IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JULY SESSION, 1996

FILED

January 31, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9602-CC-00051
Appellee	)	
	)	SEVIER COUNTY
vs.	)	
	)	Hon. Ben W. Hooper, II, Judge
JAMES DISON,	)	
	)	(Rape of a Child)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jimmy Dison, was convicted by a Sevier County jury of raping his sister, AD, in violation of Tenn. Code Ann. § 39-13-522 (1994 Supp.).[1] The trial court imposed a sentence of twenty-five years confinement in the Tennessee Department of Correction, the maximum sentence authorized by law. Tenn. Code Ann. § 39-13-522(b); Tenn. Code Ann. § 40-35-112(a)(1) (1990). Before this court, the appellant raises the following issues:

(1) Whether the indictment was fatally defective, depriving the trial court of jurisdiction in the appellant's case;
(2) Whether the trial court erroneously permitted the introduction at trial of testimony concerning incidents of sexual abuse other than the incident alleged in the indictment;
(3) Whether the trial court erroneously denied the appellant's motion to dismiss the indictment or, alternatively, continue the trial date due to the inability of defense counsel to interview the State's witnesses, AD and Chris Dison;
(4) Whether the trial court erroneously denied defense counsel access to the records of the Department of Human Services (DHS) and erroneously refused to conduct an in camera inspection of the records in search of exculpatory material;
(5) Whether the trial court erroneously refused to permit the appellant to introduce the testimony of a pharmacist concerning methadone or, alternatively, introduce a "drug monograph," describing the characteristics of methadone;
(6) Whether the trial court erroneously permitted the introduction at trial of "fresh complaint" testimony;
(7) Whether the appellant's sentence is excessive.

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

I. Factual Background

On February 8, 1995, the Sevier County Grand Jury returned an indictment, charging the appellant with rape of a child. Tenn. Code Ann. § 39-

[1] As a matter of policy, this court does not name minors who are victims of sexual abuse. See State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989). The record reflects that the victim, AD, was eight years old at the time of the instant offense.

13-522. The indictment alleged that the appellant, "on the --- day of July, 1994, ... did unlawfully, have sexual penetration of [AD], a child of less then [sic] thirteen (13) years of age ... ." On August 22, 1995, the appellant's case proceeded to trial. At trial, the State adduced the following testimony. AD testified that, at the time of the instant offense, she was living on Jay Ell Road in Sevierville with her mother, father, and three brothers named Jimmy, Jeremy, and Chris. The appellant, Jimmy Dison, is the victim's oldest brother. Both her mother and father worked at Ruby Tuesday's in Gatlinburg, leaving AD at home in the care of the appellant. On the occasion of the charged sexual abuse, AD was at home with her brothers, Jimmy and Chris. On this day, AD's father was not working due to an injury he had suffered at work. However, at the time of the rape, he was driving AD's mother to work. AD and Chris were in the living room, watching television, and Jimmy was in their parents' bedroom. Jimmy asked AD to come to their parents' room. When she entered the room, the appellant shut and blockaded the door. The appellant then moved onto the bed, underneath the blankets. He instructed AD to join him on the bed and proceeded to force AD to perform oral sex on him. At trial, AD recounted, "White stuff came out of his wiener."

Following oral intercourse, AD went to the bathroom and rinsed out her mouth. While she was in the bathroom, her brother, Chris, entered the room. He asked her what she was spitting into the sink. She informed him that it was "come," and described what had happened. The appellant then directed AD to return to their parents' room. AD explained that she returned to the room, because she was afraid of the appellant. In the room, the appellant told AD to remove her clothing and, again, join him on the bed. AD testified, "Then he stuck his wiener up in me ... [and] told me to go up and down." At some point, AD asked the appellant to stop, but the appellant did not respond. AD stated that the penile intercourse was painful, and she cried.

The appellant subsequently informed AD that, if she reported his actions, "he would stick it in all the way." Nevertheless, AD attempted to tell her mother what the appellant had done, but her mother did not believe her. She also told her babysitter, Tanya Humphrey, what had happened. Apparently, Ms. Humphrey reported the incident to the Department of Human Services (DHS), as, soon thereafter, AD was interviewed by DHS and, again, recounted her experience. She was examined by Dr. Philip Stanley, in whom she also confided.

On cross-examination, AD testified that, on Fridays, Saturdays, and some Sundays, she would stay at Tanya Humphrey's home while her parents worked at a card shop at a local mall. Moreover, during the week, the appellant would occasionally visit his girlfriend, leaving AD with Ms. Humphrey for several hours. Occasionally, AD spent the night at Ms. Humphrey's residence. Ms. Humphrey lived with her daughter and her boyfriend. Her son, who was approximately twelve or thirteen years old, would also visit.

AD additionally revealed that, when AD was feeling ill, Ms. Humphrey would give her medicine that she had obtained in Knoxville. According to AD, "[s]ome of [the pills] were white and some of them were yellow and red." Ms. Humphrey also gave AD a "very, very, very dark pink" substance that she referred to as Pepto-Bismol. This substance was not contained in a Pepto-Bismol bottle and made AD feel drowsy. After ingesting the medicine, AD would sleep for three or four hours. When she awoke, AD would discover that her underwear had been removed or changed. AD denied that anybody, to her knowledge, had sexually molested her at Ms. Humphrey's home. Finally, AD testified that, after she informed Ms. Humphrey about her brother's actions, the babysitter told AD that her father had sexually molested her when she was a child. However, AD denied that Tanya ever told her what to say when

interviewed by DHS.

Chris Dison also testified. Chris recalled the occasion recounted by his sister, AD. He testified that, on that occasion, he, AD, and their oldest brother Jimmy were at home. Jimmy was supervising both Chris and AD. Jimmy asked AD to accompany him into their parents' room and instructed Chris to remain in the living room watching television. Chris subsequently heard his sister crying and attempted to enter the bedroom. However, according to Chris, something was blocking the door. He returned to the living room and continued watching television. He then heard his sister exit the bedroom and enter the bathroom. He went to the bathroom and observed AD "spitting out white stuff, gooey white stuff." When he asked AD what had happened, AD responded that the appellant "was having sex with her and made her suck his penis." When Chris confronted his brother, the appellant threatened to hit Chris if he told anyone what the appellant had done. Nevertheless, Chris attempted to tell his mother what had happened. His mother did not believe him. He then told his father. However, DHS was only contacted when AD informed Ms. Humphrey of the incident.

On cross-examination, Chris testified that, during the summer of 1994, the appellant was rarely alone with Chris and AD. He also confirmed that, occasionally, Ms. Humphrey baby-sat both him and AD and that she gave both him and AD pills which would cause them to sleep. Chris affirmed that Ms. Humphrey recounted to the children in some detail her experience of sexual abuse by her father.

Dr. Philip B. Stanley, a pediatrician, testified that, on August 3, 1994, he examined the victim, AD. He stated that he "performed a full physical exam on [AD] and during that physical exam, particularly dealing with her genital area, [he] noticed that she had absence of her hymen and a scar tissue located in the

hymenal vault area." Dr. Stanley opined that only sexual intercourse could have caused the absence of the hymen. Similarly, the scar tissue indicated "[trauma] meaning from a penis being inserted in [the hymenal vault area]." Dr. Stanley stated that the victim had informed him that the appellant, Jimmy Dison, had engaged in intercourse with her. AD also informed the doctor that "she had to perform oral sex for [the appellant] on numerous occasions."

The appellant testified. He stated that, during July of 1994, he was employed at the Pizza Hut in Sevierville. He worked every day, except Wednesday and Sunday, from 5:00 p.m. until between I:00 a.m. and 2:30 a.m. in the morning. On his days off, he would visit his girlfriend. He could not recall being at home alone with AD and Chris during the month of July, 1994, as, that summer, his father did not work during the week. Additionally, on weekends, while his father and mother worked at the card shop, AD and Chris stayed with the babysitter, Tanya Humphrey. The appellant conceded that he did occasionally baby-sit his siblings, but he denied ever molesting his sister.

Jeremy Dison testified. He stated that he could only recall one occasion in July of 1994 on which the appellant was at home alone with him, Chris, and AD. According to Jeremy, on that day, the appellant slept all morning until their mother returned home. With respect to Ms. Humphrey, Jeremy testified that he had observed her administering medication to Chris and AD while baby-sitting the Dison children:

> They were various different pills. There was big blue pills the size of quarters and there was white pills looked like horse pills; there was Valium, I know she gave them Valium, but a whole slew kinds of pills.

Jeremy further testified that Ms. Humphrey was a recovering heroin addict and traveled to Knoxville every other day to obtain Methadone. She kept the Methadone, which was orange, in the refrigerator at her home. Jeremy asserted

that she gave AD and Chris Methadone when they experienced headaches or stomachaches. Jeremy testified that he accompanied Ms. Humphrey to Knoxville several times. During these trips, AD and Chris were left at Ms. Humphrey's home, either alone or in the care of Ms. Humphrey's daughter.

Jeremy further asserted that, following the initiation of an investigation by DHS, AD indicated to her family that she had been molested by someone other than her brother. AD also stated that she had dreamed that her brother had molested her. On cross-examination, Jeremy conceded that, when AD made these statements, he, his grandmother, and his parents were attempting to tape AD's statements in order to assist the appellant's defense. Moreover, at the time of these statements, the appellant was in the yard outside the Dison home. Jeremy admitted that neither he nor any other member of his family informed DHS of AD's statements, but alleged that DHS refused to schedule an appointment with the appellant's family. He did testify that, when interviewed by Angela Johnson, from DHS, he informed Ms. Johnson that AD had told her family various, different stories concerning her experience of sexual abuse. However, a transcript of the interview did not support this testimony. Moreover, Jeremy testified that he did not mention his allegations concerning Ms. Humphrey to Ms. Johnson. Finally, during the interview with Ms. Johnson, Jeremy suggested that his sister's allegations were the result of watching cable television.

Cora Stanton, the appellant's grandmother testified on behalf of the appellant. She stated that she had known the appellant his entire life and that the appellant lived with her for a time following his sister's allegations. She asserted that the appellant is "more honest than most." She further testified:

> Well, we were sitting on the couch one day, Jeremy and [AD] and myself. And I said [AD], did Jimmy really do that. She said I don't think so. I dreamed. I said well, the dream was not the same thing, [AD]. She said, I know, but Tanya give me a pill, I went to

> sleep. I dreamed somebody was doing something to me and when I woke up I didn't have any panties on. Tanya said it was Jimmy.

Ms. Stanton conceded that, after the initiation of an investigation, in violation of a court order, she brought the appellant two times to the Dison home where AD and Chris were staying. She asserted, however, that the appellant remained outside on both occasions. The record reflects that, due in part to these violations, AD and Chris were removed from the Dison home.

Tracy Proffitt, a DHS foster care worker assigned to AD and Chris, testified that these children currently reside at the Church of God Home for Children. She stated that defense counsel contacted her, attempting to schedule an interview with the children. After speaking with her supervisor, she informed defense counsel that he would have to speak with DHS Legal Services. Lana Riddick, the DHS Social Service Supervisor for Sevier County, testified that she decided to refuse defense counsel access to the children. She was aware that the children had already been interviewed by the Public Defender's office. She was also aware that the children had testified in juvenile court and had been cross-examined by an attorney from the Public Defender's office.

Angela Johnson, a DHS Social Counselor, testified that she was the primary investigator in this case and conducted the initial interview of the victim. She testified that, in interviewing AD, she did not ask leading questions. Rather, AD first brought up her brother's name and the topic of "bad touches." Ms. Johnson also spoke with Chris Dison. Again, Chris first broached the topic of his sister's sexual abuse.

At the conclusion of the proof, the State elected to proceed with respect to the allegation of penile intercourse. After deliberating for twenty-five minutes, the jury returned a guilty verdict. On September 29, 1995, the trial court conducted a sentencing hearing. In imposing a sentence of twenty-five years incarceration,

the trial court considered general principles of sentencing. Specifically, he noted evidence in the record that the incident of sexual abuse for which the appellant was convicted was not an isolated event. Tenn. Code Ann. § 40-35-103(1)(A) (1990); Tenn. Code Ann. § 40-35-102(3)(B) (1994 Supp.). He further remarked upon the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B) and 40-35-102(1), and the lack of any potential for rehabilitation, Tenn. Code Ann. § 40-35-103(5). The court proceeded to apply the following enhancement factors:

(1) the appellant has a previous history of criminal behavior in addition to that necessary to establish the appropriate range; Tenn. Code Ann. § 40-35-114(1) (1994 Supp.);
(6) the personal injuries inflicted upon the victim were particularly great, Tenn. Code Ann. § 40-35-114(6);
(7) the offense involved a victim and was committed to gratify the appellant's desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114(7);
(15) the appellant abused a position of private trust, Tenn. Code Ann. § 40-35-114(15).

The court found one mitigating factor, the appellant's lack of a criminal record, Tenn. Code Ann. §40-35-113(13)(1990), but afforded the factor very little weight in light of the evidence that the appellant's offense in the instant case was not an isolated event.

II. Analysis

a. The Indictment

The appellant first contends that, because the indictment fails to state the requisite mens rea for the crime of rape of a child, the instrument is fatally defective. Accordingly, the appellant argues that the trial court was without jurisdiction and all proceedings flowing from the indictment are void. State v. Hill, No. 01C01-9508-CC-00267 (Tenn. Crim. App. at Nashville, June 20, 1996). The State contends that, because the appellant raises this issue for the first time on

appeal, he has waived any objection to the indictment. Moreover, the State asserts that, because the statutory definition of rape of a child fails to define a mental state,[2] the indictment fully comports with both constitutional and statutory requirements.

The issue raised by the appellant was first encountered following the enactment of the Criminal Code of 1989 in the case of State v. Perkinson, 867 S.W.2d 1, 6 (Tenn. Crim. App. 1992). Other decisions have followed; the most recent being Hill, No. 01C01-9508-CC-00267. Because the crux of this issue is the sufficiency of the indictment, we begin our examination with an overview of the constitutional and statutory requirements of a charging instrument and, generally, the requirement of culpability.

i. Requirements of the Charging Instrument

The Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Tennessee Constitution, in addition to general principles of due process, guarantee the accused knowledge of the "nature and cause of the accusation." See Perkinson, 867 S.W.2d at 5; State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979) (citing DeJonge v. Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 259 (1937)). Obviously, a charging instrument which does not state an offense does not give the accused adequate notice, and the charge will not support a judgment of conviction. Moreover, the conviction will be subject to challenge at any time. Tenn. R. Crim. P. 12(b)(2).[3]

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[2]As originally enacted, Title 39 of the Criminal Code of 1989 contained eighty-seven crimes which specify no mental element. Moreover, numerous criminal offenses found outside Title 39 contain no mental element.

[3]Tenn. R. Crim. P. 12(b)(2) provides:
(b) Pretrial Motions. --- Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial:

(2) Defenses and objections based on defects in the indictment, presentment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings) . . .

In other words, in order to comply with constitutional guidelines, an indictment must provide notice of the offense charged, adequate grounds upon which a proper judgment may be entered, and suitable protection against double jeopardy. Perkinson, 867 S.W.2d at 5. See also Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 419 (1931) (citations omitted) ("[t]he true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'"). In the context of these constitutional guarantees, our supreme court has observed that the legislature may prescribe the form in which the crime shall be charged, provided the indictment states the nature and cause of the accusation. Tipton v. State, 28 S.W.2d 635, 636-637 (Tenn. 1930). Thus, echoing constitutional guarantees, Tenn. Code Ann. § 40-13-202 (1990) provides:

> The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment.

(Emphasis added).

ii. Culpability

The issue is, therefore, whether the requisite mental state is a "fact constituting the offense" which must be alleged in the indictment in order to provide the accused constitutionally adequate notice. Our criminal code is, in large part, an adoption of the American Law Institute's Model Penal Code.[4] The

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(Emphasis added).

[4]Model Penal Code Section 2.02. (1) Minimum Requirements of culpability. Except as provided in Section 2.05 [strict liability offenses]. A person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each

following provisions relating to the requirement of culpability are found in our code. "No person may be convicted of an offense unless each of the following is proven beyond a reasonable doubt . . . (3) the culpable mental state required ... ." Tenn. Code Ann. § 39-11-201(a)(2)(1991). "A culpable mental state is required within this title unless the definition of an offense plainly dispenses with a mental element." Tenn. Code Ann. § 39-11-301(b)(1991). "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(c).[5]

Thus, it is indisputable from a reading of these provisions that, excepting offenses of strict liability, some element of mental culpability must be proven at trial. Otherwise, no conviction may be obtained. However, we distinguish between that which must be proven at trial and that which must be alleged in the indictment. In other words, the requirement that some mental state be proven at trial, even if not explicitly included in the definition of the offense, does not resolve the question of whether this element must be alleged in the indictment.

iii. Material Element

Generally, an indictment must allege the material elements of an offense. 2 Charles Torcia, Wharton's Criminal Procedure § 235 at 59 (13th ed. 1990). Thus, we must determine if culpability constitutes a "material element." Again, the touchstone is constitutionally adequate notice to the accused. The authors of the Model Penal Code opined that "the material elements of offenses are

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material element of the offense. (3) When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

[5]In addition to these requirements, a stated general objective of the Criminal Code is to "(2) give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the Act and the culpable mental state which together constitute an offense." Tenn. Code Ann. § 39-11-101(2)(1991).

those characteristics (conduct, circumstances, result) of the actor's behavior that, when combined with the appropriate level of culpability, will constitute the offense." Comment, MODEL PENAL CODE §2.02, Footnote 1 (emphasis added). The authors of the Model Penal Code thereby suggest that culpability is not a material element of an offense, although, at common law, "scienter" was a necessary element in the indictment of every crime. 41 Am.Jur.2d Indictments and Information § 126 (1995). "However, the common-law rule has been modified as to statutory offenses. In modern practice, it is unnecessary to charge guilty knowledge unless that is a part of the statutory definition of the offense ... ." Id. (emphasis added).

Courts have frequently explained or justified this modern practice by finding that crimes for which legislatures have omitted the requisite mental state are "general intent" crimes. United States v. Garrett, 984 F.2d 1402, 1415 (5th Cir. 1993); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972) (because scienter requirement implied in the relevant statute was something less than specific intent, the indictment did not have to allege that element; it was sufficient that the prosecution prove it and the jury be charged that finding it was essential to the conviction). See also People v. Thompson, 466 N.E.2d 380, 384-387 (Ill. App. 2 Dist. 1984).[6] In contrast, where the legislature explicitly included the mental state in the definition of an arguably "general intent" crime, i.e., one requiring "knowledge," at least one court has concluded that an indictment omitting the mental state would have been inadequate pursuant to the Sixth Amendment to the United States had not the very conduct alleged necessarily

[6]Generally, but not always, if a definition of a crime consists only of the description of the act and omits any reference to the defendant's intent, the intent is general and the only proof necessary at trial is whether the defendant intended to commit the proscribed act. Harrell v. State, 593 S.W.2d 664, 670 (Tenn. Crim. App. 1979) (citing State v. Bitting, 162 Conn. 1, 291 A.2d 240, 242 (1971); People v. Norris, 88 Cal. App. 3d Supp. 32, 37, 152 Cal. Rptr. 134, 137 (1978)). However, if the definition requires any intent other than the intent to do the deed constituting the *actus reus* of the particular crime, such as an intent to achieve some additional consequence or to commit some further act, the additional language makes the crime one requiring specific intent. State v. Wilson, 924 S.W.2d 648, 650 (Tenn. 1996) (citing R. Perkins, Criminal Law 751 (1969)); see also Harrell, 593 S.W.2d at 670. Generally, the mental state of "intent" corresponds loosely with the common law concept of specific intent, while "knowledge" and lesser mental states correspond loosely with the concept of general intent. See, e.g., State v. Ayer, 612 A.2d 923, 925 (N.H. 1992) (citing United States v. Bailey, 444 U.S. 394, 405, 100 S.Ct. 624, 632 (1980)) (utilizing the distinction despite the derivation from the Model Penal Code of statutory culpable mental states set forth in the New Hampshire statute).

implied the requisite mental state. People v. Shelton, 248 N.E.2d 65, 67-68 (Ill. 1969).[7] The distinguishing factor is the legislature's choice of a mental state from a range of culpability. Where the entire range is applicable, an indictment that merely alleges the criminal conduct is constitutionally sufficient.

Tennessee has generally abandoned the distinction between general and specific intent. Sentencing Commission Comments. Tenn. Code Ann. § 39-11-301. The designation is no longer required as its application is now, in effect, statutorily imposed. As the drafters of the Illinois Criminal Code remarked, "Reference to 'general intent' crimes seems unnecessary, if the definition of a particular offense describes accurately the mental state involved - a specific intent if that is appropriate, or [a general intent, i.e.,] the knowledge of specified facts or of the natural consequences of described acts." See Committee Comments, 720 Ill. Comp. Stat. Ann. 5/4-3 (West 1993).

However, Tenn. Code Ann. § 39-13-522 defines the offense of rape of a child as "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age." This statute does not define a mental state. Thus, pursuant to Tenn. Code Ann. § 39-11-301(c), the mental element is satisfied if the proof shows that the defendant committed the proscribed act with intent, knowledge, or recklessness. We conclude that, under these circumstances, an indictment which merely alleges the criminal conduct provides sufficient notice to the accused. In other words, the mens rea requirement, omitted from a statutory definition, need not be alleged in the charging instrument.

iv. Decisions of Model Penal Code States

[7]We note that, in drafting an indictment, the State may charge the offense in the language of the statute or may set out the facts which constitute the offense.

The Model Penal Code has also served as the framework for numerous other sister states' revised criminal codes. In construing our criminal code, we are not confined to our own judicial decisions, but may look to the decisions of other jurisdictions, which have adopted the Model Penal Code, to promote justice and to effect the objectives of our code. Tenn. Code Ann. § 39-11-104(1991). An examination of the decisions in other jurisdictions, which have adopted the Model Penal Code, supports this court's conclusion in the instant case.

In People v. Thompson, 466 N.E.2d at 384-387, the appellate court of Illinois held that a charge of armed robbery was sufficient to withstand a motion to dismiss notwithstanding the absence of a mental state in the charging instrument. The court in Thompson concluded that, because no particular mental state was included in the definition of armed robbery, none need be alleged in the indictment. Id. We note the similarities in the Illinois and Tennessee criminal code provisions and the similarities of the issues raised in Thompson and the case before us. Illinois criminal procedure requires in pertinent part that: "(a) [a] charge shall be in writing and allege the commission of an offense by (3) 'setting forth the nature and elements of the offense charged.'" 725 Ill. Comp. Stat. Ann. 5/111-3 (West 1993). Moreover, culpability requirements in the Illinois Criminal Code provide in pertinent part: "(a) A person is not guilty of an offense, . . . unless . . . he acts while having one of the mental states described in sections 4-4 through 4-7." 720 Ill. Comp. Stat. Ann. 5/4-3. Similar to our criminal code, the Illinois Code delineates four levels of culpability: intentional, knowing, reckless and negligent. 720 Ill. Comp. Stat. Ann. 5/4-4, 4-5, 4-6, 4-7 (West 1993).

In Thompson, as in the instant case, the appellant argued that one of the mental states, i.e., intentional, knowing, or reckless, must be alleged in the

indictment, otherwise, it is fatally defective. In reviewing the appellant's contentions in Thompson, the court noted that the appellate courts of Illinois have repeatedly held that a charge is sufficient "if the indictment or information sufficiently states the necessary elements of the offense so that by the language used, the defendant is apprised with reasonable certainty of the precise offenses of which he is charged." 466 N.E.2d at 386. The purpose of the requirements of Chapter 725 Section 111-3, drawn pursuant to due process principles, is to make certain that the accused will be adequately informed of the nature and elements of the offense charged against him, so that he may be able to prepare his defense and protect himself from double jeopardy by subsequent prosecutions for the same offense. Id.

In light of these principles, the court in Thompson concluded that the indictment was sufficient, noting that the Illinois armed robbery statute fails to set forth a specific intent element "and the [Illinois] supreme court has reaffirmed what it considered was a matter of legislative prerogative as construed by a line of prior Illinois cases, to wit: that robbery is a general intent crime." Id. Numerous other Illinois appellate decisions follow this reasoning. See People v. Leonard, 526 N.E.2d 397 (Ill. App. 2 Dist.), perm. to appeal denied, 535 N.E.2d 407 (Ill. 1988), cert. denied, 490 U.S. 1008, 109 S.Ct. 1647 (1989) (the Illinois court held that an indictment was not defective for failure to allege a defendant's mental state, when the statute defining the offense charged did not include a specific mental state; the court observed that the crime of aggravated criminal sexual assault - aggravated rape - is a general intent crime and does not require the allegation of a specific mental state). See also People v. Wilder, 579 N.E.2d 948, 949-951 (Ill. App. 1 Dist. 1991) (citing with approval the holding in Leonard).

v. Conclusion

Accordingly, the appellant's argument, that the indictment charging him with the rape of a child is fatally defective, must fail. We conclude that failure to allege a mental state in the indictment in the instant case is not error. When the legislature neglects to include the requisite mental state in the definition of an offense, permitting the application of any one of three mental states set forth in Tenn. Code Ann. § 39-11-301(c), an allegation of criminal conduct will provide the accused constitutionally adequate notice of the facts constituting the offense. Moreover, since, under these circumstances, the appellant's culpability is not an essential element of the offense, the appellant's challenge is not jurisdictional in nature, i.e. a defect that renders the indictment void. Contra Perkinson, 867 S.W.2d at 1; Hill, No. 01C01-9508-CC-00267. Thus, any objection to the omission of the requisite mental state for an offense to which §39-11-301(c) applies must be raised pre-trial or, otherwise, is waived. See Tenn. R. Crim. P. 12(b)(2).

b. Evidence of Other Crimes

The appellant also asserts that the trial court erroneously declined to declare a mistrial following the introduction of evidence concerning numerous incidents of child rape. The appellant specifically cites the remarks of the prosecutor during his opening statement and the testimony of AD, both describing the incident of oral intercourse that immediately preceded the penile intercourse for which the appellant was convicted. Moreover, the appellant points to Dr. Stanley's vague reference at trial to "numerous occasions" of oral intercourse.

The entry of a mistrial is appropriate when the trial of an accused cannot continue, or, if the trial does continue, a miscarriage of justice will occur. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). In other words, a mistrial will be declared in a criminal case only

when there is a "manifest necessity" requiring such action by the trial judge. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). Whether an occurrence during the course of a trial warrants the entry of a mistrial is a matter which addresses itself to the sound discretion of the trial court, and this court will not interfere absent clear abuse appearing on the face of the record. McPherson, 882 S.W.2d at 370.

Initially, the evidence concerning the incident of oral intercourse which occurred during the time charged in the indictment was admissible pursuant to our supreme court's decision in State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994)(the supreme court reaffirmed the rule announced in State v. Shelton, 851 S.W.2d 134 (Tenn. 1993), and State v. Brown, 762 S.W.2d 135 (Tenn. 1988), which admits evidence of other sex crimes when an indictment is not time specific and when the evidence relates to sex crimes that allegedly occurred during the time charged in the indictment). See also State v. Woodcock, 922 S.W.2d 904, 911 n. 4 (Tenn. Crim. App. 1995). Moreover, the State made the requisite election of offenses, choosing to proceed on the basis of evidence establishing penile intercourse. See State v. Hoyt, 928 S.W.2d 935, 947 (Tenn. Crim. App. 1995)("the introduction of other incidents of sexual crimes occurring within the indicted period requires an election of offenses").

However, with respect to Dr. Stanley's testimony, it is unclear when the alleged acts of oral intercourse occurred. Thus, the evidence possibly lies outside the confines of the narrow exception to Tenn. R. Evid. 404(b) enunciated in Rickman. Id. ("the introduction of other sexual crimes outside the indicted period ... requires compliance with 404(b) procedures"). Indeed, the State concedes in its brief that the admission of Dr. Stanley's testimony was error

under Rule 404(b).[8]

Nevertheless, there is no indication that the State intended or anticipated that the witness, in responding to the State's question, would refer to "numerous occasions" of oral intercourse. See State v. Smith, 755 S.W.2d 757, 766 (Tenn. 1988), overruled on other grounds, State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).[9] Indeed, the prosecutor indicated to the court that he had previously discussed with Dr. Stanley the limitations on his testimony. Accordingly, there was no opportunity for a jury-out hearing to determine the admissibility of this evidence prior to its presentation to the jury. Moreover, following the introduction of Dr. Stanley's testimony, when the trial court denied the appellant's motion for a mistrial, the appellant should have requested a curative instruction. McPherson, 882 S.W.2d at 371. "[A]n accused is not entitled to relief when he fails 'to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.'" Id. (citing Tenn. R. App. P. 36(a)). Finally, having reviewed the record, including the prosecutor's remarks during closing argument,[10] we are unable to conclude that the admission of Dr.

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[8]The appellant does not contend that Dr. Stanley's testimony was inadmissible hearsay under Tenn. R. Evid. 802. Moreover, the State correctly notes that the doctor's testimony qualifies under Tenn. R. Evid. 803(4) as a statement made for the purposes of medical treatment and diagnosis.

[9]The prosecutor and Dr. Stanley engaged in the following exchange:

Prosecutor:	Alright [sic], sir. In getting a history from little [AD] did she tell you about any oral sex?
Dr. Stanley:	Yes, she did.
Prosecutor:	What kind of oral sex did she tell you happened?
Dr. Stanley:	She said she had to perform oral sex for Jimmy on numerous occasions.

[10]The prosecutor prefaced his closing argument with the following statements:

> As we told you at the very beginning, this defendant is charged in one count, with one charge. ... Because of the one charge, we have to, the State has to elect which offense we're asking the jury to return a verdict on. And the Court will instruct you and I'm telling you that ... what I'm asking you to find him guilty of beyond a reasonable doubt unanimously is that he inserted his penis up into this little girl's vagina. ...
>
> Also, I want to remind you and tell you that what we're trying here today is the one charge that occurred in July of 1994. You're not to speculate whether or not there's other things that occurred with this little girl and this defendant before this one incident that she told you about. The fact that she did or didn't tell about others, you're not to put any weight one way or the other in that. Because we're restricted by the Indictment to talk about this one time in July of 1994 and all of you all follow me on that and let me get that out of the way.

Stanley's statement "more probably than not affected the judgment" in this case. Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). See Woodcock, 922 S.W.2d at 911-912 (court applied harmless error analysis). Thus, we cannot say that the trial court abused its discretion in denying the appellant's motion for a mistrial.

c. The Inability of Defense Counsel to Interview AD and Chris Dison

The appellant next contends that the trial court should have dismissed the indictment, as DHS denied defense counsel access to the victim and her brother prior to trial. Alternatively, the appellant argues that the trial court should have granted him a continuance in order to allow defense counsel the opportunity to interview the witnesses. The State contends that the appellant waived this issue when defense counsel failed to adequately pursue the resolution of his motions prior to trial. Tenn. R. App. P. 36(a). Moreover, the State asserts that defense counsel had limited access to the witnesses prior to trial and, in any event, the appellant is unable to demonstrate any prejudice flowing from DHS's actions.

On July 31, 1995, defense counsel filed a motion requesting access to the witnesses, AD and Chris Dison. On August 17, 1995, counsel filed a motion to dismiss the indictment due to his inability to obtain access to those witnesses. On August 22, 1995, the appellant's case proceeded to trial, and defense counsel again raised the aforementioned motions. Counsel stated:

> I began trying to interview [AD], the alleged victim in this case, and her brother, [Chris Dison], some months ago, by starting with their place of residence at the Church of God Home for Children. I was referred from there to the Department of Human Services, Tracy Profitt.
>
> Tracy Profitt indicated to me that she would have to check with her supervisor. She did that. In the meantime I talked with [the prosecutor]. He said that he would talk with DHS.
>
> About the same day [the prosecutor] got to me and said they don't want you talking to her, I called Tracy Proffitt, she said you'll have to talk with our legal counsel, Ms. Sponholtz. I called Ms. Sponholtz. She said you're not to be talking with these children. As their custodian we can withhold consent.

Defense counsel then filed an affidavit containing the information he had imparted to the court.

> The trial court denied the appellant's motions:
>
> [L]et me overrule your Motion for the reason that it comes too late. I realize that it's been filed for some time, both Motions ... .
>
> It's not the filing of the Motion, it's pursuing the Motion after filing that's the problem. Because it may very well have been had this been brought to my attention at some [earlier] time ... then I may very well have acted favorably in ordering the DHS or whoever to have allowed you to interview these witnesses.[11]

Additionally, the State and defense counsel stipulated that, some months prior to trial, an assistant public defender did interview both AD and Chris Dison in his office, unencumbered by the presence of any representative of the State. Defense counsel further stated that the interview was approximately five minutes long, and the assistant public defender who conducted the interview could not recall any information that he obtained from the witnesses. The parties further stipulated that both witnesses testified at the appellant's transfer hearing in Juvenile Court. The appellant was represented by the Public Defender's Office, and his attorney cross-examined both witnesses. Finally, the State provided appellant's trial counsel, the public defender, with a recording of the transfer hearing which included all of AD's testimony and much of Chris Dison's testimony.

> Initially, Tenn. R. Crim. P. 12(e) provides:
>
> A motion made before trial shall be determined before trial unless the court , for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict ... .

This court has held that the phrase "before trial" means sometime earlier than

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[11]The trial court also denied the following motions, presented by defense counsel at trial: appellant's motion to prohibit AD and Chris Dison from testifying at trial; the appellant's motion asking that the court advise the witnesses of their rights and responsibilities with respect to communicating with defense counsel; and the appellant's motion for a continuance in order to allow defense counsel to seek an interlocutory appeal.

the day the trial is to commence. State v. Aucoin, 756 S.W.2d 705, 709 (Tenn. Crim. App. 1988). Thus, "[w]hen the defendant fails to bring a motion to the attention of the trial judge and have the trial judge rule upon the motion prior to trial, the defendant waives the issues raised in the motion. Id.; State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. at Jackson, October 20, 1993); State v. Lee, No. 03C01-9410-CR-00393 (Tenn. Crim. App. at Nashville, July 6, 1995). See also State v. Estes, 655 S.W.2d 179, 181-182 (Tenn. Crim. App. 1983)(this court, citing Tenn. R. App. P. 36(a), required that defense counsel pursue, prior to trial, the resolution of matters raised prior to trial in order to avoid waiver). Accordingly, the appellant has waived this issue.

In any event, the appellant's argument is without merit. The appellant relies upon State v. Hunt, No. 6 (Tenn. Crim. App. at Jackson, March 29, 1989), in support of his position that the trial court should have dismissed the indictment or, alternatively, should have granted the appellant a continuance in order that defense counsel receive an opportunity to interview AD and Chris Dison. In Hunt, the appellant argued that the District Attorney General and DHS denied defense counsel access to the minor victim, violating his right to such access under Article I, Section 9 of the Tennessee Constitution.[12] This court opined that "it is indeed unfortunate if either side in a criminal case should arrogate 'control' over access to witnesses. For no matter how loud the clamor otherwise, no witness 'belongs' to either side, and this Court will redress such arrogation upon a proper record." However, in addition to finding that the appellant had waived the issue pursuant to Tenn. R. App. P. 36(a), this court also concluded that the appellant's contention must fail for the following reasons:

1) Article 1, § 9, of the Tennessee Constitution does not mandate that defense counsel be provided the opportunity to interview any witness prior to trial;
2) Defendant cannot establish even a colorable rights

[12]Article I, Section 9 of the Tennessee Constitution provides "[t]hat in all criminal prosections, the accused hath the right to be heard by himself and his counsel ... ."

violation (right to counsel) under art. 1, § 9, without first showing that the State of Tennessee, acting through any person connected to the case or to the defendant, wrongly blocked the interview. Even then, we think the defendant should also demonstrate that such conduct prejudicially affected his defense;

3) A witness, under ordinary circumstances, may alone decide by whom to be interviewed.

Tennessee case law gives the prospective witness the option of refusing to communicate with counsel on either side of a case. State v. Singleton, 853 S.W.2d 490, 493 (Tenn. 1993). In other words,

> The right of an accused to interview a victim 'exists coequally with the witness' right to refuse to say anything.' Consequently, the victim of a crime who testifies for the State has an absolute right to refuse to be interviewed by defense counsel. When this occurs, the accused's right to access to prosecution witnesses is not violated.

Hall v. State, No. 01C01-9109-CC-00269 (Tenn. Crim. App. at Nashville, February 28, 1992)(citations omitted). Moreover, the legal custodian of a minor victim has an absolute right to refuse defense counsel's request to interview the minor victim. State v. Barone, No. 01C01-9008-CR-00196 (Tenn. Crim. App. at Nashville, October 2, 1991), reversed in part on other grounds, 852 S.W.2d 216 (Tenn. 1993). The instant record reflects that DHS had custody of AD and CD when the department denied defense counsel's request for an interview. As a general rule, the accused is not entitled to the entry of an order compelling a witness, who has declined an interview, to appear and submit to an interview. Id. See also Singleton, 853 S.W.2d at 489 (our supreme court declined to adopt a rule permitting trial courts to order police witnesses to speak to defense counsel).

Of course, the difficulty in applying the general rule to the instant case lies in the sometimes close relationship between DHS and the prosecutor in the trial of alleged child sexual abusers. This close relationship is frequently reflected in the rule that possession of evidence by DHS may be considered possession by the prosecution. See, e.g., State v. Eastep, No. 89-229-III (Tenn. Crim. App. at

Nashville, August 9, 1990); State v. Hacker, No. 165 (Tenn. Crim. App. at Knoxville, November 7, 1988). Yet, in Singleton, 853 S.W.2d at 495-496, in declining to adopt a rule permitting the trial court to order police officers to submit to pretrial interviews with defense counsel, the supreme court observed, "[W] e do not perceive the police witness's desire to obtain convictions as being necessarily greater than that of other witnesses ... ." Applying the court's logic to the instant case, DHS should be granted the right of other custodians of minor witnesses to refuse an interview with defense counsel on behalf of the minor witness.

Yet, as noted by the appellant, this court in Hunt stated that the appellant could establish a colorable violation of his right to counsel if he could demonstrate that the State of Tennessee, "acting through any person connected to the case or to the defendant," wrongly denied defense counsel access to a minor witness. Nevertheless, it appears anomalous that, where a defendant's actions may have necessitated the removal of a child from the custody of her parents and placed the child in the custody of the State, those very actions may further strip the child of any shield from the possibly harmful effects of granting defense counsel access to the victim or minor witness.[13] In any case, the appellant has clearly failed to establish that he was wrongly denied access to the minor witnesses by either the prosecution or DHS. Indeed, the record is completely devoid of evidence that the prosecution was in any way involved in the decision by DHS to block the appellant's access to the witnesses. Moreover, the appellant has failed to demonstrate how, if at all, he was prejudiced by the absence of an opportunity to interview the victim and Chris Dison. Thus, we cannot conclude that the trial court's denial of the appellant's motion to dismiss the indictment constituted reversible error, nor can we conclude that the trial

[13]The solution may very well lie in Tenn. Code Ann. § 37-1-610 (1996), which statute provides that a guardian ad litem may be appointed to represent a child in any child sexual abuse proceeding in criminal court at the discretion of the court and shall be presumed prima facie to be acting in good faith.

court abused his discretion in denying the appellant's motion for a continuance. State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995), cert. denied, __ U.S. __, 117 S.Ct. 133 (1996)("[a]n abuse of discretion is demonstrated by showing that the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted").

d. DHS Records

On August 17, 1995, the appellant filed a motion requesting an in camera inspection by the trial court of those records of DHS pertaining to the appellant's case, in order to determine if exculpatory material was contained therein. In support of his motion, the appellant cited Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197 (1963)(the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). On the day of trial, August 22, 1995, defense counsel directed the trial court's attention to his motion, again asking that the trial court conduct an in camera inspection of the records. At this time, the prosecutor indicated that he had reviewed the records and discovered no exculpatory evidence. Nevertheless, defense counsel asserted that "reasonable minds can differ with regard to what is exculpatory ... ." Yet, counsel failed to indicate to the court what, if any, exculpatory evidence might by included in the relevant records.[14] The court took the motion under advisement, but the record does not reflect that the court ever ruled upon the motion. Defense counsel next raised his motion at the hearing on the motion for new trial.

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[14]On July 31, 1995, the appellant had filed three Brady requests, seeking any evidence of sexual or other abuse of AD while under the care of her babysitter, Tanya Humphrey, evidence of sexual abuse of AD by her brother, Jeremy Dison, and evidence of DHS intervention in the Dison home prior to the events leading to the appellant's conviction. Subsequently, on August 18, 1995, the appellant filed a Brady request, seeking statements by the victim indicating that Tanya Humphrey had told the victim what she should say to the authorities.

On appeal, the appellant essentially contends that he was entitled to access to the records pursuant to Tenn. R. Crim. P. 16(a)(1)(C). Yet, as the State correctly notes in its brief, "an accused may not litigate an issue on one ground, abandon that ground post-trial, and assert a new basis or ground for his contention in this Court." State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990). See also State v. Adkisson, 899 S.W.2d 626, 634-635 (Tenn. Crim. App. 1994). Accordingly, we agree that "the issue of the disclosure of any evidence that falls within Tenn. R. Crim. P. 16(a)(1)(C), but outside of the purview of Brady, is waived."

In any case, the appellant has failed to demonstrate that he was entitled to review the records of DHS, or any portion thereof, under either Tenn. R. Crim. P. 16(a)(1)(C) or Brady, or that the trial court was required to conduct an in camera inspection of the records in search of discoverable material. Tenn. R. Crim. P. 16(a)(1)(C) provides:

> Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph ... documents ... which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general and which are material to the preparation of the defense ... .[15]

Moreover, in Eastep, No. 89-229-III, with respect to a photograph contained in

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[15]We note that Tenn. Code Ann. § 37-1-612 (1991) provided that, "[i]n order to protect the rights of the child and [the child's] parents or other persons responsible for the child's welfare, all records concerning reports of child sexual abuse ... and all records generated as a result of such reports, shall be confidential and exempt from other provisions of law, and shall not be disclosed except as specifically authorized by the provisions of this part ... ." However, the statute permits the district attorney general access to the records, Tenn. Code Ann. § 37-1-612(c)(2), and further provides the following:

> [T]he department may disclose any relevant information to the court, ... the parties, or their legal representatives in any proceeding which may be brought in any court ... for the purpose of protecting a child or children from child abuse or neglect or child sexual abuse. In the event of any disagreement between the department and any other parties as to what information should be disclosed, the court ... may enter an order allowing access to any information which it finds necessary for the proper disposition of the case. The court ... may order any information disclosed in such proceeding to be placed and kept under seal ... to the extent it finds it necessary to protect the child.

Tenn. Code Ann. § 37-1-612(h).

the records of DHS, this court held that possession of evidence by a state agency may be considered possession by the prosecution. See also Hacker, No. 165 ("[t]he duty of the district attorney general to provide the defendant with discovery includes requested materials and information in the possession, custody or control of state agencies participating in the investigation, evaluation or preparation of the charges of which the defendant stands accused"). However, Rule 16 does not entitle a defendant or his counsel to examine the entire file of DHS, only those documents material to defense preparation. Hacker, No. 165. Moreover, an in camera inspection of the records by the trial court is only necessary once it has been shown that there is material in the State's possession producible under Rule 16. State v. Caughron, 855 S.W.2d 526, 541 (Tenn. 1993). See also State v. Butts, 640 S.W.2d 37, 39 (Tenn. Crim. App. 1982)("[c]riminal defendants may not routinely have access to police personnel records, but upon a strong showing that the ... records might contain information material to a defendant's case, the trial court should conduct an in camera inspection of the records and release to defendant those items the court deems material to the defense").

The record does not reflect that the appellant made the requisite showing before the trial court. Similarly, the record simply does not support any allegation that the State has failed to comply with its duties under Brady. Caughron, 855 S.W.2d at 541; Hacker, No. 165 ("[t]his court is not permitted to engage in conjecture, speculation or to guess what, if any, exculpatory materials may have been included in the records of the DHS; nor may we do so with regard to what, if any, materials the [prosecutor] suppressed absent a showing that such materials existed"). See also State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995)(the defendant has the burden of proving a due process violation under

Brady by a preponderance of the evidence). Thus, the appellant's contentions must fail.

e. Evidence Concerning Methadone

Citing Tenn. R. Evid. 401 and 402, the appellant next contends that the trial court erroneously refused to admit at trial the testimony of a pharmacist concerning the properties of the drug Methadone or, alternatively, a "drug education monograph," describing Methadone. The appellant contends that the evidence would have corroborated testimony, adduced at trial, that Tanya Humphrey administered drugs, possibly including Methadone, to AD and Chris Dison while the children were under her supervision. According to the appellant, the evidence therefore supported the defense theory that AD's allegations of abuse stemmed from her association with Ms. Humphrey and events that transpired at Ms. Humphrey's home.[16]

The decision to admit or exclude evidence is generally left to the discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Davis, 872 S.W.2d 950, 955 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993). See also State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995)(the determination of whether proffered evidence is relevant in accordance with Tenn. R. Evid. 402 is left to the discretion of the trial judge). Having thoroughly reviewed the record, we cannot conclude that the trial court abused its discretion.

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[16]The trial court, in sustaining the prosecutor's objection to the admission of the evidence, concluded:

> ... I believe thus far I have let you prove that while at the babysitter's [AD and Chris Dison] said they took medicine and that's one thing. They described that it had the effect of making them sleepy. ...
>
> Now the question is do we start getting into the side effects of medicine. I'm not sure that I really want to let this in. I think we may be going a little bit far afield, as the State has pointed out. And I'm not sure that a proper foundation has been laid. It would seem to me like the babysitter would have to say that she had given them Methadone and that she herself had Methadone. I'm not sure that that has been clearly established in the record by competent proof. I'm going to rule that this would not be admissible.

f. "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). Specifically, the appellant cites the testimony of Chris Dison that, when he encountered the victim in the bathroom of the Dison Home on the day of the offense, she told him that the appellant "was having sex with her and made her suck his penis." Additionally, the appellant challenges the introduction of the testimony of defense witness, Angela Johnson, during cross-examination, that, when she interviewed the victim, AD initiated the discussion concerning the appellant's sexual assault. Ms. Johnson, a DHS counselor, and other employees of DHS were apparently called by defense counsel in an effort to cast doubt upon DHS's investigation of the victim's allegations.

Initially, we agree with the State that the appellant has waived any objection to Chris Dison's testimony due to his failure to enter a contemporaneous objection. Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1); State v. Pilkey, 776 S.W.2d 943, 952 (Tenn. 1989). Moreover, in Livingston, 907 S.W.2d at 395, our supreme court, while eliminating the doctrine of fresh complaint in cases involving child victims, noted that "evidence in the nature of fresh complaint may be admissible if it satisfies some hearsay exception." We agree that the statement of AD to Chris Dison immediately following her rape by her brother and while she was in the process of spitting semen into the bathroom sink qualifies as an excited utterance. Tenn. R. Evid. 803(2)("[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"); State v. Anthony, No. 01C01-9504-CC-00115 (Tenn. Crim. App. at Nashville, February 13, 1996), perm. to appeal denied, (Tenn. 1996)(citing State v. Smith, 857 S.W.2d 1 (Tenn.

1993))("'[t]he ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near as to preclude the idea of deliberation and fabrication'"). See also State v. Rucker, 847 S.W.2d 512, 517 (Tenn. Crim. App. 1992)(a statement by a child victim to her mother almost immediately after the victim had been raped qualified as an excited utterance; "[t]he rape certainly must be considered 'a startling event or condition,' and, due to the timing, 'the declarant was under the stress of excitement' after having just been raped"). See generally Cohen, Sheppeard, and Paine, Tennessee Law of Evidence (1995) § 803(2).

With respect to Angela Johnson's testimony, she and the prosecutor engaged in the following exchange:

Prosecutor:	[During your interview with AD,] [d]id you bring up the name of her brother, Jimmy or ask her about the abuse or how does that work ... ?
Ms. Johnson:	I talked with her and she was the one that brought Jimmy's name up first.
Prosecutor:	And was she the one, did you bring up about the bad touches or was she the one that brought that up to you about Jimmy?
Ms. Johnson:	She was the one that brought that up.
Prosecutor:	Is that what you're trained to do with regard to interviewing children with regard to these allegations?
Ms. Johnson:	Yes, it is.

We are again compelled to note that the appellant has waived this issue due to

his failure to object at trial. Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1); Pilkey, 776 S.W.2d at 952. Moreover, assuming that Ms. Johnson's testimony qualified as "fresh complaint" testimony,[17] in Livingston, 907 S.W.2d at 395, our supreme court observed that, as in the case of exceptions to the hearsay rule, fresh complaint testimony is admissible if it satisfies the prior consistent statement rule.

Cross-examination of a victim, attacking a victim's honesty and the accuracy of her account, will generally permit the introduction of the victim's prior consistent statements. Livingston, 907 S.W.2d at 398 (the fresh complaint testimony of a witness in a child sexual abuse case was admissible as a prior consistent statement for corroborative purposes when, on cross-examination, defense counsel questioned the victim's account by asking if she had told her aunt and mother something else).[18] See also State v. Tizard, 897 S.W.2d 732, 746 (Tenn. Crim. App. 1994); State v. Meeks, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993). In the instant case, the victim testified during the State's case-in-chief. During cross-examination of AD, defense counsel asked if the victim had ever told her mother that someone other than her brother had molested her. He further inquired whether AD had ever told her grandmother that she had merely dreamed that her brother was the culprit. Accordingly, we agree that Ms. Johnson's testimony satisfies the prior consistent statement rule.[19]

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[17]The State contends that, because Ms. Johnson did not recount at trial a "statement" by AD describing the offense, Ms. Johnson's testimony was not fresh complaint testimony. However, clearly Ms. Johnson imparted to the jury that, during her interview with the victim less than two months after the offense, AD mentioned both the appellant and "bad touches." The jury would have been hard-pressed to infer anything other than a fresh complaint from this testimony. Additionally, the State's attempts to establish that Ms. Johnson's questioning was neither coercive nor suggestive would merely bolster the legitimacy of the "complaint." See State v. Kendricks, 891 S.W.2d 597, 605 (Tenn. 1994).

[18]The State correctly notes that, due to the appellant's failure to object to Ms. Johnson's testimony, the trial court did not instruct the jury that the testimony was admissible solely for corroborative purposes.

[19]The appellant also contends that the prejudicial impact of the fresh complaint evidence was compounded by the prosecutor's questions to Ms. Johnson concerning the consistency of results from physical and psychological examinations of the victim with the victim's allegations. First, we have already concluded that the fresh complaint evidence was admissible. Second, the trial court sustained the appellant's objections to the prosecutor's questions, preventing Ms.

g. Sentencing

Finally, the appellant challenges the trial court's imposition of the maximum sentence authorized by law. Specifically, the appellant argues that the trial court should have applied the following mitigating factors: (1) the appellant's criminal conduct neither caused nor threatened serious bodily injury, Tenn. Code Ann. § 40-35-113; and (6) the appellant's youth, id. Moreover, the appellant contends that the trial court erroneously applied enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great, and enhancement factor (7), that the offense was committed to gratify the appellant's desire for pleasure or excitement. Tenn. Code Ann. § 40-35-114.

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), perm. to appeal denied, (Tenn. 1993). For reasons subsequently discussed in this opinion, we conclude that the trial court applied inappropriate sentencing considerations. Therefore, we do not defer to its sentencing determination.

Nevertheless, the appellant bears the burden of establishing that the sentence imposed by the trial court is erroneous. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995). In determining whether the appellant has met this burden, this court must consider the factors listed in

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Johnson from answering the questions.

Tenn. Code Ann. § 40-35-210(b)(1990) and the sentencing principles described in Tenn. Code Ann. § 40-35-102 and § 40-35-103.

The appellant received a maximum sentence of twenty-five years. Generally, the presumptive sentence is the minimum sentence in the range. Tenn. Code Ann. § 40-35-210(c).[20] However, if there are enhancement factors, but no mitigating factors, then a court may impose a sentence above the minimum in the range. Reviewing the record, we find no significant mitigating factors. First, we agree with the trial court that there is simply no evidence in the record that, because of his youth, the appellant lacked substantial judgment in committing the offense. Tenn. Code Ann. § 40-35-113(6); State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993)(in determining the application of this factor, courts should consider a defendant's age, education, maturity, experience, mental capacity or development, and other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct). Second, although we conclude below that Tenn. Code Ann. §40-35-114(6), relating to particularly great personal injury to the victim, is inapplicable in the instant case, we reject the appellant's argument that our conclusion mandates the application of Tenn. Code Ann. §40-35-113(1), "[t]he [appellant's] conduct neither caused nor threatened serious bodily injury". The failure of the record to reflect injuries sufficient to satisfy enhancement factor (6) does not negate the existence of serious bodily injury to the victim in this case. Dr. Stanley testified that the victim's hymen was completely absent and that he observed scar tissue in the victim's hymenal vault. Moreover, the record reflects that the victim suffered pain and also bled due to the appellant's actions.[21]

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[20]Pursuant to Ch. 493 § 1 [1995] Tenn. Pub. Acts, the presumptive sentence for a class A felony occurring on or after July 1, 1995, is the midpoint in the applicable range.

[21]Arguably, Tenn. Code Ann. §40-35-114(16), "[t]he crime was committed under circumstances under which the potential for bodily injury to the victim was great," was applicable in the instant case. The record reflects that the victim was afraid of the appellant and that the appellant threatened the victim. See State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996). In any case, we subsequently conclude that, even absent this enhancement factor, the record

With respect to the trial court's application of enhancement factor (6), relating to particularly great personal injury, this court has observed that, "clearly, rape is injurious per se to the body and mind of the victim. In this regard, the legislature has seen fit to enhance the offense of aggravated rape if a child is involved." State v. Salazar, No. 02C01-9105-CR-00098 (Tenn. Crim. App. January 15, 1992); State v. Carico, No. 03C01-9307-CR-00206 (Tenn. Crim. App. at Knoxville), perm. to appeal granted, (Tenn. 1996). See also Kissinger, 922 S.W.2d at 487 ("[e]very rape ... is physically and mentally injurious to the victim"). The rape of a child statute has replaced aggravated rape of a child. Nevertheless, the reasoning is equally applicable. We have suggested that the amendment reflected the legislature's desire to protect children by extending the period of confinement for child rapists. State v. Bain, No. 03C01-9311-CR-00384 (Tenn. Crim. App. at Knoxville, August 21, 1995). Thus, absent evidence that the injury to the victim in the instant case was greater than that which is ordinarily involved in the rape of a child, this factor is inapplicable. The State concedes that the record does not support the application of this factor. See, e.g., State v. Embry, 915 S.W.2d 451, 456-457 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996)(a physician's findings that the victim's vagina had "marked" redness and swelling and evidence of the victim's "mental agitation" were insufficient to justify the application of this enhancement factor).

The trial court also improperly enhanced the sentence because the offense was committed for gratification. In Adams, 864 S.W.2d at 34-35, our supreme court held that gratification is not an essential element of rape and enhancement factor (7) could be applied where the evidence demonstrates that the rape was motivated by the defendant's desire for pleasure or excitement. See also Kissinger, 922 S.W.2d at 489. However, there is no evidence in the record to support the application of this factor. Our supreme court, in Kissinger,

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supports the sentence imposed by the trial court.

922 S.W.2d at 491, observed

> Human motivation is a tangled web, always complex and multifaceted. To prove defendant's motives will always be a difficult task. But the legislature, in its wisdom, has placed that obligation on the state when the state seeks an enhanced sentence.

See also State v. Smith, 910 S.W.2d 457, 460 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995)(the State carries the burden of demonstrating that the rape was sexually motivated). The State argues, "[T]he evidence reveals that the defendant loved his sister, bore her no malice and had no reason or desire to injure her." However, the desire for pleasure cannot be presumed merely because the record does not reflect any other reason for the offense to have occurred. Salazar, No. 02C01-9105-CR-00098. We conclude that the record in the instant case does not support the application of this factor.

Nevertheless, the appellant does not challenge the trial court's application of enhancement factor (1), that the appellant has a previous history of criminal behavior, and enhancement factor (15), that the appellant abused a position of private trust. Tenn. Code Ann. §40-35-114. Additionally, we agree with the State that the record supports the trial court's application of these factors. Specifically, a preponderance of the evidence adduced at trial and contained in the pre-sentence report supports the trial court's conclusion that "[t]here is proof of previous criminal behavior of the worst kind, of these same acts being committed."[22] 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)). See also State v. Hunter, 926 S.W.2d 744, 748-749 (Tenn. Crim. App.

[22]Again, at trial, the victim testified that, immediately prior to the incident of penile intercourse for which the appellant was convicted, the appellant forced AD to perform oral intercourse upon him. Chris Dison confirmed that, on the day of the offense, he observed AD spitting semen into a bathroom sink. Additionally, Dr. Stanley testified that the victim had recounted to him numerous instances of oral intercourse. Finally, the pre-sentence report includes an excerpt from the transcript of Ms. Johnson's interview with the victim, during which the victim described numerous instances of sexual abuse by the appellant.

1995), perm. to appeal denied, (Tenn. 1996)("a defendant's prior criminal behavior may include evidence of sexual crimes committed but not prosecuted"); State v. Desirey, 909 S.W.2d 20, 31-32 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995)(the court noted that the concerns in a jury trial about the introduction of other crimes evidence do not apply equally to a sentencing hearing conducted by a trial court pursuant to the 1989 Sentencing Reform Act, further suggesting that even evidence of an offense for which a defendant is acquitted might be considered in the sentencing context).[23] Additionally, the appellant is the victim's brother, and, at the time of the rape, was babysitting the victim and Chris Dison while their parents were absent from the home. We conclude that the applicable enhancement factors and general principles of sentencing amply support a sentence of twenty-five years.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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William M. Dender, Sp. Judge

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[23]Noting "the traditional understanding of the sentencing process, which we have often recognized as being less exacting than the process of establishing guilt," the United States Supreme Court has observed that "[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior." Nichols v. United States, __ U.S. __, 114 S.Ct. 1921, 1927-1928 (1994)(citing Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949)). Indeed, more recently, the Supreme Court has held that, in the federal context, a jury's verdict of acquittal does not prevent a sentencing court from considering conduct underlying the acquitted charge if proven by a preponderance of the evidence. United States v. Watts, No. 95-1906, 1997 WL 2443, at *5 (U.S. January 6, 1997).

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

STATE OF TENNESSEE, APPELLEE,	)	No. 03-C-01-9602-CC-00051
	)	Sevier County
v.	)	Ben W. Hooper, II, Judge
	)	(Rape of a Child)
JAMES DISON, APPELLANT.	)	

CONCURRING OPINION

My distinguished colleague, Judge David G. Hayes, has written a thorough, scholarly and complete opinion. I agree with the reasoning advanced by my colleague regarding all of the issues presented for review except the issue pertaining to the validity of the indictment. I also agree the allegations contained in the indictment are sufficient to allege the offense of rape of a child. Therefore, I concur in the result reached by Judge Hayes, but I write separately on the indictment issue.

Judge Hayes, while recognizing the Tennessee Sentencing Reform Act of 1989, has abandoned "[t]he former confusing distinction between general and specific intent,"[24] nevertheless decides this issue based upon a distinction between general and specific crimes. His resolution of this issue is predicated upon the Model Penal Code and the decisions from other jurisdictions. I am of the opinion this issue may and should be resolved pursuant to Tennessee law. The 1989 Act is to be "construed according to the fair import of their terms, including reference to judicial decisions and common law

[24]Sentencing Commission Comments to Tenn. Code Ann. § 39-11-301.

interpretations, to promote justice, and effect the objectives of the criminal code."[25]

I.

A criminal prosecution, which originates in a court having original jurisdiction of all criminal matters,[26] is commenced by the return of an indictment or presentment, or the filing of a criminal information with the clerk.[27] The Tennessee Constitution provides that an accused may not "be put to answer any criminal charge but by presentment, indictment or impeachment."[28] In 1975 the General Assembly enacted legislation which permits a prosecution to be commenced by a criminal information.[29]

It is an elementary rule of law that an accused cannot be required to defend against, or be convicted of, a crime that is greater than the crime alleged in the charging instrument.[30] Thus, an accused cannot be convicted of a felony if the charging instrument does not contain an essential element of the felony. Under these circumstances, the accused may only be convicted of a misdemeanor, if the charging instrument alleges the essential elements of the misdemeanor offense.[31]

An accused cannot be validly prosecuted or convicted of a criminal offense under color of a charging instrument which fails to allege a crime.[32] In State v. Morgan, this Court stated "[a] lawful accusation is an essential jurisdictional element of a criminal trial, without

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[25]Tenn. Code Ann. § 39-11-104. See State v. Blouvett, 904 S.W.2d 111 (Tenn. 1995).

[26]See Tenn. Code Ann. § 40-1-108.

[27]Tenn. Code Ann. § 40-3-101.

[28]Tenn. Const. Art. I, § 14. See Tenn. Code Ann. § 40-3-101, et. seq.

[29]Tenn. Code Ann. § 40-3-103.

[30]Church v. State, 206 Tenn. 336, 356-58, 333 S.W.2d 799, 808-09 (1960); Huffman v. State, 200 Tenn. 487, 495, 292 S.W.2d 738, 741 (1956); Shook v. State, 192 Tenn. 134, 135-36 , 237 S.W.2d 959, 959 (1951); Holbert v. State, 178 Tenn. 80, 82, 156 S.W.2d 388, 389 (1941).

[31]Shook, 192 Tenn. at 136, 237 S.W.2d at 959-60.

[32]State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979).

which there can be no valid prosecution."[33] If an accused is tried and convicted under color of a charging instrument which fails to state a crime, the accused is denied due process of law within the meaning of both the United States and Tennessee constitutions; and the accused is entitled to relief from the conviction.[34] In this jurisdiction, all proceedings conducted pursuant to a charging instrument which does not state a crime are void.[35]

II.

The Tennessee Constitution requires an indictment, presentment, or information to state "the nature and cause of the accusation."[36] Tennessee Code Annotated § 40-13-202 also governs the allegations which must be alleged in a charging instrument. This statute states:

> The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are such words as "force and arms" or "contrary to the form of the statute" necessary.

The Supreme Court of Tennessee has said the constitution and statute require a charging instrument to "contain a complete description of such facts and circumstances as will constitute the crime."[37]

While the description of the offense contained in a charging instrument "must be sufficient in distinctness, certainty, and precision to enable the accused to know what offense he is charged with and to understand the special nature of the charge he is called

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[33]598 S.W.2d at 797 (citations omitted).

[34]See Nease v. State, 592 S.W.2d 327, 332-33 (Tenn. Crim. App.), per. app. denied (Tenn. 1979).

[35]Morgan, 598 S.W.2d at 797; see De Jonge v. Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278, 282 (1937).

[36]Tenn. Const. Art. I, § 9.

[37]Tipton v. State, 160 Tenn. 664, 670, 28 S.W.2d 635, 636 (1930)(citations omitted).

upon to answer,"[38] it is not necessary to "amplify and encumber the charge by circumstantial detail and minute description."[39] As a general rule, it is sufficient to state the offense charged in the words of the statute,[40] or words which are equivalent to the words contained in the statute.[41] However, if the statute proscribing the offense does not contain all of the ingredients of the offense, or the wording of the statute is not sufficient to constitute an offense, the charging instrument must allege any additional ingredients necessary to constitute the offense.[42]

If an accused needs additional facts or details, the accused can file a motion for a bill of particulars.[43] However, the granting of a bill of particulars and providing additional information will not validate a void charging instrument.[44]

A court must consider several factors when determining the sufficiency of a charging offense. As this Court said in State v. Tate:

> [The court] must consider whether (a) the charging instrument contains the elements of the offense which is intended to be charged; (b) the charging instrument sufficiently apprises the accused of the offense he is called upon to defend; (c) the trial court knows to what offense it must apply the judgment; and (d) the accused knows with accuracy to what extent he may plead a former acquittal or conviction in a subsequent prosecution for the same offense.[45]

This Court must now consider whether the indictment in this case meets the criteria set forth in Tate.

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[38]Church v. State, 206 Tenn. 336, 358, 333 S.W.2d 799, 809 (1960).

[39]Jordan v. State, 156 Tenn. 509, 514, 3 S.W.2d 159, 160 (1928)(citations omitted).

[40]State v. Overton, 193 Tenn. 171, 174, 245 S.W.2d 188, 189 (1951); Stanfield v. State, 181 Tenn. 428, 432, 181 S.W.2d 617, 618 (1944); Jordan, 156 Tenn. at 514, 3 S.W.2d at 160; State v. Tate, 912 S.W.2d 785, 789 (Tenn. Crim. App. 1995).

[41]Coke v. State, 208 Tenn. 248, 250-51, 345 S.W.2d 673, 674 (1961); Starks v. State, 66 Tenn. 64, 66 (1872). See Tate, 912 S.W.2d at 789.

[42]Jordan, 156 Tenn. at 514, 3 S.W.2d at 160.

[43]See Tenn. R. Crim. P. 7(c); State v. Hicks, 666 S.W.2d 54 (Tenn. 1984).

[44]Hicks, 666 S.W.2d at 56.

[45]912 S.W.2d at 789.

III.

The indictment returned by the Sevier County Grand Jury tracks the language of the applicable statute. Tenn. Code Ann. § 39-13-522 states:

> Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age.

The salient allegations of the indictment are that the appellant "on the ____ day of July, 1994, . . . did unlawfully, have sexual penetration of [AD], a child of less than thirteen (13) years of age." Based upon the decisions interpreting Art. 1, § 9 of the Tennessee Constitution and Tenn. Code Ann. § 40-13-202, the indictment is sufficient. It clearly sets forth the offense of the rape of a child.

The use of the phrase "sexual penetration" in the indictment is the same as if the definition of that phrase was set forth verbatim in the indictment. Sexual penetration is defined as:

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required.[46]

The nature of the offense cannot be made clearer.

The Tennessee Criminal Sentencing Reform Act of 1989 does not require an indictment to allege the mens rea or culpable mental state unless the language of the statute specifically provides the mens rea is an element of the offense.[47] However, the State of Tennessee is required to prove the requisite culpable mental state beyond a reasonable doubt regardless of whether the statute proscribing the conduct does or does not have the culpable mental state as an element of the offense. Consequently, the failure to allege a culpable mental state or mens rea in this case did not invalidate the indictment. The statute proscribing the offense does not make a culpable mental state an element of

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[46]Tenn. Code Ann. § 39-13-501(7).

[47]Tenn. Code Ann. §§ 39-11-301 and -302.

the offense.

My colleague, Special Judge William M. Dender, joins me in this concurring opinion.

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JOE B. JONES, PRESIDING JUDGE

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WILLIAM M. DENDER, SPECIAL JUDGE