

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED

July 24, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

JAMES LLOYD JULIAN, II,)

Appellant.)

C.C.A. NO. 03 C01-9511-CV-00371

LOUDON COUNTY

HON. E. EUGENE EBLEN
JUDGE

(Esp. Agg. Kidnapping, Rape of a Child,
and Felony Murder)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF LOUDON COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure. The Defendant, James Lloyd Julian, II, was convicted by a Loudon County jury of rape of a child, especially aggravated kidnapping, and first-degree felony murder. The State sought the death penalty and during the sentencing phase of the trial, the jury found two aggravating circumstances: (1) that the victim was less than twelve (12) years of age and the defendant was over eighteen (18) years of age, and; (2) that the murder was especially heinous, atrocious and cruel. See Tenn. Code Ann. §§ 39-13-204(i)(1),(5). However, the jury determined that the aggravating circumstances did not outweigh the mitigating circumstances and sentenced the Defendant to imprisonment for life without parole. See Tenn. Code Ann. § 39-13-204(f)(2). At a separate sentencing hearing for the two remaining counts, the trial court sentenced the Defendant as a Range I standard offender to twenty-five years (25) for the rape and twenty-five years (25) for the kidnapping to run concurrently with each other but consecutive to the sentence of life without parole. The Defendant appeals his convictions and sentences.

In this appeal, the Defendant presents several issues for review: (1) That the trial court erred by failing to find the especially aggravated kidnapping to be incidental to the rape; (2) that the trial court erred in admitting photographs of the victim at both the guilt and sentencing phases of the trial; (3) that the trial court erred in allowing the jury to consider the victim's age as an aggravating circumstance in sentencing for the felony murder conviction; (4) that the trial court

erred by sentencing the Defendant at the top of the applicable ranges for the rape and kidnapping; (5) that the trial court erred by denying his motion to suppress evidence as a result of a search of his automobile; and (6) that the evidence was insufficient to support the conviction for felony murder. During the pendency of this appeal, the Defendant also submitted a supplemental brief asserting that the conviction for rape of a child must be set aside because the indictment charging the offense did not allege the requisite mens rea. In turn, because the indictment for felony murder charged rape and kidnapping, he argues that conviction must also be dismissed.

Factual Background

The State presented the following proof at the guilt phase of the prosecution. The Defendant, James Julian, became acquainted with the victim's parents in early 1993 while working at a fast-food restaurant in Knoxville. The Defendant and the victim's family, including the victim Kaile Lynn Lee, nearly three years old, and a younger brother and sister, began to socialize. He went with the family on trips to the lake and became friends with the children. On one or two occasions he took Kaile with him in his vehicle to get cigarettes at a convenience store down the street from the family's apartment. In May of 1993, the Defendant told Kaile's mother that he abused intravenous drugs. After that, Kaile's parents became concerned and made an effort to distance themselves from the Defendant. They did not observe any unusual behavior. During this time, the victim's parents' marriage was disintegrating and they separated.

Kaile's mother and the children continued to live in the apartment. Kaile turned three on June 29, 1993. The Defendant had no contact with them until he stopped by briefly on July 3, 1993. On the evening of July 10, Kaile's mother and a friend went out to a party and the friend's sister babysat the children. Everyone spent the night in the victim's apartment. The babysitter and the children slept in the living room and the others were in the bedroom. At approximately 6:30 a.m., the babysitter awoke to the Defendant's knocking on the apartment door. She asked who it was and the Defendant said "Jim." He mentioned the names of family members and the babysitter let him in. He sat on the couch and talked with her an hour or less. He was drinking a glass of bourbon and coke and she noticed that he was barefoot. The babysitter persuaded him to leave. She drifted off to sleep again until awakened by knocking on the door sometime around 7:30 a.m. The babysitter did not answer the door right away because "I knew that he was drunk and I didn't trust him." Kaile woke up and asked who was knocking and wanted to open the door. The babysitter let in the Defendant. He sat on the couch with Kaile and talked with her, then they appeared to sleep. The babysitter dozed off and awakened to the Defendant carrying the child in his arms and walking out the door.

The babysitter woke Kaile's mother and they went outside to look for them. This was approximately 8:30 to 9:00 a.m. They did not report the child as missing until approximately 11:00 a.m. because they initially thought the Defendant may have taken her to the store. They reported that the Defendant might be driving a red, older model Maverick. Kaile was last seen wearing a "Beauty and the Beast" shorts outfit. The Defendant took the child to a remote location at the Wear's Bend area of Tellico Lake in Loudon County. He parked

his vehicle near a stand of pine trees, blocking the area such that he could see any cars coming into the area. After undressing himself, he took her to swim in the lake. She was still clothed.

After swimming, the Defendant and Kaile went back to the car. He turned the car radio up loudly. He took a green towel out of the car and took the child to the pine thicket. There, he undressed her and positioned her on the towel so he could see the roadway. He attempted penile penetration vaginally, but was unable to do so. The victim squirmed and began to cry. He placed her on her stomach and penetrated her anally. He had penetrated with approximately half of his penis when Kaile began to scream, squirm and cry loudly. He attempted to muffle her screams by using his right hand. When this was unsuccessful, he grabbed her neck and began to choke her. The cries ceased and he "knew he hurt" the victim when she went limp and he saw blood coming from her mouth. He withdrew, then masturbated to ejaculation.

The Defendant picked up the child and took her to the lake, cleaned himself and washed her off, immersing her in the water. He knew she was dead at that point. The Defendant put on a pair of shorts and carried her up the roadway. The underbrush was thick so he could not walk into it, so he tossed the victim's naked body into the underbrush. He returned to the car, picked up the towel and the victim's clothes and put them in the trunk of his car. The Defendant returned home and prepared for a work trip that he was scheduled to begin at 12:00 p.m.

Earlier during the day after Kaile's mother reported her daughter missing, law enforcement officers from Knox and Blount counties located the Defendant's Maverick at Colvin and Sons Heating and Air, his place of employment. Officer Gary Hamilton of the Blount County Sheriff's Department arrived at Colvin and Sons and spoke on the telephone with Investigator Tom Presley of the Knoxville Police Department. Investigator Presley provided more details about the disappearance of the victim. The officers observed a child's toy in plain view on the front seat and mud and grass on the car's exterior. While talking with Investigator Presley, Officer Hamilton became increasingly concerned that the child might be locked in the trunk of the Defendant's vehicle and that she might still be alive. The day was hot and sunny, which contributed to the urgency expressed by Investigator Presley. At this time, the Defendant's grandmother arrived with the keys to the vehicle and gave her consent to open the trunk. The officers opened the trunk, but observed only a child's outfit and a green towel covered with what appeared to be blood, feces, sticks and leaves. They closed the trunk, obtained a search warrant, and towed the Maverick to the crime laboratory in Knoxville.

The Defendant was employed by Colvin and Sons Heating and Air in Blount County and was scheduled to deliver equipment to Savannah, Georgia. He left his vehicle in the company parking lot and left with Dale Sinard in a delivery truck. Mr. Sinard noticed the Defendant was clad only in a pair of shorts, but noted no unusual behavior. The Defendant fell asleep shortly after the trip began. The two stopped at a rest area near Chattanooga and the Defendant placed a call on a pay telephone. He called his grandmother, who told him that the police were looking for him. After that, he appeared nervous and wanted to

return home, stating he needed to go to court and to get his car. Sinard did not stop, but the Defendant asked several times how much longer the trip was and what time it was. When they reached Macon, Georgia, the Defendant wanted Sinard to take him to the airport, but he refused. The Defendant gathered his things, put on some clothes and left. He rented a car and drove back to Tennessee.

After returning from Georgia in the rented car, the Defendant revisited the lake area where the killing occurred, then returned to Blount County. Near his home, the Defendant stopped at Red Eye's Market on Highway 411 and called his father on a pay telephone from his car. He then called Blount County law enforcement. The Defendant was arrested by officers of the Blount County Sheriff's Department while still on the phone. He was handcuffed, given Miranda warnings, and placed in the back of a police cruiser. Officer David Maples had the first contact with the Defendant, who initially admitted seeing the victim at her apartment, but denied any further contact. Chief of Detectives Dale Gourley joined them and asked the Defendant where Kaile was located. The Defendant agreed to lead the officers to the body.

The officers and the Defendant drove to the site near the lake and directed them to the victim's body in the underbrush. Officer Maples and the Defendant walked down to the bank of the lake, the Defendant smoked a cigarette and recounted the events surrounding the killing of Kaile. Subsequently, the officers made an audiotape of Officer Maples describing the statement made by the Defendant, who agreed to its accuracy. It was determined that the crime

occurred in Loudon County, so the Defendant was released to a Loudon County officer.

Subsequent forensic examinations of Kaile's body revealed several areas of trauma. There was bruising and soft tissue injury consistent with strangulation, as well as bruising on her forehead, knees and back. There was swelling and severe tissue damage to the vaginal and anal openings. Semen was detected in the victim's mouth, vagina and anus. The cause of death was found to be asphyxiation, secondary to strangulation.

The Defendant submitted proof in support of a diminished capacity manner of defense. Dr. Worley Fain, a clinical psychologist, described the Defendant's history of polysubstance abuse, including alcohol, marijuana, cocaine, LSD, PCP, and inhalants. The Defendant also was sexually abused as a child by his maternal grandfather. His mother was an alcoholic and divorced his father. The Defendant has had episodes in the past where he became disoriented and violent after ingesting large amounts of alcohol and taking hallucinogens. The Defendant was diagnosed with depressive disorder and a mixed personality disorder with borderline features. Dr. Fain testified that the Defendant claimed to have consumed a fifth of bourbon and smoked marijuana in the hours before the incident. Bennie Fleming, a licensed clinical social worker, concurred with the testimony of Dr. Fain. Other witnesses testified regarding the Defendant's neglect by his mother and his violent outbursts.

The State called Dr. Samuel Craddock, a clinical psychologist from Middle Tennessee Mental Institute, who conducted the forensic mental health evaluation

of the Defendant. The evaluation team, under Dr. Craddock's supervision, determined that the Defendant did not suffer from a mental illness such that he was unable to form intent. Dr. Craddock considered substance abuse when conducting the evaluation. Yet, he admitted that he was not a specialist in the area of addictions and drug counseling. The evaluation team did conduct a battery of tests and diagnosed the Defendant similarly to the conclusions made by Dr. Fain.

The jury found the Defendant guilty of rape of a child, especially aggravated kidnapping, and first-degree felony murder. Tenn. Code Ann. §§ 39-13-522, 39-13-305(a)(2), 39-13-202(a)(2). During the sentencing portion of this capital case, the State admitted evidence of the victim's age and photographs of the victim in support of a finding of statutory aggravating circumstances. See Tenn. Code Ann. § 39-13-204(i). The Defendant called Dr. Eric Engum, a clinical psychologist, who testified regarding the Defendant's dysfunctional family background and current psychological disorders, including substance abuse. The Defendant's mother testified regarding her alcoholism and prescription drug abuse, sexual abuse by her father, her divorce, and the Defendant's history of alcohol abuse. The jury found two aggravating factors, that the victim was under twelve (12) years old and that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. Tenn. Code Ann. §§ 39-13-204(i)(1),(5). The jury also found that the aggravating circumstances did not outweigh the mitigating circumstances and sentenced the Defendant to imprisonment for life without parole. See Tenn. Code Ann. § 39-13-204(f)(2). The trial court sentenced the Defendant as a Range I standard offender to twenty-five (25) years for the rape conviction and

twenty-five (25) years for the kidnapping conviction to run concurrently with each other but consecutive to the sentence of life without parole.

I. Kidnapping Conviction

As his first issue, the Defendant contends that the trial court erred by failing to grant a judgment of acquittal on the kidnapping charge on the ground that the kidnapping was merely incidental to the rape. In State v. Anthony, 817 S.W.2d 299, 300 (Tenn.1991), our supreme court held that due process precludes conviction for kidnapping where the detention of the victim occurs as merely incidental to the commission of another felony such as robbery or rape. Id. The test is "whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction". Id. at 306. "[O]ne method of resolving this question is to ask whether the defendant's conduct 'substantially increased [the] risk of harm over and above that necessarily present in the crime of the robbery itself' ". Id. Finally, the kidnapping statute is to be narrowly applied to protect due process rights. Id.

The Defendant argues that the kidnapping was incidental to the rape in this case. First, the Defendant claims that the victim willingly went with him such that any restraint of liberty constituting kidnapping occurred after he instigated the sexual assault. Second, he claims that he brought the victim to the remote location knowing that he intended to have sex with her, therefore, the actions that

were considered to be kidnapping were actually perpetrated in pursuance of the rape. Furthermore, he contends that, because the kidnapping charge should properly be dismissed, the conviction for felony murder also fails because the underlying felonies of rape and kidnapping were charged conjunctively. See State v. Cox., 644 S.W.2d 692 (Tenn. Crim. App. 1982); Turner v. State, 50 Tenn. 452 (1871). The indictment charging first-degree felony murder contained the following language: “[O]n the 11th day of July, 1993 and in the State and County aforesaid, the said JAMES LLOYD JULIAN, II aforesaid, did unlawfully and recklessly kill Kaile Lynn Lee during the perpetration of Kidnapping and Rape, in violation of T.C.A. 39-13-202.” (emphasis added).

We cannot agree that because the three-year-old victim went willingly with the Defendant, she was capable of consent such that the actions taken by the Defendant did not constitute kidnapping from the time he took her from her home. Also, even though the Defendant stated that he took the child with the intent to rape her, this does not necessarily mean that the kidnapping was purely incidental to the rape. The State argues that the kidnapping “substantially increased [the] risk of harm over and above that necessarily present in the [accompanying felony] itself.” Anthony, 817 S.W.2d at 306. The State cites two opinions from this Court where the kidnappings were considered separate offenses from the rapes. State v. Michael Eugene Duff, C.C.A. No. 03C01-9501-CR-00008, Knox County (Tenn. Crim. App., Knoxville, Feb. 8, 1996), perm. to appeal denied (Tenn. 1996); Thomas Ray Tarpley v. State, C.C.A. No. 03C01-9303-CR-00067, Hamilton County (Tenn. Crim. App., Knoxville, Dec. 20, 1993), perm. to appeal denied (Tenn. 1994). In Tarpley, the defendant kidnapped the victim while she was walking along a roadside, drove her to an isolated cemetery

and raped her. Slip op. at 2-3. In Duff, the victim was tricked into pulling her car off the road. She was forced to the floorboard of the car while her attackers drove it around to the back of restaurant where she was raped. Slip op. at 3.

In the case sub judice, the Defendant took the victim from her home in Knoxville and drove her to an isolated lake area miles away that was only approachable by rutted dirt roads. At that location, the Defendant substantially reduced the probability of being detected and allowed ample time to perpetrate the sexual assault. This also increased the risk of harm to the victim, which resulted in Kaile's death. We conclude that this is sufficient to support the conviction for kidnapping and that it was not "essentially incidental" to the rape. As a result, the conviction for felony murder remains valid as based on the underlying kidnapping charge. This issue has no merit.

II. Photographs

Next, the Defendant challenges the trial court's allowing the State to introduce photographs of the victim at both the guilt and sentencing phases of the trial. The admissibility of photographs is governed by Tennessee Rule of Evidence 403 and State v. Banks, 564 S.W.2d 947 (Tenn.1978). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Tenn. R. Evid. 403. Whether to admit the photographs is within the discretionary authority of the trial court and will not be reversed absent a clear showing of an abuse of discretion appearing on the face of the record. Banks, 564 S.W.2d at 949; State v. Braden, 867 S.W.2d 750, 758

(Tenn. Crim. App. 1993); State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App.1993).

During the guilt phase of the trial, the State introduced a photograph depicting the victim as she was found at the crime scene. The photograph consisted of the victim's naked body, lying face down in the underbrush. The Defendant argues that this photograph was overly prejudicial such that it outweighed any probative value. He also contends that the State was unable to support that the photograph was probative of a contested issue of fact. When photographs are gruesome in nature and are not probative of some contested issue of fact, they are not admissible. State v. Harbison, 704 S.W.2d 314, 317 (Tenn. 1986). Here, however, although the photograph in question is disturbing, it is not shocking or gruesome in nature. In fact, it was taken at some distance from the victim and revealed no details of trauma to her body. Furthermore, it showed the location and position of the body supporting the investigating officers' testimony describing the crime scene. See State v. Caughron, 855 S.W.2d 526, 536 (Tenn. 1993); State v. Wilcoxson, 772 S.W.2d 33, 37 (Tenn. 1989); Harbison, 704 S.W.2d at 317. We find no clear evidence of an abuse of discretion in admitting this photograph. In fact, the trial court admitted only one objected-to photograph during the guilt phase.

The Defendant also asserts that the photographs of the victim admitted by the trial court during the sentencing phase were severely prejudicial. Two photographs show the victim's head and torso from two angles. Dried blood is evident in and around the child's mouth, nose and eyes, there are numerous insect bites, as well as effects from exposure and rigor mortis. The third

photograph shows the victim's vaginal/anal area, which is swollen, red and evidences the tearing of the vagina and anus as described by the medical examiner. The Defendant argues that the photographs showing the postmortem effects unrelated to the cause of death are misleading. He also asserts that the photographs evoked strong emotions in the jurors (in fact, several jurors were visibly upset) and that the State did not justify their introduction.

Although the photographs are graphic and gruesome, they accurately depict the nature and extent of the victim's injuries. This evidence was relevant to support the State's proof of the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." Tenn. Code Ann. § 39-13-204(i)(5); State v. McNish, 727 S.W.2d 490, 495 (Tenn. 1987). They clarify the testimony of the medical examiner regarding the severity of the injuries. Similarly to the Harbison case, they indicate that the degree of injury inflicted in perpetration of the rapes was more damaging than as described in the Defendant's confession. Harbison, 704 S.W.2d at 317. Although the photographs were prejudicial to the Defendant's case, they were highly probative in determining an aggravating circumstance. We cannot conclude that the trial judge abused his discretion by admitting these photographs during the sentencing process. See Tenn.R.Evid. 403; State v. Evans, 838 S.W.2d 185 (Tenn.1992); State v. Banks, 564 S.W.2d 947 (Tenn.1978).

This issue is without merit.

III. Sentencing for Felony Murder

Next, the Defendant argues that the trial court erred by allowing the jury to consider the victim's age as an aggravating circumstance for felony murder. The indictment for felony murder for which he was convicted alleges that he "did unlawfully and recklessly kill Kaile Lynn Lee during the perpetration of Kidnapping and Rape, in violation of T.C.A. 39-13-202." The felonies for which the Defendant was convicted are rape of a child and especially aggravated kidnapping. Tenn. Code Ann. §§ 39-13-522, 39-13-305. Both felonies, as charged, included age as an element of the crimes.¹ The Defendant was convicted of first-degree felony murder based on the above indictment. The State sought the death penalty in this case and submitted two aggravating circumstances for the jury's consideration during a separate sentencing procedure. See Tenn. Code Ann. § 39-13-204(i). Those submitted were that (1) [t]he murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older; and (5) [t]he murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. Tenn. Code Ann. § 39-13-204(i)(1),(5). The jury found both aggravating circumstances, but determined that they did not outweigh the mitigating circumstances and sentenced the Defendant to life without parole. See Tenn. Code Ann. § 39-13-204(f)(2). The Defendant urges that, because the underlying felonies for which he was

¹"Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. §39-13-522(a). (emphasis added). "Especially aggravated kidnapping is false imprisonment, as defined in § 39-13-302: 1) Accomplished with a deadly weapon or by display or any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; (2) Where the victim was under the age of thirteen (13) at the time of the removal or confinement; (3) Committed to hold the victim for ransom or reward, or as a shield or hostage; or (4) Where the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-305. (emphasis added). The indictment charging the Defendant with especially aggravated kidnapping alleged that the victim was under the age of thirteen (13).

convicted contained the victim's age as essential elements, it was improper for the trial court to allow age to be considered as an aggravating circumstance for felony murder, citing State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

The constitutional concern in Middlebrooks was that the class of death-eligible murderers be narrowed so that only the worst offenders receive the death penalty. See Middlebrooks, 840 S.W.2d at 341-47. The supreme court observed that the felony murder aggravating circumstance duplicates the crime of felony murder and thereby makes all felony murderers susceptible to the death penalty. That result violates the Eighth Amendment to the United States Constitution, as well as Article I, Section 16 of the Tennessee Constitution. Id. at 346. When an aggravating circumstance is improperly injected into the process by which the jurors must weigh aggravating and mitigating circumstances to determine a sentence, the integrity and reliability of the sentencing process is jeopardized because the death penalty may not be reserved for only the most culpable defendants. Barber v. State, 889 S.W.2d 185, 187 (Tenn. 1994).

In the case sub judice, the Defendant did not receive the death penalty, but life without parole. The State argues that the constitutional concerns presented in Middlebrooks are inapplicable when a defendant receives a sentence of life without parole and that double enhancement is not specifically barred. However, the capital sentencing scheme was applied when using the aggravating circumstances in an attempt to secure the death penalty for the Defendant. Thus, the application of the age circumstance was used to determine the Defendant's death eligibility and the Middlebrooks-type double enhancement is at issue. But cf. State v. Frederick D. Butler, DeWayne B. Butler, and Eric D.

Alexander, C.C.A. No. 02C01-9604-CR-00128, Shelby County (Tenn. Crim. App., Jackson, Mar. 19, 1997), perm. to appeal not filed.² In addition, the non-capital sentencing scheme bars double enhancement. See Tenn. Code Ann. § 40-35-114. “In order to comply with the Eighth Amendment, aggravating circumstances must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” Middlebrooks, 840 S.W.2d at 342)(quoting Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235, 249-50 (1983)). The supreme court “also relied upon Tennessee statutes that prohibit duplication in non-capital sentencing and concluded that Article I, § 16, imposed the same prohibition in capital cases.” See State v. Bigbee, 885 S.W.2d 797, 816 (Tenn. 1994). We do not believe the legislature intended to except those receiving life without parole from the protections against double enhancement afforded those receiving death and those receiving lesser sentences.

Nevertheless, we conclude that the trial court did not err in allowing the jury to consider age an aggravating circumstance for felony murder. Multiple punishments for felony murder and the underlying felonies are permissible. State v. Blackburn, 694 S.W.2d 934, 937 (Tenn. 1985). As charged in the indictment, the Defendant was convicted of felony murder based on the elements specified for that offense. The felony murder indictment did not allege specifically “rape of a child” and “especially aggravated kidnapping.” The indictment required that the State needed only to prove the Defendant recklessly killed the victim during the

² Butler was an interlocutory appeal in a case in which the State sought life without parole and not the death penalty. The panel held that the State may enhance a sentence to life without parole using aggravating factor (l)(7) without implicating the concerns in Middlebrooks.

perpetration of a rape and a kidnapping. The record reflects that the State proved the Defendant perpetrated the offense of rape independently of any age factor by showing there was sexual penetration and that he accomplished the rape by force. See Tenn. Code Ann. § 39-13-502. Also, the State proved aggravated kidnapping by showing there was false imprisonment and that the Defendant secreted the child to a remote location. See Tenn. Code Ann. § 39-13-304. This was sufficient to satisfy the elements of felony murder as charged in the indictment.

In addition, the State prosecuted the Defendant separately for the rape and kidnapping offenses and used the victim's age to enhance the potential penalties for those individual crimes. See Tenn. Code Ann. §§ 39-13-522; 39-13-305. Rape of a child is a Class A felony and one convicted as a child rapist is required to serve the entire sentence. Tenn. Code Ann. §§ 39-13-522; 39-13-523(a)(1), (b). Especially aggravated kidnapping is a Class A felony while kidnapping is a Class C felony. Tenn. Code Ann. §§ 39-13-305; 39-13-304. However, the conviction for felony murder was not dependent upon any age factor³, therefore the trial court did not err in allowing the jury to consider the victim's age as an aggravating factor for felony murder.

³ This result could be different had the felony murder indictment charged rape of a child under section 39-13-522 and especially aggravated kidnapping under section 39-13-305 as the underlying felonies.

IV. Sentencing for Rape of a Child and Especially Aggravated Kidnapping

The Defendant contends that the trial court erred by sentencing him at the top of the range for his convictions of rape of a child and especially aggravated kidnapping. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then

we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In the case at bar, the trial court sentenced the Defendant as a Range I standard offender to twenty-five years (25) for the rape of a child and twenty-five years (25) for the especially aggravated kidnapping to run concurrently with each other but consecutive to the sentence of life without parole. Both are Class A felonies. Tenn. Code Ann. §§ 39-13-305, -522. The applicable sentencing range for a Class A felony as a Range I standard offender is fifteen (15) to twenty-five (25) years. Tenn. Code Ann. § 40-25-112(a)(1). At the time the Defendant was sentenced, the presumptive minimum sentence for a Class A felony was at the bottom of the range, to be adjusted accordingly in consideration of enhancement and mitigating factors. Tenn. Code Ann. § 40-35-210(c) (1990). The Defendant argues that the trial court erred by either failing to consider or failing to place in the record its findings regarding mitigating factors. He also charges that the trial court failed to state on the record how each enhancement factor applied to each separate conviction for rape of a child and especially aggravated kidnapping. Because we find that the trial court failed to adequately discuss the application of enhancement and mitigating factors on the record, we review the sentence in this appeal de novo without the presumption of correctness. See State v. Chrisman, 885 S.W.2d 834 (Tenn. Crim. App. 1994); State v. Dies, 829 S.W.2d 706 (Tenn. Crim. App. 1991).

At the time the presentence report was prepared, the Defendant was a 23 year-old single male. Prior to the commission of the offenses in question, he had a history of criminal behavior primarily for drug possession, but including DUIs,

assault, evading arrest and reckless endangerment. At trial during both the guilt and sentencing phases, evidence was introduced regarding the Defendant's unstable family history, his emotional problems and drug abuse.

The trial court considered and found the following enhancement factors applicable to both offenses for which the Defendant was convicted: (1) That the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) that the victim of the offense was particularly vulnerable because of age; (3) that the personal injuries inflicted upon the victim were particularly great; (4) that the offense was committed to gratify the Defendant's desire for pleasure or excitement; (5) that the Defendant had no hesitation about committing a crime when the risk to human life was high; (6) that the Defendant abused a position of private trust; and (7) that the crime was committed under circumstances under which the potential for bodily injury to the victim was great. Tenn. Code Ann. §§ 40-35-114(1), (4), (6), (7), (10), (15), (16). The trial court found no applicable mitigating factors. We shall address the convictions for rape of a child and especially aggravated kidnapping separately.

A. Rape of a Child

The trial court applied enhancement factor (1) because of the Defendant's prior criminal behavior. Tenn. Code Ann. § 40-35-114(1). There is evidence in the record that he was convicted for DUI and for an assault. There was testimony at trial that the Defendant assaulted and choked his mother while he was intoxicated. The Defendant also made admissions that he used controlled

substances, including PCP, LSD, cocaine and marijuana. We believe this is sufficient to support the application of factor (1).

The trial court also applied enhancement factor (4), that the victim was particularly vulnerable because of age. Tenn. Code Ann. § 40-35-114(4). The Defendant argues that this factor should not be applied because the age of the victim is an essential element of the crime of rape of a child.⁴ In State v. Adams, 864 S.W.2d 31 (Tenn.1993), our supreme court held that although age is an element of the offense of aggravated rape involving a child under the age of thirteen, factor (4) may be used if "circumstances show that the victim, because of [the victim's] age or physical or mental condition, was in fact, particularly vulnerable." State v. Adams, 864 S.W.2d at 35; see State v. Chad Douglas Poole, No. 02S01-9607-CC-00064, Hardeman County (Tenn., Jackson, May 12, 1997). Thus, the factor may be used to enhance sentences when a victim's natural physical and mental limitations render the victim particularly vulnerable for his or her age because of an inability to resist, a difficulty in calling for help, or a difficulty in testifying against the perpetrator. State v. Kissinger, 922 S.W.2d 482, 487 (Tenn. 1996); State v. Melvin, 913 S.W.2d 195, 203 (Tenn. Crim. App. 1995); State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995). This factor is assessed on a case specific basis and "the State bears the burden of proving the victim's limitations rendering him or her particularly vulnerable." Poole, slip op. at 7-8 (quoting Adams, 864 S.W.2d at 35).

⁴ "Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). (emphasis added).

This limitation is likewise applicable to the offenses of rape of a child and especially aggravated kidnapping in which the victim's age is an essential element of the offense.⁵ We believe that the State has presented facts that support the application of factor (4) for the rape of a child. It is clear that Kaile was physically vulnerable and was unable to defend against the sexual assault. Her attempts to scream were muffled and she was physically restrained when she attempted to free herself from the Defendant. Furthermore, in such a remote location, any attempt to escape would have been fruitless.

Application of factor (5), that the victim was treated with exceptional cruelty, is supported by the facts. Tenn. Code Ann. § 40-35-114(5). Exceptional cruelty is usually found in cases of abuse or torture. See State v. Williams, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995); State v. Davis, 825 S.W.2d 109, 113 (Tenn.1991); State v. Haynes, 720 S.W.2d 76, 86 (Tenn.Crim.App.1986). Here, there is evidence of multiple penetrations of the victim, including the oral, vaginal and anal openings. There is also evidence that the Defendant became angry when he was unable to achieve satisfactory vaginal penetration. This resulted in anal penetration and the victim screaming and attempting to get away. The victim's suffering motivated the Defendant to muffle her screams, which eventually caused the strangulation death for which he was convicted of felony murder. This is sufficient to show that the victim was abused beyond a penetration necessary to prove rape of a child. In addition, the record supports a finding that Kaile suffered personal injury that was particularly great. Tenn. Code Ann. § 40-35-114(6). The postmortem examination of the victim revealed

⁵The indictment charging the Defendant with especially aggravated kidnapping alleged that the victim was under the age of thirteen (13).

severe tearing of the vaginal and anal walls, such that the tissue dividing the vagina and the anus was extremely thinned. Such bodily injury is not an essential element of the crime of rape of a child, which requires no injury, and thus, can properly be applied as an enhancement factor. See Tenn. Code Ann. § 39-13-522.

The sentencing court also applied enhancement factor (7) providing for enhancement when the offense was committed to satisfy the defendant's desire for pleasure. Tenn.Code Ann. § 40-35-114(7). In State v. Adams, 864 S.W.2d 31, 34-35 (Tenn.1993), our supreme court rejected the proposition that, "as a matter of law, every rape is implicitly committed for the purpose of pleasure or excitement." The supreme court noted that not all such crimes are committed for pleasure, but rather may be motivated by acts such as brutality, revenge, punishment, or intimidation. Id.; State v. Hoyt, 928 S.W.2d 935, 949 (Tenn. Crim. App. 1995). In State v. Kissinger, 922 S.W.2d 482, 491 (Tenn. 1996), the supreme court added that the commission of crime to gratify a desire for pleasure or excitement is not limited to proof of sexual desire or sexual pleasure. Thus, evidence of the achievement of sexual orgasm will not, by itself, prove factor (7), nor will the absence of orgasm negate such application. Id. The State must demonstrate that a defendant was motivated to commit a crime to gratify a desire for pleasure or excitement. Id. "The focus is the offender's motive, not the eventual result." Id. In the case sub judice, the Defendant indicated that he kidnapped Kaile with the intent to "have sex with her." He took her to an isolated location, raped her, and strangled her during the commission of the rape. After the Defendant withdrew, he continued to masturbate to achieve an orgasm. There is some evidence in the Defendant's mental health examination that he

had some feelings for or a desire for a relationship with the victim's mother. However, his only statements regarding motivation were to have sex with the child. Also, although he had already achieved penetration and killed the victim, he continued to sexually stimulate himself. This suggests that the Defendant was indeed motivated to perpetrate the crime to gratify a desire for pleasure or excitement. We conclude that the application of enhancement factor (7) should be upheld.

The trial court found that the Defendant had no hesitation about committing a crime where the risk to human life was high, Tenn. Code Ann. § 40-35-114(10), and that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. Tenn. Code Ann. § 40-35-114(16). The judge did not state what evidence led him to these conclusions. We feel that the commission of the rape supports both enhancement factors. Although the Defendant has been punished and convicted for felony murder for the killing, the manner in which he perpetrated the rape placed Kaile's life at risk before the murder occurred. The Defendant took the victim to an isolated location which provided ample time and privacy to sexually assault her without being detected. It is clear that the penile penetration of a child only three years old was likely to produce bodily injuries. Furthermore, if the victim had remained alive and in need of medical treatment, the remoteness of the crime scene increased the risk that the victim would not be found. Therefore, the application of factors (10) and (16) is proper.

Finally, we agree that the Defendant abused a position of private trust. Tenn. Code Ann. § 40-35-114(15). He had developed a friendly relationship with

the family of the victim. The Defendant had taken Kaile alone with him to the store on one or two occasions. He secured entrance to the victim's apartment and talked and played with her before kidnapping her. There is evidence that the victim knew and trusted the Defendant. The Defendant stated that she willingly went with him. Moreover, the Defendant took the child swimming with him at the lake, disrobed himself before they went swimming, and eventually took off her wet clothes. The Defendant used his relationship with the child to place himself in a position to perpetrate the rape, thus factor (15) applies.

The Defendant has proposed several mitigating factors. He also contends that, because the jury, when considering his sentence for felony murder, found that the aggravating circumstances did not outweigh the mitigating circumstances, this should be considered when weighing enhancement and mitigating factors for his other convictions. However, we find this argument unpersuasive. The jury considered circumstances designed to determine death eligibility. They are not applicable to the factors considered in the sentencing for other offenses.

We have reviewed the mitigating factors as are provided in Tennessee Code Annotated section 40-35-113, and find only two that apply. It is clear from the facts that the Defendant contacted the authorities and led them to the crime scene. Therefore, we find that factor (10) may be applied, but with little weight. Furthermore, the Defendant has expressed remorse about perpetrating the crime. He became tearful and requested that the arresting officers shoot him. This Court has previously held that genuine, sincere remorse is a proper mitigating factor. See Tenn. Code Ann. § 40-35-113(13); State v. Williamson,

919 S.W.2d 69, 83 (Tenn. Crim. App. 1995); State v. Buttrey, 756 S.W.2d 718, 722 (Tenn.Crim.App. 1988). Although the Defendant did assist law enforcement officials and appears to regret his crime, we cannot conclude that the combined mitigating factors carry much weight, if any. Therefore, we conclude that, with the number and severity of the enhancement factors, they outweigh any weight that might be afforded to the mitigating factors. The twenty-five (25) year sentence for rape of a child is affirmed.

B. Especially Aggravated Kidnapping

We have also considered the enhancement and mitigating factors as they apply to the conviction for especially aggravated kidnapping. As for the previous conviction, we have no hesitation applying enhancement factor (1) for prior criminal behavior. It is also appropriate to apply factor (4), that the victim was particularly vulnerable because of age, to the kidnapping.⁶ Tenn. Code Ann. § 40-35-114(4). Kaile was three years old. It is unlikely that she possessed the knowledge to adequately recognize the potential danger of leaving the apartment with the Defendant. She had gone on trips alone with him to the store in the past, and on this occasion, he apparently offered to buy her a soft drink. After the Defendant picked her up and put her in his car, the victim's ability to get away from him or request help was extremely limited. This, we feel, sufficiently supports the imposition of factor (4).

⁶“Especially aggravated kidnapping is false imprisonment, as defined in § 39-13-302: (1) Accomplished with a deadly weapon or by display or any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; (2) Where the victim was under the age of thirteen (13) at the time of the removal or confinement; (3) Committed to hold the victim for ransom or reward, or as a shield or hostage; or (4) Where the victim suffers serious bodily injury.” Tenn. Code Ann. § 39-13-305. (emphasis added).

We consider enhancement factor (7) applicable, that the offense was committed to satisfy the Defendant's desire for pleasure or excitement. Tenn. Code Ann. § 40-35-114(7). The record reflects that the Defendant kidnapped the victim for the purpose of having sex with her. As with our analysis of the rape, the decision to kidnap the victim was motivated by the Defendant's desire for pleasure and excitement. Kissinger, 922 S.W.2d at 491. Thus, factor (7) is relevant.

We have also considered and find applicable factors (10) and (16), that the Defendant had no hesitation about committing a crime when the risk to human life was high and that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. Tenn. Code Ann. § 40-35-114(10), (16). Again, we note that the Defendant took the victim to an extremely isolated location for the purpose of sexually assaulting her. This increased the likelihood that other crimes could be committed beyond the kidnapping. The Defendant was at his leisure in treating the victim as he saw fit without the risk of detection, which ended with tragic results. The probability that bodily injury would result and that the victim's life was at risk was substantially increased by the Defendant's course of action.

The record also supports the application of factor (15), the abuse of a position of private trust. Tenn. Code Ann. § 40-35-114(15). We do feel that the age of the child contributed to her trust in the actions of the Defendant. She recognized him, played with him, and willingly agreed to leave with him because he had developed a trust relationship with her parents. This enabled the Defendant to kidnap the child from her home. Beyond this, the family's prior

relationship with the Defendant contributed to a two-hour delay in reporting the child's disappearance. This delay enabled him to transport the victim from Knoxville to the remote lake location where the other crimes were committed. Therefore, the application of factor (15) is warranted.

We have considered the other enhancement factors and conclude that the record does not support the application of factor (5). We have also reviewed the mitigating factors and find that factors (10) and (13) do apply. Tenn. Code Ann. §§ 40-35-113(10), (13). Yet, as with the conviction for rape of a child, we conclude that these mitigating factors merit very little weight, if any. We conclude that the number and the seriousness of the enhancement factors dramatically outweigh any mitigating factors and therefore, imposition of the maximum sentence is appropriate for the conviction for especially aggravated kidnapping. Thus, we affirm the Defendant's twenty-five (25) year sentence.

V. Motion to Suppress

The Defendant argues that the trial court erred by failing to grant his motion to suppress evidence obtained through a search of his vehicle. On a motion to suppress, deference is given to the trial court to assess the credibility of the witnesses and determine issues of fact, and the prevailing party is entitled to the strongest legitimate view of the evidence. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The findings of fact of the trial court at a suppression hearing will not be disturbed on appeal unless the evidence in the record preponderates otherwise. Id.

The Defendant argues that law enforcement officers searched his vehicle without consent and that no exigent circumstances existed to except the search from the

warrant requirement. He asserts that the search was violative of both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution and that the evidence seized as a result should have been suppressed.

Both the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Tennessee Constitution prohibit "unreasonable" searches and seizures. Any warrantless search is presumptively per se unreasonable under the Fourth Amendment. However, there are a few exceptions to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971); Fuqua v. Armour, 543 S.W.2d 64, 66 (Tenn.1976). Exceptions are "jealously and carefully drawn." There must be a showing by those asserting the exception that the exigencies of the situation made the search imperative. Coolidge, 403 U.S. at 454-55, 91 S.Ct. at 2032, 29 L.Ed.2d at 576. The burden is on those seeking the exception to show the need. State v. Bartram, 925 S.W.2d 227, 230 (Tenn. 1996).

Warrantless searches of automobiles under certain circumstances are allowed. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); State v. Shrum, 643 S.W.2d 891, 893 (Tenn.1982). An automobile may be searched without a warrant if the officer has probable cause to believe that the vehicle contains contraband and if exigent circumstances require an immediate search. Carroll, 267 U.S. at 149, 45 S.Ct. at 283-84. Where probable cause to search exists, the immediate search of a vehicle is no more intrusive than a seizure and subsequent search. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Furthermore, the inherent mobility of a vehicle parked in a public location after a recent crime and when there is probable cause raises a presumption of exigent circumstances. California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985); State v. Leveye, 796 S.W.2d 948, 952 (Tenn. 1990). Therefore, the Fourth

Amendment authorizes the police either to seize and hold the vehicle until a search warrant has issued or to search the vehicle immediately. Chambers, 399 U.S. at 52, 90 S.Ct. at 1981. The vehicle exception has been held to apply in the context of a locked car trunk. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). In Ross, the United States Supreme Court held that:

The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.

456 U.S. at 824, 102 S.Ct. at 2172.

In the case at bar, the Defendant was known to be the person who took the victim from her home. The child had been missing for several hours. Police officers located his red Maverick parked at Colvin and Sons, his employer in Blount County. A child's toy was in plain view on the front passenger seat of the car and mud and grass were observed on the exterior. When Officer Hamilton arrived on the scene, he spoke with Officer Presley in Knoxville, who was very concerned that the victim might still be alive in the trunk of the car. Twenty-five to thirty minutes elapsed between the time the officers arrived and the time the Defendant's grandmother arrived with the car keys. She allowed the officers to open the trunk. They viewed several items, including the victim's shorts outfit and a green towel containing blood, feces, sticks and leaves. The car, still containing the items, was towed to the crime laboratory in Knoxville. The two items found in the Defendant's trunk were admitted as evidence at trial.

The Defendant first charges that his grandmother did not have the authority to consent to a search of his vehicle. Second, he asserts that exigent circumstances did not exist to justify the search. He argues that the time lapse at the scene demonstrated a lack of urgency, which refutes the officers' explanation of concern for the victim's safety. We need not address whether the Defendant's grandmother could validly consent to the search of his vehicle because we believe that there was sufficient exigency to support the search. The officers had probable cause to search the Defendant's car because he was identified as the suspect in the disappearance of the victim. He was seen taking the child from her home. The vehicle parked at Colvin and Sons was identified as that belonging to the Defendant. The officers saw a child's toy in plain view in the Defendant's Maverick. The presumption of exigency exists when a vehicle is parked in a public place simply because of its inherent mobility. With probable cause, the officers were permitted to conduct a search. In addition, there was grave concern for the life of the victim and the possibility that she may have been locked in the trunk of the car. The weather was hot and the car was parked in the sun. This created an actual exigency beyond that which is presumed, thus rendering the search of the Defendant's trunk valid.

From the evidence before us in the record, we cannot conclude that the trial court erred by failing to grant the Defendant's motion to suppress. He contends that the search was illegal and that subsequent incriminating statements elicited by telling him that the items were found in his trunk should be suppressed as "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Yet, because we find the search to be valid, the Defendant's subsequent confession was properly admitted.

This issue has no merit.

VI. Sufficiency of the Evidence

The Defendant next asserts that the evidence was insufficient to support the jury's finding of guilt. Specifically, he challenges his conviction for first-degree felony murder and claims that the State did not prove that he "recklessly" killed the victim. As his defense, he submits that the was unable to form the requisite mens rea such that he could not have consciously disregarded the risk of death to the victim because of his psychological and drug addiction problems. Furthermore, he claims that because he was unable to recklessly kill the victim, he was also unable to "knowingly" perpetrate the kidnapping.

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing 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). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474,

476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

Under the version of the felony-murder statute in effect at the time of the Defendant's crimes, first-degree murder included "[a] reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy." Tenn.Code Ann. § 39-13-202(a)(2) (1991). Thus, the offense of felony murder was an unintentional killing; recklessness as a mens rea would suffice to support a conviction for a death occurring in the course of one of the enumerated felonies.

"Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn.Code Ann. § 39-11-302(c) (1991).

The Defendant argues that because of his psychological problems, he was compelled to ingest alcohol and drugs which impaired his ability to be aware of the risks to the victim. This Court has recognized that the admission of evidence

regarding a defendant's mental illness may establish a claim of "diminished capacity" to form the requisite criminal intent. See State v. Phipps, 883 S.W.2d 138, 148 (Tenn. Crim. App. 1994). Furthermore, we have admitted evidence of voluntary intoxication to negate the state of mind requirement. See Tenn. Code Ann. § 39-11-503(a); State v. Shelton, 854 S.W.2d 116, 121 (Tenn. Crim. App. 1992). "Voluntary intoxication, generally considered socially unacceptable, is within the control of the defendant. On the other hand, most conditions which give rise to diminished capacity are not volitional and not controlled by the defendant." Phipps, 883 S.W.2d at 148.

Here, the Defendant appears to argue that he had severe psychological problems which in turn compelled him to become intoxicated to the extent that his ingestion of substances over time became involuntary. The legislature has established distinctions between voluntary and involuntary intoxication. Neither diminished capacity nor voluntary intoxication are true defenses. See Tenn. Code Ann. § 39-11-503(a). "[I]ntoxication itself is not a defense to prosecution for an offense. However, intoxication, whether voluntary or involuntary, is admissible in evidence if it is relevant to negate a culpable mental state." Tenn Code Ann. § 39-11-503(a). Moreover, "[i]f recklessness establishes an element of an offense and the person is unaware of a risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense." § 39-11-503(b). The legislature has also chosen to address the interplay between intoxication and insanity:

Intoxication itself does not constitute a mental disease or defect within the meaning of § 39-11-501. However, involuntary intoxication is a defense to prosecution if, as a result of the involuntary intoxication, the

person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law allegedly violated.

Tenn.Code Ann. § 39-11-503(c).

The Defendant contends that this compulsion to use drugs amounted to an involuntary intoxication making him incapable of forming the mens rea of recklessness required to prove felony murder. He has not claimed involuntary intoxication as a defense against prosecution and clearly if his intoxication is considered voluntary, he cannot assert such evidence to negate the requisite mens rea of recklessness. Rather, he presented a hybridized theory of diminished capacity based on claims of involuntary intoxication due to his mental illness.

This Court has held under former law that the compulsion to drink alcohol or ingest narcotics due to an addiction does not constitute involuntary intoxication. Burns v. State, 591 S.W.2d 780, 783 (Tenn. Crim. App. 1979); Layne v. State, 531 S.W.2d 802, 803 (Tenn. Crim. App. 1975). Moreover, while involuntary intoxication has been defined in our current law as “intoxication that is not voluntary,” voluntary intoxication requires that a substance has been “knowingly introduced into the person’s body.” Tenn. Code Ann. §§ 39-11-503(d)(2), (3). This suggests that involuntary intoxication requires that the ingestion of a substance is not “knowing,” but rather attributable to a “mistake, trick, accident, or coercion.” Layne, 531 S.W.2d at 803. Therefore, we cannot conclude the Defendant’s alcohol dependence amounted to involuntary intoxication. On this ground, evidence about his alcohol consumption was not

properly available to negate the mens rea for felony murder. See Tenn. Code Ann. § 39-11-503(b). However, assuming arguendo that testimony about the Defendant's mental state was admissible because he was involuntarily intoxicated, we believe the evidence was sufficient to establish recklessness beyond a reasonable doubt.

By the Defendant's self-report, on the morning of the incident he ingested approximately thirty (30) ounces of whiskey, two beers and a marijuana cigarette. However, witnesses who observed him that morning noted no apparent symptoms of intoxication. The Defendant also reported having no trouble operating his vehicle. When he was arrested, the Defendant confessed, in detail, about the crimes. He admitted to taking the victim from her home and to the remote location with the intent to have sex with her. When interviewed by Dr. Worley Fain, a psychiatrist, addictionologist and expert witness for the defense, the Defendant reported being unable to remember the details of the incident.

Dr. Fain testified at trial that the Defendant had psychological disorders, including alcohol dependence and a mixed personality disorder. His exposure to child sex abuse, parental alcoholism and neglect contributed to his chronic alcoholism that began when he was a teenager. Dr. Fain also testified that he felt the Defendant could not control his alcohol consumption and stated the following: "I feel like he was doing the normal thing alcoholics do, which is to get up and drink. . . . That's really not a choice. . . . That's what he's compelled to do."

The State offered the testimony of Dr. Samuel Craddock, a licensed clinical psychologist for Middle Tennessee Mental Health Institute, in rebuttal. Dr.

Craddock stated that the evaluation team “did not find a mental illness present at the time of the alleged incident . . . that would have removed Mr. Julian’s capacity to be able to form intent.” Moreover, Dr. Craddock testified that alcohol consumption could impair one’s perception and judgment regarding the risks of one’s behavior, but that the evidence he considered regarding the Defendant’s intoxication did not establish sufficient diminished capacity to negate the formation of the necessary mens rea.

The Defendant asserts that the State failed to rebut the testimony of the expert witness for the defense regarding his intoxication and cites State v. Hammock, 867 S.W.2d 8 (Tenn. Crim. App. 1995). Yet, in Hammock, the defendant offered expert testimony⁷ for which the State offered only lay testimony in rebuttal and this Court found the evidence insufficient to support the guilty verdict. Id. at 9. “The State offered no medical testimony to refute that presented by the appellant” Id. (emphasis added). Here, the State offered the testimony of Dr. Craddock, its expert witness, to rebut Dr. Fain. Although Dr. Fain specializes in the effects of substance abuse on behavior, both Dr. Fain and Dr. Craddock were qualified as experts on assessing the Defendant’s capability to form the requisite mens rea.

The jury accredited the testimony of the State’s witnesses and rejected that of the Defendant’s. Obviously, they discounted the defense’s theory that an alcoholic’s compulsion to drink rendered the Defendant incapable of forming the intent that rendered him culpable for his crimes. From the Defendant’s own

⁷The expert medical testimony offered by the defense in Hammock was that of the same Dr. Craddock, a licensed clinical psychologist, offered by the State in the case at bar. Id. at 9.

confession, he acknowledged choking the victim in an attempt to cease her screaming. We can only conclude that the jury properly found that squeezing the neck of the three-year-old victim constituted a conscious disregard of a risk that was a gross deviation from the standard of care of an ordinary person.

As for the conviction for especially aggravated kidnapping, we also conclude that the evidence was sufficient. To be convicted of especially aggravated kidnapping, one must “knowingly remove or confine another.” Tenn. Code Ann. §§ 39-13-305; 39-13-302. To “knowingly” perform an act, one is “aware of the nature of the conduct or that the circumstances exist [and] is aware that the conduct is reasonably certain to cause the result.” Tenn. Code Ann. § 39-11-302(b). Here, the Defendant arrived at the victim’s home and gained entrance. He sat in the front room and talked with the babysitter where the victim remained asleep. After leaving once, the Defendant returned to the home, played with the child who was then awake, and took her without permission while everyone was asleep. The jury contemplated the circumstances of the crime and conflicting expert testimony and resolved the issue in favor of the State. We cannot reweigh such evidence, therefore, this issue has no merit.

VI. Sufficiency of the Indictment

In an amended brief filed by the Defendant during the pendency of this appeal, he contends that the fourth count of the indictment charging rape of a child is insufficient because it does not allege the requisite mens rea. He also argues that if the rape indictment is invalid, this negates his conviction for felony murder because that indictment charged both rape and kidnapping.

The indictment charging the Defendant with rape of a child states “That, on the 11th day of July, 1993, and in the State and County aforesaid, the same JAMES LLOOYD [sic] JULIAN, II aforesaid, did unlawfully sexually penetrate Kaile Lynn Lee, a child of less than thirteen years of age, in violation of T.C.A. § 39-13-522.” Our law provides that “[i]f the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge, or recklessness suffices to establish the culpable mental state.” Tenn. Code Ann. § 39-11-301(c). Rape of a child is charged as : “Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by the victim, if such victim is less than thirteen (13) years of age.” Tenn. Code Ann. § 39-13-522. “Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required.” Tenn. Code Ann. § 39-13-501(7).

An indictment or presentment must provide notice of the offense charged, an adequate basis for the entry of a proper judgment, and suitable protection against double jeopardy. State v. Trusty, 919 S.W.2d 305, 310 (Tenn. 1996); State v. Byrd, 820 S.W.2d 739, 741 (Tenn. 1991); State v. Lindsay, 637 S.W.2d 886, 890 (Tenn. Crim. App.1982). The indictment “must state the facts in ordinary and concise language in a manner that would enable a person of common understanding to know what is intended, and with a degree of certainty which would enable the court upon conviction, to pronounce the proper judgment.” Warden v. State, 214 Tenn. 391, 381 S.W.2d 244, 245 (1964).

A lawful accusation is an essential jurisdictional element, thus, a prosecution cannot proceed without an indictment that sufficiently informs the accused of the essential elements of the offense. State v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992); State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979). A judgment based on an indictment that does not allege all the essential elements of the offense is a nullity. Warden v. State, 381 S.W.2d at 245; McCracken v. State, 489 S.W.2d 48, 53 (Tenn. Crim. App. 1972).

There is no language in the rape of a child statute that plainly dispenses with a mental element. Therefore, the Defendant alleges that the State must have charged in the indictment at least that the act was done “recklessly.” The State counters that the purpose of an indictment is to provide an accused with notice of the offense for which he must defend. The Defendant cites a recent decision of a panel of this Court that held an indictment invalid which charged the offense of aggravated rape in language nearly identical to that in the case sub judice. See State v. Roger Dale Hill, C.C.A. No. 01C01-9508-CC-00267, Wayne County (Tenn. Crim. App., Nashville, June 20, 1996), perm. to appeal granted (Tenn. 1997). Yet, other panels of this court have declined to follow Hill, David Cross v. Robert Conley, Warden, C.C.A. No. 02C01-9702-CC-00072, Lauderdale County (Tenn. Crim. App., Jackson, May 14, 1997); State v. Phillip Ray Griffis and Melissa Faith Rogers, C.C.A. No. 01C01-9506-CC-00201, Maury County (Tenn. Crim. App., Nashville, Apr. 30, 1997); State v. John James, C.C.A. No. 01C01-9601-CR-00016, Davidson County (Tenn. Crim. App., Nashville, Mar. 27, 1997); State v. Larry Steve Wilson, C.C.A. No. 03C01-9511-CC-00355, Blount County (Tenn. Crim. App., Knoxville, Mar. 25, 1997); State v. Milton S. Jones, Jr., C.C.A. No. 02C01-9503-CR-00061, Shelby County (Tenn. Crim. App., Jackson,

Mar. 7, 1997); State v. Johns Haws Burrell, C.C.A. No. 03C01-9404-CR-00157 (Tenn. Crim. App., Knoxville, Feb. 11, 1997); State v. James Dison, C.C.A. No. 03C01-9602-CC-00051 (Tenn. Crim. App., Knoxville, Jan. 31, 1997), and a decision is pending from our supreme court.

This Court has held that nothing in our criminal code requires that an indictment or presentment allege the mens rea unless the statute specifically states the mens rea as an element of the offense. See Dison, slip op. at 17. All that is required is that a defendant is provided notice of the elements of the offense which “sufficiently apprises the accused of the offense he is called upon to defend.” State v. Tate, 912 S.W.2d 785, 789 (Tenn. Crim. App. 1995). Therefore, the allegation of the criminal conduct in an indictment provides constitutionally adequate notice and mens rea is not an essential element of the offense. See Dison, slip op. at 17; Griffis, slip op. at 16; Cross, slip op. at 2. As a result, the indictment for rape of a child as charged in the indictment in the case sub judice was constitutionally sufficient and therefore valid.

However, even if we were to find that the mens rea is an essential element of the offense of rape of a child, we conclude that the form of the indictment in the case sub judice sufficiently apprised the Defendant of the mens rea. In an unpublished decision of this Court, State v. Nathaniel White, C.C.A. No. 03C01-9408-CR-00277, Sullivan County (Tenn. Crim. App., Knoxville, June 7, 1995), the indictment for the offense did not specify the mental element of “knowing” as was required by the statute charging the offense. However, the indictment did allege that the defendant “did unlawfully possess a controlled substance.” This Court concluded that the word “unlawfully” does not, in the ordinary use of the term,

connote mental culpability.” Slip op. at 5. Specifically, the panel noted that “one cannot logically infer that an accused acting “unlawfully” necessarily acts “knowingly.” Id. In Hill, the Court expanded this and concluded that “unlawful” was inadequate to allege a mens rea of intentionally, knowingly, or recklessly when a specific mental state is not specified by the offense charged. Slip op. at 6. We believe that, although inadequate to describe a specific mens rea such as “knowingly,” when it is required by the offense charged, “unlawfully” sufficiently indicates mental culpability when no mental state is specified.

The basic rule of statutory construction is to ascertain and give effect to the intent or purpose of the legislature as expressed in the statute. Metropolitan Government of Nashville & Davidson Co. v. Motel Systems, Inc., 525 S.W.2d 840 (Tenn.1975); State v. South land News Co., Inc., 587 S.W.2d 103,106 (Tenn. Crim. App. 1979). We must consider the natural and ordinary meaning of the language used, when read in context of the entire statute, without any forced or subtle construction to limit or extend the import of that language. Worrall v. Kroger Co., 545 S.W.2d 736 (Tenn. 1977).

We must try to reconcile inconsistent or repugnant provisions of a statute and attempt to construe a statute so that no part will be inoperative, superfluous, void or insignificant. We must try to give effect to every word, phrase, clause and sentence of the act in order to achieve the Legislature's intent, and we must construe a statute so that no section will destroy another. Tidwell v. Collins, 522 S.W.2d 674, 676-77 (Tenn. 1975); City of Caryville v. Campbell County, 660 S.W.2d 510, 512 (Tenn. App. 1983). Moreover, we cannot presume that the legislature intended to place superfluous terms in the statute; and all language

in a statute is presumed to have some meaning. State v. Vestal, 611 S.W.2d 819, 821 (Tenn. 1981); see State v. Northcutt, 568 S.W.2d 636 (Tenn. Crim. App. 1978).

We believe that the use of the word “unlawful” as used in Tennessee Code Annotated section 39-13-522 informs a defendant of a mental culpability requirement. If we are to give meaning to every word in the statute, the legislature must have included the word “unlawful”, in the absence of a specific mens rea, for a purpose. “Unlawful” has been interpreted in prior judicial decisions in our state as a word that connotes mental culpability. Erby v. State, 184 S.W.2d 14, 16 (Tenn. 1944); Terrell v. State, 8 S.W. 212, 215 (Tenn. 1888); State v. Haynorth, 35 Tenn. 64, 65, 3 Sneed 34, 35 (1855). “Unlawful” generally means “without legal justification,” yet our supreme court has determined that if a defendant is charged to have committed a crime “unlawfully,” this means that he had no legal justification and that the defendant had some form of intent or knowledge of this fact. Terrell, 8 S.W. at 214; Black’s Law Dictionary 1536 (6th ed. 1990). “In [its] ordinary acceptance, the word[] ‘unlawfully’, when applied to an act or thing done, import[s] knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing.” Erby, 184 S.W.2d at 16. “[T]he act was unlawful, and, that being so, malice would be implied.” Terrell, 8 S.W. at 215. In finding that “illegal” and “unlawful” were synonymous, the Haynorth court stated that “illegally” “implies that the party had knowledge, or was bound to have had knowledge, of the facts which constituted the vote illegal.” Haynorth, 35 Tenn. at 65.

Our current criminal code demonstrates that the legislature must have intended some meaning for the word “unlawful” in the rape of a child statute. By comparison, statutory rape is defined as “sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.” Tenn. Code Ann. § 39-13-506(a). Also, we note that statutory rape has been considered a strict liability crime; all that is required is that the act be performed. “If the defendant is at least four years older than the victim, proof of sexual penetration of a victim between the ages of thirteen and eighteen, is all that is necessary.” State v. McKnight, 900 S.W.2d 36, 48 (Tenn. Crim. App. 1994). We also note that, unlike rape of a child, with statutory rape there is no mention of “unlawful” or any other language regarding mens rea.

The Criminal Sentencing Reform Act of 1989 mandates that we interpret "according to the fair import of [the statute's] terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code." Tenn.Code Ann. § 39-11-104 (1991). "Questions involving statutory construction 'must be answered in the light of reason, having in mind the object of the statute, and the mischief it aims at.' " State v. Netto, 486 S.W.2d 725, 728 (Tenn.1972) (citations omitted); State v. Williams, 854 S.W.2d 904, 908 (Tenn. Crim. App. 1993). The intent of the legislature must govern, and, where possible, courts must not construe a statute in a manner that will defeat the obvious legislative purpose. Williams, 854 S.W.2d at 908.

It is clear that the legislature intended to single out the rape of a child as a crime. It is also apparent that the legislature enacted the criminal code which requires some proof of mens rea “[i]f the definition of the offense within this title does not plainly dispense with a mental element.” Tenn. Code Ann. § 39-1-301(c). It would have been clearer, of course, had the legislature included “intentionally, knowingly, or recklessly” in the language of the statute for rape of a child. However, in order to effect the legislature’s intent to proscribe this activity and to interpret the statutes to prevent one section from defeating the purpose of another, we believe that the use of the word “unlawful” in section 39-13-522 informs the Defendant of a mens rea required for this offense. Thus, the use of the word “unlawfully” in the charging instrument was sufficient notice to the Defendant of the essential elements of the offense. Because we find the indictment for rape of a child to be valid, the convictions for both rape of a child and first-degree felony murder are affirmed on this issue.

After careful consideration of the record and the issues in this case, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

THOMAS T. WOODALL, JUDGE