IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 4, 2023 Session

**STATE OF TENNESSEE v. HARRISON ALEXANDER MASON**

**Appeal from the Circuit Court for Fayette County**
**No. 20-CR-194 J. Weber McCraw, Judge**

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**No. W2021-01390-CCA-R3-CD**

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The Defendant, Harrison Alexander Mason, was convicted in the Fayette County Circuit Court of three counts of rape of a child, three counts of aggravated sexual battery, and one count of solicitation of a minor and received an effective sentence of fifty-seven years in confinement. On appeal, the Defendant contends that the trial court committed plain error by failing to exclude statements made by the victim during her forensic interviews pursuant to Tennessee Rule of Evidence 404(b); that the trial court committed plain error by giving a "vague" curative instruction and waiting until the final jury charge to give the instruction; and that the trial court's errors require reversal of the convictions under the cumulative error doctrine. Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Jessica F. Butler (on appeal), Assistant Public Defender - Appellate Division, Franklin, Tennessee; Shana Johnson (at motion for new trial hearing), Assistant District Public Defender, Somerville Tennessee; and Matthew Edwards and Kari Weber (at trial), Assistant District Public Defenders, Somerville, Tennessee, for the appellant, Harrison Alexander Mason.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Mark E. Davidson, District Attorney General; and Falen Chandler, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

## FACTS

In November 2020, the Fayette County Grand Jury indicted the Defendant for three counts of rape of a child, a Class A felony; three counts of aggravated sexual battery, a Class B felony; and one count of solicitation of a minor, a Class C felony. The indictment alleged that the Defendant committed the offenses between December 1, 2019, and March 1, 2020, against his daughter, who was eight years old at the time of the crimes. The Defendant went to trial in July 2021.

At trial, Monica Mason testified that she was the victim's grandmother and the Defendant's mother. She acknowledged that it was "pretty hard" to testify against the Defendant. At the time of trial, the Defendant was thirty-one years old and had two children: the victim, who was ten years old, and a son, H.M., who was eleven years old.[1] Ms. Mason said that she had had custody of the children since the victim was twenty-four-hours old and H.M. was three months old and that they lived with her and William Wright in Oakland, Tennessee. The Defendant would visit the children "whenever he had time" and would be alone with the victim at "[d]ifferent times," such as when Ms. Mason took H.M. to Taekwondo class. The Defendant spent the night at Ms. Mason's home sometimes and slept with the children. Ms. Mason said that she was not aware of any disagreements between the children and the Defendant and that the victim loved the Defendant.

Ms. Mason testified that about 11:00 p.m. on April 21, 2020, the victim woke her and told her about some events that had occurred. Ms. Mason said, "I just let her tell me what she needed to tell me and then I told her it would be okay and that we would take care of it and I'd protect her." The next morning, Ms. Mason and the victim went to the Fayette County Sheriff's Office ("FCSO") and spoke with Investigator Jacob Jenkins. The victim had a forensic physical examination at a rape crisis center and a forensic interview at the Carl Perkins Center. She also began counseling at the Carl Perkins Center. Ms. Mason acknowledged that during counseling, the victim disclosed another "event." As a result of the new disclosure, the victim had a second forensic interview at the Carl Perkins Center. Ms. Mason said that despite the allegations, the victim still loved the Defendant. Ms. Mason did not know of any reason the victim would make up the allegations.

On cross-examination, Ms. Mason testified that she did not remember the dates of the two forensic interviews at the Carl Perkins Center but that they "might have been some weeks" apart. The victim also received trauma-based therapy at the Carl Perkins Center. Between December 1, 2019, and March 1, 2020, Ms. Mason took H.M. to Taekwondo class two or three times per week.

[1] Because H.M. is a minor, we will refer to him by his initials to protect his identity.

The victim testified that she knew the difference between the truth and a lie and that she was born in March 2011. On May 4, 2020, when the victim was nine years old, she met with Sydni Turner at the Carl Perkins Center for a forensic interview. The victim acknowledged that she was scared and nervous during the interview. The State asked the victim if she told Ms. Turner the truth during the interview, and the victim answered, "Yes and no." The victim acknowledged that she left information out of the interview and, therefore, that she had to meet with Ms. Turner again in November 2020. The victim received therapy between the two forensic interviews. The victim told Ms. Turner the truth during the second interview, and no one told the victim what to say. The victim had no reason to make up the allegations against the Defendant.

On cross-examination, the victim testified that in addition to Ms. Turner, the victim talked with her grandmother and her counselor about the sexual abuse. At the time of trial, the victim was still meeting with her counselor "[s]ome of the time." On redirect examination, the victim acknowledged that she also talked with her brother about the abuse.

Sydni Turner testified that she was a forensic interviewer at the Carl Perkins Center and that she interviewed the victim on May 4 and November 5, 2020. The second interview was "a follow-up forensic interview for additional information that [the victim] had disclosed." Ms. Turner said that it was not uncommon for a child to have a second forensic interview after receiving therapy. She explained,

> Disclosure is a process and sometimes children continue to disclose about the events that occurred to them through therapy and through other things so then we would bring them back for [a] follow-up forensic interview like we did this one whenever new information is disclosed.

Ms. Turner said children sometimes withheld information about sexual abuse in their initial forensic interviews because they were scared and because "[i]t's not a comfortable topic to talk about."

Ms. Turner identified video recordings of the victim's two forensic interviews, and the State played the videos for the jury. During the first interview on May 4, 2020, which was approximately one hour and fifteen minutes in duration, the victim told Ms. Turner the following: The Defendant started sexually abusing her after her family moved from Chattanooga to Oakland. The victim was eight years old. On one occasion, the victim was lying on H.M.'s bed in his bedroom and was watching television. H.M. was taking a shower. The Defendant came into the bedroom and pulled down the victim's shorts. The victim kept trying to pull up her shorts, but the Defendant kept pulling them down. The Defendant showed the victim his "private," meaning his penis, and told her to look at "it." However, the victim did not want to look at it, so she glanced at it one time and looked

back at the television. The Defendant "kept it out" and put his private on her leg "like at the very side." The victim showed Ms. Turner where the Defendant's private touched her leg. The victim's shorts were pulled up, and the Defendant's private touched her skin below her shorts. The victim described the Defendant's private as "long," "big," and "warm."

The victim told Ms. Turner that while her shorts were down, the Defendant used the light on his cellular telephone to look at her "private," meaning her vagina. At first, the victim said that the incident with the telephone and the incident in which the Defendant put his private on her leg occurred on different days. However, she later said the telephone incident occurred on the day H.M. was taking a shower. While the Defendant was shining a light on the victim's private, he also touched the "very front" of her private with his finger. The Defendant's finger was "moving around" and felt "weird" on the victim's private. The Defendant did not say anything while he was touching the victim with his finger. The victim was wearing pink shorts and "some underwear," and the Defendant was wearing gray pants and red striped underwear. The victim said that the Defendant always wore gray pants because they were his "work pants." The victim's shorts were down, and the Defendant's private was still touching her leg while his finger was touching her private. The Defendant also touched the outside of the victim's private with his private. The Defendant's private was "big" and "warm." The Defendant's private was "really really soft" while it was touching the victim's leg, but his private was "hard" while it was touching the victim's private. The Defendant stopped and left before H.M. came into the bedroom.

In another incident, H.M. was eating dinner, and the victim was watching television in H.M's bedroom. The victim was on the bed, and the Defendant asked her to "suck" his private. However, she did not do so. The next day, the Defendant asked the victim to suck his private again, but she did not. The Defendant got a text on his cellular telephone, left, and "went home." The victim said that the Defendant also "tried" to put his private into her private. The victim told him that "it hurt," and he told her that it would hurt "a little bit." The victim moved away from the Defendant because she "started getting frustrated," and he "tried" to put his finger into her private. The Defendant's private and finger did not go into the victim. The Defendant's gray pants were "down a little bit," and his private was "sticking out of it." The Defendant got a text on his cellular telephone and left.

The victim described an incident that occurred in her bedroom. She said that the Defendant "was trying to do the same thing," meaning he was trying to put his private into her private. The Defendant told the victim that "once it stretches out, I'll be able to put my private part in there, and it will feel really good." The Defendant stopped because the victim's grandmother and H.M. came back from Taekwondo.

The victim told H.M. about the abuse but told him not to tell their grandmother because the victim did not want the Defendant to go to jail. The victim told Ms. Turner that "he's been to jail a lot. I don't like it when he goes to jail." After a while, though, the victim told her grandmother that the Defendant was sexually abusing her. The victim's grandmother told her that the Defendant also had abused another girl. The victim asked her grandmother to tell her about the abuse, but her grandmother said that "it would be too inappropriate." The victim told Ms. Turner that the Defendant did not abuse her after she turned nine years old in March 2020.

During the second interview on November 5, 2020, which was approximately fifty-five minutes in duration, the victim told Ms. Turner that she was not completely honest with Ms. Turner during the first interview. Ms. Turner asked the victim to explain, and the victim said, "You asked me if I had sucked it, and I said no, but I did. I guess I was scared." Ms. Turner asked why the victim was scared, and the victim answered, "I didn't really know you that well." The victim said that the first time the Defendant asked her to suck his private, she told him no. However, the second time, she "just went ahead and did it." The victim could not remember where the incident occurred, but it may have happened in H.M.'s bedroom. The Defendant was lying on H.M.'s bed, and his private was "sticking up" out of his pants. The victim was on the bed and was "bent over" with her legs crossed. The Defendant told the victim, "That feels good." The victim "didn't like it" and "didn't want to do it anymore," so she "pulled her mouth off of it." The Defendant told the victim, "Don't stop," but the victim did not suck his private again. Nothing came out of the Defendant's private, and the victim did not taste anything. The victim thought that her grandmother and H.M. were at Taekwondo at the time of the incident and that the incident occurred when she was "checking into Essentials" for school. She was in the third grade, and it was "hot outside." After the incident, the victim climbed onto the Defendant's back, and he carried her to the pantry for a snack.

The victim said that another time, she saw the Defendant "rubbing" his private while he was lying on the bed. The Defendant's clothes were on, and his private was "sticking out" of his jeans. The victim demonstrated for Ms. Turner how the Defendant was rubbing his private, and the victim moved her hand up and down. The victim said that she saw "white stuff" come out of the Defendant's private and "land" on his stomach. At first, the victim said that the bed covers were "over" her and the Defendant and that she looked under the covers. However, she then said that "the covers weren't on at that point" and that the Defendant was lying "at the edge of the bed." After the Defendant ejaculated, he told the victim to get a tissue. The victim got a tissue for the Defendant, he cleaned his stomach, and he had the victim hide the tissue under the bed. H.M. was in the bed with the victim and the Defendant when the incident occurred, but the victim thought H.M. was asleep. On a different occasion, the victim and the Defendant were in the victim's bedroom. The Defendant "went to the wall" of the room, and the victim saw him "rubbing"

his private. She also heard "smacking," but she did not see anything come out of his private. The Defendant stopped rubbing his private and left.

The victim said that H.M. saw "something" occur between her and the Defendant but that she did not know what H.M. witnessed. One time when the victim and H.M. were in the kitchen, they made a "plan" so that H.M. could "help" the victim when the Defendant started to "do stuff" to her. The victim and H.M. agreed that the victim would "tug" on H.M.'s arm, which was her way of telling H.M. that the Defendant was sexually abusing her.

On cross-examination, Ms. Turner testified that the victim "didn't seem really uncomfortable" during her interviews but that "[s]he's just really a reserved child, presents reserved." Ms. Turner acknowledged that the victim's interviews occurred six months apart and that Investigator Jacobs and an employee of Child Protective Services watched the interviews from another room. Defense counsel asked if Ms. Turner had ever heard that children wanted to give "the appropriate answer" to interviewers and parents, and Ms. Turner said no. She acknowledged that the victim claimed the Defendant was wearing red striped underwear during one incident of sexual abuse. On redirect examination, Ms. Turner acknowledged that she conducted "completely unbiased" interviews with the victim.

H.M. testified that he knew the difference between the truth and a lie and that he and the victim lived with their grandmother. H.M. met with Ms. Turner at the Carl Perkins Center to talk about incidents of sexual abuse he witnessed between December 2019 and March 2020. H.M. said that in one incident, the victim was on top of the Defendant and was touching the Defendant's private part. H.M. also saw the victim and the Defendant kissing on the mouth. In another incident, the Defendant and the victim were under a blanket, and the victim was "moving her butt on his private part." H.M. said that the three of them were in his bed when the incident occurred and that he was "next to them." The victim and the Defendant did not know H.M. witnessed the incident. H.M. said that he and the victim talked about the abuse "[s]ometimes" and that they came up with a plan in which the victim would touch his arm whenever sexual abuse occurred.

On cross-examination, H.M. testified that he had been taking Taekwondo classes since he was five years old and that he attended classes two to three times per week. H.M. and the victim had their own bedrooms, and the victim spent more time in her bedroom than in H.M.'s bedroom. Defense counsel asked H.M., "Has anyone spoken to you about this case prior to today?" H.M. responded, "My grandma." Defense counsel then asked H.M., "Has your grandmother ever told you she wanted you to go to the forensic interview to help your -- to build your sister's case, in those words?" H.M. answered, "She said that we were going to do it." Defense counsel asked, "To build the case[?] H.M. said, "Yes."

On redirect examination, the State asked if the victim was ever alone with the Defendant when H.M. went to Taekwondo. H.M. stated, "I believe once." He said that his grandmother never told him what to say in his interview with Ms. Turner, that he had no reason to lie against the Defendant, and that he loved the Defendant.

Investigator Jacob Jenkins of the FCSO testified that on April 22, 2020, he received a sexual abuse complaint involving the victim and sent the victim to the Carl Perkins Center for a forensic interview. Investigator Jenkins observed the interview. He also observed the victim's and H.M.'s forensic interviews on November 5, 2020. Based on the interviews and Investigator Jenkins's investigation, he charged the Defendant with three counts of rape, three counts of aggravated sexual battery, and one count of solicitation of a minor. The three charges for rape were based on the Defendant's "sticking" his finger inside the victim's vagina, "sticking" his penis inside her vagina, and "sticking" his penis inside her mouth. The three charges for aggravated sexual battery were based on the Defendant's "[p]utting his finger on her vagina, putting his penis on her vagina, and putting his penis on the inner part of her thigh." The charge for solicitation of a minor was based on the Defendant's asking the victim to "suck it."

On cross-examination, Investigator Jenkins acknowledged that the victim said the Defendant tried to put his penis and his finger into her vagina but that he failed. On redirect examination, Investigator Jenkins acknowledged that the definition of "penetration" included "any intrusion however so slight." At the conclusion of Investigator Jenkins's testimony, the State rested its case.

Loren Kathleen Dunn testified that she met the Defendant in February 2020 and that he was her boyfriend "when he was not in jail." They were "together" until May 5, 2020. Ms. Dunn and the Defendant lived in separate homes but "stayed together in them." Ms. Dunn kept her clothes at the Defendant's home, and he kept his clothes at her home. Ms. Dunn said that she saw the Defendant's clothes "daily" and that she washed his clothes, organized them, and put them away. She never saw a pair of red striped underwear.

On cross-examination, Ms. Dunn acknowledged that she could not name every piece of clothing the Defendant owned. The State asked if it was possible the Defendant owned a pair of red striped underwear that she did not know about, and she said, "Red is a pretty standout color, especially when everything else that somebody owns is gray or green or blue. People tend to stick to a typical color pallet and something like red stands out." The State then asked her to name every article of clothing owned by the Defendant, and she said that she could not do so.

During its initial closing argument, the State made the following election of offenses: count one, rape of a child, the Defendant tried to put his penis into the victim's

vagina and told her that "'it'll stretch out and feel good'"; count two, rape of a child, the Defendant tried to put his finger into the victim's vagina, got a text, stopped, and left; count three, rape of a child, the victim engaged in fellatio on the Defendant; count four, aggravated sexual battery, the Defendant put his penis on the victim's inner thigh; count five, aggravated sexual battery, the Defendant put his finger on the victim's vagina; count six, aggravated sexual battery, the Defendant touched the victim's vagina with his penis; and count seven, solicitation of a minor, the Defendant asked the victim for oral sex. The jury convicted the Defendant as charged of three counts of rape of a child, three counts of aggravated sexual battery, and one count of solicitation of a minor. After a sentencing hearing, the trial court sentenced him to thirty-five years for each conviction of rape of a child, to be served concurrently; twelve years for each conviction of aggravated sexual battery, to be served concurrently; and ten years for the conviction of solicitation of a minor. The trial court ordered that Defendant serve the effective thirty-five-year sentence, the effective twelve-year sentence, and the ten-year sentence consecutively for a total effective sentence of fifty-seven years.

## ANALYSIS

The Defendant claims that the trial court erred by failing to exclude several statements made by the victim during her forensic interviews because the statements were highly prejudicial and inadmissible under Tennessee Rule of Evidence 404(b). Specifically, the Defendant takes issue with the jury's hearing that he had sexually abused another girl, that he masturbated twice in front of the victim when he had not been indicted for those incidents, and that he had been to jail "a lot." In a related argument, the Defendant contends that the trial court erred by giving a curative instruction that did not explain what the jury was to disregard in the videos and by waiting until the end of the trial to give the instruction. The Defendant acknowledges that we must review these issues for plain error because he failed to object at trial and failed to include the issues in his motion for new trial. Finally, he claims that the trial court's errors warrant a new trial based on the cumulative error doctrine. The State argues that the Defendant has failed to show plain or cumulative error. We agree with the State.

On April 19, 2021, the State filed a pretrial motion to allow its use of the victim's forensic interviews at trial. On May 3, 2021, the Defendant filed a motion in limine, requesting to prohibit the State and its witnesses from mentioning "any prior convictions or bad acts of the Defendant" until a hearing could be held pursuant to *State v. Morgan*, 541 S.W.2d 385 (Tenn. 1976).[2] On July 14, 2021, the State filed a motion in limine to

[2] In *Morgan*, our supreme court adopted Federal Rule of Evidence 608(b), which addresses questioning a witness about specific instances of conduct in order to attack or support the witness's character for truthfulness or untruthfulness, and Federal Rule of Evidence 609(a) and (b), which addresses the impeachment of a witness with a prior conviction. 541 S.W.2d at 388.

allow H.M. to testify about sexual abuse he witnessed between the victim and the Defendant during the time span alleged in the indictment.

On June 22 and July 6, 2021, the trial court held hearings on the State's motion to use the victim's forensic interviews at trial. During the hearings, Ms. Mason, the victim, and Ms. Turner testified, and their testimony was similar to their trial testimony. The State also played the victim's forensic interviews for the trial court. At the conclusion of the July 6 hearing, the State argued that the videos were admissible pursuant to Tennessee Code Annotated section 24-7-123, which provides that a video recording in which a child under thirteen is interviewed by a forensic interviewer regarding sexual abuse is admissible as substantive evidence in a trial on the sexual abuse if the trial court is reasonably satisfied that the child's statement is trustworthy. Defense counsel argued that the victim's interviews were not trustworthy because she admitted in her second interview that she did not tell the truth during her first interview, because her interviews occurred months after she initially reported the allegations, and because she spoke with family members, law enforcement, and a counselor before her interviews. The trial court found that the interviews were admissible.

On the day of trial, after the jury was seated but out of the courtroom for a recess, the trial court addressed the State's motion to allow H.M. to testify about sexual abuse he witnessed. The State advised the trial court that it anticipated H.M. was going to testify about sexual acts he witnessed that occurred during the time frame alleged in the indictment but not charged in the indictment. The State argued that according to Tennessee case law, such evidence was admissible. The State advised the trial court that, even though the State was not required to do so, it would be making an election of offenses at the close of proof. Defense counsel objected to H.M.'s testifying about "anything other than the three counts of rape of a child or anything that he saw dealing with the three counts of aggravated sexual battery or the solicitation. I think anything else would be a violation of 404(b)." Defense counsel later stated as follows:

> You've seen -- I know you've seen the videos with the minor victim. Your Honor, the audio -- I have the video. I was not able to open it but I have the audio and I've been able to listen to it and it's night and day. What the son is saying is like you're listening to something totally different and I still -- I think anything that this child testifies to that's outside of the three counts of child rape, three counts of aggravated sexual battery, and the solicitation of a minor, violates 404(b). What it is, is we're going to throw some stuff on the wall and hope it sticks to it.

The trial court ruled that H.M.'s testimony was admissible, and the following colloquy occurred:

[THE COURT:] Other issues to take up while the jury is out?

[THE STATE:] Yes, Your Honor. In one of the videos -- I believe it may be the first -- so two of the videos -- I guess just out of an abundance of caution if any of the videos -- I think we need to instruct the jury there may be some testimony from the child witnesses in their forensic interviews regarding some prior crimes or convictions. I don't know exactly how to cut that out of the video without tampering, so to speak, with the video so if we could get a special instruction to the jury from Your Honor just for them not to consider any of that. I don't know what that would look like.

[THE COURT:] Can you not just mute that portion?

[THE STATE:] I'm going to be honest with you, this whole part -- this whole system with the forensic, I'm scared to touch anything once it starts playing because we may have to start it all over again.

[THE COURT:] So what's your thought on how to handle that?

[DEFENSE COUNSEL:] Your Honor, I absolutely agree. We would ask for an instruction. There are two instances that I see to where it's hearsay anyway, Grandma said or somebody said. We would ask for a special instruction on that.

[THE COURT:] So you're going to be asking the Court to instruct the jury to disregard that?

. . . .

[DEFENSE COUNSEL:] [Any reference to any prior] crimes or any prior bad acts. It's nothing more than hearsay in the video. And, Your Honor, it may come up in testimony. We've got a nine year old and -- you know, if it comes out during their testimony, we'd ask for the same instruction.

[THE STATE:] Unless defense opens the door.

[THE COURT:] Okay. And just everyone will be careful with witnesses.

> [DEFENSE COUNSEL:] I mean, I don't -- It's just hard to control that age group. I know if it blurts out, I'm not going to say [the State] is trying to get it out. It just may blurt out.
>
> [THE COURT:] Okay. I'll prepare the instruction.

Apparently, no hearing was held on the Defendant's motion in limine to prohibit the State and its witnesses from mentioning prior acts of the Defendant without a hearing under *Morgan*.

During Ms. Turner's testimony, the State played the victim's forensic interviews in their entirety for the jury. In the interviews, the victim made the statements about which the Defendant now complains: that the victim witnessed two incidents of masturbation by the Defendant, that the victim's grandmother told the victim that the Defendant had sexually abused another girl, and that the victim said the Defendant had been in jail "a lot." During the final jury charge, the trial court stated, "The jury is also instructed to disregard any references to any prior crimes or bad acts which may have been contained in the videos."

Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Tenn. R. Evid. 404(a). Similarly, 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." Tenn. R. Evid. 404(b). Such evidence may be admitted for other purposes, though, if relevant to some matter actually at issue in the case and if its probative value is not outweighed by the danger of its prejudicial effect. Tenn. R. Evid. 404(b); *State v. Wyrick*, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001). Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts.

At trial, the Defendant did not raise the inadmissibility of H.M.'s testimony under Tennessee Rule of Evidence 404(b) and did not contest the wording of the curative instruction or the trial court's giving the curative instruction in the final jury charge. *See* Tenn. Rule of Evid. 103(a). Moreover, the Defendant did not raise the issues in his motion for new trial or at the hearing on the motion. *See* Tenn. R. App. P. 3(e). Nevertheless, we can review the issues for plain error. Tenn. R. App. P. 36(b); *see State v. Knowles*, 470 S.W.3d 416, 423 (Tenn. 2015).

We may consider an issue to be plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

*State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); *see also State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the *Adkisson* test for determining plain error). Furthermore, the "'plain error' must be of such a great magnitude that it probably changed the outcome of the trial." *Adkisson*, 899 S.W.2d at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)).

Turning to the instant case, we are initially constrained to note that the State acknowledged during its colloquy with the trial court that some of the statements made by the victim during her interviews were improper. It was the State's responsibility to redact those improper statements. Although the State claimed that it could not "cut" those statements from the videos and that it was "scared" to touch the videos after the videos started playing, we fail to see why the State could not have noted the exact time of the improper statements and then muted the videos so that the jury did not hear the statements. In any event, defense counsel did not take issue with the State's excuse for being unable to redact the videos. *See* Tenn. Rule of Evid. 103(a).

As to whether the victim's improper statements rise to the level of plain error, the State argues that the Defendant cannot show that he did not waive the issue for tactical reasons or that consideration of the error is necessary to do substantial justice. We agree with the State. During defense counsel's opening statement, he said,

> You're not going to see any evidence that's going to prove any of this happened other than the testimony of a nine year old girl and maybe an eleven year old boy. What the State doesn't tell you, there were two interviews that took place. In one of them there was no sexual penetration. Almost a year later, after seeing counselors and staying with the grandmother, the story changes and there's a second interview.
>
> We spoke earlier about memory. Your memory is better on something that happened the closer you are to the event than you are farther off. The second interview is almost a year later and her memory is very vivid. But, again, there is no physical evidence here that links any crime. It's all, for all practical purposes, he said, she said. That's what this case is.

> Unfortunately, y'all are stuck in the position that you're going to have to make the decision on what story is believable, and in that I would ask you to -- the same thing that [the State] is asking you, use your common sense. But I also ask you to pay special attention to the details, both the large and the small. Pay attention to the times, the inconsistencies in stories.
>
> There's not going to be any denying that there was -- I'm not saying untruth -- that a lie was told in the very beginning. The story changes. So, I want you to pay attention to time, when things took place, both what the witnesses say took place, when it took place, as well as when the interviews took place, how long in time; also, the inconsistencies in the testimony.

During defense counsel's cross-examination of the witnesses, his questions focused on the amount of time that passed between the victim's forensic interviews, the victim's discussing the abuse with her grandmother and a counselor prior to the interviews, the victim's claim that the Defendant was wearing red striped underwear during one incident of abuse, and the victim's grandmother wanting H.M. to have a forensic interview in order to help the victim's case against the Defendant. In defense counsel's closing argument, he asserted that the victim's allegations were "confusing" and that "[i]t's hard to keep track of what's going [on] and what's being said." Defense counsel pointed out inconsistencies in her two forensic interviews, such as the fact that the victim did not say anything about "sucking it" or the Defendant's ejaculating in her first interview, and pointed out that the victim was seeing a counselor prior to changing her story in the second interview. Defense counsel said that the victim "lied in the first interview," that "the whole story" changed in her second interview, and that the acts witnessed by H.M. were completely different than the acts alleged by the victim. Defense counsel also referred to the victim's statements about the Defendant's masturbating and said,

> When she was testifying to where he would rub his penis and stuff would come out of it, if you paid specific attention to that interview, at first he was under the covers and she looked under the covers and saw it. She made a mistake. Then he was sitting on the side of the bed. That's a big difference, laying under the covers and sitting on the side of the bed.

Defense counsel said that "[t]he list of inconsistencies go on and on and on between her interviews and then her brother's testimony."

The defense's strategy, as evidenced by defense counsel's opening statement, cross-examination of the State's witnesses, and closing argument, was that the victim's grandmother and counselor influenced the victim's allegations and that the victim's two interviews were too inconsistent to be believed. Moreover, defense counsel objected to

H.M.'s testimony pursuant to Tennessee Rule of Evidence 404(b) but not the victim's statements in the videos. Therefore, with regard to the victim's statements about what her grandmother told her and about seeing the Defendant masturbate, we agree with the State that the Defendant has failed to show that he did not waive an objection to the statements pursuant to Rule 404(b) for tactical reasons. As to the victim's statement that she did not want the Defendant to go back to jail because he had been in jail "a lot," the Defendant's own witness testified that the Defendant was her boyfriend from February to May 2020 "when he was not in jail." Therefore, we conclude that the Defendant has failed to show that consideration of any error in admitting that statement is necessary to do substantial justice.

As to the curative instruction, the Defendant cites several cases in which this court has stated that a trial court's giving an immediate or prompt curative instruction to a witness's improper testimony is a factor to consider in determining whether the trial court properly denied the defendant's motion for a mistrial. *See, e.g.*, *State v. Hall*, 976 S.W.2d 121, 147-48 (Tenn. 1998); *State v. Mathis*, 969 S.W.2d 418, 422 (Tenn. Crim. App. 1997); *State v. Dick*, 872 S.W.2d 938, 944 (Tenn. Crim. App. 1993). The Defendant also cites *State v. William Dotson*, in which this court considered whether the trial court erred by failing to grant a mistrial when a law enforcement officer testified that the defendant had been arrested for a federal parole violation. No. 03C01-9803-CC-00105, 1999 WL 357327, at *3 (Tenn. Crim. App. June 4, 1999). In its analysis, this court noted,

> [T]here is no per se rule that a curative instruction must be given immediately in order to be effective. However, . . . the vast majority of cases in which Tennessee Courts have upheld a trial court's failure to grant a mistrial in situations similar to the one . . . have based that determination at least partly on the fact that a curative instruction was given immediately or at least shortly after the improper testimony.

*Id*. at *5. This court concluded that the trial court erred because the trial court's failure to give a curative instruction until about eighteen hours after the improper testimony precluded an impartial verdict. *Id*. at *6.

In all of the cases cited by the Defendant, though, the improper testimony was unexpected. Here, defense counsel was well-aware of the statements the jury was going to hear in the videos and "absolutely" agreed with the State that the trial court should give a curative instruction. However, defense counsel never requested that the trial court give a specific instruction or give the instruction contemporaneously with the videos. As noted by the State in its brief and at oral arguments, an immediate instruction can improperly highlight the very proof it attempts to cure. *See State v. Jackson*, 444 S.W.3d 554, 592 (Tenn. 2014). Moreover, we generally presume that the jury follows the instructions of the

trial court. *See State v. Butler*, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Therefore, even though the trial court did not give the instruction contemporaneously with the videos, because the trial court specifically instructed the jury the in final jury charge to disregard the victim's statements about the Defendant's "prior crimes or bad acts which may have been contained in the videos," we conclude that the Petitioner has failed to show that a clear and unequivocal rule of law was breached, that he did not waive the issue for tactical reasons, or that consideration of the error is necessary to do substantial justice.

Finally, as to the Defendant's claim that he is entitled to relief based on cumulative error,

> [t]he 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. To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings.

*State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (citations omitted). However, because the Defendant has failed to show that he did not waive an objection to the admissibility of the victim's statements or waive an objection to the jury instruction for tactical reasons, we cannot say that the trial court erred. Therefore, the Defendant is not entitled to relief based on cumulative error.

## CONCLUSION

Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgments of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE