IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JUNE SESSION, 1994

FILED

July 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9401-CR-00010
Appellee	)	
	)	HAMBLEN COUNTY
vs.	)	
	)	Hon. James E. Beckner, Judge
JAMES PERRY HYDE,	)	
	)	(Rape of a Child)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, James Perry Hyde, was convicted by a Hamblen County jury of rape of a child. Tenn. Code Ann. § 39-13-522 (1994 Supp.). The jury imposed a fine of fifty thousand dollars, and the trial court sentenced the appellant to twenty-five years incarceration in the Tennessee Department of Correction. On appeal, the appellant raises the following issues:

(1) whether the prosecutor engaged in misconduct warranting a mistrial and/or reversal of the appellant's conviction;
(2) whether the trial court should have suppressed the appellant's statements to investigators;
(3) whether the trial court should have suppressed the victim's statements to examining physicians;
(4) whether the evidence adduced at trial is sufficient to sustain the appellant's conviction;
(5) whether the trial court properly denied the appellant's request for a special jury instruction concerning sentencing; and
(6) whether the appellant's sentence of twenty-five years is excessive.

After carefully reviewing the record, we affirm the judgment of the trial court.

I. Factual Background

On February 8, 1993, the Grand Jury of Hamblen County returned an indictment charging the appellant with three counts of rape of his daughter, SAH, occurring on or about September 15, 1992, August 21, 1992, and September 3, 1992.[1] Prior to trial, the State amended the first count to reflect the date of September 14, 1992. On July 7, 1993, the appellant submitted a motion for a bill of particulars. The State submitted the following response:

1. Count I: On September 14, 1992, in the bathroom of the Hyde home, the defendant inserted an enema

[1]At the time of the offense, SAH was eleven years old. As a matter of policy, this court does not name minors involved in sexual abuse but, instead, uses their initials. See State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

device filled with cough syrup into the victim's rectum.

2. Count II: On or about August 21, 1992, in the victim's bedroom in the Hyde home, the defendant inserted a baton type pen into the victim's rectum. Thereafter the victim fled her home on her bicycle.
3. Count III: On or about September 3, 1992, the day after the victim ran away from school, the defendant inserted a baton type pen into the victim's vagina, while they were in the victim's bedroom in the Hyde home.

The appellant's trial occurred on July 28 and July 29, 1993. Following the State's presentation of proof and the victim's refusal to testify, the trial court dismissed counts two and three.

At trial, the State introduced the testimony of Captain Hugh Moore of the Hamblen County Sheriff's Department. Captain Moore recounted that, on September 15, 1992, the dispatcher informed him that an automobile accident had occurred on Danberry Drive in Morristown. Before Captain Moore arrived at Danberry Drive, the dispatcher reported that the call had been false. Captain Moore proceeded to the address from which the call had been made. The appellant answered the door. He and Captain Moore were joined by the appellant's wife, Linda Hyde, and his daughter, SAH. SAH informed the officer that she had made the false report, because she wanted the police to take her to jail. Her mother and her father then questioned her. SAH began "cursing and spitting" at her father. At one point, the appellant "smacked [SAH] on the mouth." SAH grabbed Captain Moore's leg and again asked to be taken to jail. Linda Hyde called the East Tennessee Children's Hospital in Knoxville. However, the officer decided to transport SAH to the county juvenile holding facility. En route to the holding facility, SAH told Captain Moore that she had been abused. She refused to say anything more to the officer.

Lisa Hodge, a youth services officer for the juvenile court of Hamblen County, also testified. She spoke with SAH on September 15, 1992, when SAH was brought to the juvenile holding facility. SAH "was crying. She was shaking.

She appeared to be afraid." SAH asked Ms. Hodge if Ms. Hodge knew what sex abuse was and whether SAH would have to return home. Ms. Hodge then contacted the Department of Human Services. Melissa Thomas, an employee of the Department of Human Services, arrived and spoke with SAH. Subsequently, SAH's parents transported her to the East Tennessee Children's Hospital.

Dr. Alison Jones, a pediatrician at East Tennessee Children's Hospital, testified that, on September 18, 1992, Dr. Greeson, a psychiatrist in the inpatient ward, asked that she examine SAH. Dr. Jones testified that the purposes of the examination were diagnosis and treatment. Moreover, in order to accurately diagnose and treat SAH, Dr. Jones required an account of what had occurred to SAH. SAH told Dr. Jones that

> she had been hit with a board on occasion in her private areas ... . She also specifically told [Dr. Jones] that she had had cough syrup poured into her vagina ... She denied penile penetration. She talked more of fingering [in her vagina and rectum] and again she focused a lot on the board and the cough medicine.

SAH indicated to Dr. Jones that her father had committed these acts.

Dr. Jones outlined her medical conclusions:

> It was my impression that her external genitalia or her female parts were all, as far as I could tell, normal. I didn't detect any problems with the hymenal ring; I felt it was intact.
>
> I did think that her rectal exam was grossly abnormal however. ... [O]n [SAH's] exam, the minute I touched her bottom or her rear end, her anus opened up widely, which is not usually the case. There's usually a constriction of that muscle. And when I further went and did a rectal exam and put my finger in her bottom, there was absolutely no resistance ...
>
> I don't believe she has a problem with constipation or any other problem. And I didn't see any other duodenal tears or bruises or tags or anything else that would indicate a problem, but the rectal exam was grossly abnormal, and I had no explanation for that.
>
> [My findings are] consistent with some form of rectal penetration, usually forceful, because the child again or anyone is trying not to have somebody do something to them. And over a long period of time, that results in the muscle becoming loose and lax and not

having full rectal tone.

On cross-examination, Dr. Jones stated that SAH had indicated that the abuse had not occurred in the immediate past.

Dr. Christy Lynn, a physician employed at Lakeshore Mental Health Institute, performed a physical examination of SAH on November 9, 1992. She also obtained her admission history. Dr. Lynn testified that, although her work involved psychiatry, on this occasion she was acting in her capacity as a physician, and, moreover, the physical examination and admission history were for the purposes of diagnosis and, if necessary, treatment. Dr. Lynn testified that SAH,

> [i]n talking about [the rectal area], ... did answer yes in the affirmative that she had been touched on that part of her body and furthermore that some specific objects had been inserted into her body. She named several of those objects to me. ... one object that she named and kept going back to was a baton or a toy-type object she got at Dollywood that had a pen on one end. She also mentioned that cough syrup and a gun had been placed inside her body. ... She said her father had done that.[2]

Dr. Lynn testified that SAH had difficulty distinguishing the rectal and vaginal openings. During the physical examination, Dr. Lynn also noted that the tissues in the genital and rectal area were "unusually relaxed for a child of her age." The victim's hymen was intact. However, Dr. Lynn stated, "I've seen women who delivered children and had intact hymen." Finally, Dr. Lynn testified that SAH had made false accusations of sexual assault against Dr. Lynn and various staff members at Lakeshore Mental Health Institute. Dr. Jerry Burl Lemler, a psychiatrist and chief of medical staff at Lakeshore Mental Health Institute, testified that SAH was suffering "post-traumatic disorder."

Linda Hyde, the appellant's wife, also testified. She stated that she and

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[2]Defense counsel objected at this point, arguing that the doctor's testimony was not relevant.

her husband had been married for twenty-five years and that she had filed for divorce on September 25, 1992. She testified that, in March, 1991, SAH began having difficulties in school and threatening suicide. Ms. Hyde took SAH to see Pamela Matthews, a clinical social worker. In November, 1991, the Hydes decided to hospitalize SAH in Valley Hospital in Chattanooga, Tennessee. SAH remained in the hospital for thirty days. In January, 1992, SAH was placed on medication and returned to school. However, in February, 1992, she began to again experience problems and ran away from school. When she was found, she stated that she had intended to go to the police station. In March, 1992, SAH was admitted to the East Tennessee Children's Hospital in Knoxville for one month.

Ms. Hyde testified that, on September 14, 1992, SAH remained at home with her father, because she was sick. Ms. Hyde was at work all day. She stated that her husband may have taken their daughter to the doctor on that day. She conceded that, occasionally, SAH's grandmother would care for SAH when she was sick.

On September 15, 1992, Ms. Hyde returned home for lunch at approximately 1:30 p.m. or 2:00 p.m. A police officer arrived and informed Ms. Hyde and the appellant that 911 had been called from their address. Ms. Hyde discovered that her daughter had called the police and had told them that a terrible accident had occurred on their street. When the officer attempted to leave, SAH grabbed his leg. She called her father an "S.O.B." Mr. Hyde then "smacked [SAH's] mouth." Shortly thereafter, SAH was admitted to the East Tennessee Children's Hospital. Ms. Hyde spoke with Pamela Matthews concerning SAH's allegations of abuse. Ms. Hyde also spoke with her daughter at the hospital. She testified that, after she spoke with her daughter, she became terrified of her husband. On September 24, 1992, she received a call

from her husband. He told her that he was going to jail. When she asked him if he had abused their daughter, he replied, “Well, if it walks like a duck and quacks like a duck, it must be a duck.”

Finally, on cross-examination, Ms. Hyde testified that she had administered enemas to her daughter when SAH was approximately three years old. She administered the enemas in accordance with a doctor’s instructions, to treat constipation. Ms. Hyde also stated that the appellant suffered constipation and used enemas.

Teddy Collingsworth, an Investigator for the Attorney General's Office, also testified. He stated that he first became involved in the case when he was contacted by a fellow investigator, Kennetta Williamson. He and Ms. Williamson obtained Ms. Hyde’s consent to a search of the Hyde home. The investigators recovered from the house a cough syrup bottle, an enema bag, and a “baton-type” pen from Dollywood.

On September 24, 1992, he and Ms. Williamson drove to the Hyde residence and asked the appellant if he would be willing to accompany them to the district attorney general’s office at the Justice Center for an interview. Collingsworth told the appellant that the interview would concern allegations made by the appellant’s daughter. The appellant agreed to accompany Collingsworth and Williamson. Collingsworth rode in the appellant’s van to the justice center, and Williamson drove the car in which she and Collingsworth had driven to the appellant’s residence. Collingsworth testified that the appellant was not under arrest at that time. Nevertheless, Collingsworth advised the appellant of his constitutional rights. Collingsworth was informed by the appellant that he could read and write and had completed the ninth grade. The appellant then signed an admonition and waiver of rights form and gave the following statement

in response to questioning by Collingsworth:

> Linda Hyde, my wife, and I started having problems with [SAH] when she was in the fourth grade. She wouldn't do her homework. And then when she was in the fifth grade, [SAH] was still having problems.
>
> [SAH] told someone I had sexually assaulted her. [SAH] was checked by a doctor and couldn't find anything wrong. Then a few weeks ago started running away. She has done this several times.
>
> [SAH] has cut her arms until they bleed. [SAH] told her mother and I she had injected herself with Dr. Pepper, a soft drink.
>
> Since I have had a heart attack about three years ago, I've been off work. I take care of [SAH] while my wife is working. I pick up [SAH] from school. I usually take [SAH] to see the doctor with her mother.
>
> I have problems with my bowels. I have a red enema bag I use and keep it underneath the bathroom sink. I wash it out with water and that is all I use in it.
>
> My other daughter also has a pen that she got at Dollywood that I use sometimes or I play with it. [SAH] has got some clankers. They get on my nerves. It's been a long time since I have seen them.
>
> There has never been nobody else ever taking care of [SAH] except Linda and I in the last three or four years.
>
> I have bought three guns, all of the twenty-two caliber pistols. Two of them are chrome, and one black or blue in color.
>
> The only way I could have done these things to [SAH] is that I have been passed out. I don't think I have. But if you hear a duck and it quacks, it's a duck.
>
> The things that have been done to [SAH] couldn't have been done by nobody else because [SAH] isn't with anybody else but Linda and I. I know I didn't do these things, I guess. I wouldn't hurt [SAH] intentionally.
>
> My mother and sister will do things and completely deny they have did it. I don't think I have done this. If I knew I did this, I would kill myself. The three pistols are at my trailer camper in the backyard of my mother's beside the fence. Mother lives at 203 Hill Avenue, Morristown, Tennessee.
>
> [SAH] sometimes stays all night with my mother and Linda's mother and daddy. [SAH] has stayed all night with Bob Anderson and Marsha.

Collingsworth began to question the appellant at approximately 9:30 a.m. and concluded the interview at approximately 1:50 p.m. Because it was warm in the room where the interview was conducted, Williamson obtained a fan. During

the interview, the appellant was permitted to go to the restroom and take occasional breaks. For lunch, at the appellant's request, Collingsworth provided a coke and some crackers.

At the conclusion of the interview, Collingsworth read the appellant's statement to him "verbatim." Moreover, the appellant himself looked at the statement "for a period of time and then he signed it." Afterwards, the appellant went to Sheriff Charles Long's office. Collingsworth remained at the district attorney general's office. At approximately, 4:00 p.m., Sheriff Long informed Collingsworth and Williamson that the appellant wanted to speak with them. They interviewed the appellant a second time in Sheriff Long's office. Collingsworth was present when the appellant signed a second admonition and waiver of rights form. After the appellant made a second statement, he was arrested and charged with rape of a child.

Kennetta Williamson, an investigator with the district attorney general's office, testified that she became involved in the case when she was asked to speak with the appellant's wife, Linda Hyde. Ms. Hyde described SAH's allegations and informed Williamson that her daughter had been placed in the East Tennessee Children's Hospital in Knoxville. Williamson and Melissa Thomas from the Department of Human Services went to speak with SAH at the hospital. They spoke with SAH for two or three hours. Williamson testified that SAH "was very emotional, hard to talk with, hard to understand, communicate with."

After speaking with SAH, Williamson and Collingsworth obtained Ms. Hyde's consent to search the Hyde home. The next day, Williamson and Collingsworth interviewed the appellant. Williamson confirmed that the appellant was not under arrest and could have left at any time during the interviews.

Williamson testified that she was not present during most of the appellant's first statement. However, she heard the appellant state that he could read. She wrote down the appellant's second statement. She testified that she advised the appellant of his rights and

> [h]e told me that on September 14, 1992, that he could remember having [SAH] take off her clothes. He said he then remembered giving [SAH] an enema with some cough syrup and he placed it in her rectum. He told me he loved [SAH] very much. Said, I can't remember anything else that happened. I remember it happening upstairs in the bathroom. This happened in the morning hours after Linda went to work. I don't know why I did this.

According to Williamson, the appellant refused to swear that the statement was true due to his religious beliefs. However, he did state, "This did happen in Hamblen County, Tennessee, and I am giving the statement to get it off my conscience and to help [SAH]." Williamson specifically asked the appellant whether he was making the statement "so [she] would leave him alone" or because it was the truth. He replied that the statement was true.

Williamson testified that, prior to the interview, she had been informed that the appellant had suffered heart problems in the past. Accordingly, she was "concerned about his health" and, during the initial interview, obtained a fan for the interview room "so it would be more comfortable." In part, Williamson's concern for the appellant's comfort precipitated the move to Sheriff Charles Long's office.

Sheriff Charles Long testified that he knew the appellant, because he had investigated the vandalism of the appellant's car. He discovered on that occasion that the vandalism had been committed by the appellant's daughter, SAH. Sheriff Long stated that, on September 24, 1992, the appellant voluntarily came to his office. The Sheriff advised the appellant of his constitutional rights. Sheriff Long testified that the appellant denied raping his daughter and was

concerned that his daughter might have to testify in court. The appellant was in Long's office for less than one hour and made two telephone calls. The first call was made to the appellant's wife. During this call, the appellant indicated that he did not want his daughter to testify in court and that "he was just going to go ahead and tell about it." The second telephone call was made to a doctor at Cherokee Mental Health Center.

Marsha Anderson testified on behalf of the appellant that she had known the Hyde family for approximately ten years. She baby-sat SAH when SAH was two or three years old. At that time, she was aware that SAH suffered from constipation and was given enemas.

The appellant also introduced the testimony of Ron Hagan, an assistant principal, at East Ridge Middle School. Hagan testified that, on September 14, 1992, Edith Hyde signed SAH out of school. Edith Hyde, the appellant's mother, testified that, on September 14, 1992, the counselor at school called and informed her that her granddaughter had a fever. The appellant's mother picked SAH up from school and went to the store. Subsequently, she and SAH went to her home where SAH lay on a pallet on the floor. The appellant arrived shortly thereafter. SAH's mother arrived later that afternoon. Edith Hyde testified that her son was never alone with SAH.

Judy Holt, a record keeper at Hamblen Pediatrics, testified that, according to their records, SAH visited Hamblen Pediatrics at approximately 3:00 p.m. on September 14, 1992, and was treated for fever, coughing, and difficulty breathing at night. The records suggested that SAH was accompanied by a parent.

Ann Laws, a former counselor/recruiter with Hamblen County Adult

Education Program, also testified. She stated that, in August, 1988, the appellant spoke with her and indicated that he had dropped out of school in the tenth grade and needed to improve his basic educational level. She administered certain tests and determined that the appellant could read at a second grade level. In January, 1991, the appellant was administered another series of tests to assess his progress. The appellant's vocabulary skills were "post-high school." His level of reading comprehension was "third grade, seventh month." His spelling was "first grade, eighth month." His ability to perform number operations was "third grade, second month." Finally his problem solving skills were "eighth grade, ninth month."

James Turner testified that he had known the appellant for ten or eleven years, and that the appellant had a reputation in the community for truthfulness. Curtis Howard testified that he had known the appellant for approximately thirty years, and that the appellant had a reputation in the community for truthfulness.

The appellant testified that he was fifty-one years old. He was unemployed due to a disability. He had experienced several heart attacks for which he had been placed on medication. At the time of the trial, he was taking medication for his nerves. His doctor was Dr. Bill Conklin at Cherokee Mental Health Center. The appellant had been seeing Dr. Conklin since 1992. He had seen other doctors at the facility prior to 1992. He denied giving his daughter a cough syrup enema. Rather, the appellant testified that, on September 14, 1992, while SAH was at school, the appellant went to a mechanic in order to obtain brake pads for his car. Afterwards, he went to his mother's home. SAH was with his mother. His mother told him that SAH was ill. He then went to the drug store and obtained cough syrup and children's Tylenol. The appellant testified that, later that day, his wife might have taken SAH to the doctor. The appellant mowed his mother's yard. Again, the appellant denied having any

sexual contact with his daughter, claiming that he loves his daughter.

The appellant further testified that, on September 24, 1992, he agreed to accompany Collingsworth and Williamson to the justice center. They questioned him in a "little room." He remembered being advised of his rights and signing a statement indicating that he did not want an attorney. However, he stated, "I was in kind of like a shock. I mean, I had never had any trouble with the law before." The appellant stated that he remained in the little room for "a long time." It was hot, and the appellant asserted that no one brought a fan. Moreover, the appellant claims that he never received crackers, although he was given a coke at some point. He was not able to take his medication. He never told either Collingsworth or Williamson that he could read or write. However, they did read his statements to him before he signed the statements.

The appellant described the interview:

> It was real intense. ... I remember just segments in there. After they started calling me a liar and all that, I just went into shock. ... I would have probably signed or done anything to get out of there. I thought I was going to get out of the office. ... I remember things being read to me. But after a while, it all run together.

The appellant further stated that he refused to swear that the second statement was true, not because of his religious convictions, but because the statement was not true.

Additionally, the appellant testified that, prior to the second interview, he made one phone call, to his therapist, Dr. Conklin, and informed him that he would be unable to keep his appointment that day. The appellant stated that he only called his wife following his arrest. Moreover, according to the appellant, he never admitted his guilt during any conversation with his wife.

On cross-examination, the appellant conceded that he had performed

various jobs prior to his disability, including the job of avionics technician. Moreover, he was required to take certain tests in order to qualify for certain jobs. The State introduced multiple choice and true/false tests that the appellant had completed. The appellant claimed that the questions on the tests, in addition to being written on the test form, were posed orally. Moreover, the appellant testified that he cheated on the tests in order to perform well.

In rebuttal, Melissa Thomas, from the Department of Human Services, testified that the appellant stated to her on June 7, 1993, that, although he had done nothing wrong, he had given his daughter an enema. He claimed that he wanted to receive counseling so that he could see his daughter again. Following Ms. Thomas' testimony, on surrebuttal, the appellant admitted that he had gone to see Thomas because he wanted to visit SAH. However, he denied admitting that he had given [SAH] an enema.

The jury found the appellant guilty of rape of a child. On July 30, 1993, the trial court conducted a sentencing hearing. The trial court found no mitigating circumstances. With respect to enhancement factors, the trial court made the following findings: the victim was particularly vulnerable because of a mental disability, Tenn. Code Ann. § 40-35-114 (4) (1990); the personal injuries inflicted upon the victim were particularly great, Tenn. Code Ann. § 40-35-114 (6); the offense was committed to gratify the defendant's desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114 (7); the appellant abused a position of private trust, Tenn. Code Ann. § 40-35-114 (15); and the crime was committed under circumstances under which the potential for bodily injury was great, Tenn. Code Ann. § 40-35-114 (16). At the conclusion of the sentencing hearing, the trial court imposed the maximum sentence authorized by law.

II. Analysis

a. Prosecutorial Misconduct

The appellant contends that "the prosecutorial misconduct in this case was such as to be incurable and warrants a mistrial and/or reversal." Specifically, the appellant cites five instances of misconduct. First, during voir dire, the district attorney general asked the prospective jurors the following questions:

> Have any of you had any member of your family who it has been necessary to have hospitalized in a state mental institution?
>
> That's a strange question, but our victim in this case has been living in a state mental institution for the past -- well, since October of '92. Would the fact of what has happened to this child, the fact that she has had to undergo institutionalization in a mental hospital, is that going to affect you all in such a way that you wouldn't be able to listen to what she has to say if she can testify, just that fact alone, that what happened to her placing her under such stress ---

Defense counsel's objection was sustained by the trial court. The court gave the following curative instruction: "The State has to prove every element of the offense beyond a reasonable doubt before the defendant can be convicted." Moreover, defense counsel later asked prospective jurors, "The attorney general asked the question before an objection by the defendant implying that perhaps that hospitalization is caused by some event. Can each of you put that implication aside and make the state even prove that? Can you do that?" The record indicates that the prospective jurors responded affirmatively.

Second, the appellant cites the conclusion of the prosecutor's opening statement and the subsequent exchange, in the presence of the jury, between counsel and the trial court:

General Bell: If SAH is able to testify and establish the other two events that are alleged in the indictment, we would submit and ask you to convict him on all three indictments. If she can't, the other proof -- There's going to be some questions the Judge will have to rule on as to what proof we can get in the case.

I really am having trouble because I don't know all the evidence I'm going to be able to put before you. But at the very least the first count of the indictment will be carried in this case and it will be based upon the proof I've just given you. ...

The Court: I'll say this. You very well know as an officer of this Court what the law allows to come into evidence and what it doesn't.

General Bell: I certainly do.

The Court: And if you're trying to ---

General Bell: I am not, your Honor.

The Court: -- make it look like it depends on me whether you get it in the case, I don't like it at all.

General Bell: No, no, no. I didn't mean that, your Honor. But you rule on whether ---

The Court: I just have to do what the law requires.

General Bell: That's exactly right your Honor. I should say if I convince the Court of the applicable law that allows the evidence in.

Mr. Eichelman: I'm going to go ahead and object. I mean the implication is that somehow if not the Court then the defense attorney or somebody is keeping relevant evidence away, and we're not.

The Court: I don't like that argument at all. I just don't like it.

General Bell: I'm sorry, your Honor.

The Court: And it's improper and unethical in my opinion.

General Bell: I didn't mean to do that, your Honor.

In a jury-out hearing, defense counsel moved for a mistrial on the basis of the prosecutor's remarks during voir dire and his remarks during his opening statement. The trial court denied defense counsel's motion and gave the following curative instruction to the jury:

Members of the jury, first, I want to apologize for you for being a little bit intemperate in my response to something that I thought was highly improper. And I've apologized to Mr. Bell also. Mr. Bell is a good lawyer and Mr. Eichelman is a good lawyer; Mr. Dugger and Mr. Mattocks all are. And we all work together day after day after day.

So we understand each other, I guess, more than you might think from looking at it. But what Mr. Bell told you was not proper and I think you can understand that a lawyer can't leave an inference with you that there's a lot of evidence out there if they could just get it in. And that's something you can't consider. You don't know what it is. I don't know what it is.

But we all have to follow very closely rules of law. And the rules of law about admitting evidence are there for a good reason. You just can't have innuendos and insinuations and what somebody said somebody said that somebody said and things like that. You understand the unreliability of certain kinds of evidence and why the law says it can't come in.

I don't yet even know what might be offered but just anticipate there could be evidence that couldn't get in and to tell you there might be evidence that they can't get in. It may or may not get in. I don't know until I have an opportunity to see it.

But it is not proper or appropriate to be told that or for you to even consider that. The only thing you can decide any case on -- and I hope you understand that after your service as a juror -- is the actual evidence, the sworn testimony that comes from the witness stand and the law that I give you.

Does anybody have any problem with that? Do any of you because of any statements that have been made this morning -- Will any of you have any problem with being fair to both sides of this case? If anyone has, would you raise your hand? Can you all -- Do this for me. If you can all decide this case solely and alone on the evidence that's presented here at the trial and the law I give you, will you raise your hand, please?

Let the record show all twelve jurors are present and each raised their hand. Thank you very much. ...

And again -- Let me say one other thing. I don't want, by what I said, to prejudice you unnecessarily against Mr. Bell who's doing his job. In his frustration I think he said those things and it's my opinion he did not intend to do anything improperly. If I thought he did, I would be taking a different action, but I don't think he intended to. It's his job to present his case as well as he can. It's Mr. Eichelman's job to present his case as well as he can. And I would fuss at any lawyer that would just sit mealymouthed and not vigorously and as an advocate present their case as long as they do it properly and ethically. All right.

Third, the appellant argues that the prosecutor improperly indulged in "theatrics" when he unsuccessfully attempted to call SAH to the stand on three

separate occasions.[3] Following the second attempt, defense counsel requested a bench conference and objected. Noting that "it's obviously not contrived," the court overruled the objection. Following the third attempt, the court stated to the jury,

> Members of the jury, I am somewhat concerned that the calling of [SAH] and subsequent problems with her coming may have an adverse impact on you that could result in unfairness to somebody. Please don't let that happen. Just understand the testimony you have -- This is a young lady with a problem.

The fourth time, SAH took the stand but refused to answer the prosecutor's questions. Following this incident, defense counsel requested a bench conference. The court denied counsel's request, observing, "I think you're in the record as much as you need to be in the record, anyway."

Fourth, the appellant argues that, on several occasions, the district attorney general improperly attempted to elicit hearsay from various witnesses. Accordingly, the appellant contends, defense counsel was forced to object, albeit successfully, an excessive number of times, thereby enhancing the impression, created by the prosecutor's earlier misconduct, "that the jury was not hearing all of the facts."

Finally, the appellant argues that the State improperly included counts two and three in the indictment. The appellant asserts that the State should have known that SAH would be unable to testify and that, therefore, the State could not carry its burden of proof with respect to counts two and three. Moreover, the appellant contends that "it was grossly misleading for the Attorney General to imply that the second and third counts would have to be dismissed for failure to prove the time element" when, in fact, the State had not proven beyond a

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[3]On these three occasions, SAH refused to enter the courtroom. As subsequently mentioned, on the fourth occasion, the victim did take the stand but refused to testify.

reasonable doubt any element of the second and third counts.

Following the presentation of the State's proof and the dismissal of counts two and three of the indictment, defense counsel again moved for a mistrial. This motion and the motion for a judgment of acquittal were denied. Nevertheless, the trial court instructed the jury in the following manner:

> Please be careful not to infer that there is something you should know that you haven't heard because you can ... only base your decision or your verdict on the evidence that you hear in the courtroom and the law I give you and nothing else; and please do not let anything else come into your deliberations in any way. You've told me you could do that and I think you can.
>
> And, secondly, because of the difficulties that we had with the young girl and her testimony, please don't let any sympathy for her control your deliberations. Jury verdicts can't be based on sympathy. They have to be based on the law and the evidence in the case.

At the conclusion of the trial, the trial court again instructed the jury:

> Please remember that you cannot infer from statements of lawyers or failure of a witness to testify that there is other evidence in the case. The only evidence you can consider for any purpose is that that you have heard from witnesses who were sworn and who testified.
>
> Also, you are reminded you cannot let sympathy for the alleged victim be part of your deliberations. The case must be decided only on the law and the evidence.

In essence, the appellant contends that the trial court should have declared a mistrial. Generally, the trial judge is given wide discretion in controlling the conduct of counsel. Hunter v. State, 440 S.W.2d 1, 15 (Tenn. 1969). To sustain an assignment of error regarding this subject, it is necessary that an abuse of discretion be shown. Id. The test to be applied by the appellate courts in reviewing instances of prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court set forth five factors that should be considered in making this determination:

(1) The conduct complained of viewed in context and in light of the facts and circumstances of the case.
(2) The curative measures undertaken by the court and the prosecution.
(3) The intent of the prosecutor in making the statement.
(4) The cumulative effect of the improper conduct and any other errors in the record.
(5) The relative strength or weakness of the case.

Our Supreme Court approved these factors in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

Pursuant to these guidelines and following a thorough review of the record, we conclude that the prosecutor's conduct was not so inflammatory or improper as to affect the verdict. First, the trial court gave numerous curative instructions to the jury.[4] Although rebuttable, there is a presumption that a jury follows the trial court's instructions. State v. Vanzant, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983). Second, the trial court noted on two separate occasions that the prosecutor's conduct, to the extent that it constituted error, was not intentional. For example, the State's prosecution of counts two and three of the indictment was supported by probable cause. See Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530 (1985)(citing Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668 (1978))("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by the statute, the decisions whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion"). Finally, contrary to the appellant's assertion, the evidence supporting the appellant's conviction is substantial. This issue is without merit.

b. The Appellant's Statements to Investigators

On January 9, 1993, the trial court conducted a preliminary hearing to

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[4]The trial court observed, "[T]his may be the most difficult case I've ever tried. It's been a hard case." With respect to the trial judge's conduct of the proceedings, we commend him for the effective use of currative instructions and for maintaining a level playing field.

determine the admissibility of the appellant's statements to Investigators Williamson and Collingsworth on September 24, 1992. The appellant contends that he did not knowingly, intelligently, and voluntarily relinquish his privilege against self-incrimination and his right to counsel. At the hearing, the appellant introduced no evidence. The State introduced the testimony of Investigators Williamson and Collingsworth and Sheriff Long. At the conclusion of the hearing, the trial court made the following findings:

> This interview, interrogation, doesn't feel in any way, viewing the totality of circumstances, like a violation of the defendant's constitutional rights. It appears in all respects to be voluntary. There are always some problems involved, whether it's length of time or soberness, sobriety, of the defendant, or the way questions are asked, whether there was a question of force or coercion. Here, no one, I think, questions the fact the defendant was treated humanely and courteously during his interrogation. It's mainly alleged it was the circumstances that coerced him.
>
> However, the real facts belie that assertion. He voluntarily came -- to the interview. He was advised fully and completely of his Miranda rights. It's clear he understood them. It's clear that he waived them. The time is not excessive. The conditions are not coercive. He was allowed to make a phone call. He did call.
>
> And I think any court would hold from those facts and circumstances that the statements were not the result of coercion or promises, that he was sober and rational at the time and that he understood his rights. He made a voluntary and effective waiver and his statement was voluntarily, intelligently, and understandably made.

At an evidentiary hearing, the State has the burden of demonstrating by a preponderance of the evidence that the appellant's statements were voluntary, knowing, and intelligent. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980). However, on appeal, if an appellant has been afforded an evidentiary hearing on the merits of a motion to suppress a statement given to law enforcement officials, the factual findings of the trial court have the weight of a jury verdict. State v. Makoka, 885 S.W.2d 366, 371 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Consequently, the trial court's ruling in a suppression hearing is presumed correct unless the evidence in the record preponderates against it. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994). The

defendant has the burden of showing that the evidence preponderates against a finding that a confession was, in fact, knowingly and voluntarily given. State v. Nakdimen, 735 S.W.2d 799, 800 (Tenn. Crim. App. 1987).

It is undisputed that the appellant was advised of his Miranda rights before making the statements to the investigators in this case. Additionally, the appellant signed written waivers of his constitutional rights. He raised no questions about the waivers. Nothing in the record indicates that he asked for an attorney or that he announced an intent to remain silent after the waivers were signed. Nevertheless, the appellant challenges the validity of the waivers.

The right to counsel and the right against self-incrimination may be waived, provided the waiver is made "voluntarily, knowingly, and intelligently." State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992)(citing Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966)).

> The relinquishment of the right must be voluntary in the sense that it is the product of a free and deliberate choice rather than the product of intimidation, coercion, or deception. Moreover, the waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Stephenson, 878 S.W.2d at 544-545. In determining whether the statement has been made knowingly and voluntarily, the court must look to the totality of the circumstances. Middlebrooks, 840 S.W.2d at 326 (citations omitted).

The appellant argues that his lack of education and his limited mental abilities combined with coercive circumstances precluded a voluntary, knowing, and intelligent waiver of his rights. Initially, this court has held that "[m]ental incapacity which does not render one incompetent to be a witness does not render his confession incompetent." State v. Green, 613 S.W.2d 229, 233 (Tenn. Crim. App. 1980). In other words, mental unsoundness does not render a confession invalid if the evidence shows that the confessor was capable of

understanding and waiving his or her rights. State v. Bell, 690 S.W.2d 879, 882 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1985). All that is required is that the defendant understand his or her rights and be capable of making a narrative of past events. State v. Ross, No. 03C01-9404-CR-00153 (Tenn. Crim. App. at Knoxville, June 15, 1995). Although the record contains evidence that the appellant had a limited education and was undergoing treatment for "nerves," there is virtually no evidence in the record to indicate that the appellant was not mentally competent to waive his rights.

However, the appellant also argues that the atmosphere in which his statements were elicited was unduly coercive and precluded a voluntary waiver of his rights. This court has observed that

> [i]n Tennessee, it, likewise, appears that police conduct may be deemed coercive in the context of a mentally unsound defendant, when such conduct would otherwise be viewed appropriate under normal circumstances.

State v. Wooding, No. 1177 (Tenn. Crim. App. at Knoxville, November 15, 1990). Again, there is no evidence in the record that the defendant is mentally unsound. Moreover, our examination of the totality of the circumstances surrounding this interview reveals a lack of intimidation, coercion, or deception. Rather, the record reflects that the appellant's relinquishment of his rights was the result of the appellant's free and deliberate choice. The evidence in the record does not preponderate against the trial court's findings. Accordingly, we uphold the admission of the appellant's statements.

c. The Victim's Statements to Examining Physicians

Following an examination of the record, we conclude that the testimony of Dr. Jones and Dr. Lynn was admissible under Tenn. R. Evid. 803(4).[5] The

[5]We note that the statements of the victim to her physicians included evidence of other crimes by the appellant which were arguably excludable pursuant to Tenn. R. Evid. 404(b). Specifically, the victim informed Dr. Jones that her father had poured cough syrup into her vagina, had fingered her vagina

and rectum, and had hit her "private areas" with a board. SAH told Dr. Lynn that a Dollywood baton and a gun had been placed in her body. First, the appellant does not properly raise this issue in his brief. Accordingly, this issue is waived pursuant to Tenn. R. App. P. 27(a)(4) and (7) and Ct. Crim. App. R. 10(b). Second, the appellant failed to object to the introduction of evidence of other acts introduced during Dr. Jones' testimony. It is a well-established rule that a defendant's failure to timely object to the introduction of evidence constitutes a waiver of appellate review of the issue. Tenn. R. App. P. 3(e) and 36(a); State v. Harrington, 627 S.W.2d 345, 348 (Tenn. 1981), cert. denied, 457 U.S. 1110, 102 S.Ct. 2913 (1982); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). Moreover, objections must be specific as to the grounds upon which they are based. State v. Weeden, 733 S.W.2d 124, 125-126 (Tenn. Crim. App. 1987). Tenn. R. App. P. 36(a) specifically directs that relief on appeal need not be granted "to a party responsible for an error or [to a party] who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." The appellant objected to the relevance of other acts evidence only during Dr. Lynn's testimony, remarking, "I mean it almost benefits our case if she was naming so many different things to different doctors, but we don't see how this is relevant ... ." This objection was overruled. The appellant did not request a jury-out hearing to determine the admissibility of SAH's statements concerning bad acts occurring outside the indicted period, although the record indicates that defense counsel was aware of the victim's statements and the contents of the statements prior to the testimony at issue. Tenn. R. Evid. 404(b)(1). The record demonstrates that no hearing was held.

In any event, the Dollywood baton allegations were charged in the indictment. We have already concluded that, although the State moved to dismiss the Dollywood baton counts at the close of their proof, the prosecutor's decision to include those counts in the indictment was supported by probable cause. Accordingly, the evidence concerning the Dollywood baton was admissible. Indeed, the situation in this case is closely analogous to the circumstance of an "open-dated" indictment charging sex crimes that occurred over a span of time and require the election of offenses at the close of the State's proof. In that context, this court has held that "[e]vidence of a prior sex crime that is necessarily included within the charge of the indictment is also necessarily relevant to the issues being tried and, therefore, is admissible." State v. Rickman, 876 S.W.2d 824, 827 (Tenn. 1994). The appellant does not argue that the counts were improperly joined, and, following a review of the record, we decline to so find.

However, evidence of crimes not included within the charge of the indictment was introduced through the doctors' testimony. Again, the doctors recounted the victim's allegations concerning fingering, being hit with a board, the placement of a gun in her rectum, and the placement of cough syrup in her vagina. (The last allegation may, in fact, have been a description of the events set forth in count 1 of the indictment, in light of medical testimony that the victim found it difficult to distinguish between her rectal and vaginal openings). Arguably, the highly unusual nature of the act alleged in the first count and the treatment of SAH with enemas when she was approximately three years old placed the appellant's motive at issue, despite the appellant's retraction at trial of his earlier admission. Rickman, 876 S.W.2d at 827; State v. Parton, 694 S.W.2d 299, 302 (Tenn. 1985); Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980); State v. Drinkard, 909 S.W.2d 13, 16 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995); State v. Hooten, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987). However, our supreme court has cautioned against confusing intent and motive with propensity and disposition to commit a crime. Parton, 694 S.W.2d at 303.

In any case, given the appellant's admission, the admissibility of the

record clearly indicates that the declarant's (the victim's) statements were made to medical doctors for the purposes of diagnosis and treatment. Contrary to the appellant's assertion in his brief, the fact that treatment was not given does not bar the use of this hearsay exception as long as the statements were made for the proper purposes. Cohen, Sheppeard, Paine, Tennessee Law of Evidence (1995) § 803(4).2, p. 550. See State v. Edward, 868 S.W.2d 682, 699 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993); State v. McLeod, No. 01C01-9103-CR-00091 (Tenn. Crim. App. at Nashville, September 9, 1993). Our supreme court has explained the rationale underlying this exception to the hearsay rule:

> [T]he declarant's motive of obtaining improved health increases the statement's reliability and trustworthiness. This motivation is considered stronger than the motivation to lie or shade the truth.

State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993). Thus, the pertinent inquiry is whether the declarant has a self-interested motive to tell the truth. McLeod, No. 01C01-9103-CR-00091.

This court has previously noted that our supreme court's decision in Barone, 852 S.W.2d at 219-220, distinguished between statements made in order to obtain diagnosis and treatment of medical or physical problems and statements made in order to obtain diagnosis and treatment of psychological or mental problems. State v. Williams, 920 S.W.2d 247, 256 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996). See also State v. Hunter, No. 01C01-9410-CR-00335 (Tenn. Crim. App. at Nashville, October 25, 1995), perm. to appeal denied, (Tenn. 1996). We observed that, when a patient seeks diagnosis and treatment of a psychological or mental problem, the declarant

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evidence concerning the Dollywood baton, and the medical testimony, any error was harmless beyond a reasonable doubt. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Moreover, the court, following the State's case-in-chief, instructed the prosecutor to avoid any further mention of alleged acts other than the act set forth in count 1 and, at the conclusion of the trial, did give a limiting instruction concerning evidence of other crimes.

might not feel the same necessity to speak truthfully. Id. However, in the instant case, the statements were clearly made in the context of a physical examination of the victim for the purposes of medical diagnosis and treatment. The fact that the information obtained might have been subsequently used in a psychological context did not foreclose the introduction of the statements under Rule 803(4). Thus, this court has held, "[S]tatements made by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment and may be admitted into evidence." State v. Rucker, 847 S.W.2d 512, 519 (Tenn. Crim. App. 1992). This court cited two reasons for this rule:

> (1) Physicians must be attentive to treating both the physical injuries and the emotional and psychological injuries which accompany child abuse, and the nature and extent of psychological problems will often depend upon the identity of the abuser.
> (2) Moreover, physicians have an obligation to prevent an abused child from being returned to an environment in which she cannot be protected from recurrent abuse.

(citing United States v. Renville, 779 F.2d 430, 437-438 (8th Cir. 1985))(emphasis added). Our supreme court, in State v. Livingston, 907 S.W.2d 392, 397 (Tenn. 1995), adopted the reasoning set forth in Rucker.

Moreover, it is clear from the record that the child understood the nature of the examination and the importance of responding to the doctor's questions truthfully. State v. Purvis, No. 02C01-9412-CC-00278 (Tenn. Crim. App. at Jackson, September 20, 1995); State v. Frierson, No. 01C01-9112-CC-00357 (Tenn. Crim. App. at Nashville, July 22, 1993), perm. to appeal denied, concurring in results only, (Tenn. 1995). See also Livingston, 907 S.W.2d at 396. First, the victim clearly had, on multiple occasions in the past, consulted medical doctors for both physical and psychological treatment. Moreover, the examinations by Dr. Jones and Dr. Lynn occurred in a setting that was clearly intended for the diagnosis and treatment of any physical ailments. Dr. Jones'

examination occurred in the emergency room at the East Tennessee Children's Hospital. The examination was a full physical examination. Dr. Jones' testified that she discussed with the victim why she had been sent to the emergency room and what the examination would entail, including cultures for the purpose of determining the presence of venereal disease. Dr. Lynn also testified that she was not SAH's attending psychiatrist, and she conducted a complete physical examination of SAH.

Nevertheless, because the victim did not testify, the appellant suggests that his right under the Sixth Amendment to the Constitution of the United States and Article I, Section 9 of the Tennessee Constitution to cross-examine and confront witnesses is implicated by the admission of the victim's statements to the medical doctors. However, in White v. Illinois, 502 U.S. 346, 112 S.Ct. 736 (1992), the Supreme Court of the United States addressed a factual situation similar to that in the instant case.[6] The defendant in White was charged with sexual assault upon a minor female. Id. at 349-350, 739. The victim gave certain statements to an emergency room nurse and a doctor for purposes of medical diagnosis and treatment. Id. The minor victim never testified at trial. "The state attempted on two occasions to call her as a witness, but she apparently experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying." Id. The statements made to medical personnel implicating the defendant White were admitted into evidence. The Supreme Court held that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the

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[6]Illinois Rev. Stat., ch. 38, § 115-13 (1989) provides:
> In a prosecution for violation of Section 12-13, 12-14, 12-15, or 12-16 of the 'Criminal Code of 1961,' statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

See White, 502 U.S. at 351 n.2, 112 S.Ct. at 740 n.2.

Confrontation Clause is satisfied. Id. at 356, 743.

The appellant's citation to State v. Williams, 598 S.W.2d 830 (Tenn. Crim. App. 1980), is similarly misguided. Williams clearly addressed fresh complaint testimony. Id. at 832. This court observed that

> a witness who has received a fresh complaint from the victim ... should be allowed to testify such a complaint was made. However, we do not agree a witness should be allowed to give details of the complaint when the victim does not testify.

Id. In Livingston, 907 S.W.2d at 395, our supreme court, while eliminating the doctrine of fresh complaint in cases involving child victims, noted that "evidence in the nature of fresh complaint may be admissible if it satisfies some hearsay exception." We have already concluded that the statements of the victim in this case fall within the purview of Tenn. R. Evid. 803(4).

d. Sufficiency of the Evidence

The appellant also challenges the sufficiency of the evidence supporting his conviction. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert. denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). "A jury verdict approved by the trial judge accredits the

testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073, 104 S.Ct. 1429 (1984). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, 507 U.S. 954, 113 S.Ct. 1368 (1993).

The appellant was convicted of rape of a child. Tenn. Code Ann. § 39-13-522. In order to convict a defendant under this statute, a jury must find (1) unlawful sexual penetration of a victim by the defendant, and (2) the victim was less than thirteen years old. Having thoroughly reviewed the record, we conclude that the evidence was sufficient to establish the elements of the offense beyond a reasonable doubt. Specifically, the appellant's admissions to various individuals and the medical testimony amply support the verdict.

e. The Special Jury Instruction

The appellant next asserts that the trial court should have instructed the jury that the appellant would be required, if convicted, to serve his entire sentence. Tenn. Code Ann. § 39-13-523 (1994 Supp.). When a trial court's instructions correctly charge the applicable law, the court does not err by refusing special requests. Tillery v. State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978). Our supreme court in State v. Cook, 816 S.W.2d 322, 327 (Tenn. 1991), observed that, in enacting Tenn. Code Ann. § 40-35-201(b) (1990), the legislature "said that where a defendant wants his trial jury to know the range of possible punishments resulting from convictions that he is entitled to have that information conveyed to the jury." However, in the instant case, the trial court instructed the jury that the appellant, if convicted, could receive a sentence "from a minimum of fifteen years to a maximum of twenty-five years." Rape of a child is a class A felony. Tenn. Code Ann. § 39-13-522(b). Accordingly, as a

standard, range 1 offender, the appellant was subject to a sentence ranging from fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112 (a)(1) (1990).

In 1994, the legislature amended Tenn. Code Ann. § 40-35-201(b) to include the following language:

> When a charge as to possible penalties has been requested ... , the judge shall also include in the instructions for the jury to weigh and consider the meaning of a sentence of imprisonment for the offense charged and any lesser included offenses. Such instruction shall include an approximate calculation of the minimum number of years a person sentenced to imprisonment ... must serve before reaching that such person's earliest release eligibility date.

The effective date of the amendment was July 1, 1994. The appellant committed the crime for which he was convicted on September 14, 1992. Thus, this provision is inapplicable to the instant case. This issue is meritless.

f. Sentencing

Finally, the appellant argues that his sentence is excessive. Review by this court of the length of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). Thus, the appellant bears the burden of showing that his sentence is improper. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption of correctness, however, only applies if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. Id. For reasons subsequently discussed in this opinion, we conclude that the trial court applied inappropriate sentencing considerations. Therefore, we do not defer to its sentencing determination.

In conducting a de novo review of the appellant's sentence, we must consider the following factors:

> 1. The evidence, if any, received at the trial and the sentencing hearing;
> 2. The presentence report;
> 3. The principles of sentencing and arguments as to sentencing alternatives;

> 4. The nature and characteristics of the criminal conduct involved;
> 5. Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
> 6. Any statement the defendant wishes to make in his own behalf about sentencing.

Tenn. Code Ann. § 40-35-210(b)(1990). General principles of sentencing are the potential or lack of potential for rehabilitation; the imposition of a sentence no greater than that warranted by the offense; the imposition of the least severe measure necessary to achieve the purposes for which the sentence is imposed; and the availability of alternatives to incarceration. Tenn. Code Ann. §§ 40-35-103(2)-(6)(1990).

The appellant received a maximum sentence of twenty-five years. Generally, the presumptive sentence is the minimum sentence in the range. Tenn. Code Ann. § 40-35-210(c) (1990).[7] However, if there are enhancement factors, but no mitigating factors, then a court may impose a sentence above the minimum in the range. Reviewing the record, we find no mitigating factors. With respect to the trial court's application of enhancement factor (6), relating to particularly great personal injury, this court has observed that, "clearly, rape is injurious per se to the body and mind of the victim. In this regard, the legislature has seen fit to enhance the offense of aggravated rape if a child is involved." State v. Salazar, No. 02C01-9105-CR-00098 (Tenn. Crim. App. January 15, 1992). See also State v. Carico, No. 03C01-9307-CR-00206 (Tenn. Crim. App. at Knoxville, April 3, 1996). The rape of a child statute has replaced aggravated rape of a child. Nevertheless, the reasoning is equally applicable. We have suggested that the amendment reflected the legislature's desire to protect children by extending the period of confinement for child rapists. State v. Bain, No. 03C01-9311-CR-00384 (Tenn. Crim. App. at Knoxville, August 21, 1995).

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[7]Pursuant to Ch. 493 § 1 [1995] Tenn. Pub. Acts, the presumptive sentence for a class A felony occurring on or after July 1, 1995, is the midpoint in the applicable range.

However, in contrast to Carico and Salazar, the record in this case is more than sufficient to show that "the mental disturbance was greater than that which is ordinarily involved in [the rape of a child]." Carico, No. 03C01-9307-CR-00206. The record supports the trial court's finding that "probably the girl had a lot of emotional and mental instability and then these acts upon her were the straw that broke the camel's back and ended up in her hospitalization in a mental hospital." Accordingly, the court properly applied enhancement factor (6). Similarly, the court properly applied enhancement factor (4), that the victim was particularly vulnerable due to a mental disability. Finally, we conclude that the application of enhancement factor (15), concerning the appellant's abuse of a position of private trust, was proper.

However, the trial court improperly applied the enhancement factor that the crime was committed under circumstances in which the potential for bodily injury was great. Tenn. Code Ann. § 40-35-114(16). The legislature has already recognized the potential for bodily injury in enacting the rape of a child statute and enhancing the punishment for the offense. Carico, No. 03C01-9307-CR-00206. Thus, this factor should not apply absent extraordinary circumstances. Id.

The trial court also improperly enhanced the sentence because the offense was committed for gratification. In State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993), our supreme court held that gratification is not an essential element of rape and enhancement factor (7) could only be applied where the evidence demonstrates that the rape was motivated by the defendant's desire for pleasure or excitement. See also Carico, No. 03C01-9307-CR-00206. However, there is no evidence in the record to support the application of this factor. The desire for pleasure cannot be presumed merely because the record does not reflect any other reason for the offense to have occurred. Salazar, No. 02C01-

9105-CR-00098.

In summary, our de novo review establishes the presence of three enhancement factors and no mitigating factors. We therefore conclude that the applicable enhancement factors in this case adequately support the sentence imposed.

III. Conclusion

Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

(Not Participating)_____
PENNY J. WHITE, Judge

_____
ANN LACY JOHNS, Special Judge