

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1998 SESSION

**FILED**

July 28, 1999

**Cecil W. Crowson  
Appellate Court Clerk**

STATE OF TENNESSEE,

\*

C.C.A. # 01C01-9708-CP-00334

Appellee,

\*

Davidson County

VS.

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Hon. Cheryl Blackburn, Judge

RANDALL SCOTT,

\*

(Rape of a Child; Aggravated Sexual  
Battery)

Appellant.

\*

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OPINION FILED:\_\_\_\_\_

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

## OPINION

The defendant, Randall Scott, was convicted of rape of a child and aggravated sexual battery. The trial court imposed twenty-five and ten-year sentences respectively and ordered the sentences to be served consecutively.

In this appeal of right, the defendant presents the following issues for our review:

- (I) whether the defendant was denied his right to a speedy trial;
- (II) whether the trial court erred by denying the defendant's motion for expert assistance in the field of DNA analysis;
- (III) whether the trial court erred by failing to conduct a pretrial hearing on the admissibility of mitochondrial DNA evidence;
- (IV) whether the state established the chain of custody for the admission of microscopic slides containing hairs taken from the victim's pubic area;
- (V) whether certain out of court statements by the victim were properly admitted under the excited utterance exception to the hearsay rule;
- (VI) whether the trial court erred by providing jury instructions that guilt might be inferred if the accused attempts to conceal evidence;
- (VII) whether separate convictions for aggravated sexual battery and rape of a child are permissible; and
- (VIII) whether the sentence is excessive.

We affirm the judgment of the trial court.

On April 17, 1995, the victim, L.F.,<sup>1</sup> was nine years old and lived on

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<sup>1</sup>It is the policy of this court not to divulge the names of minors who are victims of sexual abuse.

Chicamauga Avenue in East Nashville. On that date at about dusk, the victim walked to a Revco, located about one block from her home, to purchase earrings. Along the way, she saw the defendant, who was wearing gray short pants and a T-shirt, walk outside of his residence on Chicamauga Avenue, enter the Revco, purchase a beer, and then leave the store. At trial, the victim testified that she was on her way home when the defendant grabbed her from behind, placing one hand around her waist and the other over her mouth. After forcing her into an alley behind a shed, the defendant pushed her to the ground, pulled her shorts and underpants down, touched her vaginal area with his finger, and then penetrated her anally with his penis.<sup>2</sup> During the assault, the defendant ordered the victim to "shut up" and called her names. When released, the victim ran to her residence and reported the incident to her father. Her father notified the police, who arrived about five to ten minutes later. The victim provided details of the incident and showed officers the defendant's house. She was then transported to Vanderbilt Hospital, placed under general anesthesia, and discharged from the hospital the next day.

At trial, the victim identified the defendant as her assailant. On cross-examination, however, she admitted that she was unable to identify the defendant at a police line-up conducted one week after the incident. She also acknowledged that the night of the incident, she did not know "exactly what he look[ed] like."

Albert Haas of the Nashville Metro Police Department initiated the investigation. He found the victim "curled up in a chair ... tears were rolling out of her eyes and she was shaking." Officer Haas, who described her as covered with dirt and very scared, was unable to acquire much information from the victim

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<sup>2</sup>Instead of testifying verbally about these details, the victim wrote answers on a machine that displayed her responses to the jury.

because she was so distraught. He testified that when Officer Jenine Sarno arrived on the scene, the victim indicated she would be more comfortable talking to a female officer.

The victim was able to show officers where she was raped and where the defendant lived. When officers entered his residence, they found the defendant, Mary Gooch (the owner of the residence), Ricky Knight, and Teresa Gooch. They learned that the defendant rented a room there and found a pair of muddy blue jean shorts on the floor of the defendant's room. Initially, the defendant claimed to the detectives that he had been at the residence all evening. Later, after being admonished by the other residents, he informed officers that he had walked to the Revco to purchase beer and cigarettes and visited at a friend's house.

Officer Haas testified that the victim was not able to identify the defendant at the line-up. He did recall that the defendant had changed his hair between the date of the offense and the line-up.

Officer Sarno testified that the victim informed her that a black male followed her to the Revco and that as she was returning to her residence, he grabbed her from behind and pulled her behind a shed. The victim stated that she tried to run away but that the defendant hit her in the back with rock, pulled her behind the shed, and raped her. Officer Sarno testified that the victim pointed out the defendant's house before being transported by ambulance to the hospital.

Teresa Gooch, who lived with her grandmother and grandfather, Mary and Major Gooch, her parents, Ricky Knight and Sandra Gooch, "Tootie," and the defendant, was called as a witness for the state. Teresa Gooch testified that on the

day of the assault, the defendant, who was wearing a red tank-top and faded, knee-length blue jeans, went to the Revco to purchase beer and cigarettes. She recalled that when he returned, he had mud on his clothes, quickly changed, and placed the soiled clothes under his bed. She remembered that within a few minutes of his return to the residence, the police arrived, inquiring if there was anyone inside the house "with long hair and ... rough skin like they didn't shave." When the police entered the house, the defendant, who met the description provided, was in bed; when the police asked the defendant where he had been, he responded that he had visited a friend; when asked about his muddy clothes, the defendant explained that he had fallen.

Judy Troutt, who worked at the Revco on the evening of the assault, recalled that the defendant, who was a regular customer, bought a bottle of St. Ives beer and cigarettes. She was able to identify the defendant in a photo lineup.

Julie Rosof, a family nurse practitioner, employed at Our Kids Center at Vanderbilt University, testified at trial that she performs "medical/legal evaluations" of children who claim to be victims of sexual abuse. Ms. Rosof related that she responded to an emergency call at Metro General Hospital and conducted an exam on the victim. As a part of her examination, she removed hairs from the victim's genital area and placed them in a sealed envelope as part of the rape kit. She recalled that the victim was having difficulty remaining still during the exam due to trauma to the rectal area. The rest of the exam was conducted at Vanderbilt Hospital after the victim was placed under general anesthesia. Ms. Rosof determined that the victim suffered several tears in the rectal area; while one of the tears was significant, surgery was not required to repair the damage. Ms. Rosof concluded that the victim's rectum had been penetrated.

Detective Steve Kleek, who interviewed the defendant shortly after the incident, testified that the defendant initially claimed he had been home all evening and had been awakened by the arrival of police. He recalled that the defendant later conceded that he had been to the Revco to purchase beer and cigarettes.

Anita Matthews, a forensic scientist employed by Laboratory Corporation of America ("LabCorp"), conducted polymerase chain reaction DNA analysis ("PCR testing") on various pieces of evidence. She concluded that the blood on the defendant's shorts was consistent with the victim's DNA and that the victim could not be excluded as the donor of the blood found on the defendant's shirt. PCR testing of the hair fibers was not consistent with that of the defendant. Ms. Matthews acknowledged that her laboratory does not wash hairs before testing them, although others do. She acknowledged that some components of her DNA testing are considered "new and emerging technology" by the National Research Center.

FBI Special Agent Mark Wilson testified that he performed mitochondrial DNA analysis on hair fibers. A "relatively new" technique that was begun by the FBI in June of 1996, the process works on items of evidence that have "very little association with DNA" such as hairs, bones, teeth, or aged samples. Agent Wilson explained that the correct procedure is to wash hair before testing. "We found that hairs which were not adequately washed would sometimes yield the wrong type, ... if the hairs weren't adequately washed, sometimes the type that you would get at the end was actually from the person, the body fluid type and not from the hair type." In this instance, the lab washed a hair taken from the victim's rectum and then conducted mitochondrial DNA testing. The DNA sequence matched the defendant. Agent Wilson recalled that he had several hair samples but tested only

one. He explained that the FBI did not routinely test hair, but that he agreed to an exception in this case because the District Attorney had stated that prior test results had been "inconsistent with the circumstances." Wilson testified that this is only the fourth case in the country where mitochondrial DNA test results have been offered as evidence. No laboratories in Tennessee conduct mitochondrial DNA testing, a process that is very susceptible to contamination because it is so sensitive.

(I)

The defendant first contends he was denied his right to a speedy trial. The arrest was April 17, 1995, and the trial began on April 14, 1997. The case was first continued from November 30, 1995, until February 2, 1996, to allow DNA testing to be completed. On February 1, 1996, the defendant agreed to a trial date of May 13, 1996, but thereafter the state sought a continuance because of "difficulties with the physical evidence ... the testing of it." The defendant did not object to rescheduling the trial to August 19, 1996. On July 31, 1996, Judge Ann Lacey Johns, who had been presiding over the case, resigned her office and Judge Cheryl Blackburn was appointed three weeks later. On August 14, 1996, five days before the second scheduled trial date, the state filed a motion for a continuance, alleging that defense counsel planned to file a motion to exclude DNA evidence and the state needed time to respond to the motion. The case was continued to September 5, 1996, at which point Judge Blackburn scheduled pretrial hearings on evidentiary issues for November 12 and the trial for December 2, 1996. Six days before the date of the pretrial hearings, the state sought a continuance so that the mitochondrial DNA testing could be completed. The trial court granted the continuance over the objection of defense counsel and the case was set for April 14, 1997, the date on which the trial took place.

The Sixth Amendment to the United States Constitution provides that "the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a speedy trial is also founded in the Tennessee Constitution. Tenn. Const. art. 1 § 9. This same right has been codified by Tenn. Code Ann. § 40-14-101 which provides: "In all criminal prosecutions, the accused is entitled to a speedy trial...." See also Tenn. R. Crim. P. 48. In State v. Bishop, 493 S.W.2d 81 (Tenn. 1973), the Tennessee Supreme Court adopted a four-factor test for determining whether one has been denied his right to a speedy trial. Adopting a test first established in Barker v. Wingo, 407 U.S. 514 (1972), our court identified the factors as follows:

- (1) the length of the delay;
- (2) the reason for the delay;
- (3) whether the defendant asserted his right to a speedy trial; and
- (4) the prejudice which accrued to the defendant as a result of the delay.

Bishop, 493 S.W.2d at 84 (citing Barker, 407 U.S. at 530).

In Barker, the United States Supreme Court held that "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. Here, the two-year delay is sufficient to trigger an examination into the other factors.

The second Barker factor, the reason for the delay, generally falls into four categories: (1) intentional delay by the state to gain a tactical advantage or harass the defendant; (2) negligence; (3) delay necessary to effectively prosecute the case; and (4) delay caused by or acquiesced in by the defendant. State v.



Wood, 924 S.W.2d 342, 346-47 (Tenn. 1996). Intentional delay to gain undue advantage or harass the defendant weighs heavily against the state, while delay through the state's negligence is given slighter weight. The third type of delay, that which is necessary to prosecute the case, does not weigh in favor of or against either party, while delay caused by the defendant weighs against the defendant. Id.

The defendant acquiesced in the greater part of the delay. A portion of the delay was caused when the original trial judge resigned her position. DNA testing also caused delay. When portions of the DNA testing on the hairs conducted by LabCorp yielded inconsistent results, it was appropriate for the state to seek another opinion. Overall, this factor weighs in favor of the state.

The third factor is the defendant's assertion of his speedy trial right. Of course, the defendant is under no duty to bring himself to trial. In consequence, the absence of a demand for a speedy trial does not amount to a waiver of the issue. Bishop, 493 S.W.2d at 84. Nonetheless, the timeliness of the demand is a factor in consideration of whether the defendant has been denied his right to a speedy trial. Id. Here, the defendant first mentioned the necessity of trying the case promptly at a February 1, 1996, hearing. When, however, the trial court asked "can we justify that extra time because we are waiting for the lab reports," defense counsel responded, "yes, I think so." The defendant did not actually demand a speedy trial until November of 1996, a year and one-half after the arrest. Because the trial commenced within five months of the demand, the factor weighs for the state.

Prejudice, the most important of the considerations, is assessed in the light of three interests to the defendant:

- (1) to prevent oppressive pretrial incarceration;
- (2) to minimize anxiety and concern of the accused; and
- (3) to limit the possibility that the defense will be impaired.

Barker, 407 U.S. at 532.

A two-year pretrial incarceration is oppressive and undoubtedly caused anxiety and concern for the defendant. The record does not, however, indicate that the defense was prejudiced or impaired by the delay. For all of these reasons, it is our assessment that the defendant was not denied his right to a speedy trial.

(II)

The second issue is whether the trial court erred by denying the defense motion for expert assistance in the field of DNA analysis. On October 31, 1996, the defendant filed a motion for expert services, wherein he conceded that the victim had been forcibly raped but contended that he was not the perpetrator. Because the victim had been unable to identify the defendant in a physical lineup, he argued that identity was the key issue in the case. The defendant also alleged that the state intended to use DNA evidence to link him to the crime and sought an expert for the following reasons:

[A] review of the laboratory reports, instruction upon the underlying theory and methodology, consultation as to appropriate potential lines of questioning, and referral to helpful sources of technical literature. The defendant does not ... request that the samples be retested or that the expert attempt to duplicate ... findings.

An accompanying affidavit, filed under seal, documented counsel's efforts at becoming knowledgeable in DNA and yet included an assertion that an expert was nevertheless necessary to assist defense counsel in challenging the

DNA evidence. Defense counsel also contended that the expert was necessary to resolve the following issues: (1) why the FBI attributed hairs removed from the victim to the defendant while LabCorp attributed the hairs to the victim; (2) why test results indicate the presence of a third DNA donor and whether contamination could have occurred; and (3) whether the DNA samples were properly handled by investigators on the scene as well as other individuals in the chain of custody.

In the pretrial hearing on the motion, Attorney Bappa Mukherji testified that he and attorney Mike Galligan had successfully barred admission of DNA evidence in a rape case in White County. To mount an attack on the evidence, Attorney Mukherji hired two experts to help him understand DNA testing. He stated that the experts also assisted in locating weaknesses in the testing conducted in that particular case.

Attorney David Raybin testified that an attorney could not competently represent the defendant unless there was funding for an DNA expert. Attorney Raybin reasoned that defense counsel could generally educate himself sufficiently to manage most types of expert testimony but could not do so in a DNA case due to the uniqueness of that type of evidence.

At the conclusion of the hearing, the trial court took the motion under advisement. A few weeks later, a second hearing was held wherein defense counsel submitted affidavits detailing proposed experts and the fees they would charge. Afterward, the trial court entered an order denying the funds. The trial court initially determined that while due process required equal treatment of indigent and non-indigent defendants, the Constitution was not abridged because some non-indigent defendants would not be able to afford a DNA expert. The trial court further

ruled that the appointment of a DNA expert fell in "the category of a luxurious defense, not an adequate one" and ruled that the defendant failed to demonstrate a particularized necessity, noting that defense counsel appeared to be knowledgeable about the technology involved. At the time of the trial court's ruling, some of the test results were inconclusive. Some of the tests results were arguably favorable to the defendant because they showed that hair removed from the victim's rectum belonged to the victim, not the defendant. While the trial court observed that the "fiscal burden on the State would be astronomical" and that the "large fiscal burden of the State far outweighs any risk of misidentification," the court also ordered that all experts that would be called by the state "must be made available to defense counsel for in-depth interviews about their test data, interpretations, and protocols without the presence of counsel for the State."

Three weeks before the trial, defense counsel filed a renewed motion, advising the trial court that subsequent testing by the FBI on the hairs removed from the victim's rectum indicated the hairs belonged to the defendant, not the victim. The trial court denied the motion.

At the motion for new trial, the trial court found that an expert was not necessary for several reasons. First, the DNA was not "all that crucial" to the state's case against the defendant. The trial court found that the state established a strong circumstantial case against the defendant, notwithstanding the victim's inability to identify the defendant at the lineup. Next, the court reasoned, defense counsel was able to prepare its case without the expert:

[Defense counsel] did an exceptional job in this case, both in all the motions and otherwise, provided this Court with a great deal of technical information and it was also clear by his cross-examination of the experts that he was very knowledgeable about these issues, managed to get in front of the jury some clearly impeachable issues

having to do with protocols, the fact that the FBI Agency is not certified; how unique this is; I think doing an exceptional job with this regard ....

The defendant argues that the trial court's ruling deprived him of due process of law and the effective assistance of counsel. The state argues the trial court did not abuse its discretion by denying the services.

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Supreme Court held that an indigent defendant's right to due process had been violated by a denial of funds to employ a psychiatrist. In Ake, a capital case, although the defense was insanity, neither the state nor the defense offered any expert testimony on the defendant's sanity at the time of the offense. Id. at 72. The Supreme Court ruled that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Id. at 75. The Court reasoned that fundamental fairness would not be met if "as a result of his poverty, a defendant is denied the opportunity to participate meaningfully" in his trial. Id. at 76. The state is required to take minimal steps "to assure that the defendant has a fair opportunity to present his defense" and must provide "'the basic tools of an adequate defense.'" Id. at 76, 77 (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

The Court ruled that the following factors are relevant in determining whether an indigent defendant is entitled to services:

The first [factor] is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 77.

The Court noted that an individual's liberty interest is "uniquely compelling." Id. The Court also acknowledged the state's economic interest but ruled that "where the potential accuracy of the jury's determination is so dramatically enhanced ..., the State's interest in its fisc must yield." Id. at 83. Finally, the Court noted that "the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses" enhances the fact-finding process and allows the jury to make a "sensible determination" on the sanity issue. Id. at 83.

Ake left open two questions: whether due process would require the appointment of an expert in a non-capital case; and whether due process would require the provision of non-psychiatric services. Our supreme court, however, has ruled that the reasoning of Ake applies in non-capital cases. State v. Barnett, 909 S.W.2d 423, 427 (Tenn. 1995) (citing with approval the reasoning of State v. Edwards, 868 S.W.2d 682, 697 (Tenn. Crim. App. 1993) ("due process ... applies whether the death penalty is sought or not")). In Edwards, this court also ruled that the reasoning of Ake could apply to a claim for non-psychiatric services. Upon reviewing a claim that a defendant's due process rights were violated by the trial court's failure to appoint a DNA expert, the court ruled as follows:

The test, we think, is whether the indigent defendant has demonstrated before trial the necessity of expert assistance upon an issue likely to be significant at trial. The burden is upon the defendant to establish that the expert would be of material assistance in the establishment of his defense theory: "[M]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided."

Edwards, 868 S.W.2d at 697 (quoting State v. Parks, 331 N.C. 649, 658 (N.C.

1992)).

In 1997, Supreme Court Rule 13 was amended to govern the provision of "investigative or expert services or other similar services ... necessary to ensure that the constitutional rights of the defendant are properly protected." From all this, it is our assessment that an Ake claim may extend to non-psychiatric services. See also Husske v. Commonwealth, 476 S.E.2d 920 (Va. 1996); Dubose v. State, 662 So.2d 1189 (Ala. 1995) (both cases where the court ruled due process may require the provision of a non-psychiatric expert). In Barnett, the court established several guidelines for how to litigate the issue. First, an ex parte hearing is appropriate. Funding should only be granted when the defendant establishes a "particularized need." Barnett, 909 S.W.2d at 320. "[U]ndeveloped assertions that the services [are] needed to attempt to counter the State's proof" will not suffice. Id. (quoting State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994)). The form of the motion should comply with Tenn. Sup. Ct. Rule 13 § 2(B)(10). The reasoning of the court's prior cases interpreting the statute governing provision of services in capital cases would apply to cases where services are sought in non-capital cases on due process grounds. Barnett, 909 S.W.2d at 431. See generally Tenn. Code Ann. § 40-14-207(b). The standard of review of a trial court's decision to grant or deny funds is whether the trial court abused its discretion. Barnett, 909 S.W.2d at 431.

It is our view that the trial court did not abuse its discretion by refusing to appoint an expert in this instance. The defendant's express purpose for the appointment of an expert was to assist in reviewing lab reports, providing instruction upon the underlying theory and methodology, referral to helpful sources of literature and to suggest appropriate lines of questioning. The record, however, supports the trial court's evaluation of defense counsel's performance at trial. He ably cross-

examined the state's expert witnesses and communicated the weaknesses in the DNA evidence to the jury.<sup>3</sup> From our review, little else could have been accomplished by an expert's guidance in recognizing weaknesses in the DNA technology. Stated more simply, the defense did not establish a "particularized need" for an expert in preparing defense counsel for trial. Barnett, 909 S.W.2d at 320. Moreover, we also agree with the trial court's finding that the DNA evidence was not crucial to the state's case. While the victim was unable to identify the defendant at a pretrial lineup, she showed authorities his residence where the defendant was found by police. The defendant had recently changed from his muddy clothing and witnesses who shared the residence testified to the defendant's strange behavior following the incident. Finally, the clerk at the Revco recalled that the defendant had left the store only moments before the assault. In summary, there was strong evidence of guilt without the DNA evidence and the DNA evidence presented was not entirely persuasive in view of the fact that LabCorp's testing of the hair samples was clearly erroneous. Thus, there was no error.

### (III)

The next issue is whether the trial court erred by failing to conduct a pretrial hearing on the admissibility of mitochondrial DNA evidence.<sup>4</sup> Prior to trial, the trial court denied a defense motion for a hearing. At trial, FBI Agent Mark Wilson testified that mitochondrial analysis on a hair removed from the victim's inner thigh indicated the hair came from the defendant. The defendant contends that admission of this evidence without a pretrial hearing deprived him of due process of law.

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<sup>3</sup>Defense counsel filed an excellent brief on this issue. Despite the adverse ruling on this issue, the content of the argument has truly been of assistance to the court.

<sup>4</sup>The defendant does not challenge the admissibility of the PCR testing which showed that blood on the defendant's shorts contained DNA matching that of the victim.



Almost eighty years ago, in the landmark case of Frye v. United States, 293 F. 1013 (D.C.Cir. 1923), it was established that scientific evidence would be admissible only when it had "gained general acceptance in the particular field in which it belongs." Id. at 1014. This rule was followed by Tennessee as well as the majority of other federal and state jurisdictions. See McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 262 (Tenn. 1997).

In 1993, however, the United States Supreme Court ruled that Frye had been superseded by the Federal Rules of Evidence. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); see Fed. R. Evid. 702. Under the federal rules, trial courts are required to determine "whether the reasoning or methodology underlying the testimony is scientifically valid and ... can be applied to the facts in issue." Daubert, 509 U.S. at 592. A list of factors relevant to this determination includes whether the scientific theory has been tested and subject to peer review, whether there is a known rate of error, and whether it is generally accepted in the scientific field. Id.

After the Daubert opinion, there was some confusion in Tennessee about the admissibility requirements for scientific evidence. Recently, however, our supreme court clarified the guidelines for determining the admissibility of scientific evidence. In McDaniel, the high court ruled that "Tennessee's adoption of Rules 702 and 703 ... as part of the Rules of Evidence supersede[s] the general acceptance test of Frye." 955 S.W.2d at 265. Rule 702, Tenn. R. Evid., provides, in part:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Rule 703, Tenn. R. Evid., provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In interpreting these rules, our supreme court observed that the "rules together necessarily require a determination as to the scientific validity or reliability of the evidence ... but there is no requirement in the rule that it be generally accepted."

McDaniel, 955 S.W.2d at 265. The court held that the following factors would be useful in determining whether scientific evidence is reliable or valid:

- (1) whether scientific evidence has been tested and the methodology with which it has been tested;
- (2) whether the evidence has been subjected to peer review or publication;
- (3) whether a potential rate of error is known;
- (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and
- (5) whether the expert's research in the field has been conducted independent of litigation.

Id. at 265.

In addition to the requirements of McDaniel, however, Tennessee has a statute governing the admissibility of DNA, which provides, in part, as follows:

(a) As used in this section, unless the context otherwise requires, "DNA analysis" means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes.

(b)(1) In any civil or criminal trial, hearing or proceeding, the results of DNA analysis, as defined in subsection (a), are admissible in evidence without antecedent expert testimony that DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material upon a showing that the offered testimony meets the standards of admissibility set forth in the Tennessee Rules of Evidence.

(2) Nothing in this section shall be construed as prohibiting any party in a civil or criminal trial from offering proof that DNA analysis does not provide a trustworthy and reliable method of identifying characteristics in an individual's genetic material, nor shall it prohibit a party from cross-examining the other party's expert as to the lack of trustworthiness and reliability of such analysis.

Tenn. Code Ann. § 24-7-117 (emphasis added).

In State v. Begley, 956 S.W.2d 471 (Tenn. 1997), our supreme court explained how to apply the McDaniel requirements in light of the statute governing the admissibility of DNA evidence. In Begley, where the admissibility of PCR DNA testing was at issue, the court explained that the purpose of the statute was "to ease the admission of DNA evidence in Tennessee." Id. at 476. It held that all of the McDaniel requirements must be met, except that a "judicial determination of the scientific reliability of the evidence is unnecessary" because the "evidence is statutorily regarded as trustworthy and reliable" and concluded that "the PCR method of DNA analysis shall be admissible into evidence without expert testimony as to its trustworthiness and reliability pursuant to Tenn. Code Ann. § 24-7-117(b)(1)." Id. at 477, 478.<sup>5</sup>

Based upon the ruling in McDaniel, as interpreted by Begley, it is our view that the trial court did not err by refusing to hold a hearing on the admissibility of mitochondrial DNA evidence. The initial question is whether the DNA evidence is relevant under Tenn. R. Evid. 401. Begley, 956 S.W.2d at 475. Because identity was an issue at trial, the DNA evidence was relevant because it tended to suggest the defendant was the assailant. See id. at 477. We must also determine whether

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<sup>5</sup>This ruling perhaps explains why the appellant has not challenged the admissibility of the PCR DNA testing of the blood on his shorts. Those test results indicated the blood on the appellant's shorts came from the victim.

Agent Wilson was appropriately qualified as an expert and whether his testimony assisted the jury. See id. at 476-77; Tenn. R. Evid. 702. With a Master of Arts degree in biology and employment in the FBI Laboratory since 1990, Agent Wilson is certified as a Mitochondrial DNA Analyst and has published approximately thirteen papers dealing with forensic DNA analysis. He was able to explain the testing process to the jury as well as the results of the testing. For these reasons, we must conclude Agent Wilson was appropriately qualified as an expert and that his testimony assisted the jury. Furthermore, the evidence is statutorily regarded as reliable. Id. at 476 (discussing Tenn. Code Ann. § 24-7-117). All of the elements of the McDaniel analysis have been satisfied. The trial court did not abuse its discretion by admitting the evidence.

The defendant complains, however, that neither McDaniel, Begley, nor the terms of the statute authorize the admission of novel scientific evidence without a showing that the evidence is reliable. He contends that the mitochondrial technique was not developed until June, 1996, and that this case is only the fourth in the country in which this type of evidence has been admitted. The defendant argues that the portion of the DNA statute which provides that the evidence is admissible "upon a showing that the ... testimony meets the standards of admissibility set forth in the Tennessee Rules of Evidence" requires that the state show the evidence is scientifically reliable. See Tenn. Code Ann. § 24-7-117(b)(1).

In our view, however, interpretation of the statute is governed by the supreme court's ruling in Begley. In that case, the court interpreted the statute as follows:

[DNA] evidence is statutorily regarded as trustworthy and reliable. Tennessee Code Annotated § 24-7-117 exempts DNA evidence from the trial court's determination under Rule 703 of whether it provides a

trustworthy and reliable method of identifying characteristics in an individual's genetic material. Consequently, a judicial determination of the scientific reliability of the evidence is unnecessary.

956 S.W.2d at 477. That ruling controls in this instance. See also State v. Paul William Ware, No. 03C01-9705-CR-00164, slip op. at 26-35 (Tenn. Crim. App., at Knoxville, Apr. 20, 1999) (the first appellate opinion in Tennessee to hold mitochondrial DNA test results are admissible).

(IV)

The next issue is whether the state established the chain of custody for microscopic slides containing hair taken from the victim's genital area. The basis for the defendant's argument is Detective Kleek's testimony that he mailed the hairs to the FBI in an envelope and they were returned mounted on slides. He contends there is a missing link in the chain of custody because there is no proof in the record as to who placed the hairs on the slides.

Tenn. R. Evid. 901(a) requires that tangible evidence be authenticated and provides as follows:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

In determining the admissibility of tangible evidence, the rule does not require absolute certainty of identification. It is sufficient if the facts establish a reasonable assurance of the identity of the evidence. Ritter v. State, 462 S.W.2d 247 (Tenn. Crim. App. 1970). Whether the proof sufficiently establishes the chain of custody is a matter committed to the discretion of the trial judge. Id. at 249.

The purpose of the chain of custody requirement is to "demonstrate

that there has been no tampering, loss, substitution, or mistake with respect to the evidence." State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993). A leading treatise on Tennessee's evidence law has explained the type of proof required to establish the chain of custody:

The concept of "chain" of custody recognizes that real evidence is typically handled by more than one person between the time it is obtained and the time it is either introduced into evidence or subjected to scientific analysis. Obviously, any of these persons might have the opportunity to tamper with, confuse, misplace, damage, substitute, lose and replace, or otherwise alter the evidence or observe another doing so. Each person who has custody or control of the evidence during this time is a "link" in the chain of custody. Generally, testimony from each link is needed to verify the authenticity of the evidence and to show that it is what it purports to be. Each link in the chain testifies about when, where, and how possession or control of the evidence was obtained; its condition upon receipt; where the item was kept; how it was safeguarded, if at all; any changes during possession; and when, where and how it left the witness's possession.

Neil P. Cohen, et al., Tennessee Law of Evidence, 623-24 (3d ed. 1995). Although the chain of custody does not have to be established beyond a reasonable doubt, there has been absolutely no proof as to how the hairs were mounted on the slides or the person responsible. In our view, there is a "missing link" in the chain. Because the defense filed a pretrial motion to exclude the evidence on this basis, the state had the opportunity to present the evidence necessary to complete the chain.

The error was harmless, however. See Tenn. R. App. P. 36(b). The DNA testimony based on tests of the hairs was inconsistent and confusing. One expert testified the hairs could have come from the victim. Another expert testified the hairs could have come from the defendant. Given the conflicting nature of the testimony, it is unlikely that the jury placed much weight on that evidence. Thus, admission of the evidence absent an adequate chain of custody did not affect the

results of the trial.

(V)

The defendant also contends that the trial court erroneously admitted as exceptions to the hearsay rule out of court statements by the victim. He argues that there is no proof that the excited utterance exception applies because the statements were neither spontaneous nor excitedly made.

Officer Albert Haas, the first officer to arrive at the victim's residence after the assault, recalled that the victim began to cry when he attempted to question her about the events. The victim confided in Officer Jenine Sarno who arrived a short time later. Officer Haas, who did not overhear the statements made by the victim to Officer Sarno, testified that the victim told her about the crime scene. The defendant objected, contending there were multiple layers of hearsay. The trial court allowed the testimony, finding it was admissible under the excited utterance exception to the hearsay rule.

When Officer Sarno was called to testify, she related that the victim informed her that a black male left his residence on Chicamauga and followed her to the store. The victim recalled to the officers that when she left the store, the same man followed her, grabbed her from behind, covered her mouth, took her behind a shed, and ordered her to remove her pants. The victim also told Officer Sarno that when she tried to run, the man threw a rock at her, striking her in the back, after which he subdued and raped her.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted," Tenn. R. Evid. 801(c), and is generally inadmissible. "The following are not excluded by the hearsay rule: [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." Tenn. R. Evid. 803(2).

In our view, the testimony by Officer Haas that the victim told Officer Sarno, out of Officer Haas' presence, where the crime scene was, would not be admissible under the excited utterance exception to the hearsay rule. While the victim's statements to Officer Sarno would qualify as an excited utterance, there is no hearsay exception to address the next layer of hearsay, where Officer Sarno apparently repeated the information to Officer Haas. Accordingly, the trial court erred by admitting this evidence. Again, however, the error qualifies as harmless. Tenn. R. App. P. 36(b). This testimony was only a small portion of the state's case and the jury heard admissible evidence about the crime scene from other witnesses.

Officers arrived at the victim's residence within minutes of the attack. When Officer Haas saw the victim she was "curled up in a chair ... and she seemed very scared ... crying ... [t]ears were rolling out of her eyes and she was shaking." Officer Sarno also described the victim as upset and crying, thereby establishing that the victim was still under the "stress" of the attack. In State v. Gordon, 952 S.W.2d 817, 820-21 (Tenn. 1997), our supreme court ruled that statements made in response to questions may be admissible if the declarant is still under the stress of the incident. The proof establishes the victim was visibly shaken at the time the statements to Officer Sarno were made. Thus, the trial court did not err by allowing her testimony.



(VI)

The defendant next complains that the trial court erred by instructing the jury that an inference of guilt arises if the accused attempts to conceal evidence.

Over defense counsel's objection, the trial court gave the following instruction:

Any attempt by an accused to conceal or destroy evidence is relevant as a circumstance from which guilt of the accused may be inferred. The Court has charged the jury concerning an inference that the jury may make in regard to certain evidence in this case. However, the jury is not required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by all the evidence in the case warrant the inference which the law permits the jury to draw. The inference may be rebutted by direct or circumstantial evidence or both, whether it exists in the evidence of the State or is offered by the defendant. The State must prove beyond a reasonable doubt every element of the offense before the defendant can be found guilty.

The defendant contends the evidence did not support the instruction and that the instruction was an impermissible judicial comment on the evidence. We do not agree.

The trial judge has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see Tenn. R. Crim. P. 30. "[T]he defendant has a constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). Jury instructions must, however, be reviewed in the context of the overall charge rather than in isolation. Sandstrom v. Montana, 442 U.S. 510 (1979); see State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994). Erroneous jury instructions require a reversal unless the error is harmless beyond a reasonable doubt. State v. Carpenter, 773 S.W.2d 1 (Tenn. Crim. App. 1989).

The instruction here was a correct statement of the law. See Tillery v.

State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978). Furthermore, the instruction was supported by the evidence. Ms. Gooch testified that the defendant entered the home and tried to go into the bathroom to change clothes. When he could not gain access to the bathroom, he changed clothes in the hallway. She also asserted that the defendant hid the soiled clothes under the bed. The defendant complains that because her testimony was inconsistent with that of police officers, the instruction should not have been given. It is, however, the jury's duty to resolve conflicts in the evidence, after having received accurate instructions. The mere fact that there is conflicting testimony on a matter of importance does not mean the jury may not be instructed on that issue. Such a ruling would deprive the jury of its essential function, which is to determine the facts of the case. See Tenn. Const. art. I, § 19 ("[T]he jury shall have the right to determine the law and the facts, under the direction of the court, as in other criminal cases").

The defendant also argues that the instruction amounted to a judicial comment on the evidence. The Tennessee Constitution, of course, prohibits judges from any comment "with regard to matters of fact." Tenn. Const. art. VI, § 9; State v. Suttles, 767 S.W.2d 403, 406 (Tenn. 1989). The aim of this rule is to avoid giving "the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." Suttles, 767 S.W.2d at 407; State v. Brown, 823 S.W.2d 576 (Tenn. Crim. App. 1991). "It is natural that jurors should be anxious to know the mind of the court and follow it. Therefore, a court cannot be too cautious in his inquiries." McDonald v. State, 14 S.W. 487, 488 (Tenn. 1890).

In our view, the charge did not amount to a comment on the evidence. The record does not contain any indication of the trial court's opinion of the

evidence. The jury was properly informed that it had complete fact-finding authority.

The defendant's final complaint about the instruction is that it permitted the jury to draw an inference from another inference. He contends the jury would first have to infer the defendant was concealing evidence and then infer that because he was doing so, he was guilty. It is true that "in Tennessee ... an inference cannot be properly drawn from another inference." Benton v. Snyder, 825 S.W.2d 409, 414 (Tenn. 1992). Because, however, there was direct evidence that the defendant removed the soiled clothing and then hid them in his bedroom, no "double" inference is required. This issue is without merit.

(VII)

The defendant's next issue is whether separate convictions for aggravated sexual battery and rape of a child are permissible. The victim testified that her assailant touched her front "private part" with his finger and then placed his penis inside her anus. The touching of the front "private part" supported the aggravated sexual battery conviction, while the penile penetration of the victim's anus was the basis for the rape of a child conviction. The defendant contends that the acts constituting the sexual battery were incidental to the rape and that dual convictions violate due process under State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), as well his right to be free from multiple punishments under the Double Jeopardy Clause. See State v. Denton, 938 S.W.2d 373 (Tenn. 1996). We cannot agree.

In Anthony, our supreme court addressed the issue of whether dual convictions of armed robbery and aggravated kidnapping violated the due process guarantees of Article I, Section 8 of the Tennessee Constitution. The court

concluded that when a confinement, movement, or detention is "essentially incidental" to the accompanying felony, it is not sufficient to support a separate conviction for kidnapping. Anthony, 817 S.W.2d at 306. The court warned that the kidnapping statute should be narrowly construed "so as to make its reach fundamentally fair and to protect the due process rights of every citizen...." Id.

On February 1, 1999, after the briefs were filed in this court, our supreme court released its opinion in State v. Barney, 986 S.W.2d 545, 548 (Tenn. 1999). The court ruled that Anthony's "essentially incidental" test was "not helpful in the context of sexual offenses because each separate sexual act 'is capable of producing its own attendant fear, humiliation, pain, and damage to the victim.'" Id. (quoting State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996)). The court, instead, adopted the following test, taken from People v. Madera, 231 Cal. App. 3d 845, 282 Cal. Rptr. 674 (1991):

[I]f the act in question directly facilitates or is merely incidental to the accompanying sexual conduct (such as, for example, applying lubricant to the area of intended copulation), convictions for both acts would be barred. If, however, the act in question is "preparatory" only in the sense that it is intended to sexually arouse either the victim or the perpetrator, separate convictions are not barred.

Id. at 548 (citations omitted).

The court ruled the following factors were relevant in determining whether an act was facilitative, and thus would not support a separate conviction, or is intended to arouse the victim or perpetrator, and thus would support a separate conviction:

1. temporal proximity--the greater the interval between the acts, the more likely the acts are separate;
2. spatial proximity--movement or re-positioning tends to suggest separate acts;
3. occurrence of an intervening event--an interruption tends to suggest separate acts;

4. sequence of the acts--serial penetration of different orifices as distinguished from repeated penetrations of the same orifice tends to suggest separate offenses; and
5. the defendant's intent as evidenced by conduct and statements.

Id. at 548-49.

In Barney, the victim testified that the defendant entered his bedroom, rubbed the victim's penis with his hand, and then performed fellatio on the victim.

Id. at 549. The supreme court concluded that the evidence supported dual convictions. Id.

Applying the test established in Barney, it is our conclusion that due process does not bar dual convictions in this case. The first factor, temporal proximity, weighs against dual convictions. The testimony suggests the vaginal touching occurred only moments before the penile penetration. The second factor, spatial proximity, supports dual convictions, as the defendant touched separate parts of the victim's body. "Movement or repositioning" would be required from touching the victim's vaginal area to penile penetration of her anus. Id. The third factor, whether there were intervening events, weighs against separate convictions, as the testimony suggests the acts occurred closely together without any interruption. The fourth factor, the sequence of the acts, supports dual convictions. In explaining this fourth factor, the court noted that repeated penetrations of the same orifice may suggest a single conviction is appropriate; whereas if difference orifices are involved, dual convictions may be appropriate. Id. Because the sexual battery involved a separate body part than the rape, this factor supports dual convictions. The final factor is the defendant's intent as evidenced by his conduct and statements. In our view, the defendant's removal of his clothing and then that of the victim support the conclusion that the act of touching the victim's vagina was

for sexual gratification. Sexual battery requires proof of unlawful sexual contact, which is defined as "intentional touching of the victim's .. intimate parts ... if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(5). By convicting the defendant of aggravated sexual battery, the jury has found, beyond a reasonable doubt, that the touching could be reasonably construed "as being for the purpose of sexual arousal or gratification." We cannot disagree with the jury's assessment that the touching was for sexual gratification. In our view, dual convictions do not violate due process.

The defendant also contends that dual convictions are barred by the Double Jeopardy Clause. The supreme court also addressed this issue in Barney, 986 S.W.2d at 549. The court first applied the ruling in State v. Denton, 938 S.W.2d 373 (Tenn. 1996). Barney, 986 S.W.2d at 549 (discussing the ruling in Denton). Denton requires consideration of the following:

1. an analysis of the statutory offenses under Blockburger v. United States to determine "whether each provision requires proof of an additional fact which the other does not";
2. an analysis, guided by the principles of Duchac v. State, of whether the same evidence is required to prove each offense;
3. a consideration of whether there were multiple victims or discrete acts; and
4. a comparison of the purposes of the respective statutes.

Barney, 986 S.W.2d at 549 (discussing the test for double jeopardy violations established in Denton) (citations omitted).

In Barney, the court also relied upon its prior ruling in Phillips, 924 S.W.2d at 665. Barney, 986 S.W.2d at 549. Under Phillips, the following factors

are relevant:

1. the nature of the act;
2. the area of the victim's body invaded by the sexually assaultive behavior;
3. the time elapsed between the discrete acts;
4. the accused's intent, in the sense that the lapse of time may indicate a newly formed intent to again seek sexual gratification or inflict abuse; and
5. the cumulative punishment.

Barney, 986 S.W.2d at 549 (summarizing the holding in Phillips). In Barney, the court concluded that convictions for sexual battery and rape were not barred by the Double Jeopardy Clause. 986 S.W.2d at 550.

Applying the criteria of Denton and Phillips, as set forth in Barney, we conclude double jeopardy principles do not bar dual convictions. The offense of sexual battery contains different elements than the offense of rape. See Barney, 986 S.W.2d at 550. Each offense requires differing proof. Battery requires an intentional touching for the purpose of sexual gratification while rape requires only sexual penetration. See Barney, 986 S.W.2d at 550. Also, each offense requires a different type of contact. Id. Finally, the effective sentence of thirty-five years does not seem excessive, given the amount of trauma suffered by the victim.

Accordingly, double jeopardy does not bar dual convictions.

(VIII)

The defendant's final issue is whether the trial court erred by imposing an excessive sentence. The trial court imposed a twenty-five-year sentence for the rape conviction and a ten-year sentence for the aggravated sexual battery conviction and ordered the sentences to be served consecutively. The defendant complains that the trial court erred by imposing the maximum term available for

each offense and by ordering the sentences to be served consecutively.

At the sentencing hearing, Ida Black, a probation officer with the Metro General Sessions Probation Department, testified that in 1994, she was assigned to monitor the defendant, who had been placed on probation for a theft charge. She recalled that when the defendant did not comply with the terms of his probation, she filed a revocation warrant. The defendant failed to appear in court at the revocation hearing and a *capias* was issued. Ultimately, his probation was revoked.

Sue Ann Bottoms, employed at a community mental health center that provides counseling services in child sexual abuse cases, met with the victim several times after the assault. She testified that the victim experienced severe emotional difficulties and has been unable to talk about the details of the assault except through a tape recording. Ms. Bottoms predicted that the victim would continue to have emotional difficulties.

The appellant entered proof showing that he had completed twenty-six months of incarceration and that his "record of deportment is relatively good and ... trouble free." The presentence report shows that the thirty-four-year-old defendant has prior convictions for theft under \$50 and reckless driving. As indicated, his probation for the theft offense was revoked. The defendant acknowledged using marijuana weekly since his teenage years and "rock" cocaine every other weekend since he was in his mid-twenties. The defendant did not complete high school but has received his GED.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a



presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

At the time of these offenses, the presumptive sentence was the minimum in the range. Tenn. Code Ann. § 40-35-210(c). Should the trial court find mitigating and enhancement factors, it must start at the presumptive minimum in the range and enhance the sentence based upon any applicable enhancement factors, then reduce the sentence based upon any appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight given to each factor is within the trial court's discretion provided that the record supports its findings and it complies with the Sentencing Act. See Ashby, 823 S.W.2d at 169. The trial court, however, should make specific findings on the record which indicate its application of the sentencing principles. Tenn. Code Ann. §§ 40-35-209, -210.

The trial court found the following enhancement factors applicable: prior criminal behavior, that the defendant treated the victim with exceptional cruelty, that the personal injuries inflicted upon the victim were great; that the crimes were committed for the defendant's own pleasure (applicable only to the rape conviction); and that the defendant has a previous history of unwillingness to comply with the terms of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(1), (5), (6), (7), and (8). He gave "extremely great weight" to factor six, that personal injuries to the victim were great. The trial court declined to find any mitigating factors.

Initially, the defendant contends the trial court erred by finding he had a previous history of criminal behavior, asserting that enhancement factor is reserved for those with a "far more extensive criminal record than is present here." We disagree. In our view, the evidence supported the trial court's determination that the defendant has a previous history of criminal behavior. He acknowledged using illegal drugs weekly for twenty years.

The defendant also complains that the trial court erred by determining he treated the victim with exceptional cruelty. He contends the state's proof did not establish cruelty that was "appreciably greater than that incident to the crime itself." State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997) (quoting State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994)). Enhancement factors codified in Tenn. Code Ann. § 40-35-114 may not be used to enhance a sentence if they are "essential elements of the offense." Poole, 945 S.W.2d at 95. The rationale for this rule is to "avoid enhancing the length of sentences based on factors the Legislature took into consideration when establishing the range of punishment for the offense." Id. at 98 (citations omitted).

The "exceptional cruelty" enhancement factor may be applied where the facts "demonstrate a culpability distinct from and appreciably greater than that incident to" the crime. Id. (quoting Jones, 883 S.W.2d at 603). Exceptional cruelty is "usually found in cases of abuse or torture." State v. Williams, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995). In Williams, the defendant was convicted of aggravated rape; the aggravating circumstance was that the victim suffered bodily injury. See Tenn. Code Ann. § 39-13-502(a)(2). The court declined to apply the exceptional cruelty factor because the facts did not show any injury beyond that necessary to establish the bodily injury element of aggravated rape.

In this case, the defendant was convicted of rape of a child. The essential elements are penetration and that the victim be less than thirteen years of age. Tenn. Code Ann. § 39-13-522. Although it is a close question, the facts here do establish a culpability appreciably greater than that incident to the crime. Nurse Practitioner Rosof testified that the victim suffered several abrasions and tears in the rectal area, including one significant tear. Rosof also testified that the victim could not remain still during the examination and ultimately had to be anesthetized for the examination to be completed. Any penetration, no matter how slight, would be sufficient to establish the rape. The facts suggest an excessive amount of force was used to achieve the penetration. Moreover, the victim testified that the defendant ordered her to "shut up" and repeatedly called her vulgar names during the incident. The victim informed one of the investigating officers that she initially tried to escape but that the defendant threw a rock at her, hitting her in the back, and then drug her back to the location behind the shed. These facts are sufficient to establish excessive cruelty beyond that incident to the crime itself.

The defendant next complains that the trial court erred by finding the

victim suffered particularly great personal injuries. See Tenn. Code Ann. § 40-35-114(6). We cannot agree. Although the physical injuries would not qualify as "particularly great," the emotional damage easily does. The victim was so traumatized by the attack that she was unable to verbalize the assault at trial and instead had to put her answers in writing. Sue Ann Bottoms, a psychological examiner who had seen the victim between twelve and twenty times, testified that the victim was withdrawn and unable to talk about the event. Ms. Bottoms also believed the victim would need another year and a half of therapy and would require additional counseling later in life when she moved into adolescence and young adulthood. "Personal injury" may include psychological scarring. State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994). Application of this factor is appropriate.

The defendant next contends the trial court erred by finding the offense was "committed to gratify the defendant's desire for pleasure and excitement." See Tenn. Code Ann. § 40-35-114(7). The trial court only applied this enhancement factor to the rape conviction. The state, of course, bears the burden of demonstrating that the rape was sexually motivated or committed for the defendant's own pleasure or excitement. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993). In State v. Kissinger, 922 S.W.2d 482, 489 (Tenn. 1996), the supreme court ruled that this factor could not be used to enhance a sentence for sexual battery because it duplicates an essential element of the offense. The court, concluded, however, that the factor could be used to enhance a sentence for rape in appropriate cases. Id. In Kissinger, the court concluded the record was devoid of any evidence tending to show a motivation for the rape and, therefore, application of factor seven was inappropriate. Id. at 491.

Because the victim was unable to provide many of the details which might have supported the application of the enhancement factor, we must conclude there is no evidence that the rape was motivated by a desire for pleasure or excitement. The facts, calling the victim names and throwing a rock, suggest anger; but the record contains few facts, at least at the level required by Kissinger, to suggest the defendant acted out of a desire for sexual gratification or pleasure. See id. It is our view that the trial court erred by applying this factor.

The defendant also complains that the trial court erred by failing to apply the mitigating circumstance that the defendant did not have a sustained intent to violate the law, but instead committed an impulsive act. See Tenn. Code Ann. § 40-35-113(11). In our view, this factor is inapplicable. The facts support an inference that the defendant followed the victim to the Revco and then followed her when she left. When she tried to escape, he subdued her. These facts suggest there was a sustained intent to commit the unlawful acts. The defendant also contends that his favorable record while incarcerated should be given some weight under the "catch all" provision of Tenn. Code Ann. § 40-35-113(13). That the defendant has a good record of behavior while incarcerated could arguably be a mitigating circumstance. In our view, however, it would be entitled to only marginal consideration.

As a final matter, although not mentioned by either party, when imposing sentence for the rape conviction, the trial court applied a presumptive mid-range sentence of twenty years pursuant to Tenn. Code Ann. § 40-35-210(c) (Supp. 1996). The court stated the presumptive minimum for a Class A felony is twenty years and then imposed a twenty-five-year sentence. The trial court also stated that even if it had started at fifteen years, it would have imposed the maximum sentence.

That provision, however, was not in effect at the time of the offense. Prior law requires the minimum possible term as the beginning point. The application of the twenty-year presumptive sentence as a starting point for an offense committed prior to July 1, 1995, would constitute an ex post facto violation of the defendant's constitutional rights. State v. James Holloway, No. 01C01-9608-CR-00330, slip op. at 2 (Tenn. Crim. App., at Nashville, June 30, 1997). Because the trial court erred by applying enhancement factor seven and by starting at the midpoint in the range, our review must be de novo without a presumption of correctness.

The court gives great weight to the personal injury suffered by the victim. Significant weight is also given to the defendant's extensive criminal background and to the fact that he had not complied with the terms of release on probation. In our view, the ten-year sentence for aggravated sexual battery and the twenty-five year sentence for the greater offense is appropriate.

We now turn to the appropriateness of ordering consecutive sentences. Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution: "[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language.

Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria<sup>6</sup> exist:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation;
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection

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<sup>6</sup>The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

(b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate[] to the severity of the offenses committed and are necessary in order to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct." The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938. The record must show that the sentencing principles and all relevant facts and circumstances were considered before the presumption of correctness applies.

The trial court concluded the defendant was a dangerous offender whose conduct indicated little regard for human life and little hesitation about committing a crime in which the risk to human life was high. The trial court also applied factor five, that the defendant had been convicted of two or more statutory offenses involving sexual abuse of a minor. See Tenn. Code Ann. § 40-35-115(4), (5). In our view, the trial court erred by concluding the defendant was a dangerous offender whose behavior indicates little regard for human life and little hesitation about committing a crime in which the risk to human life was high. Although the attack was severe, no weapon was used and the assault did not pose a threat to the



victim's life. The victim was released without serious physical injury.

Whether the other basis for consecutive sentencing applies is a closer question. The trial court made the following finding:

I'm also going to find that number five applies; that the defendant has been convicted of two or more statutory offenses involving sexual abuse of a minor, with consideration of the aggravating factors or circumstances arising from the relationship between the defendant and the victim, there is none in this case. The time span of the activity, there was none. It was one incident. The nature and scope of the sexual acts, and the extent of the residual physical and mental damage to the victim ... that is so great in this case. The physical damage is extensive. She still cannot speak of these events and is going to have trouble for the rest of her life, so I find evidence for two bases for running these sentences consecutive. I must go further, however, and look at the factors set out in Wilkerson, and that is I must determine that the aggregate term reasonably relates to the severity of the offenses, and that this is necessary in order to protect the public from further serious criminal conduct by the defendant. Some of the considerations that I have to look at is that confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, which does not apply in this case. I also have to consider confinement is necessary to avoid depreciating the seriousness of the offense, and the confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses. That part of the sentencing statute is important in this case because it is important for this Court to let people know that you cannot abduct nine-year-old children off the streets of Davidson County, and brutally rape them and use them for their own purposes and not receive a severe sanction. It is important in this case because the defendant has demonstrated to this Court what his behavior is like, and the extent of the residual and physical damage; therefore, I am going to sentence Mr. Scott to an effective sentence of 35 years; 25 years for the rape, and 10 years for the aggravated sexual battery, and that is my judgment in this case.

In our view, this factor, standing alone, would not justify consecutive sentencing. There was no relationship between the defendant and the victim; there was no time span between the acts; and the scope of the defendant's acts was

limited. There was, however, testimony that the mental damage to the victim was substantial. See State v. Woodcock, 922 S.W.2d 904, 915-16 (Tenn. Crim. App. 1995). Factor (5) standing alone would not establish a need for consecutive sentences; however, the defendant was sentenced for an offense committed while on probation, which is a separate basis for consecutive sentencing. See Tenn. Code Ann. § 40-35-115(6). Furthermore, the Wilkerson factors are favorable to the state, as indicated by the trial court. That is, the term is reasonably related to the severity of the offenses and is necessary to protect society from a defendant who has escalated his participation in criminal behavior.

Accordingly, the judgment of the trial court is affirmed.

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Gary R. Wade, Presiding Judge

CONCUR:

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John H. Peay, Judge

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Jerry L. Smith, Judge