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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 8, 2022 Session

STATE OF TENNESSEE v. FRANK M. GREEN

Appeal from the Criminal Court for Davidson County
No. 2018-A-241 Cheryl A. Blackburn, Judge

No. M2021-01438-CCA-R3-CD

The Defendant, Frank M. Green, was convicted by a Davidson County Criminal Court jury of rape in Counts 1 and 3 and assault by extremely offensive or provocative physical contact in Counts 2 and 4 and was acquitted of the charge of aggravated kidnapping in Count 5. The Defendant filed a post-trial motion for judgment of acquittal as to the rape conviction in Count 3 and the assault conviction in Count 4. The trial court denied this motion but merged Count 3 with Count 1 and merged Count 4 with Count 2. Following a sentencing hearing, the trial court imposed a sentence of ten years for each of the rape convictions and a sentence of eleven months and twenty-nine days for each of the assault convictions and ordered the rape and assault convictions served concurrently, for an effective sentence of ten years. On appeal, the Defendant argues: (1) the State's faulty election of offenses led the trial court to provide erroneous and misleading jury instructions, which undermined the integrity of the jury's verdict; (2) the evidence is insufficient to sustain the convictions in count 3 for rape and count 4 for assault; and (3) the convictions in Counts 2 and 4 reflect the incorrect offense class and sentence. Because the State failed to demonstrate beyond a reasonable doubt that errors regarding the election, the charge, and the supplemental jury instructions were harmless, we reverse the Defendant's convictions and remand the case for a new trial on the offenses of rape in Counts 1 and 3 and the offenses of assault by extremely offensive or provocative physical contact in Counts 2 and 4.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed and Remanded

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which TOM GREENHOLTZ, J., joined. ROBERT H. MONTGOMERY, JR. J., filed a separate opinion dissenting in part.

Martesha Johnson Moore, District Public Defender, Emma Rae Tennet (on appeal), Kristin Neff and Chris Street-Razbadouski (at trial), Assistant District Public Defenders, for the Defendant, Frank M. Green.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Megan King and Ronald Dowdy, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

In 2018, the Defendant, Frank M. Green, was indicted on four counts of rape and one count of aggravated kidnapping. All of these charges concerned the same victim on the same day. Counts 1 and 3 charged the Defendant with rape without consent, and Counts 2 and 4 charged the Defendant with rape by force or coercion. Tenn. Code Ann. §§ 39-13-503(a)(1), (2) (Supp. 2017).

Trial. The victim, T.M.,[1] testified that when this incident involving the Defendant occurred she was seventeen years old and was working at Burger King on Charlotte Avenue in Nashville. At the time, she had been dating one of her coworkers for a few months, and they were looking for an apartment together.

The victim said she first met the Defendant in November 2017 while riding the bus to work. The Defendant told her that she was beautiful, and the victim replied that she "was gay." The next time she saw the Defendant on the bus, the Defendant was "friendly" and asked her where the nearest liquor store was located.

The victim saw the Defendant for the third time on the bus a few days later, and when the Defendant overheard that the victim was looking for an apartment, he asked her if she wanted to rent his furnished apartment. The victim said she was interested, and they agreed she would look at his apartment the following day during her work break. The Defendant provided his cell phone number, and the victim used a cell phone belonging to her girlfriend, A.K., to set up a time to see the apartment because she did not have a phone of her own.

The Defendant met the victim at her work on December 7, 2017. Prior to that date, they had only interacted with one another at the bus station or on the bus. The Defendant talked to the victim's girlfriend about his apartment, showed her his identification and some

[1] It is the policy of this court to identify victims of sexual offenses by their initials only. In addition, we identify the victim's family members as well as other individuals close to the victim solely by their initials in order to protect the privacy of the victim.

paperwork, and then waited a while for the victim to have her thirty-minute break. While the victim testified that she and her girlfriend would be required to pay some rent and the cost of utilities for the apartment, the victim's girlfriend testified that she understood they would only be required to pay for their utilities at the apartment. At some time, a little after 4:00 p.m., the victim walked with the Defendant to his apartment, which was only ten to fifteen minutes away from her work. Although the initial plan was for both the victim and her girlfriend to look at the apartment with the Defendant, the victim's girlfriend decided to get her nails done for her birthday and did not go to the apartment.

When the victim and the Defendant left the Burger King, the Defendant had a "personal size" bottle of vodka that was open with more than half of it gone. The victim said the Defendant smelled of alcohol but was not "sloppy drunk." While the victim was not worried about the Defendant's drinking, she was "anxious" and "a little nervous" because she "was going to [his] apartment without somebody else with [her]," although she "felt like it was going to be okay." As they walked to the Defendant's apartment, the victim used the Defendant's phone to call her girlfriend and gave her the name, address, and apartment number of the Defendant's apartment. The victim's girlfriend also called her from the phone at the nail salon a few times between 4:22 and 4:45 p.m.

When the victim and the Defendant arrived at the apartment, the Defendant used his key to open the front door. Although the Defendant had told the victim that his apartment was furnished, the apartment did not have furniture, although there were some things on the kitchen counter and a sheet on the floor. The Defendant invited the victim to look around the one-bedroom apartment. A short time later, the victim's girlfriend called from the nail salon to hear what the victim thought about the apartment. The victim walked into the bedroom, inspected the closet, and looked out the window to check out the view. She recalled that the living room and bedroom had brown carpet on the floor.

As the victim was looking out the window, the Defendant walked into the bedroom behind her and shut the door. The victim said she heard the door close and thought the Defendant locked the door but did not see him lock it. When the victim turned around, the Defendant was wearing nothing but socks. At that point, the victim "just went into shock."

The victim said the Defendant grabbed her shirt and pushed her down. The victim was five feet tall and weighed ninety-seven pounds, and the Defendant was five feet, nine inches tall and weighed two hundred pounds. The victim said the Defendant sat on her chest and for fifteen to twenty minutes "kept trying to put his penis into [her] mouth" while also pulling her pants down. The victim said the Defendant never got his penis "past [her] teeth" but was able to get his penis through her lips. The victim "kept moving [her] head" to try to get away but never tried to bite the Defendant because she "didn't want to catch anything" that was "not curable." At the time, the victim was crying because she felt

"hopeless" and "weak." She said the Defendant had her arms restrained with his legs. She was not sure whether the Defendant threatened her and was unable to remember everything that happened during the incident because it was all "a blur." The victim said she neither wanted nor agreed to any sexual contact with the Defendant.

The victim stated that the Defendant eventually stopped focusing on her mouth and "just slid down her body" and began "trying to put his penis inside [her]." He pulled her underwear and pants all the way down to her ankles. She said she felt the Defendant trying to use his hand to force his penis inside her. The victim stated that some of the Defendant's erect penis went inside her vagina "probably . . . just half an inch" and entered the "lips" outside her vagina. The Defendant never put on a condom during this incident. The victim said that she was a virgin and that she did not engage in vaginal sexual activity with her girlfriend.

The victim asserted that she did not want the Defendant to put his penis in her vagina but acknowledged that she did not fight him. She said she had never gone through anything like that and "went into shock the moment [she] heard the door shut."

When the victim failed to return from her break on time, the Burger King manager called the victim's girlfriend, who began to panic and called the Defendant's phone to check on the victim approximately fifteen times starting at 5:42 p.m., but the Defendant never answered her calls. The victim said that when the Defendant's phone kept ringing, he stopped attempting to have vaginal intercourse with her after announcing that he "couldn't concentrate." When the Defendant stood up, the victim immediately pulled up her pants, left the apartment, and "went to the Walgreens up the street."

After the victim left the apartment, the Defendant eventually answered a call from the victim's girlfriend that she placed from her mother's phone. The victim's girlfriend told the Defendant that he was the last person seen with the victim and that she was going to call the police, and the Defendant replied that the victim had left his apartment five minutes earlier. During this conversation with the Defendant, the girlfriend received a call from the victim, who was at the Walgreens. The victim, who was crying, told her girlfriend what had happened and said she "didn't know what to do[.]" After they hung up, the girlfriend called the victim's manager. The victim walked to the Burger King, and her manager drove her to her girlfriend's home. During the car ride, the manager told the victim he was concerned because she was "an hour and ten or fifteen minutes late from [her] break." The victim believed she had been inside the Defendant's apartment for around an hour, although she was not sure. She said did not call the police from the Walgreens or Burger King because she did not want to contact the police without her mother or grandmother present.

When the victim arrived at her girlfriend's home, her girlfriend's mother called S.M., the victim's mother. Approximately thirty minutes after the victim called from Walgreens, her girlfriend arrived back home and saw that the victim was "crying," and "[n]ervous, shaking." The victim's mother, upon arriving, heard what happened and asked the victim if she wanted to call the police, and the victim responded affirmatively. The victim's mother noted that the victim was "in a daze" and her eyes were "red" and "swollen" from crying.

The victim's mother drove the victim to her grandmother's home, where they called 9-1-1. When the police officer arrived, the victim told him what happened and then agreed to go to the hospital for a physical examination. While there, the victim gave a recorded interview to Detective Jacob Masteller. Detective Masteller testified that the victim was "[k]ind of closed off" during the interview but "but answered questions appropriately[.]"

Close to midnight on December 7, 2017, nurse practitioner Connie Barrow asked the victim questions about the rape prior to conducting the physical examination. The victim told Barrow that the Defendant sat on her chest, put his penis in her mouth, and put his penis "slightly" in her vagina. The victim also said the Defendant told her that if she moved, he was going to bust her head. The victim acknowledged telling Barrow that while she had not bathed or showered after the rape, she had washed her hands and brushed her teeth because she "couldn't get the smell [of the Defendant] off [her] hands or [her] face." The victim also told Barrow that she had not engaged in consensual sex during the previous week.

When conducting the physical exam, Barrow observed "two small tears" on the outside of the victim's vagina that were bleeding. The victim "declined a speculum exam" of her vagina but allowed Barrow to insert vaginal swabs, which later tested presumptively positive for semen and male DNA. A later DNA comparison between this sample and the Defendant's DNA was inconclusive. Barrow also obtained blood and urine samples from the victim, which tested positive for marijuana and opiates. The victim said that although she had smoked marijuana around 1:30 or 2:00 p.m. on December 7 before going to work, she "remember[ed] exactly what happened" that day.

The victim agreed that the Defendant had given her his actual name and phone number. However, she denied talking to the Defendant for an hour at the apartment and denied that her conversation with the Defendant ever became sexual. She acknowledged telling a police officer and a detective and testifying at the preliminary hearing that she just heard the bedroom door being shut, not that the bedroom door was locked. She said that while there were two small external tears on her vagina, there were no bruises or scrapes on her body. The victim declared that although her girlfriend had gotten jealous in the past when the victim cheated on her with other women, her girlfriend was not concerned about

her going with the Defendant to look at his apartment. The victim asserted that she had never voluntarily had sexual intercourse or vaginal penetration with a man.

S.M., the victim's mother, testified that the victim was "totally different" after this incident. She stated that the victim did not like to be touched and was either "super serious" or "super sad." S.M. said the victim also "dropped out of high school with five months to go" because "she just gave up." A.K., the victim's girlfriend, testified that the victim was "a nervous wreck" and was very emotional after the incident.

At the end of its proof, the State mistakenly elected rape by oral penetration in Count 1 and rape by oral penetration in Count 3 under identical facts as in Count 1. In addition, the State elected rape by vaginal penetration in Count 2 and rape by vaginal penetration in Count 4 under identical facts as in Count 2.[2] Following the State's faulty election, the trial court charged the jury on two sets of identical offenses: rape by oral penetration without consent in Count 1 and 3 and rape by vaginal penetration by force or coercion in Counts 2 and 4.

Casey Wilson, a defense investigator, testified that she took photographs of the Defendant's apartment on December 29, 2017, and identified two photographs showing that the living room had carpet, and the bedroom had hardwood flooring. She also stated that there was no locking mechanism on the bedroom door.

The Defendant testified that he moved to Nashville and signed a twelve-month lease for his apartment in October 2017. However, soon after moving into the apartment, he was arrested for "fighting in a bar" and was terminated from his job as a construction engineer. By early December 2017, he had obtained a new job in Georgia and was looking for someone to take over the lease for his Nashville apartmen. The Defendant, who did not own a car, used public transportation, and he met the victim while riding on the bus. He asserted that the victim told him she was nineteen years old.

Shortly after meeting the victim, the Defendant told the victim about his apartment and gave her his cell phone number to share with anyone who might be interested in renting it. He said the victim's girlfriend called him the next day, and the day after that, he went to the Burger King to talk to her about the apartment. The Defendant said that although he was paying $800 a month for rent plus the cost of utilities, he claimed he was willing to allow the victim and her girlfriend to pay only for their utilities because he knew the victim "didn't make a lot of money" and wanted to "help her out." He also said his job in Georgia would only last five or six months, and then he would come back to work in Nashville and

[2] More detailed information regarding the State's election of offenses is found in the analysis section of this opinion.

would give the victim and her girlfriend thirty days' notice to vacate his apartment. The Defendant said he informed the victim and her girlfriend that they would have to be added to the lease.

The Defendant claimed that the plan for was for both the victim and her girlfriend to look at his apartment but approximately five minutes before they left the Burger King, the victim's girlfriend said that she was going to the salon for her birthday. Later, when he and the victim were walking to his apartment, the victim's girlfriend called him and asked to talk to the victim. The Defendant's cell phone records showed that the victim's girlfriend called him at 4:22 p.m. while they were on the way to the apartment and then again at 4:45 p.m. after the victim had seen the inside of the apartment. After the second call, the Defendant said the victim asked if she could "stay for a minute[,]" so they sat down in the carpeted living room for "at least an hour." During this conversation, the victim informed him that she was a lesbian, and the Defendant told the victim about other lesbians he knew, including his ex-wife who was a bisexual "adult film star." The Defendant claimed he told the victim a story about his ex-wife telling a group of people to "get naked," and then he jokingly told the victim to "get naked" as he left to go to the bathroom, and when he returned to the living room, the victim had "nothing but her Burger King shirt on." He said, "I thought you were a lesbian," and the victim replied, "[O]h, I like boys too." Then the Defendant kissed the victim.

The Defendant denied shoving the victim to the ground and claimed they were sexually intimate for no more than ten minutes. He said the victim gave him oral sex for "maybe a minute[,]" but when he tried give her oral sex, "she put her hands between her legs" and said, "Unh-uh, this is just for my girlfriend," so he tried to have vaginal sex with her instead. The Defendant said he put his penis in her vagina "about a quarter of an inch[,]" but the victim "grimaced[.]" He asked if she was okay, and she "shook her head yes with still the grimace on her face[.]" Then he "went in a little bit more . . . about an inch in[,] and she grimaced again[.]" The Defendant said he "pulled out" because he "wasn't trying to hurt her or anything like that[.]" He said the victim "immediately got up and gave [him] oral sex again like she wanted to keep going," and they "tried" vaginal intercourse again with "the same results" so the Defendant "stopped" and told the victim, "[L]et's get dressed[;] you are already late going back to work." The Defendant said that as he was pulling his pants up, his cell phone, which was in his pants, started vibrating because the ringer was turned off. He claimed he answered his phone around 5:50 p.m., but the person on the other end of the line never said anything.

The Defendant said a few minutes later, he called Royce Moody, a friend who was a sheriff's deputy who had just lost his wife, and he talked to him. About seven or eight minutes into his conversation with Moody, the victim's girlfriend called and asked for the victim, so he put Moody on hold and gave his phone to the victim. The Defendant said

that after the victim spoke to her girlfriend, he asked the victim if she wanted him to walk her back, and she said, "No." He asked for her to give him a hug, which she did, and he kissed her on the cheek and told her, "I'm going to make you my little girlfriend," and the victim "smiled and kind of chuckled." Before the victim left his apartment, the Defendant told her that as soon as he heard from his job, he was going to give her a call or text her and her girlfriend. The Defendant then returned to his phone call with Moody and talked to him for a total of thirty-four minutes.

The Defendant said that after he got off the phone with Moody, he made some other calls and then noticed that he had a missed text in all caps from the victim's girlfriend asking, "Where's my girlfriend. Her manager is looking for her." He said he called the victim's girlfriend back at 8:07 p.m. on December 7, 2017, to see if the victim had made it back okay, but he did not get an answer. The next morning, the Defendant said he texted the victim's girlfriend that he finally had an exact date he was leaving for Georgia, and when she asked when he would be leaving, he told her it would be December 14, 2017. He also contacted the victim's girlfriend on Monday, December 11, 2017, to see if she or the victim were at work, but he got no response.

The Defendant said that he told officers after his arrest that he "didn't touch" the victim. He said he "didn't think [he] was going to be locked up" and knew he did not rape her, so he agreed to speak with them. Two days later, he spoke with the police again and told them that he had consensual sexual activity with the victim that lasted only "5 to 7 minutes."

During deliberations, the jury asked multiple questions about the nature of the Defendant's charges in Counts 1 through 4, and the trial court provided supplemental jury instructions in response to these questions.[3] Ultimately, the jury convicted the Defendant in Count 1 and Count 3 of rape by oral penetration without consent, convicted the Defendant in Count 2 and Count 4 of the lesser included offense of assault by extremely offensive or provocative physical contact, and acquitted the Defendant in Count 5 of aggravated kidnapping.

Post-Trial Motion. The Defendant filed a post-trial Motion for Judgment of Acquittal, contending that Counts 3 and 4 should be dismissed because no proof had been presented that he engaged in two counts of oral penetration of the victim or that he engaged

[3] The jury's questions and the trial court's responses to these questions are detailed in the analysis portion of this opinion.

in two counts of vaginal penetration of the victim. Following a hearing, the trial court denied the motion but merged Count 3 with Count 1 and merged Count 4 with Count 2.[4]

Sentencing. At the Defendant's sentencing hearing, the trial court imposed a sentence of ten years for each of the rape convictions and a sentence of eleven months and twenty-nine days for each of the assault convictions and ordered the rape and assault convictions served concurrently, for an effective sentence of ten years' imprisonment.

The Defendant timely filed a motion for new trial, arguing in pertinent part that the trial court erred in denying the post-trial motion for judgment of acquittal. He then filed an amended motion for new trial, contending that the trial court's supplemental jury instructions, which were given in response to the jury's three questions "over the State's illogical and inconsistent election of offenses," were "fundamentally misleading as to the application of relevant law to the factual issues the jury had to decide and undermine[d] confidence in the verdict." The Defendant also asserted in this amended motion for new trial that "[t]he jurors were never adequately instructed on how to resolve their concerns [about the State's faulty election of offenses]" and that "as a result, the reliability of the verdict [wa]s in doubt." Following a hearing, the trial court entered an order denying the motion for new trial, stating:

> The Court addressed the motion for judgment of acquittal in the written order issued on April 12, 2021. In that order, the Court reviewed the supplemental jury instructions referenced in the amended motion for new trial. The Court finds no basis to disturb its prior ruling, and the motion for new trial is denied as to this issue.

Thereafter, the Defendant timely filed a notice of appeal.

ANALYSIS

I. Election of Offenses. The Defendant argues that the State's election of offenses led the trial court to provide erroneous and misleading jury instructions, which undermined the integrity of the jury's verdict. Referencing the State's concession at the post-trial motion hearing that its election was incorrect and inconsistent with the indictment, the Defendant asserts that because of the State's faulty election and the trial court's subsequent jury charge, Counts 1 and 3 charged identical offenses (rape without consent) and specified identical facts to support each element of these offenses ("The defendant penetration [the

[4] Although the trial court stated in this order that it was merging "Count 1 with Count 3" and "Count 2 with Count 4," it is clear from the sentencing transcript that the trial court intended for Counts 1 and 2 survive the merger, and this interpretation is also reflected in the judgments forms for Counts 1 through 4.

victim's] mouth with his penis. The victim testified this occurred when he pushed her to the ground."). Moreover, the Defendant asserts that because of these errors Counts 2 and 4 also charged identical offenses (rape using force or coercion) and specified identical facts to support each element of these offenses ("The defendant penetrating [the victim's] vagina with his penis. The victim testified this occurred after he penetrated her mouth with his penis and pulled down her pants."). Accordingly, the Defendant contends that "where the original indictment and proof at trial appeared to allege two acts of unlawful penetration under two alternate theories, the election and jury charge appeared to put forward four separate acts of penetration for the jury to consider: two counts of (oral) penetration without consent (occurring 'when he pushed her to the ground') and two counts of (vaginal) penetration using force or coercion (occurring 'after he penetrated her mouth with his penis and pulled down her pants')." The Defendant asserts that because the trial court incorporated "the State's faulty election," the trial court's jury charge was "fundamentally misleading[.]" He also maintains that the trial court's supplemental jury instructions, which were given in response to the jury's three questions showing their bewilderment over the election of offenses and jury charge, "were inadequate to resolve the juror[s'] confusion" and the jurors' "continued, unalleviated confusion casts doubt upon the reliability of the verdict."

In response, the State acknowledges that the trial court's initial responses to the jury's questions were "not entirely accurate" but that the trial court's final supplemental instruction was correct. The State also contends that the jury's verdict was consistent with the charges in the indictment, the election of offenses, and the final supplemental instruction and asserts that the trial court's supplemental jury instructions, as a whole, were not so erroneous as to require a new trial.

As noted, the indictment in this case charged the Defendant with four counts of rape under two alternative modes or theories. Counts 1 and 3 alleged rape where the unlawful sexual penetration was accomplished without consent. Tenn. Code Ann. § 39-13-503(a)(2). Counts 2 and 4 alleged rape where the unlawful sexual penetration was accomplished using force or coercion. Id. § 39-13-503(a)(1).

At trial, the victim unequivocally testified to one incident of oral penetration and one incident of vaginal penetration. The victim stated that the Defendant grabbed her, pushed her to the ground, sat on her chest, and forced his penis in her mouth, although he did not get it "past [her] teeth." The victim also testified that the Defendant then pulled her pants down and forced his penis inside her vagina "probably . . . just half an inch." The victim stated that she did not consent to any sexual contact with the Defendant.

At the close of its case-in-chief, the State indicated that it was going to make an election of offenses. The trial court explained to the jury that the State, with its election,

"is required to tell you what the underlying factual basis" is for each of the four rape counts so that "if you reach a verdict, it is unanimous . . . ."

The State then made the following election of offenses:

> Count One of the [i]ndictment alleges an act of Rape, and refers to the following conduct: the defendant penetrating [the victim's] mouth with his penis. The victim testified this occurred when he pushed her to the ground.
>
> Count Two of the [i]ndictment alleges an act of Rape, and refers to the following conduct: the defendant penetrating [the victim's] vagina with his penis. The victim testified this occurred after he penetrated her mouth with his penis and pulled down her pants.
>
> Count Three of the indictment alleges an act of Rape, and refers to the following conduct: the defendant penetrating [the victim's] mouth with his penis. The victim testified this occurred when he pushed her to the ground.
>
> Count Four of the indictment alleges an act of Rape, and refers to the following conduct: the defendant penetrating [the victim's] vagina with his penis. The victim testified this occurred after he penetrated her mouth with his penis and pulled down her pants.

Thereafter, the trial court accepted the State's election.

During its closing argument, the State's only comments that connected specific facts to Counts 1 through 4 were limited to the following:

> I want to . . . talk to you about rape. The State has to prove to you certain elements when it comes to this charge. For you to find the defendant guilty of rape—I'm sorry (technical issue), the State has to prove that the defendant had unlawful sexual penetration with the victim and that the penetration was accomplished . . . without her consent and that the defendant knew or had reason to know that . . . [the victim] did not consent to that penetration; and third, that the defendant acted intentionally, knowingly, or recklessly.
>
> Now, because I stated that there are certain things, facts that are not in dispute, that there was sexual penetration as defined here. The Judge will read for you and you will have the opportunity to read this fully. Penetration is the putting the penis in the mouth, putting the penis in the vagina. There's an

> agreement there. Below it says fellatio qualifies him putting his penis into her mouth qualifies as penetration.
>
> You heard [the victim] say time and again, seven times as I recounted, that she did not consent to this sex and you heard her say that she told him on the very first day that they met that she was gay and that she didn't—that she was not interested in him in any romantic way. That is with regards to count one and three.
>
> Now, let's look at counts two and four. The State would have to prove to you that the defendant had unlawful sexual penetration of the alleged victim. We just discussed that[,] that was—that there was sexual penetration. That force or coercion was used to accomplish the act. [The victim] said that she was forced to the ground, pinned down and was held as he was doing this. That is force and that the defendant acted either intentionally, knowingly, or recklessly.
>
> There is no doubt . . . , and the evidence shows, that the defendant clearly mean[t] to do what he was doing. The evidence shows he clearly meant to hold her down, put his penis in her mouth, and into her vagina.

Following the parties' closing arguments, the trial court incorporated the State's election of offenses into its jury charge. Regarding this election, the trial court instructed:

> The fact that the Court accepted that election does not mean that the Court has found that the state has carried its burden of proving those allegations; that is for your determination. Before the jury may return a verdict of guilt on a charged or included offense, the jury must unanimously find that, with respect to a given count, the state has proven beyond a reasonable doubt that the particular incident specified in the election occurred. In other words, to convict the defendant on a particular count, every juror must base that finding on the same, single, identifiable incident. If the State fails to prove the facts in the election beyond a reasonable doubt, then your verdict as to that count must be not guilty.

The trial court then provided the essential elements of the rape offense charged in Counts 1 and 3, which included the second element, "that the sexual penetration was accomplished without the consent of the alleged victim and the defendant knew, or had reason to know, at the time of the penetration that the alleged victim did not consent[.]" In addition, the trial court provided the essential elements of the rape offense charged in Counts 2 and 4, which included the second element, "that force or coercion was used to

accomplish the act[.]" The trial court also incorporated the State's election, word for word, into its verdict form.

The following chart depicts what occurred in this case:

Indictment	**Election**	**Charge/Verdict Form**	**Verdict**
Ct. 1: Rape Without Consent	Rape (Oral Penetration)	Rape (Oral Penetration) Without Consent	Rape (Oral Penetration) Without Consent
Ct. 2: Rape By Force or Coercion	Rape (Vaginal Penetration)	Rape (Vaginal Penetration) By Force or Coercion	Assault (Vaginal Penetration)
Ct. 3: Rape Without Consent	Rape (Oral Penetration)—identical facts as Ct 1	Rape (Oral Penetration) Without Consent	Rape (Oral Penetration) Without Consent
Ct. 4: Rape By Force or Coercion	Rape (Vaginal Penetration)—identical facts as Ct. 2	Rape (Vaginal Penetration) By Force or Coercion	Assault (Vaginal Penetration)

The jury deliberated two days in the Defendant's case, and during its deliberations, the jury asked three different questions stemming from their obvious confusion regarding the State's election of offenses and the trial court's jury charge.

At 10:00 a.m. on the first morning of deliberations, the jury asked the following question:

> Why are Counts 1 and 3 identical[?]
>
> Also Counts 2 and 4 are identical as well.

In response to this question, the trial court provided the following supplemental instruction:

> Please read the "Election of Offenses" listed in the charge and verdict form for the underlying incidents which refer to the separate counts. The offense and essential elements are the same but the underlying incidents or facts are separate and distinct. Please refer to the Court's instructions.

Then, at 11:35 a.m. during deliberations, the jury asked this second question:

> Just for clarification
>
> Are counts one and three both for rape without consent regarding penetration of her mouth?
>
> Are counts two and four both for rape by force or coercion regarding penetration of her vagina?
>
> If so, will our rulings on 1 and 3 be the same and will our rulings be the same on counts 2 and 4?

In response to this question, the trial court provided the following supplemental instruction:

> Please refer to the indictment and charge about the essential elements for each count.
>
> All counts are separate. Your decision on all counts [is] separate based on the facts and law for each count.

At 10:50 a.m. on the second day of deliberations, the jury asked the following question:

> Right now, the only rulings the indictment gives us the option to make is Rape w/o consent to mouth (counts 1 & 3) and/or rape w/o consent and force to vagina.
>
> There is no option to rule on rape w/o consent for vagina or rape w/o consent w/force for mouth.
>
> As is:
> Count # 1) Rape mouth w/o consent
> 2) Rape vagina w/o consent and force
> 3) Rape mouth w/o consent
> 4) Rape vagina w/o consent and force
>
> What we expected[:]
> Count # 1) Rape mouth w/o consent
> 2) Rape mouth w/o consent and w/force
> 3) Rape vagina w/o consent
> 4) Rape vagina w/o consent and w/force

In response to this question, the trial court provided the following supplemental instruction:

> Please refer to the indictment and the jury charge for the essential elements for each count.
>
> Counts 1 and 2 are one theory.
> Counts 3 and 4 are another theory.
>
> As stated in the charge you can find the defendant guilty or not guilty of all or none or any combination of the counts depending on your deliberations.

Finally, at 1:00 p.m., the trial court provided the following "corrected" supplemental instruction:

> Correction[:] Counts 1 and 3 are one theory.
> Counts 2 and 4 are another theory.
>
> Please refer to the indictment [for] essential elements and verdict form.

This last response by the trial court was the only response consistent with the indictment. However, this response failed to address the fact that the election of offenses, jury charge, and verdict form were inconsistent with the evidence the jury heard at trial, wherein the victim alleged one act of oral penetration committed "without consent," one act of oral penetration committed "by force or coercion," one act of vaginal penetration committed "without consent," and one act of vaginal penetration committed "by force or coercion."

Shortly after the trial court provided its last response, the jury returned its verdict. Specifically, the jury found the Defendant guilty of rape in Counts 1 and 3, guilty of the lesser included offense of assault by extremely offensive or provocative physical contact in Counts 2 and 4, and not guilty of aggravated kidnapping in Count 5.

Following his conviction at trial, the Defendant filed a Motion for Judgment of Acquittal as to Counts 3 and 4. At the hearing on this motion, defense counsel argued that the State intended "for Counts 1 and 2 to be alternative theories [for the same underlying facts], and Counts 3 and 4 to be alternative theories [for the same underlying facts], but that's not how it ended up being charged." After reviewing the charge, the trial court acknowledged:

> Count 1—[the jury] found him guilty. Count 2 was Assault. Count 3 was Rape, which reads exactly like Count 1. And Count 4 was Assault. So it would appear Counts 1 and 3 allege the same thing. Counts 2 and 4

> allege the same thing. So only one, so [defense counsel] you're saying only one Rape and one Assault?

Thereafter, the State conceded that "[t]he election and the indictment are inconsistent." When the trial court stated that "[t]he election [wa]s incorrect," the State agreed that it filed the election incorrectly and that the election "should have been written the way the indictment was written." The State then asserted that the victim's testimony was that there were two different incidents of oral penetration, and the trial court replied,

> [The State in its election] identified Count 3 and Count 1 as the same thing, the same events, factual, underlying factual thing. Count 2 and 4 are where [the Defendant] penetrated [the victim's] mouth. [The State's election for] Counts 2 and 4 read the same. Because you have to elect what the underlying facts are.

The State continued to argue that the victim's testimony showed two different incidents of oral penetration, and the trial court interjected, "I know what you're arguing, General, but how do you get around what is stated in the election." When the State acknowledged that it would do the election differently if it could go back in time, the trial court reiterated that the purpose of the election was to ensure a "unanimous" verdict. The court added, "In other words, you cannot have a verdict where four people are going one way on this and the remaining go [the other way], you know, they're finding him guilty on that and the others. That's why you have to be so specific in the underlying facts or [that's] what they're doing."

At that point, defense counsel argued that there should be only one rape and one assault. When the trial court asked if the rapes and assaults would merge, defense counsel replied, "I would argue that Counts 3 and 4 would be dismissed, Counts 1 and 2 would go forward, and they would not merge." Then the State said its position would be that "Counts 2 and 4 would merge, but Counts 1 and 3 remain separate . . . . [b]ecause there was only testimony about one vaginal penetration[.]" When the trial court asked if this was because there were "two rapes," the State replied, "That's correct."

The trial court acknowledged that it had to make a ruling on this "very important" issue before conducting the Defendant's sentencing hearing. The court added, "I remember, because, obviously, [the jury was] having trouble, and we had trouble, and I had to correct what we were saying[,] and I think we discussed it at the time." Defense counsel again argued that because the jury found the Defendant guilty of two counts of oral penetration and two counts of assault by vaginal penetration, Counts 3 and 4 needed to be dismissed.

Thereafter, the trial court entered an order denying the motion for judgment of acquittal, stating:

> Although the election of offenses and the verdict form do not set forth the rape charges as ordered in the indictment,[5] the verdict form clearly reflects that the jurors unanimously found [the Defendant] guilty of one count of rape by penetrating the victim's mouth and one count of assault by penetrating the victim's vagina. Had the election of offenses followed the indictment the outcome would still be the same: one rape conviction and one assault conviction. [The Defendant] acknowledges that "the State's proof was that one act of unlawful vaginal penetration and one act of unlawful penetration of [T.M.]'s mouth occurred." (Corrected Motion, at 2). Thus, the error in the State's election did not prevent the defense [from] prepar[ing] for the specific charge or subject him to double jeopardy. The Court finds no basis to grant a judgment of acquittal as to Counts 3 and 4.

However, the trial court held that "since the State charged alternative theories for the same act, it was merging Count 3 with Count 1 and merging Count 4 with Count 2.

The record shows that the State's election of offenses in the Defendant's case was insufficient and that this insufficiency was repeated by the trial court in its jury charge and supplemental jury instructions. We believe the Defendant properly preserved this issue by raising it in his amended motion for new trial. See State v. Knowles, 470 S.W.3d 416, 422-23 (Tenn. 2015) (criticizing this court for raising the election issue sua sponte and reviewing it "as if the defendant had properly preserved it for review on appeal by raising it in his motion for new trial, rather than applying the plain error doctrine"). Because this issue was properly preserved, we must conduct a de novo review when determining whether the election requirement has been satisfied and whether the jury instructions are sufficient in this case. State v. Qualls, 482 S.W.3d 1, 8 (Tenn. 2016); State v. Clark, 452 S.W.3d 268, 295 (Tenn. 2014).

The right to a jury trial, which is protected by both the Tennessee and United States Constitutions, also requires that a jury's verdict be unanimous. Tenn. Const. art. I, § 6; U.S. Const. amend. VI, XIV; see State v. Kendrick, 38 S.W.3d 566, 568 (Tenn. 2001); Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020). In other words, all twelve jurors must unanimously agree that the defendant committed the particular criminal act charged before returning a verdict of conviction. Kendrick, 38 S.W.3d at 568. A defendant's right to a

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[5] The trial court included the following footnote in its order: "The indictment alternates the alternative theories as shown below whereas the election of offenses alternated the type of rape (i.e. oral and vaginal)."

unanimous verdict has been described as "fundamental, immediately touching the constitutional rights of an accused . . . ." Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973).

The election of offenses doctrine developed to protect this fundamental right to a unanimous verdict. Qualls, 482 S.W.3d at 10. "The election doctrine refers to the prosecutor's duty in a case where evidence of multiple separate incidents is introduced to elect for each count charged the specific incident on which the jury should deliberate to determine the defendant's guilt." Id. at 9-10 (citing State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994)); see State v. Johnson, 53 S.W.3d 628, 630 (Tenn. 2001). The need for an election is not confined to situations in which the Defendant is charged with a single crime and the proof at trial shows that multiple crimes of that type were committed; an election is also required when there is proof of more than one crime and the defendant is charged with multiple counts of the same crime. See, e.g., State v. Walton, 958 S.W.2d 724, 727-28 (Tenn. 1997); State v. Ricky Dale Breeden, No. E2019-00983-CCA-R3-CD, 2020 WL 5638589, at *14 (Tenn. Crim. App. Sept. 21, 2020); State v. Donald Lee Harris, No. M2018-01680-CCA-R3-CD, 2019 WL 5704185, at *10 (Tenn. Crim. App. Nov. 5, 2019). The election requirement supplements the general unanimity instruction and helps "ensure that the jury understands its obligation to agree unanimously that the defendant committed the same criminal act before it may convict the defendant of a criminal offense." Qualls, 482 S.W.3d at 10 (citing State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999)). If the State were allowed to present evidence of several criminal acts that all allegedly occurred within the time period covered by the indictment but not required to make an election of offenses, "juror unanimity would be compromised because nothing would prevent jurors from 'reach[ing] into the brimming bag of offenses and pull[ing] out one for each count.'" Id. (quoting Tidwell v. State, 922 S.W.2d 497, 501 (Tenn. 1996)); see State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993) ("A defendant's right to a unanimous jury before conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of creating a 'patchwork verdict' based on different offenses in evidence." (quoting State v. Brown, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991)). The election doctrine "assists the defendant in preparing for and defending against the specific charge, protects the defendant from double-jeopardy concerns, 'enables the trial judge to review the weight of evidence in its role as thirteenth juror[, and] enables an appellate court to review the legal sufficiency of the evidence.'" Qualls, 482 S.W.3d at 10 (quoting State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999)). However, the most significant purpose served by the election doctrine is to "ensure that the jurors deliberate over and render a verdict based on the same offense[.]" Brown, 992 S.W.2d at 391; see Shelton, 851 S.W.2d at 138 ("[T]he purpose of election is to ensure that each juror is considering the same occurrence.").

"[E]lection errors are subject to a constitutional harmless error analysis." State v. Smith, 492 S.W.3d 224, 236 (Tenn. 2016) "[N]on-structural constitutional error requires reversal unless the State demonstrates beyond a reasonable doubt that the error is harmless." State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008) (emphasis added). "The test used to determine whether a non-structural constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (citations and internal quotation marks omitted).

The Tennessee Supreme Court has recognized that "'[t]here is no right to a perfect election, and indeed, . . . the election requirement may be satisfied in a variety of ways.'" Qualls, 482 S.W.3d at 10 (quoting Knowles, 470 S.W.3d at 424). In fact, "'[a]ny description that will identify the prosecuted offense for the jury is sufficient.'" Knowles, 470 S.W.3d at 424 (quoting Shelton, 851 S.W.2d at 138). The State may elect offenses by narrowing the multiple incidents by asking the victim to relate any of the incidents to a specific month, by identifying a particular type of abuse, or by specifying the unique surroundings or circumstances that help identify an incident. Qualls, 482 S.W.3d at 10-11; Shelton, 851 S.W.2d at 138 ("If, for example, the evidence indicates various types of abuse, the prosecution may identify a particular type of abuse and elect that offense.").

Many cases have boldly declared that jurors are not required to unanimously agree on the facts supporting a particular element of an offense as long as the jury agrees that the defendant is guilty of the offense charged. See Johnson, 53 S.W.3d at 633; State v. Adams, 24 S.W.3d 289, 297 (Tenn. 2000); see also Lemacks, 996 S.W.2d at 170. However, the key cases cited for this holding all involved a single incident in which there was only one criminal offense at issue. See Johnson, 53 S.W.3d at 634 (stating that "the way in which sexual battery is defined by statute suggests that the General Assembly intended to punish for each instance of sexual contact, not for each separate touch that may comprise one instance of sexual contact" and concluding that "the proof in this case indicates only one offense"); Adams, 24 S.W.3d at 294, 297 (clarifying that "[i]n cases when the charged offense consists of a discrete act and proof is introduced of a series of acts, the state will be required to make an election" but "[i]n cases when the nature of the charged offense is meant to punish a continuing course of conduct, . . . election of offenses is not required because the offense is, by definition, a single offense") (ultimately concluding that because "the offense of child abuse through neglect is a single, continuing offense, . . . the State was not required to make an election of offenses" including the particular serious bodily injury); Lemacks, 996 S.W.2d at 171 ("In such cases, as here, where the State seeks to prove one crime arising from one event, we may presume that the jury's general verdict [of DUI] was unanimous."). The aforementioned cases have no bearing on the Defendant's case because the State charged two alternative modes for two separate rape offenses, namely charging rape "without consent" and rape "by force or coercion" for both the oral penetration and the vaginal penetration, which resulted in a total of four rape charges. See

State v. Hogg, 448 S.W.3d 877, 886 (Tenn. 2014) (concluding that "separate incidents of sexual penetration" constitute separate offenses); Johnson, 53 S.W.3d at 634 (distinguishing multiple non-penetrative acts of sexual touching in a case involving a single sexual battery charge with "multiple acts of penetration" in rape cases, which "constitute[] discrete offenses").

The Tennessee Supreme Court has consistently held that "when the evidence indicates the defendant has committed multiple offenses against a victim, the prosecution must elect the particular offense as charged in the indictment for which the conviction is sought." Brown, 992 S.W.2d at 391; see Walton, 958 S.W.2d at 727-28 (granting plain error relief where the State "did not elect which of the numerous types of sexual acts it relied upon to establish the convictions[,]" which allowed each juror "to choose independently the act(s) of abuse upon which to base a verdict," resulting in the "grab bag" result the court condemned in Tidwell, 922 S.W.2d at 501). As this court recognized,

> Not only must the [S]tate's election identify and distinguish offenses sufficiently to allow the trier of fact to render discrete and unanimous verdicts on each, the [S]tate must . . . support this election with evidence sufficient for a reasonable trier of fact to find that the offenses occurred as elected beyond a reasonable doubt.

State v. Johnny Lee Hines, No. 01C01-9709-CC-00405, 1999 WL 33107, at *4 (Tenn. Crim. App. Jan. 27, 1999) (emphasis added); see Ricky Dale Breeden, 2020 WL 5638589, at *8.

After carefully reviewing the record in this case, we conclude that the State's election was clearly erroneous. First, the election was error because it failed to protect the Defendant from double jeopardy. The election charged the Defendant with two identical offenses in Counts 1 and 3 and two identical offenses in Counts 2 and 4. See Qualls, 482 S.W.3d at 10 (reiterating that one of the purposes served by the election doctrine is to protect a defendant from "double-jeopardy concerns"). The election in this case had the double effect of "twice put[ting the Defendant] in jeopardy of life or limb" for "the same offense." U.S. Const. amend. V (providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."); Tenn. Const. art I, § 10 (similarly stating that "no person shall, for the same offence, be twice put in jeopardy of life or limb"). As the United States Supreme Court recognized, the Double Jeopardy Clause "was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." Ex Parte Lange, 85 U.S. 163, 173 (1873). The protections afforded by article I, section 10, which have been interpreted as co-extensive with the protections afforded by the Fifth Amendment, specifically include prohibitions against "(1) a second prosecution following an acquittal; (2) a second prosecution following a

conviction; and (3) multiple punishments for the same offense." Watkins, 362 S.W.3d at 548. The State's faulty election in this case, which provided facts showing that the Defendant was charged with two sets of identical offenses, implicates this third category because the State, albeit mistakenly, was seeking multiple convictions and punishments for the identical offenses charged in Counts 1 and 3 and in Counts 2 and 4.

Second, the election in this case was error because it precluded the trial court from reviewing the weight of evidence in its role as thirteenth juror. As we will explain in the next section, it was impossible for the trial court to act as "thirteenth juror" in this case when determining whether the verdicts were against the weight of the evidence because the trial court "[could not] be certain which evidence was matched by the jury to which count." Tidwell, 922 S.W.2d at 501.

Third, and most importantly, the State's election was error because it failed to "ensure that the jurors deliberate[d] over and render[ed] a verdict based on the same offense[.]" Brown, 992 S.W.2d at 391; see Shelton, 851 S.W.2d at 138. Again, an election must "identify and distinguish offenses sufficiently to allow the trier of fact to render discrete and unanimous verdicts on each." Johnny Lee Hines, 1999 WL 33107, at *4. This court has routinely held that an election that fails to distinguish the different counts of the same charged offense is insufficient. See Tidwell, 922 S.W.2d at 501 (concluding that the prosecutor should have been required to elect the sexual acts upon which the State would rely for conviction after observing that there was "no apparent means to differentiate among various counts of the same offense" and that the indictment provided "no means to enable a fact-finder to match a specific conduct to a specific count"); State v. Marty Lynn Ray, No. E2019-00362-CCA-R3-CD, 2020 WL 2188997, at *8 n.9 (Tenn. Crim. App. May 6, 2020) (noting that the instructions were insufficient elections regarding two counts, "which were described using identical language and no distinguishing facts"); State v. Donald Lee Harris, 2019 WL 5704185, at *10 (concluding that the election in count 6 did not safeguard the right to a unanimous jury because it contained "insufficient information, such as a specific date, modality of abuse, or significant detail to allow the jury to differentiate the act of abuse in that count from the offenses described in Counts 1, 2, and 3").

Here, the State all but ensured non-unanimous verdicts when it failed to elect the (1) type of unlawful penetration as well as (2) the particular mode under the rape statute, for each of the four rape counts. In this case, there were two different types of penetration ("oral" and "vaginal") that were charged under two different subsections of the rape statute ("without consent" and "by force or coercion"). Because the two different penetrations occurred on the same day, at the same place, and during the same incident involving the victim, the election should have identified both the type of penetration and the type of rape offense in order to be "sufficiently specific" to "safeguard juror unanimity." This is

particularly true given that the indictment charged the Defendant with a total of four rape counts, namely two counts under the "without consent" mode and two counts under the alternate "by force or coercion" mode, and the proof showed a total of two penetrations. Cf. Knowles, 470 S.W.3d at 424-25. Additionally, the record strongly suggests that the trial court, during deliberations, knew that the State had made an insufficient election but failed to provide the jury with any information in its supplemental instructions resolving the State's election error. See Tidwell, 922 S.W.2d at 501 (holding that "a defendant's right to a unanimous verdict before imposition of conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of assembling a 'patchwork verdict' based on the different offenses in evidence" (quoting Shelton, 851 S.W.2d at 137)).

The State's election in this case, which illogically consisted of two identical sets of offenses (in Counts 1 and 3 and Counts 2 and 4), failed to match not only the alternative counts of the indictment but also the proof presented at trial, a fact the jury clearly understood based on its numerous questions to the trial court. The election was improper because it identified the same crimes twice (two counts of oral penetration rape "without consent" under the same facts and two counts of vaginal penetration rape "by force or coercion" under the same facts) rather than charging the oral penetration rape under both the "without consent" and "by force or coercion" modes and charging the vaginal penetration rape under both rape "without consent" and "by force or coercion" modes. Moreover, the State's election error was compounded by the trial court's erroneous jury charge and supplemental instructions. As we will explain, this amalgamation of errors put juror unanimity "at serious risk." Id.

Having concluded that the election in this case was error, we must now consider whether the State has demonstrated beyond a reasonable doubt that the error is harmless. See Smith, 492 S.W.3d at 236. In this case, the victim's testimony described two distinct penetrations, either of which could have been committed "without consent" or "by force or coercion" and could have supported any of the four rape offenses charged in the indictment. Following its election of offenses, the State was inexplicably seeking convictions for two identically charged crimes with identical underlying facts in Counts 1 and 3 (oral penetration rape "without consent") as well as in Counts 2 and 4 (vaginal penetration rape "by force or coercion"). The State's grave election error was never resolved during its closing argument, where the State again failed to clearly connect the type of unlawful penetration with the particular mode under the rape statute for each of the four rape charges, a fact that weighs heavily against a finding that this election error was harmless beyond a reasonable doubt. See Knowles, 470 S.W.3d at 427.

Given the number of errors in this case, the jury could have easily determined that the State had, in fact, proven two rapes, an oral penetration and a vaginal penetration, that

occurred "without consent" of the victim. Because the State used identical facts to support its elections in Counts 1 and 3, which were the only counts charging rape "without consent," the jury could have found that it did not matter which of these counts actually represented the oral penetration or vaginal penetration, as long as all of the jurors agreed that the State had proven beyond a reasonable doubt that the oral penetration rape and vaginal penetration rape occurred "without consent." The jury could have applied the similar logic to its verdicts in Counts 2 and 4, which were the only counts charging rape "by force or coercion." Specifically, the jury could have found that it did not matter which of these counts actually represented the oral penetration or vaginal penetration, as long as all of the jurors agreed that, while the State had not proven the greater offenses, it had proven beyond a reasonable doubt the lesser included offense of assault by extremely offensive or provocative physical contact in Counts 2 and 4. Because the State's election and the trial court's instructions were illogical and failed to correspond to the indictment and the proof presented, it is quite likely that the jury decided "to select for itself the offenses on which it w[ould] convict." Tidwell, 922 S.W.2d at 501. Such a decision allowed the jury to make sense out of the chaos initially created by the State and perpetuated by the trial court by having the charges conform to the indictment and the proof presented at trial. The jury's detailed questions during deliberations emphasize how perplexed it was by the faulty election of offenses and jury charge, and the trial court's first three supplemental instructions, rather than eliminating the jury's uncertainty, only served to increase the jury's confusion in this case. See Kendrick, 38 S.W.3d at 569 (holding that "the election requirement is a responsibility of the trial court and the prosecution" and observing that the trial court in Kendrick's case "did not augment its charge to the jury with an instruction that would have required that the verdict of each juror be united on one offense"). While the trial court's final response did clarify that there were two different "theories" for the charges of rape—"without consent" and "by force or coercion"—it never resolved the State's election error by informing the jury that the State intended to elect alternative modes, namely "without consent" and "by force or coercion," for the oral penetration rape and the vaginal penetration rape. Because of these errors, it was impossible for the jury to identify and distinguish between the four rape offenses that were charged. We reiterate that an election error, which constitutes a non-structural constitutional error, requires reversal unless the State demonstrates beyond a reasonable doubt that the error is harmless. See Rodriguez, 254 S.W.3d at 371.

After carefully reviewing the record, we conclude that the State has failed to show that the jurors in the Defendant's case unanimously considered the same act in reaching its verdicts in Counts 1, 2, 3, and 4. We fully agree with the Defendant's assertion that the jury knew "something was wrong with the election and charge" and "sought rational clarification from the trial court—clarification they would never be given." Accordingly, we conclude that the State has failed to demonstrate beyond a reasonable doubt that errors regarding the election, the charge, and the supplemental jury instructions were harmless.

See Smith, 492 S.W.3d at 236; Qualls, 482 S.W.3d at 18; Rodriguez, 254 S.W.3d at 371. Therefore, we reverse all of the Defendant's convictions and remand the case for a new trial in Counts 1, 2, 3, and 4. See Brown, 992 S.W.2d at 392 (asserting that "the remedy for the State's failure to satisfy the election requirement is a new trial"). In reaching this conclusion, we note that the Defendant should be retried on the offenses of which he had been convicted in the first trial, namely rape in Counts 1 and 3 and assault by extremely offensive or provocative physical contact in Counts 2 and 4, rather than the four charged rape offenses. See King v. State, 391 S.W.2d 637, 639, 642 (Tenn. 1965) (noting that "a verdict of guilty of a lesser included offense on an indictment charging a more serious crime is an acquittal of all grades of the offense above that of which the defendant was found guilty" and concluding that where the defendant was tried a second time for the greater offense of assault with intent to commit murder in the first degree after having been acquitted of that offense, it was reversible error for the trial court not to instruct the jury that the defendant had been previously acquitted of that greater offense and was not on trial for that offense); Green v. United States, 355 U.S. 184, 190-92 (1957) (reiterating that "once a person has been acquitted of an offense[,] he cannot be prosecuted again on the same charge" and holding that double jeopardy precluded the defendant's retrial on the greater charge of first degree murder when the jury at his first trial "was given a full opportunity to return a verdict" on this greater charge and instead returned a verdict on the lesser charge of second degree murder). Accordingly, we reverse the Defendant's convictions and remand the case for a new trial on the offenses of rape in Counts 1 and 3 and the offenses of assault by extremely offensive or provocative physical contact in Counts 2 and 4.

II. Twice Convicted for Identical Offenses. The Defendant also contends that the evidence is insufficient to support a finding by a rational trier of fact that he is guilty of rape as charged in Count 3 and guilty of assault as a lesser included offense in Count 4. He claims he was convicted of two identical, not alternate, rape offenses in Counts 1 and 3 and two identical, not alternate, assault offenses in Counts 3 and 4, even though "there was no admissible, reliable proof such that a rational juror could find that [the Defendant] engaged in two counts of unlawful penetration of [the victim's] mouth with his penis without consent" or that "[the Defendant] engaged in two counts of assault as a lesser included offense of unlawful penetration of [the victim's] vagina with his penis using force or coercion." Consequently, the Defendant contends that the judgments in Counts 3 and 4 should be dismissed because the evidence is legally insufficient to support the verdicts in these counts. In response, the State asserts that because the duplicative convictions present a double jeopardy problem, rather than a sufficiency of the evidence problem, the trial court's merger, rather than dismissal, was the correct remedy for the duplicative convictions, and the judgments should be affirmed.

Although we have already reversed the Defendant's convictions and remanded the case for a new trial in Counts 1 through 4 because the State failed to demonstrate beyond a reasonable doubt that errors regarding the election, the charge, and the supplemental jury instructions were harmless, we will nevertheless consider this issue in the event of further appellate review.

As noted, the indictment in this case charged the Defendant with four counts of rape. Counts 1 and 3 alleged that the Defendant engaged in unlawful sexual penetration of the victim where the sexual penetration was accomplished without the consent of the victim. Tenn. Code Ann. § 39-13-503(a)(2). Counts 2 and 4 alleged an alternate mode, namely that the Defendant engaged in unlawful sexual penetration of the victim where force or coercion was used to accomplish the act. Id. § 39-13-503(a)(1).

At trial, the victim unequivocally testified to one incident of oral penetration and one incident of vaginal penetration. The victim stated that the Defendant grabbed her, pushed her to the ground, sat on her chest, and forced his penis in her mouth, although he did not get it "past [her] teeth." The victim also testified that the Defendant then pulled her pants down and forced his penis inside her vagina "probably . . . just half an inch." The victim stated that she did not consent to any sexual contact with the Defendant.

At the close of its proof, the State elected that Counts 1 and 3, which charged nonconsensual rape, referred to "the defendant penetrating [the victim's] mouth with his penis. The victim testified this occurred when he pushed her to the ground." In addition, the State elected that Counts 2 and 4, which charged rape using force or coercion, referred to "the defendant penetrating [the victim's] vagina with his penis. The victim testified this occurred after he penetrated her mouth with his penis and pulled down her pants."

Here, the State asserts in its brief that the jury convicted the Defendant of two identical acts of oral penetration without consent in Counts 1 and 3 and two identical acts of assault by extremely offensive or provocative physical contact (as a lesser included offense of rape) in Counts 2 and 4. After trial, the Defendant filed a motion for judgment of acquittal, contending that Counts 3 and 4 should be dismissed because the proof was insufficient to support the verdicts in these counts. During the hearing on this motion, the trial court agreed that Counts 3 and 4 were invalid based on the State's election:

> Trial court: If Count 1 is where they found him guilty of rape and that was without consent, Count 3 was without consent, Counts 1 and 3 are the same thing, according to the election.
>
> State: That is correct, Judge.

Trial court:	And Counts 2 and 4 are the same thing. 2 and 4 came out as assault. 1 and 3 came out as rape. But if it's the same thing, so you would have a rape, basically a rape and an assault.
State:	Yes. So as to the facts, the State concedes we filed the election incorrectly. It should have been written the way that the indictment was written.
Trial court:	Correct.

Thereafter, the State argued that despite its faulty election, the Defendant's two convictions for rape in Counts 1 and 3 should stand as two separate, valid verdicts because the victim's testimony showed two different incidents of oral penetration without consent.

In considering this issue, the trial court requested the trial transcripts and then entered an order denying the Defendant's motion for judgment of acquittal, wherein it made the following findings:

> [I]t appears the victim only testified about one incident of oral penetration where [the Defendant] got on top of her and was able to penetrate her mouth to her teeth, followed by one incident of partial vaginal penetration, which stopped when [the Defendant] got up because the victim's phone repeatedly rang. Likewise, during opening argument the State summarized that the incident involving oral sex occurred prior to an incident of vaginal penetration, which was interrupted because [the Defendant] was distracted by the ringing phone.

Notwithstanding these findings of fact, the trial court denied the Defendant's motion for judgment of acquittal after determining that Counts 1 and 3 represented "alternate theories" of the same offense and that Counts 2 and 4 were also based on "alternate theories." The trial court declined to reverse and dismiss Counts 3 and 4, even though it had already found that Count 3 alleged the same underlying facts as Count 1 and that Count 4 alleged the same underlying facts as Count 2. Instead, the trial court merged Count 3 with Count 1 and merged Count 4 with Count 2.

Here, the Defendant does not claim that the evidence presented at trial is insufficient to sustain one of each of his convictions for rape and assault; instead, he contends that there is no proof of two distinct acts of oral penetration and no proof of two distinct acts of vaginal penetration. The State counters that because it was not attempting to prove two oral rapes and two vaginal rapes, the evidence is sufficient to sustain both sets of

convictions, and the actual issue is that the Defendant was twice convicted for the same conduct, which is a double jeopardy issue rather than a sufficiency issue.

Notwithstanding our conclusion that the State failed to demonstrate beyond a reasonable doubt that errors regarding the election, the charge, and the supplemental jury instructions were harmless, we begrudgingly acknowledge that the record, at least on the surface, indicates that the Defendant received dual convictions for identical offenses. If this is true, then the proof sufficient to sustain one conviction is sufficient to sustain the duplicate conviction. Here, the evidence was more than sufficient to sustain the convictions for rape by oral penetration without consent and the convictions for assault by extremely offensive or provocative physical contact. Accordingly, we must consider whether the Defendant's dual convictions violate double jeopardy.

As we noted, both the United States and Tennessee Constitutions protect an accused from being "twice put in jeopardy of life or limb" for "the same offense." U.S. Const. amend. V; Tenn. Const. art. I, § 10. The double jeopardy clause protects against a second prosecution for the same offense after an acquittal, protects against a second prosecution for the same offense after conviction, and protects against multiple punishments for the same offense. Watkins, 362 S.W.3d at 541. Once again, the issue here relates to the third category, protection against multiple punishments for the same criminal offense. Whether multiple convictions violate double jeopardy principles is a mixed question of law and fact that this court reviews de novo with no presumption of correctness. Smith, 436 S.W.3d at 766 (citing State v. Thompson, 285 S.W.3d 840, 846 (Tenn. 2009)).

While one of the purposes of an election is to avoid a double jeopardy violation, the State's election in this case failed to fulfill this purpose because it sought to convict the Defendant of the same act under the same mode in Counts 1 and 3 and likewise sought to convict the Defendant of the same act under the same mode in Counts 2 and 4. This case involves unit-of-prosecution claims because the Defendant's dual convictions under the rape statute in Counts 1 and 3 appear to be for the same offense and his dual convictions under the assault statute in Counts 2 and 4 appear to be for the same offense. See Hogg, 448 S.W.3d at 886 (stating that "a unit-of-prosecution claim . . . is raised when a defendant who has been convicted of multiple violations of the same statute asserts that the multiple convictions are for the same offense"). Again, putting our conclusion regarding the unanimity issue to the side, the Defendant's apparent dual convictions in Counts 1 and 3 for the same offense violate double jeopardy and the Defendant's apparent dual convictions in Counts 2 and 4 for the same offense also violate double jeopardy. We disagree with the trial court's finding that the convictions in Counts 1 and 3 and in Counts 2 and 4 represented "alternate theories." If we assume that the convictions in Counts 1 and 3 and Counts 2 and 4 represent convictions for identical offenses, the appropriate remedy was to dismiss Counts 3 and 4. See State v. Ziberia Marico Carero, No. E2015-00140-CCA-R3-CD, 2015

WL 9412836, at *8 (Tenn. Crim. App. Dec. 22, 2015) ("A new trial is not the remedy for a double jeopardy violation; instead, a reversal of the conviction and a dismissal of the relevant charge or a merger of the counts that violate double jeopardy principles are the proper remedies."). Accordingly, we conclude that the trial court erred in merging Count 3 with Count 1 and erred in merging Count 4 with Count 2.

III. Incorrect Offense Class and Sentence in Counts 2 and 4. Lastly, the Defendant contends that his judgments in Counts 2 and 4 reflect an incorrect offense class and sentence. Although these counts charged the Defendant with rape by force or coercion, the trial court instructed the jury on the lesser included offense of assault by extremely offensive or provocative physical contact [I, 38, VII, 397]. See Tenn. Code Ann. § 39-13-101(a)(3). Ultimately, the jury convicted the Defendant of this lesser included assault offense in Counts 2 and 4. Because the trial court imposed a sentence of eleven months and twenty-nine days for these counts and entered judgments reflecting that these convictions were Class A misdemeanors, the Defendant asks this court to modify the judgments to reflect the assaults in Counts 2 and 4 as Class B misdemeanors, consistent with the jury instructions and verdict, and to modify his sentences in these counts to six months, served concurrently with his sentences for rape as originally ordered by the trial court. See State v. Guy L. Hines, No. E2012-02456-CCA-R3-CD, 2013 WL 5940634, at *8-9 (Tenn. Crim. App. Nov. 5, 2013) (modifying the judgment form to correctly reflect the defendant's assault conviction as a Class B misdemeanor, consistent with the jury's verdict, and modifying the defendant's sentence to six months, the maximum sentence for a Class B misdemeanor conviction). In response, the State concedes that the judgments for assault require modification. Although we have already reversed the Defendant's convictions and remanded the case for a new trial in Counts 1 through 4, we will nevertheless consider this issue in the event of further appellate review.

Assault may be a Class A misdemeanor or a Class B misdemeanor, depending on the particular type of assault committed. The assault statute provides:

> (a) A person commits assault who:
>
> (1) Intentionally, knowingly or recklessly causes bodily injury to another;
>
> (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
>
> (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

> (b)(1)(A) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor . . . .

Tenn. Code Ann. §§ 39-13-101(a)(1)-(3), (b)(1)(A).

Here, the record shows that the trial court instructed the jury on assault through extremely offensive or provocative physical contact under subsection (a)(3) as a lesser included offense of rape by force or coercion, and the jury convicted the Defendant of this lesser included offense. This form of assault is a Class B misdemeanor. Id. § 39-13-101(b)(1)(A) [I, 38]. A sentence imposed for a Class B misdemeanor cannot exceed six months. Id. § 40-35-111(e)(2). Nevertheless, the trial court sentenced the Defendant for these convictions to eleven months and twenty-nine days and entered judgment forms reflecting that these counts were Class A misdemeanor convictions. Given that the judgments forms in Counts 2 and 4 reflect an incorrect offense grade that is inconsistent with the jury's verdicts, it is appropriate to modify the judgment forms in these counts to reflect that the assault convictions are Class B misdemeanors and to modify the Defendant's sentences in these counts to six months, served concurrently with the sentences for rape in Counts 1 and 3.

CONCLUSION

Because the State failed to demonstrate that errors regarding the election, the charge, and the supplemental jury instructions were harmless beyond a reasonable doubt, we reverse the Defendant's convictions and remand the case for a new trial on the offenses of rape in Counts 1 and 3 and the offenses of assault by extremely offensive or provocative physical contact in Counts 2 and 4.

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CAMILLE R. MCMULLEN, JUDGE