IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9512-CC-00383
Appellee	)	
	)	HAYWOOD COUNTY
vs.	)	
	)	Hon. Dick Jerman, Jr., Judge
JAMES WEBB,	)	
	)	(Aggravated Rape)
Appellant	)	

For the Appellant:

Tom Crider
District Public Defender

Laura Rule Hendricks
Appellant Contract Attorney
for the District Public Defender
810 Henley Street
Knoxville, TN 37902

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Robin L. Harris
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Clayburn L. Peeples
District Attorney General
109 East First Street
Trenton, TN 38382

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, James Webb, was convicted by a jury in the Circuit Court of Haywood County of the aggravated rape of his daughter. Tenn. Code Ann. § 39-2-603 (1982)(repealed 1989). The trial court sentenced the appellant as a standard, range I offender to eighteen (18) years in the Tennessee Department of Correction. Tenn. Code Ann. §40-35-112(a)(1) (1990). The appellant challenges his conviction and sentence, raising the following issues:

(1) Whether the applicable statute of limitations barred the prosecution of the appellant;
(2) Whether the State's delay in initiating prosecution violated the appellant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Tennessee Constitution;
(3) Whether the trial court erroneously admitted "fresh complaint" testimony by the victim;
(4) Whether the evidence adduced at trial is sufficient to support the jury's verdict;
(5) Whether the trial court, at the hearing on the appellant's Motion for New Trial, erroneously refused to hear proof concerning the unanimity of the jury's verdict; and
(6) Whether the appellant's sentence is excessive.

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

FACTUAL BACKGROUND

The proof at trial established that the appellant committed the offense of aggravated rape in 1982. At the time of the offense, the victim, SW, was approximately eleven years old.[1] On May 2, 1994, roughly twelve years later, the appellant was indicted for a single count of aggravated rape. The indictment alleged:

> JAMES WEBB upon or after June 5, 1979 and prior to June 21, 1984, ... did unlawfully sexually penetrate [SW], a person then less than 13 years of age, in violation of T.C.A. 39-2-603, and further, that pursuant to T.C.A. 40-2-101(d), said offense may be

[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).

> prosecuted at any time after the offense shall have been committed ... .

The appellant's case proceeded to trial on January 13, 1995. At trial, SW recounted that, in 1982, en route to a grocery store, her father took her to a field and, in his truck, forcibly engaged in sexual intercourse with her. According to the victim, the appellant continued to engage in intercourse with his daughter on "a regular basis" until she was eighteen.[2]

The victim also testified that, during their encounters, her father did not use any form of birth control. However, when she was fourteen, the victim's mother placed her on birth control pills, because her mother "felt like [the victim] was at an age that [she] needed to be." In order to obtain the birth control pills, the victim underwent a physical examination at the Health Department. She spoke with a nurse and informed her that she had first become sexually active in 1983. The victim indicated to the nurse that her "partner was cooperative in using condoms." The victim explained at trial that she lied to the nurse "because [she] didn't want to tell her anything else." With respect to her relationship with her father, the victim testified, "That's too embarrassing to tell a total stranger."

In 1985 or 1986, SW reported her father's actions to her aunt, Shirley Kee, because she "couldn't keep it in no more." Her aunt then informed the victim's mother. At some point, the victim also spoke with representatives from the Department of Human Services (DHS)[3] and the Brownsville Police Department, who in turn contacted her father. However, the appellant was not formally charged with raping his daughter, and the victim was instructed to attend

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[2]The victim also testified that, a year or a year and a half before first engaging in intercourse with her, the appellant had begun "fondling" her, including "touch[ing] [her] breasts and [her] privates,". The fondling occurred "maybe once a week and then several times a week as it went on." The incidents occurred at home, "late at night." According to SH, her father told her that if she reported the incidents to anyone, she "would get in trouble, ... they would send [her] away and [she would] never see [her] brothers or mother." The victim stated that she was afraid of her father.

[3]The State and defense counsel apparently stipulated at trial that the victim reported these incidents to the Department of Human Services in 1986.

counseling.

On cross-examination, the victim stated that, when she spoke with the representatives from DHS, they indicated that they believed her story and "would do something about it." She could not recall being instructed to stay away from her father and admitted that, during her teenage years, she would visit her father, who was a mechanic, at work.[4] She also conceded that she refused to go to counseling. She explained that she did not believe she was "crazy" and did not understand why she needed to attend the sessions.

The victim's aunt, Shirley Kee, also testified at trial on behalf of the State. Ms. Kee confirmed that, in 1985 or 1986, the victim reported the appellant's activities to her. The victim asked Ms. Kee to follow her and her father to the grocery store, as her father would often accost her during these trips. Ms. Kee acquiesced, but observed nothing unusual on that occasion. Ms. Kee also confirmed at trial that she informed the victim's mother about the victim's allegations.

Finally, defense counsel and the State stipulated to the admissibility of several statements by the victim's mother to DHS personnel.[5] The State

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[4]Again, SW testified that, following her disclosure of the appellant's acts and an investigation by DHS and the police, the appellant continued to molest her until she was eighteen.

[5]The interview included, in relevant part, the following questions and answers:

> Q: Has there ever been a time when you actually felt like you might have seen something or something was about to happen and maybe you were there with [SW] and her Daddy when she was young? ...
>
> A: No, because I was always at work because, see, I worked at the glove factory and then I turned around and went to work at Somerville. I was always working.
>
> Q: Okay. Was he -- were they ever alone together and you'd catch them or walk in on them or --
>
> A: No. The only thing after we separated -- we wasn't divorced but we was separated -- he got where he'd just come in and out when he wanted to. He might come and spend a night or two and leave again, and the only time after [SW] had told me and everything he thought I was asleep

introduced an excerpt from an interview of the victim's mother by DHS on August 16, 1994. The appellant introduced an excerpt from an earlier interview that occurred on March 16, 1986.[6] The victim's mother did not testify at trial. [SW] testified that, at the time of the trial, her mother was "supposed to be in Mississippi, but other than that [she didn't] really know."

The appellant testified at trial. He denied ever molesting his daughter. He described his relationship with his daughter:

> Well, me and her's had her differences. She had rheumatoid arthritis when she was little and we petted her, and when me and her mother separated we -- our differences went on, you know. She'd come and live with us for a while and she'd leave, you know ... She wouldn't tell us when she'd be home at night and me and my old lady now would have to go looking for her and -- finally, I just carried her back to her mother ... then she wanted to come back, and so she came back and lived with us again.

The appellant stated that, when the victim was young, he had difficulty disciplining her, although he "never whipped her." With respect to the victim being placed on birth control pills, the appellant testified that he had not approved. He also indicated that, at that time, the victim's mother was allowing "a boy" to live with her and her daughter in their trailer.

> one night and he was watching TV in there and he went back towards her room and he went in her room. Well, I got up and went on back there. But in her room the light was on in the far side of the bedroom and we -- I asked him what he was doing back there and he come on back up front. His pants was unzipped and me and [SW] faced him, but he said it was not true. Now, that's the only time after [SW] told me. I didn't know what was going on."

[6]The victim's mother divulged the following information:

> A: My husband and I have been separated for three years, been divorced a year in September.
> Q: Have you ever suspected that your ex-husband might be bothering [SW]?
> A: No, not really.
> Q: Would she ... have confided in you ... about that?
> A: She would either confide in me or my youngest sister. She will talk to my youngest sister, too.
> Q: Would your youngest sister have told you?
> A: Yes.
> Q: How would you feel about it if he had?
> A: I would feel like killing him ... .

In 1986, the police questioned him concerning his daughter's allegations. He denied any wrongdoing. The victim's mother also confronted the appellant about the victim's accusations. Again, the appellant denied molesting his daughter. Moreover, according to the appellant, the victim frequently visited the appellant at his workplace during the period of the investigations by DHS and the police and never exhibited any fear of the appellant.

The appellant also testified that, while he was still married to the victim's mother, he, his daughter, and the victim's mother often slept together. He further admitted that, when the victim was eleven or twelve, he occasionally slept with her in her room. He explained that he slept with the victim when he was experiencing marital difficulties. He stated, "I wouldn't think no more about going to her -- going to sleep with her that I would one of the boys ... I've laid on the couch and watched television, you know, and her in my arms and -- it didn't mean nothing."[7]

The appellant's wife, Janice Webb, testified on behalf of the appellant. She stated that she knew the victim and that the victim and her father did not "get along" very well. Moreover, Janice Webb stated that, in 1986, she and the appellant were living together. The victim occasionally spent the night with them. Her visits were voluntary. Moreover, Janice Webb never observed the victim exhibit any fear of the appellant. She first heard about the victim's allegations in 1986 from DHS. She spoke with her husband about the matter, but did not ask him if he had done the acts alleged. She did not believe the allegations, nor did she believe the victim when, in 1988 or 1989, she personally informed Ms. Webb that the appellant was molesting her.

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[7]The appellant further stated that, the year prior to his trial, he and his daughter had been involved in an altercation during which he had slapped the victim. The record reveals that the altercation concerned allegations by another of the appellant's daughters that she had been molested by the appellant. The jury was not informed about these additional allegations. Furthermore, the trial court prohibited defense counsel from arguing that the altercation in any way prompted the prosecution of the appellant.

Finally, James Webb, Jr., the appellant's son, testified. He is six years older than the victim, his sister. He grew up in the same house with the victim, and occasionally shared a room with her. He stated that he never observed his father engage in any sexual activity with the victim, nor could he recall his father ever sleeping with the victim.

At the conclusion of the trial, the jury returned a verdict of guilt. On March 6, 1995, the trial court conducted a sentencing hearing. At the hearing, the State relied upon the presentence report and the evidence adduced at trial. The appellant presented the testimony of Richard Patterson, the appellant's employer. He operated a trucking and farming business. At the time of the hearing, the appellant had been working for him as a mechanic for twenty-five years. Mr. Patterson stated, "[The appellant] has always been a good worker and he was dependable to me. I have had no problems with him."

In imposing a sentence at the lower end of the applicable sentencing range, the trial court found one mitigating factor, the appellant's lack of a criminal history. Tenn. Code Ann. § 40-35-113(13) (1990). The court further found two enhancement factors, that the victim was particularly vulnerable because of her age, Tenn. Code Ann. § 40-35-114(4) (1994 Supp.), and that the appellant abused a position of private trust, Tenn. Code Ann. § 40-35-114(15).

ANALYSIS

I. Statute of Limitations

In 1982, at the time of the appellant's offense, the prescribed punishment for aggravated rape was "imprisonment in the penitentiary for life or a period not less than twenty years." Tenn. Code Ann. § 39-2-603 (b). The applicable statute of limitations provided that any offense which carried a possible sentence of life imprisonment was not subject to a limitation period. Tenn. Code Ann. § 40-2-

101(a)(1982). Accordingly, in 1982, the offense of aggravated rape was not subject to a limitation period. The law remained unchanged until 1989.

On November 1, 1989, § 39-2-603, the aggravated rape statute, was replaced by Tenn. Code Ann. § 39-13-502, which designated the crime of aggravated rape a class A felony. See also Tenn. Code Ann. § 40-35-110 (1990). Pursuant to the Tennessee Criminal Sentencing Reform Act of 1989, the authorized term of imprisonment for a class A felony is not less than fifteen nor more than sixty years. Tenn. Code Ann. § 40-35-111 (b)(1)(1990). Moreover, the 1989 Sentencing Act provides, in relevant part, that "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 [the Criminal Sentencing Reform Act of 1989]." Tenn. Code Ann. § 40-35-117 (1990). The appellant was convicted and sentenced in 1995. The trial court applied the 1989 Act, imposing a sentence of eighteen years pursuant to the appellant's conviction for a class A felony. Tenn. Code Ann. § 40-35-112(a)(1) (as a range I, standard offender, the appellant was subject to not less than fifteen nor more than twenty-five years imprisonment in the Tennessee Department of Correction).

In 1982, the limitation period applicable to any offense punishable by a sentence greater than five years imprisonment, but less than life imprisonment, was four years. Tenn. Code Ann. § 40-2-101(c)(1982). Therefore, applying the statute of limitations in effect at the time of the appellant's crime, in conjunction with the 1989 Act under which the appellant was sentenced, would subject the crime of aggravated rape to a limitation period of four years.[8] However, in 1990,

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[8]In 1989, the legislature also enacted a general savings statute "by which prosecutions are preserved after the statute proscribing the offense has been amended or repealed." State v. Davis, 825 S.W.2d 109, 111 (Tenn. Crim. App. 1991); Tenn. Code Ann. § 39-11-112 (1991). That statute provides:

> Whenever any penal statute or legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act

the legislature amended Tenn. Code Ann. § 40-2-101 in order to "establish limitation periods consistent with the Criminal Sentencing Reform Act of 1989." State v. Ricci, 914 S.W.2d 475, 480 (Tenn. 1996). The legislature's amendments included subsection (e), which provides that "[f]or offenses committed prior to November 1, 1989, the limitation of prosecution in effect at that time shall govern." Accordingly, the issue before this court is whether the legislature's 1989 revisions of the criminal code and the sentencing laws triggered the four year limitation period to bar the State's prosecution of the appellant in 1994 or whether Tenn. Code Ann. § 40-2-101(e)(1990) operates as a "savings statute" to preserve the State's right of prosecution.

The appellant cites State v. Carrier, 822 S.W.2d 623, 624-625 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991), for the proposition that the legislature's reduction of the punishment for aggravated rape on November 1, 1989, changed the limitation period applicable to the appellant's crime.[9] In

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> being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

Tenn. Code Ann. § 39-11-112 (emphasis added). Under Tenn. Code Ann. § 40-35-117(c), persons who committed crimes before July 1, 1982, must be sentenced according to the law as it existed prior to that date. Thus, had the appellant's offense occurred prior to July 1, 1982, the 1989 Act would not have applied to his case, and the appellant would have remained subject to a possible sentence of life imprisonment after November 1, 1989. Arguably, under those facts, the appellant's offense would have remained free of any limitation period according to any theory. However, although in this case the precise day of the offense in 1982 was unclear, the record is devoid of any objection by the State to the determination of the appellant's sentence according to the 1989 Act.

[9]The appellant also contends that his prosecution for the aggravated rape of his daughter in 1982 was barred in 1994 by Tenn. Code Ann. § 40-2-101(d)(1990). That statute provides:

> Prosecutions for any offense committed against a child that constitutes a criminal offense under ... 39-2-603 [repealed] ... shall commence no later than the date the child attains the age of majority or within four (4) years next after the commission of the offense, whichever occurs later; provided ... an offense punishable by life imprisonment may be prosecuted at any time after the offense shall have been committed.

Id. The appellant argues that, pursuant to this statute, the State was required to initiate prosecution either in 1986, within four years of the offense, or in 1989, when the victim attained the age of majority. We disagree. First, until November 1, 1989, aggravated rape was punishable by life imprisonment. Second, the legislature added this provision to Tenn. Code Ann. § 40-2-101 in 1985, approximately three years following the appellant's offense. In Overton v. State, 874 S.W.2d 6, 10-11 (Tenn. 1994), the supreme court held that this provision should not be retroactively applied. See also Ricci, 914 S.W.2d at 480 ("[a] statute of limitations may not be applied to offenses occurring before the effective date of the statute unless the statute includes specific language indicating retroactive application"). We do note that in State v. Gray, No. 01C01-9309-CR-00334 (Tenn. Crim. App. at Nashville, August 4, 1994), reversed on other

Carrier, this court held that, when the legislature reduced the maximum punishment for "simple rape" from life imprisonment to fifteen years in 1979, the corresponding limitation period began to run. Id. at 624.[10] Thus, according to Carrier, the State in this case was required to prosecute the appellant within four years of November 1, 1989; i.e., the State was barred from prosecuting the appellant after November 1, 1993. See also Gray, No. 01C01-9309-CR-00334 ("[w]hen the legislature reduced the maximum punishment for the offense of aggravated rape, effective 1 November 1989, the four year statute of limitations began to run").

The State argues in this case, as it did in Carrier, 822 S.W.2d at 624, that the 1990 adoption by the legislature of Tenn. Code Ann. § 40-2-101(e) saves the prosecution in this case. In Carrier, the new limitation period for the offense of rape, triggered by the legislature's reduction in 1979 of the punishment for rape, had already expired in 1990. In declining to apply § 40-2-101(e) in favor of the State, the court noted, "This statute cannot revive offenses which were already barred by the statute of limitations." Id. In the instant case, assuming that the 1989 revisions to the Code triggered the shorter limitation period, prosecution of the appellant's offense was not barred at the time of the 1990 amendment.

However, in Ricci, 914 S.W.2d at 480, our supreme court concluded that the legislature included subsection (e) in the 1990 amendments to § 40-2-101 merely to emphasize that nothing in the 1990 version of the statute of limitations applies to offenses committed prior to November 1, 1989. Id. at 480-481. In

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grounds, State v. Gray, 917 S.W.2d 668 (Tenn. 1996), this court nevertheless applied Tenn. Code Ann. § 40-2-101(d) to offenses that occurred in the early 1950s.

[10]The State argues that, because this court in Carrier concluded that two aggravated rape charges remained pending against the appellant in that case, Carrier does not support the appellant's position. However, we note that, in Carrier, the State initiated prosecution before November 1, 1989. As mentioned earlier, prior to this date, the maximum punishment for aggravated rape was life imprisonment. Accordingly, prior to this date, there was no applicable limitation period for aggravated rape.

other words, "[t]he legislature could have worded [subsection (e)] differently. If [the provision] said that the 1990 statute [of limitations] applied only to offenses committed after November 1, 1989, the result would have been the same." Id. at 481 n. 7.[11]

In the instant case, we are not applying the 1990 statute of limitations to the appellant's case. Rather we are applying the statute of limitations in existence in 1982, at the time of the offense. Consequently, the issue becomes whether the legislature intended, with respect to offenses committed in 1982, to trigger the shorter limitation period set forth in the 1982 statute of limitations when it enacted the revisions to the criminal code and sentencing laws. Although we must, pursuant to Ricci, reject the State's characterization of subsection (e) of Tenn. Code Ann. § 40-2-101 as a "savings statute," we conclude that the legislature clearly intended that the 1990 amendments to Tenn. Code Ann. § 40-2-101 govern the impact of the 1989 revisions to the criminal code and sentencing laws upon applicable limitation periods. In other words, while absent the 1990 amendment, according to a tenet of statutory construction, we would presume that the legislature was aware of and intended the effect of the 1989 revisions in reducing the applicable limitation period for aggravated rapes occurring before 1989, the 1990 amendments to Tenn. Code Ann. § 40-2-101 reflect a contrary intent. Owens v. State, 908 S.W.2d 923, 926-927 (Tenn. 1995)(in construing statutes, a court must presume that a legislature knows of its prior enactments and knows the state of the law at the time it passes legislation). Thus, we distinguish our decision in Carrier, in which case the legislature did not directly address the impact of the 1979 change to the punishment for simple rape upon the applicable limitation period, and, contrary to Gray, No. 01C01-9309-CR-00334, we decline to extend the rationale of Carrier

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[11]Thus, contrary to this court's suggestion in Gray, No. 01C01-9309-CR-00334 at n.5, Tenn. Code Ann. § 40-2-101(b)(1)(1990), which provides a fifteen year statute of limitations for class A felonies, is inapplicable to the appellant's offense.

to the facts of the instant case. Moreover, although only the applicable limitation period, not the 1982 statute of limitations, was changed by the 1989 revisions, our conclusion in this case is more consistent with the general principles that retroactive changes to statutes of limitations should be expressly mandated by the legislature, Ricci, 914 S.W.2d at 480, and that new statutes change pre-existing law only to the extent expressly declared, State v. Dodd, 871 S.W.2d 496, 497 (Tenn. Crim. App. 1993).[12]

In conclusion, a statute of limitations provides the impetus for quick action by law enforcement officers and prevents the use of stale evidence to convict a citizen. State v. Pearson, 858 S.W.2d 879, 886 (Tenn. 1993). See also 22 C.J.S. Criminal Law § 196(a) (1989)("[a] statute of limitations balances the government interest in prosecution with the need to protect those who may lose their means of defense"). In the instant case, for no apparent reason, the State waited for eight years to prosecute the appellant, at which time the parties were unable to locate a potentially key witness, the victim's mother. However, in the instant case, there was no applicable limitation period. Thus, while we certainly do not encourage delayed prosecutions, the State was not statutorily barred from pursuing this case in 1994.

II. Pre-Accusatorial/Pre-Indictment Delay

We next address the appellant's contention that the delay in his prosecution violated concepts of fundamental fairness and substantial justice embodied in the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 8 of the Tennessee Constitution.[13]

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[12]We note with interest that, following the enactment of the Tennessee Code of 1956, the legislature rejected retroactive application of new limitation periods and expressed a preference for the longer limitation period in the event of any ambiguity stemming from the enactment of the Code. Tenn. Code Ann. § 1-2-113(1994).

[13]The appellant did not raise this issue in his motion for new trial and has, accordingly waived this issue. Tenn. R. App. 3 (e). Nevertheless, in the interest of justice, we choose to address the merits of the appellant's contention. Tenn. R. Crim. P. 52(b).

In State v. Dykes, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990), this court recognized that delay between the commission of an offense and the initiation of adversarial proceedings may violate an accused's due process rights. However, the court held that, before an accused is entitled to relief based upon such delay, the accused must prove the following:

(a) There was a delay.
(b) The accused sustained actual prejudice as a direct and proximate result of the delay.
(c) The State caused the delay in order to obtain tactical advantage over or to harass the accused.

Id. at 256. See also State v. Tuttle, 914 S.W.2d 926, 930 (Tenn. Crim. App. 1995).

Subsequently, in State v. Gray, 917 S.W.2d 668, 670 (Tenn. 1996), our supreme court distinguished between "pre-accusatorial" delay and "pre-indictment" delay, observing that pre-accusatorial delay refers to the period of time between the commission of the offense and its disclosure to law enforcement authorities. In the case of pre-accusatorial delay, the court applied a less stringent standard, holding that a court must consider:

(a) the length of the delay;
(b) the reason for the delay; and
(c) the degree of prejudice, if any, to the accused.

Id. at 673. See also State v. Carico, No. 03C01-9307-CR-00206 (Tenn. Crim. App. at Knoxville), perm. to appeal granted, (Tenn. 1996)(this court noted the different analyses applicable in pre-accusatorial delay cases and pre-indictment delay cases).

Accordingly, Gray appears to require a two-tiered approach to those cases involving both pre-accusatorial and pre-indictment delay.[14] In any event,

[14]The appellant alleges that the delay of his prosecution diminished the victim's ability to recall the incidents of sexual abuse and resulted in the unavailability at trial of the victim's mother. First, the record does not reflect that the appellant was unduly prejudiced, under either test, by any memory lapse of the victim. Second, the disappearance of the victim's mother occurred during the period of pre-indictment delay. Accordingly, the appellant would have to establish that the State caused the delay in order to obtain tactical advantage over the appellant. The record

we conclude that the appellant has failed to adequately demonstrate prejudice under either standard. See Carico, No. 03C01-9307-CR-00206. In Jones v. Greene, No. 01A01-9505- CH-00187 (Tenn. App. December 5, 1996), the appellate court observed that the test to determine whether pre-accusatorial delay violates due process principles is essentially the same test as that applicable in reviewing a delay in instituting civil forfeiture proceedings. In the latter context, the court stated:

> [T]he most critical [factor] is the prejudice to the accused. For the purposes of the inquiry, the courts are chiefly concerned with the prejudice to a party's ability to marshal its evidence and to present its case. A delay will be considered constitutionally harmless without a clear showing of actual prejudice. ... Prejudice is evident when witnesses die or disappear ... . However, persons seeking to prove that a delay impaired their ability to present favorable evidence must demonstrate actual prejudice by offering some proof of the witness' expected testimony and of their efforts to assure that these witnesses would attend the hearing.

Jones, No. 01A01-9505- CH-00187 (citations omitted). The appellant has simply failed to meet his burden in the instant case.[15] Therefore, this issue is without merit.

III. Fresh Complaint Testimony

The appellant also contends that the trial court erroneously admitted fresh complaint testimony in violation of our supreme court's decision in State v. Livingston, 907 S.W.2d 392, 395 (Tenn. 1995)(declining to extend the fresh complaint doctrine to cases involving child victims). The appellant specifically

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contains no evidence to support this theory.

[15]As mentioned above, the record does not reflect that the appellant was prejudiced by any memory lapse of the victim. Moreover, the record does not support the appellant's argument that he was prejudiced by the disappearance of the victim's mother and his consequent inability to cross-examine the mother concerning her inconsistent statements to DHS. The statements included in the record are not inconsistent. The State introduced at trial a statement by the victim's mother to DHS personnel that, during the victim's early childhood, she never suspected that the appellant was molesting her daughter. However, on one occasion, after she had been informed of the victim's allegations, she observed the appellant in the victim's room with his pants unfastened. The appellant introduced another, earlier, statement by the mother to DHS personnel in which the mother stated that she never suspected sexual abuse. Indeed, the record indicates that the mother's testimony would have more probably harmed the appellant's case than helped his case. Moreover, the appellant has failed to include in the record any documentation of his efforts to secure the mother's presence at trial.

cites the testimony of the victim that she reported her father's actions to her aunt, Shirley Kee, to the Department of Human Services, to the Brownsville Police Department, and to her best friend, Samantha Riggins. He further challenges the testimony of Shirley Kee that the victim recounted her father's sexual abuse to her aunt.

Initially, we note that the appellant did not challenge the victim's testimony in his motion for new trial. Accordingly, the appellant has waived any objection to her testimony. Tenn. R. App. P. 3 (e). See also State v. Seaton, 914 S.W.2d 129, 131 (Tenn. Crim. App. 1995)(we are required to treat as waived any issue relating to the admission or exclusion of evidence that was not submitted in a motion for new trial, unless it is dispositive of the case).[16] With respect to Ms. Kee's testimony, in Livingston, our supreme court observed that fresh complaint testimony is admissible if it satisfies the prior consistent statement rule. 907 S.W.2d at 395. See also State v. Burton, No. 02C01-9507-CC-00193 (Tenn. Crim. App. at Knoxville), perm. to appeal denied, (Tenn. 1996). We conclude that Ms. Kee's testimony satisfies this rule.

This court has previously observed that while, ordinarily, prior consistent statements of a witness are not admissible to bolster the witness' credibility, a strong attack by the defendant on a witness' credibility during cross-examination will allow the State to introduce, during its case-in-chief, such statements. State v. Tizard, 897 S.W.2d 732, 746 (Tenn. Crim. App. 1994). See also State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993)(an impeaching attack on

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[16]At trial, the State asserted that the victim's statements were not hearsay, and the trial court agreed. We disagree. Absent an exception to the hearsay rule, a witness may not testify concerning another person's out-of-court statements, when the statements are offered in evidence to prove the truth of the matters asserted. Tenn. R. Evid. 801 and 802. Similarly, a witness may not testify concerning her own out-of-court statements. "While often the witness and the declarant are different people, they do not have to be. If a person repeats his or her earlier statement, the person is both the declarant and the witness." Cohen, Sheppeard, Paine, Tennessee Law of Evidence §801.3, p. 493 (1995). In any event, notwithstanding waiver, we adjudge any error to be harmless. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

a witness' testimony will allow the introduction of the witness' prior consistent statements). Again, in Livingston, 907 S.W.2d at 398, the supreme court reaffirmed the continuing vitality of the prior consistent statement rule. Of course, prior consistent statements are not admissible unless the witness is impeached about some matter to which the prior statements pertain. State v. Belser, No. 03C01-9502-CR-00056 (Tenn. Crim. App. at Knoxville, September 18, 1996).

In the instant case, during cross-examination of the victim, defense counsel attacked the victim's credibility, particularly with respect to her accusations against her father, inquiring why the victim continued to seek her father's company even following the initiation of an investigation in 1986. Moreover, defense counsel questioned the victim concerning an interview with medical personnel prior to her disclosure of her father's sexual abuse, clearly suggesting that the victim had been sexually active with a partner other than her father. Accordingly, Ms. Kee's testimony was admissible.[17]

IV. Sufficiency of the Evidence

The appellant next challenges the sufficiency of the convicting evidence. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant must establish that the evidence presented at trial was so deficient that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994), cert.

[17]Additionally, we note that the appellant testified during direct examination that, in 1986, he was approached and questioned concerning allegations of sexual abuse by the victim's mother and representatives of the Department of Human Services and the Brownsville Police Department.

denied, __ U.S. __, 115 S.Ct. 743 (1995); Tenn. R. App. P. 13(e).

Moreover, an appellate court may neither reweigh nor reevaluate the evidence when determining its sufficiency. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). "A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory." State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id. See also State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). We conclude that the appellant has failed to demonstrate the inadequacy of the proof supporting the jury's verdict.[18]

V. The Unanimity of the Jury's Verdict

The appellant next contends that he "had information post trial that the jury had rendered a compromise or majority verdict." According to the appellant, the trial court prohibited defense counsel from further investigating this matter. The appellant asserts that his case should be remanded to the trial court for a thorough hearing on this issue.

Initially, we note that, in support of his argument, the appellant also states:

> The State was charging the Appellant with one specific act of rape. However, the State insisted upon muddying the water by eliciting testimony from [SW] that the sexual activity had continued regularly for seven years. With all the talk of such sexual activity, the jury

[18]The appellant argues that, because "[t]he State submitted no admissible evidence other than [SW's] testimony that a rape had occurred," the evidence is insufficient. However, "[a] conviction based on the victim's testimony alone is proper." State v. Laws, No. 03C01-9509-CC-00289 (Tenn. Crim. App. at Knoxville, April 11, 1996)(citing State v. Williams, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981)).

> could have easily been confused as to what particular act they were convicting the Appellant.

The appellant thereby raised the specter of election of offenses. In fact, in this case, although the victim alluded to numerous incidents of sexual abuse occurring within the indicted period, the State failed to elect the offense upon which it would proceed, and the trial court failed to give an augmented instruction to the jury. See State v. Hoyt, 928 S.W.2d 935, 947 (Tenn. Crim. App. 1995)("[t]he introduction of other incidents of sexual crimes occurring within the indicted period requires an election of offenses"); State v. Frierson, No. 01C01-9112-CC-00357 (Tenn. Crim. App. at Nashville, July 22, 1993), perm. to appeal denied, concurring in results only, (Tenn. 1995)(a basic statement that the verdict must be unanimous is insufficient). However, the appellant has failed to raise this issue in accordance with Tenn. R. App. P. 27(a)(4) and (7) and Ct. of Crim. App. Rule 10(b). Moreover, the appellant did not raise this issue in his motion for new trial. Tenn. R. App. P. 3(e).[19]

Nevertheless, because "the requirement of election is fundamental, immediately touching on the constitutional rights of the accused," we address the merits of this issue. State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993). This court, in State v. Clabo, 905 S.W.2d 197, 204-205 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995), held that the trial court did not err in failing to require an election of offenses when, with respect to one count of sexual battery, the victim testified in detail about one precise sexual incident and provided no details about any other incident. The court concluded that the "minor innuendos about another incident" were harmless. Id. at 205. In State v. Hinkle, No. 02C01-9603-CR-00076 (Tenn. Crim. App. at Jackson, October 22, 1996), this court similarly held that the trial court's failure to require an election was

[19]The appellant never requested at trial an election of offenses. However, the trial court must require the State to elect offenses even absent a request by the defendant. Hoyt, 928 S.W.2d at 947 (citing Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973)).

harmless error when the "overwhelming majority of detailed evidence" concerned one incident of sexual battery and no details were developed regarding other occurrences of sexual battery. See also Shelton, 851 S.W.2d at 138 (when the victim testified in specific terms about one incident of rape and only in very general terms about other occurrences, the trial court's failure to require an election of offenses was harmless error). Contrast Tidwell v. State, 922 S.W.2d 497, 500-502 (Tenn. 1996)(the supreme court rejected the "grab-bag" theory of justice); State v. Moore, No. 01C01-9409-CC-00317 (Tenn. Crim. App. at Nashville, August 9, 1996).

Accordingly, in the instant case, we conclude that the State's failure to elect and the trial court's failure to give an augmented instruction did not constitute reversible constitutional trial error, because, absent any additional evidence, it can be concluded beyond a reasonable doubt that the verdict was unanimous as to the incident of rape en route to the grocery store in 1982.[20] During its opening statement, the State only alluded to this incident. The State's closing argument is not included in the record,[21] yet, during the course of the trial, the only incident described in any detail by the victim was the 1982 rape. The victim made only vague and brief reference to the other incidents. Finally, in

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[20]The victim testified that, following the rape en route to the grocery store in 1982, the appellant regularly engaged in intercourse with the victim until she was seventeen or eighteen years old. Her testimony necessarily referred to incidents of sexual abuse outside the period of the indictment, as the indictment only encompassed acts occurring through June 21, 1984, at which time the victim was only approximately 13 years old. The introduction of evidence of sexual crimes that occurred outside the indicted period requires compliance with Tenn. R. Evid. 404(b). Hoyt, 928 S.W.2d at 947; State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994)(rejecting, generally, a "sex crimes exception" to Tenn. R. Evid. 404).

Once again, the appellant has waived this issue pursuant to Tenn. R. App. P. 3(e), Tenn. R. App. P. 27(a)(4)and (7), and Ct. of Crim. App. Rule 10(b). Notwithstanding waiver, with respect to the merits of this issue, defense counsel orally submitted to the trial court, prior to trial, a motion to exclude evidence of sexual abuse occurring outside the period of the indictment. The trial court denied the motion, but failed to state on the record his reasons for admitting the evidence; nor did defense counsel request that the trial court state its findings on the record. Tenn. R. Evid. 404(b)(2). In any case, we cannot conclude that this evidence would be admissible as a 404(b) exception. Nevertheless, we conclude that any error is harmless. Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

[21]It is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal. Tenn. R. App. P. 24(b).

announcing the jury's verdict to the trial court, the jury foreperson, Louise Southern, spontaneously remarked, "Your Honor, it was all unanimous."

Nevertheless, at the hearing on the motion for new trial, the appellant alleged that Ms. Southern had indicated to third persons, including a Jennifer Dancey, that the jurors in the instant case had arrived at their verdict by a majority vote. In denying the appellant's motion for new trial, the trial court ordered that defense counsel refrain from contacting the jurors in the instant case, but indicated that defense counsel could submit any relevant affidavits, including that of Ms. Dancey.[22] The appellant failed to submit any affidavits.

The question remains whether the trial court erred in prohibiting defense counsel from contacting the jurors "in any manner". In State v. Thomas, 813 S.W.2d 395, 396 (Tenn. 1991), our supreme court observed:

> [E.C. 7-29 and D.R. 7-108 of Sup. Ct.] Rule 8 allow[] litigants and their counsel to make reasonable investigations to determine if a verdict is subject to legal challenge. ... Rule 606(b) of the Tennessee Rules of Evidence ... lists those factors that invalidate a verdict: ... an agreement to be bound by a quotient or gambling verdict. Rule 8 therefore allows post-trial interviews by counsel with jurors on [this] matter without the prior approval of the trial court.

Of course, the lawyer must "refrain[] from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases." Sup. Ct. Rule 8, E.C. 7-29. See also Sup. Ct. Rule 8, D.R. 7-108(D). Yet, within the confines of these rules and Tenn. R. Evid. 606(b), the trial court may not prohibit post-trial contact between jurors and defense counsel.[23]

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[22]We disagree with the appellant's contention that he was "totally precluded from offering any proof on this constitutional issue."

[23]Defense counsel did contact Ms. Southern prior to the hearing on the motion for new trial. Ms. Southern refused to speak with defense counsel without first consulting her attorney. We note that nothing in the rules would require a juror to submit to an interview with defense counsel.

_____Nevertheless, the supreme court further indicated that motions for permission to interview jurors, such as defense counsel's motion in the instant case, although not required in every case, are not inappropriate. Thomas, 813 S.W.2d at 397. Indeed, the court indicated that such motions should be encouraged "in cases in which the contemplated inquiry reasonably could be considered to go beyond that approved by the provisions of Rule 8." Id.

Again, Sup. Ct. Rule 8 permits post-trial communications between counsel and former jurors concerning matters encompassed by the Tenn. R. Evid. 606(b) exceptions. Rule 606(b) is essentially the same as Fed. R. Evid. 606(b), other than the additional exception under Tennessee law concerning antecedent agreements by jurors to be bound by a quotient, gambling, or majority result. State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984). See also Thomas, 813 S.W.2d at 396. "The values sought to be promoted by [the federal rule] include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarassment." Advisory Committee Notes, Fed. R. Evid. 606(b). Within the context of these values, one federal court has noted that there is a general reluctance to "haul jurors in after they have reached a verdict in order to probe for potential instances of ... misconduct ... ." United States v. Infelise, 813 F. Supp. 599, 605 (N.D.Ill. 1993). Accordingly, the court required a proper preliminary showing of likely jury misconduct and witness competency. Id. See also, e.g., Tejada v. Dugger, 941 F.2d 1551, 1561 (11th Cir. 1991). Where defense counsel has applied to the court for permission to interview jurors, we do not believe that such a requirement is inconsistent with Sup. Ct. Rule 8, as baseless questioning of former jurors by counsel into possible misconduct would, at the very least, border harassment. In the instant case, defense counsel failed to proffer any evidence in support of his motion,

despite the trial court's invitation to counsel to submit Ms. Dancey's affidavit.[24] Moreover, the trial court had polled the jury following the return of the verdict, and each juror had responded affirmatively. "The object of polling the jury is the ascertainment, for a certainty, of each individual juror's verdict." Whitwell v. State, 520 S.W.2d 338, 342 (Tenn. 1975). Accordingly, this issue is without merit.

VI. Sentencing

The appellant contends that his sentence is excessive. Initially, the appellant argues that this court should not afford the trial court's sentencing determination a presumption of correctness. Generally, review, by this court, of the length of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court applies inappropriate factors or otherwise fails to comply with the 1989 Sentencing Act, the presumption of correctness falls. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The appellant asserts that the trial court failed to include in the record of the sentencing hearing, as required by Tenn. Code Ann. § 40-35-209 (c) and 40-35-210(f), specific findings of fact upon which application of sentencing principles was based. He cited State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994), in which our supreme court observed:

> To facilitate meaningful appellate review, the Act provides that 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

[24] Contrast State v. Walls, No. 02C01-9307-CR-00140 (Tenn. Crim. App. at Jackson, November 15, 1995)(appellant's contention that the jury convicted the appellant by way of a compromise verdict was waived due to his failure to include in the record the affidavit of the juror on which he relied to make his assertion). We realize that the trial court's order precluded the submission of Ms. Southern's affidavit for the purpose of challenging the jury's verdict. However, according to counsel, other proof was available with which to make a threshold showing. Counsel failed to present this proof to the trial court.

> enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

Of course, in Jones, the trial court neglected even to state enhancement or mitigating factors on the record. Id. at 600.

In any event, we conclude that, upon de novo review, the record supports the sentence imposed. Specifically, we reject the appellant's argument that, in sentencing the appellant, the trial court improperly applied the enhancement factor set forth in Tenn. Code Ann. §40-35-114(4), that "[a] victim of the offense was particularly vulnerable because of age ... ." In State v. Kissinger, 922 S.W.2d 482, 487 (Tenn. 1996)(citing State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993)), the supreme court stated that, in cases involving the rape of a child,

> the factor may be used to enhance [the] sentence[] when a victim's natural physical and mental limitations renders the victim particularly vulnerable for his or her age because of an inability to resist, a difficulty in calling for help, or a difficulty in testifying against the perpetrator.

This court cannot conclude that an eleven-year-old victim is particularly vulnerable merely because of her age and size. State v. Grissom, No. 02C01-9501-CC-00023 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1996). The State has the burden of proving that the victim's limitations rendered her particularly vulnerable. Adams, 864 S.W.2d at 35.

In the instant case, the victim testified that she had enjoyed a close relationship with her father prior to the sexual abuse and was "Daddy's Little Girl." Her testimony further revealed that she was physically unable to resist the appellant's assault en route to the grocery store in 1982. Moreover, her father informed her that she would be removed from her home and would never again see her mother or brothers if she revealed his abuse. Thus, she did not report the abuse until 1986, approximately four years following the first incident of sexual penetration. The record supports the application of both enhancement

factors and, despite the appellant's employment history and lack of a criminal record,[25] supports the sentence imposed.

VII. Conclusion

Accordingly, we affirm the judgment of the trial court.

_____
DAVID G. HAYES, Judge

CONCUR:

_____
PAUL G. SUMMERS, Judge

_____
PAUL R. SUMMERS, Special Judge

[25]Arguably, this mitigating factor is entitled to very little weight, as the record contains evidence of other acts of sexual abuse by the appellant against this victim. Therefore, Tenn. Code Ann. § 40-35-114(1) is applicable. See State v. Carney, No. 01C01-9412-CR-00425 (Tenn. Crim. App. at Nashville, February 23, 1996)(a preponderance of the evidence established four enhancement factors, including Tenn. Code Ann. § 40-35-114(1)); State v. Hunter, 926 S.W.2d 744, 748-749 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996)("a defendant's prior criminal behavior may include evidence of sexual crimes committed but not prosecuted"). See also United States v. Watts, No. 95-1906, 1997 WL 2443, at *5 (U.S. January 6, 1997)(the Supreme Court held that, in the federal context, even a jury's verdict of acquittal does not prevent a sentencing court from considering conduct underlying an acquitted charge if proven by a preponderance of the evidence).