

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1993

<p><b>FILED</b></p> <p><b>April 3, 1996</b></p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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STATE OF TENNESSEE, )

Appellee, )

v. )

WILLIAM JEFFERY CARICO, )

Appellant. )

No. 03C01-9307-CR-00206

Hawkins County

Hon. James E. Beckner, Judge

(Aggravated Rape)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joseph M. Tipton  
Judge

## OPINION

The defendant, William Jeffery Carico, appeals as of right from his conviction by a jury in the Hawkins County Criminal Court for aggravated rape, a Class A felony. The defendant was sentenced as a Range I, standard offender to twenty-five years in the custody of the Department of Correction. The following issues are presented for our review:

(1) whether the evidence is insufficient to support the defendant's conviction,

(2) whether the nine-year delay between the offense and its prosecution was unconstitutional,

(3) whether the defendant was given proper notice of the date of the offense by the indictment and its subsequent amendment,

(4) whether the trial court erred in failing to suppress statements that the defendant gave to the Tennessee Department of Human Services and Counseling and Consultation Services,

(5) whether the trial court erred in allowing the victim to testify concerning alleged offenses that occurred eight to ten years prior to the indictment in this case in spite of rules regarding fresh complaint and staleness,

(6) whether the trial court erred in refusing to allow the victim to be cross-examined about making similar accusations against another person,

(7) whether the trial court erred in allowing the victim and her mother to testify regarding the manner in which they arrived at the date of the offense,

(8) whether the trial court erred in its instructions regarding the significance of the date of the offense as charged in the indictment,

(9) whether the trial court erred in its instructions that emphasized the date of the offense as January 1985,

(10) whether the trial court imposed an excessive sentence by improperly balancing the enhancement and mitigating factors, and

(11) whether the accumulation of the errors combined to deprive the defendant of a fair, public, speedy and constitutional trial.

The indictment alleged that on an unnamed day in July 1983, the defendant unlawfully penetrated his step-daughter, who was less than thirteen years old, by forcing her to perform fellatio. Teresa Fletcher, a counselor with a sexual offender treatment program called Counseling and Consultation Services (CCS), testified that the defendant came to her office seeking help on March 2, 1992. She stated that she told the defendant of her mandatory duty to report incidents of known or suspected child abuse and that he signed a waiver of confidentiality before being interviewed. She testified that the defendant told her that he was having problems because he had begun fondling his step-daughter in 1983, when she was approximately ten years old, and that he wanted to take some responsibility for his actions. She recounted that the defendant told her that for a period of at least one year, he had fondled the victim's vaginal area over and under her clothing and then masturbated. She stated that he also told her that when the victim reported him to the authorities, he denied the allegations. However, she testified that the defendant stated that after he and the victim's mother, Vanessa Hartsock, separated in October 1991, he admitted to the victim's mother that he had abused the victim.

Ms. Fletcher stated that after interviewing the defendant on March 2, 1992, she contacted Rita Parris of the Washington County Department of Human Services (DHS). Ms. Parris testified that the defendant also called her on the same day to schedule an interview. Ms. Parris contacted Kenneth Peterson, an investigator with the Washington County Sheriff's Department, and requested that he attend the interview. She stated that the defendant told her that he had touched the victim's breasts and genitals underneath her clothing approximately six times. She also testified that the defendant said that the incidents occurred from 1983 to 1984 when the victim was approximately ten or eleven years old and that the incidents always took place while the victim's mother was at work.

Ms. Parris testified that the defendant said the abuse had been reported sometime in 1984 to Sarah Morelock of the DHS, but the investigation was dismissed when the victim recanted the allegations. She testified that the defendant stated that the victim had possibly recanted at her mother's suggestion. She stated that the defendant also told her that the abuse was again reported in 1990 when the victim told her natural father about the abuse. Ms. Parris stated that the defendant was afraid that he might be arrested.

Kenneth Peterson testified that he participated in the interview of the defendant on March 2, 1992. He stated that he identified himself as an investigator with the Washington County Sheriff's Department and informed the defendant that he was not under arrest and was free to leave the interview at any time. Investigator Peterson's testimony regarding the defendant's version of events was essentially the same as that of Ms. Parris. Investigator Peterson stated that he gave his notes from the interview with the defendant to the Hawkins County Sheriff's Department and had no further contact with the defendant after the interview.

Gary Wiseman, a Sergeant with the Washington County Sheriff's Department, testified that he also conducted interviews for CCS on a private part-time basis. He stated that he conducted a taped interview of the defendant on July 24, 1992, for CCS as part of the assessment process for admission into the treatment program. Sergeant Wiseman stated that he informed the defendant that he was free to refuse to answer any questions or to leave at any time. The defendant told Sergeant Wiseman that he began fondling the victim's breasts and vagina when she was approximately eight or nine years old. Sergeant Wiseman testified that the defendant stated that the incidents occurred no more than ten times. In response to Sergeant Wiseman's question, the defendant also admitted that he held the victim's head and forced her to fellate him approximately four times. The defendant said he did various

things to keep the victim from telling anyone about the abuse, such as allowing her to drink beer. Sergeant Wiseman stated that the defendant reported that the abuse stopped in 1986.

Michael Adler, the Clinical Director of CCS, testified that the defendant completed a self-report sexual interest inventory test on March 26, 1992, in which he indicated that he had touched a child's genitals in a sexual manner approximately five to ten times. Mr. Alder also conducted a clinical interview of the defendant on July 27, 1992. He testified that in the interview, the defendant stated that he had become sexually aroused while wrestling with the victim when she was eight or nine years old. The defendant said that he then began to fondle the victim's breasts and vagina over her clothing, and then under her clothing. Mr. Alder testified that the defendant reported digitally penetrating the victim, performing oral sex on the victim, and holding the victim's head to make her perform oral sex on him. Mr. Adler stated that the defendant also reported that he watched the victim bathe and undress and had masturbated with her underwear.

On cross-examination, Mr. Alder testified that at his last meeting with the defendant on August 8, 1992, he informed the defendant that his assessment reflected a need for in-patient treatment. He stated that the defendant chose not to follow his recommendation of in-patient treatment and, thus, had no further contact with CCS.

Sarah Morelock, a DHS Field Supervisor, testified that she investigated the victim's allegations against the defendant in May 1985. She stated that she substantiated the fact that the victim had been sexually abused and reported her findings to the district attorney's office. Ms. Morelock's report listed the victim's allegations and stated that the abuse occurred while the victim's mother was at work. The report also stated that the defendant had denied the abuse and that the defendant

and the victim's mother felt that the victim lied about the abuse in order to break up their marriage. Ms. Morelock testified that she recommended that the case be kept open for child protective services for six months, but she could not testify as to what occurred after her report was made because she did not conduct the follow-up investigation and all of the pre-1988 files had been destroyed due to a lack of adequate storage space at the DHS office.

Vanessa Hartsock, the victim's mother, testified that she and the defendant were married from May 1980 until August 1992. She stated that the family moved into a white house in Hawkins County in the spring of 1984 and the defendant's daughter from a previous marriage came to live with them in October 1984. She said that during 1984 and 1985, she usually worked on weeknights and weekend days and evenings. She stated that she began working every Sunday in October 1984.

Ms. Hartsock testified that Ms. Morelock informed her of the victim's allegations in May 1985. She stated that she was very scared and angry because she could not believe that the abuse had occurred. She recounted that the defendant left their home for approximately eight weeks after Ms. Morelock's visit. During this time, she stated that she cried in front of the victim on a daily basis and told her that the defendant would go to jail and the family would not be able to live if she continued to say that he had abused her. She admitted that she also asked the victim if the abuse had not just been a bad dream.

The victim's mother testified that sometime after Christmas 1984, she called the defendant from work one Sunday afternoon and argued with him when she learned that he and their daughters were taking a nap in the same bed. The victim's mother testified that the victim told her about the defendant's abuse again on October 25, 1991, and that the defendant moved out the following day. She stated that the

victim said that she was scared to be around the defendant and could not hide the abuse any longer. She testified that she met with the defendant after he had moved out and that he said that he had abused the victim, but that he wanted to get help.

The final witness presented in the state's case was the victim, who was eighteen years old at the time of trial. She testified that she moved into a white house in Hawkins County in July 1984 with her mother and the defendant. She stated that after moving to Hawkins County, the defendant began to fondle her breasts and between her legs through her clothing. He then began removing her clothing and digitally penetrating her. She testified that she would try to get away from the defendant but he would hold her down. She stated that he would kiss her and stick his tongue inside her mouth. The victim also testified that the defendant would watch her while she showered.

The victim testified that the defendant began taking naps with the victim and her stepsister on Sundays in January 1985. She stated that when her stepsister fell asleep, the defendant would begin kissing and hugging her. She testified that he then would hold her head down and force her to perform fellatio on him. During the incidents of abuse, the defendant would tell the victim that her mother would be angry if she found out and explained to the victim that he only wanted to love her.

The victim testified that she told her third grade teacher about the defendant's abuse in May 1985 and that Sarah Morelock of DHS came to her house. She stated she was under a lot of pressure because her mother was very upset and kept suggesting to the victim that the abuse had occurred in the victim's dreams. The victim testified that her mother also told her that she wanted the family to be together and that she would not hurt her own father by making such accusations. The victim

testified that for her mother, she told Ms. Morelock that the abuse had occurred in a dream.

The victim stated that the defendant did not abuse her again until she and her family moved to an apartment in August 1985. She testified that the defendant again began to kiss and to penetrate her digitally. The defendant stopped when she refused to do it anymore and threatened to kill him. The victim stated that after the abuse stopped, she tried to act as if nothing had happened and to treat the defendant as a father. However, she testified that when she began having nightmares in 1991, she told her biological father and grandparents about the abuse because she realized that she needed help. The victim admitted on cross-examination that she knew the defendant and her mother were having marital problems and that the defendant was having an affair when she reported the abuse in the fall of 1991.

The defendant testified that his daughter from a previous marriage came to live with the family in the fall of 1984. He stated that the family began to experience problems because the victim was jealous of his daughter. The defendant denied any inappropriate physical contact with the victim, stating that he only demonstrated fatherly affection toward her. He stated that he was shocked when the victim first alleged that he had abused her and told his wife and Ms. Morelock that he had not done anything to the victim.

The defendant stated that he went to CCS because he had moved out of the home and his wife would not talk to him about a reconciliation until he got treatment. He testified that after several months of not having a home or family, he finally allowed his wife to persuade him to schedule an appointment with CCS. He stated that he was interviewed by Ms. Fletcher on March 2nd and that he said he had fondled the victim because he knew he could not get into the treatment program without making some



type of admission. Ms. Fletcher suggested that he go to DHS in order to find out if charges were going to be brought against him and to explain that his daughter was living with him. He stated that when he spoke to Ms. Parris and Mr. Peterson, he began to feel trapped. Approximately one week later, DHS took his daughter into protective custody. The defendant testified that he only said that he had fondled the victim and engaged in oral sex with her in order to get his family back together.

Richard Stooksbury and Barry Miller both testified as to the defendant's good character. Mr. Stooksbury also stated that if the defendant had admitted abusing the victim, it was because he wanted to get his family back together. The defendant was convicted based upon the foregoing evidence.

## I

The defendant contends that the evidence is insufficient to support his conviction because there was no credible evidence that he committed aggravated rape in January 1985. Also, he contends that although he admitted making incriminating statements to Mr. Adler and Sergeant Wiseman, he explained that he is not guilty and that he only made those statements in order to get his family back.

Our standard of review when the sufficiency of the evidence is questioned on appeal 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 crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

At the time of the commission of the offense, aggravated rape was defined, in pertinent part, as the “unlawful sexual penetration of another [when] the victim is less than thirteen (13) years of age.” T.C.A. § 39-2-603(a)(4) (1982). After hearing the testimony at trial, the jury rejected the defendant's theory of events and chose instead to believe the state's witnesses. The victim testified that the defendant began sexually abusing her in July 1984. She stated that he began forcing her to perform fellatio on him in January 1985. Both Sergeant Wiseman and Mr. Adler testified that the defendant admitted that he began fondling the victim's breasts and vaginal area when she was approximately eight or nine years old and then progressed to forcing the victim to fellate him. Sergeant Wiseman also testified that the defendant stated that he stopped abusing the victim in 1986. We are not in a position to reweigh the evidence or to draw our own conclusions as to which witnesses to accredit. The defendant contends that he only admitted sexually abusing the victim because his wife would not consider a reconciliation with him until he obtained treatment. However, based upon the facts in the record, the jury could and did find that the defendant committed aggravated rape against the victim in January 1985. We conclude that the evidence is sufficient to support the defendant's conviction for aggravated rape.

## II

The defendant contends that his prosecution for this offense approximately nine years after it occurred resulted in an unreasonable delay in violation of his constitutional rights under the Fifth and Sixth Amendments<sup>1</sup> to the U.S. Constitution and Article 1 §§ 8 and 9 of the Tennessee Constitution. The state argues that the defendant has not shown that the delay was attributable to the state, that he

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<sup>1</sup> The defendant argues that the delay violated his right to a speedy trial and that Sixth Amendment speedy trial considerations should be applied to the pre-indictment delay that occurred in this case. We note that “[t]he delay between the commission of an offense and the commencement of proceedings does not violate an accused's constitutional right to a speedy trial.” Dykes, 803 S.W.2d at 255. Furthermore, speedy trial principles are not applicable in such a situation and, instead, the consideration is whether an accused's Fifth Amendment right to due process is violated by the preindictment delay. Id. See also, State v. Harold Winter Gray, No. 01S01-9411-CR-00138, Wilson Co. (Tenn. Feb. 26, 1996)(for publication).

was prejudiced by the delay or that the state intentionally delayed the prosecution to gain a tactical advantage. See State v. Dykes, 803 S.W.2d 250 (Tenn. Crim. App.), app. denied (Tenn. 1990).

In Dykes, this court used a three-prong test to determine whether the defendant was entitled to relief based upon a delay between the commission of an offense and the initiation of adversarial proceedings. This court held that an accused must prove that there was a delay, that the accused sustained actual prejudice by the delay, and that the State caused the delay in order to gain tactical advantage over or to harass the accused. Dykes, 803 S.W.2d at 256.

However, recently in Gray, our supreme court discussed the difference between the pre-indictment delay that occurred in Dykes and the pre-accusatorial delay that occurs between the alleged commission of an offense and its disclosure to law enforcement authorities. It stated that the Dykes three-pronged test was inapplicable to pre-accusatorial delay and held that “the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused” in determining whether a defendant’s due process rights were violated by a pre-accusatorial delay. Slip op. at 11-12. The court held that a forty-two-year delay between the commission of the offense and its disclosure to the authorities prejudiced the defendant’s ability to obtain witnesses, the victim’s ability to recall dates and the defendant’s ability to establish an alibi defense resulting in a violation of the defendant’s due process rights. Slip op. at 12.

In this case, the defendant was indicted in 1993 for acts alleged to have occurred in 1983. The allegations were reported to DHS in 1985 but the case was not prosecuted at that time because the victim recanted her statements. When the defendant sought counseling in 1992, the counseling center reported his statements to

the sheriff's department and an investigation ensued leading to the defendant's indictment.

The facts of this case have elements of both pre-indictment delay cases and pre-accusatorial delay cases. However, we need not decide which analysis is appropriate to this case because, although we recognize the rather lengthy delay between the offense and the indictment in this case, we also conclude that the defendant has not shown how he was prejudiced by this delay. Given these facts, we conclude that the defendant's right to due process was not violated by the delay in this case.

### III

The defendant contends that the indictment fails to grant proper notice of the date of the offense. The indictment, issued January 11, 1993, alleges that the offense occurred in July 1983. The trial court granted a motion for bill of particulars on January 27, 1993, and ordered the state to be more specific as to the date of the offense. The state responded on February 19, 1993, by filing a motion to amend the indictment to allege the date of the offense as January 1985. On February 24, 1993, the first day of trial, the trial court overruled the state's motion to amend but ruled that it would allow the jury to find that the offense occurred on a date other than July 1983 because the date of the offense was not an essential element of the crime. See T.C.A. § 40-13-207 (time of offense need not be alleged in indictment "unless the time is a material ingredient in the offense"). At the opening of trial proceedings, the trial court instructed the jury that "if you find beyond a reasonable doubt that the defendant committed a criminal offense, you can find that it occurred on some time other than the on or about time that is alleged in the indictment."

In State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984), the Tennessee Supreme Court outlined the rule regarding variations between the indictment and the proof at trial:

Unless substantial rights of the defendant are affected by a variance, he has suffered no harm, and a variance does not prejudice the defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense; all other variances must be considered to be harmless error.

See also, State v. Clabo, 905 S.W.2d 197 (Tenn. Crim. App.), app. denied (Tenn. 1995).

In this case, substantial rights of the defendant were not affected by the variance. The defendant was adequately informed of the change in the date five days before trial. The defendant knew the time period that the state would seek to prove and was not surprised at trial. Also, the indictment adequately informed the defendant of the alleged act that the state would seek to prove in establishing the aggravated rape. The state did not mislead the defendant at trial and presented proof that the act occurred in January 1985 as well as proof relative to how the victim arrived at that date.

Finally, the variance in dates did not prevent the defendant from presenting a defense. The victim testified that the defendant forced her to fellate him on a Sunday in January 1985 when her mother was at work. The defendant's statement to Sergeant Wiseman indicated that he had forced the victim to fellate him approximately four times and that his abuse of the victim stopped in 1986. The defendant also told authorities that the abuse always occurred while the victim's mother was at work. The defendant never attempted to present an alibi defense. The variance resulted in no harm to his ability to prepare his defense. Furthermore, since time is not an essential element of aggravated rape, "the time of the commission of the offense

averred in the indictment is not material and proof is not confined to the time charged.” State v. West, 737 S.W.2d 790, 793 (Tenn. Crim. App.), app. denied (Tenn. 1987)(citing Sullivan v. State, 513 S.W.2d 152 (Tenn. Crim. App. 1974)). Therefore, we conclude that the variance in the date of the offense was harmless in this case.

#### IV

The defendant contends that the trial court erred in failing to suppress the incriminating statements that he gave to DHS and CCS. He argues that he only admitted that he had sexually abused the victim in order to reunite his family. Also, he contends that he was coerced into making incriminating statements because the interviewers with DHS and CCS insisted that he sign waivers and pretended to be helping him.

The record shows that the defendant voluntarily contacted both CCS and DHS and scheduled interviews. At his first interview with Ms. Fletcher at CCS, he signed a waiver of confidentiality, in which he acknowledged that he had no rights of confidentiality and gave permission to the personnel at CCS to report any occurrence of sexual abuse to the proper authorities. Ms. Fletcher also testified that she informed the defendant of her mandatory duty to report any known or suspected child abuse to the proper authorities. See T.C.A. § 37-1-605. Mr. Adler of CCS testified that he explained the contents of the waiver of confidentiality to the defendant. He stated that he told the defendant that anything he said could be used against him in court and that any abuse could be reported to DHS. When Sergeant Wiseman interviewed the defendant for CCS, he began by informing the defendant that he was free to leave at any time or to refuse to answer any questions. Also, Investigator Peterson testified that he participated in the defendant's interview with Ms. Parris at DHS. He stated that he identified himself to the defendant as an investigator with the sheriff's department and

informed the defendant that he was not under arrest and was free to leave at any time during the interview.

At the pretrial evidentiary hearing, the trial court overruled the defendant's motion to suppress his statements. The trial court found that the defendant had signed a waiver of confidentiality, in addition to the fact that there is no evidentiary privilege for communications between a professional and his patient regarding child sexual abuse. T.C.A. § 37-1-614. Also, the trial court found that the defendant voluntarily submitted to interviews at DHS and CCS, that he was not under arrest and that he was free to leave at any time.

The findings of fact made by the trial court after an evidentiary hearing on a motion to suppress have the weight of a jury verdict and, thus, are binding upon this court unless the evidence contained in the record preponderates against these facts. State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988), cert. denied, 489 U.S. 1084 (1989). In this case, the defendant was clearly not in custody when he made the statements in question. He voluntarily went to CCS and DHS and made the admissions of sexual abuse against the victim with the knowledge that anything he said could be reported to the authorities. Based upon the foregoing, there was ample evidence to support the trial court's denial of the defendant's motion to suppress. We conclude that the defendant's statements were properly admitted.

## V

The defendant asserts that the trial court erred in overruling his motion in limine and permitting the victim to testify regarding instances of sexual abuse by the defendant. At a pretrial motion hearing, the defendant argued that the victim's testimony was unreliable based upon her recanting the allegation in 1985 coupled with the fact that she continued to live with her mother and the defendant until 1992, when

the allegations came to light once again. The trial court overruled the defendant's motion to exclude the victim's testimony and held that the defendant could impeach the victim with facts surrounding the recantation and her continued stay with her mother and the defendant. At trial, the defendant did not object to the victim's testimony. On appeal, the defendant asserts once again that the victim's testimony is not fresh complaint and that it is stale due to the eight-year delay between the 1985 complaint and the prosecution.

Initially, we believe that the trial court properly allowed the victim to testify regarding the sexual abuse that occurred several years before the prosecution of the case and was the subject of the indictment. The victim's recantation and continued residence with the defendant after 1985 was probative of her credibility, but did not render her testimony so unreliable as to warrant suppression of her testimony. Furthermore, we conclude that the eight-year delay between the occurrence of the sexual abuse and the prosecution goes to the weight of the testimony and does not render the testimony inadmissible.

The defendant also argues that the victim's testimony is not fresh complaint because of its staleness. At the time of the defendant's trial, the fresh-complaint doctrine allowed the fact and the details of a rape complaint, made in a reasonable time after the rape, to be admitted during the state's case-in-chief. See Phillips v. State, 28 Tenn. (1 Hum.) 246 (1848). Later, in State v. Kendricks, 891 S.W.2d 597, 603 (Tenn. 1994), the Tennessee Supreme Court clarified the fresh-complaint doctrine in adult rape cases to allow only the fact, but not the details, of a complaint to be admitted during the state's case-in-chief. Then, in State v. Livingston, 907 S.W.2d 392, 395 (Tenn. 1995), the court held that the fresh-complaint doctrine does not apply to child rape cases and that neither the fact nor the details of a complaint are admissible in the state's case-in-chief. However, the same evidence may



be admissible as substantive evidence if it satisfies a hearsay exception or as corroborative evidence as a prior consistent statement. Id.

First and foremost, we note that the fact that the defendant failed to object to the evidence at trial on the ground of fresh complaint effectively constitutes a waiver. In any event, we conclude that reversible error did not occur. At trial, the defendant's statements to CCS and DHS personnel were admitted, each referring to the victim's 1985 report of sexual abuse and subsequent recantation. The state also presented the testimony of a DHS investigator and the victim's mother regarding the 1985 investigation, including the fact that the victim reported the abuse and then recanted. These witnesses did not testify about the details of any complaint. Finally, the victim testified about her 1985 report and recantation. However, the only testimony concerning the details of the abuse occurred in the defendant's admissions and the victim's direct recollection of the abuse.

Thus, although the 1985 complaint was admitted through the state's case-in-chief in apparent violation of Livingston, it was initially admitted without objection through the defendant's own statements. Also, the fact that a complaint was made in 1985 is inextricably tied to the victim's recantation, an event that inevitably would have been admitted through the defendant's cross-examination of the victim. Under all of these circumstances, we conclude that not only was this issue waived, the admission of the 1985 complaint was not reversible error.

## VI

The defendant contends that the trial court erred in refusing to allow the victim to be cross-examined about falsely making similar accusations against another person. Although the defendant admits that he does not know whether the victim falsely accused another man of sexual misconduct and could not offer any proof at trial

to support his allegation, he asserts that the jury should have been able to decide if the victim made such a false accusation.

At trial, defense counsel attempted to ask the victim if she had previously accused another man of sexually abusing her. In a bench conference outside the hearing of the jury, defense counsel asserted that the victim had accused her uncle of the same misconduct. However, defense counsel did not know when the accusation was made nor whether any investigation was ever conducted. Defense counsel stated that the victim testified at the preliminary hearing that she was waiting for her aunt to die in order to "burn" her uncle because he had done the same thing to her. The trial court read the preliminary hearing transcript<sup>2</sup> and stated that it agreed that the cross-examination would be relevant to the victim's credibility if defense counsel could show that the victim falsely accused somebody. The trial court then sustained the state's objection to questioning related to the victim's accusations against her uncle.

The defendant sought to impeach the victim's credibility by showing that she had falsely accused her uncle of sexual abuse. Generally, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Tenn. R. Evid. 611. However, in this case, the defendant had no knowledge or proof that the victim's allegation against her uncle was actually false, did not know when the accusation was made or if the accusation was ever investigated. Under these circumstances, we conclude that there was no reasonable factual basis for the cross-examination, in terms of making it relevant to the victim's credibility, and that the trial court properly limited the questioning. See Tenn. R. Evid. 401, 402 and 608(b). Also, as far as the testimony would relate to the victim's animosity toward anyone who she claimed had abused her, the defendant had already elicited testimony from the victim

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<sup>2</sup> We note that the preliminary hearing transcript is not included in the record before us. It is the duty of the defendant to prepare a fair, accurate and complete record on appeal to enable review. T.R.A.P. 24.

that she hated the defendant for this reason. Therefore, there was no reversible error in the limitation of the cross-examination.

## VII

The defendant argues that the trial court erred in allowing the victim and her mother to testify regarding how they arrived at the date of the offense. The state argues that the testimony was relevant to show how the victim determined the date of the offense and that the defendant was not prejudiced by the testimony. In this case, the specific date of the offense is not essential proof of the offense nor is it necessary for the imposition of any defense raised at trial. The law only requires the state to prove that the offense occurred prior to the finding of the indictment and within any applicable statute of limitations. State v. Howse, 634 S.W.2d 652, 657 (Tenn. Crim. App. 1982); Sullivan, 513 S.W.2d at 155. However, the testimony was quite relevant to the victim's credibility in terms of showing that she was not inventing the date of the offense. We conclude that the testimony was admitted properly.

## VIII and IX

In two related issues, the defendant argues that the trial court erroneously instructed the jury regarding the significance of the date of the offense as charged in the indictment and regarding the state's theory of when the offense occurred. The trial court instructed the jury as follows:

The indictment in this case alleges the time of the offense to be on or about the \_\_\_\_ day of July, 1983. The term "on or about" is merely a best estimate by the State of Tennessee as to the time of the alleged offense. The proof in this cause may include earlier or later events and the State of Tennessee is not confined to the time charged in the indictment so long as the proof is reasonably related to the time alleged in the indictment. The time at which the offense was committed need not be stated in the indictment, but the offense may be alleged to have been committed on a date before the finding thereof, or generally before the findings of the indictment unless time is a material ingredient in the offense.

The rule is that the offense must be proved to have been committed prior to the finding of the indictment and within the time specified by any applicable statute of limitations; and, except where a special date is essential or time is of the essence of the offense, the time of the commission of the offense averred in the indictment is not material and proof is not confined to the time charged.

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You have heard evidence of other sexual acts committed by the defendant upon the alleged victim. These are admissible for your consideration as to whether or not they show the conduct of the defendant toward the alleged victim and whether or not they corroborate the evidence of the offense charged in the indictment.

However, your verdict must be as to only one occurrence. If you find the defendant guilty beyond a reasonable doubt your verdict cannot include more than one offense.

It is the State's theory that the first offense of "fellatio," the subject of this indictment, occurred on a Sunday in January, 1985, at the white house in Church Hill, Hawkins County, Tennessee. If you agree with the State's theory beyond a reasonable doubt and find the defendant guilty of Aggravated Rape you should go further in your verdict and write out that you find the offense charged in the indictment occurred "the first time the defendant had fellatio with the victim which was on a Sunday in January, 1985, at the white house in Church Hill, Hawkins County, Tennessee."

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

The defendant contends that the instructions were confusing to the jury and that the January 1985 date was not reasonably related to the July 1983 date charged in the indictment. The defendant also argues that the court improperly emphasized the January 1985 date in its instructions regarding the state's theory of the case, especially in light of the trial court's denial of the state's motion to amend the indictment.

The trial court's instructions regarding the significance of the date of the offense were accurate and appropriate statements of the applicable law in this case. See Howse, 634 S.W.2d at 657. Contrary to the defendant's assertion that he relied upon the trial court's denial of the state's motion to amend the indictment as an

indication that January 1985 was not the time of the offense, the record reveals that the trial court, in denying the motion to amend, made it clear to the parties that the date of the offense was not essential and all that was necessary is that the act occurred before the finding of the indictment. Furthermore, in State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993) (citations omitted), the Tennessee Supreme Court held that “[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.” In this case, the instructions to the jury regarding the state’s theory of the case were aimed at ensuring such a unanimous verdict. We conclude that the trial court did not err in instructing the jury.

## X

The defendant contends that the trial court imposed an excessive sentence. He was convicted of aggravated rape, a Class A felony, which carries a possible punishment of fifteen to twenty-five years as a Range I standard offender under the 1989 Sentencing Act. The defendant was sentenced to the maximum of twenty-five years to be served in the custody of the Department of Correction. The defendant's brief offers no guidance regarding which enhancement factors were erroneously applied and only argues that the defendant should have received the minimum sentence based upon his good reputation, lack of a criminal record, college education, status as a military officer and regular employment. The state argues that the maximum sentence is appropriate. From our review of the record, we conclude that the trial court failed to consider the defendant’s sentence under both the 1982 and 1989 Sentencing Acts as required by State v. Pearson, 858 S.W.2d 879 (Tenn. 1993).

T.C.A. § 40-35-117(b) states that “[u]nless prohibited by the United States or Tennessee Constitution, any person sentenced on or after November 1, 1989, for an

offense committed between July 1, 1982 and November 1, 1989, shall be sentenced under the provisions of this chapter [the 1989 Sentencing Act].” The offense in this case occurred in January 1985 and the sentence was imposed in February 1993. In Pearson, our supreme court imposed a constitutional requirement upon offenses committed prior to November 1, 1989, but sentenced after that date. The court concluded that, in order to avoid an ex post facto violation, the trial court must calculate the proper sentence under both the 1982 and the 1989 Sentencing Acts and then impose the least severe sentence. Pearson, 858 S.W.2d at 884.

The record reflects that the trial court failed to consider the defendant’s sentence separately under both acts. In imposing the sentence, the trial court stated:

Mr. Carico, the jury has convicted you of Aggravated Rape, and even though when these offenses were committed the punishment was life imprisonment . . . . You are entitled to be sentenced under the new sentencing law, and the range there is from a minimum of fifteen (15) years to a maximum of twenty-five (25) years.

The trial court proceeded to sentence the defendant under the 1989 Sentencing Act and made no findings relative to the 1982 Sentencing Act. We must now determine the appropriate sentence under each act and impose the least severe sentence.

As previously stated, the offense in this case occurred in January 1985. At that time, aggravated rape was a Class X felony that carried a range of punishment of twenty years to life. T.C.A. § 39-2-603(b) and (c) (1982). In calculating a sentence under the 1982 Act, a life sentence was “presumed to be sixty (60) years.” T.C.A. § 40-35-109(d) (1982). Because the defendant qualifies as a Range I offender under the 1982 Act, his sentence range would be twenty to forty years. T.C.A. § 40-35-109(a) (1982).

Pursuant to T.C.A. § 40-35-118, an aggravated rape committed prior to November 1, 1989 is classified as a Class A felony for 1989 sentencing purposes. The

defendant qualifies as a standard offender and would be sentenced as a Range I offender under the 1989 Act. Therefore, his possible range of punishment would be fifteen to twenty-five years. T.C.A. § 40-35-112(a)(1).

Under the 1989 Act, appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court follows the statutory sentencing procedure, makes findings of fact that are adequately supported by the record and gives due consideration and proper application of the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action 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). In this respect, for the purpose of meaningful appellate review,

the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. §§ 40-35-210(f)(1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review under either act, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the

presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

Under the 1989 Act, the sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. T.C.A. § 40-35-210 (c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d) and (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169. Unlike the 1989 Act, the 1982 Act does not provide for a presumptive minimum sentence.

The trial court applied the following enhancement factors as listed in T.C.A. § 40-35-114 (1990):

- (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range,
- (6) the personal injuries inflicted upon the victim were particularly great,
- (7) the offense was committed to gratify the defendant's desire for pleasure or excitement,
- (15) the defendant abused a position of private trust, and
- (16) the crime was committed under circumstances under which the potential for bodily injury was great.



The trial court properly enhanced the defendant's sentence based upon his history of criminal behavior. The trial court found that there were numerous other offenses from fondling to penetration. They were repeated offenses that occurred over two years for which the defendant was not charged. Such a history of criminal behavior qualifies for enhancement under T.C.A. §§ 40-35-111(1) (1982) and -114(1) (1990).

Regarding enhancement for particularly great personal injury, the trial court found that "it was obvious . . . that there has been a lot of damage to [the victim], and her thinking, as well as hatred. There's a lot of guilt, and embarrassment. . . she's still a child. . . it seems to me that a combination of those things is, in fact, great injury to her." There was some testimony from the victim and her mother regarding nightmares from which the victim still suffers. However, this court has recognized that "clearly, rape is injurious per se to the body and mind of the victim. In this regard, the legislature has seen fit to enhance the offense of aggravated rape if a child is involved." State v. Lorenzo Punte Salazar, No. 02C01-9105-CR-00098, Shelby Co., slip op. at 7 (Tenn. Crim. App. Jan. 15, 1992). Similar to this case, the six-year-old victim in Salazar also experienced recurring nightmares as a result of the rape. Yet this court held that the record was insufficient to show that the mental disturbance was greater than that which is ordinarily involved in an aggravated rape case and, therefore, the record did not support a finding of particularly great injuries. Salazar, slip op. at 8. But see State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App.), app. denied (Tenn. 1994) (victim of aggravated rape who was unable to enter her home alone, arose every thirty minutes each night to make sure her windows and doors were locked and underwent extensive counseling sustained emotional injuries beyond those of a typical rape victim). We conclude that the record in this case is insufficient to support the application of enhancement for particularly great injuries. T.C.A. §§ 40-35-111(6) (1982) and -114(6) (1990).

Regarding enhancement because the offense was committed for gratification, the trial court acknowledged that not all rape cases involve gratification, but concluded, though, that it was obviously the purpose in this case. In State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993), our supreme court held that gratification is not an essential element of rape and enhancement factor (7) could be applied where the evidence demonstrates that the rape was motivated by the defendant's desire for pleasure or excitement. In this case, there was substantial evidence to support the application of this enhancement factor. The defendant reported that he became sexually aroused by wrestling with the victim when she was eight or nine years old, which eventually escalated to fondling and penetration. The defendant also reported that he would often watch the victim undress and bathe and that he would masturbate in her underwear. We conclude that the trial court correctly applied this factor. T.C.A. §§ 40-35-111(7) (1982) and -114(7) (1990).

The trial court also enhanced the defendant's sentence because the offense involved an abuse of a position of private trust. T.C.A. § 40-35-114(7) (1990). We note that this factor did not exist under the 1982 Act. See T.C.A. § 40-35-111(1982). However, under Pearson, we are still required to consider its application under the 1989 Act. See Pearson, 858 S.W.2d at 884 (calculate the appropriate sentence under each act, in its entirety, to prevent an ex post facto violation). We conclude that, under the 1989 Act, this factor is appropriate in this case. The defendant was the victim's stepfather. He had primary care and control of the victim while her mother worked many nights and weekends. It was during this time while the mother was at work that the defendant would sexually abuse the victim. We agree with the trial court's conclusion that this is a substantial enhancement factor in this case.

The trial court enhanced the defendant's sentence because the crime was committed under circumstances in which the potential for bodily injury was great.

T.C.A. § 40-35-114(16). This factor also did not exist as a statutory enhancement factor under the 1982 Act, see T.C.A. § 40-35-111(1982), but we will consider its application under the 1989 Act. Pearson, 858 S.W.2d at 884. In Smith, 891 S.W.2d at 930, this court held that a trial court should not apply this factor to enhance a sentence for aggravated rape absent extraordinary circumstances because the legislature has already recognized the potential for bodily injury in enhancing the offense and sentence to an aggravated one. In Smith, the defendant entered the victim's bedroom window late at night. When the victim realized that she could not resist the defendant without being killed, she asked that the defendant penetrate her vagina rather than her rectum and he complied. We held that there were no exceptional circumstances to warrant application of factor (16). Id. In this case, the defendant held the victim's head while he forced her to fellate him. We conclude that there was no greater a potential for bodily injury in this case than in any other aggravated rape case involving a child and that the trial court should not have applied this factor to enhance the defendant's sentence.

Two enhancement factors exist under the 1982 Act: the defendant has a previous history of criminal behavior and the offense was committed to gratify the defendant's desire for pleasure or excitement. T.C.A. § 40-35-111(1) and (7) (1982). As stated earlier, the possible sentence under the 1982 Act ranges from twenty to forty years without a presumptive sentence. In light of the enhancement factors present and the weight of the evidence supporting them, primarily regarding the history of sexual abuse proven but not charged, we conclude that thirty years is an appropriate sentence under the 1982 Act.

Under the 1989 Act, the range of punishment is fifteen to twenty-five years with a presumptive minimum sentence. The record supports the enhancement of the defendant's sentence based upon his history of criminal behavior and the fact that the offense was committed to gratify his desire for pleasure or excitement. T.C.A. § 40-35-

114(1) and (7) (1990). Under the 1989 Act, the record also supports enhancement for abuse of a position of trust. T.C.A. § 40-35-114(4) (1990). We conclude that the record supports the imposition of the maximum Range I sentence under the 1989 Act. Therefore, the less onerous sentence is the one computed under the 1989 Act. In light of the applicable enhancement factors and our analysis under Pearson, we conclude that the twenty-five-year sentence imposed by the trial court was appropriate.

## XI

In the defendant's final issue, he contends that the accumulation of errors combined to deprive him of a fair, public, speedy and constitutional trial. Based upon our findings on the foregoing issues, we conclude that the defendant was not deprived of a fair, public, speedy and constitutional trial through any combination of errors.

In consideration of the foregoing and the record as a whole, the judgment of conviction is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Gary R. Wade, Judge

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John H. Peay, Judge