

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 18, 2025

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STATE OF TENNESSEE v. JOHN WAYNE HAMBY

Appeal from the Criminal Court for Cumberland County
No. CC21CR36 Gary McKenzie, Judge

No. E2025-00376-CCA-R3-CD

The Defendant, John Wayne Hamby, was convicted by a Cumberland County jury of rape of a child, for which he received a sentence of forty years' incarceration at one hundred percent service. On appeal, the Defendant claims that the evidence is insufficient to support his conviction and that the trial court erred by imposing an excessive sentence. Because we conclude that the Defendant's notice of appeal was untimely filed and that the interests of justice do not merit waiver of the untimeliness, we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

STEVEN W. SWORD, J., delivered the opinion of the court, in which TOM GREENHOLTZ and KYLE A. HIXSON, JJ., joined.

Jeffrey A. Vires, Crossville, Tennessee, for the appellant, John Wayne Hamby.

Jonathan Skrmetti, Attorney General and Reporter; William C. Lundy, Assistant Attorney General; Bryant C. Dunaway, District Attorney General; and Jessica Krebs and Randal L. Gilliam, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

A. TRIAL

On February 22, 2021, a Cumberland County grand jury returned an indictment charging the Defendant with one count of rape of a child.¹ At trial, witnesses testified that the minor female victim referred to the Defendant as “Dad,” even though he was her stepfather. The victim referred to herself as having been a “daddy’s girl” and recalled that the Defendant had always been in her life, even after he and the victim’s mother divorced. The victim described how she and the Defendant spent time together, including going on vacation and to ball games, and how he had purchased her first phone. Witnesses also testified that in August of 2020, the then twelve-year-old victim lived with her mother and two younger brothers. The victim’s mother was a pharmacist, but the Defendant was not employed and lived with his parents. The Defendant continued to play a consistent role in the children’s lives after the divorce, including picking them up from school daily while their mother was at work. The victim and her brother would occasionally stay overnight with the Defendant at his parents’ home as needed.

Witnesses testified that the victim and her brother spent the night with the Defendant at his parents’ home on August 28, 2020. The victim testified that, around 11:00 p.m. that evening, the Defendant entered her bedroom, told her they were going to go on a drive, and told her to leave her phone in her bedroom. The victim stated she told the Defendant she did not want to go, but he insisted. When they got into his car, and she attempted to sit in the back seat where she normally sat, the Defendant told her to sit in the front passenger seat. While driving, the Defendant told the victim that they were “going to smoke weed.” The victim stated she had never done this and objected, but at a stop sign, the Defendant forcibly pulled her face to within inches of his face, and he blew smoke into her face. She did not recall seeing the Defendant smoke weed previously, and that this frightened her. On the vehicle's navigation screen, the victim saw “Renegade Mountain Parkway” listed as the wooded area where they were driving. The victim testified that when they stopped on a type of ATV trail, the Defendant told her to get in the back seat of the car, and when she questioned him, he told her to “shut the f*** up and get in the back seat.” She testified she felt helpless because she had no phone and nowhere to run, so she complied.

The victim testified that the Defendant initially got on top of her with his clothes on. She testified that she was crying throughout the time in the back seat. She recalled the Defendant had stated “[y]ou can cry your eyes out. I don’t care. . . . This is happening.” She stated that she could feel that his penis was hard, and he was moving it back and forth on her private parts really hard. The Defendant then instructed her to take her clothes off, and he took his clothes off as well. The victim stated she pleaded with the Defendant not to do this to her and that she was on her period. The Defendant then told her, “I’m not

¹ The State elected at trial to submit the facts related to the digital vaginal penetration of the victim to the jury.

going to ruin your life that bad.” The Defendant made a further comment about how, when he had met the victim’s mother, she had a three-year-old daughter, and that he “had to watch her grow up.” The victim also recalled that the Defendant had apologized because his body did not look like the bodies of boys her age and because he did not have a “six pack.” The victim testified that she asked to go home many times.

The victim testified that the Defendant put his hands between her legs, put his fingers inside her vagina, and started licking her vagina with his tongue at the same time. The Defendant also licked her chest and mouth. The victim recalled she was in pain and that she was shaking; the Defendant asked her if she was shaking because she was scared or because it felt good, but she did not respond. She stated she tried not to look at the Defendant and only looked out the window. She felt unsure if she would get to go home.

After the digital penetration, the victim asked the Defendant to let her leave, but he did not. She testified that he then put her hand on his penis and forced her to perform oral sex on him. She stated she had asked him if, if she did this, he would take her home, and he had replied that if she continued to ask, she would not get to go home. Again, she did as he told her, with the Defendant using his hands to move her head. She also recalled that when she asked to go home, the Defendant had smacked her back three times with his hand, which she described as painful and had scared her. She stated the Defendant had never done something like this before. She stated she thought she would throw up as she gagged several times. She testified that he did not ejaculate. She started gagging, and the Defendant said that they could go home.

The Defendant allowed her to use the bathroom in the grass before they returned to the front seat and drove home. On the way home, the Defendant asked her if she felt closer to him, like more than a dad. The victim testified that she was scared and answered “yes,” but she stated she had been glad it was over. He told her not to tell anybody and that this would not be the last time that this happened. She stated he also instructed her not to act any differently. The victim testified that they arrived home after 12:00 a.m., and she just went to bed and cried, while she tried to decide whether to tell anyone.

The victim then testified she had looked at the Life360 app, which had been put on her phone by the Defendant. She identified a screenshot from her phone indicating that the Defendant had left the home at 11:18 p.m. and returned at 12:24 a.m. The victim told her mother and her best friend that she had been raped the morning after the offense. The victim also informed the police and then went to the hospital. She spoke with the Department of Children’s Services and with the District Attorney’s Office. Dr. Laura Boos, an expert forensic scientist in DNA analysis with the Tennessee Bureau of Investigation, testified that the swabs taken from the victim contained DNA consistent with the Defendant’s genetic profile.

In his case-in-chief, the Defendant called the victim's mother, who testified that the Defendant was a former United States Marine who served in Iraq and Afghanistan. The Defendant sustained a head injury during his service and was later diagnosed with post-traumatic stress disorder. The victim's mother recalled that the Defendant suffered from night terrors, hallucinations, sleepwalking, and a fear of the dark and of loud noises. She stated that the Defendant usually had no memory of his hallucinations or sleepwalking and that there were sometimes issues with medications which he received from the V.A. The victim's mother and the Defendant's mother, who also testified, noted that the Defendant was suffering from these same issues during August of 2020.

Upon this proof, the jury convicted the Defendant as charged.

B. SENTENCING

At the Defendant's June 21, 2024 sentencing hearing, the trial court considered mitigating and enhancing factors in determining the Defendant's sentence. The trial court first discussed the mitigation factors set forth in Tennessee Code Annotated section 40-35-113. The trial court found that factors (1) that the defendant's criminal conduct neither caused nor threatened serious bodily injury, and (11) that the Defendant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct did not apply. However, the trial court did find that mitigating factors (8) that the defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense, and (13) based on the Defendant's military service, did apply. But the trial court noted that factor (8) was only supported by lay testimony rather than expert testimony; thus, it only garnered "some consideration."

The trial court next discussed the enhancement factors set forth in Tennessee Code Annotated section 40-35-114. The trial court found that the following enhancement factors argued by the State applied and would be given "weight": (1) that the Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range, and (7) that the offense involved a victim and was committed to gratify the Defendant's desire for pleasure or excitement. The trial court found that these two enhancement factors "alone offset the [applicable] mitigation." The trial court then found enhancement factor (14) that the Defendant abused a position of public or private trust in a manner that significantly facilitated the commission or the fulfillment of the offense, also applied. The trial court stated that facts supporting the application of this factor were "so overwhelming and so strong . . . that it [alone] justify[d] . . . taking this sentence from the minimum to the maximum, because that factor is so heavy

in this case.” After considering the purposes and principles of the Sentencing Act, the trial court imposed a within-range² sentence of forty years’ incarceration.

The Defendant’s judgment of conviction was entered on June 21, 2024, and a corrected judgment was entered on September 30, 2024.³ The Defendant filed a motion for a new trial on November 13, 2024, and the State filed a response on January 30, 2025. The trial court held a hearing on the motion on March 4, 2025, and on March 18, 2025. The trial court subsequently entered a written order denying the motion for a new trial. The Defendant filed his notice of appeal on March 21, 2025.

II. ANALYSIS

On appeal, the Defendant claims that the evidence was insufficient to support his conviction of rape of a child and that the trial court erred in imposing the maximum sentence. The State responds that the Defendant’s appeal should be dismissed because his notice of appeal is untimely. We agree with the State.

Tennessee Rule of Criminal Procedure 33(b) requires that a motion for a new trial be made in writing “within thirty days of the date the order of sentence is entered” to preserve issues for appellate review. The thirty-day timeframe imposed by Rule 33(b) may not be extended by the trial court, *see* Tenn. R. Crim. P. 45(b)(3), and a trial court is without jurisdiction to consider an untimely filed motion for a new trial, *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). When a defendant files an untimely motion for a new trial, the trial court must dismiss the motion. *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989) (citing *State v. Williams*, 675 S.W.2d 499, 501 (Tenn. Crim. App. 1984), *abrogated on other grounds by State v. Thomas*, 687 S.W.3d 223, 242 (Tenn. 2024)). Moreover, the fact that a trial court nevertheless considers and rules upon an untimely motion for a new trial will not preserve the issues raised therein for appellate review. *State v. Lowe-Kelley*, 380 S.W.3d 30, 34 (Tenn. 2012); *Dodson*, 780 S.W.2d at 780. Accordingly, when a defendant fails to timely file a motion for a new trial, “all issues are deemed waived except for sufficiency of evidence and sentencing.” *State v. Bough*, 152 S.W.3d 453, 460 (Tenn. 2004), *abrogated on other grounds by Thomas*, 687 S.W.3d at 242.

² While the trial court found the Defendant to be a Range I, standard offender, pursuant to Tennessee Code Annotated section 39-13-522(b)(1), “a person convicted of a violation of [section 39-13-522] shall be punished [no lower than] a Range II offender.”

³ The corrected judgment was entered to clarify the provision of community supervision for life following release.

The Defendant's original judgment of conviction was entered on June 21, 2024. Accordingly, he had until July 22, 2024, to timely file his motion for a new trial.⁴ The record contains the Defendant's November 13, 2024 motion for a new trial. In his initial brief, the Defendant asserts that he filed a timely notice of appeal after the trial court denied his motion for a new trial. In his reply brief, however, the Defendant admits that his motion for a new trial was untimely. His motion for a new trial was 114 days late. Therefore, the trial court lacked jurisdiction to hold a hearing and rule on the untimely motion. *Dodson*, 780 S.W.2d at 780.

The Defendant further admits in his reply brief that, as a result of his untimely motion for a new trial, his notice of appeal is also untimely. Tennessee Rule of Appellate Procedure 4(a) requires that a notice of appeal be "filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from[.]" Certain specifically enumerated motions toll the 30-day timeframe for timely filing a notice of appeal, including a motion for a new trial. Tenn. R. App. P. 4(c). When a defendant files a timely motion for a new trial, "the time for appeal for all parties shall run from entry of the order denying a new trial or granting or denying any other such motion or petition." *Id.*; see also *State v. Byington*, 284 S.W.3d 220, 225 (Tenn. 2009). Since the motion for a new trial was untimely, the Defendant's notice of appeal here is untimely, as well.

The Defendant argues in his reply brief that his untimely notice of appeal should be waived because the timely filing of a notice of appeal is not jurisdictional and may be waived in the interest of justice. See Tenn. R. App. 4(a); *State v. Rockwell*, 280 S.W.3d 212, 214 (Tenn. 2007). "In determining whether waiver is appropriate, this court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case." *Rockwell*, 280 S.W.3d at 214 (quoting *State v. Broyle*, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App. Dec. 27, 2005), *no perm. app. filed*). Importantly, the appellant bears the burden of perfecting an appeal or else demonstrating that the interests of justice weigh in favor of waiver. *State v. Thomas*, No. W2022-00109-CCA-R3-CD, 2023 WL 328337, at *3 (Tenn. Crim. App. Jan. 20, 2023) (citing *State v. Jones*, No. M2011-00878-CCA-R3-CD, 2011 WL 5573579, at *1 (Tenn. Crim. App. Nov. 15, 2011), *perm. app. denied* (Tenn. Apr. 11, 2012)), *perm. app. denied* (Tenn. June 7, 2023).

First, we consider the nature of the issues presented for review. *Rockwell*, 280 S.W.3d at 214. The Defendant first argues that the evidence was insufficient to sustain his

⁴ Thirty days from entry of the judgment of conviction was on July 21, 2024; however, this date was a Sunday, so the next business day of July 22, 2024, was the deadline for a timely filed motion for a new trial. See Tenn. R. Crim. P. 45(a)(2).

conviction of rape of a child because “no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt” as the “testimony concerning [the Defendant’s] hallucinations, as well as medication mismanagement by the V[.]A[.], which were occurring during the time surrounding the charged offense, coupled with [the victim’s] testimony that [the Defendant] had never done anything like this before, created a reasonable doubt.”

“Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than eight (8) years of age but less than thirteen (13) years of age.” Tenn. Code Ann. § 39-13-522(a) (Supp. 2020). “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.” *Id.* at § 39-13-501(7). We review the sufficiency of the convicting evidence in the light most favorable to the State. *State v. Williams*, 558 S.W.3d 633, 638 (Tenn. 2018). Moreover, this court does not “reweigh the evidence . . . because questions regarding witness credibility, the weight to be given the evidence, and factual issues raised by the evidence are resolved by the jury as the trier of fact[.]” *State v. Curry*, 705 S.W.3d 176, 183 (Tenn. 2025) (citations omitted).

The nature of the Defendant’s challenge to the sufficiency of the convicting evidence weighs against waiver for two reasons. Principally, the Defendant’s challenge to the sufficiency of the convicting evidence is that no rational juror could have found the essential elements of the offense beyond a reasonable doubt in light of the testimony regarding his hallucinations and that he had never done something like this before. This argument seeks to have this court reweigh the evidence presented at trial, which we cannot do. *Id.* Regardless, this argument was presented to the jury, but the jury instead credited the victim’s testimony, as was its prerogative. Secondly, this portion of the Defendant’s brief contains no citations to authority or the record and instead relies upon conclusory statements. He does not, for example, explain precisely which elements of the crime of rape of a child the State failed to prove. Tennessee Rule of Appellate Procedure 27(a)(7) requires that an appellant present an argument that includes “citations to the authorities and appropriate references to the record” in support of that argument, and “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.” Tenn. R. Ct. Crim. App. 10(b); *see also State v. Bonds*, 502 S.W.3d 118, 144 (Tenn. Crim. App. 2016) (holding that this court will “refuse to speculate about which pieces of evidence [an appellant] may find objectionable” where the appellant’s brief “fails to specifically identify which evidence he deems improper” and makes only a “general complaint” about the evidence.). Because the Defendant’s challenge is based upon the weight of the evidence and because his argument is likely waived due to inadequate briefing, the nature of this issue weighs against waiver.

The only additional issue the Defendant raises is that the trial court erred in imposing the maximum sentence of forty years' incarceration. The Defendant generally argues that the trial court abused its discretion in imposing the maximum sentence by "not giv[ing] the proper weight to the mitigating factors when compared to [the] enhancement factors" and because "the sentence imposed by the trial judge . . . exceeded the State's recommended sentence by [ten] years, and put great weight on a factor not submitted by the State: the abuse of a position of public or private trust in the facilitation or commission of the offense." The State responds that the trial court did not abuse its discretion in imposing the maximum sentence.

We review a trial court's sentencing determinations for abuse of discretion. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). Additionally, where the trial court imposes a within-range sentence, "and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles" of the Sentencing Act, we afford its sentencing determinations a presumption of reasonableness. *Id.* A trial court abuses its discretion in the context of sentencing determinations by applying an incorrect standard of law or reaching a decision contrary to logic or reasoning, which causes prejudice to the complaining party. *State v. Bonds*, 502 S.W.3d 118, 166 (Tenn. Crim. App. 2016) (citing *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

The Defendant's argument that the trial court improperly weighed the enhancement and mitigating factors is not a valid basis for an appeal. *See State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008); *see also State v. Scott*, No. M2016-02362-CCA-R3-CD, 2018 WL 446203, at *8 (Tenn. Crim. App. Jan. 17, 2018), *perm. app. denied* (Tenn. May 16, 2018). Accordingly, the nature of the Defendant's challenge to the imposition of the maximum sentence weighs against waiver.

Next, we consider the reasons for and the length of the delay in seeking relief. *Rockwell*, 280 S.W.3d at 214. Based on his initial appellate brief, the Defendant appeared unaware of the untimeliness of his notice of appeal until the State argued that the appeal should be dismissed because the Defendant failed to file a timely motion for a new trial or a notice of appeal. The Defendant argues in his reply brief that the untimeliness of the notice of appeal was the mistake of counsel and should not result in detriment to the Defendant. Appellate counsel argues that "[r]ather than file a 'bare bones' motion for new trial in a timely manner, and subsequently seek to amend the motion after the transcript was prepared and filed, [c]ounsel waited until receipt of the transcript before preparing the motion for new trial." He does not provide any further explanation of why the Defendant would have been unable to file a "skeletal" written motion that could have served as a placeholder and been amended later. *See Lowe-Kelley*, 380 S.W.3d at 34 (recognizing "the possibility that the circumstances of a case may require a 'skeletal motion'" for a new trial

followed by a later amendment to ensure a motion is timely filed) (citing Tenn. R. Crim. P. 33, Adv. Comm'n Cmt.). This court has held that the absence of a reasonable explanation for the untimely filing of the notice of appeal weighs against waiver. *See, e.g., State v. Smith*, No. E2023-01416-CCA-R3-CD, 2024 WL 4554632, at *6 (Tenn. Crim. App. Oct. 22, 2024), *no perm. app. filed*; *State v. Manning*, No. E2022-01715-CCA-R3-CD, 2023 WL 7439203, at *5 (Tenn. Crim. App. Nov. 9, 2023) (“[T]he absence of an apparent reason for the delay weighs strongly against a waiver[.]”). We do not find the Defendant’s explanation reasonable in this case, and the nearly five-month delay in filing a notice of appeal was substantial. Accordingly, the Defendant’s reasons for and the length of the delay in seeking relief weigh against waiver.

The final *Rockwell* factor considers “any other relevant factors presented in the particular case.” *Rockwell*, 280 S.W.3d at 214. Among the “other relevant factors” are whether the defendant acknowledges the late filing, requests a waiver of the timely filing requirement, or responds to the State’s argument seeking dismissal of the case. *Id.*; *Manning*, 2023 WL 7439203, at *6. Here, the Defendant responds to the State’s argument in his reply brief seeking waiver, but in a rather brief and conclusory manner. The Defendant requests that this court waive the defect in the interest of justice because he relied upon counsel, and any untimeliness in the filing of the notice of appeal was the fault of counsel and should not be held against the Defendant. Additionally, the Defendant submits that the untimeliness of the notice of appeal should be waived because the severity of his “substantial” sentence is “especially important” and the delay in the filing of the motion for new trial and notice of appeal “did not substantially affect the need for an orderly process of expediting cases.” Other than these brief and conclusory statements, the Defendant does not address the *Rockwell* factors in his reply brief. We reiterate that the appellant bears the burden of demonstrating that the interests of justice weigh in favor of waiver. *Thomas*, 2023 WL 328337, at *3. The Defendant has not satisfied that burden. Accordingly, we conclude that the interests of justice do not merit waiver of the Defendant’s untimely notice of appeal.

III. CONCLUSION

Following our review of the record and based upon the foregoing analysis, we conclude that the Defendant’s motion for a new trial and notice of appeal were untimely filed. Because the interests of justice do not merit waiver of the untimeliness of the Defendant’s notice of appeal, his appeal is dismissed.

S/ STEVEN W. SWORD

STEVEN W. SWORD, JUDGE