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

STATE OF TENNESSEE v. CHARLES D. PERRY

Appeal from the Circuit Court for Cheatham County
No. 17851 Larry Wallace, Judge

No. M2022-00643-CCA-R3-CD

A Cheatham County jury convicted the Defendant, Charles D. Perry, of two counts of rape of a child, and the trial court entered an agreed effective sentence of fifteen years of incarceration. On appeal, the Defendant contends that: (1) the prosecution was time-barred because it was commenced outside the statute of limitations; (2) his verdict was not unanimous; (3) the trial court deprived his right to present a defense by limiting expert testimony; (4) the trial court erred when it admitted character evidence in violation of Tennessee Rule of Evidence 404(b); (5) the evidence is insufficient to sustain his convictions; and (6) the cumulative effect of the trial court's errors entitles him to a new trial. After review, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which MATTHEW J. WILSON, J., joined. CAMILLE R. MCMULLEN, P.J., concurred in the results only.

Jessica F. Butler, Assistant Public Defender – Appellate Division (on appeal), Franklin, Tennessee; Brent O. Horst (at trial) Nashville, Tennessee, for the appellant, Charles D. Perry.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Wendell Ray Crouch, Jr., District Attorney General; and David W. Wyatt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts
A. Procedural History

On May 2, 2016, a Cheatham County grand jury issued a presentment against the Defendant alleging two counts of rape of a child and one count of aggravated sexual

battery. These crimes allegedly occurred on or about January 1, 2001 through December 31, 2005.

Pursuant to the Defendant's request, filed July 20, 2016, the State filed a Bill of Particulars. The Bill of Particulars, filed October 19, 2017, reads:

> On numerous occasions between the dates of March 2001 and October 2006, the [D]efendant . . . knowingly sexually penetrated [M.R.][1], DOB 02/12/1994, who was between the ages of 7 and 12 at the times of the offense, while at [two different addresses in] Cheatham County, Tennessee. [The Defendant] accomplished sexual penetration of [M.R.] by penetrating [M.R.'s] genitals with his penis.
>
> On numerous occasions between the dates of March 2001 and October 2006, the [Defendant] . . . knowingly sexually penetrated [M.R.] . . . DOB 02/12/1994, who was between the ages of 7 and 12 at the times of the offense, while at [two different addresses in] . . . Cheatham County, Tennessee. [The Defendant] accomplished sexual penetration of [M.R.] by requiring [M.R.] to perform oral sex on him and by [the Defendant] performing oral sex on [M.R.].
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> On multiple occasions between the dates of March 2001 and October 2006, the [D]efendant . . . knowingly had unlawful sexual contact [with M.R.], DOB 02/12/1994, who was between the ages of 7 and 12 at the times of the offense, while at [two different addresses] in Cheatham County, Tennessee. [The Defendant] accomplished unlawful sexual contact of [M.R.] by touching [M.R.'s] genitals while she was using a personal computer, while she was in bed asleep, and while she was in the shower.

On November 6, 2017, the Defendant filed a motion to dismiss Count 3. He asserted that Count 3 alleged a Class B felony and that the statute of limitations for prosecuting a Class B felony was eight years, which had expired because the alleged offense took place between January 1, 2001 and December 31, 2005. The State conceded the issue, and the trial court dismissed Count 3.

B. Trial

[1] To protect the victim's privacy, we will refer to her and her friends and family members by their initials.

At trial, the parties presented the following evidence: The victim, M.R., testified that her biological parents separated when she was four years old, shortly after her brother was born. After moving around, M.R.'s mother moved to Ashland City in 2001, when M.R. was seven or eight years old, to marry the Defendant. The two were married approximately five years before divorcing. M.R. recounted her educational background, saying that she graduated from high school, went on to obtain a college degree, and was working as a registered nurse at the time of trial.

M.R. recalled the layout of the house in which she, her brother, and her mother lived with the Defendant, who was working for a home security company at the time. He installed security systems in homes, and the home in which they lived had a security system. She said that it had three bedrooms, and she and her brother shared one of the three bedrooms when they first moved in with the Defendant. Her mother and the Defendant shared the master bedroom, and the third bedroom was used as a playroom. At some point, the playroom was converted into M.R.'s bedroom, and she and her brother no longer shared a bedroom. M.R. recounted as "odd" the time in which she lived with the Defendant. She said he did not want her to do activities outside the home and would make her feel bad if she asked to do anything outside the home.

M.R. described the abuse that occurred while she was living with the Defendant. She said that the first incident occurred about six months after they had moved in with the Defendant and while she was playing a game on a computer in the master bedroom. Her mother was in the shower, and the family was preparing to go to the Defendant's brother's house for a cookout. The Defendant placed his hands down her pants and began rubbing her. He asked her if it bothered her, and she said "yes." He responded "okay, good. It should."

Months later, more intense abuse began. The Defendant touched her "private" areas and had her touch his penis. He performed oral sex on her and had her perform oral sex on him. M.R. recounted an event of oral sex that occurred after she moved into the playroom. She said that her mother was not home, and the Defendant pulled down his pants and had her perform oral sex on him by the door. He placed his penis in her mouth. The Defendant played pornography in her room and asked her to masturbate to it as he watched from a camera. M.R. explained that the Defendant placed a live feed camera in her room to watch her, and he would watch the feed from upstairs in the attic.

On one occasion, the Defendant attempted to penetrate her with his penis. She said that they were on the right side of her bed. She was lying on the bed with her hips toward the edge of the bed, and the Defendant was standing. The Defendant got the tip of his penis in her vagina, and she told him that it hurt and that she did not want to do it. He said he did not want to hurt her, and he stopped.

The abuse, she said, occurred almost every day. The Defendant returned home from work at 3:00 p.m. each day, which was the same time that she got home from school, and her mother did not end her workday until 5:00 or 6:00 p.m. The abuse occurred after school or during the middle of the night when the Defendant would awaken her by touching her. M.R. explained that this was her first sexual experience, so the Defendant instructed her how to rub his penis with her hands and how to perform oral sex on him. These interactions occurred in the bedroom and the bathroom.

The abused ceased for a time when M.R.'s mother moved to another location with M.R. and her brother because the Defendant did not initially move with them. He then followed them, and the abuse began again, ceasing permanently when her mother filed for divorce from the Defendant in 2006.

At some point thereafter, M.R.'s mother asked M.R. if the Defendant had sexually abused her, but M.R. said no. She said that she was scared of what the Defendant would do if she disclosed the abuse. He had told her that he would kill himself if she told anyone and that she needed to keep the abuse a secret. She found this threat credible because he had once held a knife to himself and threatened to kill himself if she left for church camp. M.R. said that she also did not want her mother to blame herself for the abuse.

M.R. testified that she later told a friend and her brother about the abuse. Her brother told her mother. M.R. then learned that there was another child living with the Defendant, and she wondered if he was also abusing her. At that time, she decided to legally pursue charges against the Defendant.

M.R. described telling her mother, her mother's reaction, and their joint decision to call the police. The police came to interview her, and she told them about the abuse.

During cross-examination, M.R. agreed that, although she was twenty-one years old at the time, her mother called the police for her. She agreed that her mother encouraged her to call the police. She said that the first person she told of the abuse was her friend, L.P., whom she told when they were in ninth or tenth grade together.

M.R. agreed that she never saw the camera in her bedroom that the Defendant said he used to watch her. She also agreed that her mother told her that she had found a camera in M.R.'s bedroom. Her mother also told her that she caught the Defendant in her bedroom during the night one night. M.R. denied that her mother told her the allegations to make against the Defendant.

During redirect examination, M.R. read the statement that she gave to police to clarify any confusion. She reiterated that her mother never told her what to say and that it was M.R.'s decision to pursue charges against the Defendant.

T.R., M.R.'s brother, testified that he and M.R. had always been close. In 2016, M.R. and told T.R. that she had been molested as a child. T.R. did not tell anyone about her disclosure until he confided in his mother.

L.A., M.R.'s mother, testified that she was currently married to her third husband and that she had two children, M.R. and T.R., both from her first marriage. She said that she met the Defendant in 2000 and married him seven months after meeting. The two moved into his house before marrying, and she recalled that the home had stairs from the living room to an unfinished room upstairs. The room had desks, books, and a computer. L.A. said that she never saw the Defendant touch M.R. sexually, but he massaged M.R.'s feet and rubbed her back, both of which L.A. felt in hindsight were "red flags."

L.A. said that the home had a security system and a "beeper" on the driveway that notified them if someone entered the driveway. The home had cameras outside that could be monitored from a television inside. Later, L.A. saw a light on in the attic and, when she went to turn it off, she saw a computer monitor that showed M.R.'s room, in which M.R. was getting ready for school. The Defendant was standing looking at the monitor. She confronted the Defendant, and the two got into a "huge argument." The Defendant showed her the camera in M.R.'s room and told her that there were other cameras in the house, but she never saw them.

L.A. described another incident when she awoke during the night and the Defendant was not in their bed. She went to find him, and he was standing over M.R.'s bed in his underwear. When he saw her, he dropped to the floor and put his ear to the vent. He said he thought he heard something and was listening to something in the vent.

L.A. stated that another concerning event involved one of M.R.'s friends. The Defendant told L.A. that he saw M.R.'s friend's private area through her shorts when she was playing on the ground and that it aroused him. He attempted to initiate sexual relations with L.A., and she told him that she would never want to talk about a child like that. In response, the Defendant said he was just trying to spice things up, and he went to the bathroom and masturbated. This event occurred shortly before she moved out with her children.

L.A. explained that, when she questioned things, the Defendant, and to some extent M.R., made her feel "nuts." She described the Defendant as "very manipulative." L.A. said that, both before and after the divorce, she specifically asked M.R. on three occasions

if the Defendant had touched her inappropriately. L.A. said that, after the divorce, she and the Defendant remained friendly. She did not learn that he had inappropriately touched M.R. until January of 2016 when T.R. told her. Upon learning of the allegation, L.A. immediately called M.R. and asked her to come over and talk.

After L.A. and M.R. had a very "emotional" conversation, L.A. said that she told M.R. that she did not think the Defendant should get away with his conduct. She encouraged M.R. to call the police, and then L.A. initiated the call to the police. L.A. said, however, whether to call the police was M.R.'s decision.

During cross-examination, L.A. acknowledged that, despite the incidents that concerned her involving the Defendant, she stayed with him. She also allowed him to move into her home after she had left him.

Travis Walker, a deputy with the Cheatham County Sheriff's Department, testified that a road officer received M.R.'s call about sexual abuse and responded and created a report. Deputy Walker's supervisor then assigned the case to Deputy Walker for investigation. He interviewed M.R. and L.A. and then executed a search warrant at the Defendant's home. Deputy Walker said that the home had flooded and been completely gutted and rebuilt since M.R. had lived at the home. Deputy Walker did confiscate some electronic devices during the search. A subsequent report indicated that there was nothing incriminating on any of those devices.

Deputy Walker contacted the Defendant to speak with him, but the Defendant declined to speak with law enforcement.

During cross-examination, Deputy Walker testified that he did not record the telephone conversation during which the Defendant declined to speak with law enforcement.

The Defendant's son, Charles Perry, Jr., testified that he visited the Defendant on weekends while the Defendant lived with M.R., T.R., and L.A. During this time, he was around twelve years old. Mr. Perry never observed anything unusual. He said that he went into the attic of the family home, and it was used primarily for storage.

The Defendant's daughter, Shelby Lane, testified that she was a year older than her brother, so she was between ten and fourteen years old while he was married to L.A. She also never noticed anything unusual.

Scott Levasseur, with the Dickson County Sheriff's Department, testified that he searched several electronic devices that law enforcement confiscated during a search of the

Defendant's home. He did not find any evidence of searching for pornography nor did he find evidence that someone had erased the laptop's memory. Mr. Levasseur was unable to search one of the laptops submitted because he was not able to power it.

Andrea Maggart, the Defendant's sister, testified that, after L.A. moved out with the Defendant, Ms. Armstrong and Ms. Maggart were still neighbors and remained friendly. On multiple occasions when they saw each other, L.A. said that she still loved the Defendant and did not want the divorce.

The Defendant testified that Deputy Walker never called him to interview him and that he would have willingly given a statement had the deputy contacted him. He also denied inappropriately touching M.R. He denied having a camera set up in her room to monitor her.

The Defendant said that when he and L.A. lived together, they both worked long hours but the two got along well. He described his parenting style as stricter than L.A.'s parenting style. They each had two children respectively, so they agreed to jointly parent and did so successfully.

The Defendant said that it was his decision to divorce L.A. He said he awoke one morning and no longer wanted to be there. He discussed this with her, and the two decided that she would save money for a few months and purchase her own house. After she moved out of the house and was living on her own, the two began talking again and started dating. At some point, the Defendant moved into L.A.'s home. He again decided he did not want to be with L.A., told her as much, and she filed for divorce.

The Defendant said that his mother died in 2013, and at that time L.A. called and asked if she could attend the funeral. He agreed, and she then told him that she still loved him. The Defendant said that he hung up the phone during the conversation. The Defendant's father died two years later, in November 2015, and L.A. again came to the services. There, the Defendant introduced her to his then girlfriend, and L.A. appeared agitated and abruptly left. She did not attend the burial.

Two months later, his then girlfriend contacted him to tell him that law enforcement was searching their home with regard to allegations made by M.R. The Defendant reiterated that no one from law enforcement ever contacted him to make a statement.

During cross-examination, he said that, while it was possible that law enforcement had contacted his attorney and that his attorney had not informed him, this was unlikely. The Defendant said that there was no electricity in the attic and that he did not keep a work area in the attic. It was strictly used for storage.

Based upon this evidence, the jury convicted the Defendant of two counts of rape of a child. The trial court entered an agreed upon effective sentence of fifteen years of incarceration.

II. Analysis

On appeal, the Defendant contends that: (1) the prosecution was time-barred because it was commenced outside the statute of limitations; (2) his verdict was not unanimous; (3) the trial court deprived him of his right to present a defense by limiting expert testimony; (4) the trial court erred when it admitted character evidence in violation of Tennessee Rule of Evidence 404(b); (5) the evidence is insufficient to sustain his conviction; and (6) the cumulative effect of the trial court's errors entitles him to a new trial.

A. Statute of Limitations

The Defendant first contends that the State improperly prosecuted him on a presentment that contained approximately four months that were time-barred from prosecution. He notes that Tennessee Code Annotated section 40-2-101(g)(2) provides that his prosecution for rape of a child should have commenced within fifteen years of the offense. The presentment alleged that the rapes occurred between January 1, 2001, and December 31, 2005, and the grand jury issued the presentment on May 2, 2016. Accordingly, he alleges, any conduct that occurred between January 1, 2001, and May 1, 2001, was time-barred from prosecution.

The State counters that our review is constrained by the plain error doctrine because the Defendant did not raise this issue before the trial court. It further contends that the Defendant cannot show that the prosecution was not commenced before the statute of limitations, as an arrest warrant commences prosecution, and although there is no arrest warrant in the record, an arrest warrant may have been issued prior to May 2, 2006. Finally, it notes that the victim testified that the Defendant first inappropriately touched her by rubbing her vagina over her clothing on July 4, 2001. It was not until "months" later that he sexually penetrated her. As such, the State posits, the Defendant was not convicted of rape of a child outside the relevant statute of limitations period.

In reply, the Defendant notes that this court has repeatedly held that the statute of limitations is not waived by failure to raise an objection pretrial. Further, he contends that, while the statute of limitations may be waived under certain circumstances, any waiver must be knowingly and voluntarily entered.

Prosecution of a felony offense is barred unless it is begun within the statutory limitations period. T.C.A. § 40-2-101 (2019). The limitations period serves to protect against delay and the use of stale evidence and serves as an incentive to efficient prosecution. *State v. Burdick*, 395 S.W.3d 120, 124 (Tenn. 2012). A statute of limitations is not jurisdictional but may be waived so long as the waiver is knowingly and voluntarily entered. *State v. Pearson*, 858 S.W.2d 879, 887 (Tenn. 1993). Although the right to timely prosecution is not a fundamental right, it is nevertheless "substantial." *Id.* "To determine whether a knowing and voluntary waiver of the statute of limitations exists, the court utilized 'the same standard applied in determining whether there has been an effective waiver as to fundamental rights.'" *State v. Shell*, 512 S.W.3d 267, 274 (Tenn. Crim. App. 2016) (quoting *Pearson*, 858 S.W.2d at 887). The relinquishment of the right to a timely prosecution may not be presumed from a silent record. *Pearson*, 858 S.W.2d at 887. Here, we agree with the Defendant that the record does not indicate that he waived his right to prosecution within the limitations period. We conclude we can review this issue on its merits and are not constrained by plain error review.

Code section 40-2-104 provides:

> A prosecution is commenced, within the meaning of this chapter, by finding an indictment or presentment, the issuing of a warrant, the issuing of a juvenile petition alleging a delinquent act, binding over the offender, by the filing of an information as provided for in chapter 3 of this title, or by making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter or any other appearance in either court for any purpose involving the offense. . . .

T.C.A. § 40-2-104). This section "provides for the commencement of a prosecution by several methods, 'all deemed to provide the defendant with sufficient notice of the crime.'" *Ferrante*, 269 S.W.3d at 914 (quoting *State v. Tait*, 114 S.W.3d 518, 522 (Tenn. 2003)). "'A lawful accusation is an essential jurisdictional element of a criminal trial, without which there can be no valid prosecution.'" *Ferrante*, 269 S.W.3d at 914 (quoting *State v. Morgan*, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979)).

The prosecution for a Class A felony offense must begin within fifteen years. T.C.A. § 40-2-101(b)(1) (1998); T.C.A. § 39-13-522(b) (2000) (classifying rape of a child as a Class A felony). Our supreme court "has long recognized that, 'prior to formal accusation, [a] defendant's rights are protected by the statute of limitations.'" *Ferrante*, 269 S.W.3d at 914 (quoting *State v. Baker*, 614 S.W.2d 352, 354 (Tenn. 1981)).

The Cheatham County grand jury issued the presentment in this case on May 2, 2016. It alleged that on or about January 1, 2001, through December 31, 2005, the

Defendant did sexually penetrate the victim, who was classified as a child at the time of the offenses. Because the prosecution was required to be commenced within fifteen years, any allegations made regarding rape that occurred between January 1, 2001, and May 1, 2001, were untimely filed.

This court has stated, based on a different attack of an indictment, that we approach "'attacks upon indictments . . . from the broad and enlightened standpoint of common sense and right reason rather than from the narrow standpoint of petty preciosity, pettifogging, technicality or hair splitting fault finding.'" *State v. Hill*, 954 S.W.2d 725, 728 (Tenn. 1997) (quoting *United States v. Purvis*, 580 F.2d 853, 857 (5th Cir. 1978)). In this case, the victim testified that the Defendant first touched her inappropriately on July 4, 2001, and that the rapes occurred "months" later. Before trial, the State in its Bill of Particulars revised the time frame to having occurred between March 2001 and October 2006. The State could, and should, have amended the indictment to include only the time period beginning on May 2, 2001, through whatever date it chose thereafter, which was both within the applicable statute of limitations period and also the only relevant time frame to the victim's allegations. That said, we cannot conclude that its failure to do so requires that the Defendant's convictions be vacated.

The jury was presented evidence of rape that occurred only within the time period that was within the applicable statute of limitations. The Defendant had sufficient notice of the offenses for which he was charged within the statute of limitations period. We find persuasive the idea that where the State cannot give an approximate time of the offense, a conviction may be affirmed if in the course of the trial it does not appear that the defendant's defense has been hampered by the lack of specificity. *State v. Michael Thomason*, No W1999-02000-CCA-R3-CD, 2000 WL 298695, at *7 (Tenn. Crim. App., at Jackson, Mar. 7, 2000) (quoting *State v. Byrd*, 820 S.W.2d 739, 742 (Tenn. 1991), *no Tenn. R. App. P. 11 application filed.* Further, the right to timely prosecution, while substantial, is not a fundamental right. *State v. David Johnson,* No. W2019-01133-CCA-R3-CD, 2022 WL 1134776, at *8 (Tenn. Crim. App., at Jackson, Apr. 18, 2022) (citing *Pearson*, 858 S.W.2d at 887), *no Tenn. R. App. P. 11 application filed*. The Defendant was given notice of the offenses against him within the applicable statute of limitations period of fifteen years because there was no allegation that he raped the victim in the four-month period at the beginning of the indictment period that was beyond the statute of limitations. His allegation of the untimeliness of the four months of the indictment, which covered more than a four-year time period in total, is technical and "hair splitting" in nature. The Defendant's ability to defend the allegations was not hindered by the indictment's inclusion of the four-month timeframe beyond the statute of limitations period. This period of time was all before July 4, 2001, when the victim said the first touching occurred, so there was no allegation of any criminal activity during the four-month period beyond the statute of limitations. He is not entitled to relief on this issue.

B. Unanimity of Verdict

The Defendant next contends that the trial court erred when it gave the jury a modified unanimity instruction after the Sate presented both specific and generic evidence and made an election of offenses. This, he alleges, alleviated the State's burden of proof and violated his right to a fair trial. The State counters that the Defendant has waived this issue by failing to object to the jury instruction at trial or to raise the issue in his motion for new trial. It further contends that he cannot show that this error amounts to plain error. In reply, the Defendant concedes that our review is limited by the doctrine of plain error.

Full appellate review of this issue is waived because the Defendant failed to object to the instruction at trial and failed to raise the issue in his motion for new trial. *See* Tenn. R. App. P. 3(e). Therefore, we review this issue solely to determine if plain error review is warranted.

Plain error relief is "limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). In order to be granted relief under plain error, five criteria must be met: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Id*. at 640-41; *see also State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (Tennessee Supreme Court formally adopting the *Adkisson* standard for plain error relief). When it is clear from the record that at least one of the factors cannot be established, this court need not consider the remaining factors. *Smith*, 24 S.W.3d at 283. The defendant bears the burden of persuasion to show that he is entitled to plain error relief. *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

The parties agree that we are constrained to review this issue pursuant to the doctrine of plain error. We find that the record clearly establishes what occurred in the trial court. The arguments of the parties rely upon what occurred during the trial, which was adequately transcribed and preserved for our review. The first element of plain error review is satisfied. *See State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000).

Next, we determine whether a clear and unequivocal rule of law has been broken. *Id.* Article I, section 6 of the Tennessee Constitution provides "[t]hat the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors." Tenn. Const. art. I, § 6. This state constitutional provision has

been interpreted as guaranteeing the right to trial by a jury of twelve persons[2] and also guarantees every accused the right to a unanimous jury verdict before a conviction for a criminal offense may be imposed.[3] Generally, the right to a trial by jury guarantees that a verdict rests on the jurors' unanimous conclusion that the defendant committed one particular criminal act. *State v. Kendrick*, 38 S.W.3d 566, 568 (Tenn. 2001). Therefore, before a verdict of conviction may be rendered, jurors must unanimously agree on the particular criminal act the defendant committed. *State v. Qualls*, 482 S.W.3d 1, 10 (Tenn. 2016).

In most criminal trials, the constitutional guarantee of juror unanimity is readily satisfied because evidence of other, not indicted offenses is generally prohibited as inadmissible character evidence. *See* Tenn. R. Evid. 404(b). This general prohibition against the inadmissibility of unindicted prior criminal behavior has been relaxed in the sex crimes context, specifically in cases where the defendant is alleged to have committed sexual offenses over a lengthy period of time against young children who are often unable to identify the dates on which particular acts were perpetrated. *Qualls*, 482 S.W.3d at 9. Therefore, "where the indictment charges that sex crimes occurred over a span of time," rather than on specific dates, the "evidence of unlawful sexual contact between the defendant and the victim allegedly occurring during the time charged in the indictment is admissible." *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994) (citations omitted).

When the State adduces proof of multiple instances of conduct that each match the allegations contained in a single charged count, the State, at the close of its case-in-chief, must "elect" the distinct conduct about which the jury is to deliberate in returning its verdict on the relevant count. *See State v. Knowles*, 470 S.W.3d 416, 423 (Tenn. 2015). This election ensures that a defendant can prepare for and make a defense for a specific charge, protects the defendant against double jeopardy, and enables the courts to review the legal sufficiency of the evidence. *State v. Adams*, 24 S.W.3d at 289, 294 (Tenn. 2000) (citations omitted). The most important reason for the election requirement, however, is that it ensures that the jurors deliberate over and render a verdict on the same offense. *State v. Smith*, 492 S.W.3d 224, 233-34 (Tenn. 2016). Because the election requirement applies to offenses, not the facts supporting each element of the offense, a jury is not required to "unanimously agree as to facts supporting a particular element of a crime so long as the

[2]In all criminal cases "where a fine of more than $50.00 or any confinement of the accused may be imposed." *See State v. Dusina*, 764 S.W.2d 766, 768 (Tenn. 1989); *see also Grooms v. State*, 221 Tenn. 243, 426 S.W.2d 176, 176-77 (1968); *Willard v. State*, 174 Tenn. 642, 130 S.W.2d 99, 100 (1939).

[3]*State v. Lemacks*, 996 S.W.2d 166, 169-70 (Tenn. 1999); *see also State v. Shelton*, 851 S.W.2d 134, 137 (Tenn.1993) ("Although the federal constitution's requirement of unanimity among jurors has not been imposed on the states through the Fourteenth Amendment, there should be no question that the unanimity of twelve jurors is required in criminal cases under our state constitution." (quoting *State v. Brown*, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991) (internal quotation marks omitted))).

jury agrees that the appellant is guilty of the crime charged." *State v. Adams*, 24 S.W.3d 289, 297 (Tenn. 2000); *see Knowles*, 470 S.W.3d at 424. There is no right to a perfect election, and indeed, as this court has recognized, the election requirement may be satisfied in a variety of ways. *Knowles*, at 423.

Our supreme court has held that a conviction may stand based upon "generic evidence" under certain circumstances. *See Qualls*, 482 S.W.3d at 13. In this type of case, a victim's testimony may describe a pattern of abuse ('every time mama went to the store') rather than specific incidents ('after the July 4th parade'). *Id.* In order to protect the rights of the accused to prove guilt beyond a reasonable doubt and jury unanimity in generic evidence cases, a trial court must offer the jury a modified unanimity instruction. This instruction satisfies the election doctrine by instructing the jury it may only convict the defendant if the jury unanimously agrees the defendant committed all the acts described by the victim. *Id.* The trial court must determine at the conclusion of the State's case-in-chief whether the proof is sufficiently specific as to apply the strict election requirement or whether the election requirement may be satisfied by giving the modified unanimity instruction. *Id.* Because questions regarding the propriety of jury instructions are mixed questions of law and fact, our standard of review here is de novo, with no presumption of correctness. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001).

In this case, the State charged the Defendant using a generic evidence format in that the presentment alleged that he had committed numerous sexual acts over a period of five years. The State's presentment alleged that between January 1, 2001 and December 31, 2005, the Defendant "sexually penetrate[d]" M.R. who was less than thirteen years of age at the time (Count 1) and that he "had [M.R.] perform oral sex on" him when she was less than thirteen years of age (Count 2). In its Bill of Particulars, the State asserted that "On numerous occasions between the dates of March 2001 and October 2006, the [D]efendant . . . knowingly sexually penetrated [M.R.]" and "require[d] [her] to perform oral sex on him and by . . . performing oral sex on [her]" while she was less than thirteen.

The victim testified that these sexual interactions occurred almost daily, and she described multiple instances of abuse including oral sex and intercourse. She did recount some specific instances of sexual interactions by describing them, i.e., oral sex in the doorway to her bedroom and penile penetration that occurred while she was on her bed. The State did not make an election of offenses at the close of its proof. The trial court did not make a specific finding about the election on the record at the close of the State's case-in-chief. During closing argument, the State reminded the jury that it had heard allegations of both fellatio, cunnilingus, and penile penetration. The State requested and the trial court gave the jury a modified unanimity instruction as follows:

> The State has offered proof in its case in chief in more than one act allegedly committed by the [D]efendant, which the State alleges constitutes an element of the offense of rape of a child as charged in Counts One and Two of the indictment. To ensure a unanimous verdict, the State must prove beyond a reasonable doubt the commission of all the acts described by the alleged victim as occurring within the time period charged in Counts One and Two of the indictment. Before you can find the [D]efendant guilty, you must unanimously agree that the State has proven beyond a reasonable doubt the commission of all the acts described by the alleged victim as occurring within the time period charge in Counts One and Two of the indictment.

The modified unanimity instruction, as previously stated, requires that the State prove, beyond a reasonable doubt, that each and every instance of sexual contact described by the victim did occur. The instruction tells the jurors that they must unanimously find that the Defendant committed each of the offenses described by the victim.

Qualls relaxed the prohibition against propensity evidence in the context of sex crimes cases. It did not, however, relax the State's burden of proof. The modified unanimity instruction requires the jury to acquit a Defendant if the State does not prove beyond a reasonable doubt the commission of "*all* the acts described by the alleged victim." (emphasis added). Accordingly, where the indictment charges that sex crimes occurred over a span of time, rather than on specific dates, then evidence of unlawful sexual contact between the defendant and the victim allegedly occurring during the time charged in the indictment is admissible. *Qualls*, 482 S.W.3d at 9 (internal quotations omitted).

The Defendant takes issue with the fact that, during closing argument, the State mentioned that "the [D]efendant put his penis in her mouth and penetrated [the victim]" and that he "put his mouth on her vagina and penetrated her." He asserts that this amounted to an election of offenses, and the trial court erred when it gave the jury a modified unanimity instruction. We disagree. The victim testified about multiple instances in which the Defendant put his penis in her mouth and put his mouth on her vagina. She testified that these events occurred daily, and she clearly stated that it had been so long since these events that she could not recount dates or events with specificity.

The Defendant relies upon *State v. Tidwell*, 922 S.W.2d 497 (Tenn. 1996), to contend that his convictions amount to a patchwork verdict. We find *Tidwell* distinguishable. In *Tidwell,* the indictments as returned contained fifty-six counts—fourteen each of aggravated rape, statutory rape, incest, and contributing to the delinquency of a minor. *Id.* at 501. Each count charged the commission of a specific offense on the "___" day of a named month. *Id.* Thus, there was no apparent means to differentiate among various counts of the same offense. *Id.* Additionally, the indictments provided no

means to enable a factfinder to match a specific conduct to a specific count. The *Tidwell* court held that the indictment put unanimity at serious risk. *Id.* It held that the jury in that case was permitted to select for itself the offenses on which it convicted, rendering the court without assurance of jury unanimity. *Id.* Accordingly, when asked to function as "thirteenth juror" and assess the weight of the evidence to support the jury's verdict, the trial court could not be certain which evidence was matched by the jury to which count. Moreover, absent an election, an appellate court reviewing the legal sufficiency of the evidence would not be confident that the jury discharged its function properly. *Id.* (citing *Shelton*, 851 S.W.2d at 137). The jury was not offered a modified unanimity instruction.

This case involved a two-count indictment, Count 1 alleging that the Defendant sexually penetrated the victim when she was less than thirteen, and Count 2 alleging that the Defendant had the victim perform oral sex upon him when she was less than thirteen. The victim testified about multiple instances of these events occurring, she was unable to offer specific dates, and the trial court instructed the jury that it must find that the State proved each occurrence in order to convict the Defendant in Count 1 and Count 2. The fact pattern in *Tidwell* is not the same as the fact pattern herein, and the Defendant's right to have a unanimous jury was protected by the trial court's instruction.

This case is clearly the type of case in which a modified unanimity instruction is warranted. Both Count 1, alleging penile/vaginal penetration, and Count 2, alleging oral penetration, were described by the victim as happening in their shared home on many occasions during the period of time described in the indictment. The testimony of the victim provided what *Qualls* described as generic evidence: she "described with clarity the type of sexual battery perpetrated on [her] but failed to identify specifically when each alleged act occurred. Instead, the victim[ ] here described a pattern of abuse that occurred over an extended period of time." *Qualls*, at 11-12. The trial court offered the jury a modified unanimity instruction which instructs the jury that it must unanimously agree that the defendant committed all acts described by the victim. *See Qualls*, 482 S.W.3d at 17. The Defendant has failed to show that a clear and unequivocal rule of law was breached. Finally, Defendant has not shown that he did not waive the issue for tactical reasons, specifically that the modified unanimity instruction requires the State to prove "all" the allegations and not just the two allegations supporting the two charges. Finally, any error would be harmless. The jury unanimously agreed that the State had proven beyond a reasonable doubt that the Defendant had committed two counts of rape of a child. Therefore, the Defendant is not entitled to relief pursuant to plain error review.

C. Expert Testimony

The Defendant contends that the trial court inhibited his right to present a defense when it denied his pretrial motion to present expert testimony about the Defendant's

psychosexual evaluation. The Defendant filed a pretrial motion asking the trial court to allow Dr. Jeffrey Freiden to testify that the Defendant "did not possess the character traits of a person with a sexual interest in children." He contended that this testimony was admissible pursuant to Tennessee Rule of Evidence 402, 404(a)(1), 702 and 703, and he also cited as support *State v. Jones*, No. 03C01-9301-CR-00024, 1994 WL 529397 (Tenn. Crim. App. Sept. 15, 1994), *no perm. app. filed*. The trial court ruled the evidence inadmissible, and the Defendant contends on appeal that it erred. The State concedes that *Jones* held that this evidence is admissible but asks this court to reject the ruling in *Jones* and side with the view held by the majority of other states which holds this type of evidence inadmissible.

In Tennessee the qualifications, admissibility, relevancy and competency of expert testimony are matters which largely rest within the sound discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993) (citing *State v. Rhoden*, 739 S.W.2d 6 (Tenn. Crim. App. 1987)). As the Tennessee Supreme Court has explained:

> The abuse of discretion standard does not allow the appellate court to substitute its judgment for that of the trial court, *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998), and we will find an abuse of discretion only if the court "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 176 (Tenn. 2011). Such discretion, however, is not absolute and may be overturned on appeal where the discretion is arbitrarily exercised. *Id*. (citing *Baggett v. State*, 421 S.W.2d 629, 632 (1967)).

The law in Tennessee, and in most other jurisdictions, is very clear. Comment upon the credibility of witnesses is not a proper subject for expert testimony. *State v. Schimpf*, 782 S.W.2d 186, 192 (Tenn. Crim. App. 1989). That said, experts may offer testimony related to an issue that a jury must decide. Rule 702, governing testimony by experts, provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Under this evidentiary rule, the inquiry when determining the admissibility of expert opinion testimony is will the proof "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." *See McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997). Historically, expert testimony was admissible only upon a showing of necessity. NEIL P. COHEN, DONALD F. PAINE, AND SARAH Y. SHEPPEARD, TENNESSEE LAW OF EVIDENCE, § 702.1, p. 354 (2d Ed. 1990). For example, in 1952 this court held that in order for expert opinion testimony to be admissible, "the subject under examination must be one that requires that the court and jury have the aid of knowledge or experience such as men not specially skilled do not have, and such therefore as cannot be obtained from ordinary witnesses." *Casone v. State*, 246 S.W.2d 22, 26 (Tenn. 1952). Tennessee Rule of Evidence 702 is somewhat stricter than the comparable federal rule of evidence which permits expert opinion testimony upon a finding that it merely assists the trier of fact. Fed. R. Evid. 702.

Expert opinion testimony that embraces an ultimate issue must be "otherwise admissible" and not objectionable on other grounds. *See* Tenn. R. Evid. § 704.3. Indeed, the Tennessee Supreme Court, in *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993), concluded that expert testimony about symptoms of post-traumatic stress syndrome exhibited by victims of child abuse does not "substantially assist" a jury because it attempts to evaluate the credibility of witnesses, a task which a jury is capable of performing without expert testimony, and it is not reliable proof as to the question of whether a defendant committed the specific crime of which he or she is accused. *Id.* at 562; *see also* Tenn. R. Evid. 703. Under Tennessee law, therefore, expert opinion testimony that embraces an ultimate issue of fact is not automatically admissible. Such testimony is simply not subject to exclusion on the sole basis that it embraces an ultimate issue to be decided by the trier of fact. Importantly, the trial court's discretion embraces the relevancy of the proposed testimony, the qualifications of the witness, and whether the proposed testimony will substantially assist the trier of fact to understand the proof that has been adduced at trial or to resolve an issue of fact. Tenn. R. Evid. 401 and 702; *State v. Holcomb*, 643 S.W.2d 336, 341 (Tenn. Crim. App. 1982). Thus, not all psychological testimony is admissible. *See State v. Campbell*, 904 S.W.2d 608, 610-11 (Tenn. Crim. App. 1995) (citing *Holcomb*, 643 S.W.2d at 341).

In the context of a sexual assault case, the trial court must determine whether the subject matter invades the province of the jury; whether the jurors are incapable, for want of experience or knowledge on the subject, to draw correct conclusions from the facts proved without the evidence; whether the evidence misleads or confuses the jury; and, whether the evidence should not relate to witness credibility. *State v. Schimpf*, 782 S.W.2d 186, 192 (Tenn. Crim. App.1989), *overruled on other grounds.*

The issue presently before us is whether the trial court erred when it denied the Defendant's request to offer expert testimony regarding a psychosexual evaluation that the expert concluded showed that the Defendant "did not possess the character traits of a person with a sexual interest in children." When the trial court excluded this evidence, it found:

> So on this issue regarding this expert witness, Dr. Jeffrey . . . Freiden, to testifying on behalf of the [D]efendant, there's not a whole lot of cases that I can find that deal with the issue as it pertains to the [D]efendant wanting an expert witness to testify about the [D]efendant's mental state and . . . personality type and those kind of things, but there are a lot of cases the other way about expert witnesses identifying whether the alleged victim indicates . . . when they recant it or not recant it, how credible can they be. And, of course, all those cases that I have found have upheld courts disallowing those types of expert witnesses.
>
> In fact, I had a case here . . . just a few years ago . . . [i]t went to the court of appeals because I had denied a request by the defense at that time to have an expert witness testify about the [alleged child victim's] behavior. . . . .
>
> And, of course, I have reviewed the case cited by the defense which is State v. Jones, [1994 WL 529397]. There is a case, though, that is pretty much on point, it seems. It's not in the state of Tennessee, though, but it is the State of Montana and it just came out recently too . . . . State v. Walker, [433 P3d 202 (Mont. 2018)]. . . . [I]n that case, the Supreme Court of Montana upheld the trial court stating that . . . the trial court did not abuse its discretion in excluding the defense expert's testimony that defendant's psychosexual profile revealed no sexual interest in children, where the testimony would have improperly bolstered defendant's claim of innocence. And presumably, I'm going to add, invade the province of the jury on credibility and those kinds of things.
>
> And, of course, when the Court looks at an expert witness case, also, the court has to look at whether or not it would substantially assist the trier of fact. In this case, [it's] the jury. And the Court finds that, in this case, based on what the Court has in front of it regarding this expert witness, this doctor, that it would not substantially assist the trier of fact in either understanding the evidence or determining a fact at tissue. And the Court finds, again, that it invades the province of the jury too much.

In *Jones*, this court concluded that the trial court erred when it excluded the Defendant's psychosexual examination in a child sexual assault case. *Jones*, 1994 WL 529397, at *13. This court reasoned:

> [T]he testimony was admissible under Tennessee Rules of Evidence 404(a)(1) and 405(a), [and] that the probative value of the testimony [was] not substantially outweighed by any danger of misleading or confusing the jury, and that the testimony was not cumulative.

Id. When we remanded the case for retrial in accordance with our holding, we stated:

> On the record before us, we conclude that the trial court erred in refusing to admit the proffered testimony of Dr. Engum. This does not necessarily mean that the evidence must be admitted on retrial for the trial court must determine the admissibility of any expert testimony offered at the new trial in accordance with the law of Tennessee and in light of all the facts and circumstances that exist at that time. In the unlikely situation that those facts and circumstances are identical, the testimony must be admitted.

Id. at *15. Clearly, this court did not mandate that such expert testimony would necessarily be admissible in all situations, as we concluded that each trial court must determine such admissibility in each case in light of all the facts and circumstances of each case.

We first disagree with the Defendant's characterization of the trial court's ruling as "ignoring" precedent. *Jones* very clearly instructed the lower courts that our holding would "not necessarily mean that the evidence must be admitted" in all cases. We instructed the trial court in that case to make a determination in light of all the facts and circumstances. The trial court correctly interpreted *Jones* when it determined that our conclusion was not intended as, and should not have been, binding on all determinations of the admissibility of expert testimony about psychosexual evaluations in all child sexual assault cases.

Next, we turn to decide whether we agree with our unpublished opinion in *Jones*. The State has asked us to follow precedent from a majority of other jurisdictions and to reexamine our holding in the unpublished decision in *Jones*. "The doctrine of *stare decisis* embodies the principle that a judicial decision should not be lightly overruled once it has been implemented and acted under for a period of time as long as the decision is not repugnant to some rule of law of vital importance." *Hooker v. Haslam*, 437 S.W.3d 409, 422 (Tenn. 2014) (citing *In re Estate of McFarland*, 167 S.W.3d 299, 305 (Tenn. 2005)). The doctrine of *stare decisis,* however, only applies to binding precedent. *State v. Pruitt*, 415 S.W.3d 180, 228 (Tenn. 2013); *Staten v. State*, 232 S.W.2d 18, 19 (Tenn. 1950). Unpublished opinions of this court, constitute only persuasive authority and are not binding

precedent. *See* Tenn. S. Ct. R. 4(G)(1) ("Unless designated 'Not for Citation,' 'DCRO' or 'DNP' pursuant to subsection (E) of this Rule, unpublished opinions for all other purposes shall be considered persuasive authority."); *State v. Transil*, 72 S.W.3d 665, 667 (Tenn. Crim. App. 2002).

Because the doctrine of *stare decisis* does not apply to these unpublished opinions, *Jones* is not binding authority on our decision, but rather it is persuasive authority. Given our review of the holding and reasoning from other jurisdictions, we will grant the State's request to reexamine the issue.

Inexplicably, neither party in this case cited *State v. Campbell*, 904 S.W.2d 608 (Tenn. Crim. App. 1995). In that case, which is binding authority on this court, the defendant was convicted of aggravated sexual battery for his action against a child who was under the age of thirteen at the time of the offense. The defendant sought to introduce evidence from an expert, whose report summary included:

> The reader is referred to the attached research studies done on the MMPI [test] profile scales. This gentleman's profile is unlike those individuals who are admitted sex offenders or abusers of any type. Mr. Campbell's responses, compared to the normal population, were completely within the normal range . . . . [T]he MMPI [test] is well known for identifying potential aggressive individuals in various realms, which includes sexual acting-out, aggression, and psychopathology of all types.

Campbell, 904 S.W.2d at 616.

During a jury-out hearing, defense counsel advised the trial court that he intended to call the psychologist "[f]or the purpose of showing that he [the appellant] did not suffer from a diagnosis of mental illness" and to establish that the appellant did not have "the propensity" to commit crimes involving the sexual abuse of children. *Id.* The trial court ruled that the testimony of the psychologist could not be admitted into evidence. The court based its ruling upon Tenn. R. Evid. 702 and 703.

On appeal, this court held:

> In this case, the trial court did not abuse its discretion by ruling that the psychologist's testimony could not be introduced as evidence. The trial court correctly found that the proposed testimony of the psychologist would not substantially assist the jury to understand the proof that had been adduced during the trial or to resolve any fact in issue. The appellant testified that he never sexually abused the victim. The victim testified that the appellant did

> sexually abuse her. The ultimate question for the jury was: who is the most credible witness? The jury believed the victim and disbelieved the testimony of the appellant. The testimony of the psychologist would not have substantially assisted the jury in making this determination.
>
> The offense of aggravated sexual battery does not require a specific intent as a prerequisite to a conviction for the commission of this offense. In the context of this case, Tenn. Code Ann. § 39-13-504 defines the offense of aggravated sexual battery as "unlawful sexual contact with a victim by the defendant or the defendant by a victim" when "[t]he victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-504(a)(4). Whether the appellant had a "propensity" or predisposition to sexually abuse children was irrelevant to this inquiry. If he touched the victim as she testified or made the victim touch him as she testified, he was guilty of aggravated sexual battery.

Campbell, 904 S.W.2d at 616.

We find our holding in *Campbell* squarely on point. In this case, the issue involved an offense wherein if the Defendant engaged in the activity described by the victim, he was guilty of rape. Whether the Defendant had a "propensity" or predisposition to sexually abuse children was not relevant to this inquiry. This was, like in *Campbell*, a case where the victim said this occurred and the Defendant denied that it occurred, so the ultimate issue for the jury was credibility. The jury believed the victim and disbelieved the Defendant. The expert's proposed testimony in this case would not have substantially assisted the jury in making this determination.

Multiple jurisdictions have held that, when an expert testifies that a defendant is not a pedophile in cases of sexual abuse to a minor, the only conceivable purpose for which he or she would do so is to offer character evidence on behalf of the defendant to prove the defendant acted in conformity with that character trait on a particular occasion—i.e., to prove the defendant likely did not rape, sexually assault, or sexually batter a minor because the defendant is not a pedophile. In a case from Virginia, the court held that the trial court did not err in a child sexual abuse case when it ruled inadmissible expert witness testimony that concluded from the defendant's responses to a battery of psychosexual tests that the defendant did not show "any paraphilic tendencies" and did not fit the profile of individuals who engaged in "abhorrent sexual behavior" because it concerned the ultimate issue in the case, i.e. whether the defendant sexually abused the minor. *Christopher Francis Cipolla v. Commonwealth*, No. 1976-17-2, 2019 WL 2504326 at *1, 4-7 (Va. Ct. App. June 18, 2019). In a similar case from Montana, the court held that the trial court did not err in a child sexual abuse case when it ruled inadmissible expert witness testimony that the

defendant's psychosexual profile demonstrated, among other things, that he had no sexual interest in children. *State v. Walker*, 433 P.3d 202 (Mont. 2018). The Court concluded that the evidence offered was:

> [S]cientific evidence supporting the notion that because [the defendant] d[id] not fit a profile of a pedophile he must be innocent of the sexual assaults. [The admission of this evidence was an attempt] to bolster the credibility of a witness; . . . speak directly to the guilt or innocence of the defendant; and [this evidence would] invade the exclusive province of the jury to judge credibility and the guilt or innocence of the accused.

Id. at 210-11. In 2003, the Court of Appeals in Washington State directly examined the issue before us. *State v. Woods*, 70 P.3d 976, 977-78 (Wash. App. 2003). That court held that the expert witness physician's testimony and written psychosexual evaluation that the physician conducted on defendant therein, which found defendant had no indication of sexual impulsivity and no predisposition to sexual attraction to children, constituted opinion evidence offered as proof of defendant's "sexual morality," and thus was not admissible. *Id.*; *see also State v. Hulbert*, 481 N.W.2d 329, 330-33 (Iowa 1992); *Pendleton v. Commonwealth*, 685 S.W.2d 549, 551, 553-54 (Ky. 1985); *Gilstrap v. State*, 450 S.E.2d 436 (Ga. Ct. App. 1994); *People v. Edwards*, 586 N.E.2d 1326, 1328, 1330-31 (Ill. App. Ct. 1992); *State v. Elbert*, 831 S.W.2d 646, 647-48 (Mo. Ct. App. 1992); *People v. Berrios*, 568 N.Y.S.2d 512, 513-14 (N.Y. Sup. Ct. 1991); *State v. Armstrong*, 587 So.2d 168, 170 (La. Ct. App. 1991); *State v. Person*, 564 A.2d 626, 628 (Conn. App. Ct. 1989); *State v. Gallup*, 779 P.2d 169, 170, 171-72 (Or. Ct. App. 1989); *State v. Fitzgerald*, 382 N.W.2d 892, 893-95 (Minn. Ct. App. 1986) *Williams v. State*, 649 S.W.2d 693, 694-96 (Tex. Ct. App. 1983).

A minority of state courts permit defendants to procure expert testimony for exactly this purpose. *See State v. Gallegos*, 220 P.3d 136, 145 (Utah 2009), abrogated on other grounds by *Miller v. Utah Dept. of Transp.*, 285 P.3d 1208 (Utah 2012); *State v. Davis*, 645 N.W.2d 913, 918-22 (Wis. 2002); *People v. Stoll*, 783 P.2d 698, 708-15 (Ca. 1989).

In accordance with the foregoing reasoning and authorities, we conclude that *Campbell* is controlling in this case and that the trial court did not abuse its discretion when it found that the expert's testimony in this case would not substantially assist the trier of fact. The Defendant is not entitled to relief on this issue.

D. 404(b)

The Defendant next contends that the trial court erred when it allowed the State to discuss a "variety of alleged sexual misconduct" that should have been excluded pursuant

to Tennessee Rule of Evidence 404(b). The Defendant acknowledges that our review is limited by the doctrine of plain error, but he contends that he is nonetheless entitled to relief. The State counters that the Defendant is not entitled to plain error relief for a variety of reasons, but most convincingly, because he cannot show that his failure to object was not tactical. As the State points out, the Defendant cannot prove he is entitled to relief.

First, as noted by the State, Defendant waived this issue by failing to raise a contemporaneous objection under Rule 404(b) to any of the evidence now challenged on appeal. *See* Tenn. R. App. P. 36(a); *State v. Jordan*, 325 S.W.3d 1, 58 (Tenn. 2010).

Although Defendant waived plenary review of this issue, "when necessary to do substantial justice," this court may "consider an error that has affected the substantial rights of a party" even if the issue was waived. Tenn. R. App. P. 36(b). Such issues are reviewed under plain error analysis. *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010). Plain error relief is "limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *State v. Adkisson*, 899 S.W.2d 626, 642 (Tenn. Crim. App. 1994). In order to be granted relief under plain error, five criteria must be met: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Id*. at 640-41; *see also State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (Tennessee Supreme Court formally adopting the *Adkisson* standard for plain error relief). When it is clear from the record that at least one of the factors cannot be established, this court need not consider the remaining factors. *Smith*, 24 S.W.3d at 283. If any of these five criteria are not met, we will not grant relief, and complete consideration of all five factors is not necessary when it is clear from the record that at least one of the factors cannot be established. *Id.* at 283. The defendant bears the burden of persuasion to show that he is entitled to plain error relief. *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

Rule 404(b) of the Tennessee Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b); *see also State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005); *State v. Parton*, 694 S.W.2d 299, 302 (Tenn. 1985). Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when the evidence of the otherwise inadmissible conduct is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or a common scheme or plan. *State v. Toliver*, 117 S.W.3d 216, 230 (Tenn. 2003); *State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003).

In this case, Defendant has not shown that he is entitled to plain error relief. The Defendant correctly notes that the Tennessee Supreme Court has long refused to recognize a "sex crimes exception" to the prohibition imposed by Rule 404(b). *State v. Rickman*, 876 S.W.2d 824, 827-29 (Tenn. 1994) (citing *State v. Burchfield*, 664 S.W.2d 284, 287 (Tenn. 1984)). However, this court has held that evidence of a defendant's "grooming of a victim" is admissible, including evidence of "bad acts committed during or in preparation for the charged offense." *See, e.g., State v. Wallace*, No. W2018-01649-CCA-R3-CD, 2020 WL 768731, at *7 (Tenn. Crim. App. Feb. 14, 2020) (explaining that "the concept of 'grooming' is one that has been recognized by the courts of this state as well as other jurisdictions and is properly admitted through evidence of a defendant's bad acts to gain favor or gain access to a victim"), *perm. app. denied* (Tenn. June 5, 2020); *State v. Pottebaum*, No. M2007-02108-CCA-R3-CD, 2008 WL 5397848, at *9-10 (Tenn. Crim. App. Dec. 30, 2008), *perm. app. denied* (Tenn. June 1, 2009). Some of the evidence testified to by the victim falls into this category.

Further, as previously discussed, this general prohibition against the inadmissibility of unindicted criminal behavior in 404(b) has been relaxed in the sex crimes context, specifically in cases where the defendant is alleged to have committed sexual offenses over a lengthy period of time against young children who are often unable to identify the dates on which particular acts were perpetrated. *Qualls*, 482 S.W.3d at 9. Therefore, "where the indictment charges that sex crimes occurred over a span of time," rather than on specific dates, the "evidence of unlawful sexual contact between the defendant and the victim allegedly occurring during the time charged in the indictment is admissible." *Rickman*, 876 S.W.2d at 828 (citations omitted). The State can then elect offenses or the trial court can provide the jury a modified unanimity instruction, which it did in this case. We conclude Defendant has not shown that a clear and unequivocal rule of law was breached or that consideration of this issue is necessary to do substantial justice. *State v. Minor*, 546 S.W.3d 59, 67 (Tenn. 2018); *Adkisson*, 899 S.W.2d at 641-42. As previously stated, if any

one of the plain error criteria are not met, we will not grant relief, and complete consideration of all five factors is not necessary when it is clear from the record that at least one of the factors cannot be established. *Smith*, 24 S.W.3d at 283. As such, the Defendant is not entitled to relief.

In further support for our holding, the Defendant pcannot show that he did not fail to object to this evidence as part of a trial strategy. The Defendant's trial strategy included making the victim's story seem implausible because of the numerous times she said these events occurred, "almost every day," and the fact that she did not disclose it at the time or that the two never got caught. Accordingly, he is not entitled to plain error relief on this issue.

E. Sufficiency of Evidence

The Defendant contends that the evidence is insufficient to sustain his convictions. In his brief, the Defendant reiterates his argument about the failure of the State to make a proper election of offenses. He contends that the State "received the benefit of the modified unanimity instruction without the election requirement." He contends that our review is "frustrated" by the State's use of conduct that was "time-barred" and uncharged conduct. The State counters that the victim's testimony about the daily sexual abuse for many years, including both oral and vaginal penetration, was sufficient for a rational jury to find the Defendant guilty as charged.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*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); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999) (citing *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990)). In the absence of direct evidence, a criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973). "The jury decides the weight to be given to circumstantial evidence, and '[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.'" *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (quoting *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958)). "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 *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

In determining the sufficiency of the evidence, this Court should not re-weigh or reevaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999) (citing *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956)). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland,* 958 S.W.2d 651, 659 (Tenn. 1997). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523, 527 (Tenn. 1963)). This Court must afford the State of Tennessee the "'strongest legitimate view of the evidence'" contained in the record, as well as "'all reasonable and legitimate inferences'" that may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (quoting *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000) (citations omitted).

The Defendant was charged with and convicted of rape of a child. "Rape of a child is the unlawful sexual penetration of a victim by the defendant . . . if the victim is more than three (3) years of age but less than thirteen (13) years of age." T.C.A. § 39-13-522(a). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, 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).

At trial, the victim testified that the abuse started on July 4, 2001, when the Defendant inappropriately touched her. About a month later, he began to sexually abuse

her daily, by penial/vaginal penetration and by committing oral sex on her and having her commit oral sex on him. The victim's testimony alone is sufficient to support the Defendant's convictions. *State v. Elkins*, 102 S.W.3d 578, 582-83 (Tenn. 2003) (stating a child victim's testimony regarding sexual contact can be sufficient to support a defendant's conviction). That said, the victim's mother did offer some corroboration of the victim's testimony. Moreover, questions regarding the victim's credibility and the weight and value to be given her testimony are to be determined by the trier of fact and not this Court. *State v. Bland*, 958 S.W.2d 659, 659 (Tenn. 1997). Through its finding of guilt, the jury accredited the testimony of the victim and rejected that of the Defendant, and we will not disturb that finding on appeal. *Id.* The Defendant is not entitled to relief on this issue.

F. Cumulative Effect of Error

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." *Hester*, 324 S.W.3d at 76. Circumstances which would warrant reversal of a conviction under the cumulative error doctrine "remain rare" and require that there has "been more than one actual error committed in the trial proceedings." *Id.* at 76-77. Because we have found no error in this case, the cumulative error doctrine is inapplicable. The Defendant is not entitled to relief on this issue.

III. Conclusion

For the foregoing reasons, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE