IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

United States of America ex rel.	**)**	
TIMOTHY GUILFOY,	**)**	
TOMIS ID 00499702,	**)**	
	)	
Petitioner,	**)**	
	)	
v.	**)**	**Case No. 18-cv-1371**
	)	
MICHAEL PARRIS, Warden,	**)**	**Honorable Eli J. Richardson**
Northwestern Correctional	**)**	
Complex,	**)**	**Honorable Magistrate**
	)	**Barbara D. Holmes**
Respondent.	**)**	

AMENDED PETITION UNDER 28 U.S.C. § 2254 FOR
WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Now comes Petitioner, Timothy Guilfoy, by and through his attorneys, and petitions this Court for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. In support thereof, Petitioner states as follows:

1. **(a) Name and location of the court that entered the judgment of conviction Petitioner is challenging:** Criminal Court for Davidson County, Tennessee, Division V

   (b) Criminal docket or case number: No. 2011-A-779

2. **(a) Date of the judgment of conviction:** October 28, 2011

   (b) Date of sentencing: January 13, 2012; re-sentenced March 28, 2014

3. **Length of sentence:** Petitioner was originally sentenced to a total effective term of 70 years. On remand following Petitioner's direct appeal, Petitioner was re-sentenced to a total effective term of 40 years.

4. **In this case, was Petitioner convicted on more than one count or of more than one crime?** Yes

5. **Identify all crimes of which Petitioner was convicted and sentenced in this case:** Petitioner was originally convicted of two counts of rape of a child, four counts of aggravated sexual battery, and one count of assault. The appellate court subsequently merged several of the convictions (see below).

6. **(a) What was Petitioner's plea?** Not guilty

   (b) If Petitioner entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did Petitioner plead guilty to and what did Petitioner plead not guilty to? N/A

   (c) If Petitioner went to trial, what kind of trial did Petitioner have? Jury trial

7. **Did Petitioner testify at a pretrial hearing, trial, or a post-trial hearing?** No

8. **Did Petitioner appeal from the judgment of conviction?** Yes

9. **If Petitioner did appeal, answer the following:**

   (a) Name of court: Court of Criminal Appeals of Tennessee, at Nashville

   (b) Docket or case number: No. M2012-00600-CCA-R3-CD

   (c) Result: The appellate court affirmed the judgment in part, modified the judgment in part, and remanded the case for resentencing. The appellate court merged Petitioner's two convictions for rape of a child into a single conviction for rape of a child. The appellate court further merged two of Petitioner's convictions for aggravated sexual battery into a single conviction for aggravated sexual battery. Finally, the court merged Petitioner's conviction for assault into one of his convictions for aggravated sexual battery. Due to the significant alterations to Petitioner's convictions, the appellate court remanded the case for a new sentencing hearing.

   (d) Date of result: May 13, 2013

   (e) Citation to the case: *State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996 (Tenn. Crim. App., May 13, 2013). *See* Exhibit A.

   (f) Grounds raised:

   Ground One: The evidence was insufficient to sustain the convictions for aggravated sexual battery, rape of a child, and assault. In the alternative, a new trial should be granted pursuant to Rule 33 of the Tennessee Rules of Criminal Procedure, as the jury verdict was against the weight of the evidence.

Ground Two: The convictions in Counts One, Two, Six, Seven, and Eight must be vacated as the election of offenses for these counts was constitutionally inadequate and deprived Petitioner of his constitutional right to a unanimous jury verdict.

Ground Three: The trial court erred by admitting leading questions posed by the State of alleged victim J.A. The error denied Petitioner his constitutional right to due process of law as secured by the Fifth and Fourteenth Amendments to the United States Constitution.

Ground Four: The trial court erred by allowing a witness to give an expert opinion that the lack of physical evidence was consistent with the alleged victim's claim of penetration.

Ground Five: The trial court erred by allowing a witness to offer an opinion that it is not realistic to expect children to remember the details of an alleged assault. The trial court's admission of the testimony violated the Tennessee Rules of Evidence and Petitioner's right to due process of law as secured by the Fifth and Fourteenth Amendments to the United States Constitution.

Ground Six: The trial court erred by admitting as substantive evidence the out-of-court videotaped interviews of both alleged victims. The trial court's admission of the evidence violated the Tennessee Rules of Evidence and Petitioner's rights as secured by Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Ground Seven: A new trial should be ordered due to the admission of the controlled phone call made to the Petitioner by J.A.'s mother and at the direction, and under the supervision of, the police.

Ground Eight: A new trial should be ordered based on cumulative error which denied Petitioner's right to due process of law as secured by the Fifth and Fourteenth Amendments to the United States Constitution.

Ground Nine: The trial court violated the purpose of Tennessee's Criminal Sentencing Reform Act of 1989 by imposing consecutive sentences and sentencing Petitioner to a total effective sentence of seventy years.

(g) Did Petitioner seek further review by a higher state court? If yes, answer the following: Yes

> **(1) Name of court:** Tennessee Supreme Court
>
> **(2) Docket or case number:** No. M2012-00600-SC-R11-CD

(3) Result: Petitioner's Application for Permission to Appeal was denied

(4) Date of result: November 5, 2013

(5) Citation to the case: N/A. *See* Exhibit B.

(6) Grounds raised: Petitioner raised the same grounds as those raised in his direct appeal to the Court of Criminal Appeals of Tennessee.

(h) Did Petitioner file a petition for certiorari in the United States Supreme Court? If yes, answer the following: No

10. **Other than the direct appeals listed above, has Petitioner previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?** Yes

11. **If Petitioner's answer to Question 10 is "Yes," give the following information:**

(a) **(1) Name of court:** Criminal Court for Davidson County, Tennessee, Division V

(2) Docket or case number: No. 2011-A-779

(3) Date of filing: February 20, 2014

(4) Nature of the proceeding: Petition for Post-Conviction Relief

(5) Grounds raised:

Ground One: Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, where his trial attorney: (a) failed to object to the admission of the out-of-court videotaped interviews of the complaining witnesses as substantive evidence; (b) failed to obtain the videotaped interviews prior to trial; (c) failed to request a limiting instruction from the trial court to guide the jury's consideration of the videotaped interviews; (d) failed to object to the admission of a controlled phone call between Petitioner and the accusers' mother; (e) failed to ensure that the controlled phone call was properly redacted; (f) failed to object to the State's mischaracterization of the controlled phone call; (g) failed to object to a portion of the controlled phone call concerning an incident in another county; (h) failed to object to improper opinion testimony; (i) failed to call an expert to rebut the improper opinion testimony; (j) failed

to object to leading questions posed to the accusers by the State; (k) failed to properly impeach the accusers' and other witnesses' testimony; (l) failed to call alibi witnesses; (m) failed to object to hearsay testimony; (n) failed to effectively cross-examine the investigating detective; and (o) failed to argue the complaining witnesses' mother's motive to lie during closing argument.

Ground Two: The State committed prosecutorial misconduct during its closing argument where it mischaracterized Petitioner's statements during the controlled phone call.

Supplemental Ground One: Petitioner was denied effective assistance of counsel where his trial attorney failed to request as Jencks material the out-of-court videotaped interviews of the alleged victims after they testified.

Supplemental Ground Two: The State committed prosecutorial misconduct during its closing argument where it vouched for the credibility of the alleged victims.

Supplemental Ground Three: The State committed prosecutorial misconduct during its closing argument by improperly referring to Petitioner's social status.

Supplemental Ground Four: The State committed prosecutorial misconduct during its closing argument by telling the jury that if it were to acquit Petitioner it would be calling his accusers liars.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes

(7) Result: The post-conviction court denied the petition.

(8) Date of result: August 13, 2014

(b) If Petitioner filed any second petition, application, or motion, give the same information:

(1) Name of court: Criminal Court for Davidson County, Tennessee, Division V

(2) Docket or case number: 2011-A-779

(3) Date of filing: January 17, 2017

(4) Nature of the proceeding: Petition for Writ of Error Coram Nobis

(5) Grounds raised:

Ground One: Petitioner's fundamental right to due process of law was violated at trial based on newly discovered evidence, in the form of an affidavit from the foreperson of the jury that convicted Petitioner, which establishes that the jury requested, viewed, and considered extraneous prejudicial evidence not properly admitted at trial.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? No.

(7) Result: The error coram nobis court denied the petition.

(8) Date of result: June 3, 2017

(c) If Petitioner filed any third petition, application, or motion, give the same information: N/A

(d) Did Petitioner appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes.

The appellate court affirmed the denial of Petitioner's post-conviction petition. *State v. Guilfoy*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182 (Tenn. Crim. App., Aug. 15, 2015). *See* Exhibit C.

The appellate court subsequently denied Petitioner's petition for rehearing. *See* Exhibit D.

The Tennessee Supreme Court denied Petitioner's application for permission to appeal on February 18, 2016. *See* Exhibit E.

(2) Second petition: Yes.

The appellate court affirmed the denial of Petitioner's petition for writ of error coram nobis. *State v. Guilfoy*, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735 (Tenn. Crim. App., July 17, 2018). *See* Exhibit F.

On August 1, 2018, the appellate court denied Petitioner's petition for rehearing. *See* Exhibit G.

Case 3:18-cv-01371 Document 31 Filed 06/05/19 Page 6 of 25 PageID #: 259

The Tennessee Supreme Court denied Petitioner's application for permission to appeal on November 14, 2018. *See* Exhibit H.

(e) If Petitioner did not appeal to the highest state court having jurisdiction, explain why he did not: N/A

12. For this petition, state very ground on which Petitioner claims that he is being held in violation of the Constitution, laws, or treaties of the United States.

GROUND ONE: Petitioner was denied the right to effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, where his trial attorney failed to prevent the jury from viewing the out-of-court videotaped forensic interviews of the alleged victims. The interviews were never published in open court and not properly admitted into evidence. Furthermore, the videos were inadmissible under State law.

The forensic interviews were highly prejudicial in that the State did not produce the videos to the defense prior to trial. Because the videos were never disclosed to the defense and never formally admitted into evidence, Petitioner was not given an adequate opportunity to confront their content. Moreover, the videos that were viewed by the jury were misleadingly and improperly redacted, and they improperly bolstered the alleged victims' accusations.

Based on the foregoing, trial counsel's deficient performance in failing to prevent the jury from viewing the forensic interviews undermines confidence in the outcome of Petitioner's trial.

The State courts' denial of relief on this issue involves both an unreasonable application of clearly established Federal law and an unreasonable determination of the facts.

(a) Supporting facts: Under Tennessee law, the video-recorded interview of a child under thirteen years of age describing sexual contact is admissible for any relevant purpose if certain conditions are met. In pertinent part, the recording may be admitted during the State's case-in-chief if the child is available for cross examination, the interview was conducted by a qualified forensic interviewer, and the trial court determines at a pre-trial hearing that the statements in the video possess particularized guarantees of trustworthiness. Tenn. Code Ann. § 24-7-123(a), (b)(1)–(3). A video recording admitted under the statute is discoverable pursuant to the Tennessee rules of criminal procedure. Tenn. Code Ann. § 24-7-123(c).

Prior to trial, Petitioner filed a motion to compel the State to provide him with copies of the videotaped forensic interviews of J.A. and T.A., who were under

Case 3:18-cv-01371 Document 31 Filed 06/05/19 Page 7 of 25 PageID #: 260

thirteen years of age at the time of the interviews. The State objected to the motion on the basis that it had no intention of using the videotaped interviews as evidence at trial. The State did not request that the trial court hold a pre-trial hearing to determine the admissibility of the videotaped interviews pursuant to Tenn. Code Ann. § 24-7-123. The State did not produce copies of the forensic interviews to the defense at any point prior to or during trial. *See* the affidavit of Timothy Guilfoy, attached as Exhibit I, ¶ 6.

At trial the State called Anne Fisher Post to testify. Ms. Post conducted the forensic interviews of J.A. and T.A. The State briefly questioned Ms. Post regarding her qualifications as a forensic interviewer. After establishing that Ms. Post interviewed J.A. and T.A. in the spring of 2009, Ms. Post identified the disc purportedly containing the redacted forensic interview of J.A. The State asked that the disc "be marked an exhibit to her testimony," which the court allowed. Ms. Post then identified the disc purportedly containing the redacted forensic interview of T.A. Once again, the State asked that the disc "be marked an exhibit to her testimony," which the court allowed.

The State did not question Ms. Post about any of the details or circumstances of the interviews. The State did not ask Ms. Post to testify to any of the statements made by J.A. or T.A. during the interviews. The State did not ask to publish the interviews to the jury. The State also did not move for the interviews to be admitted into evidence.

Defense counsel did not object to the prosecution's ambiguous request that the discs "be marked [as] exhibit[s] to [Ms. Post's] testimony." Defense counsel also did not cross examine Ms. Post.

The State referenced the videotaped forensic interviews during its closing argument and informed the jury that it could watch them during their deliberations, although (1) the interviews had never been formally admitted into evidence, and (2) the interviews were otherwise inadmissible. Yet defense counsel did not object to the State's representation that the jury could watch the interviews in determining whether to convict his client.

During deliberations the jury requested that it be given the equipment to watch the videotaped forensic interviews. *See* the affidavit of Hilary Hoffman, attached as Exhibit J, ¶¶ 5-6. The jury was provided the equipment to watch the redacted videos, and did in fact watch them prior to rendering a verdict. *See* Exhibit J, ¶¶ 7, 10. That the jury requested the equipment to watch the videos and that that the equipment was provided was not spread of record.

Trial counsel's performance was clearly deficient where he (1) failed to object to the State's ambiguous request that the videotaped interviews be "marked as an exhibit" to Ms. Post's testimony, (2) failed to object to the State's invitation

to the jury during closing argument to watch the videotaped interviews during their deliberations, and (3) otherwise failed to prevent the jury from watching the videotaped interviews during deliberations. Trial counsel's failure to object was not reasonable trial strategy, but rather a failure to recognize that the interviews were never admitted into evidence and, even if the State had moved to admit the videos, they were inadmissible. No strategic justification exists for the failure to ensure that the jury was not exposed to the damaging, unfairly prejudicial out-of-court interviews.

Trial counsel's deficient performance prejudiced Petitioner. As evidenced by the fact that Petitioner's first trial resulted in a hung jury, this was a very close case. Petitioner introduced evidence inconsistent with the notion that he had abused either of his accusers, and demonstrated a motive on the part of the complaining witnesses to falsely accuse him. At the same time, no physical evidence or third-party witnesses corroborated the abuse. The State's case turned entirely on the credibility of Petitioner's accusers. Under such circumstances, the failure to prevent the jury from viewing the interviews caused significant damage to the defense, where the videotaped interviews served no purpose but to improperly bolster the alleged victims' accusations that were otherwise uncorroborated.

On direct appeal, the appellate court ruled that the admission of the videotaped interviews was clearly erroneous.[1] However, it held that Petitioner could not establish plain error because there was no evidence in the record that the jury had watched the videotaped interviews. *Guilfoy*, 2013 WL 1965996, *14–15.

In his post-conviction petition, Petitioner alleged that his trial attorney was ineffective for failing to object to the admission of the videotaped interviews. The appellate court held that Petitioner could not show that he was prejudiced by his attorney's deficient performance. *Guilfoy*, 2015 WL 4880182, *11–12.

The appellate court's ruling affirming the denial of Petitioner's post-conviction petition made several errors. First, the appellate court held that Petitioner had not identified any prejudice he suffered as a result of the "admission" of J.A.'s forensic interview. Thus, the appellate court denied Petitioner's *Strickland* claim as to trial counsel's failure to prevent the jury from viewing J.A.'s videotaped interview. *Id.*, *11.

The appellate court's ruling that Petitioner did not argue that he was prejudiced as the result of the jury viewing J.A.'s forensic interview is incorrect. Petitioner repeatedly argued in his brief that the jury was permitted

---

[1] As explained in Ground Two, although appellate and post-conviction counsel framed the issue in terms of the improper <u>admission</u> of the videotaped forensic interviews, the interviews were never actually admitted into evidence.

to use J.A.'s videotaped forensic interview as substantive evidence, and that the video contained prior consistent statements which improperly bolstered her credibility.

As to T.A.'s videotaped forensic interview, the appellate court held that the State had provided an election of offenses the details of which corresponded with her trial testimony. Therefore, according to the appellate court, Petitioner failed to prove that there was a reasonable probability that the outcome of the trial would have been different had T.A.'s forensic interview not been introduced. *Id.*, *11–12.

Similarly, in denying Petitioner's petition for rehearing, the appellate court noted that the evidence was sufficient to support Petitioner's convictions and that it would "not engage in speculation as to the jury's reasoning when rendering a verdict." *See* Exhibit D at p. 4.

The appellate court's rejection of Petitioner's ineffective assistance claim based on the State's election of offenses and the sufficiency of the evidence involves a clear misapplication of Federal precedent. A defendant is prejudiced by his attorney's deficient performance if there is a reasonable probability that absent counsel's errors the result of the proceedings would have been different. Simply because the untainted evidence is sufficient to support the convictions does not mean that Petitioner was not prejudiced by his attorney's deficient performance under *Strickland*.

The appellate court's refusal to "engage in speculation as to the jury's reasoning when rendering a verdict" was also unreasonable and a misapplication of precedent. As explained in greater detail in Ground Two, Petitioner was prepared to call the jury foreperson at his post-conviction hearing to testify that the jury viewed and relied on the videos during its deliberations. The post-conviction court refused to allow the foreperson to testify. Thus, the post-conviction court prevented Petitioner from presenting evidence the absence of which the appellate court subsequently relied on in denying Petitioner relief.

Furthermore, by refusing to "engage in speculation as to the jury's reasoning," the appellate court expressly abdicated its responsibility to decide, based on the totality of the evidence before the trier of fact, whether but for counsel's unprofessional errors there is a reasonable probability that the result of the proceeding would have been different. Once again, the State appellate court merely relied on the sufficiency of the evidence without engaging in any meaningful assessment of how the videotaped interviews may have affected the jury's verdict.

As noted above, trial counsel's deficient performance undermines confidence in the outcome of Petitioner's trial. The State appellate court's conclusions to the contrary involve an unreasonable application of clearly established Federal law, as well as an unreasonable determination of the facts. Petitioner's convictions must therefore be vacated.

(b) If Petitioner did not exhaust his state remedies on Ground One, explain why: N/A

(c) Direct Appeal of Ground One:

(1) If Petitioner appealed from the judgment of conviction, did he raise this issue? No

(2) If Petitioner did not raise this issue his direct appeal, explain why: The Tennessee Court of Criminal Appeals has cautioned defendants and their attorneys against raising claims of ineffective assistance of counsel on direct appeal, due to the significant amount of off-the-record evidence and fact finding such an issue typically entails. *E.g.*, *Kendricks v. State*, 13 S.W.3d 401, 405 (Ten. Crim. App. 1999); *State v. Brewer*, No. 02C01-9710-CC-00400 (Ten. Crim. App. 1998, at Jackson). Thus, Petitioner did not raise this issue on direct appeal so as to avoid the denial of it based on an incomplete evidentiary record.

(d) Post-Conviction Proceedings:

(1) Did Petitioner raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes

(2) If Petitioner's answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Criminal Court for Davidson County Tennessee, Division V

Docket or case number: 2011-A-779

Date of the court's decision: August 13, 2014

Result: The trial court denied the petition.

(3) Did Petitioner receive a hearing on his motion or petition? Yes

(4) Did Petitioner appeal from the denial of his motion or petition? Yes

(5) If Petitioner's answer to Question (d)(4) is "Yes," did he raise this issue in the appeal? Yes

(6) If Petitioner's answer to Question (d)(4) is "yes," state:

Name and location of the court where the appeal was filed: Court of Criminal Appeals of Tennessee, at Nashville

Docket or case number: M2014-01619-CCA-R3-PC

Date of the court's decision: August 14, 2015

Result: The appellate court affirmed the denial of the petition. *See* Exhibit C. Petitioner filed a timely petition for rehearing, which was denied September 25, 2015. *See* Exhibit D. Petitioner filed an application for permission to appeal to the Supreme Court of Tennessee, which was denied February 18, 2016. *See* Exhibit E.

(7) If Petitioner's answer to Question (d)(4) or Question (d)(5) is "No," explain why Petitioner did not raise this issue: N/A

(e) Other remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that Petitioner has used to exhaust his state remedies on Ground One: N/A

GROUND TWO: Petitioner was denied his rights to an impartial jury, confrontation, cross examination, and the assistance of counsel, in violation of the of the Sixth and Fourteenth Amendments to the United States Constitution, where the trial court granted the jury's request to view extrinsic information, *i.e.*, the redacted videotaped interviews of J.A. and T.A., during the jury's deliberations. The videotaped interviews were never admitted into evidence and contained highly prejudicial information.

The State courts' denial of relief on this issue involves both an unreasonable application of clearly established Federal law and an unreasonable determination of the facts.

(a) Supporting facts: The State indicated prior to trial that it would not use the videotaped forensic interviews of J.A. and T.A. as evidence at trial. Copies of the videotaped forensic interviews were therefore never produced to defense counsel in accordance with Tennessee State law.

During trial the State called Anne Fisher Post to testify. Ms. Post testified that she conducted the forensic interviews of J.A. and T.A., and identified discs containing redacted versions of the videotaped interviews. The State asked that the discs be made exhibits to Ms. Post's testimony. The State did not,

however, ask that the discs (or their content) be admitted into evidence. The State did not elicit any testimony from Ms. Post concerning the circumstances of the interviews, nor did it ask her to repeat any of the statements made by either J.A. or T.A. during the interviews. Finally, the State did not ask for or receive permission to publish the interviews to the jury.

Based on the foregoing, the videotaped interviews were never properly admitted into evidence, particularly because the interviews were not played for the jury in open court during trial.

During deliberations, the jury foreperson determined that the jury needed to view the videotaped interviews that had been referenced during trial in order to enable the jury "to render a verdict that was true and fair." Exhibit J, ¶ 5. The foreperson therefore informed a courtroom bailiff that the jury wanted to view the videotapes. Exhibit J, ¶ 6. Court personnel thereafter brought a television and DVD player into the jury room and the jury watched the videotaped forensic interviews. Exhibit J, ¶¶ 7, 10. The jury's request to watch the videotaped interviews was made off the record, outside of Petitioner's presence. Exhibit I, ¶ 14.

There is no question that the videotaped forensic interviews contributed to the verdict against Petitioner. As stated in Ground One, Petitioner's first trial resulted in a hung jury. The prosecution's case rested entirely on J.A.'s and T.A.'s credibility, which Petitioner had severely challenged. The jury asked to view the videotaped interviews before rendering a verdict, which served only to unfairly bolster J.A.'s and T.A.'s accusations. Under such circumstances, the only reasonable conclusion is that the extrinsic videotaped statements concerning the alleged acts influenced the jury's finding of guilt.

The State courts have unreasonably refused to grant Petitioner an adequate hearing to develop the factual basis for this claim. Specifically, Petitioner attempted to call the jury foreperson at his post-conviction hearing to testify that the jury watched the videos. Exhibit I, ¶ 28. The post-conviction court denied Petitioner's request to call the foreperson based on Tennessee Rule of Evidence 606(b).

The post-conviction court's reliance on Tennessee Rule of Evidence 606(b) as justification for refusing to allow the jury foreperson to testify is patently incorrect. Upon inquiry into the validity of the verdict, Tennessee Rule of Evidence 606(b) prohibits a juror from testifying to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict. However, there is an exception which allows a juror to testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention. T.R.E. 606(b).

Here, the post-conviction court's ruling prevented Petitioner from obtaining the factual basis for his claim that the jury was exposed to prejudicial extraneous facts during deliberations.

Subsequent to Petitioner's post-conviction proceedings, Petitioner obtained the affidavit of the jury foreperson, which confirms that the jury requested to view the videos and in fact did view them before reaching a verdict. Based on this newly discovered evidence, Petitioner filed a petition for writ of error coram nobis, alleging that the jury viewed extraneous prejudicial information which violated Petitioner's right to due process.

The error coram nobis court denied the petition on the basis that it was time-barred, without granting Petitioner a hearing. On appeal, the appellate court noted that Petitioner was aware the jury had viewed the forensic interviews during its deliberations as early as November 2011, when a private investigator hired by Petitioner spoke with jurors and learned that they had viewed the videos. *Guilfoy*, 2018 WL 3459735, *3. The appellate court therefore held that Petitioner's petition did not state a cognizable claim for relief because it failed to present subsequent or newly discovered evidence that could not have been raised in an earlier proceeding. *Id*.

The shell game utilized by the appellate courts to deny Petitioner relief on this issue violates due process and, ultimately, involves an unreasonable application of clearly established Federal law as well as an unreasonable determination of the facts.

(b) If Petitioner did not exhaust his state remedies on Ground Two, explain why: N/A

(c) Direct Appeal of Ground Two:

> **(1) If Petitioner appealed from the judgment of conviction, did he raise this issue?** No
>
> **(2) If Petitioner did not raise this issue his direct appeal, explain why:** The jury's request to view the videos and the trial court's grant of permission for it to do so occurred outside of Petitioner's presence and without his knowledge.

(d) Post-Conviction Proceedings:

> **(1) Did Petitioner raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?** Yes.
>
> **(2) If Petitioner's answer to Question (d)(1) is "Yes," state:**

Type of motion or petition: Petition for Writ of Error Coram Nobis.

Name and location of the court where the motion or petition was filed: Criminal Court for Davidson County, Tennessee, Division V

Docket or case number: 2011-A-779

Date of the court's decision: June 23, 2017

Result: The criminal court denied the petition.

(3) Did Petitioner receive a hearing on his motion or petition? N/A

(4) Did Petitioner appeal from the denial of his motion or petition? Yes

(5) If Petitioner's answer to Question (d)(4) is "Yes," did he raise this issue in the appeal? Yes

(6) If Petitioner's answer to Question (d)(4) is "yes," state:

Name and location of the court where the appeal was filed: Court of Criminal Appeals of Tennessee, at Nashville

Docket or case number: No. 2011-A-779

Date of the court's decision: July 17, 2018

Result: The appellate court affirmed the denial of Petitioner's petition for writ of error coram nobis.

(7) If Petitioner's answer to Question (d)(4) or Question (d)(5) is "No," explain why Petitioner did not raise this issue: N/A

(e) Other remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that Petitioner has used to exhaust his state remedies on Ground Two: Petitioner filed an application for permission to appeal to the Tennessee Supreme Court from the appellate court's decision affirming the denial of Petitioner's petition for writ of error coram nobis. The Tennessee Supreme Court denied the application on November 14, 2018.

GROUND THREE: Petitioner was denied the right to effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, where his trial attorney failed to object to improper

opinion testimony from Ann Post that "many things," including trauma, can disrupt a child's memory of "an abuse event."

Ms. Post was not qualified to render such an opinion and her testimony was inadmissible under Tennessee law.

Trial counsel's decision to not object to Ms. Post's testimony was not strategic, as no reasonable trial strategy contemplates the failure to exclude prejudicial opinion testimony accounting for deficiencies in the complaining witnesses' testimony.

Moreover, Petitioner was prejudiced by his attorney's deficient performance. The State's case against him turned on J.A.'s and T.A.'s credibility, and the inadmissible expert opinion served to dispel any inconsistencies and improbabilities in their testimony. Particularly in combination with trial counsel's failure to prevent the jury's exposure to other evidence improperly bolstering J.A.'s and T.A.'s credibility (*i.e.*, their videotaped forensic interviews), trial counsel's deficient performance undermines confidence in the outcome of Petitioner's trial.

The State courts' denial of relief on this issue involves both an unreasonable application of clearly established Federal law and an unreasonable determination of the facts.

(a) Supporting facts: On direct examination, the State elicited the following testimony from Ms. Post:

> Q: What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young? Is it realistic to expect that you'll get every detail from every incident?
>
> A: 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.

Trial counsel did not object to the foregoing testimony.

Petitioner argued in his post-conviction petition that trial counsel's failure to object to Ms. Post's opinion testimony constituted ineffective assistance. On appeal from the denial of this claim, the State appellate court implicitly held that trial counsel's performance in failing to object was deficient. Specifically, the court held that the admission of Ms. Post's testimony was erroneous and

that trial counsel failed to offer any strategic reason for not objecting to it. However, the court held that Petitioner was not prejudiced by the testimony. Specifically, the court stated as follows:

> Ms. Post's testimony addressed the narrow issue of why the victims could not provide details of when the events occurred. It did not address inconsistencies in the victims' descriptions of what occurred during the abuse or address the "implausibility" of their allegations, the core of the Petitioner's defense theory during the second trial.

The appellate court's ruling involves an unreasonable determination of the facts. Ms. Post's opinion testimony was not limited to J.A.'s and T.A.'s inability to remember specific dates of when the alleged abuse took place. Rather, her opinion was offered in response to the State's question whether it is realistic to expect that a child would provide "every detail from every incident." Likewise, Ms. Post did not limit her answer concerning a child's lack of recall to the date of the alleged incident. Instead, she testified that trauma can disrupt a child's memory generally, the implication being that the charged conduct can itself account for a child's inability to reliably remember it.

Petitioner was prejudiced by his attorney's deficient performance. Petitioner's defense at trial was that J.A.'s and T.A.'s testimony was inconsistent and implausible. Ms. Post's opinion testimony challenged the very core of that defense by offering the jury a "scientific" explanation for why J.A.'s and T.A.'s stories might change and appear unreliable. The prejudice inuring to Petitioner was exacerbated by trial counsel's failure to prevent the jury from seeing J.A.'s and T.A.'s videotaped forensic interviews, which served only to improperly bolster their accusations. Alone and in combination, trial counsel's deficient performance undermines confidence in the outcome of his trial. Because the State appellate court's denial of this claim rests on an unreasonable determination of the facts, as well as an unreasonable application of *Strickland*, Petitioner's convictions must be vacated.

(b) If Petitioner did not exhaust his state remedies on Ground Three, explain why: N/A

(c) Direct Appeal of Ground Three:

> **(1) If Petitioner appealed from the judgment of conviction, did he raise this issue?** No
>
> **(2) If Petitioner did not raise this issue his direct appeal, explain why:** The Tennessee Court of Criminal Appeals has cautioned defendants and their attorneys against raising claims of ineffective assistance of counsel on direct appeal, due to the significant amount of

off-the-record evidence and fact finding such an issue typically entails. *E.g.*, *Kendricks v. State*, 13 S.W.3d 401, 405 (Ten. Crim. App. 1999); *State v. Brewer*, No. 02C01-9710-CC-00400 (Ten. Crim. App. 1998, at Jackson). Thus, Petitioner did not raise this issue on direct appeal so as to avoid the denial of it based on an incomplete evidentiary record.

(d) Post-Conviction Proceedings:

(1) Did Petitioner raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes

(2) If Petitioner's answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed: Criminal Court for Davidson County Tennessee, Division V

Docket or case number: 2011-A-779

Date of the court's decision: August 13, 2014

Result: The post-conviction court denied the petition.

(3) Did Petitioner receive a hearing on his motion or petition? Yes

(4) Did Petitioner appeal from the denial of his motion or petition? Yes

(5) If Petitioner's answer to Question (d)(4) is "Yes," did he raise this issue in the appeal? Yes

(6) If Petitioner's answer to Question (d)(4) is "yes," state:

Name and location of the court where the appeal was filed: Court of Criminal Appeals of Tennessee, at Nashville

Docket or case number: M2014-01619-CCA-R3-PC

Date of the court's decision: August 14, 2015

Result: The appellate court affirmed the denial of the petition. *See* Exhibit C. Petitioner filed a timely petition for rehearing, which was denied September 25, 2015. *See* Exhibit D. Petitioner filed an application for permission to appeal to the Supreme Court of Tennessee, which was denied February 18, 2016. *See* Exhibit E.

(7) If Petitioner's answer to Question (d)(4) or Question (d)(5) is "No," explain why Petitioner did not raise this issue: N/A

(e) Other remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that Petitioner has used to exhaust his state remedies on Ground One: N/A

13. **Please answer these additional questions about the petition Petitioner is filing:**

    (a) Have all grounds for relief that Petitioner has raised in this petition been presented to the highest state court having jurisdiction? Yes

    If Petitioner's answer is "No," state which grounds have not been so presented and give Petitioner's reasons for not presenting them: N/A

    (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state Petitioner's reasons for not presenting them: No

14. **Has Petitioner previously filed any type of petition, application, or motion in a federal court regarding the conviction that he challenges in this petition?** No, other than the original petition for writ of habeas corpus which this amended petition supersedes.

15. **Does Petitioner have any petition or appeal now pending in any court, either state or federal, for the judgment he is challenging?** No

16. **Give the name and address of each attorney who represented Petitioner in the following stages of the judgment he is challenging:**

    (a) At preliminary hearing:

    Bernie McEvoy
    214 2nd Avenue North, #206
    Nashville, TN 37201

    (b) At arraignment and plea:

    Bernie McEvoy

    (c) At trial:

Case 3:18-cv-01371 Document 31 Filed 06/05/19 Page 19 of 25 PageID #: 272

Bernie McEvoy

(d) At sentencing:

Bernie McEvoy

(e) On appeal:

James O. Martin
Assistant District Attorney
Office of the District Attorney of Nashville
Washington Square, Suite 500
222 2nd Avenue North
Nashville, TN 37201

(f) In any post-conviction proceeding:

James O. Martin

(g) On appeal from any ruling against you in a post-conviction proceeding:

James O. Martin

Patrick T. McNally
Westherly, McNally & Dixon, PLC
2260 Fifth Third Center
424 Church Street
Nashville, TN 37219

17. **Does Petitioner have any future sentence to serve after he completes the sentence for the judgment that he is challenging?** No

18. **Timeliness of the petition: If Petitioner's judgment of conviction became final over one year ago, explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar the petition:**

On May 13, 2013, the Tennessee Court of Criminal Appeals affirmed the judgment in part, modified the judgment in part, and remanded the case for re-sentencing. On November 5, 2013, the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Petitioner did not file a petition for writ of certiorari.

On February 20, 2014, Petitioner filed his petition for post-conviction relief.

On March 28, 2014, the trial court re-sentenced Petitioner pursuant to the appellate court's order on direct appeal.

On August 14, 2015, the Tennessee Court of Criminal Appeals affirmed the denial of Petitioner's post-conviction petition. On February 18, 2016, the Tennessee Supreme Court denied Petitioner's application for permission to appeal.

Pursuant to 28 U.S.C. § 2244(d)(1)(A), the one-year period of limitation applicable to a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a State court runs from the latest of the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

A "judgment," for purposes of the AEDPA, "includes both the adjudication of guilt and the sentence." *King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993). Thus, where a State appellate court orders re-sentencing on direct appeal, the re-sentencing constitutes a new judgment which resets the limitations period under § 2244(d)(1)(A). *Crangle v. Kelly*, 838 F.3d 673, 678 (6th Cir. 2016) ("[A] new sentence not only permits a challenge to either the new sentence or the undisturbed conviction, but also restarts AEDPA's one-year window to challenge that judgment.")

Petitioner was re-sentenced on March 28, 2014. Pursuant to Rule 4(a) of the Tennessee Rules of Appellate Procedure, Petitioner had 30 days from the date the trial court re-sentenced him to file a notice of appeal. Petitioner's conviction therefore did not become final until April 27, 2014.

Pursuant to § 2244(d)(2), the time during which a properly filed application for State post-conviction relief is pending does not count toward the one-year period of limitation. A State post-conviction application remains pending until the State's highest court has issued its mandate or denied review concerning the application. *Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

Because Petitioner's post-conviction petition was filed on February 20, 2014, before his judgment became final, the one-year limitation period for his petition for writ of habeas corpus was tolled until February 18, 2016, the date on which the Tennessee Supreme Court denied Petitioner's application for permission to appeal from the order affirming the denial of his post-conviction petition.

The due date for Petitioner's petition for writ of habeas corpus was February 18, 2017. Petitioner filed his original timely petition on January 30, 2017, with the Western District of Tennessee. That petition alleged the same claims asserted herein. ECF Nos. 1–2.

Petitioner then moved to stay the proceedings pending the exhaustion of his State remedies. ECF Nos. 6–7. That motion was granted. ECF No. 11.

On November 14, 2018, the Tennessee Supreme Court denied Petitioner's application for permission to appeal the decision of the appellate court affirming the denial of his petition for writ of error coram nobis. Petitioner thereafter filed a motion to lift the previously ordered stay. ECF No. 12. The Western District granted the motion and transferred the petition to this Court. ECF Nos. 13–14.

On March 15, 2019, this Court granted Petitioner 45-days to file an amended petition. ECF No. 24. This Court subsequently granted Petitioner motions for extensions of time to file the amended petition, which is currently due June 10, 2019. ECF No. 30.

Petitioner's amended petition is timely because it relates back to his original, timely filed petition. *Davis v. Sexton*, Case No. 13-cv-2031, 2016 WL 4257376 (W.D. Tenn. Aug. 11, 2016) (quoting *Mayle v. Felix*, 545 U.S. 644, 650 (2005) ("So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.")

Prayer for Relief

WHEREFORE, Petitioner prays that this Court grant him all relief to which he may be entitled in this proceeding, and asks that this Court:

1) Issue a writ of habeas corpus ordering that Timothy Guilfoy be brought before the Court to be discharged from his unconstitutional confinement and relieved of his unconstitutional convictions and sentences;

2) Order the Respondent to produce the records of state court proceedings together with any responsive pleading deemed just and appropriate;

3) Schedule filing for legal briefs and memoranda in support of the issues of law in this petition so that the Court may be fully informed;

4) Hold an evidentiary hearing as to those disputed issues of fact necessary for the fair adjudication of the issues raised in the Petition; and,

5) Grant such other relief as may be just and appropriate.

Respectfully submitted,

Date: June 5, 2019

/s/ Kathleen T. Zellner
Kathleen T. Zellner
Kathleen T. Zellner & Associates, P.C.
1901 Butterfield Road, Suite 650
Downers Grove, Illinois 60515
Phone: (630) 955-1212
Fax: (630) 955-1111
Email: attorneys@zellnerlawoffices.com
Lead Counsel for Timothy Guilfoy

/s/ Benjamin H. Perry
Benjamin H. Perry
40 Music Square East, Suite 100
Nashville, Tennessee 37203
(Ph) 615-242-4200
ben@benperrylaw.com
Local Counsel for Timothy Guilfoy

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been sent via the Court's electronic filing system, *or*, if not registered, sent via U.S. Mail, postage prepaid, to:

Meredith Wood Bowen
Richard Davison Douglas
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207

this 5th day of June, 2019.

/s/ Kathleen T. Zellner
Kathleen T. Zellner

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

United States of America ex rel.	**)**	
TIMOTHY GUILFOY,	**)**	
TOMIS ID 00499702,	**)**	
	)	
Petitioner,	**)**	
	)	
v.	**)**	**Case No. 18-cv-1371**
	)	
MICHAEL PARRIS, Warden,	**)**	**Honorable Eli J. Richardson**
Northwestern Correctional	**)**	
Complex,	**)**	**Honorable Magistrate**
	)	**Barbara D. Holmes**
Respondent.	**)**	

EXHIBITS TO AMENDED PETITION

Exhibit:	**Description:**
Exhibit A	*State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996 (Tenn. Crim. App., May 13, 2013) (order affirming conviction on direct appeal)
Exhibit B	Order denying application for permission to appeal
Exhibit C	*State v. Guilfoy*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182 (Tenn. Crim. App., Aug. 14, 2015) (order affirming denial of post-conviction petition)
Exhibit D	Order denying petition for rehearing
Exhibit E	Order denying application for permission to appeal
Exhibit F	*State v. Guilfoy*, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735 (Tenn. Crim. App., July 17, 2018) (order affirming denial of petition for writ of error coram nobis)
Exhibit G	Order denying petition for rehearing
Exhibit H	Order denying application for permission to appeal
Exhibit I	Affidavit of Timothy Guilfoy
Exhibit J	Affidavit of Hilary Hoffman

2013 WL 1965996
Only the Westlaw citation is currently available.

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

Court of Criminal Appeals of Tennessee,
at Nashville.

STATE of Tennessee
v.
Timothy P. GUILFOY.

No. M2012–00600–CCA–R3–CD.
|
Feb. 12, 2013 Session.
|
May 13, 2013.

Appeal from the Criminal Court of Davidson County, No.2011–A–779; Monte Watkins, Judge.

Attorneys and Law Firms

James O. Martin, III (on appeal) and Bernard McEvoy (at trial), Nashville, Tennessee, for the appellant, Timothy P. Guilfoy.

Robert E. Cooper, Jr., Attorney General & Reporter; Brent C. Cherry, Senior Counsel; Victor S. Johnson III, District Attorney General; and Sharon Reddick and Roger Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

OPINION

JEFFREY S. BIVINS, J.

***1** Timothy P. Guilfoy ("the Defendant") was convicted by a jury of two counts of rape of a child, four counts of aggravated sexual battery, and one count of assault. After a hearing, the trial court sentenced the Defendant to twenty years for each of the rapes, ten years for each of the aggravated sexual batteries, and six months for the assault. The trial court ordered partial consecutive service, resulting in an effective sentence of seventy years to be served in the Tennessee Department of Correction. In this direct appeal, the Defendant contends as follows: (1) the trial court erred in allowing the State to ask leading questions of one of the victims; (2) the trial court erred in admitting two expert opinions; (3) the trial court erred in admitting recordings of phone calls between the Defendant and the victims' mother; (4) the trial court erred in admitting the videotaped forensic interviews of the victims as substantive evidence; (5) the State's election of offenses was ineffective; (6) the evidence is not sufficient to support his convictions; (7) cumulative errors entitle him to a new trial; and (8) his sentence is excessive. Upon our thorough review of the record and applicable law, we merge the Defendant's two convictions of aggravated sexual battery entered on Counts One and Two into a single conviction of aggravated sexual battery. We also merge the Defendant's two convictions of rape of a child into a single conviction of rape of a child. Finally, we merge the Defendant's conviction of assault into his conviction of aggravated sexual battery entered on Count Three. In light of our holdings, we remand this matter for a new sentencing hearing. The Defendant's convictions are otherwise affirmed.

Factual and Procedural Background

In June 2009, the Defendant was charged with three counts of aggravated sexual battery against J.A., a victim less than thirteen years old; two counts of aggravated sexual battery against T.A., a victim less than thirteen years old; four counts of aggravated sexual battery against A. A., a victim less than thirteen years old; and four counts of rape of a child against A. A.[1] All of the aggravated sexual battery offenses were alleged to have taken place "on a date between October 1, 2005 and September 20, 2008." All of the rape of a child offenses were alleged to have taken place "on a date between July 1, 2007 and September 30, 2008." On March 30, 2011, the State entered a nolle prosequi as to these charges.

On March 11, 2011, the Defendant was charged with four counts of aggravated sexual battery against J.A., a victim less than thirteen years old (Counts One through Four); one count of aggravated sexual battery against T. A., a victim less than thirteen years old (Count 5); and three

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 1 of 21 PageID #: 279

counts of rape of a child against T.A. (Counts Six through Eight). All of these offenses but the one alleged in Count Eight were alleged to have taken place "on a date between October 1, 2005 and September 30, 2008." The offense alleged in Count Eight was alleged to have occurred "on a date between July 1, 2007 and September 30, 2008."

***2** The Defendant initially was tried before a jury in July 2011, and a hung jury resulted. The Defendant was retried before a jury in October 2011, during which the State nolled Count Five. At the Defendant's second jury trial, the following proof was adduced:

Jennifer A., the victims' mother ("Mother"), testified that, when she and her three daughters moved to Nashville from Indiana in 2005, they began living at the Biltmore Apartments. Her father, Brian Schiff ("Grandfather"), was living there at the time, and they moved in with him. It was a two-bedroom apartment, and she described the living conditions as "pretty crunched." After several months, Grandfather purchased a nearby house on Saturn Drive, and they all moved into the house. Mother stated that, when they moved into the house on Saturn Drive, it had an unfinished basement and an unfinished attic. She used the attic as her bedroom except in the summertime. The girls slept on the main floor but did not have their own separate bedroom. The girls' sleeping accommodations included a bunk bed, a futon, and a couch that pulled out to a bed. Usually, J.A. slept in the top bunk of the bunk bed.

While they were still living in the apartment, Mother became acquainted with the Defendant. He and his roommate lived next door to them. The Defendant came to visit Mother and her family in Mother's apartment. Mother and her family also visited the Defendant in his apartment. Mother described their relationship as "friends" and denied that there was ever any romantic interest on either her or the Defendant's part. She added that the Defendant was a "really good friend."

Not long after Mother and her family moved to the house on Saturn Drive, the Defendant moved out of his apartment to another location in Nashville. The Defendant visited them at their house on Saturn Drive. A few months later, the Defendant moved to Missouri. The Defendant continued to stay in touch through phone calls and visits.

Mother explained that the Defendant worked in marketing tours and would come to Nashville to participate in events such as the "CMA festival." He usually would drive to town in a tour vehicle, and he would stay with Mother and her family at the Saturn Drive house. In this way, he was able to keep the per diem he was paid for hotels. Mother stated that she and her daughters enjoyed having the Defendant stay with them.

Mother stated that it was not her intention that the Defendant spend the night sleeping in any of the girls' beds, but she knew that he did because she would find him in one of their beds in the morning. She remembered one particular occasion when she saw the Defendant in bed with J.A. in the top bunk of the bunk bed. At that time, the bunk bed was in the dining room. She also recalled finding the Defendant in bed with T.A. on "[m]ultiple" occasions. She did not say anything to the Defendant about his presence in bed with her children.

In May of 2008, Mother, the girls, and the Defendant planned a camping trip to celebrate J.A. and Mother's birthdays, which were close together in time. Mother stated that they camped two nights, and everyone had a good time.

***3** Mother decided that she wanted to leave Nashville and move to Clarksville. The Defendant had expressed an interest in real estate investment, specifically, purchasing a house and renting it out. When Mother told him she was interested in moving to Clarksville, he purchased a house there, and she rented it from him. She stated that the rent was $700 a month. She also testified that the Defendant told her that she "wouldn't ever have to worry about just being kicked out of the house." Mother testified that the Defendant realized that she "might not always be able to come up with seven hundred dollars." She also stated that the Defendant was welcome to spend the night there. She added that it "was supposed to be a permanent move."

One morning in Clarksville, after the girls had gotten on the bus to go to school, Mother spoke with Grandfather over the phone. Grandfather told her that J.A. had told him "what happened." After her conversation with Grandfather about what J.A. had told him, Mother retrieved her daughters from school. Mother subsequently spoke with J.A. and T.A. and then she called 911. Two deputies from the Montgomery County Sheriff's Department responded and she relayed to them what J.A.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 2 of 21 PageID #: 280

and T.A. had told her. Mother testified that she called the police regarding the instant allegations on or about March 15th, 2009. The Defendant had been there three days previously.

In conjunction with the ensuing investigation, Mother made several recorded phone calls to the Defendant. She made these calls in March 2009. Mother and her family remained in the Defendant's house for about one more month. The Defendant did not serve her with an eviction notice.

On cross-examination, Mother admitted that she and the Defendant had a formal lease agreement regarding the house. She did not mail rent payments to the Defendant but deposited them twice a month into a bank account the Defendant had established. She also admitted that, whenever the Defendant came to visit, her daughters "rushed to the door and hugged him." She did not see either J.A. or T.A. acting frightened around the Defendant. She acknowledged that, when J.A. was six and seven years old, she was wetting the bed and wore pull-ups.

Mother testified that, when the Defendant was staying with them, she usually fell asleep before he did. She did not tell him where to sleep. While they were living on Saturn Drive, the girls would fight over who got to sleep with the Defendant. She did not intervene in these discussions.

Mother acknowledged that she and her daughters moved to Clarksville in September 2008. She already had been attending a junior college in Clarksville during the summer months. She was not able to pay September's rent, so the Defendant told her that she could pay it later by increasing the rent due in subsequent months. In October, she dropped out of school. She paid part of her rent for the months of October and November. She got a job in December and was able to pay December and January rent. She was fired in February. She earlier had told the Defendant that she would file her federal income tax return early in order to get her refund and pay him some of the money she owed him. She, however, did not get a refund. Mother remained in the house through at least a portion of May.

***4** Mother admitted that, in early March 2009, the Defendant told her that he was having a hard time making the mortgage payments on the house. She denied that he told her that, if she could not pay the rent, he would have to get a tenant who could.

J.A., born on May 22, 2000, and eleven years old at the time of trial, testified that she had two older sisters, T.A. and A.A. She began living in Nashville "quite a few years ago" in an apartment. She lived with her sisters, Mother, and Grandfather. The Defendant, whom J.A. identified at trial, lived in the apartment next door.

J.A. and her family later moved into a nearby house. The house had a basement, attic, and main floor. Sometimes, Mother used the attic as her bedroom. Grandfather used the basement as his living area. Sometimes the girls used the dining room as their bedroom. They used a regular bed and a bunk bed. J.A. usually slept in the upper bunk bed.

Sometimes the Defendant would spend the night at the house. On some of these occasions, the Defendant would sleep in J.A.'s bunk bed with her. J.A. testified that, on one of these occasions, the Defendant touched her "private" with his hand. She stated that he touched her skin by putting his hand down the front of her pants. She also stated that his hand moved and that she got up and went to the bathroom. She then went to sleep with one of her sisters. J.A. testified that the Defendant touched her in this manner on more than one occasion. J.A. stated that, when the Defendant touched her while in bed with her, she was not sure if the Defendant was awake at the time the touchings occurred.

J.A. also testified that, at another time, she was sitting on the Defendant's lap on the couch. The Defendant put his hand down the back of her pants and then slid his hand under her legs. He touched her "private" on her skin. When shown a drawing of a girl's body, J.A. identified the genital region as the area she referred to as her "private."

J.A. went camping with her family and the Defendant for J.A.'s eighth birthday. This trip occurred after the touchings about which J.A. testified. The Defendant did not touch her inappropriately on this trip.

After a while, J.A. decided to tell Grandfather what had happened. This was some time after she and her family left the house on Saturn Drive and moved into a house in Clarksville that the Defendant owned. Grandfather remained in the house on Saturn Drive. When she told Grandfather what the Defendant had done, he told her

to tell Mother. She did not do so, however, because she did not think Mother would believe her. Some time later, Grandfather told Mother what J.A. had told him but did not identify the Defendant. J .A. then told Mother what had happened. According to J.A., Mother then told her boyfriend. J.A. and T.A. went to school, but Mother came and got them out of school a little later. She took them home and "called the cops." J.A. subsequently was interviewed by a woman named Anne. The interview was videotaped. J.A. also visited a doctor, who examined her. She did not remember what she told the doctor but testified that she would have told the truth.

***5** On cross-examination, J.A. stated that the touching on the couch occurred while she was in second grade. At the time, her sisters were in the room with her. Also home at the time were Grandfather, her grandmother, Mother, and Mother's boyfriend, "Bob-o." J.A. acknowledged that the Defendant's visits were sometimes short, and he did not spend the night. She and her sisters were glad to see the Defendant during his visits. She did not remember the Defendant taking her anywhere by herself. He never said anything to her that made her uncomfortable.

J.A. admitted that, at the time the touchings occurred, she wore a "pull-up" because she had a problem with bed-wetting. She stated that she did not know if she was wearing a pull-up when the Defendant touched her on the occasions she testified about. She also stated that the Defendant had been lying behind her and she was facing away from him. She did not know if he was awake or asleep when the touching occurred. She stated that she had watched the videotape of her interview twice.

On redirect examination, J.A. stated that the only thing about the Defendant she did not like was the touchings. She never got mad at him or fought with him. She never saw her sisters or Mother be mad at him. When asked how many times the Defendant touched her inappropriately, she responded, "Maybe three or four times."

T.A., born on February 26, 1999, and twelve years old at the time of trial, testified that she currently lived in Florida with her two sisters, her brother, her father, and her stepmother. She previously had lived in Nashville with her two sisters, Mother, and Grandfather. She was the middle of three daughters.

T.A. identified the Defendant and stated that he lived next door to them while they lived in an apartment in Nashville. T.A. and her family later moved to a house on Saturn Drive. She stated that, while the family lived there, they frequently changed the furniture arrangements because the house was small. At one point, the family room was set up with a bunk bed and a futon. Another time, the bunk bed and a queen-size bed were in the dining room. Usually, T.A. and J.A. slept in the bunk bed, with T.A. on the bottom bunk. T.A.'s older sister, A. A., usually slept in the queen-size bed. Sometimes, T.A. would sleep on the futon in the family room to "get away from [her] sisters."

T.A. testified that the Defendant spent the night at the house on Saturn Drive "maybe three times." On these occasions, the Defendant slept in the family room or the dining room. On one particular occasion, the Defendant slept in T.A.'s bed. She testified: "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." The Defendant touched her "private part" with his finger, on her skin. She added that the Defendant's finger "went inside [her] private part." She left her bed and got in bed with her big sister. She added that she was "not too sure" if the Defendant was awake when this occurred.

***6** T.A. testified that, on another occasion, she was laying on her bunk bed when the Defendant came in and started touching her. She tried to get up, but he held her down. He touched her private part with his finger again, and she "just started crying." She got up, telling him that she had to go to the bathroom. She left and stayed away. T.A. stated that the Defendant had touched her on "[t]he inside." She also stated that this episode caused her to "want to puke."

T.A. testified that, in response to the Defendant's actions, she started wearing khaki pants to bed because they did not have an elastic waistband. She stated that the Defendant touched her another time while she was wearing her khaki pants and that he unzipped and unbuttoned them. This happened on her bunk bed. She testified, "[h]e touched me with his finger on [her] private part on [her] skin on the inside."

T.A. testified that the Defendant touched her more than three times. The touchings were similar to one another. When asked to indicate on a drawing the parts of the body

that the Defendant touched, T.A. indicated the female genitalia. When asked what she meant by "inside," she indicated, as reported by the prosecutor for the record, "the outer labia of the female genitalia."

T.A. stated that the touchings occurred before the family camping trip that they took for J.A.'s eighth birthday. She stated that she never told anyone about the touchings. She recalled J.A. telling Grandfather, however, and she remembered when Mother spoke with them while they were waiting for the school bus. T.A. testified that J.A. told Mother what had happened and that Mother began to cry. Both the girls began to cry, too. Nevertheless, the girls got on the bus and went to school.

Mother picked them up from school early that day, and they went to the District Attorney's office. There, T.A. spoke with Anne Fisher. T.A. since had watched the videotape of her interview with Fisher. After the interview, T.A. was examined by a doctor.

T.A. testified that she liked the Defendant other than his touching her. She testified that her mother and the Defendant were good friends.

On cross-examination, T.A. acknowledged that, in July 2011, she testified that the Defendant had not touched her in the same place that a tampon would go. Rather, she had earlier testified that he touched her "[l]ike on top of it," "[l]ike not literally on the outside, but like on the outside of it, yes, but like inside," and "[b]ut on the top, like where something else—like I don't know. Yeah. It wasn't like literally inside, inside, but it practically was. Yes." On cross-examination at trial, she testified that the Defendant touched her inside, where a tampon goes.

T.A. admitted that the Defendant never had threatened her, never had told her that they had a secret, and never had promised her anything for her silence. He did not speak with her about sex or boyfriends, and he never said anything that made her uncomfortable. He never pressed his body against hers, never made her touch his "private part," and never showed his "private part" to her.

***7** On redirect examination, T.A. explained that the Defendant had visited them in the house on Saturn Drive more than four times, but that he would not stay more than three days per visit.

Chris Gilmore testified that he was a school resource officer with the Cheatham County Sheriff's Department but previously had been employed as a police officer with the Clarksville Police Department. On March 18, 2009, he responded to Mother's address on an allegation of child rape. From Mother, he gathered basic information. He did not speak to any children. He notified the appropriate persons within the police department for follow-up.

Detective Ginger Fleischer of the Clarksville City Police Department testified that she was assigned to investigate the matter reported by Mother. Because the alleged criminal conduct had taken place in Nashville, she contacted the appropriate Nashville authorities. Detective Fleischer and Detective Fleming of the Davidson County Police Department determined that a "controlled phone call" between Mother and the Defendant would be helpful to the investigation. She explained to Mother that the phone call would be monitored and recorded. The phone call was scheduled to take place on March 24, 2009, the day after the forensic interview of the children. On that day, Mother made three phone calls to the Defendant, and all three phone calls were recorded and transcribed. The recordings were admitted into evidence and played for the jury. A fourth recorded phone call was made by Mother to the Defendant on the next day. This recording also was admitted into evidence and played for the jury. Additionally, the transcripts of all the recorded phone calls were admitted.

Hollye Gallion, a pediatric nurse practitioner with the Our Kids Center in Nashville, testified that she performed medical examinations on J.A. and T.A. on April 21, 2009. In conjunction with performing the exams, she reviewed the medical history reports given by the children to a social worker. J.A. reported that "a guy named Tim" had touched the outside of her butt and the outside of her "tootie" with his hands, explaining that she "pee[d]" out of her "tootie." J.A. reported that the touching had occurred more than once. Asked if she remembered the first time, J.A. reported, "It was in our old house in Nashville; I was around six or seven years old."

Gallion testified that J.A.'s physical examination was "normal." She did not find "any injuries or concerns of infection." She also stated that the results of the physical examination were consistent with the medical history that J.A. reported. Gallion added, "Touching typically doesn't leave any sort of evidence or injury."

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 5 of 21 PageID #: 283

Gallion testified that, in giving her medical history to the social worker, T.A. reported that the Defendant had touched the outside of her "too-too" with his hand, explaining that she "pee[d]" from her "too-too." T.A. reported that the touching had occurred more than once and that she was "around five or six" the first time. On conducting a physical exam, Gallion concluded that T.A.'s genital area and her "bottom" "looked completely healthy and normal." Gallion added that T.A.'s "physical exam was very consistent with what her history was."

***8** Anne Fisher Post, a forensic interviewer employed by the Montgomery County Child Advocacy Center, testified that she conducted forensic interviews of J.A. and T.A. These interviews were recorded and, without any contemporaneous objection from the Defendant, the recordings were admitted into evidence but were not played for the jury in open court.

The State rested its case after Post's testimony and then delivered to the jury the following election of offenses:

> Count one of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5–22–2000, and refers to the following conduct:
>
> 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[.] got up and went to the bathroom.
>
> Count two of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5–22–2000, and refers to the following conduct:
>
> 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[.] got up and moved to her sister's bed.
>
> Count three of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5–22–2000, and refers to the following conduct:
>
> 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 of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5–22–2000, and refers to the following conduct:
>
> 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.
>
> Count five of the indictment is withdrawn from consideration.
>
> Count six of the indictment alleges an act of rape of a child against T[.] A [.], date of birth 2–26–99, and refers to the following conduct:
>
> 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 of the indictment alleges an act of rape of a child against T [.] A[.], date of birth 2–26–99, and refers to the following conduct:
>
> 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.
>
> ***9** Count eight of the indictment alleges an act of rape of a child against T[.]A[.], date of birth 2–26–99, and refers to the following conduct:
>
> 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.

The defense called Francene Guilfoy, the Defendant's mother. She testified that the Defendant moved to Nashville in August or September 2005 for an internship at Sony Records. When the internship concluded in January 2006, he returned home to his parents' house

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 6 of 21 PageID #: 284

in Kirkwood, Missouri, a suburb of St. Louis. The Defendant worked at a number of part-time jobs until he was hired in May 2007 by Kerry Group, a marketing firm. His job was "mobile marketing," which required him to drive a tractor-trailer and attend public events such as county fairs and football games, where he would market a client's product. Between the time that the Defendant returned home and May 2007, he travelled to Nashville "[p]eriodically."

Francene[2] testified that, in 2008, the Defendant became interested in purchasing a rental property. He looked at several properties located near St. Louis as well as some in Tennessee. Eventually, he purchased a rental property in Tennessee.

The Defendant was unemployed during the period December 2008 to March 2009. He was living with Francene and her husband, the Defendant's father, and actively seeking work. Francene described the Defendant's state of mind during this period as "depressed." She added, "It bothered him a lot that he didn't have a job and couldn't pay his bills." The Defendant argued with his brother, who also was living in the parental home, about money that his brother owed him. This argument occurred in mid-March 2009. Francene described the argument as "very heated" and "loud and mean."

Francene testified that the Defendant had visited Tennessee earlier in March 2009 but returned home on March 11. The next day, the family, including the Defendant, his parents, and his brother and sister, went to dinner to celebrate the Defendant's father's birthday. The Defendant told her that his trip to Tennessee was "to confront his tenant about the rent situation." She knew that his tenant was Mother.

On cross-examination, Francene acknowledged that, during his internship, the Defendant lived in an apartment building. She visited him there but did not remember the name of the apartments. She did not meet Mother while she was there. She was aware that, after the Defendant left Nashville, sometimes he would stay with Mother on return trips. She also was aware that the Defendant was sleeping with T.A. and J.A. She testified, "He told me it was uncomfortable. He didn't like it. And he told [Mother] to stop it."

Matt Jaboor testified that he lived in St. Louis and was "[v]ery good friends" with the Defendant. In January 2009, he went with the Defendant to Clarksville to help him do some work on the rental house. J.A. and T.A. were excited to see the Defendant and gave him a hug. Throughout the three days that he and the Defendant spent at the house, the girls constantly were trying to help and "to be around" them. While they were there, Jaboor stayed in a room in the basement by himself. The Defendant slept upstairs. One night, Jaboor went upstairs to use the bathroom, and he observed the Defendant sleeping on the couch by himself.

***10** Tony Guilfoy, the Defendant's older brother, testified that he had met Mother on three occasions. On one of these occasions, the children were present and very excited to see the Defendant, who was also present. Tony testified that he had held a job similar to the Defendant's for Kerry Group. When he travelled for that job, he was paid a per diem for housing and food. If he spent his nights with a friend instead of at a hotel, he was allowed to keep the per diem. He stated that the per diem was about eighty-five dollars a day.

Tony also testified that he accompanied the Defendant to look at some of the rental properties the Defendant was considering. He told the Defendant that he thought it would be a good idea to purchase a rental home near a military base.

In late 2008 and early 2009, he and the Defendant were both living at home with their parents. The Defendant was not working at this time and, as a result, was "very depressed." The Defendant spoke with Tony about Mother not paying her rent. On March 24, 2009, before the Defendant got a phone call from Mother, Tony and the Defendant had their "worst argument ever" over money.

Patrick Guilfoy, the Defendant's father, testified that the Defendant was living at home and out of work in late 2008 and early 2009. The Defendant actively was looking for a job because he "wanted to work." Patrick was aware of the Defendant's rental property in Clarksville, Tennessee, and that, starting in December 2008, the Defendant was not being paid the rent. Shortly before March 12, 2009, the Defendant travelled to Clarksville to see about the house. Patrick testified that he told the Defendant that he should evict the tenant because she was not paying rent and that

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 7 of 21 PageID #: 285

he should get rid of the house. Patrick testified that the Defendant responded, "I know. I just—I know I got to do this. But she's my friend."

The defense rested after Patrick's testimony. The jury retired to deliberate and subsequently found the Defendant guilty of aggravated sexual battery on Count One; aggravated sexual battery on Count Two; aggravated sexual battery on Count Three; assault on Count Four; rape of a child on Count Six; rape of a child on Count Seven; and aggravated sexual battery on Count Eight. The trial court later sentenced the Defendant to ten years on each of the aggravated sexual battery convictions; twenty years on each of the rape of a child convictions; and to six months on the assault conviction. The trial court ordered partial consecutive service for an effective sentence of seventy years in the Tennessee Department of Correction. The trial court denied the Defendant's motion for new trial, and this appeal followed.

The Defendant raises the following issues: (1) the trial court erred in allowing the State to ask leading questions of J.A.; (2) the trial court erred in admitting two expert opinions; (3) the trial court erred in admitting the recordings of the phone calls between the Defendant and Mother; (4) the trial court erred in admitting the videotaped forensic interviews of the victims as substantive evidence; (5) the State's election of offenses was ineffective; (6) the evidence was not sufficient to support his convictions; (7) cumulative errors entitle him to a new trial; and (8) his sentence is excessive. We will address each of these contentions in turn.

Analysis

Leading Questions

***11** After the prosecutor elicited J.A.'s testimony about the Defendant touching her while they were both in the top bunk, after which she got up and went to the bathroom, the prosecutor engaged in the following colloquy with J. A.:

Q. 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—

At this point, defense counsel objected on the basis that the State was asking leading questions. The trial court responded, "Well, she has to lead somewhat because of the age of the child. But try to limit as much as you can." The prosecutor then asked J .A., "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?" J.A. responded, "Yes. But I am not quite sure like what happened." The following colloquy ensued:

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.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 8 of 21 PageID #: 286

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[ ].

The Defendant complains that the State's leading questions were the foundation for its election of offenses as to Counts One and Two and contends that "the only distinction offered to the jury between [these] offenses is the testimony of the attorney for the State and not [his] accuser."

As recognized by the Defendant in his opening brief, our rules of evidence provide that "[l]eading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness's testimony.*" Tenn. R. Evid. 611(c)(1) (emphasis added). This Court reviews a trial court's decision to allow leading questions on direct examination for an abuse of discretion. *See State v. Caughron,* 855 S.W.2d 526, 540 (Tenn.1993).

In this case, the witness, J.A., was eleven years old at the time of trial. The events about which she was testifying had occurred before her eighth birthday. Thus, a significant period of time had elapsed between the events at issue and the trial. Moreover, this Court frequently has recognized the propriety of leading questions during the direct examination of a child victim of sex abuse. *See, e.g., Swafford v. State,* 529 S.W.2d 748, 749 (Tenn.Crim.App.1975); *State v. Jonathan Ray Swanner,* No. E2010–00956–CCA–R3–CD, 2011 WL 5560637, at *6 (Tenn.Crim.App. Nov. 14, 2011), *perm. app. denied* (Tenn. Mar. 7, 2012); *State v. Lee Lance,* No. 03C01–9804–CR–00136, 1999 WL 301457, at *4 (Tenn.Crim.App. May 14, 1999), *perm. app. denied* (Tenn. Nov. 22, 1999); *State v. Tom Harris,* C.C.A. 86–273–III, 1988 WL 63535, at *2 (Tenn.Crim.App. Jun. 23, 1988), *perm. app. denied* (Tenn. Nov. 7, 1988). We also note that defense counsel lodged only a single objection to the form of the State's questions during its direct examination of J.A. Under the facts and circumstances of this case, we hold that the trial court did not abuse its discretion in overruling the Defendant's objection. Accordingly, the Defendant is entitled to no relief on this basis.

Expert Opinions

Hollye Gallion

***12** During her direct examination of Gallion, the prosecutor asked,

> Let me ask you this, put your expert hat on and ask you hypothetically: If [T.A.] [had] said to [the woman taking her medical history] that she was touched by an adult male's hand on the inside of her genitals, would there have been anything inconsistent about the medical exam, with that history given?

Gallion responded, "No. Again, the majority of children we see actually describe some type of penetration. That's one of the reasons that we often see children. Penetration with a hand, a finger, penetration with a penis. Typically those children also have completely normal exams." The Defendant now contends that Gallion's testimony "can be summarized as an opinion that no physical findings could be indicative of anything or nothing at all" and that, accordingly, her opinion was not of assistance to the jury in understanding the evidence or in determining a fact in issue. *Cf.* Tenn. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."). He also argues that Gallion's opinion "offered to bolster the credibility of T.A. was probative of nothing but extremely prejudicial to [him]."

We agree with the State that this issue has been waived because the defense lodged no contemporaneous objection during this colloquy. *See* Tenn. R.App. P.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 9 of 21 PageID #: 287

36(a); *State v. Killebrew,* 760 S.W.2d 228, 231 n. 7 (Tenn.Crim.App.1988). Moreover, the Defendant does not argue that the alleged error in the admission of this testimony constituted plain error. *See State v. Adkisson,* 899 S.W.2d 626, 636–42 (Tenn.Crim.App.1994) (recognizing that, when an issue is otherwise waived, relief may nevertheless be granted on a determination that plain error was committed). Accordingly, we hold that the Defendant is entitled to no relief on this basis.

Anne Fisher Post

Post conducted the forensic interviews of the victims. During her direct examination of Post, the prosecutor asked the following:

> Now, I want to just ask you a little bit about what you can expect from a forensic interview.
>
> You have testified that you hope—they're designed to give the best and most accurate information possible.
>
> What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young?
>
> Is it realistic to expect that you'll get every detail from every incident?

Post responded as follows:

> 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.
>
> ***13** And events that are very similar can be very hard to separate. I think we all know that for [sic] 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 that same event.

The Defendant argues that the trial court's admission of this testimony violated his constitutional rights because Post "was not competent to offer such testimony." He also contends that the admission of this testimony violated Tennessee Rules of Evidence 701–706 and decisions by the Tennessee Supreme Court and this Court.

As with witness Gallion, however, the defense lodged no contemporaneous objection to the admission of this testimony. Accordingly, this issue has been waived. *See* Tenn. R.App. P. 36(a); *Killebrew,* 760 S.W.2d at 231 n. 7. Moreover, the Defendant does not argue that he is entitled to plain error relief on the basis of this alleged evidentiary error. *See Adkisson,* 899 S.W.2d at 636–42 (recognizing that, when an issue is otherwise waived, relief may nevertheless be granted on a determination that plain error was committed). Therefore, we hold that the Defendant is not entitled to relief on this basis.

Admission of Recorded Phone Calls

At the urging of law enforcement, Mother engaged in four recorded phone conversations with the Defendant with the aim of eliciting incriminating evidence. Because the phone calls referred to events that occurred outside of Davidson County, the defense filed a motion to redact the recordings and the transcripts thereof to remove references to out-of-venue events. The trial court granted this motion.

The Defendant now contends that the admission of the redacted phone calls violated his rights against self-incrimination because Mother was acting as a state agent under the direction of Detective Fleischer. The Defendant acknowledges that he filed no pre-trial motion to suppress the phone calls and that, therefore, he is entitled to relief only if he demonstrates that the admission of this proof constituted plain error.

As indicated above, when an issue is waived on appeal, this Court nevertheless may grant relief on a determination that plain error was committed. *See* Tenn. R.App. P. 36(b); *Adkisson,* 899 S.W.2d at 636–42. However, we will grant relief for plain error only when five prerequisites are satisfied:

> (1) the record clearly establishes what occurred in the trial court, (2) a clear and unequivocal rule of law was breached, (3) a substantial right of the accused was adversely

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 10 of 21 PageID #: 288

> affected, (4) the accused did not waive the issue for tactical reasons, and (5) consideration of the error is necessary to do substantial justice.

State v. Banks, 271 S.W.3d 90, 119–20 (Tenn.2008); *see also Adkisson,* 899 S.W.2d at 641–42. The Defendant bears the burden of demonstrating plain error, and this Court need not consider all five factors "when it is clear from the record that at least one of them cannot be satisfied." *State v. Bledsoe,* 226 S.W.3d 349, 355 (Tenn.2007).

***14** We hold that the Defendant has not established that he is entitled to plain error relief on this issue because the record supports the inference that his decision not to file a motion to suppress was a tactical decision. This Court has reviewed the transcripts of the phone calls. We note that they are replete with the Defendant's repeated denials that he remembered ever touching the victims inappropriately. The Defendant repeatedly expressed his concern for the children, his agreement with Mother that she should not tell them that she thought they were lying, and his horror at the allegations. He surmised that, since he did not want to think the children were lying, perhaps he had touched them in some manner while he was asleep. [3] He, however, repeatedly and adamantly refused to admit to the alleged touchings. He repeatedly told Mother that, if he did as she asked and just admitted to the allegations, he would be lying. In short, despite four lengthy and vigorous attempts by Mother to have the Defendant admit to the alleged touchings, he steadfastly refused to do so. It is entirely reasonable, therefore, to infer that the Defendant wanted the jury to hear the phone calls. Accordingly, because the Defendant has not overcome the inference that he made a tactical decision not to seek suppression of the phone calls, the Defendant has failed to establish that he is entitled to plain error relief on this basis.

Admission of Forensic Interviews

Without objection, the trial court admitted as substantive evidence the recorded forensic interviews of J.A. and T.A. However, the interviews were not played in open court. Rather, they were made available to the jury during the jury's deliberations. The Defendant contends that the trial court's admission of these interviews constituted plain error entitling him to a new trial.

Once again, however, the Defendant has failed to establish the prerequisites for plain error relief. Although the record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence, the record does *not* demonstrate that the jury ever watched the interviews. Indeed, during closing argument, the prosecutor told the jury the following:

> 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. [4] 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.

These comments indicate that, in order to watch the recordings, the jury would have to request the appropriate equipment. The record contains no indication, however, that the jury ever requested the equipment. Nor does the record contain any other indication that the jury watched the recordings. The record is simply silent on this point. Accordingly, the Defendant has failed to satisfy the first prerequisite of plain error review. [5]

***15** Additionally, because the record contains no indication that the jury watched either of the recordings of the forensic interviews, the Defendant cannot demonstrate that the erroneous admission of this evidence adversely affected one of his substantial rights. Accordingly, the Defendant has failed to satisfy at least two of the prerequisites for plain error relief. Therefore, we hold that the Defendant is not entitled to plain error relief on this basis.

Election and Merger of Offenses

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 11 of 21 PageID #: 289

The Defendant also contends that his convictions of Counts One, Two, Six, and Seven must be vacated and these charges remanded for a new trial because the State's election of offenses as to these crimes was inadequate. [6] The State disagrees.

When the State adduces proof of multiple instances of conduct that match the allegations contained in a charging instrument, the State must "elect" the distinct offense about which the jury is to deliberate in returning its verdict as to each specific count. *See State v. Adams,* 24 S.W.3d 289, 294 (Tenn.2000); *State v. Brown,* 992 S.W.2d 389, 391 (Tenn.1999); *State v. Walton,* 958 S .W.2d 724, 727 (Tenn.1997); *State v. Shelton,* 851 S.W.2d 134, 136–37 (Tenn.1993); *Burlison v. State,* 501 S.W.2d 801, 803–04 (Tenn.1973). As our supreme court has explained,

> 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.

Adams, 24 S.W.3d at 294. Thus, the primary purpose for the election requirement is to ensure that the jury is deliberating about a single instance of alleged criminal conduct so that the jury may reach a unanimous verdict. *See Shelton,* 851 S.W.2d at 137. Indeed, our supreme court has characterized this right to a unanimous verdict as "fundamental, immediately touching on the constitutional rights of an accused." *Burlison,* 501 S.W.2d at 804.

In this case, Counts One and Two charged the Defendant with the aggravated sexual battery of J.A.J.A.'s testimony about these allegations consisted of the following:

Q. Now, when [the Defendant] spent the night in your house, did he ever sleep in the top bunk with you?

A. Sometimes.

Q. Did something happen when he would sleep in the top bunk with you that caused you to have to come to Nashville today, or this week, and be in court today?

A. Yes.

Q. Can you tell us what happened?

A. [The Defendant] touched me.

Q. Now, when you say he touched you, where did he touch you?

A. My private.

Q. What did he touch you with?

***16** A. His hand.

Q. Now, can you remember, tell us about a time when that happened, what were you doing and what happened? Can you describe it for us?

A. Laying in bed at night.

Q. Had you already gone to bed?

A. I was halfway asleep.

Q. So you had gotten in your bed, and you were halfway asleep?

A. (Witness nods in the affirmative).

Q. And then what happened?

A. He hung out with my mom for a while, and then he would come in my sister ['s] and my bed.

Q. I want you to tell us about when he got in your bed, okay, what you can remember about that.

A. Like what?

Q. You said he had hung out with your mom and then he came in your room—assume he came in the room where you were?

A. Yeah. After a while.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 12 of 21 PageID #: 290

Q. And what room was that?

A. It was in the dining room, I think.

Q. Had you already gone to bed?

A. Yes. I was in my bed.

Q. You were on the top bunk?

A. Yes.

Q. Then what happened?

A. Then he came in my bed.

Q. And then what happened?

A. He touched me.

Q. And when you say he touched you, where did he touch you?

A. My private.

Q. Did he touch your private over your clothes or on the skin or something else?

A. On the skin.

Q. What were you wearing when you went to bed? Do you remember?

A. No. Sometimes I wear pajamas, and sometimes I just sleep in my regular clothes.

Q. Do you remember a time when [the Defendant] got in your bed when you were wearing pajamas?

A. I am not really sure.

Q. Well, what did you usually wear to bed?

A. Just like some shorts or something.

Q. And what do you mean by "shorts"? Can you describe what kind of shorts?

A. Not like jean shorts, but just like comfortable shorts and comfortable shirt or something.

Q. By comfortable shorts, like what kind of waistband did it have?

A. Like stretchy or something.

Q. So when you went to bed at night, you would either wear pajama pants or comfortable shorts. Is that right?

A. Yes.

Q. When [the Defendant] got in your bed with you, do you remember if you specifically had on pajamas or specifically had on comfortable shorts?

A. I don't really remember.

Q. Did the pajamas pants and the shorts pants have the same kind of waistband, basically?

A. Yes.

Q. You have already told us that you remember him getting in bed with you and touching you on your private on the skin. How was it that he was—if you had shorts on, how was it that he was able to touch you on your private on the skin with his hand?

A. He put his hand in my pants.

Q. Do you remember, when he was in the bed with you, if he put his hand down the front of your pants, the side, back, or something else?

A. The front.

Q. Then what did his hand do when he put it down the front of your pants?

A. Just put it on my private.

Q. When he put it on your private, did it move or stay still or something else?

***17** A. Move.

Q. And what did you do when that happened?

A. I got up and went to the bathroom one time.

Q. So you could remember a time that you got up and went to the bathroom?

A. Yes.

Q. What did you do after you went to the bathroom?

A. I went to sleep with my sister.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 13 of 21 PageID #: 291

Q. When you got up, did [the Defendant] say anything to you?

A. I don't remember.

Q. Did you say anything to him?

A. I am pretty sure I said, I am going to the bathroom.

Q. When [the Defendant's] hand was touching you on your private, was it touching on the inside of your private or the outside of your private?

A. Outside.

Q. Can you remember, J[.], that time that you got up and went to the bathroom, before you got up, can you remember how you were laying and how [the Defendant] was laying, or how your body was and how [the Defendant's] body was?

A. I don't know, but I think either I was laying on my side or my back.

Q. So either on your side or your back?

A. Yeah.

Q. Where was [the Defendant]?

A. Next to me.

Q. Was your bed pushed up against a wall, or was it out in the middle of the room?

A. It was pushed against the wall.

Q. Were you laying closer to the wall or was [the Defendant] laying closer to the wall?

A. I think [the Defendant] was laying closer to the wall.

Q. So you told us about a time that you can remember when he got in bed with you, and you had on some kind of stretchy waistband, and he did that, and you got up and went to the bathroom.

Can you tell us about another time that it happened?

A. Where?

Q. That happened in Nashville, at [Grandfather's] house.

A. In my bed or—

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 [Grandfather'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 his 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 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 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.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 14 of 21 PageID #: 292

***18** 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[ ].

J.A. then testified about one occasion during which she sat on the Defendant's lap and he reached into her pants and touched her buttocks and genital area. Later, J.A.'s colloquy with the prosecutor continued as follows:

Q. Did it happen—you said—you told us about two times that he got in bed with you and touched your private. Did it happen more times than that?

A. I am pretty sure it happened more, but I don't know like a time like.

Q. You don't know a specific number of times?

A. Yeah.

Q. Did it happen pretty much the same way every time?

A. Yeah.

Q. He would do basically the same thing each time?

A. Yes.

Q. And you remember a specific time when you got up and went to the bathroom?

A. Yes.

Q. And another specific time when you got up and went to your sister's bed?

A. Yes.

On the basis of this testimony, the State elected its offense for Count One as follows:

> 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[.] got up and went to the bathroom.

As to Count Two, the State elected its offense as follows:

> 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[.] got up and moved to her sister's bed.

As a close review of the testimony set forth above makes clear, J .A. testified that the Defendant touched her genital region with his hand while they were together in bed on more than one occasion. Despite the State's frequent attempts to characterize her testimony to the contrary, her description of discrete, identifiable events was very limited. Indeed, the only specific incident about which J.A. testified with particularity included *both* her getting out of bed and going to the bathroom *and* then getting into bed with her sister. Moreover, when the prosecutor asked J.A. if she remembered a time when she did something other than go to the bathroom immediately after the Defendant touched her, she said, "No ." Thus, based on the actual proof, as opposed to the prosecutor's characterization

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 15 of 21 PageID #: 293

of that proof, our reading of J.A.'s testimony indicates only a *single* incident of particular criminal conduct. The prosecutor's suggestive phrasing and leading questions did not cure this lack of specificity in the proof. *See State v. Evajean Brown,* C.C.A. No. 1167, 1988 WL 136600, at *6 (Tenn.Crim.App. Dec. 20, 1988) (recognizing that an attorney's questions are not evidence), *perm. app. denied* (Tenn. May 8, 1989). Accordingly, we hold that the State's election of offenses for Counts One and Two was ineffective insofar as describing two discrete instances of criminal conduct. Rather, the State's election was an attempt to split a single instance of criminal conduct into two separate instances of criminal conduct.

***19** While such an "election" does not technically violate the election of offenses doctrine, it does violate the Defendant's constitutional rights against double jeopardy.[7] *See* U.S. Const. Amend. V; Tenn. Const. art. I, § 10; *State v. Phillips,* 924 S.W.2d 662, 665 (Tenn.1996) (recognizing that, under the prohibitions against double jeopardy, "[a] single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution"); *see also State v. Ashunti Elmore,* No. W2011–01109–CCA–R3–CD, 2012 WL 6475554, at *14 (Tenn.Crim.App. Dec. 13, 2012) (recognizing that "[c]onvicting an individual twice under the same statute for the same act so fundamentally violates federal and state double jeopardy principles that extended analysis ... is not required"). Accordingly, the Defendant's convictions on these two offenses must be merged into a single conviction of aggravated sexual battery. *See Ashunti Elmore,* 2012 WL 6475554, at * 14 (curing double jeopardy violation by remanding case to trial court for merger of two convictions).

The Defendant also complains that the State's election of offenses as to Counts Six and Seven, crimes alleged to have been committed against T.A., was ineffective. T.A. testified as follows about these offenses:

> Q. Were there times that [the Defendant] would sleep in the bed with you?
>
> A. Yes.
>
> Q. Did anything ever happen on some of those nights that cause us to have to be in court here today?
>
> A. Yes.
>
> Q. Can you tell us, did anything happen that caused us to have to be in court today, did it happen more than one time?
>
> A. Yes.
>
> Q. Did it happen quite a few times?
>
> A. Yes.
>
> ....
>
> Q. Can you remember and tell us about another specific time that happened?
>
> A. I was laying on my bunk bed. And he came in and he started touching me. And I tried to get up, but his hand just went over me and like held me so I couldn't get up.
>
> Q. Then what happened?
>
> A. He just started doing it again. And I just started crying.
>
> Q. When you say he started doing it again, what do you mean?
>
> A. Touching me again.
>
> Q. Where was he touching you?
>
> A. On my private part.
>
> Q. What was he touching you with?
>
> A. His finger.
>
> Q. Was he touching your private on the skin or over your clothes?
>
> A. Skin.
>
> Q. How was it that he was able to touch—what were you wearing? How was it that he was able to do that?
>
> A. Same. Elastic band pants, pajama pants.
>
> Q. Did he put his hand down inside your pants?
>
> A. Yes.
>
> Q. Through the waistband?
>
> A. Yes.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 16 of 21 PageID #: 294

Q. Do you remember how that ended?

A. He just stopped, I guess, or I went to bed.

Q. Was there—this sounds like a weird question, I know. But when he was doing that, how did that make you feel?

A. Felt like—made me want to puke.

Q. Was there a time when you actually did do that?

***20** A. No.

Q. Do you remember a time that you said something about having to puke or throw up?

A. I got up and said I had to go to the bathroom and left and stayed away.

Q. What had happened before you got up and said you had to go to the bathroom?

A. Are you asking if he said anything to me?

Q. No. I mean, you told us just now that you felt like you were going to puke and you got up and said you had to go to the bathroom?

A. (Witness nods in the affirmative.)

Q. What had happened right before you did that, before you got up and said you had to go to the bathroom?

A. He was touching me.

Q. Was that another time that you can remember him doing that?

A. Yes.

Q. Can you remember, where was he touching you that time?

A. Private part, on the skin, with his finger.

Q. Was his finger touching you on the inside or the outside?

A. The inside.

....

Q. If you can say, how many times did that happen at your grandfather's house in Nashville?

A. I don't know how many times.

....

Q. You said it happened many times, or several times, more than once?

A. Yes.

Q. More than twice?

A. Yes.

Q. More than three times?

A. Yes.

Q. What he did to you, was it similar in time?

A. Yes.

Q. Was there ever a time that he touched you on the outside of your private?

A. No.

On the basis of this testimony, the State made the following election for 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.

As to Count Seven, the State elected the following incident:

> The defendant touched T[.] A[.] on the inside of her genitals, when he

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 17 of 21 PageID #: 295

> 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.

Similarly to J.A.'s testimony, a close review of T.A.'s testimony recited above indicates that she was testifying about a *single* incident that was later described by the State in its election as to *both* Counts Six and Seven: the occasion when the Defendant joined her on the bunk bed and, when she tried to get up, he held her down and touched her "private part" with his hand, causing her to feel like she was going to "puke" and ending when she got up saying she had to go to the bathroom. Thus, the State once again split a single episode of criminal conduct into two offenses.[8] As set forth above, the Defendant's constitutional rights against double jeopardy protect him from dual convictions for the same offense. Accordingly, for the reasons set forth earlier in this opinion, the Defendant's convictions on these two offenses must be merged into a single conviction of rape of a child.

***21** Finally, although the Defendant has not challenged the State's election of offenses as to Counts Three and Four, we also are constrained to merge the Defendant's conviction of assault on Count Four with the Defendant's conviction of aggravated sexual battery on Count Three. Both of these counts were based on the single episode of touching that occurred while J.A. was sitting on the Defendant's lap and he put his hand down the back of her pants. As to Count Three, the State elected "the following conduct: 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." As to Count Four, the State elected "the following conduct: 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." The proof in support of these counts consisted of J. A.'s testimony that, on one occasion, while she was sitting on the Defendant's lap on the couch, he put his hand down the back of her pants. Touching her skin, he first touched her buttocks and then slid his hand further forward to touch her "private." Our supreme court has made clear that only one aggravated sexual battery is committed when two prohibited touchings occur in short succession during a single episode. *See State v. Johnson,* 53 S.W.3d 628, 633 (Tenn.2001) (holding that, "[i]f the entire instance of sexual contact occurs quickly and virtually simultaneously, then only one offense has occurred, even if more than one touching has occurred").

As it did with its election of offenses as to Counts One and Two and Six and Seven, the State again "elected" to split a single criminal episode into two crimes. The State may not violate a defendant's protections against double jeopardy in this manner. Accordingly, we must merge the Defendant's convictions of aggravated sexual battery and assault under Counts Three and Four into a single conviction of aggravated sexual battery.

Sufficiency of the Evidence

The Defendant contends that the evidence is not sufficient to support any of his convictions. The State disagrees.

Our standard of review regarding sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *see also* Tenn. R.App. P. 13(e). After a jury finds a defendant guilty, the presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans,* 838 S.W.2d 185, 191 (Tenn.1992). Consequently, the defendant has the burden on appeal of demonstrating why the evidence was insufficient to support the jury's verdict. *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). The appellate court does not weigh the evidence anew; rather, "a jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts" in the testimony and all reasonably drawn inferences in favor of the State. *State v. Harris,* 839 S.W.2d 54, 75 (Tenn.1992). Thus, "the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom." *Id.* (citation omitted). This standard of review applies to guilty verdicts based upon direct or circumstantial evidence. *State v. Dorantes,* 331 S .W.3d 370, 379 (Tenn.2011) (citing *State v. Hanson,* 279 S.W.3d 265, 275 (Tenn.2009)). In *Dorantes,* our Supreme Court adopted the United States Supreme Court standard that "direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence." *Id.*

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 18 of 21 PageID #: 296

at 381. Accordingly, the evidence need not exclude every other reasonable hypothesis except that of the defendant's guilt, provided the defendant's guilt is established beyond a reasonable doubt. *Id.*

***22** The Defendant was convicted of three counts of aggravated sexual battery and one count of assault (on Count Four) as to J.A. We have determined that the State's “election of offenses” as to Counts One, Two, Three and Four violated the Defendant's double jeopardy protections. Therefore, we have merged the Defendant's convictions of Counts One and Two into a single conviction of aggravated sexual battery. We also have merged the Defendant's conviction of assault on Count Four into his conviction of aggravated sexual battery on Count Three. Accordingly, we will consider the sufficiency of the evidence as to the Defendant's two convictions of aggravated sexual battery against J.A.

Aggravated sexual battery is defined as “unlawful sexual contact with a victim by the defendant” when the victim is less than thirteen years old. Tenn.Code Ann. § 39–13–504(a)(4) (2006). Unlawful sexual contact, in turn, is defined as including “the intentional touching 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) (2006). A victim's intimate parts are defined as including “the primary genital area, groin, inner thigh, buttock or breast of a human being.” *Id.* § 39–13–501(2).

As to Counts One and Two, as merged, the Defendant was convicted of touching J.A.'s genital area with his hand while they lay in bed together, after which she got up, went to the bathroom, and got into bed with one of her sisters. J.A. testified to this occurrence, and the proof established that she was less than thirteen years old at the time. We hold that the proof is sufficient to support the Defendant's conviction of aggravated sexual battery.

As to Counts Three and Four, the Defendant was convicted of touching J. A.'s genitals and 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.” The proof established that J.A. was less than thirteen years old at the time of this touching. She testified that, on one occasion, while she was sitting on the Defendant's lap on the couch, he put his hand down the back of her pants. Touching her skin, he first touched her buttocks and then slid his hand further forward to touch her “private.” We hold that this proof is sufficient to support the Defendant's conviction of aggravated sexual battery.

The jury also convicted the Defendant of two counts of rape of a child on Counts Six and Seven. For the reasons set forth above, we have merged the Defendant's convictions on these counts into a single conviction of rape of a child. Rape of a child is defined as the “unlawful sexual penetration of a victim by the defendant ... if the victim is more than three (3) years of age but less than thirteen (13) years of age.” Tenn.Code Ann. § 39–13–522(a) (2006). Sexual penetration includes “any ... intrusion, however slight, of any part of a person's body ... into the genital ... openings of the victim's ... body[.]” *Id.* § 39–13–501(7). As set forth above, T.A. testified that, while they were in bed together, the Defendant placed his finger inside her genital region. When asked to indicate on a picture precisely where the Defendant's finger had gone, T.A. indicated, in the prosecutor's words, “the outer labia of the female genitalia.” Our supreme court has made clear that “the entering of the vulva or labia is sufficient” to satisfy the element of sexual penetration. *State v. Bowles,* 52 S.W.3d 69, 74 (Tenn.2001) (quoting *Hart v. State,* 21 S.W.3d 901, 905 (Tenn.2000)). Accordingly, we hold that the proof is sufficient to support a conviction of rape of a child.

***23** On Count Eight, which charged rape of a child, the jury convicted the Defendant of the lesser-included offense of aggravated sexual battery of T.A. The State described this offense as follows: “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.” The State's proof of this offense consisted of the following colloquy between T.A. and the prosecutor:

> Q. At some point, did you start wearing a different kind of pants to bed when [the Defendant] came over?
>
> A. Yes.
>
> Q. What did you do? What was the change you made?
>
> A. We have to wear uniforms, so I started wearing my khaki pants.
>
> Q. Started wearing them when?
>
> A. When I went to bed.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 19 of 21 PageID #: 297

Q. What was different about the khaki pants than what you ordinarily wore to bed?

A. They don't have the elastic and they are buttoned up and zipped up.

Q. Why did you start doing that?

A. I didn't want it to happen again.

Q. So you started wearing these kind of pants when [the Defendant] visited, is that correct, to bed?

A. Yes.

Q. Did it happen again after you started wearing those kind of pants?

A. Yes.

Q. Can you tell us about that?

A. Same thing. Just he unzipped my pants and unbuttoned them.

Q. Where were you when that happened?

A. I was on the bunk bed.

Q. What did he do after he unbuttoned your pants and unzipped them?

A. He touched me with his finger on my private part on my skin on the inside.

We hold that T.A.'s testimony constituted sufficient proof to support the offense of aggravated sexual battery arising from the Defendant's touching her genital region while she was wearing khaki pants. The Defendant is entitled to no relief as to this conviction.

Cumulative Error

The Defendant asserts that the cumulative errors committed during his trial entitle him to a new trial on all charges. As set forth above, we have found errors in conjunction with the State's election of offenses. We have addressed those errors specifically and granted appropriate relief. While we have concluded that the trial court committed an evidentiary error regarding the videotapes of the forensic interviews, the record does not establish that the Defendant thereby suffered any prejudice. We have not found error arising from the other issues identified by the Defendant. Accordingly, we hold that the Defendant is not entitled to relief on the basis of cumulative error.

Sentencing

Following a sentencing hearing, the trial court sentenced the Defendant to ten years for each of the four aggravated sexual battery convictions and to twenty years for each of the two rape of a child convictions. The trial court also sentenced the Defendant to six months for the assault conviction. The trial court ordered partial consecutive service such that the Defendant received an effective sentence of seventy years in the Tennessee Department of Correction. The Defendant contends that the trial court erred in its imposition of consecutive service so as to result in an effective sentence of seventy years.

***24** As set forth above, the Defendant's convictions of aggravated sexual battery on Counts One and Two must be merged into a single conviction of aggravated sexual battery. Also, the Defendant's conviction of assault on Count Four must be merged into the Defendant's conviction of aggravated sexual battery on Count Three. Additionally, we have merged the Defendant's two convictions of rape of a child on Counts Six and Seven into a single conviction of rape of a child. In light of these significant alterations to the Defendant's convictions, we conclude that we must remand this case for a new sentencing hearing. *See, e.g., State v. Kenneth Lee Herring,* No. M199900776CCAR3CD, 2000 WL 1208311, at *9 (Tenn.Crim.App. Aug. 24, 2000), *perm. app. denied* (Tenn. Feb. 20, 2001). Accordingly, we decline to address the Defendant's contention that the trial court erred in imposing partial consecutive service.

Conclusion

The Defendant's convictions of aggravated sexual battery entered on Counts Three and Eight are affirmed. The Defendant's convictions of aggravated sexual battery entered on Counts One and Two are merged into a single conviction of aggravated sexual battery. The Defendant's conviction of assault on Count Four is merged into the Defendant's conviction of aggravated sexual battery on

Count Three. The Defendant's two convictions of rape of a child on Counts Six and Seven are merged into a single conviction of rape of a child. This matter is remanded to the trial court for further proceedings consistent with this opinion, including amendment of the judgment orders entered on Counts One, Two, Three, Four, Six and Seven to reflect the mergers noted herein and a new sentencing hearing.

All Citations

Not Reported in S.W.3d, 2013 WL 1965996

Footnotes

1 It is this Court's policy to identify the victims of sexual crimes only by their initials.

2 Because several witnesses with the surname Guilfoy testified, we refer to each by his or her first name to avoid confusion. We intend no disrespect.

3 We note that our supreme court has considered at least one case in which the defendant accused of sexual offenses raised a defense of sleep parasomnia. *See State v. Scott,* 275 S.W.3d 395, 399 (Tenn.2009).

4 The State had earlier experienced technical difficulties in playing the recordings of the phone calls between the Defendant and Mother.

5 The Defendant contends in his reply brief that "[t]he jury is presumed to have considered all the evidence." The Defendant cites to no authority for this contention. We decline to adopt this alleged presumption as an adequate means of satisfying the first prerequisite of plain error review.

6 In the heading of his argument on this issue, the Defendant alleges that the State's election as to Count Eight was also ineffective. Later in his brief, however, the Defendant concedes that the State's election as to Count Eight rendered it "distinguishable from the other allegations." Upon our review of the record, we agree. Accordingly, the Defendant is entitled to no relief from his conviction of Count Eight on the basis of the State's election of offenses.

7 When the State splits a single offense into several offenses at the *commencement* of its prosecution by charging the same offense in more than one count, it has engaged in the improper practice of "multiplicity." *See State v. Desirey,* 909 S.W.2d 20, 27 (Tenn .Crim.App.1995). As this Court recognized in *Desirey,* this practice presents two "evils":

> First, as to the trial itself, multiplicity may carry the potential of unfair prejudice, such as suggesting to the jury that a defendant is a multiple offender or falsely bolstering the prosecution's proof on such issues as the defendant's motive or knowledge of wrongdoing. Second, it can lead to multiple convictions and punishment for only one offense. That is, a multiplicitous indictment may lead to a violation of the Double Jeopardy Clause if it results in the imposition of cumulative punishments for only one offense.

Id. (citations omitted).

8 Prior to testifying about the single episode of touching that caused T.A. to both cry and feel like she was going to "puke," she testified about a separate incident. The record does not reveal why the State did not base one of its counts of rape of a child on this separate incident.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

Case 3:18-cv-01371 Document 31-1 Filed 06/05/19 Page 21 of 21 PageID #: 299

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. TIMOTHY P. GUILFOY

Criminal Court for Davidson County
No. 2011-A-779

No. M2012-00600-SC-R11-CD

FILED
NOV 05 2013
Clerk of the Courts

ORDER

Upon consideration of Timothy P. Guilfoy's application for permission to appeal and the record before us, the application is denied.

PER CURIAM

2015 WL 4880182
Only the Westlaw citation is currently available.

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

Court of Criminal Appeals of Tennessee,
AT NASHVILLE.

Timothy GUILFOY
v.
STATE of Tennessee

No. M2014–01619–CCA–R3–PC
|
May 13, 2015 Session
|
Filed August 14, 2015
|
Application for Permission to Appeal
Denied by Supreme Court February 18, 2016

Appeal from the Criminal Court for Davidson County, No. 2011–A–779, Monte Watkins, Judge

Attorneys and Law Firms

James O. Martin, III, and Patrick T. McNally, Nashville, Tennessee, for the Appellant, Timothy Guilfoy.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Counsel; Victor S. Johnson III, District Attorney General; and Roger Moore, Assistant District Attorney General, for the Appellee, State of Tennessee.

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

OPINION

ROBERT L. HOLLOWAY, JR., J.

***1** The Petitioner, Timothy Guilfoy, appeals from the denial of his petition for post-conviction relief. On appeal, the Petitioner argues that he received ineffective assistance of counsel. Upon review, we affirm the judgment of the post-conviction court.

Trial

On direct appeal, this court summarized the procedural history of the case and the facts at trial as follows: [1]

> In June 2009, [the Petitioner] was charged with three counts of aggravated sexual battery against J.A., [2] a victim less than thirteen years old; two counts of aggravated sexual battery against T.A., a victim less than thirteen years old; four counts of aggravated sexual battery against A.A., a victim less than thirteen years old; and four counts of rape of a child against A.A. All of the aggravated sexual battery offenses were alleged to have taken place "on a date between October 1, 2005 and September 20, 2008." All of the rape of a child offenses were alleged to have taken place "on a date between July 1, 2007 and September 30, 2008." On March 30, 2011, the State entered a nolle prosequi as to these charges.
>
> On March 11, 2011, [the Petitioner] was charged with four counts of aggravated sexual battery against J.A., a victim less than thirteen years old (Counts One through Four); one count of aggravated sexual battery against T. A., a victim less than thirteen years old (Count 5); and three counts of rape of a child against T.A. (Counts Six through Eight). All of these offenses but the one alleged in Count Eight were alleged to have taken place "on a date between October 1, 2005 and September 30, 2008." The offense alleged in Count Eight was alleged to have occurred "on a date between July 1, 2007 and September 30, 2008."
>
> [The Petitioner] initially was tried before a jury in July 2011, and a hung jury resulted. [The Petitioner] was retried before a jury in October 2011, during which the State nolled Count Five. At [the Petitioner]'s second jury trial, the following proof was adduced:
>
> Jennifer A., the victims' mother ("Mother"), testified that, when she and her three daughters moved to Nashville from Indiana in 2005, they began living at the Biltmore Apartments. Her father, Brian Schiff ("Grandfather"), was living there at the time, and they moved in with him. It was a two-bedroom apartment, and she described the living conditions as

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 1 of 15 PageID #: 301

"pretty crunched." After several months, Grandfather purchased a nearby house on Saturn Drive, and they all moved into the house. Mother stated that, when they moved into the house on Saturn Drive, it had an unfinished basement and an unfinished attic. She used the attic as her bedroom except in the summertime. The girls slept on the main floor but did not have their own separate bedroom. The girls' sleeping accommodations included a bunk bed, a futon, and a couch that pulled out to a bed. Usually, J.A. slept in the top bunk of the bunk bed.

While they were still living in the apartment, Mother became acquainted with [the Petitioner]. He and his roommate lived next door to them. [The Petitioner] came to visit Mother and her family in Mother's apartment. Mother and her family also visited [the Petitioner] in his apartment. Mother described their relationship as "friends" and denied that there was ever any romantic interest on either her or [the Petitioner]'s part. She added that [the Petitioner] was a "really good friend."

***2** Not long after Mother and her family moved to the house on Saturn Drive, [the Petitioner] moved out of his apartment to another location in Nashville. [The Petitioner] visited them at their house on Saturn Drive. A few months later, [the Petitioner] moved to Missouri. [The Petitioner] continued to stay in touch through phone calls and visits.

Mother explained that [the Petitioner] worked in marketing tours and would come to Nashville to participate in events such as the "CMA festival." He usually would drive to town in a tour vehicle, and he would stay with Mother and her family at the Saturn Drive house. In this way, he was able to keep the per diem he was paid for hotels. Mother stated that she and her daughters enjoyed having [the Petitioner] stay with them.

Mother stated that it was not her intention that [the Petitioner] spend the night sleeping in any of the girls' beds, but she knew that he did because she would find him in one of their beds in the morning. She remembered one particular occasion when she saw [the Petitioner] in bed with J.A. in the top bunk of the bunk bed. At that time, the bunk bed was in the dining room. She also recalled finding [the Petitioner] in bed with T.A. on "[m]ultiple" occasions. She did not say anything to [the Petitioner] about his presence in bed with her children.

In May of 2008, Mother, the girls, and [the Petitioner] planned a camping trip to celebrate J.A. and Mother's birthdays, which were close together in time. Mother stated that they camped two nights, and everyone had a good time.

Mother decided that she wanted to leave Nashville and move to Clarksville. [The Petitioner] had expressed an interest in real estate investment, specifically, purchasing a house and renting it out. When Mother told him she was interested in moving to Clarksville, he purchased a house there, and she rented it from him. She stated that the rent was $700 a month. She also testified that [the Petitioner] told her that she "wouldn't ever have to worry about just being kicked out of the house." Mother testified that [the Petitioner] realized that she "might not always be able to come up with seven hundred dollars." She also stated that [the Petitioner] was welcome to spend the night there. She added that it "was supposed to be a permanent move."

One morning in Clarksville, after the girls had gotten on the bus to go to school, Mother spoke with Grandfather over the phone. Grandfather told her that J.A. had told him "what happened." After her conversation with Grandfather about what J.A. had told him, Mother retrieved her daughters from school. Mother subsequently spoke with J.A. and T.A. and then she called 911. Two deputies from the Montgomery County Sheriff's Department responded and she relayed to them what J.A. and T.A. had told her. Mother testified that she called the police regarding the instant allegations on or about March 15th, 2009. [The Petitioner] had been there three days previously.

In conjunction with the ensuing investigation, Mother made several recorded phone calls to [the Petitioner]. She made these calls in March 2009. Mother and her family remained in [the Petitioner]'s house for about one more month. [The Petitioner] did not serve her with an eviction notice.

On cross-examination, Mother admitted that she and [the Petitioner] had a formal lease agreement regarding the house. She did not mail rent payments to [the Petitioner] but deposited them twice a month into a bank account [the Petitioner] had established. She also admitted that, whenever [the Petitioner] came to visit,

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

her daughters "rushed to the door and hugged him." She did not see either J.A. or T.A. acting frightened around [the Petitioner]. She acknowledged that, when J.A. was six and seven years old, she was wetting the bed and wore pull-ups.

***3** Mother testified that, when [the Petitioner] was staying with them, she usually fell asleep before he did. She did not tell him where to sleep. While they were living on Saturn Drive, the girls would fight over who got to sleep with [the Petitioner]. She did not intervene in these discussions.

Mother acknowledged that she and her daughters moved to Clarksville in September 2008. She already had been attending a junior college in Clarksville during the summer months. She was not able to pay September's rent, so [the Petitioner] told her that she could pay it later by increasing the rent due in subsequent months. In October, she dropped out of school. She paid part of her rent for the months of October and November. She got a job in December and was able to pay December and January rent. She was fired in February. She earlier had told [the Petitioner] that she would file her federal income tax return early in order to get her refund and pay him some of the money she owed him. She, however, did not get a refund. Mother remained in the house through at least a portion of May.

Mother admitted that, in early March 2009, [the Petitioner] told her that he was having a hard time making the mortgage payments on the house. She denied that he told her that, if she could not pay the rent, he would have to get a tenant who could.

J.A., born on May 22, 2000, and eleven years old at the time of trial, testified that she had two older sisters, T.A. and A.A. She began living in Nashville "quite a few years ago" in an apartment. She lived with her sisters, Mother, and Grandfather. [The Petitioner], whom J.A. identified at trial, lived in the apartment next door.

J.A. and her family later moved into a nearby house. The house had a basement, attic, and main floor. Sometimes, Mother used the attic as her bedroom. Grandfather used the basement as his living area. Sometimes the girls used the dining room as their bedroom. They used a regular bed and a bunk bed. J.A. usually slept in the upper bunk bed.

Sometimes [the Petitioner] would spend the night at the house. On some of these occasions, [the Petitioner] would sleep in J.A.'s bunk bed with her. J.A. testified that, on one of these occasions, [the Petitioner] touched her "private" with his hand. She stated that he touched her skin by putting his hand down the front of her pants. She also stated that his hand moved and that she got up and went to the bathroom. She then went to sleep with one of her sisters. J.A. testified that [the Petitioner] touched her in this manner on more than one occasion. J.A. stated that, when [the Petitioner] touched her while in bed with her, she was not sure if [the Petitioner] was awake at the time the touchings occurred.

J.A. also testified that, at another time, she was sitting on [the Petitioner]'s lap on the couch. [The Petitioner] put his hand down the back of her pants and then slid his hand under her legs. He touched her "private" on her skin. When shown a drawing of a girl's body, J.A. identified the genital region as the area she referred to as her "private."

J.A. went camping with her family and [the Petitioner] for J.A.'s eighth birthday. This trip occurred after the touchings about which J.A. testified. [The Petitioner] did not touch her inappropriately on this trip.

***4** After a while, J.A. decided to tell Grandfather what had happened. This was some time after she and her family left the house on Saturn Drive and moved into a house in Clarksville that [the Petitioner] owned. Grandfather remained in the house on Saturn Drive. When she told Grandfather what [the Petitioner] had done, he told her to tell Mother. She did not do so, however, because she did not think Mother would believe her. Some time later, Grandfather told Mother what J.A. had told him but did not identify [the Petitioner]. J.A. then told Mother what had happened. According to J.A., Mother then told her boyfriend. J.A. and T.A. went to school, but Mother came and got them out of school a little later. She took them home and "called the cops." J.A. subsequently was interviewed by a woman named Anne. The interview was videotaped. J.A. also visited a doctor, who examined her. She did not remember what she told the doctor but testified that she would have told the truth.

On cross-examination, J.A. stated that the touching on the couch occurred while she was in second grade. At the time, her sisters were in the room with

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 3 of 15 PageID #: 303

her. Also home at the time were Grandfather, her grandmother, Mother, and Mother's boyfriend, "Bob-o." J.A. acknowledged that [the Petitioner]'s visits were sometimes short, and he did not spend the night. She and her sisters were glad to see [the Petitioner] during his visits. She did not remember [the Petitioner's] taking her anywhere by herself. He never said anything to her that made her uncomfortable.

J.A. admitted that, at the time the touchings occurred, she wore a "pull-up" because she had a problem with bed-wetting. She stated that she did not know if she was wearing a pull-up when [the Petitioner] touched her on the occasions she testified about. She also stated that [the Petitioner] had been lying behind her and she was facing away from him. She did not know if he was awake or asleep when the touching occurred. She stated that she had watched the videotape of her interview twice.

On redirect examination, J.A. stated that the only thing about [the Petitioner] she did not like was the touchings. She never got mad at him or fought with him. She never saw her sisters or Mother be mad at him. When asked how many times [the Petitioner] touched her inappropriately, she responded, "Maybe three or four times."

T.A., born on February 26, 1999, and twelve years old at the time of trial, testified that she currently lived in Florida with her two sisters, her brother, her father, and her stepmother. She previously had lived in Nashville with her two sisters, Mother, and Grandfather. She was the middle of three daughters.

T.A. identified [the Petitioner] and stated that he lived next door to them while they lived in an apartment in Nashville. T.A. and her family later moved to a house on Saturn Drive. She stated that, while the family lived there, they frequently changed the furniture arrangements because the house was small. At one point, the family room was set up with a bunk bed and a futon. Another time, the bunk bed and a queen-size bed were in the dining room. Usually, T.A. and J.A. slept in the bunk bed, with T.A. on the bottom bunk. T.A.'s older sister, A.A., usually slept in the queen-size bed. Sometimes, T.A. would sleep on the futon in the family room to "get away from [her] sisters."

T.A. testified that [the Petitioner] spent the night at the house on Saturn Drive "maybe three times." On these occasions, [the Petitioner] slept in the family room or the dining room. On one particular occasion, [the Petitioner] slept in T.A.'s bed. She testified: "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." [The Petitioner] touched her "private part" with his finger, on her skin. She added that [the Petitioner]'s finger "went inside [her] private part." She left her bed and got in bed with her big sister. She added that she was "not too sure" if [the Petitioner] was awake when this occurred.

***5** T.A. testified that, on another occasion, she was laying on her bunk bed when [the Petitioner] came in and started touching her. She tried to get up, but he held her down. He touched her private part with his finger again, and she "just started crying." She got up, telling him that she had to go to the bathroom. She left and stayed away. T.A. stated that [the Petitioner] had touched her on "[t]he inside." She also stated that this episode caused her to "want to puke."

T.A. testified that, in response to [the Petitioner]'s actions, she started wearing khaki pants to bed because they did not have an elastic waistband. She stated that [the Petitioner] touched her another time while she was wearing her khaki pants and that he unzipped and unbuttoned them. This happened on her bunk bed. She testified, "[h]e touched me with his finger on [her] private part on [her] skin on the inside."

T.A. testified that the Defendant touched her more than three times. The touchings were similar to one another. When asked to indicate on a drawing the parts of the body that the Defendant touched, T.A. indicated the female genitalia. When asked what she meant by "inside," she indicated, as reported by the prosecutor for the record, "the outer labia of the female genitalia."

T.A. stated that the touchings occurred before the family camping trip that they took for J.A.'s eighth birthday. She stated that she never told anyone about the touchings. She recalled J.A. telling Grandfather, however, and she remembered when Mother spoke with them while they were waiting for the school bus. T.A. testified that J.A. told Mother what had happened and that Mother began to cry. Both the girls began to cry, too. Nevertheless, the girls got on the bus and went to school.

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 4 of 15 PageID #: 304

Mother picked them up from school early that day, and they went to the District Attorney's office. There, T.A. spoke with Anne Fisher. T.A. since had watched the videotape of her interview with Fisher. After the interview, T.A. was examined by a doctor.

T.A. testified that she liked [the Petitioner] other than his touching her. She testified that her mother and [the Petitioner] were good friends.

On cross-examination, T.A. acknowledged that, in July 2011, she testified that [the Petitioner] had not touched her in the same place that a tampon would go. Rather, she had earlier testified that he touched her "[l]ike on top of it," "[l]ike not literally on the outside, but like on the outside of it, yes, but like inside," and "[b]ut on the top, like where something else—like I don't know. Yeah. It wasn't like literally inside, inside, but it practically was. Yes." On cross-examination at trial, she testified that [the Petitioner] touched her inside, where a tampon goes.

T.A. admitted that [the Petitioner] never had threatened her, never had told her that they had a secret, and never had promised her anything for her silence. He did not speak with her about sex or boyfriends, and he never said anything that made her uncomfortable. He never pressed his body against hers, never made her touch his "private part," and never showed his "private part" to her.

On redirect examination, T.A. explained that [the Petitioner] had visited them in the house on Saturn Drive more than four times, but that he would not stay more than three days per visit.

Chris Gilmore testified that he was a school resource officer with the Cheatham County Sheriff's Department but previously had been employed as a police officer with the Clarksville Police Department. On March 18, 2009, he responded to Mother's address on an allegation of child rape. From Mother, he gathered basic information. He did not speak to any children. He notified the appropriate persons within the police department for follow-up.

***6** Detective Ginger Fleischer of the Clarksville City Police Department testified that she was assigned to investigate the matter reported by Mother. Because the alleged criminal conduct had taken place in Nashville, she contacted the appropriate Nashville authorities. Detective Fleischer and Detective Fleming of the Davidson County Police Department determined that a "controlled phone call" between Mother and [the Petitioner] would be helpful to the investigation. She explained to Mother that the phone call would be monitored and recorded. The phone call was scheduled to take place on March 24, 2009, the day after the forensic interview of the children. On that day, Mother made three phone calls to [the Petitioner], and all three phone calls were recorded and transcribed. The recordings were admitted into evidence and played for the jury. A fourth recorded phone call was made by Mother to [the Petitioner] on the next day. This recording also was admitted into evidence and played for the jury. Additionally, the transcripts of all the recorded phone calls were admitted.

Hollye Gallion, a pediatric nurse practitioner with the Our Kids Center in Nashville, testified that she performed medical examinations on J.A. and T.A. on April 21, 2009. In conjunction with performing the exams, she reviewed the medical history reports given by the children to a social worker. J.A. reported that "a guy named Tim" had touched the outside of her butt and the outside of her "tootie" with his hands, explaining that she "pee[d]" out of her "tootie." J.A. reported that the touching had occurred more than once. Asked if she remembered the first time, J.A. reported, "It was in our old house in Nashville; I was around six or seven years old."

Gallion testified that J.A.'s physical examination was "normal." She did not find "any injuries or concerns of infection." She also stated that the results of the physical examination were consistent with the medical history that J.A. reported. Gallion added, "Touching typically doesn't leave any sort of evidence or injury."

Gallion testified that, in giving her medical history to the social worker, T.A. reported that [the Petitioner] had touched the outside of her "too-too" with his hand, explaining that she "pee[d]" from her "too-too." T.A. reported that the touching had occurred more than once and that she was "around five or six" the first time. On conducting a physical exam, Gallion concluded that T.A.'s genital area and her "bottom" "looked completely healthy and normal." Gallion added that T.A.'s "physical exam was very consistent with what her history was."

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 5 of 15 PageID #: 305

> Anne Fisher Post, a forensic interviewer employed by the Montgomery County Child Advocacy Center, testified that she conducted forensic interviews of J.A. and T.A. These interviews were recorded and, without any contemporaneous objection from [the Petitioner], the recordings were admitted into evidence but were not played for the jury in open court.

State v. Timothy P. Guilfoy, M2012–00600–CCA–R3–CD, 2013 WL 1965996, *1–8 (Tenn.Crim.App. May 13, 2013). At the close of its case-in-chief, the State delivered an election of offenses which corresponded with details from each victim's testimony. *Id.* at *8–9.

On direct appeal, this court merged two of the Petitioner's convictions for aggravated sexual battery against J.A. and two of the Petitioner's convictions for rape of a child against T.A. *Id.* at *18, *21. Additionally, this court concluded that challenges to the testimonies of Hollye Gallion and Anne Fisher Post, as well as the admission of the recorded phone calls and forensic interviews, were waived by trial counsel's failure to contemporaneously object and that the Petitioner was not entitled to plain error relief. *Id.* at *12–14.

Post–Conviction Proceedings

***7** The Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel. At the post-conviction hearing, trial counsel testified that he did not object to the introduction of the recorded forensic interviews as substantive evidence at trial and that he did not request that a limiting instruction be given to the jury. Trial counsel recalled that he went through the forensic interviews and redacted any reference to incidents that happened outside of Davidson County or incidents that involved a third victim, A.A. He identified the portions of the interview that needed to be redacted by looking for references to A.A., to things "that 'happened at the new house,' " or to "things that 'happened where we live now.' " Trial counsel recalled that he redacted statements from T.A. regarding incidents that happened in Montgomery County. However, trial counsel admitted that the redacted version of the video included the following statement:

> Interviewer: Okay. So, you've told me about a time he put his hand in your pants and touched your private part and nothing went inside. And you told me about a couple of times when he touched your private part and his finger went inside.

Trial counsel confirmed that at least two of the three events included in the interviewer's summary occurred in Montgomery County.

Trial counsel explained that he did not object to the admission of the video-recorded forensic interview because he believed that, when a victim was impeached, the victim's prior consistent statements were admissible as to the subject of the victim's credibility. He expected the trial court to give a limiting instruction to the jury and failed to notice that no limiting instruction was given.

Trial counsel also recalled that controlled phone calls between the Petitioner and the victims' mother were introduced into evidence. Trial counsel did not file any pretrial motions to suppress the introduction of the phone calls, but he did redact the phone calls because they contained references to incidents that happened in Montgomery County. In a portion of the recorded phone calls, the Petitioner stated, "[H]ad said it was me?" In the redacted version, a portion of what the victims' mother said to the Petitioner immediately before he made that statement was removed. Trial counsel agreed that, taken out of context, the Petitioner's statement could have been characterized as having a guilty mind. Trial counsel stated that his failure to redact that portion of the recorded phone call must have been an oversight.

Trial counsel also admitted that the unredacted phone calls included a statement from the Petitioner where he admits that he woke up one time to find T.A. on top of him. When he attempted to push her off of him, his fingers went inside her underwear. This incident occurred in Montgomery County. In the redacted version, the location of the incident was taken out, but the details of the incident remained.

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 6 of 15 PageID #: 306

Trial counsel explained that his theory of defense during the second trial was to demonstrate "the implausibility of the allegations" against the Petitioner. Trial counsel recalled that, during the first trial, he extensively cross-examined the victims' mother about the particular dates the incidents were alleged to have occurred. Trial counsel used a large poster board to create a diagram of the alleged dates and then, through other witnesses, demonstrated that the Petitioner was not in Nashville on the dates in question. However, trial counsel did not use the same technique during the second trial. He explained:

> My thinking was, the lack of specificity, with regard to dates, was a weakness in the State's case for the first trial. And in the second trial, obviously, they would fix that, they would be prepared for what I was doing. So, my thinking was, the second trial we would present our case differently, because if we tried the same case twice the State would be able to anticipate everything we did.

***8** Trial counsel also recalled that the State's direct examination of the victims' mother was essentially the same in each trial. Trial counsel agreed that he could have addressed in the second trial the issue of dates in order to demonstrate the implausibility of the allegations against the Petitioner.

Trial counsel also confirmed that he did not object to the respective testimony of Ms. Gallion and Ms. Post. He agreed that their respective testimony could have bolstered the victims' testimony.

On cross-examination, trial counsel stated that he was one of about six attorneys who regularly represented clients charged with child sex abuse. He stated that it was common for there to be no unbiased adult eyewitnesses in such cases. Often, such cases turned on the victim's credibility. Trial counsel recalled that the State's general practice in such cases would be to have the nurse practitioner qualified as an expert witness, but he did not know whether the forensic interviewer was qualified as an expert. He also recalled that he met with the prosecutor about redacting statements from the recorded phone calls, and the prosecutor agreed to "redact everything we wanted redacted."

Kathleen Byers, the Petitioner's sister, testified that she was present at both trials. After the jury was released to deliberate in the second trial, Ms. Byers asked trial counsel if she had time to get lunch before the jury returned. Trial counsel told her that she likely did because the jurors had requested that a TV and viewing equipment be brought into the jury room so they could "watch the video."

The post-conviction court denied relief, noting that trial counsel admitted that his failure to object to improperly admitted evidence was not meant to further a defensive strategy and that "several other instances of alleged deficient performance" were due to oversights on the part of trial counsel. However, the post-conviction court held that, even if the Petitioner's allegations were true, trial counsel's deficiencies did not result in prejudice. This timely appeal followed.

Analysis

On appeal, the Petitioner contends that trial counsel was ineffective for failing to: (1) properly redact the video of T.A.'s forensic interview; (2) object to the admission of the forensic interviews as substantive evidence; (3) properly redact the recordings of the controlled phone calls; (4) present an alibi defense; (5) object to Ms. Gallion's testimony regarding the results of T.A.'s medical exam; and (6) object to Ms. Post's testimony that victims could not realistically be expected to remember details of events.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State,* 120 S.W.3d 828, 830 (Tenn.2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State,* 40 S.W.3d 450, 458 (Tenn.2001). As such, we review a trial court's findings of fact under a *de novo* standard with a presumption that those findings are correct unless otherwise proven by a preponderance of the evidence. *Id.* (citing Tenn. R.App. P. 13(d); *Henley v. State,* 960 S.W.2d 572, 578 (Tenn.1997)). The trial court's conclusions of law are reviewed "under a purely *de novo* standard, with no presumption of correctness...." *Id.*

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 7 of 15 PageID #: 307

***9** When reviewing the trial court's findings of fact, this court does not reweigh the evidence or "substitute [its] own inferences for those drawn by the trial court." *Id.* at 456. Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge." *Id.* (citing *Henley,* 960 S.W.2d at 579).

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove two factors: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *see State v. Taylor,* 968 S.W.2d 900, 905 (Tenn.Crim.App.1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven in order for the court to grant post-conviction relief. *Strickland,* 466 U.S. at 687; *Henley,* 960 S.W.2d at 580; *Goad v. State,* 938 S.W.2d 363, 370 (Tenn.1996). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689; *see also Henley,* 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State,* 197 S.W.3d 782, 790 (Tenn.Crim.App.2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley,* 960 S.W.2d at 579 (citing *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975)); *see also Goad,* 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that the counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad,* 938 S.W.2d at 369 (citing *Strickland,* 466 U.S. at 688); *see also Baxter,* 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad,* 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland,* 466 U.S. at 694) (internal quotation marks omitted).

Failure to Properly Redact T.A.'s Forensic Interview

The Petitioner argues that he was prejudiced by trial counsel's failure to properly redact T.A.'s forensic interview because it violated his right to a unanimous jury verdict. He claims that it allowed the jury to find the Defendant guilty for the counts involving T.A. based on the interviewer's summary of T.A.'s statements during the forensic interview, which included references to incidents alleged to have occurred in Montgomery County.

***10** In the unredacted copy of her forensic interview, T.A. described several incidents where the Petitioner touched her "private part." She described two incidents that happened in Montgomery County, including one incident where the Petitioner's finger "went inside [her] private part." T.A. also described an incident that took place in Davidson County which did not involve penetration. The details of both incidents from Montgomery County were redacted from the forensic interview before the interview was presented to the jury. However, trial counsel failed to redact the interviewer's comment where she said:

> Okay. So you've told me about a time that [the Petitioner] put his hand in your pants and touched your private part and nothing went inside. And you told me about a couple of times when he touched your private part and his finger went inside.

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 8 of 15 PageID #: 308

At trial, T.A. gave detailed descriptions of three instances that occurred in Davidson County where the Petitioner's finger went inside her "private part." After resting its case-in-chief, the State delivered an election of offenses for each count of rape of a child against T.A. The details of each elected offense corresponded with two of the events T.A. described during her testimony at trial. [3] At the same time, the State dismissed the single count of aggravated sexual battery against T.A.

Trial courts may admit evidence of other sexual crimes when an indictment charges a number of sexual offenses but does not allege the specific date such offenses occurred. *State v. Rickman,* 876 S.W.2d 824, 828 (Tenn.1994). However, in such cases, the state is required "to elect the particular offenses for which convictions are sought." *State v. Shelton,* 851 S.W.2d 134, 137 (Tenn.1993); *State v. Burlison,* 501 S.W.2d 801, 803 (Tenn.1973). Requiring the state to make an election serves three purposes:

> First, to enable the defendant to prepare for and make his defense to the specific charge; second, to protect him from double jeopardy by individualization of the issue, and third, so that the jury's verdict may not be a matter of choice between offenses, some jurors convicting on one offense and others, another.

Burlison, 501 S.W.2d at 803. In short, such practice allows the State latitude when prosecuting criminal acts against young children while simultaneously preserving a criminal defendant's right to a unanimous jury verdict. *Rickman,* 876 S.W.2d at 828; *see also Shelton,* 851 S.W.2d at 137 (stating, "A defendant's right to a unanimous jury before conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of creating a 'patchwork verdict' based on different offenses in evidence" (citing *State v. Brown,* 823 S.W.2d 576, 583 (Tenn.Crim.App.1991)).

In this case, T.A. testified at trial about three different instances where the Petitioner penetrated her "private part" with his finger. After the close of its case-in-chief, the State delivered an election of offenses to the jury, which contained facts that clearly corresponded to T.A.'s trial testimony. The Petitioner's right to a unanimous verdict was protected when the State satisfied the election requirement.

***11** Further, the Petitioner has failed to prove that he was prejudiced by trial counsel's failure to redact the forensic interviewer's statement from the video. As noted above, the State's election of offenses protected the Petitioner's right to a unanimous jury verdict. In the redacted copy of the forensic interview, T.A. described only one incident of misconduct happening in Davidson County, and it did not include penetration. At trial, she described three instances that occurred in Davidson County, all three of which included penetration. Accordingly, we do not believe that, had trial counsel redacted the interviewer's comment, there was a reasonable probability that the outcome of the trial would have been different. *See Strickland,* 466 U.S. at 694. The Petitioner is not entitled to relief.

Admission of Forensic Interview Videos as Substantive Evidence

The Petitioner argues that trial counsel was deficient when he failed to object to the introduction of the videos of the victims' forensic interviews as substantive evidence or request that a limiting instruction be given to the jury. The Petitioner claims that the videos could have only been introduced as prior consistent statements and, consequently, their introduction as substantive evidence was unlawful. The Petitioner contends that he was prejudiced because the admission of the videos as substantive evidence violated his right to a unanimous jury verdict and his protection against double jeopardy. Specifically, the Petitioner argues that the jury's verdicts were based on the forensic interviewer's summary comment in T.A.'s interview as opposed to the evidence presented at trial.

As a preliminary matter, we note that the Petitioner has not identified any prejudice he suffered as a result of the admission of J.A.'s forensic interview. As such, we will limit our analysis to the admission of T.A.'s forensic interview, which included the forensic interviewer's summary statement of events that happened in both Davidson and Montgomery Counties. *See Carpenter v. State,* 126 S.W.3d 879, 886 (Tenn.2004) ("Failure to

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 9 of 15 PageID #: 309

establish either prong [of the *Strickland* test] provides a sufficient basis to deny relief.")

At trial, T.A. was asked to identify a copy of her forensic interview. Then, during the testimony of Ms. Post, the forensic interviewer, the State introduced a copy of T.A.'s forensic interview into evidence without any argument as to its admissibility or explanation as to why it was admitted. Trial counsel made no objection, and the trial court provided no contemporaneous limiting instruction. During the jury charge, the trial court instructed the jury that prior inconsistent statements could be used only to determine a witness's credibility. However, the trial court did not provide a similar instruction for prior consistent statements.

On direct appeal, this court stated, "Although the record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence, the record does *not* demonstrate that the jury ever watched the interviews." *Timothy P. Guilfoy,* 2013 WL 1965996, at *14 (emphasis in original). As such, this court concluded that the Petitioner had failed to satisfy the first requirement of plain error review—that the record clearly established what happened at trial. *Id.* at *14.[4]

It is not clear from the record why T.A.'s forensic interview was introduced into evidence. Nevertheless, this court has previously determined that the trial court erred in admitting the recording. *Id.* While the State argues in this appeal that the interview was properly admitted as a prior consistent statement, the State concedes that the trial court did not issue a proper limiting instruction. *See State v. Braggs,* 604 S.W.2d 883, 885 (Tenn.Crim.App.1980) (when prior consistent statements are admitted to rehabilitate a witness, the trial court should instruct the jury that the statement cannot be considered for the truth of the matter asserted).

***12** However, despite trial counsel's failure to object to the introduction of the video or request a limiting instruction, the Petitioner has failed to demonstrate that he was prejudiced by its introduction as substantive evidence. As discussed above, the forensic interviewer's summary statement did not violate the Petitioner's right to a unanimous jury verdict because the State provided an election of offenses. The details of each elected offense corresponded to incidents both J.A. and T.A. described in their trial testimony. The Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview not been introduced as substantive evidence. Accordingly, the Petitioner is not entitled to relief.

Failure to Properly Redact
Recordings of Controlled Phone Calls

The Petitioner claims that trial counsel was ineffective for failing to properly redact two statements from the controlled phone calls—one where the Petitioner described an incident which occurred in Montgomery County and one where the Petitioner asked the victims' mother, "Had said it was me?" We will address each in turn.

a. Incident in Montgomery County

The Petitioner claims trial counsel was ineffective for failing to redact a portion of the controlled phone calls where the Petitioner described an incident that happened in Montgomery County when he woke up to find T.A. asleep on top of him. Trial counsel filed a pretrial motion to have this portion of the recorded telephone call redacted, which the trial court granted. However, instead of redacting the entire incident, trial counsel only redacted some details where the Petitioner stated he may have placed his hand under T.A.'s underwear when he pushed her off him. Trial counsel also redacted the Petitioner's statement establishing that this incident happened in Montgomery County. Consequently, the following redacted version of the phone call was submitted at trial:

> [Mother]: Look, I asked you to call me back to call me and be truthful.
>
> [The Petitioner]: I know, I'm trying to be truthful.
>
> [Mother]: (Inaudible)
>
> [The Petitioner]: Okay, okay, okay, okay, this is the one thing, the only f* * *ing 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

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 10 of 15 PageID #: 310

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.

[Mother]: Right.

[The Petitioner]: But it happened.

[Mother]: If it was once, go ahead, go ahead.

[The Petitioner]: 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.

[Mother]: Okay.

[The Petitioner]: And I kind of pushed her off, not violently, kind of like understanding, pushed her off,

[The Petitioner]: 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 f* * *ing terrified. And you know what, I did go back to sleep, I went back to sleep so I wouldn't have to f* * *ing 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—

[The Petitioner]: I tried to, I tried—I tried to talk to [T.A.] about it.

Trial counsel generally addressed the controlled phone calls during closing argument, contending that they were designed to elicit an admission from the Petitioner but that the Petitioner did not admit to any sexual contact. During rebuttal argument, the State argued, "[The Petitioner] had the time. He had the opportunity. He had the place. That corroborates [the victim's] version of what happened. [The Petitioner] himself provides a great deal of corroboration." Later, the State referenced the Petitioner's statement that "there was this one time that [T.A.] was on me" in order to illustrate the Petitioner was attempting to shift the blame to someone else.

***13** The Petitioner argues that trial counsel was deficient for failing to redact the entire exchange about the Petitioner waking up with T.A. on top of him. Further, the Petitioner contends that he was prejudiced "in the same way the Defendant was prejudiced in *State v. Danny Ray Smith.*" However, we find no support in the case for the Petitioner's argument in that case.

In *State v. Danny Ray Smith,* No. E2012–02587–CCA–R3–CD, 2014 WL 3940134 (Tenn.Crim.App. Aug. 13, 2014), *no. perm. app. filed,* the defendant proceeded to trial on one count of rape of a child. *Danny Ray Smith,* 2014 WL 3940134, at *10. The trial court allowed the State to admit evidence of other sexual offenses under the "special rule admitting evidence of other sexual crimes when an indictment charges a number of sexual offenses, but alleges no specific date upon which they occurred." *Id.* at *10, *12 (citing *Rickman,* 876 S.W.2d at 828). Consequently, the victim's testimony detailed instances where the defendant penetrated her vagina and her "bottom" with his finger, penetrated her vagina with "his mouth," and one instance where the defendant placed his "private part" on the victim's "private part" and "stuff" came out of the defendant's private part and "went onto [the victim's] private part." *Id.* at *2. The State also introduced the defendant's statement wherein he admitted to several instances of sexual abuse—one where he "rubbed" the victim's vagina while she "rubbed" his penis, one where he penetrated the victim's vagina with the tip of his little finger, one where he performed oral sex on the victim and penetrated her vagina with his tongue, and one where he ejaculated onto the victim's abdomen. *Id.* at *3.

This court held that it was reversible error to admit evidence of other sexual acts because the State knew in advance the offense for which it sought a conviction. *Id.* at *13. Because evidence of other sexual acts was inadmissible under *Rickman,* the defendant's statement to investigators should have been redacted to exclude acts other than the act for which the State sought a conviction —his penetrating the victim's vagina with his pinky finger. *Id.*

In this case, unlike the defendant in *Danny Ray Smith,* the Petitioner does not contest the State's admission of other instances of sexual misconduct under *Rickman.* He simply contests the introduction of any reference to instances that occurred in Montgomery County. We note that trial counsel failed to redact a portion of the incident that happened in Montgomery County from the phone calls. However, we do not believe trial counsel's failure resulted in prejudice. The portion of the recorded phone call that the Petitioner claims should have been redacted does not

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 11 of 15 PageID #: 311

contain any reference to sexually illicit conduct. Instead, the Petitioner simply states that he woke up one night to find T.A. on top of him and he pushed her off gently. Additionally, T.A. did not testify to a similar incident at trial. Therefore, the recorded phone call was not used to corroborate her testimony. As to the State's argument during closing that "[the Petitioner] himself provides a great deal of corroboration," it is clear from the transcript that the State was not referencing the incident described during the phone call. Instead, the State was highlighting the fact that the Petitioner did not deny that he had time and opportunity to commit the acts.

***14** We note that the State did reference the incident during its closing argument to illustrate that the Petitioner was trying to shift the blame to someone else. However, we do not believe that the reference makes the redacted statement prejudicial, especially when it is considered in the greater context of the recorded phone calls. As we noted on direct appeal, the recorded phone calls "are replete with the [Petitioner's] repeated denials that he remembered ever touching the victims inappropriately." *Timothy P. Guilfoy,* 2013 WL 1965996, at *14. Both the State and the Petitioner made the same observation during closing arguments. Accordingly, the Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had trial counsel redacted the entire description of the incident from Montgomery County. The Petitioner is not entitled to relief.

b. "Had said it was me?" Statement

The Petitioner claims counsel was ineffective for failing to properly redact the following portion of the controlled phone call: [5]

> [Mother]: Well, I needed to talk to you about something kind of serious.
>
> [The Petitioner]: Yeah?
>
> [Mother]: Yeah. I um—I got a phone call today from [J.A.'s] guidance counselor?
>
> [The Petitioner]: Oh yeah? the jury.
>
> [Mother]: And she kind of insinuated to her that—that somebody was touching her in the wrong ways.
>
> [The Petitioner]: Really?
>
> [Mother]: Yeah.
>
> [The Petitioner]: Oh man.
>
> [Mother]: And uh, I mean obviously I went and picked them up.
>
> [The Petitioner]: Sure, sure ... man, that's, that's, man, that's ... f* * * ing puke.
>
> [Mother]: Yeah. Well uh ... they didn't really [say] anything about who it was, and I'm trying to figure out y'know ...
>
> [The Petitioner]: Yeah. I, I mean anybody ...
>
> [Mother]: Well, yeah, and well when I talked to [T.A.] and [A.A.] about it cause apparently they said it was her sisters too, they were, they were um ... [A.A.] said it was you.
>
> [The Petitioner]: Had said it was me?

The Petitioner argues that this "confusing edit" allowed the State to argue in its closing that the Petition had a guilty mind. To support his argument, the Petitioner points to a section of the State's closing where the prosecutor argued:

> I am not going to go through [the phone calls] line by line, but I just want you to think about the way he answered the phone. The fact that [Mother] said to him, pretty much right off, "The girls are saying someone touched them." [ ] Does he say who? No, because he knows.

First, we note that trial counsel testified at the post-conviction hearing that he redacted anything in the phone calls which referenced A.A., a third, unindicted victim. The portion that was redacted clearly shows that A.A. identified the Petitioner as the suspect. As such, we cannot say that trial counsel was deficient in redacting this portion of the recorded phone calls.

Additionally, we are unable to determine that the Petitioner was prejudiced by trial counsel's failure to redact the comment, "Had said it was me?" It appears that the Petitioner was confirming that someone had accused him of the alleged conduct, a fact the jury would clearly

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 12 of 15 PageID #: 312

know since the victims' mother made the police controlled calls to the Petitioner and the Petitioner is on trial for the offenses. Moreover, the prosecutor's comment is not referring to this lone statement or question—it is referring to the Petitioner's failure to ask the mother who the girls said touched them. Further, as noted above, the remainder of the phone calls is “replete with the [Petitioner's] repeated denials that he remembered ever touching the victims inappropriately.” *See Timothy P. Guilfoy,* 2013 WL 1965996, at *14. Therefore, the Petitioner has failed to show that he was prejudiced by the way this particular portion of the controlled phone calls was redacted. The Petitioner is not entitled to relief.

Failure to Present an Alibi Defense

***15** The Petitioner argues that trial counsel was ineffective because he failed to present an alibi defense similar to the defense that was presented in the Petitioner's first trial. Through the victims' mother and other witnesses during the first trial, trial counsel was able to demonstrate that the Petitioner was not at the victims' home on the dates their mother alleged the abuse occurred. However, trial counsel did not employ a similar technique during the second trial. During the second trial, the Petitioner's theory of defense was to show the implausibility of the victims' allegations. At the post-conviction hearing, trial counsel explained that he chose not to present the same defense because he anticipated that the State would have solidified the dates on which the abuse was alleged to have occurred. Additionally, trial counsel stated that he changed his defense strategy because “if we tried the same case twice the State would be able to anticipate everything we did.” We will not second-guess a reasoned, yet ultimately unsuccessful, trial strategy. *See Granderson,* 197 S.W.3d at 790. Accordingly, the Petitioner is not entitled to relief.

Failure to Object to Ms. Gallion's Testimony

The Petitioner contends that trial counsel should have objected when Ms. Gallion testified that T.A.'s medical exam, which showed no injury, was consistent with both penetration and no penetration. Specifically, the Petitioner claims trial counsel should have objected to the following testimony:

> [The State]: Let me ask you this, put your expert hat on and ask you hypothetically: If [T.A.] [had] said to [the intake interviewer] that she was touched by an adult male's hand on the inside of her genitals, would there have been anything inconsistent about the medical exam, with that history given?
>
> [Ms. Gallion]: No. Again, the majority of children we see actually describe some type of penetration. That's one of the reasons that we often see children. Penetration with a hand, a finger, penetration with a penis. Typically those children also have completely normal exams.

The Petitioner contends that Ms. Gallion's comment did not “substantially assist the trier of fact to understand the evidence or to determine a fact at issue....” Tenn. R. Evid. 702. Additionally, the Petitioner asserts that Ms. Gallion's comment was offered simply to bolster T.A.'s testimony and that its “extremely prejudicial” nature outweighed its probative value.

At trial, both parties stipulated to Ms. Gallion's qualification as an expert. As an expert witness, she was allowed to offer her opinion. Tenn. R. Evid. 702. When an expert's opinion is otherwise admissible, it “is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Tenn. R. Evid. 704.

Whether the Petitioner penetrated T.A. with his finger was a question of fact for the jury to resolve. Ms. Gallion's testimony about the results of T.A.'s medical examination and whether those results were or were not consistent with penetration substantially assisted the jury in evaluating T.A.'s medical report, which showed no injury to T.A. Additionally, we do not believe that Ms. Gallion's testimony was so prejudicial as to outweigh its probative value. Accordingly, trial counsel was not deficient for failing to object to this portion of Ms. Gallion's testimony. The Petitioner is not entitled to relief.

Failure to Object to Ms. Post's Testimony

The Petitioner argues that trial counsel should have objected to the following testimony:

> [The State]: What is your experience in the area of interviewing children who have perhaps been subjected

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 13 of 15 PageID #: 313

to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young? Is it realistic to expect that you'll get every detail from every incident?

[Ms. Post]: 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.

***16** The Petitioner contends that Ms. Post's testimony constitutes improper expert testimony because Ms. Post was not offered as an expert witness. Additionally, the Petitioner argues that the State offered this evidence to support the victims' credibility by explaining why they could not provide any details of when the abuse occurred.

The Tennessee Supreme Court addressed this issue in a similar case, *State v. Bolin,* 922 S.W.2d 870 (Tenn.1996). In that case, the social worker who performed the forensic interview testified that children who had been abused over a long period of time often had trouble remembering the details of when and how each event took place. *Id.* at 872–73. Our supreme court held that the social worker's testimony constituted expert proof and that its admission through a non-expert witness was error. *Id.* at 874. However, the court also found that any error was harmless. *Id.* Specifically, the court stated:

> The testimony essentially consists of an explanation of a narrow issue—why K.N. could not assign reasonably specific time or dates to any of the alleged events of sexual abuse. Therefore, the testimony does not, unlike the testimony in *Ballard,* purport to completely vouch for the overall credibility of the victim, and thus it cannot be said to have "explained away" the inconsistencies and recantations—the heart of the defense theory. Hence, the damaging effect of the testimony is minimal. [6]

Id.

Similarly, the admission of Ms. Post's testimony was error. She did not testify as an expert witness but offered testimony that was "specialized knowledge" she gathered from her experience as a forensic interviewer. *See id.* Moreover, we note there is nothing in the post-conviction record to indicate that trial counsel did not object for strategic reasons. Even if this were deficient performance on the part of trial counsel, the Petitioner has failed to establish any resulting prejudice. Like the social worker in *Bolin,* Ms. Post's testimony addressed the narrow issue of why the victims could not provide details of when the events occurred. It did not address inconsistencies in the victims' descriptions of what occurred during the abuse or address the "implausibility" of their allegations, the core of the Petitioner's defense theory during the second trial. Admittedly, there was no conclusive medical evidence that either victim had been sexually abused, but the medical evidence did not rule out the possibility of abuse. Further, the victims told several people about the abuse—their grandfather, their mother, Ms. Post, and Ms. Gallion—over a period of several weeks. Also, they testified about the abuse during the first trial. Trial counsel specifically addressed the inconsistencies between their testimonies at both trials during cross-examination. Accordingly, the Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to object to Ms. Post's testimony and is not entitled to relief.

Conclusion

***17** The judgment of the post-conviction court is affirmed.

All Citations

Not Reported in S.W.3d, 2015 WL 4880182

Footnotes

Case 3:18-cv-01371 Document 31-3 Filed 06/05/19 Page 14 of 15 PageID #: 314

1 To assist in the resolution of this proceeding, we take judicial notice of the record from the Petitioner«s# direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson,* 291 S.W.3d 864, 869 (Tenn. 2009); *State ex rel Wilkerson v. Bomar,* 376 S.W.2d 451, 453 (Tenn. 1964).

2 As is the policy of this court, minor victims are identified by their initials.

3 On direct appeal, this court merged two of the Petitioner's convictions for rape of a child against T.A. because the State elected the same incident for those two counts. *Timothy P. Guilfoy* 2013 WL 1965996, at *20. However, this court noted that T.A.'s testimony described three separate instances and that the record failed to reveal why the State did not elect the third incident as the basis for the third count of rape of a child. *Id.* at *20 n.8.

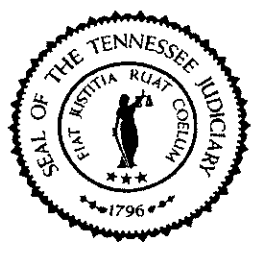
4 The Petitioner attempted to correct this gap in the record through the post-conviction testimony of Ms. Byers that trial counsel told her she had time to get lunch because the jury had requested equipment to view the video.

5 Portions in italics were redacted from the phone calls before the recordings were presented to

6 In *State v. Ballard,* 855 S.W.2d 557 (Tenn.1993), the expert witness testified that the victims exhibited “symptom constellations” consistent with being sexually abused. *Ballard,* 855 S.W.2d at 561. The supreme court concluded that because the behavior profile was consistent with a number of psychological stressors, including sexual abuse, the list of symptoms was too generic to be probative. *Id.* at 562. Therefore, the admission of expert testimony was reversible error. *Id.* at 563.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.



Court of Criminal Appeals – Middle Division
Appellate Court Clerk's Office - Nashville
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
(615) 741-2681

SEP 29 2015

Patrick Timothy McNally
Weatherly, McNally & Dixon, PLC
424 Church Street
Suite 2260
Nashville TN 37219

Re: M2014-01619-CCA-R3-PC - TIMOTHY GUILFOY v. STATE OF TENNESSEE

Notice: Order - Petition to Rehear Denied

Attached to this cover letter, please find the referenced notice issued in the above case. If you have any questions, please feel free to call our office at the number provided.

cc: Patrick Timothy McNally
Brent C. Cherry

Case 3:18-cv-01371 Document 31-4 Filed 06/05/19 Page 1 of 7 PageID #: 316

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

TIMOTHY GUILFOY v. STATE OF TENNESSEE

Davidson County Criminal Court
2011A779

No. M2014-01619-CCA-R3-PC

Date Printed: 09/25/2015 **Notice / Filed Date: 09/25/2015**

NOTICE - Order - Petition to Rehear Denied

The Appellate Court Clerk's Office has entered the above action.

If you wish to file an application for permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and six copies with the Appellate Court Clerk. The application must be filed "within 60 days after the denial of the petition or entry of the judgment on rehearing." NO EXTENSIONS WILL BE GRANTED.

James M. Hivner
Clerk of the Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 13, 2015 Session

TIMOTHY GUILFOY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2011-A-779 Monte Watkins, Judge

FILED
SEP 25 2015
Clerk of the Courts
Rec'd By ____________

No. M2014-01619-CCA-R3-PC

ORDER DENYING PETITION FOR REHEARING

The Petitioner, by and through counsel, has filed a Petition for Rehearing pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure, asking this court to reconsider its August 14, 2015, opinion in this case. The Petitioner contends that the opinion conflicts with a statute, prior decision, or other principle of law; overlooks or misapprehends a material fact; and relied upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute. Tenn. R. App. P. 39(a)(2)-(4).

Conflicts with Prior Statute, Decision, or Other Principle of Law

First, the Petitioner argues that our conclusion that "[t]he Petitioner's right to a unanimous verdict [and prohibition of double jeopardy] was protected when the State satisfied the election requirement" conflicts with this court's opinion on the Petitioner's direct appeal. Timothy Guilfoy v. State, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *10 (Tenn. Crim. App. Aug. 14, 2015) (alteration added by the Petitioner). The Petitioner correctly notes that on direct appeal this court held that the State's election of offenses violated the Petitioner's constitutional rights against double jeopardy. State v. Timothy P. Guilfoy, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *19 (Tenn. Crim. App. May 13, 2013). However, that does not mean that our opinion is in conflict with this court's prior opinion on direct appeal, as the Petitioner claims. As this court noted in the direct appeal, while the State's election of offenses violated the prohibition against double jeopardy, "such an 'election' does not technically violate the election of offenses doctrine . . . ." Id. at *18-19. To be clear, our opinion in the post-conviction appeal does not suggest that the State's election protected the Petitioner's rights against

double jeopardy for the charges against him in this case. On the contrary, it simply says that his right to a unanimous jury verdict was protected when the State delivered an election of offenses which corresponded to facts that were included in the victims' trial testimony. "The election requirement safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that *the jurors deliberate and render a verdict based on the same evidence*." State v. Johnson, 53 S.W.3d 628, 631 (Tenn. 2001) (emphasis added). To the extent that the election requirement protects defendants against double jeopardy, it does so by "prohibiting retrial on the same specific charge." State v. Adams, 24 S.W.3d 289, 294 (Tenn. 2000). The Petitioner's right to a unanimous verdict was protected when the State gave its election of offenses, even if that election violated the Petitioner's rights against double jeopardy in this case. See Johnson, 53 S.W.3d at 631; Timothy P. Guilfoy, 2013 WL 1965996, at *19. Our opinion does not conflict with this court's opinion on direct appeal.

Overlooks or Misapprehends a Material Fact

a. Election of Offenses Did not Correspond with Victims' Testimony

Second, the Petitioner claims that this court overlooked or misapprehended a material fact when we stated that the Petitioner's right to a unanimous verdict was protected because "the State delivered an election of offenses to the jury, which contained facts that clearly corresponded with T.A.'s trial testimony." Timothy Guilfoy, 2015 WL 4880182, at *10. The Petitioner submits that the State's election for Counts 1, 2, 6, and 7 did not correspond to J.A. and T.A.'s trial testimony because the State improperly split single instances of conduct into two counts.

At trial, J.A. described two instances where the Petitioner touched her—once when she got up, went to the bathroom, and got into bed with her sister; and once when she was sitting on the Petitioner's lap on the couch. Similarly, T.A. testified about three instances where the Petitioner touched her—once when she left and got into bed with her sister; once when she started crying, went to the bathroom, and wanted to "puke"; and once when she was wearing khakis. The State's election of offenses for the four charges involving J.A. included the following facts: two counts where the Petitioner touched J.A. on the outside of her genitals and the incident concluded when she went to the bathroom and got into bed with her sister; and two counts where the Petitioner touched J.A.'s bottom and genitals while she was sitting on the Petitioner's lap on the couch. The State's election for the three offenses involving T.A. included the following facts: two counts where the Petitioner touched the inside of T.A.'s genitals while in bed and she started crying, wanted to puke, and got into bed with her sister; and one count where the Petitioner touched the inside T.A.'s genitals while in bed and while she was wearing khaki pants. The facts included in the State's election corresponded with the facts presented in the victims' trial testimony, even if the election improperly split some of the

Case 3:18-cv-01371 Document 31-4 Filed 06/05/19 Page 4 of 7 PageID #: 319

instances into two counts of criminal conduct. The facts in the election of offenses did not correspond at all with the forensic interviewer's summary statement in T.A.'s interview. The Petitioner is not entitled to rehearing on this issue.

b. Jury's Verdict Mirrored Forensic Interview as Opposed to Trial Testimony

The Petitioner also claims that this court overlooked or misapprehended the material fact that the jury's verdict on the charges involving T.A. mirrored the forensic interviewer's summary statement instead of T.A.'s trial testimony. The Petitioner notes that T.A.'s testimony only described instances of conduct that involved penetration. The Petitioner asserts that, because the jury convicted the Petitioner of two counts of rape of a child and one count of aggravated sexual battery against T.A., the jury necessarily based its verdict on the forensic interviewer's summary statement in T.A.'s interview instead of T.A.'s trial testimony, and therefore, the introduction of the summary statement as substantive evidence was not harmless. Additionally, the Petitioner contends that the State's election of offenses, which improperly split one instance of illegal touching against T.A. into two offenses, confused the jury, and the two convictions of rape of a child "can only be reconciled with the accounts provided in the [forensic interviewer's summary statement]."

The Petitioner cites State v. Benjamin Foust, No. E2014-00277-CCA-R3-CD, 2015 WL 5256422 (Tenn. Crim. App. Apr. 28, 2015), perm. app. filed, to support his claim that the introduction of the forensic interviewer's summary statement as substantive evidence was not harmless. In that case, the defendant was indicted along with two co-defendants, Ashlie Tanner and Teddie Jones, for the murder to two people. Id. at *1. At trial, both Ms. Tanner and Mr. Jones testified that *Mr. Jones* committed the murders while the defendant waited in the car. Id. at *5-6, *8-9, *15. However, during the cross-examination of Mr. Jones, the State admitted into evidence a recording of Mr. Jones's statement to police, in which he gave a detailed description of the defendant's murdering the two victims while Mr. Jones watched. Id. at *11-12. In that same interview, Mr. Jones stated that the defendant was a member of the Aryan Circle and had threatened to have Mr. Jones killed. Id. at *12. This court held that Mr. Jones's statement to police should not have been entered as substantive evidence because it did not meet the requirements for admission under Tennessee Rules of Evidence 613(b) and 803(26). Id. at *14. Further, this court concluded that the error was not harmless because the case hinged on the credibility of Mr. Jones and Ms. Tanner and because the State had relied heavily on Mr. Jones's statement to police in its closing argument when it told the jury that the whole statement was evidence it could consider in its deliberations and argued that Mr. Jones had lied during his testimony because he was "terrified" of the defendant. Id. at *15.

Case 3:18-cv-01371 Document 31-4 Filed 06/05/19 Page 5 of 7 PageID #: 320

The Petitioner's claim that the jury based its verdict on the interviewer's summary statement is without merit. First, this case is distinguishable from Benjamin Foust because the State did not rely at all upon the forensic interviewer's summary statement. Instead, the State specifically elected offenses underlying each count of the indictment which included facts that corresponded with the T.A.'s description of the event at trial. Such election ensured that the jury was deliberating on the same evidence, not on extraneous evidence admitted at trial. See Johnson, 53 S.W.3d at 631. Further, this court will not engage in speculation as to the jury's reasoning when rendering a verdict. State v. Cynthia J. Finch, -- S.W.3d --, No. E2011-02544-CCA-R3-CD, 2013 WL 6174832, at *13 (Tenn. Crim. App. Nov. 22, 2013). This court has already held that the evidence was sufficient to uphold each of the Petitioner's convictions, as merged on direct appeal, for conduct against T.A. Timothy P. Guilfoy, 2013 WL 1965996, at *22, *23. The Petitioner has presented no proof, and we will not assume, that the jury's verdict was based on the forensic interview's summary statement as opposed to T.A.'s trial testimony. The Petitioner is not entitled to a rehearing on this issue.

Opinion Relies upon Matters of Fact upon Which the Parties Have Not Been Heard and are Open to Reasonable Dispute

Finally, the Petitioner argues that our opinion relied upon matters of fact upon which the Petitioner has not been heard and are open to reasonable dispute. Specifically, the Petitioner claims that our opinion is based on the erroneous conclusion that the State's election of offenses corresponded with J.A. and T.A.'s trial testimony and asserts that "[t]he State and the [Petitioner] have not addressed the defective nature of the election of the offenses in their respective briefs or during oral argument."

First, we note that the Petitioner argued in his brief that the admission of the improper redaction of T.A.'s forensic interview and its admission into evidence caused the Petitioner to be "denied the right to a unanimous verdict." In order to determine whether a defendant was denied the right to a unanimous verdict in cases where the evidence showed that the defendant committed multiple offenses against the victim, this court must determine whether the State satisfied the election requirement. Johnson, 53 S.W.3d at 630-31. Accordingly, the Petitioner had the opportunity to address his claim that the State's election was improper, and he chose not to do so.

Further, whether the State's election corresponded to J.A. and T.A.'s testimony is not open to reasonable dispute. As noted above, the specific facts from both victims' trial testimony were included in the State's election of offenses. Moreover, this court held on direct appeal that, even though the election of offenses violated the Petitioner's rights against double jeopardy, the State's election did not violate the election of offenses doctrine. Timothy P. Guilfoy, 2013 WL 1965996, at *19. Accordingly, the Petitioner is not entitled to a rehearing on this issue.

Case 3:18-cv-01371 Document 31-4 Filed 06/05/19 Page 6 of 7 PageID #: 321

For the reasons set forth above, the Petition for Rehearing is hereby DENIED.

PER CURIAM
ROBERT L. HOLLOWAY, JR., JUDGE
JAMES CURWOOD WITT, JR., JUDGE
ROBERT H. MONTGOMERY, JR., JUDGE

Tennessee Supreme Court

DISCRETIONARY APPEALS

Grants & Denials List

February 15, 2016 - February 19, 2016

GRANTS

Style/Appeal Number	County/Trial Judge/ Trial Court No.	Appellate Judge/Judgment	Nature Of Appeal	Action
Nashville				
STATE OF TENNESSEE v. JERRY LEWIS TUTTLE M2014-00566-SC-R11-CD	Maury County Circuit Court Stella L. Hargrove 21695, 22091	McMullen, Camille R.: Affirmed in Part, Reversed in Part Page, Roger A.: Concur in Part/Dissent in Part	TRAP 11	Granted: Application of the State of Tennessee Order filed 2-18-16
JOSEPH BRENNAN, ET AL. v. BOARD OF PAROLE FOR THE STATE OF TENNESSEE M2014-01591-SC-R11-CV	Davidson County Chancery Court Carol L. McCoy 131171II	Goldin, Arnold B.: Vacated	TRAP 11	Granted: Application of Tennessee Board of Parole Order filed 2-18-16

Case 3:18-cv-01371 Document 31-5 Filed 06/05/19 Page 1 of 2 PageID #: 323

STATE OF TENNESSEE v. DENNIS ALLEN RAYFIELD M2013-02167-SC-R11-CD	Wayne County Circuit Court Jim T. Hamilton 15198	Montgomery Jr., Robert H.: Affirmed	TRAP 11	Denied: Application of Dennis Allen Rayfield Order filed 2-18-16
ANGELI CHAN SELITSCH v. MICHAEL JOHN SELITSCH M2014-00905-SC-R11-CV	Rutherford County Chancery Court Robert E. Corlew, III 12CV1621	Clement Jr., Frank G.: Affirmed	TRAP 11	Denied: Application of Michael John Selitsch Order filed 2-17-16
STATE OF TENNESSEE v. JEFFERY D. AARON M2014-01483-SC-R11-CD	Williamson County Circuit Court Michael Binkley ICR017709	Woodall, Thomas T.: Reversed	TRAP 11	Denied: Application of Jeffery D. Aaron Order filed 2-19-16
TIMOTHY GUILFOY v. STATE OF TENNESSEE M2014-01619-SC-R11-PC	Davidson County Criminal Court Monte Watkins 2011A779	Holloway Jr., Robert L.: Affirmed	TRAP 11	Denied: Application of Timothy Patrick Guilfoy Order filed 2-18-16

2018 WL 3459735
Only the Westlaw citation is currently available.

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

Court of Criminal Appeals of Tennessee,
AT NASHVILLE.

Timothy P. GUILFOY
v.
STATE of Tennessee

No. M2017-01454-CCA-R3-ECN
|
June 20, 2018 Session
|
FILED 07/17/2018
|
Application for Permission to Appeal Denied by Supreme Court November 14, 2018

Appeal from the Criminal Court for Davidson County, No. 2011-A-779, Monte D. Watkins, Judge

Attorneys and Law Firms

Samuel J. Muldavin, Memphis, Tennessee, for the appellant, Timothy P. Guilfoy.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Glenn R. Funk, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

D. Kelly Thomas, Jr., J., delivered the opinion of the court, in which Robert L. Holloway, Jr., and Timothy L. Easter, JJ., joined.

OPINION

***1** The Petitioner, Timothy P. Guilfoy, appeals from the Davidson County Criminal Court's denial of his petition for a writ of error coram nobis. The Petitioner contends that the coram nobis court erred in denying his petition because he presented newly discovered evidence in the form of an affidavit from the jury foreperson stating that the jury viewed videotaped forensic interviews of the victims during its deliberations. Discerning no error, we affirm the judgment of the coram nobis court.

The Petitioner is serving a total effective sentence of forty years for his October 2011 convictions for three counts of aggravated sexual battery and one count of rape of a child. On January 17, 2017, the Petitioner filed the instant petition for writ of error coram nobis. Attached to his petition was an affidavit from the jury foreperson stating that videotaped forensic interviews of the victims were admitted into evidence at trial but not played in the courtroom during the trial, that she requested that the jury be allowed to view the interviews in the jury room during its deliberations, and that the jury had viewed them. The State responded to the petition by arguing that it was barred by the statute of limitations. On June 23, 2017, the coram nobis court entered a written order denying the petition on the grounds that it was time-barred and failed to state a cognizable claim for coram nobis relief. The Petitioner now appeals to this court.

This is the Petitioner's third attempt to raise in this court the issue of the jury's viewing the videotaped forensic interviews during its deliberations. See Timothy Guilfoy v. State (Guilfoy II), No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *11-12 (Tenn. Crim. App. Aug. 14, 2015), perm. app. denied (Tenn. Feb. 18, 2016); State v. Timothy P. Guilfoy (Guilfoy I), No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *14-15 (Tenn. Crim. App. May 13, 2013). During the Petitioner's trial, "the trial court admitted as substantive evidence the recorded forensic interviews" of the victims "[w]ithout objection" from trial counsel. Guilfoy I, 2013 WL 1965996, at *14. "[T]he interviews were not played in open court," but "they were made available to the jury during the jury's deliberations." Id.

The Petitioner conceded in his error coram nobis petition that he had retained a private investigator "who issued a written report" in November 2011 stating "that he had succeeded in speaking to several jurors and had ascertained that the jury had in fact, watched the forensic [interviews] during their deliberations." Included in the Petitioner's motion for new trial was the issue of the jury's having viewed the forensic interviews during its deliberations despite the fact that they were not played during the trial. On direct appeal, appellate counsel

Case 3:18-cv-01371 Document 31-6 Filed 06/05/19 Page 1 of 3 PageID #: 325

framed the issue as an objection to the admission of the forensic interviews "as substantive evidence." Guilfoy I, 2013 WL 1965996, at *1.

A panel of this court concluded on direct appeal that the Petitioner had waived plenary appellate review of the issue by failing to make a contemporaneous objection to the admission of the forensic interviews. Guilfoy I, 2013 WL 1965996, at *14. The panel determined that "the trial court erred in admitting the recordings of the interviews into evidence," but that the Petitioner had "failed to establish the prerequisites for plain error relief" because the appellate record did not "demonstrate that the jury ever watched the interviews." Id. The panel stated that the record was "simply silent" on whether the jury had viewed the recordings during its deliberations. Id.

***2** The Petitioner conceded in his error coram nobis petition that he attempted to raise this issue again in his post-conviction proceedings. The Petitioner sought to have the jury foreperson testify at the post-conviction hearing that the jury had viewed the recordings of the forensic interviews during its deliberations, but the post-conviction court ruled her testimony inadmissible. Nonetheless, the Petitioner presented the testimony of his sister that she had asked trial counsel while the jury was deliberating "if she had time to get lunch before the jury returned" and that trial counsel responded that "she likely did because the jurors had requested that a TV and viewing equipment be brought into the jury room so they could 'watch the video.' " Guilfoy II, 2015 WL 4880182, at *8.

The Petitioner appealed the post-conviction court's denial of his post-conviction petition to this court. On appeal, the Petitioner did not raise the issue of the post-conviction court's having barred the jury foreperson's testimony. However, the Petitioner did allege on appeal that trial counsel was ineffective for failing "to object to the introduction of the videos of the victims' forensic interviews as substantive evidence." Guilfoy II, 2015 WL 4880182, at *11. A panel of this court concluded that the Petitioner had "failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview[s] not been introduced as substantive evidence." Id. at *12.

The Petitioner now raises this issue again in the context of the coram nobis court's denial of his petition for writ of error coram nobis. A writ of error coram nobis is an extraordinary remedy available only under very narrow and limited circumstances. State v. Mixon, 983 S.W.2d 661, 666 (Tenn. 1999). A writ of error coram nobis lies "for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial." Tenn. Code Ann. § 40-26-105; see also State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995). The purpose of a writ of error coram nobis is to bring to the court's attention a previously unknown fact that, had it been known, may have resulted in a different judgment. State v. Vasques, 221 S.W.3d 514, 526-27 (Tenn. 2007).

The decision to grant or deny the writ rests within the discretion of the coram nobis court. Teague v. State, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988). "A court abuses its discretion when it applies an incorrect legal standard or its decision is illogical or unreasonable, is based on a clearly erroneous assessment of the evidence, or utilizes reasoning that results in an injustice to the complaining party." State v. Wilson, 367 S.W.3d 229, 235 (Tenn. 2012).

A petition for writ of error coram nobis must be filed within one year of the date the judgment of the trial court became final. See Tenn. Code Ann. §§ 27-7-103, 40-26-105; Mixon, 983 S.W.2d at 671. For coram nobis purposes, a trial court's judgment becomes final "either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion." Harris v. State, 301 S.W.3d 141, 144 (Tenn. 2010). "The State bears the burden of raising the bar of the statute of limitations as an affirmative defense." Id.

The one-year limitations period may be tolled only when required by due process concerns. See Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001). Courts must "balance the petitioner's interest in having a hearing with the interest of the State in preventing a claim that is stale and groundless" in determining whether due process tolls the statute of limitations. Wilson, 367 S.W.3d at 234. To do so, courts perform the following steps:

> ***3** (1) determine when the limitations period would normally have begun to run; (2) determine

Case 3:18-cv-01371 Document 31-6 Filed 06/05/19 Page 2 of 3 PageID #: 326

> whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising," determine if, under the facts of the case a strict applications of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

Id. (quoting Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995)).

The Petitioner's motion for new trial was denied on March 13, 2012; therefore, the trial court's judgments became final on April 12, 2012. The Petitioner had until April 12, 2013, to file a petition for writ of error coram nobis. The instant petition was not filed until January 17, 2017, well outside the one-year statute of limitations. The State raised the statute of limitations as an affirmative defense in the coram nobis court, and the coram nobis court concluded that the petition was time-barred. We agree with the coram nobis court's conclusion. The Petitioner's grounds for relief were not "later-arising." In fact, the Petitioner conceded in his petition that he was aware that the jury had viewed the forensic interviews during its deliberations as early as November 2011. Therefore, we conclude that due process does not require tolling of the statute of limitations.

Moreover, the petition for writ of error coram nobis failed to state a cognizable claim for relief. Coram nobis relief is not available for matters which could have been raised in a motion for new trial, on direct appeal, or in a petition for post-conviction relief. Freshwater v. State, 160 S.W.3d 548, 556 (Tenn. Crim. App. 2004). Here, the issue was raised in the Petitioner's motion for new trial, on direct appeal, at his post-conviction proceedings, and in an appeal of his post-conviction proceedings. As such, the petition failed to present any subsequent or newly discovered evidence that could not have been raised in an earlier proceeding.

Much of the Petitioner's brief is focused on the fact that the record was insufficient for this court to determine on direct appeal if the jury viewed the forensic interviews during its deliberations and the fact that the post-conviction court barred the foreperson of the jury from testifying at the post-conviction hearing. However, a petition for writ of error coram nobis is not the proper forum to address these issues.

With respect to the record on direct appeal, it is the appellant's "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). To the extent that either trial or appellate counsel failed to adequately preserve the issue in the appellate record, a post-conviction claim of ineffective assistance of counsel would have been the proper avenue to address their deficiencies in compiling the appellate record. See Laquan Napoleon Johnson v. State, No. M2014-00976-CCA-R3-ECN, 2015 WL 1517795, at *4 (Tenn. Crim. App. Mar. 31, 2015) (noting that a claim of ineffective assistance of counsel "is not an appropriate ground for relief" in a coram nobis proceeding).

Likewise, any challenge to the post-conviction court's ruling on the admissibility of the jury foreperson's testimony at the post-conviction hearing should have been raised on appeal from that court's denial of post-conviction relief. Accordingly, we conclude that the coram nobis court did not abuse its discretion in denying the petition for writ of error coram nobis as time-barred and for failing to state a cognizable claim for coram nobis relief.

***4** Upon the foregoing and the record as a whole, the judgment of the coram nobis court is affirmed.

All Citations

Slip Copy, 2018 WL 3459735

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

Case 3:18-cv-01371 Document 31-6 Filed 06/05/19 Page 3 of 3 PageID #: 327

FILED
08/01/2018
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

TIMOTHY P. GUILFOY v. STATE OF TENNESSEE

Criminal Court for Davidson County
No. 2011-A-779

No. M2017-01454-CCA-R3-ECN

ORDER DENYING PETITION TO REHEAR

Pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure, the Petitioner has filed a pro se petition for rehearing of this court's opinion in Timothy P. Guilfoy v. State of Tennessee, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735 (Tenn. Crim. App. July 17, 2018). In our opinion, we affirmed the coram nobis court's denial of the Petitioner's petition for writ of error coram nobis on the grounds that the petition was time-barred and failed to state a cognizable claim for coram nobis relief. Id. at *1.

Examples of when a rehearing may be granted include, but are not limited to, the following: (1) when "the court's opinion incorrectly states the material facts established by the evidence and set forth in the record"; (2) when "the court's opinion is in conflict with a statute, prior decision, or other principle of law"; (3) when "the court's opinion overlooks or misapprehends a material fact or proposition of law"; and (4) when "the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute." Tenn. R. App. P. 39(a). "A rehearing will not be granted to permit reargument of matters fully argued." Id.

The Petitioner contends that this court's opinion was "flawed from the first paragraph." The Petitioner alleges numerous instances where he believes that this court's opinion incorrectly states material facts; is in conflict with a statute, prior decision, or other principle of law; and overlooks or misapprehends material facts and propositions of law. However, all of the Petitioner's contentions in the petition for rehearing are merely attempts to reargue matters that have been fully argued. Furthermore, it has long been the rule that an appellant may not be represented by counsel and simultaneously proceed pro se. See State v. Parsons, 437 S.W.3d 457, 478 (Tenn. Crim. App. 2011) (citing State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976)).

Based upon the foregoing and having reviewed our opinion and the Petitioner's petition, we conclude that the Petitioner's contentions are not well-taken. It is, therefore, ordered that the petition to rehear is DENIED.

PER CURIAM
(Thomas, J., Holloway, J., and Easter, J.)

Case 3:18-cv-01371 Document 31-7 Filed 06/05/19 Page 2 of 2 PageID #: 329

FILED
11/14/2018
Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TIMOTHY P. GUILFOY v. STATE OF TENNESSEE

Criminal Court for Davidson County
No. 2011-A-779

No. M2017-01454-SC-R11-ECN

ORDER

Upon consideration of the application for permission to appeal of Timothy P. Guilfoy and the record before us, the application is denied.

PER CURIAM

Case 3:18-cv-01371 Document 31-8 Filed 06/05/19 Page 1 of 1 PageID #: 330

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

United States of America ex rel.	)	
TIMOTHY GUILFOY,	)	
TOMIS ID 00499702,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 18-cv-1371**
	)	
MICHAEL PARRIS, Warden,	)	**Honorable Eli J. Richardson**
Northwestern Correctional	)	
Complex,	)	**Honorable Magistrate**
	)	**Barbara D. Holmes**
Respondent.	)	

AFFIDAVIT OF TIMOTHY GUILFOY

Timothy Guilfoy, having been duly sworn, hereby deposes and states as follows:

1. My name is Timothy Guilfoy. I am the Petitioner in the above-captioned matter. I am incarcerated at the Northwest Correctional Complex. My TOMIS ID is 00499702.

2. The statements in this affidavit are truthful and based on my personal and direct knowledge.

3. Through a superseding indictment, I was charged with four counts of aggravated sexual battery against J.A., three counts of rape of a child against T.A., and one count of aggravated battery against T.A.

TG

4. I was represented by Bernard McEvoy at both my first trial, which ended in a hung jury, and at my second trial, which resulted in convictions on some of the charges.

5. Through the course of preparing for trial with Mr. McEvoy, I learned that "forensic interviews" of J.A. and T.A. were conducted at the local Child Advocacy Center, and that the interviews were videotaped.

6. The recorded interviews were not produced to Mr. McEvoy during discovery.

7. Mr. McEvoy filed a motion to compel the State to disclose a copy of the recorded interviews. The State objected to disclosing the videos because it claimed it would not use the recorded interviews during its case in chief. Based on the State's representation, the trial court denied Mr. McEvoy's motion to compel.

8. During my first trial, the State, through J.A. and T.A.'s mother, testified to specific range of dates on which I allegedly committed the abuse at their residence. I presented alibi witnesses and other corroborative evidence—including work schedules and credit card statements—to show that I was working and/or not even in the same state as J.A. and T.A. on virtually every date the mother claimed that I was present at their residence when the abuse allegedly occurred. The recorded interviews were not used at trial. As mentioned above, the result of the first trial was a hung jury.

9. During my second trial, the State, again through J.A. and T.A.'s mother, generally alleged that the abuse I allegedly committed occurred during a three-year

period. The State also called the psychologist—Anne Fisher Post—who conducted the recorded forensic interviews. The State had Ms. Post identify two DVDs as containing the recorded interviews she conducted of J.A. and T.A. Ms. Post claimed that the she had watched the recorded interviews and that they were an accurate representation of the interviews "subject to some redactions." The State asked that the DVDs be marked as exhibits to Ms. Post's testimony. However, it did not ask the trial court to publish the recorded interviews to the jury.

10. I was surprised and confused by the State's reference to the recorded interviews during Ms. Post's testimony, because my understanding was that the State would not—and could not—present the recorded interviews during its case in chief based on its pretrial representations and its refusal to disclose the interviews to me (*i.e.*, my attorney).

11. I told my attorney, Mr. McEvoy, that I thought he should renew his motion to compel a copy of the recorded interviews because the State referenced them in front of the jury. Mr. McEvoy told me he could not do so because the State was not "using" the recorded interviews by playing them for the jury and the interviews were therefore not evidence.

12. During his closing argument, the prosecutor referenced the recorded interviews and told the jury that it could watch the interviews during deliberations if it chose to do so.

13. Based on the State's argument, I again told Mr. McEvoy that we needed a copy of the recorded interviews, especially because I had no memory of seeing them

and I know for certain that I had never seen the "redacted" versions which the State was presumably referencing. Mr. McEvoy again assured me that the jury would not be able to view the recorded interviews because they were not played at trial and, if the jury requested viewing equipment during deliberations, he would object.

14. No one informed me prior to the jury's verdict that it had requested equipment to watch the recorded interviews during deliberations, and no such request was ever made on the record.

15. The jury subsequently found me guilty.

16. A few weeks after I was convicted, I hired James O. Martin III to represent me on appeal. Mr. Martin suggested that I hire a private investigator to interview the jurors to ask them why they found me guilty. An investigator was able to track down several of the jurors, who told him that they found me guilty based on the recorded interviews.

17. The jurors did not explain how they were able to watch the recorded interviews, only that they did so in the jury room.

18. Mr. Martin then went to the courthouse to watch the recorded interviews, both unredacted and redacted. He subsequently reported to me that, in his opinion, the recorded interviews watched by the jury were misleadingly redacted.

19. Mr. Martin also told me that the recorded interviews, *i.e.*, the content of the DVDs, were not evidence in my case because they were not played during my trial. He told me this meant that by watching the recorded interviews, the jury was

TG

exposed to "extraneous information" which amounted to constitutional error. He expressed to me that he thought I would receive a new trial based on this error.

20. Mr. Martin filed a motion for new trial in which he argued that the court erred in admitting the recorded interviews, and that I was denied a public trial because the interviews were not played in open court and were only watched by the jury during deliberations.

21. The trial court denied my motion for a new trial.

22. On appeal, Mr. Martin argued that the trial court committed plain error when it admitted the recorded interviews into evidence, and that the error was prejudicial because the State invited the jury to watch the interviews during closing argument.

23. The Sate responded by arguing, in part, that I could not show prejudice because there was nothing on the record to suggest that the jury ever watched the recorded interviews.

24. The Court of Appeals agreed that the trial court erred by admitting the recordings, but that I could not show prejudice because the record did not establish that the jury watched them. In particular, the Court of Appeals noted that based on the prosecutor's closing argument, the jury would have had to have requested equipment to watch the recorded interviews, and no such request was in the record. The court therefore denied me relief.

25. I hired Mr. Martin to represent me in my post-conviction proceedings.

26. I asked Mr. Martin to try to get affidavits from the jurors as evidence that they had watched the recorded interviews. Mr. Martin told me that none of the jurors would sign an affidavit. However, he told me that he would call at least one of the jurors to testify at my post-conviction hearing to establish that they had watched the videos.

27. Mr. Martin thereafter subpoenaed the jury foreperson, Hilary Hoffman, to testify at my post-conviction hearing. Mr. Martin told me the purpose of Ms. Hoffman's testimony was to establish the necessary fact that the jury was exposed to extraneous information in order to raise an additional issue of jury exposure to extraneous evidence.

28. Mrs. Hoffman was present at the hearing pursuant to the subpoena. However, the prosecutor objected to her testimony based on Tennessee Rule of Evidence 606(b). Mr. Martin argued that he only intended to ask Mrs. Hoffman whether the jury watched the recorded interviews. The post-conviction judge sustained the State's objection and would not even allow Mrs. Hoffman to testify as an offer of proof that the videos were watched.

29. After the hearing, Mr. Martin immediately told my family that he would appeal the court's refusal to allow Mrs. Hoffman's testimony. When I spoke with him three days later, Mr. Martin again told me that he was going to appeal the court's refusal to allow Mrs. Hoffman to testify, and that it was by far the most obvious and important issue to appeal.

TG

30. Over the following months, I had very little contact with Mr. Martin. I called multiple times per week without any answer. It was only after my family and I emailed him on multiple occasions expressing frustration and the need for a sense of urgency that Mr. Martin became responsive to my attempts at communication.

31. I spoke with Mr. Martin by phone on many occasions in December of 2014 about the brief in my post-conviction appeal. Mr. Martin again assured me that he would raise as an issue in the appeal the court's refusal to allow Mrs. Hoffman to testify about the jury watching the recorded interviews.

32. On January 15, 2015, Mr. Martin emailed a draft of the brief to my sister, Katie. The draft did not include an argument that the post-conviction court erred by refusing to allow Mrs. Hoffman to testify. However, Mr. Martin indicated in the email that he had additional argument to include in the brief. In a subsequent phone call, Mr. Martin specified that the additional argument to be added to the brief was the issue of the judge's failure to allow the jury testimony.

33. On January 21, 2015, Mr. Martin filed my brief. I did not have the opportunity to read the finalized brief before it was filed.

34. On February 15, 2015, Mr. Martin sent an email to my sister asking her to have me call him the following day.

35. I called Mr. Martin on February 16, 2015. During the phone call, Mr. Martin told me had been offered another job. He did not tell me for whom he would be working, only that "they" had been offering him the job for several months and

that if he did not accept it, the offer would go away. He also told me that he was going to accept the position.

36. Mr. Martin offered to hire an attorney, Patrick T. McNally, to finish the appeal. I agreed to let Mr. McNally continue with the representation based on Mr. Martin's recommendation.

37. Mr. Martin never informed me about any conflict of interest based on his job offer and new position.

38. After my phone call with Mr. Martin, I received a copy of the brief Mr. Martin filed in my appeal. To my astonishment, the brief did not raise as an issue the court's refusal to allow Mrs. Hoffman to testify during my post-conviction hearing.

39. I was furious about the failure to include the issue regarding the juror in my appeal.

40. I had my sister email Mr. Martin to set up a call as soon as possible.

41. When I spoke with Mr. Martin, I confronted him about the failure to raise the juror issue in the appeal. He told me that I had misunderstood the brief; he claimed to have raised two issues concerning the video, and that he did not need to raise the juror issue because the Court of Appeals "would read the transcript and see what happened."

42. At the end of March of 2015, I received a notice from the Court of Appeals regarding Mr. Martin's withdrawal from my case. In the notice, Mr. Martin explained that he had accepted a position with the Davidson County District Attorney's Office and that his ongoing representation of me would amount to a conflict of interest.

43. Reading the notice was the first time I was notified that the position Mr. Martin had been offered—and was considering for months prior to his filing my brief—was with the very same office that prosecuted me and which was my opponent in the appeal for which he had just filed the primary brief.

44. Had I known that Mr. Martin was considering an offer of employment with the Davidson County District Attorney's Office, I would not have allowed him to draft and file a brief on my behalf in my post-conviction appeal.

45. On September 28, 2018, I submitted a written complaint to the Tennessee Board of Professional Responsibility, detailing the reasons for my belief that Mr. Martin was laboring under a conflict of interest at the time he was representing me. I also alleged Mr. Martin did not notify me of this conflict before filing my brief. A true and correct copy of that letter is attached to this Affidavit as Exhibit 1.

46. Mr. Martin responded to my complaint. In his response, Mr. Martin admitted he was offered a position with the Davidson County District Attorney's Office—the opposing party—before he filed my brief. Mr. Martin did not deny his failure to notify me that this conflict existed at any time before he filed my brief.

47. The statements made in Exhibit 1 are accurate and truthful to the best of my knowledge and belief, and I would testify to them under oath if called upon to do so.

FURTHER AFFIANT SAYETH NAUGHT.

TG

Timothy Guilfoy

SWORN TO AND SUBSCRIBED BEFORE ME THIS 21 DAY OF MAY, 2019.

Notary Public

PATRICIA SCOTT
STATE OF TENNESSEE NOTARY PUBLIC
COUNTY OF LAKE

My commission expires:

3-28-2023

Case 3:18-cv-01371 Document 31-9 Filed 06/05/19 Page 10 of 10 PageID #: 340

IN DIVISION V CRIMINAL COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE

vs. **CASE NO. 2011-A-779**

TIMOTHY GUILFOY

AFFIDAVIT OF HILLARY HOFFMAN

STATE OF TENNESSEE)

COUNTY OF RUTHERFORD)

BEFORE ME, the undersigned authority, did appear HILLARY HOFFMAN who did depose and state under oath the following.

1. My name is Hillary Hoffman.

2. I am a person of the age of majority and a resident of Rutherford County, State of Tennessee.

3. On or about October of 2011, I was the foreperson of the jury sitting in the matter of *State of Tennessee v. Timothy Guilfoy*.

3. Sitting in the courtroom during the course of the trial, I heard mention or discussion regarding video tapes that appeared to have been some related to the issues being presented to the jury.

4. The video tapes were never played in the courtroom during the trial.

5. After the jury retired to the jury room, I decided that it was important that the jury view the video tapes as part of our deliberation. Simply stated, I sincerely believed that the jurors had to examine absolutely every item of available information about the case in order to enable us to render a verdict that was true and fair.

6. Having decided that viewing the video tapes was necessary, I informed an individual who I believe was a court officer that the jury wanted to view the video tapes.

7. In response to my request, an individual who I believe was a court offer wheeled into the jury room a television and a \DVD player that were sitting on a rolling cart.

8. I cannot recall specifically who I informed that the jury wanted to view the videos.

9. I cannot specifically recall if the individual who I spoke to about wanting to view the videos was the same individual who brought the television and the DVD player into the jury room.

10. After the television and DVD player into the jury room, they were set up by the person who brought them in, the DVDs were inserted and the jury, gathering around the television, watched them.

HILLARY HOFFMAN

SWORN TO AND SUBSCRIBED BEFORE ME THIS 15th DAY OF December, 2016.

NOTARY PUBLIC

My commission expires;
1-6-2020