IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 6, 2014

STATE OF TENNESSEE v. KENNETH HAMM

Appeal from the Criminal Court for Shelby County
No. 11-02713 W. Mark Ward, Judge

No. W2013-01125-CCA-R3-CD - Filed July 7, 2014

The Defendant, Kenneth Hamm, was convicted by a Shelby County Criminal Court jury of attempt to commit rape of a child, a Class B felony. *See* T.C.A. §§ 39-13-522 (2010) (rape of a child), 39-12-101 (criminal attempt), 39-12-107 (criminal attempt classification). The trial court sentenced him as a Range I, standard offender to ten years and one month in confinement. On appeal, he contends that (1) the evidence is insufficient to support his conviction; (2) the trial court erred in admitting into evidence his uncorroborated statements to Officer Diffee; (3) the court erred in excluding evidence of the victim's previous allegations of sexual abuse by others; and (4) the court erred by applying insufficient weight to the mitigating factors during sentencing. We affirm the judgment of the trial court.

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

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN and CAMILLE R. MCMULLEN, JJ., joined.

Vicki M. Carriker (on appeal) and S. Ronald Lucchesi (at trial), Memphis, Tennessee, for the appellant, Kenneth Hamm.

Robert E. Cooper, Jr., Attorney General and Reporter; Michelle L. Consiglio-Young, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Carrie Shelton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the Defendant's conviction for attempt to commit rape of a ten-year-old female child. At the trial, the victim testified that her birthday was August 3, 1999, and that she was thirteen at the time of the trial. She identified her mother and her seventeen-year-old sister. She said that at the time of the trial, she lived at the Airport Inn and had lived

there since August 2012. She said she lived with the Defendant before moving to the Airport Inn and last saw him in 2009. When asked, though, where she had lived between her last seeing the Defendant in 2009 and her moving to the Airport Inn in 2012, she said she had lived with the Defendant. She did not respond when the prosecutor asked if she had last seen the Defendant in 2009.

The victim testified that she knew the Defendant because he worked with her mother at Walmart and that they lived with him when they did not have anywhere else to live after her aunt made them leave her house. She denied having known the Defendant a long time but said she met him when she was five years old. She agreed she had known the Defendant about eight years. She said that in November 2009, she was ten years old and was living with the Defendant at an apartment complex in Memphis. She said the police were called to the apartment because the Defendant "did something" to her. She said the Defendant's mother would not allow them to return to the apartment after the police came.

The victim testified that the Defendant touched her. When asked what she meant by "touched," the victim said that the Defendant raped her. She said her mother and sister and the Defendant's mother and brothers lived in the apartment. She said that the apartment had two bedrooms, that her mother slept in the Defendant's mother's room, that the Defendant's mother slept in the living room, and that she and her sister slept in the Defendant's room. She said she and her sister slept in the bed and on the floor. She said that the Defendant and his youngest brother slept in the bed together, that only one bed was in the room, that she did not share the bed with them, and that if they were in the bed, she and her sister slept on the floor.

The victim testified that the incident occurred the first time she and the Defendant were left in the apartment alone. She said that her mother and Jay, who was one of the Defendant's brothers and who dated the victim's mother, left the apartment to get her mother's paycheck and that her sister and the Defendant's youngest brother went to school. She said that she did not go to school that day because she had a seizure and that although she no longer had seizures often, she did at the time of the incident. She said that she was supposed to stay in the Defendant's mother's room that day, that the Defendant was in his room next to the Defendant's mother's, and that she was not in the room with the Defendant. She said that the Defendant grabbed her right arm when she was asleep on the bed in the Defendant's mother's room and took her to his room and that she tried to get him off her. She said that when she was in the Defendant's room, he pulled down her pants and put his penis in her "butt." She said that they were on the Defendant's bed and that she was not looking at him but at the bed because of the way she was facing. She said that she was flat on the bed, that her feet and hands were on the bed, and that her face was turned. She denied

saying anything to the Defendant. She said the Defendant pulled down her pants and removed her underwear.

The victim testified that she knew it was the Defendant's penis because she turned and saw it. She said the Defendant's penis went inside her butt, but when she was asked if she was talking about her butt or her vagina, she was unsure. She said that she felt his penis go into her butt and that it hurt. She said that although she asked the Defendant to stop, he did not. She did not know if the Defendant wore a condom. She said the Defendant told her that if she did not "do this," he was going to "kick" them out of the apartment. She said she did not want to be forced to leave the apartment because they had nowhere to go.

The victim testified that she told her mother what happened the next day. She said that if the police came to the apartment on Thursday, November 4, that was the day she told her mother. She agreed that she stayed home from school on a Wednesday and that she and the Defendant were at the apartment alone. She denied staying in the Defendant's room the night of the incident and said she was in the Defendant's mother's room because her mother styled her hair.

The victim agreed that she returned to her room after the incident and that the Defendant returned to his room. She said she took a bath because "white stuff" was in her panties. She said she threw her panties into the closet, which was what she did with things she did not want her mother to find. She denied returning to the apartment since the incident. She said her mother called the police after finding the panties. She said she told someone what happened when she arrived at the hospital. She agreed that after leaving the hospital, she went to the Child Advocacy Center and told someone the same facts she told the person at the hospital and that the conversation was recorded. She denied either of the Defendant's brothers touched her and said it was the Defendant.

The victim testified that she heard the Defendant had previously done similar things to someone else in the same apartment. She said that the Defendant and his youngest brother were in the apartment when the previous incident occurred, that her sister was not there, and that a girl named Jessica, who was older than she, was the other person. She denied Jessica was the Defendant's girlfriend. She said Jessica lived in the same apartment complex and was "hanging out" at the Defendant's apartment.

The victim testified that she knew the difference between the truth and a lie and that it was not "okay" to tell a lie. She said that if she told a lie at school or at home, she would be in trouble. She denied anyone told her to lie during the trial and said she was told that telling the truth was the most important thing to do at the trial. She said that after she told her mother what happened, they were forced to leave the apartment. She denied living in the

same apartment as the Defendant again after the incident or seeing the Defendant since the incident. She denied having a reason to make up a story.

The victim testified that the Defendant wore a t-shirt and shorts on the day of the incident but did not remember what she wore. When asked what her relationship was with the Defendant before the incident, she said, "Nothing," and agreed he was just someone living in the apartment. She denied telling her mother to make up a story for the trial. She did not remember anything differently than what was written in her previous statement.

On cross-examination, the victim testified that her mother looked in the closet while doing her hair and saw the panties, which were thrown on the floor and had "white stuff" on them. She said the white stuff came from the Defendant's touching her. She denied it came from the Defendant and said it was from her. She denied the Defendant inserted his finger and said he used his "private." She denied seeing the Defendant's private part because he was pinning her down but said she had seen it previously. When asked to describe the Defendant's private part, she said it was "white" and "kinda big." She agreed that his finger was little and that the body part inserted into her was larger than a finger. She was unsure whether the Defendant put his penis in her butt or vagina, but when asked what was hurting after the incident, she said her butt. She denied the Defendant's penis was in her vagina and said it was in her butt. She said that the Defendant's penis "went in deep" and that he went up and down for five hours. She denied anything came from his "male part." When asked how she knew nothing came from his penis, the victim said, "Cause it was stuff in my panties." She said that after the incident, she put on her panties, threw them in the closet when she removed them, and bathed. She said she knew how long five hours was and agreed it was a long time. She said her mother was gone "a long time" and more than five hours. She denied the Defendant stopped and started again during the five hours and said he stopped after five hours.

The victim testified that she screamed and told the Defendant to get off her. She said the Defendant told her that if she did not "do this" or if she told her mother, he was kicking her out of the apartment. She denied she was going to tell her mother but agreed she told her mother after she found the panties. She said that she was ashamed of what was on her panties and that her mother seemed angry when she saw them. She agreed that her mother asked how the "stuff" got in her panties and that she told her the Defendant did it. She denied the white stuff came from her "bootie" after the incident and said it came from her vagina. She said the Defendant did not use lubricant or Vaseline. Although she agreed it "just slipped right in [her] bootie," she also agreed it took force but denied she bled afterward.

The victim did not remember giving a statement to Clare Prince at the Memphis Police Department but remembered talking to a woman with black hair. She did not remember the woman's name but agreed they talked quite a while. She agreed she told the woman that the Defendant "did this" for five hours and said she knew how long an hour was. She said that her favorite television show was *Sponge Bob* and agreed that it was thirty minutes long, that the incident was longer than one episode, and that she would have to watch ten episodes for five hours to pass. She said she told the woman that she and the Defendant walked to J.'s house after the incident but denied knowing J.'s last name. She said J. did not return to their apartment but was in a room at her apartment with the Defendant. She said the Defendant and J. were in the room for a long time, longer than five hours. She said the Defendant's brother told her what J. and the Defendant did in the room. She said the incident with J. happened the same day as the incident with her. She denied she could estimate how long the Defendant and J. were in the room but then said one or two hours, although she did not know.

The victim testified that the Defendant returned to his apartment after he left J.'s. She said that she was standing outside J.'s apartment when the Defendant was with J.. She said she told the woman with black hair that she walked to J.'s apartment, which was in the same apartment complex as the Defendant's apartment. She agreed the Defendant's brother told her that the Defendant was "doing the same thing." When counsel asked to review the events to put them in order, the victim agreed that the Defendant had his male part in her "bootie" for five hours, that she put on her panties, which is when the white stuff got on them, that they walked to J.'s house, and that she went inside J.'s apartment.

The victim denied J.'s mother was home and said only she, the Defendant, and his youngest brother were there. She said the Defendant's brother went in the room with the Defendant and agreed she stayed in the living room for two hours while the Defendant and his brother did "bad things" to J.. She denied hearing anything when they were in the room. She said J. did not say anything when she came from the room. She said she watched television while they were in the room but did not remember what she watched. She agreed she told the "officer with black hair" that she saw the Defendant "pull the same thing out and put it in her." She said she went into the room for a little while but came back to the living room to watch television. She agreed her previous statement said that the Defendant told J. to get on the couch and that he would get on top of her. She said that J. was short, African-American, and "light skinned" and that she had long hair. She said she saw J. remove her clothes. She said J. was fourteen years old.

The victim testified that the Defendant's youngest brother showed her how to get to J.'s apartment. She denied the Defendant did anything to her sister. She said the officer with black hair wanted to go with her to J.'s apartment but did not know if the officer went there.

She agreed the Defendant put his private part in her first, not J., and denied it was at the same time.

The victim testified that after they moved from the Defendant's apartment and to the shelter in November 2009, she did not move back to his apartment or stay with him in 2011. She said she did not go to school during the year of the incident because she was too sick. She denied she "mess[ed]" in her panties. She agreed her mother was angry when she saw the panties. She agreed she had reviewed her testimony but denied anyone made suggestions about what she should say. She denied she would have told her mother what happened if her mother had not found her panties. She said her mother got "real mad" when she found the panties but agreed her mother calmed down and began blaming the Defendant after she told her what happened.

On redirect examination, the victim testified that she was positive the Defendant had done something to her. She denied making up the story because she had "nasty" panties. She said that her mother was mad at the Defendant when she found the panties but then stated that her mother was mad at her first. She denied making up the story to avoid getting into trouble.

The victim denied having seen the woman with black hair before or since the day she spoke with her. She admitted telling the woman that the Defendant had been with another child because he was in the room with her and she did not know what happened. She denied assuming the Defendant had done something to the other child and agreed she knew because she saw it happen. She said she saw the other child crying and the Defendant's "private" in the child's "butt" when she was in the room with them. She said this occurred before the Defendant did anything to her. She denied saying "yes" during her testimony to "get this over with."

The victim denied guessing how long she was in the room with the Defendant and said she wore a watch. When asked how long she had been testifying, she did not know but said a long time. She said it felt like a long time when she was in the room with the Defendant. When asked how long she was alone in her room before she went to J.'s, the victim said she was "in there about probably two o'clock." She said that the Defendant's youngest brother came home about 2:15 p.m. and that she looked at a clock. When asked if she could remember what happened three years ago, she said, "I guess." She denied making up the story because it was what she saw the Defendant do to J. or because she wanted to avoid getting into trouble for her dirty panties and said she did not make up the story.

The victim testified that her mother found the panties about one and one-half days after the incident. She said that she had not talked about the incident but agreed that she had

spoken with the prosecutor, her mother, and a doctor at Le Bonheur about it. She agreed everyone had asked if this really happened and said she told everyone that it did.

The victim testified that she took a bath and changed her underwear before she went to J.'s apartment. She said she was with the Defendant after the incident because her mother was not there and she could not stay alone. She agreed the Defendant was supposed to watch her. She said that the Defendant's youngest brother was with them when they were at J.'s apartment and that he stayed in J.'s room with the Defendant the entire time. She denied telling the Defendant's brother what the Defendant did to her.

The victim testified that her "bottom" was hurting at the time of the trial. When asked what it felt like, she said, "Pain." She said that the pain was from the Defendant and that she was not hurting before the incident. She denied looking at a clock during the incident and said she just knew it was five hours.

The victim's mother testified that the victim was her thirteen-year-old daughter and that she had a seventeen-year-old daughter. She said she knew the Defendant as a co-worker and had known him about a year before the incident occurred. She said that they began working together in 2005 or 2006 and that the incident occurred in 2009. She clarified that she had known the Defendant at least two and one-half years. She said that she lived with the Hamms once before the incident. When asked to describe her relationship with the Defendant, she stated that they were "like regular peoples." She said that she and the Defendant had issues concerning money and things not going the way he and his mother wanted when she was dating his brother and that she left.

The victim's mother testified that she had dated the Defendant's brother, Jay, about two and one-half years and that they were dating when she and her daughters lived with the Hamms in November 2009. She said she met Jay and his family through the Defendant. When asked if she was good friends with the Defendant before moving in with him, she said they were co-workers. She said that after her sister made her family leave her house, they did not have anywhere to go and that she asked the Defendant's mother if they could stay with her. She denied that she was friends with the Defendant's mother but said that when the Defendant introduced her to his mother, she seemed friendly. She said that because his mother had raised him, she "figured she was a good woman." She stated that his mother previously worked at Walmart, that everyone said she seemed friendly, and that she asked his mother if they could stay with her. She said she was looking for a place to live at the time, that she had a job, and that she saved money and found a place to stay.

The victim's mother testified that she called the police on November 4, 2009, after the victim told her what the Defendant had done. She said she called the police because she

found something, thought something was not right that day, and the victim was not acting like a "usual kid" but was quiet and subtle. She said that she left the victim with the Defendant once previously during the first time they lived with the Hamms but that the Defendant's youngest brother, who she guessed was eight years old at the time, was there.

The victim's mother testified that she left the victim alone with the Defendant on the morning of November 4, 2009, the day she called the police, because she had to pick up her check downtown and the victim was sick. She said Jay was supposed to work but did not, and she did not know if the Defendant was off work or did not go. She said that the Defendant told her he was going to stay at the apartment and that she told the victim to stay in her room. She told the Defendant to call her and then call 9-1-1 if anything happened. She said that she, Jay, and the Defendant's mother left the apartment in the Defendant's mother's van, that she took the Defendant's mother to FedEx, and that she and Jay went to get her check. She said that she needed to get the check, which was in Collierville, because if she did not get it, she could not pick it up until the next week and she needed to pay the Defendant's mother. She said that it was the Defendant's apartment but that she dealt with the Defendant's mother and that the Defendant's mother dealt with the Defendant.

The victim's mother testified that she and Jay slept in the "other room," that her daughters slept in the room with them but sometimes took naps in "their room," and that the televisions were in the Defendant's room and the living room. She said that the Defendant's mother allowed them to stay in her room because her daughters were sleeping in the living room with the Defendant's mother. She said that the Defendant wanted her daughters to sleep in the room with him, that they stayed with him a couple of nights, and that she told the Defendant her daughters did not need to sleep in his room. She said that the Defendant threatened to "put [them] out" if the girls did not sleep in his room and that he had made the threat previously. She denied making up the incident or telling the victim what to say to "get back" at the Defendant.

The victim's mother testified that she found the victim's panties in the closet where the Defendant's mother allowed them to keep their clothes. She said she found a "substance" in the victim's panties and asked her about it. She denied she was mad and said she did not want to scare the victim because the victim would not tell her the truth if she did. She said that she asked the victim nicely from where "this" came and that the victim was scared to tell her. She stated that she knew something was not right when the victim said "yes, ma'am, no, ma'am mama," which she did not say normally. She said the victim became scared and grabbed the panties. She said that she did not argue with anyone because she did not have time and she was "sickly" and that "all [she] did was [get] on the phone." She said she did not question anyone before calling the police because she did not have time to argue and slam doors and cabinets, which is what occurred previously.

The victim's mother testified that the victim said, "[M]ama, he tried to get in poo poo and (indiscernible)." She denied saying anything to the Defendant or the Defendant's mother after the victim made the statement. She said she called the police and told them what the victim stated when they arrived. She said the police took her and her daughter to the hospital where a "swab test" was performed. She denied they returned to the apartment that night and agreed they had been "put out."

The victim's mother testified that they were escorted from the premises and stayed in a shelter or a hotel that night. She denied returning to live with the Hamms after the incident and said they went to a shelter. Although she denied living in the apartment with the Defendant between the time she called the police and the trial, she said that the Defendant's mother picked them up and took them to the apartment, that the Defendant was not supposed to be there, and that she was still friends with the Defendant's mother. She said the Defendant's mother brought the Defendant and her other sons to the shelter where the victim's mother and her daughters were staying. She said the Defendant and the Defendant's mother stated that the Defendant could be around the victim's mother and her daughters because "they dropped everything." She admitted allowing the Defendant around her daughter but said she did not want to allow it. She denied she was living with the Defendant.

The victim's mother denied that the victim told her she made up the story and that the victim changed her story about what happened. She denied her daughter was good with time and said she was not gone for five hours on the day of the incident. She said the victim could not tell time well at the time of the incident but could at the time of the trial. She said the victim repeated kindergarten because she had seizures. She said the victim had been diagnosed with epilepsy, took medication, and was under a doctor's care. She said that the victim was home on the day of the incident because she was "real sick," that she was not allowed to be home alone, and that she asked the Defendant to watch her. She said she told the Defendant that if he heard something or if the victim knocked on his door, he should call her, not go into the victim's room. When asked if the Defendant could go anywhere he wanted because it was his apartment, she said, "Not really," and stated he was not supposed to go in a room if she or the Defendant's mother told him not to go in the room. She said the Defendant's mother may have told him not to go in a room because she knew how "childish" he could be. She said she no longer spoke with the Defendant's mother and did not communicate with the Hamms because they threatened her and her family.

The victim's mother testified that she did not allow anyone around the victim. When asked where she lived, she said it was confidential because she did not want the Defendant to know, later stating she lived at the Airport Inn. She said that she did not want the Defendant to know where she lived because she did not want his family threatening her and her family. She said the Defendant's mother knew where she was after the incident because

Jay called her. She denied threatening the Defendant when he forced her to leave his apartment. She denied staying at others' houses and said they went to shelters and stayed with family. She said she taught the victim the difference between right and wrong and between telling the truth and telling a lie. She said she told the truth at the trial.

On cross-examination, the victim's mother testified that she began working at Walmart in 2005, that she and the Defendant were co-workers there, and that at the time, she was living with her sister. She said that she left her sister's house in 2005, that she did not have a place to stay, and that she stayed with an "older lady" before asking the Defendant's mother if she and her daughters could stay at the Defendant's mother's apartment. She then corrected herself and said she left her sister's house around 2006 and asked to live with the Defendant's mother. She said she stayed with the Hamms a couple of months in 2006 and returned to live in their apartment in 2008.

The victim's mother testified that she and Jay had their own apartment before 2008 but were evicted because Jay "put[] holes" in the apartment. She said that she did not stay with the Hamms long in 2008 because she worked at Service Master and Wendy's, had a car, and had applied for "MIFA" housing. She said that MIFA "messed up [her] time frame," that she did not receive the MIFA house, and that the incident occurred the same week she was denied MIFA housing. She said she lived with the Hamms a couple of months in 2008 but moved into a shelter after the incident. She later said that the incident happened in November 2009, that she had lived with the Hamms a little while in 2008, and that she lived with them on three separate occasions.

The victim's mother denied questioning the Defendant's mother or the Defendant after she found the victim's panties. She said that she called the police and an ambulance and that the ambulance transported the victim to the hospital where tests were performed and a "swab" was taken. She did not know what the police did with the Defendant after she left. She said they moved from the apartment on the day of the incident. When asked if she returned to live with the Hamms in 2011, she said she had her own place. She said that she had a heart attack, that the Hamms knew she had a heart attack, that Jay helped her, and that they kept bringing the Defendant around her and her daughters. She denied living with the Hamms in 2011 but said she had contact with the Defendant in 2011 because the Hamms tried to help her after her heart attack. She said that Jay was working and gave her money and that Jay also asked the Defendant's mother for money.

The victim's mother denied that the incident occurred during the short time she returned to live with the Hamms after she was evicted from her apartment. She said that they lived with the Hamms temporarily at that time but that she and Jay moved to a house. She said, though, that the house was foreclosed, that they returned to the Hamms' apartment in

2011 for at least one month, and that they then moved to "Ivy Chase." She agreed that "all of this stuff" had happened with the Defendant a few years previously and that they returned to live in his apartment for a couple of months because she was trying "to get back on [her] feet." She agreed the victim probably did not remember moving back to the Defendant's apartment because she was "a kid." She later stated that her family "was in [their] own stuff" in 2011, that they were in Atlanta "in 2010 going on '11," and that when they returned to Memphis, they went to a shelter first and then MIFA. She said that she did not resume living with the Defendant but had a heart attack in 2011 when she was in MIFA housing and that his family brought him when they were helping her.

The victim's mother testified that she was gone about thirty-five to forty minutes on the day of the incident because it took that long to go downtown and get her paycheck. She said she left the Defendant and the victim at the apartment. She said that a "gunk of white stuff" was in the victim's panties and that it was "human liquid stuff." When asked if the victim told her what was in her panties, she said the victim told her it came from the victim. She said that when she returned from her forty minute trip, she checked on the victim, that the victim was lying on the Defendant's mother's bed like she was asleep, and that the Defendant was watching television and told her the victim was fine. She said she slept in the Defendant's mother's room because the Defendant's mother slept in the front room. She said that her daughters slept in the front room with the Defendant's mother but that the Defendant would "have a fit" if they did not sleep in the back room with him.

The victim's mother testified that she was unemployed at the time of the trial because of her health. She said that Jay was not living with her at the time of the trial and that she did not know where he was staying. She denied the victim was bleeding when she questioned her but said the victim was "walking funny" like she had been "traumatized." She said the Defendant was supposed to watch the victim on the day of the incident. She denied being gone seven hours. She denied knowing J. but thought she may have lived in the neighborhood, although she did not know and had never met her.

On redirect examination, the victim's mother testified that she had health problems and was taking "Claudine, Topral, Zofermax," and other medication for her back at the time of the trial. She denied it was pain medication but said it was like Ibuprofen. She agreed the medicine made her drowsy but later denied it made her sleepy. She said that it made her confused sometimes and that she had seizures. She said the medicine sometimes affected her memory but "not that much." She denied returning to live with the Defendant or the Defendant's mother after the victim told her he hurt her. She said that the Defendant's mother brought the Defendant when visiting her family at the MIFA shelter. When asked why she stated during cross-examination that she had returned to live with the Defendant after the incident, she said that they moved back in "way before" the incident occurred.

The victim's mother testified that the victim told her the Defendant put his penis in her and denied that she suggested it to the victim. She said that she pulled the victim to a quiet place and asked her what happened. She denied the victim and the Defendant were alone for seven hours. She denied leaving the victim for that long and said her older daughter would have been home from school after that period of time. She identified the victim's underwear. She denied speaking with the Defendant or the Defendant's mother about the incident.

Memphis Police Officer Quentin Houge testified that he responded to the Defendant's apartment around 10:00 p.m. on November 4, 2009, and that his partner, Officer Diffee, arrived first. He said that when he arrived, a white male was being escorted to a patrol car. He said that although he did not talk to the man, he heard him complain about being claustrophobic and not being able to get into the car. Officer Houge said he was given panties to hold as evidence and to deliver to "Crime Scene" when they arrived, which he did. On cross-examination, Officer Houge agreed that he was basically gathering "materials." He denied he took photographs of the panties but said Crime Scene did.

Memphis Police Sergeant Alpha Hinds testified that she was an investigator with the Crime Scene Division at the time of the incident, responded to the scene, and photographed evidence that officers collected from the victim's mother. She said she received from the officers the victim's panties in a plastic bag and identified her photographs of them. She said that the panties were dirty when she pulled them from the bag and that she used the Alternate Light Source (ALS) to identify body fluids at the scene. Using a photograph exhibit, she explained that the "glow part" in the "crotch area" of the underwear was bodily fluid. She said she collected DNA swabs from the area on the panties and from the Defendant.

On cross-examination, Sergeant Hinds denied testing the substance on the panties for the presence of DNA to determine its source and said she only collected the swabs, which were sent to the Tennessee Bureau of Investigation (TBI) for analysis. She said she swabbed the Defendant's mouth for DNA and sent the swab to the TBI. She denied swabbing the victim for a DNA sample but agreed someone probably did.

Memphis Police Officer Chris Diffee testified that he responded to the Defendant's apartment on November 4, 2009, after the victim's mother called the police. He said that when he arrived, the Defendant met him outside on the staircase and that the Defendant was confused and a "little bit" angry. He said that because the Defendant was bigger than him, he tried to stall until his partner arrived. He said he detained the Defendant, which meant that the Defendant was not in custody but matched the suspect's description and that the police "wanted to hang onto him." He said the Defendant asked why he was there and who called the police and became angry when he realized what was happening and who had

called. He denied telling the Defendant who called. He said he placed the Defendant in the back of his squad car and spoke with the victim and her mother.

Officer Diffee testified that after the victim told him what happened, he notified his supervisor, which was protocol. He said that his supervisor came to the scene, that the supervisor called the "bureau," and that he worked on a report. He said he was the arresting officer in this case, which meant he was the first on the scene and was responsible for completing the paperwork. He said that the paperwork in this case was submitted electronically, that it went to the bureau after it was submitted, and that although he could have submitted a continuation to amend the report, it was more complicated than changing a paper report. He said that he submitted the paperwork and then transported the Defendant. He denied questioning the Defendant or reading him his *Miranda* rights. He said that he was not supposed to question the Defendant and that bureau sergeants questioned suspects, not patrol officers.

Officer Diffee testified that after he submitted the paperwork, he transported the Defendant, that the Defendant made brief statements during the transport, and that it was "a long time ago." He said the Defendant stated, "[T]his is bulls---. The little b---- wanted it. I didn't do anything she didn't want me to do." He denied having previous interactions with the Defendant and having a reason to make up the statements. He denied telling anyone at the bureau that the Defendant made the statements and said he first told someone about the statements when he spoke with the prosecutor before the trial began. He agreed the statements were important information and said that in hindsight, he would have done things differently. He was positive the Defendant made the statements and said that the Defendant made other statements he could not remember and that the Defendant was angry. He said that the Defendant was quieter while waiting at the bureau but that he only sat with him briefly.

On cross-examination, Officer Diffee agreed that the call occurred about three years before the trial and that the first time the defense heard about the Defendant's statements was about one year before the trial. He agreed the case was continued after the statements were presented to allow the defense time to investigate. He said that a lot of paperwork was generated when an arrest was made, including a police report, an arrest ticket, and an affidavit of complaint. He admitted he wrote the affidavit of complaint but did not include a confession from the Defendant. When asked if he did not think the Defendant's statements were important enough to include, he said that the paperwork was submitted before the Defendant made the statements. He admitted, though, that the affidavit was signed by a judge or commissioner the day after it was submitted, giving him time to amend it. He said he could have submitted a continuation to add information to the affidavit or the arrest ticket.

He agreed a confession was the most important piece of evidence he could collect and said he normally added a confession to the report when he received one.

Officer Diffee agreed Officer Houge, Sergeant Ray, and a photographer were at the scene. He said that the lieutenant was his immediate supervisor and that he did not tell the lieutenant about the Defendant's statements at the scene because the Defendant had not made the statements at the time. He said that the Defendant made the statements during transport, that only the two of them were in the car, and that the radio was "going off." He agreed he had probably answered hundreds of calls in the three years before the trial. He said plexiglass divided the front and back seat of his patrol car and agreed it was not a "real good thing to talk through." When asked if the Defendant's statements may not have been the same as to what he testified, he said that the sliding window in the center of the cage was open and that he could hear "pretty clear." He said that the Defendant sat directly behind him on the left side of the back seat and agreed that plexiglass was between them even with the window open because the window was in the center. He said that Officer Houge had the victim's panties and that he did not see him again after the Defendant made the statements to tell him. He said that after he took the Defendant to the bureau, there was "so much going on," that he sat with him a few minutes before a sergeant came, and that he left. He said he did not have a chance to talk to anyone. He could not remember the next call to which he responded that night or if the next person made a confession. He said that he remembered this call because it "stood out."

On redirect examination, Officer Diffee testified that this case stood out because it involved the rape of a child. When asked if the sergeant asked him questions about the Defendant, he said that the sergeant took charge and that he left within thirty minutes of arriving. He said that he had completed and submitted his paperwork before the Defendant told him anything and that although he could have changed it, he did not. He remembered the Defendant specifically and remembered the Defendant's talking about a "little girl" because he had seen the girl. He denied the Defendant was incoherent or appeared under the influence. He denied that the Defendant made the statements in response to questioning or that he asked questions about how tall the Defendant was or how much he weighed. He denied asking the Defendant for his Social Security number and said he used his driver's license and obtained all the information from it.

When asked if he had conversations with people when he was transporting them, Officer Diffee said, "It just depends." He said it was a fifteen- to twenty-minute ride and agreed it was "dead silence" unless someone spoke. He said that when he transported someone, he told dispatch he was transporting and gave them his mileage, which removed him from the call rotation, that he did not listen for calls, and that he paid attention to the person in the back seat and to driving. When asked again what the Defendant stated, he said

that "it was a long time ago" but that the Defendant told him something "along the lines of, I didn't do anything that she didn't want. This is bulls---. The little b---- wanted it." On recross-examination, Officer Diffee was asked if his testimony was an exact quote from the Defendant because he said the statements were "along the lines" of what the Defendant stated. Officer Diffee responded that other things were said.

TBI Forensic Scientist Lawrence James testified that he was assigned to the DNA section of the Memphis laboratory and that he analyzed body fluid and performed DNA comparisons. He said he received saliva standards, anal swabs, vaginal swabs, and underwear, tested for semen, saliva, and blood, and performed a DNA analysis. He said he would not expect to detect semen anally if the victim was assaulted on the morning of November 2, 2009, around 8:00 or 9:00 a.m., and swabs were not taken until November 5 or 6. He said that loss of a sample could occur from bowel movements, bathing, drainage, and an immune system response in which bacteria caused semen and sperm cells to degrade. He said that it was uncommon for him to be asked to test for blood, that testing was used to link a suspect to a victim, and that although a victim may bleed, it was uncommon for a perpetrator to bleed.

Agent James testified that he did not find semen when he tested the victim's anal and vaginal swabs for DNA. He said that he performed a saliva test and an "alpha-amylase" test on the vaginal swabs because he did not assume a child victim knew everything that occurred during a sexual encounter. He explained that an alpha-amylase test was different than a saliva test, that it was a chemical found in many body fluids, especially fluids associated with the digestive system and that vaginal secretions, sweat, and urine were known to have some degree of alpha-amylase. He said that his test showed a "weak positive" for alpha-amylase in this case but that he only found the victim's DNA when he tested the alpha-amylase.

On cross-examination, Agent James testified that he found only the victim's DNA on the evidence in this case. He said he tested for saliva and semen, not feces. When asked if a victim was raped anally for four or five hours, put on her panties afterward, and went with the perpetrator while he raped someone else for a couple of hours, he would expect there to be something in her panties, he agreed he would expect there to be some if the perpetrator ejaculated. He said that it was possible that pubic hairs would be left from the perpetrator and that semen would remain somewhere after an extended period of sexual intercourse. He said that the panties were stained when he looked at them but that he found only the victim's DNA. He said he could not determine if the fluid in the panties was vaginal or anal secretions.

Agent James agreed that if someone had a yeast infection, some secretion would probably be left in the panties and that it would contain the DNA of the person wearing the

panties. He agreed he found nothing in the panties or on the victim's vaginal and anal swabs that connected the Defendant to the attack. He said the Defendant gave a saliva sample. He said that if a large amount of DNA was contributed by one person and a minute amount was contributed by a second person, his testing would not detect the minor contributor's profile and that the results would appear as a single profile even though two profiles were actually there. He denied the evidence showed a mixture of DNA. When asked on redirect examination if his testing excluded the Defendant as the perpetrator of the assault, Agent James said that he could not conclude the Defendant was not the perpetrator but that his testing did not reveal the Defendant's DNA was present.

Dr. Karen Lakin, an assistant professor of pediatrics at the University of Tennessee, the medical director for the Le Bonheur Child Assessment Program, and a general pediatrician, testified that her team was called to consult and assist when a child was admitted to her hospital for injuries or medical problems that indicated child maltreatment. She said she was board certified in general pediatrics and child abuse pediatrics. She said that she examined the victim on November 4 or 5, 2009, at about 11:00 p.m. and that the victim was ten years old at the time. She said the victim told her the Defendant "put his private part in [her] behind" around 10:00 a.m. on the day she came to the emergency room. She said that in her experience, children were not good at telling time and agreed that the younger the child, the more difficult and abstract the concept of time was.

Dr. Lakin testified that the victim had problems following directions, seemed immature, and was difficult to examine. She said the victim had bathed, urinated, defecated, eaten, brushed her teeth, and changed clothes before arriving at the emergency room. She said that children do not always have knowledge of the anatomy of their genital region, that the victim's words were that the Defendant put his private part in her "behind," that sometimes "behind" meant anus when used by a child victim, and that sometimes a child victim used "behind" to describe the approach. She said she did not try to interpret a child victim's meaning and always quoted the child's words in her report.

Dr. Lakin testified that most pediatric sexual assault examinations did not show any indication of abnormalities or changes. She found a small abrasion at the base of the victim's hymen when she performed the genital examination and a lot of thick, white discharge. In her opinion, the findings from the physical exam were indeterminate in supporting the victim's disclosure. She said testing of the white discharge showed that the victim had a yeast infection. She said her report showed that the abrasion was "very friable," meaning that the irritated tissue would bleed if touched. When asked if her findings were consistent with what the victim told her, she said, "It can be." When asked if an adult male who assaulted a child would "most definitely have left something behind," she said, "That's not been my experience." She said the vagina and the sphincter were elastic. She said that the

thick, white discharge could have acted as a lubricant and affected whether lacerations or bruising occurred. She said, though, that even in the absence of a lubricant, she did not necessarily see trauma in examining girls with known sexual penetration.

Dr. Lakin testified that children had difficulty understanding time periods and agreed that if this assault occurred for five hours, she would have expected to see something. She had not heard of a child sexual assault occurring for five continuous hours. She stated that her findings were indeterminate but that they did not rule out sexual assault.

On cross-examination, Dr. Lakin testified that she found no injury to the victim's anus but that most of the time, she did not find injury. When asked if she would find trauma if an adult man forced his penis in the victim's anus, she said, "That's not what we see actually." She denied the anus was "self-lubricating" and assumed it would take force to insert the penis. She denied seeing any tearing or severe trauma to that area of the victim's body.

Dr. Lakin testified that yeast was recovered when the white discharge was tested. She said that yeast infections can be contracted a number of ways, that men usually do not contract yeast infections, and that although yeast could enter a man's urethrae if he had sexual intercourse with a woman who had a yeast infection, it usually did not. She agreed that she used a rape kit to examine the victim about thirteen and one-half or fourteen hours after the incident. She denied the time between the assault and the testing was as long as two days.

Dr. Lakin testified that she marked the box in her report showing that the indeterminate physical exam may support the victim's statements. She said that a yeast infection could cause irritation, that it may prompt scratching to relieve the irritation, and that rubbing the area would cause more irritation. She denied the small abrasion was bleeding but said blood was probably on the swabs because she wrote "friable" on the report. She agreed the blood could have been caused by scratching but denied it could have been caused by the victim's panties irritating the area. She denied seeing the panties the police collected. She agreed that "small abrasion" meant about as big as the head of a pin and that the small abrasion was the only trauma she found on the victim. She clarified that the abrasion was big enough for her to see and that the circumference of the abrasion was probably the size of a BB. She said that an abrasion could occur in the genital area for various reasons and that "abrasion" meant the "integrity of the skin" was broken. She agreed a yeast infection or scratching because of the yeast infection could have caused the abrasion.

On redirect examination, Dr. Lakin testified that the abrasion she found could be consistent with a penis or other foreign object being inserted in the child's anus or vagina. She said the thick, white discharge could act as a lubricant. She said that "mild erythema"

was noted separately from the abrasion on her report, that mild erythema meant redness, and that abrasion meant torn skin. She said the abrasion could cause pain. She denied that the child's reporting the Defendant put his penis "in her behind" meant "anus only" to her and agreed it meant "anything down there." She agreed she could not see the victim's hymen because of the white discharge. She said that a small abrasion could be significant in a child and that she marked it as indeterminate and diagrammed it because it was not a normal finding but that an abrasion was not a significant injury. She denied she could rule out sexual assault in this case. She agreed that she had no findings in the majority of her cases but that in this case her findings were indeterminate.

The Defendant testified that he was thirty-six years old. He denied that he touched or had any sexual contact with the victim on the morning in question and that he took off his or her clothes. He said he had anxiety, high blood pressure, and high cholesterol and was home that morning because he had an anxiety attack at work the previous day. He said that he took Paxil for his anxiety and Lipzol for his blood pressure.

The Defendant denied knowing J., taking the victim and his brother to J.'s house, and having sex with J.. He said that he and the victim were alone briefly at the apartment from 9:00 until about 10:00 or 11:00 that morning. He denied seeing the soiled panties in the house and said he did not know anything about the situation. He said he was employed at Walmart at the time of the incident and had worked there six years. He said that he worked at Piggly Wiggly before working at Walmart and that he had worked since he was fourteen years old. He said that he had been in jail eighteen months at the time of the trial and that he had maintained his innocence. He said none of the alleged events took place.

On cross-examination, the Defendant testified that he and the victim were home alone on the morning of the incident but that the time was different than what he told the police. He agreed he told the police he was only alone with the victim on Tuesday morning, November 2, but testified that they were alone on Thursday morning, November 4. He said that he was actually alone with the victim on Tuesday morning, November 2, before he was taken into custody on Thursday, November 4. He agreed that he was with the victim for one or one and one-half hours and that the victim's mother correctly testified about the time.

The Defendant denied he was angry when the police came to arrest him and said he was curious because he did not know what was happening. He admitted complaining about being claustrophobic on the night he was arrested. He said that he asked why the police were handcuffing him and putting him in the patrol car but that he was not told anything until he arrived in the detective's office. He said the detective told him he was accused of rape of a child. He said that he was at home watching television with his mother in the living room on the night he was arrested and that the victim and her mother were in his room. He said

that Officer Diffee asked him to come outside, that he complied, and that he was not angry. He denied having a temper and said he was more of a protective person than a violent person.

When asked if the victim's mother was lying when she testified that it was loud in the apartment and that doors were slammed, he said that they had normal family disagreements but that no doors were slammed and that no "hollering" occurred. He denied ever arguing with the victim's mother and said they were "pretty close" the entire time he knew her until the incident occurred. He said that they were casual friends and that he helped her by allowing her to live with him. He agreed he was "cool with kids" and said his youngest brother had friends, who were younger children, visit the apartment. He denied it was possible one of his brother's friends was named J. and said mainly boys came to play video games. He agreed that he was home alone with the victim on the morning of November 2, 2009, that the victim's mother was only gone for about one or one and one-half hours, that he was arrested on the evening of November 4, 2009, and that his relationship with the victim's mother was "okay."

The Defendant testified that the victim and her sister slept on the floor in his room sometimes but slept with their mother other times and that he and his brother slept on a bed in the room. He said that he was thirty-three years old at the time of the incident and denied that he normally had young girls whom he did not know well sleep on his bedroom floor. He said that the girls spent most of the time in the victim's mother and Jay's room watching television and that he spent his time at work or in the living room with his mother. When asked if the victim's mother testified truthfully that she did not tell him she was calling the police, he said he did not know anything about it.

The Defendant denied making the comments to which Officer Diffee testified. He denied saying that the "little b---- wanted it" and that he "didn't do anything to her that she didn't want." He said that Officer Diffee was lying and that he only knew Officer Diffee from his arrest. When asked if Officer Diffee was working on his small computer before leaving the scene, the Defendant said that he knew they sat at the scene for a "little while" and that he guessed the police were gathering information and evidence. He denied hearing anyone talk about criminal assault, rape, or the victim while he waited. He denied talking to the officers or asking them questions and said he only asked what was happening. He denied speaking to his mother other than to ask her to get his driver's license when he was asked for his identification and said that although he heard her talk to the police and ask questions, he did not hear exactly what she said because he was outside and down the hall. He said that he was standing outside the apartment, that only Officer Diffee was there, and that the victim and her mother were standing with his brother outside in front of the apartment by the swimming pool. He said he did not know the situation when he saw the

police speaking with the victim, was "in the dark" until he spoke to Lieutenant Jones, and was "completely shocked."

On redirect examination, the Defendant testified that he did not make a confession to Officer Diffee. He denied saying anything about the victim "wanting it." He said that no rule at the apartment required the victim and her sister to sleep in his room and that the girls' sleeping in his room was their and their mother's decision. He said the victim's family lived with him three or four times.

Karen Hamm, the Defendant's mother, testified that the victim's family first moved to her apartment in 2006 because the victim's extended family had "put them out on the street." She said that the victim's mother worked with her son and that her son was nice and invited them to move into the apartment. She said the victim's family left in 2008 because they had an apartment at the Peabody Shelter. She said the Defendant was her oldest son. She said that Jay Hamm, her middle son, was dating the victim's mother when the victim's family moved to the Peabody Shelter and that he moved with them a couple of weeks after they moved. She thought the victim's family returned to live in her apartment in 2009 because the family was evicted from the shelter but moved again when they found their own apartment. She said that the victim's family returned to live with her in 2010, which she agreed was when the incident occurred, and that they left again about three months after moving into the apartment. She said they returned to her apartment when they were evicted again.

The Defendant's mother denied that the victim and her family moved from her apartment after the Defendant was arrested. She did not know how long the victim's family stayed in her apartment because the landlord made her family move after the incident. She said that when the incident occurred in 2009, the victim was living with her. She said that she moved from the apartment and that the victim's family did not. She then said that the victim's family moved from the apartment two days after the incident. She said that the Defendant was arrested on May 4, 2011, and that the victim and her family were living with the Hamms at the time, which was the fourth time they had lived with the Hamms and was after the incident. She said that the victim's family did not have another place to live, that they lived in the Salvation Army shelter, and that they were living with the Hamms when the Defendant was arrested two years after the incident. She said that the Defendant had been in jail since 2011.

The Defendant's mother testified that the victim and her sister were supposed to sleep in the living room. She denied the Defendant ever insisted the girls sleep in his room but said they slept in his room a few times. She said that the Defendant and her youngest son shared a bed in the room, that one of the girls slept on a second bed in the room, and that the other

slept on the floor. She said that she had her own room beside the Defendant's and that she slept in her room after everyone moved to the apartment. She said the victim's mother slept on the living room floor. She denied knowing anyone named J. and said J. had never been to her apartment. She denied any of her sons had mentioned J..

On cross-examination, the Defendant's mother testified that the victim's mother and her family lived in homeless shelters before living with her but that they were "kicked out" of each shelter. She agreed that the victim's mother's choice was to live on the streets or live with the Hamms. When asked if she had testified that the incident occurred in 2010, she said she heard it was 2009 but was unsure. She said that the Defendant was taken for questioning on November 4, 2009, but that he did not stay in jail. She said that they were "kicked out" of the apartment after the Defendant was taken for questioning and that the victim's mother had nowhere to go.

The Defendant's mother agreed that the victim's mother borrowed her car a couple of times and that she trusted the victim's mother with her car. She agreed that she, the victim's mother, and Jay were not at the apartment on November 2, 2009, and that she did not know what happened when she was not there. She said she was always home when not at work. She agreed she could only say that no one named J. was at her apartment when she was there. She agreed that she allowed the victim and her mother to return to her apartment after accusing the Defendant of raping the victim because she was trying to be nice. She agreed the victim's mother was "between a rock and a hard place" when faced with the decision to live on the streets or with the Hamms. She said that to her knowledge, the victim's mother and Jay were still together but that she did not speak to Jay anymore. She agreed the Defendant and the victim were alone in the apartment on the Tuesday before the Defendant was arrested but said they were only alone about five minutes when Jay and the victim's mother took her to work, which was around the corner from her apartment.

Upon this evidence, the jury convicted the Defendant of attempt to commit rape of a child. The trial court sentenced him as a Range I, standard offender to ten years and one month in confinement. This appeal followed.

I

The Defendant contends that the evidence is insufficient to support his conviction. He assails the credibility of the victim and her mother and asserts that no physical evidence exists. The State responds that the evidence is sufficient. We agree with the State.

Our standard of review when the sufficiency of the evidence is questioned on appeal 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). We do not reweigh the evidence but presume that the trier of fact has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. *See State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility are resolved by the jury. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997).

"'A crime may be established by direct evidence, circumstantial evidence, or a combination of the two.'" *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005) (quoting *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998)). Circumstantial evidence alone may be sufficient to support a conviction. *State v. Richmond*, 7 S.W.3d 90, 91 (Tenn. Crim. App. 1999); *State v. Buttrey*, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). The standard of proof is the same, whether the evidence is direct or circumstantial. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). Likewise, appellate review of the convicting evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" *Id.* (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

Relevant to this appeal, "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part[.]" T. C. A. § 39-12-101(a)(2). Rape of a child is "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age." *Id.* at § 39-13-522(a).

The Defendant argues that the victim and her mother were not credible witnesses. However, defense counsel was able to cross-examine the witnesses and question their credibility. The jury saw and heard the witnesses at the trial and was able to weigh their credibility and the evidence. Questions of witness credibility are resolved by the jury. *See Bland*, 958 S.W.2d at 659.

The Defendant also argues that no physical evidence showed the Defendant sexually assaulted the victim. However, Dr. Lakin found a small, abnormal abrasion near the base of the victim's hymen and denied her findings ruled out sexual assault. Although the Defendant's DNA was not found on the evidence, Agent James could not state that the Defendant was not the perpetrator, only that his testing did not reveal the presence of the Defendant's DNA. We presume the jury resolved all conflicts in the testimony and drew all reasonable inferences from the evidence in favor of the State. *See Sheffield*, 676 S.W.2d at 547; *Cabbage*, 571 S.W.2d at 835.

In the light most favorable to the State, the victim's birthday was August 3, 1999, and she was ten years old in November 2009 when the incident occurred. The victim and her family lived with the Defendant at the time. The victim was home from school because she had seizures and was left alone with the Defendant on the morning in question. The victim testified that the Defendant grabbed her arm when she was asleep and took her to his room where he pulled down her pants and put his penis in her "butt." She said that she felt his penis go into her butt and that it hurt. She took a bath because "white stuff" was in her panties and threw her panties in the closet where her mother later found them.

The victim's mother called the police on November 4, 2009, because she found the victim's soiled panties and the victim told her what happened. When Officer Diffee transported the Defendant to the jail, the Defendant told him, "The little b---- wanted it. I didn't do anything she didn't want me to do." Dr. Lakin, who performed the victim's physical examination, said the victim told her that the Defendant put in penis in her "behind." When she performed the genital examination, she found a small abrasion at the base of the victim's hymen, which was an abnormal finding. She stated that although her findings were indeterminate, the assault could have occurred as the victim described because abnormal findings were shown, and she denied her findings ruled out sexual assault.

We conclude that a rational trier of fact could have found beyond a reasonable doubt that the Defendant attempted to commit rape of a child. The evidence is sufficient to support his conviction. He is not entitled to relief on this basis.

II

The Defendant contends that the trial court erred in admitting his uncorroborated statements to Officer Diffee. He argues that because an "extreme issue" of credibility existed concerning the victim's allegations and because of the lack of physical evidence, his admission was the only evidence that showed he committed the crime. He argues that although the issue was not raised in his motion for a new trial, he filed a pretrial motion on the issue, which was denied, and that the statements were admitted over his objection at the trial and affected his rights. The State responds that the Defendant has waived the issue for failing to include it in his motion for a new trial and for failing to object to the statements during the trial, arguing that the Defendant only noted his objection to the court's denial of his motion instead of objecting to the statements' admission. In the alternative, the State contends that the trial court properly denied the Defendant's pretrial motion to suppress his statements. We conclude the statements were admissible.

Initially, we note the record does not show that the Defendant objected during Officer Diffee's testimony about the statements. The Defendant filed a pretrial motion arguing that

his statements were inadmissible because they were uncorroborated, and the trial court denied the motion. Aside from the fact that whether corroboration existed was to be determined from the proof at the trial, the issue is not included in the Defendant's motion for a new trial and is waived. *See* T.R.A.P. 3(e), 36(a). Our review is limited to consideration of whether plain error occurred.

Our supreme court has adopted the factors developed by this court to be considered

> when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(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. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). The record must establish all five factors before plain error will be recognized and "complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Smith*, 24 S.W.3d at 283. In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the trial," and "recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *Adkisson*, 899 S.W.2d at 642.

The Defendant argued in his pretrial motion that Officer Diffee told prosecutors the Defendant made a confession when he was in the back of the patrol car but that the confession was not corroborated by any written document or by other officers present. He argued that the confession was never reduced to writing and signed by him, that he did not know about the confession until a previous trial setting, and that it was inadmissible because the confession was uncorroborated. In denying the motion, the trial court stated that it was not aware of any law allowing it to assess the credibility of the statements or requiring the statements to be corroborated before being admitted.

Officer Diffee testified that after he submitted the paperwork, he transported the Defendant and that during the transport, the Defendant made brief statements. Although Officer Diffee admitted that it was "a long time ago," he remembered that the Defendant said something "along the lines of," "[T]his is bulls---. The little b---- wanted it. I didn't do anything she didn't want me to do." The statements were not included in the police report, arrest report, or any filing in the trial court. However, Officer Diffee said he had submitted the paperwork before the Defendant made the statements and failed to amend it afterward.

He also said that only he and the Defendant were in the car when the Defendant made the statements and that no other officers were present to hear the statements.

As stated above, the victim testified at the trial that the Defendant grabbed her arm when she was asleep and took her to his room where he pulled down her pants and put his penis in her "butt." The victim told Dr. Lakin that the Defendant put his penis in her "behind." The victim's mother called the police on November 4, 2009, because she found the victim's soiled panties and the victim told her what happened, and the Defendant made the statements when Officer Diffee transported him on November 4. Dr. Lakin found a small abrasion at the base of the victim's hymen, which was an abnormal finding. We conclude that the Defendant's statements were sufficiently corroborated, and the trial court did not err in admitting them. The Defendant is not entitled to relief on the issue.

III

The Defendant contends that the trial court erred in denying his pretrial motion made pursuant to Tennessee Rule of Evidence 412. He argues that the victim's previous allegations of sexual abuse were pertinent to show reasons for past injury, to question whether the previous allegations "mirror[ed] the surrounding circumstances of the present accusation," and to show the victim's previous sexual knowledge. He also argues that the previous allegations were relevant to the victim's credibility and that the court's denial of his right to question the victim regarding the previous allegations violated the Confrontation Clause and "severely impaired" his case. He asserts that he did not waive the issue for tactical reasons and that the issue should be reviewed for plain error. The State responds that the issue is waived because the Defendant failed to include it in his motion for a new trial. In the alternative, the State asserts that the trial court properly denied the Defendant's motion. We conclude the Defendant is not entitled to relief.

Regarding the State's waiver argument, the Defendant raised the issue in a pretrial motion, which the trial court denied. However, we note that the Defendant did not include the issue in his motion for new trial, and it is waived. *See* T.R.A.P. 3(e), 36(a). Our review is limited to consideration of whether plain error occurred.

As applicable to this case, Rule 412 states that

> **(c) Specific Instances of Conduct.** Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:
>
> (1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

Tenn. R. Evid. 412(c). Subdivision (d) requires a party, in part, to file a motion at least ten days before trial, containing a written offer of proof describing the specific evidence and the purpose for introducing it. *Id.* at 412(d)(i), (iii). Sexual behavior means "sexual activity of the alleged victim other than the sexual act at issue in the case." *Id.* at 412(a). The trial court's decision to admit or exclude evidence will be overturned on appeal only when there is an abuse of discretion. *See State v. Samuel*, 243 S.W.3d 592, 599 (Tenn. Crim. App. 2007).

The Defendant filed a pretrial motion on the issue, requesting that he be allowed to present evidence of the victim's previous sexual behavior. At the hearing on the motion, defense counsel clarified that he wanted to question the victim about two previous accusations of sexual abuse, not about her previous sexual behavior. Defense counsel said that in June 2008, the victim accused an eleven-year-old-boy of anally raping her, that she was examined, that the allegations were not substantiated, and that the charges were dropped. He also stated that in July 2006, three men allegedly forced the victim to perform oral sex on them at a motel, that the victim's mother was questioned because allegations existed that she sold her daughters' services to people living in the motel, and that defense counsel found no charges against the men. He argued that he should have been able to question the victim, her mother, and the Department of Child Services (DCS) employees about the previous allegations because they were relevant and material to the case. He argued that the victim

accused the Defendant of the same acts as those in the previous allegations and that no evidence ever substantiated the previous allegations.

In response, the prosecutor stated that the victim did not make the allegation in 2006, that a family member did, that when the victim was questioned, she denied "any type of contact," and that DCS closed the referral. The prosecutor also stated that the second allegation concerned an eight-year-old boy who touched the victim's breasts and tried to "put it in her butt" and that the boy was prosecuted in juvenile court. The prosecutor did not know the outcome of the juvenile court proceedings. The State argued that the evidence was irrelevant.

The trial court asked defense counsel, "So if you're raped more than once, you get around 412? Because you've been raped more than once, you have a propensity to be raped?" Defense counsel argued that "the fact that she has accused two people of the same thing shows a propensity on her part to make those accusations" and that the allegations were relevant to the victim's credibility. The State argued that the evidence was exactly what Rule 412 was meant to prohibit.

The trial court outlined the procedural requirements of Rule 412 and noted the Defendant did not include a written offer of proof with his motion as required by the rule. Defense counsel said that he had copies of the statement, but the court stated that it did not have copies. In denying the motion, the court found that the Defendant had not shown the evidence was admissible under one of the exceptions listed in the rule.

The Defendant argues that he met the procedural burdens of Rule 412 by filing the motion and requesting the trial court rule on the admissibility of the evidence. However, the Defendant's motion did not include a written offer of specific proof he sought to introduce under Rule 412, and the trial court noted the Defendant's failure to comply with Rule 412(d)(1)(iii). Although defense counsel discussed at the pretrial hearing specific proof concerning the victim's previous allegations that he wanted to present at the trial, the prosecutor presented different versions of the allegations. No witnesses were presented at the hearing, and no exhibits were received. Defense counsel admitted during the hearing that he had no evidence showing the victim's previous allegations were false. The court heard both versions of the victim's allegations and ruled that the Defendant had not shown the evidence was admissible under one of the exceptions listed in the rule. Without further proof in the record of the previous allegations, we cannot conclude that the trial court erred in excluding the evidence.

Furthermore, the Defendant was not denied his right to confront the victim. He was able to cross-examine her in front of the jury and challenge her credibility. The only

evidence the trial court excluded was related to whether the victim made previous allegations of sexual abuse. The trial court did not abuse its discretion in excluding the evidence, and the Defendant is not entitled to relief on this issue.

IV

The Defendant contends that the trial court failed to give sufficient weight to the mitigating factors in sentencing. He argues that he had no previous criminal history and did not pose a threat, that incarceration was unnecessary to protect society, and that he would not violate alternative sentencing. He argues that it was clear the jury questioned the victim's testimony by returning a guilty verdict for attempted rape of a child but that the court was concerned because he did not acknowledge guilt or show remorse. He argues that the court found two mitigating factors applicable but did not give them any weight and that the court erred in not starting at the presumptive minimum sentence and increasing or decreasing the sentence based on applicable enhancement or mitigating factors. The State responds that the trial court properly sentenced the Defendant. We conclude the sentence is appropriate.

At the sentencing hearing, the presentence report and the psycho-sexual report were received as exhibits. The Defendant testified that he had been incarcerated for two years, one month, and eight days and acknowledged he had been found guilty. He denied he would have a problem with registering as a sex offender and attending the required therapy course. He said that although a jury found him guilty, he was not admitting any sexual contact occurred between him and the victim. When asked if he understood that he would have to admit wrongdoing for the trial court to reduce his sentence to the minimum, he said he would follow any rules he was required to follow. He agreed he wanted the court to sentence him to probation for eight years and give him credit for the time he had served. When asked if he would do everything the law required to stay on probation, he said, "As long as it won't hurt me going back to work." He said he had worked since he was fourteen years old in restaurants, a shoe store, and Walmart. He said he would maintain employment if he were allowed to return to work. He said that he planned to live with an aunt and a cousin if he was released, that he was unaware if they lived close to a school, and that he realized he would have to find another place to live if they did. He agreed he would abide by the law and the rules of probation, that he would attend the required classes, and that he would "get whatever benefit [he could from] those classes."

On cross-examination, the Defendant testified that he was applying for disability benefits at the time of his arrest for a back injury. He agreed that his working since he was fourteen and his applying for disability were different things and said that he was receiving unemployment benefits from his employer until he could return to work. He said he reviewed his psycho-sexual evaluation with his attorney and saw that one test showed he was

a moderate risk for reoffending, which he said he would not do. He said that the domestic violence arrest listed in the presentence report concerned his defending his mother when his brother Jay threw a telephone at her, that "no punches were thrown," and that it was a "little scuffle" but agreed he was arrested for it. He said he was not convicted and denied taking anger management classes. When asked if things became "heated" at his apartment between him and his mother when the victim lived there, he said no but that situations existed regarding money.

The Defendant testified that he had no problem doing what he needed to do to receive probation, including participate in the group sex offender therapy. He understood he would have to register four times a year and would be unable to work around children. He asked if the community supervision for life and registration requirements would prevent his attending school because he wanted to attend culinary school. The trial court asked the Defendant if he expected the court to believe he did not commit this crime, and the Defendant responded, "Yes," and said he did not make the statements alleged by Officer Diffee.

The trial court found that the Defendant was a Range I offender convicted of a Class B felony and that his sentencing range was eight to twelve years. The court applied one enhancement factor because the offense involved a victim and was committed to gratify the Defendant's desire for pleasure or excitement. The court applied one mitigating factor because the Defendant had no previous criminal convictions. The court noted that it could not mitigate the Defendant's sentence based on remorse because the Defendant maintained his innocence but that it would not enhance his sentence on this basis. The court stated that it would not second guess the jury's resolution of the case and sentenced the Defendant to ten years and one month in confinement.

A length of a sentence "within the appropriate statutory range [is] to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). In determining the proper sentence, the trial court must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee, (7) any statement that the defendant made on his own behalf, and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; *see State v. Ashby*, 823 S.W.2d 166, 168 (Tenn. 1991); *State v. Moss*, 727 S.W.2d 229, 236 (Tenn. 1986).

Generally, challenges to a trial court's application of enhancement and mitigating factors are reviewed under an abuse of discretion standard. *Bise*, 380 S.W.3d at 706. We must apply "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *Id.* at 707. "[A] trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Id.* at 706. "So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld." *Id.*

The Defendant's sentence is presumed reasonable because it is within the appropriate range. Attempted rape of a child is a Class B felony. *See* T.C.A. §§ 39-13-522, 39-12-101, 39-12-107. The sentencing range for a Range I, standard offender convicted of a Class B felony is eight to twelve years, and ten years, one month is within that range. *Id.* at 40-35-112(a)(2).

Regarding the Defendant's argument that the trial court erred in failing to apply sufficient weight to the mitigating factors in sentencing him, we initially note that contrary to the Defendant's brief, the court applied only one mitigating factor, not two. The court applied the mitigating factor because the Defendant had no previous criminal convictions, which is an appropriate mitigating factor. *See* T.C.A. § 40-35-113(13) ("Any other factor consistent with the purposes of this chapter."); *State v. Kelley*, 34 S.W.3d 471, 483 (Tenn. Crim. App. 2000).

The trial court applied one enhancement factor because "the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement." *See* T.C.A. §40-35-114(7). However, the court did not state the facts upon which it based this finding. Our supreme court has held that

> some acts of rape are not committed for pleasure at all. Some crimes of this nature are simply acts of brutality resulting from hatred or the desire to seek revenge, control, intimidate, or are the product of a misguided desire to just abuse another human being. The desire for pleasure or excitement should not be inherently presumed from the act of rape.

State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). The State presented no evidence that the Defendant's motive was his desire for pleasure or excitement, and the court made no findings on the issue. We conclude that the trial court erred in applying this enhancement factor. Our inquiry, though, does not end with the trial court's misapplication of the enhancement factor.

The Defendant's sentence is not invalid "[s]o long as there are other reasons consistent with the purposes and principles of sentencing[.]" *Bise*, 380 S.W.3d at 706.

In considering enhancement factors, the trial court stated, "There's a possibility that [the Defendant] abused a position of private trust, but I am not going to find that. I don't think the proof was sufficient, even though they were living in the same residence, that he had any supervisory authority[.]" *See* T.C.A. § 40-35-114(14) (2010) ("The defendant abused a position of . . . private trust . . . in a manner that significantly facilitated the commission or the fulfillment of the offense."). We disagree. Our supreme court held that the "position of parent, stepparent, babysitter, teacher, coach are but a few obvious examples" of someone in a position of trust. *State v. Gutierrez*, 5 S.W.3d 641, 645 (Tenn. 1999) (quoting *State v. Kissinger*, 922 S.W.2d 482, 488 (Tenn. 1996)).

The record shows that the Defendant leased the apartment in which the victim lived, that he allowed the victim and her family to stay with him, and that the victim and her family had nowhere else to stay. The victim testified that the Defendant told her that if she did not "do this" or if she told her mother, he was "kicking" her out of the apartment. The victim was ten years old, was diagnosed with epilepsy, and was left alone at the apartment with the Defendant while her mother left to get her paycheck. The victim said she was with the Defendant after the incident because her mother was not there, she could not stay alone, and the Defendant was supposed to be watching her. The victim's mother said that the victim was home on the day of the incident because she was sick, that she was not allowed to be home alone, and that she asked the Defendant to watch her. The victim's mother told the Defendant to call her and then 9-1-1 if anything happened to the victim. Because the record establishes that the Defendant was in a position of trust at the time of the offense, we conclude that enhancement factor (14) applied. The ten-year, one-month sentence is consistent with the purposes and principles of sentencing, and the sentence is within range and supported by the record.

Regarding alternative sentencing, the Defendant was not eligible for probation because his sentence was more than ten years. *See* T.C.A. § 40-35-303(a) (2010); *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Regarding the Defendant's argument that the trial court was concerned because he did not acknowledge guilt or show remorse, the court neither enhanced nor mitigated his sentence based on his lack of remorse. The court noted that although it could not mitigate the sentence based on remorse because the Defendant continued to maintain his innocence, it could not enhance the sentence on that basis either.

Regarding the Defendant's argument that the trial court erred in not beginning with the presumptive minimum sentence and increasing or decreasing the sentence based on applicable enhancement or mitigating factors, the Sentencing Act no longer requires a trial

court to impose the minimum sentence and adjust it based upon applicable enhancement and mitigating factors. *See* T.C.A. §§ 40-35-210(c); -114. Further, no proof shows the court did not begin at the minimum sentence and adjust upward for the erroneously applied enhancement factor.

Although we conclude that the court erred in applying enhancement factor (7), the trial court did not abuse its discretion in imposing the ten-year, one-month sentence. The record reflects that the court considered the purposes and principles of sentencing and the appropriate evidence from the trial and the sentencing hearing. The Defendant is not entitled to relief on the issue.

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

_____
JOSEPH M. TIPTON, PRESIDING JUDGE