IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

FILED

December 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. W1998-01767-CCA-R3-CD**
	)	
Appellee,	)	
	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. WHIT LAFON,**
JOHN D. COOKE, III,	)	**JUDGE**
	)	
Appellant.	)	**(Aggravated Sexual Battery)**

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF MADISON COUNTY

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OPINION FILED ________________________

AFFIRMED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, John D. Cooke, III, was convicted by a Madison County jury of aggravated sexual battery, assault, contributing to the delinquency of a minor, and unlawful possession of a firearm. He was sentenced to nine years for aggravated sexual battery, six months for assault, eleven months twenty-nine days for contributing to the delinquency of a minor, and thirty days for unlawful possession of a firearm, all to be served concurrently. In this appeal as of right, the Defendant presents the following seven issues for review:

> I. Did the trial court err in instructing the jury regarding the State's election of which incident of aggravated sexual battery upon which they were proceeding?
>
> II. Did the trial court improperly instruct the jury as to the different offenses for which he was charged, specifically with respect to any lesser included offenses?
>
> III. Did the trial court err by denying the Appellant's motions to have the victim psychologically evaluated or to secure the attendance of out-of-state witnesses?
>
> IV. Was the evidence insufficient to convict the Appellant of aggravated sexual battery, provocative touching assault, contributing to the delinquency of a minor, and unlawful possession of a firearm?
>
> V. Did the trial court err by permitting the State to introduce evidence of other alleged acts as to this victim in violation of Rule 404(b) of the Tennessee Rules of Evidence?
>
> VI. Was the sentence excessive in view of the State's failure to establish any enhancement factors such that the minimum sentence should have been applied?
>
> VII. Was the Appellant deprived of a fair trial by virtue of the trial court's limitation of the cross-examination of Roger Curry?

After reviewing the record, we find no reversible error and thus affirm the judgment and sentence of the trial court.

Evidence at trial showed that on February 22, 1995, the Defendant was present with the eleven-year old victim, M.J., in the United States District Courtroom in Jackson Tennessee, observing the criminal trial of Robert Smith,

the Defendant's former employer. Mr. Smith had terminated the Defendant's employment, and the Defendant had filed a lawsuit against Mr. Smith as a result. The criminal trial had begun the day before, and the Defendant and M.J. were present on that date as well. Deputy U.S. Marshall Richard Bateman noticed the two the previous day because they were the only spectators, and on occasions they would be sitting very close together with the Defendant's arm around the child and the child's head on the Defendant's shoulder. Bateman thought their behavior was "kind of weird," but assumed the two were related. The behavior continued the next day.

On February 22, the second day of the trial, Mr. Smith's attorney, Ed Chandler, approached Bateman, told him that there "was a love affair going on back in the courtroom," and referred to the Defendant as a "pedophile." Bateman then discussed the situation with Roger Curry, an FBI Agent who was in the courtroom, and the two of them talked to Judge James D. Todd, the U.S. District Judge presiding over the criminal case. Agent Curry called the Jackson Police Department, which sent two officers out to investigate. After the officers observed the occurrences in the courtroom for a few minutes, Bateman escorted the Defendant out of the courtroom, and he was questioned by the police. At trial, Bateman described the conduct between the Defendant and M.J. as "unnatural."

Judge Todd testified that he noticed a man and a boy in the courtroom during the criminal trial, but had not paid much attention to them because he was concentrating on the trial. After Agent Curry brought the matter to his attention, he told Curry to call the local police, then went back into the courtroom to observe. He saw a man and a boy sitting side by side, with the man's arm around the boy and the boy snuggling up to the man. Having learned that the man and boy were not related, Judge Todd concluded that the behavior was "inappropriate."

Agent Curry testified that after Bateman brought the matter to his attention, he observed the Defendant and the boy. He described the events as follows:

> The young boy was on his knees, and Mr. Cooke - - this is kind of hard to describe - - he was nuzzling him in the neck area, and he appeared to be kissing him. That's what the impression was that I got when I looked at him. The young boy was giggling - - laughing, and so was Mr. Cooke. This was very - - I have been a State Trooper many years and an Agent for a good number of years, and this was very inappropriate in any courtroom, and particularly while a trial was in session.

After he observed these things, he and Bateman approached Judge Todd regarding the matter, then he subsequently called the police.

Donna Turner and Doris Jackson were the two police investigators who responded to the call by Agent Curry. Bateman asked them to look into the courtroom to see if they saw anything. Investigator Turner described what she observed:

> The man had his arm kind of around the younger boy. And the younger boy was turned towards the man, and he was kind of playing with the hair - - they were kind of looking at each other - - eye to eye and kind of playing with the hair. The boy was playing with the hair of the man, and the man was doing the same thing on the other side - - you know - - with his hair. They looked like they were - - there may have been some conversation there.
> . . .
> I stood there and watched a few minutes because I had not been told what to look for, so it took me a few minutes to scan up front. I came back and I looked. I really didn't believe what I was seeing, so - - I didn't want to see it. So I kept looking again, and I saw it. It was not a constant thing. When I first went up there, it was just the man with the arm around the boy, and he was - - they were just kind of sitting close to each other. The adult was looking towards the front of the Court. Didn't ever look at each other, and then the boy turned around and they kind of looked at each other - - embraced themselves towards each other and then that's when the hair and stuff - - and I had seen enough. I asked him to escort them out.

After Marshall Bateman escorted the Defendant and M.J. out of the courtroom, they were separated while Investigator Turner questioned the Defendant and Investigator Jackson questioned M.J. The Defendant was not under arrest, and he voluntarily talked to Turner. He said that he knew M.J. through an affiliation with a church in Chattanooga, where he was Youth Director,

and that he was in Jackson observing a court hearing. He stated that he had permission from M.J.'s mother and from M.J.'s school to have the child at the hearing and that the child was getting some type of credit for attending a judicial hearing. The Defendant and M.J. were staying together in a motel in Jackson during the trial, and they had been in Jackson for two nights. The first motel did not work out, so they moved to a different one the second night.

Turner asked the Defendant for some of M.J.'s clothing because they were turning M.J. over to the Department of Human Services, then she escorted the Defendant to his vehicle for him to get the clothing and some identification. The Defendant produced his driver's license, which was in the front of a Ford Explorer, then went to the back of the Explorer to get the clothing. He started pulling clothing out of several different bags in the back. He opened up one bag, and Turner saw the butt of a gun in the bag. Before Turner could respond, the Defendant said, "Hey, I've got a gun in this bag." Turner asked him to step away, which he did, then she retrieved the gun from the bag. The gun was a semiautomatic pistol, which was loaded. The Defendant admitted the gun was his and stated that he did not have a permit to carry it. Turner then asked him if he would come down to the police station while she checked to make sure the gun was not stolen, and he agreed. Instead of going to the police station, the Defendant called his attorney in Chattanooga, who subsequently called Turner and told her that he had advised his client not to go to the station. Turner put out a bulletin for the Defendant, and he was located and arrested for the unlawful possession of a weapon.

When Investigator Jackson interviewed M.J. at the courthouse, he denied that the Defendant had done anything to him which made him feel uncomfortable. When she interviewed him again twelve or thirteen hours later, he again denied that anything inappropriate had occurred. At trial, however, M.J. testified differently. He said that he met the Defendant at church, where the Defendant

was the Youth Director. At first, M.J. participated in activities at church with other children and the Defendant, then he started doing things with the Defendant alone. They once watched a man hang gliding, they went flying, and M.J. sometimes spent the night at the Defendant's house. The Defendant bought him a knife once and had given him money. M.J. testified that he trusted the Defendant "pretty well," but his trust changed because of things the Defendant did.

When they arrived in Jackson, the Defendant checked into a motel room which had only one bed. M.J. was going to sleep in the chair, but the Defendant kept asking him to come over to the bed. He finally got into the bed with the Defendant, then the Defendant began rubbing his penis through his underwear. M.J. ejaculated a little bit into his underwear, which the Defendant rinsed out in the sink the next morning. The following night, M.J. got into bed with the Defendant because he knew the Defendant would not let him sleep in the chair. The Defendant then began masturbating M.J. and himself at the same time. He masturbated M.J. by holding M.J.'s penis in his hand and moving his hand up and down.

During the criminal trial of Smith, the Defendant had M.J. sitting very close to him, and he had his arm around M.J. M.J. said that the Defendant kept leaning over and "messing with" his ear and his hair. Then, they were taken out of the courtroom and questioned by police officers. M.J. did not tell the police officer what happened because he was ashamed and because he thought he was going to have to ride back home with the Defendant.

At trial, M.J. was questioned about his background. He testified that when he was a little boy, he believed he had dead Presidents speaking to him, though it was just his imagination. As a result of some of his problems, he was sent to a psychiatric hospital. He was in a program called Northwest Georgia

Educational Program for a period of time, and was taking Imipramine. On several occasions, he was expelled from his middle school. His biological father exposed him to pornography and physically abused him. He had sniffed paint and gasoline, but said that he was not currently taking any drugs and his brain was not impaired in any way.

The Defendant testified in his own behalf and denied that anything inappropriate occurred between himself and M.J. He gave the following version of the events leading to his arrest. He said that he met M.J. through a church affiliation and that M.J.'s mother had requested his help dealing with her unruly son. He had permission from M.J.'s mother to take him to the hearing in Jackson, and they checked into the EconoLodge because it was the first place he found off the interstate and they were both very tired. It was a little after midnight when they checked into the motel. The room had only one bed, so the Defendant slept in the bed and M.J. slept in the chair. The next morning they awoke and went to the trial. M.J. was "fairly unruly" in the courtroom, so the Defendant had to make efforts to have M.J. sit still and be attentive.

After the trial the first day, the Defendant went to another motel to get a room with two beds. He and M.J. went out to dinner, then returned to the motel room to sleep. The next morning they got up and went back to the trial. That day was uneventful until Marshall Bateman came and escorted the Defendant out of the room. The Defendant was questioned about his relationship with the child, so he explained who they were and why they were there. He went with Investigator Turner to his Ford Explorer to get his identification and clothing for the child. He had a gun that he used for target practice in one of the bags, about which he had forgotten. Once he noticed it, the Defendant backed away from it and said that he had a weapon. Turner secured the weapon and asked the Defendant to drive to the police station. The Defendant agreed. He drove to the station, then stopped and called his attorney. While he was in the parking lot at

the station, a police officer approached his vehicle and told him to come inside. At some point, he was arrested. Once he got out of jail, he sent Turner information showing that he owned the gun.

The Defendant called Tom White, M.J.'s stepfather, as a witness for the defense. Mr. White denied that he and M.J.'s mother took actions to frame the Defendant for the crimes with which he was charged. However, he admitted that he called the Defendant's mother on numerous occasions and told her that he and M.J.'s mother had worked to frame the Defendant. He said he did this because he had just gotten out of jail for assaulting his wife, and he was angry with her because of that. He stated that he had made a similar statement to the Defendant's civil lawyer's investigator, which was also false and claimed that this statement was made out of vindictiveness as well.

I. JURY INSTRUCTIONS ON ELECTION OF OFFENSE

When a victim testifies about multiple instances of unlawful sexual conduct, it is "the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense." Burlison v. State, 501 S.W.2d 801, 804 (Tenn. 1973); see also Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); State v. Shelton, 851 S.W.2d 134, 136-37 (Tenn. 1983). This election ensures that the jury's verdict is unanimous, instead of a "patchwork verdict" based on different offenses in evidence. Shelton, 851 S.W.2d at 137 (citing State v. Brown, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991), and United States v. Duncan, 850 F.2d 1104, 1110 (6th Cir. 1988)). While the particular offense of unlawful sexual conduct must be identified, the particular date of the offense is not required, so long as the description will adequately identify the prosecuted offense. Shelton, 851 S.W.2d at 137-38.

M.J. testified that the Defendant touched his penis on two separate occasions, so at the close of the proof the State elected to "go with the date on the indictment which would be the second night." The indictment alleges that

> John D. Cooke, III, on or about February 21, 1995, in Madison County, Tennessee, and before the finding of this indictment, did unlawfully, intentionally, knowingly and/or recklessly engage in sexual contact as defined in T.C.A. § 39-13-501 with [M.J.], a person less than thirteen (13) years of age, in violation of T.C.A. § 39-13-504, all of which is against the peace and dignity of the State of Tennessee.

While the indictment identifies the date of the offense as February 21, 1995, that date could refer to either the first or second instance of sexual contact because the Defendant and M.J. did not check into the motel on the first night until after midnight. This means the contact on the first night took place in the early morning hours of February 21, and the contact on the second night took place during either the evening of February 21 or the early morning hours of February 22.

When instructing on this offense, the trial court stated,

> The indictment alleges that this offense occurred on February the 21st. You have heard the testimony that two incidents allegedly occurred which may be sexual battery. The State has proceeded to - - has elected to proceed on the incident alleged on February the 21st. Your verdict must be unanimous as to this incident. This incident - - this incident is the one referred to as happening on the second night.

The court's last statement, "this incident is the one referred to as happening on the second night," was written into the instructions in the judge's handwriting and submitted to the jury with the typewritten jury instructions.

Tennessee Rule of Criminal Procedure 30(c) provides, "every word of the judge's instructions shall be reduced to writing before being given to the jury." While it is error for a trial judge to fail to submit "every word" of the charge to the jury, that error will not require reversal unless it more probably than not affected the judgment. State v. Gorman, 628 S.W.2d 739 (Tenn. 1982); Tenn. R. App. P.

36(b). It is not error for part of the charge to be handwritten while the remainder is typewritten. State v. Tyson, 603 S.W.2d 748, 754-55 (Tenn. Crim. App. 1980).

Recognizing that it is not error for part of the charge to be handwritten, the Defendant argues that the charge given by the trial court was reversible error because the handwritten part was illegible. He asserts that the word "second" is particularly illegible and that this word is the most critical because it refers to the specific offense elected by the State.

While the handwritten portion of the jury charge could have been more legible, it does not rise to the level of reversible error. During the oral jury instructions, the trial court clearly instructed the jury that the State elected the incident "referred to as happening on the second night." This instruction adequately identified the particular offense because M.J. testified about two different offenses occurring the first and second nights of his stay in Jackson. In the handwritten portion of the jury charge, the first three letters of the word "second" are visible, but the remaining letters are not apparent. However, the word could not have been mistaken for "first," and the jury could not have been confused about which offense the State elected to prosecute. Because the oral jury charge correctly informed the jury of the particular offense, and because the written charge could not have been misinterpreted as referring to the "first" incident, the partially illegible charge did not affect the verdict. Therefore, the illegible charge is not reversible error.

II. JURY INSTRUCTION ON OFFENSES

The Defendant argues that the trial court erred by failing to instruct the jury as to its responsibilities with respect to the different charges, specifically that the charges were four separate charges and that the jury was to deliberate each count separately. He also argues that the trial court erred by failing to instruct the jury on assault as a lesser included offense of aggravated sexual battery. The

Defendant did not, however, object to the jury instructions at the time of trial, and the only issues raised in his motion for a new trial with respect to jury instructions were the State's election of offenses and the applicable range of punishment.

Failure to make a contemporaneous objection waives consideration by this Court of the issue on appeal. See Tenn. R. App. P. 36(a); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). Similarly, Tennessee Rule of Appellate Procedure 3(e) provides "that in all cases tried by a jury, no issue presented for review shall be predicated upon error in . . . jury instructions granted or refused . . . or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived." See also State v. Caughron, 855 S.W.2d 526, 538 (Tenn. 1993). Because the Defendant did not contemporaneously object to the jury instructions or raise these issues in his motion for a new trial, the issues are waived.

Even so, this Court is of the opinion that any error in the jury instructions was harmless. The indictment charged the Defendant with four separate crimes in four separate counts, which counts identified the specific crime by date and description, and the trial court gave the jury definitions of all four crimes. This was sufficient for the jury to treat each offense separately and deliberate on each offense separately.

We also conclude that the trial judge did not err by refusing to instruct the jury on assault. In support of his argument that assault should have been charged as a lesser included offense of aggravated sexual battery, the Defendant relies primarily upon State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996), in which this Court held that assault was a lesser included offense of aggravated sexual battery and that the trial court erred in failing to instruct on the lesser offense of assault. Id. at 585. Howard is one of a number of

Tennessee cases which have held that assaultive offenses are lesser included offenses of various sexual offenses. See generally State v. Tina Swindle, No. 01C01-9805-CR-00202, 1999 WL 254408, at *2 (Tenn. Crim. App., Nashville, Apr. 30, 1999) (discussing other cases addressing this issue).

We believe, however, that these earlier decisions of our appellate courts have been implicitly overruled by our supreme court in cases such as State v. Cleveland, 959 S.W.2d 548 (Tenn. 1998). In Cleveland, the court analyzed in the abstract the respective statutory elements of aggravated assault and aggravated rape to determine that the latter is not a lesser included offense of the former. Cleveland, 959 S.W.2d at 553. In response to Cleveland, this court has held that assault is neither a lesser grade nor a lesser included offense of sexual battery. State v. Edward L, Davis, No. 02C01-9712-CC-00480, 1999 WL 147951 at *5 (Tenn. Crim. App., Jackson, Mar. 19, 1999). Just as this court concluded in State v. Tina Swindle, 1999 WL 254408, we also find that assault is not a lesser included offense of aggravated sexual battery. Therefore, we conclude that the failure of the trial court to instruct the jury on assault was not error. This issue has no merit.

III. DENIAL OF MOTIONS TO ORDER PSYCHOLOGICAL EVALUATION AND TO SECURE ATTENDANCE OF OUT-OF-STATE WITNESSES

The Defendant argues that the trial court erred in refusing to order M.J. to undergo a psychological examination and in refusing to compel the attendance of M.J.'s teachers who resided in Georgia. He asserts that the teachers could testify about M.J.'s prior acts of unruly and deviant behavior. We find no error in this refusal.

While our supreme court has held that trial judges have the inherent power to compel a psychiatric or psychological examination of a sex abuse victim, it has also stated that "[s]uch power should be invoked only for the most compelling of

reasons, all of which must be documented in the record. This discretion should be exercised sparingly." Forbes v. State, 559 S.W.2d 318, 321 (Tenn. 1977). "Compelling reasons" include situations "such as where substantial doubt is cast upon the victim's sanity, or where there is a record of prior mental disorders or sexual fantasies, or where the story is incredible, and even in these situations, only if there is little or no corroboration to support the charge." State v. Ballard, 714 S.W.2d 284, 287 (Tenn. Crim. App. 1986); see also State v. Campbell, 904 S.W.2d 608, 612-13 (Tenn. Crim. App. 1995).

The Defendant asserts that compelling reasons existed for the testing because there was evidence of prior hallucinations and separations from reality and because M.J.'s testimony on the instances of sexual battery was uncorroborated. The Defendant wanted the evaluation to use in casting doubt upon M.J.'s credibility. He presented three psychological reports to the trial court in order to convince the judge to order another one. One report, prepared in August, 1994 by Dr. William Hillner, a clinical psychologist with Affiliated Psychological Services, Inc. in Chattanooga, reported that M.J. suffered from auditory hallucinations in that voices of past presidents told him what to do when he was in trouble. It also reported that M.J. suffered from behavioral problems, that he exhibited signs of anxiety and depression, and that he had suffered emotional and physical abuse from his natural father. Another report, prepared by the Northwest Georgia Education Program in September, 1993, also reported auditory hallucinations involving past presidents, depression, and problems with authority figures. The final evaluation, prepared in February, 1992, by the Calhoun City Schools in Calhoun Georgia, reported that M.J. is of average intelligence with academic and behavioral difficulties.

We believe that these reports do not show "compelling reasons" to order yet another evaluation. Granted, M.J.'s testimony as to the instances of aggravated sexual battery is not corroborated, but M.J.'s story is not incredible,

there was no evidence of prior sexual fantasies or mental disorders, other than the auditory hallucinations, and there was no evidence casting substantial doubt as to M.J.'s sanity. Based on this information, we cannot say that the trial judge abused his discretion in denying the motion for psychological testing. However, even if the denial was an abuse of discretion, the Defendant has made no showing of how he was prejudiced by that denial. He had the opportunity, and took advantage of it, to question M.J.'s credibility by asking him about the hallucinations, behavioral problems, physical abuse, and prior drug abuse, all of which M.J. admitted. This was precisely the type of information the Defendant indicated he wanted from the psychological report, and it was properly admitted through M.J.'s testimony. Therefore, the Defendant has made no showing of prejudice, and this issue is without merit.

The Defendant also asserts that the trial judge erred by refusing to compel the attendance of several out-of-state witnesses. The Defendant wanted to subpoena witnesses from Georgia, whom he argues would have been in a position to corroborate the victim's behavioral disorders. The Defendant has not, however, shown how these witnesses would be material witnesses, which is required before a witness from another state can be compelled to come to this state to testify. Tenn. Code Ann. § 40-17-201 to -212; State v. Workman, 667 S.W.2d 44, 49 (Tenn. 1984). He admits that the witnesses would be unable to testify about the occurrences in Jackson, Tennessee, but argues that they are material witnesses because they are familiar with M.J.'s behavior. Though they may be familiar with M.J.'s behavior, the Defendant did not offer any evidence of what the witnesses' testimony would be or how it would be material to an issue before the court because the witnesses would not talk to him without a court order. Without more information, neither the trial court nor this Court could determine whether the witnesses' testimony would even be relevant, much less material; thus it was not error to deny the motion to compel their attendance.

IV. SUFFICIENCY OF THE EVIDENCE

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

Upon review of the evidence in this case, we find that the evidence is sufficient to support the Defendant's convictions as to each count of the indictment. In count one of the indictment, the Defendant was charged with aggravated sexual battery. The State elected to proceed on the incident occurring the second night of the Defendant's stay in Jackson. M.J. testified that

on the second night in Jackson, the Defendant masturbated M.J. and himself at the same time, while the Defendant denied that this occurred. Aggravated sexual battery is the unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of four different circumstances, with the relevant circumstance here being the victim is less than thirteen years of age. Tenn. Code Ann. § 39-13-504. Sexual contact is defined as "the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6). Based on the testimony of the victim, who was eleven years old at the time of the offense, a rational trier of fact could easily find the elements of aggravated sexual battery beyond a reasonable doubt.

In count two of the indictment, the Defendant was charged with assault, in that he unlawfully, intentionally, and knowingly caused physical contact with M.J. in an extremely offensive or provocative manner, in violation of Tenn. Code Ann. § 39-13-101. This incident was alleged to have occurred on February 22, 1995, which is the date the Defendant was removed from the federal courtroom with M.J. The only element of assault applicable to this case is the intentional or knowing physical contact with another which a reasonable person would regard as extremely offensive or provocative. Tenn. Code Ann. § 39-13-101. Here, four different witnesses testified about the Defendant's conduct with M.J. in the courtroom, describing it as "unnatural" and "inappropriate." They each testified that the Defendant was sitting close to M.J. with his arm around the child. One said that the Defendant was nuzzling M.J.'s neck and that it looked like he was kissing the child. Another testified that the Defendant and the child were playing with each other's hair. Obviously, physical contact took place in the courtroom,

and a reasonable person could conclude that the contact was offensive or provocative; thus the evidence was sufficient to sustain the conviction for assault.

Count three of the indictment alleges that the Defendant "on or about February 22, 1995, in Madison County, Tennessee, and prior to the finding of this indictment, did unlawfully, willfully, intentionally, knowingly, and/or recklessly contribute to or encourage the delinquency or unruly behavior of a minor . . ., [M.J.], a child under eighteen (18) years of age, by engaging in sexual contact and/or penetration with the said [M.J.]." Tennessee Code Annotated § 37-1-156 makes it a crime for any adult to contribute to or encourage the delinquency or unruly behavior of a child, "whether by aiding or abetting or encouraging the child in the commission of an act of delinquency or unruly conduct or by participating as a principal with the child in an act of delinquency." Since the statute is aimed at the behavior of the adult, the minor does not actually have to commit an act of delinquency for the adult to contribute to the minor's delinquency. See Lovvorn v. State, 389 S.W.2d 252, 253-56 (Tenn. 1965); Birdsell v. State, 330 S.W.2d 1, 4-6 (Tenn. 1959). Convictions for contributing to the delinquency of a minor involving much less sexual contact than is present here have been upheld as sufficient. See Birdsell, 330 S.W.2d at 4-5 (upholding conviction of contributing where Defendant took pictures of a nude minor); Lang v. State, 457 S.W.2d 882, 884 (Tenn. Crim. App. 1970) (upholding conviction of contributing where Defendant showed minor comic books depicting males and females engaged in various forms of intercourse and sexual activity). Similarly, a rational jury could conclude that this Defendant contributed to the delinquency of M.J. by engaging in sexual contact with M.J.. Thus, the evidence is sufficient to support the conviction.

The Defendant points out, and the State admits, that no sexual contact took place on February 22, 1995, which is the date the Defendant and M.J. were in the courtroom. The conduct occurring on February 22, 1995 was conduct

supporting an assault conviction, while the conduct occurring on February 21, 1995 was sexual conduct supporting a contributing to the delinquency of a minor conviction. Therefore, there is a variance in the date of the offense alleged in the indictment and the proof presented at trial. However, a variance in the date of the commission of the offense and the date charged in the indictment is not material so long as the proof establishes that the offense occurred prior to the finding and returning of the indictment, the defendant is sufficiently informed of the charges against him so that he can adequately prepare for trial, and the defendant is protected against a subsequent prosecution for the same offense. See State v. Mayes, 854 S.W.2d 638, 640 (Tenn. 1993); State v. Chance, 778 S.W.2d 457, 462 (Tenn. Crim. App. 1989); State v. Hardin, 691 S.W.2d 578, 580 (Tenn. Crim. App. 1985). The indictment itself alleges that the conduct took place before the finding and returning of the indictment, and it identifies the conduct supporting the charge as sexual contact and/or penetration with M.J. This was sufficient information for the Defendant to prepare his defense, and it sufficiently identified the crime so that the Defendant will be protected against a subsequent prosecution for the same offense. Therefore, the variance is not material and does not require reversal.

Lastly, the Defendant was charged in count four of the indictment with the unlawful carrying of a weapon. This offense only requires that a person carry a firearm with the intent to go armed. Tenn. Code Ann. § 39-17-1307(a)(1). The evidence showed that the Defendant had a loaded semiautomatic pistol in a bag in his vehicle. He told Investigator Turner that he had the weapon, that it was his gun, and that he did not have a permit to carry it. This was sufficient evidence to find beyond a reasonable doubt that the Defendant was carrying the weapon with the intent to go armed.

V. EVIDENCE OF PRIOR BAD ACTS

The Defendant complains that the trial court improperly admitted testimony of other crimes, wrongs, or acts in violation of Tennessee Rule of Evidence 404(b). That rule 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.

Tenn. R. Evid. 404(b).

"Other purposes" includes proving identity, proving intent, and rebutting a claim of mistake or accident if asserted as a defense. State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996).

The evidence at issue was testimony by M.J. that he participated in church activities with the Defendant, that he stayed the night at the Defendant's house, that the Defendant took him to watch a person hang gliding, and that the Defendant bought him gifts. This is not the type of evidence prohibited by Rule 404(b). It is not evidence of any crimes or wrongdoings. If used to show action in conformity with a character trait, it would simply show that the Defendant did nice things for M.J., not that the Defendant committed sexual battery on M.J. Because this evidence could not have been excluded under Rule 404(b), it was not error for the trial court to admit it.

VI. EXCESSIVE SENTENCE

The Defendant argues that the trial court erred in sentencing him to nine years for the aggravated sexual battery conviction because the State failed to prove the existence of any enhancement factors. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant

facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). When the record does not show that the trial court considered the sentencing principles and all relevant facts and circumstances, this Court must review the case de novo with no presumption of correctness. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

The presumptive sentence is the minimum sentence in the range. Tenn. Code Ann. § 40-35-210(c). Procedurally, the court is to increase the sentence within the range based upon the enhancement factors, then reduce the sentence as required by the mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight to be given any existing factor is a matter of discretion, so long as it complies with the purposes and principles of sentencing and the court's findings are adequately supported by the record. State v. Williams, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

The Defendant was convicted of aggravated sexual battery, which is a class B felony. Tenn. Code Ann. § 39-13-504(b). A class B felony has a sentence range for a standard offender of eight to twelve years. Tenn. Code Ann. § 40-15-112(a)(2).

Several witnesses testified at the sentencing hearing as to the Defendant's good reputation in the communities of Chattanooga and Signal Mountain, Tennessee. The Reverend of the First Assembly of God testified that the Defendant was a good, honest, and reliable member of the church who has helped many people in the church. The Defendant did not make a statement at the sentencing hearing.

The presentence report reflects no prior felony convictions, but does reflect two convictions of driving under the influence: one on January 20, 1992 and another on December 6, 1995. The Defendant was arrested for public drunkenness and driving on a revoked license on September 29, 1996. He reported that he was declared delinquent for malicious mischief as a juvenile when he was fourteen or fifteen years old. He has charges pending against him in Georgia for alleged offenses that occurred with the same victim while in Georgia, but no specific information is known about those charges. The Defendant graduated from college in 1988 and is a licensed pilot. He was a self-employed pilot in Chattanooga from 1992 until his incarceration. He reported no alcohol or drug problems, but did report numerous, long-term, physical problems, specifically with his liver. He is 32 years old (as of June 17, 1998), single, has never married, and has no dependants. His parents live in Signal Mountain, Tennessee. He has two sisters. One is a psychologist who lives in Knoxville, Tennessee, and the other is a hospital clerk who lives in Dalton, Georgia.

At the sentencing hearing, the State argued that two enhancement factors applied: (1) that the victim was particularly vulnerable because of age or physical or mental disability; and (2) that the Defendant abused a position of public trust or used a special skill in a manner that specifically facilitated the commission or the fulfillment of the offense. See Tenn. Code Ann. § 40-35-114(4), (15). The Defendant denied the existence of any enhancement factors and argued that the trial court should consider as mitigating factors that the Defendant's conduct

neither caused nor threatened serious bodily injury, that the Defendant did not have a prior felony record, that the Defendant received the highest commendation he could in the Junior ROTC program, and that the Defendant had a good reputation. Without stating any facts or reasons supporting its decision or mentioning any mitigating factors, the trial court found that the victim was particularly vulnerable and sentenced the Defendant to nine years incarceration.

Because the trial court failed to state any findings of fact or reasoning for its sentence determination in the record, we will review the sentence de novo without any presumption of correctness. See Poole, 945 S.W.2d at 96. The Defendant contends that the trial court erroneously enhanced his sentence based on a finding that the victim was particularly vulnerable. We agree. Tennessee Code Annotated § 40-35-114(4) provides that it is an enhancement factor if the "victim of the offense was particularly vulnerable because of age or physical or mental disability." Though this factor may be used to enhance a sentence for aggravated sexual battery when the victim's age is an element of the offense, the State must prove that "a victim's natural physical and mental limitations renders [sic] the victim particularly vulnerable for his or her age because of an inability to resist, a difficulty in calling for help, or a difficulty in testifying against the perpetrator." State v. Kissinger, 922 S.W.2d 482, 487 (Tenn. 1996); see also Poole, 945 S.W.2d at 96-97; State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). While there was evidence that the victim had a history of emotional and behavioral problems, had been physically abused by his natural father, had auditory hallucinations, and had spent time in a psychiatric hospital, the State did not show how these things made the victim "particularly vulnerable" to the Defendant. Specifically, there was no showing that these problems resulted in an inability to resist the Defendant, difficulty in calling for help, or difficulty testifying against the Defendant. Thus, we find that the trial court improperly found the victim to be particularly vulnerable.

While we find that the trial court improperly found the existence of one enhancement factor, we are authorized in conducting our de novo review to consider any enhancement or mitigating factors supported by the record. Adams, 864 S.W.2d at 34. Upon review of the record, we find the existence of statutory factor (15): "The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense." Tenn. Code Ann. § 40-35-114(15). In determining whether a defendant occupied a position of trust, "the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith." Kissinger, 922 S.W.2d at 488. We find that the Defendant informally stood in a relationship to the victim that promoted confidence, reliability, and faith. The victim met the Defendant through church, where the Defendant was the youth director. The victim's mother requested the Defendant's help with her son, who had emotional and behavioral problems. The victim did things with the Defendant through the church with other children, and alone with just the Defendant. The Defendant acted as a surrogate father-figure, taking the child places, buying him things, and being nice to him. By committing the offense of aggravated sexual battery on the victim, the Defendant violated that relationship of trust. Thus, we find the Defendant's sentence could be enhanced due to a violation of private trust.

We also find that the Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1). The Defendant's two DUI convictions support the application of this factor.

Recognizing that the Defendant has no prior felony convictions and that he has a good reputation in his community and church, we find that those factors are outweighed by the enhancing factors present. Accordingly, we affirm the nine year sentence imposed by the trial court.

The State correctly points out in its brief that the judgment incorrectly identifies the Defendant as a 100% violent offender. The statute mandating that persons convicted of aggravated sexual battery serve 100% of their sentence is only applicable to offenses committed on or after July 1, 1995. Tenn. Code Ann. § 40-35-501(i). Since this offense occurred on or about February 21, 1995, the case must be remanded for correction of the judgment to reflect that the Defendant is a range I standard offender.

VII. LIMITATION OF CROSS-EXAMINATION OF ROGER CURRY

On direct examination, Roger Curry testified that he is an FBI agent who was present in the federal courtroom on February 22, 1995 and that Marshall Bateman brought the activity between the Defendant and M.J. to his attention. During cross-examination, Agent Curry denied that Ed Chandler, the defense attorney for Bob Smith, the Defendant's former employer who was on trial that day, originally brought the matter to his attention. But Curry admitted that he filed a report detailing this incident and that the report stated, "During the trial, Bob Smith in Federal Court, Defense Attorney, Ed Chandler, had pulled me aside during a trial break and pointed to John Cooke." He also acknowledged that his report revealed that Ed Chandler stated the Defendant was fired for pedophilia and now had a lawsuit pending against Mr. Smith. The Defendant then tried to introduce Agent Curry's written report into evidence as a prior inconsistent statement, but the trial court did not allow it. Now, the Defendant asserts that it was error not to allow the introduction of the report.

Tennessee Rule of Evidence 613(b) provides, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Our supreme court has further held that "extrinsic evidence remains inadmissible until the witness either denies or equivocates as

to having made the prior inconsistent statement." State v. Martin, 964 S.W.2d 564, 567 (Tenn. 1998). If a witness admits making the prior inconsistent statement, the extrinsic evidence would be both cumulative and consistent with a statement made by the witness at trial. Id. In this case, Agent Curry admitted making the statement in his report that Ed Chandler, Mr. Smith's defense attorney, brought the matter to his attention. Because he admitted making the statement, the actual report was inadmissible extrinsic evidence and was properly excluded.

Accordingly, the judgment of the trial court is affirmed. The case is remanded for correction of the judgment to reflect that the Defendant is a range I standard offender, rather than a 100% violent offender.

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DAVID H. WELLES, JUDGE

CONCUR:

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JERRY L. SMITH, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE