IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
November 1, 2022 Session

STATE OF TENNESSEE v. TIMOTHY POTTS

Appeal from the Criminal Court for Shelby County
Nos. 20-01522, C2002738 J. Robert Carter, Jr., Judge

No. W2021-01508-CCA-R3-CD

Defendant, Timothy Potts, appeals as of right from his jury convictions for two counts of aggravated rape, for which he received a sentence of twenty-four years. On appeal, Defendant contends that the trial court erred by denying his motions to dismiss based upon the statute of limitations and due process and that the evidence was insufficient to support his convictions. Following our review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which J. ROSS DYER, and KYLE A. HIXSON, JJ., joined.

Phyllis Aluko, District Public Defender, Barry W. Kuhn (on appeal), and Horace A. Reid and Mary Kent (at trial), Assistant District Public Defenders, for the appellant, Timothy Potts.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Dru Carpenter and Reagan Murphy, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

This case arises from the December 1998 home invasion and rape of the victim, A.B.[1] On June 30, 2020, the Shelby County Grand Jury returned an indictment charging Defendant with aggravated rape using a weapon and aggravated rape causing bodily injury, both Class A felonies. *See* Tenn. Code Ann. § 39-13-502(a)(1)-(2). Both counts of the

[1] It is the policy of this court to refer to victims of sexual offenses by their initials.

indictment included that Defendant "was not usually and publicly a resident in the State of Tennessee between January 1, 2003, and January 1, 2020."

On December 7, 2020, Defendant filed a motion to dismiss the case pursuant to Tennessee Rule of Criminal Procedure 12(b), arguing that the twenty-two-year pre-indictment delay violated his due process rights. The motion alleged that "essential evidence" to the defense was no longer available.

On February 8, 2021, Defendant filed a motion to dismiss the case as violative of the statute of limitations. *See* Tenn. Code Ann. § 40-2-101(b)(1) (providing that the statute of limitations for a Class A felony is fifteen years). In the motion, Defendant stated that the Memphis Police Department ("MPD") received initial test results from A.B.'s sexual assault examination kit on March 8, 1999, that the kit was removed from storage in 2016, that a DNA profile was submitted on April 25, 2017, and that Defendant was identified as a CODIS database match on October 23, 2017. Memphis police detectives visited Defendant, who was in custody in Alabama, on August 29, 2019, and they arrested Defendant on October 12, 2020, at the "Alabama Therapeutic and Education Center." Defendant stated that he lived in Tennessee from 1998 until 2002 and that he had been incarcerated multiple times in Alabama between January 2003 until January 2020.

A. Pretrial hearing

At a May 27, 2021 motion hearing, the trial court summarized Defendant's motion to dismiss and noted that, at an unspecified previous hearing, the parties and the court

> had previously . . . come to the agreement that the applicable statute of limitations at the time this offense was committed . . . was a 15-year statute of limitations, generally speaking . . . . And then the State alleges in their motion . . . facts that they believe would toll the statute of limitations. And that's kind of where we left it. We didn't put on any proof of that. We argued that that might exist and we set it today for the actual establishment of some sort of proof . . . on that.

MPD Sergeant David DesVergnes testified that he was assigned to the "[c]old case DNA Unit," which investigated older sexual assault cases related to "the rape kit backlog." Sergeant DesVergnes stated that he investigated A.B.'s sexual assault, which occurred on December 8, 1998, and that Defendant was identified as a suspect through DNA evidence. Sergeant DesVergnes met with Defendant, who was in the custody of the Alabama Department of Corrections at the "State of Alabama therapeutic and educational facility," on August 29, 2019. Defendant waived his *Miranda* rights and voluntarily agreed to a buccal swab.

When shown a photograph of A.B., Defendant wrote on the photograph, "No I dont know this wom[a]n. No I have not had sex with her. Lived in Memphis from 1997 till 2002. I stayed in AL after 2002." Defendant signed the statement and wrote the date and time.

Sergeant DesVergnes testified he obtained a "penitentiary packet" from Alabama, which included Defendant's incarceration history and driver's license information. He stated that, after A.B.'s sexual assault, Defendant lived primarily in Alabama. Sergeant DesVergnes noted that his investigation corroborated Defendant's account of his residency.

On cross-examination, Sergeant DesVergnes testified that he and his partner had been investigating Defendant's case for about one year at the time they met with Defendant in Alabama. He stated that, when Defendant arrived in the interview room, they informed him that he was a suspect in their investigation. Sergeant DesVergnes said that the interview took place before noon and lasted about two and one-half hours. He did not recall whether Defendant named the places in Alabama he lived after he moved there in 2002. Sergeant DesVergnes noted, though, that Defendant described fleeing from an Alabama work release program to Memphis in 1997. Defendant also told him that, in 2002, he was "brought back to Alabama" after a traffic stop in which an officer discovered an outstanding Alabama warrant.

The penitentiary packet, Defendant's Alabama driver's history, and Defendant's signed waiver of rights form were received as exhibits. Defendant had numerous traffic infractions, multiple instances of driving under the influence, and license suspensions and revocations. The driving history reflected periodic convictions, suspensions, and reinstatements in Alabama between 1993 through 1997. Defendant's license was reinstated in December 2003, and his next traffic-related conviction occurred in 2005. Defendant's license was suspended again in 2009, he was convicted of driving on a suspended license in 2010, and then a gap existed until late 2013. His license was revoked again in 2015 and 2016, and it was suspended in 2017.

Defendant's penitentiary packet reflected that he was sentenced in 1994 and 1995 to work release for receiving stolen property and breaking and entering a vehicle. An "inmate summary" document reflected that Defendant was released on probation on October 17, 1995; that on May 30, 1997, Defendant "[e]scaped from 57 NORTH ALABAMA COMMUNITY BASED FAC"; that he was recaptured on November 10, 2002; and that he was returned to Alabama on November 30, 2002. A Madison County, Alabama "conviction report" reflected that, on June 9, 2003, Defendant was sentenced to five years of probation after pleading guilty to offenses committed on February 7, 1997—"theft of prop[erty] 2nd" and third degree burglary. A judgment reflected that Defendant's

probation was revoked on October 11, 2006, and he was ordered to serve his sentence in confinement, to run concurrently with his sentence in another case. In 2006, Defendant had an additional conviction for "crim[inal] use of defense spray." Defendant was paroled in 2008, and the parole was revoked in 2010. Defendant was released on parole again in 2012. On February 11, 2019, Defendant was sentenced to five years for "[obstruction] of justice-false identity" and possession of a controlled substance.

The trial court found that Defendant was "primarily a resident of Alabama," including a "short period of time" before the rape and "since 2010"[2] and that the police located and brought Defendant back to Tennessee from Alabama. The court stated, "[T]he strict construction of the statute of limitations shows that that period of time should be tolled." The court concluded that, considering the time the limitations period had been tolled, the indictment had been returned within the limitations period, and it denied the motion to dismiss. After further argument, the court noted,

> [I]f [Defendant] was an Alabama resident, he chose to drive up to Memphis to perpetrate rapes on people and run back down to Alabama where he stayed, he can't very well go, "Gosh, I'm at a tactical disadvantage because [the State] ha[s] all that evidence and they've been looking into it and they don't even know where I am." So I'm not finding that that's a tactical disadvantage.

The court denied Defendant's request for a written ruling.[3]

B. Trial

At trial, MPD Lieutenant Dressels Fox testified that, at about 4:00 a.m. on December 8, 1998, he responded to a sexual assault call at A.B.'s apartment. He noted that A.B. had a bruise on her left cheek and a "knot" on her left temple and that she was very upset. A.B. gave him a description of the suspect. A.B.'s small child was also present at the apartment. Lieutenant Fox stated that he identified a rear bedroom window as the possible point of entry.

On cross-examination, Lieutenant Fox clarified that he did not take a statement from A.B. He noted that his report did not indicate that the attacker pointed his gun at a child, only that he pointed it at A.B. Lieutenant Fox affirmed that the fire department responded to the scene. He was uncertain whether the bedroom window was broken or partially

[2] The trial court inadvertently misspoke here; it was clear from the evidence at the hearing that Defendant had been in Alabama since 2002.

[3] Defendant also filed a request for an interlocutory appeal; although the trial court's response is not included in the record on appeal, the motion for new trial refers to the motion's having been denied.

opened, and he did not note any damage in his report. The report did not reflect that the officers found footprints at the scene.

Former MPD Crime Scene Officer Alvin Peppers testified that, on December 8, 1998, he collected a comforter, bed sheet, and women's underwear from the crime scene. He did not dust for fingerprints because it had been raining that evening, which made it "virtually impossible" to collect prints. He identified photographs of the scene, including a window in a child's bedroom, which had two of the slats in the closed blinds partially raised or stuck, and a photograph of A.B., in which scratches and some swelling were visible on her cheek. On cross-examination, Mr. Peppers stated that the outside of the bedroom window was wet; he denied finding any muddy footprints at the scene.

A.B. testified that, in December 1998, she lived at an East Memphis apartment with her husband and three young children. She stated that, on December 7, 1998, she went to bed after putting the children to bed and locking the doors; her husband was working an overnight shift as a firefighter. She noted that it was raining outside. A.B. fell asleep with the light on and, at some point, was awakened by a knock at the bedroom door. Thinking it was one of her children, she told the person to come in.

A.B. testified that a man entered, switched the light off, jumped on the bed, and straddled her. A.B. stated that she fought the man and that she did not initially know if she was awake or dreaming. She said that the man hit her and asked her where her money was located. A.B. told the man that she had no money, and he got up as though to walk away. The man then turned around and told A.B. to remove her underwear. A.B. stated that she told the man, "Don't do this," and they started fighting. She noted that, at the time, she did not realize that the man was hitting her with a gun.

A.B. testified that her four-year-old son entered the room, that the man pointed the gun at him, and that the man told A.B. to tell her son to go back to his room or the man would kill him. A.B. asked her son to go back to his room, and he complied.

A.B. testified that she began to remove her underwear, that the man pulled them down, and that the man penetrated her vagina with his penis. He did not wear a condom. The man told A.B. not to look at him and placed a pillow over her face. After the man ejaculated, he told A.B. not to follow him and left. A.B. noted that he used the front door because she heard the latch make a loud noise. After the man left, A.B. checked on her children; she stated that she saw water on a toy box near the children's bedroom window. A.B. said that a previously unbroken latch on the outside of the window had been broken.

A.B. identified photographs of her bedroom and the children's bedroom; she noted that, when she put the children to bed that evening, the blinds were not askew. She stated

that the toy box was out of frame of the photographs. A.B. further identified photographs of the exterior of the apartment, which were taken near the time of trial. The photographs reflected that the apartment's front door and the window to the children's bedroom were below an overhang and accessible via a cement walkway surrounding the building. A.B. observed that the exterior window latch on the children's bedroom window was still broken.

When asked to describe her attacker, A.B. testified that he was African American, had short black hair, and was not heavy set; that he smelled of cigarette smoke; and that her hands slipped off of his jacket during their struggle because he was wet. A.B. explained that, although the man had turned off the bedroom light, the hallway light and a streetlight illuminated the room.

A.B. testified that she called the police, that her husband was called, and that family members also came to the apartment. She noted that, after she told the police what happened, she heard a detective ask her brother-in-law, who was standing nearby, whether he thought she was lying. A.B.'s husband drove her to the Rape Crisis Center, where she was examined by a nurse. She stated that the nurse took vaginal swabs and commented that the rape could not have hurt because A.B. had three children.

A.B. testified that, during the attack, she suffered a "busted" lip, swollen eye, and bruising to her face. She noted that the next day, her eye was swollen shut, that the side of her face and her lip were swollen, and that the bruising lasted a few weeks.

A.B. testified that, at the police station, she was shown a photographic lineup and identified a suspect; however, a detective later told her that the man could not have been her attacker and chastised her for "putting another innocent black man in jail[.]" A.B. stated that she apologized and felt remorseful and sad about the mistake. She did not hear anything else about her case.

A.B. testified that she was tested for HIV and that the test took weeks to come back, during which she experienced "mental torture" and considered the possibility that she would not see her children grow up. A.B. had previously done hair out of her home for supplemental income but stopped after the attack. A.B. stated that she developed a fear of having people in her home and letting her children be around other people.

A.B. testified that, in July 2019, MPD Detective John Byars left a card at her home asking to speak to her. They met at the Rape Crisis Center, where Detective Byars told her that they had found a DNA match to the man who had attacked her. Detective Byars asked A.B. if she wanted to pursue the case and told her that it was her decision. Detective Byars showed A.B. a photograph of Defendant, and she wrote on the photograph, "I don't know

this man. I never had consensual sex with him." A.B. denied knowing Defendant or having had a relationship or consensual sex with him.

On cross-examination, A.B. testified that, after the attack, she first called 911 and then tried to reach her husband; she noted that the 911 operator called her back and told her that they would find her husband. She estimated that it took about twenty minutes for the police to arrive. A.B. stated that she told the officers that the attacker left through the front door, that the officers "kept saying he broke in through the front door," and that she had to correct them that he came in through the window. She noted that she was "quite adamant" about it and that "they notated it later on." A.B. did not recall whether she saw water on the dresser in her children's room, which was in front of the window. A.B. stated that it was possible her clothing was damp after the attack.

A.B. testified that she told the officers that her attacker had held a gun to her son's head and had threatened to shoot him. She did not know how many times the attacker hit her in the face, explaining that they were fighting and that he hit her multiple times. A.B. recalled most of the blows landing on the left side of her face. She thought that the man hit her with the butt of the gun. A.B. was unsure how the man held the gun, and she noted that she did not recognize the item in his hand as a gun until he pointed it at her son.

A.B. recalled giving a police statement the day after the attack. She stated that she was certain she told the detective that she stopped fighting the man because he pointed a gun at her son's head and threatened to kill him if A.B. did not send him back to bed. A.B. stated that, when the police arrived, the window in the children's bedroom had been pried open, a screen had been removed, the latch had been loosened, and the closed blinds had been disturbed. She stated that a wet footprint was visible on the toy chest.

A.B. testified that she gave an additional police statement in August 2019, during which she said that she may have told Detective Byars that she could "barely see" the attacker. She stated that, after the man left, she saw that the window in the children's bedroom was open; she maintained that the man exited through the front door.

On redirect examination, A.B. testified that, when the man pointed the gun at her son, her son was standing a short distance from the bed. She clarified that the footprint she saw on the toy chest was only water, not mud. A.B. noted that they had never unlocked or opened the children's bedroom window previously.

Margaret Aiken, an expert in forensic sexual assault examinations, testified that in December 1998, she worked part-time as a nurse with the Memphis Rape Crisis Center; she noted that she worked at the center beginning in 1978. Ms. Aiken stated that she

examined A.B. on December 8, 1998, and that she composed a report documenting her findings.

Ms. Aiken's report reflected that A.B. stated she was in her bed asleep when an "unknown black male with a metal object" struck her with the object and forced her to have vaginal intercourse; A.B. denied that the man used a condom. Ms. Aiken observed a reddened area around A.B.'s left eye where A.B. said she had been hit.

Ms. Aiken testified that she also conducted a pelvic examination, including taking vaginal swabs, which were dried and sealed. Ms. Aiken did not find any genital injuries; she noted that this was unsurprising because A.B. had several children and had been sexually active. Ms. Aiken stated that she would not necessarily expect to find injuries in an adult woman who had been sexually assaulted. Ms. Aiken agreed that the lack of injury was not inconsistent with A.B.'s description of the rape.

On cross-examination, Ms. Aiken testified that, if A.B. had reported being struck with a gun, she would have noted it in her report. Ms. Aiken agreed that she also would have recorded if A.B. had a busted lip, a chipped tooth, swelling, or a knot on her head. Ms. Aiken thought that a black eye took more than three hours to develop after an injury occurred. She did not notice any swelling around A.B.'s eye. When asked whether she told A.B. that the rape could not have hurt because she had three children, Ms. Aiken stated, "I have no recollection. It doesn't sound like me." Ms. Aiken did not think she would intentionally make a derogatory comment to a patient.

Former MPD Officer Calvin Brown testified that he conducted the photographic lineup in which A.B. identified a potential suspect. Mr. Brown verified that the identified suspect was incarcerated in another state at the time of the rape. On cross-examination, Mr. Brown stated that the lineup consisted of a book of photographs; he did not recall how many photographs he showed A.B. or how long A.B. took to make an identification. Mr. Brown affirmed that he asked A.B. if she was certain of her identification.

Former MPD Detective John Byars testified that, before his retirement, he worked in the DNA unit, which investigated the backlog of sexual assault cases in Memphis. Mr. Byars stated that, when they tested A.B.'s rape kit, the DNA database showed a match to Defendant. Mr. Byars noted that he was unable to find the original paper file for A.B.'s case but that he obtained a printout of electronic information in the MPD's system. He agreed that the printout reflected that another suspect had been ruled out. Mr. Byars left a card at A.B.'s home and met with her at the Rape Crisis Center. Mr. Byars told A.B. that she did not have to go forward with the case, and she affirmed that she wanted to proceed. Mr. Byars denied pressuring A.B.

Mr. Byars testified that A.B. was very emotional and tearful when describing the attack. He stated that he showed A.B. a photograph of Defendant from 1997 or 1998. A.B. wrote on the photograph that she did not know Defendant or have consensual sex with him. Mr. Byars denied that his research ever suggested that A.B. and Defendant knew one another.

Mr. Byars testified that he traveled to Shelby County, Alabama to meet Defendant in 2019. He agreed that, according to his research, Defendant had been in Alabama "for some time." Mr. Byars advised Defendant of his rights and had Defendant sign an Advice of Rights form. He asserted that Defendant understood his rights and agreed to speak with him. Mr. Byars showed Defendant a driver's license photograph of A.B. taken in 1998, and Defendant wrote on the photograph that he did not know A.B. or have sex with her. Defendant further wrote that he lived in Memphis from 1997 until 2002, after which time he stayed in Alabama. Mr. Byars collected two buccal swabs from Defendant's cheek to confirm the DNA match with A.B.'s rape kit.

On cross-examination, Mr. Byars testified that his review of the file did not reflect a mention of wet or muddy footprints in the apartment, moisture on a trunk in the children's bedroom, or the condition of the exterior of the children's bedroom window. He recalled that the file stated that the ground was wet due to rain. Mr. Byars stated that, in a supplemental report he filed, he included that A.B. had bruising to the right side of her face. He noted that the original report listed that she had a busted lip and a knot on her head. Mr. Byars agreed that he took a typed statement from A.B. in 2019 and that she initialed it after reviewing it for accuracy.

TBI Special Agent Chad Johnson, an expert in forensic biology, testified that in 1998, he was assigned to the serology DNA section, in which he tested items for bodily fluids and performed DNA analysis. He stated that, in February 1999, he tested the vaginal swabs in A.B.'s rape kit and that they were positive for semen and sperm. Agent Johnson noted that he did not test items of clothing or bedding in cases with only one suspect if internal swabs tested positive. Agent Johnson acknowledged a note in his report that DNA analysis would be performed if requested by the District Attorney's Office and compared with a DNA standard from a suspect "if there was one." Agent Johnson denied ever receiving a request for DNA analysis in this case. The rape kit was returned to MPD.

Katelin Hogan, an expert in forensic DNA analysis, testified that she was a senior forensic scientist with Sorenson Forensics and that she tested swabs from A.B.'s rape kit in 2017. She stated that she developed a "complete male profile" from the "sperm fraction" on the swabs, meaning that all twenty-one markers were present. Ms. Hogan said that, in 2019, she received a reference swab for Defendant and that his DNA profile matched the profile obtained from A.B.'s rape kit. Ms. Hogan stated that the "frequency of occurrence"

of Defendant's DNA profile in an unrelated individual was "one in 19.4 nonillion for African[]Americans"; she explained that one nonillion was "one followed by [thirty] zeros."

Upon this evidence, the jury convicted Defendant as charged. After a sentencing hearing, the trial court merged the convictions and imposed a twenty-four-year sentence. After his motion for new trial was denied, Defendant timely appealed.

Analysis

I. Statute of Limitations

Rule 12(b)(1) of the Tennessee Rules of Criminal Procedure provides, in pertinent part, that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." In addition, "a motion alleging a defect in the indictment, presentment, or information" must be raised before trial, "but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court[.]" Tenn. R. Crim. P. 12(b)(2)(A), (B). "A motion to dismiss under Rule 12 allows the trial court to decide issues that are ripe for resolution without a full trial on the merits." *State v. Sherman*, 266 S.W.3d 395, 403 (Tenn. 2008). "Generally speaking, pre-trial motions to dismiss that are 'capable of determination' involve questions of law, rather than fact." *Id.* (citing *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987) ("A Rule 12 . . . motion to dismiss is appropriately granted when it is based on questions of law rather than fact.")). However, the trial court "may make some findings of fact, so long as it does not encroach upon the province of the jury." *Id.* (citing *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976)). When the trial court applies a statute to "undisputed facts," that application remains an issue of law, which we review de novo. *Id.* at 403-404.

Here, the parties did not contest that Defendant lived in Memphis between 1997 and 2002 and that after 2002, he lived and was incarcerated in Alabama. Similarly, the timeframe in which A.B.'s rape kit was re-tested and the State's investigation of the case between 2016 and 2019, was not in dispute. Therefore, we review the trial court's application of these facts to the relevant law de novo.

A. Equal Protection Challenge

Defendant contends that the trial court erred by denying his motion to dismiss the indictment as violative of the statute of limitations, arguing that the tolling statute—Tennessee Code Annotated section 40-2-103—violates the Equal Protection Clause because it treats residents and non-residents differently. Defendant asserts that he was

subject to the trial court's jurisdiction at all times after the rape by virtue of being subject to extradition. The State responds that the statute treats residents and non-residents equally and that no limitations period applies to the offenses because Defendant resided outside of the state during a period in which the legislature removed the statute of limitations for aggravated rape under certain circumstances.

As a preliminary matter, Defendant's Equal Protection issue has been raised for the first time on appeal; he did not raise the issue in his pretrial motion to dismiss or in his motion for new trial. In *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983), our supreme court stated,

> It has long been the general rule that questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion.

(internal citations omitted). The *Lawrence* court noted that because the constitutional validity of the statute at issue was not raised in the trial court, "no opportunity was afforded for the introduction of evidence which might be material and pertinent in considering the validity of the statute," and that the appellate court should not have adjudicated the issue. *Id.; see also* Tenn. R. App. P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon . . . [an]other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."); *State v. Simon Dean Porter*, No. M2020-00860-CCA-R3-CD, 2021 WL 4955719, at *18 (Tenn. Crim. App. Oct. 26, 2021) (exercising only plain error review of defendant's constitutional attack on the statute requiring him to provide a DNA specimen in jail, which was raised for the first time on appeal), *perm. app. denied* (Tenn. Mar. 24, 2022).

We note, however, that panels of this court have extended plenary review to a constitutional challenge to a proscriptive statute notwithstanding its failure to be properly preserved in the trial court, reasoning that "a claim that the proscriptive statute is unconstitutional on its face strikes at the jurisdiction of the convicting court and, as a result, may be raised at any time before the sentence has expired, even in a petition for the writ of habeas corpus." *State v. Michael Broyles*, No. E2019-01033-CCA-R3-CD, 2021 WL 2156935, at *12-13 (Tenn. Crim. App. May 27, 2021) (quoting *State v. Kaylecia Woodard*, No. E2016-00676-CCA-R3-CD, 2017 WL 2590216, at *9 (Tenn. Crim. App. June 15, 2017), *no perm. app. filed*), *perm. app. denied* (Tenn. Oct. 13, 2021).

In its brief to the court in this case, the State does not address the issue of waiver. In *State v. Bristol*, 654 S.W.3d 917, 925 (Tenn. 2022), our supreme court cautioned that this court's discretion to "review unpreserved or unpresented issues" should be "sparingly exercised." The court further instructed that this court must "give the parties 'fair notice and an opportunity to be heard on the dispositive issues'" before considering an issue that was not properly presented. *Id.* (quoting *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018)).

However, we need not solicit additional briefing from the parties to determine whether a constitutional challenge to the tolling statute in Code section 40-2-103 is of similar jurisdictional character that it is not subject to waiver for failure to raise the issue in the court below. The parties have had the opportunity to argue the equal protection issue on its merits before this court, and whether we exercise plenary review or plain error review, Defendant is not entitled to relief because the statute complies with the Equal Protection Clause. *See State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)) (stating that in order to prove plain error, "a clear and unequivocal rule of law must have been breached").

This court has previously rejected a similar challenge to Code section 40-2-103, concluding that the statute "on its face applies equally to all persons who commit a crime in this State and then depart." *State v. March*, 395 S.W.3d 738, 788 (Tenn. Crim. App. 2011). As in *March*, Defendant has not alleged, and the record does not reflect, that the State enforced the tolling statute against him in a different manner than in other cases. *See id.*

Similarly, Defendant has cited no authority to support his contention that being subject to extradition gave the trial court personal jurisdiction over him; were this the case, jurisprudence requiring that a defendant be physically brought before the court would be unnecessary. *Cf. Johns v. Bowlen*, 942 S.W.2d 544, 547 (Tenn. Crim. App. 1996) (discussing in the context of extradition to another state that, "as long as an accused is physically present in Tennessee[,] . . . he is subject to this state's jurisdiction"); *State v. Frederick J. Schmitz, Jr.*, No. M2014-02377-CCA-R3-CD, 2015 WL 12978196, at *2 (Tenn. Crim. App. Aug. 13, 2015) (concluding that the trial court had personal jurisdiction in part because the defendant "personally appeared" in that court), *no perm. app. filed*; *State v. Michael Keith Hale*, No. 55, 1991 WL 6413, at *2 (Tenn. Crim. App. Jan. 25, 1991) ("Jurisdiction of the person involves the power of the court to render a personal judgment or to subject the parties in a particular case to its decisions and rulings, and is usually obtained by process"), *rev'd on other grounds*, 833 S.W.2d 65 (Tenn. 1992). Defendant is not entitled to relief on this basis.

B. Statutory Tolling

"Our supreme court has concluded that statutes of limitation must be 'liberally construed in favor of a criminally accused.'" *March*, 395 S.W.3d at 785 (quoting *State v. Henry*, 834 S.W.2d 273, 276 (Tenn. 1992)). Accordingly, a statute extending the limitation period for an offense is "to be strictly construed against the state." *Id.* At the time of A.B.'s rape, prosecution for aggravated rape was subject to a fifteen-year statute of limitations. *See* Tenn. Code Ann. § 40-2-101(b)(1) (1998) (stating that the statute of limitations for a Class A felony is fifteen years). However, "[n]o period during which . . . the party charged was not usually and publicly a resident within the state, is included in the period of limitation." Tenn. Code Ann. § 40-2-103.

In this case, the proof at the motion to dismiss hearing and at trial established that the aggravated rape occurred in December 1998 and that Defendant was not indicted on charges relating to the offense until June 2020. However, the State alleged in the indictment that Defendant was not publicly a resident in Tennessee between January 1, 2003, and January 1, 2020, *see* Tenn. Code Ann. § 40-2-103, and the proof further established that Defendant left Tennessee sometime in 2002, that Mr. Byars located Defendant in custody in Alabama in 2019, and that Defendant was incarcerated in Alabama for much of this interval. Based on this proof, the trial court properly determined that the fifteen-year statute of limitations was tolled during Defendant's absence from the State and that the prosecution was not time-barred.

Moreover, as noted by the State on appeal, our legislature has amended Tennessee Code Annotated section 40-2-101 to include, in relevant part, that a defendant may be prosecuted "at any time" for aggravated rape if certain circumstances are met. This subsection was first added in April 2014 and reorganized in 2019; pertinent to this case, it requires the following: (1) the victim was an adult at the time of the offense; (2) the victim notified law enforcement of the offense within three years; and (3) the offense was committed "[p]rior to July 1, 2014, unless prosecution for the offense is barred because the applicable time limitation set out in this section for prosecution of the offense expired prior to July 1, 2014." Tenn. Code Ann. § 40-2-101(l)(1).

Although not the basis for the trial court's ruling, we recognize that A.B. was an adult at the time of the aggravated rape and reported it to law enforcement that same night. *See* Tenn. Code Ann. § 40-2-101(l)(1). Because the statute of limitations was tolled at the time Defendant left Tennessee in 2002, the limitations period did not expire in 2013, as it otherwise would have but for the provisions of Code section 40-2-103. As a result, the limitations period had not expired on July 1, 2014, and by extension, the statute of limitations for A.B.'s aggravated rape was unlimited. *See id.* The trial court properly

determined that the indictment was timely issued, and it did not err by denying the motion to dismiss.

II. Pre-Indictment Delay/Due Process

Defendant contends that the pre-indictment delay violated his right to due process, arguing that the State should have DNA tested A.B.'s rape kit more promptly, that the State provided no explanation for the delay, and that Defendant could not adequately defend himself twenty years after the fact. The State responds that Defendant has failed to prove actual prejudice or that the State caused the delay for tactical gain.

In Tennessee, it is well-settled law that "delay between the commission of an offense and the commencement of adversarial proceedings" implicates Defendant's Fifth Amendment due process rights. *State v. Gray*, 917 S.W.2d 668, 671 (Tenn. 1996) (quoting *State v. Dykes*, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990), *overruled on other grounds as stated in State v. Hooper*, 29 S.W.3d 1, 8 (Tenn. 2000)) (internal quotation marks omitted). The Due Process Clause requires dismissal of an indictment "if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to the [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324 (1971). Likewise, our supreme court has stated,

> [b]efore an accused is entitled to relief based upon delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain a tactical advantage over or to harass the accused.

Dykes, 803 S.W.2d at 256.

Defendant urges this court not to apply the *Marion-Dykes* standard, however. He asserts that because of the length of the pre-indictment delay, the appropriate standard is found in *Gray*, 917 S.W.2d at 671. In *Gray*, a victim of childhood sexual abuse reported the abuse to the police more than forty-two years after it occurred; the victim had never previously disclosed the abuse to law enforcement authorities. 917 S.W.2d at 670. In the intervening decades, the victim's memory had diminished, and she could not identify when the incident occurred beyond a six-month period; similarly, material witnesses were no longer available. *Id.* at 673. Our supreme court acknowledged that, in these circumstances, a "daunting, almost insurmountable" burden was placed on defendants by requiring them to prove both prejudice and the State's having caused the delay for tactical advantage. *Id.* Thus, our supreme court held that in analyzing a "pre-accusatorial" delay during which the

State was unaware of the commission of the crime, "the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused." *Id.*

Our supreme court later clarified that *Gray* was decided on its "unique facts," namely the State's being unaware of the commission of the offense, and that "in other cases involving a pre-arrest delay, the due process inquiry continues to be guided by *Marion*." *State v. Utley*, 956 S.W.2d 489, 495 (Tenn. 1997). The court also noted that prejudice "cannot be presumed and instead must be substantiated by the defendant with evidence in the record." *Id.*

Defendant also directs this court's attention to our recent application of the *Gray* standard in *State v. Inman D. Turner*, No. M2020-01729-CCA-R3-CD, 2022 WL 1948713 (Tenn. Crim. App. June 6, 2022). In *Turner*, the minor victim reported to a teacher or guidance counselor in the early 1980s that her father had sexually abused her, but the defendant was not charged until 2019. *Id.* at *1. The victim's mother testified at a pretrial motion hearing that an investigator from the Department of Human Services (DHS) met with her and the victim at the family home and that the family attended counseling, but the victim's mother had no records of the counseling. *Id.* at *2. The victim denied ever having spoken to a DHS investigator. *Id.* at *6. Any files from the school district, the counseling center, and DHS had been destroyed. *Id.* at *10, 12. In addition, a former teacher at the victim's school testified that a teacher to whom the victim made the disclosure had passed away, and the guidance counselor the victim named had no memory of it. *Id.* at *5, 8.

The trial court dismissed the indictment after applying *Gray*, finding that although the victim had attempted to disclose the abuse to her mother and school personnel, she "failed to take any steps to initiate a formal prosecution" until she first notified law enforcement of the abuse in June 2018. *Id.* at *12. The court noted that the State gave no reason for the approximately forty-year delay and found that the defendant had shown that "multiple witnesses" were deceased; that the remaining witnesses' memories had faded, including that of the victim; and that records from DHS, the school, and the counseling center had been destroyed. *Id.*

On appeal, the State argued that the trial court should have applied *Marion-Dykes* because the victim's disclosure was communicated to DHS, which constituted an arm of the State. *Id.* at *13. This court concluded that law enforcement authorities had not learned of the abuse during the forty-year gap between its commission and the return of the indictment, noting that no evidence indicated that DHS substantiated the allegations or submitted a required report to the juvenile court. *Id.* at *15-16. Accordingly, this court applied the *Gray* standard to its consideration of defendant's motion to dismiss the indictment on due process grounds. *Id.* at *16-17. In its analysis, this court contrasted the

defendant's case with other cases applying the *Marion-Dykes* standard, in which sexual abuse allegations had been substantiated by DHS and reported to the District Attorney General's Office or the police. *Id.* at *14-15 (discussing *State v. Carico*, 968 S.W.2d 280, 283 (Tenn. 1998), and *State v. Gwendolyn Hagerman*, No. E2011-00233-CCA-R3-CD, 2013 WL 6729912, at *34 (Tenn. Crim. App. Dec. 19, 2013)).

Inman D. Turner is distinguishable from Defendant's case because it is undisputed that A.B. reported the rape to law enforcement authorities immediately after it occurred. Defendant's reliance upon the size of the gap between the incident and the commencement of the prosecution is misplaced—the determinative factor of our inquiry is when law enforcement authorities learned of the offense. Because law enforcement promptly learned of the rape, the *Marion-Dykes* test applies.

The twenty-two-year delay between the offense and the indictment is sufficient to trigger a due process inquiry. *See, e.g.*, *Carico*, 968 S.W.2d 280 (conducting a due process inquiry for a seven-year delay between offense and arrest); *Utley*, 956 S.W.2d 489 (five-year delay). However, Defendant cannot satisfy the other two factors required for relief.

First, Defendant presented no evidence to show how he was prejudiced by the delay. As noted by the State, Defendant's argument that he lost the opportunity to serve his sentence concurrently with his Alabama sentences was raised for the first time on appeal and has been waived. *See* Tenn. R. App. P. 36(a). Relevant to his remaining assertions, despite claiming that the victim's memory had faded over time and that unspecified witnesses may have been produced closer to the incident, Defendant does not identify any witnesses he was unable to locate or explain how the faded memories actually prejudiced his defense. *Cf. Inman D. Turner*, 2022 WL 1948713, at *17 (discussing that DHS and school records had been destroyed, that at least one material witness was deceased or had no memory of the relevant events, and that defendant had to account for his whereabouts and conduct during a four-year period); *Gray*, 917 S.W.2d at 673 (discussing that the victim had lapsed memory, that the victim no longer recalled the date of the offenses beyond a six-month period, and that witnesses were no longer available). We note that defense counsel cross-examined A.B. thoroughly about the accuracy of her memory and observations, including her identifying the wrong person in a photographic lineup performed near the time of the incident.

Second, Defendant does not provide any proof that the State "caused the delay in order to gain a tactical advantage or to harass [Defendant]." *See Gray*, 917 S.W.2d at 671. Defendant's only allegation in this regard is that the State was negligent in failing to test the rape kit, and defense counsel acknowledged at oral argument that the reason for the

delay is unknown.[4] Therefore, the record supports the trial court's conclusion that Defendant was not entitled to relief on Fifth Amendment due process grounds.

III. Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to support his convictions, arguing that the victim was unable to identify her attacker and that "[t]here was no physical evidence at the scene that belonged to [D]efendant." Defendant states that the only evidence was "a twenty-year[-]old lab test." The State responds that the evidence is sufficient.

Our standard of review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id.* Our standard of review "is the same whether the conviction is based upon direct or circumstantial evidence." *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the "State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007).

Aggravated rape is defined, in relevant part, as "the unlawful sexual penetration of a victim by the defendant" that is accompanied by "[f]orce or coercion . . . and the defendant is armed with a weapon," or when the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-502(a)(1), (2).

[4] We note that, at oral argument, the State referred to A.B.'s rape kit as part of the now widely-publicized backlog of Memphis rape kits. *See, e.g.*, *State v. Terrell Jackson*, No. W2019-01883-CCA-R3-CD, 2021 WL 1157025, at *2 (Tenn. Crim. App. Mar. 25, 2021) (noting in the context of a 2014 investigation into a 1998 aggravated rape that the MPD "Sex Crimes DNA Unit . . . was created to address the backlog of sexual assault kits in Memphis"); *State v. Timothy Lindsey*, No. W2018-01987-CCA-R3-CD, 2020 WL 774047, at *3 (Tenn. Crim App. Feb. 14, 2020) (noting in the context of a 2015 investigation into a 2005 aggravated rape that the detective "was investigating backlogged rape kits for the [MPD]").

As noted by the State, Defendant only raises the sufficiency of the evidence relative to his identity as the person who raped A.B., not the State's proof of the remaining elements of aggravated rape. We will confine our analysis accordingly.

The identity of the perpetrator is "an essential element of any crime." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Identity may be established with circumstantial evidence alone, and the "jury decides the weight to be given to circumstantial evidence, and [t]he inferences to be drawn from such evidence . . . ." *Id.* (internal quotation marks omitted). The question of identity is a question of fact left to the trier of fact to resolve. *State v. Crawford*, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982).

Previous panels of this court have concluded that, in certain circumstances, identity can be proven by DNA evidence alone. *See, e.g.*, *State v. Toomes*, 191 S.W.3d 122, 131 (Tenn. Crim. App. 2005) (stating that, although this court "hesitate[d] to describe [DNA analysis] as absolute or infallible," the State had sufficiently proven defendant's identity when swabs from the victim matched defendant and defendant's identical twin was shown to have been incarcerated at the time of the rape); *State v. Timothy Lindsey*, No. W2018-01987-CCA-R3-CD, 2020 WL 774047, at *5-6 (Tenn. Crim. App. Feb. 14, 2020) (concluding that, although the victim's description of her assailant was inconsistent in some respects with defendant's appearance, defendant's DNA match with oral and "miscellaneous" swabs was sufficient to establish defendant's identity as the perpetrator).

In the light most favorable to the State, A.B. testified that her attacker did not wear a condom and ejaculated. The vaginal swabs taken from inside A.B.'s body yielded a full DNA profile that matched Defendant's CODIS profile, as well as his 2019 buccal swabs. Ms. Hogan testified that the likelihood of another person's sharing the same DNA profile as Defendant was one in 19.4 nonillion, or a one followed by thirty zeros. Defendant informed MPD investigators in 2019 that he lived in Memphis from 1997 until 2002. Defendant denied knowing A.B. or having had sex with her. The evidence is sufficient for a reasonable trier of fact to find that Defendant was the person who raped A.B. Defendant is not entitled to relief on this basis.

Conclusion

Based on the foregoing and the record as a whole, the judgments of criminal court are affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE