IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 1, 2022

STATE OF TENNESSEE v. LESTER TOLLIVER

Appeal from the Criminal Court for Shelby County
No. 15-03064 Lee V. Coffee, Judge

No. W2021-01386-CCA-R3-CD

Defendant, Lester Tolliver, appeals as of right from his jury conviction for aggravated rape, for which he received a sentence of twenty-five years. On appeal, Defendant contends that the evidence was insufficient to support his conviction and that the trial court erred by (1) admitting hearsay statements, specifically the victim's reporting the rape to a friend and the victim's statement to a police officer; (2) admitting the victim's testimony that she had been sexually assaulted previously; (3) admitting testimony from an expert witness regarding why a victim might lie about having had sexual activity in the days preceding a sexual assault; and (4) denying Defendant's request for a special jury instruction. Following our review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which J. ROSS DYER, and KYLE A. HIXSON, JJ., joined.

Shae Atkinson (on appeal) and Blake D. Ballin (at trial), Memphis, Tennessee, for the appellant, Lester Tolliver.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Dru Carpenter and Meghan Fowler, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

This case arises from the July 3, 2003 rape of the victim, D.J.[1] The May 2015[2] term of the Shelby County Grand Jury indicted Defendant for aggravated rape resulting in bodily injury, a Class A felony. *See* Tenn. Code Ann. § 39-13-502.

At trial, Sherika Taper testified that she and D.J. met in college and had been friends for almost twenty years. She stated that, in 2003, D.J. was "witty," social, and friendly. After July 3, 2003, Ms. Taper noted that D.J. "became introverted, she became guarded, and she was a lot less patient . . . . [and] kind of mean-spirited." The women previously spoke to one another daily, but after July 3, they only talked occasionally, and D.J. withdrew from their friendship.

The prosecutor asked Ms. Taper what reason D.J. gave for the change, and defense counsel objected to hearsay. The prosecutor responded that the evidence was not offered for the truth of the matter but to explain D.J.'s personality change and prove that she disclosed the rape. The trial court overruled the objection and instructed the jury that D.J.'s statements to Ms. Taper should only be considered to show that D.J. made a report and in the context of D.J.'s credibility as a witness. Ms. Taper testified that, a few months later, D.J. explained that she had been raped around the same time that Ms. Taper noticed D.J.'s personality change.

On cross-examination, Ms. Taper did not recall whether D.J. had a boyfriend or the name of the man D.J. was dating in July 2003. She stated that the name Kevin sounded familiar. Ms. Taper did not think that D.J. was dating anyone other than Kevin at the time.

D.J. testified that, in 2003, she was twenty-four years old and studying social work at the University of Memphis. In July 2003, she was in a relationship with a man named Kevin Williams ("Mr. Williams"), whom she considered to be her boyfriend. She stated that, a couple of months prior, she was at a gas station when a man, who also introduced himself as Kevin ("Kevin"), asked her about hail damage to her car and stated that he worked on cars. D.J. exchanged telephone numbers with Kevin. D.J. stated that she spoke with Kevin on the telephone five or six times. She did not recall ever texting Kevin.

[1] It is the policy of this court to refer to victims of sexual offenses by their initials.

[2] Before the September 2021 trial began, the trial court noted that trial had been delayed as a result of Defendant's having multiple cases pending trial and submission to the Grand Jury.

D.J. testified that, on July 3, 2003, she and Mr. Williams were "on bad terms" and that, as a result, she agreed to go on a date with Kevin at an indoor movie theater. She noted that Kevin had asked her out on dates previously but that she had always declined. D.J. stated that she met Kevin at a Walgreens near the movie theater because she did not want him to know where she lived as a safety precaution.

After D.J. entered Kevin's car, he drove to a liquor store and bought liquor. D.J. stated that she was "a little uneasy" and that Kevin drove to a drive-in theater, which was not the theater to which D.J. expected to go. She noted that other cars were present at the drive-in. After Kevin parked the car, he put his hand on D.J.'s leg. She moved his hand away and told him, "Stop." D.J. said that she reached inside her purse, flipped her cell phone open, and tried to dial 911 but that Kevin saw her and asked what she was doing. D.J. closed her phone.

D.J. testified that, in a fluid motion, Kevin reached over her, reclined the passenger seat all the way back, and straddled her. D.J. denied that Kevin struggled to move in the car. D.J. stated that he did not say anything and that it happened so quickly that she did not have time to process what was happening. D.J. said that, in the hopes that he would stop, she told Kevin that she was menstruating, and Kevin inserted his finger into her vagina "to check."

D.J. testified that she was five feet, one inch tall and that, in 2003, she weighed 115 pounds. She stated that Kevin was about six feet, one inch tall and weighed about 200 pounds. D.J. said that Kevin opened the console, took out a condom, put it on, and inserted his penis into her vagina. D.J. stated that her memory "was just a blank" and "a blur" after that. She said that she did not fight Kevin because "he had the power," she was a small woman, and her "main goal . . . was to make it home to [her] boys safely." D.J. noted that her sons were ages three and seven at the time.

D.J. testified that, when it was over, Kevin said, "You would have some good sex if only you knew what to do with it." Kevin talked about going to a hotel and drove them out of the drive-in. D.J. stated that she did not think about trying to get out of the car at that time. D.J. noted that she did not think she would get home safely if she went to the hotel. D.J. said that she told Kevin she had to use the restroom immediately, and he stopped at a nearby gas station.

D.J. testified that Kevin pulled up to the convenience store door, that she exited the car with her purse, and that she asked the clerk for the restroom key. D.J. said that she did not ask the clerk for help because "[i]t was a small gas station, but too open, and [she] felt like he would still be able to get to [her]." D.J. walked to the restroom, which was outside, went inside, locked the door, and called 911. D.J. stated that, as she spoke to the operator,

Kevin began banging on the door. After a few minutes passed, the clerk knocked and announced himself; D.J. opened the door and went inside the convenience store stock room to wait for the police. Kevin had left.

D.J. testified that she told the police what happened, explained where the rape occurred, and gave the police the information she had about Kevin, which was his telephone number. D.J. was taken to the Rape Crisis Center and examined by a nurse; she stated that, during the pelvic exam, she was "so sore and everything, that [the nurse] could barely do it." She denied having had similar pain during previous pelvic examinations. D.J. said that the examination was painful and embarrassing and that her vaginal pain lasted for two or three days after the rape. D.J. acknowledged that the nurse asked her if she had consensual sex within four days of the rape and that she answered negatively, which was untrue. When asked why she gave a false answer, D.J. responded that she was embarrassed because she had a boyfriend and should not have been on a date with Kevin. D.J. also noted that the nurse was a stranger. She stated that she had consensual sex with Mr. Williams two or three days before the rape but that she was not experiencing vaginal pain prior to the rape.

D.J. testified that, during the first year after the rape, she followed cars similar to the one Kevin drove in an effort to investigate the case herself. D.J. said that she was afraid to be alone and was easily startled in her apartment; she added that she obtained a handgun carry permit shortly thereafter.

D.J. testified that, in 2015, the Memphis Police Department (MPD) contacted her at her workplace and informed her that they had obtained a DNA match in the rape case. D.J. told the police that she wanted to move forward with the case. The officer showed D.J. a photographic lineup, but she did not identify a suspect; she noted that she was nervous and afraid and that she had tried to move past the incident. She said that she told the interviewing officer about having had sex with Mr. Williams two or three days prior to the rape. D.J. denied knowing anyone with Defendant's name or having had consensual sex with Defendant.

On cross-examination, D.J. testified that Kevin only gave her one telephone number to what she assumed was his cell phone. She agreed that it was probably a flip phone. She said that, during their telephone calls, Kevin discussed where he worked, his local barbershop, and D.J.'s car, and that he asked D.J. for a date once or twice. She agreed that she continued to talk to Kevin after turning him down. She said that, the third time he asked her for a date, she and Mr. Williams were having relationship trouble.

D.J. testified that, as a single mother, she did not let anyone know where she lived. She did not know why Kevin drove to a different theater than the one they initially

discussed. D.J. acknowledged that she felt uneasy when they stopped at the liquor store but that she did not call anyone or do anything to "get out of the situation[.]" She noted that "nothing had happened" at that point.

D.J. testified that Kevin put his hand on her leg about ten minutes after the movie started at the drive-in. She agreed that she moved his hand and told him, "No." She reiterated that Kevin reached over and reclined her seat immediately thereafter.

D.J. testified that she did not remember giving a second statement to MPD Sergeant William Singleton on September 19, 2003. Defense counsel noted that the statement had not been signed, and after reviewing a copy of it, D.J. said that it did not look familiar. However, she agreed that its contents appeared to accurately reflect what she told the police. D.J. acknowledged that, in the statement, she reported that Kevin waited three minutes after she removed his hand before he reclined her seat. She stated that, during the three minutes, she did not attempt to get out of Kevin's car. She said that the statement may have been more accurate than her memory at the time of trial. D.J. noted, though, that everything she recounted in the statement happened.

D.J. testified that she gave a third statement in 2015 to MPD Sergeant Samuel McMinn, and she identified her initials and signature on the statement. D.J. did not recall telling Sergeant McMinn that she asked Kevin to take her back to her car when he climbed over to her seat and again after he mentioned going to a hotel. D.J. also did not recall stating that she unsuccessfully tried to use her cell phone after the rape. D.J. acknowledged, though, that such facts were included in the typed police statement. She remembered telling Sergeant McMinn that Kevin said, "We're going to the hotel to finish this."

D.J. denied that Kevin had a gun during the incident. She acknowledged that she did not struggle or scream for help during the rape. She agreed that she was "trying to just get through it" because of her sons. D.J. agreed that, after the rape, she did not try to exit the car before arriving at the gas station. She further agreed that Kevin allowed her to exit the car and go into the convenience store with her purse. D.J. acknowledged that she did not ask the convenience store clerk to call 911 and that she went back outside, where Kevin was waiting, to reach the bathroom.

D.J. did not recall telling the police in September 2003 that Kevin's car came back to the gas station and that she ran into an "employee room" and stayed there until the police arrived. She acknowledged that, in her September 2003 and April 2015 police statements, she denied having been injured during the rape.

On redirect examination, D.J. testified that, in the September 2003 statement, Sergeant Singleton never asked her whether she had consensual sex prior to being attacked.

D.J. read her account of the rape from the statement, which was consistent with her trial testimony, but it added that she tried to get her cell phone when Kevin straddled her and that he grabbed her purse and threw it in the back seat before raping her. The statement also included that Kevin was calm and that, during the rape, D.J. begged Kevin to stop.

D.J. testified that, prior to giving the 2015 statement, she did not review anything related to her case, and Sergeant McMinn did not give her anything to read. D.J. read her account of the rape from the statement, which was generally consistent with her trial testimony, but the statement added that she asked Kevin to take her back to her car when he started to climb over her and after the rape and that she unsuccessfully attempted to use her cell phone after the rape.

When asked why she did not struggle during the rape, D.J. stated that her goal was safety and to get back to her sons; she noted that she was smaller than Kevin, that she feared being harmed, and that she felt powerless and like there was nothing else she could do. The prosecutor asked if anything in D.J.'s past made her react that way, and she answered affirmatively.

When the prosecutor asked D.J. to elaborate, defense counsel requested a bench conference and objected to D.J.'s talking about "any other incidents" that could elicit the jury's sympathy. The State responded that defense counsel had questioned D.J.'s reaction to being raped. The trial court overruled the objection, finding that defense counsel asked D.J. whether she fought, resisted, or struggled, and whether or not Kevin had a gun. The court further found that "if it goes to explain her passivity that would rebut the questions that [counsel] asked, those are relevant questions as to why she did not put [up] a fight to the death, if you will."

D.J. testified that she grew up in foster care and that she had been molested several times. She stated that, "in doing so, it's just, like, go with the program until you can be safe." D.J. affirmed that she was afraid of Kevin. D.J. stated relevant to the period of time between the leg touching and the rape that she was not timing the events and that she was recalling events that occurred eighteen years ago. She affirmed that the "physical acts" committed against her had remained the same. D.J. further affirmed that she felt pain as a result of the rape.

MPD Sergeant Ryan Reviere testified that he was a new patrol officer in 2003 and that, at midnight on July 4, 2003, he responded to the gas station after D.J.'s call reporting a sexual assault. He had no memory of interacting with D.J., and his role was to take an initial report and forward it to the MPD Sex Crimes Bureau.

Former MPD Sergeant Barbara Javer testified that, in 2003, she worked the midnight shift as a crime scene investigator and that she responded to the Rape Crisis Center on July 4, 2003, to interview D.J. Ms. Javer described D.J. as upset and "terrified." She agreed that D.J. was traumatized. D.J. described Kevin to her as a heavyset black man who was about six feet, three or four inches tall.

Defense counsel objected to D.J.'s statements to Ms. Javer as hearsay. The trial court found that the statements were an excited utterance and issued an instruction to the jury.

Ms. Javer continued, testifying that D.J. relayed she was supposed to meet Kevin to go to a movie theater and that, when she got in his car, he drove in the opposite direction. When D.J. asked Kevin why, he stated that they had missed that movie and that he would take her to the drive-in theater. Ms. Javer said that D.J. "stated that he kept trying to put . . . his hand on her leg, and that she would move it off, and then, the next thing she knew, he reached over, . . . [p]ushed her seat back, and got on top of her" before raping her. D.J. also stated that, afterward, she told Kevin that she needed to use the bathroom, and he stopped at a gas station; D.J. exited the car after collecting her purse, which Kevin had put in the back seat, went inside the bathroom, and locked herself in. Ms. Javer noted that D.J. said she did not fight Kevin because he was so much larger than she was and she was afraid he would hurt her. Ms. Javer stated that, during their conversation, D.J. was "still terrified. She[was] still traumatized." Ms. Javer composed a report and referred the case to the Sex Crimes Bureau.

On cross-examination, Ms. Javer testified that she dealt with thousands of victims during her time with the MPD. She stated that she remembered the cases "that stuck in [her] mind" and that the purpose of her reports were to document "the actual things that have been told to [her] by the victims, or evidence that had been gathered by [her] . . . from the victims." Ms. Javer acknowledged that she referenced her report to refresh her memory in advance of her trial testimony. She agreed that she did not note D.J.'s demeanor in her report; she maintained, though, that she remembered it.

On redirect examination, Ms. Javer explained that she recalled the case because it occurred on July 4, that it was the only case she had that day, and that D.J.'s demeanor "stuck out." Ms. Javer noted that "a lot of [the] victims don't seem like victims. [D.J.] was traumatized. You could see it in her eyes."

On recross-examination, Ms. Javer added that some victims were calm but that D.J. was terrified. When asked whether it was fair to "put [her] personal views onto what a victim should act like," Ms. Javer stated that this was why she did not include her thoughts in her reports.

Nurse Sally DiScenza, an expert in sexual assault examination, testified that she examined D.J. at the Rape Crisis Center. She stated that D.J. told her that she had gone to a drive-in movie with a twenty-nine-year-old man and that, within fifteen minutes of watching the movie, he started touching her. D.J. told him that she was uncomfortable, then the man got on top of her. D.J. stated that she told the man that she was menstruating, that he felt her vaginal area, that he pulled out a condom from the armrest, and that he "forced protected vaginal penetration[.]" Ms. DiScenza stated that D.J.'s demeanor was cooperative, "very expressed," and "very careful," and that D.J. readily answered questions.

Ms. DiScenza testified that she asked D.J. if she had engaged in consensual sexual activity in the past four days and that D.J. reported not having been sexually active within three months. Ms. DiScenza added, "We ask that because we determine . . . whether there could be other people's DNA." The prosecutor asked, "Do you find in your experience that sometimes your patients struggle to answer that question?" Defense counsel objected to the "relevance of what other patients do or didn't do." The trial court overruled, noting for the jury that Ms. DiScenza had been qualified as an expert and that the question was meant to provide "contextual background" relevant to the credibility of, and any inconsistencies in, the proof.

Ms. DiScenza testified that she did not know whether the rationale for the question was explained to D.J. and that "sometimes victims – it's a very traumatic time for them, and when [she] ask[ed] them personal questions that they may not understand why [she was] asking it, they may [have been] reluctant to . . . reveal some of their personal information."

Ms. DiScenza testified that D.J. did not initially report any pain. Relative to D.J.'s physiology, Ms. DiScenza noted that D.J.'s vaginal opening was smaller than average. Ms. DiScenza stated that she found an "acute laceration" caused by blunt force trauma just outside and below the vaginal opening. Ms. DiScenza added that the injury was "acutely painful" to D.J. and that she included the pain in her report. Ms. DiScenza said that the laceration was "acutely red" and that it was a "very recent injury." Ms. DiScenza identified three photographs of the injury, which were received as exhibits.

Ms. DiScenza testified that the laceration could have been caused by an erect penis and that, due to D.J.'s small vaginal opening, she was more susceptible to injury. Ms. DiScenza stated that "in forced penetration, if there's resistance, there's more likely to [be] injur[y] around it." She agreed, though, that she could not say whether the injury was caused by sexual assault or consensual sex and that her job was to document injury.

Ms. DiScenza testified that, if D.J. had reported that she had consensual sex two or three days before the rape, the consensual partner could have caused D.J.'s injury. She noted, however, that D.J. was "in a lot of pain" and that "the encounter would have been very painful if . . . she had a prior laceration like that." Ms. DiScenza stated that she had to manipulate the area in order to perform a pelvic exam and that it was very painful for D.J.

Ms. DiScenza testified that it was policy to collect DNA swabs even if a victim reported that the assailant used a condom. Ms. DiScenza took one of the DNA swabs and made a microscopic slide, which she examined and determined that sperm was present.

On cross-examination, Ms. DiScenza testified that, generally, it was more common to find external injuries or injuries to the tissue leading to the vaginal opening than internal injuries in a sexual assault due to "estr[o]genized" tissue's ability to stretch. She acknowledged that injury consistent with penetration could sometimes occur to the vaginal opening. Ms. DiScenza added, though, that "many times" she did not find injury despite forced penetration. She denied that D.J. had any injury to the tissue leading to the vaginal opening. When asked whether it was more likely to find injury from "force" because of the size of the vaginal opening, Ms. DiScenza stated that, if an assailant did not succeed in penetrating the opening, the assailant might engage in repeated attempts to penetrate.

Ms. DiScenza testified that she should have explained to D.J. why she asked about her recent sexual activity but that she did not because they had so much information to cover. Ms. DiScenza did not know why D.J. might have omitted other sexual activity. She noted that victims sometimes did not want to tell her personal information apart from the assault. Ms. DiScenza denied that a victim had ever come back and told her that the victim had lied to "cover something up[.]" She agreed that victims signed a form indicating that the information she received was kept confidential.

Ms. DiScenza testified that a "laceration" meant tearing of the skin and that she considered it to be superficial, meaning not requiring sutures and not actively bleeding. She agreed that a similar injury could be caused from a non-sexual activity, like riding a bicycle. Relative to when the injury occurred, Ms. DiScenza stated that she did not "give timeframes" but rather noted whether healing or "granulation" had occurred; she did not find granulation in D.J.'s laceration and opined that it was a recent injury. She agreed that she could not speak to whether the injury was preexisting and had been aggravated.

On redirect examination, Ms. DiScenza testified that her examination took at least two hours and that D.J. was in "considerable pain" during the exam. She did not recall whether someone came in to hold D.J.'s hand, although she stated that, in her experience, an advocate or family member sometimes did so.

Former MPD Lieutenant William Singleton testified that he was a Sex Crimes investigator in 2003 and that he contacted D.J. on July 4, 2003, to set up an interview. He initially stated that he had reviewed reports composed by the officer who responded to the crime scene and Ms. Javer. Later, Mr. Singleton indicated that he did not recall whether he reviewed the reports, eventually concluding that he did because he "had to [have gotten] a report because there's a report number." His practice was to review other reports. However, Mr. Singleton claimed never to have seen any telephone number D.J. gave to the police to reach Kevin, which was included in the reports. He noted that, if D.J. had given the numbers to him, they would be noted in her September 2003 statement. According to the reports, D.J. named the assailant, and the police had a description of Kevin's car.

Mr. Singleton testified that he "[w]aited for [D.J.] to come in to give her statement" to continue investigating and that, in September 2003, D.J. came to the police department. When asked whether he told D.J. that it was "her obligation" to talk to him in order to investigate the case, Mr. Singleton responded negatively, noting, "[I]t's the victim's option whether they come in and give a statement or not." He stated that he did not review the 911 call or any crime scene photographs until after D.J. gave her statement. Mr. Singleton did not check to see if surveillance recordings were available. He acknowledged that, if Kevin's telephone numbers were in the initial reports, he had that information on July 4, 2003. When asked whether he made an attempt to use the information prior to September 19, 2003, Mr. Singleton responded that it was "probably true" that he did not. He noted that procedure dictated that, "if you don't get a victim statement, you don't follow up on nothing else." Mr. Singleton did not recall what he did to investigate D.J.'s case after she gave her statement.

When asked whether the "onus" was on D.J. to give an additional statement before the MPD would investigate, Mr. Singleton responded, "We don't have a case unless we have a victim . . . . Until the victim comes in and gives a statement, that's what anything else is followed up on after that." He stated that he "probably didn't" tell D.J. that he would not investigate the case until she gave a statement.

Mr. Singleton testified that, per his September 19, 2003 supplement to the police report, he attempted to call Kevin's telephone number after D.J. gave her statement that morning. He stated that, after his investigation, the case was turned over to the District Attorney General's Office, which closed it. He acknowledged that his supplement was about half a page in length.

On cross-examination, Mr. Singleton testified that the victim stated that she would come to the police department on July 7 to give her statement. He agreed that his supplement did not indicate why the victim's statement occurred in September. He did not

know whether the delay was caused by a police mistake or "indifference on the part of [the] victim."

James Byars testified that he was an investigator for the District Attorney General's Office and that, the week before trial, he took photographs of the drive-in theater where the rape occurred. He stated that the drive-in was constructed such that vehicles were spaced out between one another. Mr. Byars also took photographs of the gas station, which was within walking distance of the drive-in. He noted that the convenience store was "tiny" and only contained three sets of shelves.

Kristen Hammonds, an expert in forensic DNA analysis, testified that, in 2013, she worked for a private laboratory in Texas and that she tested the swabs from D.J.'s rape kit. Sperm was found on both the vaginal and vulvar swabs. The swabs contained an epithelial portion, which contained two DNA profiles; the major contributor was D.J., and the "minor alleles" were consistent with the "sperm fraction donor." The sperm found on the swabs yielded a complete DNA profile from an unknown male. No other evidence was submitted for testing.

MPD Sergeant Samuel McMinn testified that he was assigned to the MPD's DNA Unit in 2015, which was tasked with testing the MPD's backlog of rape kits, and that he worked on D.J.'s case. He stated that the private laboratory obtained a DNA profile and sent it to the Tennessee Bureau of Investigation, which entered the results into the Combined DNA Index (CODIS), a national DNA database. When the profile was compared with the DNA profiles in CODIS, it matched Defendant.

Sergeant McMinn testified that he found an original "memo or report" with the supplements from the officers who investigated the case in 2003. He stated that he did not have "significant information" and that he had to start investigating "from scratch." Sergeant McMinn denied that his file contained surveillance photographs or video, crime scene photos, or the 911 recording; he noted that the photographs from the Rape Crisis Center's examination stayed with their records and that he did not have access to them. He said that he did not attempt to locate the 911 or surveillance recordings because too much time had passed. He noted that, generally, store surveillance footage was only stored for between seven and thirty days.

Sergeant McMinn testified that he located D.J.'s workplace and met her there with a victim advocate from the Rape Crisis Center. He stated that D.J. became emotional and tearful when he informed her that a suspect had been identified; she asked him what took so long, and he told her that he could not answer the question or make excuses. When Sergeant McMinn asked D.J. that day and the following day whether she wanted to proceed with the case, she answered affirmatively.

Afterward, D.J. went to the Rape Crisis Center and provided another typed statement. Sergeant McMinn said that, during the interview, D.J. was emotional even though twelve years had passed and that it was difficult for her to "retell" the incident. Sergeant McMinn also gave D.J. a photographic lineup; he noted that the photograph he used of Defendant was from 2011. Sergeant McMinn instructed D.J. not to make an identification if she was not positive, and D.J. was unable to identify her attacker. He agreed that Defendant had aged between 2003 and 2011.

After meeting with the prosecutor, Sergeant McMinn took a buccal swab from Defendant on November 19, 2015. Sergeant McMinn also confirmed that Defendant was six feet, one inch tall and weighed 230 pounds, which he opined was "close" to the description D.J. gave of Kevin.

Stephanie Hickey, an expert in forensic DNA analysis, testified that, in January 2016, she tested Defendant's buccal swab and compared it to the profile obtained from D.J.'s rape kit. Defendant's DNA profile matched the sperm fraction of the vaginal swabs. Ms. Hickey stated that the probability of randomly selecting an unrelated individual with the same DNA profile was "one in two hundred ninety quintillion in the U.S. African-American population," which was a one followed by eighteen zeroes.

After the close of the State's evidence, the trial court held a jury charge conference during a recess. Defense counsel requested a special instruction on aggravated rape, stating as follows:

> The aggravated rape, the elements are pretty simple. Unlawful sexual penetration; bodily injury; intentional, knowing, or reckless. What bothers me about this charge is that it doesn't mention anything about consent. And, while "unlawful" is, in fact, in the first element, there's no definition of "unlawful."
>
> So, I started looking at a few cases yesterday and this morning, and found two that I've cited in the instruction request that I filed. One is reported, and it talks about before -- I think before they had disconnected the aggravated rape statute from the rape of a child statute, one of the ways to prove aggravated rape was "under thirteen years of age." With regard to that specific element, consent was not a defense . . . [T]he case I've cited . . . it talks about that, in fact, consent is not a defense to aggravated rape under that now -- no longer existent subsection regarding age. But it does reiterate that "unlawful" . . . may generally refer to non-consensual matters.
>
> . . . .

> [W]e are requesting Your Honor to instruct them that, "Unlawful sexual penetration means sexual penetration without consent of the alleged victim."

The State responded that the case law to which defense counsel cited "refers to a now defunct part of the law" and requested that the trial court issue the pattern jury instruction. The prosecutor noted that the language of the pattern jury instruction had not been modified to include the language "since 1994 or 2013."

The trial court found that the pattern jury instruction for aggravated rape had not changed since the sentencing guidelines were amended in 1989. The court noted its participation on the pattern jury instruction committee for the past fifteen years; the court stated that no indication had arisen in that time that the pattern jury instruction on aggravated rape needed to be revised. The court found that the instruction was not confusing to a jury, that the instruction adequately informed the jury of the elements the State had to prove, that the instruction adequately protected Defendant's rights, and that the court would answer any questions the jury had. The court noted that its issuing Defendant's proposed instruction "would probably be inappropriately commenting on the facts of this case," and it stated that Defendant could argue consent as a defense.

Upon this evidence, the jury convicted Defendant as charged. After a sentencing hearing, the trial court imposed a twenty-five-year sentence. After his motion for new trial was denied, Defendant timely appealed.

Analysis

On appeal, Defendant contends that the evidence was insufficient and that the trial court erred by (1) admitting the victim's hearsay statements to Ms. Taper and Officer Javer; (2) admitting the victim's testimony that she had been sexually assaulted previously; (3) admitting speculative testimony from an expert witness regarding why a victim might lie about having had sexual activity in the days preceding a sexual assault; and (4) denying Defendant's request for a special jury instruction.

I. Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to prove that the victim did not consent to the sexual encounter, pointing out inconsistencies in D.J.'s testimony; her withholding information about recent consensual sex from Ms. DiScenza and responding officers; her admission that she did not fight Defendant, scream for help, or get out of the car; her failure to ask the gas station clerk to call the police. Defendant also argues that Officer Javer's testimony about D.J.'s traumatized demeanor was based upon distant

memory and not memorialized in her report and that, according to Ms. DiScenza, D.J.'s injury could have been caused by non-sexual means. The State responds that the evidence is sufficient.

Our standard of review for a sufficiency of the evidence challenge is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also* Tenn. R. App. P. 13(e). Questions of fact, the credibility of witnesses, and weight of the evidence are resolved by the fact finder. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh the evidence. *Id.* Our standard of review "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)) (internal quotation marks omitted).

A guilty verdict removes the presumption of innocence, replacing it with a presumption of guilt. *Bland*, 958 S.W.2d at 659; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant bears the burden of proving why the evidence was insufficient to support the conviction. *Bland*, 958 S.W.2d at 659; *Tuggle*, 639 S.W.2d at 914. On appeal, the "State must be afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom." *State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007).

Aggravated rape is defined, in relevant part, as "the unlawful sexual penetration of a victim by the defendant" when the defendant causes bodily injury to the victim. Tenn. Code Ann. § 39-13-502(a)(2) (2003). "'Bodily injury' includes a cut, abrasion, bruise, burn, or disfigurement, and physical pain or temporary illness, or impairment of the function of a bodily member, organ, or mental faculty[.]" Tenn. Code Ann. § 39-11-106(a)(2) (2003).

In the light most favorable to the State, the evidence established that D.J. went on a date with Defendant, who had given her the false name Kevin; although they had agreed to go to an indoor movie theater, Defendant drove D.J. to a drive-in theater. Defendant began to touch D.J.'s leg, and she asked him to stop. Shortly thereafter, Defendant reached over, leaned back D.J.'s seat, and straddled her. Defendant was a foot taller than D.J. and outweighed her by about eighty-five pounds. D.J. pleaded with Defendant to stop and told him that she was menstruating. After touching D.J.'s vaginal area to verify that she was not menstruating, Defendant put on a condom and penetrated D.J.'s vagina with his penis. After he was finished, he told her, "You would have some good sex if only you knew what to do with it" and said that he would take D.J. to a hotel. D.J. persuaded Defendant to pull over at a nearby gas station so that she could use the restroom; as soon as D.J. was inside

the restroom, she locked the door and called the police to report the assault. The police took D.J. to the Rape Crisis Center, where Officer Javer interviewed her and Ms. DiScenza examined her. Both individuals testified about how upset D.J. was, and Ms. DiScenza noted a laceration to D.J.'s pubic area that could have been caused by forced penetration. Ms. DiScenza and D.J. testified about the acute pain the laceration caused. The vaginal swabs taken from D.J. yielded a full DNA profile that matched Defendant's CODIS profile, as well as his buccal swabs. Ms. Hickey stated that the probability of randomly selecting an unrelated individual with the same DNA profile was "one in two hundred ninety quintillion in the U.S. African-American population," which was a one followed by eighteen zeroes. The evidence is sufficient for a rational jury to conclude that Defendant unlawfully penetrated D.J.'s vagina and caused her bodily injury.

Relative to Defendant's specific sufficiency arguments, they relate to the weight of the evidence, not its sufficiency. We note that the jury was entitled to accept some of D.J.'s testimony, even if it did not accept all of it. *State v. Adams*, 45 S.W.3d 46, 56 (Tenn. Crim. App. 2000) (citing *State v. Bolin*, 922 S.W.2d 870, 875 (Tenn. 1996)). Moreover, the jury resolved any inconsistencies in the evidence by its verdict. *State v. Inlow*, 52 S.W.3d 101, 104 (Tenn. Crim. App. 2000) (citing *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978)). It is not the purview of this court to reweigh evidence or substitute our judgment for that of the factfinder. *See Bland*, 958 S.W.2d at 659. Defendant is not entitled to relief on this basis.

II. Hearsay

Under the Tennessee Rules of Evidence, "hearsay" is any statement, other than one made by the declarant while testifying at trial or in a hearing, offered into evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801. Hearsay statements are not admissible unless they fall within one of the evidentiary exceptions or some other law renders them admissible. Tenn. R. Evid. 802. A trial court's decision of whether a particular statement is hearsay and whether a hearsay exception applies are questions of law that are reviewed de novo. *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015). A trial court's factual findings and credibility findings relative to a hearsay issue are binding upon an appellate court unless the evidence preponderates against them. *Id.*

a. Ms. Taper's testimony

At trial, the court determined that D.J.'s statement to Ms. Taper that she underwent a personality change because she had been raped was not hearsay. After hearing argument from the State that it sought to establish that D.J. reported the incident to Ms. Taper and to explain D.J.'s personality change, the court accepted the State's argument and noted that

the statement was also relevant to D.J.'s credibility. Defendant contends, without further argument, that D.J.'s statement was used to prove that D.J. was raped.

We conclude that the trial court properly determined that the testimony was not hearsay. Defendant has not established that, contrary to the State's assertions in court, the statement was offered for its truth. Ms. Taper was not asked to provide any details of the incident, and the court instructed the jury that it was not to consider the statement for its truth, explaining:

> So, any questions that [the State] asks of Ms. Taper that goes to anything that somebody might have told her is not being offered to show that those things that were reported are actually true, but simply for those purposes that goes to the credibility of a witness, and also to show whether or not there was a report made to someone of an alleged event or some crime that may have been committed. It's not being offered to say these things are actually true.

The jury indicated affirmatively that it understood, and we note that a jury is presumed to have followed the trial court's instructions. *See State v. Young*, 196 S.W.3d 85, 111 (Tenn. 2006). Defendant is not entitled to relief on this basis.

b. Officer Javer's testimony

Defendant contends that the trial court erred by finding that D.J.'s statements describing the rape and her assailant to Officer Javer at the Rape Crisis Center were admissible as excited utterances, arguing that the statements were offered for their truth and that they were not made "contemporaneously" because D.J. was no longer in danger. The State responds that the trial court correctly admitted the statements.

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an excited utterance. Tenn. R. Evid. 803(2). In order to fall within this exception, there must first be an event or condition that is "sufficiently startling to suspend the normal reflective thought process of the declarant." *Kendrick*, 454 S.W.3d at 478 (citing *State v. Gordon*, 952 S.W.2d 817, 820 (Tenn. 1997)). Second, "the statement must 'relate to' the startling event or condition." *Id.* "A statement relates to a startling event when it describes all or part of the event or condition, or deals with the effect or impact of that event or condition." *Id.* (citing *State v. Stout*, 46 S.W.3d 689, 699 (Tenn. 2001); *State v. Gilley*, 297 S.W.3d 739, 761 (Tenn. Crim. App. 2008)). Third, the statement must have been made "while the declarant is under the stress or excitement from the event or condition." *Id.* The "ultimate test" under the third prong is "whether the statement suggests 'spontaneity'" and whether the statement has a "logical relation" to the shocking event. *Id.*

Defendant has not cited to authority for the proposition that a victim's having had "time to remove herself from the situation and any potential danger" meant that her statement could not have been an excited utterance. "[T]he length of time between a startling event and the statement does not automatically preclude the statement's being admissible as an excited utterance." *State v. Stephen Maurice Mobley*, No. E2020-00234-CCA-R3-CD, 2021 WL 3610905, at *27 (Tenn. Crim. App. Aug. 16, 2021), *perm. app. denied* (Tenn. Jan. 13, 2022) (quoting *State v. Banks*, 271 S.W.3d 90, 116-17 (Tenn. 2008) (internal citation and quotation marks omitted)). In *Kendrick*, our supreme court addressed this precise issue as follows:

> One consideration for determining whether a statement was made under the stress and excitement of a shocking event is the time interval between the event and the statement. But the time interval is not dispositive; other factors must be considered. In addition to the time interval, other relevant circumstances include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant (including such characteristics as age and physical or mental condition); and the contents of the statement itself, which may indicate the presence or absence of stress.

454 S.W.3d at 478. (citations omitted).

In the present case, D.J. had been raped by an acquaintance with enough force to cause injury, a serious event. Officer Javer testified that D.J. was upset, "terrified," and "traumatized" when they spoke. Although we do not know the exact interval between the rape and Officer Javer's interview, D.J. had immediately called the police and was taken to the Rape Crisis Center; Officer Javer stated that she spoke to D.J. at midnight on July 4, 2003. The record supports the trial court's finding that D.J. was still in a state of distress when she spoke to Officer Javer. *See, e.g., State v. Dewayne Wright*, No. W2013-00433-CCA-R3-CD, 2014 WL 1168579, at *10 (Tenn. Crim. App. Mar. 21, 2014) (concluding that a rape victim's disclosure to her friend hours after she was attacked was an excited utterance and that the victim had "remained in a state of shock," in spite of testimony that the victim was "blank in the face" prior to the disclosure, when the victim disclosed the rape after observing blood coming from her genital injuries and "broke down crying"), *no perm. app. filed*. Defendant is not entitled to relief on this basis.

III. Victim's Previous Sexual Assault

Defendant contends that the trial court erred by admitting D.J.'s testimony that she was molested while in foster care, arguing that it was irrelevant and unfairly prejudicial because it elicited sympathy from the jury. The State responds that the court properly

allowed the testimony after Defendant cross-examined D.J. about why she did not fight Defendant during the rape.

In order for evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Tenn. R. Evid. 401. However, even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Tenn. R. Evid. 403. We review a trial court's ruling regarding the admissibility of evidence for an abuse of discretion. *Banks*, 271 S.W.3d at 116. We will not reverse a conviction due to erroneously admitted evidence unless the error or errors "affirmatively appear to have affected the result of the trial on its merits." *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000) (citations omitted); *see* Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.").

Defense counsel cross-examined D.J. at some length about whether she tried to call for help or leave the car when Defendant went into the liquor store; when he touched her leg; during the rape; or after the rape. Defense counsel also asked D.J. whether she struggled against Defendant and whether he had a gun. Counsel used the lack of a physical struggle, an attempted escape, and a weapon, along with the fact that D.J. was able to exit the car at the gas station, to attack her credibility.

The trial court found that, given counsel's questioning, D.J.'s explanation of her passivity was relevant. D.J. testified that she learned to "go with the program until you can be safe" when she was abused in foster care. D.J. testified that she did not struggle or fight with Defendant because she prioritized survival and that her goal was to go home to her children.

Although the trial court should have placed on the record a finding regarding the weight it gave the probative value and the potential for unfair prejudice to Defendant, *see* Tenn. R. Evid. 403, we conclude that the trial court did not abuse its discretion by allowing the testimony and that any error was harmless in light of the overwhelming evidence of Defendant's guilt. We note that the State did not ask detailed questions about the prior abuse, and it did not reference the abuse in closing or rebuttal argument. In contrast, during closing argument, defense counsel not only emphasized D.J.'s failure to fight or try to escape Defendant as a reason to doubt her credibility, but he also utilized D.J.'s prior sexual abuse as a reason she may have fabricated the allegations against Defendant. D.J.'s brief

testimony did not cause Defendant unfair prejudice. Defendant is not entitled to relief on this basis.

IV. Ms. DiScenza's testimony

Defendant contends that the trial court erred by allowing Ms. DiScenza to testify about reasons why victims sometimes were not forthcoming about their sexual histories. The State responds that the testimony was within the scope of Ms. DiScenza's expertise as a sexual assault nurse examiner.

During Ms. DiScenza's testimony, the prosecutor asked whether her patients sometimes struggled to answer a question about their recent sexual history. Defense counsel objected to the "relevance of what other patients do or didn't do." The trial court overruled, noting for the jury that Ms. DiScenza had been qualified as an expert and that the question was meant to provide "contextual background" relevant to credibility and any inconsistencies in the proof. Ms. DiScenza testified that she did not know whether the rationale for the question was explained to D.J. and that victims were sometimes reluctant to reveal their personal information.

We note that, at trial, Defendant raised an objection relative to relevance; at the motion for new trial, he framed the issue as the admission of speculative testimony. On appeal, Defendant states his issue as one of the admission of speculative testimony but only cites to authority regarding Tennessee Rule of Evidence 602 relative to a lack of personal knowledge. A defendant may not object to the introduction of evidence, such as testimony, on one ground at trial but rely on a different ground on appeal. *See State v. Alder*, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001) ("It is well-settled that an appellant is bound by the evidentiary theory set forth at trial, and may not change theories on appeal") (citation omitted). Because Defendant has only briefed an argument he failed to raise at trial, he has waived review of this issue.

However, we briefly note that Ms. DiScenza's testimony was based upon her extensive professional experience, which routinely included questioning rape victims about their recent sexual history. The trial court properly admitted her testimony about why some victims withheld information as within the scope of her expertise. *See* Tenn. R. Evid. 703 (stating that "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by . . . the expert . . . before the hearing"). Defendant is not entitled to relief on this basis.

V. Special Jury Instruction

Defendant contends that the trial court erred by denying his request for a special jury instruction defining "unlawful sexual penetration" as "sexual penetration without consent of the alleged victim." Defendant argues that the word "unlawful" is not defined in the aggravated rape statute, that defense counsel argued at trial that it "might have a common meaning and it might not," and that the special instruction "would serve to more accurately define a proposition already submitted to the jury by defining unlawful." The State responds that the pattern jury instruction is an accurate statement of the law.

"'It is well-settled in Tennessee that a defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions.'" *State v. Perrier*, 536 S.W.3d 388, 403 (Tenn. 2017) (quoting *State v. Farner*, 66 S.W.3d 188, 204 (Tenn. 2001)). Thus, a trial court has a duty to give "'a complete charge of the law applicable to the facts of a case.'" *Id.* (quoting *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986)). Issues relating to the propriety of jury instructions involve mixed questions of law and fact, which we review de novo with no presumption of correctness. *Id.* (citing *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001)). "The omission of an essential element from the jury charge is subject to harmless error analysis." *State v. Majors*, 318 S.W.3d 850, 864 (Tenn. 2010) (citing *State v. Garrison*, 40 S.W.3d 426, 434 (Tenn. 2000)). "'An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law.'" *Id.* (quoting *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005)).

The trial court issued the pattern jury instruction on aggravated rape, which is as follows:

> Aggravated rape. Any person who commits the offense of aggravated rape is guilty of a crime. For you to find the Defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements: (1) that the Defendant had unlawful sexual penetration of the alleged victim [D.J.] or the alleged victim had unlawful sexual penetration of the Defendant; and (2) that the Defendant caused bodily injury to the alleged victim [D.J.]; and (3) that the Defendant acted intentionally, knowingly, or recklessly.

See T.P.I. Crim. § 10.01.

Defendant's claim that the definition of "unlawful" relative to aggravated rape means "without consent" involves an issue of statutory construction, which is a question

of law. *See State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020); *State v. Smith*, 436 S.W.3d 751, 761-62 (Tenn. 2014). In construing a statute, this court must "'ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Welch*, 595 S.W.3d at 621 (quoting *State v. Howard*, 504 S.W.3d 260, 269 (Tenn. 2016)). This court first examines "the plain language of the statute to determine the legislature's intent," while giving the statute's words their natural and ordinary meaning. *Frazier v. State*, 495 S.W.3d 246, 248 (Tenn. 2016) (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010)). "When those words are clear and unambiguous, we need not consider other sources of information but must simply enforce the statute as written." *Id.* at 249.

Tennessee Code Annotated section 39-13-502 does not define "unlawful." Similarly, the definitions section of Title 39, Chapter 13 does not include "unlawful." *See* Tenn. Code Ann. § 39-13-501. However, the first principle of statutory construction is to give words their natural and ordinary meaning. Black's Law Dictionary defines "unlawful" first as "[n]ot authorized by law; illegal[,]" followed by "[c]riminally punishable[.]" *Black's Law Dictionary* (11th ed. 2019). Although Defendant states in his brief that the special instruction "more accurately define[s]" the term "unlawful," he does not cite to any case law indicating that this word has a different meaning than its common understanding. *See* Tenn. R. App. P. 27(a)(7)(A).

Moreover, although Defendant asserts on appeal that the special instruction "would serve to more accurately define a proposition already submitted to the jury," he does not allege that the pattern jury instruction failed to fairly submit the legal issues or misled the jury as to the applicable law in his case. Defendant is not entitled to relief on this basis.

Conclusion

Based on the foregoing and the record as a whole, the judgment of criminal court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE