

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2023 Session

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STATE OF TENNESSEE v. JAY DEE GARRITY

**Appeal from the Criminal Court for Davidson County
No. 2009-C-2411 Angelita Blackshear Dalton, Judge**

No. M2022-00725-CCA-R3-CD

Jay Dee Garrity, Defendant, was convicted of three counts of aggravated sexual battery and sentenced to consecutive sentences of 17 years for each conviction. In this appeal as of right, Defendant asserts that: 1) the trial court erred by allowing evidence of Defendant's prior bad acts; 2) it was plain error for the trial court to admit portions of the victim's recorded interview; 3) the trial court abused its discretion in running Defendant's sentences consecutively and his sentence is presumptively vindictive; 4) the trial court improperly restricted Defendant's cross-examination of the victim; 5) the trial court erred in allowing the State to call a witness at trial without giving sufficient notice to Defendant; 6) the trial court erred by granting the State's request for a special jury instruction; and 7) the evidence was insufficient to support Defendant's convictions. Upon our review, we affirm the judgments of the trial court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Manuel B. Russ (on appeal), Chad Davidson (at trial), Nashville, Tennessee for the appellant, Jay Dean Garrity.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Janice Norman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural History

On August 7, 2009, Defendant was indicted by the Davidson County Grand Jury for three counts of aggravated sexual battery against his former stepdaughter, the victim, between August 1997 and March 1999. Defendant was convicted as charged after a bench trial and sentenced to an effective 48 year-sentence. A panel of this Court affirmed the convictions on appeal but remanded for a new sentencing hearing, after which the trial court again imposed a 48-year sentence. *State v. Jay Dee Garrity*, No. M2010-02592-CCA-R3-CD, 2012 WL 3939349, at *1 (Tenn. Crim. App. Sept. 11, 2012), *perm. app. denied* (Tenn. May 14, 2013) (“*Garrity I*”); *Jay Dee Garrity v. State*, No. M2016-01463-CCA-R3-PC, 2018 WL 1040135, at *3 (Tenn. Crim. App. Feb. 22, 2018), *no. perm. app. filed* (“*Garrity II*”).

Another panel of this Court subsequently reversed the post-conviction court’s denial of post-conviction relief, concluding that Defendant received the ineffective assistance of trial counsel and remanded the case for a new trial. *Jay Dee Garrity v. State*, No. M2016-01463-CCA-R3-PC, 2018 WL 1691296, at *1 (Tenn. Crim. App. Apr. 4, 2018), *no. perm. app. filed* (“*Garrity III*”). Following a second jury trial on the original indictment, Defendant was again convicted as charged by a jury, and the trial court imposed 17-year sentences for each conviction to be served consecutively, for an effective 51-year sentence. This appeal followed.

Trial

The victim was 29 years old at the time of the second trial. Her mother married Defendant when the victim was four or five years old, and they lived in Oklahoma. They moved to Nashville when the victim was in kindergarten and moved back to Oklahoma when she was in third grade. She testified that Defendant “treated [her] like his own” and they had no problems until she was in second grade. The victim recalled an occasion when Defendant picked her up after school and told her to lift her shirt in the living room of their apartment. She testified that Defendant just looked at her on that occasion. On another occasion, Defendant called the victim to his bedroom and told her to lift her shirt again and touched her breasts for “a minute or so, not very long.”

After that, Defendant would rub the victim’s breasts “quite often[,]” and she felt “[v]ery uncomfortable.” Defendant touched his penis while he was touching her breasts, and Defendant would also “have [the victim] touch him.” Defendant took her hand and made her touch his penis. The victim recalled one occasion when Defendant called her into the bathroom. Defendant was not wearing any clothes, and he had the victim sit on the toilet and move her hand on his penis. The victim recalled another occasion when she was sitting on the bed in her mother’s bedroom and Defendant was touching her breasts.

She testified, Defendant “unzipped his pants and pulled them down just a little bit and was touching himself while he touched me[,] and then he grabbed my hand and had me touch him.”

Defendant told the victim that if she told anyone about the touching, he would say that it was her brother or her uncle who stayed with them sometimes. The victim recalled that Defendant would tell her “to come take a nap” and “[t]hose were the times that he would touch [her].” The victim’s mother took her to the doctor after she began wetting the bed and sleepwalking. The victim testified that the touching continued after they moved from Tennessee until she was 13 years old, when her uncles and Defendant went out-of-town to work on a construction job and the victim’s mother told the victim’s uncles to leave Defendant there.

The victim’s mother had asked her if Defendant had ever touched her inappropriately, and the victim denied any abuse because she was afraid her mother would not believe her. The victim eventually told her mother about the abuse after Defendant had been gone for a couple of years. She testified, “it was a relief to not have to keep it in. I just remember just crying a lot.” The only contact the victim had with Defendant after she disclosed the abuse was when Defendant called her mother and the victim and her mother both answered the phone. The victim’s mother told Defendant that she knew what Defendant had done to the victim, and Defendant said, “he didn’t do it [and] that it was her [uncle] Bo.”

On cross-examination, the victim acknowledged that she told a detective in Oklahoma during an interview in 2007 that there was an instance of oral sex while her family lived in Nashville and that Defendant had ejaculated in her mouth.

N.G.¹, the victim’s mother, testified that she married Defendant when the victim was three years old. She said Defendant “always kind of favored [the victim] . . . and always made her go everywhere with him. . . .” N.G. never saw any inappropriate touching. She became suspicious after the victim began wetting the bed and sleepwalking. N.G. assured the victim that her relationship with Defendant was over and asked her if Defendant had ever touched her inappropriately. The victim cried and told her that he had. N.G. did not immediately contact the police, “[b]ecause at that particular time [the victim] was not emotionally equipped to go through that,” and N.G. “knew [the victim] needed time to process what had just transpired[.]”

¹ It is the policy of this court to protect the identity of victims of sexual offenses. Family members of the victim are identified by initials.

N.G. recalled the phone call from Defendant in which she confronted him, saying, “I know what you did you SOB.” Defendant responded, “[the victim] is lying” and blamed N.G.’s brother. N.G. testified that she had not specifically mentioned the victim or the inappropriate touching. After that phone call, N.G. contacted police in Oklahoma. N.G. received another phone call from Defendant after she contacted police in which Defendant told her that he “had a real good job and he was making real good money and he just felt like he ought to try and help [N.G.] out, which [N.G.] declined.”

S.R., the victim’s older brother, recalled that Defendant often drove the victim home from school, and he would take the bus home. He recalled that Defendant never let the victim “get out of his sight” and that when Defendant “went somewhere she had to go with him and that . . . seemed to be the case always.” S.R. never observed Defendant inappropriately touch the victim.

R.B., the victim’s cousin, recalled an occasion when she visited the victim’s family in Nashville and the victim and S.R. wanted to go to the grocery store with her. Defendant said that the victim needed to take a nap and could not go but that S.R. could go. When R.B. got ready to leave, the victim asked to go with her, and Defendant refused, saying that she needed a nap. R.B. thought it was odd, “especially as [the victim] wanted to go with [them] as badly as she did.”

B.S.B., R.B.’s mother and the victim’s aunt, was deceased at the time of the trial. Her prior testimony was read into the record. She testified about an occasion when she visited the family in Nashville and Defendant told the victim that it was time to take a nap. B.S.B. asked why the victim needed to take a nap, and Defendant said, “If she doesn’t take a nap you just can’t stand to be around her.” The victim was eight years old at the time. B.S.B. had not seen the victim be difficult to be around without a nap. B.S.B. saw Defendant and the victim go to Defendant’s bedroom and close the door behind them. B.S.B. thought it was “[v]ery odd” for the victim to take a nap with Defendant, but she did not express her concerns to N.G. B.S.B. “just figured she knew.”

Rachel Black, a former sex crimes detective with the Metro Nashville Police Department, met with the victim and N.G. in Nashville in May of 2009. She said that when a victim discloses allegations in another jurisdiction, it is standard protocol for the department to notify the jurisdiction in which the alleged offenses occurred. Detective Black’s interview with the victim was not recorded. Detective Black verified that the victim’s family was living in Nashville at the time of the offenses through records from the Nashville Electric Service. The victim did not disclose any act of oral sex that happened while the family was living in Nashville.

Defendant did not testify or present any additional proof.

Based on this evidence, the jury convicted Defendant of three counts of aggravated sexual battery. Following a sentencing hearing, the trial court imposed consecutive 17-year sentences for each of the three convictions, for a total effective sentence of 51 years in the Tennessee Department of Correction.

Analysis

I. Rule 404(b) Evidence

Defendant contends that the trial court erred by allowing the victim to testify about acts of sexual abuse that occurred in Oklahoma. The State argues that Defendant opened the door to the testimony and the trial court did not err.

For evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” Tenn. R. Evid. 403. Ordinarily, evidence of prior bad acts is inadmissible to show that a defendant acted in conformity with a character trait. Tenn. R. Evid. 404(b). Before admitting such evidence, the trial court must: (1) hold a hearing outside the jury’s presence upon request; (2) determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; (3) find the proof of the other crime, wrong, or act to be clear and convincing; and (4) exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404(b)(1)-(4).

When a trial court substantially complies with the procedural requirements of Rule 404(b), this Court will not overturn the ruling absent an abuse of discretion. *See State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005). “Reviewing courts will find an abuse of discretion only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party.” *State v. Parker*, 350 S.W.3d 883, 897 (Tenn. 2011) (quoting *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)).

Prior to trial, Defendant filed a motion pursuant to Rule 404(b) to exclude testimony regarding acts of sexual abuse alleged to have occurred in Oklahoma. Following a hearing, the trial court concluded that testimony about prior convictions or acts of abuse that occurred in Oklahoma were not admissible. The court found, however, that “a conceptual void w[ould] be created if all testimony regarding the victim’s time in Oklahoma [wa]s prohibited.” The court noted that the investigation was commenced in Oklahoma and that

it could not “anticipate what testimony or evidence w[ould] be presented” at trial. The court ruled, therefore, that “testimony should be limited to information absolutely necessary to establish there was a disclosure, investigation and referral to Davidson County.”

On cross-examination, defense counsel attempted to impeach the victim by asking about a statement she made to an Oklahoma detective that Defendant made her perform oral sex on him in Nashville. The victim responded that she did not recall making that statement and that if she did make the statement, she “may not have been referring to Nashville.” She also did not recall stating that Defendant ejaculated or that he ejaculated in her mouth while the family lived in Nashville. Defense counsel asked the victim how her story could have changed from Defendant “only touching [her] chest and there was no ejaculation to in fact well this is now oral sex and there was ejaculation in Nashville?” The victim explained that she was “uncomfortable” and “nervous” when she gave the interview. Defense counsel again asked the victim why she “describe[d] the events that occurred in Nashville [] significantly differently[.]” The victim answered, “It’s not that I was trying to describe what happened in Nashville. I was putting everything together in one group[.]” She continued, “I was trying to tell everything that I could recall at that time stating whether it was in Nashville or stating whether it was in Oklahoma did not occur to me.”

Defense counsel objected to the victim’s testimony and requested a jury-out hearing. Defense counsel asserted that he specifically limited his questions to discrepancies in the victim’s story about what occurred in Nashville and that it did not give the victim “license” to testify about the offenses that occurred in Oklahoma. The State responded that defense counsel “opened the door” to the testimony, and the trial court agreed. The trial court reminded defense counsel “to be very careful” in phrasing his questions. The court explained that defense counsel was entitled to ask the victim about any discrepancy between the victim’s prior statement and her testimony about the sexual abuse that occurred in Nashville but that defense counsel should narrowly tailor his questions and he was “stuck with the answer” the victim provided. The State requested that the victim be allowed to clarify on redirect examination that oral sex occurred in Oklahoma and that she was “lumping it all together.” The trial court said, “Yes. I don’t have a problem with that.”

When cross-examination resumed, defense counsel asked the victim if she told the Oklahoma detective that there was an instance of oral sex in Nashville, that there was ejaculation in Nashville, and that Defendant ejaculated in her mouth. The victim answered each question affirmatively. On redirect examination by the State, the victim explained that the Oklahoma detective asked her why she was there, and the victim told him she was there to discuss being molested. The detective asked her what Defendant had her do, and the victim said Defendant would touch her and make her touch him. The detective asked if Defendant had her do anything else, and she answered that Defendant had her perform

oral sex on her. The State asked if the detective was asking her specifically about events that occurred in Nashville, and defense counsel objected.

The trial court observed that the detective's questions to the victim about the abuse were "vague" and agreed with the State that the detective did not specifically ask the victim about events that occurred in Nashville until after she described acts of sexual abuse. The State argued that the victim "should be allowed to explain how the interview occurred." The trial court agreed and ruled that the victim could explain. The victim testified,

Q. [The victim], you have described that the detective in Oklahoma was asking you about what had happened to you; is that correct?

A. Correct.

Q. And when you were describing it to him at the beginning of that interview he doesn't say anything about Nashville, Tennessee, initially, correct?

A. Correct.

Q. And so when you are describing events to him are those events that occurred in Oklahoma?

A. Both.

Q. Both Nashville and Oklahoma?

A. Correct.

Q. But specifically when you described to him about oral sex –

Defense counsel objected to the question as "asked and answered," and the trial court overruled the objection. The prosecutor continued,

Q. When you were describing to him about oral sex and [Defendant] making you perform oral sex on him is that an event that occurred in Oklahoma after you moved away from Nashville?

A. Yes.

Q. And when you were describing that to the detective were you intending to explain to him that that occurred in Nashville?

A. No.

Q. And so were you just telling him about all of the events that occurred?

A. Correct.

Q. And then the detective asked you when did it all start; is that correct?

A. Right.

Q. And you told him that it started in Nashville?

A. Right.

We agree with the trial court that defense counsel opened the door to testimony about sexual acts that occurred in Oklahoma when he asked the victim how her statements to the detective differed from her trial testimony. “[O]pening the door’ is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence.” *State v. Vance*, 596 S.W.3d 229, 250 (Tenn. 2020). “[T]he remedy sought after a party has opened the door should be both relevant and proportional,” and “the otherwise inadmissible evidence sought to be introduced by the opposing party should be limited to that necessary to correct a misleading advantage created by the evidence that opened the door.” *Id.* at 250-51.

We agree with the State that defense counsel “attempted to cherry pick portions of the interview and to use them out of context[.]” The trial court did not abuse its discretion by allowing the victim to explain and give context to her statements. Nor did the trial court abuse its discretion by allowing the State to attempt to clarify the victim’s testimony in its redirect examination. This issue is without merit.

II. Victim’s Interview

Defendant argues that it was plain error for the trial court to admit into evidence the first four pages of the transcript of the victim’s interview with the Oklahoma detective. Defendant concedes that he did not contemporaneously object to the introduction of the interview and asks this Court to review the issue for plain error. The State responds that plain error relief is not warranted because Defendant has not shown that a clear and unequivocal rule of law was breached or that he did not waive the issue for tactical reasons.

Tennessee Rule of Evidence 613(b) states that “[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.” “[E]xtrinsic evidence remains inadmissible until the witness either denies or equivocates as to having made the prior inconsistent statement.” *State v. Martin*, 964 S.W.2d 564, 567 (Tenn. 1998). Tennessee Rule of Evidence 803(26) provides an exception to the rule against hearsay that a prior inconsistent statement of a testifying witness otherwise admissible under Rule 613(b) is admissible if: (1) the declarant testified at trial and was subject to cross-examination about the statement; (2) the statement is an audio or video recorded statement, a signed written statement, or a statement given under oath; and (3) the trial court determines after a jury-out hearing by a preponderance of the evidence that the witness made the prior statement under circumstances indicating trustworthiness. Tenn. R. Evid. 803(26)(A)-(C).

Defendant’s failure to make a contemporaneous objection at trial to the introduction of evidence results in the waiver of the issue on appeal. *See* Tenn. R. Evid. 103 (“Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection. . . .”); Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”). When a defendant has waived an issue on appeal, it is subject only to plain error review. *See State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000).

This Court considers the following factors in determining whether plain error relief is warranted: (1) the record must clearly establish what occurred in the trial court; (2) there must be a breach of a clear and unequivocal rule of law; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *Id.* at 282-83. This Court need not consider all five factors when a single factor indicates that relief is not warranted. *State v. Fayne*, 451 S.W.3d 362, 372 (Tenn. 2014). “[A]n error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error.” *Id.*

Defendant asserts that he used the victim’s statements to impeach her and to “draw[] the jury’s attention to significant inconsistencies in her recollection of events[,]” but that defense counsel did not suggest that the victim “was fabricating or falsifying her testimony.” Defendant argues that it was plain error for the trial court to allow the State to

bolster the victim's testimony with her prior consistent statement. The State responds that defense counsel requested the admission of the statement and, therefore, cannot establish that it was not for tactical reasons. The State also argues that no clear and unequivocal rule of law was breached.

At the conclusion of the State's redirect examination of the victim, defense counsel asked the trial court to make pages 1-4 of the victim's interview an exhibit. The State responded that it had no objection to introducing the entire transcript of the interview but argued that it should be for identification purposes only and not submitted to the jury as evidence. The trial court stated that it would "address this later." At the end of the first day of trial, defense counsel asked the trial court if it would permit the parties "to be heard on the issue of the interview that [defense counsel] asked to be made an exhibit[.]" The prosecutor asked if defense counsel wanted to introduce the transcript under Rule 803(26) of the Tennessee Rules of Evidence and asked the purpose of introducing it. Defense counsel explained that "there was a disagreement" about what was said in the interview "and how it could have been taken." He argued that both parties should be allowed to present their interpretations of the interview and it "should be for argument to a jury."

The next day, the trial court stated that it had reviewed the transcript of the interview and stated that it would introduce pages 1-4 as an exhibit. The trial court asked defense counsel if he had "anything in response." Defense counsel answered negatively and stated that introducing the exhibit was "fine."

Defendant asserts on appeal that "the failure to object to this was not for any tactical reason." However, Defendant did not simply fail to object, but rather he moved to introduce the evidence and explained his reasoning for doing so. Defense counsel stated that it was "the best thing to do" to allow the jury to determine for itself whether it believed Defendant's or the State's interpretation of the victim's prior statement.

We conclude that Defendant has not shown that he did not waive the issue for tactical reasons, and we need not address the remaining plain error factors. Defendant is not entitled to relief on this issue.

III. Sentencing

Defendant argues that the trial court erred by imposing consecutive sentences and that the trial court erred by imposing a harsher sentence than was imposed after the first trial. The State responds that the trial court did not abuse its discretion in sentencing Defendant.

At the sentencing hearing, the State offered into evidence the presentence report, as well as certified judgments of conviction showing that Defendant had three prior felony convictions. The State also offered proof of Defendant's subsequent convictions in Oklahoma for rape, sodomy, and sexual battery against the victim.

The victim testified via video that Defendant's acts of sexual abuse began while the family was living in Nashville and progressed after the family moved to Oklahoma. She testified that Defendant would penetrate her with his fingers and rub her genitals with his penis and that he "would ejaculate on [her] or beside [her]." She read a victim impact statement in which she lamented how much of her life "and now [her] family's life" she had spent trying to keep Defendant "behind bars[.]" She stated that Defendant had "molested [her] for years," causing her to "suffer from sever[e] PTSD." She had nightmares, insomnia, anxiety, depression, and suicidal thoughts and took medication. Addressing the court, the victim stated, "Your Honor, this man has not only taken my innocence from me, but has caused so much emotional and mental damage that I fear that I will never be able to be repaired."

Defendant testified that he was 61 years old, that he had a "good relationship" with his mother, and that he "never really knew" his father. Defendant did "pretty well" in school, and he obtained his GED. Defendant was a "pipe fitter by trade." Defendant testified that he was diabetic and had neuropathy in his hands and feet and that he had never been diagnosed with any psychological disorder. Defendant explained his prior burglary conviction in New Mexico, stating, "I was young, and I guess we just did something stupid, just walked into these people['s] house." Defendant said he successfully completed his five-year probationary sentence. He testified that he served five years incarcerated and five years on probation for "bounc[ing] some checks" in Oklahoma. While serving that sentence, Defendant set up an account under "[his] name and a bogus address" to make phone calls from the county jail, and he was convicted and sentenced to ten years concurrent with his prior sentence. Defendant was released after serving "[a]bout four and a half years[.]" and he complied with the conditions of release.

Defendant pleaded "no contest" in Oklahoma to rape, sodomy, and sexual battery against the victim. He explained that his attorney "told [him] that if [he] went to trial and if [the victim] shed a tear[,] the [c]ourt would convict [him.]" His attorney advised him, "the best thing for [him] to do [wa]s take th[e] deal . . . and put this behind [him] and go on with [his] life." Defendant testified he was facing a life sentence for the rape charge, 20 years for sodomy, and five years for sexual battery, but that he received two years on unsupervised probation. He said it "took [him] a little while to finally agree to it" but that his girlfriend and boss convinced him to accept the plea offer.

Regarding the offenses in this case, Defendant said, “I can never say I’m sorry, because this did not happen. I don’t know what motivate[d] this.” He said the victim’s mother had “control.” Defendant denied he was a “threat” to anyone and asked the court for leniency.

In a written order, the trial court stated that it had considered the proof at trial and sentencing, the victim impact statement, and the presentence report, and the court determined that Defendant was a Range II multiple offender. The court found applicable four enhancement factors: (1) Defendant had a previous history of criminal convictions or criminal behavior in addition to that necessary to establish the appropriate range, (2) the personal injuries inflicted upon the victim were particularly great, (3) Defendant was on probation at the time the offenses in this case were committed, and (4) Defendant abused a position of private trust. *See* T.C.A. § 40-35-114(1), (6), (13), and (15). In mitigation, the trial court found, “[w]ithout minimizing the emotional and psychological impact of the Defendant’s conduct on the victim . . . , there was no evidence to support a finding that the victim suffered serious bodily injury or that she was at risk of suffering serious bodily injury.” *See id.* § 40-35-113(1). The court further found that “the applicable enhancement factors far outweigh[ed] the mitigating factors” and sentenced Defendant to 17 years for each of his three convictions.

In determining whether to run Defendant’s sentences concurrently or consecutively, the trial court found that Defendant was an offender whose record of criminal activity was extensive. *See id.* § 40-35-115(b)(2). The court also found that Defendant was convicted of two or more statutory offenses involving sexual abuse of a minor, and the court considered the aggravated circumstances arising from the relationship between Defendant and the victim the timespan of Defendant’s undetected sexual activity, and the nature and scope of the sexual acts and the extent of the residual physical and mental damage to the victim. *See id.* § 40-35-115(b)(5). In support of this determination, the court found that Defendant’s sexual conduct “not only continued after the family moved from Nashville to Oklahoma, but the nature of the conduct progressed.”

Defendant argues that his consecutive 17-year sentences were presumptively vindictive. The United States Supreme Court has held that a harsher sentence after a new trial raises a presumption of “judicial vindictiveness,” which may be overcome by an affirmative showing on the record of the reasons for the harsher sentence. *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969). In subsequent cases, the Court clarified that the presumption of vindictiveness announced in *Pearce* “do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.” *See Alabama v. Smith*, 490 U.S. 794, 799 (1989) (quoting *Texas v. McCullough*, 475 U.S. 134, 138 (1986)). The Supreme Court limited the application of *Pearce* to circumstances “in which there is a ‘reasonable likelihood’ . . . that the increase in sentence is the product of actual

vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness.” *Smith*, 490 U.S. at 799-800 (citing *Wasman v. United States*, 468 U.S. 559, 569 (1984)).

Citing *Pearce*, Defendant contends that his effective 51-year sentence is constitutionally impermissible because it is harsher than his 48-year sentence imposed after his first trial. However, the trial judge who presided over Defendant’s first trial and sentencing hearing recused himself after remand. The “risk of vindictiveness by [a second] trial judge being confronted by resentencing is nonexistent.” *State v. John L. Goodwin, III*, No. 01C01-9601-CR-00013, 1997 WL 409484, at *7 (Tenn. Crim. App. July 23, 1997), *perm. app. denied* (Tenn. Nov. 9, 1998); *see also State v. Antonio Demonte Lyons*, M1999-00149-CCA-R3-CD, 2000 WL 218131, at *8 (Tenn. Crim. App. Feb. 25, 2000), *perm. app. denied* (Tenn. Oct. 23, 2000). “A trial judge is vested with discretion when fixing a sentence for an offense and when a different judge presides in a new proceeding, differing results may reasonably occur.” *John L. Goodwin, III*, 1997 WL 409484, at *7. We find nothing in the record to indicate any actual vindictiveness on the part of the trial court.

Regarding the length of Defendant’s sentences, Defendant does not challenge the trial court’s application of any enhancement factors, and he acknowledges that his sentences were within the appropriate range. Defendant argues, rather, that he is entitled to a new sentencing hearing because the trial court failed to state its reasoning for imposing a greater sentence at the second trial than the trial court imposed after the first trial. However, the record establishes that the trial court imposed a sentence within the appropriate range that reflects a “proper application of the purposes and principles of our Sentencing Act,” and therefore, we review the trial court’s sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *See State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012).

The trial court considered “all of the relevant facts from the trial, sentencing hearing, and applicable law,” considered the applicable mitigating and enhancement factors, and imposed a within-range sentence of 17 years for each conviction. Defendant has not shown that the sentence violated his due process rights, and he is thus not entitled to relief.

Defendant also argues that the trial court abused its discretion by imposing consecutive sentencing. Defendant concedes that the statute allows for consecutive sentencing when a defendant has multiple convictions for sexual offenses against a minor. He asserts, however, that his effective 51-year sentence is not the least severe measure necessary to achieve the purposes for which the sentence was imposed.

Tennessee Code Annotated section 40-35-115(b) permits the trial court to impose consecutive sentences when a “defendant is convicted of two (2) or more statutory offenses

involving sexual abuse of a minor” so long as the court considers “the aggravating circumstances arising from the relationship between the defendant and victim . . . , the time span of defendant’s undetected sexual activity, the nature and scope of the sexual acts, and the extent of the residual, physical, and mental damage to the victim[.]” T.C.A. § 40-35-115(b)(5).

Defendant was convicted of three counts of aggravated sexual battery against a minor victim. The victim was seven or eight years old when the abuse started, and the abuse went undetected over a timespan of several years, continuing after the family moved to Oklahoma. Defendant was the victim’s stepfather and lived in the same home as the victim. The trial court found that Defendant abused his position of trust and that the victim’s impact statement detailed the emotional and psychological impact the abuse had on her. The victim stated that she suffered from PTSD, nightmares, insomnia, anxiety, and depression. She said she was taking medication and that her marriage and family suffered before she began taking medication. She testified that Defendant’s abuse caused her “so much emotional and mental damage” that she believed she might never heal.

The record supports the trial court’s finding of the statutory aggravating circumstances, and the court did not abuse its discretion by imposing consecutive sentencing. *See State v. Doyle Wayne Mason, Jr.*, No. E2019-00174-CCA-R3-CD, 2020 WL 5015903, at *36 (Tenn. Crim. App. Aug. 25, 2020) (“[W]e note that a fifty-one year sentence for a Range I offender is not unprecedented in child sexual abuse cases.”), *perm. app. denied* (Tenn. Jan. 14, 2021). Defendant is not entitled to relief.

IV. Limitation on Cross-Examination

Defendant asserts that the trial court improperly prevented him from asking the victim about allegations of sexual abuse that N.G. made regarding the victim’s biological father. The State argues that Defendant has waived by issue by failing to make an offer of proof at trial and that despite waiver, the testimony was not relevant.

Denial of a defendant’s right to effective cross-examination is “constitutional error of the first magnitude” and may violate the defendant’s right to a fair trial. *State v. Hill*, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980) (quoting *Davis v. Alaska*, 415 U.S. 308, 318, (1974)). “The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the discretion of the trial court.” *State v. Dishman*, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); *Coffee v. State*, 216 S.W.2d 702, 703 (1948). This Court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. *Dishman*, 915 S.W.2d at 463; *State v. Fowler*, 373 S.W.2d 460, 466 (1963).

Defendant sought to cross-examine the victim about prior accusations of sexual abuse by the victim's mother, N.G., against the victim's biological father. The State objected, stating that the victim was asked the question at the first trial and arguing, "[t]here is absolutely no basis in the record for that question. No one has ever answered that question yes. The answer has always been no." The prosecutor stated that Defendant had not provided the State with any information to substantiate the claim. The trial court asked defense counsel whether he had "something to substantiate that [N.G.] actually did accuse[.]" and defense counsel responded that Defendant had advised him that N.G. had accused "her prior husband [of] molest[ing] her son." The trial court sustained the State's objection.

A party is not entitled to relief based upon the exclusion of evidence unless "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." Tenn. R. Evid. 103(a)(2). Defendant did not present an offer of proof as to how the victim would have answered the question, nor did Defendant provide an offer of proof to substantiate the claim that N.G. had previously alleged "that her prior husband molested her son."

The failure to make an offer of proof precludes this Court from reviewing the issue. *See State v. McCaleb*, 582 S.W.3d 179, 199 (Tenn. 2019) (holding that the State's failure to make an offer of proof regarding the excluded evidence precluded the trial court from making specific findings regarding the proposed testimony and precluded the appellate court from considering the issue); *State v. Hall*, 958 S.W.2d 679, 691 n. 10 (Tenn. 1997) ("[G]enerally, if an offer of proof is not made, the issue is deemed waived and appellate review is precluded.").

Without an offer of proof, Defendant has not shown how the excluded testimony would have affected the credibility of the victim or how the testimony was relevant to the defense. Accordingly, we conclude that the trial court did not err by sustaining the State's objection. Defendant is not entitled to relief on this issue.

V. Sufficiency of Notice of Witness's Testimony

Defendant argues that the State provided inadequate notice of its intent to call S.R. to testify at trial. He asserts that he did not have an opportunity to investigate, interview S.R., or prepare for his testimony. The State responds that the trial court properly allowed S.R. to testify.

The record reflects that the State notified defense counsel one week before Defendant's trial began that it intended to call S.R., the victim's brother, to testify. At trial, the prosecutor explained that S.R. lived in Oklahoma, and she notified the defense when

she learned that S.R. would be available to testify. Defense counsel objected, arguing that the State gave “extremely late notice” of the witness and the prior week had been the Thanksgiving holiday. Defense counsel argued, “I just haven’t had any opportunity with one business day at best . . . to investigate him or look into things, get his background or anything. . . .” The trial court observed that “one week, especially a week that includes a two-day holiday, . . . can be problematic,” but determined that the State’s notice was sufficient and allowed defense counsel an opportunity to interview S.R. before he testified.

Tennessee Code Annotated section 40-17-106 requires the State to include in the indictment “the names of the witnesses as [it] intends shall be summoned in the cause.” Our supreme court has observed that it is “well settled” that this section is “merely directory,” not mandatory. *State v. Dellinger*, 79 S.W.3d 458, 489 (Tenn. 2002). As such, section 40-17-106 does not necessarily disqualify from testifying a witness whose name does not appear on the indictment. *Id.*; *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992). Rather, the purpose of this section is to avoid surprising the defendant, thereby providing the defendant with an adequate basis upon which to prepare a defense. To obtain relief, a defendant must show “prejudice, bad faith, or undue advantage” as a result of the State’s delay in furnishing the witnesses’ names. *Harris*, 839 S.W.2d at 69 (citing *State v. Baker*, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); *State v. Craft*, 743 S.W.2d 203 (Tenn. Crim. App. 1987)). The prejudice to the defendant must result from the lack of notice, not merely the substance of the witness’ testimony. *State v. Kendricks*, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). A trial court’s decision to permit a witness to testify is within the sound discretion of the trial court. *State v. Underwood*, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984).

In *Harris*, our supreme court held that section 40-17-106 did not bar testimony from a witness disclosed to the defense only four days before trial because the State notified the defense as soon as it became aware of the witness and because defense counsel interviewed the witness before trial. *Id.* Here, Defendant contends that the trial court’s remedy in allowing defense counsel an opportunity to interview the witness on the morning of trial was inadequate. However, Defendant has not shown how he was prejudiced by the lack of notice. As the State points out, the witness was the victim’s brother and lived with the victim and Defendant when the abuse occurred. After speaking with S.R., defense counsel’s argument for excluding his testimony was that it was “getting entirely redundant and needlessly accumulative” considering the testimony of other family members. Defendant’s objection was based on the substance of S.R.’s testimony rather than prejudice resulting from the State’s late notice. We conclude that the trial court did not abuse its discretion in permitting S.R. to testify.

VI. Special Jury Instruction

Defendant contends that the trial court should not have provided a special instruction to the jury regarding the length of time between the indictment and trial. The State responds that the instruction fully and fairly stated the applicable law and that the trial court did not abuse its discretion.

A defendant is entitled “to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions.” *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). “Trial courts have the duty, without request, to give proper jury instructions as to the law governing the issues raised by the nature of the proceeding and the evidence introduced at trial.” *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013). But jury instructions must be viewed in their entirety, and phrases may not be examined in isolation. *State v. Rimmer*, 250 S.W.3d 12, 31 (Tenn. 2008). “An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.” *State v. Majors*, 318 S.W.3d 850, 864-65 (Tenn. 2008) (quotation and citation omitted).

The State requested that the trial court instruct the jury that they not consider the length of time between the indictment and the trial. Defense counsel stated his opposition to the special instruction, explaining that it was not “any fault” of Defendant’s and that it could confuse the jury. The State argued the jury “might hold it against the State that somehow the State was not doing [its] job in bringing this case to trial [or] hold it against [Defendant].” Defense counsel then requested a “caveat” that if the trial court instructed the jury not to “consider this delay . . . also instruct the jury that they may consider the prior delay [between the alleged offenses and the victim’s disclosure].” The trial court stated that defense counsel could argue that point to the jury, but it would not include it in its instruction to the jury.

The trial court ultimately gave the jury the following instruction:

In this case, the indictment was filed with the clerk on August 7, 2009. The filing of the indictment marked the commencement of proceedings against the defendant. There are a variety of procedural reasons that impact the scheduling of trials, with some proceeding to trial quickly and others taking much longer. You should not consider the time between the filing of the indictment in 2009 and the trial today during your deliberations.

The trial court’s instruction did not fail to fairly submit the legal issues or mislead the jury as to the applicable law. As the prosecutor noted, the jury could have perceived the delay in prosecution as damaging to either the State or the defense. The trial court was careful not to include any comment on the length of time between the offenses and the

indictment in the instruction, and the court acknowledged that it would be fair for defense counsel to argue to the jury that it could consider the delay between the abuse and the disclosure.

Defendant has not established that the special jury instruction was erroneous or that it deprived him of the right to a fair trial. Defendant is not entitled to relief on this issue.

VII. Sufficiency of the Evidence

Finally, Defendant contends that the evidence at trial was legally insufficient to convict him of aggravated sexual battery. The State responds that the evidence was sufficient to sustain Defendant's convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury's verdict replaces the presumption of innocence with one of guilt; therefore, the burden is shifted onto the defendant to show that the evidence introduced at trial was insufficient to support such a verdict. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). The prosecution is entitled to the "strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom." *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). It is not the role of this Court to reweigh or reevaluate the evidence, nor to substitute our own inferences for those drawn from the evidence by the trier of fact. *Reid*, 91 S.W.3d at 277. Questions concerning the "credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008)). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *Reid*, 91 S.W.3d at 277 (quoting *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). The standard of review is the same whether the conviction is based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

In order to establish the offense of aggravated sexual battery, the State had to prove that there was unlawful sexual contact between Defendant and the victim, who was less than 13 years of age. T.C.A. § 39-13-504(a)(4). "Sexual contact" means the intentional touching of anyone's intimate parts, or the clothing covering those parts, if the touching

can be “reasonably construed as being for the purpose of sexual arousal or gratification.” T.C.A. § 39-13-501(6). The “primary genital area” and “breast” are both considered an “intimate part.” T.C.A. § 39-13-501(2). Moreover, “jurors may use their common knowledge and experience in making reasonable inferences from evidence.” *State v. Meeks*, 876 S.W.2d 121, 131 (Tenn. Crim. App. 1993) (citing 23A C.J.S. Criminal Law § 1380).

The proof at trial, in the light most favorable to the State, showed that the victim was under age 13 when her stepfather, Defendant, touched her on the breast area underneath her shirt and that his hand remained there for a short period. The victim testified about another incident when Defendant told her to come into the bathroom. Defendant, who was not wearing clothes, directed the victim to sit on the toilet, and he took her hand and placed it on his penis. In a third incident, the victim was sitting on the bed when Defendant began touching her chest. He pulled down his pants and grabbed the victim’s hand and “had [her] touch him.”

Defendant asserts that the victim’s testimony was uncorroborated and her credibility “was called into question.” However, appellate courts give full deference to the jury’s credibility determinations. Furthermore, “[t]his Court has repeatedly held that the testimony of a minor victim, alone, is sufficient to uphold a conviction of sexual offenses.” *State v. Joseph Jason Qualls*, No. W2019-01083-CCA-R3-CD, 2020 WL 4346803, at *3 (Tenn. Crim. App. July 28, 2020), *no perm. app. filed*.

In our view, the evidence was sufficient to support the convictions. Defendant is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

TIMOTHY L. EASTER, JUDGE