IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 7, 2020 Session

STATE OF TENNESSEE v. RODNEY MILLER

Appeal from the Criminal Court for Shelby County
No. 17-02942 James M. Lammey, Judge

No. W2019-00080-CCA-R3-CD

A Shelby County Jury found Defendant, Rodney Miller, guilty of rape of a child, aggravated statutory rape, and aggravated sexual battery. The trial court imposed a sentence of thirty-six years for rape of a child, four years for aggravated statutory rape, and ten years for aggravated sexual battery to be served consecutively in confinement. On appeal, Defendant raises the following issues: (1) whether the evidence was sufficient to support his conviction for rape of a child; (2) whether the trial court properly admitted the victim's medical history provided during her SANE examination; (3) whether the trial court properly denied Defendant's motion for a bill of particulars; (4) whether the trial court erred by failing to merge Defendant's conviction for aggravated sexual battery into his conviction for rape of a child; (5) whether the trial court erred by ordering consecutive sentences; and (6) cumulative error. Upon reviewing the record and the applicable law, we affirm the judgments of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Marty B. McAfee, Memphis, Tennessee (on appeal) and Robert Golder, Brett Stein, and William Friedman, Memphis, Tennessee (at trial) for the appellant, Rodney Miller.

Herbert H. Slatery III, Attorney General and Reporter; Katharine K. Decker, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Lessie Rainey and Drew Carpenter, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Background

The victim's grandmother testified that she had known Defendant for more than ten years and that she had been "involved" with his brother. She said that Defendant helped out the victim's family in 2015 while the victim's mother was undergoing cancer treatments. The victim's grandmother testified that Defendant would help the victim's mother take care of her children, including the victim, and he would take them places. She noted that the victim's date of birth was October 21, 2003. The victim's grandmother testified that in December 2016 the victim's mother called police based on some text messages that she saw on the victim's cell phone. The victim's mother passed away prior to trial.

The victim testified that she was born on October 21, 2003, and she was fourteen years old at the time of trial. She said that she had known Defendant all of her life because her grandmother and Defendant's brother were "together – fiancé type of thing," and Defendant became close to her family. She referred to him as "Uncle Rodney." The victim testified that Defendant lived with his wife and son. She said that Defendant helped her family with things when the victim's mother became sick with cancer. The victim testified that Defendant drove her and her siblings back and forth to school, and they stayed with him when her mother went out of town for chemotherapy. The victim agreed that she and her siblings spent some days and nights at Defendant's house in the summer of 2016, and some days and nights were spent at their own house with Defendant.

The victim testified that in the summer of 2015, when she was eleven years old, Defendant began touching her inappropriately. She said the first time that Defendant touched her vagina was in his house in the bedroom. The victim testified that she was under the covers, and Defendant was sitting on the side of the bed. She said that Defendant touched her thighs and then her vagina on top of her clothes. Defendant told her: "I didn't think that I could trust you. I thought you would tell your mom[.]" The victim testified that she did not tell her mother what happened because she "didn't know how to talk to her about anything like that."

The victim testified that Defendant began touching her vagina on the inside of her clothing. She said that Defendant touched both the inside and the outside of her vagina. The victim testified that Defendant also touched her breasts and buttocks, and he asked her to touch his penis. The touching continued until the summer of 2016 when Defendant asked her to have sex with him. She did not know the number of times that Defendant touched her because there were so many. The victim noted that on one occasion, Defendant drove her to his house and showed her a pornographic movie in which "people were having sex and doing stuff that I shouldn't have been seeing." The victim said that she and Defendant had sex for the first time in Defendant's son's bedroom. She was on

the bed, and Defendant stood next to the bed. They were wearing shirts, but their pants and underwear were off. Defendant did not ejaculate inside her, but she did not know if he ejaculated onto something else. The victim testified that she and Defendant had sex in various places. She said that Defendant last had sex with her on December 3, 2016. She remembered the date because Defendant had spent the night at her house in order to go shopping with her mother the next day. The victim testified that Defendant's son and all of her siblings were at the house, and they had movie night. She said that later on, she and Defendant were in the floor in her bedroom, and her twin siblings were in the victim's bed asleep. The victim testified that she and Defendant had sex on her bedroom floor, and Defendant was wearing a condom. She then went to sleep. The victim testified that the following morning, Defendant sent her a text that read: "Did you find the condom wrapper, and I jacked off on your breasts." Defendant also said that he had her blue Calvin Klein panties. The victim testified that Defendant had sent her text messages on other occasions about sexual things that he did to her. The victim recalled that on one occasion she was at Defendant's house in the office with him. The door was closed, and Defendant had his pants unzipped, and he placed his finger in the victim's vagina. The victim's sister walked in and saw what was happening. The victim could not recall the date that this occurred.

On December 16, 2016, the victim inadvertently left her phone at home when she went to school, and her mother saw text messages from Defendant. Her mother asked her about the messages in the car after she picked the victim up after school. The victim testified that she told her mother what happened, and her mother called police. The victim spoke with police and then went for an examination.

Detective Malisa Hart of the Shelby County Sheriff's Office, Special Victim's Unit, testified that in December 2016 she was given the victim's cell phone by the victim's mother, and Detective Hart took it to the Memphis Police Department's "forensic downloaders." She also contacted Defendant. Detective Hart identified Defendant's phone number at trial.

In December 2016, Lolita Rosser of the Memphis Police Department was assigned to the internet crimes against children unit. She was given the victim's cell phone in the present case to extract information. Officer Rosser was able to extract communications between the victim and Defendant from the phone. She extracted both deleted and active text messages, videos, photographs, and anything associated with Defendant's name or cell phone number. The deleted text messages, outgoing and incoming text messages, and photographs between Defendant and the victim were introduced at trial.

On October 17, 2016, Defendant sent the victim a text which read: "I seen everybody but you today not cool." To which the victim responded: "My day was good I'm about to take a bath and go to sleep to[o]." Defendant then asked the victim to send him a picture, and he texted: "You knew I was going to say that" and "I like it." On the

night of November 6, 2016, Defendant texted the victim and asked her to "take a picture now." He further texted: "I love it" and "Goodnight love." The following night on November 7, 2016, Defendant texted "[u]nderwear pic" to the victim and asked, "What u have on." He later texted, "Good night love." On the night of November 10, 2016, Defendant texted the victim the following: "He's standing up tall looking for you," and "I need some pictures to look at." Defendant further texted, "I need a picture of that monkey," and "Down there by them thighs." He also sent, "I love you."

After midnight on November 13, 2016, Defendant sent the following text to the victim: "Shouldn't let me hit a little bit," and "Just for a few minutes [while] was upstairs." He also sent: "My dick is so hard." Defendant later texted the victim and said, "Take picture" and "Show me the wet p." On November 14, 2016, Defendant texted the victim: "I am about to tell your mom what we got going on what you think," and "Love with u." On December 4, 2016, Defendant texted: "Hello, sexy." Defendant and victim also exchanged the following texts:

[Defendant]:	I got something of yours[:] it's in my bag and smells so good[.] LiteBlue Calvin Klein p[iece]
[The victim]:	Why do u have those
[Defendant]:	I don't know
[The victim]:	Yes u do
[Defendant]:	Dressed in the dark
[Defendant]:	Did you find a condom
[The victim]:	No
[The victim]:	I thought u found it
[Defendant]:	The [w]rapper
[The victim]:	U don't [know] where the condom is
[The victim]:	I will run across it
[The victim]:	For some reason I'm hurting
[Defendant]:	Where at
[The victim]:	P
[Defendant]:	Only put it in one time
[The victim]:	I know but it's still hurting[.] I don't know why[,] but its irritated
[Defendant]:	Have you take[n] a bath
[The victim]:	Yes
[Defendant]:	I will be f [ ]ckin' in the bed from now on[,] no floor
[The victim]:	K maybe that's it

On December 14, 2016, Defendant texted the victim: "Next time you come[,] spend the night sleeping in the bed with me."

The victim's sister testified that she and her siblings occasionally stayed at Defendant's house, and they called him "Uncle Rodney." She said that the victim sometimes slept in the room with Defendant when they stayed at his house. On one occasion in the summer of 2016, the victim's sister saw the victim and Defendant in the office together. Defendant's pants were unzipped, and he touched the victim's "butt." Defendant then told the victim's sister that "[n]othing happened." The victim's sister did not tell anyone what she saw because she was afraid.

Kristine Gable, a sexual assault nurse examiner at the Rape Crisis Center testified as an expert in the field of sexual assault nurse examinations (SANE). She examined thirteen-year-old victim on December 16, 2016. Ms. Gable testified that the victim gave the following information to her:

> Alone with nurse, [the victim] reported that she has had sex with [Defendant] several times since June 2015 with the last being on December 3rd, 2016. She reported that he put lubricant jelly on him and put his penis and his fingers in [her] vagina but not in her mouth or anus. He used a condom maybe twice and did ejaculate. She's unsure if he ejaculated inside her vagina but did ejaculate on [her] once.

Ms. Gable testified that the victim reported vaginal irritation and itching after Defendant had sex with her on December 3, 2016, but she had no symptoms at the time of her examination. Ms. Gable noted that the results of the tests on the victim for sexually transmitted diseases and pregnancy were negative. Ms. Gable did not find any injuries to the victim during the examination. She testified that it is uncommon to find injuries in the genital area during a sexual assault examination. Ms. Gable noted that in girls who have begun menstruation, as the victim had, "there's estrogen going through the body. The genital tissue is more elastic – stretchy. It can become lubricated even in unwanted penetration, and that's why usually there's no injury." Ms. Gable further testified that injuries to the genital area are not common and are "very, very small." Additionally, that area heals quickly, so any injuries would heal within a few weeks after an incident. In this case, she saw the victim more than two weeks after the last incident with Defendant. Ms. Gable's findings were consistent with what the victim told her, and the absence of injuries did not mean that a sexual assault did not occur.

Concerning the State's election of offenses, the following exchange took place at the end of trial:

> [Prosecutor]: For Count I, the rape of a child, the state has elected the incident in [Defendant's] son's bedroom on the bed when [the victim] had her underwear down; [Defendant] had his pants down standing by the bed and put his penis in her vagina in the Summer of 2016.

THE COURT: Is that the one where the child walked in?

[Prosecutor]: No. No. That's going to be Count III.

THE COURT: Count III, the aggravated sexual battery.

[Prosecutor]: Yes, Count II is aggravated statutory rape, the incident which was in [the victim's] bedroom on the floor when [Defendant] put his penis in her vagina with her twin siblings asleep in the bed in December of 2016.

And then Count III, aggravated sexual battery in [Defendant's] office when he touched [the victim's] vagina with his hand and [the victim's sister] opened the door and saw them in the summer of 2016.

Analysis

I. Sufficiency of the Evidence

Defendant contends the evidence was not sufficient to support his convictions for rape of a child, aggravated statutory rape, and aggravated sexual battery. However, his argument addresses only that the State failed to prove the element of penetration. Penetration is not an essential element of aggravated sexual battery. *See* T.C.A. §39-13-504. Defendant's only argument as to rape of a child and aggravated statutory rape is his assertion that the State failed to present physical proof of penetration.

"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)); 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)).

In order to sustain a conviction of rape of a child, the State was required to prove beyond a reasonable doubt that (1) the Defendant unlawfully sexually penetrated the victim, (2) who was less than thirteen years old, and that (3) the Defendant acted intentionally, knowingly, or recklessly. T.C.A. § 39-13-522. "Aggravated statutory rape is the unlawful sexual penetration of a victim by the defendant . . . when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least ten (10) years older than the victim." T.C.A. § 39-13-506 (c). Sexual penetration is defined, in relevant part, as "sexual intercourse, . . . fellatio, [or] anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." T.C.A. § 39-13-501(7).

Taken in the light most favorable to the State, the proof at trial established that the victim was born on October 21, 2003. Defendant's date of birth is August 6, 1970. During the summer of 2016 Defendant had sexual intercourse with the victim in his son's bedroom. The victim testified that she was on the bed, and Defendant stood next to the bed. They were wearing shirts, but their pants and underwear were off. Defendant did not ejaculate inside her, but she did not know if her ejaculated onto something else. The victim acknowledged that Defendant's penis "went inside [her] vagina." The victim testified that she and Defendant had sex on her bedroom floor on December 3, 2016. She said that Defendant's penis went inside her vagina, and he used a condom. In text messages exchanged the following day, the victim and Defendant discussed Defendant's use of a condom, that the victim's vagina was hurting, and that Defendant only "put [it] in one time." Defendant indicated in the texts that he and the victim had sex on the floor, and that in the future they would only have sexual relations in the bed not on the floor. During her SANE examination, the victim told Ms. Gable that Defendant had sex with her several times from June 2015 until December 2016. She reported that he put lubricant jelly on himself and penetrated her vagina with his penis, ejaculated, and he sometimes used a condom. This supported the victim's testimony that Defendant

penetrated with his penis during the summer of 2016. Defendant's text messages sent to the victim provided evidence of an ongoing sexual relationship between the victim and Defendant.

As noted above, Defendant argues that the State failed to prove the necessary element of penetration for his rape of a child conviction because no physical proof of penetration was provided by the State. However, this court has previously said that a victim's testimony is sufficient in and of itself to support a conviction. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); *State v. Williams*, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981). Thus, no "physical proof" of penetration is required. The issue is whether the victim's testimony was credible, and a witness' credibility is to be determined by the jury. *Campbell*, 245 S.W.3d at 335. Clearly, the jury in this case found the victim's testimony credible.

We also conclude that the State presented sufficient evidence to support the conviction for aggravated sexual battery. Defendant is not entitled to relief on this issue.

II. Admission of the Victim's Medical History Provided During Her SANE Examination

Defendant argues that the trial court erred by admitting evidence of the victim's medical history provided during her medical SANE examination with Ms. Gable. In his heading to this issue, Defendant states: "The Trial Court Erred When it Admitted Hearsay Testimony Contained in the Rape Crisis Report in Violation of Tennessee Rules of Evidence §803." However, in the body of his argument, Defendant only argues that the victim's statements were testimonial, and therefore the admission of the statements violated his constitutional right of confrontation. *See* U.S. Const, amends. VI, XIV; Tenn. Const. art. I, § 9; *State v. Williams*, 913 S.W.2d 462, 465 (Tenn. 1996).

As argued by the State, Defendant has waived any claim concerning a violation of Rule 803 because he has not made any argument concerning this claim or supported it with any citation to the record or legal authorities. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived" in this court. Tenn. Ct. Crim. App. R. 10(b); *See also* Tenn. R. App. P. 27(a)(7) (a brief shall contain "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities . . . relied on").

Additionally, Defendant has also waived his challenge to the admission of the victim's statements to Ms. Gable as violating the Confrontation Clause. *See generally Crawford v. Washington*, 541 U.S. 36 (2004). Although Defendant raised the confrontation issue in his "MOTION IN *LIMINE* TO EXCLUDE OR REDACT RAPE CRISIS REPORT," he did not raise it in his motion for new trial. In his motion for new

trial, Defendant only argued that the trial court erred by admitting "testimony contained in a rape crisis report in violation of TENN. R. EVID. § 803." Therefore, this issue is waived. *See* Tenn. R. App. P. 3(e); *State v. Parker*, 350 S.W.3d 883, 900 (Tenn. 2011) (a confrontation issue is waived when defendant failed to raise it in a motion for new trial and declining to review for plain error). We also decline plain error review. We note that the Confrontation Clause is not violated when the declarant, in this case the victim, is a witness and subject to cross-examination regarding prior testimonial statements. *See State v. Dotson*, 450 S.W.3d 1, 73 (Tenn. 2014); *Crawford*, 541 U.S. at 59, n. 9; *California v. Green*, 399 U.S. 149, 162 (1970). Defendant is not entitled to relief on this issue.

III. Denial of Motion for a Bill of Particulars

Defendant contends that the trial court erred by not ordering the State to provide a Bill of Particulars. Tennessee Rule of Criminal Procedure 7(c) provides, "On defendant's motion, the court may direct the district attorney general to file a bill of particulars so as to adequately identify the offense charged." A bill of particulars serves three purposes. First, the bill of particulars provides a "'defendant with information about the details of the charge against him if this is necessary to the preparation of his defense.'" *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991) (quoting *State v. Hicks*, 666 S.W.2d 54, 56 (Tenn. 1984)). Second, it assures that a defendant has an opportunity to "'avoid prejudicial surprise at trial.'" *Id.* Finally, it enables the defendant to preserve a plea against double jeopardy. *Id.*; *see also State v. Speck*, 944 S.W.2d 598, 600 (Tenn. 1997). A bill of particulars is not a discovery device and is limited to information a defendant needs to prepare a defense to the charges. Tenn. R. Crim. P. 7(c), Advisory Comm'n Comments.

The trial court should make every effort to ensure that the State supplies all critical information in its bill of particulars, but lack of specificity will not result in reversible error unless a defendant can prove prejudice. *Speck*, 944 S.W.2d at 601; *Byrd*, 820 S.W.2d at 741. Such prejudice cannot be found until after all proof has been presented. *State v. Sherman*, 266 S.W.3d 395, 409 (Tenn. 2008).

Prior to trial, Defendant filed a motion for a bill of particulars "setting forth with more specificity the exact dates that the alleged incident took place in both counts one [(]1) and two (2)." The indictment in count one alleged that the rape of a child occurred between "between June 1, 2015 and October 21, 2016[.]" The indictment in count two alleged that the aggravated statutory rape occurred "between October 22, 2016 and December 10, 2016[.]" At a pretrial hearing, Defendant argued that the indictment alleged an "extremely long period of time" and that the State was capable of "narrowing based on evidence that's been provided in discovery." The trial court noted that if Defendant had discovery, and "it's the same information the state has, what else do you think they can do except give you the discovery?" The State argued that the victim was very specific at the preliminary hearing about the time frame for each of the charges in

this case and that Defendant had a copy of the preliminary hearing transcript. The State further asserted:

> This is an on-going abuse case. This is not a case where one thing happened only one time. This is a case of on-going abuse over a number of years. And the victim was pretty specific in that prelim[inary hearing] about when the abuse began – when the sexual battery child abuse transitioned to rape; and then her birth date indicates when it transitions from rape of a child to ag[gravated] stat[utory] rape.
>
> So all of the information that I have is – you know, when I've spoken to the victim, she told me the same thing that's in the prelim[inary hearing]; and defense counsel has all of that.

The State also told the trial court that it would be electing the particular events for each of Defendant's the three counts of the indictment, which would be three separate events and that the information discussed in the preliminary hearing had remained the same throughout discovery and that the State did not have any further information that was not the same. The trial court then noted that the State had provided everything possible under the law to which defense counsel replied: "In that case, we would certainly be expecting an election. I guess that would be something to deal with at the close of the State's proof." The trial court denied Defendant's motion.

Although Defendant asserts in his brief that he was unable to "properly present a defense as the range of dates and potential incidents covered an eighteen[-]month time frame," he has not argued how any information from a bill of particulars would have changed his trial preparation or defense. Further, Defendant has not said how his defense was hampered by any such withheld information. In other words, Defendant has not stated how he was prejudiced by the lack of a bill of particulars. *State v. Marc Baechtle*, No. W2014-01737-CCA-R3-CD, 2016 WL 1564128, at *12 (April 15, 2016); *State v. Thomas Wayne Overbay*, No. E1999-00840-CCA-R3-CD, 2000 WL 1246617, at *6 (Tenn. Crim. App., Sept. 5, 2000); *State v. Michael Thomason*, No. W1999-02000-CCA-R3-CD, 2000 WL 298695, at *8 (Tenn. Crim. App., Mar. 7, 2000). We note that the Defendant was provided with all of the information in the State's possession, and the State was required to make an election of offenses at trial. Accordingly, we conclude that the Defendant is not entitled to relief on this issue.

IV. Failure to Merge Defendant's Convictions for Rape of a Child and Aggravated Sexual Battery

Defendant contends that the trial court erred by failing to merge his conviction for aggravated sexual battery into his conviction for rape of a child. He argues that merger is required because aggravated sexual battery is a lesser-included offense of rape of a child

and that the failure to merge the two offenses violated the principles of double jeopardy and his right to due process.

"Whether multiple convictions violate double jeopardy is a mixed question of law and fact that we review de novo with no presumption of correctness." *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014). "[T]he propriety of multiple convictions of sexual offenses arising from an allegedly **single sexual assault** must be analyzed under principles of double jeopardy as set forth by our supreme court in *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012)." *State v. Itzol-Deleon*, 537 S.W.3d 434, 441 (Tenn. 2017)(emphasis added). The double jeopardy clauses of the United States and Tennessee Constitutions protect an accused from (1) a second prosecution following an acquittal; (2) a second prosecution following conviction; and (3) multiple punishments for the same offense. *See Watkins*, 362 S.W.3d at 541 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *abrogated on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). This case concerns the third category, protection against multiple punishments for the same offense in a single prosecution. "Multiple punishment claims fall into one of two categories: (1) unit-of-prosecution claims; or (2) multiple description claims." *State v. Hogg*, 448 S.W.3d 877, 885 (Tenn. 2014) (citing *Watkins*, 362 S.W.3d at 543). The present case involves multiple description claims because Defendant asserts that his convictions for violating two different statutes - rape of a child and aggravated sexual battery - punish the same offense. *See Itzol-Deleon*, 537 S.W.3d at 441. The "threshold inquiry" in multiple description claims is whether the dual convictions arose from the same act or transaction. *Id.* at 441-42. If so, a double jeopardy violation may exist. *Id.; State v. Felipe Gonzales*, No. W2017-00941-CCA-R3-CD, 2018 WL 5098204, at *19 (Tenn. Crim. App. Oct. 18, 2018)(Defendant's dual convictions for rape of a child and aggravated sexual battery did not violate double jeopardy because they did not arise out of the same transaction).

In determining whether the convictions arose from the same act or transaction, our supreme court offered the following "non-exclusive" factors for consideration:

> 1. The nature of the defendant's actions that are alleged to be in violation of the various statutes ("the defendant's actions");
>
> 2. The temporal proximity between the defendant's actions;
>
> 3. The spatial proximity of the physical locations in which the defendant's actions took place;
>
> 4. Whether the defendant's actions contacted different intimate areas of the victim's body and the degree of proximity of those areas to each other;

> 5. Whether the defendant's contact with different intimate areas of the victim's body was deliberate or merely incidental to facilitating contact with another intimate area;
>
> 6. Whether the defendant deliberately used different parts of his body (or objects) to assault the victim sexually;
>
> 7. Whether the defendant's assault was interrupted by some event, giving him an opportunity to either cease his assault or re-form a subsequent intent to commit a subsequent assault;
>
> 8. Indications of the defendant's intent to commit one or more than one sexual assault on the victim; and
>
> 9. The extent to which any of the defendant's actions were merely ancillary to, prefatory to, or congruent with, any of his other actions, thereby indicating unitary conduct.

Id. at 450-51.

In support of Defendant's conviction for rape of a child in this case, the proof showed that sometime during the summer of 2016, Defendant and the victim were in Defendant's son's bedroom, and Defendant penetrated her vagina with his penis. In support of Defendant's conviction for aggravated sexual battery, the proof showed that also in the summer of 2016, Defendant and the victim were in his office at his home, and Defendant had his pants unzipped. The victim testified that Defendant inserted his finger into her vagina, and her sister walked into the room and saw the incident. The victim's sister testified that she saw Defendant touch the victim's "butt."

Defendant's convictions for aggravated sexual battery and rape of a child in this case obviously did not arise from the same act or transaction. The incidents occurred in two separate rooms of the house, and there was no proof that the incidents even occurred on the same day. Additionally, the victim's sister walked into the room interrupting Defendant's commission of the aggravated sexual battery, giving Defendant opportunity to "either cease his assault or re-form a subsequent intent to commit a subsequent assault." *Itzol-Deleon*, 537 S.W.3d at 450-51. Defendant also used two different body parts - his penis and his fingers - to contact the victim's body. As argued by the State, none of Defendant's actions in one offense were "merely ancillary to, prefatory to, or congruent with" his actions in the other offense and in no way indicated a unitary conduct. *Id.* Therefore, Defendant's convictions for aggravated sexual battery and rape of a child did not arise out of the same transaction, and the trial court's failure to merge the convictions did not violate Defendant's protection against double jeopardy. Defendant is not entitled to relief on this issue.

V. Consecutive Sentencing

Defendant argues that the trial court erred by ordering his sentences for aggravated sexual battery and rape of a child to be served consecutively because the trial court failed to merge his conviction for aggravated sexual battery into his conviction for rape of child. However, as set forth above, we have already determined that the trial court was not required to merge the convictions.

Our standard of review of the trial court's sentencing determinations is whether the trial court abused its discretion, and we apply a "presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The party challenging the sentence on appeal bears the burden of establishing that the sentence was improper. T.C.A. § 40-35-401 (2017), Sentencing Comm'n Cmts. In determining the proper sentence, the trial court must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made in the defendant's own behalf about sentencing; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. *See* T.C.A. § 40-35-210; *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2017).

With respect to consecutive sentencing, our supreme court has held that the standard of review adopted in *Bise* "applies similarly" to the imposition of consecutive sentences, "giving deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)[.]" *State v. Pollard*, 432 S.W.3d 851, 861 (Tenn. 2013). Tennessee Code Annotated section 40-35-115(b) provides that a trial court may order sentences to run consecutively if it finds any one of the following criteria by a preponderance of the evidence:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;

> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b). In *Pollard*, the court reiterated that "[a]ny one of these grounds is a sufficient basis for the imposition of consecutive sentences." 432 S.W.3d at 862. "So long as a trial court properly articulates its reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal." *Id.*; *Bise*, 380 S.W.3d at 705.

In this case, the trial court properly imposed consecutive sentences based on the court's finding that Defendant was convicted of two or more statutory offenses involving sexual abuse of a minor. The trial court further considered the relationship between Defendant and the victim, the time span of Defendant's undetected sexual activity, the nature and scope of the sexual acts, and the extent of the residual physical and mental damage to the victim. T.C.A. § 40-35-115(b)(5). This finding alone is sufficient to support consecutive sentencing. Defendant is not entitled to relief on this issue.

VI. Cumulative Error

Defendant contends that cumulative errors by the trial court constitute reversible error. Our supreme court has stated:

> The United States Constitution protects a criminal defendant's right to a fair trial; it does not guarantee him or her a perfect trial. We have

> reached the same conclusion with regard to the Constitution of Tennessee. It is the protection of the right to a fair trial that drives the existence of and application of the cumulative error doctrine in the context of criminal proceedings. However, circumstances warranting the application of the cumulative error doctrine to reverse a conviction or sentence remain rare.
>
> The cumulative error doctrine is a judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial.

State v. Hester, 324 S.W.3d 1, 76-77 (Tenn. 2010) (citations omitted).

To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings. *State v. Herron*, 461 S.W.3d 890, 910 (Tenn. 2015) (citing *Hester*, 324 S.W.3d at 77). After considering each of Defendant's issues on appeal and finding no error, we need not consider the cumulative effect of any alleged errors. Defendant is not entitled to relief on this issue.

CONCLUSION

Based on foregoing analysis, we affirm the judgments of the trial court.

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THOMAS T. WOODALL, JUDGE