

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 4, 2023

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STATE OF TENNESSEE v. JUSTIN L. STEGALL

Appeal from the Circuit Court for Henderson County
No. 20-114-2 Donald H. Allen, Judge

No. W2022-00628-CCA-R3-CD

Defendant was convicted of a single count of aggravated sexual battery, and the trial court imposed a sentence of eight years as a Range I offender to be served in confinement. On appeal, Defendant argues that the evidence was insufficient to support his conviction and that the trial court erred by admitting the video recording of the minor victim’s forensic interview. Following our review of the entire record and the parties’ briefs, we reverse Defendant’s conviction and remand this case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Reversed

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and J. ROSS DYER, JJ., joined.

Mitchell A. Raines (on appeal), Assistant Public Defender – Appellate Division; George Morton Gooze (at trial), Public Defender; Hayley F. Johnson (at trial), Assistant Public Defender, Jackson Tennessee, for the appellant, Justin L. Stegall.

Jonathan Skrmetti, Attorney General and Reporter; Courtney Orr, Senior Assistant Attorney General; Jody Pickens, District Attorney General; and Angela R. Scott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Pretrial Hearings on State’s Motion in Limine

The State filed a pretrial motion in limine requesting the trial court to determine the trustworthiness of the video of the forensic interview conducted with the victim on

December 5, 2019, at the Carl Perkins Center. Hearings on the motion were held on August 11 and September 23, 2021, but based on the record, no testimony was presented at either hearing. At the first hearing, the State, without objection, made a copy of the forensic interview an addendum to its motion for the court's viewing before the next hearing date. At the second hearing, the trial court noted that it had reviewed the entire video of the forensic interview and ruled that it was "admissible into evidence for the reason I stated in the letter."¹ It was further noted that portions of the interview referencing Defendant and someone else would be redacted for trial purposes.

The trial court's order finding that the recording of the interview was admissible was approved for entry by the State and counsel for Defendant and stated that "upon argument and proof submitted by the parties and applicable law" the court finds as follows:

1. The video possesses a particularized guarantee of trustworthiness;
2. The interview was conducted by a qualified forensic interviewer who met the qualifications at the time the interview was conducted, Ms. Nikki Klopfenstein Ms. Klopfenstein testified² that she has conducted over 600 forensic interviews, and has received extensive specialized training as a forensic interviewer;
3. The recording is both visual and oral and is recorded on videotape;
4. The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and,
5. Every voice on the video recording is properly identified[.]

Trial

State's Proof

At trial, Nikki Klopfenstein, a forensic interviewer for the Carl Perkins Center, testified that she had a bachelor's degree in sociology and a law degree. She had worked as a forensic interviewer for nearly two years. Ms. Klopfenstein estimated that she had conducted approximately 600 interviews during that time. She said that she had completed a required forty-hour forensic interview training at the National Child Advocacy Center in Huntsville, Alabama, and she had also satisfied annual continuing education requirements.

¹ The record on appeal does not contain a letter from the trial court.

² Contrary to the trial court's order, the record reflects that Ms. Klopfenstein did not testify at either of the hearings on the admissibility of the forensic interview, nor was her curriculum vitae exhibited to the motion, hearing or order.

Ms. Klopfenstein described the interview process and identified the video of the forensic interview conducted in this case at the Madison County Carl Perkins Center on Lexington Avenue and agreed that it was a “clear and accurate representation” of her interview with the victim.³ She said that during the interview, the victim was responsive to her questions and corrected anything that was wrong, and the victim’s maturity level was appropriate for her age. The portions of the video of the forensic interview that had been deemed admissible were then played for the jury.

During the interview, the victim said that she lived with her grandmother (“Grandmother”) and that her mother had spoken to her about going to the Carl Perkins Center for a forensic interview. Her mother also told her that she would have to talk with the person in charge “of all of that.” The victim knew that she needed to talk “about [Defendant]. He was touching me inappropriately.” The victim told Ms. Klopfenstein that on the day of the offense, she and her cousin were asleep on a sectional couch in the living room of the house that Defendant shared with the victim’s aunt (“Aunt”), his fiancée. The victim said that she was wearing shorts and a t-shirt and at some point woke up, and Defendant began touching her.

The victim told Ms. Klopfenstein that she put her knees up while using her phone, and Defendant approached her, spread her knees apart, and placed his hand under her shorts and underwear. She said that Defendant touched her “private area” and her “vagina” and explained that it was almost inside “right there on the edge of her private area.” The victim further described Defendant as “poking” her genitals, “rubbing [her] hardly,” and touching her genitals “hard hard.” She said that Defendant touched her four or five times, and each time that he touched her, Defendant would crouch down on the floor next to the couch and place one hand on his lap. The victim told Ms. Klopfenstein that Defendant did not say anything while he was touching her.

The victim said that she eventually moved away from Defendant and to a chair in the living room. She told Ms. Klopfenstein that he tried to convince her to move back to the couch, but she refused. Defendant then got up and went back into the bedroom. Grandmother picked her up later that afternoon, and she immediately told Grandmother what happened. During the interview, the victim was unable to give a specific date for the offense. However, she described it as occurring during summer break before third grade when she was eight or nine years old. The victim also told Ms. Klopfenstein that the offense occurred at 9:00 or 10:00 a.m. and that the “sun was a little bit out but not that

³In order to protect the minor victim’s identity, she will be referred to throughout this opinion as “the victim.” We will refer to the victim's grandmother, mother, and aunt by their relationship to the victim in order to further protect the victim's identity.

much.” She also noted that she could not see very much because her head was against the couch. The victim said she knew Defendant was the person who was touching her because everyone else in the house was asleep at the time. She said that was the only time that the touching occurred. The victim told Ms. Klopfenstein that Aunt later yelled at her while the victim was at her grandfather’s house and said “it’s not true.”

Ms. Klopfenstein testified that Investigator Crystal Duke of the Henderson County Sheriff’s Office (“HCSO”) and Investigator Brianna Cotham with the Department of Children’s Services (“DCS”) also observed the interview but were not present in the room. Ms. Klopfenstein stated that her usual procedure before conducting a forensic interview was to meet with law enforcement and DCS to complete paperwork and review the police report and allegations.

On cross-examination, Ms. Klopfenstein testified that she was briefed by Investigator Duke and Investigator Cotham prior to interviewing the victim in this case. She also stepped out of the room during the interview to confer with them.

The twelve-year-old victim affirmed that she knew the difference between the truth and a lie. She testified that she lived with Grandmother. Defendant lived with Aunt, and they had children together. The victim testified that she had visited Aunt’s home one time before the offense. She remembered going to the Carl Perkins Center and talking with Ms. Klopfenstein, and she told Ms. Klopfenstein the truth. She said the person that she referred to on the video of the interview was Defendant. The victim also remembered talking to Investigator Duke one time after giving her “forensic” to Ms. Klopfenstein. She told Investigator Duke that the touching occurred “right before” a birthday party, although she could not give a specific date of the party. The victim testified that the incident occurred “just before sunrise,” and she remembered visiting with Aunt and going to Vacation Bible School (“VBS”) that summer.

The victim testified that after Defendant touched her, Grandmother arrived fifteen to thirty minutes later to pick her up, and she immediately went to the car and told Grandmother what happened. She also discussed the incident with her mother and her grandfather. The victim testified that Aunt was upset and “screamed” at her that day. She said that she spoke with law enforcement one time “because like, Mama Barnideau – she overheard me and Mama talking about it, and then she got one of her law enforcement friends involved.” The victim clarified that she spoke with law enforcement after someone from Le Bonheur Children’s Hospital contacted them.

Concerning the circumstances of the offense, the victim testified: “[Defendant] was on the couch, like, and then like I would look and notice him, and then he would like crouch down on the floor and try to be sneaky.” She said that her cousin, who was ten or eleven, was also asleep in the room on the couch. The victim indicated that she was on one side of the couch, and her cousin was on the other side. The victim eventually moved to a chair.

She said: “I was in that chair for about like at least two minutes before he told me to come back to the couch because he was going to bring [his daughter] back in there – He said he was going to bring [his daughter] to the chair.” The victim said that she refused to move from the chair, and Defendant went back into his bedroom.

On cross-examination, the victim agreed that she had testified the offense occurred just before sunrise. When asked if she recalled telling Ms. Klopfenstein that it occurred around 9:00 or 10:00 a.m., the victim said: “Like, I don’t know how to describe it. Like it felt like sunrise, but because the sun was hiding behind a tree.” She did not recall telling a nurse at Le Bonheur Children’s Hospital that the offense occurred while her cousins were upstairs.

Investigator Crystal Duke testified that she primarily investigated child abuse and sex crimes for the HCSO at the time of the offense. She said that Le Bonheur Children’s Hospital made a referral to DCS in this case, and she received the referral on November 14, 2019. Investigator Duke began an investigation and learned that the offense occurred during the summer of 2019. She said that the victim’s grandmother talked to her about VBS, and Investigator Duke obtained the dates, June 2-7, 2019, from the church.

Investigator Duke testified that she did not discuss the details of the offense with the victim prior to the forensic interview. After the interview, she asked the victim to clarify how Defendant’s body was positioned while he was crouched down on the floor. Investigator Duke testified that she also took statements from other family members in this case.

On cross-examination, Investigator Duke testified that she observed the forensic interview, and Ms. Klopfenstein conferred with her during a break. After that, Ms. Klopfenstein asked the victim some questions to clarify her statements about the position of her body. Investigator Duke agreed that she followed up with the victim and Ms. Klopfenstein after the interview to clarify Defendant’s body position during the offense. She did not recall if VBS was referenced during the interview. Investigator Duke testified that no one told her about a birthday party during her investigation, and she was informed that the victim’s cousin was also on the couch when the offense occurred.

Grandmother⁴ testified that her grandson’s birthday was June 26, 2016. She recalled a party for her grandson that took place at Chickasaw Park around Easter 2019. Grandmother testified that the party was a joint birthday party/Easter egg hunt, and she recalled that the victim, the victim’s mother, and Aunt were all present at the party.

Defendant’s Proof

⁴ Grandmother testified that she is the mother to Aunt and the victim’s mother.

Aunt testified that she and Defendant had been together for eighteen years, and he was her fiancé, and they had children together. She recalled attending her nephew's birthday party around Easter in 2019. Aunt testified that it "was basically a birthday and an Easter egg hunt together. She recalled that the victim was at the party and that the victim rode to and from the party with the victim's mother.

Aunt recalled speaking with Investigator Duke and being asked about the "situation" with Defendant and the victim. She could not recall anything else about the conversation. Aunt testified that the victim visited her home one time in 2019 with Aunt's grandmother while attending VBS. She said that the victim never stayed overnight at her house.

On cross-examination, Aunt testified that she confronted the victim at Aunt's father's house when the victim told Grandmother what happened. She said that at the time of the offense, "[the victim] was visiting and then she left that night with my daughter to go to [Grandmother's] house. Aunt did not recall if this happened in the summer of 2019. She did recall sending text messages to the victim's mother about the victim being at VBS with Aunt and Aunt's grandmother in 2019. She was aware that a birthday party for her nephew occurred on June 25, 2019, but she did not attend.

Defendant described the victim and Aunt's family as "close," and he had known the victim since she was a baby. He said that the victim occasionally visited his and Aunt's home, but she did not stay overnight. Defendant recalled that in 2019, the victim attended VBS, but she left with her cousin and Grandmother, and "went to spend the night with them." He said that the victim did not visit his and Aunt's house any other time that summer. Defendant denied touching the victim and had no "clue" why she made the allegation against him. He said that he frequently attended Aunt's family functions up until the allegation was made.

On cross-examination, Defendant denied that Grandmother came to pick up the victim from his house on the day of the offense. He claimed that Grandmother was already there because she and the victim attended VBS with him and his family and that the victim and her cousin left with Grandmother to spend the night with her. Defendant denied that Aunt gave a statement that the victim spent the night at their house that night. He agreed that he was at the house when Grandmother picked up the victim. Defendant testified that there was a sectional couch in his living room in 2019, but it was no longer there. He did recall a birthday party for Aunt's nephew on June 25, 2019. Defendant testified that he was unaware of the allegation against him until November of 2019.

State's Rebuttal Proof

The State recalled Investigator Duke as a rebuttal witness. She testified that Aunt gave a statement on December 20, 2019. Investigator Duke testified: "She stated that the

child had stayed there that summer. The last time that she stayed there was about the time of a [VBS], and she also said that the child slept on a sectional in the living room.”

ANALYSIS

I. Admission of the Forensic Interview

Defendant argues that the trial court committed plain error when it failed to comply with the requirements of Tennessee Code Annotated section 24-7-123 and admitted the video recording of the victim’s forensic interview. The State responds that the interview was properly admitted because Defendant’s failure to challenge the trial court’s adherence to the statute “could have been tactical,” that none of Defendant’s substantial rights were adversely affected, and consideration of this issue is not necessary to do substantial justice.

“Generally, the admissibility of evidence rests within the trial court’s sound discretion, and the appellate court does not interfere with the exercise of that discretion unless a clear abuse appears on the face of the record.” *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)). A trial court abuses its discretion when it applies “an incorrect legal standard or reaches a conclusion that is ‘illogical or unreasonable and causes an injustice to the party complaining.’” *Lewis*, 235 S.W.3d at 141 (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

Pursuant to Tennessee Code Annotated section 24-7-123 a video recording of a forensic interview of a child under the age of thirteen where the child describes any act of sexual contact performed with or on the child by another may be admitted as substantive evidence if certain requirements are met. T.C.A. § 24-7-123(a). The interview “may be considered for its bearing on any matter to which it is relevant evidence at the trial” of the defendant. *Id.* The video recording “may” be admitted if:

- (1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;
- (2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pretrial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:
 - (A) The mental and physical age and maturity of the child;
 - (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
 - (C) The timing of the child’s statement;
 - (D) The nature and duration of the alleged abuse;

- (E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
 - (F) Whether the statement is spontaneous or directly responsive to questions;
 - (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;
 - (H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
 - (I) The relationship of the child to the offender;
 - (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
 - (K) Any other factor deemed appropriate by the court;
- (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;
 - (B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education, criminal justice, nursing, psychology or other similar profession;
 - (C) Had experience equivalent to three (3) years of fulltime professional work in one (1) or a combination of the following areas:
 - (i) Child protective services;
 - (ii) Criminal justice;
 - (iii) Clinical evaluation;
 - (iv) Counseling; or
 - (v) Forensic interviewing or other comparable work with children;
 - (D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;
 - (E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;
 - (F) Had knowledge of child development through coursework, professional training or experience;

- (G) Had no criminal history as determined through a criminal records background check; and
- (H) Had actively participated in peer review;
- (4) The recording is both visual and oral and is recorded on film or videotape or by other similar audiovisual means;
- (5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and
- (6) Every voice heard on the video recording is properly identified as determined by the court.

Id. § 24-7-123(b). A trial court must make specific findings of fact on the record explaining its ruling regarding the admissibility of the forensic interview. *Id.* § 24-7-123(d). Additionally, the recording of the interview shall not become public record in any legal proceeding, and the trial court shall order the recording to be sealed and preserved at the conclusion of the trial. *Id.* § 24-7-123(e).

Defendant contends that the trial court failed to make the findings necessary to admit the video recording of the forensic interview under section 24-7-123. More specifically, he argues that the State failed to have the victim testify under oath at either the pretrial hearing or at trial as to the accuracy and authenticity of the recording of the forensic interview. *See Id.* § 24-7-123(b)(1). Additionally, he argues that the trial court failed to “make sufficient findings at a pretrial hearing that the recording possessed ‘particularized guarantees of trustworthiness.’” *Id.* § 24-7-123(b)(2).

Defendant concedes that he failed to object to the admission of the recording of the forensic interview at either the pretrial hearing or at trial, and the issue was not raised in his motion for new trial. However, he requests that we review this issue under plain error because the trial court’s failures “were so detrimental” to his right to a fair trial. To demonstrate plain error, Defendant must show that: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was violated; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to achieve substantial justice. *State v. Rimmer*, 623 S.W.3d 235, 255-56 (Tenn. 2021), *reh’g denied* (May 21, 2021), *cert. denied*, 142 S. Ct. 790 (2022) (citing *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016). “[A]n appellate court need not consider all criteria when the record demonstrates that one of them cannot be established.” *State v. Vance*, 596 S.W.3d 229, 254 (Tenn. 2020).

First, the record clearly established what occurred in the trial court. The State filed a motion in limine prior to trial requesting the trial court to determine the trustworthiness of the video recording of the forensic interview conducted with the victim. Hearings on

the motion were held, but no testimony was presented, and after reviewing the video recording, the trial court ultimately determined that it was admissible with some redactions.

Regarding the second, third and fifth plain error factors, we conclude that Defendant has established a violation of a clear and unequivocal rule of law, that a substantial right was affected, and that consideration of the error is necessary to do substantial justice. While the trial court in this case found that the recording of the forensic interview possessed a particularized guarantee of trustworthiness and that the interview was conducted by a qualified forensic interviewer who had “conducted over 600 forensic interviews, and ha[d] received extensive specialized training as a forensic interviewer,” there was no testimony or evidence presented at either of the two pretrial hearings on this matter to support the trial court’s findings concerning Ms. Klopfenstein’s qualifications. It was not until trial, after the trial court had determined that the recording of the forensic interview was admissible, that any evidence was presented concerning the interviewer’s qualifications. Moreover, prior to admitting the forensic interview at trial, the trial court did not make any other findings required by section 24-7-123(b) to support its ruling that the recording was admissible. The trial court made absolutely no findings concerning the victim or the Carl Perkins Center as required by section 24-7-123(b). Further, the trial court made no specific findings on the record explaining its ruling regarding the admissibility of the recording of the forensic interview. *See* T.C.A. § 24-7-123(d).

Additionally, as pointed out by Defendant, although the victim testified at trial and was subject to cross-examination, she did not testify until after the recording of the interview had already been played to the jury during Ms. Klopfenstein’s testimony. While the victim did testify that she told the truth at the interview, based on the record, we determine that the victim did not at any time, under oath, testify before the video was played for the jury that the offered video was a true and correct recording of the events contained in the video as is required by section 24-7-123(b). Although Ms. Klopfenstein testified at trial that the video recording was a true and accurate depiction of her interview with the victim, the statute specifically requires that the video be authenticated by the victim, not the forensic interviewer. *See Id.* § 24-7-123(b).

Because the recording of the forensic interview was the only evidence presented at trial to show where Defendant actually touched the victim to support his conviction for aggravated sexual battery, we find that a substantial right was adversely affected. “For a ‘substantial right’ of the accused to have been affected, the error must have prejudiced the appellant. In other words, it must have affected the outcome of the trial court proceedings.” *Rimmer*, 623 S.W.3d at 278 (quoting *State v. Maddin*, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005)). Also, consideration of the error in admitting the forensic interview is necessary to do substantial justice because Defendant was deprived of the right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States as well as Article I, section 9 of the Tennessee Constitution. While the victim testified at trial as to certain details surrounding the offense and that she was touched by Defendant, she never

testified as to the exact nature or location of the touching. There was no other evidence presented at trial, other than the recording of the forensic interview, to show that Defendant had unlawful sexual contact with the victim.

As for the fourth plain error factor, the State contends that Defendant's decision not to challenge the admission of the recording of the forensic interview "could have been tactical." Defendant further argues that had he raised a challenge to the trial court's failure to comply with the requirements of section 24-7-123, the trial court could have made more detailed findings for each of the factors, and the State could have asked the victim to testify that the recording of the forensic interview was a "true and correct recording of the events contained in the video recording." See T.C.A. § 24-7-123(b)(1). Therefore, the State asserts that "[b]y failing to raise an objection at the appropriate time, [Defendant] essentially built error into the proceedings that easily could have been corrected below."

However, we conclude that nothing in the record indicates that Defendant failed to challenge the admission of the recording of the forensic interview for tactical reasons. As pointed by Defendant, his failure to object to the admission of the recording has subjected him to a higher burden on appeal under plain error. Had he objected at trial, this court would review the issue de novo rather than under plain error. *State v. Tyler*, No. W2015-00161-CCA-R3-CD, 2016 WL 1756419, at *5-6 (Tenn. Crim. App. Apr. 29, 2016) (even when there is "virtually perfect compliance with the statute, but the court fails to make complete findings of fact" regarding the admissibility of a forensic interview, appellate review is de novo).

We determine that the trial court committed plain error when it failed to comply with the requirements of Tennessee Code Annotated section 24-7-123 and determined without sworn testimony or other proof that the forensic interview was admissible.

II. Sufficiency of the Evidence

While we have reversed Defendant's conviction and remanded for a new trial, we must still review his challenge as to the sufficiency of the evidence. "[A] conclusion that there was legally sufficient evidence to support a conviction(s) is not, alone, reason to avoid a reversal and remand for a new trial based upon reversible error committed by the trial court." *State v. Reed*, No. E2015-01638-CCA-R3-CD, 2017 WL 1959497, at *10 (Tenn. Crim. App. May 11, 2017). Defendant argues that the evidence was insufficient to support his conviction for aggravated sexual battery because "the State failed to prove that the touching was motivated by sexual arousal or sexual gratification, and therefore qualified as unlawful sexual contact." The State responds that the evidence was sufficient to support the conviction and that "a rational juror could reasonably construe [Defendant's] action to be for the purpose of sexual gratification or arousal."

“Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict.” *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009) (citing *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). “Appellate courts evaluating the sufficiency of the convicting evidence must determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)); see Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (citing *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005); *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998). The standard of review for sufficiency of the evidence “‘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 *Hanson*, 279 S.W.3d at 275). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses’ testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence. *Dorantes*, 331 S.W.3d at 379 (citing *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court “neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury.” *Wagner*, 382 S.W.3d at 297 (citing *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). Additionally, when reviewing sufficiency of the evidence, this court properly considers all of the evidence admitted at trial, even if a portion was prejudicial and erroneously admitted. See *State v. Longstreet*, 619 S.W.2d 97, 100-01 (Tenn. 1981); *State v. Ward*, 138 S.W.3d 245, 280 (Tenn. Crim. App. 2003). In this case, because the victim’s forensic interview was part of the evidence considered by the jury, we will consider it in evaluating the sufficiency of the evidence to support Defendant’s aggravated sexual battery conviction.

Aggravated sexual battery as charged in this case is “unlawful sexual contact with a victim by the defendant,” and the victim is less than thirteen years old. T.C.A. § 39-13-504(a)(4). “Sexual contact” is defined as “the intentional touching of the victim’s ... intimate parts ... if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.” T.C.A. § 39-13-501(6). “Intimate parts” includes “the primary genital areas, groin, [or] inner thigh[.]”

When viewed in the light most favorable to the State, the proof showed that Defendant approached the victim, who was eight or nine years old, and spread her knees apart while she was on a sectional couch in the living room of the house that he shared with her aunt and placed his hand under her shorts and underwear. The victim said that he touched her “private area” and her “vagina” and explained that it was almost inside and “right there on the edge of her private area.” She further described Defendant as “poking” her genitals, rubbing [her] hardly,” and touching her genitals “hard.” Defendant touched the victim four or five times, and when she noticed him touching her, Defendant crouched down on the floor next to the couch and placed his hand on his lap. The victim eventually moved away from Defendant to a chair in the living room. He then tried to convince her to move back to the couch, but she refused, and he went back into his bedroom.

Although Defendant argues that this evidence failed to show that the touching was motivated by sexual arousal or sexual gratification, there is no statutory “requirement that the sexual contact itself be for sexual arousal or gratification.” *State v. Chisenhall*, No. M2003-00956-CCA-R3-CD, 2004 WL 1217118, at *3 (Tenn. Crim. App. June 3, 2004). The statute only requires that the touching can be “reasonably construed” as being for that purpose. *Id.*; T.C.A. § 39-13-501(6). “The determination of whether the contact was for the purpose of sexual arousal or gratification is a question of fact for the jury.” *State v. Walton*, No. M2014-01337-CCA-R3-CD, 2015 WL 2257130, at *3 (Tenn. Crim. App. May 12, 2015). Defendant’s touching of the victim’s vagina could have reasonably been construed by the jury in this case as being for the purpose of sexual arousal or gratification, and therefore, the evidence is sufficient to support his conviction for aggravated sexual battery. Defendant is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, Defendant’s conviction for aggravated sexual battery is reversed, and this case is remanded for a new trial.

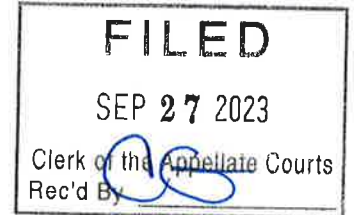
JILL BARTEE AYERS, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. JUSTIN L. STEGALL

Circuit Court for Henderson County
No. 20-114-2

No. W2022-00628-CCA-R3-CD



ORDER

Before the court is counsel for the State's petition for rehearing filed pursuant to Tennessee Rule of Appellate Procedure 39. On July 14, 2023, this court issued its opinion concluding that the trial court committed plain error when it failed to comply with the requirements of Tennessee Code Annotated section 24-7-123 and determined without sworn testimony or other proof that the forensic interview was admissible. We reversed the judgment of the trial court and remanded for a new trial. On July 24, 2023, the State filed a motion to supplement the record pursuant to Tennessee Rule of Appellate Procedure 24(e) after determining that the transcript of an August 24, 2021 hearing on the admissibility of the forensic interview had not been included in the record. Defendant did not object to the motion to supplement the record. We granted the motion to supplement the record and ordered the parties to file supplemental briefs based on the supplemental record.

The State's petition for rehearing claims that this court's opinion overlooks or misapprehends a material fact. Tenn. R. App. P. 39(a). Specifically, the State argues that the supplemental transcript from a third hearing on the motion in limine to admit the victim's forensic interview reveals that the forensic interviewer testified regarding her qualifications, the forensic interview process, and the credentials of the interviewing center.

Pursuant to Tennessee Code Annotated section 24-7-123(b)(1)-(2), a video recording of a forensic interview of a child victim "may" be admitted if:

- (1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;

(2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pretrial, to possess particularized guarantees of trustworthiness.

In determining the “particularized guarantees of trustworthiness,” the trial court considers many other factors including, but not limited to, the child’s maturity and motive, the device used to record the interview, the professional qualifications of the forensic interviewer, and whether the child advocacy center meets statutory requirements. *Id.* § 24-7-123(b). Additionally, the trial court must further determine:

(4) The recording is both visual and oral and is recorded on film or videotape or by other similar audiovisual means;

(5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and

(6) Every voice heard on the video recording is properly identified as determined by the court.

Id. § 24-7-123(b)(4)-(6).

The State argues in its supplemental brief that the supplemental record shows that the trial court made specific findings to support its conclusion that the video was admissible and that the facility met the requirements of a child advocacy center under the statute. The State also claims, as it did in its initial brief, that the “defendant made a strategic decision not to insist on [victim’s] testimony regarding the admissibility of the video. Defendant argues in his supplemental brief that the supplemental record does not change this court’s analysis because the victim never testified at any pretrial hearing or at trial prior to the video’s admission as an exhibit and publication to the jury as required by section (b)(1). Defendant further argues that the trial court did not make sufficient findings to support its order that the forensic interview possessed particularized guarantees of trustworthiness and that the interviewer was qualified under the statute. *Id.* § 24-7-123(b)(2)-(3), (d).

We now have in the record a transcript from a pre-trial hearing conducted August 24, 2021, where forensic interviewer, Nikki Klopfenstein, did in fact testify about her qualifications and about the accreditation of Carl Perkins Center as required by Tennessee Code Annotated section 24-7-123(b)(3). Thus, there was testimony presented to support the trial court’s findings regarding the qualifications of the forensic interviewer. However, the supplemental record does not change the material fact that the victim,

although available for cross examination, did not testify under oath that the video recording was a true and correct recording of the events contained in the video recording as required by subsection (1). The victim did not testify until after the recording of the interview had already been played to the jury during Ms. Klopfenstein’s testimony. And, while the victim did testify that she told the truth at the interview, based on the record, the victim did not at any time, under oath authenticate the video. Although Ms. Klopfenstein testified at trial that the video recording was a true and accurate depiction of her interview with the victim, the statute specifically requires that the “child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording.” *Id.* § 24-7-123(b).

Further, the supplemental record does not support the State’s contention that Defendant made a strategic decision by not insisting that the victim testify before the video was played to the jury. The statute clearly and plainly states that the video may be admitted if the victim testifies under oath, authenticates the video, and is available for cross examination. In *State v. McCoy*, 459 S.W.3d 1 (Tenn. 2014), the supreme court, in upholding the constitutionality of the statute, noted that the State conceded that section 24-7-123(b)(1) requires a witness to authenticate a video recording *before* it is submitted, and agreed that procedure is the “proper construction of the statutory text. In consequence, we hold that the only circumstance under which a child victim’s video-recorded statements may be admitted in a manner consistent with both section 24-7-123 and the right of confrontation is when the witness first authenticates the video recording and then appears for cross-examination at trial to defend or explain the prior recorded statements.” *Id.* at 15. The victim’s testimony authenticating the video recording of the forensic interview is foundational to the admission of the video. *See State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978) (“before any photograph can be admitted into evidence it must be verified and authenticated by a witness with knowledge of the facts”).

Because the victim in this case did not testify and authenticate the video recording of the forensic interview prior to the video’s admission as an exhibit and publication to the jury, we conclude that the trial court committed plain error for the reasons set forth in our opinion. Accordingly, the petition for rehearing is DENIED. This court’s opinion shall remain in full force and effect and a copy of this order shall be attached to the opinion for purposes of citation.

JUDGE JILL BARTEE AYERS
JUDGE ROBERT L. HOLLOWAY, JR.
JUDGE J. ROSS DYER