IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #02C01-9412-CC-00278
APPELLEE,	*	CARROLL COUNTY
VS.	*	Hon. C. Creed McGinley, Judge
CALVIN GRADY PURVIS,	*	(Aggravated Sexual Battery)
APPELLANT.	*	

For the Appellant:

Billy R. Roe, Jr.
Asst. Public Defender
P.O. Box 663
Camden, TN 38320
(On appeal)

Steve West
Attorney at Law
McKenzie, TN 38201
(At trial)

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Charlotte H. Rappuhn
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Robert Radford
District Attorney General

Eleanor Cahill
Asst. District Attorney General
111 S. Paris St.
P.O. Box 686
Huntington, TN 38344

OPINION FILED:_____

REVERSED AND REMANDED FOR A NEW TRIAL

William M. Barker, Judge

OPINION

The appellant, Calvin Grady Purvis, was convicted of aggravated sexual battery, a class B felony, and was sentenced as a Range I offender to twelve years in the Department of Correction. On appeal he raises the following issues: (a) whether the evidence was sufficient to sustain the jury's verdict of guilt; (b) whether the trial court erred in allowing the examining physician to relate statements made by the victim; (c) whether the trial court should have granted a mistrial when the investigating officer testified that the appellant refused to give a statement; and (d) whether the sentence was excessive.

In addition to the issues raised by the appellant, we have addressed an issue of constitutional magnitude that was not raised by the parties. We conclude that it amounts to plain error under the law and necessitates a new trial. Tenn. R. Crim. P. 52(b). Thus, the judgment is reversed, and this case is remanded for a new trial.

The victim, C,[1] was four years of age at the time of the offense, and five years of age at the time of trial. She testified that she lived with her mother, her older brother, and her older sister. In the summer of 1993, the victim and her siblings stayed at the home of the appellant and his wife while the victim's mother was at work. According to the victim, the appellant put "his hands down in [her] panties," on more than one occasion. The appellant also made the victim place her hands on his penis on more than one occasion. The offenses took place in the living room at the appellant's home when no one else was around.

Hydee Lynn Birch, the victim's mother, testified that on Sunday, August 8, 1993, she left the victim at the appellant's home, and picked her up later about 5:00

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[1] The court's policy in sexual abuse cases is to refer to minors by initials only.

p.m. That evening, while giving the victim a bath, the victim told her that her vaginal area hurt because the appellant, whom she called "Pepaw," had been "playing with it and touching it." Ms. Birch examined the victim's vaginal area; it was "all red," and had scratch marks. The next day, Ms. Birch went to the police and was referred to DHS. There, the victim gave a statement to a DHS worker, Judy Dunlap, and an investigator with the Carroll County Sheriff's Department, Buck Gately. She was then referred to a physician in Humboldt, Tennessee.

On cross examination, Ms. Birch denied that she had a dispute with the appellant's wife over money owed for day care services. She admitted that all of her children stayed with the appellant and his wife, but denied that the appellant's wife had ever told her about an incident in which her son had engaged in sexually inappropriate conduct with the victim.

Dr. Warner Dunlap testified that he examined the victim on August 9, 1993. The victim told him that "Pepaw had hurt her," by placing his hand "down her pants." She said that this occurred "lots of times," and that the appellant's fingernails had hurt her. The victim also said that the appellant "took her hand and put it on his penis." The physical examination revealed redness to the victim's genitalia which, according to Dunlap, was "consistent" with the history related by the victim. Dunlap conceded that the findings were also consistent with non-sexual activity such as the victim's failure to properly clean herself. He also testified that he found no "scratches, lacerations, cuts, [or] tears." Although certain injuries to the victim's vaginal area would heal "pretty quickly," Dunlap testified that scratches with tears in the skin would not heal overnight.

The appellant called the DHS worker, Judy Dunlap, to testify. She said

that she had investigated the case and had taken a statement from the victim. On one occasion, the victim told her that two other children had been present in the living room when the appellant committed the offense. Although Dunlap believed one of the children was the victim's older sister, she was unable to ascertain the identity of the other child. She did not find any children who confirmed the victim's statement.

Sylvia Purvis testified that she had been married to the appellant for fifteen years. Their home consists of a bedroom, living room, and kitchen. Two other bedrooms in the home are not used. The kitchen is immediately next to the living room, and no door separates the two rooms. Mrs. Purvis said that she could see into the living room from the kitchen, and that she never saw the appellant alone with the victim. On one occasion prior to August 8, 1993, Mrs. Purvis found the victim's nine year old brother in a bed with the victim. He was "playing with" the victim, who had her panties off. Mrs. Purvis told the victim's mother about the incident, but she denied her son would do such a thing. Mrs. Purvis also testified that Ms. Birch owed her $85 for day care services. Further, she testified that Birch continued to let her children stay at the Purvis home up to August 15, 1993. She claimed that all three children stayed at her home on the evening of August 8th, and on the day of August 9th.

The appellant testified on his own behalf. He was "past" sixty-eight years of age at the time of trial, and had worked for the city of McKenzie, Tennessee, for twenty-two years. He denied touching the victim, or even being alone with the victim. He did not know why the victim would make such allegations.

I

When the sufficiency of the evidence is challenged, the standard for review by an appellate court is whether, after considering the evidence in a light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence, id., and this court should not substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956).

Aggravated sexual battery as applied in this case is "unlawful sexual contact with a victim by the defendant or the defendant by the victim," when the victim is less than thirteen years of age. Tenn. Code Ann. §39-13-504(a)(4)(1994 Supp.). The phrase "unlawful sexual contact" includes: "the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. §39-13-501(6)(1991 Repl.).

Here, the victim specifically testified that the appellant put his hands beneath her panties, touching her vaginal area, and that the appellant placed her hands on his penis. Her testimony was corroborated by her mother's testimony and the testimony of the examining physician. On appeal, the appellant, in effect, asks this court to reweigh the credibility of the witnesses, something this court may not do. See State v. Cabbage, 571 S.W.2d at 836. We conclude that a rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. Tenn. R. App.

P. 13(e).

II

Although not raised by the parties, we are compelled to address an error of constitutional magnitude that is plain on the record. As noted, the victim testified as to two different acts constituting the crime of aggravated sexual battery: one in which the appellant touched her vaginal area, and one in which the appellant made the victim touch his penis. The two acts were related by the victim to the examining physician as well. Simply put, nowhere in the record does it appear that the state properly elected which of the two acts it proceeded upon to seek a conviction. Our review leads us to conclude, therefore, that a remand for a new trial is the only way to ensure the appellant's constitutional right to a unanimous verdict.

In Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973), our supreme court held that it is "the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense." The court enumerated three reasons for the election requirement:

> First, to enable the defendant to prepare for and make his defense to the specific charge; second, to protect him from double jeopardy by individualization of the issue; and third, so that the jury's verdict may not be a matter of choice between offenses, some jurors convicting on one offense and others, another.

Id. at 803. In the recent case of State v. Shelton, 851 S.W.2d 134 (Tenn. 1993), the court reaffirmed that the election requirement is "fundamental, immediately touching on the constitutional rights of an accused...." Id. at 137 (quoting, Burlison, 501 S.W.2d at 804); see State v. Brown, 762 S.W.2d 135, 137 (Tenn. 1988); State v. Brown, 823 S.W.2d 576, 581 (Tenn. Crim. App. 1991); State v. Mitchell, 737 S.W.2d 298, 300

(Tenn. Crim. App. 1987).

The Shelton court stressed that the importance of election lies primarily in the third reason delineated in Burlison: to protect the "well established right under our state constitution to a unanimous jury verdict before a criminal conviction is imposed." Id., 851 S.W.2d at 137; see State v. Brown, 823 S.W.2d at 581. The court observed:

> [T]here should be no question that the unanimity of twelve jurors is required in criminal cases under our state constitution. A defendant's right to a unanimous jury before conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of creating a 'patchwork verdict' based on different offenses in evidence. . . .

Shelton, 851 S.W.2d at 137 (citing State v. Brown, 823 S.W.2d at 581). Accordingly, "when evidence suggests that a defendant has committed many sexual crimes against a victim, the court must require the state to elect the particular offenses for which convictions are sought." Shelton, 851 S.W.2d at 137. Moreover, this duty exists on the trial court even in the absence of a specific request by the defendant. Burlison, 501 S.W.2d at 804; see also State v. Mitchell, 737 S.W.2d at 300.

In Shelton, the defendant had been convicted of, among other offenses, aggravated sexual battery. The six year old victim testified that the defendant had fondled her and penetrated her digitally on more than one occasion; however, she did not differentiate one event from the others. The trial court's failure to require the state to make an election, and the resulting danger that the jury's verdict had not been unanimous, required that the conviction be reversed. Shelton, 851 S.W.2d at 139. Likewise, in State v. Brown, the defendant was convicted of one count of aggravated sexual battery. The six year old victim related two separate offenses, one that occurred at night, and one the next morning. The defense moved to require the state to elect which offense it was relying upon, but the trial court overruled the motion. On appeal,

the supreme court concluded that the trial court's failure to require the state to make an election was reversible error. Brown, 762 S.W.2d at 137.

In State v. Mitchell, the defendant was convicted of three counts of aggravated sexual battery involving three victims. Each victim related multiple acts of sexual abuse committed by the defendant; however, the trial court did not sua sponte order the state to elect which of the offenses it was relying upon. On appeal, this court followed Burlison and held that the trial court's failure to require an election of offenses was reversible error. Mitchell, 737 S.W.2d at 299-300. Similarly, in State v. Randy Clabo, No. 03C01-9307-CR-00217 (Tenn. Crim. App., Knoxville, Jan. 12, 1995), perm. to appeal denied, (Tenn., June 5, 1995), the defendant was convicted of aggravated rape against a child who had testified as to acts of oral and anal sex committed against him. Even though the issue was not specifically preserved in the motion for a new trial, this court held that the trial court's failure to order the state to elect which offense it was proceeding upon, the oral act or the anal act, amounted to plain error. Id. slip op. at 15-16.

Here, it is clear that the victim testified as to two acts that constituted aggravated sexual battery. It further appears that the trial court was aware of the election requirement in that it made the state narrow its proof to the acts that occurred on August 8, 1993.[2] However, the court did not further require the state to elect which of the two acts committed on August 8th it sought to prove. The harm from the error was compounded in several ways. First, the examining physician related the victim's statements regarding the occurrence of two sexual acts. Second, the prosecution relied in part on both acts in its closing argument: "And this little girl told you that this defendant stuck his hand down her pants,- and touched her genital area,-- and also

[2] The time span in the indictment was May to August, 1993.

took her hand and placed it on his penis. She was very clear about that." Finally, and perhaps most critically, the trial court charged the jury that the state was required to prove "that the defendant had unlawful sexual contact with the alleged victim..., or the alleged victim had unlawful sexual contact with the defendant, on or about August the 8th, 1993...." The court did not augment the charge with an instruction to ensure that the jury unanimously agreed with regard to the specific, individual offense committed. See, e.g., State v. Brown, 823 S.W.2d at 581.

This court has the authority to address errors that have not been raised by the parties:

> An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

Tenn. R. Crim. P. 52(b). In State v. James Wayne Adkisson, No. 01C01-9308-CR-00286 (Tenn. Crim. App., Dec. 9, 1994, Nashville), this court used the following factors to determine when to address plain error: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the issue is necessary to do substantial justice. Id. slip op. at 22. Here, these factors weigh in favor of a new trial. The appellant's right to a unanimous verdict is based on a clear and unequivocal constitutional ground. It was breached by the prosecution's failure to elect, and we are unable to conclude that the error was harmless. See, e.g., State v. Randy Clabo, supra, slip op. at 15-16.

The need for a second trial is unfortunate in as much as the error was preventable. The state's duty to elect in sexual abuse cases has been established for

years. Burlison, which underscored the constitutional interests at stake, was decided in 1973; Shelton, which approved of and applied Burlison, was decided just one year before the trial in this case. It is difficult to believe that the prosecution and the defense would be unfamiliar with the law at this juncture. Moreover, the trial court placed the state on notice as to the election requirement, at least insofar as it isolated a specific day; nonetheless, neither the court nor the state followed through with the requirement by properly electing the specific act. A new trial is the only appropriate remedy at this stage.

III

The appellant complains that the trial court should not have permitted the examining physician to relate statements made to him by the victim. The appellant acknowledges that statements made for the purpose of "medical diagnosis and treatment" are exceptions to the rule excluding hearsay, see Tenn. R. Evid. 803(4), yet he claims that two statements made by the victim did not satisfy this exception: her identification of the appellant, and her assertion that the appellant made her touch his penis. The state asserts that review of the issue was waived and that, in any event, the error was harmless.

Notwithstanding likely waiver of the issue,[3] we opt to review the issue to provide guidance to the court and parties upon remand. Tennessee Rules of Evidence 803(4) provides as follows:

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[3] The record indicates that defense counsel objected to the physician's testimony on the ground the victim's statements did not qualify as "fresh complaint." The motion for a new trial asserted that the victim's hearsay statements denied him a fair trial. Not until this appeal did the appellant object to the two portions of the statement on the basis of Tenn. R. Evid. 803(4). This court has often noted that a party cannot object to the admission of evidence on one ground, abandon that ground, and subsequently assert another theory on appeal. See State v. Aucoin, 756 S.W.2d 705 (Tenn. Crim. App. 1988).

> Statements for Purposes of Medical Diagnosis and Treatment. Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

The rule is based on the assumption that persons seeking medical aid are strongly motivated to tell the truth in order to facilitate the health care provider's accurate diagnosis and treatment. See State v. Rucker, 847 S.W.2d 512 (Tenn. Crim. App. 1992). Not every statement made to a physician or health care provider is admissible under this exception. For instance, it has been recognized that the identity of a perpetrator is generally not pertinent to diagnosis and treatment. See Neil P. Cohen, et al., Tennessee Law of Evidence, §803(4).1 at 425 (2d ed. 1990).

However, "on rare occasions, such as in a child abuse case, identification of the perpetrator may be quite pertinent to proper psychological treatment of the victim and should be admissible under 803(4)." Id. at 427. In United States v. Renville, 779 F.2d 430 (8th Cir. 1985), the court allowed the victim's statement to a physician, in which she identified her step father as the perpetrator, to be admitted at trial. The Court said that "statements of identity to a physician by a child sexually abused by a family member are of a type physicians rely on in composing a diagnosis and course of treatment." Id. at 438. This proposition has been approved by this court. See State v. Rucker, 847 S.W.2d at 519-520 (statements of victim's mother admissible under this exception).

Nonetheless, there is an inadequate foundation in this case to support the admissibility of the victim's statement of identity under Renville or Rucker. First, as noted, the exception is generally limited to perpetrators in the same household. See United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). Although similar considerations may be present where the child is regularly

exposed to and vulnerable to a perpetrator outside the family setting, the state did not show an adequate foundation here. Moreover, the state did not demonstrate that the statement of identity was made relative to the victim's motivation for treatment and diagnosis. In Renville, the Court stressed the doctor's detailed explanation of the medical importance of the information and the doctor's explanation of that importance to the patient. See, e.g., State v. Frank Frierson, No. 01C01-9112-CC-00357 (Tenn. Crim. App., Nashville, July 22, 1993). Thus, unlike the present case, there was a sufficient foundation for the admission of the victim's statements.

Similarly, the foundation was insufficient to show that the victim's statement regarding the other act of sexual abuse, (that is, the appellant placing the victim's hand on his penis), was "reasonably pertinent to medical diagnosis and treatment." The physician's examination centered primarily on the possible harm to the victim's vaginal area. It was not evident, at least on this record, that the statement involving the victim's contact with the appellant was reasonably pertinent to medical diagnosis and treatment. Accordingly, on remand, the state may attempt to show a proper foundation for the admissibility of the victim's statements to the examining physician. Absent such a foundation, and upon a proper objection by the defense, the trial court should excise any statements that do not meet the requirements for admissibility under 803(4). See State v. Rucker, 847 S.W.2d at 520.

IV

The appellant argues that the trial court should have declared a mistrial based on the following colloquy during the direct testimony of investigator Gately:

> Q: And what did you first do on that?
> A: I...went to the Department of Human Services and spoke with the victim....
> Q: And after that what did you do?
> A: I contacted the District Attorney's Office and advised them of what the situation was.

Q: Did you later draw a warrant up against the [appellant]?

A: Yes, I did.
Q: And what was the charge?
A: Aggravated sexual battery.
Q: Did you interview [the appellant] on this matter?
A: I asked [the appellant] did he want to make a statement, and he advised me that he did not.
Q: You did not take a statement from him?
A: No ma'am.

Following the appellant's objection on another ground, the trial court sent the jury from the courtroom and, on its own motion, warned the prosecution that it had elicited an improper comment on the appellant's constitutional right to silence. The defense requested a mistrial, but the trial court instructed the jury to disregard the response and to draw no inference from the appellant's failure to make a statement. The court then polled each juror to determine whether he or she understood the instruction.

The United States Supreme Court and the Tennessee Courts have condemned the use of an accused's post-arrest, post-Miranda silence at trial. In Doyle v. Ohio, 426 U.S. 610, 619 (1976), the Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." The rule "rests upon the 'fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" Wainright v. Greenfield, 474 U.S. 284, 291 (1986) (quoting South Dakota v. Neville, 459 U.S. 553, 565 (1983)). The "implicit assurance," is based on the right to remain silent component of Miranda; thus, the courts have held that the use of a suspect's pre-arrest, or pre-Miranda silence does not infringe upon the same fundamental fairness concerns. "Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." Jenkins v. Anderson, 447 U.S. 231, 239 (1980); see also Brecht v. Abrahamson, ___

U.S. ___, 113 S.Ct. 1710 (1993).

Accordingly, the record in this case does not support a clear constitutional violation. There is no indication that the appellant had been either arrested or read his Miranda warnings prior to electing not to make a statement. Thus, it is not sufficiently clear that his silence followed an assurance that it would not be used against him. Moreover, to the extent that an improper inference could have been drawn by the jury, the trial court gave a curative instruction. See Pender v. State, 687 S.W.2d 714 (Tenn. Crim. App. 1984). Thus, is it clear that the trial court did not abuse its discretion in refusing to grant a mistrial.

V

Finally, the appellant contends that the trial court erred in imposing the maximum sentence for the offense in that the age of the victim should not have been used as an enhancement factor under Tennessee Code Annotated section 40-35-114(4). The state maintains that the sentence was properly based on this factor as well as enhancement factors 114(6)(victim's particularly great injuries) and -114(15)(abuse of position of trust). Although we have remanded this case for a new trial, we will address the sentencing issue briefly in the event of a subsequent conviction.

When a defendant challenges the length, range or manner of service of a sentence, the reviewing court must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. §40-35-401(d)(1990 Repl.). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Here, the trial court made the following findings to support each

factor:

> I think [114(4)] should be considered by this court...when you have a particularly young victim...well below the statutory factor in a much, much more defenseless type of person because of their age. There is absolutely no question...that she was more vulnerable because of her age....
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> [T]he court...is considering as enhancing factor number (6). That the personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great. I think there is adequate proof in this record to show that this child has sustained emotional damage as a result of this man's activities. She has been under-going counseling, there is indication that she is withdrawn, she has had terrible difficulties dealing with this type of situation....
>
> I think the court can consider...number (15)- that the defendant abused a position of public or private trust....[T]here is no question that these children were placed in his home for the purposes of day care....

The supreme court has rejected the appellant's argument that the age of the victim may not be used to enhance a sentence in cases where the age is also an element of the offense. In State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993), the court explained that -114(4) could be applied in such cases "if the circumstances show that the victim, because of his age or physical or mental condition was in fact 'particularly vulnerable,' i.e., incapable of resisting, summoning help, or testifying against the perpetrator." However, the burden of establishing such circumstances rests with the state. In Adams, the court held that the burden had not been met even though one of the victims was only four years of age. Id.

Here, the state contends that there was a risk that the victim would have been unable to testify and that a child of four would not recognize the wrongful nature of the appellant's conduct. There appears to be insufficient evidence in this record to support either of the state's contentions; and the trial court's finding does not appear to be based on such evidence or any other proof in the record. Similarly, the record

does not appear to support the trial court's findings with regard to the victim's particularly great injuries under 114(6). Although we do not discount the likely harm to the victim in a case of this nature, there is no testimony or evidence in this record to support the trial court's findings as to "particularly" severe emotional, mental, or physical harm required for enhancement of this sentence under this factor. See State v. Richard Crossman, No. 01C01-9311-CR-00394 (Tenn. Crim. App., Nashville, Oct. 6, 1994), perm. to appeal denied, (Tenn. 1995). Accordingly, absent additional evidence, these factors should not be applied to enhance the sentence in the event the appellant is again convicted of this offense.

VI

For all of the foregoing reasons, the judgment of the trial court is reversed, and this case is remanded for a new trial consistent with this opinion.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge