IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 13, 2002

STATE OF TENNESSEE v. HASKEL D. FINCH

Direct Appeal from the Circuit Court for Humphreys County
No. 9751 Allen W. Wallace, Judge

No. M2001-00340-CCA-R3-CD - Filed June 5, 2002

A Humphreys County Circuit Court jury convicted the defendant of rape, and the trial court sentenced him as a violent offender to ten years, with 100% of his sentence to be served. On appeal, the defendant argues that the trial court erred in finding sufficient evidence to convict him of rape, in admitting a statement he made to the police, in admitting evidence of the victim's mental capacity, in denying his Tennessee Rule of Evidence 412 motion, and in failing to instruct the jury as to assault. We affirm the judgment of the trial court.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

William B. Lockert, III, District Public Defender, and Richard D. Taylor, Jr., Assistant District Public Defender, for the appellant, Haskel D. Finch.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Lisa C. Donegan, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On Friday, December 10, 1999, the victim, R.P.,[1] and her son went to New Johnsonville, Tennessee, to visit Danielle and Haskel Finch, the victim's sister and brother-in-law. The next day, R.P. kept her son and the Finches' three children while her sister and the defendant went to a company Christmas party.

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[1]Because of the nature of this matter, we will refer to the victim by initials only.

The victim testified that on Saturday evening she and her son went to sleep on a bed in the Finches' living room. At approximately 11:00 p.m., the defendant came into the living room, held her hands over her head, and raped her. The victim told the defendant "no" several times while he was forcing himself on her. She said the incident lasted for about an hour. R.P. said she did not say anything about the incident to her sister or the defendant the next day, and they took her and her son home at about 2:00 or 3:00 p.m. on Sunday. Approximately two hours later, the victim told her grandmother and her aunt that she had been raped by the defendant.

Detective Michael Hooper of the Humphreys County Sheriff's Department testified that he first received the complaint concerning this case on December 12, 1999. He met with the victim at the hospital and took a report from her. R.P. said that her brother-in-law had raped her. After meeting with R.P., Hooper went to talk to the defendant at the Humphreys County Jail where he was being held for questioning. Hooper testified that after he had read the defendant his rights and made sure he understood them, the defendant signed an admonition and waiver form. Hooper said that the defendant made two statements the evening of December 12, 1999. Initially, the defendant told Hooper that the sexual encounter with R.P. was consensual and that his wife had assented to his having sexual relations with her sister, which Hooper related: "I, Doug Finch, had a relationship with [R.P.] in a consensual procedure. I had no intent of rape or malice to [R.P.] for a one-time affair on 12-11 of '99. I had discussed this affair with my wife, Danielle, [R.P.'s] sister, before it took place." After the first statement, Hooper went to another area of the jail to obtain warrants. Approximately an hour and a half later, the defendant summoned Hooper and made a second statement, which, as recited by Hooper, was: "What took place in my home on 12-11 of '99, should not have took [sic] place. I know now when someone says no, that means no."

The victim's aunt testified that when she first saw R.P. on Sunday night, R.P. was crying and vomiting. R.P. subsequently told her that the defendant had raped her. R.P. told her the defendant came into the living room where R.P. and her son were sleeping and began fondling her. R.P. said her son started crying, and the defendant put him on the couch. R.P. also told her aunt that she kept telling the defendant to stop, but he continued to force himself on her. She said that she had to pull over two or three times to allow R.P. to vomit when they were on the way to the hospital to meet the police. R.P.'s aunt also testified that R.P., as a child, had attended a preschool for mentally handicapped children, had been enrolled in a special education program in school, and was currently participating in a rehabilitation program for mentally handicapped individuals.

Both sides stipulated to the accuracy of the Tennessee Bureau of Investigation Crime Lab report, which showed that the defendant's semen was present on the vaginal swab taken from R.P. Additionally, the defendant stipulated that on or about December 12, 1999, he had sexual intercourse with R.P. and ejaculated, thereby leaving his semen in R.P.'s vagina.

The defendant testified he woke up at approximately 11:00 p.m. and talked with his wife about whether it would be all right to have sexual intercourse with R.P. He stated that his wife said it was fine with her. The defendant went into the living room where R.P. and her son were sleeping. He asked R.P.'s permission to move her sleeping son to the couch. The defendant claimed that he

kissed and tickled R.P., and she told him "no" at first. He asked her to remove her gown, and she did so. They then had sexual intercourse. The defendant claimed the entire incident took about forty-five minutes. The defendant testified that he did not hold R.P.'s hands or threaten her in any way and that R.P. did not try to fight him at any time. He stated that the next morning he, his wife, and R.P. all had breakfast together. The defendant admitted on cross-examination that R.P. never said "yes" to having intercourse with him. He also stated that he wrote the second statement at the jail to defend himself.

The Humphreys County Grand Jury charged the defendant with two counts of rape. Count One stated that the defendant "unlawfully, feloniously, and willfully sexually penetrate[d] [R.P.] knowing or having reason to know that the said [R.P.] was mentally incapacitated or physically helpless; thereby committing the offense of Rape, in violation of T.C.A. 39-13-503, a Class B felony[.]" At the conclusion of the State's presentation of proof, the trial court, at the State's request, dismissed Count One. The trial then proceeded on Count Two which alleged that the defendant "unlawfully, feloniously, intentionally or knowingly sexually penetrate[d], [R.P.], said sexual penetration being accomplished without the consent of the said [R.P.] and the defendant knowing or having reason to know at the time of penetration that the said [R.P.] did not consent, in violation of T.C.A. 39-15-503, a Class B felony[.]"

ANALYSIS

We will consider the issues presented in the defendant's brief.

I. Sufficiency of the Evidence

The defendant claims that the trial court erred in finding sufficient evidence to convict him of rape.

In considering this issue, we apply the familiar rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979). See also State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992); Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 472, 370 S.W.2d 523, 527 (Tenn. 1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The defendant's claim of insufficiency of proof is predicated on his claim that "[t]he State failed in this case to present sufficient proof of the defendant's intent to commit a criminal offense." To bolster this argument, he points to "his belief that the victim had consented to have sexual relations with him"; to the fact that he "possessed knowledge that [the victim] was familiar with sexual conduct, and had maintained a sexual liaison with a man named Harvey Birdwell for four years"; that he "never denied having sexual relations with [the victim]"; that he "made voluntary statements to investigating law enforcement" regarding the incident; that "there was no proof that he in any fashion attempted to obscure or conceal the fact of his sexual relations with [the victim]"; and that "he even conferred with his wife prior to initiating sexual relations with [the victim]."

Tennessee Code Annotated section 39-11-301 sets out the proof required in a criminal prosecution as to the culpable mental state of the accused:

> (a)(1) A person commits an offense who acts intentionally, knowingly, recklessly or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense.
>
> (2) When the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish an element, that element is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.
>
> (b) A culpable mental state is required within this title unless the definition of an offense plainly dispenses with a mental element.

> (c) If the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state.

Tenn. Code Ann. § 39-11-301 (1997).

In this matter, the jury was instructed only as to Count Two of the indictment, which alleged that, in violation of Tennessee Code Annotated section 39-13-503(a)(2), "the said HASKEL D. FINCH did unlawfully, feloniously, intentionally or knowingly sexually penetrate" the victim without her consent and knowing or having reason to know at the time of penetration that she did not consent. Since the statute under which the defendant was indicted "does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state." Tenn. Code Ann. § 39-11-301(c) (1997). Thus, to establish the mental state necessary for the conviction of rape, the State had to prove the defendant's "intent, knowledge or recklessness." See Crittenden v. State, 978 S.W.2d 929, 930 (Tenn. 1998) (aggravated rape statute neither expressly requires nor plainly dispenses with the requirement for a culpable mental state, and, thus, intent, knowledge, or recklessness suffices to establish the necessary culpable mental state). We will now review the proof to determine its sufficiency.

In rape cases, the issue of consent is decided by the jury. State v. Fred Nichols, No. 01C01-9511-CC-00378, 1997 Tenn. Crim. App. LEXIS 463, at *4 (Tenn. Crim. App. May 16, 1997) (citing Haynes v. State, 540 S.W.2d 277, 278 (Tenn. Crim. App. 1976)). The Nichols court also recognized that "[t]acit consent by non-resistance has been held to be no consent." Id. at *4-*5 (citing State v. Lundy, 521 S.W.2d 591, 593 (Tenn. Crim. App. 1975)).

Based on the evidence in the record, we conclude that the jury had sufficient evidence to convict the defendant of rape under Tennessee Code Annotated section 39-13-503(a)(2), sexual penetration without the consent of the victim. The victim testified that the defendant "held my hand up over my head, up over my head, and he raped me." The defendant testified that he believed the act was consensual. He said that "[o]nly at the beginning" had the victim said "no," that he had not held her hands down or behind her head, and that she was not "fighting" as he penetrated her.

Accordingly, viewing the evidence in the record in a light most favorable to the State, we conclude that a rational trier of fact could have found the requisite "intent, knowledge or recklessness," thus concluding that the defendant was guilty beyond a reasonable doubt of rape. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979).

II. Admissibility of Defendant's Statement

The defendant argues that the trial court erred in admitting the second written statement he made to the police, in which, according to Detective Hooper, he had stated that "when someone says no, that means no." In his motion to suppress, the defendant argued that the second statement "was taken without effective warnings required by State and Federal constitutions, and [was] not a

voluntary statement of the Defendant within the meaning of the applicable laws." Following a hearing at which Detective Hooper, but not the defendant, testified, the trial court denied the motion to suppress:

> Gentlemen, I don't need any argument in this case. This is a short time, he was brought into jail, he was advised of his Miranda Rights. It's not like they're over there interviewing him half a night. I mean this is a very short time. We're talking about an hour and a half to do all this, the interview, the writing it down, even the second statement. There's no problem with this statement. So your motion to suppress will be denied.

At trial, Detective Hooper testified, without objection, as to the defendant's statement that "no means no," and the defendant was cross-examined as to the statement. However, in his motion for a new trial and in his brief on appeal, the defendant argued that the statement was more "prejudicial than probative" and, thus, inadmissible under Tennessee Rule of Evidence 403.

In this state, "a party is bound by the ground asserted when making an objection" and "cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court." State v. Adkisson, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994) (footnote omitted). Similarly, a defendant may not object to the admissibility of evidence based on one argument, and then drop that argument and object to the same evidence based on a new argument. State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988) (citing State v. Brock, 678 S.W.2d 486, 489-90 (Tenn. Crim. App. 1984); State v. Galloway, 696 S.W.2d 364, 368 (Tenn. Crim. App. 1985)). A trial court is given discretion over the admissibility of evidence, and a trial court's determination on admissibility will not be overturned without an abuse of discretion. State v. Edison, 9 S.W.3d 75, 77 (Tenn. 1999) (citing State v. McLeod, 937 S.W.2d 867, 871 (Tenn. 1996)). We agree with the State that the defendant, impermissibly, has adopted on appeal a theory of inadmissibility not presented to the trial court. Additionally, by not objecting to this statement at trial, the defendant seeks advantage from an alleged error of his own making. This inaction waives the right on appeal to claim error. Tenn. R. App. P. 36(a). For these reasons, we conclude that this assignment is without merit.

III. Victim's Mental Capacity

The defendant argues that "[t]he trial court erred in allowing [ ] testimony and references by the State to the victim being mentally defective . . . because the Appellant was not charged with" rape of a "mentally defective, mentally incapacitated or physically helpless" victim, as proscribed by Tennessee Code Annotated section 39-13-503(a)(3). As we have previously stated, the defendant was charged in a two-count indictment, both counts alleging that he had sexual intercourse with the victim, the first, in violation of Tennessee Code Annotated section 39-13-503(a)(3), that she was "mentally incapacitated or physically helpless," and the second, in violation of Tennessee Code Annotated section 39-13-503(a)(2), that the sexual penetration occurred "without the consent" of the

victim. Count One was dismissed at the request of the State at the conclusion of its proof, and the jury was instructed only as to Count Two.

In assessing this argument, we will review the chronology of the jurors' learning of the victim's mental ability.

Identifying allegedly improper references in the record to the victim's mental capacity, the defendant points to the prosecution's opening statement, where the jury was told that the victim was retarded and that "it's readily apparent by looking at her. It becomes even more apparent after you listen to her speak." The jurors were told that they would observe this "from the way she phrases things, the way she talks, she's very childlike in some ways." They were told that the victim "goes to a vocational center where she thinks she actually has a job, but actually it's a training center where they try to help her to survive in the real world." No objections were made by the defense to these statements.

However, in identifying allegedly improper references during the prosecution's opening statement to the victim's mental ability, the defendant ignores the fact that during his own opening statement, the jury was told:

> [T]here is no doubt when she takes this stand, she will impress you that she is of somewhat lower than average mental capacity. I don't know whether she is retarded or not. Retarded is a term that has certain scientific connotations, but at the very best [she] is slow. And the state has referred to her as a sweet girl and you will agree with me that she is a sweet girl, there's no doubt about that.

When the victim testified, she was asked by the State, in the presence of the jury, a series of questions, similar to those sometimes used to qualify a child-witness, regarding her understanding of the oath she had taken regarding her testimony:

> Q. You just raised your hand a few minutes ago?
>
> A. Yes.
>
> Q. Do you know what happens when you tell a lie?
>
> A. (No verbal response).
>
> Q. Is lying a good thing or a bad thing?
>
> A. A bad thing.

Q. You understand you've told me you're going to tell me the truth here today?

A. Yes.

Q. Is that what you're going to do?

A. Yes.

No objection was made by the defense to this series of questions.

Later in the trial, after an objection had been made by the defense as to Detective Hooper testifying about what the victim told him of the incident, and the jury had been excused, the trial court observed that dealing with the victim was like "dealing with children which I feel like I'm dealing with a child when I talk to her" and that "she's slow and that's obvious." Neither side objected to this statement, and nothing in the record indicates that it was other than an accurate observation.

Although the defendant, in his brief, objects to evidence of the "victim being mentally defective," he does not identify when or if an objection was made in this regard. The first such objection which we have located in the record occurred, after both the victim and Detective Hooper had testified, during the direct examination of the victim's aunt, as she was about to respond to the question "[w]hat kind of classes did [the victim] take?" During the subsequent jury-out hearing in which the defense argued that the witness was not "medically qualified to testify in regard to whether or not [the victim] is retarded or handicapped in any way," the trial court observed that the witness was "talking about a personality defect that she's noticed and everybody else notices and the jury noticed in this witness stand." Subsequently, the State announced that it wished to proceed only on Count Two, alleging that the sexual penetration occurred without the consent of the victim, and requesting that Count One, alleging that the victim was "mentally incapacitated or physically helpless" be dismissed, which then occurred.

From all of this, we conclude that it was readily apparent to all trial participants, including the jurors, that the victim had a low IQ. Both counsel spoke of her being child-like, as did the trial court, and she was treated in that fashion while being questioned. Even if we assume that the defendant made a timely objection to questions about the victim's mental status, we would reach an illogical result if we concluded that the trial court erred in allowing statements as to a matter which already was readily apparent to the jury. Accordingly, we conclude that this assignment is without merit.

The defendant's next argument as to prejudice resulting from the jurors' learning of the victim's limited mental capacity is that it could have resulted in a less than unanimous verdict, with some jurors believing the defendant guilty of sexual penetration without the consent of the victim and others of sexual penetration of a mentally defective victim.

The trial court gave the following instruction to the jury concerning the charge of rape:

> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant had unlawful sexual penetration of the alleged victim or the alleged victim had unlawful sexual penetration of the defendant; and
>
> (2) that the sexual penetration was accomplished without the consent of the alleged victim and the defendant knew, or had reason to know, at the time of the penetration that the alleged victim did not consent; and
>
> (3) that the defendant acted intentionally, knowingly or recklessly.

The trial court also made a general unanimity charge to the jury: "The verdict must represent the considered judgment of each juror. In order to return the verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous."

The defendant argues that "[e]vidence was allowed in the instant case that the defendant was guilty of rape because [the] victim was mentally defective, as well as evidence that [the] victim didn't consent . . . and evidence that force was used." Accordingly, the defendant argues, "it is clear that the jury may have convicted the defendant under the theory of a mentally defective victim, which is one statutory mode, or force or coercion, another statutory mode, or under the mode that [the] victim did not consent." However, this argument overlooks the fact that the jury was instructed only as to Tennessee Code Annotated section 39-13-503(a)(2), that the sexual penetration occurred without the consent of the victim. A unanimity issue does not result simply because the rape statute itself has alternative means by which the crime of rape can be committed. The jury was instructed to determine only if the rape occurred without the victim's consent. Thus, we conclude that this assignment is without merit.

As a corollary claim, the defendant argues that "the state was allowed to introduce testimony that would allow a juror to find the alleged victim mentally defective and unable to consent." Thus, according to this argument, the defendant should have been allowed to introduce evidence pursuant to Tennessee Rule of Evidence 412 that the victim "had a four year affair," which resulted in a child.[2] The defendant has not identified evidence that the victim was "unable to consent," and we

[2] Although the victim testified that she had a young son, who was with her at the time of the incident, no proof was put before the jury as to who had fathered the child or the circumstances of his conception.

conclude that this argument, which we will consider in detail as the next assignment, is without merit.

IV. Defendant's Tennessee Rule of Evidence 412 Motion

To consider this issue, we first will set out the history of the defendant's Rule 412 motions. The defendant's first request to present such evidence occurred with the filing on June 8, 2000, of a Rule 412 notice, advising that the defense sought to present proof of the victim's "sexual conduct, including sexual intercourse before the alleged incident which is the basis of the prosecution." According to the notice, this evidence was admissible pursuant to Rule 412(c)(4)(ii) to "demonstrate sexual knowledge of the alleged victim."

Consequently, pursuant to the defendant's Rule 412 motion, a hearing was held on June 14, 2000, where the victim testified and was questioned only by defense counsel. She said that she first had sexual intercourse at age 22 and that it was consensual. She became pregnant and continued to have relations with the same man. She said that although she had not enjoyed having sexual relations with him, she neither had been forced to do so nor had been paid for the acts. According to the victim's sister, who also testified, the victim had been "slow" all of her life.

At the conclusion of the hearing, the defense explained its basis for seeking to present Rule 412 evidence:

> The fact that the state raised the issue of the [victim's] incapacity to give consent, compelled me to look into the capacity of [the victim] to understand the actual nature of sexual conduct which is in accordance with the statutory definition for effective consent.
>
> And absolutely under the balancing test that's expressed in the footnote to Rule 412, there was absolutely no enterprise afoot to embarrass or humiliate [the victim] in any way, but simply to inquire as to her prior conduct insofar as it would be relevant to her understanding the nature of sexual conduct, so as to argue to a jury that she understood and that she had given consent to certain sexual contact with Haskel Finch, as she had given consent to certain sexual contact with another adult male in her life, being Harvey whatever his name was.

Explaining the purpose for such testimony, the defense sought to "ask a few questions to establish the fact that she understands the nature of sexual conduct, that she's engaged in it before, that she's had a child, she knows what sexual intercourse is, she's participated in sexual intercourse in the past."

Following further arguments by counsel, the trial court ruled that the defense could not question the victim about the prior relationship because of its dissimilarity with the incident involving the defendant:

> Now in the comments, and I read this this morning, the defendant may prove acts with third persons in the so-called signature cases to prove consent, that's what we're talking about under 4. These acts are so similar to the defendant's version of the offense that they corroborate the defendant's story.
>
> There is nothing in similarity about her association and her relationship with a man for four years and what happened in this case on one time at midnight. There's nothing similar between them.

On June 20, 2000, two days before the trial began, the defendant filed an amended Rule 412 notice, stating that the amendment was occasioned by his "receipt of certain medical records pertinent to the condition of the alleged victim shortly after the alleged rape incident." This evidence was described as proof of the victim's "sexual conduct, including sexual intercourse, and certain observations of medical personnel made during the course of their examination" of the victim. According to the amended motion, this evidence was offered pursuant to Rule 412(c)(2). This subsection permits evidence on the issue of credibility as to "specific instances of a victim's sexual behavior," after the State or the victim "has presented evidence as to the victim's sexual behavior."

On June 22, 2000, the morning of the trial, the defendant filed a second amended Rule 412 motion, which requested as follows:[3]

> To cross-examine the alleged victim and/or to introduce evidence in regard to the statement made by alleged victim to defendant that "it has been over 30 (thirty) days since she had sexual intercourse". Defense would contend admissibility because statement made by the alleged victim to the Defendant indicated to him that she was willing and consented to having sexual intercourse with the Defendant.

Unlike the previous Rule 412 notices, it did not refer to a specific subsection of the Rule pursuant to which admission was sought.

On the day of trial, prior to the presentation of proof, further arguments were made on the Rule 412 matters. The defense explained why its second amended Rule 412 motion should be granted and renewed its earlier Rule 412 motion which the trial court had denied:

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[3]Apparently a copy of this amended notice had been furnished to the State the previous day.

> [I]f a man's with a woman and pursuing her sexually, she indicates to you it's been over 30 days since I've had sexual intercourse, some people are going to take that as though she's saying, it's about time, or I'm ready to have sex, it's been over 30 days. That's at least something that can be argued.
>
> The other reason that that is relevant, Your Honor, and we contend again renewing our 412 motion, all evidence of her having previous sexual conduct including this statement is relevant when one of the state's counts involves them proving that the victim did not have the capacity to give consent.

The trial court again ruled that evidence as to the prior relationship was inadmissible:

> THE COURT: Under 412(4)(3), to prove consent if evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused['s] version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant to reasonably believe that the victim consented.
>
> Now if you go over into the comments, these acts are so similar to the defendant's version of the offense that they corroborate the defendant's story.
>
> MR. LOCKERT: Yes, we're not asking it be introduced to show consent. Again, what we're saying, Judge, this is evidence of her capacity. The issue in this case is whether she has capacity to consent or not.

At the conclusion of the hearing, the trial court again ruled that Rule 412 did not permit evidence of the victim's prior sexual relationship. At trial, the victim testified as to the facts of the incident and was not cross-examined by defense counsel.

On appeal, the defendant alleges as error the trial court's barring his questioning the victim as to a prior consensual sexual relationship. He argues that evidence of that relationship "was extremely relevant to rebut the impression that she was so mentally defective as to not be able to consent or not able to react to the defendant[']s sexual advances like someone who is not mentally defective." Additionally, he argues that "[e]vidence of her telling the defendant that it had been over thirty days since she had had sexual intercourse would have been relevant to whether that was an indication of consent and as to whether the defendant had reason to believe she was consenting."

Tennessee's rape shield law, Tennessee Rule of Evidence 412, was enacted to offset the view that "a woman who had sexual relations in the past was more likely to have consented to sexual relations with a specific criminal defendant." State v. Sheline, 955 S.W.2d 42, 44 (Tenn. 1997). Although Rule 412 limits introduction of evidence concerning the victim's sexual history, it does allow evidence of the victim's sexual relations if such evidence is necessary to protect a defendant's right to a fair trial. Id. at 45. Rule 412 sets out the circumstances under which such evidence is admissible:

> **Sex Offense Cases; Relevance of Victim's Sexual Behavior.**
>
> Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of an offense under T.C.A. §§ 39-13-502 [aggravated rape], 39-13-503 [rape], 39-13-504 [aggravated sexual battery], 39-13-505 [sexual battery], 39-13-507 [spousal sexual offenses], 39-13-522 [rape of a child], 39-15-302 [incest], 39-13-506 [statutory rape], 39-13-527 [sexual battery by an authority figure], 39-13-528 [solicitation of minors for sexual acts], or the attempt to commit any such offense, the following rules apply:
>
> (a) Definition of Sexual Behavior. In this rule "sexual behavior" means sexual activity of the alleged victim other than the sexual act at issue in the case.
>
> (b) Reputation or Opinion. Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule and required by the Tennessee or United States Constitution.
>
> (c) Specific Instances of Conduct. Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:
>
> (1) Required by the Tennessee or United States Constitution, or
>
> (2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to

> rebut the specific evidence presented by the prosecutor or victim, or
>
> (3) If the sexual behavior was with the accused, on the issue of consent, or
>
> (4) If the sexual behavior was with persons other than the accused,
>
> (i) to rebut or explain scientific or medical evidence, or
>
> (ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or
>
> (iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

Tenn. R. Evid. 412(a), (b), (c) (2001).

In Sheline, our supreme court interpreted the use of the word "pattern" in Rule 412(c)(4)(iii) to mean "repetitive or multiple acts and not just an isolated occurrence" and "distinctive" to mean "'so unusual, so outside the normal, that it had distinctive characteristics which make it the complainant's modus operandi.'" 955 S.W.2d at 46 (quoting People v. Sandoval, 552 N.E.2d 726, 738 (Ill. 1990)). Thus, "to have probative value on the issue of consent, the pattern of distinctive sexual conduct must closely resemble the defendant's version of facts." Id. (citing Neil P. Cohen et al., Tennessee Law of Evidence, § 412.4 at 246-47 (3d ed. 1995)). Evidentiary rulings by a trial court are subject to an abuse of discretion analysis. Sheline, 955 S.W.2d at 46 ("As with other evidentiary rulings, the admissibility of the evidence [pursuant to Rule 412] rests in the discretion of the trial court.").

We will review separately the two Rule 412 issues.

As to the first issue, the prior consensual relationship, the basis for admission alleged in the initial Rule 412 notice was that this evidence was admissible "to demonstrate sexual knowledge of the alleged victim, which is relevant to the issue of effective consent." At the hearing on the motion, before dismissal of Count One of the indictment alleging that the victim was "mentally incapacitated" and the rape had occurred in violation of Tennessee Code Annotated section 39-13-

503(a)(3), the defendant argued that the prior relationship evidence was admissible to show the victim was capable of consenting to a sexual relationship. An element of rape as proscribed by this section is that the victim was "mentally incapacitated." On appeal, the defendant argues that "[t]he state in this case was permitted to introduce on evidence of multiple modes of conviction, including that the victim was mentally defective. The trial court then effectively tied the defendant's hands in regard to being able to present a defense as to whether the victim was not so mentally defective as [to] be able to consent."

To support further his claim that evidence of the victim's prior sexual history was admissible, the defendant cites State v. Grover Green, No. 01C01-9002-CC-00045, 1990 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App., Nashville, Oct. 3, 1990), arguing that "proof that the rape victim, who had [a] brain stem injury, had an affair and sexual relations with other patients in the nursing home where she had been since age eight because of brain damage, was found admissible." We respectfully disagree that the defendant has accurately described the issues presented by or the holding of Green, in which, unlike in the instant case, the indictment considered by the jury charged the defendant with raping a "mentally defective or mentally incapacitated" victim. The issue in Green was whether the State adequately had proven that the victim lacked the mental capacity to consent to sexual relations. The inadequacy was explained in State v. Schaller, 975 S.W.2d 313, 318 (Tenn. Crim. App. 1997):

> [W]e note this court's opinion in State v. Grover Green, No. 01C01-9002-CC-00045, Grundy County (Tenn. Crim. App. Oct. 3, 1990), in which the defendant was convicted of assault with the intent to commit sexual battery in which the victim was alleged to be mentally defective. The victim, a nursing home resident, was shown to have irreversible brain damage because of a brain stem injury she suffered as a child. However, this court stated that the burden to prove that her mental defect met the specific statutory definition was upon the state, including the requirement that she be incapable of appraising the nature of her conduct. The in-house doctor for the nursing home testified that "more than half of the time, the victim could understand the consequences and repercussions of her actions." This court concluded that the evidence was insufficient to show beyond a reasonable doubt that the victim was incapable of appraising the nature of her conduct. In doing so, the court indicated that proof that meets the statutory definition of mentally defective should ordinarily come from a psychologist, psychiatrist, or other expert medical personnel.

As to prior sexual history, the opinion in Green recites that the victim previously had been married to another nursing home resident and, at the time of the incident, "was permitted regular sexual encounters with a male resident." 1990 Tenn. Crim. App. LEXIS, at *4. However, the opinion does not reveal the circumstances under which this evidence came into the record or indicate

whether its admission was contested or by consent. We note further that the holding in Green was decided pursuant to Tennessee Code Annotated section 40-17-119, which was much less restrictive than the current Rule 412, because it allowed proof of prior sexual activity when "such activity shows a relation to the conduct involved in the case on the part of the victim that is relevant to the issue of consent." Tenn. Code Ann. § 40-17-119 (repealed 1991). We conclude that the holding in Green does not support the defendant's argument.

For several reasons, we agree with the trial court that evidence of a prior consensual relationship was not admissible. First, although the defendant seeks to bolster his argument by referring to "the impression that the victim might not be able to consent," no reference is made to evidence from which such an impression would result. Counsel for both sides described the victim as having some degree of mental impairment, and the trial court commented that this fact was apparent from her responses to questions. However, such an impairment does not equate to an inability to consent to sexual relations. There was no proof that this was the case, and we note that the victim testified that she had a young child, thus demonstrating some sexual experience.

Accordingly, we conclude that the trial court did not abuse its discretion in finding that evidence of the victim's prior relationship was not admissible.

As a further part of this assignment, the defendant argues that "[e]vidence of [the victim's] telling the defendant that it had been over thirty days since she had had sexual intercourse" was relevant as "an indication of consent and as to whether the defendant had reason to believe she was consenting." This matter arose when, on June 21, 2000, the day before trial, the defendant filed an "Amended Motion Under Rule 412," contending that the "statement made by the alleged victim to the Defendant indicated to him that she was willing and consented to having sexual intercourse with the Defendant."[4]

In concluding at the pretrial hearing that this testimony was not admissible, the trial court ruled: "It's not admissible. I'm not going to allow you to do that. That's just kind of a back door way of getting into prior sexual conduct."[5]

This issue was not raised in the motion for new trial and, therefore, is waived. Tenn. R. App. P. 3(e) ("[N]o issue presented for review shall be predicated upon error in the admission or exclusion of evidence . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."). However, even if we consider this claim on its merits and, further, assume that the trial court abused its discretion in not allowing this testimony, we would

[4]This statement was allegedly made by the victim to the defendant at the time of the incident and, presumably, told by him to defense counsel. Thus, it is unclear why he did not timely advise his counsel of the statement so that it could have been taken up at the pretrial hearing when the victim was questioned about her sexual history.

[5]It does not appear that the defendant has argued that this statement was admissible other than pursuant to Rule 412. Accordingly, the trial court was not asked to determine whether it was admissible by another evidentiary means.

conclude that the error was harmless, given that the defendant testified as to his version of the incident, although without relating the alleged statement of the victim to him.

The issue claiming that the trial court erred in denying the defendant's Rule 412 motion comes to this court in an unusual posture. At the time of both trial court hearings on this matter, the defendant was facing a two-count indictment charging that he sexually penetrated the victim, the first count alleging that she could not consent because of a mental or physical disability, and the second that she did not consent. Much of the defendant's argument at both hearings was that the victim's prior consensual sexual activity was admissible to prove that she was capable of giving consent. However, the matter was not reargued after the dismissal of Count One at the conclusion of the State's proof. While we see the possible efficacy of showing prior consensual relations when a victim is alleged to be unable to consent, this rationale evaporated when Count One of the indictment was dismissed. Presumably to adjust to the fact that the defendant was tried only on the allegation that the victim did not consent to the sexual act, the thrust of the defense argument on appeal differs from that presented to the trial court. The defendant now argues that evidence of a prior sexual relationship, although factually dissimilar to that for which he was tried, is admissible to dispel the jurors' "impression" that the victim was incapable of giving consent. Additionally, he argues, without elaboration, that his constitutional rights to present a defense and to confront witnesses were violated by the trial court's not allowing proof as to the victim's prior consensual relationship and by limiting "cross-examining the victim and other state[']s witnesses in regard to relevant evidence." We are unpersuaded by this argument regardless of whether it has a Rule 412 or constitutional cast. Likewise, he argues that harm would not have resulted from introduction of this evidence through the victim, because the questioning would not have been lengthy, her family already knew of the prior relationship, and there was no intent to embarrass her. However, these are not exceptions to the rape shield law, and we find them unpersuasive also.

We conclude that the defendant's Rule 412 arguments are without merit.

V. Lesser-Included Offense of Assault

A. Application of State v. Burns

While the trial court did instruct the jury on the lesser-included offense of sexual battery, the defendant argues that the court should have also instructed on the lesser- included offense of assault. A trial court must instruct the jury on lesser-included offenses, regardless of whether the defense has requested such an instruction. State v. Burns, 6 S.W.3d 453, 464 (Tenn. 1999). According to the Model Penal Code approach adopted in Burns, an offense is a lesser-included offense if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Id. at 466-67.

To identify the lesser-included offenses of rape, we must review its elements.

Tennessee Code Annotated section 39-13-503 defines rape:

(a) Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act;

(2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;

(3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(4) The sexual penetration is accomplished by fraud.

Tenn. Code Ann. § 39-13-503(a) (1997).

The trial court also instructed the jury as to sexual battery, which Tennessee Code Annotated section 39-13-505 defines:

> (a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:
>
> (1) Force or coercion is used to accomplish the act;
>
> (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;
>
> (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless;
>
> (4) The sexual contact is accomplished by fraud.

Tenn. Code Ann. § 39-13-505(a) (1997).

The defendant asserts that the trial court also should have instructed as to misdemeanor assault, which Tennessee Code Annotated section 39-13-101 defines as follows:

> (a) A person commits assault who:
>
> (1) Intentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.
>
> (b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor.

Tenn. Code Ann. § 39-13-101 (1997).

Our supreme court concluded in State v. Bowles, 52 S.W.3d 69, 77 (Tenn. 2001), that sexual battery is a lesser-included offense of aggravated rape under part (b) of the Burns test. We conclude that, likewise, sexual battery is a lesser-included offense of rape. That being the case, Class B misdemeanor assault, as proscribed by Tennessee Code Annotated section 39-13-101(a)(3), resulting from "extremely offensive or provocative" physical contact, likewise, is a lesser-included offense of rape. We must now determine the effect of the trial court's not instructing the jury as to assault.

Our supreme court established a two-step test for determining whether the jury should be instructed on a particular lesser-included offense:

> In Burns, we acknowledged that whether a lesser-included offense must be charged in a jury instruction is a two-part inquiry: first, whether the lesser offense is included in the greater under the test adopted, and second, whether a charge is justified by the evidence. Burns, 6 S.W.3d at 467. The second step of the analysis adopted in Burns requires a determination of (a) whether any evidence exists that reasonable minds could accept to prove the existence of a lesser-included offense, and (b) whether the evidence is legally sufficient to support a conviction for the lesser-included offense. Id. at 469. The evidence must be viewed liberally in the light most favorable to the existence of the lesser-included offense without making any judgments as to the credibility of such evidence. Id.

State v. Ely, 48 S.W.3d 710, 722 (Tenn.), cert. denied, Bowers v. State, __ U.S. __, 122 S. Ct. 408, 151 L. Ed. 2d 310 (2001).

Here, there was no dispute as to whether the defendant had sexual relations with the victim. The issue was whether the act was consensual. The defense was that, although the victim first said "no," she did not resist when the defendant later penetrated her. Thus, by the defendant's version, while his first touching could have been "extremely offensive or provocative" contact, the sexual act was consensual. Accordingly, we conclude that the trial court erred in not instructing as to misdemeanor assault. We now will determine whether not doing so requires reversal of the defendant's conviction.

B. Harmless Error Analysis

In Ely, our supreme court addressed the questions remaining after its harmless error analysis in State v. Williams, 977 S.W.2d 101, 104 (Tenn. 1998), determining that a constitutional, and not merely statutory, right is affected when a trial court fails to instruct the jury on lesser-included offenses. 48 S.W.3d at 725. Thus, the court held that "when determining whether an erroneous failure to instruct on a lesser-included offense requires reversal . . . the proper inquiry for an

appellate court is whether the error is harmless beyond a reasonable doubt." Id. at 727. In Williams, our supreme court held that a trial court's failure to instruct the jury on the lesser-included offense of voluntary manslaughter was harmless:

> [B]y finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses, including involuntary manslaughter. Accordingly, the trial court's erroneous failure to charge voluntary manslaughter is harmless beyond a reasonable doubt because the jury's verdict of guilt on the greater offense of first degree murder and its disinclination to consider the lesser included offense of second degree murder clearly demonstrates that it certainly would not have returned a verdict on voluntary manslaughter.

977 S.W.2d at 106.

The trial court did, in fact, instruct the jury on the lesser-included offense of sexual battery. However, the jury chose to convict the defendant of the greater offense of rape. Therefore, we conclude that the error in not instructing also as to misdemeanor assault was harmless beyond a reasonable doubt.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE