IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

STATE OF TENNESSEE,	)	C.C.A. No. 01C01-9601-CR-00016
	)	
Appellee,	)	DAVIDSON COUNTY
	)	
vs	)	HON. J. RANDALL WYATT, JR,
	)	JUDGE
JOHN JAMES,	)	
	)	(Rape of a Child; Aggravated Rape;
Appellant.	)	and Aggravated Sexual Battery)

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OPINION FILED: _____

AFFIRMED IN PART, REVERSED IN PART

J. STEVEN STAFFORD,
SPECIAL JUDGE

O P I N I O N

This is a direct appeal as a result of a jury verdict of guilty of one count of Rape of a Child, six (6) counts of Aggravated Rape, and six (6) counts of Aggravated Sexual Battery. Some sentences were run concurrently and others consecutively resulting in an effective sentence of seventy (70) years as a Range I, Standard Offender. Defendant, John James, presents the following issues for our review:

> 1. whether the evidence was sufficient to sustain the convictions;
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> 2. whether the trial court erred in failing to impose the minimum sentence on all counts;
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> 3. whether the trial court erred in imposing consecutive sentences; and
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> 4. whether the indictment was fatally defective for failing to charge the requisite *mens rea* element of the offenses.

We set aside the conviction for rape of a child and two convictions of aggravated rape, affirm all other convictions, and remand for re-sentencing.

INDICTMENT

Count 1 of the indictment alleged that the defendant "between July 1, 1992, and March 6, 1993... did engage in unlawful sexual penetration of [victim's name], a child less than thirteen (13) years of age, in violation of Tennessee Code Annotated § 39-13-522..." The statutory violation cited in this count is rape of a child.

Counts Two through Seven were identical with each other and charged that the defendant "on a day in 1991, 1992 or 1993... did engage in unlawful sexual penetration of [victim's name], a child less than thirteen (13) years of age, in violation of Tennessee Code Annotated..." These counts did not contain a code section.

Counts Eight through Thirteen were identical with each other and alleged that the defendant "on a day in 1991, 1992, or 1993... did engage in unlawful sexual contact with [victim's name], a child less than thirteen (13) years of age, in violation of

Tennessee Code Annotated § 39-13-504..." The statutory violation cited in these counts is aggravated sexual battery.

TRIAL TESTIMONY

At the time of trial the female victim was twelve (12) years of age. She had been sexually abused by the defendant, her stepfather, "over and over... like I would say two or three times out of the week."

COUNTS ONE AND EIGHT:

The last occasion of sexual abuse occurred in the fall of 1992 when the victim was in the fifth grade. The victim was asleep in her bedroom when the defendant awakened her. He put his hands on her breast and vagina. The victim then stated, "he'll sometimes put his penis in my vagina." The victim later testified the defendant would "start playing with me and everything and then he'll get on top of me and put his penis in my vagina."

COUNTS TWO AND NINE:

On another occasion when the victim was in the fifth grade, she was again in her bed asleep when the defendant felt of her breast and vagina. In describing this incident she testified "sometimes he would put his penis in my vagina and sometimes he wouldn't."

COUNTS THREE AND TEN:

On another occasion the victim was asleep in her bedroom and again the defendant felt of her breast and vagina. He put his hand over the victim's mouth and

inserted his penis into her vagina. It is unclear as to whether this incident occurred while the victim was in the fifth grade or before.

COUNTS FOUR, FIVE AND ELEVEN:

On another occasion the victim was in the living room one morning just prior to school when the defendant placed her on the floor, felt her breast and vagina, and inserted his penis into her vagina. On this occasion the touching of her vagina was "on the inside." Again it is unclear whether these events occurred while the victim was in the fifth grade or before.

COUNTS SIX AND TWELVE:

On another occasion when the victim was in the defendant's bedroom, the defendant laid her on the bed and felt her breast and vagina, and "was licking my vagina... inside and outside." The defendant also inserted his penis into her vagina. Again, it is unclear whether these events occurred while the victim was in the fifth grade or before.

COUNTS SEVEN AND THIRTEEN:

The final event related by the victim occurred in the defendant's bedroom when the defendant placed her on the floor, touched her vagina and breast, inserted his penis into her vagina, and also touched her vagina "on the inside." There was no testimony that the defendant used his mouth or placed his tongue inside the victim's vagina on this occasion. Again, it is unclear whether these events occurred while the victim was in the fifth grade or before.

OTHER TESTIMONY

Although it is unclear exactly when some of the incidents occurred, the victim testified that she moved into the Jamestown Apartments in Nashville in the fall of 1991. She further testified that the sexual abuse started happening a couple of weeks later. Also implicit in her testimony is that the last incident of sexual abuse was when she was "at least, say ten" and in the fifth grade.[1] The victim started the fifth grade in the fall of 1992.[2]

The trial testimony also indicated that when the defendant was interviewed by a representative of the Department of Human Services, he stated, "It's not like I forced myself on her." When the representative stated to him that he did not have to physically force or coerce her, "you raped her...", the defendant replied, "You're right. I agree. I absolutely agree."

When briefly questioned by a police department detective, the defendant stated he had "sex with the victim and was now in counseling." He further stated to a sex offender therapist that he had sexual relations with the child since she was nine (9) years old and that it had lasted at least until she was ten (10). He stated he could not tell whether she was a virgin when they first had sex, and it happened at least three (3) more times in which intercourse occurred. He stated that he had intercourse with the victim four (4) or five (5) times and would advise the victim not to tell her mother. The therapist further testified that the defendant had subsequently requested that she change that part of her report indicating his admission to sexual intercourse.

The defense presented no proof at trial.

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[1] This incident constituted the charge of rape of a child in Count One and aggravated sexual battery in Count Eight.

[2] The victim also testified about another incident of abuse that occurred in Franklin, Williamson County, Tennessee, before the family moved to Nashville. Defendant contends this incident could well have been one of the incidents described above and relied upon by the state for a conviction. However, the victim's testimony about the Franklin incident clearly indicated that it occurred in the living room after school, whereas the only living room incident in Davidson County occurred in the morning before school.

ELECTION OF OFFENSES

Inasmuch as there was testimony about additional sexual acts committed during the same time period listed in the various counts of the indictment, the state was required to elect with specificity which offenses it was relying upon for conviction. *See* State v. Rickman, 876 S.W.2d 824, 828-829 (Tenn. 1994); State v. Woodcock, 922 S.W.2d 904, 911 (Tenn. Crim. App. 1995). The state made the following elections which were subsequently related to the jury as a part of the jury instructions:

> Count One refers to the first of three incidents occurring in the alleged victim's bedroom in Nashville after July 1, 1992, when the alleged victim was in the fifth grade. On this occasion, the defendant inserted his penis inside her vagina.
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> Count Two refers to the second of three incidents occurring in the alleged victim's bedroom in Nashville after July 1, 1992, when the alleged victim was in the fifth grade. On this occasion, the defendant placed his penis inside her vagina.
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> Count Three refers to the third of three incidents occurring in the alleged victim's bedroom in Nashville after July 1, 1992, when the alleged victim was in the fifth grade. On this occasion, the defendant placed his penis inside her vagina.
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> Count Four refers to an incident that occurred in the living room of the Nashville apartment in the morning before school, when the defendant allegedly placed his penis inside the victim's vagina as she lay on the living room floor.
>
> Count Five refers to an incident occurring on the same occasion, in the same location as that set forth in Count Four. The defendant in a separate act allegedly placed his fingers inside the victim's vagina as she lay on the living room floor prior to leaving for school.
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> Count Six refers to an incident that occurred when the alleged victim was upstairs in her parents' bedroom, and the defendant allegedly placed his penis inside the victim's vagina as she lay in bed.
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> Count Seven refers to an incident that occurred when the alleged victim was upstairs in her parents' bedroom on the floor when the defendant allegedly placed his tongue inside the victim's vagina.
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> Count Eight refers to the first of three incidents occurring in the alleged victim's bedroom after July 1, 1992, at a

time that the alleged victim was in the fifth grade. In this incident, the defendant allegedly placed his hands on the alleged victim's breast beneath her clothing.

Count Nine refers to the second of three incidents occurring in the alleged victim's bedroom after July 1, 1992, at a time that the alleged victim was in the fifth grade. In this incident, the defendant allegedly placed his hands on the alleged victim's breast beneath her clothing.

Count Ten refers to the third of three incidents occurring in the alleged victim's bedroom after July 1, 1992, at a time the alleged victim was in the fifth grade. In this incident, the defendant allegedly placed his hand on the alleged victim's breast beneath her clothing.

Count Eleven refers to an incident that occurred in the living room in Nashville before school, when the defendant allegedly placed his hand on the alleged victim's breast as she lay on the floor.

Count Twelve refers to an incident that occurred in the defendant's bedroom in Nashville, when he placed his hand on the alleged victim's breast as she lay in his bed.

Count Thirteen refers to an incident that occurred in the defendant's bedroom in Nashville, when he allegedly placed his hand on the alleged victim's breast as she lay on the floor.

SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence was insufficient to prove guilt beyond a reasonable doubt as to all counts of the indictment. In Tennessee, great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405 (Tenn.1983). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832 (Tenn.1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. Id.

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985); T.R.A.P. 13(e). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542 (Tenn.1984); Byrge v. State, 575 S.W.2d 292 (Tenn. Crim. App. 1978).

A.

Count One charges the offense of rape of a child. Rape of a child is the "unlawful sexual penetration of a victim by the defendant..., if such victim is less than thirteen (13) years of age." T. C. A. § 39-13-522(a). Rape of a child is a Class A felony; however, T. C. A. § 39-13-523(b) provides that one who commits this offense is ineligible for any sentence reduction credits and must serve the entire sentence imposed by the court. Most significantly, rape of a child and the requirement for such an offender to serve the entire sentence undiminished by sentencing credits only applies if the unlawful sexual penetration occurred on or after July 1, 1992. Public Acts of 1992, Chapter 878.

Prior to July 1, 1992, the unlawful penetration of a victim less than thirteen (13) years of age was aggravated rape. T. C. A. § 39-13-502(a)(4)(1991). That portion of the aggravated rape statute referring to victims under thirteen (13) years of age was simply "moved to § 39-13-522." Sentencing Comments, T. C. A. § 39-13-502 (Supp.1996). In other words, the unlawful sexual penetration of a victim less than thirteen (13) years of age was not deleted as a crime but was renamed as the specific crime of "rape of a child." Both aggravated rape and rape of a child are Class A felonies. T. C. A. § 39-13-502(b); 522 (b). However, the requirement of full service of the sentence undiminished by sentencing credits as set forth in T. C. A. § 39-13-523 does not apply to aggravated rape unless the defendant qualifies as a "multiple rapist."

Although the elements of the offense of rape of a child are exactly the same as the elements as they previously existed under aggravated rape and both are Class A

felonies, the undiminished sentencing provisions of rape of a child require a showing beyond a reasonable doubt that the penetration occurred on or after July 1, 1992, before one can be convicted of rape of a child. If there is reasonable doubt as to whether the offense occurred on or after July 1, 1992, one could only be convicted of aggravated rape and not rape of a child.

B.

COUNTS ONE AND EIGHT

As to Count One charging rape of a child, the state elected to proceed on the alleged incident in the victim's bedroom when "the defendant inserted his penis inside her vagina." The trial testimony was unclear as to whether there was penile penetration on this particular occasion. The only testimony relating to penile penetration was that he "sometimes put his penis in my vagina," and "he'll get on top of me and put his penis in my vagina." Since it is unclear as to whether the victim was referring to penile penetration on this particular occasion or other occasions, the evidence is insufficient to establish penile penetration relating to this particular incident. Count One charging rape of a child must be set aside.

As to Count Eight the testimony indicated that on this same occasion the defendant placed his hand on the victim's breast underneath her clothing. The evidence is sufficient to support the guilty verdict of aggravated sexual battery in Count Eight.

COUNTS TWO AND NINE

As to the state's election in Count Two relating to the charge of aggravated rape, the state relied upon the defendant placing his penis inside the victim's vagina. Again, the trial testimony was vague as to whether there was an actual penile penetration relating to this incident. The victim's only testimony in this regard was that

similar events happened three or four times when she was in the fifth grade and "sometimes he would put his penis in my vagina, and sometimes he wouldn't." The proof is insufficient to establish beyond a reasonable doubt that the defendant had penile penetration with the victim on this occasion. Accordingly, Count Two must be set aside.

As to Count Nine the testimony indicated that on this occasion the defendant placed his hand on the victim's breast underneath her clothing. The evidence is sufficient to support the guilty verdict of aggravated sexual battery in Count Nine.

COUNTS THREE AND TEN

Count Three of the indictment alleges unlawful sexual penetration on "a day in 1991, 1992, or 1993." The state elected the third of three incidents in the victim's bedroom "after July 1, 1992" in which the defendant placed his penis inside the victim's vagina. If this event indeed occurred after July 1, 1992, it would be rape of a child (T. C. A. § 39-13-522) rather than aggravated rape (T. C. A. 39-13-502(a)(4)). However, the testimony as to this incident does not clearly establish whether it occurred when the victim was in the fifth grade or before. The evidence does establish beyond a reasonable doubt that it occurred after the family moved to Nashville in the fall of 1991.

Where time is not of the essence of a particular offense and the time does not bar the commencement of prosecution, the time of commission of the offense averred in the indictment is not material. Sullivan v. State, 513 S.W.2d 152 (Tenn. Crim. App. 1974). Proof, therefore, need not be confined to the time charged. State v. West, 737 S.W.2d 790 (Tenn. Crim. App. 1987). We conclude the election by the state indicating the offense occurred "after July 1, 1992" was not fatal. Since this was described to the jury as the third of three incidents in the victim's bedroom, the jury was not misled by the election. The trial testimony by the victim clearly indicated penile penetration on this third incident in her bedroom. It occurred on or before the return of this indictment;

therefore, the evidence supports the guilty verdict of aggravated rape in Count Three.

As to Count Ten the testimony indicated that on this same occasion the defendant placed his hand on the victim's breast underneath her clothing. The evidence is sufficient to support the guilty verdict of aggravated sexual battery in Count Ten.

COUNTS FOUR, FIVE AND ELEVEN

The trial testimony indicated that in the living room on a morning before school, the defendant placed his penis inside the victim's vagina, placed his fingers inside the victim's vagina and placed his hand on the victim's breast as she lay on the floor. The evidence is sufficient to establish aggravated rape as to Counts Four and Five and aggravated sexual battery as to Count Eleven.

COUNTS SIX AND TWELVE

The trial testimony indicated that on one occasion in the defendant's bedroom, the defendant placed his penis inside the victim's vagina, licked her vagina "inside and outside," and placed his hand on the victim's breast as she lay on the bed. The state elected penile penetration as to Count Six. The evidence is sufficient for the conviction of aggravated rape in Count Six and aggravated sexual battery in Count Twelve.

COUNTS SEVEN AND THIRTEEN

As to the state's election in Count Seven relating to aggravated rape, the state relied upon an incident in the parents' bedroom on the floor when the defendant placed his tongue inside the victim's vagina. There was no testimony at all to support this election. Although there was testimony that the defendant "touched or felt" the victim's vagina with his hand and put his penis inside the vagina, there was no testimony

indicating the use of defendant's mouth or tongue. Due to the state's erroneous election, the aggravated rape conviction in Count Seven must be set aside.[3]

The state's election in Count Thirteen relating to aggravated sexual battery was based upon this same occasion when the defendant placed his hand on the victim's breast as she lay on the floor. The testimony clearly supported this allegation; therefore, the conviction of aggravated sexual battery in Count Thirteen is proper.

In summary, the convictions of rape of a child in Count One and aggravated rape in Counts Two and Seven must be set aside. All other convictions are properly supported by the evidence.

MID-RANGE SENTENCING

James contends the trial court erred in the application of certain enhancement factors, thereby entitling him to the minimum sentence on each count. The trial court applied two (2) enhancement factors; namely, (1) the offense was committed to gratify the defendant's desire for pleasure or excitement (T. C. A. § 40-35-114(7)), and (2) the defendant abused a position of private trust (T. C. A. § 40-35-114(15)).

James also contends the trial court erred in not giving appropriate weight to the absence of any criminal record of the defendant. He further argues the defendant neither caused nor threatened serious bodily injury to the victim; therefore, the court should have considered this as a mitigating factor. *See* T. C. A. §40-35-113(1).

A.

This Court's review of the sentence imposed by the trial court is *de novo* review with a presumption of correctness. T.C.A. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby,

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[3]There was testimony to support oral penetration when the victim was on the bed as charged in Count Six; however, the state elected penile penetration for that count.

823 S.W.2d 166, 169 (Tenn. 1991). The burden is upon the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d) Sentencing Commission Comments. In conducting our review, we are required, pursuant to T.C.A. § 40-35-210, to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

If no mitigating or enhancing factors for sentencing are present, T.C.A. § 40-35-210(c) requires a minimum sentence within the applicable range as the presumptive sentence. *See* State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). However, if such factors do exist, a trial court should start at the minimum sentence, enhance the minimum sentence within the range for aggravating factors and then reduce the sentence within the range for the mitigating factors. T.C.A. § 40-35-210(e). No particular weight for each factor is prescribed by the statute, as the weight given to each factor is left to the discretion of the trial court as long as its findings are supported by the record. State v. Moss, 727 S.W.2d 229 (Tenn. 1986); State v. Santiago, 914 S.W.2d 116 (Tenn. Crim. App. 1995); *see* T.C.A. § 40-35-102 Sentencing Commission Comments. Nevertheless, should there be no mitigating factors, but enhancement factors are present, a trial court may set the sentence above the minimum within the range. T.C.A. § 40-35-210(d); *see* State v. Manning, 883 S.W.2d 635 (Tenn. Crim. App. 1994).

B.

Pleasure or excitement is not an essential element of aggravated rape; therefore, it may be considered as an appropriate enhancement factor. State v. Adams, 864 S.W.2d 31 (Tenn. 1993). However, the state has the burden of demonstrating that the rape was sexually motivated. Id at 35.

The only reasonable inference from the proof is that all acts of sexual

penetration by this defendant were sexually motivated. Although some crimes of this nature are simply acts of brutality resulting from hatred or the desire to seek revenge, control, intimidate, or are the product of a misguided desire to abuse another human being, the record adequately supports the conclusion of the trial judge that the sexual penetrations were for the purposes of pleasure or excitement. *See* State v. Kissinger, 922 S.W.2d 482 (Tenn. 1996); Adams, 864 S.W.2d at 35. The focus in determining the applicability of this factor is on the defendant's motive. Kissinger at 490. The trial judge properly applied this enhancement factor for the aggravated rape convictions. *See* Manning v. State, 883 S.W.2d 635 (Tenn. Crim. App. 1994); State v. McPherson, 882 S.W.2d 365 (Tenn. Crim. App. 1994).

C.

Although the pleasure or excitement enhancement factor may be applied to rape or aggravated rape since it is not an essential element of the offense, this enhancement factor may not be applied to the offense of aggravated sexual battery. State v. Kissinger, 922 S.W.2d at 489. A necessary element of aggravated sexual battery is that the sexual contact consists of the "intentional touching... if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T. C. A. § 39-13-501(6). Although the trial judge erred in applying this factor to the aggravated sexual battery convictions, this does not necessarily lead to a reduced sentence.

D.

James contends the trial court erred in finding the defendant abused a position of private trust with regard to the commission of these offenses. We disagree. The victim was often entrusted by her mother to the defendant's care. According to the defendant, some of the incidents occurred while the victim's mother was away from the residence traveling. The position of step-parent is an obvious example of a person

who occupies a position of private trust. State v. Kissinger, 922 S.W.2d at 488. *See also* State v. Adams, 864 S.W.2d at 34 (finding a live-in boyfriend of the mother occupied a position of private trust). The trial court properly applied this enhancement factor.

E.

James finally contends the court erred in failing to properly weigh as mitigating factors the absence of a prior criminal record[4] and that his conduct did not cause or threaten serious bodily injury. Although it is arguable whether these factors apply, they would be entitled to little weight in any event.

Our *de novo* review of the sentences imposed indicate that the mid-range sentences of twenty (20) years on each aggravated rape conviction and ten (10) years on each aggravated sexual battery conviction are appropriate. This issue is without merit.

CONSECUTIVE SENTENCING

James contends the trial court erred by imposing consecutive sentences. Defendant was sentenced to twenty (20) years for rape of a child, twenty (20) years on each count of aggravated rape, and ten (10) years on each count of aggravated sexual battery. The first three sentences ran consecutively to each other, and the first aggravated battery conviction ran consecutively for an effective sentence of seventy (70) years. In determining that some of the sentences should run consecutively, the trial court considered that there were more than two (2) offenses involving sexual abuse of a minor with aggravating circumstances arising from the relationship between the defendant and the victim, the time span of the defendant's undetected sexual

[4] The presentence report, agreed by defense counsel as being accurate, indicates the defendant admitted to a prior conviction of driving under the influence of marijuana in Louisiana. The report also indicates that the defendant admitted to periodic use of cocaine and marijuana from 1973 to 1993.

activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim. T. C. A. § 40-35-115(b)(5).

A.

These factors as set forth in T. C. A. § 40-35-115(b)(5) are a codification of the same factors listed in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987). Taylor warned that consecutive sentences should not routinely be imposed in sexual abuse cases, and that the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved. Id at 230. The enactment of T. C. A. § 40-35-115 did not invalidate the decisions in Taylor and Gray v. State, 538 S.W.2d 391 (Tenn. 1976). State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995).

An analysis of the statutory factors is appropriate. The relationship between the defendant and the victim was one of step-parent, step-child. The victim was, accordingly, in the presence and care of the defendant on a regular basis. The defendant abused this position of trust. This factor may be considered for both enhancement and consecutive sentencing purposes. State v. Melvin, 913 S.W.2d 195 (Tenn. Crim. App. 1995); State v. Marshall, 888 S.W.2d 786 (Tenn. Crim. App. 1994).

The time span of the defendant's undetected sexual activity was at least one (1) year and perhaps longer. The nature and scope of the sexual acts were extensive. There was foreplay, oral sex and penile penetration over a substantial period of time.

As to the residual, physical and mental damage to the victim, the only witness to testify at sentencing was the victim's grandfather. He testified about her having "a few bad dreams" and behavioral problems. Based upon this limited proof, this factor does not weigh heavily for consecutive sentencing.

B.

In order to impose consecutive sentences under the statute, the court must also find that the aggregate term reasonably relates to the severity of the offenses and is

necessary in order to protect the public from further serious criminal conduct by the defendant. State v. Wilkerson, 905 S.W.2d at 938. Wilkerson was decided subsequent to James' sentencing; therefore, the trial court made no findings with regard to these two factors.

C.

We agree with the trial court's conclusion that consecutive sentencing would be appropriate considering all the statutory factors. However, three of the convictions must be set aside. Furthermore, there is an absence of the findings required by Wilkerson. For these reasons this cause should be remanded for re-sentencing. In the event the trial court finds that consecutive sentencing is necessary to protect the public from further serious criminal conduct by the defendant, then consecutive sentencing may be appropriate to the extent that the aggregate term reasonably relates to the severity of the offenses.

FAILURE TO ALLEGE MENS REA ELEMENT OF OFFENSES

Defendant contends the indictment charging aggravated sexual battery was fatally defective in that it did not contain the requisite *mens rea* element of the offense. Defendant relies upon State v. Hill, C. C. A. No. 01C01-9508-CC-00267 (Tenn. Crim. App. filed June 20, 1996, at Nashville), *perm. to app.* granted January 6, 1997. The defendant did not raise this issue in the trial court.

The defendant in Hill was charged with the offense of aggravated rape. The court concluded that the failure of the indictment to specifically allege the *mens rea* was fatally defective.

A.

All counts of the indictment alleging the offense of aggravated rape charged that James "did engage in unlawful sexual penetration of [victim's name]..." All counts of the indictment alleging the offense of aggravated sexual battery charge that James "did engage in unlawful sexual contact with [victim's name]..." None of the counts alleged a *mens rea* of "intentional," " knowing," or "reckless."

B.

T. C. A. § 40-13-202 provides as follows:

> 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.

Fair and reasonable notice of the charges against a defendant is a fundamental constitutional requirement. U. S. Const. amend. VI; Tenn. Const. art. I, § 9. An indictment has three (3) purposes in Tennessee; namely, (1) to inform the defendant of the precise charges; (2) to enable the trial court upon conviction to enter an appropriate judgment and sentence; and (3) to protect the defendant against double jeopardy. State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996). The facts must be stated in ordinary and concise language so that a person of "common understanding" will know what is intended. Warden v. State, 214 Tenn. 391, 381 S.W.2d 244 (1964).

Furthermore, in Campbell v. State, 491 S.W.2d 359, 361 (Tenn. 1973) (emphasis supplied), while addressing the sufficiency of an indictment charging the offense of murder, our Supreme Court stated the following:

> While it seems clear that the indictment in *Witt* was insufficient in that it failed to charge an element, that the murder was committed unlawfully, in either the language of the statute or common law or words of equivalent import, the decision is confusing because

> of the language, "fatally defective in omitting the charge that the offense was committed feloniously, or with malice aforethought; and containing no words of equivalent import." *It is clear, however, that had the indictment used the words "feloniously" or* "unlawfully", it would have been sufficient.

By containing the words found in the language of the statutes on aggravated rape and aggravated sexual battery, the indictment at issue sufficiently apprised James of the offenses charged. The charges were stated in ordinary and concise language so that a person of common understanding would know what was intended.

For the above reasons we decline to follow Hill and find this indictment was sufficient to charge the offenses of aggravated rape and aggravated sexual battery.[5]

C.

Furthermore, Hill has no application to those counts of the indictment charging the offense of aggravated sexual battery. Hill dealt only with the charge of aggravated rape.

Aggravated sexual battery as defined in T. C. A. § 39-13-504 is "unlawful sexual contact" with a victim "less than thirteen (13) years of age." T. C. A. § 39-13-501(6) defines "sexual contact" as the

> ...intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification (emphasis added).

Therefore, the mental element of "intentional" is included in the definition of "sexual contact" and is impliedly included within the indictment. By statutory definition the only way one can have "sexual contact" is by the "intentional touching...for the purpose of sexual arousal or gratification." Id.

[5]Another panel of this Court has recently declined to follow Hill. *See* State v. James Dison, C. C. A. No. 03C01-9602-CC-00051 (Tenn. Crim. App. filed January 31, 1997, at Knoxville).

We, therefore, conclude that Hill is distinguishable as to those counts charging aggravated sexual battery.

CONCLUSION

The judgments of conviction for rape of a child in Count One and aggravated rape in Counts Two and Seven are reversed and dismissed. The convictions and sentences in Counts Three, Four, Five, Six, Eight, Nine, Ten, Eleven, Twelve, and Thirteen are affirmed. This cause is remanded for re-sentencing pursuant to the principles recognized in this opinion.

J. STEVEN STAFFORD, SPECIAL JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

WILLIAM M. BARKER, JUDGE