IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

NOVEMBER 1994 SESSION

AT KNOXVILLE

	)	**C.C.A. NO. 03C01-9312-CR-00402**
Appellee,	)	
	)	**WASHINGTON COUNTY**
STATE OF TENNESSEE,	)	
VS.	)	
	)	**HON. ARDEN L. HILL,**
HARRY MUSE JONES III,	)	**JUDGE**
A/K/A HARRY MUSE JONES, JR.,	)	
	)	(Aggravated Rape,
Appellant.	)	Aggravated Sexual Battery)

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OPINION FILED:_____

REVERSED AND REMANDED

JOHN H. PEAY,
Judge

O P I N I O N

On December 10, 1992, the defendant was convicted by a jury of one count each of aggravated rape and aggravated sexual battery of his son. Sentenced as a Range I standard offender, the defendant received consecutive sentences of twenty years and nine years, respectively.

In this appeal as of right, the defendant raises six issues for review contending that the trial court:

1. erred in allowing into evidence testimony of Bill Cook, Rita Parris, and Jean Andrews, relating to inadmissible hearsay statements made to them by the alleged victim;

2. committed prejudicial error in allowing into evidence inadmissible character testimony concerning alleged prior sexual bad acts against the alleged victim by the defendant;

3. erred by allowing into evidence inadmissible lay opinion testimony of Cherie Jones, the mother of the alleged victim, and Rita Parris, a social counselor with the Department of Human Services;

4. erred in not granting defendant's motion for a continuance to permit counsel to depose Dr. Robert Bowman, when shortly before trial it was discovered that he was no longer in the State of Tennessee, and when his medical report contained exculpatory evidence for defendant;

5. erred in overruling the defendant's motion for funds for expert assistance from a licensed clinical psychologist to undertake an independent examination and evaluation of the alleged victim; and

6. improperly weighed and applied sentencing considerations in imposing an excessive sentence.

Following our review of the record, we reverse and remand for a new trial.

The testimony at trial revealed that the defendant and his wife, Cherie Jones, separated in December 1989 and eventually divorced in August 1990. Pursuant

to the visitation agreement, their five-year-old son, M.J.,[1] visited the defendant on a regular basis in the late summer and early fall of 1990. Ms. Jones testified that she had noticed a change in M.J.'s behavior when he returned from visiting the defendant, including his failure to use utensils when eating, continual speech problems, and an inability to control his bowels. Because of her concern, Ms. Jones took M.J. to Johnson City Pediatrics in June 1990 to determine the cause of his bowel problem. At the urging of a friend, Ms. Jones mentioned to the doctor the possibility of child abuse; however, the doctor seemed unconcerned. Ms. Jones permitted the visitation to continue until November 1990 when she was advised to discontinue visitation.

Ms. Jones testified that when she and the defendant were still married, the defendant and M.J. had taken baths together. She stated that on many occasions she had observed both the defendant and M.J. with erections in the bathtub when the two played a game the defendant called submarine in which they made their "guys"[2] grow. Ms. Jones further testified that on at least two occasions, when M.J. returned from visitation with his father, she had noticed that M.J.'s bowel movement in his pants consisted of a white mucousy substance mixed with a spot or two of blood. Although Ms. Jones admitted that she had no specialized training in identifying bodily fluids, she stated that in her opinion the white substance was semen.

During M.J.'s testimony, he identified on a diagram the sexual organs of a child and an adult. When asked if his father touched his private parts, M.J. answered that his father had touched him on four occasions. As to the first instance in October, M.J. said that the defendant had touched M.J.'s "guy" through his underwear, then took M.J.'s underwear off and touched his "guy" again. M.J. testified that on a separate occasion

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[1]Pursuant to the policy of this Court, the name of the minor victim will not be used.

[2]The testimony revealed that M.J. referred to his penis as his "guy" and his father's penis (defendant's) as "big guy."

near Halloween, the defendant had put his hand "in" M.J.'s bottom which caused him pain. The third touching described by M.J. occurred in the bathtub when the defendant and M.J. were bathing and the defendant touched M.J. on his "guy." In a fourth episode, M.J. explained that he and the defendant had been lying on the floor when the defendant "slept" on him. M.J. further described the contact as the defendant putting his guy on M.J.'s bottom. Finally, M.J. testified that the defendant had threatened to chop off M.J.'s head and that M.J. would be in big trouble if he told anyone what had occurred.

Jean Andrews, the pastor's wife, testified that in the fall of 1990 she had been transporting a car full of children, including M.J., when M.J. leaned forward and calmly told her "my daddy poked me in the butt with his finger." Ms. Andrews said that this statement was repeated at least three times but that she was the only one to hear it as the other children were talking and singing loudly. She added that she did not react to the statement so that M.J. would continue to speak freely and not feel self-conscious. Approximately one week later, Ms. Andrews conveyed this incident to Ms. Jones and suggested that Ms. Jones might want to take M.J. to the doctor. Ms. Andrews could not pinpoint the exact date the statement was made.

Rita Parris, a social counselor with the Department of Human Services (DHS), testified that she had first met M.J. on September 25, 1990, when M.J. was five years old. M.J. told Ms. Parris that he didn't mind his daddy seeing his bottom and his "guy" and that his daddy liked to see his "guy" grow. Ms. Parris again spoke with M.J. on November 5, 1990, following another report that M.J. had been sexually abused. During this second meeting, Ms. Parris allowed M.J. to draw pictures to assist in his explanation of the sexual incidents. M.J. drew his daddy's "big fat guy" and M.J.'s bottom and told Ms. Parris what the "big fat guy" did in relation to his bottom. Ms. Parris testified that M.J.'s recitation had been a description of anal intercourse. M.J. further demonstrated for Ms. Parris what occurred between he and his father through the use of male

anatomically correct dolls. M.J. demonstrated anal intercourse by placing one male doll on top of the other in addition to the hand of the doll touching the penis. On cross-examination, Ms. Parris was extensively questioned about the use of dolls in such cases and the validity of that method. Further, she discussed the importance of letting the child speak freely without prompting from adults. Finally, she responded on redirect that it was important to have M.J. examined by a pediatrician as soon as possible because with little boys the "[rectal] tissue tends to regenerate itself, heal very quickly, within . . . 72 hours."

Bill Cook of the Watauga Mental Health Center, Children and Youth Division, testified that he had first met M.J. in October 1990 and had begun counseling on November 5, 1990. Mr. Cook stated that he and M.J. had been talking about problems at home when M.J. stated voluntarily that "it's okay for my father to touch my guy." M.J. went on to explain that his "guy" was his penis and drew pictures to illustrate it. M.J. further told Mr. Cook that his father had touched his "guy" three times and that it "didn't feel good." M.J. said that it hurt to use the bathroom and that he had "pooped in his pants." At that point, Mr. Cook testified that he had broken off the interview and had reported it to Peggy Willingham at DHS.

On November 15, 1990, Mr. Cook met with M.J. for the second official counseling session during which M.J. talked while he drew pictures. M.J. described to Mr. Cook about his dad lying on him on his bed in the living room floor and how his dad squeezed his "guy." He further described through his drawings how a "guy" can become big when it is touched. Mr. Cook testified that M.J. had indicated that his father had touched his "guy" and that he had touched his father's "guy" a total of three times. On December 11, 1990, Mr. Cook met with M.J.'s mother to instruct her how to handle M.J.'s defecating in his pants. During a December 13, 1990, session, M.J. described how stuff comes out of a "big guy" when it is touched.

Looking back to the initial meetings, Mr. Cook stated that he had had two problems in conducting the interviews with M.J. First, he explained that although M.J. had a good vocabulary, he could not understand some sentences initially spoken by Mr. Cook. Second, when Mr. Cook began to talk about M.J.'s father, M.J. would regress by curling up and putting his thumb in his mouth. On cross-examination, Mr. Cook stated that M.J. had said that his dad had put his "guy" in "his body" and would point to his rectum. During redirect, Mr. Cook indicated that M.J. had described dreams in which his father would shoot him and he would be buried.

The State's final witness was Wanda Robertson of the Washington County Sheriff's Department who conducted the polygraph examination given to the defendant in the winter of 1991. At approximately 10:00 a.m. that morning, after the defendant signed a consent to a polygraph examination statement, Ms. Robertson began the examination with a series of questions. At some point into the one hour questioning, the examination was stopped because Ms. Robertson felt there were some answers she needed to discuss with the defendant. As she discussed these with the defendant, he began to cry and became what Ms. Robertson described as "over emotional" and indicated that he wished to speak with Sergeant Lisa Coppock. Ms. Robertson testified that the defendant had said he didn't want to talk about the accusations made against him and that he didn't remember anything. The defendant told her that he was sure M.J. was telling the truth but that he had blocked out specific instances. The defendant further admitted that he told M.J. he would "rip his head off" if he told anyone of the occurrences. The only specific as to sexual contact was his admission that he had placed his bare penis against M.J.'s bare bottom. During the interview with Sergeant Coppock, the defendant gave a written statement in which he admitted to "inappropriate sexual contact."

The defendant first presented the testimony of Amy Lynn Worrell, a college

roommate of Ms. Jones' sister. In the summer of 1991, Ms. Worrell heard M.J. comment in no specific context that his mother's friend, Danny, was not his real dad because his real dad was in jail. Later, he commented that his dad was in jail because "he hurt me."

Next, Katherine Worrell, a secretary at Appalachian Christian Camp, testified that she had known the defendant, his wife and M.J. and that during the summer of 1991 she had heard M.J. say that his daddy was in jail and that he wasn't allowed to see him. The third witness was Susan Caroline Mullins, the defendant's sister, who testified that she and her children had seen M.J. at church. Ms. Mullins' son, Curtis, age twelve, testified that when he had seen M.J. at church that Sunday, M.J. told him that his dad was in jail and that his mother told him to tell everyone that his dad had abused him. Curtis said that M.J. told him he didn't remember it happening. Curtis' brother, Ryan, age ten, testified that M.J. told him that same Sunday that "Harry's [defendant] in prison" and that M.J.'s mother told him to tell everyone. Ryan also added that M.J. told him he did not remember his father abusing him.

Finally, the defendant testified that since his divorce he and his wife had had an open custody agreement where the defendant could see the child every weekend and anytime he was off from work, but the agreement changed when Ms. Jones wanted to see M.J. more on the weekends because of the short time they had together throughout the week. Shortly thereafter, the defendant was informed that he would no longer be permitted to see his son because sexual abuse allegations had been made against him. The defendant said he had laughed the first time he heard about the allegations and later requested a polygraph examination which was administered some months later by Ms. Robertson. The defendant claimed that when the exam was completed, Ms. Robertson told him he did it, but that he denied he could have done such acts. The defendant stated that he became upset because he had believed the

polygraph would absolve him.

The defendant testified that due to Ms. Robertson's actions, he had begun to think that maybe he did the acts alleged against him and that he might have a hereditary chemical imbalance in his brain. He further claimed that Ms. Robertson continually told him that he did it and that the polygraph machine is never wrong. He stated that when he had stepped into the next room where Ms. Coppock was located, he told her that he had failed the polygraph test. He further stated to her that "I've done this, I've lied to my . . . parents . . . brothers . . . sisters." Shortly thereafter, he signed a written confession. The defendant denied at trial that he committed any of the charged acts, contending that he was coerced into giving a confession.

I.

Fresh-Complaint Evidence

In his first issue the defendant insists that the trial court erred by allowing into evidence the testimony of Bill Cook, an outpatient therapist at Watauga Mental Health Center, Rita Parris of DHS, and Jean Andrews, the pastor's wife. Specifically, the defendant contests the trial judge's admission of these statements as "fresh-complaint" evidence and contends that all of the statements were inadmissible hearsay.

Although the status of the fresh-complaint doctrine has been uncertain, our Supreme Court has recently issued two rulings that clarify application of this doctrine.

In State v. Kendricks, 891 S.W.2d 597 (Tenn. 1994), the Court left intact the fresh-complaint doctrine as to adult victims of sex crimes. Exploring the historical basis for the doctrine, the Court acknowledged the "profoundly sexist" expectation that adult female victims of sexual crimes will make an immediate outcry, id. at 604, and voiced its concern that juries might presume an adult victim of a sex crime is fabricating

her (or his) testimony unless corroborated by a report that immediately followed the attack.

In State v. Livingston, __ S.W.2d __ (Tenn. 1995), however, the Supreme Court found that any expectation of an immediate outcry by a child victim of a sex crime is simply not applicable. Rather, the Court noted, child victims may be reluctant or fearful to report the incident(s), as well as confused about or unaware of the significance of the abusive conduct. Further, the Court found, juries do not necessarily make the same presumptions about child victims of sex abuse that they make about adult victims where the crime is not reported immediately. Accordingly, Livingston abolishes the fresh-complaint doctrine where the victim is a child.

In the present case, Cook, Parris and Andrews testified following the child victim's testimony. Under Livingston, this testimony was hearsay not admissible under the fresh-complaint doctrine. Even if the fresh-complaint doctrine were applicable, the trial judge failed to give an instruction prior to, simultaneous with, or following this testimony to the jurors that this evidence was not substantive and was to be considered by them for corroborative purposes only. Nor was there any such cautionary instruction included in the charge given to the jury prior to their deliberations. For this reason, we must reverse the conviction and remand the case for a new trial.

Although we reverse the convictions, we will address the remaining issues for guidance upon remand.

A. Testimony of Bill Cook

The defendant argues that the responses given by M.J. to Bill Cook were not complaints but were answers to interrogatories; therefore, they do not qualify as fresh-complaint evidence. He further argues that the statements were not spontaneous

or otherwise sufficiently timely to fall under the fresh-complaint doctrine. In addition, the defendant contends that the statements made to Mr. Cook were not admissible under the hearsay exception governing statements made for the purpose of medical diagnosis and treatment.

Under Livingston, M.J.'s statements to Mr. Cook are inadmissible as fresh-complaint evidence even if they do meet that doctrine's requirements. However, notwithstanding its holding about the fresh-complaint doctrine, the Supreme Court made clear in Livingston that "evidence in the nature of fresh-complaint may be admissible as substantive evidence if it satisfies some hearsay exception and as corroborative evidence if it satisfies the prior consistent statement rule." Thus, although Mr. Cook's testimony is inadmissible as fresh-complaint under Livingston, we conclude that Mr. Cook's testimony may be admissible as prior consistent statements if the victim's credibility is first attacked.

In another challenge to Mr. Cook's testimony, the defendant claims that the victim's statements made to Mr. Cook were not admissible under the hearsay exception governing statements made for the purpose of medical diagnosis and treatment. It appears from the record that the trial court suggested during the defendant's motion for a new trial that the victim's statements made to Mr. Cook could fall under this exception. We disagree. Under Tenn. R. Evid. 803(4), certain statements are admissible when made for the purposes of medical diagnosis and treatment. In State v. Barone, 852 S.W.2d 216, 217-18 (Tenn. 1993), our Supreme Court held that statements of child sexual abuse victims to psychologists do not satisfy this rule. The victim's statements to Mr. Cook in this case are of a similar nature. Thus, the victim's statements in the present case do not to fit into this exception.

B. Testimony of Rita Parris

The defendant likewise claims that the testimony of Rita Parris was inadmissible hearsay because the statements given to her by the victim were answers to interrogatories and therefore fail to meet the requirements of fresh-complaint evidence. As set forth above, these statements are inadmissible as fresh-complaint even if they do meet the requirements. However, as with Mr. Cook's testimony, we find that Ms. Parris' testimony may be admissible as prior consistent statements following an attack on the victim's credibility.

The defendant also contends that Ms. Parris' testimony was inadmissible because the victim's statements failed to allege a sexual offense. Although Ms. Parris testified that M.J. had told her the defendant liked to see his "guy" grow and liked to see him naked, she also testified that during the second session M.J. drew pictures and described anal intercourse. Depending on the course of the testimony at retrial, these statements may be corroborative of the victim's credibility and so admissible.

C. Testimony of Jean Andrews

The defendant also contends that Jean Andrews' testimony was inadmissible as fresh-complaint because she could not state with absolute certainty when the victim made the statements to her. Ms. Andrews testified that in the fall of 1990, while driving some children home from church, M.J. stated to her on three occasions that the defendant "poked him in the butt with his finger." The defendant concedes that these statements were spontaneous but argues that they were inadmissible because she could not identify the exact date the statements were made. Consistent with the guidelines stated above, such testimony, although not admissible as fresh-complaint, may be admissible as prior consistent statements.

In summary, under the rule of Livingston, the testimony of Cook, Parris and Andrews is inadmissible under the fresh-complaint doctrine. However, upon an attack

on the victim's credibility, it may be admissible as prior consistent statements and the witnesses may testify as to specifics of the victim's complaints in an attempt to bolster the victim's credibility.

II.

Prior Bad Acts Testimony

In his second issue the defendant contends that the trial court erred by allowing into evidence inadmissible character testimony concerning alleged prior sexual acts against the victim by the defendant. This specific claim is directed toward Cherie Jones' testimony that during her marriage to the defendant she had observed both the defendant and M.J. with erections while bathing together. Because Ms. Jones' testimony indicated that these bathing incidents occurred during the marriage and Ms. Jones left the defendant on December 1, 1989, these occurrences fall outside the June 1990 to November 1990 period charged in the indictment. The trial judge held an out-of-jury hearing and ruled that because intimacy was a material issue, the probative value outweighed the prejudicial effect.

The specific testimony now alleged as error by the defendant occurred during cross-examination and redirect of Ms. Jones. On cross-examination, defense counsel questioned Ms. Jones as to whether she had seen M.J. with an erection between ages three through five. After repeated inquiries, Ms. Jones described the bathtub games she observed in which the defendant and M.J., while bathing together, would make their penises "grow." Defense counsel did not object until redirect when the State questioned Ms. Jones further regarding these games.

The State contends that the testimony was not reversible error because (1) the defendant "opened the door" to the testimony on cross-examination; (2) the testimony was admissible to show a common scheme under Tenn. R. Evid. 404(b); and

(3) the acts complained of were not criminal. However, the defendant responds that our Supreme Court clarified this issue in State v. Rickman, 876 S.W.2d 824 (Tenn. 1994). We agree with the State that the defendant "opened the door" to this testimony and therefore cannot now complain of its introduction at the trial.

In Rickman, our Supreme Court held that testimony about sex acts not charged in the indictment, or which occurred outside of the time period covered by the indictment, is inadmissible under Tennessee Rule of Evidence 404. Rickman, 876 S.W.2d at 830. In the present case, the bathtub games occurred while the defendant and Ms. Jones were married; however, based upon Ms. Jones testimony, the defendant moved out of the residence in December 1989. These incidents clearly fall outside the dates of the indicted sexual incidents and therefore cannot be used to corroborate the offenses now alleged against the defendant.

We note some differences between the present case and Rickman. Here, the testimony being attacked was not that of the victim but of the victim's mother; therefore, arguably it was on behalf of the child victim. However, the testimony was not elicited to corroborate the victim's testimony but was given to explain when Ms. Jones had seen her son with an erection. Further, such testimony was initially elicited by the defense and not by the State. Because the State elected which indicted incidents it would pursue and because one of those instances involved a claim by M.J. that the defendant had touched him in the bathtub, we must find that the testimony would not have been in the State's case-in-chief.

With the admission of Ms. Jones' testimony regarding the bathtub incidents, it is likely the jury could have used such testimony to support its finding of guilt as to the indicted count regarding the touching in the bathtub rather than basing its finding upon the State's proof as to the charged bathtub incident. Nonetheless, we find that because

the defendant brought this testimony into the trial, his complaint has no merit.

III.

Lay Opinion Testimony

The defendant claims in his third issue that the trial judge erred by allowing the admission of improper lay opinion testimony. Specifically, he contends that Ms. Jones' characterization of a mucousy substance found in her son's bowel movement as semen should have been determined by an expert. In addition, the defendant attacks the admission of Rita Parris' testimony that children should be examined as soon as possible after suspected child abuse because rectal tears can heal within seventy-two hours.

"A non-expert witness must ordinarily confine his [or her] testimony to a narration of facts based on first-hand knowledge and avoid stating mere personal opinions." State v. Middlebrooks, 840 S.W.2d 317, 330 (Tenn. 1992). The purpose of this rule is to preserve the fact-finding role of the jury since it is the jury's function to draw conclusions from evidentiary facts stated by witnesses. Middlebrooks, 840 S.W.2d at 330 (citations omitted).

Non-expert testimony can be admissible when it describes the observed facts in the only way "in which they can be clearly described." Middlebrooks, 840 S.W.2d at 330 (citations omitted). Therefore, lay opinion testimony is limited to those circumstances

> [w]here facts perceived by the senses are numerous, and it is difficult to describe them adequately to the jury, and the conclusion or inference to be drawn from such facts is simple and within the range of common experience, and the witness can relate what he has seen more accurately and more easily by stating his conclusion than by attempting to detail the [evidentiary] facts.

Middlebrooks, 840 S.W.2d at 331 (citations omitted); see also Tenn. R. Evid. 701(a).

Here, the question is close as to whether Ms. Jones' testimony was permissible lay testimony or at what point it became inadmissible testimony. Having been married, we think that Ms. Jones could recognize semen and could tell the jury that the substance found in her son's bowel movement looked like semen. However, when pressed further at trial, Ms. Jones testified that she was certain the substance was semen, perhaps crossing the line into inadmissible lay opinion testimony. Ms. Jones agreed that she had no specialized training in evaluating bodily fluids, and the defendant contends that having been married was an insufficient basis to establish that the substance was semen. Instead, the defendant argues that she should have been limited to describing the white matter as a "mucousy substance." We disagree with such a limitation; however, on remand we find that Ms. Jones may state that the substance appeared to have been semen just as she testified that she had additionally seen blood in the bowel movement.[3] However, she may not, as a lay person, absolutely conclude to the jury that the substance was semen.

We also find that Ms. Parris' testimony regarding the reason that a child be taken to a physician as soon as possible after suspected abuse was improper lay testimony. This proof was obviously offered to counteract the defense proof that no injuries were apparent following examination of the victim. However, the defendant failed to object to the testimony until the witness was excused and after a return from recess. The failure of defense counsel to make a contemporaneous objection waives consideration by this Court of the issue on appeal. See Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988); T.R.A.P. 36(a). Notwithstanding this waiver, we agree that the State failed to establish a proper foundation for such testimony from this witness, and we find no support in the record for permitting Ms. Parris' statement to come into the record.

[3]We note that the defendant did not raise a challenge to that portion of Ms. Jones' statement regarding blood she also saw in the bowel movement.

However, because the testimony was not specific to this case, we find that any error was harmless . T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a). This issue has no merit.

IV.

Continuance

In his fourth issue the defendant argues that the trial court should have granted his oral motion for a continuance to permit counsel to depose Dr. Robert Bowman, who no longer resided in Tennessee and whose medical report allegedly contained exculpatory evidence. The State contends that because the defendant failed to follow the requirements established for presenting a motion for continuance based upon unavailability of a witness, such a claim is baseless. We agree.

The granting or denial of a continuance is a matter left to the sole discretion of the trial judge, whose decision will not be disturbed absent "a clear showing of gross abuse of his [or her] discretion to the prejudice of the defendant." Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). This Court has previously stated that "[t]he only test is whether the defendant has been deprived of his [or her] rights and an injustice done." State v. Goodman, 643 S.W.2d 375, 378 (Tenn. Crim. App. 1982). In order to reverse the judgment of the trial judge, we must be convinced that the defendant "did not have a fair trial and that a different result would or might reasonably have been reached had there been a different disposition of the application for a continuance." Baxter, 503 S.W.2d at 230; accord Goodman, 643 S.W.2d at 378.

When a defendant files a motion for continuance on the ground that a witness is unavailable, the defendant must support that motion with an affidavit. That affidavit must (a) allege the substance of the testimony, (b) establish the relevance and materiality of the testimony, (c) show that the testimony would be admissible, (d) prove that the testimony is not merely cumulative to other evidence, (e) confirm that the witness

will be available at a later date, and (f) verify that diligence was used to obtain the witness's presence. State v. Dykes, 803 S.W.2d 250, 256-57 (Tenn. Crim. App. 1990). Failure to file an affidavit, standing alone, justifies the denial of a motion for a continuance. Mitchell v. State, 92 Tenn. 668, 669, 23 S.W. 68, 69 (1893); Dykes, 803 S.W.2d 250, 257. But see, State v. Alvin Glenn Hughes, No. 02C01-9208-CR-0018-00183, Shelby County (Tenn. Crim. App. filed June 9, 1993, at Jackson).

In this case, the defendant orally requested the continuance when one week prior to trial he became aware that Dr. Robert Bowman had moved to Nebraska. No affidavit was filed or presented to the court when the oral motion was made on December 7, 1992, even though the record indicates that such an opportunity existed. Further, the defendant failed to establish orally the requirements for such a motion for continuance. It appears from the record that Dr. Bowman examined M.J. on June 25, 1990, and made reference to irritation in the anal area. Because the defendant was charged with anal penetration of M.J., he wished to depose Dr. Bowman concerning evidence of tearing, scarring and bruising of the anal area. At the hearing on the oral motion, the State conceded that they anticipated the only testimony regarding anal penetration would come from the victim. Further, the report of Dr. Bowman was introduced into evidence at trial. The defendant did not show that the witness would be available at a later date or that diligence was used to obtain the witness's presence. Therefore, we find that the trial judge did not abuse his discretion in denying the defendant's oral motion for continuance.

V.

Expert Assistance Funds

Fifth, the defendant asserts that the trial court erred in overruling his motion for funds as an indigent to obtain expert assistance from a licensed clinical psychologist to undertake an independent examination and evaluation of the victim. The defendant

argues that although T.C.A. § 40-14-207(b) precludes a defendant from receiving funds for expert testimony in a non-capital case, the courts of Tennessee should mandate that such assistance be made available. We do not find compelling reasons to require such assistance even if empowered to do so. The record fails to establish that the victim had a history of any mental disorder or mental abnormalities in any sense. There is nothing to indicate a lack of sanity on the part of the victim or that his story was incredible or that he had experienced sexual fantasies. See State v. Ballard, 714 S.W.2d 284 (Tenn. Crim. App. 1986), which deals with the authority of the trial court to order an evaluation of an alleged child sex victim. Accordingly, this issue is without merit.

VI.

Excessive Sentence

In his final issue the defendant claims that the sentence imposed by the trial judge was excessive due to the trial court's improper consideration and weight given to sentencing factors. Further, he complains that the trial judge improperly ordered the aggravated sexual battery sentence to run consecutively to the sentence for the aggravated rape conviction. As stated above, although this issue is moot we will address these contentions for guidance upon remand.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A.

§ 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The trial judge sentenced the defendant as a Range I standard offender and imposed a twenty year sentence for aggravated rape and a consecutive nine year sentence for aggravated sexual battery. The defendant contends that the "presumption of correctness" set forth in Ashby does not apply in this case because the trial judge improperly weighed the enhancement and mitigating factors and improperly characterized evidence as enhancement though it did not fit into the criteria of T.C.A. § 40-35-114. The trial judge found that four enhancement factors were applicable: the offense involved a victim and was committed to satisfy the defendant's desire for pleasure or excitement; the defendant had no hesitation about committing the crime when the risk to human life was

high; the defendant abused a position of trust in committing the offense; and the offense was committed under circumstances where the potential for bodily injury was great. T.C.A. § 40-35-114 (7), (10), (15) & (16).

The first enhancement factor challenged by the defendant is that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement. T.C.A. § 40-35-114(7). Specifically, he contends that this factor does not apply because it is inherent in any crime of this nature. See State v. Adams, 864 S.W.2d 31 (Tenn. 1993). Under our caselaw, this factor must be supported by proof offered by the State that the offenses were sexually motivated. Adams, 864 S.W.2d at 35. Proof of the prior sexual games, if properly admitted at trial or sentencing, would support the application of this factor.

Next, the defendant challenges the enhancement factor that the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(10). The State concedes and we agree that the record failed to establish support for this factor. Though the trial judge stated that "it's possible that this little boy could have been injured to the point he would have bled to death," the only testimony as to injury was Ms. Jones' testimony that she had seen traces of blood in the victim's bowel movements. This proof alone is insufficient to justify the use of this enhancement factor. Therefore, this factor was improperly considered.

The third enhancement factor applied by the trial judge was that the defendant abused a position of private trust. T.C.A. § 40-35-114(15). The defendant does not challenge the applicability of this factor but questions the trial court's failure to state a basis for its finding. The trial judge noted that a child should be able to trust his father above anyone else. We agree that this factor is applicable due simply to the father/son relationship between the defendant and the victim.

Finally, as a fourth enhancement factor, the trial court found that the offense was committed under circumstances where the potential for bodily injury to the victim was great. T.C.A. § 40-35-114(16). Though similar to the first enhancement factor applied by the trial judge, we find that this factor merited consideration because the testimony indicated that anal penetration had occurred and blood was found in the victim's bowel movement. Bodily injury is not an element of this offense and there is factual support in the record to apply this factor, especially considering the tender age of the victim.

The trial judge found no specific statutorily listed mitigating factors but did consider, pursuant to T.C.A. § 40-35-113(13), argument of counsel and that the defendant is a good man that has "gone astray" because of pornography. We fail to glean much in the way of mitigation from these matters. The evidence does not preponderate against the sentence imposed.

Finally, the defendant complains that the trial judge's imposition of consecutive sentences cannot be supported by the record. T.C.A. § 40-35-115 provides that consecutive sentences may be imposed in sexual offense cases only when:

> The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, 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 or victims[.]

T.C.A. § 40-35-115(5). Here, there is evidence to support the above-listed criteria. The trial court's order of consecutive sentencing was proper.

Accordingly, for the grounds stated above, the judgment of the trial court is reversed and remanded for a new trial.

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JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID G. HAYES, Judge