IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 13, 2022

STATE OF TENNESSEE v. CLINTON W. BRYANT

Appeal from the Criminal Court for Sumner County
No. 2014-CR-858 Dee David Gay, Judge

No. M2022-00260-CCA-R3-CD

Defendant, Clinton W. Bryant, was charged with five counts of rape of a child. Following the State's proof at trial, the trial court granted Defendant's motion for judgment of acquittal on one of the five counts, and a jury convicted Defendant of the remaining four counts. The trial court sentenced Defendant to an effective fifty-year sentence in the Tennessee Department of Correction. On appeal, Defendant contends that the trial court abused its discretion in denying his motion to sever all five counts; that the trial court erred in denying a new trial based on an incomplete trial transcript; and that the cumulation of these errors warrant relief. Following a review of the entire record, the briefs of the parties, and the applicable law, we affirm the judgments of the trial court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which TIMOTHY L. EASTER, J., joined. CAMILLE R. MCMULLEN, J., concurring in results only.

David A. Doyle, District Public Defender (on appeal and at trial), and Ellison Berryhill, Assistant Public Defender (on appeal), for the appellant, Clinton W. Bryant.

Jonathan Skrmetti, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General, Benjamin A. Ball, Senior Assistant Attorney General; Ray Whitley, District Attorney General; and Tara A. Wyllie, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

In June of 2011, Defendant moved in with the victim's mother, who along with her two children, the victim who was six years old, and an infant brother, lived with the victim's great-grandparents ("Great-Grandparents"). Defendant and the victim's mother then married on August 10, 2011. He lived there until December 2011 when he was arrested in an unrelated case. Six months after Defendant moved out, the victim revealed to her maternal great-grandmother ("Great-Grandmother") that Defendant had sexually assaulted her.

In December 2014, a Sumner County grand jury returned a true bill charging Defendant with five counts of rape of a child. Each count alleged that the offenses occurred sometime during the six-month period between June 1, 2011 and December 20, 2011, while Defendant was living with the victim and her family.

Severance Motion – March 28, 2016

Defendant filed a motion to sever the five counts. The State opposed the motion on the grounds that the counts were subject to mandatory joinder under Tenn. R. Crim. P. 8(a), because each of the counts involved the same victim, occurred in the period of time listed in the indictment, and were part of the "same criminal investigation." The State added that it would have been foreclosed from proceeding on the remaining counts had it proceeded on only one count. Alternatively, the State argued that the counts should be joined permissively under Tenn. R. Crim. P. 8(b), because they constitute a common scheme or plan, and the offenses were otherwise admissible as an exception to Rule 404(b) of the Tennessee Rules of Evidence.

On March 28, 2016, the trial court heard several motions including the State's motion to admit the victim's forensic interview under Tennessee Code Annotated section 24-7-123 and Defendant's motion to sever the offenses. The video recording of the victim's forensic interview was admitted as an exhibit during the testimony of Jennifer Longmire, a forensic interviewer at Ashley's Place, a child advocacy center serving Sumner County. Ms. Longmire interviewed the victim, and the video recording of the interview was played at the end of her testimony. The forensic interview recording was also incorporated as an exhibit to the motion to sever. Accordingly, it is summarized below.

Ms. Longmire began the substance of the interview by asking the victim if she knew why she was at Ashley's Place. The victim replied, "Mom said we're here to talk about

'Clint' because he did bad to me." The victim explained that "Clint" is her mother's "girlfriend" who is "a boy" and lived with her family. When asked to talk about the "bad things" Defendant did to her, the victim hesitated and said, "It's something you don't want to hear. It's nasty." Eventually, the victim told Ms. Longmire that Defendant "put his front private . . . into her back" and that "it hurt." She stated that he woke her up and put her in his bed while her mother was at work and it was "dark outside." The victim also stated that Defendant threatened to cut her fingers off "to scare [her] from telling anyone" what he had done. She stated that Defendant was wearing only a shirt, and she was wearing a shirt and a pull-up which Defendant removed and put on the floor with the rest of his clothes.

The victim was reluctant to describe Defendant's "private," and instead drew a picture of it using a dark-colored marker which she said matched the color of Defendant's "private" which had "hair on it." She said that Defendant did not put his private anywhere else but "her back." When asked whether Defendant did anything else, the victim nodded her head affirmatively, and said, "It's nasty," and again made a drawing and stated that she was "scared to talk about it." Ms. Longmire reminded her that she was in a safe place and how "important it is to tell the truth about what really happened."

Ms. Longmire then asked the victim questions about what she had drawn. The victim told her that she drew a picture of herself and "Clint," under the covers. Her pull-up was off. She was reluctant to say what Defendant was doing except that it "starts with [an] 'L,'" that he was using his tongue, and she patted her genital area with her hand. She stated that "he kept licking it" and that it did not feel good and that Defendant warned her not to tell anybody or "I'll cut your fingers off" with a knife. She told Ms. Longmire that she saw the knife in the morning when Defendant was not at home.

The victim denied that she did anything to Defendant but revealed that he told her to get on her hands and knees on her mother's bed. Defendant stood behind her and put his "front private in her back private." Defendant told her that "it felt good." When he stopped doing this, Defendant used a flashlight to look at her "back private" to see "if something had happened." The victim did not know whether something had happened to her "back private." The victim said that this type of incident occurred more than one time, on her mother's bed, and while her mother was at work.

When asked about any other time and whether anything was "different," the victim shared that Defendant ordered her to get on top of him as he was lying on his bed. He then put his "front private" in her "back private." She stated that, "It happened a lot." According to the victim, it occurred "always in his bed" and "only" when her mother was at work. She stated, "when she goes to work, he does it."

Next, Ms. Longmire showed the victim an outline of a little girl with no clothes and asked her to point where Defendant put "his private." The victim told her the "butt." She also told her that Defendant licked her "private" and her "butt."

At the conclusion of the interview, Ms. Longmire asked the victim to review her drawing. The victim identified Defendant's "private" in her drawing and said that Defendant "peed" on her, "on purpose" when she was on her hands and knees. She recalled Defendant saying, "Oops. I peed on you." She did not see the "pee" but felt it as it hit the back of her legs, ankles, feet, and buttocks. She stated that Defendant had "peed" on her more than one time and only when she was on her hands and knees. She indicated that Defendant wiped it up with a towel he grabbed from the kitchen.

During the hearing on the motion to sever, Detective Neal Harris of the Hendersonville Police Department testified about his investigation which included observing the victim's forensic interview and interviewing Defendant. Detective Harris testified that a police report was made on June 18, 2012, accusing Defendant of having sexual contact with the victim while Defendant was living with the victim's mother and her family. The report indicated that the offenses occurred in the bed Defendant shared with the victim's mother while the victim's mother was at work as a third-shift employee at Panera Bread. Detective Harris recalled the victim's interview where she reported that Defendant "performed oral sex on [her] and put his penis in her anus."

Detective Harris interviewed Defendant three times. Defendant was in custody for "some burglaries" in Davidson County when Detective Harris served him with the indictment. Defendant consistently denied that he sexually abused the victim, but stated in one of the interviews that he did not believe the victim would make up the allegations.

On cross-examination, Detective Harris confirmed that the victim "never wavered" in identifying Defendant as the person who assaulted her. When asked whether identity was relevant in the case, Detective Harris responded, "I would say that it – it was not relevant from [the victim]. It was relevant from [Defendant], because he stated that . . . – he didn't believe she was lying, but it – he's not the one who perpetrated the crime." Detective Harris's three interviews with Defendant were recorded on an audio recording device but were not part of the proof on the severance motion.

Following the testimony at the hearing, the defense argued that the five counts of the indictment did not constitute a common scheme or plan, that "there's been no proof whatsoever that any two of these five incidents occurred on the same day," and that proof of one incident was not relevant in a trial for the second described incident. The defense asserted that a jury would be hard-pressed to determine which facts support each of the five counts, insisting that the proof would also present problems for a unanimous verdict and

maintaining that the five counts constitute "separate offenses that took place at separate times."

The State responded that the forensic interview "exposed" five separate incidents of rape of a child, and maintained that the counts were subject to mandatory joinder, but should the trial court disagree, the counts should be joined permissively because the facts showed a common scheme or plan for Defendant to sexually abuse a single victim, to whom Defendant had access by virtue of being married to the victim's mother, and committing the offenses only when the mother went to work. The State also argued that evidence of all five counts would be admissible at the trial of any single count under Rule 404(b) in order for the victim "to tell her whole entire story." The State added that Defendant put his identity at issue by stating that he did not believe the victim was lying but denying that he was the perpetrator. The State further pointed out that any unanimity issue would be cured by the State's election at trial. The State argued that it knew of no case in Tennessee that supported the position of a victim having to testify on "five different occasions for five different counts of rape of a child perpetrated by the same defendant" in order to preserve a defendant's right to a fair trial.

The trial court held that the evidence demonstrated a common scheme or plan, that evidence of each count would be admissible in the trial of the other counts, and that the probative value of the evidence of each count was not outweighed by the danger of unfair prejudice pursuant to *Spicer v. State* 12 S.W.3d 438, 449 (Tenn. 2000), and *State v. Toliver,* 117 S.W.3d 216, (Tenn. 2003).[1]

404(b) Motion Hearing – April 11, 2016

The State moved to introduce Defendant's arrest and incarceration for aggravated burglary on December 13, 2011, to show the victim's state of mind in waiting to report the sexual abuse until six months after Defendant had moved out of the family home. Defendant filed a motion under Rule 404(b) of the Tennessee Rules of Evidence to exclude this evidence. Three witnesses testified at the 404(b) hearing, the victim's mother, the victim's grandmother ("Grandmother"), and Detective Harris. Because the victim's mother's testimony is at the heart of Defendant's issue on the insufficiency of the trial transcript, we will summarize only her testimony from this hearing. The victim's forensic interview was also admitted as an exhibit to this hearing.

[1] In the transcript, the trial judge is quoted to have said *State v. Oliver.* We glean from the State's response to the motion to sever that the trial court was referring to *State v. Toliver,* 117 S.W.3d 216 (Tenn. 2003).

The victim's mother testified that she met Defendant online in 2007. During the early part of their relationship, Defendant was serving a three-year sentence for a parole violation. They rekindled their relationship when Defendant was released on parole in 2011. They married on August 10, 2011, but he had already moved in prior to the wedding. The victim's mother testified that Defendant lived with them "a good solid six months" before she "kicked him out" in December 2011. She recalled that Defendant was arrested a couple of weeks after he moved out.

After Defendant moved out, the victim began asking her mother about his whereabouts. According to the victim's mother, when the victim was told Defendant was in jail, she did not seem to comprehend what jail was and what it meant to be "locked up." The victim asked whether there was a possibility of Defendant getting out of jail, and if so, whether he would move back in with them. Although she did not know how long Defendant would remain imprisoned, the victim's mother told the victim that Defendant would not be released to put her "at ease."

The victim's mother testified that after she learned about the abuse from Great-Grandmother, she picked the victim up from school that day and took her to a park where she asked the victim whether Defendant had ever touched her inappropriately. The victim nervously confirmed that he had and told her mother that he had threatened to cut off her fingers with a knife if she told anyone. The victim did not give her mother details on how Defendant touched her other than that he had touched her "down below inappropriately" and had "peed" on her and that the incidents occurred in the house during the time Defendant was living with them and while her mother was at work. The victim's mother confirmed that she worked the third shift at Panera Bread as a baker. The victim's mother speculated that the victim waited to report the abuse until she felt like she was safe and Defendant was not coming back, but the victim did not tell her this.

The trial court granted the Defendant's 404(b) motion, ruling that witnesses at trial would not be allowed to refer to Defendant as being in jail. The trial court permitted witnesses to say that the victim "was satisfied that [Defendant] would not come around anymore" to explain the delay in reporting the incidents.

Trial – June 20-22, 2016

Although Defendant does not challenge the sufficiency of the evidence, he does challenge the sufficiency of the trial transcripts. Thus, we will summarize the proof relevant to that issue and will then discuss the issue regarding the trial transcripts.

The victim, who was age eleven at the time of trial, identified Defendant in the courtroom. She testified that he used to live with her and her family at her Great-

Grandparents'[2] house. She drew a diagram of the house marking where everyone slept, and the diagram was admitted as an exhibit at trial. She slept in the same room with her mother, Defendant, and her infant sibling. She also drew a picture of the bedroom where they slept, explaining that she shared a bunk bed with her mother and Defendant. She slept on the top bunk while her mother and Defendant slept on the bottom bunk. Her sibling slept in a crib in the same room.

The victim's testimony about the incidents was consistent with the account she gave in her forensic interview. At trial, the victim testified that Defendant "hurt" her by "putting his front private into [her] back private." She waited to tell someone what Defendant had done because he threatened to cut off her fingers if she told anyone. The victim remembered talking to a lady named "Ms. Jennifer" at Ashley's Place about the incidents. She confirmed that she told the truth of what had happened to "Ms. Jennifer." Her forensic interview was then played for the jury.

After the forensic interview was played for the jury, the victim affirmed that everything she told Ms. Jennifer was "the truth." She revealed that in the past year, she began writing about the incidents in a notebook for her teacher. She testified that writing about the incidents made her "mad." She also wrote about her brother's father "Tim," who looks "kind of" like Defendant but never lived with them. She made clear that Tim was not in the courtroom and that Tim was not the one who put his "front private part in [her] back private." She testified that it was Defendant, not Tim, who "licked [her] private," told her to get on her hands and knees, removed her pull-up, used a flashlight to look at her "back private," and ordered her to get on top of him as he was lying flat on his back on the bed, and then put his "front private" in her "back private." She testified that it was "painful" when Defendant put his "front private" in her "back private." She stated that she did not yell for help because Defendant warned her not to. She identified a knife she found behind the bunk bed and testified that Defendant "h[e]ld it up" and told her he would use this knife to cut off her fingers if she told anyone what he had done. The victim testified that she waited almost seven months to talk to someone about the abuse because it was clear "[Defendant] was gone" and not coming back. She testified that the first person she told was Great-Grandmother. She also talked to her mother and her Grandmother.

On cross-examination, the victim testified that her bedroom was located across from Great-Grandfather's bedroom. She could not recall whether the door to her bedroom was open or closed when the incidents occurred. She recalled that Great-Grandfather kept his bedroom door closed while he slept. She testified that her mother worked overnight and

[2] The victim referred to the people she lived with as Grandma and Grandpa. However, they were in fact, her great-grandparents and because the victim's grandmother also testified at trial, for clarity, we will refer to these individuals based on their actual relationship to the victim rather than what she called them.

would sleep during the day. Her mother did not work on the weekends. The victim testified that Defendant woke her up the first time he abused her. She did not remember what time it was other than it was at night.

Although she was closer to Great-Grandfather than Great-Grandmother, the victim first told Great-Grandmother about the abuse because when she decided to tell someone, Great-Grandmother was awake and Great-Grandfather was asleep. She acknowledged that she could have told either Great-Grandparent earlier than she had. She did not tell her mother because she thought her mother would not believe her because her mother "liked" Defendant. She did not tell anyone about the abuse earlier because Defendant had threatened her with the knife.

The victim's mother testified next. It was later determined that the recording equipment for the courtroom malfunctioned or had inadvertently been turned off during her direct examination. The transcript of her testimony contains the witness stating her name, her home address, and with whom she lived. The typed transcript then ends with the following explanation: "A malfunction of the recording system occurred, the following proceedings were had after the malfunction was corrected." Accordingly, the bulk of the victim's mother's trial testimony on direct examination was not recorded. The transcript commences during her cross-examination by defense counsel and consists of only one page of the transcript where the victim's mother answered questions about the victim's sleeping habits and testified that the victim always slept in her bed but would "sometimes" fall asleep in the living room while watching television. She added that if the victim did fall asleep somewhere other than her bed, either she, Defendant, or Great-Grandfather would put the victim to bed. On redirect examination, the victim's mother told the jury that she did not look for signs of abuse when bathing the victim because she had no reason to think that the victim was being abused. The defense had no re-cross examination of the victim's mother.

Grandmother testified about the living arrangements of the victim's family with Great-Grandparents. Grandmother testified she thought it was unusual that Defendant was always the first to volunteer to give the victim a bath because Defendant was not the victim's birth father. She testified that she mentioned this to the victim's mother "tons of times."

Grandmother had given the victim a bath a handful of times but specifically recalled one time when the victim put her hands down to cover herself, moved to the edge of the tub, and repeatedly said, "no." Grandmother asked the victim what was the matter and whether she was hurting "down there," but the victim would not say. Grandmother did a visual scan of the victim, but found nothing alarming. Grandmother mentioned the tub incident to the victim's mother and asked her whether the victim had fallen or gotten hurt.

Grandmother recalled that this incident in the tub occurred "a couple of months before [she] found out" about Defendant's sexual abuse of the victim. When pressed to give a more precise time, Grandmother could not be "100% sure" when the incident in the tub occurred.

Grandmother testified that the victim's mother called her on June 15, 2012, about five o'clock in the evening to tell her that Defendant had sexually abused the victim. Grandmother, an over-the-road truck driver, was in Indiana when she got the call from the victim's mother. She immediately drove to Nashville, picked up the victim, and took her to her home. The next day, Grandmother took the victim to an arts festival and then to a restaurant to talk. As they sat down to eat, the victim asked Grandmother if she knew what Defendant had done to her, and Grandmother replied that she did not. The victim told her that he was "putting his thing in her butt." Unable to eat, Grandmother put her food in a to-go box, and they left the restaurant and returned to Grandmother's house.

After dropping the victim off at school the following Monday morning, Grandmother and the victim's mother filed a police report against Defendant. Grandmother testified that she wanted to go to the police immediately but the victim's mother wanted to wait. At the police station, Grandmother and the victim's mother each gave a statement to a detective. Grandmother testified that she did not witness Defendant sexually abuse the victim. On cross-examination, Grandmother did not know why the victim's mother did not mention the bathtub incident during her trial testimony.

On redirect examination, Grandmother agreed that the tub incident could have occurred before April 2012. She did not believe that Defendant was still living at the Great-Grandparents' house at the time. She stated that the tub incident occurred while she was bathing the victim in her home.

On re-cross-examination, Grandmother conceded that she was unsure when Defendant moved into Great-Grandparents' house; she knew only that Defendant moved in after he and the victim's mother got married. She reiterated that Defendant was "definitely" living with the victim at the time of the tub incident in her home.

Jill Howlett, a forensic social worker at Our Kids Center in Nashville, testified that she met with the victim on July 24, 2012, to establish the victim's medical history. The victim told Ms. Howlett that it "hurt to poop." The victim relayed to Ms. Howlett that Defendant put his "private part" and fingers where the "poop came out" and that he "licked" her in the same area and also where she urinated. The victim also told Ms. Howlett that Defendant used a flashlight to look at her private area "just like you're going to" for the medical examination. Ms. Howlett testified that the "anal/genital examination is without acute or chronic signs of trauma." Ms. Howlett explained that the lack of signs of

trauma does not rule out the possibility of sexual contact. She added that it is not unusual for children to wait to report incidences of abuse and that only twenty-five percent of children observed at the Our Kids Center report abuse within seventy-two hours of the abuse.

Lori Littrell, a physician's assistant, testified without objection as an expert in forensic medical evaluations of children. Ms. Littrell conducted a forensic medical examination of the victim on July 24, 2012. She observed "no signs of injury" and found the anal and genital examination of the victim to be "normal." She stated that "children can sustain abuse without there being an injury." Ms. Littrell explained that only five percent of children who report abuse will have a genital injury. She clarified that a diagnosis of trauma does not constitute a diagnosis of abuse. Based on her expert opinion, the most reliable indicator of abuse is the child's report.

The victim's Great-Grandfather testified about the layout of the home where he and Great-Grandmother lived with the victim and her family. His testimony corroborated the testimonies of the victim and Grandmother on the sleeping arrangements. Great-Grandfather's bedroom was located across from and only nine feet from the bedroom the victim shared with her mother, Defendant, and her sibling. Great-Grandfather testified that he did not have any hearing issues and only used glasses to read. He stated that when the victim's mother was at work, he kept his bedroom door open so he could hear when the baby cried. He added that the door to the victim's bedroom remained opened when the victim's mother worked. He tended to the victim and her infant sibling when they were sick. He did not witness nor suspect abuse. No other man lived in his house at the time of the incidents other than himself and Defendant. On cross-examination, Great-Grandfather admitted some confusion about the dates Defendant lived in his home.

Detective Harris testified that he interviewed Defendant on June 21, 2012, shortly after the police report was filed, a second time on July 30, 2014, and a final time on October 24, 2014, when the indictment was returned. The audio recordings of Defendant's three interviews were played for the jury.

In the first interview, Defendant agreed to talk to Detective Harris after being advised of his rights. Detective Harris informed Defendant that the victim's mother filed a police report accusing him of having sexual contact with the victim. Defendant admitted living with the victim's mother, her two children, and the Great-Grandparents for three to four months. He got along well with the family until he "got on drugs" and began "stealing stuff" from the victim's mother.

Defendant insisted that "nothing sexual happened between [him and the victim]." He denied that he touched the victim sexually and added that he did not even like to give

her a bath; he suggested that the victim's mother would corroborate this information. He "never felt comfortable" giving her a bath because she was not his "kid." She was usually bathed by Great-Grandfather or her mother. Defendant then terminated that interview.

Defendant was interviewed a second time, two years later. After Detective Harris advised Defendant of his rights, Defendant stated that he "want[d] to hear what [Detective Harris] has to say first" before agreeing to talk. Detective Harris refreshed Defendant's memory about the allegations involving the victim. Defendant reiterated that he lived with the victim and her family three to four months. He described himself as being "100% devoted to [the victim's mother] and her two kids." He denied that he touched the victim and insisted that nothing occurred which could be misconstrued or misunderstood by the victim as being sexual. Defendant stated that he was never left "unattended" with the victim. He explained that Great-Grandfather's[3] bedroom was next to the bedroom he shared with the victim's mother, the victim, and the baby and that the door to their shared bedroom was always "cracked" open in case Defendant did not hear the baby cry. Defendant added that the victim was never in the bedroom when he and the victim's mother were intimate.

Defendant stated, "If it did happen . . . It didn't happen with me. She's got me confused with someone else." Defendant said that he has many child relatives in his extended family, and no one had ever accused him of acting inappropriately. He studied pedophilia and understood that a child sex abuser usually has a history of inappropriate conduct, and there is no record of such a complaint with "DCS" or other members of his family. However, he saw no reason for the victim to make up the allegations.

Defendant never observed Great-Grandfather or anyone in the household touch the victim inappropriately. He recalled that two older boys who lived across the street and often "hung out" with the victim, but he did not witness anything inappropriate when the victim was playing with them. He never experienced the victim making up stories. He stated that while she may not have been forthcoming when questioned, the victim was always honest. He described the victim as a "balanced child" despite being raised by a single parent.

In the third interview, Defendant agreed to talk to Detective Harris without any reservation. Detective Harris then described the offenses in detail, and Defendant remained quiet. Then, Defendant asked whether Detective Harris had spoken to the Great-Grandfather because he remained awake all night due to chronic pain, and he was a "light sleeper" whose bedroom was located close by. Defendant suggested he could not have abused the victim without Great-Grandfather hearing or witnessing the abuse: "Wouldn't

[3] Defendant also refers to Great-Grandfather as grandfather.

a child cry out? Did she say I put my hand on her face to keep her from crying? That would wake up [Great-Grandfather]." Detective Harris told Defendant that the victim had accused him of threatening to cut her fingers off with a knife if she told anyone about the abuse.

Defendant stated that he would not expect a five- or six-year-old child to be "intelligent enough" to know of sexual matters. While saying that he did not want to "blame" anyone, Defendant suggested that Great-Grandmother may have put "ideas" in the victim's head as she drinks and was "constantly on her phone." He asked Detective Harris whether there was any "physical evidence of abuse." Detective Harris replied that the "evidence" was the victim's statement.

Defendant said that "half the time" the victim did not know who he was and often mistook him for "Tim." Detective Harris explained that the victim told her family about the abuse once she was no longer fearful that he would get to her. Detective Harris then handed Defendant a copy of the mittimus and explained that he was visiting Defendant to give him "one last chance to explain [him]self." Defendant did not deny that the victim may have been sexually abused, but denied that he was the abuser, "I'm not saying it didn't happen. It didn't happen with me."

Defendant admitted to being "f-ed up" from drug use but he never "lost the ability to function." He admitted that he was using crack cocaine but denied that he may have touched the victim while hallucinating or that he may have confused the victim for her mother. Defendant suggested that Detective Harris talk to Great-Grandfather because he "was up all night" and would have witnessed anything inappropriate. Defendant told Detective Harris that if he were to check Defendant's cell phone, he would not find anything inappropriate unlike "sexually deviant" people who always have something untoward on their phones or devices.

Defendant restated, "I'm not denying that this didn't happen" but that "it wasn't me." The interview concluded with the following statement from Defendant: "In most experiences, when a child does make an allegation, it's most of the time true."

After the three interviews were played for the jury, Detective Harris resumed his testimony. He testified that he watched the victim's forensic interview from a remote location and spoke to the victim with the prosecutor on June 17, 2014, nearly two years after the police report was filed. According to Detective Harris, the victim's account of the abuse was unchanged from the account she gave in her forensic interview.

Following the close of the State's proof, the State made its election of offenses, followed by the Defendant's motion for judgment of acquittal. The trial court granted

Defendant's motion for judgment of acquittal as to count five but denied it as to the remaining four counts.

Defendant testified that he lived with the victim and her family from August 6, 2011, until three days before Thanksgiving 2011. He moved in before he and the victim's mother married. He was unemployed at the time he lived there. The victim's mother worked the night shift from 8:30-9:00 p.m. until 6:00 a.m. He denied that he had sexually abused the victim. He acknowledged that he had previously pled guilty to two convictions of theft over $1,000, aggravated burglary, burglary of a vehicle, burglary of a home, and possession of marijuana.

On cross-examination, Defendant testified that he and the victim's mother began dating three to four months before he was released on parole in June 2011. He affirmed that he and the victim's mother slept in the same room as the victim. He admitted to using a number of drugs including crack cocaine, methamphetamine, and heroin while living with the victim's mother and her family, but maintained that he never used drugs in front of the victim. He began using methamphetamine while in prison and left prison with an addiction.

Defendant confirmed that he spoke with Detective Harris three times about the case. He also confirmed that he was arrested on December 12, 2011, for burglary of a vehicle. He was not living with the victim when she accused him of sexual abuse. He was unaware of when she first accused him but agreed that he was in jail on June 15, 2012, the day the police report was made. Defendant agreed that in one of the interviews, he told Detective Harris that he had studied pedophilia. He testified that he researched the subject following the first interview with Detective Harris and not before.

Defendant recalled telling Detective Harris during one of the interviews that he did not think the victim would lie "about something like this." At trial, he emphasized that "most of the time" such allegations are true. At trial, as he did during his interviews, Defendant did not deny that the victim was raped but denied that he was the person who raped her. He testified that the victim had always been truthful in all his interactions with her. He acknowledged that no other man lived in the house other than himself and Great-Grandfather while he was living with the victim and her family.

On redirect examination, Defendant denied that he was hallucinating or under the influence of cocaine or heroin while living with the victim and her family. He "terminated" the first interview with Detective Harris because it was apparent to him that Detective Harris already assumed that he was guilty. Defendant was "asked to leave" the house because he was stealing money from Great-Grandparents in order to buy drugs. When confronted with the theft, Defendant did not deny that he had stolen the money.

The jury convicted Defendant of all four counts of rape of a child. The sentencing hearing was two months later on August 26, 2016. The trial court sentenced Defendant to the minimum Range II sentence of twenty-five years on each count, *see* T.C.A. §§ 39-13-522(b)(2)(A); - 40-35-112(b)(1), and ran counts one, three, and four concurrently with each other but consecutively to the sentence in count two for an aggregate sentence of fifty years at 100% by operation of law. *See id.* § 39-13-523(a)(2), (b). The judgments were entered on September 6, 2016.

Defendant filed a timely motion for a new trial on October 6, 2016, alleging that the evidence was insufficient to support his convictions and that the jury instructions incorrectly defined the mental state for rape of a child. The technical record shows that Defendant next filed a request for transcripts in March 2017, for purposes of appeal.[4] The trial court granted Defendant's motion for the requested transcripts.

Hearing on Motion to Designate the Record – April 8, 2019

The first indication that there was a problem with the trial transcripts was on December 6, 2018, when the State filed a motion "for corrected transcript" and a motion for designation of the record. The State moved to designate the record under Rule 24(c) of the Tennessee Rules of Appellate Procedure because the court reporter "missed part of [the victim's mother's] testimony" on the first day of trial, and that "[o]nly a portion of her testimony was recorded and could be transcribed." The State moved to designate the first day of the trial transcript "from the notes of the two State[']s Attorneys that were trying the case" and "as well as any notes taken by the Court during the testimony." The State noted that it had discussed the matter with defense counsel who did not have any notes from the trial that could be considered in designating the record. The typed notes from the two state's attorneys were attached as exhibits to the motion to designate the record.

Defendant filed a response to the State's motion on April 2, 2019, submitting that he would endeavor to review the available transcripts to determine whether an amended motion for a new trial should be filed.

The trial court made some prefatory remarks regarding the transcripts to provide background for the State's motion regarding the record:

> Now, ever since [sentencing] we've been involved trying to get transcripts of all the proceedings from this court so that we can have everything for a motion for new trial and/or for the Court of Appeals on any appellate review.

[4] This pleading bears two file stamps: March 24, 2017, and March 27, 2017.

> We are still waiting for the completion of that – of those transcripts, and we've had some difficulties which are pretty unique here.

The trial court provided additional background about seeking the services of designated court reporters in its jurisdiction:

> [D]uring the period of time that this case was tried, we had a designated reporter, and that's what the [Administrative Office of the Court] has wanted the criminal court trial judges to use. This Court has had difficulty in getting designated reporters on a regular basis since 2010.

The trial lasted three days. The trial court stated that Jaimee Dillon transcribed two days of the trial and Winnie Bagley transcribed one day. The court explained that Gloria Dillard had been called to the hearing to testify about the status of the transcripts. The trial court also mentioned that the parties were specifically "having trouble with the day that Ms. Bagley" had transcribed the trial and that Ms. Dillon had abruptly quit her employment as a designated court reporter.

Gloria Dillard, a licensed court reporter, testified to the different methods of court reporting: court stenography, voice or mask writing, pen writing which uses shorthand, and "e-writers or e-recorders or digital recorders." Ms. Dillard testified that e-writers record the proceedings and transcribe the proceeding solely from the audio recording. Although a recognized method of transcription, Ms. Dillard testified that she does not consider "e-writers" to be court reporters.

Ms. Dillard testified that Jaimee Dillon had been a full-time designated court reporter in the district from early 2016 until May or June 2017. Ms. Dillard and a fellow reporter, Lori C. Bice tried to fill in when Ms. Dillon abruptly quit during the trial. Their efforts were hampered by a backlog of transcripts that had been ordered but not yet completed. In addition, appeals with deadlines took priority over trial transcripts. Ms. Dillard coordinated with other court reporters and the trial judge to complete the appellate transcripts so the hearings in this case could be transcribed.

When she received the order to transcribe the trial and pretrial hearings in the case, Ms. Dillard obtained and listened to all the recordings. Ms. Dillard testified that there were no indicators as to when a hearing began and ended. Ms. Dillard took copious notes so that whoever was assigned to transcribe the recordings would know when a hearing began and ended.

Ms. Dillard determined that the recording device was turned off during the testimony of one of the witnesses on the first day of trial:

> I went on through the day and I noticed that it was either during a break or at lunchtime that there was a cross-examination of a witness, but I couldn't find the direct examination, and as it turned out the recorder was not turned on for the direct examination for [the victim's mother].

In addition to the missing portion of the victim's mother's testimony, none of the bench conferences were transcribed. Ms. Dillard testified that there is a separate recording device to record bench conferences which should always be transcribed. Because there was no separate recording device, the bench conferences from the first day of trial were not transcribed.

Winnie Bagley, a pen writer, was present for the first day of trial to transcribe that day's proceedings. Ms. Bagley did not need a recording of the first day because she already had an audio recording of the first day of trial. Ms. Bagley initially told Ms. Dillard that she could not transcribe the first day of trial because she was to undergo surgery. With the assistance of the Administrative Office of the Courts ("AOC"), the case was assigned to Kerri Harper who had a "wealth of experience" and training as a court reporter. Ms. Dillard sent Ms. Harper "everything . . . except that first day of the trial." Ms. Dillard resolved to transcribe the first day of trial after Ms. Bagley notified her about her upcoming surgery. Ms. Dillard testified that Ms. Harper had difficulty transcribing the proceedings from the recordings:

> She was contacting me, asking me to send her different documents from the file, just statements and different things that were read from because she was having difficulty understanding it, and I did that. Then she ended up telling me that it was too time-consuming, she was constantly having to go back and forth between channels on the recording system to understand, and that she was not going to be able to do any more of it, and she sent the rest of it back.

Ultimately, Ms. Harper transcribed one pretrial motion hearing and the sentencing hearing. Ms. Dillard testified that although it was not her fault, Ms. Harper "felt so badly" that there were so many "inaudibles" in the transcripts she had prepared and declined payment for the two volumes she had transcribed.

As Ms. Dillard began working on the first day of trial, Ms. Bagley texted her "out of the blue" and offered to transcribe the first day of trial. Ms. Dillard informed her that there were issues with the audio recording. Ms. Bagley responded that her notes would have more information than what was on the recording. Ms. Dillard discussed the matter with defense counsel who agreed to Ms. Bagley's transcribing the first day. Ms. Bagley's transcript of the first day was entered as an exhibit to the hearing. On cross-examination,

Ms. Dillard agreed that defense counsel took issue with Ms. Bagley's transcription of the first day and declined to approve the transcript when it was submitted for defense counsel's signature because the transcript, in his view, was "not accurate."

Ms. Dillard testified that after Ms. Harper quit working on the case, Tami Hornick took on the task of transcribing the remaining proceedings that had yet to be transcribed. At the time of the hearing, Ms. Hornick had transcribed the second and third days of trial and was "current with every transcript that's necessary except for [April 11, 2016 Rule 404(b) hearing] and [April 13, 2016 hearing to redact Defendant's interviews.]" Like Ms. Harper, Ms. Hornick was "concerned about the inaudibles." However, because she was aware the "inaudibles" were the result of an inadequate recording and not a reflection of her work, Ms. Hornick agreed to complete the remaining requested transcripts.

Ms. Dillard stated that when there is an "inaudible" in a transcript, it typically means that the court reporter could not make out what was said because the witness spoke "too low," "too fast," or the parties spoke over each other. Ms. Dillard explained that when a court reporter certifies that a transcript is "accurate" in the certificate, the court reporter is certifying that the "words spoken are transcribed verbatim." Ms. Dillard testified that she has "never put an inaudible in a transcript" because she transcribes everything "word-for-word." When asked about the "inaudibles" in the transcripts in this case, Ms. Dillard testified that because the court reporters were working from a recording, they each certified that they "transcribed from audio" rather than "taken verbatim by me."

Following Ms. Dillard's testimony, defense counsel informed the trial court that he had received all the completed transcripts in the case, but requested time to review them and the two forthcoming transcripts to prepare and file an amended motion for new trial, if necessary. The trial court granted the defense request.

Defendant filed an amended motion for new trial on January 11, 2022. Defendant maintained his challenge to the sufficiency of the evidence and added three issues which remain the basis for this appeal. One, the trial court erred in denying his motion to sever the offenses; two, the State failed "to ensure that a complete and accurate transcript of the trial proceedings was prepared, including (but not limited to) much of the testimony of the victim's mother" under Tennessee Code Annotated section 40-14-307(a), and contrary to the decision of this court in *State v. Draper,* 800 S.W.2d 489 (Tenn. Crim. App. 1990), and the Supreme Court in *Elliot v. State,* 435 S.W.2d 812 (Tenn. 1968); and three, relief was warranted under the cumulative error doctrine.

For the missing testimony issue, Defense counsel stated that he was unable to comply with Rule 24 of the Rules of Evidence in preparing a Statement of the Evidence because:

> He is unable to prepare a statement of the evidence pursuant to Rule 24 of the Tennessee Rules of Appellate Procedure of the missing testimony . . . for the reason that Counsel made very few notes at trial and therefore cannot even attempt to reconstruct those portions of the record which were not transcribed[.]

Defendant also asked that the trial court order the AOC to provide a transcript of the victim's forensic interview and Defendant's three interviews with Detective Harris.

Regarding the severance issue, Defendant argued that there is no sex crimes exception to the rule prohibiting propensity evidence and that contrary to the trial court's holding, proof of the other offenses was not relevant to show motive, intent, or absence of mistake or accident. Lastly, Defendant argued that he was entitled to relief under the cumulative error doctrine because he was denied a fair trial.

Hearing on Motion for New Trial – January 14, 2022

Consistent with his amended motion for new trial, Defendant moved to direct the AOC to provide transcripts of his three interviews with Detective Harris and the victim's forensic interview to "obviate[e] the need for both the trial court and appellate court to watch the video recordings to have a full and fair opportunity to view the evidence presented at trial" in considering the severance issue.

The trial court denied Defendant's motion for transcriptions of the interviews. The trial court also denied Defendant's motion for new trial on the severance issue, holding that the offenses were subject to mandatory joinder, not permissive joinder:

> I heard the proof and we're dealing with a situation here where we've got one victim, and I think the period of time was from [June 1, 2011] to [December 20, 2011]. We've got the same victim; we've got the same bedroom; we've got the same threats. And this is a mandatory joinder, and I don't think the issue for appellate review is very difficult.

On the missing testimony issue, Defendant argued that the lack of a complete transcript is prejudice per se because prejudice could not be shown without a complete transcript. As an example of prejudice, defense counsel referred to the cross-examination testimony of Grandmother. Grandmother testified that she told the victim's mother about her concerns in permitting Defendant to bathe the victim. On cross-examination, Grandmother was asked, "would it surprise you to learn" that the victim's mother never mentioned having a conversation with Grandmother about Defendant bathing the victim.

Because this question came from the missing portion of the victim's mother's testimony, defense counsel argued that Defendant was prejudiced by not being able to contrast the victim's mother's testimony with Grandmother's testimony.

The State's attorney agreed that the missing portion of the victim's mother's testimony was "unfortunate" and something she had never seen in fourteen years as a prosecutor, but argued against a showing of prejudice because the missing testimony was not the "linchpin" of the State's case. The victim's mother knew nothing about the abuse until the victim first confided in Great-Grandmother. The State recognized the situation would be quite different had the victim's testimony been missing. The trial court informed the parties that it had taken notes of the trial and did not recall the victim's mother making a hearsay statement from the victim.

Based on its recollection of the trial testimonies, the trial court entered its notes and the State's notes from the missing testimony as exhibits into the record and found no prejudice from the missing testimony. The trial court found instead that Defendant was prejudiced by his testimony which did little to undermine the testimony of the victim. The trial court entered an order denying the motion for a new trial on January 28, 2022. Defendant filed a notice of appeal, the timeliness of which we discuss below.

Analysis

I. *Notice of Appeal*

The State alerted this court of an issue regarding the timeliness of Defendant's notice of appeal in a footnote in the Statement of the Case section of its brief. Defendant responds in its reply brief that the State cited to an outdated version of Rule 4(a) of the Tennessee Rules of Appellate Procedure ("Rule 4(a)") in challenging the timeliness of his appeal and that under both the old and current versions of Rule 4(a), his notice of appeal was timely filed.

A thorough review of the record shows that Defendant's notice of appeal was timely filed. Under the Tennessee Rules of Appellate Procedure, a party appealing a judgment must do so within thirty (30) days of the entry of the judgment. *See* Tenn. R. App. P. 4(a). The trial court entered its order denying Defendant's motion for new trial on January 28, 2022. Defendant had until February 27, 2022, to file a timely notice of appeal. Tenn. R. App. P. 4(a). However, because the thirtieth day fell on a Sunday, Defendant had until Monday, February 28, 2022, to file a timely notice of appeal. Tenn. R. App. P. 21(a). The notice of appeal shows a file-stamped date of March 1, 2022. As the State noted, the certificate of service indicates that the notice was mailed on February 25, 2022, via U.S. mail. Rule 20(a) of the Tennessee Rules of Appellate Procedure provides that "[f]iling

shall not be timely unless the papers are received by the clerk within the time fixed for filing or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing." Tenn. R. App. P. 20(a). The notice of appeal also shows that it was mailed via certified registered mail on February 25, 2022. Based on the date of the certified registered mail date, the notice of appeal was timely filed.

II. *Motion to Sever the Offenses*

Defendant claims the trial court abused its discretion in denying his motion to sever all five counts in the indictment arguing that the offenses were not subject to mandatory joinder because they arose "from several different criminal episodes." He also contends that the offenses were not subject to permissive joinder because the offenses were not part of a larger, continuing plan, evidence of one count was inadmissible in a trial of the other counts, and the probative value of the five counts was outweighed by the danger of unfair prejudice. On appeal, the State maintains that the counts were subject to permissive joinder. Alternatively, the State claims that, if joinder was erroneous, it was harmless given the overwhelming evidence of Defendant's guilt.

A trial court's decision to consolidate or sever offenses is discretionary and will only be reversed if discretion has been abused. *State v. Shirley*, 6 S.W.3d 243, 245-47 (Tenn. 1999); *State v. Moore,* 6 S.W.3d 235, 238 (Tenn. 1999). "[A] trial court's refusal to sever offenses will be reversed only when the 'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *Spicer v. State*, 12 S.W.3d 438, 442-43 (Tenn. 2000) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)); *see also Shirley,* 6 S.W.3d at 247. Discretion is also abused when the trial court "failed to consider the relevant factors provided by higher courts as guidance for determining an issue." *State v. Garrett*, 331 S.W.3d 392, 401 (Tenn. 2011) (citing *State v. Lewis,* 235 S.W.3d 136, 141 (Tenn. 2007)).

The consolidation of multiple offenses against a single defendant in a single trial is governed by the interplay of Rules 8, 13, and 14 of the Tennessee Rules of Criminal Procedure. Rule 8 identifies the circumstances for mandatory joinder and permissive joinder. Under the rule for mandatory joinder:

> (a)(1) Two or more offenses *shall* be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or the offenses consolidated pursuant to Rule 13, if the offenses are:
> (A) based on the same conduct or arise from the same criminal episode;
> (B) within the jurisdiction of a single court; and
> (C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

Tenn. R. Crim. P. 8(a) (emphasis added). Under the rule for permissive joinder:

> (b)(1) Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13, if:
> (1) the offenses constitute parts of a common scheme or plan; or
> (2) they are of the same or similar character.

Tenn. R. Crim. P. 8(b) ("Rule 8(b)"). Thus, if the State moves to consolidate separate indictments, it needs to establish only one thing: the offenses are either parts of a common scheme or plan, or, they are of the "same or similar character." *Id.; see also Spicer,* 12 S.W.3d at 443. Next, Rule 13 permits the trial court to sever offenses pre-trial "if a severance could be obtained on motion of a defendant or of the state pursuant to Rule 14." Tenn. R. Crim. P. 13(b). Finally, Rule 14(b)(1) permits the severance of offenses which have been joined permissively under Rule 8(b).

Under Rule 14(b)(1), a defendant has "an absolute right" to a severance of the offenses unless the State can establish that (1) the offenses are part of a common scheme or plan; (2) evidence of each offense would be admissible in the trial of the other offenses if severed; and (3) the probative value of the evidence of the other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant. *State v. Toliver*, 117 S.W.3d 216, 228 (Tenn. 2003); *Spicer,* 12 S.W.3d at 443-45 (citing Tenn. R. Crim. P. 14(b)(1), Tenn. R. Evid. 404(b)(2), and Tenn. R. Evid. 404(b)(4)).

Under the first prong, crimes which are part of a larger, continuing plan or conspiracy constitute evidence of a common scheme or plan under Rule 14(b). *See State v. Hoyt,* 928 S.W.2d 935, 943 (Tenn. 1995) (*overruled on other grounds by Spicer,* 12 S.W.3d at 447, n.12); *see also State v. Hallock,* 875 S.W.2d 285, 289-90 (Tenn. Crim. App. 1993).

Under the second or "primary" prong, multiple offenses tried together is an issue of evidentiary relevance and thus invokes Rule 404(b). Rule 404(b) excludes evidence of other crimes which amount to nothing more than propensity evidence unless the evidence serves some "other purpose" such as identity, motive, intent, absence of mistake or accident, if that is a defense, and a common scheme or plan for commission of two or more crimes so related to each other that proof of one tends to establish the other. *Moore,* 6 S.W.3d at 239; Tenn. R. Evid. 404(b), Advisory Commission Comment; *Toliver,* 117 S.W.3d at 230.

For the third prong, the trial court must balance the probative value of the evidence against the danger of its unfair prejudice in showing the defendant's propensity or character as required by Rule 404(b). Factors to consider include "the prosecution's need for the evidence, the likelihood the defendant committed the other crimes, and the degree of its relevance." *State v. Edwards*, 868 S.W.2d 682, 691 (Tenn. Crim. App. 1993). "The similarity of the acts makes the probative value particularly significant." *Id.*

In determining whether discretion has been abused, our review of a severance ruling is confined to the evidence presented at the severance hearing, along with the trial court's findings of fact and conclusions of law. *Spicer*, 12 S.W.3d at 445 ("because the trial court's decision of whether to consolidate offenses is determined from the evidence presented at the hearing, appellate courts should usually only look to that evidence"); *see also Shirley*, 6 SW.3d at 247 (Supreme Court "closely examine[d]" proof at the severance hearing only where trial court held a hearing but failed to make findings of fact and conclusions of law); *cf. Toliver*, 331 S.W.3d at 404 (because trial court failed to hold a hearing, Supreme Court analyzed consolidation issue based on the evidence at trial).

At the severance hearing in this case, the State argued that the offenses were subject to mandatory joinder because the offenses involved a single victim, occurred in the time period listed in the indictment, and were part of the "same criminal investigation." The State also argued for permissive joinder as an alternative theory. In its ruling, the trial court based its decision on the principles in Rule 14(b)(1) relative to the severance of permissibly joined offenses finding that "this is an offense that is part of a larger, continuing plan or conspiracy and does meet the element or the condition that it is a common scheme or plan," and that there were material issues regarding motive, intent, absence of mistake or accident and identity. The trial court also found that the probative value of the evidence was not outweighed by the prejudicial effect:

> We have a six-month period of time, where the Defendant lived in this particular residence. It happened the same way, the same location over a few months' period of time. The mother was always away at work and there is only one victim, the same victim.

At the hearing on the motion for new trial, the trial court again addressed the severance issue, but found that the offenses were subject to mandatory joinder:

> I heard the proof and we're dealing with a situation here where we've got one victim, and I think the period of time was from [June 1, 2011] to [December 20, 2011]. We've got the same victim; we've got the same bedroom; we've got the same threats. And this is a mandatory joinder, and I don't think the issue for appellate review is very difficult.

While the trial court denied the motion to sever on different grounds at the severance hearing and the motion for new trial, based on the overwhelming proof in the case, we conclude that the trial court did not abuse its discretion in denying Defendant's motion to sever the five counts. In this case, Defendant used his position as the victim's stepfather to sexually assault the victim. The offenses occurred only at night while the victim's mother was working. The victim never recalled a time when the offenses occurred when her mother was at home. *See State v. David Boyd Conner, Jr.*, No. M2005-01628-CCA-R3-CD, 2006 WL 3516215, at *5 (Tenn. Crim. App. Dec. 5, 2006) (multiple offenses against single victim were part of a continuing plan where defendant waited until the household members were asleep before entering the victim's bed); *Craig U. Quevedo v. State*, No. M2010-01399-CCA-R3-PC, 2013 WL 1188957, at *12 (Tenn. Crim. App. Mar. 22, 2013) (concluding on postconviction that a severance issue was not meritorious because the petitioner's journal indicated a continuing plan to isolate the victim in order to continue to subject her to sexual abuse).

Except for count two, Defendant engaged in the same type of sexual conduct. The offenses involved anal penetration and occurred in the bottom bunk of their shared bedroom. In addition, Defendant threatened to cut off the victim's fingers with a knife which he brandished, and which the victim later found on the floor underneath the bunk bed. Defendant did not deny that the victim may have been sexually abused, he denied that he was the person who abused her. We conclude that the trial court did not abuse its discretion by denying Defendant's motion for severance. He is not entitled to relief.

III. *"Failure to Secure Complete Transcripts" – Missing transcription of the direct and cross examination testimony of victim's mother and bench conferences.*

Defendant contends he is entitled to a new trial because 1) the trial transcript does not include all of the direct testimony of the victim's mother; 2) the trial transcript does not include a transcription of the bench conferences; and 3) the transcript includes several instances of "inaudible" suggesting that the court reporter did not hear or comprehend a witness, the attorneys, or the trial judge.

Defendant maintains that the victim's mother's testimony was "critical" because she was "likely to be closest" to the victim, and there may have been portions of her testimony inconsistent with other witnesses. For the first time on appeal, Defendant contends that this court cannot conduct meaningful appellate review without a transcription of the bench conferences. Defendant also maintains that the outcome of the trial cannot be trusted with so many instances of "inaudible" in the trial transcript. Because trial counsel did not take "significant notes of the trial," Defendant asserts that it was "impossible" to comply with Rule 24 of the Tennessee Rule of Appellate Procedure in drafting a statement of the evidence.

The State argues that the missing portion of the victim's mother's direct and cross examination testimony and "inaudibles" in the transcript do not preclude us from conducting a meaningful review. The State argues further that Defendant waived this issue by failing to construct and submit a statement of the missing testimony to the trial court as set forth in Rule 24.

In his reply brief, Defendant asserts that this issue is not waived because neither our Rules of Appellate Procedure nor caselaw requires an appellant to submit a statement of the evidence as set forth in Rule 24.

Indigent defendants in both felony and misdemeanor cases have the right to adequate appellate review. *Lester Douglas Bell v. State*, No. E1997-00082-CCA-R3-CD, 1999 WL 436432, at *2 (Tenn. Crim. App. June 29, 1999) (citing *Mayer v. City of Chicago*, 404 U.S. 189, 195-96, 92 (1971) (citing *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969)). An indigent defendant "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Lester Douglas Bell*, 1999 WL 436432, at *2 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)). The State must provide an indigent defendant with a "record of sufficient completeness" for proper consideration of claims for appellate review. *Bell*, 1999 WL 436432, at *2 (citing *Draper v. Washington*, 372 U.S. 487, 499, 781 (1963). In addressing what constitutes a "record of sufficient completeness," our supreme court, stated:

> A 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript . . . a State 'may find other means [than providing stenographic transcripts] for affording adequate and effective appellate review to indigent defendants' . . . 'alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise.'

State v. Gallagher, 738 S.W.2d 624, 625 (Tenn. 1987) (citations omitted).

Tennessee Supreme Court Rule 13 requires all general sessions, juvenile, trial and appellate courts to appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation. Tenn. R. Sup. Ct. R 13, § 1(c). A defendant's indigency does not, however, automatically entitle the defendant to a verbatim transcript of the evidence at the State's expense. Tennessee Rule of Criminal Procedure 37(c), requires either a transcript *or* a statement of the evidence:

> If the defendant is indigent, the court shall advise the defendant that, if he or she has not already retained appellate counsel or if counsel has not previously

> been appointed, the court will appoint appellate counsel and that a transcript *or* statement of the evidence will be furnished at state expense.

Tenn. R. Crim. P. 37(c)(2) (emphasis added).

Furthermore, to secure a criminal defendant's right to a transcript at the State's expense, Tennessee Code Annotated Section 40-14-307(a) provides:

> A designated reporter shall attend every stage of each criminal case before the court and shall record verbatim, by a method prescribed or approved by the administrative director, all proceedings had in open court and other proceedings as the judge may direct. The reporter shall attach the reporter's official certificate to the records so taken and promptly file them with the clerk of the court, who shall preserve them as a part of the records of the trial.

T.C.A. § 40-14-307(a). The administrative director shall approve methods for the taking of verbatim records and any approved method for transcribing the evidence "shall be of a nature that an accurate written transcript can be prepared from that method." *Id.* § 40-14-306.

Rule 24 governs the duty of an appellant in preparing the appellate record. "[I]f a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). Tennessee Rule of Appellate Procedure 24(c) further provides:

> If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, . . . and a statement of the evidence or proceedings is a reasonable alternative to a stenographic report, the appellant *shall* prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal.

Tenn. R. App. P. 24(c) (emphasis added). Rule 24(c) places the primary burden on the appellant to see that a proper record is prepared and filed in this court.

The trial court acknowledged that there were problems with the transcripts of the trial.[5] However, it found no prejudice from the victim's mother's missing direct examination testimony to warrant a new trial:

> Under the circumstances and under – as stated by the Court in what I remember and as stated by the State in their motion to [designate] a record, I find that it doesn't appear to the Court there was anything prejudicial or anything exculpatory that would prejudice the defendant. To the contrary, I think it would probably be material that would be more harmful to him. In light of all the other testimony here – and the victim did an incredible job with the diagram and other things. We had other circumstances that were proved through the testimony and – but you get down to, I think, the bottom line here for the evidence and any possible jury verdict was the damaging testimony of the defendant who says, yes, I believe she's always truthful. It happened, but I didn't do it. And he just happened to be the only one that was around in the mornings (sic). So based on the entire testimony, based on what I remember, based on what the State has remembered and documented, I find that there is no error on the missing transcript that would require a new trial.

This is not a case where the trial court denied an indigent defendant a transcript. Contrary to Defendant's assertion, a court reporter was present at every stage of the proceedings as required under the statute; unfortunately, there was either human error or error with the technology that equally impacted both parties. The issue is whether Defendant was prejudiced by the missing portion of the testimony and thus entitled to a new trial. A defendant is entitled to a "substantially verbatim recital" of the evidence in the form of a transcript or a statement of the evidence. An appellant can use Rule 24(c), and submit a statement of the evidence in lieu of a transcript. We note first that the record does not include a Statement of the Evidence as contemplated by Rule 24. Defendant's indigency does not alter his burden as the appellant to first prepare a statement of the evidence. Tenn. R. App. P. 24(c). The trial court and the State worked to fill the gap caused by the error in the use of the recording device during the victim's mother's testimony at trial. Defendant did not, however, join in the effort, or make any effort, to put

[5] At the hearing on the motion for new trial, it was also discovered that the transcripts for the second and third days of trial which were transcribed from audio recordings, were incorrectly paginated and the volume numbers were out of order. However, defense counsel agreed that there was no part of those two days of trial that was not transcribed, and those issues with the transcripts have not been raised on appeal.

together a statement of the evidence in lieu of a transcript for the missing testimony. Defendant made no effort to comply or attempt to comply with Rule 24(c). Accordingly, we consider this issue waived.

Waiver notwithstanding, Defendant is not entitled to a new trial. Defendant argues that the missing testimony is per se prejudice, but he does not identify an issue upon which the victim's mother's testimony was crucial; he merely speculates about what it might have included. Defendant has not demonstrated that his ability to appeal has been hindered by the lack of a transcript of the missing testimony. In fact, Defendant does not assign as error that the evidence was insufficient. Nor does he contend that the victim's mother's testimony was relevant to his severance issue. Indeed, she did not testify at the severance hearing.

The State's case did not rest on the victim's mother's testimony. She was not a crucial witness in this case. She did not witness the offenses, was unaware of any abuse while Defendant was living with her and her family, and was one of the last people to learn about the abuse. As demonstrated by her available testimony, she had no grounds to suspect abuse and therefore did not examine the victim's body for signs of abuse while bathing her.

The evidence of Defendant's guilt of the remaining four counts was compelling. The victim, in both her testimony at trial and in her forensic interview, described in childlike terms the graphic nature of the offenses. Defendant's testimony did nothing to undermine or combat her testimony. Defendant acknowledged both in his second and third interviews with Detective Harris and in his testimony at trial that he had no reason to doubt the victim's allegation that she had been raped. He denied that it was him.

Furthermore, this court is not persuaded by Defendant's reliance on *State v. Draper*, 800 S.W.2d 489 (Tenn. Crim. App. 1990). The circumstances in *Draper* are distinct from this case. In *Draper*, there was no indication that a witness's testimony was missing or omitted from the transcripts of the record. In *Draper,* the trial court limited the transcription of the *entire* record based on the court's determination of the merits of the issues in the defendant's motion for new trial. *Id.* at 491-97. The trial court, here, without question or judgment, granted Defendant's motion for the requested transcripts. It was only after the transcripts had been prepared that the State alerted the defense and the court of the issue with the victim's mother's trial testimony. Defendant has not established prejudice and is therefore not entitled to a new trial.

Defendant's claim for relief based on the failure to transcribe the bench conferences and the "inaudibles" in the transcript is also waived. The record shows that the trial court granted Defendant's request for more time to review the transcripts as they became

available. At the time Ms. Dillard testified at the hearing on the motion to designate the record, April 8, 2019, all three volumes of the trial had been transcribed and defense counsel acknowledged receipt of same. More than a year passed before Defendant filed an amended motion for new trial on January 11, 2022. The hearing on the motion for new trial was held three days later. Defendant was therefore on notice regarding the bench conferences and the "inaudibles" in the trial transcripts. He challenged neither and chose instead to concentrate on the victim's mother's trial testimony which was the more glaring omission. Failure to raise an issue regarding the bench conferences and the "inaudibles" in the trial court renders the issue waived on appeal.

IV. *Cumulative Error*

Defendant contends that he is entitled to a new trial under the doctrine of cumulative error. The State counters that Defendant is not entitled to relief because he has failed to demonstrate that there was more than one error at trial, and proof of Defendant's guilt was overwhelming. To warrant relief under the cumulative error doctrine, there must have been "multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). Here, we need not consider the cumulative effect of any alleged errors because Defendant has failed to demonstrate multiple errors, much less a single error in any of his issues. *See also State v. Herron*, 461 S.W.3d 890, 910 (Tenn. 2015). He is not entitled to relief.

Conclusion

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

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JILL BARTEE AYERS, JUDGE