

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 9, 2009 Session

STATE OF TENNESSEE v. KENNETH THOMPSON ANDERSON, JR.

**Appeal from the Criminal Court for Davidson County
No. 2006-C-2268 Monte Watkins, Judge**

No. M2008-01377-CCA-R3-CD - Filed September 28, 2009

Following a jury trial, the Defendant, Kenneth Thompson Anderson, Jr., was convicted of five counts of statutory rape, Class E felonies, and two counts of assault, Class A misdemeanors. See Tenn. Code Ann. §§ 39-13-506(d)(1)(2), -101(b)(1). The trial court sentenced him as a Range I, standard offender, to two years for each statutory rape conviction and eleven months and twenty-nine days for each assault conviction. The trial court ordered the Defendant to serve two statutory rape convictions and both assault convictions concurrently with one another but consecutively to the three other statutory rape convictions, each of which was also to be served consecutively to one another. This resulted in a total effective sentence of eight years. The trial court further ordered that the Defendant serve one year of this sentence “day-for-day” in confinement, with the remaining seven years to be served on probation. In this direct appeal, the Defendant argues that: (1) the trial court violated the cancellation rule by allowing the victim to testify about instances of digital penetration and cunnilingus; (2) the trial court erred in finding sufficient corroboration of the victim’s allegations of statutory rape; (3) the State presented evidence insufficient to convict him; (4) the trial court erred in excluding testimony about the victim’s prior sexual conduct under Tennessee Rule of Evidence 412; (5) the trial court impermissibly denied him the right to fully cross-examine certain witnesses; (6) the trial court shifted the burden of proof to him by constraining his closing argument; and (7) the trial court erred in setting the length and manner of his sentence, and in ordering that he serve one year of his sentence “day-for-day.” After our review, we affirm the Defendant’s convictions for statutory rape but vacate his convictions for assault. We also affirm his sentence length and split confinement, but remand and order that his judgment forms correctly reflect service of his period of confinement in the local jail rather than the Department of Correction, and we order that the requirement of “day-for-day” service of the sentence be deleted.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part;
Reversed in Part; Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. MCLIN, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, Kenneth Thompson Anderson, Jr.,

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and J.W. Hupp, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The events underlying this case took place between January and September 2005, during which time the Defendant and the victim, J.T.,¹ developed a relationship. The victim was thirteen years old during this period. She testified that she lived with her father and attended Antioch Middle School at the time. She served as a basketball manager at her school with one of the Defendant's daughters, Jessica Anderson, who also served as a basketball manager and played on the basketball team. Jessica was in the same grade as the victim, but not in the same class. The victim was good friends with the Defendant's other daughter, Kendra Anderson, who was one year older than the victim. The Defendant and his daughters lived about two blocks away from the victim.

The victim testified that she had a difficult relationship with her father in 2005 and "butted heads" with him frequently. The victim first met the Defendant at an Antioch Middle School basketball game, and she began talking to him occasionally when calling his house to speak to Kendra. The Defendant eventually gave her his cell phone number so they could talk more frequently. She originally considered him a father figure, but the Defendant later began to discuss sex with her, including conversations about his sexual experiences with other women. Eventually, the Defendant began expressing an interest in having sex with the victim. He told the victim he was thirty-one years old,² which she testified was important because she would not have become involved with a man older than her father. The victim also testified that she and the Defendant began to discuss having a life together, getting married, and visiting Paris. The victim believed that she was falling in love with the Defendant.

The victim could not recall the date of her first sexual contact with the Defendant, but she remembered that he called her and asked her to come over to his house. She complied, and she and the Defendant had penile-vaginal sexual intercourse in the Defendant's living room. She testified that she and the Defendant had penile-vaginal intercourse on two other occasions, once at the Defendant's house on his bed and the other at the victim's house on her bed. The incidents at the Defendant's house occurred when the Defendant's daughters were staying with their mother. The incident at the victim's house occurred when her father was at work. The Defendant digitally penetrated her on two of these occasions and performed cunnilingus on the third occasion.

¹It is the policy of this Court to refer to a minor victim by his or her initials.

²The Defendant was thirty-seven years old at the time.

The victim also introduced a hand-written letter the Defendant left in her mailbox one night, which reads as follows:

[J.T.],

Hey you,

I writing this letter for two reasons. One, I have a lot to say to you and not enough time to say it. Two, I see that you like letters so I will start sending you one every week. It's three o'clock in the morning and I can't sleep. I just go off the phone with you after talking to Chelsea. I feel like I was given a brief history of my reasons for loving you. I enjoyed the conversation. I just want clear something up. I don't want to see you just to make love to you. I love spending time with you. You make me laugh and feel good inside. I love having you in my lap talking any and everything. I love holding up and whispering I love you in your ear. I love staring at your beautiful smile. So it's not about just sex. I love spending time with my girl. I want see you laugh and smile. I enjoyed the afternoon we spent together. I need more of days. The love I feel for you needs time to grow with the person I share it with. I promise that the love I have for you will only be for you. The love have for is like a timeless fantasy that will never end. It like place that all dream come true. All you have do is wanted it like a place where two people get closer and closer. Where we explore everything about each other from the way they feel to how they respond from the touch from their lover. I really scared of the feeling I have for you. I have no control over any of this. All I want is to be with you. My heart yearns for the attention from you. I really hope you that this feeling I have for you doesn't destroy me in the end. I love you.

“You are my Angel.”

P.S. You will never want or need from anyone else because my is to satisfy your every need.

[Defendant's Signature]

The victim also said that the Defendant gave her a chain bearing the symbol of his college fraternity. The State further introduced a home video taken by the Defendant. The video in part shows the victim and the Defendant's daughters cheerleading at an Antioch High School sporting event.

The victim also testified that the Defendant digitally penetrated her on two occasions as she sat in the front passenger seat of his car while driving to pick up his daughters.

The victim testified that her relationship with the Defendant ended on September 24, 2005. On that day, the Defendant called her and asked if he could come to the victim's house. She said that he could. After the Defendant arrived, he sat with the victim on her bed. The victim's father unexpectedly came home at this point and saw the Defendant and the victim sitting on the bed. The victim testified that her father began yelling at the Defendant and then walked toward his room. The Defendant ran out of the house. The victim did not see him again.

The victim spoke to her grandmother that evening about her relationship with the Defendant. The victim told her grandmother she loved the Defendant, although she denied having a sexual relationship with him. The victim later talked to a representative from the Department of Children's Services ("DCS"). She again denied any sexual relationship. At trial, the victim explained that she lied because she was afraid and embarrassed. Some time later, the victim met with Detective Mike Adkins of the Metro Nashville Police Department and told him the truth because she was tired of lying.

On cross-examination, the victim confirmed two incidents in the January to September 2005 period in which her father had hit her for disobeying him. She told the Defendant about both of them, and he contacted DCS, which, thereafter, conducted investigations. The victim also confirmed that she agreed to have sex with the Defendant because she was in love with him and not because she was promised financial security or a trip to Paris. On redirect examination, however, she said she would not have had sex with the Defendant if she had known he was older than her father, that he was separated rather than divorced, or that the Defendant's promise to take her to Paris was an empty one.

The victim's father, Carlos Turner, also testified. He lived with the victim in all of 2005 but worked a lot of hours and was frequently away from home during the day and into the evening. He had a bad relationship with the victim in 2005, which he largely attributed to the appearance of the Defendant as a rival father figure. Mr. Turner first met the Defendant when he came home in early 2005 and found the Defendant, the victim, and the Defendant's two daughters in his home. This upset Mr. Turner because the victim had broken his rule that she was not have anyone else in the house when he was not present. Mr. Turner conversed politely with the Defendant on that occasion.

Mr. Turner admitted to using corporal punishment on the victim at least twice in 2005. On one occasion, he whipped her with a belt after she lied to him about who drove her to her grandmother's house. On another occasion, Mr. Turner, concerned about how much the victim conversed with the Defendant, tried to take the victim's cell phone away from her. She threw the phone at him. He responded by hitting her in the face, causing the victim's nose to bleed. Mr. Turner submitted to the resulting DCS investigations.

On September 24, 2005, Mr. Turner took advantage of a rare opportunity to come home from work for lunch. He entered the house and approached the victim's mostly-closed bedroom door, intending to surprise her. When Mr. Turner entered the room, he saw the Defendant and the victim sitting on the victim's bed. The victim looked like she had been crying. The Defendant was rubbing

the victim's face with both hands. Mr. Turner said, "What are you doing here?" Mr. Turner "wanted to kill" the Defendant, and ran to his room to retrieve a pistol. The Defendant fled out the back door of the house, leaving his car keys, cell phone, and wallet on the victim's bed. Mr. Turner called the police, who told him that they could take no action against the Defendant because Mr. Turner had not posted a "No Trespassing" sign on his property. A few months later, Det. Adkins contacted Mr. Turner, leading to Det. Adkins' discussion with the victim. Mr. Turner affirmed that he and the victim's relationship had improved between these events and the time of trial. He still did not know what had happened between the victim and the Defendant, however, and did not want to know.

The victim's grandmother, Linda Turner, testified that the victim was argumentative and secretive during 2005. At the time, Ms. Turner did not know why. On September 24, 2005, she went to Mr. Turner's house to speak to the victim, asking her "[w]hy did you have that old man in this house?" The victim replied, "Granny, I love him, he listens to me." Ms. Turner had a "gut feeling" that something inappropriate was going on but did not pursue the matter further because she trusted the Defendant.

Ms. Turner was aware that her son, Mr. Turner, occasionally corporally punished the victim, but Ms. Turner never felt that the victim was in an danger. She added testimony about a 2003 incident in which the victim said Mr. Turner grabbed her around the neck. Ms. Turner did not witness the incident or know for sure that it occurred.

Courtney Scott, the victim's cousin, testified that she lived with Mr. Turner and the victim during a portion of 2005. She first met the Defendant when he and his daughters visited the victim's house. They stayed for about three hours. On another occasion, she and the victim were watching television in the victim's room. The victim left the room for a moment, at which point her cell phone rang. The cell phone's screen indicated that the call was from "Kendra," and displayed a heart-shaped icon. Ms. Scott answered the phone and heard a male voice say, "Hey, baby." Ms. Scott hung up and told the victim about the call.

Jennet Anderson, the Defendant's wife, testified that she and the Defendant had been married since 1990. They had been separated since September 1998. Ms. Anderson recalled that the Defendant and the victim visited her house three times in order to pick up the Defendant's daughters.

Kendra Anderson testified that the victim was her best friend in 2005 and that they spent a lot of time together at school. They frequently spoke on the phone at night and visited each other's houses a few times. Kendra said the Defendant told her he had a girlfriend named Jen. On one occasion when the Defendant claimed to be speaking to Jen on his cell, Kendra heard the other voice and thought it sounded like the victim's. Kendra did not otherwise witness any inappropriate behavior between the Defendant and the victim.

Detective Mike Adkins testified that he was a member of the Metro Nashville Police Department's sex crimes unit, and he received special training in sexual assault investigation. In January 2006, he received information that led him to contact the victim's father. Based on

information Det. Adkins received from Mr. Turner, he set up an interview with the victim at her grandmother's house. After taking the victim's statement, Det. Adkins went to her house to retrieve the letter the victim received from the Defendant. Detective Adkins noted that the letter's envelope also contained a yellow and red rose.

The victim also gave Det. Adkins the fraternity chain she said she received from the Defendant. Detective Adkins noted that the fraternity symbol on the chain also appeared on the Defendant's license plate cover and about ten objects in the Defendant's home. Because the victim's statement indicated that her last sexual contact with the Defendant had occurred more than seventy-two hours before, Det. Adkins did not think a medical-legal exam was warranted. Detective Adkins also introduced a map showing the location of the victim's residence and the Defendant's residence in relationship to one another.

On cross-examination, Det. Adkins noted that medical-legal exams are not done in order to determine whether or not a victim's hymen has been broken. No such determination was made in this case with respect to the victim. Detective Adkins, while noting that he was not an expert in examinations of alleged victims of sexual assault, said that the hymen is not necessarily broken during sex and that such a determination would therefore not necessarily prove whether a victim had engaged in penile-vaginal intercourse.

The Defendant chose to testify in his own defense and gave his account of the relevant events. He testified that he never had any sexual relationship with the victim. He worked at Franklin High School in 2005 and was thirty-seven years old during the period of time at issue in this case. As of late 2004, the Defendant had what he termed a "hi and bye" relationship with the victim. His daughter Kendra became close friends with the victim in 2005, however. Kendra and the victim began talking constantly on the phone, exchanging gifts, and generally acting "like sisters."

The Defendant began spending more time at Antioch High School when the basketball season started. He videotaped almost every sporting event in which his daughters participated, and he testified that the victim was aware of the cheerleading video introduced by the State. As of about February 2005, the victim became like an adopted daughter to the Defendant and his family. The Defendant felt that the victim wanted to be part of his family, as she called him every day to talk about various subjects. The victim frequently became upset if the Defendant, for instance, hugged his daughters but did not hug her. Soon after, the Defendant began volunteering with the Antioch High School basketball program.

In late February, the victim called the Defendant and told him that Mr. Turner had hit her. Because the victim had not done so, the Defendant called the police. Shortly thereafter, the Defendant gave the victim his cell phone number and told her to call him if she ever needed help.

The Defendant decided to speak to Mr. Turner. He and his daughters, with the victim's permission, visited her house for that purpose. Mr. Turner was not present when they arrived. When he came home, Mr. Turner politely greeted the Defendant and engaged in normal small talk. Mr.

Turner “cut off” the conversation when the Defendant mentioned possible problems the victim had been having, however. The Defendant offered to allow the victim to spend time at his house when Mr. Turner was at work.

In the summer of 2005, the victim became increasingly “despondent” and “clingy.” She frequently visited the Defendant’s house. She also began to inappropriately discuss sexual issues, including her particular sexual experiences. Eventually, the victim began calling the Defendant, telling him she was “horny,” and implying that she wanted a sexual relationship with him. The Defendant emphasized that they had only a father-daughter kind of relationship, but the victim refused to accept that. The Defendant then stopped talking to the victim for about two weeks, during which time the victim incessantly called his home phone and his cell phone, sometimes calling four or five times in a row. The Defendant instructed his daughters not to answer their home phone. At the end of this two-week period, Kendra answered one of the victim’s calls. The victim said she urgently needed to speak to the Defendant. Their speaking relationship restarted at this time.

During one conversation, the victim told the Defendant that she wanted to move away from her father’s house. The Defendant responded by asking the victim, “If you can go somewhere where would you like to go?” The victim responded that she wanted to go to Paris. The Defendant responded that he would do everything he could to get her out of her house, and he remarked that one day he, the victim, and his daughters would be in Paris. The victim told the Defendant that she was in love with him.

In September 2005, the Defendant again called the police after the victim reported to him another incident in which Mr. Turner had hit her. Around this time, the victim also began calling the Defendant and threatening to kill herself because her father did not love her. The victim also detailed three previous suicide attempts. She suggested that she and the Defendant run away together.

On September 24, 2005, the victim again called the Defendant threatening to kill herself. The Defendant went to the victim’s house and found the crying victim sitting on her bed next to a knife. The Defendant did not close the victim’s bedroom door. In an attempt to calm her down by wiping away her tears, the Defendant put one hand to the victim’s face. The victim’s father came in at that time, and the Defendant fled because Mr. Turner was angry. Later that day, Mr. Turner came to the Defendant’s house with the police. The Defendant told the police that nothing inappropriate had happened between him and the victim.

The Defendant admitted that he wrote the letter the victim introduced into evidence. He recognized that it implied a sexual relationship, but said that it was “a last ditch effort to keep [the victim] from doing something to herself.” The letter was completely fictitious, the idea of it being “to make [the victim] feel good about herself.” A short time after dropping off the letter at the victim’s house, the Defendant had a conversation with the victim in which he explained to her the fictitious nature of the letter and told her it was not a love letter. On cross-examination, the

Defendant confirmed that he never relayed any of the information above to Det. Adkins. He also said that he did not give the victim his fraternity chain and that she must have stolen it.

At the conclusion of all the evidence, the Defendant was convicted of five counts of statutory rape and two counts of assault. He now appeals.

Analysis

I. The Cancellation Rule

The Defendant first contends that the trial court erred in allowing the victim to testify regarding four instances of digital penetration and one instance of cunnilingus. He bases this contention on the fact that the victim, at two prior hearings, testified “that she had had ‘sex’ with the Defendant on three occasions.” Because the victim testified to eight sexual acts at trial, the Defendant argues that testimony regarding the additional acts should have been barred by the cancellation rule.

“The rule of law in Tennessee is that contradictory statements made by a witness as to the same fact can cancel each other out.” State v. Caldwell, 977 S.W.2d 110, 118 (Tenn. Crim. App. 1997) (citing Taylor v. Nashville Banner Publ’g Co., 573 S.W.2d 476, 482 (Tenn. App. 1978)). “However, this rule applies only when inconsistency in a witness’s testimony is unexplained and when neither version of his testimony is corroborated by other evidence.” Id.

We conclude that the trial court did not err in admitting the victim’s testimony because she did not contradict herself. The record reflects that, when questioned at previous hearings, the victim understood “sex” to mean penile-vaginal intercourse. After defense counsel clarified on cross-examination that he was using “sex or sexual relations” to refer to penile-vaginal intercourse, oral sex, or digital penetration, the victim affirmed her testimony on direct that she and the Defendant had engaged in eight such acts. This issue is without merit.

II. Corroboration of Statutory Rape

The Defendant next contends that he cannot be convicted of statutory rape because “a defendant cannot be convicted upon the uncorroborated testimony of accomplices.” State v. McKnight, 900 S.W.2d 36, 47 (Tenn. Crim. App. 1994), reversed on other grounds by State v. Williams, 977 S.W.2d 101 (Tenn. 1998) (citing Sherill v. State, 321 S.W.2d 811 (Tenn. 1959); Prince v. State, 529 S.W.2d 729, 732 (Tenn. Crim. App. 1975)). An accomplice is a person who “knowingly, voluntarily, and with common intent with the principal offers to unite in the commission of a crime.” Id. (citing Clapp v. State, 30 S.W.2d 214, 216 (Tenn. 1895); Letner v. State, 512 S.W.2d 643 (Tenn. Crim. App. 1974)). We agree that the victim is an accomplice under this definition.

The Defendant argues that the letter he wrote to the victim “[a]t most . . . intimates a close relationship between the parties but it most certainly does not speak to the specific counts of which [he] was convicted.” Corroboration need not speak to specific counts, however: the rule only

requires that “there must be some fact testified to which is entirely independent of the accomplice’s testimony,” and which “must lead to an inference that a crime has been committed and that the defendant is responsible therefor.” Id. (citing State v. Fowler, 373 S.W.2d 460, 463 (Tenn. 1963)). Such corroborative evidence need only be “slight” and “need not be adequate in and of itself to convict.” Id. (citing Garton v. State, 332 S.W.2d 169, 175 (Tenn. 1960); Conner v. State, 531 S.W.2d 119, (Tenn. Crim. App. 1975)).

In our view, the evidence in this case meets this burden, because the Defendant’s letter to the victim twice notes a sexual relationship between the two of them. This issue is without merit.

III. Sufficiency of the Evidence

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State’s witnesses and resolves all conflicts in the evidence in favor of the prosecution’s theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

A. Assault

The Defendant was convicted of Class A misdemeanor assault, the crime set forth in Tennessee Code Annotated sections 39-13-101(a)(1) and (a)(2). Those sections punish as a Class A misdemeanor a person who “intentionally, knowingly, or recklessly causes bodily injury to another” or a person who “intentionally or knowingly causes another to reasonably fear imminent bodily injury.” The Defendant contends that he should not have been convicted under either of these sections because the victim’s consent is a complete defense to Class A misdemeanor assault.

The counts under which the Defendant was convicted of assault charged him with statutory rape as a result of digital penetration of the victim. The victim testified that the Defendant digitally penetrated her on four occasions: twice preceding penile-vaginal intercourse and twice in the Defendant's car. The evidence is thus sufficient to establish that the Defendant engaged in such conduct.

The Defendant correctly notes, however, that consent is a complete defense to assault under Tennessee Code Annotated sections 39-13-101(a)(1) and (a)(2). See McKnight, 900 S.W.2d at 49. We therefore conclude, and the State concedes, that the trial court erred in upholding the Defendant's assault convictions and sentencing him as a Class A misdemeanor. The State argues, however, that the Defendant could be convicted of Class B misdemeanor assault under Tennessee Code Annotated section 39-13-101(a)(3), which provides that a person commits assault who intentionally or knowingly causes physical contact with another that a reasonable person would regard as extremely offensive or provocative.

Although only Class A misdemeanor assault was at issue in McKnight, this Court noted therein that "[t]he consent of the victim is no defense to statutory rape. The same does not hold true for assault." In State v. James Robert Fields, No. 02C01-9709-CC-00341, 1999 WL 177550 (Tenn. Crim. App., Jackson, Apr. 1, 1999), this Court specifically explained that consent is a complete defense to Class B misdemeanor assault, noting that "statutory rape is committed when the sexual penetration is consensual and Class B misdemeanor assault is committed when the physical contact is nonconsensual . . ." Id. at *4. Because the Defendant digitally penetrated the victim with her consent, his assault convictions must be vacated.

B. Statutory Rape

The Defendant's five convictions for statutory rape rest on indictments charging him with three instances of penile-vaginal penetration of the victim and two instances of digital penetration of the victim. At the time of the Defendant's conduct, Tennessee Code Annotated section 39-13-506(b)(1)(2005) defined statutory rape as the unlawful sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen but less than fifteen years of age and the defendant is at least four years older than the victim. The victim testified that the Defendant committed each of these acts, and the jury obviously credited her testimony. The victim also testified that she was thirteen during the time period at issue, and the Defendant testified that he was thirty-seven during that same period. We therefore conclude the evidence was sufficient. This issue is without merit.

IV. Tennessee Rule of Evidence 412

The Defendant next contends that the trial court erred in preventing him from cross-examining the victim regarding her knowledge of sexual matters, and in preventing him from testifying about specific instances of sexual conduct in which the victim told him she had engaged.

Tennessee Rule of Evidence 412 governs the admissibility of evidence about a sex crime victim's prior sexual acts. It is a rule of relevance, see State v. Brown, 29 S.W.3d 427, 430 (Tenn.

2000), and we will not overturn a trial court’s Rule 412 ruling absent an abuse of discretion. State v. Sheline, 955 S.W.2d 42, 46 (Tenn. 1997).

In relevant part, Rule 412 provides that in a criminal trial for statutory rape, among other crimes, “the following rules apply”:

(a) Definition of sexual behavior. In this rule “sexual behavior” means sexual activity of the alleged victim other than the sexual act at issue in the case.

....

(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)³ of the 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 defendant’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.

A. Cross-Examination of the Victim

The Defendant’s argument rests on Rule 412(c)(4)(ii), as he sought to prove the victim’s prior knowledge of sexual matters in order to avoid the implication that the victim must have learned

³The record reflects that the Defendant complied with the requirements of subdivision (d) in moving to introduce evidence of the victim’s prior sexual conduct.

about sex from the Defendant. At the hearing on the Defendant's Rule 412 motion, the victim testified that she had been raped by her uncle prior to having any contact with the Defendant, but denied any other sexual activity. The trial court denied the Defendant's motion because the State "conceded that the victim has allegedly engaged in sexual behavior with another individual." This concession did not result in a stipulation at trial, however. Further, the record contains no indication that the victim's rape allegation against her uncle was false; it is thus still considered "sexual behavior" under Rule 412. See State v. Wyrick, 62 S.W.3d 751, 781-82 (Tenn. Crim. App. 2001). Testimony about the victim's rape by her uncle would have tended to establish prior knowledge of sexual matters. In our view, the evidence also would also have been more probative than prejudicial to the victim as required by Tennessee Rule of Evidence 412 (d)(4), because it would not have suggested that the victim had a history of voluntary sexual conduct. Therefore we conclude that the trial court abused its discretion in excluding it.

We conclude that this pretrial error was rendered harmless by other testimony at trial, however. See Tenn. R. App. P. 36(b) (stating that "[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process"). The victim testified at trial that she had learned about sex in conversations with her grandmother. She also did not testify or imply that she had learned about sex from the Defendant. The jury therefore had evidence before it confirming that the victim had prior sexual knowledge, and we cannot conclude that exclusion of testimony regarding the victim's rape by her uncle more probably than not affected the judgment.

B. Direct Examination of the Defendant

At trial, the Defendant wished to offer his own account of the specific instances of sexual conduct the victim allegedly told him about. The trial court prevented him from doing so. During the resulting offer of proof, the Defendant said that the victim had told him about her prior sexual partners, including her uncle and two boys about her age. The Defendant also said the victim discussed her sexual preferences and asked him to purchase a pregnancy test for her. The Defendant wished to introduce this testimony in order to show that the victim "was the aggressor in the relationship" and used her prior sexual knowledge to "get to [the Defendant]."

This purpose, however, is not one enumerated in Rule 412. The victim's alleged statements also constitute hearsay because each was "offered in evidence to prove the truth of the matter asserted," Tenn. R. Evid. 801, and the statements do not fall within any hearsay exception.

The Defendant argues that the trial court's exclusion of this testimony deprived him of the ability to present a defense. There are circumstances under which otherwise inadmissible evidence should be admitted in order to preserve a defendant's constitutional right to present a defense by examining witnesses. See Chambers v. Mississippi, 410 U.S. 284, 295 (1973). Our supreme court has recognized that the constitutional right to present a defense can trump Rule 412 and hearsay rules. See State v. Brown, 29 S.W.3d 427, 433 (Tenn. 2000).

The facts of each case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence. Generally, the analysis should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; (3) the interest supporting exclusion of the evidence is substantially important.

Id. at 433-34 (citing Chambers, 410 U.S. at 298-301).

We conclude that the exclusion of the Defendant's offered testimony did not deprive him of the right to present a defense. Although the Defendant was not allowed to discuss the victim's rape by her uncle or the details of her other alleged sexual encounters, he was permitted to testify that the victim occasionally discussed sexual experiences with others, asked him for sex, and told him she was "horny." Additional detail would have added little to the defense and was therefore not critical. This conclusion is bolstered by the fact that the victim's status as the aggressor in her relationship with the Defendant, even if established, does nothing to strengthen the Defendant's contention that he did not have a sexual relationship with her. We also conclude that, except for testimony of the victim's rape by her uncle, the evidence bears insufficient indicia of reliability. The Defendant is the only source of the evidence. Finally, the interests supporting exclusion of the testimony – reliability and relevance – are substantially important. The Defendant is not entitled to relief on this issue.

V. Denial of Full Cross-Examination

The Defendant next contends that the trial court improperly prevented him from cross-examining Mr. Turner and Ms. Turner, the victim's father and grandmother, regarding pre-2005 instances in which Mr. Turner had abused or used corporal punishment on the victim. The trial court held that this evidence was irrelevant.

Only relevant evidence is admissible. See Tenn. R. Evid. 402. Tennessee Rules of Evidence 401 and 403 govern whether evidence is relevant. Trial courts have broad discretion in assessing relevance, and we will not overturn their decisions absent an abuse of that discretion. State v. Stinnet, 958 S.W.2d 329, 331 (Tenn. 1997), State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997). The trial court's exercise of discretion may not be reversed unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

"'Relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. The Defendant presents no argument, and we can think of none, regarding why testimony about pre-2005 incidents of violence between the victim

and Mr. Turner would have made more or less probable any fact of consequence to the determination of this case. We therefore conclude that the trial court did not err in excluding such testimony.⁴

VI. Restriction of Closing Argument

The following exchange took place during defense counsel's closing argument:

[Defense Counsel]: Remember, the State has the burden of proof here. They have to bring in the evidence. And, you know, I made brief mention of this, as far as why there is no medical evidence in this case. Why doesn't the State bring in a doctor to say that this was examined to tell us whether or not [the victim] was a virgin or not. Why don't they bring that in? Now –

[The State]: Objection, your honor. Misstates the law and the facts.

[Defense Counsel]: I disagree with him, Judge.

[The State]: Your honor –

[Defense Counsel]: This is common sense.

[The State]: – he is making stuff up again.

[Defense Counsel]: I am not making stuff up and I resent that, and I object to his characterization.

[Trial Court]: Well, let's argue –

[The State]: We went through this, Your Honor.

[Trial Court]: – the facts in the case. Argue the facts of the case.

[Defense Counsel]: I ask you to use your common sense and ask yourself why don't they bring in a doctor to say that [the victim] was –

[The State]: Objection. The defense cannot argue about witnesses that the State doesn't present.

[Defense Counsel]: Oh, yes, I can.

⁴We note, however, that the trial court did allow Ms. Turner to testify on a limited basis about an alleged 2003 incident of abuse; she said that she was aware of the victim's claim that Mr. Turner had put his hands around her throat, but did not witness any such incident.

[The State]: No. You cannot.

[Defense Counsel]: They have the burden of proof, Your Honor.

[The State]: Your Honor –

[Defense Counsel]: And I would object to his interrupting my argument.

[Trial Court]: All right, the objection is sustained, the original one.

[Defense Counsel]: Okay. May I ask what is sustained about the objection, Your Honor?

[Trial Court]: Well, it's sustained. All right. Move on.

[Defense Counsel]: I cannot argue about people they don't bring in?

[The State]: Absolutely.

[Trial Court]: [Defense counsel], move on.

[Defense Counsel]: Is that what the Court's ruling is?

[The State]: Absolutely.

[Trial Court]: [Defense counsel], move on.

[Defense Counsel]: Judge, can we have a jury-out? I need to preserve the record on this.

[Trial Court]: Well, the record is preserved. Move on.

[Defense Counsel]: Okay. Well, I thought that you had – that they had the burden of proof. Okay. And they're supposed to – last I heard, they're supposed to bring in witnesses to prove their case.

On appeal, the Defendant contends that the trial court's ruling shifted the burden of proof from the State onto him. The State responds that the trial court correctly sustained its objection because the jury was properly instructed and because it presented evidence sufficient to prove every element required by the statutory rape statute.

It is not clear from the Defendant's brief precisely how he asserts that the trial court's ruling shifted the State's burden of proof onto him. We agree with the State that the ruling did not lessen

its burden of proof or shift the burden of proof to the Defendant because the ruling did not relieve the State of the burden of proving beyond a reasonable doubt that the Defendant penetrated the victim. See Tenn. Code Ann. § 39-13-506(b)(1)(2005). Further, the jury instructions in this case correctly stated the elements of statutory rape and instructed the jury on the State's burden of proving each element.

We conclude that the State's objection was improperly sustained, however, because the trial court's ruling did deprive defense counsel of a proper argument that the State had not met its burden. "In general, closing argument is subject to the trial court's discretion. Counsel for both the prosecution and the defense should be permitted wide latitude in arguing their cases to the jury." State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999) (citing State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994)). "Argument must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or the law." Id.

Defense counsel's argument did not misstate the law, and it was relevant to the issue of penetration. The State did not explain the reasons underlying its objection at trial, and its brief does not clarify them. We assume, however, that the State asserted that the Defendant's closing argument was not predicated on evidence introduced at trial because defense counsel's statements tended to imply that it was possible for a medical professional to determine "whether or not [the victim] was a virgin." The evidence does not support this implication; Det. Adkins testified that a medical exam could determine whether or not a victim's hymen had been broken, but said that this was not dispositive of whether or not that victim had been penetrated. The evidence thus established that a victim with an intact hymen may not be a virgin.

Had the trial court foreclosed defense counsel from arguing this specific issue, we would conclude that it did not err. Instead, the ruling effectively foreclosed all argument about the State's failure to offer proof of the status of the victim's hymen, an issue that remained relevant to the contested issue of penetration even if it was not dispositive thereof. While the State is correct that it was not required to offer evidence in the form of expert medical testimony, we conclude that the Defendant should have been allowed to argue in closing that the State's failure to offer such testimony created doubt about the victim's physical status and resulted in a lesser weight of evidence than might otherwise have been presented. We therefore conclude that the trial court abused its discretion in simply sustaining the State's objection. In our view, defense counsel's argument was not improper.

We also conclude that this error did not "more than likely affect[] the judgment," and was therefore harmless. See Tenn. R. App. P. 36(b). Because the issue of whether the victim's hymen had been broken was not dispositive of whether she had been sexually penetrated, it was of relatively little probative value. The Defendant is not entitled to relief on this issue.

VII. Sentencing

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n

Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant’s own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

A. Length of Sentence

The Defendant apparently concedes that his conduct occurred subsequent to the enactment of the 2005 amendments to the Sentencing Act, which became effective June 7, 2005. The Defendant acknowledges in his brief that certain “sentencing guidelines” are now only “advisory” in nature. The amended statute no longer imposes a presumptive sentence. Carter, 254 S.W.3d at 343. As further explained by our supreme court in Carter,

the trial court is free to select any sentence within the applicable range so long as the length of the sentence is “consistent with the purposes and principles of [the Sentencing Act].” [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include “the imposition of a sentence justly deserved in relation to the seriousness of the offense,” [Tenn. Code Ann.] § 40-35-102(1), a punishment sufficient “to prevent crime and promote respect for the law,” [Tenn. Code Ann.] § 40-35-102(3), and consideration of a defendant’s “potential or lack of potential for . . . rehabilitation,” [Tenn. Code Ann.] § 40-35-103(5).

Id. (footnote omitted).

The 2005 Amendment to the Sentencing Act deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory, as opposed to binding, upon the trial court’s sentencing decision. Id. Under current sentencing law, the trial court is nonetheless required to “consider” an advisory sentencing guideline that is relevant to the

sentencing determination, including the application of enhancing and mitigating factors. Id. at 344. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. Id. Thus, the 2005 revision to Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. Id. at 344.

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See id. at 343; State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that the trial court applied inappropriate mitigating and/or enhancement factors or otherwise failed to follow the Sentencing Act, the presumption of correctness fails and our review is de novo. Carter, 254 S.W.3d at 345.

The Defendant argues against the length of his sentence as if he had been sentenced under the pre-2005 version of the Sentencing Act, stating that the trial court's consideration of enhancement factors not submitted to a jury was unconstitutional under U.S. v. Booker, 543 U.S. 220 (2005). Again, he was sentenced under the revised Sentencing Act, which renders mitigating and enhancement factors advisory and does not run afoul of the Sixth Amendment to the United States Constitution. See Cunningham v. California, 549 U.S. 270, 294 n.18 (2007).

The Defendant otherwise generally claims that his sentence of confinement was not consistent with the purposes and principles of the Sentencing Act in that it enhanced his sentences within their respective ranges and applied consecutive sentencing. The Defendant offers no argument or citation to authority on the issue of consecutive sentencing. It is therefore waived. See Tenn. R. Crim. App. 10(b); Tenn. R. App. P. 27(a)(7). The Defendant also offers no argument against the enhancement factors the trial court applied: that the victim was particularly vulnerable because of age, that the Defendant committed his offenses to gratify his desire for pleasure or excitement, and that the Defendant abused a position of private trust. See Tenn. Code Ann. §§ 40-35-114(4), (7), (14).

Our review of the record reveals that the trial court properly considered the purposes and principles of the Sentencing Act in considering the Defendant's sentencing length. Apart from his vacated assault convictions, we therefore affirm the length and consecutive nature of the Defendant's sentences.

The Defendant also argues that the trial court erred by sentencing him to confinement. The trial court did not put on the record the reasons for its finding that the Defendant should be sentenced to serve one year in the Department of Correction. Under de novo review, however, we conclude that the record supports a finding that confinement is necessary to avoid depreciating the seriousness of the Defendant's offense and that the sentence was justly deserved in relation to the seriousness of the offense. See Tenn. Code Ann. §§ 40-35-102(1), -103(1)(B).

B. Day-for-Day Sentence

Subsequent to sentencing, the trial court conducted a hearing on a motion by the Defendant to correct his judgments. He requested that the trial court grant him pretrial jail credits and eliminate the requirement of day-for-day service of one year. The trial court later issued an order granting the Defendant's request for pretrial jail credit but denying his motion to eliminate his day-for-day service.

The Defendant argues, and the State concedes, that the trial court erred in sentencing the Defendant to serve one year day-for-day. We agree. Both the State and the Defendant cite as authority cases in which a defendant was sentenced to serve less than one year day-for-day; it is settled that such sentences are illegal because they deprive the Defendant of the good conduct credits statutorily guaranteed by Tennessee Code Annotated section 41-2-111. *See, e.g., State v. James Kevin Underwood*, No. E2000-01945-CCA-R3-CD, 2001 WL 872436, at *3 (Tenn. Crim. App., Knoxville, Aug. 2, 2001) (citing Op. Tenn. Att'y Gen. No. 00-0051 (Mar. 20, 2000) (judgment cannot require county jail inmate to serve less than one year day-for-day so as to deprive inmate of good conduct credits)). In this case, however, the Defendant was sentenced to serve one year day-for-day, and thus does not fall under Tennessee Code Annotated section 41-2-111.

In *State v. Jeannie Hudson*, E2001-00377-CCA-R3-CD, 2002 WL 264625 (Tenn. Crim. App., Knoxville, Feb. 19, 2002), this Court addressed a sentence in which a defendant received a three-year effective sentence, nine months of which was ordered to be served day-for-day. Although the court held this nine-month period of confinement illegal under Tennessee Code Annotated section 41-2-111 for the reasons explained above, the court noted that the period of confinement was not illegal by virtue of its day-for-day service:

Pursuant to Tennessee Code Annotated section 40-35-501(c), a Range I standard offender shall gain release eligibility after thirty percent of the sentence is served. The sentencing range for Class C felonies, Range I, is three to six years. Tenn. Code Ann. § 40-35-112(a)(3)(1997). Thus, with a three year minimum sentence, this defendant would be eligible for release after 10.8 months. This Court has ruled that the period which a defendant is ordered to serve in split confinement cannot exceed what would otherwise be the release eligibility date. *State v. Glynnon Bradshaw*, No. 01C01-9810-CR-00439, 1999 WL 737871, at *2 (Tenn. Crim. App., Knoxville, Sep. 22, 1999). . . . In the instance case, defendant was only sentenced to nine months incarceration, a sentence that falls within the range of the sentencing guidelines.

Id. at *3. It appears however that the legislature has authorized sheriffs, local jailers and superintendents to develop inmate incentive programs and inmate work programs which allow inmates serving sentences in local jails to earn sentence reduction credits. *See* Tenn. Code Ann. §§ 41-2-144, -145, -146, -147. In our view, our sentencing laws do not authorize a court to override or circumvent the legislative mandate by ordering that sentences to the local jail or workhouse be served "day-for-day."

In this case, the Defendant was sentenced to a total effective sentence of eight years. As a Range I, standard offender, he is eligible for release after serving thirty percent of this sentence, or 2.4 years. See Tenn. Code. Ann. § 40-35-501(c). Because the trial court's order of one year of confinement is far less than 2.4 years, the trial court's sentence is authorized by our sentencing law. However, the trial court's direction that the sentence be served "day-for-day" is contrary to law.

The State is correct, however, that Tennessee Code Annotated section 40-35-306(a) requires that a sentence of split confinement including a period of continuous confinement up to one year be served "in the local jail or workhouse." The State asserts that the judgment forms in this case order that the Defendant's one-year period of confinement be served in the Department of Correction, and consequently must be amended.

In Shorts v. Bartholomew, 278 S.W.3d 268 (Tenn. 2009), our Supreme Court addressed a felony sentence of eight years, with one year to be served in confinement. The Court noted that the trial court erred when it designated on the judgment orders that the Defendant was sentenced to the Department of Correction. Id. at 275.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's convictions for statutory rape but vacate his convictions for assault. We also remand so that the Defendant's judgment forms can be amended to reflect service of his sentence in the local jail or workhouse, and we order that the direction that the sentence be served "day-for-day" be deleted from the judgment.

DAVID H. WELLES, JUDGE