his motion for a new trial.

It is well settled law that a failure to raise an issue other than sentencing or sufficiency of evidence in a motion for a new trial waives that issue for purposes of appellate review. *See* Tenn. R.App. P. 3(e) . We recognize that we may take notice at any time,

within our discretion, of an error that affects a substantial right of an accused, even though not raised in motion for new trial, where it may be necessary to do substantial justice. *See* Tenn. R.Crim. P. 52(b) ; *State v. Ray,* 880 S.W.2d 700, 705 (Tenn.Crim.App.1993) (holding that failing to raise an issue in a motion for new trial waives the issue on appeal "except for purposes of plain error review"). However, we have determined that this issue does not invite plain error review. *See State v. Adkisson,* 899 S.W.2d 626, 611 (Tenn.Crim.App.1994). Accordingly, the election issue raised by the Defendant on appeal is deemed waived.

III. Due process rights violation

In the Defendant's final issue on appeal, he claims that his "Due Process rights were violated by the State's failure to provide immediate access to the Defendant's personal property." Specifically, the Defendant asserts that he was "denied access to 'any' of his possessions" from May 1, 2003, the date of his arrest, to "early April 2004," because of the conditions "imposed" upon him by the "Order Granting Bail for Domestic Abuse Cases." [FN3] It is unclear exactly what error the Defendant believes the trial court committed, or what remedy he now seeks from this Court.

> FN3. Following his arrest for domestic assault, the Defendant was released on bail with the condition that he "vacate or stay away from the home of the alleged vic- tim."

First, we note that the Defendant admits he did not raise this issue at trial. Additionally, we find that he also did not include this issue in his motion for a new trial. Therefore, we conclude the Defendant has waived this issue for purposes of appellate review. *See* Tenn. R.App. P. 3(e).

Second, even if the issue had been preserved for appellate review, because the Defendant failed to cite any relevant legal authority in support of his argument, as required by our rules, the issue is procedurally waived. *See* Tenn. Ct.Crim.App. R. 10(b); Tenn. R.App. P. 27(a)(7). While the Defendant quoted the general due process language from the federal and Tennessee constitutions, he cited to no legal authority which would support his assertion that the trial court in this case violated his due process rights because of "the State's failure" to provide him with immediate access to his personal property. Under these circumstances, we are not obligated to review this issue as it is presented and we deem it waived. A criminal defendant may appeal as of right from a judgment of conviction, from an order denying or revoking probation, or from a final judgment in criminal contempt, habeas corpus, extradition, or a post-conviction proceeding. *See* Tenn. R.App. P. 3(b). It appears the Defendant is challenging the conditions of his bail order issued by the General Sessions Court of Montgomery County. While it is not entirely clear what the exact nature of the Defendant's claim is, it does not appear to relate to his conviction of domestic assault in the trial court-the case now before us on review.

CONCLUSION

*6 We find sufficient evidence to support the Defendant's conviction for domestic assault. We conclude that all other issues raised on appeal are waived. Accordingly, the judgment of the trial court is affirmed.

Tenn.Crim.App.,2005.
State v. Hale
Not Reported in S.W.3d, 2005 WL 711908 (Tenn.Crim.App.)

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Westlaw

Slip Copy, 2012 WL 5193401 (Tenn.Crim.App.)
(Cite as: 2012 WL 5193401 (Tenn.Crim.App.))

Court of Criminal Appeals of Tennessee,
at Nashville.
STATE Of Tennessee
v.
Timothy Eugene KELLY, Jr.

No. M2011–01260–CCA–R3–CD.
Assigned on Briefs April 18, 2012.
Oct. 22, 2012.

Direct Appeal from the Criminal Court for Davidson County, No.2010–B–1511; Steve R. Dozier, Judge.
Elaine Heard, Nashville, Tennessee, for the appellant, Timothy Eugene Kelly, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Nicholas W. Spangler, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and J. Wesley King, Assistant District Attorney General, for the appellee, State of Tenness- ee.

NORMA McGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and ROGER A. PAGE, JJ., joined.

OPINION

NORMA McGEE OGLE, J.

***1** A Davidson County Criminal Court Jury convicted the appellant, Timothy Eugene Kelly, Jr., of one count of especially aggravated robbery and two counts of fraudulent use of a credit card. The trial court imposed a total effective sentence of thirty-seven years in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence supporting his convictions and the sentences imposed by the trial court. Upon review, we affirm the judgments of the trial court.

I. Factual Background

At trial, the victim, Barbara Erskine Futter, testified that around 6:00 p.m. on October 27, 2009, she and her boyfriend, Claude Todd, had dinner with friends, one of whom was Diane Gregory, at the Calypso Café. Around 7:15 or 7:30 p.m., the victim and Todd went to a Target store on White Bridge Road. Approximately fifteen minutes later, after making purchases, they left the store. In the parking lot, they encountered Gregory, and the trio stopped to talk.

While they were talking, the victim heard a noise and looked over her left shoulder. The victim was then hit in the back, and she felt her purse being pulled from her shoulder. However, the victim was unable to see the perpetrator. Gregory ran into the store to report the incident, and Todd ran after the perpetrator.

The victim said that she stood in place, holding onto her shopping cart until Todd and Gregory returned. The victim said that she felt as if someone had hit her with a fist on her back and that she experienced a dull pain in her back. The police arrived and spoke with the victim, Todd, and Gregory. After ten or fifteen minutes, the victim needed to go inside and sit. The victim testified that she could not stand and had to hold onto a wall to walk inside the store.

As they walked down a hallway inside Target, Gregory told the victim that she saw a slit in the victim's raincoat. When they got to a room where the victim could sit, the victim pulled off her raincoat and the jacket she wore underneath. The victim's back was covered with blood, and she realized she had been wounded. A few minutes later,

someone tried to push towels against her back, but the victim asked the person to stop because it was painful. Thereafter, ambulance personnel arrived and put the victim on a stretcher; the victim was unable to assist because "the pain in [her] back was so significant [she] couldn't really lean or bend or anything." The medical personnel placed the victim in an ambulance and transported her to Saint Thomas Hospital.

At the hospital, the victim was placed in a room, and a doctor told her that she had been stabbed. The victim said that the doctor's examination of the wound was "agony." The doctor determined that the wound was eight inches deep. Further testing revealed that one of the victim's kidneys had been lacerated. The victim stayed in the hospital for three days for treatment. She said that she still had a scar on the left side of her back.

*2 The day after she was admitted to the hospital, the victim called her credit card company, informed them of the robbery, and cancelled her credit cards. A credit card company employee told her that her card had been used four times the day after her purse was stolen: once at an Exxon gas station, twice at a Fancy Nails salon, and once at a Krystal's restaurant. Additionally, on the night of the stabbing, there was an attempted use of her credit card on John E. Merritt Boulevard.

On cross-examination, the victim denied that she had suffered a "substantial risk of death." She stated that although her kidney function was "fine" at the time of trial, her kidney did not work correctly "right away" after the stabbing. The victim described the initial pain as "a thick, heavy pain like somebody had hit you with a fist." She stated that she was unable to walk without support.

Diane Gregory testified that while she was talking with the victim and Todd in the Target parking lot, she saw a man walking from the shopping cart area. The man was wearing blue jeans, and he had a blue bandana around his face, covering his nose and mouth. Gregory said that she saw the man's face from about three feet away. The man walked behind the victim, hit her, and took her purse. When the man fled, Gregory ran into Target to get help. Thereafter, the police arrived, and everyone moved inside the store. At that time, Gregory saw that the victim's jacket was ripped and that she had been stabbed.

Gregory stated that sometime later, police brought her a photograph lineup to examine. After looking at the photographs, she identified the appellant as the perpetrator. On cross-examination, Gregory acknowledged that she had seen the appellant's eyes but no other distinguishing features. Nevertheless, she was able to quickly identify the appellant as the perpetrator.

Claude Todd testified that as he and the victim talked with Gregory in the Target parking lot, he saw a man quickly walking toward them from a service alley. The man had a bandana over his nose and mouth and a metallic object, which Todd thought was a pistol, in his hand. Todd believed the man was going to rob Target. However, the man moved behind the victim, and Todd heard the victim scream, "[W]hy did you hit me, or, you know, that's my purse." As the man left, Todd started to follow but slipped in a puddle of water.

After regaining his balance, Todd chased the perpetrator and saw him go into an alley behind either Dault's Restaurant or Calhoun's restaurant. The man got into a car that looked like a black Mustang or Trans Am, and the car sped away. Todd did not see enough of the man to be able to positively identify him; however, Todd knew the man was a black male with a slender build and height similar to Todd. Todd thought the man was a Target employee because he was wearing a red shirt. After the car left, Todd called 911 and returned to the victim.

When police arrived and the group went into Target, Todd had to assist the victim because she was weak. Gregory saw a tear in the back of the victim's coat. Todd pushed up the coat and saw that

the victim's blouse was covered with blood. He also saw a cut in the victim's skin.

*3 On cross-examination, Todd said that although he had watched the perpetrator, he was unable to identify him. Todd explained, "I got a good look at his eyes, but I was also not trying to stare at anybody that I perceived to have a gun at that time." He also explained that he thought the object the perpetrator carried was a gun because he did not think someone would try to rob Target with a knife.

Sharhonda Cunningham testified that she knew the appellant but that she had not known him long at the time of the offenses. Cunningham acknowledged that she had previously been convicted of misdemeanor theft, but she denied that she had three other theft convictions.

Cunningham testified that on Sunday, October 25, 2009, she was a passenger in a black Mustang with the appellant and four women: Shawndraka, Alicia, Jasmine, and Ashley. The Mustang belonged to Shawndraka. Cunningham did not know the surnames of any of the females. Two days later, Cunningham saw Shawndraka's car on television news footage regarding a robbery at Target.

Cunningham said that sometime after the robbery, she spoke with the appellant on the telephone. The appellant told her that he had robbed and stabbed a woman at Target. Cunningham said that she was not with the appellant at Target.

On cross-examination, Cunningham stated that she did not know why the appellant told her about the robbery. She denied that she was familiar with the Crime Stoppers Program or that she was expecting money from the State for her testimony.

Shawndraka Goodner testified that on Sunday, October 25, 2009, she was in her dark blue Mustang with the appellant, Cunningham, Ashley, and Jasmine. Goodner did not know the last names of Ashley or Jasmine. Goodner said that Jasmine and the appellant were "together." Goodner said that on October 27, she loaned her car to Jasmine. Later that night, Goodner saw her car on a television news report regarding a robbery at Target. When Goodner spoke face-to-face with the appellant, he said that he had committed a robbery at Target.

Goodner said that on October 28, she, her mother, and Jasmine went to Fancy Nails and had their nails done. Goodner and Jasmine paid with a credit card. On crossexamination, Goodner acknowledged that she knew the card was stolen. She conceded that she initially told police she paid for the nail service with her own money.

Metropolitan Nashville Police Detective Robert Peterson said that at around 8:05 p.m. on October 27, 2009, he responded to a robbery at Target. After speaking with the victim for a while, Detective Peterson noticed that she had been stabbed. An ambulance was called, and the victim was transported to the hospital.

Detective Peterson stated that he obtained security camera footage from Target. On the video was a dark blue Mustang. Detective Peterson released a description of the vehicle to the news outlets. He then went to the hospital, spoke with the victim, and asked her to cancel her stolen credit cards. The victim did so, and Detective Peterson learned that there were unauthorized transactions on the card following the robbery. The transactions included an attempted charge at 2801 John E. Merritt Boulevard, two charges at Fancy Nails, and one charge at a Krystal's restaurant. Police were unable to obtain security video relating to the transactions. Another unauthorized charge occurred at an Exxon gas station. Detective Peterson obtained video footage that showed a black female paying for gas for a dark blue Mustang.

*4 Detective Peterson said that on October 28, police dispatch notified him that Cunningham wanted to talk to him about the robbery at Target. When Detective Peterson interviewed Cunningham, she said that "[s]he had been riding around with [the appellant]." After the interview, Detective

Peterson prepared a photograph lineup and showed it to Gregory, who was facing the perpetrator as he approached the victim. Gregory identified the appellant from the lineup.

Thereafter, Detective Peterson spoke with Goodner, who acknowledged owning a 2000 model dark blue Ford Mustang. Goodner said that on October 27, she loaned the car to Jasmine Crook. After receiving permission from Goodner, Detective Peterson searched the car. In the back seat near the "trunk area," Detective Peterson found a blue bandana. Also in the vehicle were several photographic identifications of Crook and a temporary registration plate. Detective Peterson said that the Mustang matched the vehicle on the Target security video. He stated that the video revealed that the car had dropped someone off in a "distant part of the parking lot" and that person later ran back to the area where the car was located.

Metropolitan Officer Jimmy Gregg testified that on October 31, 2009, he was "asked to respond to a dark Mustang on Murfreesboro Road." Officer Gregg got behind the vehicle and activated his emergency lights. The vehicle drove into the parking lot of a coin laundry. Officer Gregg activated a spotlight and directed it toward the back window of the Mustang. He said, "I could see a male in the back behind the passenger seat taking off a—bandanna around from his ... nose and face area." Officer Gregg said that the bandanna was blue. He identified the appellant as the man who was wearing the bandanna. Officer Gregg recalled that the driver of the Mustang was a female named Jasmine Crook.

Detective Gregory Jennings testified that on October 31, 2009, he was informed that the appellant had been arrested. Detective Jennings responded to the laundromat on Murfreesboro Road, looked in the car, and saw a blue bandanna in the backseat. Detective Jennings read the appellant his *Miranda* rights, but the appellant did not give a statement.

In his defense, the appellant submitted "certified copies of [three additional theft] convictions of Ms. Cunningham" to impeach her credibility as a witness. The appellant presented no witnesses.

The jury found the appellant guilty of one count of especially aggravated robbery and two counts of fraudulent use of a credit card. On appeal, the appellant challenges the sufficiency of the evidence supporting his convictions and the sentences imposed by the trial court.

II. Analysis

A. Sufficiency of the Evidence

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. *See State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979); Tenn. R.App. P. 13(e).

*5 Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *See State v. Williams,* 657 S.W.2d 405, 410 (Tenn.1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See *State v. Pruett,* 788 S.W.2d 559, 561 (Tenn.1990).

The appellant complains that there was no physical evidence to tie him to the crimes except a blue bandanna that was not forensically tested by police. Further, he contends that "witnesses for the State who came forward to give statements and assistance to the police were either inconsistent or unreliable. Ms. Goodner and Ms. Cunningham both were not entirely honest both with the police and in

court."

First, we will address the appellant's conviction of especially aggravated robbery, which is defined as robbery accomplished with a deadly weapon where the victim suffers serious bodily injury. Tenn.Code Ann. § 39–13–403(a)(1) and (2). Aggravated robbery is defined as robbery accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon. Tenn.Code Ann. § 39–13–402(a)(1). Robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn.Code Ann. § 39–13–401(a). A theft of property occurs when someone, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. Tenn.Code Ann. § 39–14–103. Serious bodily injury is defined as a bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted unconsciousness;

(C) Extreme physical pain;

(D) Protracted or obvious disfigurement;

(E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or

(F) A broken bone of a child who is eight (8) years of age or less

Tenn.Code Ann. § 39–11–106(a)(34); *see also State v. Michael Farmer,* —— S.W.3d ——, No. W2009–02281–SC–R11–CD, 2012 WL 3594242, at *4–5 (Tenn.Crim.App. at Nashville, Aug. 22, 2012).

Our review of the record reveals that the victim, Todd, and Gregory were talking in the Target parking lot when a man approached, stabbed the victim in the back, and took her purse. Although the perpetrator wore a blue bandanna covering the bottom of his face, Gregory was later able to identify the appellant as the perpetrator. Todd saw the perpetrator flee and get into a dark-colored Mustang. Detective Peterson retrieved video footage from Target's security cameras and released the footage of the vehicle to the media. Upon seeing the footage on the news, Cunningham called Detective Peterson and said that she recognized the car. Goodner also recognized the car, which belonged to her. Goodner said that she had loaned the car to Jasmine Crook, the appellant's girlfriend. Later, Officer Gregory pursued the Mustang and saw the appellant in the backseat, taking off a blue bandanna.

***6** Immediately after the stabbing, the victim experienced a "dull pain" which progressed until she was "in too much pain" to move without assistance. The victim said that she was in "agony" and that she was hospitalized for three days. The hospital record show that she was given morphine, oxycontin, and other strong pain relievers. At the hospital, the victim learned that the stab wound was eight inches deep and had lacerated her kidney. She said that her kidney was "[w]orking fine [at the time of trial, but] it was not working fine right away." Further, she said that she had a scar on her back, which she showed to the jury. We conclude that the evidence was sufficient to sustain the appellant's conviction of especially aggravated robbery.

Turning to the appellant's remaining convictions, Tennessee Code Annotated section 39–14–118(b)(1) provides that "[a] person commits the crime of fraudulent use of a credit or debit card who uses, or allows to be used, a credit or debit card or information from that card, for the purpose of obtaining property, credit, services or anything else of value with knowledge that ... [t]he card is forged or stolen." Tennessee Code Annotated section 39–14–118(c)(1) provides that "[f]raudulent use of a credit or debit card is punishable as theft pursuant to § 39–14–105, depending on the amount of property, credit, goods or services obtained";

otherwise, subsection (c)(2) provides that "[i]f no property, credit, goods, or services are actually received or obtained, illegal possession or fraudulent use of a credit card is a Class A misdemeanor."

The victim stated that after her purse was stolen, she cancelled the credit cards that were in her purse. She learned that her credit card had been used four times the day after her purse was stolen: once at an Exxon gas station, twice at a Fancy Nails salon, and once at a Krystal's restaurant. Additionally, on the night of the stabbing, there was an attempted use of her credit card on John E. Merritt Boulevard. Video footage obtained by Detective Peterson depicted a black female at the Exxon gas station paying for gas for a dark blue Mustang. Goodner testified that she, her mother, and the appellant's girlfriend Crook went to Fancy Nails; Goodner and Crook each used a credit card to pay for services. Goodner acknowledged that she knew the credit card was stolen. Although the appellant questions the credibility of Crook and Goodner, we note that determining the credibility of witnesses is within the purview of the jury. *See State v. Millsaps,* 30 S.W.3d 364, 368 (Tenn.Crim.App.2000) (stating that "the weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the trier [ ] of fact"). In the instant case, the jury clearly resolved the issue of credibility in the State's favor. We may not now reconsider the jury's credibility assessment. *See State v. Carruthers,* 35 S.W.3d 516, 558 (Tenn.2000). We conclude that there was sufficient evidence for the jury to find that the appellant stole the credit card and that he allowed Goodner and Crook to use the stolen credit card.[FN1]

FN1. The trial court's minutes from January 28, 2011, reflect that the court granted an oral motion to sever the offenses and noted that trial would proceed on counts 3, 4, and 5. Likewise, the trial court's sentencing order noted that "Counts 3–5 of the original indictment were tried as Counts 1, 2, and 3 during this trial for the purpose of the jury. Counts 1 and 2 and 6–9 were severed to be tried separately." The judgments of conviction reflect that the appellant was found guilty on counts 3, 4, and 5. However, the court's minutes from March 22, 2011, reflect that the jury found the appellant "guilty as to count one especially aggravated robbery [ ] and counts two and three fraudulent use of [a] credit card."

B. Sentencing

*7 Previously, appellate review of the length, range, or manner of service of a sentence was de novo with a presumption of correctness. *See* Tenn.Code Ann. § 40–35–401(d). However, our supreme court recently announced that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.' " *State v. Susan Renee Bise,* —— S.W.3d ——, No. E2011–00005–SC–R11–CD, 2012 WL 4380564, at *19 (Tenn.Crim.App. at Knoxville, Sept. 26, 2012). In conducting its review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. *See* Tenn.Code Ann. §§ 40–35–102, –103, –210; *see also Bise,* ——S.W.3d ——, No. E2011–00005–SC–R11–CD, 2012 WL 4380564, at * 11. The burden is on the appellant to demonstrate the impropriety of his sentence. *See* Tenn.Code Ann. § 40–35–401, Sentencing Comm'n Cmts.

The trial court should also consider enhancement and mitigating factors; however, the statutory enhancement factors are advisory only. See

Tenn.Code Ann. § 40–35–114; *see also* Bise, —— S.W.3d ——, No. E2011–00005–SC–R11–CD, 2012 WL 4380564, at *11; *State v. Carter,* 254 S.W.3d 335, 343 (Tenn.2008). Our supreme court has stated that "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." *Carter,* 254 S.W.3d at 345. In other words, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act] .' " *Id.* at 343. "[A]ppellate courts are therefore left with a narrower set of circumstances in which they might find that a trial court has abused its discretion in setting the length of a defendant's sentence." *Id.* at 345–46. "[They are] bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections –102 and –103 of the Sentencing Act." *Id.* at 346.

The appellant alleges that the sentences imposed by the trial court were excessive. However, as the State correctly notes, the appellant waived this issue by failing to include a transcript of the sentencing hearing. It is well-established that "[w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard,* 855 S.W.2d 557, 560 (Tenn.1993); *see also* Tenn. R.App. P. 24(b); *Thompson v. State,* 958 S.W.2d 156, 172 (Tenn.Crim.App.1997). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." *State v. Oody,* 823 S.W.2d 554, 559 (Tenn.Crim.App.1991). Without the transcript of the sentencing hearing, we are unable to perform a de novo review of the appellant's sentencing issues, and we presume the trial court correctly sentenced the appellant.

III. Conclusion

***8** In sum, we conclude that there is sufficient evidence to sustain the appellant's convictions and that the trial court did not err in sentencing the appellant. Therefore, we affirm the judgments of the trial court.

Tenn.Crim.App.,2012.
State v. Kelly
Slip Copy, 2012 WL 5193401 (Tenn.Crim.App.)

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Slip Copy, 2010 WL 3384988 (Tenn.Crim.App.)
(Cite as: 2010 WL 3384988 (Tenn.Crim.App.))

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Only the Westlaw citation is currently available.

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

Court of Criminal Appeals of Tennessee,
at Jackson.
STATE of Tennessee
v.
Joseph SHAW, Jr.

No. W2009-02326-CCA-R3-CD.
Assigned on Briefs May 4, 2010.
Aug. 27, 2010.
Application for Permission to Appeal Denied by Supreme Court Jan. 13, 2011.

Appeal from the Circuit Court for Madison County, No. 09-52; Roger A. Page, Judge.
Magan N. White, Jackson, Tennessee (on appeal); and Paul Edward Meyers, Assistant Public Defender (at trial), for the appellant, Joseph Shaw, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; James G. (Jerry) Woodall, District Attorney General; and James W. Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

ALAN E. GLENN, J., delivered the opinion of the Court, in which J .C. McLIN and D. KELLY THOMAS, JR., JJ., joined.

OPINION

ALAN E. GLENN, J.

***1** The defendant, Joseph Shaw, Jr., was convicted by a Madison County jury of one count of rape, a Class B felony, and one count of sexual battery, a Class E felony. The trial court merged the sexual battery conviction into the rape conviction and sentenced the defendant as a Range I offender to eleven years at 100% in the Department of Correction. On appeal, the defendant challenges the sufficiency of the evidence and argues that the trial court erred by admitting a prior consistent statement of the victim without issuing a limiting instruction and by imposing an excessive sentence. Following our review, we affirm the judgment of the trial court.

FACTS

According to the State's proof at trial, on August 30, 2008, the defendant sexually assaulted his girlfriend's thirteen-year-old daughter, K.P.,[FN1] grabbing her breasts and buttocks and penetrating her labia with his fingers. He was subsequently charged with one count of rape and one count of sexual battery and tried before a Madison County jury on June 11, 2009.

FN1. It is the policy of this court to refer to minor victims of sexual assault by their initials only.

The victim, who was fourteen years old at the time of trial, testified that late on the morning of August 30, 2008, her mother was at work and she was home alone in their Jackson apartment when the defendant came to the apartment at her mother's request to bring her some food. She said that she admitted him into the apartment and that he ate his lunch at the table while she ate on the couch as she watched television. The victim testified that she had slept late that morning and was dressed in pajamas and wrapped in her cover. She said she was still watching television after she had finished her meal when the defendant got up as if to leave but then knelt down on the floor beside her and started talking.

The victim testified that she could not recall what the defendant said but that after a few minutes

she asked him to leave. The defendant said no and kept talking. A few minutes later, she asked him to leave again and he again refused. She then told him to get out, but he instead placed his hand on her thigh. She slapped his hand and moved it away. He kept trying to touch her, and she kept pushing him off. Finally, he walked behind the couch, grabbed the cover that she had tucked under herself, and threw it onto the floor, in the process knocking her to her stomach onto the floor.

At that point, the defendant "started grabbing ... and touching [her]" as she attempted to fight him off. The victim said that the defendant grabbed her breasts, touched her buttocks, and stuck his hands inside her pajamas and underpants to touch her in her "private parts." She stated that she was screaming and kicking and that the defendant put her mother's shirt, which was lying across the arm of the couch, in her mouth as he told her to stop screaming and that they would both get in trouble. In addition, the defendant told her not to tell her mother and that if she did, he would say that she had been "walking around the house butt [sic] naked in front of him."

***2** The victim testified that the defendant stopped and ran out the door when her cousin called her on her cell phone. She said that she got up and locked the door behind him, retrieved her phone from where it had been knocked under the couch, and called her cousin back. She stated that she did not tell her cousin what had happened because she did not want her family to know. Immediately after that conversation, however, she called her best friend, Shantevious Gillard, broke down crying, and told her what the defendant had done. The victim said that Gillard put her grandmother on the phone, who reacted by calling Gillard's mother. Gillard's mother, in turn, reported the incident to the victim's mother.

The victim identified on an anatomical drawing where the defendant had touched her, circling the buttocks, breasts, and pubic areas of the drawing. She testified that as the defendant was touching her privates, "[h]is fingers touched the inside of [her] lips just a little bit." At the request of the prosecutor, she then indicated on a diagram of the female sex organ the precise places the defendant had touched, marking two X's on each labium minus and a "P" beside them to indicate penetration. She also demonstrated on an anatomically correct doll where the defendant had penetrated her with his fingers.

On cross-examination, the victim acknowledged that she did not call 911 or her mother, that she told her cousin that everything was okay, and that none of her neighbors came to check on her, despite the fact that she lived in a second floor apartment and the incident happened in the middle of the day on a Saturday. She testified that she had known the defendant for approximately three years, had been alone with him before, and had never expressed any uneasiness or problems with him in the past. She agreed that she testified at the preliminary hearing that the defendant had not penetrated her but then changed her answer after meeting with someone from the prosecutor's office. After having her memory refreshed by her preliminary hearing testimony, she also acknowledged that just prior to the incident, the defendant had told her that R & B singer Chris Brown, whom she had jokingly claimed as her boyfriend, would not be with her because she was "a big girl." She denied, however, that the defendant's comment made her start fighting with him or caused her to fabricate the allegations against him.

On redirect examination, she testified that she did not call her mother because she knew that she "would be upset and crying and hurt."

Derrick Mays, the victim's cousin, testified that he called to check on the victim on August 30, 2008, after leaving church. As he recalled, the victim told him that her mother was gone and that she was home alone.

Shantevious Gillard testified that the victim called her crying on August 30, 2008, and was ini-

tially unable to tell her what was wrong because "she was choking up her words." She said that the victim finally told her what had happened but begged her not to tell anyone because the defendant had told her she would get in trouble. The witness stated that she started crying upon hearing the victim's revelations and that her grandmother, who was in the room with her, got on the phone, assured the victim that they would be right over, and then called the witness's mother, who reported the incident to the victim's mother.

*3 Stacy Gillard, Shantevious' mother, testified that her daughter's grandmother called her on August 30, 2008, to tell her that the victim had reported that the defendant had tried to rape her and that she relayed that information to the victim's mother.

The victim's mother testified that when she received a phone call informing her that the victim had been raped by the defendant she immediately headed home, calling the police, an ambulance, and the defendant en route. She said when she asked the defendant what he had done to the victim, he replied that he had not done anything, that the victim was lying because she did not want them to be together, and that he would meet her at the apartment. When she got home, the defendant was waiting outside and the victim, who was crying and wrapped up in her cover on the floor, told her that the defendant had touched her. The defendant initially said that he had not touched the victim but later admitted that he had touched the victim's breasts and buttocks. She asked him why, but he never gave her an answer.

The victim's mother testified that the victim said at the preliminary hearing that she had not been penetrated because she thought, at the time, that penetration required insertion into the actual vagina. The witness said that she and the victim did not learn otherwise until they were instructed by the prosecutor.

On cross-examination, the witness testified that, although she could not now recall the conversation, she said in her statement to police that the defendant told her that his touching of the victim's breasts and buttocks occurred while they were playing.

Jackson Police Officer Rochelle Staten, who responded to the scene, testified that she interviewed the victim while Officer Isaiah Thompson interviewed the defendant.

Jackson Police Officer Isaiah Thompson testified that the defendant told him that he and the victim had been "wrestling," but the defendant denied having touched the victim's breasts, buttocks, or groin area. He said he asked the defendant if the victim's panties were down, and the defendant stated that "[t]hey might have come down when [they were] tussling" because the victim was kicking at him. He stated that when he asked the defendant to explain why he was "tussling" with the thirteen-year-old victim, the defendant replied that the victim was "kind of tomboyish" and that she did not "even really like [him]."

Investigator Danielle Jones of the Jackson Police Department testified that the victim's account of the crime in the statement she took from her was consistent with the account she provided at trial. On cross-examination, she acknowledged that the victim mentioned nothing in her statement about the Chris Brown exchange or the defendant's having touched her thigh.

The defendant, testifying in his own behalf, provided the following account of the episode. He was about to leave after he and the victim had eaten the food he brought them when the victim, who was watching television, "got to hollering" about Chris Brown, saying that he was her boyfriend. He told her that Brown would not have her because she was "a fat big juju," and the victim became very angry and jumped at him. He and the victim struggled, and he grabbed her arms and threw her down in an effort to prevent her from hitting him. She then tried to kick him below the waist, and he grabbed her legs to stop her. He did not hurt her but did only

"enough to get her off [him.]" At that point, the victim got up and started panting as if she were having an asthma attack. She pointed to the door, and he left the apartment, got into his truck, and drove home.

*4 The defendant testified that he might have touched the victim's breasts or buttocks during the struggle but that it was unintentional. He denied that he pulled her panties down, put his hands down her pants, or penetrated her in any way. On cross-examination, he said that if the victim's panties came down, it was not because he pulled them down but because the victim was "kicking and stuff, wiggling."

The State called the victim in rebuttal, who denied that she had attacked the defendant or that the two had engaged in any playful "tussle" or fight.

Following deliberations, the jury convicted the defendant of both counts as charged in the indictment. The trial court merged the sexual battery count into the rape count and, applying the enhancement factor that the defendant abused a position of private trust, sentenced the defendant as a Range I offender to eleven years at 100 percent for the rape conviction, three years beyond the minimum sentence in the range.

ANALYSIS

I. Sufficiency of the Evidence

The defendant first contends that the evidence was insufficient to sustain his convictions for rape and sexual battery. When the sufficiency of the convicting evidence is challenged on appeal, the relevant question of the reviewing court 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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also* Tenn. R.App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans,* 838 S.W.2d 185, 190-92 (Tenn.1992); *State v. Anderson,* 835 S.W.2d 600, 604 (Tenn.Crim.App.1992).

All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pappas,* 754 S.W.2d 620, 623 (Tenn.Crim.App.1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace,* 493 S.W.2d 474, 476 (Tenn.1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing *Carroll v. State,* 212 Tenn. 464, 370 S.W.2d 523 (1963)).

*5 "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982).

For the purposes of this case, rape is defined as "unlawful sexual penetration of a victim by the defendant" accomplished with "force or coercion." Tenn.Code Ann. § 39-13-503(a)(1) (2006). " 'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any other intrusion, however slight,* of any part of a person's

body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body...." *Id.* § 39-13-501(7) (emphasis added). As our supreme court has explained, " 'sexual penetration in a legal sense' " occurs " 'if there is the slightest penetration of the sexual organ of the female.... It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient.' " *State v. Bowles,* 52 S.W.3d 69, 74 (Tenn.2001) (quoting *Hart v. State,* 21 S.W.3d 901, 905 (Tenn.2000)).

"Sexual battery" is defined as "unlawful sexual contact with a victim by the defendant" accomplished with "force or coercion." *Id.* 39-13-505(a)(1). " 'Sexual contact' includes the intentional touching of the victim's ... intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's ... intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." *Id.* § 39-13-501(6).

The defendant argues that the evidence was insufficient to show beyond a reasonable doubt that he sexually penetrated the victim or that he intentionally touched her in any sexual manner. In support, he cites his testimony that he and the victim were involved in a struggle after she attacked him when he called her fat, as well as the victim's admissions that she did not call 911 or her mother, told her cousin that nothing was wrong, and testified at the preliminary hearing that she had not been penetrated. The State responds by arguing that the jury accredited the victim's testimony over that of the defendant, as was within its province.

We conclude that the evidence, viewed in the light most favorable to the State, established that the defendant, using force, intentionally touched the victim's breasts, buttocks, and pubic region for the purpose of sexual arousal or gratification and that his touching of her pubic region occurred under her clothing and included the penetration of her labia with his fingers. The victim provided great detail about the assault, relating how the defendant first made sexual advances, which she refused, and then physically attacked her by throwing her on the ground, groping her breasts and buttocks, and putting his hand inside her pajamas and underpants to penetrate her labia with his fingers. The victim explained that she changed her testimony with respect to whether she had been penetrated after receiving instruction from the prosecutor on what constituted penetration. She also demonstrated on both a diagram and an anatomically correct doll exactly where the defendant had touched her vulva. In sum, the victim's testimony, which was obviously accredited by the jury, was more than sufficient to sustain the defendant's convictions for rape and sexual battery.

II. Admission of Prior Consistent Statement

*6 The defendant next contends that the trial court erred by allowing Investigator Danielle Jones to testify about the victim's prior consistent statement without instructing the jury that such statement could not be considered as substantive evidence but only in assessing the victim's credibility. The State argues, alternatively, that the defendant has waived the issue by his failure to request the limiting instruction at trial and that any error in admitting the evidence without a specific limiting instruction was harmless, particularly in light of the fact that the trial court issued the appropriate limiting instruction with respect to the use of a prior inconsistent statement. We will trace how this matter developed at trial.

In the defense's cross-examination of the victim, she was questioned at length about how her testimony at the preliminary hearing [FN2] differed from her testimony at trial. She acknowledged that, at the preliminary hearing, she did not say that the defendant had touched her thigh or that he had penetrated her. The trial court sustained the State's objection to the defendant's question, "Is there any reason why your story keeps changing every time you meet with the investigators?"

FN2. The record on appeal does not contain a transcript of the preliminary hearing

or the victim's statement to Danielle Jones of the Jackson Police Department.

Later in the trial, Danielle Jones, who investigated the victim's complaint for the Jackson Police Department, was called as a witness for the State. She said the victim told her that she had awakened at about 11:30 a.m. and that the defendant had brought food for her and left briefly to get a drink. The defendant objected to this line of questioning, but the court overruled the objection, concluding that the State was asking about prior consistent statements of the victim. Officer Jones said that the victim had said in her statement, as she had testified in court, that she was wearing pajama top and pants; that the defendant said he was leaving but returned, got on his knees on the floor, and began talking with her; that he threw her cover to the floor, knocking her to the floor; that he rubbed her vaginal area, buttocks, and breasts; that she was kicking and screaming and he told her to stop or both would get in trouble; that the defendant put a white shirt around her mouth; that her cell phone began ringing but had fallen under the couch; that the defendant left as the telephone began to ring; that the telephone call was from her cousin, Derrick, with whom she talked; and that she told her friend, Shantevious Gillard, what the defendant had done.

So, in a nutshell, what occurred at trial as to this matter, is that after the victim testified, the defense cross-examined her as to differences between her testimony at trial and the preliminary hearing, establishing that she had not earlier testified that the defendant had penetrated her. On redirect examination, the State questioned her as to the contents of her statement to police officers. That statement appears to have been consistent with her testimony at trial, except that she did not tell Investigator Jones that the defendant had penetrated her.

*7 Evidence of a witness's prior consistent statement may be admitted when, as here, the witness's credibility has been impeached through the introduction of a prior inconsistent statement that suggests that the witness's "trial testimony was either fabricated or based upon faulty recollection." *State v. Meeks,* 867 S.W.2d 361, 374 (Tenn.Crim.App.1993). "Under such circumstances, the [witness's] statement made before the inconsistent statement but which was consistent with [the witness's] trial testimony" is admissible to rehabilitate the witness's credibility. *Id.* The prior consistent statement is not offered for the truth of the matter asserted, and it is proper for the trial court to issue a limiting instruction to the jury to that effect. *See State v. Livingston,* 907 S.W.2d 392, 398 (Tenn.1995); *State v. Braggs,* 604 S.W.2d 883, 885 (Tenn.Crim.App.1980).

Although the defendant objected to the introduction of evidence of the victim's prior consistent statement on the grounds of hearsay, he did not request that the trial court issue a limiting instruction upon the admission of the evidence. Generally, a failure to request such an instruction results in waiver of the issue on appeal. *See* Tenn. R. Evid. 105; *State v. Smith,* 24 S.W.3d 274, 279 (Tenn.2000) ("A trial court ... generally has no duty to exclude evidence or provide a limiting instruction to the jury in the absence of a timely objection."). Thus, we agree with the State that the defendant has waived this issue by his failure to request the instruction at trial.

The defendant argues that "[s]imilar to the case of the admission of a prior inconsistent statement for impeachment purposes, a limiting instruction should be given in the case of the admission of a prior consistent statement, even when not requested, if the State's proof is weak and the prior statement is damaging." The State points out that the trial court issued the appropriate limiting instruction on the use of prior inconsistent statements and asserts that "no court has found that both instructions should be given absent any special request." We agree with the State.

In *State v. Thomas Dee Huskey,* No. E1999-00483-CCA-R3-CD, 2002 WL 1400059, at *156-57, (Tenn.Crim.App. June 28, 2002), *perm. to*

appeal denied (Tenn. Feb. 18, 2003), which is cited by the defendant in support of his argument, we did not hold that a limiting instruction should be issued, regardless of request, whenever a damaging prior consistent statement is admitted for impeachment purposes and the State's case is weak. Rather, after noting the principle as it applies to prior inconsistent statements, we concluded that "[e]ven if, for argument's sake, we were to apply that principle to the present circumstance, it would avail the defendant nothing," as the State's case was not weak and the prior consistent statement was not very damaging. *Id.* at *176. In this case, likewise, the State's proof was far from weak, as the victim's testimony was strong and unwavering and was bolstered by her friend's and her mother's description of her emotional distress immediately following the attack. Furthermore, the evidence presented of the victim's prior consistent statement was not that damaging, for, in the statement, the victim did not say that the defendant had penetrated her.

***8** In a reply brief, the defendant asserts that a limiting instruction is a specific requirement for the admission of a prior consistent statement and that the trial court's failure to issue one constitutes plain error. We respectfully disagree. In order for us to find plain error, " '(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice.' " *State v. Smith,* 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson,* 899 S.W.2d 626, 641-42 (Tenn.Crim.App.1994)). The presence of all five factors must be established by the record before we will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one factor cannot be established. *Id.* at 283.

The prerequisites for a finding of plain error are not met in this case, as no clear and unequivocal rule of law was breached and consideration of the error is unnecessary to do substantial justice. Although a limiting instruction should be issued, it is not, as we discussed above, an absolute requirement for the admission of a prior consistent statement in the absence of a defendant's request. Moreover, even if the trial court erred in allowing the State to question the victim about her statement to police officers, the error was harmless. Earlier in the trial, the jury had heard the testimony of the victim's friend, Shantevious Gillard, who said that the victim had called her on August 30, 2008, crying and "choking up her words." Gillard's grandmother then spoke with the victim and, afterwards, telephoned Gillard's mother, saying that the defendant had tried to rape the victim. When the victim's mother arrived at her residence, the defendant was waiting outside. The victim was inside, crying and wrapped up in a blanket, and told her mother that the defendant had "touched" her. The defendant later admitted to the victim's mother that he had touched the victim's breasts and buttocks and did not respond when asked why he had done so. Additionally, without objection, the victim's mother testified that, at the preliminary hearing, the victim did not testify that the defendant had raped her because the victim believed that rape required penetration of the vagina. Given all of this testimony, particularly as to the emotional state of the victim and the admission of the defendant to the victim's mother that he had touched the victim's breasts and buttocks, we conclude that, even if the trial court erred in this evidentiary ruling, the error was harmless.

III. Excessive Sentence

Lastly, the defendant contends that the trial court imposed an excessive sentence by improperly applying the enhancement factor of his abuse of a position of private trust. Specifically, he argues that the factor should not have been applied because he did not share the same household with the victim, and there was "no evidence as to what interactions between [the victim] and [the defendant] led [to the victim's] trusting [the defendant.]" The State argues

that the trial court's application of the enhancement factor was proper, as "the defendant would not have been able to rape and sexually abuse this child, had he not been her mother's boyfriend and had he not been entrusted in that capacity to take her lunch on the day the offense occurred." We agree with the State.

*9 When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn.Code Ann. § 40-35-401(d) (2006). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Butler,* 900 S.W.2d 305, 311 (Tenn.Crim.App.1994); *State v. Smith,* 891 S.W.2d 922, 929 (Tenn.Crim.App.1994); *State v. Bonestel,* 871 S.W.2d 163, 166 (Tenn.Crim.App.1993), *overruled on other grounds by State v. Hooper,* 29 S.W.3d 1, 9 (Tenn.2000).

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statistical information provided by the administrative office of the courts as to Tennessee sentencing practices for similar offenses, (h) any statements made by the accused in his own behalf, and (i) the accused's potential or lack of potential for rehabilitation or treatment. Tenn.Code Ann. §§ 40-35-103, -210 (2006); *State v. Taylor,* 63 S.W.3d 400, 411 (Tenn.Crim.App.2001). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn.Code Ann. § 40-35-401 (2006), Sentencing Commission Cmts.; *Ashby,* 823 S.W.2d at 169.

In imposing a specific sentence within a range, a trial court "shall consider, but is not bound by" certain advisory sentencing guidelines, including that the "minimum sentence within the range of punishment is the sentence that should be imposed" and that "[t]he sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors[.]" Tenn.Code Ann. § 40-35-210(c)(1), (2). The weighing of the various mitigating and enhancement factors is "left to the trial court's sound discretion." *State v. Carter,* 254 S.W.3d 335, 345 (Tenn.2008).

At the sentencing hearing, the victim's mother testified that the defendant's actions had devastated both the victim and herself and that they both attended counseling as a result. She said that she had placed complete trust in the defendant, who had "always appeared to be like a father figure" to the victim, but that she now no longer trusted any man. She further testified that the victim's personality had completely changed, in that she was quieter, no longer liked to attend church or be around other people, and in general preferred to keep to herself.

***10** In his allocution to the court, the defendant denied that he raped or improperly touched the victim, protesting that it was "more like a case of assault and battery because [the victim] got aggressive and tried to hit" him.

At the conclusion of the hearing, the trial court rejected the State's proposed enhancement factor that the victim was particularly vulnerable due to her age, *see* Tenn.Code Ann. § 40-35-114(4) (2006), but found that enhancement factor (14), the defendant abused a position of private trust, *see id.* § 40-35-114(14), applied and was entitled to great weight due to evidence that the defendant had used his romantic relationship with the victim's mother

to gain access to the victim. The court's ruling states in pertinent part:

> Now, as to the other one, number fourteen, it deals with a position of private trust. The [d]efendant abused a position of private trust that significantly facilitated the commission or the fulfillment of the offense. I'm finding by a preponderance of the evidence from ... what I heard during the sentencing hearing and also at trial that [the defendant] was the boyfriend of this victim's mother, which gave him accessibility to the victim. It also gave him an opportunity to commit this crime that others would not have had.
>
> Most of the cases dealing with this deal with parents, stepparents, teachers, that sort of thing. But the Court can make a finding that there was a position of trust here.
>
> In the case of *State v. [Larry E.] Rathbone,* [No. E2007-00602-CCA-R3-CD, 2008 WL 1744581 (Tenn.Crim.App. Apr.16, 2008), *perm. to appeal denied* (Tenn. Oct. 27, 2008)], the Court was upheld in applying the factor to the father's girlfriend.... And even on that case it was a live-in girlfriend.
>
> I think here because of the damage to the victim ... and the impact on her, I think the Court is going to find for that reason, along with all the others, the [d]efendant was in a relationship with the victim that promoted confidence, reliability, and faith.

We find no error in the trial court's application of this factor. Although our supreme court has held that an adult "occupies a position of 'presumptive private trust' with respect to the minor" when the adult and child are members of the same household, there is no requirement that a defendant share the same household with the victim, or occupy any formal relationship with respect to the family, in order for enhancement factor (14) to apply. *State v. Gutierrez,* 5 S.W.3d 641, 645 (Tenn.1999). As the *Gutierrez* court explained:

> [T]o determine the application of the private trust factor, the court must look to "the nature of the relationship," and whether that relationship "promoted confidence, reliability, or faith." *State v. Kissinger,* 922 S.W.2d [482,] 488 [(Tenn.1996)]. A relationship which promotes confidence, reliability, or faith, usually includes a degree of vulnerability. It is the exploitation of this vulnerability to achieve criminal purposes which is deemed more blameworthy and thus justifies application of the enhancement factor.... As with all determinations regarding the application of an enhancement factor, the utilization of this analysis "is a task that must be undertaken on a case-by-case basis." *[State v.] Poole,* 945 S.W.2d [93,] 96 [(Tenn.1997)].

*11 *Id.* at 646.

The defendant, whom the victim had known for approximately three years at the time of the offense, was the boyfriend of the victim's mother and, according to the mother's testimony, acted as a sort of father figure to the victim. As such, he was entrusted to bring the victim her lunch and to dine alone with her at the apartment while the victim's mother was at work. The defendant exploited that trust and the vulnerability of the thirteen-year-old victim by not only sexually assaulting her but also threatening that if she reported the abuse, he would claim that she had engaged in exhibitionist behavior in front of him. Given his close relationship with her mother, the defendant was also no doubt aware that the victim would be reluctant to report the abuse to her mother for fear of upsetting her. Under these circumstances, we conclude that the trial court properly enhanced the defendant's sentence based on the application of enhancement factor (14).

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

Tenn.Crim.App.,2010.
State v. Shaw

Slip Copy, 2010 WL 3384988 (Tenn.Crim.App.)

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