IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
September 7, 2023 Session

STATE OF TENNESSEE v. WILLIE BROWN

Appeal from the Criminal Court for Shelby County
No. 20-00416 Paula L. Skahan, Judge

No. W2022-01188-CCA-R3-CD

A Shelby County jury convicted the Defendant, Willie Brown, of rape of a child, and the trial court sentenced him to serve twenty-seven years. On appeal, the Defendant argues that the evidence is legally insufficient to support his conviction. He also asserts that (1) the trial court erred in admitting text messages that were not properly authenticated; (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose records related to an investigation of the victim's mother; and (3) the trial court imposed an excessive sentence. On our review, we respectfully affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Criminal Court Affirmed

TOM GREENHOLTZ, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and J. ROSS DYER, JJ., joined.

Roberto Garcia, Jr. (on appeal) and Terita M. Hewlett (at trial), Memphis, Tennessee, for the appellant, Willie Brown.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Alyssa Hennig and Gavin Smith, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On February 4, 2020, the Shelby County grand jury charged the Defendant with raping a child less than thirteen years of age between May 12, 2014, and May 12, 2015. The trial of the case began on March 14, 2022.

The proof presented at trial established that, when she was eleven years old, the victim, T.G.,[1] lived in a two-bedroom house with her two sisters, her mother, and her mother's boyfriend, the Defendant. One night, the victim went to use the bathroom. The victim tried to shut the door, but the Defendant entered the bathroom behind her.

In the bathroom, the Defendant removed the victim's pants. To ensure the victim did not fight back, the Defendant told her if she "didn't do it[,] he would go and do it to [her] sisters." Because she "had to protect [her] sisters[,]" the victim did what Defendant told her.

The Defendant also removed his pants and pulled the victim onto him while sitting on the toilet. The Defendant inserted his penis into the victim's vagina, grabbed her bottom, and "took [it] up and down." The victim described the experience as "the most hurtful thing ever[.]" Despite the pain, the victim did not cry out because she feared that the Defendant would hurt her or her sisters if she did.

The Defendant told the victim that he would kill her if she told anyone, and, for years, she did not. The Defendant and the victim's mother later separated. When the victim was fifteen years old, she told her mother about the rape, and the mother reported the rape to the police.[2] On one occasion thereafter, the victim saw the Defendant drive by as she walked home from school. The Defendant told her he knew "where to find [her]."

After reporting the rape, the victim's mother received threatening text messages from a number registered to bandwidth.com, a service that allows people to send messages from a disguised phone number. At trial, the mother identified the sender of the messages as being the Defendant, in part, because the messages referred to her by two nicknames used by the Defendant while they were dating. In the text messages, the Defendant also said that he told the victim "not to tell" and that he had been watching her house for months. He texted that the victim "will not get away with what she did[,] trust me[.] I have learned the time you come and go[.] I will kill [the victim.] I told her what would happen if she told and anybody get in my way[,] I will f****** take them down too by any means necessary[.]" Additionally, the Defendant said that the victim's "body was nice" and promised "to kill her no matter what[.]"

[1] It is the policy of this Court to identify the victims of sexual offenses only by their initials.

[2] As we discuss later in this opinion, although the victim repeatedly identified the Defendant as her assailant, she was unable to recognize him in open court.

The Defendant testified at trial. The Defendant said his relationship with the mother was "unhealthy," and he described her as "very vindictive." He denied sending her the threatening text messages and suggested that she had fabricated the story.

Upon conclusion of the proof, the jury found the Defendant guilty as charged. Following a hearing, the trial court sentenced the Defendant to serve twenty-seven years. The trial court denied the Defendant's motion for a new trial on August 19, 2022, and the Defendant filed a timely notice of appeal on August 29, 2022.

ANALYSIS

In this appeal, the Defendant argues that evidence is legally insufficient to support his conviction. He also asserts that (1) the trial court erred in admitting text messages that were not properly authenticated; (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose records related to an investigation of the victim's mother; and (3) the trial court imposed an excessive sentence. We address each of these issues in turn.

A. LEGAL SUFFICIENCY OF THE EVIDENCE

The Defendant first argues that the evidence is legally insufficient to support his conviction for rape of a child. He asserts that the State failed to prove the element of identity because the victim could not identify him in the courtroom during the trial as her assailant. In addition, he argues that the victim's testimony was wholly uncorroborated and that the mother was not a credible witness due to her background and bias against the Defendant. Finally, the Defendant argues that the text messages may not be considered in the analysis as they were not properly admitted at trial. In response, the State argues that the proof is sufficient for conviction. We agree with the State.

1. Standard of Appellate Review

"The standard for appellate review of a claim challenging the sufficiency of the State's evidence 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 beyond a reasonable doubt.'" *State v. Miller*, 638 S.W.3d 136, 157 (Tenn. 2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review is "highly deferential" in favor of the jury's verdict. *See State v. Lyons*, 669 S.W.3d 775, 791 (Tenn. 2023). Indeed, this standard requires us to resolve all conflicts in favor of the State's theory and to view the credited testimony in a light most favorable to the State. *State v. McKinney*, 669 S.W.3d 753, 772 (Tenn. 2023). To that end, "[w]e do not reweigh the evidence,

because questions regarding witness credibility, the weight to be given the evidence, and factual issues raised by the evidence are resolved by the jury, as the trier of fact." *State v. Shackleford*, 673 S.W.3d 243, 250 (Tenn. 2023) (citations omitted). "The standard of review is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (internal quotation marks and citation omitted).

2. Rape of a Child

As charged in this case, rape of a child is the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a) (2014) (since amended). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required[.]" *Id.* § 39-13-501(7) (2014).

On appeal, the Defendant first asserts that the victim was "the sole witness of the alleged rape" and that her testimony was not corroborated by DNA or other evidence. He also asserts that the testimony of the victim and her mother were not credible, arguing that each had a motive to accuse the Defendant and that the victim's testimony was inconsistent with other proof.

When reviewing the sufficiency of the convicting evidence, our standard of appellate review requires us to accredit the testimony of the State's witnesses. *Shackleford*, 673 S.W.3d at 250. The law does not require physical evidence or corroboration of a victim's testimony to sustain a conviction for rape. *State v. Collier*, 411 S.W.3d 886, 899 (Tenn. 2013) ("[I]t has long been the rule in our state that the uncorroborated testimony of a minor victim may be sufficient to sustain a conviction for forcible or coercive sex offenses such as simple rape."); *State v. Pennington*, No. E2020-00415-CCA-R3-CD, 2021 WL 2172189, at *7 (Tenn. Crim. App. May 27, 2021) (citation omitted), *no perm. app. filed*. The Defendant's argument is essentially an invitation to reweigh the evidence or to disturb the jury's determinations on appeal. We respectfully decline to do so.

Second, the Defendant challenges the element of identity. Our supreme court has recognized that "the identity of the perpetrator is an essential element of any crime." *Miller*, 638 S.W.3d at 158. "The identity of the perpetrator is a question of fact for the jury to determine," *State v. McLawhorn*, 636 S.W.3d 210, 237 (Tenn. Crim. App. 2020), and "[c]ircumstantial evidence alone may be sufficient to establish the perpetrator's identity," *State v. Watkins*, 648 S.W.3d 235, 253 (Tenn. Crim. App. 2021).

The Defendant asserts that because the victim could not identify him in open court as the person who raped her, the State failed to prove the element of identity beyond a reasonable doubt. We respectfully disagree. The victim was clear in her testimony that when she was eleven years old, she was raped by her mother's boyfriend. She testified that this boyfriend lived with them at the time and that his name was "Willie Brown."

When the victim's mother later testified, she affirmatively identified the Defendant as her boyfriend, Willie Brown, who lived with her and her children when the victim was eleven. For whatever reason, the victim could not recognize the Defendant in open court, but "[a] courtroom identification is not a prerequisite to a conviction for a criminal offense." *State v. Morris*, No. 01C01-9506-CC-00206, 1996 WL 233989, at *2 (Tenn. Crim. App. May 9, 1996). Instead, the jury credited the testimony of the victim and her mother, and this evidence was plainly sufficient for a reasonable juror to find that the Defendant was the person who committed the offense. *See State v. Adkins*, No. W2015-01810-CCA-R3-CD, 2017 WL 2275809, at *3 (Tenn. Crim. App. May 24, 2017) (upholding identification when, despite the victim being unable to identify the defendant in open court, the victim gave the perpetrator's name and description and the police investigator linked the name and description to the defendant), *perm. app. denied* (Tenn. Sept. 22, 2017).

Finally, the Defendant argues that the identification testimony was bolstered by improperly admitted text messages purporting to be from the Defendant. He asserts that if the text messages had been excluded, no rational trier of fact could have found the element of identity beyond a reasonable doubt. For two reasons, we respectfully disagree.

First, as we recognized above, the evidence is legally sufficient to support the Defendant's conviction for rape of a child based upon the credited testimony of the victim and her mother. To that end, the text messages were not necessary to sustain the Defendant's conviction on appeal. In other words, even if the text messages were excluded from consideration, the evidence still plainly supports the Defendant's conviction.

More importantly, though, the sufficiency of the evidence "must be examined in light of all the evidence presented to the jury, including that which is improperly admitted." *State v. Long*, 45 S.W.3d 611, 619 (Tenn. Crim. App. 2000) (citing *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988)). As such, although we conclude below that the text messages were properly admitted, the question of their admissibility is irrelevant to our review of the sufficiency of the evidence.

Ultimately, the proof at trial established that, when the victim was eleven years old, the Defendant followed her one night into the bathroom, where he undressed her and himself. He then grabbed and pulled her down on him, penetrating her with his penis.

After the rape, the Defendant threatened her with harm if she told another person what he had done. A reasonable jury also could have found that the Defendant's actions were intentional, knowing, or reckless and that he acted recklessly with respect to the victim's age. *State v. Clark*, 452 S.W.3d 268, 297 (Tenn. 2014). Viewing the evidence in a light most favorable to the State, we conclude that a rational juror could find the essential elements of rape of a child beyond a reasonable doubt.

B. AUTHENTICATION OF TEXT MESSAGES

The Defendant next argues that the trial court erred in admitting text messages purporting to be sent from the Defendant to the victim's mother. At trial, the Defendant objected to the admission of the text messages, arguing that the evidence was irrelevant without proper authentication and that the danger of unfair prejudice outweighed their probative value. Tenn. R. Evid. 901, 402, 403. After a jury-out hearing, the court overruled the objection, finding that the messages were relevant to the Defendant's "knowledge of guilt" and that the probative value of the messages outweighed the danger of unfair prejudice. On appeal, the Defendant does not challenge the admissibility of the messages apart from the lack of authentication or proof of authorship.

Tennessee Rule of Evidence 901(a) provides that evidence may be authenticated "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." As a leading treatise has observed, "[a]uthentication is actually a facet of conditional relevance discussed in rule 104(b)." Neil P. Cohen et al., *Tennessee Law of Evidence*, § 9.01[2][a] (6th ed. 2011). In this process, "[t]he judge looks at the evidence presented by the proponent of the proof and decides whether the jury, if presented with that evidence, could reasonably find that the proffered item is what it is claimed to be." *Id.* Once the evidence is admitted, "the jury, then, is free to give [the evidence] as much or little weight as the jury thinks appropriate." *Id.* § 9.01[2][c]; *State v. Hinton*, 42 S.W.3d 113, 127 (Tenn. Crim. App. 2000). We review a trial court's determination that evidence has been properly authenticated for an abuse of discretion. *State v. Mickens*, 123 S.W.3d 355, 376 (Tenn. Crim. App. 2003). "An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is illogical or unreasonable and causes an injustice to the party complaining." *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (internal quotation marks and citation omitted); *State v. Murray*, No. M2021-00688-CCA-R3-CD, 2022 WL 17336522, at *6 (Tenn. Crim. App. Nov. 30, 2022), *perm. app. denied* (Tenn. Mar. 8, 2023) (internal quotation marks and citation omitted).

In the context of a writing where the author's identity is relevant, including an electronic writing, a proponent may authenticate the evidence as having come from another person in various ways. For example, the proponent may have direct proof of the writing's

authorship, such as an admission, a signature, or other proof from a knowledgeable witness. Tenn. R. Evid. 901(b)(1).

Additionally, "[a]uthentication may be established solely through the use of circumstantial evidence." *State v. Spivey*, No. M2018-00263-CCA-R3-CD, 2020 WL 598347, at *12 (Tenn. Crim. App. Feb. 7, 2020) (citation and internal quotation marks omitted), *perm. app. denied* (Tenn. June 3, 2020). As such, a writing may be authenticated based on its contents and substance when "taken in conjunction with circumstances" of the case. *See* Tenn. R. Evid. 901(b)(4) (allowing authentication based on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"). With respect to electronic messages, we have recognized that the State is not "required to affirmatively prove that the Defendant was the author of the message." *State v. Burns*, No. M2014-00357-CCA-R3-CD, 2015 WL 2105543, at *12 (Tenn. Crim. App. May 5, 2015), *no perm. app. filed*. Instead, once the evidence is sufficiently authenticated by other means, any challenge as to the conclusive or definitive author "goes to the weight of the evidence, not its admissibility." *Id.*; *State v. Austin*, No. M2018-00591-CCA-R3-CD, 2020 WL 6277557, at *16 (Tenn. Crim. App. Oct. 27, 2020) ("The Defendant's complaint relative to the adequacy of the evidence connecting him to the cell phone and text messages is an issue of the weight of the evidence, which was the province of the finder of fact at trial."), *no perm. app. filed*.

In this case, the State offered proof that the victim's mother received threatening text messages related to her daughter, and it sought to authenticate the messages through their contents and surrounding circumstances. As to the content of the messages, the mother testified that the text messages referred to her by two names that the Defendant used while they were dating. The mother stated that the text messages referenced the victim by name, said that he told the victim "not to tell," and threatened to kill her. The author of the text messages knew that the mother was staying at her sister's house. The author also drove past the mother and the victim on the day of the messages, and the author identified the clothing the victim wore. One of the messages concluded with the statement that "[the victim's] body was nice."

As to the circumstances surrounding the messages, the mother testified that she did not know of anyone other than the Defendant with a reason to threaten her daughter, and she knew of no one else who would have a reason to say, "I told her not to tell." She also testified that the victim had never made accusations against any of her other boyfriends. In addition, the mother testified as to the timing of the text messages. She said that she reported the victim's allegations to the police in 2019, some four years after the rape, and that she received the text messages only "recently" after contacting law enforcement. Finally, in her responses to the text messages, the mother affirmatively identified "Willie [B]rown Jr" as the author, and the author did not deny the claim or assert that the mother was mistaken.

The Defendant argues that another person could have sent the text messages, including the victim herself. Indeed, it is true that the mother did not recognize the number from which the messages were sent. Nevertheless, while evidence of the account from which electronic messages were sent may help authentication, this evidence may not be necessary when the messages can be authenticated by other means, such as through their contents and surrounding circumstances. The Defendant's arguments are more appropriately addressed, as they were at trial, to the jury's consideration of whether it would credit the evidence and, if so, how much weight the evidence should be given.

Although the question is a close one, the standard of appellate review is important. Under an abuse-of-discretion standard, "[t]he reviewing court need not find that the trial court made the best decision or the one the appellate court would have made; instead, the reviewing court must confine itself to determining whether the trial court's decision was within the range of acceptable alternatives." *State v. Willis*, 496 S.W.3d 653, 729 (Tenn. 2016). The trial court's decision here was not illogical or wholly unreasonable, and it was not based on a clearly erroneous assessment of the evidence. *See In re Karissa V.*, No. E2016-00395-COA-R3-PT, 2017 WL 758513, at *13 (Tenn. Ct. App. Feb. 27, 2017) (affirming authentication of text messages without definitive proof of authorship as a "close question" when "reasonable minds can disagree about a particular discretionary decision"), *perm. app. denied* (Tenn. May 24, 2017). As such, when the contents of the text messages and their surrounding circumstances are taken together, we cannot conclude that the trial court abused its discretion in finding that the text messages were sufficiently authenticated for admission. The Defendant is not entitled to relief on this issue.

C. THE STATE'S DISCLOSURE OF INVESTIGATIVE RECORDS

The Defendant next argues that the State withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). More specifically, the Defendant asserts that the State had records from a prior investigation of the mother by the Department of Children's Services ("DCS"). According to the Defendant, this investigation involved allegations that the mother struck one of her other children, and although the mother testified about the events at trial, the records "could have been used to further discredit [the mother's] testimony and corroborate his defense." In response, the State argues that the Defendant has failed to meet any of the *Brady* requirements and that the evidence was equally available to him through an *in camera* review of the records by the trial court. We agree with the State.

1. Background

As background for this issue, during the Defendant's cross-examination of the mother at trial, the Defendant asked whether she had been the subject of a DCS investigation in 2015, the same year the rape was alleged to have occurred. After the State objected, the trial court held a hearing outside the jury's presence. During this hearing, the Defendant asserted that the State's discovery revealed the mother was the subject of a physical abuse complaint involving the victim's sister. The Defendant wished to ask about this investigation to show the "home environment" and to explain why the victim would be afraid of her mother.

The trial court asked defense counsel to see "the DCS information" she had about the abuse investigation. Defense counsel gave the DCS records to the court, noting that she did not have the entire file. Reviewing the records, the trial court observed that the investigation occurred in 2013, one or two years before the alleged rape, and noted that defense counsel was "playing kind of fast and loose with these years." When defense counsel stated that another investigation occurred in 2015, the trial court responded, "[Y]ou don't have the entire DCS record, which I would have provided to you had you requested it." When the court asked the State whether it had "that DCS record," the State responded that it was "not aware of anything else involving this victim in 2015."

Because defense counsel's DCS records did not refer to a 2015 investigation, the trial court allowed counsel to ask the mother only about the earlier investigation. When the trial resumed, the mother confirmed that she was investigated by DCS in 2013 and that the investigation was dismissed after she "went to anger management." Defense counsel did not raise any issue concerning the completeness of the State's discovery responses, assert a *Brady* violation, or tender her own partial DCS records as part of the trial record.

During the hearing on the Defendant's motion for a new trial, defense counsel asserted that "*if* the State inadvertently failed to turn over any exculpatory evidence pertaining to the DCS records, then [the Defendant] should be granted a new trial." Counsel acknowledged that the State provided the DCS records she possessed in discovery but that "*if* there was some additional information[,] that they were under obligation to provide it to us." The Defendant did not otherwise establish that additional records existed, or if so, what information was contained in those records.

In response, the State's attorney represented that she disclosed to the Defendant all the DCS records she had in her possession. After the argument, the trial court denied this ground for relief without further explanation.

2. Standard of Appellate Review

"When considering a *Brady* claim, this court reviews the trial court's findings of fact, such as whether the defendant requested the information or whether the State withheld the information, de novo with a presumption that the findings are correct unless the evidence preponderates otherwise[.]" *State v. Tice*, No. M2021-00495-CCA-R3-CD, 2022 WL 2800876, at *27 (Tenn. Crim. App. July 18, 2022) (citing *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004)), *perm. app. denied* (Tenn. Dec. 14, 2022). However, we review "the trial court's conclusions of law, including whether the evidence was favorable to the accused or material, de novo with no presumption of correctness." *Id.*

3. *Brady* Analysis

In this Court, the Defendant argues that the State "failed to disclose DCS records about an investigation against [the mother] that [the Defendant] could have used as impeachment." In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See also Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). Evidence that is "favorable to an accused" includes, among other things, "evidence relevant to the impeachment of prosecution witnesses." *State v. Jackson*, 444 S.W.3d 554, 593 (Tenn. 2014). As our supreme court has recognized,

> To establish a Due Process violation based on *Brady*, a defendant must show that: (1) the defendant requested the evidence (unless the evidence is obviously exculpatory, in which case the prosecution is bound to produce the information, without a request); (2) the State suppressed evidence in its possession; (3) the suppressed evidence was favorable to the defendant; and (4) the evidence was material.

Id. at 594 (citing *Johnson*, 38 S.W.3d at 56). Importantly, "[a]ll of the *Brady* requirements must be met in order to show a *Brady* violation." *Watson v. State*, No. W2019-00489-CCA-R3-PC, 2020 WL 7786957, at *13 (Tenn. Crim. App. Dec. 30, 2020), *perm. app. denied* (Tenn. Mar. 23, 2021). To that end, "[t]he burden of proving a *Brady* violation rests with the defendant, and the violation must be proven by a preponderance of the evidence." *State v. Dotson*, 450 S.W.3d 1, 94 (Tenn. 2014).

We have recognized that no *Brady* claim may proceed unless the defendant first shows that the withheld evidence existed. *State v. Winbush*, No. E2018-02136-CCA-R3-CD, 2020 WL 1466307, at *20 (Tenn. Crim. App. Mar. 24, 2020), *perm. app. denied*

(Tenn. Aug. 6, 2020). Indeed, "the State's obligation to disclose favorable evidence under *Brady* does not extend to nonexistent evidence[.]" *State v. Ivory*, No. M2020-01458-CCA-R3-CD, 2021 WL 4955665 (Tenn. Crim. App. Oct. 26, 2021), *perm. app. denied* (Tenn. Mar. 23, 2022). Perhaps obviously, a defendant cannot show prejudice from the State's failure to produce evidence that does not exist. *E.g.*, *United States v. Taylor*, 253 F.3d 1115, 1117 (8th Cir. 2001) ("[The Defendant] has shown no prejudice from the Government's failure to produce non-existent evidence. The Government did not violate its duty under *Brady*.").

In this case, the Defendant has not shown that other DCS records exist. The State's attorney represented to the trial court that she was unaware of any other DCS records and that she disclosed all the DCS records in her possession. At the hearing on his motion for a new trial, the Defendant did not seek to subpoena any additional records from DCS, nor did he proffer to the trial court any records that he claimed should have been produced. He also did not present any witnesses to establish that other DCS records existed but were not disclosed.

Notably, the Defendant himself did not allege that other DCS records existed, and he repeatedly phrased his request for *Brady* relief in the conditional sense. In his motion for a new trial, for example, he asserted that he "should be granted a new trial *if* the [S]tate inadvertently failed to turn over exculpatory evidence[.]" Later during the hearing itself, the Defendant's counsel clarified his position as being "that *if* the State inadvertently failed to turn over any exculpatory evidence . . . , then [the Defendant] should be granted a new trial."

We may not "engage in conjecture, speculation or to guess what . . . materials the assistant district attorney general suppressed absent a showing that such materials existed." *State v. Hacker*, No. 165, 1988 WL 118088, at *10 (Tenn. Crim. App. Nov. 7, 1988). A claim that the State suppressed favorable and material evidence must rely on something more than "the Defendant's bare assertion" of the fact, and the law requires a defendant to prove that the information exists (or existed) before relief may be granted. *See State v. Allen*, No. E2022-00437-CCA-R3-CD, 2023 WL 4487704, at *47 (Tenn. Crim. App. July 12, 2023). The Defendant has failed to meet this burden.

Finally, the absence of the disputed DCS records in this appeal is important. Without having the DCS documents in the appellate record for our review, we cannot determine whether the records "were favorable to Defendant or to determine their materiality under *Brady*." *State v. Jackson*, No. M2019-01128-CCA-R3-CD, 2020 WL 2488763, at *9 (Tenn. Crim. App. May 14, 2020), *perm. app. denied* (Tenn. Aug. 5, 2020). For these reasons, we conclude that the Defendant has failed to show that the State

suppressed favorable and material information at trial. The Defendant's claim, respectfully, is without merit.

D. SENTENCING

Finally, the Defendant argues that the trial court imposed an excessive sentence. More specifically, he argues that the trial court misapplied enhancement factors (1) and (14), Tenn. Code Ann. § 40-35-114(1), (14), and asserts that without these two enhancement factors, no other reason existed to support a sentence above the range minimum. In response, the State argues that the sentence should be affirmed because the trial court imposed a within-range sentence that complies with the purposes and principles of sentencing. We agree with the State.

1. Standard of Appellate Review

"[W]hen a defendant challenges the length of a sentence that falls within the applicable statutory range and reflects the purposes and principles of sentencing, the appropriate standard of appellate review is abuse of discretion accompanied by a presumption of reasonableness." *State v. King*, 432 S.W.3d 316, 321 (Tenn. 2014) (citing *State v. Bise*, 380 S.W.3d 682, 706-07 (Tenn. 2012)). As such, this Court is "bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out" in the Sentencing Act. *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008); Tenn. Code Ann. §§ 40-35-101 and -102. While trial courts need not comprehensively articulate their findings with regard to sentencing, "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed [on the record]." *Bise*, 380 S.W.3d at 706.

2. Length of Sentence

The Defendant challenges the length of the twenty-seven-year sentence the trial court imposed for his rape of a child conviction. The offense of rape of a child is a Class A felony offense, and the law requires that the sentencing range may not be lower than Range II. *See* Tenn. Code Ann. § 39-13-522(b)(1); (b)(2)(A). Because the applicable sentencing range was not less than twenty-five years and no more than forty years, *id.* § 40-35-112(b)(1), the trial court's twenty-seven-year sentence was within the applicable range. *King*, 432 S.W.3d at 321.

a. Enhancement Factor (1)

The Defendant first argues that the trial court misapplied enhancement factor (1), asserting that the trial court improperly found that the Defendant engaged in criminal behavior by sending threatening text messages to the victim's mother. He contends that because the trial court had no credible proof that he sent the text messages, the trial court improperly applied enhancement factor (1). We respectfully disagree.

Enhancement factor (1) permits a court to enhance a sentence when "[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range[.]" Tenn. Code Ann. § 40-35-114(1). Application of this factor is not limited to circumstances where a defendant has a record of criminal convictions. Instead, a trial court may apply this factor when there is "evidence of criminal behavior even though there has been no conviction." *State v. Emery*, No. W2021-00086-CCA-R3-CD, 2022 WL 1134771, at *5 (Tenn. Crim. App. Apr. 18, 2022), *no perm. app. filed*. So long as the State proves the criminal behavior by a preponderance of the evidence, a trial court may apply this factor "regardless of whether [the behavior] resulted in arrest, indictment, or conviction[.]" *State v. Beham*, No. W2018-01974-CCA-R3-CD, 2019 WL 6898356, at *11 (Tenn. Crim. App. Dec. 18, 2019) (citation and internal quotation marks omitted), *perm. app. denied* (Tenn. Apr. 17, 2020); *see also State v. Erwin*, No. E2021-01232-CCA-R3-CD, 2022 WL 3355024, at *8 (Tenn. Crim. App. Aug. 15, 2022) ("The defendant's action of displaying a firearm during a road rage incident constitutes criminal behavior regardless of whether it was prosecuted."), *no perm. app. filed*.

In this case, the trial court found that the Defendant "had no prior record," and it applied enhancement factor (1) based solely on the threatening text messages introduced at trial. (VI, 16-17.) Importantly, the Defendant does not challenge that the text messages threatening death and other harm could be evidence of a crime, including harassment. *See* Tenn. Code Ann. § 39-17-308(a)(1), (a)(2). Instead, he asserts that the State failed to prove that he was the author. However, the court credited the mother's trial testimony concerning the contents of the messages and the circumstances surrounding their receipt, and we must give great weight to this credibility determination. *State v. Melvin*, 913 S.W.2d 195, 202 (Tenn. Crim. App. 1995). With this credited testimony, the proof establishes the Defendant's authorship of the messages by a preponderance of the evidence. We conclude that the trial court acted within its discretion to consider enhancement factor (1).

b. Enhancement Factor (14)

The Defendant next argues that the trial court erred in applying enhancement factor (14), asserting that the trial court mischaracterized the nature of his relationship with the victim's mother. He contends that proof of a short relationship "was insufficient proof that this equated to a position of trust," particularly when the Defendant "rarely interacted" with her children. We again respectfully disagree.

Enhancement factor (14) permits a court to enhance a sentence when "[t]he defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or the fulfillment of the offense." Tenn. Code Ann. § 40-35-114(14). As our supreme court has recognized, "a position of trust does not depend on the length or formality of the relationship, but upon *the nature of the relationship*. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith." *State v. Kissinger*, 922 S.W.2d 482, 488 (Tenn. 1996) (emphasis added). To that end, our courts have observed that an adult "occupies a position of 'presumptive private trust' with respect to the minor" when the adult and child are members of the same household. *State v. Gutierrez*, 5 S.W.3d 641, 645 (Tenn. 1999); *State v. Blackstock*, 19 S.W.3d 200, 212 (Tenn. 2000).

In this case, the victim's mother testified that the Defendant was her boyfriend for about a year and that he lived in her home with her family the entire time. The victim also testified that her relationship with the Defendant "was like the step-father relationship. It was a good relationship." Although the Defendant gave a different account and testified that he rarely interacted with the children, the trial court did not credit his testimony. We conclude that the trial court acted within its discretion in considering enhancement factor (14). *See, e.g.*, *State v. Mayberry*, No. E2018-01597-CCA-R3-CD, 2019 WL 2775615, at *5 (Tenn. Crim. App. July 2, 2019) (affirming application of enhancement factor (14) when "the evidence presented at sentencing was that the Defendant was in a relationship with the victim's mother and living in her home when he raped the victim. The victim was in the Defendant's and her mother's care at the time of the rape."), *no perm. app. filed*.

Ultimately, the record indicates the trial court imposed a within-range sentence after considering the evidence offered at trial and the sentencing hearing, the presentence report, the principles of sentencing, the parties' arguments, the nature and characteristics of the crime, and evidence of mitigating and enhancement factors. Tenn. Code Ann. §§ 40-35-103(5), -114, -210(b). The record indicates the trial court acted within its discretion in weighing the applicable enhancement and mitigating factors. *Bise*, 380 S.W.3d at 707. And as our supreme court has made clear, a defendant's "mere disagreement with the trial court's weighing of the properly assigned enhancement and mitigating factors is no longer

a ground for appeal." *Id.* at 706. We affirm the Defendant's within-range sentence of twenty-seven years.

CONCLUSION

In summary, we hold that the evidence is legally sufficient to support the Defendant's conviction for rape of a child. We also hold that the trial court acted within its discretion in admitting evidence of threatening text messages and that the Defendant has not shown that the State violated any duties of disclosure. Finally, we hold that the trial court acted within its discretion to impose a twenty-seven-year sentence. We respectfully affirm the judgment of the trial court.

_____

TOM GREENHOLTZ, JUDGE