IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2023 Session

STATE OF TENNESSEE v. WILLIAM VESS BINKLEY

Appeal from the Circuit Court for Dickson County
No. 2018-CR-129 David D. Wolfe, Judge

No. M2022-00132-CCA-R3-CD

Defendant, William Vess Binkley, stands convicted by a Dickson County jury of one count of rape of a child, a Class A felony, and was sentenced to forty years in the Tennessee Department of Correction. On appeal, he argues: (1) the trial court erred by not declaring a mistrial after the State introduced evidence during trial that had not been disclosed to Defendant during discovery; (2) the trial court erred by admitting the victim's forensic interview as substantive evidence; (3) the State committed prosecutorial misconduct during its closing arguments; and (4) the trial court imposed an excessive sentence. After review, we affirm the judgment of the trial court.

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

MATTHEW J. WILSON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Kendall Stivers Jones, Assistant Public Defender-Appellate Division (on appeal); William B. (Jake) Lockert, III, District Public Defender, and Mitchell B. Dugan, Assistant District Public Defender (at trial), for the appellant, William Vess Binkley.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; W. Ray Crouch, Jr., District Attorney General; and Carey Thompson and Jennifer Stribling, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural History

This case arises from the victim's February 2018 disclosure to her mother and law enforcement that Defendant, her then-stepfather, had engaged in several sexual acts with her. The Defendant was indicted on one count of rape of a child, relating to a single incident of anal penetration occurring in January 2018.

Although Defendant is not challenging the sufficiency of the evidence supporting his conviction, we will offer this factual summary to provide context. At trial, K.B.,[1] the victim's mother, testified she married Defendant[2] in June 2011, when the victim was six years old. The couple lived in Dickson County, with the victim (K.B.'s daughter from a previous relationship) and a son K.B. had with Defendant. In January 2018, the victim was twelve years old and the other child was four. Before the sexual abuse, Defendant and the victim seemed to have had a good relationship. To K.B., it seemed the victim loved Defendant. K.B. said her marriage to Defendant was "good up until probably the last year of the marriage," and she thought she and Defendant had worked through previous marital strife that had occurred. K.B. said she trusted Defendant with the victim before she learned of the abuse.

On February 20, 2018, K.B. awoke around 5:30 a.m. in her family home. When K.B. looked in the victim's bedroom, K.B. saw Defendant and the victim in bed together. K.B. testified this was not unusual, as Defendant had told K.B. in the past that he found the victim's bed more comfortable and that on occasions he "just wanted to lay in there and cuddle" with the victim. Defendant waved at K.B., who then went to the couch in the living room. Shortly before 6:00 a.m., K.B. saw the light turn on in the victim's bedroom, which led K.B. to believe the victim and Defendant were getting up to prepare for school and work. However, K.B. then saw someone had closed the victim's bedroom door, when it previously was open. This was unusual. She went to the victim's bedroom, opened the door, and "saw [Defendant] sitting on the side of [the victim's] bed, like all the way scooted to the side, and he was only in his boxers[.]" K.B. said "she did not see his private parts out or anything," but the victim "was standing between his legs and all she had on was a shirt and panties." K.B. "knew something didn't look right by where [the victim] was standing and the way [Defendant] was sitting positioned on the bed." K.B. described what she saw next:

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1 To protect the privacy of the victim and her family, the victim will be referenced as "the victim," and the victim's mother, who was married to Defendant at the time of the offense, will be referenced by her initials.

2 K.B. referenced Defendant as her "ex-husband" at trial.

> . . . [Defendant] grabbed [the victim] around the waist and like tossed her over onto the bed, kind of like they were playing or wrestling. Then when he did that he also stayed leaned over on his side and grabbed a pillow and covered up his private area when he did that and just kind of stayed leaned over. Again, it did not look right to me. Something looked very suspicious.

K.B. and Defendant then went into their bedroom, where she asked Defendant what was going on with the victim. Defendant denied anything inappropriate, telling K.B., "I know what you are thinking and . . . I don't like that you are thinking that." K.B. then went to the victim's room. K.B. asked the victim what had occurred, and she said nothing. K.B. specifically asked the victim if Defendant or anyone else had ever touched her, and she said no.

After all of this, K.B. went to work and the victim went to school. K.B. and Defendant spoke by phone during the day and K.B. expressed her discomfort with the morning's events. During the day, K.B. received several text messages from the victim asking K.B. to pick her up from school. The victim told her mother she had seen some bathroom graffiti that had made her upset. However, K.B. later received a text from the victim stating Defendant was coming to school to pick her up. This was odd, as K.B. never recalled Defendant picking the victim up from school before that day.

K.B., who was a nurse at an urgent care facility, returned home after her work shift ended at 8:00 that evening. About ten to fifteen minutes before she reached her house, K.B. called Defendant and told him she wanted to speak with the victim privately when K.B. returned home. When K.B. arrived, both the victim and Defendant were outside. The victim got into K.B.'s car, and Defendant sat in a lawn chair next to K.B.'s driver-side window so he could hear K.B. speaking with her daughter. When their younger child came outside, K.B. told Defendant to take him inside so she and the victim could have privacy. But Defendant kept coming outside while K.B. and the victim were attempting to speak in K.B.'s car.

While they were in the car in the driveway, K.B. told the victim that she (K.B.) needed to know what Defendant had done, adding, "if [Defendant] has ever touched you he needs help and we will get help." The victim denied Defendant had touched her, but K.B. testified these initial denials occurred while Defendant "kept coming outside. . . . [E]very time he would come out the door the conversation would stop because she would get scared and not want to talk."

Eventually, K.B. drove the victim to a quiet neighborhood about a half-mile from the family's home and away from Defendant. There, she again asked the victim if

Defendant had ever touched her. In response, the victim began to cry and scream, and she admitted that Defendant had touched her. K.B. specifically asked the victim if Defendant had touched her (victim's) breasts and private parts. She answered "yes" to both. K.B. asked the victim whether Defendant had put his mouth on her private parts, and whether the victim had put her mouth on his private parts. She answered "yes" to both.

After the disclosure, mother and daughter briefly returned home, where K.B. immediately retrieved her other child and drove away with both children. K.B. went to a cousin's home, who cared for the younger child while K.B. and the victim went to the Dickson County Sheriff's Office in Charlotte. K.B. went to the Sheriff's Office first because the thought of taking the victim to the hospital "didn't even cross [her] mind." The victim was medically examined the next day.

Sergeant Trevor Daniels, a detective with the Dickson County Sheriff's Office, conducted the law enforcement investigation. After speaking with K.B. when she arrived at the Sheriff's Office the night of February 20, the detective called Defendant, who drove down and met him at the office. A video recording of Sgt. Daniels' interview with Defendant was played at trial. Sgt. Daniels advised Defendant of his *Miranda* rights, and Defendant signed a written rights waiver form. During the first portion of the interview, which began just after midnight on February 21, 2018, and lasted roughly one hour and forty-five minutes, Defendant denied any sexual activity with the victim and stated he did not know why the victim would make up such allegations. Shortly before 2:00 a.m., Defendant, who was not under arrest at the time, left the interview room.

After Defendant left, Sgt. Daniels resumed speaking with K.B., but that conversation did not last long. After a few minutes, the detective received a voicemail message from Defendant, who was still in the parking lot, stating that Defendant wanted to talk with him again. Sgt. Daniels ended his interview with K.B. and went to the parking lot to bring Defendant back inside the Sheriff's Office. At 2:12 a.m., Defendant (who was not given additional *Miranda* warnings) and Sgt. Daniels reentered the interview room. Defendant told Sgt. Daniels he (Defendant) had a "breakdown moment" after leaving the Sheriff's Office, and decided to speak with the detective again.

In his second statement, Defendant claimed that on one Wednesday evening in January 2018, the victim entered Defendant's bedroom and showed him a video on a phone of persons engaging in anal sex. Defendant asked the victim if that was "something she would want to try"; according to Defendant, the victim said yes but asked if it would hurt. Defendant told her the act probably would hurt. Defendant then penetrated the victim's anus with his penis. Defendant told Sgt. Daniels the sexual activity lasted two to three minutes. Initially, Defendant denied ejaculating inside the victim, but he later told Sgt.

Daniels that he did so.

Defendant said this incident probably happened around 6:00 p.m. to 7:00 p.m. on a Wednesday, because K.B. worked late on Wednesdays. Defendant said the act probably occurred on either January 10 or January 17, 2018. Defendant admitted to some of the other types of sexual activity alleged by the victim, but denied other types.

Immediately after the interview, Sgt. Daniels had Defendant provide a written statement. The statement, in Defendant's own writing and signed by Defendant, stated,

> One Wednesday in the month of January 2018 between 6-7 pm, I got home from work. I went and layed down. [Victim] came into the room. Grabbed my phone and turned on Pornhub. She picked a video and we watched it. I asked her if she wanted to try want was on the video (anal). She said kind of. She asked if it would hurt, I said probably. So we tried it. After it was over (2-3 mins) she got up and took a shower and went to her room and played on her phone. A few months ago she grabbed my penis and stroked it until I came. This started the same time as the anal. She has from time to time put my hand down her pants for me to play with her. The anal was only a one time thing. She has only played with my penis twice. She has stuck my hand down her panties about five time[s]. I didn't keep track of all this because after it happened I wasn't happy with myself for allowing it to go on.

Defendant also wrote letters of apology to K.B. and the victim. While these letters did not specify any type of behavior, Defendant wrote to K.B. that "I didn't plan for this to happen" and wrote to the victim, "I'm sorry for what I have done [and] I don't blame you for speaking out. You did the right thing."

On February 21, 2018, the victim was interviewed at the 23rd Judicial District Child Advocacy Center (CAC) by Jessica Tiggert, a CAC forensic interviewer. The jury saw video of this interview at trial. The victim's account of events from the day before was consistent with K.B.'s trial testimony. The victim, who was in the seventh grade at the time of the interview, told Ms. Tiggert that Defendant's abuse first started when she was in the sixth grade. The victim described the types of abuse she claimed to have suffered during the time in question; because Defendant was only charged with (and convicted of) one specific act of abuse, those other incidents will not be described here. As relevant to this case, the victim stated that one time, Defendant put his fingers inside her "butthole," followed by his "private part." The victim stated that on previous occasions, she had seen "white stuff" come out of his penis after their encounters; she told the interviewer that when Defendant penetrated her "butthole," she saw "white stuff" come out of his penis, but this liquid did not get on or in her. Rather, Defendant finished onto a towel.

K.B. testified that between February 2018 and the trial, the victim had tested positive for herpes.[3] At trial, K.B. said the victim tested positive for both herpes type one and herpes type two, but testing results introduced at the sentencing hearing showed the victim had only tested positive for herpes simplex virus type two. K.B. said Defendant is positive for herpes type one, and Defendant had infected K.B. with the herpes virus, type one. K.B. testified she had her first outbreak after her first sexual encounter with Defendant.

Defendant testified at his trial. He denied any sexual activity with the victim. He emphasized there was "not physical proof of anal rape or any rape at all." Defendant attempted to explain his inculpatory statements to Sgt. Daniels. He testified that during his police interview he "admitted exactly what Detective Daniels told me that I did within the first two hours of the interview" because he was afraid his children would be taken from his wife and placed into state custody. When asked why he thought the victim would claim Defendant had sexually assaulted her, Defendant replied, "I have no idea. I figure the way her mother questioned her that she was just saying what her mother wanted her to say." Defendant added that he and K.B. had discussed divorce because he had what he described as "video sexual relationships with other women," and Defendant surmised these allegations were "an easy way for [K.B.] to get the divorce."

The jury did not believe Defendant's explanation. It found Defendant guilty as charged on the sole count of rape of a child, for Defendant's anal penetration of the victim in January 2018. This timely appeal followed.

II. Analysis

A. Alleged Discovery Violation

1. Overview

Defendant argues the trial court erred by not declaring a mistrial after K.B. testified the victim had tested positive for herpes, because this information was not provided in discovery. The State contends it was under no obligation to disclose the evidence because Defendant did not make a formal discovery request under Rule 16 of the Tennessee Rules of Criminal Procedure and because the State did not have the report detailing the victim's diagnosis in its possession. In the alternative, the State argues Defendant has not shown prejudice because the defense "opened the door" to the introduction of such evidence and because overwhelming proof to convict Defendant exists even without K.B.'s testimony

3 This testimony will be examined in greater detail below.

regarding the victim's diagnosis.

2. Summary of Evidence Presented

During K.B.'s direct examination, the State asked her no questions about herpes or any other sexually transmitted disease. On cross-examination, defense counsel asked her if she was aware of "any physical evidence that there was something going on between" Defendant and the victim. K.B. replied, "I don't believe so." On redirect examination, the following exchange took place between the prosecutor and K.B.:

Prosecutor:	[K.B.], Mr. Dugan asked you about physical evidence. You said at that point you didn't know about any physical evidence?
K.B.:	Huh-uh.
Prosecutor:	Would there be any physical evidence now? Has [victim] been checked for any diseases?
K.B.:	Yes.
Prosecutor:	Can you tell us about that?
K.B.:	She is positive for herpes virus type one and type two, which myself and Mr. Binkley both have.
Prosecutor:	So he is positive for herpes type one and type two?
K.B.:	I know for sure type one that he is positive for, but, yes.

Defense counsel requested a jury-out hearing, and the following exchange occurred:

Defense Counsel:	Your Honor, well, what I am asking is this. The discovery that we received from the State, which included physical examination of the child, did not disclose any herpes, didn't disclose anything regarding that type of an examination. I think we were entitled to that, whatever the results were from the examination. I was just wondering why we didn't get that.

Prosecutor: Your Honor, she was examined. At the time of the exam and the results she did not have herpes. The defendant in his statement to the detective admitted that he did have herpes. Mr. Dugan opened the door to physical evidence, and I think this witness is able to explain why there was no physical evidence at the time, and now her child has herpes.

The Court: Well, when was the child diagnosed with the herpes?

K.B: I made her an appointment with Kelly Sharp, a local pediatrician here, and-that was the recommendation of the Our Kids nurse practitioner to follow-up and have additional testing for all STD's. And so that blood work was done. It was probably one to two weeks after the Our Kids examination. So I would probably -- I would probably say March of 2018.[4]

The Court: So what specifically are you asking me?

Defense Counsel: I'm asking that the Jury be instructed to disregard the information about the herpes. We didn't have that information. And without -- In other words, if that information was available because she had had another examination separate and apart from the original examination it would have been nice if we had had a copy of the results of that examination.

The Court: Well, it's my understanding that examination was you taking your child to a private doctor, not a part of the law enforcement investigation; is that correct?

K.B.: Correct, uh-huh. On the recommendation of Our Kids.

The Court: Of Our Kids. All right.

Defense Counsel: Judge, if it was on the recommendation of any individual department from the Department of

4 The report from this testing was not introduced into evidence at trial, but the report was introduced at the sentencing hearing. The report indicates the testing took place in June 2018.

Children's Services or affiliated therewith then it would be a state organization and it would be tied to this case. And I think we are entitled to have that stricken.

The Court: Was that information supplied to law enforcement that she was positive, or a copy of that result?

K.B.: It was not, huh-uh.

The Court: If law enforcement didn't have it then it's not discoverable per se, because under the Rules of Discovery Rule 16 provides that the State will provide you with any information that is in their possession or under their control, and the witness has just testified that she did not alert the law enforcement to those facts. Therefore, in my opinion, the State was under no duty to disclose that information because they didn't have it. It was a private examination by the child's physician. So my ruling is that I am overruling your objection or request for an instruction to the Jury based upon the fact that the witness is testifying that this was a private examination. I will allow you to bring out the fact that that was never – on cross-examine you can recross this witness and bring out that it was never disclosed to law enforcement. I think that's a fair way of handling it.

After the jury returned, K.B. testified that the victim's initial physical examination at Our Kids, the State-contracted facility, did not involve any laboratory work. K.B. said "a few weeks" after this initial examination and at the recommendation of a case worker, she had a private health care provider conduct lab work on the victim. The laboratory confirmed the victim's herpes diagnosis. K.B. told the District Attorney General's Office one week before trial that the victim had tested positive for herpes, but K.B. did not provide the State with the lab reports from the testing and did not bring any reports to trial. She said the prosecutor with whom she had spoken about the victim's diagnosis "did not request" the lab report, telling K.B. "it would be too late at this point. We would not be able to get it into evidence since the trial was this week." When asked why K.B. testified regarding herpes after the State told her the lab report could not be admitted into evidence, K.B. replied, "I was asked a question and I answered it truthfully." On further redirect examination, K.B. clarified that she had told the State about the victim's positive herpes test the week before trial and acknowledged that the prosecutor had informed her the State "wouldn't have time to get the documents subpoenaed from the doctor's office before

today." Later, the prosecutor asked her "We didn't tell you that it wouldn't be used, just the documentation could not be obtained from the doctor?" K.B. responded, "In time, correct. Yes."

When he objected to K.B.'s testimony, defendant's trial counsel never moved for a mistrial; rather, he moved the trial court to strike the testimony regarding the victim's positive herpes test. The trial court denied the motion, and instead said the following to the jury:

> Ladies and Gentlemen, there are Rules of Discovery that are governing in criminal cases, and one of those Rules is a Rule 16 which says that the State is supposed to supply to the defendant any information that they seek to introduce regarding this case or anything that might be exculpatory, meaning that it might clear the defendant of any wrongdoing. But any sort of information that they intend to introduce is all required to be introduced and submitted.
>
> Mr. Dugan brings the point that his office and he were never given any information regarding this testing of the child to determine that the child was in fact tested positive for the herpes virus. That was not brought out in the State's case-in-chief. In other words, the State didn't introduce that in their direct testimony of this witness. It only came out after Mr. Dugan had asked about the particular evidence regarding any sort of evidence, physical evidence.
>
> I'm instructing you that the Defense was never advised of that fact and that the State did not reveal that to the defendant. You have heard an explanation for that and you can attach such weight to that information as you deem to be appropriate. Thank you.

3. Applicable Case Law

Among the items the State must turn over to the defense in discovery are "reports of examinations and tests." The applicable discovery rule states:

> (G) Reports of Examinations and Tests. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:

(i) the item is within the state's possession, custody, or control;

(ii) the district attorney general knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

Tenn. R. Crim. P. 16(a)(1)(G)(i)-(iii). Furthermore, Rule 16(c) establishes a continuing duty to disclose, and the rule states, "A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney or the court" if such evidence is "subject to discovery or inspection" under Rule 16 or if disclosure was previously requested by the other party or ordered by the court. Tenn. R. Crim. P. 16(c).

If a party fails to comply with a discovery request, the trial court may consider one of the following remedies:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances.

Tenn. R. Crim. P. 16(d)(2). A trial court "has wide discretion in fashioning a remedy for non-compliance with a discovery order, and the sanction should fit the circumstances of the case." *State v. Downey*, 259 S.W.3d 723, 737 (Tenn. 2008). "[W]hether the defendant has been prejudiced by the failure to disclose is always a significant factor" in fashioning the appropriate remedy. *State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995).

As previously noted, Defendant's trial counsel did not move for a mistrial, but appellate counsel suggests the trial court should have issued one sua sponte. "[T]he granting of a mistrial is a matter resting within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion; 'normally, a mistrial should be declared only if there is manifest necessity for such action.'" *State v. Nash*, 294 S.W.3d 541, 546 (Tenn. 2009) (quoting *State v. Saylor*, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "Moreover, the burden of establishing the necessity for a mistrial lies within the party seeking it." *State v. Reid*, 164 S.W.3d 286, 342 (Tenn. 2005) (appendix).

4. Application to Present Case

Defendant argues he was prejudiced by the State's nondisclosure of the victim's herpes diagnosis because the nondisclosure prevented the defense from investigating this claim, including investigating what type of herpes simplex virus (HSV-1 or HSV-2) Defendant, K.B., and the victim had. Defendant suggests had he known about this diagnosis, Defendant could have obtained an expert to testify regarding the spread of herpes and attempted to present testimony regarding the victim's sexual history—possibly to explain an alternate source of her infection. Defendant also claims "the State's suppression and surprise took away the opportunity for [Defendant]'s counsel to fulfill his duty in providing him with advice on how best to proceed based upon the assessment of the strength and weakness of the State's case."

Initially, we conclude that regardless of whether there is a request for discovery under Rule 16 found in the appellate record, all signs point to a request having been made. When the prosecutor met with K.B. shortly before trial and she disclosed the victim had been diagnosed with herpes, the prosecutor told K.B. "it would be too late at this point. We would not be able to get it into evidence since the trial was this week." When the trial court attempted to correct the State's failure to disclose, it instructed the jury on the State's discovery obligations. "[T]here are Rules of Discovery that are governing in criminal cases, and one of those Rules is Rule 16 which says that the State is supposed to supply to the defendant any information that they seek to introduce regarding this case." In response, the State never made a claim to the contrary.

We also conclude that the State's claim that Defendant "invited" or "opened the door" to K.B.'s testimony regarding the victim's herpes diagnosis is unavailing. As Defendant states in his brief, Defendant's trial counsel likely asked K.B. the "lack of physical evidence" question because before trial the State provided nothing in discovery suggesting there was any physical evidence of sexual contact between Defendant and the victim. And had defense counsel known about the herpes diagnosis, he likely would not have asked K.B. this question. As we recently noted, discovery exists to prevent surprises and '"the primary purpose of the criminal trial is to discover the truth.'" *Casey Colbert v. State*, No. W2021-00778-CCA-R3-PC, 2022 WL 2115258 at *5 (Tenn. Crim. App. June 13, 2022) (quoting *State v. Gilford E. Williams*, No. W1999-01556-CCA-R3-CD, 2001 WL 43172 at *3 (Tenn. Crim. App. Jan. 17, 2001)). We also noted there has been a "decline of 'trial by ambush' and 'sporting theory of justice.'" *Id.* (quoting *State v. Gaddis*, 530 S.W.2d 64, 69 (Tenn. 1975)).

We also observe that the testing which resulted in the victim's herpes diagnosis was carried out by a private medical provider. Between the time of the testing in June 2018 and

the week before trial, when K.B. told the prosecution about the victim's positive test, the State had no way of knowing this information. The test results were not in the State's "custody or control" during that time, and the State was therefore under no obligation to turn over results about which it knew nothing. But things changed when K.B. told the prosecutor. Per Rule 16's continuing duty to disclose, the State should have informed defense counsel about the positive test, even if the State were unable to disclose the report containing the test results before trial. In our view, the record contains no reasonable basis for the State's failure to disclose the test results to Defendant when the State learned about the test results the week before trial.

Having concluded the State committed a discovery violation, we need not consider whether the trial court's remedy in providing a curative instruction was proper. Because if there was error, we must determine whether that error is harmless. Tennessee Rule of Appellate Procedure 36(b) provides: "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b). Put another way, we must consider whether admission of the evidence affected the verdict. *State v. Simon Dean Porter*, No. M2020-00860-CCA-R3-CD, 2021 WL 4955719 at *24 (Tenn. Crim. App. Oct. 26, 2021) (citing *State v. Martin*, 964 S.W.2d 564, 568 (Tenn. 1998)). This analysis is case specific, and an appellate court considers the whole record to decide reversible error. *Id.* (quoting *Blankenship v. State*, 410 S.W.2d 159, 161 (Tenn. 1966)).

Here, evidence involving the victim's herpes diagnosis did not prejudice Defendant in light of the overwhelming proof of Defendant's guilt. Defendant confessed to the rape on a video recording and in writing. He wrote apology letters to the victim and to her mother admitting he was "sorry for what [he has] done," and he "never meant to cause you and [their] kids so much pain and suffering." The jury also saw the victim's forensic interview where the victim described Defendant's crime (and other incidents of abuse) in detail. Her descriptions matched K.B.'s testimony and Defendant's confession. Considering this strong evidence, it is unlikely that the victim's herpes diagnosis affected the jury's verdict. Had the trial court excluded the evidence or Defendant called an expert witness to counter the source of the victim's infection, the jury's verdict would have been the same. This is harmless error, and Defendant is not entitled to relief on this issue.

B. Admissibility of Victim's Forensic Interview

1. Overview

Defendant argues the trial court erred in entering as substantive evidence the video

of the victim's CAC interview with forensic examiner Jessica Tiggert. Defendant asserts the video is inadmissible because the trial court did not make the findings required to admit such evidence under Tennessee Code Annotated section 24-7-123(3)(A). The State contends Defendant has waived the issue for failure to raise it in the trial court and that the issue does not entitle Defendant to relief under plain error review. We agree with the State.

The trial court held a pretrial hearing to determine the admissibility of the forensic interview as substantive evidence. Defense counsel's only challenge to the interview's admissibility was to Ms. Tiggert's asking the victim leading questions, which he contended were overly suggestive. At no time during the trial court proceedings—pretrial, during trial, or in the motion for new trial—did Defendant's trial counsel challenge the interview on the same grounds he now raises in this appeal. A defendant's failure to object waives the issue on appeal. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief to be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error").

When an issue is waived on appeal, this Court may only review the issue for plain error. *See State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000). This court will grant relief under plain error only if an appellant can establish all of the following:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

(d) the accused did not waive the issue for tactical reasons; and

(e) consideration of the error is necessary to do substantial justice.

Id. (internal quotation omitted; citing *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). "Because each factor must be established, [an appellate court] need not consider all five factors when a single factor indicates that relief is not warranted." *State v. Fayne*, 451 S.W.3d 362, 372 (Tenn. 2014) (citing *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007)). "An error would have to [be] especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error." *State v. Page*, 184 S.W.3d 223, 231 (Tenn. 2006).

2. First Plain Error Factor: Trial Court Record

The record in this case clearly establishes what occurred in the trial court. At the pretrial admissibility hearing, held September 17, 2019, Ms. Tiggert testified regarding her work experience, and her curriculum vitae was introduced as an exhibit. At the time of the hearing, Ms. Tiggert had been employed as a CAC forensic interviewer since June 2013, or just over six years. She previously spent just under three years (in two separate stints) with the Department of Children's Services, including approximately nine months as a Child Protective Services (CPS) worker. She also spent two and a half years as a youth services officer with the Marshall County Juvenile Court. She also testified regarding her previous and ongoing forensic interview training. The video of Ms. Tiggert's forensic interview of the victim was played in court; Ms. Tiggert identified the interview room as one at the CAC, which she described as "a non-profit" with locations in Dickson, Stewart, and Cheatham Counties. Ms. Tiggert said she and the victim were the only persons in the interview room, per established protocols, but law enforcement and a DCS worker usually monitored the interviews. The victim testified she met with Ms. Tiggert for an interview at the CAC on February 21, 2018, and she affirmed that the video depicted the interview as it occurred that day.

Defendant's trial counsel did not challenge the qualifications of Ms. Tiggert or her employer; counsel only challenged the interview based on Ms. Tiggert's purported use of leading and suggestive questions. At the end of the hearing, the trial court ruled as follows:

> Well, pursuant to the provisions of Tennessee Code Annotated 24-7-123 I am required to make certain specific findings of fact. Clearly the interview was conducted by an appropriate individual and a forensic interviewer who has testified on many occasions before this Court and been qualified to testify on many occasions. And many of her interviews have been introduced and allowed into evidence before me, as I'm sure all the other Judges.
>
> She meets all of the criteria required by the statute regarding her education, training and so forth. She is employed by the Child Advocacy Center. That meets the standards of the statute. And her undergraduate degree was in child development. So clearly she is a person who was entitled to be accredited for the type of interview that was conducted.
>
> I find that the recording was both visual and oral. Once we got the problems with the video corrected, we were able to see both the video and hear the audio.

The child has testified the entire interview of the child was recorded as well as Ms. Tiggert testified to the same thing. Every voice on the video recording was properly identified. And regarding the other specifics, the child has testified under oath that the video recording is a true and correct recording of the events.

It has been shown to my reasonable satisfaction that the particularized guarantees of trustworthiness, and I'm judging that by the mental and physical age and maturity of the child at age—at the time of that was age 12, I understand. So it does not appear to have any motive that the child would have to falsify or distort the events.

The timing of the child's statement was apparently very close in time, within a few weeks of the alleged incident having occurred. The child's age does not necessarily make it likely or unlikely that the child could have fabricated it. It was not a graphic detailed account, it was more of a very reluctant testimony on her part about what happened.

The statement was spontaneous and—Well, it wasn't spontaneous to the extent that the child was very reluctant to testify, but I do not agree that the interviewer's questions were leading in any way. In fact, at one point Ms. Tiggert stated to her, I can't tell you what to say, or something. I'm paraphrasing what she said. She said, you have got to tell me what happened. There were times when she followed up with direct questions, but those were not in my opinion leading.

There is no extrinsic evidence before me that would indicate whether or not the defendant had an opportunity to commit the act other than what the child said about living together. The manner in which the interview was conducted in my opinion was reliable. And lastly, the equipment used to make the video recording was capable of making an accurate recording. And the relationship with the child's offender was established by that interview.

So I find that all of those factors have played in favor of the introduction of that video recording. So that video will be admitted pursuant to the statute.

3. Other Plain Error Factors

Regarding the second plain error factor, we conclude Defendant has not established

a violation of a clear and unequivocal rule of law. Tennessee Code Annotated section 24-7-123(a) provides, in relevant part,

> Notwithstanding any of this part to the contrary, a video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact performed with or on the child by another is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the sexual contact if the requirements of this section are met.

The remainder of section 24-7-123 contains numerous requirements regarding the accuracy of the recording, the trustworthiness of the child's statements, and the qualifications and training of the forensic examiner and the examiner's employer. Defendant does not challenge most of the provisions of this statute; he only alleges the trial court failed to make findings complying with section 24-7-123(b)(3)(A), which provides,

> (3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:
>
> > (A) Was employed by a child advocacy center that meets the requirements of § 9-4-213(a) or (b); provided, however, that an interview shall not be inadmissible solely because the interviewer is employed by a child advocacy center that:
> >
> > > (i) Is not a nonprofit corporation, if the child advocacy center is accredited by a nationally recognized accrediting agency; or
> > >
> > > (ii) Employs an executive director who does not meet the criteria of § 9-4-213(a)(2), if the executive director is supervised by a publicly elected official;

Thus, if a forensic interviewer is employed by a child advocacy center, the trial court must consider whether the center demonstrates that it:

> (1) Is a nonprofit corporation which has received a determination of exemption from the internal revenue service under 26 U.S.C. § 501(c)(3);
>
> (2) Employs an executive director who is answerable to the board of directors

and who is not the salaried employee of any governmental entity signing the memorandum of understanding and working protocol identified in subdivision (a)(3);

(3) Has a signed memorandum of understanding and working protocol executed among:

(A) The department of children's services;

(B) All county and municipal law enforcement agencies within the geographical area served by the center;

(C) All district attorneys general offices within the geographical area served by the center; and

(D) Any other governmental entity which participates in child abuse investigations or offers services to child abuse victims within the geographical area served by the center;

(4) Facilitates the use of a multidisciplinary team (representing prosecution, law enforcement, mental health, medical, child protective and social services professionals and the juvenile court) which jointly:

(A) Assess victims of child abuse and their families; and

(B) Determine the need for services;

(5) Provides a facility that is child-focused, neutral, comfortable, private, and safe, where the multidisciplinary team can meet to coordinate the efficient and appropriate disposition of child abuse cases through the civil and criminal justice systems;

(6) Provides for the provision of needed services, referral to such services, and case tracking;

(7) Has written policies and procedures consistent with the standards established by the National Children's Alliance; and

(8) Agrees to accurately collect and report key outcome data and information relative to each center's operations to the Tennessee chapter of children's

> advocacy centers, which is the statewide membership organization. The Tennessee chapter of children's advocacy centers shall compile and report such data annually to the chairs of the judiciary committee of the senate, civil justice committee of the house of representatives, health and welfare committee of the senate, and health committee of the house of representatives. The data and information collected pursuant to this subdivision (a)(8) shall include, at a minimum, the following:
>
> > (A) Number and demographic profiles of cases served by age, gender, race, type of abuse, and treatment thereof, including mental health and medical services rendered;
> >
> > (B) Demographic profiles of perpetrators of abuse by age, gender, race, relationship to victim, and the outcome of any legal action taken against such perpetrators;
> >
> > (C) Nature of services and support provided by or through the center; and
> >
> > (D) Data and information relative to community investment in and community support of the center.

Tenn. Code Ann. § 9-4-213(a).

"Generally, questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this Court will not interfere with the exercise of that discretion in the absence of a clear showing of abuse [of discretion] appearing on the face of the record." *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014). "An abuse of discretion occurs when the trial court (1) applies an incorrect legal standard; (2) reaches an illogical or unreasonable decision; or (3) bases its decision on a clearly erroneous assessment of the evidence." *Id.* (citing *State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013)).

Here, Defendant argues the forensic interview was inadmissible because there was no proof in the record regarding the 23rd Judicial District CAC's compliance with the requirements of section 9-4-213. While the better course would have been for the State to have presented evidence regarding the section 9-4-213 factors at the pretrial hearing and for the trial court to have made these requisite findings, we still conclude Defendant has failed to show that admitting the forensic interview in this case violated a clear and unequivocal rule of law. We previously have rejected a similar plain error challenge in a child rape case. In *State v. Joseph Lester Haven*, a defendant convicted of rape of a child and aggravated sexual battery challenged the admissibility of a forensic interview on

appeal based on the alleged failure to establish the required statutory qualifications of the forensic interviewer. No. W2018-01204-CCA-R3-CD, 2020 WL 3410242, at *12-13 (Tenn. Crim. App. June 19, 2020), *perm. app. denied* (Tenn. Oct. 12, 2020). We concluded the issue was waived for failure to raise these challenges in the trial court, and the defendant was limited to plain error review on appeal. *Id.* at *13. We denied relief, stating,

> At the hearing, [the interviewer] testified that she met the three-year requirement by having been employed for one year as a forensic interviewer and having "worked with the center on the various social work positions for seven years." While she did not specify which statutory field or fields her employment fell under, she did testify that her seven years' employment had qualified her under the statute at issue and that she had been deemed qualified in prior court proceedings. Defense counsel had the opportunity to cross-examine her regarding which of the statutory fields her work experience fell into, and he chose not to pursue this line of questioning. Accordingly, there is no evidence in the record on appeal that the admission of the forensic interviews breached a clear and unequivocal rule of law based on the qualifications of the interviewer under the statute. Instead, [her] testimony was that she was qualified under the statute by her work experience consisting of one year of forensic interviews and work with the center in various social work positions for seven years. The Defendant is not entitled to relief.

Id. at *14.

Returning to the instant case, Defendant's trial counsel had the opportunity to question Ms. Tiggert regarding her employer's compliance with the requirements of section 9-4-213(a). He did not. Absent proof in the record that the 23rd Judicial District CAC failed to meet the appropriate statutory requirements, Defendant has not shown a violation of an unequivocal rule of law and is not entitled to relief.

Even if the lack of proof in the record regarding the CAC's qualifications equates to a violation of a clear and unequivocal rule of law, Defendant still cannot establish that consideration of this issue is necessary to do substantial justice. Any potential error in the admission of the forensic interview would be harmless based on Defendant's oral and written confession to Sgt. Daniels and Defendant's letters of apology to the victim and K.B. Defendant correctly states that in victim's trial testimony she did not describe any acts of abuse—she only did so in the forensic interview. Defendant argues the admission of the forensic interview "likely had an injurious effect on the jury's assessment in weighing credibility" and that had the forensic interview been excluded, the lack of substantive

testimony from the victim "would have cast [Defendant's] denial at trial in a different light[.]" However, this argument underestimates significantly the effect Defendant's confession and apologies to his family had on the jury. Given Defendant's own words, we cannot say that if the trial court erred in admitting the victim's forensic interview, as powerful as it was, such error "more probably than not affected the verdict or resulted in prejudice to the judicial process." *State v. Rodriguez*, 254 S.W.3d 361, 372 (Tenn. 2008); Tenn. R. App. P. 36(b).

For these reasons, we conclude Defendant is not entitled to relief on this issue.

C. State's Closing Argument

1. Overview

During the State's closing argument, the prosecutor said, "[The victim]'s credibility cannot be questioned. Not to be questioned." Defendant argues this statement was improper vouching for the victim and therefore constituted prosecutorial misconduct. The State asserts this issue has been waived and that Defendant cannot establish he is entitled to plain error relief. We agree with the State.

Defense counsel did not lodge a contemporaneous objection to the comment at trial, nor did Defendant raise this issue in his motion for new trial. Thus, the issue is waived. *See* Tenn. R. App. P. 36(a); *State v. Jordan*, 325 S.W.3d 1, 57 (Tenn. 2010) ("it is incumbent upon defense counsel to object contemporaneously whenever it deems the prosecution to be making improper argument"). As stated above, this Court may only review a waived issue for plain error. *See State v. Enix*, 653 S.W.3d 692, 700 (Tenn. 2022).

2. Plain Error Factors: Trial Court Record and Violation of Clear Rule of Law

Turning to the plain error factors, the record clearly establishes what occurred in the trial court, as the transcript of the evidence contains the State's closing argument. However, Defendant cannot establish any other factors. Regarding the violation of a clear rule of law, in a recent opinion our supreme court stated,

> This Court consistently has recognized that "closing argument is a valuable privilege that should not be unduly restricted." *State v. Reid*, 164 S.W.3d 286, 320 (Tenn. 2005) (quoting *State v. Bane*, 57 S.W.3d 411, 425 (Tenn. 2001)). It provides parties with an opportunity to persuade the jury of their theory of the case and to highlight the strengths and weaknesses in the proof for the jury. *State v. Banks*, 271 S.W.3d 90, 130 (Tenn. 2008). "[P]rosecutors, no less than defense counsel, may use colorful and forceful language in their

> closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices." *Id.* at 131 (citation omitted). "A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *Id.* Rather, "[a]n improper closing argument will not constitute reversible error unless it is so inflammatory or improper that i[t] affected the outcome of the trial to the defendant's prejudice." *Id.*

Enix, 653 S.W.3d at 701.

In determining whether a closing argument was so inflammatory or improper that it affected a verdict negatively, the reviewing court examines

> (1) the conduct complained of viewed in the light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper arguments; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case.

State v. Chalmers, 28 S.W.3d 913, 917 (2000) (citations omitted).

We previously have acknowledged that a prosecutor may not "express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). "The prohibition prevents the advocate from personally endorsing or vouching for or giving his or her opinion [on the witness] . . . witnesses must stand on their own." *Id.* at 7; *see also State v. Jim Gerhardt*, No. W2006-02589-CCA-R3-CD, 2009 WL 160930, at *16 (Tenn. Crim. App. Jan. 23, 2009) (prosecutor's labeling juvenile sibling of child neglect victim as "the best witness" during closing argument improper but not prejudicial considering remainder of State's proper argument). Thus, in this case the prosecutor's statement that the victim's credibility "could not be questioned" was improper. However, when applying the factors listed in *Chalmers*, cited above, we conclude this statement was not so prejudicial as to render Defendant's trial unfair.

First, this court observes the State's comment concerning the victim's credibility was a reasonable inference based on the facts of the case. Before making the statement, the prosecutor described the victim's reluctance to disclose Defendant's abuse and the fear she felt in making such disclosures. Additionally, the details from the victim's forensic interview were largely consistent with K.B.'s trial testimony and Defendant's confession to police. Thus, the prosecutor's comments regarding the victim's credibility, while

improper, were not unreasonable. Second, while there was not a curative measure requested by either party, the trial court instructed the jury at the end of the case that statements and arguments of counsel are not evidence. "[T]he jury is presumed to follow a trial court's instructions." *State v. Gann*, 251 S.W.3d 446, 463 (Tenn. Crim. App. 2007).

Perhaps most importantly, as stated above, the evidence supporting Defendant's conviction was strong. Thus, any prejudice which may have resulted from the State's comment on the victim's credibility was insignificant compared to the overwhelming proof of Defendant's guilt.

3. Other Plain Error Factors

We also agree with the State's assertion that Defendant has failed to establish that tactical reasons did not guide trial counsel's decision not to object to the State's closing argument. Given the nature of the offense and the fear and reluctance the victim felt in reporting Defendant's abuse, one can reasonably presume Defendant would have gained little had his attorney challenged the victim's credibility. Finally, as stated above, the evidence supporting Defendant's guilt was overwhelming and resulted largely from Defendant's own words, so this court finds neither that this issue adversely affected a substantial right of Defendant nor that consideration of the issue is necessary to do substantial justice. Thus, Defendant is not entitled to plain error relief on this issue.

D. Sentencing

1. Overview

The trial court sentenced Defendant to forty years, the maximum sentence for a Class A felony committed by a Range II offender. Tenn. Code Ann. § 40-35-112(b)(1).[5] Defendant argues that sentence was excessive. Specifically, Defendant asserts "the trial court's misapplication of enhancement factors, coupled with a failure to acknowledge mitigating factors, established that [Defendant's] sentence ultimately did not comport with the statutory purposes and principles of sentencing." The State contends that the trial court followed the principles of sentencing and complied with its statutory obligations, and therefore the trial court did not abuse its discretion in imposing the forty-year sentence. We agree with the State.

5 A person convicted of rape of a child "shall be punished as a Range II offender . . . the sentence imposed upon such person may, if appropriate, be within Range III but in no case shall it be lower than Range II." Tenn. Code Ann. § 39-13-522(b)(2)(A).

2. Sentencing Hearing Proof

At the sentencing hearing, the State introduced the report confirming the victim had tested positive for herpes simplex virus, type 2 (HSV-2), in June 2018. K.B. testified that the effects of HSV-1 (which K.B. had) and HSV-2 were similar; she stated that virus outbreaks normally manifested "with red bumps that turn into blisters, and those blisters or sores can open, and then that's usually how it spreads." K.B. did not believe the victim had experienced any blisters in the roughly year-and-a-half between the victim's disclosure and the sentencing hearing, though during that time the victim had taken antiviral medication four or five times to prevent outbreaks. K.B. testified the herpes virus has no cure, and concerns over spreading the virus could require a pregnant woman to give birth by Caesarian section.

K.B. also said the victim had been seeing a mental health therapist since reporting her abuse. K.B. said the victim had become more anxious and was more easily prone to becoming upset than she had been before these events occurred.

The presentence report indicated Defendant had no prior criminal record before his arrest for this offense. Defendant completed a risk and needs assessment as part of the presentence report; this assessment reflected Defendant scored "an overall low with no high target risk factors." The trial court permitted Defendant to allocute; as at trial, Defendant asserted the allegations against him were false.

At the conclusion of the sentencing hearing, the trial court applied the statutory aggravating factors from Tennessee Code Annotated sections 40-35-114. Specifically, the trial court found: the victim's herpes infection constituted a "particularly great injury" under section 40-35-114(6); Defendant's rape of the victim "was committed to gratify the defendant's desire for pleasure or excitement," under 40-35-114(7); that Defendant's infecting the victim with herpes showed that he "had no hesitation about committing a crime when the risk to human life is high," under section 40-35-114(10); and that Defendant "abused a position of private trust" by raping his stepdaughter, under section 40-35-114(14). The trial court announced it had reviewed the mitigating factors and acknowledged that Defendant's lack of a prior criminal record could be considered a nonstatutory mitigating factor under the "catch-all" provision of Tennessee Code Annotated section 40-35-113(13), but apparently gave this mitigating factor little to no weight. Given the presence of four aggravating factors, the Court sentenced Defendant to forty years in the Department of Correction as a Range II offender, which was the maximum in the range. The trial court acknowledged that the rape of a child statute gave

it the authority to sentence Defendant as a Range III offender,[6] but the court chose not to because the statute lacked guidance for determining the circumstances under which a person convicted for rape of a child may be sentenced as a Range III offender.

3. Standard of Review

"Sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). The reviewing court should uphold the sentence "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709-10.

Trial courts are "required under the 2005 amendments to 'place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.'" *Id.* at 698-99 (quoting Tenn. Code Ann. § 40-35-210(e)). However, the statutory factors are advisory only. *See* Tenn. Code Ann. § 40-35-114; *see also Bise*, 380 S.W.3d at 701; *State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). Our supreme court has stated that "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." *Carter*, 254 S.W.3d at 345. In other words, "the trial court is free to select any sentence within the applicable range so long] as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" *Id.* at 343 (quoting Tenn. Code Ann. § 40-35-210(d)).

In determining the proper sentence, the trial court must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. *See* Tenn. Code Ann. § 40-35-210; *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. Tenn. Code Ann. § 40-35-103.

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6 *See* footnote 5, *supra.*

4. Application to Present Case

Defendant argues that the trial court: (1) improperly applied the aggravating factors found in Tennessee Code Annotated section 40-35-114(6) and (10), when it found a herpes infection to be a "particularly great injury" and the virus's spread to be a "serious bodily injury;" and (2) did not consider and give proper weight to Defendant's proposed mitigating factors, including Defendant's lack of a criminal record, his unlikeliness to reoffend, and his history of gainful employment. Defendant also takes issue with the trial court's failure to make a specific on-the-record finding that it was considering the principles of sentencing in reaching its sentencing decision.

Defendant claims the trial court improperly found that herpes constitutes a particularly great injury because the trial court, in applying the aggravating factor, cited to an opinion from this court designated "Not for Citation" by our supreme court. In that opinion, *State v. Freeman Ray Harrison, Jr.*, we concluded that exposing a minor victim to herpes constituted a risk of serious bodily injury and affirmed the defendant's conviction for misdemeanor reckless endangerment. No. M2011-01803-CCA-R3-CD, 2013 WL 5436711, at *20 (Tenn. Crim. App. Sept. 27, 2013) (not for citation). However, as the State points out in its brief, even before the *Harrison* opinion, we concluded that a defendant's "infect[ing] the victim with venereal disease qualifies the personal injuries to the victim as being particularly great." *State v. Roger Grissom*, No. 02C01-9501-CC-00023, 1996 WL 218213, at *5 (Tenn. Crim. App. May 1, 1996). Thus, we conclude the evidence supported the trial court's application of the two challenged aggravating factors.

Even if the trial court erred in applying the two challenged aggravating factors, such error would be harmless. Defendant did not challenge the trial court's findings that he abused a position of trust in raping his stepdaughter and that his actions were designed to gratify his desire for pleasure or excitement. Although the trial court did not state expressly that it was giving these two factors great weight, the trial court's comments in applying these factors—particularly the court's statement that it found "few things more reprehensible than abusing a child that is entrusted to you as a stepchild"—make clear that it did give these two factors great weight. We conclude the evidence supported the application of these two aggravating circumstances and the weight afforded them, and these two factors, standing alone, would have justified the sentence imposed. *See, e.g.*, *Bise*, 380 S.W.3d at 706 ("misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 [Sentencing] Act, as amended in 2005").

Now we address Defendant's contention the trial court failed to apply certain mitigating factors and misapplied others. The trial court stated on the record that it had

reviewed all statutory mitigating factors, and found the only applicable mitigating factor was Defendant's lack of a criminal record. Although the trial court did not expressly state so, one can reasonably infer from the totality of the trial court's sentencing hearing comments that the trial court gave this mitigating factor little to no weight. As long as a trial court considers mitigating circumstances, such matters are for a trial court to decide. *See Carter*, 254 S.W.3d at 345 ("a trial court's weighing of various mitigating and enhancement factors has been left to the trial court's sound discretion").

Although Defendant correctly asserts the trial court made no explicit finding on the record that it had considered the principles of sentencing, this court can reasonably infer the trial court did, in fact, consider them. We observe the trial court explained its decisions thoroughly. It made lengthy comments in applying each of the four statutory aggravating circumstances, stated expressly that it considered the potential mitigating circumstances, and explained why it declined to sentence Defendant as a Range III offender. The trial court considered the principles of sentencing and imposed a sentence within the appropriate range, so the trial court's sentence is entitled to a presumption of reasonableness. We conclude the evidence supports the trial court's application of the four statutory aggravating factors, the weight the trial court gave these factors, and the trial court's application of only one of the proposed mitigating factors after due consideration. The trial court therefore did not abuse its discretion in imposing the forty-year sentence in this case.

III. Conclusion

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

MATTHEW J. WILSON, JUDGE