

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

On Remand from the Supreme Court, February 10, 2023

STATE OF TENNESSEE v. JOHNNY DEWAYNE BOYD

Appeal from the Circuit Court for Giles County
No. 2019-CR-15099 Stella L. Hargrove, Judge

No. M2021-01057-CCA-R3-CD

Defendant, Johnny DeWayne Boyd, was convicted by a jury of rape of a child and incest. The trial court imposed an effective thirty-year sentence in the Department of Correction. On appeal, Defendant contends (1) the trial court erred in denying his motion to dismiss due to the State's failure to file a bill of particulars, and (2) that the trial court abused its discretion in denying Defendant's motion to continue trial after a court security officer tested positive for COVID-19 and by failing to comply with the Tennessee Supreme Court's Order on COVID-19 protocol. Following a review of the record, the briefs and oral arguments of the parties, we affirm the judgments of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and JOHN W. CAMPBELL, SR., JJ., joined.

John S. Colley, III, Columbia, Tennessee, for the appellant, Johnny DeWayne Boyd.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General, Benjamin A. Ball, Senior Assistant Attorney General; Brent A. Cooper, District Attorney General; and Emily Crafton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arose from the sexual abuse of a ten-year-old child by Defendant. A jury convicted Defendant of rape of a child and incest as charged in a superseding indictment. Defendant was sentenced to thirty years at 100 percent by operation of law on the rape of a child conviction and three years as a Range I offender on the incest conviction. The trial court ran the two counts concurrently with each other for an effective thirty-year sentence.

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Defendant appealed alleging that the State's bill of particulars was inadequate and that the trial court failed to follow COVID-19 protocol at trial. This court dismissed the appeal because the record showed that the motion for new trial was untimely filed which in turn rendered the notice of appeal untimely. Neither party raised the timeliness of the motion for new trial or notice of appeal as an issue on appeal. Defendant filed an application for permission to appeal to the supreme court. After Defendant filed his application for permission to appeal, the trial court supplemented the record with an order and an affidavit from the Giles County Clerk indicating that the clerk's office was closed due to inclement weather on the day the motion for new trial was to be filed, Friday, February 19, 2021. Because Defendant filed the motion for new trial on Monday, February 22, 2021, the next available day for filing, the motion for new trial was timely filed. Based on the supplemented record, the supreme court granted Defendant's application for permission to appeal and remanded the case to this court for consideration of Defendant's issues as mentioned above.

Facts and Procedural History

Bill of Particulars

On December 12, 2018, the Giles County Grand Jury returned an indictment against Defendant charging him with rape of a child, a Class A felony, and incest, a Class C felony, "on or about the 8th of October 2018." See T.C.A. §§ 39-13-522, 39-15-302. The case was set for trial on December 2, 2019. However, on November 27, 2019, the State moved to amend its indictment. The court granted the motion and re-set the case for trial. On December 11, 2019, the State obtained a superseding indictment identifying the commission of both offenses during a period of time on or about October 1, 2018 to November 1, 2018.

On January 16, 2020, Defendant filed a motion for bill of particulars requesting "the location, the means of penetration, and date of each alleged crime." Following a case status hearing on February 25, 2020, the State signed an agreed order "to provide bill of particulars within 10 days setting forth the manner of penetration and date (according to victim) for each incident alleged under count 1." On April 27, 2020¹, the court held a status conference. It was discovered during that conference that the State had failed to comply with the order granting the motion for a bill of particulars. The prosecutor denied ever receiving Defendant's motion for bill of particulars despite "defense counsel having a copy of a fax transmission to the District Attorney General's Office" and the prosecutor's

¹ The trial court's order from the hearing notes the date as April 27, 2020 and other documents in the technical record indicate the status conference was set for April 27, 2020; however the transcript indicates the hearing took place on April 28, 2020.

signature on the February 25, 2020 order agreeing to respond to the motion within ten days. However, the State did identify the manner of penetration as “penile penetration [by Defendant] of the minor victim’s genital openings” but did not include a date of the offense. When questioned by the trial court, the prosecutor stated that she had talked to the victim since the February status hearing but was unable to provide any additional time period other than the time period identified in the indictment. Based on the foregoing, Defendant made an oral motion to dismiss the indictment. The trial court entered a written order² denying Defendant’s motion to dismiss; however, relying heavily on *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991), the trial court held that it could not determine whether deficiencies in the State’s response hampered Defendant’s defense or otherwise inured to his prejudice until the case had been tried.

The trial was scheduled for Monday, October 15, 2020. As will be discussed in more detail below, Defendant filed a motion to continue the trial when it was revealed that a court security officer had tested positive for COVID-19 on October 12, 2020, the Friday before the scheduled trial date. When the trial court denied the motion to continue, Defendant filed an extraordinary appeal to this court pursuant to Rule 10 of Tennessee Rules Appellate Procedure. This court denied the application for extraordinary appeal, and the trial commenced as scheduled on October 15, 2020.

The State began its proof with Lieutenant Shane Hunter, an officer in the Giles County Sheriff’s Department. Lieutenant Hunter testified that on the evening of November 9, 2018, he was notified by the Department of Children’s Services (“DCS”) of an allegation of sexual abuse. Lieutenant Hunter assisted a DCS representative, Amy Moore, in gathering basic information, and together they went to the victim’s residence. The victim lived with her mother, her brother, and Defendant who was her mother’s husband. Lieutenant Hunter spoke with Defendant and the victim’s mother while Ms. Moore spoke with the victim in another room. Based on her conversation with the victim, Ms. Moore recommended a forensic interview for the victim.

The forensic interview occurred the next morning at A Kid’s Place, a satellite DCS office. The victim was accompanied to the forensic interview by her mother and her brother, but they were not present, nor did they watch the victim’s interview. Lieutenant Hunter observed the forensic interview from another room. Lieutenant Hunter spoke briefly with the victim’s mother at the sheriff’s department after the interview and asked her to contact Defendant to request that he come to the sheriff’s department for questioning.

² The trial court’s order was signed by both the Honorable J. Russell Parkes and the Honorable Stella L. Hargrove, noting that prior to April 27, 2020, Judge Hargrove had presided over Defendant’s case, but that due to complications associated with the COVID-19 virus, Judge Parkes heard all motions on April 27, 2020.

Defendant arrived at the sheriff's department "late afternoon" the same day. Lieutenant Hunter recalled that Defendant was "walking perfectly fine" and was not using a wheelchair or a walker to get around. After being advised of his rights, Defendant agreed to talk. When asked whether he was on any medication that might impair his ability to understand his rights, Defendant revealed that he had been taking prescription pain medication for a back surgery but had stopped taking them because he had a "high tolerance to pain." Lieutenant Hunter testified that he is "very cautious" when interviewing someone who might be in pain or uncomfortable. Lieutenant Hunter testified that the interview lasted between an hour and an hour and a half and that Defendant did not appear to be in pain or in any discomfort.

Defendant told Lieutenant Hunter that the victim's mother told him about the victim's allegations the night before he had come in for the interview. Defendant denied that he had touched the victim inappropriately, but that if he had, it was accidental. Defendant believed the victim had made up the allegations because she had recently spoken with her biological father whom Defendant described as "a deadbeat." Lieutenant Hunter was aware that Defendant was not working during the time period of the victim's claim. The victim's mother was the primary provider of the family.

Because the allegation involved penile penetration, Lieutenant Hunter asked Defendant questions about his sex life and whether his anatomy had identifying characteristics. Defendant revealed that he and the victim's mother had engaged in sexual acts since his surgery. Defendant denied having any unusual characteristic about his body until Lieutenant Hunter asked him whether he had three testicles. Defendant admitted that he did. Lieutenant Hunter explained that he had this information about Defendant before interviewing him, but he was not asked how he gained this information

Because the victim had tested positive for chlamydia, Lieutenant Hunter obtained a warrant for a urine sample from Defendant. The warrant was obtained November 20, 2018, but the sample was not acquired until December 17, 2018. Although Defendant tested negative for chlamydia, he was not ruled out as a suspect. On November 27, 2018, Lieutenant Hunter filed a petition to remove the victim from the custody of her mother. His reasons for filing the petition were the victim's positive test for chlamydia and Defendant's jailhouse phone conversation with his adult daughter wherein he told his daughter, "we got to figure out a way to get rid of [the victim]."

Lieutenant Hunter was also concerned that six days after the victim's positive test for chlamydia, the victim's mother had still not filled the prescribed medication for the victim, and although Defendant was to have no contact with the victim, after he had been released from jail, Defendant updated his Facebook status to reflect that he and the victim's

mother were “together.” In the petition, the victim’s mother reportedly agreed that it was “best” that the victim not live with her.

Lieutenant Hunter acknowledged that when he took out a warrant for Defendant’s arrest, he put down “on or about October 8, 2018,” as the date of the offense. He clarified that the victim did not provide a specific date or specifically identify October 8, 2018, as the date of the offense. In his experience, child sex abuse victims “very rarely” provide a specific date. He used “on or about October 8, 2018” as the offense date because the victim stated that the crime had occurred when she was on fall break, and he knew that the Giles County Public Schools had their fall break the week of October 8, 2018. During the course of the investigation, Lieutenant Hunter learned that the victim’s mother work records showed that she was not working on October 8, 2018. Because the victim had alleged that the offense occurred when her mother was not at home, he confirmed that a superseding indictment was then obtained revising the date of the offense to a range of on or about October 1, 2018 to November 1, 2018. On cross-examination, he confirmed that he identified October 8, 2018, as the offense date when he testified before the grand jury. A copy of the original indictment with an October 8, 2018 offense date was made an exhibit without objection. Despite revising the date of offense, Lieutenant Hunter agreed that he felt comfortable that the offense occurred “some time the week of October 8th through 12th, the week of fall break, for the Giles County school system.”

Lieutenant Hunter testified that Defendant’s interview was recorded on a video recording device. The recording of the interview was not played for the jury and is not a part of the appellate record. Lieutenant Hunter confirmed that Defendant denied the allegations “multiple times” during the interview. Defendant spoke briefly about a prior accusation made by the victim against Defendant in 2016. DCS dismissed the allegation and closed the case. Lieutenant Hunter did not work on the prior case.

The victim’s mother testified that she and Defendant got married in September 2014. She and Defendant did not have any children together. The victim’s mother had two children from a previous relationship who lived with her and Defendant. She testified that in November 2018, the victim had not seen her biological father in two years and had not spoken to him in over a year.

The victim’s mother testified that she learned about the allegations when Lieutenant Hunter and a DCS worker came to her home on November 9, 2018, after she had finished her 4 a.m. to 1 p.m. shift at Walmart. Defendant was not employed at the time and had not worked since September 3, 2018. The victim’s mother testified that her son worked the evening shift at Walmart and that he was routinely at home in the mornings during her shift while she was at home in the afternoons and evenings during his shift. Based on their work schedules, Defendant was never alone with the victim.

The victim's mother recalled telling Lieutenant Hunter that the last time she and Defendant had sex was before September 3, 2018, his last day of work. She told Lieutenant Hunter that Defendant would not use protection during sex and would use a towel to clean up after ejaculation. When confronted with Defendant's statement that she and Defendant had sex after his back surgery, the victim's mother denied Defendant had lied and instead blamed her memory. She testified that she had been under a lot of stress as the family's sole breadwinner and Defendant's caregiver.

On cross-examination, the victim's mother maintained that between Defendant's back surgery on October 3, 2018, and November 8, 2018, she and Defendant did not have sex because he was "physically unable due to his spinal fusion." She recalled that Defendant could not stand on his own and needed assistance getting around and using the restroom. She testified that Walmart permitted her to adjust her schedule so that she could tend to Defendant as he recovered from surgery. Her timecard at Walmart was admitted as an exhibit and showed that she did not work October 3-9, October 13-14, and October 20-21.

The victim's mother testified that the victim underwent a sexual assault examination after the forensic interview. The victim had not suffered physical trauma but later tested positive for chlamydia. She did not know how the victim could have contracted chlamydia because neither she nor Defendant tested positive for the disease. However, the victim's mother did not get tested until March 2019. The victim's mother did not have the prescription filled for her daughter because she could not afford it.

She did not recall calling the director of A Kid's Place after the forensic interview to tell her that Defendant was sometimes washing the bedsheets when she came home from work. At trial, she testified that it was not uncommon for Defendant to launder bedsheets even after his back surgery. He managed to "shuffle" around, but he could not pick up anything heavy and he helped with some of the chores he could manage.

Without objection, Lisa Milam of the Our Kids Center, testified as an expert in forensic social work relative to child sexual abuse. Our Kids Center is an outpatient clinic that provides forensic medical evaluations when there have been allegations of child sexual abuse. Ms. Milam saw the victim at the Lawrenceburg satellite location which is the A Kid's Place Child Advocacy Center on November 14, 2018, based on an allegation of penile-vaginal penetration by the stepfather. She also spoke with the victim's mother who told her about the 2016 allegation of improper touching. According to the victim's mother, that allegation was unsubstantiated by DCS after it was revealed that the victim "misunderstood" what the word "sex" meant. The victim's mother told Ms. Milam that the victim had thought sex was the same as hugging.

Ms. Milam testified that the victim's mother was protective of her daughter but was "struggling to believe" the new allegation because she believed that she and her son "had been providing essentially 24[-]hour supervision day and night in an effort to prevent any possibility of an allegation." Additionally, Defendant had injured his back in September 2018, requiring surgery on October 3, 2018. The victim's mother did not think Defendant would have been "physically capable of doing anything to [the victim] due to his health."

The victim, who was ten years old and in the fourth grade, referred to her genital area as "the line," her buttocks as "bottom," and her breasts as "circles." She identified Defendant as her "daddy" although he was her stepfather. She knew that it was best to tell someone if she had ever been touched in the genital area. The victim stated that Defendant put "his private in [her] line and told [her] to stay still ... and he pushed upward." The victim stated that this contact hurt and occurred more than once. The victim told Ms. Milam that Defendant had "tried to do it three times this year but now he's in jail." The last time Defendant tried to put "his private" in "her line," "he couldn't, and he stopped." When asked about the third or last time, the victim replied that it occurred "in October after fall break." The victim denied that anyone other than Defendant had touched her genital area. The victim stated that Defendant had also touched her "circles" or breasts but it was accidental. When asked whether Defendant did anything else or asked her to do anything, she said, "he would ask me to love on him." When asked what he wanted her to do "to love on him," she answered, "to do something he likes." Instead of giving her hints, Defendant wanted the victim "to figure it out."

Ms. Milam added a supplement to her report when the victim tested positive for chlamydia, a sexually transmitted disease. Ms. Milam explained that a child is commonly tested for sexually transmitted and infectious disease whenever there is an allegation of penile/vaginal penetration. Ms. Milam informed the victim's mother about the positive test on November 21, 2018, and arranged for the medication, azithromycin to be filled at the Walmart where the victim's mother worked. Ms. Milam testified that the medication was between \$4-\$10, and "not terribly expensive." Had she known that the victim's family could not afford the medication, Ms. Milam would have arranged for the Our Kids Center to pick up the cost. She became aware only later that the medication was never picked up.

Heidi Dennis, a pediatric nurse practitioner at Our Kids Center, testified as a pediatric nurse practitioner expert with a specialty in child sex abuse. She examined the victim on November 14, 2018, and described the victim's examination as "normal." She testified that the victim had entered puberty and was starting to develop. The victim submitted a urine sample which tested positive for chlamydia. Ms. Dennis said that chlamydia is easily treated with standard antibiotics. She called in the prescription on November 21, 2018, and learned from a DCS investigator on November 29, 2018, that the victim had not received her medication. She explained that she called in the generic brand

of the medication with an estimated cost of \$5-\$10. She was unaware that the victim's mother could not afford the medication; had she known, she would have arranged to have Our Kids pick up the cost. She maintained that a child is never denied medication due to an inability to pay. Ms. Dennis explained that if left untreated, a child the victim's age, could develop pelvic inflammatory disease which is "very dangerous" and would have to be treated in the hospital with IV antibiotics. She acknowledged that chlamydia can "self clear" but if left untreated, could develop into something "really dangerous" and create further complications such as infertility or issues with the uterus or fallopian tubes. Ms. Dennis testified that chlamydia can only be transmitted sexually. She affirmed that penetration of inside the labia is sufficient contact to transfer chlamydia. She affirmed further that "full contact" of the penis in the vaginal canal is not necessary for chlamydia to be transferred.

Dr. Blake Boyett, an orthopedic and spine surgeon at Athens-Limestone Hospital in Athens, Alabama, testified that he treated Defendant for low back pain and degenerative arthritis in his lower back. Dr. Boyett performed a minimally invasive fusion in Defendant's lower back involving smaller incisions and requiring less recovery time. Defendant was given a total of three doses of antibiotics intravenously, one dose before the operation, and two doses after the operation. He received the last two doses on October 3, 2018, and October 4, 2018. Dr. Boyett agreed that the antibiotic Defendant received covered a range of different bacteria and could "definitely" clear up a sexually transmitted disease.

Jennifer Hood, counselor at Richland Elementary described the victim as a "[v]ery sweet child, very quiet, and kind" and "a very good student." Ms. Hood testified that the victim had asked to talk privately after a guidance class on bullying and "making good choices." During the class, students were advised to talk to a trusted adult if they felt unsafe. Ms. Hood made a referral to DCS when the victim reported that her mother's "boyfriend" had been touching her inappropriately. Ms. Hood recalled that the victim transferred to another school shortly after the referral.

Cindy Powell, the forensic interviewer at A Kid's Place in Lawrenceburg interviewed the victim on November 10, 2018. During the interview, the victim circled certain anatomical parts on the drawing of a male and female body. The drawings were admitted as exhibits. Ms. Powell agreed that it is "usually very difficult" for a child to give a specific date for when an offense occurred and specifying a date becomes even more difficult if the abuse has been ongoing. A child may however, associate the offense with a holiday or a birthday. Ms. Powell stated that an interviewer will attempt to correlate the abuse to a time frame. Ms. Powell saw the victim twice. The first time was on September 6, 2016. She confirmed that those allegations were determined by a team of people from different organizations known as the Child Protective Investigative Team to be unfounded.

DCS closed its investigation of the 2016 allegation, and no prosecution was brought. After reviewing her notes of the 2016 allegation, Ms. Powell testified that there were similarities between the 2016 and the present case.

The victim's father testified that the victim was placed in his custody in June 2019, due to the underlying case. Due to his schedule after joining the Navy, he did not often see the victim. In November 2018, he came to Tennessee to check on the victim when he was notified by the victim's mother about the allegations. Until the court hearing in November 2018, it had been six months since the victim's father had talked to, or seen the victim.

The victim testified that she told her guidance counselor her stepfather "was raping [her]." The victim was "at least in the fourth grade" at the time and she was persuaded to confide in her guidance counselor after watching a video on identifying child abuse. The victim testified that the offenses occurred "during the day" when her mother and her brother were not home. She testified that her mother was either at work or shopping, and her brother was at work or with his friends.

The victim testified that Defendant would approach her by asking her if she "want[ed] some loving." The victim expected a "hug" or a "kiss on the cheek." Instead, Defendant instructed her to go to the bedroom he shared with the victim's mother and lie down on the bed. Defendant would get on top of her and put his "private part" in her "line" and move "up and down." She testified that she knew that he had penetrated "her line" with his "private part" because she could feel it, and it was painful. She stated that she saw Defendant's penis "[o]nce" when he took it out of his underwear and told her "to suck on it."³ She observed "pee" come out of his penis. Defendant had her grab a towel which he used to wipe the "pee" off the bed. She could not remember the last time the offense occurred. She testified that Defendant would have her remove basically all of her clothing, and he would do the same. Although Defendant forbade her from telling anyone about the incidents, the victim told her brother in addition to her guidance counselor and "the lady at the therapy place." The victim was not certain whether she would be able to identify Defendant in the courtroom because "it's been awhile," and she had forgotten what he looked like. After looking around the courtroom, she identified Defendant as the man who sexually penetrated her.

The victim recalled that Defendant underwent back surgery in October 2018, because her mother stayed home to take care of him as he recovered. She "d[i]dn't

³ Defendant objected after the victim concluded her testimony outside the presence of the jury. Upon agreement of the parties, the trial court gave the jury a limiting instruction to consider only the proof of vaginal/penile penetration for the element of penetration in count one.

remember the day” the offenses occurred, but said it was before but not after Defendant’s back surgery. The victim testified that Defendant had stopped “raping [her]” after she told her mother. She told her mother about the “rape” one time but could not recall when. Based on the testimony of the prior witnesses, the victim appeared to be referring to the events that led to the 2016 investigation by DCS. In her discussions with her guidance counselor, the victim indicated she did not tell her mother when Defendant “started again.”

At the close of the State’s proof, Defendant moved for judgment of acquittal arguing that the victim’s testimony about when the rape occurred was inconsistent with the State’s theory and the indictment that the rape occurred after October 3, 2018, the day of Defendant’s back surgery. The trial court denied the motion because the indictment alleged that the offense occurred “on or about” October 1, 2018 to November 1, 2018.

Jessica McKinney, the DCS case investigator during the 2016 allegation, testified for the defense. The collective case file was admitted as an exhibit during her testimony. On cross-examination, Ms. McKinney testified that the 2016 case was closed due to inconsistencies in the victim’s interview about the offense. However, Ms. McKinney confirmed that the classification to close out the 2016 case was not signed by a representative of the District Attorney’s Office, Lieutenant Hunter, or Ms. Powell, the forensic interviewer.

Defendant also testified and denied that he had any sexual contact with the victim. He confirmed that he was interviewed by Lieutenant Hunter in November 2018 for about an hour. He reviewed the transcript of the interview and counted ninety-ones times that he denied the allegations. On cross-examination, Defendant testified that the allegations against him were “a big lie” made up by the victim. Although both the victim’s mother and the victim’s father testified that the victim had not talked to her father in about a year, Defendant maintained that the victim “made up” the allegations because she had recently talked to her father and Defendant had scolded and disciplined her “the night before.”

Defendant acknowledged that the victim had previously accused him of sexual abuse in 2016 and as a result, he “refused to be alone with her” and insisted that he was never alone with the victim. He chose not to move out because he “would never abandon [his] kids” and he had been “raising [the victim]” for four years.

Defendant testified that he was unable to walk or get around without assistance “close to a month” after his back surgery on October 3rd. He was able to walk and drive himself to the sheriff’s department to talk to Lieutenant Hunter on November 10th. He stated that the victim once saw him naked by accident when he walked out of the shower. He returned to the bathroom when he saw her. He testified that he was tested for chlamydia when he learned that the victim had tested positive for it. He recalled being “tripped out”

by the news. He got tested to determine whether he had “caught anything” because he had heard that one could “catch it from sitting on the toilet[.]” He denied that he gave her chlamydia.

Thirty minutes into the jury’s deliberation, the trial court received word that the jury had two questions: “Does the offense have to occur during the date for the indictment. And then it says, number two, on or about. What does that mean?” Without the jury present, the trial court discussed the questions and proposed responses to the questions with the attorneys. To the first question, the trial court and the parties realized during their discussion that the jury had the original indictment with the offense date of “on or about October 8, 2018” which had been admitted as an exhibit. The State recalled that the superseding indictment was read “out loud to them,” but they did not have a copy. The transcript indicates that by agreement of the parties, the jury received written instruction from the trial court “spell[ing] out” the date of the offense as written in the superseding indictment: “on or about October 1, 2018 to November 1, 2018,” rather than giving the jury a copy of the superseding indictment. To the second question, the parties agreed to instruct the jury to “please refer to page four of the charge ... you should rely on your own common sense and everyday experience.” It appears from the record that written responses were sent to the jury and they were not brought in for the answers to the questions.

At the hearing on Defendant’s motion for new trial, the victim’s mother testified that she assisted Defendant in preparing for trial. In preparing for trial, the defense focused on the victim’s fall break. However, she admitted that she had received a copy of the indictment which identified the period of offense of on or about October 1, 2018 to November 1, 2018. The trial court denied Defendant’s motion for new trial. In addressing the issue regarding the bill of particulars, the trial court considered the time span of the indictment and the age of the victim, and found that Defendant “was not greatly adversely affected by the response of the State, or non-response of the State in answering the Bill of Particulars[.]” The trial court held that the State “properly provide[d] discovery and answered the Bill of Particulars in the best way that the State knew how.”

Motion to Continue and COVID-19 Protocol

The case was set for trial on October 15, 2020. Defendant moved to continue the trial because a security officer at the Giles County courthouse had tested positive for the COVID-19 virus on Monday, October 12, 2020. When the trial court denied Defendant’s motion to continue the trial, Defendant filed an application for an extraordinary appeal pursuant to Tennessee Rule of Appellate Procedure 10(a). In his application, defense counsel stated that he was informed of the denial via email. Defendant filed his application for an extraordinary appeal approximately two hours after receiving news of the trial court’s decision. This court denied the application for an extraordinary appeal. *See State*

v. Johnny Boyd, No. M2020-01426-CCA-R10-CD (Tenn. Crim. App. Oct. 15, 2020). Based on the statements attributed to the trial court, this court found that the lower court was following the guidelines and restrictions established by the supreme court. This court held that Defendant had “failed to demonstrate how the trial judge has not complied with any of the supreme court’s mandates.” The trial commenced on October 16, 2020, the day after this court denied Defendant’s application for extraordinary appeal.

Before the panel of prospective jurors was brought into the courtroom, the trial court discussed how the voir dire would be conducted:

Let me tell you how we are doing it. We can only seat [thirty-two] under our protocol. So, . . . what I have done in Maury (County) on two trials is randomly, I think this is random, the first [thirty-two] people that show up will go into the courtroom with masks. Then I will draw from that bucket, whatever, as many names as I can, because we have a special place designated for that, . . . And they are not going to be sitting there.

So how many do we designate for the potential jurors?

Okay. We will draw [sixteen], . . . And then you all, they are going to be a little spaced out but you all do the best you can.

To assure each side the effectiveness of the court’s protocol, the trial court referenced an earlier trial in a smaller courtroom. Neither party expressed concern or had questions about the trial court’s implementation of the COVID-19 protocol in the courtroom.

The trial court addressed the venire regarding the COVID-19 protocol before the parties engaged in voir dire:

Good morning to everyone. Thank you all for being here. I have got 32 potential jurors that we can safely seat. I want each of you to know that we have been very careful in this courthouse. We want you to be as safe as possible. We have a protocol that we judges established many, many months ago, particularly in the face of some people testing positive off and on throughout the last many months. We have followed that protocol to the letter and we feel like we have a safe environment for you. I hope that you agree.

The trial court then explained how the courtroom was physically distanced:

We have got you spaced out. We have our juror seats spaced out. We have 14 up here, lawyers. That is all we can do. And we have our six foot radius.

When the lawyers question the potential jurors, you will have to stand back some. But we know we have a six foot distance to your table, so that's a pretty good gauge.

Next, the trial court emphasized the importance of the venire to feel safe in the courtroom:

So I wanted to say those things to you, that your safety and your health is paramount to anything else going on. We are trying to move our cases. We have a backlog, ever since about February or March. We are hoping to get going, but in a safe manner. And so if you have any questions, let us know.

The trial court then addressed the need for the venire to wear masks and identified the court personnel who was to assist them and the trial court in addressing any concerns:

Be sure to wear your masks. These are clear, somewhat. They are not very comfortable because plastic is not as breathable as cotton; however, we need those for the lawyers to look a[t] your faces as well as they can. They like to judge demeanor when picking a jury. That is important to you all as well. But I hope you feel safe. And any time you don't, please let Sarge, who is going to be the one working with you primarily – we call him Sarge. He is a court officer. He will bring to me any questions that you have, so don't hesitate.

During the first round of voir dire, defense counsel stated that he could not hear the jurors, in part, because of the masks and the physical distancing:

Judge, I can't – I'm sorry. I know I'm old and I'm deaf and that's half of it, but the other half is these masks and how far away they are. I apologize, I just can't hear these jurors.

The trial court acknowledged that the court also had a problem hearing the potential juror being questioned and asked the venire to “talk loud, if you can.” The court also suggested that the venire lower their masks “a little bit if you are comfortable when you are talking, if you don't mind[.]”

After the jury was selected, but before the trial began, the trial court noted on the record that members of the clerk's office had been tested for COVID-19. Seven members had been tested at the same time. At that time, two results had been returned and both were negative. The trial court informed the parties that they would be advised as soon as the results became available but she "anticipate[d] negative all the way around." With no objections, the trial proceeded.

During a break between the third and fourth witnesses, the jury asked the trial court if the witnesses could be asked to lower their masks "a little bit" to make it easier for them to be heard. The trial court agreed and without objection asked most of the witnesses to lower their masks while testifying "if they are comfortable." Several witnesses pulled down their masks. Defendant declined to lower his mask and testified with it on.

At the hearing on Defendant's motion for new trial, Sheriff Kyle Helton of Giles County testified that in response to a subpoena, he supplied the October 2020 time cards of three employees tasked to provide courthouse security during a period that included Defendant's trial. Sheriff Helton confirmed that precautionary measures were taken at the security checkpoint due to COVID-19 such as checking people's temperatures and making sure everyone was wearing a mask.

Sheriff Helton testified that at some point in October 2020, Nicholas Oliver, an employee working the security checkpoint, was sent home when he tested positive for COVID-19. Sheriff Helton testified further that "everybody exposed around him" was also tested. Defendant's trial was Thursday and Friday, October 15-16, 2020. According to his timecard, Deputy Oliver worked the week before Defendant's trial, and was out due to COVID-19 October 12-16, 2020. Deputy Oliver worked with Sergeant Timothy Scott and Deputy Megan Grenier. Sheriff Helton did not recall when Sergeant Scott and Deputy Grenier were tested relative to Deputy Oliver's positive test result. He also did not recall whether they quarantined following Deputy Oliver's positive test result. However, according to their time cards, Sergeant Scott and Deputy Grenier both worked the week of October 12-16, 2020. Sheriff Helton believed that both were tested but did not know when. Neither of them tested positive within the ten-day or fourteen-day period of being exposed to Deputy Oliver.

Deputy Megan Grenier testified that she was stationed at the courthouse October 12-16, 2020. She was not tested nor did she quarantine after Deputy Oliver tested positive. She did not develop any symptoms relative to COVID-19 "at any time around October." On cross-examination, Deputy Grenier gave the following reason for not getting tested:

No, sir, I didn't. I actually didn't – I wasn't around him. I know he worked in the same spot, but because the trial and stuff was going on, I was

completely upstairs. And he had developed symptoms over the weekend, as far as I can remember. So the whole entire time, the exposure period, I wasn't around him at all because we were so busy and he was downstairs and I was upstairs.

Deputy Grenier acknowledged that she worked the week before Defendant's trial when Deputy Oliver was also working. However, she maintained that because she was not less than six feet from Deputy Oliver for a period of time exceeding ten minutes, she did not get tested or quarantine.

Sergeant Timothy Scott testified that at no time in the month of October 2020, did he experience any symptoms related to COVID-19. Sergeant Scott later tested positive for COVID-19 in December 2020. Sergeant Scott confirmed that he wore a mask while working in the courthouse the week before and during Defendant's trial, as did his fellow officers. He testified that the courthouse operated under the COVID-19 protocol established by the supreme court. Sergeant Scott testified that he was on vacation in Gulf Shores, Alabama the week of Defendant's trial. Due to a hurricane, Sergeant Scott cut short his vacation and returned to work Friday, October 9, 2020. He worked nine hours that day and forty hours the following week. Sergeant Scott learned that Deputy Oliver tested positive "on a Sunday." Sergeant Scott testified that he did not test for COVID-19 or quarantine because he was not within six feet of Deputy Oliver for ten consecutive minutes or longer.

During argument at the motion for new trial hearing, defense counsel referenced the lack of mask wearing by the trial judge and the removal of masks by the prosecutor and the testifying witnesses:

It's okay that people in the trial didn't wear a mask, because I haven't heard [the prosecutor] address that, that the witnesses were asked to remove their mask, that the trial judge didn't wear her mask, and the district attorney, every time she opened her mouth, took off her mask. Now that not only violates the C.D.C. guidelines but violates the orders of the Supreme Court and this judicial district.

Neither the State nor the trial court commented, disputed, or confirmed defense counsel's reference to the trial judge not wearing a mask or the prosecutor removing her mask when speaking at trial. The State argued that Defendant suffered no threat per the C.D.C. guidelines because neither Deputy Grenier nor Sergeant Scott testified to being exposed to Deputy Oliver to warrant testing and quarantine. The trial court simply "agree[d]" with the State that there was "no threat, no prejudice" to Defendant and entered

an order denying the motion for new trial on August 17, 2021. Defendant filed a timely notice of appeal.

Analysis

Bill of Particulars

Defendant claims that he was prejudiced by the inadequacy of the State's response to his motion for a bill of particulars because it failed to reflect the victim's testimony that she was raped before Defendant's back surgery which took place on October 3, 2018. Defendant contends that based on "[a]ll prior discovery, pleadings, and testimony," his trial preparation was focused on the period after his surgery and more specifically, the week of October 8, 2018, the victim's school fall break. He contends he suffered prejudice as evidenced by his thirty-year sentence. The State argues that Defendant is not entitled to relief because there was no proof that the State knew in advance that the victim would testify at trial that the rape occurred before Defendant's surgery or that the State withheld this information from the defense. We agree with the State.

In Tennessee, there is no requirement that an indictment state an exact date or year of an offense unless the date or time "is a material ingredient in the offense." *State v. Byrd*, 820 S.W.2d 739, 740 (Tenn. 1991) (quoting T.C.A. § 40-13-207). In order to establish the legal sufficiency of an indictment, "the [S]tate need allege only that the offense was committed prior to the finding of the indictment or presentment." *Id.* (citing T.C.A. § 40-13-207) ("[t]he time at which the offense was committed need not be stated in the indictment, but the offense may be alleged to have been committed on any day before the finding of the indictment, or generally before the finding of the indictment").

Under both the federal and state constitutions, criminal defendants possess the right to know "the nature and cause of the accusation." *Id.* (quoting Tenn. Const. Art. I, § 9); *see also* U.S. Const. Amend. 6.) The State does not satisfy these constitutional burdens by simply alleging that it is unable to give specific dates on which the offenses occurred. *Id.* at 742. To that end, a defendant may seek a bill of particulars to provide additional information not contained in the indictment. Tenn. R. Crim. P. 7(c) ("[o]n defendant's motion, the court may direct the district attorney general to file a bill of particulars so as to adequately identify the offense charged"). A bill of particulars serves a threefold purpose: (1) the bill provides the defendant with sufficient information about the offenses alleged in the indictment to permit the defendant to prepare a defense; (2) the bill serves to permit the defendant to avoid prejudicial surprise at trial; and (3) the bill enables the defendant to preserve a plea of double jeopardy. *Byrd*, 820 S.W.2d at 741; *State v. Sherman*, 266 S.W.3d 395, 408-09 (Tenn. 2008). "A bill of particulars is not a discovery device and is limited to

information a defendant needs to prepare a defense to the charges.” *Sherman*, 266 S.W.3d at 409 (citing Tenn. R. Crim. P. 7(c), Advisory Comm’n Comments).

“The trial court should make every effort to ensure that the State supplies all critical information in its bill of particulars[.]” *Sherman*, 266 S.W.3d at 409. The “lack of specificity will not result in reversible error unless a defendant can prove prejudice” in the form of unfair surprise or the inability to prepare an adequate defense. *Sherman*, 266 S.W.3d at 409 (citing *Byrd*, 820 S.W.2d at 741). Prejudice will not often be apparent until after all the proof has been presented. *Byrd*, 820 S.W.2d at 741; *Sherman*, 266 S.W.3d at 409.

In *State v. Byrd*, the supreme court recognized that in child sex abuse cases the State is often unable to provide the specific date on which an alleged offense occurred. 820 S.W.2d at 741. If exact dates cannot be provided, “descriptive information can be made available that will tend to narrow the time-frame of the indictment” such as birthdays, seasonal celebrations, the beginning or end of the school year, or visitations by relatives. *Id.* at 742. If the State is still unable to provide even an approximate time of the alleged offense by means of a descriptive reference, a conviction may still be upheld “if in the course of the trial the defense has not been hampered by the lack of specificity.” *Id.*; see *State v. Shropshire*, 45 S.W.3d 64, 71 (Tenn. Crim. App. 2000) (defendant not prejudiced by victim’s failure to testify as to the month in which the incidents occurred during a three-year period where the defendant had ample notice of the victim’s testimony because her testimony in the second trial was virtually identical to her testimony in the first trial).

On the other hand, a conviction will be reversed “if trial testimony establishes that the [S]tate had in its possession, either actually or constructively, additional information that could have helped pinpoint the nature, time, or place of the offense, and withheld that information from the defendant.” *Byrd*, 820 S.W.2d at 742; see *State v. Doyle Winslow Smith*, No. E2006-02642-CCA-R3-CD, 2008 WL 5272480, at *10-11 (Tenn. Crim. App. Dec. 19, 2008) (new trial warranted where the prosecution knew at least five days before trial that the victim was able to recall the offenses occurred the day before her seventh birthday but did not reveal this information prejudicing the preparation of the defense strategy and resulting in surprise at trial).

In this case, there is nothing in the record to show the State had actual or constructive knowledge the victim would testify that the rape occurred before Defendant’s back surgery and withheld this information from Defendant. See *Byrd*, 820 S.W.2d at 742. In the original indictment, the offenses were alleged to have occurred on or about October 8, 2018. The State obtained a superseding indictment alleging that the offenses occurred on or about October 1, 2018 to November 1, 2018. Defendant thereafter filed a motion for bill of particulars to provide more specific dates and the manner of penetration for the rape

of a child count, and the trial court granted Defendant's motion. The State's bill identified the manner of penetration but could not provide a narrower time frame or a specific date of the offense. When questioned by the trial court at the April 2020 motion hearing, the prosecutor stated that she had discussed the matter with the victim "multiple times" since the February status hearing two months prior but could not provide a particularized date for the commission of the offenses in response to Defendant's motion. During her forensic interview, the victim told Lisa Milam that Defendant had "tried to do it three times" and that the third time "was in October *after* fall break." (emphasis added.) Aware that the Giles County Public Schools' fall break began the week of October 8, 2018, Lieutenant Hunter used October 8, 2018, as the offense date for the original indictment and at trial, he maintained his belief that the offenses occurred that week. Although the State obtained a superseding indictment with a broader time frame which encompassed a period after Defendant's surgery and the victim's school's fall break, the State, like the defense, had no reason to believe the victim would testify that the offenses all occurred before, and not after Defendant's back surgery. Thus, without proof that the State knew how the victim would testify and withheld this information, Defendant is entitled to no relief.

Furthermore, Defendant cannot show prejudice in the form of a hampered defense or unfair surprise at trial. *See Sherman*, 266 S.W.3d at 409. The date of the superseding indictment was December 11, 2019. The motion for bill of particulars was filed and heard on April 27, 2020. The trial was held October 15 and 16, 2020. At trial, the victim testified that the incidents occurred before Defendant's surgery which took place on October 3, 2018. Although the time frame in the superseding indictment was broader than that alleged by the victim during her testimony, Defendant was not hampered in his defense. To the contrary, Defendant used the victim's testimony, however unexpected, to discredit the State's case by arguing that the offenses could not have occurred as described by the victim given the undisputed date of Defendant's surgery. He argued further that the days preceding the surgery were also suspect given the date of his back injury which necessitated the surgery, making it physically unlikely to have committed the offense.

Defendant's argument at trial shows that he was not hampered in his defense due to the victim's testimony but was able to use her testimony to highlight the weakness in the State's case. *See State v. Banks*, 271 S.W.3d 90, 130 (Tenn. 2008) (closing argument provides parties with an opportunity to persuade the jury of their theory of the case and to emphasize the strengths and weaknesses in the proof for the jury). Moreover, we agree with the State that Defendant "cannot claim surprise." Here, Defendant knew where the offenses were alleged to have occurred, Defendant and victim's mother's bedroom; the time of day, when mother and brother were at work or on errands; the span of time in which they allegedly occurred, from October 1, 2018 to November 1, 2018; and the nature of the sexual contact alleged by the victim, penile penetration. The indictment sufficiently apprised Defendant of the charges and the State's inability to narrow the time frame did

not impair his ability to prepare his defense or result in a surprise at trial. The three-fold purpose of the bill of particulars was adequately met. Defendant is not entitled to relief.

Motion to Continue and COVID-19 Protocol

As he did in his Rule 10 application for extraordinary appeal before trial, Defendant claims once again that the trial court abused its discretion by denying his motion to continue the trial after Deputy Nicolas Oliver tested positive for COVID-19 the weekend before trial. He further complains that the trial court failed to comply with the supreme court's COVID-19 protocol during trial. Defendant alleges the trial court did not wear a mask, the prosecutor removed her mask whenever she spoke, witnesses were instructed to lower their masks as they testified, there were no plastic barriers or shields to protect the participants, the officers who were exposed to Deputy Oliver failed to test for COVID-19 or did not quarantine, and the trial court "simply accept[ed] the first 32 jurors who showed up . . . as the initial venire."

Because Defendant has not established actual prejudice from the trial court's decision denying the continuance, he is not entitled to relief. Furthermore, the record does not support the claim that the trial court failed to comply with the supreme court's COVID-19 protocol.

The grant or denial of a continuance rests within the sound discretion of the trial court. *State v. Hester*, 324 S.W.3d 1, 35 (Tenn. 2010); *State v. Willis*, 496 S.W.3d 653, 744 (Tenn. 2016) (appendix). An abuse of discretion requires a showing that the denial of a continuance denied the defendant a fair trial or that the result of the trial would have been different. *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004); *Hester*, 324 S.W.3d at 35. "[A] defendant who asserts that the denial of a continuance constitutes a denial of due process . . . must establish actual prejudice." *Odom*, 137 S.W.3d at 589 (citing *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). "The defendant demonstrates 'actual prejudice' by showing that a continuance would have made relevant witnesses available or added something to the defense." *State v. Daniels*, 656 S.W.3d 378, 386 (Tenn. Crim. App. 2022) (quoting *United States v. King*, 127 F.3d 483, 487 (6th Cir. 1997)).

Defendant has failed to demonstrate that he was actually and specifically prejudiced by the trial court's denial of his motion to continue the trial. Our review of the record shows that the trial court complied with the supreme court's COVID-19 protocol. Defendant's trial was scheduled for October 15, 2020. Most relevant to the trial were the following two orders entered by the supreme court on COVID-19 protocol for trials. First, on May 26, 2020, the supreme court issued an order directing that any jury trial commenced after July 3, 2020, "shall strictly comply with courtroom capacity and social distancing requirements applicable at the time of trial." *In Re: COVID-19 Pandemic*, No. ADM2020-

00428 (Tenn. May 26, 2020) (Order). On July 9, 2020, the supreme court issued an order mandating the use of face coverings, specifically requiring all persons entering a courthouse for the purpose of conducting court-related business to wear a face covering over the nose and mouth at all times while inside the building. *In Re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. July 9, 2020) (Order).

The record reflects that the trial court implemented precautions to facilitate a trial in October 2020. The voir dire and trial took place in a larger courtroom to allow for greater distance among the participants. Prior to trial, the trial court informed the jury that the court had put safety measures in place and that they should alert the court if there were concerns or issues with these measures. Jurors were seated six-feet apart and instructed to wear their face masks at all times. Contrary to Defendant's assertion, the witnesses were permitted, but not required, to lower their masks. Indeed, Defendant chose to testify while wearing his mask.

Additionally, Defendant has failed to demonstrate prejudice in the trial court's decision to deny his motion to continue the trial due to Deputy Oliver's positive test for COVID-19. The proof shows that Deputy Oliver did not work the week of Defendant's trial. Neither of the two officers who worked in the courthouse the same week preceding Deputy Oliver's positive test developed symptoms indicative of COVID-19 and each was masked in accordance with the supreme court's COVID-19 protocol. Further, Defendant's assertion that the trial court selected the first thirty-two people who appeared in the courtroom without voir dire is wholly contradicted by the record.

Moreover, we note that the record does not indicate when, if at all, the trial judge wore a mask or removed her mask other than defense counsel's comment during his argument at the hearing on the motion for new trial. The same holds true for the prosecutor. While arguments of counsel should be based on the evidence, arguments alone do not constitute evidence. *See, e.g., State v. Jordan*, 325 S.W.3d 1, 66 (Tenn. 2010).

Defendant claims that prejudice cannot be determined and relies on *State v. McMullen*, 801 S.W.2d 826 (Tenn. Crim. App. 1990), where the trial judge held court in a first-degree murder jury trial for nearly forty hours over two days. In *McMullen*, this court held that "the stressful hours involved in the trial of this case, over the protest of the defendant's counsel, without the express agreement of the jurors, and without unusual and compelling circumstances," required a reversal and a remand for a new trial because the trial court's actions violated the defendant's right to counsel, his right to due process of law, and the rule laid down in *Hembree v. State*, 546 S.W.2d 235 (Tenn. Crim. App. 1976) regarding lengthy and evening court sessions 801 S.W.2d at 830. Based on the facts and circumstances, we fail to see how *McMullen* is relevant or helpful to Defendant. We hold likewise that *Adams v. Illinois Cent. R.R. Co.*, No. W2020-01290-COA-R3-CV, 2022 WL

170134, at *10-13 (Tenn. Ct. App. Jan. 19, 2022) (*no perm. app. filed*), a case that was remanded because the trial court failed to consider relevant factors in determining an appropriate sanction for discovery abuse is comparable to this case and not helpful to Defendant.

Instead, we are bound by our decision in *State v. Daniels*, 656 S.W.3d 378 (Tenn. Crim. App. 2022), where this court dealt with the denial of a defendant's motion to continue trial based on the implementation of COVID-19 safety measures. Defendant here has presented no grounds for us to depart from *Daniels* and grant him relief without a demonstration of actual prejudice. In light of the evidence, we find no abuse of discretion by the trial court when it declined to grant Defendant's request for a continuance.

Conclusion

Based on the foregoing, the judgments of the trial court are affirmed.

JILL BARTEE AYERS, JUDGE