IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9404-CR-00157
Appellee,	*	ANDERSON COUNTY
VS.	*	Hon. James B. Scott, Judge
JOHN HAWS BURRELL,	*	(Sexual Battery, Rape, and Coercion
Appellant.	*	of Witness)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, John Haws Burrell, was convicted of twelve counts of sexual battery, three counts of rape, and two counts of coercion of a witness. The trial court imposed Range I sentences of one year for each of the sexual battery convictions, nine years for each of the rape convictions, and three years for each of the convictions for coercion of a witness. The trial court imposed partial consecutive sentencing. We calculate the effective sentence at 24 years.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues in this appeal of right:

> (1) whether the trial court erred by allowing Dr. Christie Lynn to testify pursuant to Tenn. R. Evid. 803(4);
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> (2) whether the trial court erred by admitting certain photographs into evidence;
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> (3) whether the entire testimony of a state witness, who invoked her fifth amendment right on cross-examination, should have been stricken or, alternatively, the defendant granted a continuance;
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> (4) whether the trial court erred by denying a motion to recuse; and
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> (5) by motion to remand for dismissal, whether the indictment includes allegations of the requisite mens rea.

Because we find no reversible error, we affirm the judgment of the trial court.

Thirteen-year-old HH and fourteen-year-old SH[1] testified that they had been sexually assaulted by the defendant during September and October of 1991.[2]

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[1]It is the policy of the court not to mention minor victims by name.

[2]Although charged with one count of aggravated sexual battery against the minor TK, the defendant was acquitted of this charge. The facts surrounding that charge have not been included in the opinion.

They also claimed that the defendant, who had made threatening remarks, instructed them to lie to the authorities about the events.

In December of 1990, HH was visiting with her father, Ray Hoopes, in the state of Utah. Her mother, divorced from her father, lived in Nevada. The defendant, who was acquainted with Hoopes, traveled to Utah for a visit, met HH, and offered to take her to Tennessee so he could teach her about computers and provide her with a home-school education. Upon receiving the consent of her father, HH moved into the defendant's townhouse. She stayed some three to four weeks but returned to Utah when the defendant failed to provide home schooling.

In April of 1991, the defendant returned to Utah, informed HH that he had the home school ready to begin, and informed her that if she came to live with him he might buy her a horse. He also asked HH's brother and sister to come but they decided to wait until later. Upon receiving permission from Hoopes, HH returned with the defendant to a residence in Clinton, Tennessee. The defendant, however, neither enrolled HH in a public school nor provided home schooling. During the following summer, the defendant gave HH perfume and bought her two horses. HH's brother, CH, moved in some time later.

HH testified that the defendant often talked about sex and owned adult computer games, pornographic videotapes, vibrators, and brochures. She stated that the defendant often offered her the use of vibrators and claimed to have seen the defendant masturbate on a number of occasions. On two instances, HH watched videos with the defendant while he masturbated; she acknowledged, however, that there was no physical contact between the defendant and the victim on these occasions. HH also testified that CH had watched the pornographic videos

during his visit. Portions of the videos were shown to the jury. HH claimed the defendant had offered to buy sex-related paraphernalia from advertising brochures; she stated that the defendant, who liked younger girls, had used the phrase, "screw 'em before they're eight or it's too late." HH testified that the defendant told the victim that he had sent her father money; she did not know why.

SH, HH's sister, was scheduled to visit the Clinton residence for about three weeks in October of 1991. HH claimed that just before her sister's arrival, she agreed to masturbate the defendant if he would leave her sister out of "sexual things." HH testified that she used her hand to masturbate the defendant on five consecutive days just before her sister arrived; each incident lasted between five and fifteen minutes. After SH arrived, HH testified that she placed her hands on the defendant's penis on four more occasions in order to provide him with sexual gratification. She also claimed that the defendant performed oral sex on her on three other occasions during her sister's visit; HH testified that she touched the defendant's penis on each of these occasions. HH also related that on one occasion she and SH had watched a pornographic video together. She claimed that she had found several videotapes that the defendant had made of their sexual encounters and, with the help of SH, destroyed them.

SH testified that the defendant talked about sex all the time. She claimed that the defendant often exposed himself and that she had discovered the defendant masturbating while watching his pornographic videos. SH testified that she had refused to watch. She also said that the defendant would bet with the victims when they went bowling; if the girls lost, they were supposed to masturbate the defendant and if the girls won, the defendant had to give them money.

While originally claiming that she had no sexual contact with the defendant, SH admitted that two days before her return home she had agreed to masturbate the defendant for five minutes in return for money. SH testified that the defendant provided for her during her stay in this state. On October 24, 1991, both victims returned to their mother's home in Nevada.

Some six months later the defendant visited with the victims at their father's residence in Utah. The victims accepted his invitation to return to this state to see his mare give birth to a colt. After their arrival, HH and SH played the "rubber band game"; if the victims could flip a rubber band against the defendant's penis, he would give them five dollars. The victims took several pictures of the defendant masturbating in the living room. The photographs were introduced into evidence. Each testified that the defendant appeared to realize they were taking the pictures. One week after their return to Tennessee, the Department of Human Services (DHS) received a tip and investigated for sexual abuse. After giving statements against the defendant, the victims were placed in a protective environment.

While staying at the youth center and with foster parents, the victims went to a public skating rink every Wednesday and Friday night. On one occasion, the defendant saw the victims and asked them to tell authorities that nothing had happened. The owner of the skating rink reported the incident. One of the victims overheard the defendant, when confronted by the foster parents, make a threat, "You have the girls in jail but jails can burn down"; the owner of the rink heard the defendant say "something about burning a house down."

Each of the victims talked about the treatment they received from DHS. They understood that they could receive up to $7,000.00 each in victim's

compensation. They testified that DHS told them if they did not cooperate that they would keep them until they were 18 years old. HH believed that this only meant that they needed to answer their questions. The defense attempted to impeach HH with an earlier affidavit in which the victims claimed to have been intimidated by the DHS. HH testified that the defendant had told her father what to put in the affidavit before she had signed the document in the presence of a notary. Each victim claimed that their signing of the affidavit would keep them from having to come back to Tennessee to testify. Each conceded that portions of the affidavit were accurate. For example, they alleged that a DHS worker had called HH a "bitch" and that her guardian ad litem had called HH a "brat." HH also said that one DHS worker tricked her into talking about some things by telling her that her sister had already given information on the subject. While acknowledging that she had at times felt intimidated by the DHS and other state officials, HH said she did not feel pressured to tell the authorities about the defendant's behavior.

The victims' parents filed a civil lawsuit against the DHS for their treatment of SH and HH, citing the department's alleged refusal to return the girls to their parents when requested. HH acknowledged having signed the document but claimed she had done so in an attempt to avoid testifying. She thought that the state would not need her testimony. HH stated that the complaint contained no allegations that the sexual assaults occurred.

Vickie Shoopman, a child protective services worker with the Department of Human Services, and Audra Gibson, the investigator for the district attorney's office, initiated the investigation. The defendant initially claimed that HH was his daughter. On the following day, they interviewed the victims in the presence of Anderson County Detective Penny Baker. The defendant was present during

portions of the questioning but returned to work before the interviews were finished. Afterwards, the victims were removed from his residence.

Later, the DHS worker explained to the defendant that the victims were in DHS custody. The defendant was advised of the allegations of sexual abuse. Initially, the defendant responded that "if that was what [HH] and [SH] had said then let the record reflect that." Later, he told the officers that the victims had learned to masturbate from their mother; he explained that watching the victims do so had influenced his behavior. The defendant told officers that he had kissed HH on her breasts and her vagina during a shower but denied that any oral sex had occurred; the defendant explained that a kiss on the cheek from HH could "almost bring him to ejaculation." Detective Baker testified that the defendant had admitted that HH had caused his ejaculation by touching his penis. Ms. Gibson recalled that the defendant admitted placing HH's hand on his penis and having shown the pornographic videos.

Ms. Shoopman claimed that the defendant had given conflicting statements about the videos. She recalled that the defendant, while admitting that he had given the victims money at different times, denied that it was a payoff for sex. Ms. Shoopman described the defendant as generally cooperative during the interview. On cross-examination, she acknowledged that she had once described HH as "acting like a bitch." She denied ever having told the victims that they could be in custody until they were 18 years old if they did not cooperate. As she recalled, the victims were returned to their mother in late June or July. Ms. Shoopman claimed that the civil lawsuit had no basis.

RR, the defendant's twelve-year-old neighbor, testified for the defense.

He stated that he had watched the pornographic videos with HH at the defendant's house when no one else was there.

The victims' father, Ray Hoopes, also testified for the defense. He stated that he was in an energy systems business with the defendant dating back to June of 1990. He claimed that he and the defendant were as "close as brothers" and had been associated with the Church of Jesus Christ of Latter Day Saints, the Righteous Branch, a religious group that had broken off from the Mormon church. He stated that his daughters had changed their story several times and that he was “ashamed of them for their dishonesty." Hoopes was dissatisfied with the way in which his daughters had been treated by the DHS office and had filed a lawsuit against various state officials. A father of five, Hoopes admitted on cross-examination that he did not support his children, that he had not had a regular job in 20 years, that he had received money from the defendant, and that he had previously been convicted of six counts of child abuse for which he served six years in jail.

The defendant, age 51, testified that he had worked for Martin-Marietta from March of 1966 to May of 1992. He had been married twice and divorced. He claimed that he had become acquainted with Mr. Hoopes through a mutual friend and visited him four or five times while the defendant had been living in California. He testified that he had met the victims and their brother CH when he went to Utah in 1990.

The defendant acknowledged that he was supposed to home school the victims. He claimed that he had sent the victim [HH] away because he did not think it looked appropriate for just the two of them to be living in the residence.

The defendant claimed that the DHS workers originally told him the girls had been removed from his house because they were not in school. He claimed that he was shocked when he learned of the sexual abuse allegations. He said that officials informed him that it was not a criminal matter but that they needed to get some information from him to assist in the victims' psychiatric treatment. The defendant claimed that when asked about any sexual contact, he admitted only one brief incident of nudity in the bathroom when they were trying to hurry to get ready. He acknowledged that he had kissed HH when they were being silly and that he had seen the girls masturbating. He denied that he had ever told DHS officials that he had engaged in masturbation and claimed that he had repeatedly asked for a lawyer during the interview.

The defendant explained that the pornographic videos belonged to his ex-roommate. He said that he had discovered them when he had unpacked his computer items after moving to Tennessee and intended to send them back. The defendant also testified that he had caught HH and his neighbor RR watching the videos. After that, he had told HH that they were off limits. When he found out that HH and her brother were watching the videos a second time, he locked them in his gun cabinet which had a combination lock. The defendant testified that CH stole several items during his visit.

The defendant denied having engaged in any sexual activities with the victims. He introduced business records to show that he was out of town on some of the dates alleged in the indictments. He claimed that his relationship was one of foster parent and that he had worked with HH on some computer educational programs.

On cross-examination, however, the defendant conceded that he had not checked into all the requirements for home schooling. The defendant admitted that he had sexual discussions with HH, explaining that he wanted her to understand some of her own behavior. He also acknowledged that he believed in plural marriages and had talked with the victims about having them both as his wives at some point in the future. The defendant believed that he was the victim of a conspiracy of "over-emotional females who were trying to lock [him] up" in an attempt to "shut [him] up about polygamy." The defendant also suggested that state government was being run by "communists" and would protect his accusers.

When asked about the incident at the skating rink, the defendant explained that he had gone out there to see the girls at their mother's request. He also said that he took the victims' dog to the rink in case they wanted to see it. He acknowledged that the owner complained about his talking to the victims. He said that he instructed HH and SH to call their mother. As they left, their foster parent told the defendant not to talk to them. He claimed that he said he "knew about that jail for kids that [they had] down there, and [that] ... someone ought to burn such a jail down." He denied threatening the victims.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e).

Initially, we note that the date or time of the offense is not an essential element of the offense. See State v. Shelton, 851 S.W.2d 134 (Tenn. 1993); State v. Fears, 659 S.W.2d 370 (Tenn. Crim. App. 1983); see also Tenn. Code Ann. § 40-13-207. The defendant was convicted of twelve counts of sexual battery and three counts of rape. Rape, as charged in the indictment, is defined as the "unlawful sexual penetration of a victim by the defendant ... [where] force or coercion is used to accomplish the act." Tenn. Code Ann. § 39-13-503. Sexual battery, as charged in the indictment, is "unlawful sexual contact with a victim by the defendant or the defendant by a victim ... [where force or coercion is used to accomplish the act]." Tenn. Code Ann. § 39-13-505 (also referring to Tenn. Code Ann. § 39-13-503). Coercion, as used in the statutes dealing with sexual offenses, is defined in part as "the use of parental, custodial, or official authority over a child less than fifteen (15) years of age." Tenn. Code Ann. § 39-13-501(1). Each sexual battery count in the indictment against the defendant alleged that the offenses were committed through the use of custodial authority. Two of the counts of rape charged that the acts were committed by coercion while one count charged more specifically that the acts were committed by custodial authority.

SH testified that she masturbated the defendant in exchange for money two days before leaving Tennessee on October 24, 1991. She stated that she had no other family or friends in this state and that while here she was completely dependent on the defendant for her support. In our view, this evidence is sufficient to establish the sexual battery conviction in which SH was the victim.

The remaining eleven counts of sexual battery are related to assaults in which HH was the victim. HH testified that she lived with the defendant and was totally dependent on him to provide the necessities of life. HH specifically testified that she did not want the defendant to talk about or do things of a sexual nature after her sister arrived; in exchange for his promise, she agreed to masturbate the defendant on five separate occasions just before October 5, 1991. After SH arrived, HH touched the defendant's penis on four more occasions. There was testimony that the defendant performed oral sex on her on three other instances and that she had touched the defendant's penis on each event. In our view, this evidence was sufficient to support the defendant's convictions on the rape and sexual battery counts involving HH as the victim.

The defendant was also convicted of two counts of coercion of a witness. "A person commits [this] offense [when], by means of coercion, [he] ... attempts to influence a witness or prospective witness in an official proceeding with intent to influence the witness to ... [t]estify falsely[.]" Tenn. Code Ann. § 39-16-507(a)(1). Both HH and SH testified that after they were taken into protective custody by DHS, the defendant approached them at a skating rink on April 29, 1991, and asked them to tell the authorities that nothing had happened. The victims and other witnesses testified that the defendant made a threatening statement. Clearly, this evidence supports the defendant's convictions for coercion of two witnesses.

I

The defendant argues that the trial court erroneously admitted testimony by the physician who examined the victims. Rule 803(4), Tenn. R. Evid., provides that the following is not excluded by the rule against hearsay:

> Statements made for the purpose of medical diagnosis and treatment describing medical history; past or present

> symptoms, pain, or sensations; or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

Our supreme court addressed this issue in State v. Livingston, 907 S.W.2d 392, 396-97 (Tenn. 1995):

> The rationale for the medical diagnosis and treatment hearsay exception is that such declarations are deemed reliable because the declarant is motivated to tell the truth; that is, the declarant makes the statement for the ultimate purpose of receiving proper diagnosis and treatment. Generally, (1) the statement must be made for medical diagnosis and treatment; (2) the statement may include extensive information about symptoms, pain, or sensation; and (3) the statement is admissible only "insofar as reasonably pertinent to diagnosis and treatment."
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> The critical issue here is whether statements concerning feelings about the abuse, statements identifying the abuser, and other details not usually related to traditional medical diagnosis and treatment nevertheless fall within the scope of Rule 803(4).... In State v. Rucker, the court noted that generally "the name and identity of the perpetrator is not considered 'reasonably pertinent to diagnosis and treatment.'" However, "the name or identity of the perpetrator is 'reasonably pertinent to diagnosis and treatment' in child sexual abuse prosecutions when the perpetrator is a member of the victim's immediate household."
>
> The Rucker Court relied extensively on United States v. Renville, 779 F.2d 430 (8th Cir. 1985), the leading case on Fed. R. Evid. 803(4). While the federal rule differs from the Tennessee rule in that the federal rule admits statements if made for the purposes of medical diagnosis or treatment, in all other respects, the rules are identical. Finding that child abuse involves emotional and psychological, as well as physical, injury and that the physician has an obligation to prevent the child from being returned to the abuser, the Eighth Circuit held that statements which identify a household member as the abuser are reasonably pertinent to medical treatment or diagnosis.
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> The Eighth Circuit emphasized, however, that there must be "sufficient indicia of the declarant's proper motivation to ensure the trustworthiness of her statements to the testifying physician." Such a situation would exist where the physician "makes clear to the victim that the inquiry into the identity of the abuser is

> important to diagnosis and treatment, and the victim manifests such an understanding."
>
> We adopt the reasoning of the Rucker Court and find that statements made to a physician identifying a perpetrator who is a member of the child's household may be reasonably pertinent to proper diagnosis and treatment of emotional and psychological injury.

(Citations and footnotes omitted).

In the most recent case of State v. Carl Lee McLeod, _____ S.W.2d _____, No. 01S01-9509-CR-00170 (Tenn., at Nashville, Oct. 14, 1996), decided well after the trial in this case, our supreme court again addressed the issue. The court held that a jury out hearing should be conducted before the introduction of testimony as to diagnosis and treatment. It can be admitted "only upon an affirmative finding that the conditions described in the rule have been satisfied." McLeod, slip op. at 3. Trial courts are to consider the following:

> [T]he circumstances surrounding the making of the statement, which would include the timing of the statement and its contents. If the trial court finds that the statement was inappropriately influenced by another, the court should exclude it as not having been made for the purpose of diagnosis and treatment. The inquiry, however, will vary depending on the facts of each case. To illustrate: (1) the trial court may consider whether the child's statement was in response to suggestive or leading questions; and/or (2) the trial court may consider any other factor that may affect trustworthiness, such as a bitter custody battle or family feud.

Id. at 8 (emphasis added).

Dr. Christie Lynn, a family practitioner, examined the victims based upon a referral from the Anderson County Department of Human Services. She testified that she was "one of the identified individuals in Knoxville to perform forensic evaluations for child sexual abuse as well as child physical abuse." As part of her examinations, Dr. Lynn asked for medical histories:

> [S]he reported that the sexual perpetrator was an individual named John Burrell. She described him as being a 52 year old friend of the family [with whom the victim was staying].
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> * * *
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> She described digital, vaginal and [penile] contact with penetration. Oral, genital sexual activities, that would be both by the victim and by the perpetrator, and kissing involving the mouth and [the] b[r]east. She also described ejaculation. She recalled not being concerned about pregnancy because the alleged perpetrator had said ... he had a vasectomy....

Dr. Lynn further testified that the physical exam was consistent with the history given by HH. She recommended that HH receive counseling for her psychological injuries and that she be placed in a protective environment.

The defendant argues that Dr. Lynn is essentially a "hired" witness for the DHS and should not be allowed to testify to the hearsay evidence. He argues that Dr. Lynn never really treated the victim and, therefore, the "medical diagnosis and treatment" exception to the hearsay rule should not apply.

Although there was no suggestion of inappropriate influence, we are constrained to hold the statements were improperly admitted. In McLeod, our supreme court found that the statements made during an examination were inadmissible where the examination was for "evaluative purposes" and the examination was arranged by DHS one month after the abuse was reported. Id. at 13. "By definition, a distinction exists between statements made for diagnosis and treatment and those made for evaluation. Statements made for purposes of evaluation are less likely to be viewed as reliable in the sense that they may have been affected by the prospect of litigation." Id. at 14. There was an eight-month delay between the series of offenses and the examination here. At that point, prosecution by the state was very likely. Also, Dr. Lynn described her experience as

follows:

> My experience there is that I have been one of the identified individuals in Knoxville to perform forensic evaluations for child sexual abuse as well as child physical abuse. I'm recognized as a person capable of giving court testimony. I have been an expert witness on many occasions.

(Emphasis added). Although it is true that Dr. Lynn gave "treatment" by advising the children receive psychological counseling and not be around the defendant, Dr. Lynn's own statement suggests that she primarily performed a forensic evaluation for the purpose of gathering evidence rather than a true examination for the purpose of diagnosis and treatment.

The error in State v. James Young, the companion case to McLeod, was found to be harmless; the impact of the testimony here was, in our view, also ineffectual. Id. at 14. The victims' testimony was clear and unwavering. Dr. Lynn's statement was largely cumulative. It is unlikely that the testimony affected the outcome of the trial. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Thus the admission of the testimony was harmless.

II

The defendant next challenges the admission of the four photographs contained in exhibit 14. The defendant's brief states that "the photographs depicted the [defendant] in an apparent act of masturbation." At trial, it was established that the photos were taken by the victims in April of 1992. The defendant objected to their admission under Tenn. R. Evid. 404 based upon the fact that the indictment only covered sexual offenses through October of 1991; thus, the photos were taken outside the time frame covered by the indictment. The trial court allowed the jury to view the photographs as "material in regard to the relationship of the parties and also corroborating any testimony that it is necessary on down the line." The state

insists that the exhibits were relevant to show the nature of the relationship between the defendant and the victims and to show the appearance of the defendant.

The admissibility of photographs is generally governed by Tenn. R. Evid. 403 and State v. Banks, 564 S.W.2d 947 (Tenn. 1978). Photographs must be relevant and their probative value must outweigh any prejudicial effect. Tenn. R. Evid. 403; Banks, 564 S.W.2d at 950-51. Whether to admit the photographs would be within the discretionary authority of the trial court and would not be reversed absent a clear showing of an abuse. State v. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985). The defendant does not contest the admission of the evidence under Rule 403 and instead argues that the photographs were introduced as character evidence to show that the defendant was acting in conformity with other misconduct.

Rule 404(a), more restrictive than Rule 403 in that the former requires prejudice "substantially" outweighing the probative value, before the testimony is excluded, provides that evidence of a person's character or a trait of character is generally not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion. Subsection (b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
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> (1) The court upon request must hold a hearing outside the jury's presence;
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> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and

> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Generally, this rule is one of exclusion but there are, as stated, exceptions. See State v. Parton, 694 S.W.2d 299 (Tenn. 1985); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980); Carroll v. State, 370 S.W.2d 523 (1963); see also State v. Rickman, 876 S.W.2d 824 (Tenn. 1994)(favorably citing both Parton and Bunch). Most authorities suggest trial courts take a "restrictive approach of 404(b) ... because 'other act' evidence carries a significant potential for unfairly influencing a jury." See Neil P. Cohen, et. al., Tennessee Law of Evidence § 404.7 at 170-71 (3d ed. 1995). That best explains the traditional posture of the courts that any testimony of prior bad acts by a defendant, when used as substantive evidence of guilt of the crime on trial, is not usually permissible. Parton, 694 S.W.2d at 302-03. The general exceptions to the rule are when the evidence is offered to prove the motive of the defendant, his identity, his intent, the absence of mistake, opportunity, or as a part of a common scheme or plan. Bunch, 605 S.W.2d at 229.

On appeal, the state argues that the photographs were, in fact, admissible to show the relationship between the defendant and the victim and that their probative value substantially outweighed any potential danger of unfair prejudice.

Recently, our supreme court spoke on the dangers of admitting into evidence prior, sex-related, bad acts in the context of a child victim. This passage, perhaps, illustrates the reason for the rule:

> The general rule excluding evidence of other crimes [or acts] is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent

> propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial. Such a potential particularity exists when the conduct or acts are similar to the crimes on trial.
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> * * *
>
> [I]t is clear that the victim's testimony about other uncharged sex crimes was error.... Moreover, the prejudice resulting from [the testimony of sex crimes] outweighs its probative value....

Rickman, 876 S.W.2d at 828, 830 (emphasis added)(citations omitted). In Getz v. State, 538 A.2d 726 (Del. l988), a case cited by our supreme court in Rickman, the Delaware Supreme Court made further comment upon the rationale behind the rule:

> "[W]e are no more inclined to endorse [the assumption that a defendant's propensity for satisfying sexual needs is so unique that it is relevant to his guilt] than we are to consider previous crimes of theft as demonstrating a larcenous disposition and thus admissible to show proof of intent to commit theft on a given occasion."

Rickman, 876 S.W.2d at 829 (quoting Getz, 538 A.2d at 734) (alteration in original).

Traditionally, courts have not permitted the state to establish through acts of prior misconduct any generalized propensity on the part of a defendant to commit crimes. See, e.g., State v. Teague, 645 S.W.2d 392 (Tenn. 1983). A jury cannot be allowed to convict a defendant for bad character or any particular "disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial." Rickman, 876 S.W.2d at 828 (citing Anderson v. State, 56 S.W.2d 731 (1933)).

Here, the state attempts to distinguish Rickman on the basis that the acts depicted in the photographs are not "prior" bad acts; instead, they are acts subsequent to offenses charged in the indictment. Yet the term "prior," in our assessment, should be interpreted as prior to trial rather than prior to the offenses. The rule itself does not limit its application to "prior" acts, but rather states that it

addresses itself to "other" crimes, wrongs, or acts. See Tenn. R. Evid. 404. The real question is whether the other acts evidence which is not covered by the indictment is being offered as character evidence and, if so, whether the evidence falls within an exception to the rule of exclusion.

The trial in this case occurred prior to the decision in Rickman. Thus specific guidance on the issue was not available to the trial judge. In our view, the acts depicted in the photographs were similar enough in nature to the crimes on trial to raise concern. See generally Rickman, 876 S.W.2d at 828. The trial court cited identification as a basis for admission. The photos, however, do not appear to be related to the identification of the defendant; that was not really an issue at trial. See Tenn. R. Evid. 404. The photographs of the defendant in the act of masturbation qualified as prejudicial; in our view, part of their value to the state was to establish the defendant's disposition toward sexual perversity. The real question, however, was whether and to what extent the defendant had physical contact with the minor victims. That the victims were able to take four relatively close-range snapshots with a flash camera suggests a level of intimacy corroborative of their testimony. That the photographs could be taken without objection touched upon both the defendant's intent and the absence of any mistaken touching. The defendant had claimed accidental contact with HH; that the defendant permitted such intimate photographs months later by the same victim tends to negate that claim. On this relatively close issue, we also conclude that the probative value did outweigh the prejudice. Thus, the evidence was properly admitted.

III

Next, the defendant claims that the trial court should have stricken the testimony of HH when she invoked her fifth amendment right against self-

incrimination during cross-examination. Alternatively, he claims he should have been granted a continuance in order to gather extrinsic evidence of the witness's bias. Prior to trial, the defendant discovered that HH or someone in her household might have made unauthorized purchases on his credit card. The court denied the defendant's request for a continuance for the purpose of gathering evidence to link HH to the purchases and thereby establish possible witness's bias. See Tenn. R. Evid. 616. When asked about whether she would answer questions about the purchases, HH invoked her fifth amendment right against self-incrimination outside the presence of the jury.

The sixth amendment guarantees a criminal defendant the right to cross-examine witnesses against him. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974). The rights of confrontation and cross-examination are essential to a fair trial. See, e.g., Pointer v. Texas, 380 U.S. 400 (1965). Rule 616, Tenn. R. Evid., provides that "[a] party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Rule 611(b), Tenn. R. Evid., provides that a witness "may be cross-examined on any matter relevant to any issue in the case, including credibility."

On the other hand, trial courts have a duty to protect the fifth amendment rights of witnesses against self-incrimination. See, e.g., Alford v. United States, 282 U.S. 687 (1931). Rule 501, Tenn. R. Evid., states that "[e]xcept as otherwise provided by constitution, ... no person has a privilege to ... refuse to disclose any matter." This rule permits a witness to refuse to disclose any matter upon assertion of the right against self-incrimination.

This court has previously recognized, however, that "the right of a co-

defendant ... to exercise his Fifth Amendment privilege against self-incrimination has a greater force than the right of a mere witness to the same privilege." State v. Baker, 751 S.W.2d 154, 161 (Tenn. Crim. App. 1987). However, "where the witness which a defendant seeks to cross-examine is the prosecution's chief witness, providing the crucial link in the prosecution's case, the importance of full cross-examination is necessarily increased." State v. Horace Charles Corum and Anthony L. Holmes, No. 03C01-9301-CR-00028, slip op. at 7 (Tenn. Crim. App., at Knoxville, Nov. 15, 1993)(citing generally Davis v. Alaska, 415 U.S. 308 (1974); United States v. Nunez, 668 F.2d 1116 (10th Cir. 1981)).

Here, there is no question that the testimony of HH was essential to the state's case. The trial court was faced with a difficult decision of balancing these conflicting constitutional rights. We have previously held, however, that "where there is a conflict between the basic right of a defendant to compulsory process and the witness's right against self-incrimination, ... the right against self-incrimination is the stronger and paramount right." State v. Dicks, 615 S.W.2d 126, 129 (Tenn. 1981). We conclude that the trial court did not err by refusing to strike the victim's testimony.

We also consider whether the trial court erred by denying a continuance. At first look, the questions of possible bias appear to be proper. In United States v. Lyons, 703 F.2d 815, 819 (5th Cir. 1983), the court held as follows:

> When a prosecution witness invokes the fifth amendment after testifying on direct examination, the privilege against self-incrimination conflicts with the defendant's sixth amendment confrontation rights. The defendant is deprived of his right to inquire into the witness' credibility through cross-examination. If this impediment to cross-examination creates a "substantial danger of prejudice by depriving [the defendant] of the ability to test the truth of the witness's direct testimony," relief is warranted.

(Emphasis added).

The defendant argues he should have been granted a continuance in order to gather extrinsic evidence to show the witness's bias. The state argues that the information was irrelevant and independent of whether the victim was biased or prejudiced against the defendant. Had the record of the trial been better developed, we might have disagreed. The state prevails only because the exhibits, submitted pretrial by the defendant, never connected either of the victims to the misuse of the defendant's credit card. The transcript of the hearing on the motion for new trial was not included in the record on appeal. We must presume that any evidence presented at the hearing on the motion for new trial failed to connect the victims to the credit card fraud.

While the law is well settled that the grant or denial of a continuance rests within the sound discretion of the trial court, State v. Seals, 735 S.W.2d 849, 853 (Tenn. Crim. App. 1987), the trial court may not "abuse [that] discretion, to the prejudice of the defendant." Woods v. State, 552 S.W.2d 782, 784 (Tenn. Crim. App. 1977); Frazier v. State, 466 S.W.2d 535, 537 (Tenn. Crim. App. 1970).

In the pretrial jury-out hearing, defense counsel asked HH about "certain telephone purchases via the use of a credit card belonging to the defendant." Initially, HH indicated that she was willing to answer questions about that, saying she would waive her fifth amendment rights. After being further admonished as to her rights by the trial judge, HH changed her mind. The trial court ruled that he would allow defense counsel "to attack her credibility but not in a way that would cause her to incriminate herself." It then ruled that this was not "one of those areas that bias is available." Defense counsel sought a continuance "to

produce the extrinsic evidence referred to before trial." The state argued that the extrinsic evidence was not admissible. Exhibit 1 includes a computer printout indicating a purchase of three items ordered over a period of five days in the latter part of 1994 totaling approximately $375.00. Thereafter, there was a series of letters from a bankcard representative allowing the defendant credit, apparently for unauthorized charges in excess of $1,000.00; the letters were dated in early 1993. Shortly thereafter, the defendant asked for additional credits of $320.14 for allegedly unauthorized credit card charges.

Witness bias, as indicated, would have been a viable source for cross-examination, even if it had incriminated HH. But there is no record of any additional evidence linking HH to the purchases offered at the hearing on the motion for new trial. The defendant merely claimed that the charges arose out of a residence in Las Vegas, Nevada. He asked for the continuance, we must assume, for the purpose of establishing a connection with one of the victims.

It is the appellant's duty to file an adequate record of the proceedings in order to convey a fair, accurate and complete account of what transpired with respect to the issues presented on appeal. See State v. Hooper, 695 S.W.2d 530 (Tenn. Crim. App. 1985); State v. Jones, 623 S.W.2d 129 (Tenn. Crim. App. 1981). Without a fully developed transcript of the motion for new trial, this court must presume that the evidence supports the trial court's actions and rulings. State v. Baron, 659 S.W.2d 811, 815 (Tenn. Crim. App. 1983); State v. Taylor, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983). Without an adequate record, this court is precluded from considering the issues. Hooper, 695 S.W.2d at 537.

Because the error claimed is that the trial court improperly denied a

motion for continuance and the record does not sufficiently establish the bias, our scope of review is limited to whether the trial court abused its discretion. We cannot find that.

IV

As his next issue, the defendant claims that the trial court should have granted his motion for recusal. The defendant based his motion on the trial court's pretrial rulings; on appeal, the defendant cites the trial court's refusal to grant a continuance, the admission of exhibit 14 (photographs showing the defendant masturbating), and the denial of counsel's motion to withdraw only days before the trial was set as evidence of the trial court's bias.

Whether recusal is necessary, based upon the alleged bias or prejudice of the trial judge, rests within the discretion of the trial court. Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). A judge should grant a motion for recusal whenever his or her "impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(C); Tenn. Sup. Ct. R. 10; State v. Jimmy D. Dillingham, No. 03C01-9110-CR-00319 (Tenn. Crim. App., at Knoxville, February 3, 1993). This court will not interfere with the trial court's discretion unless clear abuse appears on the face of the record. Caruthers, 814 S.W.2d at 67.

Here, the record simply does not support the defendant's claims of bias and prejudice. The only basis for the motion to recuse was the trial court's rulings on legal issues. Even if errors had occurred in the conduct of the trial, that would not disqualify the trial judge from the case.

V

During the pendency of this appeal, the defendant filed a motion for remand, seeking a dismissal of all charges because the indictment on all counts failed to allege the requisite mens rea. The defendant relies upon the holding in State v. Roger Dale Hill, Sr., No. 01C01-9508-CC-00267 (Tenn. Crim. App., at Nashville, June 20, 1996), perm. to app. filed, Aug. 19, 1996. In Hill, our court held that an indictment that alleged the defendant "'did unlawfully sexually penetrate [M.H.] a person less than thirteen (13) years of age, in violation of Tennessee Code Annotated [§] 39-13-512'" was "fatally defective because [the indictment] does not allege that he sexually penetrated [M.H.] intentionally, knowingly, or recklessly." Hill, slip op. at 5. The defendant argues that because his indictment did not allege the mens rea, all convictions must be reversed and the charges must be dismissed. We cannot agree.

In our view, the indictment was sufficient to give the defendant notice of the charges, including notice of the mens rea. Generally, an indictment must set forth the elements of the offense. State v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992). It is settled law that "[w]hen the indictment or presentment fails to fully state the crime, all subsequent proceedings are void." Id. (citing State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979)). That all elements of the offense must be alleged is "not [a] new concept[] in Tennessee jurisprudence." Hill, slip op. at 7 (citing State v. Hughes, 371 S.W.2d 445 (Tenn. 1963); State v. Cornellison, 59 S.W.2d 514 (Tenn. 1933); State v. Smith, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980)).

Our research traces this requirement to the early 1800's. See, e.g., Whiteside v. State, 44 Tenn. 175 (1867); Peek v. State, 21 Tenn. 78 (1840); State v. Pearce, 7 Tenn. 68 (1823). The historical significance of the indictment is well

documented in the federal courts as well:

> The general ... and universal rule ... is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital.

United States v. Hess, 124 U.S. 483, 8 S. Ct. 571, 573 (1888).

Provisions of state and federal constitutions guarantee the criminally accused knowledge of "the nature and cause of the accusation." U.S. Const. amend. VI; Tenn. Const. art I, § 9. "Fair and reasonable notice of the charges against an accused is a fundamental constitutional requirement." State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996). To be sufficient, an indictment must "inform the defendant of the precise charges; ... must enable the trial court upon conviction to enter an appropriate judgment; ... and must protect [the] defendant against double jeopardy." Id. As a matter of fairness, the constitutional requirement is designed to afford the criminally accused with an adequate opportunity to prepare any defense before the trial. See, e.g., Pope v. State, 258 S.W. 775 (Tenn. 1923); Daniel v. State, 50 Tenn. 257 (1871).

Obviously, such a rigid rule can cause harsh results. At times, convictions must be set aside even though the prosecution has gained no advantage:

> At common law, even the slightest technical defect might fell an indictment. Sir Matthew Hale lamented the strictness with which indictments were viewed as "a blemish and inconvenience of the law" whereby "heinous and crying offenses escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonour of God." 2 Sir Matthew Hale, The History of the Pleas of the Crown 193 (London, E. Rider

1800)(1716).

United States v. Wydermyer, 51 F.3d 319, 324 (2d Cir. 1995).

In Wydermyer, the defendant was convicted of violations of a federal money laundering statute. Two elements of the offense had been inadvertently left out of the indictment. Six months after the verdicts were entered, the district court, sua sponte, detected the deficiencies and dismissed the charges. On direct appeal, the Second Circuit ruled that the indictments were sufficient; "[t]he scrutiny given an indictment ... depends on the timing of the defendant's objection." Id. (citing United States v. Thompson, 356 F.2d 216, 225-26 (2d Cir. 1965)). Where a challenge is made to an indictment after the verdict is rendered, "we interpret the indictment liberally in favor of sufficiency, absent any prejudice to the defendant." Id. The court observed as follows:

> [T]he courts of the United States long ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused--such a showing that the indictment is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.

Id. at 325. Few courts have embraced such a lax rule; the approach has never been utilized by the courts of this state. Other jurisdictions have found that reference to statutory provisions in the criminal code is sufficient to give the defendant notice of the charges. See, e.g., People v. Del Pilar, 576 N.Y.S.2d 346 (N.Y. 1991); State v. Petrone, 468 N.W.2d 676 (Wis. 1991); State v. Howell, 391 S.E.2d 415 (Ga. Ct. App. 1990) cited in State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993). In Marshall, however, this court specifically rejected that view. 870 S.W.2d at 537. That rejection was based upon the statutory requirement that an indictment "state the facts constituting the offense in ordinary and concise language ... in such a manner as to enable a person of common understanding to know what is intended

...." Id. (quoting Tenn. Code Ann. § 40-13-202).

In Marshall, the indictment alleged "that the defendant 'did possess, with intent to sell, a controlled substance ....'" Id. at 536. The defendant argued the indictment was fatal for failing to allege that the possession was knowing. Id. This court held that failure to specifically allege an element of the offense is not fatal "if the elements are necessarily implied from the allegations made." Id. (citing Hagner v. United States, 285 U.S. 427 (1932)). "By alleging that the defendant possessed cocaine which he intended to sell, the indictment necessarily implied that it was a knowing possession." Id. at 538. Thus, the conviction was upheld.

In Grandi v. United States, 262 F. 123 (6th Cir. 1920), which the Marshall court cited with approval, the defendant was charged with possession of stolen goods. The indictment alleged that the defendant knowingly received stolen goods but failed to specifically allege the goods were in fact stolen. The Sixth Circuit held as follows:

> There is an absence of such specific allegation. But while the count was ... technically subject to criticism, yet in view of the frame of the indictment taken as a whole, plaintiff in error could not well have been misled to his prejudice. The count fairly informed the accused of the charge against him, and sufficiently so to enable him to prepare his defense .... The charge that defendant knew the goods to have been stolen naturally implies that the goods had been in fact stolen. The verdict should not be reversed on account of a defect so obviously technical and unsubstantial.

Grandi, 262 F. at 124 (emphasis added)(citations omitted).

In Phipps v. United States, 251 F. 879 (4th Cir. 1918), the defendant was charged with conspiracy against the United States. An element of the offense, the intent to use force, was not alleged in the indictment. Id. at 880. The Fourth

Circuit held, however, that the allegation that the act was done "with the intent of engaging in armed hostility against the United States of America by attacking with force ..." was sufficient to imply the element of intent to use force. Id.

The ruling in Marshall controls here. If the offense is alleged in such a way that the defendant cannot fail to be apprised of the elements of the offense, the indictment is sufficient, notwithstanding the fact that an element may not be specifically alleged. By use of this standard, the indictments in this case are sufficient. Counts 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, and 16 all charge the defendant with sexual battery. Tenn. Code Ann. § 39-13-505:

> John Haws Burrell ... did then and there unlawfully and feloniously engage in unlawful sexual contact with [the victim], through the use of custodial authority, to wit: by having [the victim] intentionally touch the intimate parts and touch clothing covering the immediate area of the intimate parts of John Haws Burrell, for the purpose of sexual arousal and gratification in violation of TCA 39-13-505 ....

The statute defines sexual battery as the "unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the circumstances listed in § 39-13-503(a)." Tenn. Code Ann. § 39-13-505. "If the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge, or recklessness suffices to establish the culpable mental state." Tenn. Code Ann. § 39-11-301. Because the definition of sexual battery does not dispense with a mental element, the terms of Tenn. Code Ann. § 39-11-301 apply. Thus, the indictment must allege or "necessarily imply" intent, knowledge, or recklessness. In our view, the term "feloniously" necessarily implies a reckless mens rea. Historically, the word "feloniously" has meant "'[p]roceeding from an evil heart or purpose; done with the deliberate intention of committing a crime.'" Charles Gate v. State, No. 03C01-9510-CC-00313 (Tenn. Crim. App., at

Knoxville, Aug. 16, 1996)(quoting Black's Law Dictionary 617 (6th ed. 1990))(order denying a motion for post-judgment relief). "Feloniously" also means "done with the intent to commit a crime." Id. (quoting State v. Smith, 105 S.W. 68, 70 (Tenn. 1907)). Accordingly, each of the counts gave the defendant adequate notice of the charges.

Counts 15 and 17 charge that the defendant "did then and there unlawfully by means of coercion attempt to influence a prospective witness ... to testify falsely in an official proceeding, in violation of TCA 39-16-507." The definition of coercion of witnesses does not dispense with a mental state so intentionally, knowingly, or recklessly must be alleged or necessarily implied. See Tenn. Code Ann. § 39-11-301. "Attempt to influence" necessarily implies an intentional act. "Attempt" in criminal law means "[a]n intent to commit a crime coupled with an act taken toward committing the offense." Black's Law Dictionary 127 (6th ed. 1990). Accordingly, counts 15 and 17 are sufficient.

Counts 8 and 14 allege the defendant "did then and there unlawfully engage in unlawful sexual penetration of [the victim], by use of coercion, in violation of TCA 39-13-503 ...." Count 11 alleges the defendant "did then and there unlawfully engage in unlawful sexual penetration of [the victim], through the use of custodial authority, in violation of TCA 39-13-503." Rape is defined as unlawful sexual penetration of a victim by the defendant ... accompanied by any of the following circumstances: ... [f]orce or coercion is used to accomplish the act." Tenn. Code Ann. § 39-13-503(a)(1). Rape under the circumstance in subpart (1) does not dispense with a mens rea so the act must be done intentionally, knowingly, or recklessly. See Tenn. Code Ann. § 39-11-301.

Sexual penetration by coercion or the use of custodial authority necessarily implies the sexual penetration would occur intentionally or knowingly. "Coercion" means "threat of kidnaping, extortion, force or violence to be performed immediately or in the future or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age." Tenn. Code Ann. § 39-13-501(1). If one threatens a person in order to be able to sexually penetrate that person, or if one uses custodial authority to sexually penetrate that person, the penetration must be intentional. In our view, the mens rea of intent is necessarily implied in the allegation.

The judgment is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
David H. Welles, Judge

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William M. Barker, Judge