IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
JUNE SESSION, 1996

FILED

December 30, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9511-CC-00365
Appellee	)	
	)	ROBERTSON COUNTY
vs.	)	
	)	Hon. Robert W. Wedemeyer, Judge
JAMES RYION,	)	
	)	(Agg. Sexual Battery; Agg. Rape)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, James Ryion, was convicted by a jury in the Circuit Court of Robertson County of the aggravated sexual battery and aggravated rape of his stepson, AM.[1] The trial court sentenced the appellant to 10 years imprisonment in the Tennessee Department of Correction for the aggravated sexual battery conviction and 20 years imprisonment for the aggravated rape conviction. The court ordered that the sentences be served consecutively. The appellant now raises the following issues before this court:

(1) Whether the appellant's convictions for aggravated sexual battery and aggravated rape violate principles of double jeopardy;
(2) Whether the trial court erred in admitting at trial testimony by witnesses Bonnie Beneke, a licensed clinical social worker, and Jane Mankin, an elementary school guidance counselor; and
(3) Whether prosecutorial misconduct during the appellant's trial sufficiently prejudiced the proceedings to require a new trial.

Following a thorough review of the record, we affirm the judgment of the trial court.

Factual Background

On January 27, 1993, the Robertson County Grand Jury returned an indictment charging the appellant with the following crimes:

Count 1: Aggravated Rape, i.e., obtaining oral sex from a victim less that thirteen years of age, Tenn. Code Ann. § 39-13-502(a)(4) (1989 Supp.).
Count 2: Rape of a Child, i.e., obtaining oral sex from a victim less than thirteen years of age between July 1, 1992, and September 27, 1992, Tenn. Code Ann. § 39-13-522 (1992 Supp.).
Count 3: Aggravated Sexual Battery, i.e., forcing a victim less than thirteen years of age

[1] As a matter of policy, this court does not name minors involved in sexual abuse but, instead, uses their initials. See State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989). The victim in the instant case was four years old when the incidents of abuse began. He was nine years old at the time of trial.

to touch the appellant's penis between June 1, 1989, and June 30, 1992, Tenn. Code Ann. § 39-13-504(a) (1989 Supp.).

Count 4: Aggravated Sexual Battery, i.e., forcing a victim under thirteen years of age to touch the appellant's penis between July 1, 1992, and September 27, 1992, Tenn. Code Ann. § 39-13-504(a).

Count 5: Aggravated Rape, i.e., anal penetration of a victim less than thirteen years of age between June 1, 1989, and June 30, 1992, Tenn. Code Ann. § 39-13-502(a)(4).

Count 6: Rape of a Child, i.e., anal penetration of a victim less than thirteen years of age between July 1, 1992, and September 27, 1992, Tenn. Code Ann. § 39-13-522.

Testimony at trial established that, on April 1, 1989, the appellant and the victim's mother, Sharon Schmucker, met at the Starlight Dinner Club in Nashville. At this time, Ms. Schmucker had been separated from her second husband, the victim's father, for eight months and was seeking a divorce. The appellant was also married to his second wife and currently separated. Two sons, James Jr. and Charles, were born of the appellant's first marriage. His sons resided with their mother. Ms. Schmucker and the appellant commenced a relationship, and, in August, 1989, the appellant moved into Ms. Schmucker's home on Poplar Avenue in Springfield. On August 3, 1989, Ms. Schmucker's divorce became final, and, on February 9, 1990, the appellant's divorce became final. Finally, on June 9, 1990, Ms. Schmucker and the appellant married.[2]

At trial, Ms. Schmucker testified that, initially, her relationship with the appellant was a happy one. However, approximately four or five months after the appellant moved into Ms. Schmucker's home, he began to physically and verbally abuse her. With respect to the appellant's relationship with her son, Ms.

[2]At the time of the appellant's trial, Ms. Schmucker was divorced from the appellant and had remarried.

Schmucker testified that the appellant went fishing with AM and engaged in other activities with her son. The appellant insisted that AM call him "daddy." However, Ms. Schmucker further stated:

> Well, [the appellant] got where he fussed at [AM] a lot, and he always wanted [AM] to hug and kiss on him, as soon as he got home, and if he didn't he'd get mad and if [AM] showed me any affection he got mad.

The appellant also began to physically discipline AM. Additionally, the appellant discouraged AM from playing with other children in the neighborhood. Ms. Schmucker observed that AM became reluctant to accompany the appellant on errands.

Flora Majusick, a friend of Ms. Schmucker for approximately seventeen years, also testified about the appellant's relationship with Ms. Schmucker and her son. On approximately March 1, 1989, Ms. Majusick moved into Ms. Schmucker's home in order to share household expenses, as Ms. Schmucker was experiencing financial difficulties. Ms. Majusick continued living in the home until May, 1990, just prior to Ms. Schmucker's marriage to the appellant. Ms. Majusick testified that, when the appellant first began living with Ms. Schmucker, their relationship was "[p]retty good." However, certain aspects of the relationship and certain information concerning the appellant disturbed Ms. Majusick. For example, Ms. Majusick learned that the appellant was prohibited from seeing his children from a prior marriage. Additionally, the appellant attempted to undermine AM's relationship with his father, limiting AM's opportunities to see his father and, on one occasion, informing AM that his father did not love him.[3] Moreover, the appellant "would literally make [AM and Carla Gezley, a cousin with whom AM played,] sit on his lap and hug and kiss him, even though they protested." According to Ms. Majusick, if the children refused

[3]Ms. Schmucker testified that, prior to her involvement with the appellant, she had generally allowed AM to visit his father, except during those periods when AM's father was experiencing problems with drugs or alcohol. She testified that she and the victim's father have never fought about visitation.

to comply with the appellant's wishes, the appellant would become angry. Ms. Majusick testified, generally, that "[o]ne minute [the appellant] could be the nicest person in the world, but in the next minute, he could be mean and I do mean mean." Ms. Majusick also testified that, as the appellant's relationship with Ms. Schmucker progressed, the appellant became physically and verbally abusive toward her. Much of the abusive conduct occurred in the presence of AM. Ms. Majusick stated at trial that AM was afraid of the appellant.[4]

Both Ms. Schmucker and Ms. Majusick worked for the Frigidaire Company. Ms. Schmucker worked from 3:30 a.m. until 2:00 p.m. Ms. Majusick worked from 3:00 p.m. until approximately 12:00 a.m. Before the appellant moved into the house, AM would sleep either with his mother in her bedroom or with Ms. Majusick in an adjoining bedroom. There was no door between the bedrooms. When the appellant moved into the house, Ms. Schmucker and Ms. Majusick hung a curtain between the two rooms, and AM slept with Ms. Majusick in her room. However, before leaving for work every morning, at the appellant's request, Ms. Schmucker would place AM in bed with the appellant. The appellant was unemployed much of the time, and was often alone with the victim.[5]

Both Ms. Schmucker and Ms. Majusick also recounted that, sometime between January, 1990, and May, 1990, AM complained that "his bottom was hurting." Ms. Majusick testified that "the little boy's rectum was all red ... ." Neither she nor the victim's mother took the victim to a doctor. Moreover, Ms. Majusick explained that she did not call the police, because it never occurred to

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[4]On cross-examination, Ms. Majusick conceded that the appellant took the victim fishing and camping, and worked in the garden with him. Moreover, she stated that, while she lived at Ms. Schmucker's home, she never observed the appellant sexually abuse the victim.

[5]Ms. Majusick testified on cross-examination that, on many of these occasions, she was present in the house, but was asleep in her bedroom. Ms. Schmucker similarly testified that either she or Ms. Majusick were often present, but asleep, in the house when the appellant was at home with the victim.

her that AM's condition was the result of sexual abuse.

Ms. Majusick testified that, prior to the appellant's inclusion in the household, AM "didn't know a thing" concerning "sexual matters." However, after the appellant began living with Ms. Schmucker, AM began remarking upon the size of Ms. Majusick's breasts, and he compared them to his mother's breasts. The victim also "started pinching or grabbing [Ms. Schmucker and Ms. Majusick] on the busts, and [AM] never - he never did that before."[6]

In the spring of 1992, en route to the Piggly Wiggly grocery store, AM informed his mother that the appellant "was playing with his worm." She confronted the appellant, who denied the victim's allegations. Ms. Schmucker recounted:

> [The appellant] had [AM] in there with us and he told me that [AM] was lying and he was pleading with [AM] and trying to play with [AM] and started crying and he kept telling [AM] to tell me that he was lying.

The appellant then asked Ms. Schmucker to go to a convenience store and buy cigarettes. Despite her concern for her son, Ms. Schmucker complied with the appellant's request. This errand took approximately eight minutes to complete. When she returned to the house, AM immediately informed his mother that he had been lying. Ms. Schmucker believed him. She did not associate her son's accusations with his complaint, several years prior to this incident, that "his bottom was hurting."

The relationship between Ms. Schmucker and the appellant continued to

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[6]Ms. Schmucker confirmed that, after the appellant moved in with her, "[AM] liked to run around and pinch - and pinch your bottom and then he would talk about boobs, which he would call tits." Ms. Schmucker testified that, when AM was approximately three years old, she had instructed him that he should not permit people to touch certain places on his body, including "his butt ... [and] his penis, we called it 'worm.'" Ms. Schmucker additionally stated that, in order to go to the bathroom at night, AM had to pass through his mother's room. She discovered that, on two occasions, AM had observed her and the appellant during sexual intercourse. The house was dark on these occasions. Ms. Schmucker finally testified that the appellant rented X-rated videos. However, to her knowledge, AM never viewed these films.

deteriorate. Finally, according to Ms. Schmucker, on September 27, 1992, the appellant assaulted her, prompting police intervention. The police assisted the appellant's departure from Ms. Schmucker's home. On October 21, 1992, Ms. Schmucker obtained a restraining order against the appellant, and, on October 22, 1992, initiated divorce proceedings. The divorce became final on December 22, 1992.

In October, 1992, when he was approximately seven years old, AM began to exhibit behavioral problems.[7] Ms. Schmucker testified:

> He got to where he would throw temper tantrums and fights and you couldn't control him, and anything [you] wanted him to do, it seemed like it set him off on a temper tantrum and I called his dad[, Ms. Schmucker's second husband,] to come down and see if he could do anything with him because he always wanted his dad around.

In December of 1992, she and the victim's father took AM to a doctor in Springfield, who immediately referred AM to the Department of Human Services (DHS). On cross-examination, Ms. Schmucker testified that she informed DHS about the incident involving AM's red and swollen rectum and about the appellant's persistent request that Ms. Schmucker place her son in his bed every morning before she departed for work. She conceded at trial that, while the appellant resided in her home, she never suspected that he was sexually abusing her son.

JoAnn Gregory, a police officer with the Springfield Police Department, testified. She is specifically assigned to the Robertson County Child Advocacy Center and is a member of the Robertson County Child Protective Investigative Team. On December 29, 1992, she was contacted by DHS and advised of AM's

[7]Ms. Schmucker asserted at trial that, prior to her involvement with the appellant, AM "was doing great."

allegations. She was present during an interview of the victim by an employee of DHS. The victim also met with a licensed clinical social worker, Bonnie Beneke, at the Advocacy Center. However, Gregory stated that the Center attempts to limit the number of times a child is interviewed concerning his or her allegations. Moreover, interviewers receive training in order to avoid leading questions. Gregory asserted that the victim's allegations in the instant case, as recounted to her, have been consistent.

The victim was sent to the "Our Kids Clinic," an outpatient facility established for the examination and treatment of children allegedly subjected to sexual or physical abuse and apparently associated with both Vanderbilt University Hospital and Nashville Metropolitan General Hospital. Sue Ross, a nurse practitioner employed by Vanderbilt University, works at the Our Kids Center. She testified that "the rectal area is designed by its very nature to pass large stools, and not - usually not have any injury as a result of that or a very minor injury. ... [Therefore, if there is penetration,] there is healing without scars in the mucous membrane area and even in the - even in the external skin area ... ." She additionally testified that, if a child had been anally penetrated within the last twenty-four hours, she would not necessarily expect to find redness or irritation. Again, "it is very - very common to have no findings with rectal penetration." Moreover, while any redness and swelling in the rectal area would not be inconsistent with penile penetration, Ms. Ross would be unable to definitely state that the symptoms were the result of sexual abuse.

On January 11, 1993, Ms. Ross examined AM. She testified:

> The history from [AM] was that - he reported that the perpetrator had touched his mouth and his rectum with the perpetrator's penis, and he also stated that something white came out of the perpetrator's penis. And reported that this had started before he was in pre-school and was still happening when he started school at West Side.

Following an examination of the victim's rectal area, Ms. Ross recorded that "it

was basically a normal exam." There were no physical findings indicative of any kind of penetration. No sexually transmitted diseases were present. However, she observed that her findings did not preclude past sexual abuse. Finally, she testified that, in her experience, the best evidence of child sexual abuse "has been what the child says." During cross-examination, Ms. Ross opined:

> My experience is that children may frequently omit things that happened to them, that's considered lying - and add things on as they get comfortable with talking to people around them. My experience is that in terms of lying, that something happened that didn't happen, is that it is extremely rare. It has happened in my experience but it is extremely rare.

Bonnie Beneke, a licensed clinical social worker, also testified. She began working on AM's case in January, 1993. She testified that, in interviewing alleged victims of child sexual abuse, she avoids suggesting responses to her questions. With respect to her interview of the victim in this case, she stated, "I didn't use any particular technique. I didn't - it isn't important to me to know the details of what happened to him, so, I didn't ask him about what happened to him." Moreover, she discouraged the victim's family from questioning him about the incidents of abuse.

Jane Mankin, an elementary school guidance counselor, testified. She was employed by the Robertson County Board of Education, and worked at both West Side Elementary School and Cheatham Park Elementary School. Ms. Mankin first became acquainted with the victim when AM was seven years old, attending the second grade at West Side Elementary School. She began counseling the victim, because he was misbehaving in the classroom. She further testified that she "work[ed] on anger with him, controlling his anger and ... on self-esteem ... ." She stated that, as she is not a psychologist, she did not explore with the victim any possible sexual abuse that AM may have suffered in the past. By the third grade, when the victim was eight years old, he had improved. She observed that the victim was "[s]taying in his seat better and

wasn't having as much anger. He was just acting like a normal third grader, but I did stay in touch with him." Finally, she testified that, at the time of trial, the victim was nine years old, attending the fourth grade at Cheatham Park Elementary School, and was continuing to improve. "[H]e still has some anger problems and we have still worked on that some. But he is progressing." AM's latest report card contained four A's, one B, and one C.

The victim, AM, testified that the first incident of sexual abuse by his stepfather occurred at home, before he began to attend kindergarten, and involved anal intercourse and touching the appellant's penis. AM stated that, at the time, he did not understand what was happening. Moreover, he did not report the appellant's actions, because the appellant threatened to "bruise" him. The incidents occurred "a lot," primarily in his mother's bedroom. The victim testified, "Everything just kept going over and over." According to the victim, on several occasions, including the final incident shortly before the appellant's departure from the victim's home, the appellant would "make [the victim] suck his worm." The appellant also showed the victim sexually explicit movies. On one occasion, the appellant showed the victim and his cousin, Carla Gezley, sexually explicit magazines.[8] Ultimately, the victim, en route to a grocery store, did inform his mother that the appellant had "stuck his worm in my butt and ... made me rub his thing." He admitted that he later recanted his story, because the appellant "was on his knees crying , so he wouldn't leave and all that."

At the close of the State's proof, the State elected to proceed on counts three, four, five, and six. The trial court dismissed counts one and two. The appellant testified at trial, denying the victim's allegations. Nevertheless, at the conclusion of the trial, the jury returned verdicts of guilt with respect to counts

[8]Carla Gezley, the victim's cousin, testified. She is approximately two years older than the victim. She lived across the street from the victim at the time of the instant crimes. They frequently played together. Carla confirmed that the appellant had shown her and the victim sexually explicit magazines in the living room of the victim's home.

three and five.

Analysis

The appellant first argues that, "[i]n the case at hand, the appellant was convicted of aggravated rape and aggravated sexual battery, both referring to the same event." In essence, the appellant contends that, because aggravated sexual battery is a lesser included offense of aggravated rape, the appellant's conviction for the former crime violates principles of double jeopardy and should be vacated. We disagree.

In State v. Black, 524 S.W.2d 913, 919-920 (Tenn. 1975), our supreme court adopted the Blockburger test for the purpose of evaluating double jeopardy claims. This test was originally enunciated by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932), and was recently reaffirmed by the Supreme Court in United States v. Dixon, 509 U.S. 688, 696, 113 U.S. 2849, 2856 (1993).

> The broad question is whether or not the offenses at issue constitute the 'same offense' under the double jeopardy clause. As Black makes clear, multiple convictions do not violate double jeopardy if '[t]he statutory elements of the ... offenses are different, and neither offense is included in the other.' Specifically, the Blockburger test requires that 'courts ... ascertain "whether each [statutory] provision requires proof of a fact which the other does not."'

State v. Stephenson, 878 S.W.2d 530, 538 (Tenn. 1994)(citations omitted). See also State v. Phillips, 924 S.W.2d 662, 664-665 (Tenn. 1996). More recently, in State v. Denton, No. 01S01-9509-CC-00152 (Tenn. December 2, 1992)(for publication), our supreme court revisited double jeopardy, expanding the requisite analysis. The court concluded:

> [R]esolution of a double jeopardy punishment issue under the Tennessee Constitution requires the following: (1) a Blockburger analysis of the statutory offenses; (2) an analysis, guided by the principles of [Duhac v. State, 505 S.W.2d 237 (Tenn. 1973)], of the evidence used to prove the offenses; (3) a consideration of whether there were multiple victims or discrete acts; and (4) a comparison of the purposes of the respective statutes. None of these steps is

> determinative; rather the results of each must be weighed and considered in relation to each other.

Id. Again, "[b]efore multiple convictions can stand, it must be clear that the offenses supporting the convictions are 'wholly separate and distinct.'" State v. Pelayo, 881 S.W.2d 7, 10 (Tenn. Crim. App. 1994)(citation omitted).

This court has previously held that the offenses of aggravated sexual battery and aggravated rape may support multiple convictions under certain circumstances. State v. Banes, 874 S.W.2d 73, 79-80 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994). Under the facts and circumstances of the instant case, a conviction for each offense required proof of a fact which a conviction for the other did not. Unlike aggravated sexual battery, the offense of aggravated rape required proof of sexual penetration. Tenn. Code Ann. § 39-13-502. Moreover, the elements of the offense of aggravated rape did not include all the elements of aggravated sexual battery. State v. Trusty, 919 S.W.2d 305, 310-311 (Tenn. 1996)(citing Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979)). In other words, the appellant need not have anally penetrated the victim "for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6). See, e.g., State v. Adams, 864 S.W.2d 31, 34-35 (Tenn. 1993)(pleasure or excitement is not an essential element of the offense of rape). However, the jury was required to find that the appellant forced the victim to "rub" his penis in order to obtain such gratification. Tenn. Code Ann. § 39-13-504(a).

Moreover, the indictment in the instant case alleged two discrete acts, anal penetration of a child constituting aggravated rape and fondling of the appellant's penis by a child constituting aggravated sexual battery. "Discrete acts can justify multiple convictions." Denton, No. 01S01-9509-CC-00152. Additionally, the proof adduced at trial established that, during the first incident of sexual abuse, the only occasion distinctly recalled by the victim, two discrete acts occurred. The victim testified that, on this occasion, the appellant "put his worm

in my butt and he made me rub his thing." Thus, the principles of Duhac are satisfied.

Finally, the statutes at issue clearly serve different purposes. While, in the instant case, both statutes protect small children, the aggravated rape statute clearly addresses those evils associated with sexual penetration. The aggravated sexual battery statute specifically addresses the prurient impulses of members of society. Accordingly, we conclude that the appellant's multiple convictions do not violate principles of double jeopardy.[9]

The appellant next contends that the trial court erroneously admitted at trial testimony by witnesses Bonnie Beneke, a licensed clinical social worker, and Jane Mankin, an elementary school guidance counselor. The appellant asserts that the State proffered this testimony for the sole purpose of bolstering the victim's credibility, specifically in contravention of our supreme court's holdings in State v. Schimpf, 782 S.W.2d 186 (Tenn. 1990), and State v. Ballard, 855 S.W.2d 557 (Tenn. 1993). See also State v. Anderson, 880 S.W.2d 720 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Generally, the admissibility of expert testimony is a matter entrusted to the sound discretion of the trial court, and the trial court's determination will not be reversed on appeal absent a clear abuse of that discretion. Anderson, 880 S.W.2d at 728. The trial court's discretion embraces the qualifications of the witnesses, the relevancy of the proposed testimony, and whether the proposed testimony will substantially assist the trier of fact to understand the proof that has been adduced at trial or to resolve an issue of fact. State v. Campbell, 904 S.W.2d 608, 616 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). However, "[t]he prohibition of expert testimony related to witness credibility is well established. Hornbook law

[9]We note that, with respect to this issue, the trial court's instructions to the jury were adequate.

is that the credibility of a witness and the weight to be given to the testimony rests exclusively with the jury. '[T]he jury is the lie detector in the courtroom.'" State v. Jones, No. 03C01-9301-CR-00024 (Tenn. Crim. App. at Knoxville, September 15, 1994)(citations omitted). See also State v. Wallen, No. 03C01-9304-CR-00136 (Tenn. Crim. App. at Knoxville, November 30, 1995), perm. to appeal denied, (Tenn. 1996).

Nevertheless, in contrast to the witnesses in the Schimpf and Ballard cases, the witnesses in the instant case testified that they held no opinion concerning the honesty of the victim or the truth of his allegations.[10] Rather, apparently in response to defense counsel's remark during his opening statement that "we are not sure about the source of what is happening in [the victim's] mind," the State elicited testimony from both witnesses that their treatment or counseling of the victim could not have been the source of any fabricated tales of sexual abuse. Specifically, Ms. Beneke indicated that she avoided questioning the victim concerning sexual abuse and waited for the victim to volunteer information. Ms. Mankin testified that, although she counseled the victim due to his misbehavior in the classroom, she did not discuss any possible sexual abuse with the victim. Clearly, the testimony of these witnesses left to the jury the task of weighing the victim's credibility.[11]

The appellant also alleges prosecutorial misconduct warranting a new trial. The test to be applied by the appellate courts in reviewing instances of prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 385 S.W.2d

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[10]Indeed, the State asserted during a jury-out hearing that Ms. Mankin was not even an expert witness, but merely an individual who had observed the victim's behavior in school following the alleged incidents of abuse.

[11]We note in passing that Nurse Ross, without objection by defense counsel, testified that the best evidence of child sexual abuse is the child's statements. Moreover, during cross-examination of Nurse Ross, defense counsel elicited testimony concerning the likelihood of a child lying about past child sexual abuse.

758, 759 (Tenn. 1965). In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court set forth five factors that should be considered in making this determination:

(1) The conduct complained of viewed in context and in light of the facts and circumstances of the case.
(2) The curative measures undertaken by the court and the prosecution.
(3) The intent of the prosecutor in making the statement.
(4) The cumulative effect of the improper conduct and any other errors in the record.
(5) The relative strength or weakness of the case.

Our Supreme Court approved these factors in State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

Pursuant to these guidelines and following a thorough review of the record, we conclude that the prosecutor's conduct in the instant case was not so inflammatory or improper as to affect the verdict. First, the appellant argues that the prosecutor asked leading questions of the victim in this case, suggesting answers when none were forthcoming. Defense counsel objected to leading questions several times during the prosecutor's direct examination of the victim. The trial court sustained several objections, but indicated that he would allow the prosecutor "some leeway." He acknowledged to the prosecutor, "I know you have to lead a little bit."

Trial courts are vested with the authority to supervise the presentation of evidence. Tenn. R. Evid. 611(a). Moreover, trial courts may permit leading questions to victims in child sexual abuse cases, and the exercise of discretion by the trial court will not be reversed on appeal absent a showing of abuse of discretion. State v. Nicely, No. 01C01-9506-CC-00160 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1996); State v. Lewis, No. 01C01-9307-CC-00232 (Tenn. Crim. App. at Nashville, January 12, 1995). After reviewing the record we find no abuse of discretion by the trial court.

The appellant next contends that the prosecutor made inflammatory and prejudicial remarks during closing argument. In his brief, the appellant alleges that "counsel for the State approached the Appellant and placing his finger in his face stated to the jury: 'He is guilty as sin; guilty as sin; guilty as sin.'" However, the record reflects that, in fact, the prosecutor stated, "And I submit to you that when you deliberate, and you swap ideas as you think about this case, that the resolutions that you will reach is that in counts three, four, five, and six, this defendant is as guilty as sin."

Our supreme court has observed that "argument of counsel is a valuable privilege that should not be unduly restricted. Our courts seek to give great latitude to counsel in expressing their views of the case to the jury." Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). See also State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994). However, the prosecutor should not express his or her personal opinion of the accused's guilt or innocence. State v. Henley, 774 S.W.2d 908, 911 (Tenn. 1989); Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). Nevertheless, whether the prosecutor's statements qualify as misconduct often depends upon the specific terminology used. Coker, 911 S.W.2d at 368. If argument is predicated by the words "I submit," it is unlikely to be adjudged a personal opinion. Id. We conclude, particularly in the absence of any contemporaneous objection by defense counsel, that the prosecutor's remarks in the instant case did not stray beyond the wide latitude afforded.

Finally, the appellant asserts that the prosecutor violated Tenn. R. Evid. 608 when he raised the issue of the appellant's character although this issue had not been raised by the appellant. During the appellant's testimony, the court opined that the issue of the appellant's character had not yet been raised, and that, unless defense counsel subsequently "opened the door" to character

evidence, he would sustain any objections to questions by the prosecutor pertaining to the appellant's character. The appellant argues that subsequently, despite the trial court's remarks, the prosecutor improperly asked defense witness Thomas Hart whether he had been warned by defense counsel to avoid expressing any opinion concerning the appellant's honesty. Defense counsel objected, and the trial court overruled his objection. Having reviewed the record, we conclude that any misconduct did not rise to the level of reversible error.[12]

Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

_____
WILLIAM M. BARKER, Judge

[12]We note that Rule 608(a) permits the introduction of opinion evidence of a witness' character for truthfulness or untruthfulness, although evidence of a witness' truthful character is only admissible after the character of the witness for truthfulness has been attacked. See also Tenn. R. Evid. 404(a)(3). Moreover, our supreme court has previously observed, "The particular trait of truthfulness ... is always an issue when a witness testifies. Thus, in contrast to the use of character evidence to show conformity with a trait such as violence or peacefulness, reputation and opinion evidence is always admissible to attack a witness's credibility." State v. West, 844 S.W.2d 144, 149 (Tenn. 1992)(citing Rule 608(a)). In any case, as pointed out by the State, it would be difficult to characterize the State's question and Mr. Hart's answer as evidence of the appellant's truthful or untruthful character.