IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2006 Session

STATE OF TENNESSEE v. THOMAS D. STRICKLIN

Direct Appeal from the Criminal Court for Putnam County
No. 03-0481 Lillie Ann Sells, Judge

No. M2005-02911-CCA-R3-CD - Filed April 5, 2007

Following a jury trial, Defendant, Thomas D. Stricklin, was found guilty in count one of the indictment of rape of a child, a Class A felony, and in counts two, four, five, and six of aggravated sexual battery, a Class B felony. The State entered a nolle prosequi as to count three of the indictment which charged rape of a child. After a sentencing hearing, the trial court sentenced Defendant to concurrent sentences of twenty years for his rape conviction and eight years for each aggravated sexual battery conviction, for an effective sentence of twenty years. In his appeal, Defendant argues that (1) the trial court erred in not severing the charges relating to the two victims; (2) the trial court's instructions to the jury erroneously defined the mental element of the charged offenses; (3) the trial court erred in not instructing the jury on attempted rape of a child as a lesser included offense of the charged offense; (4) the evidence was insufficient to support the convictions; and (5) the trial court erred in its evidentiary rulings. After a thorough review of the record, we conclude that the proof fails to establish a penetration as required by the offense of rape of a child as charged in count one of the indictment. We find the evidence is legally sufficient, however, to support a conviction of aggravated sexual battery for count one of the indictment. Accordingly, Defendant's conviction for rape of a child in count one is modified to aggravated sexual battery, the sentence for Defendant's rape conviction is vacated, and the case is remanded to the trial court for resentencing for the offense of aggravated sexual battery. We affirm the trial court's judgments in all other respects.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

David L. Raybin, Nashville, Tennessee; and James D. White, Jr., Celina, Tennessee, for the appellant, Thomas D. Stricklin.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William Edward Gibson, District Attorney General; and David Patterson, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

We will refer to the minor victims by their initials. The charged offenses involve two minor victims, K.C. and A.C., who are sisters. During opening argument, the State identified for the jury the acts for which it was seeking convictions as follows: an event occurring during the summer of 2000 involving K.C. while Defendant and K.C. were viewing the computer; an event occurring during the spring or summer of 2000 involving K.C. and the application of medicine for mosquito bites; an event occurring between November 2000, and February 2001, when K.C. was left alone with Defendant while her parents and Defendant's wife attended a funeral; an event on June 16, 2003, involving A.C.; and an event on June 17, 2003, involving A.C.

K.C. testified that she was born on March 21, 1992, and that she was twelve years old at the time of trial. K.C. said that she had known Defendant, a family friend, for as long as she could remember. K.C. and her younger sister, A.C., spent the night at Defendant's house on an average of once per week for approximately five or six years. The sisters called Defendant "Nona," and Defendant's wife, Vivian Stricklin, "Mon." K.C. said that she and her sister slept in bunk beds in Defendant's bedroom when they spent the night. K.C. said that Defendant's bed was adjustable so that either the head or the foot of the bed could be raised, and it faced the bedroom window.

K.C. and A.C. spent the night of June 16, 2003, with Defendant. K.C. testified that she was lying in the bottom bunk when Defendant approached the bunk beds in order to give A.C., who was sleeping in the top bunk, a back rub. K.C. said that she did not believe that Defendant rubbed A.C.'s back because he was standing by her "private part." K.C. said that she believed Defendant was rubbing A.C.'s bottom.

K.C. said that the next morning, June 17, 2003, she went upstairs to help Ms. Stricklin prepare breakfast while A.C. stayed downstairs with Defendant in his bedroom. K.C. said she came back downstairs "very quietly" to see what Defendant and A.C. were doing. K.C. said, "I thought he was doing [to her] what he did to me." The head of the bed was elevated, so K.C. walked around to the side of the bed. K.C. said that A.C. was lying next to Defendant with her pajama bottoms pulled down to her knees. K.C. said that Defendant "had his hand on [A.C.'s] private parts." K.C. defined "private part" as A.C.'s vaginal area.

K.C. said that during the spring or summer of 2000 when she was eight years old, she asked Defendant to find some information on the computer about a particular television show. Defendant sat in front of the computer with K.C. in his lap. K.C. said that both her pants and Defendant's pants were pulled down. Defendant brought up a pornographic internet site on the computer. Defendant touched K.C.'s private part "between her legs," and Defendant made K.C. touch "his private parts." K.C. said Defendant then printed off the information she wanted about the television show, and K.C. went into Defendant's bedroom to read it. Defendant followed her into his bedroom and rubbed K.C.'s private part with his hand as K.C. lay on Defendant's adjustable bed.

K.C. said that during the spring or summer, she had a number of mosquito bites. K.C. said that she went downstairs with Defendant to look for some medicated cream. Defendant took down her pants and rubbed her private parts instead of looking for the medicine.

At some point between November 2000 and February 2001, K.C. stayed with Defendant at night while her parents, Kelly and Patty Campbell, A.C., and Ms. Stricklin went to a visitation at a funeral home. K.C. and Defendant sat in Defendant's recliner watching television. K.C. said that her and Defendant's pants were pulled down, and Defendant was rubbing her private part. Defendant made K.C. touch his private part as he rubbed her. K.C. said that Defendant's private part grew hard when she touched it, "and some stuff came out of it."

K.C. told her mother about Defendant's inappropriate conduct on June 17, 2003, after she saw Defendant "doing it to [her] sister." K.C. testified that her parents were expecting some people from their church to stop by that night, and K.C. talked to Ms. Campbell in the afternoon before the company arrived. K.C. acknowledged that she told her mother that Defendant was rubbing A.C.'s private part, but she did not see if any part of Defendant's hand was inside A.C.'s private part. K.C.'s mother began crying. K.C. talked to her father the following day about the incidents involving A.C.

A.C. stated that she was nine years old at the time of trial. A.C. said that on the last morning that she was in Defendant's house, June 17, 2003, she was lying on Defendant's bed with Defendant. A.C.'s pajama bottoms were around her knees, and Defendant touched her between her legs. A.C. said that the night before, on June 16, 2003, she was in the top bunk bed, and K.C. was in the bottom bunk bed. A.C. said that Defendant was on the bed with her.

On cross-examination, A.C. said that she did not remember playing a game with Defendant and Mrs. Stricklin where she would push herself toward the foot of Defendant's bed, and either Defendant or Mrs. Stricklin would catch her before she fell off. A.C. said that she only remembered "a little bit" falling off some bleachers in the past.

Kelly Campbell, the victims' father, testified that he was the pulpit minister of the Collegeside Church of Christ. Mr. Campbell said that his family was very close to Defendant and Ms. Stricklin, and the Campbells considered the Stricklins as fulfilling a grandparent type relationship with the victims. Mr. Campbell said the victims were in and out of Defendant's home ten or twelve times a month and spent two or three nights a month with Defendant. Mr. Campbell said that he originally gave the bunk beds to Defendant to give to his daughter, but the bunk beds remained in Defendant's bedroom. Mr. Campbell said that the family did not have cable or internet connections in their home, and the victims were home schooled. Mr. Campbell said that he sometimes checked his e-mail on Defendant's computer and on one occasion in 2000, he saw some pornography on the computer.

Mr. Campbell said that on the evening of June 17, 2003, after the Campbells' company had left, he took A.C. out to the porch for a private conversation. Mr. Campbell told A.C. what K.C. had

reported to her mother about Defendant's conduct that morning, and A.C. began crying. Mr. Campbell told A.C. to pretend that his knee was her "private part," and he asked her to show him how Defendant had touched her that morning. A.C. demonstrated Defendant's touch by rubbing her hand back and forth on Mr. Campbell's knee and then began crying.

Mr. Campbell said that he talked to Defendant and Ms. Stricklin about the allegations on June 20, 2003, and again on June 24, 2003. Mr. Campbell said that Defendant asked how he could "make this easier." When Ms. Campbell told Defendant that he had betrayed them, Defendant responded, "I'll agree with that."

Mr. Campbell acknowledged that he should have called the police as soon as the victims disclosed the inappropriate conduct, but he stated that his daughters were already suffering, and he did not want to expose them to publicity. When A.C. continued to display emotional difficulties, however, Mr. Campbell called the family attorney. Mr. Campbell said that after he and Mrs. Campbell met with their attorney on July 9, 2003, the attorney called the Department of Children's Services and arranged an interview with the Campbells. The Clarksville Police Department became involved on July 10, 2003.

Mr. Campbell stated that K.C. was left alone in Defendant's care for approximately two hours when the rest of the family and Ms. Stricklin went to the funeral home. A.C. was left alone with Defendant one time when the Campbells' house was being painted, and A.C. was ill.

On cross-examination, Mr. Campbell acknowledged that Defendant, through his business, had at one time sponsored him as a minister. Mr. Campbell said that he considered Defendant to be a father-figure to him, and that Defendant had stood up as Patty Campbell's father at the Campbell's marriage. Mr. Campbell acknowledged that he had washed K.C.'s hair in the shower when K.C. was younger, and that K.C. would get into the shower with him when he was nude. Mr. Campbell said that he did not remember K.C. expressing any reluctance at going to Defendant's house, but A.C. sometimes told him that she did not want to go.

Patty Campbell testified that she picked up her daughters from Defendant's home on June 17, 2003, at approximately 10:00 a.m. Ms. Campbell said that during the afternoon, A.C. and K.C. seemed upset with each other, and then K.C. told her what had happened to A.C. at Defendant's house. Ms. Campbell acknowledged that she found it difficult to talk with her daughters about the allegations. Ms. Campbell denied that A.C. had suffered any prior injury to her vaginal area and stated that A.C. had never fallen off of a set of bleachers.

Sergeant Yvette Demming, with the Clarksville Police Department family protection unit, testified that she met with the victims on July 11, 2003. After the interview, Sergeant Demming called Defendant and asked him to come in for an interview later that afternoon. After he arrived, Sergeant Demming read Defendant his *Miranda* rights. Defendant executed a written waiver of his rights and agreed to speak with Sergeant Demming.

Defendant told Sergeant Demming that he did not know the substance of the allegations. Defendant said that he was like a grandfather to the victims. Sergeant Demming said that after she informed Defendant of the substance of the allegations, Defendant said that he had not done anything bad and denied hurting K.C. and A.C. Defendant asked Sergeant Demming to turn the tape recorder off before the interview continued, and Sergeant Demming complied with his request.

Sergeant Demming said that Defendant described in detail the financial difficulties he had previously encountered with his business and became very emotional. Defendant believed he had neglected his family during this time, particularly his daughter who later had a child out of wedlock when she was seventeen. Sergeant Demming said that Defendant expressed guilt over his daughter's situation and indicated that girls needed to be taught about sex. Defendant acknowledged that he had touched K.C. and A.C. on the breast and vaginal area as part of his teaching the victims about sexual matters. Defendant stated that A.C. had grabbed his penis on several occasions. Sergeant Demming said that Defendant laughed as he told her about the incidents.

Defendant described another incident when the victims were in the bathroom when he stepped out of the shower. Defendant told Sergeant Demming that he exposed himself to the victims and asked the victims what they thought about his penis. Defendant said that A.C. told him his penis looked "like a toadstool on a rock." Sergeant Demming said that when Defendant "finished that comment, he started laughing hysterically and continued to laugh for a certain amount of time."

Defendant said that he found A.C. examining her vaginal area with a flashlight on one occasion, and said that A.C. masturbated in the bathtub. Defendant told Sergeant Demming that A.C. liked for him to rub her buttocks before she went to sleep. Defendant said that he had been teaching A.C. about sex for two or three years. Sergeant Demming said that Defendant spoke only briefly about K.C. Defendant said that he had taught K.C. about sex in the same manner as A.C., and because of his instruction, Defendant was confident that K.C. would not get pregnant when she reached puberty.

Sergeant Demming interviewed Defendant again on July 18, 2003, and asked Defendant about what transpired with A.C. on June 17, 2003. Defendant said that K.C. had misunderstood the situation. Defendant said that he and A.C. were lying side by side on Defendant's bed, and Defendant had his arm around A.C. Defendant said that A.C. was so small that "his hand was probably resting on A.C.'s vaginal area." Defendant said that his "teaching" methods might be misunderstood so he never talked about the matter with Kelly and Patty Campbell. Sergeant Demming said that Defendant never admitted that he had penetrated either victim with his finger or penis.

During Defendant's second interview, Sergeant Demming asked Defendant to make a written statement. Sergeant Demming said that Defendant's written statement was "sketchy, vague." As for the incident which occurred on the morning of June 17, 2003, Defendant wrote that he and A.C. were playing a game, where A.C. would slide down toward the foot of the bed, and Defendant would pull her up by the waistband of her pajama bottoms. Defendant did not write about any of the other

specific incidents he had orally described to Sergeant Demming on July 11, 2003. Defendant said that he did not want to record incidents which he did not want other people to read.

On cross-examination, Sergeant Demming acknowledged that Defendant stated that he had an enlarged prostate gland which affected his ability to achieve an erection. Sergeant Demming acknowledged that she did not follow up on Defendant's comment.

Carolyn Smeltzer, a nurse practitioner with Our Kids Clinic, Inc., examined the victims on September 8, 2003. Ms. Smeltzer stated that K.C.'s physical examination was normal, and she exhibited no injuries in the genital or anal regions. Ms. Smeltzer said that ninety percent of girls K.C.'s age showed no physical signs of sexual abuse when the physical examination occurred more than a few days after the incident.

Ms. Smeltzer said that A.C.'s physical examination revealed an absence of hymenal tissue which indicated a past penetrating injury to A.C.'s vagina. Ms. Smeltzer stated that she did not often see A.C.'s type of hymenal injury from digital penetration alone. Ms. Smeltzer said, however, that A.C.'s small stature or her hymenal anatomy could produce such an injury from digital penetration. Ms. Smeltzer said that A.C.'s injury was consistent with sexual abuse.

The State rested its case-in-chief, and Defendant offered the following defense. Defendant testified that he was sixty-nine years old, had been married for forty-six years, and had three children. Defendant said that he received his bachelor of science degree from Bethel College and owned a feed mill after he graduated from college. Defendant said that the business was lost in 1966 in a fire. Defendant sold the business and moved to Cookeville where he worked as a salesman until his retirement in 1994. Defendant said that he was very close to the Campbells.

Defendant said that both he and his wife would take turns rubbing A.C.'s back to help her fall asleep, but Defendant denied that he ever rubbed A.C.'s buttocks. Defendant specifically denied that he touched A.C.'s genitalia on June 16, 2003. Defendant said that he and his wife were packing for a trip on the morning of June 17, 2003. Defendant's wife prepared breakfast for the victims, and Defendant told A.C. to wake up. The next time Defendant checked on A.C. she was sitting in Defendant's bed dressed in blue jeans and a tee-shirt. Defendant could not positively remember whether he played a game with A.C. that morning on the bed, but that was part of their normal morning routine. Defendant said that K.C. came downstairs to Defendant's bedroom and did not think Defendant heard her. Defendant said he reached his arm around the bed, grabbed K.C., and threw her on the bed. Defendant said he thought K.C.'s feelings were hurt because Defendant was not supposed to know she was by the bed.

Defendant denied touching either A.C.'s or K.C.'s genitalia. Defendant said that he suffered from erectile dysfunction as a result of the medication he took for his enlarged prostate gland. Defendant acknowledged that the victims occasionally asked him questions about sexual matters, but he denied that he ever initiated such conversations. Defendant denied that he told Sergeant Demming that A.C. had grabbed his penis. Defendant explained that he meant that A.C. had grabbed

the seat of his pants one time. Defendant denied that he purposefully exposed himself to the victims after taking a shower. Defendant said that the victims came into the bathroom while he was showering and he installed a lock on the bathroom door after the incident.

Regarding the mosquito bite incident described by K.C., Defendant stated that he and his wife applied a medicated lotion to the bites on K.C.'s legs. Defendant said that after the lotion was applied, K.C. pulled her shorts to one side and "pointed at herself." K.C. told Defendant, "That's a mosquito bite." Defendant told K.C., "Don't do that. Just don't be ugly about this." Defendant said he had known the victims since birth. When he admitted that he had touched the victims on the breast and buttocks, Defendant said that he meant when he held the victims when they were infants.

Defendant said that K.C. was researching information about a television show on the internet and inadvertently pulled up a pornographic site. Defendant said that he disconnected his internet access after that incident.

On cross-examination, Defendant acknowledged that he asked Sergeant Demming if they could get together later because he wanted to tell Sergeant Demming the "whole story." Defendant acknowledged that he did not deny the allegations in his written statement. He said that there was no reason to deny the allegations because they never happened. Defendant said that he never told the Campbells about the victims' inappropriate sexual behavior towards him or the victims' questions about sex because Defendant did not want to betray the victims' confidences.

Vivian Stricklin testified that the victims were "almost like [her] own grandchildren," and she talked to the children every day or every other day. Ms. Stricklin said that the victims usually spent the night at her house once every two weeks. Ms. Stricklin said that K.C. helped her cook breakfast on June 17, 2003, and both children ate normally. Ms. Stricklin said that Defendant told her that the victims had come into the bathroom while he was showering, and Ms. Stricklin confirmed that Defendant then installed a lock on the bathroom door. Ms. Stricklin said that she had never seen Defendant inappropriately touch either victim. Ms. Stricklin acknowledged that the victims asked Defendant questions about sex, and that both she and Defendant tried to keep the lines of communication open. Ms. Stricklin said the victims did not specifically ask her any similar types of questions because Ms. Stricklin was more reserved.

Ms. Stricklin testified that one or two years ago, Ms. Campbell told her that A.C. had fallen on something in the back yard which had caused vaginal bleeding. Ms. Campbell told Ms. Stricklin that A.C.'s injury was very painful.

James Birdweel, Oscar Gaw, Jr., and Robert Toline testified as to Defendant's reputation for truthfulness.

Patty Campbell, testifying in rebuttal, stated that A.C. had never suffered an injury that caused vaginal bleeding. Ms. Campbell stated that she would have taken A.C. immediately to the doctor if that had occurred. On cross-examination, Ms. Campbell acknowledged that she had never

seen blood on A.C.'s panties. Ms. Campbell, on redirect examination, stated that the victims often came home after they had spent the night at Defendant's house with their clothes washed.

II. Severance of the Charges

A. Background

Defendant argues that the trial court erred in denying his motion to sever the counts of the indictment involving A.C. from the counts of the indictment involving K.C. Defendant contends that the charges did not arise out of a common scheme or plan, nor was the evidence related to one victim admissible upon the separate trial as to the other victim. Defendant argues that the consolidation of the charges violated his right to a fair trial.

At the pre-trial hearing on Defendant's motion to sever, the State argued that the offenses reflected a continuing plan or scheme to victimize A.C. and K.C. as contemplated in *State v. Morris*, 788 S.W.2d 820 (Tenn. Crim. App. 1990). The State submitted that the evidence would show that Defendant first sexually abused K.C. when she was eight years old. The abuse of K.C. stopped as she grew older, and Defendant then commenced sexually abusing A.C. when she was between seven and eight years old. The State argued that the acts of sexual conduct were identical, and that the acts were in furtherance of Defendant's stated purpose of "teaching" both girls about sex. The State contended that the evidence as to one victim would be admissible in a separate trial on the charges of the other victim to show absence of mistake and motive under Rule 404(b) of the Tennessee Rules of Evidence.

Sergeant Demming testified at the hearing that Defendant said that he was teaching A.C. and K.C. about sex because of the nature of the questions they asked him. Defendant said that it was sometimes easier to physically show the victims rather than offer a verbal explanation, and that he sometimes touched the victims' breasts and vaginal areas during his instruction. Defendant demonstrated to Sergeant Demming the type of touching he engaged in with the victims by briefly tapping on the top of the interview table. Defendant indicated that he had "taught" K.C. in the same manner as he was teaching A.C., and that his conduct had been misunderstood. The State introduced into evidence Defendant's handwritten statement dated July 18, 2003; Sergeant Demming's summary of her interviews with A.C. and K.C. on July 11, 2003, and a separate interview with Defendant on that date; and Sergeant Demming's summary of her second interview with Defendant on July 18, 2003.

After the hearing, the trial court filed an order finding that:

> the testimony of [Sergeant] Demming is credible and reasonable and further find[ing] there is sufficient evidence to establish that the specific acts herein constitute parts of a common scheme and plan on defendant's part to sexually molest these children, specifically in light of defendant's own statement that he had taught both children "about sex" over a period of some three years in the "same identical manner." . . .

> The Court further finds that the victim[s] of the alleged criminal activity are sisters, and that the alleged criminal activity occurred with both female victims at approximately the same age. The alleged molestation occurred with both victims in the same place, within the defendant's home, and that the defendant's acts were of an ongoing nature as to both children over a period of years. The defendant's actions involve the same manner of abuse, (fondling and digital penetration); defendant's relationship with both victims was the same, (grandfather figure); and that the older sister (K.C.), who was also a victim, is a witness to the abuse of her younger sister (A.C.), which additionally helps to explain why she purposely and quietly slipped into defendant's bedroom to secretly observe the defendant's activities with her younger sister, (i.e. to confirm whether or not [the defendant] was molesting her sister as he had previously done to her). Thus, the Court finds that if the charges were tried separately, evidence concerning the other charged incidents would be admissible because K.C.'s observations would cause her to be a witness of A.C.'s abuse and to show her state of mind and motivation to sneak into defendant's bedroom. Additionally, the Court finds the evidence of these separate events/acts would be admissible at separate trials to show criminal intent and or lack of accident or mistake, in light of defendant's specific defense that his actions were merely incidental to a legitimate activity, i.e. sex education. Therefore based on these facts, the Court finds pursuant to Rule 404(b)(4), Tennessee Rules of Evidence, and Bunch vs State, 605 S.W.2d 227, that the evidence at issue is relevant, and the probative value of such other acts to show intent, lack of mistake, or accident, clearly outweigh any danger of unfair prejudice to the defendant.

B. Analysis

Defendant contends that the trial court erred in finding that a common plan existed to warrant joinder of the charged offenses and challenges the trial court's ruling that the evidence as to one set of crimes would be admissible in a separate trial on the other set of crimes.

The State consolidated the offenses against Defendant in a superceding indictment pursuant to Rule 8(b) of the Tennessee Rules of Criminal Procedure, which provides that two or more offenses may be consolidated "if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character." *See* Tenn. R. Crim. P. 8(b). Tennessee Rule of Criminal Procedure 14(b)(1) provides that "[i]f two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others."

A trial court's decision "to consolidate or sever offenses pursuant to Rules 8(b) and 14(b)(1) are to be reviewed for an abuse of discretion." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999). "A holding of abuse of discretion reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular

case." *State v. Moore*, 6 S.W.3d 235, 242 (Tenn.1999). Our supreme court has explained that "when a defendant objects to a pre-trial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Rule 14(b)(1), not the 'same or similar character' standard of Rule 8(b)." *State v. Spicer*, 12 S.W.3d 438, 443 (Tenn.2000).

In examining a trial court's determination on a severance issue, the primary consideration is whether the evidence of one offense would be admissible in the trial of the other if the offenses remained severed. *Id*. at 445. Essentially, "any question as to whether offenses should be tried separately pursuant to Rule 14(b)(1) is 'really a question of evidentiary relevance.'" *Id*. (quoting *Moore*, 6 S.W.3d at 239). As such, the trial court must determine from the evidence presented that: "(1) the multiple offenses constitute parts of a common scheme or plan, (2) evidence of one is relevant to some material issue in the trial of the other offenses, and (3) 'the probative value of the evidence of other offenses is not outweighed by the prejudicial effect.'" *See State v. Andre Dotson*, No. W2005-01594-CCA-R3-CD, 2006 WL 3438161, at *4 n.3 (Tenn. Crim. App., at Jackson, Nov. 29, 2006), *perm. to appeal filed* (Jan. 25, 2007).

Common scheme or plan evidence tends to fall into one of three categories: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. *Moore*, 6 S.W.3d at 240. As relevant to the case *sub judice*, "[t]he larger, continuing plan category encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose." *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim .App.,1993) (citing N. Cohen, *Tennessee Law of Evidence*, § 404.11 (2nd ed. 1990)).

In *State v. Morris*, the defendant, a school bus driver and leader of the community's tumbling group, was charged with alleged acts of aggravated rape or aggravated sexual battery against nine young males ranging in age from nine to twelve years old who were members of the defendant's tumbling team. *Id*., 788 S.W.2d at 822. The evidence showed that Defendant was a father figure to the victims who all came from single parent homes, that he used the same methods of enticing the victims to his home, and that he engaged in the same type of sexual conduct with the victims. *Id*. at 822-23. Based on the evidence presented, the trial court found that "the defendant's various offenses were parts of a common scheme and plan on his part to sexually molest these young victims. The defendant's acts were of an ongoing nature, carried out regularly over a four-year period." *Id*.

Defendant argues that there was no correlation between the alleged offenses committed against A.C. and those committed against K.C., citing *State v. Burchfield*, 664 S.W.2d 284, 288 (Tenn. 1984) and *State v. Denton*, 149 S.W.3d 1 (Tenn. 2004). In *Burchfield*, the defendant was charged with the aggravated rape of his daughter in 1980 and with the unlawful carnal knowledge of his stepdaughter in 1969 and 1970, and the State joined the offenses for trial. Our Supreme Court found that joinder, under the facts of this case, was impermissible because of the remoteness in time between the offenses, eleven years, and the State's failure to sufficiently articulate a common scheme or plan as to the offenses between the separate victims. *Burchfield*, 664 S.W.2d at 288.

In *State v. Denton*, the issue of severance was based on the State's contention that the defendant's conduct, sexually molesting a series of patients over a period of time in his office, represented a signatory crime warranting joinder, which argument the Supreme Court rejected. *Id*., 149 S.W.3d at 14. The State, however, argued for the first time on appeal that the defendant's conduct also represented a continuing plan. In briefly addressing this issue, the Supreme Court observed,

> The argument that sex crimes can be construed as part of a continuing plan or conspiracy merely by the fact that they are committed for sexual gratification has previously been rejected. *See Moore*, 6 S.W.3d at 240 (stating that two offenses of child rape do not create a larger conspiracy); *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn.Crim.App.1993) (holding that mere fact that crimes were committed for sexual gratification is insufficient to constitute a continuing plan or conspiracy). A larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses. The State has offered no evidence that the defendant had a working plan operating towards the future such as to make probable the crime with which the defendant is charged. *See Hoyt*, 928 S.W.2d at 943. Therefore, the offenses charged against the defendant are not part of a larger, continuing plan or conspiracy.

Id. at 15.

In the case *sub judice*, however, the State offered evidence at the motion hearing that Defendant's ultimate goal or purpose in committing the offenses against A.C. and K.C. was to educate the victims as to sexual matters. To this end, Sergeant Demming testified that Defendant stated during his initial interview that he had taught K.C. in the same manner as he taught A.C., and that as a result of his instruction, Defendant was confident that K.C. would not have premarital sex now that she had reached puberty. Defendant gained the victims' trust as a grandfather figure, he began inappropriately touching K.C. in 2000 when she was eight years old. In 2003, he began inappropriately touching A.C., who at that time was between seven and eight years of age. The inappropriate conduct occurred in Defendant's house and involved the same types of sexual touching. Defendant warned both victims not to tell anyone about the incidents.

Based on our review of the record, we conclude that the trial court did not err in finding that Defendant's conduct constituted a continuing plan or scheme to sexually molest the victims.

"[E]vidence that the accused committed crimes independent of those for which he is on trial is generally inadmissible because such evidence lacks relevance and invites the finder of fact to infer guilt from propensity." *Hallock*, 875 S.W.2d at 290. (citing Tenn. R. Evid. 404(b); *Mays v. State*, 145 Tenn. 118, 238 S.W. 1096 (1921)).

Rule 404(b) of the Tennessee Rules of Evidence provides:

(b) Other Crimes, Wrongs, or Acts.-Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

"Typically, offenses that are parts of a common scheme or plan are offered by the State to establish the identity of a perpetrator." *Moore*, 6 S.W.3d at 239 (citing *State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996)). However, identity is not the only basis for presenting evidence of a common plan. Such evidence may be admissible for other purposes, such as to show, motive, intent, the absence of mistake or accident, or the existence of a larger continuing plan. *Denton*, 149 S.W.3d at 13 (citing *State v. Tolliver*, 117 S.W.3d 216, 230 (Tenn. 2003)).

Identity is not an issue in the case *sub judice*. However, Defendant acknowledged during his interview with Sergeant Demming that he touched both victims on their breasts and vaginal areas as part of his sex education program, but he denied that his touches were more than a brief "tapping." Defendant said that if he on other times inappropriately touched the victims, it was inadvertent, and his conduct had been misunderstood. We conclude that the trial court did not err by finding that the evidence of other crimes was relevant to show Defendant's motive, intent, and the lack of accident or mistake in committing the offenses. Defendant is not entitled to relief on this issue.

III. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of rape of a child because there was no evidence introduced at trial which would support the jury's finding on count one of the indictment that he sexually penetrated A.C. on June 17, 2003. Although Ms. Smeltzer testified that A.C. had at some point in the past suffered an injury to her hymen which was consistent with digital penetration, Defendant submits that there was no evidence that A.C.'s injury occurred on June 17, 2003. Defendant argues that at worst he is guilty of the offense of aggravated sexual battery.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn.1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn.1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn.1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn.1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App 1990).

Count one of the indictment stated that Defendant "on or about the 17th day of June, 2003, . . . did unlawfully and intentionally or knowingly sexually penetrate a female child, (d/o/b: 7-22-95), a person less that thirteen years of age, in violation of T.C.A. § 39-13-522." Tennessee Code Annotated section 39-13-522(a) defines the offense of rape of a child as the "unlawful sexual penetration of a victim by the defendant, or the defendant by a victim, if such victim is less than thirteen (13) years of age." The legislature has defined sexual penetration as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required [.]" T.C.A. § 39-13-502(7).

At trial, the State asked A.C. during her direct examination what happened on June 17, 2003, the last morning that she was in Defendant's house. A.C. testified that she was in Defendant's bed which she described as being located "in front of a big window." The following colloquy occurred:

[STATE]: Okay. And the last day that you were there, the morning of the last day that you were there and you were in bed with the defendant, what was it that was happening that we're interested in here today to talk about? What was happening right then?

[A.C.]: (No response.)

[STATE]: Was something happening that morning?

[A.C.]: Yes.

[STATE]: Okay. And was it something that we came here to tell them about?

[A.C.]: Yes.

[STATE]: Okay. Tell them just as easily as you can, just let them know what it is.

[A.C.]: (No response).

. . .

[STATE]: Was something happening with your hands or with his hands or something?

[A.C.]: Yes.

[STATE]: Okay. Now tell us what happened with [Defendant's] hand, where was it?

[A.C.]: In between my legs.

[STATE]: Okay. And do you remember talking to your daddy about what happened, did you show your daddy what happened.

[A.C.]: Yes.

[STATE]: How did you show your daddy what happened, what did you show him? Show the jury like you showed your daddy what was happening in the bed.

[A.C.]: He touched me like this.

[STATE]: And did you show him with your hand though what was happening? Do you remember showing him?

[A.C.]: I don't know.

[STATE]: Okay. Then when his hand was between your legs, what were you wearing?

[A.C.]: My PJ's.

[STATE]: And were your PJ's on?

[A.C.]: No.

[STATE]: Where were your PJ's?

[A.C.]: (No response).

[STATE]: If they weren't on, where were they?

[A.C.]: Around my knees.

K.C. testified that she approached Defendant's bed on the morning of June 17, 2003, "very quietly." K.C. said she went around to the side of the bed and saw Defendant on the bed next to A.C. with "his hand on [A.C.'s] private part. K.C. defined "private part" by standing and pointing to her vaginal area. K.C. said that A.C.'s pajama bottoms were pulled down to her knees. The State inquired as to the location of Defendant's hand, and K.C. responded, "On her private part." Later, the follow colloquy occurred:

[STATE]: What did you tell your mother when you happened to tell her, what was it that you said to her if you can recall?

[K.C.]: I told her that I had seen [Defendant] rubbing my sister's private part.

[STATE]: On or in her private part?

[K.C.]: I didn't see if it was in her private part.

[STATE]: You don't know whether it was in, you know it was on?

[K.C.]: Yes.

A criminal offense may be established exclusively by circumstantial evidence. *Duchac v. State*, 505 S.W.2d 237 (Tenn.1973); *State v. Jones*, 901 S.W.2d 393, 396 (Tenn. Crim. App.1995); *State v. Lequire*, 634 S.W.2d 608 (Tenn. Crim. App.1987). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." *State v. Crawford*, 225 Tenn. 478, 470 S.W.2d 610, 612 (1971); *Jones*, 901 S.W.2d at 396. In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Crawford*, 470 S.W.2d at 613; *State v. McAfee*, 737 S.W.2d 304, 305 (Tenn. Crim. App.1987). "In summary, a conviction for a criminal offense cannot be predicated solely upon conjecture, guess, speculation, or a mere possibility that [the accused] may be guilty." *State v. Transou*, 928 S.W.2d 949, 955 (Tenn. Crim. App.1996).

A.C. testified that Defendant put his hand "on her private part," and she demonstrated in court and to her father that Defendant rubbed his hand back and forth against her genital area.. K.C. testified that she saw Defendant rub A.C.'s private part, but did not see whether any part of his hand had penetrated A.C.'s vagina. Ms. Smeltzer testified that A.C. had a healed laceration to the hymen tissue but could not testify as to when the injury occurred.

In closing argument, the State acknowledged that although the medical evidence clearly showed a tear in A.C.' s hymen consistent with sexual abuse, Ms. Smeltzer could not say if the injury had occurred on either June 16, or June 17, 2003. The State argued that "when [Defendant] in this case, has his hand between [A.C.'s] legs and he's rubbing back and forth, you can assume that you're going to get intrusion. And you can back that assumption up with Carolyn Smeltzer saying she saw an injury that was a result of an intrusion." This argument encouraged impermissible speculation on the part of the jury.

The State argues in its brief that the specific day of penetration is not a material element of the charge of rape of a child as reflected in count one of the indictment. *See State v. Byrd*, 820 S.W.2d 739, 740 (Tenn. 1991)(finding that the exact date of an offense need not be included in the indictment unless it is a material element of the offense). However, in the instant case, the State made a binding election based on the identification of the elected offense by a specific date to support count one of the indictment. While there was medical proof that A.C. had at some time in the past suffered a penetrating injury, the proof at trial did not establish that the penetration occurred on June 17, 2003, charged in count one of the indictment and as set forth in the State's bill of particulars, the State's election of offenses, and the jury verdict forms. In fact, there was no direct or circumstantial evidence that any penetration occurred when Defendant was with A.C. One can only assume or speculate that penetration was done by Defendant because he had the opportunity to do so.

Based on our review of the record, we are constrained to conclude that the evidence is not so strong and cogent as to support a finding beyond a reasonable doubt that Defendant digitally penetrated A.C. A.C. did not testify that the Defendant had penetrated her on that date or on any other occasion. Nor was the doctor able to determine when or how many times penetration had in fact occurred. Based on this evidence, a rational trier of fact could not find, beyond a reasonable doubt, that the Defendant committed rape of a child by penetrating A.C. with his finger.

We, therefore, set aside Defendant's conviction of rape of a child in count one of the indictment because the evidence was insufficient to prove penetration.

We conclude, however, that the evidence was legally sufficient to support Defendant's conviction of aggravated sexual battery as to this count of the indictment. The offense of aggravated sexual battery is defined as unlawful sexual contact with a victim by the defendant, or the defendant by a victim, when, as relevant here, the victim is less than thirteen years old. T.C.A. § 39-13-504(a)(4). Unlawful sexual contact includes the intentional touching of the victim's intimate parts, which includes the primary genital area, groin, inner thigh, buttocks or breast, if the intentional

touching can be reasonably construed as being for the purpose of sexual arousal or gratification. *Id*. § 39-13-501(2) and (6). Penetration is not required to support a conviction of aggravated sexual battery. Viewing the evidence in a light most favorable to the State, we conclude that the evidence is legally sufficient, beyond a reasonable doubt, to support a conviction of this offense.

IV. Jury Instructions

Defendant challenges the trial court's instructions to the jury on several levels. He contends that (1) the elements of the offense of rape of a child erroneously included recklessness as a mental state thereby lessening the State's burden of proof; (2) the use of the disjunctive "or" in the definition of the applicable mental states cast doubt on the unanimity of the jury's verdict for both offenses; and (3) the trial court erred in not instructing the jury specifically as to which mental state was applicable to each element of the offense of rape of a child.

In criminal cases, a defendant has a right to a correct and complete charge of the law. *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). The material elements of the charged offense should be described and defined in connection with that offense. *State v. Ducker*, 27 S.W.3d 889, 899 (Tenn. 2000); *State v. Craven*, 764 S.W.2d 754, 756 (Tenn. 1989). The failure to do so deprives the defendant of the constitutional right to a jury trial and subjects the erroneous jury instruction to harmless error analysis. *Garrison*, 40 S.W.3d at 433-34. A jury instruction, however, must be reviewed in its entirety and read as a whole rather than in isolation. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). "An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law." *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005) (citing *State v. Vann*, 976 S.W.2d 93, 101 (Tenn. 1998)).

The trial court instructed the jury that in order for it to find Defendant guilty of the offense of rape of a child, the jury had to find that Defendant, in pertinent part, sexually penetrated the victim, that the victim was less than thirteen years old, and that the defendant acted intentionally, knowingly, or recklessly. For aggravated sexual battery, the trial court instructed the jury that it had to find that Defendant intentionally had unlawful sexual contact with the victim, that the victim was less than thirteen, and that the defendant acted either intentionally or knowingly. The trial court instructed the jury that the definition of "sexual contact" is "the intentional touching of the alleged victim . . .if that intentionally [sic] touching can be reasonably construed as being for the purpose of sexual arousal or gratification."

Regarding the *mens rea* elements, the trial court charged the following:

> The word "intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in such conduct or to cause such a result.

> The word "knowingly" means that a person acts knowingly with respect to the conduct or circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.
>
> A person acts knowingly with respect to a result of a person's conduct when the person is aware that the conduct is reasonably certain to cause that result.
>
> The word "recklessly" means that a person acts recklessly with respect to the circumstances surrounding the conduct or the result of the conduct when the person is aware [of] but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result would occur.
>
> The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all of the circumstances as viewed from the accused person's standpoint.

Defendant argues that the trial court's instructions on the offense of rape of a child violate the provisions of Tennessee Code Annotated section 39-11-301(a)(1) which provides that "[a] person commits an offense who acts intentionally, knowingly, recklessly or with criminal negligence, *as the definition of the offense requires*, with respect to each element of the offense." (emphasis added). The statutory definition of the offense of rape of a child, however, does not specify a mental state. *See* T.C.A. § 39-13-522. Where a statutory definition of an offense "does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state." *Id*. § 39-11-301(c). Therefore, it follows that the requisite mental state for the offense of rape of a child may be established by evidence of intent, knowledge or recklessness. *See, e.g. State v. Barney*, 986 S.W.2d 545, 550 (Tenn. 1999) ("Rape of a child requires sexual penetration of the victim, and the mental state required may range from intentional to knowing or reckless."); *State v. Hill*, 954 S.W.2d 725, 729 (Tenn. 1997) ("Obviously, the act for which the defendant is indicted, 'unlawfully sexual[ly] penetrat[ing]' a person under the age of thirteen, is committable only if the principal actor's *mens rea* is intentional, knowing or reckless."). Thus, Defendant is not entitled to relief on this initial challenge to the trial court's jury instructions.

Defendant argues that the offense of rape of a child includes multiple conduct elements which have differing applicable mental states, and the trial court erred in phrasing the definition of the requisite mental states in the disjunctive without specifying which mental state applied to which element of the offenses of rape of a child and aggravated sexual battery.

In Tennessee, the culpable mental states are defined in relation to three possible conduct elements of an offense, which may be found singly or in combination with one another within an offense's statutory definition. *See* T.C.A. § 39-11-302. These "conduct elements" include the nature of the conduct, the circumstances surrounding the conduct, and the result of the conduct. *See Id*. § 39-11-201(a)(1).

Based upon the statutory definition of culpable mental states, "intentional" refers to the nature of the conduct or to a result of the conduct; "knowing" refers to the nature of the conduct, the circumstances surrounding the conduct, or the result of the conduct; and "reckless" refers only to the result of the conduct or to the circumstances surrounding the conduct, but not to the nature of the conduct. *See Id*. § 39-11-302(a), (b), and (c). "This Court has held that '[g]enerally, only the culpable mental states of "intentional" or "knowing" are applicable to nature of conduct crimes.'" *State v. Charles L. Williams*, No. M2005-00836-CCA-R3-CD, 2006 WL 3431920, at *25 (Tenn. Crim. App., at Nashville, Nov. 29, 2006), *no perm. to appeal filed* (quoting *State v. Deji A. Ogundiya*, No. M2002-03099-CCA-R3-CD, 2004 WL 315138, at *5 (Tenn. Crim. App., at Nashville, Feb. 19, 2004), *no perm. to appeal filed*)).

In *State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034, *14 (Tenn. Crim. App., at Nashville, Nov. 30, 2004), *perm. to appeal denied* (Tenn. Mar. 21, 2005), a panel of this Court recognized that the offense of rape of a child contains all three conduct elements: nature-of-conduct, result-of-conduct, and circumstances-surrounding-conduct. These conduct elements relate in various degrees to the culpable mental states of intentional, knowing, and reckless. *See generally*, T.C.A. § 39-11-302. Also, in the *Walters* case, we stated that the "unlawful sexual penetration of the victim is both nature of the conduct and result of the conduct [offense]." *Id*. at 13; *see also State v. Jennie Bain Ducker*, No. 01C01-9704-CC-00143, 1999 WL 160981 (Tenn. Crim. App., at Nashville, Mar. 25, 1999) (noting that nature of the conduct involves the physical act and that the result of the conduct is the harmful result), *aff'd on other grounds*, 27 S.W.3d 889 (Tenn.2000); *State v. Michael D. Evans*, No. 03C01-9703-CR-00104, 1997 WL 772910 (Tenn. Crim. App., at Knoxville, Dec. 9, 1997) (stating that "conduct which results in sexual penetration" must be proved intentionally, knowingly, or recklessly), *aff'd on other grounds*, 108 S.W.3d 231 (Tenn.2003).

Thus, the offense of rape, which is both a nature of the conduct and a result-of-conduct offense, is distinguishable from *State v. Page*, 81 S.W.3d 781 (Tenn. Crim. App. 2002) which is cited by Defendant is support of his argument. In *Page*, this court held that the trial court erred when it instructed the jury on the "knowing" mental state of second degree murder, a result-of-conduct offense, because the instruction included the nature-of-conduct and nature-of-circumstances definitions of knowingly. *Page*, 81 S.W.3d at 788. In *State v. Frederick Leon Tucker*, No. M2005-00839-CCA-R3-CD, 2006 WL 547997, at *13 (Tenn. Crim. App., at Nashville, Mar. 7, 2006), *no perm. to appeal filed*, we observed that:

> [In *Page*], this court reasoned that a "jury instruction that allows a jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the state's burden of proof." [*Page*, 81 S.W.3d at 788]. This court further concluded the error was not harmless beyond a reasonable doubt because defendant's culpable mental state was a disputed issue at trial. *Id*. at 789-90.
>
> However, our supreme court in *Faulkner* restricted the holding in *Page*, by concluding that the superfluous conduct language in the "knowingly" definition "did

> not lessen the burden of proof because it did not relieve the State of proving beyond a reasonable doubt that the defendant acted knowingly." *Faulkner*, 154 S.W.3d 59. The supreme court also indicated they were not convinced "that the inclusion of such language is an error of constitutional dimension when the instruction also includes the correct result-of-conduct definition." *Id*. at 58-9. The supreme court further concluded that the error did not qualify as a misstatement of a material element of the offense, as suggested by *Page*; but rather, the error was harmless. *Id*. at 60.

The case *sub judice* is distinguishable from the situation presented in *Page*. First, the offenses of rape of a child and aggravated sexual battery contain all three conduct elements: nature-of-conduct, result-of-conduct, and circumstances-surrounding conduct. *Chester Wayne Walters*, 2004 WL 2726034, at *14. Thus, we conclude that the trial court's inclusion of the result-of-conduct, nature-of-conduct, and nature-of-circumstances definitions of knowingly in its instructions to the jury was not error. The trial court limited the use of the reckless *mens rea* for the offense of rape of a child to the circumstances surrounding the offense and the result of the conduct. The nature-of-the-conduct, or the physical act of sexual penetration, for the offense of rape of a child required a finding that Defendant acted intentionally or knowingly, but not recklessly. *See Chester Wayne Walters*, 2004 WL 2726034, at *13. Regarding the definition of "sexual contact" for aggravated sexual battery, the trial court's instruction specifically stated that it required the jury to find that Defendant touched the victim intentionally. The trial court did not instruct the jury as to a reckless *mens rea* for the offense of aggravated sexual battery. Based on our review, we conclude that the trial court's instructions fairly defined the issues of law.

More problematic, however, is the trial court's failure to specifically instruct the jury as to the *mens rea* of each separate element of the offenses of rape of a child and aggravated sexual battery. When an offense has different *mens rea* for separate elements, the trial court has a duty to set forth the mental state for each element clearly so that the jury can determine whether the State has met its burden of proof. *State v. Howard*, 926 S.W.2d 579, 587 (Tenn. Crim. App. 1996), *overruled on other grounds in State v. Williams*, 977 S.W.2d 101 (Tenn. 1998). In the present case, the trial court properly defined the requisite mental states in terms of "conduct elements," but failed to clearly explain which "conduct element" was applicable to which element of the offenses of rape of a child and aggravated sexual battery.

Nonetheless, in view of our modification of Defendant's conviction of rape of a child to aggravated sexual battery, we conclude that any error in the trial court's instructions to the jury on rape of a child was harmless. *See* Tenn. R. Crim. P. 52(b)("No conviction shall be reversed on appeal except for errors that affirmatively appear to have affected the result of the trial on the merits.). The elements of aggravated sexual battery include sexual contact, and the victim's being less than thirteen years old. The trial court properly instructed the jury that the "sexual contact" element required a finding that Defendant intentionally touched the victim. The age of the victim is a circumstance surrounding the offense which could be satisfied by a reckless *mens rea*. *See Chester Wayne Walters*, 2004 WL 2726034, at *13. The trial court, however, to Defendant's benefit, instructed the jury that it must find that the Defendant acted either intentionally or knowingly as to

this element of the offense. Based on our review, we conclude that Defendant is not entitled to relief on this issue.

V. Evidentiary Rulings

A. Non-Verbal Conduct

Defendant argues that the trial court erred in repeatedly allowing the State to introduce inadmissible hearsay and opinion testimony. The first set of challenged evidence involves K.C.'s and Mr. Campbell's testimony concerning A.C.'s non-verbal reactions when each attempted to talk with A.C. about Defendant's conduct. The State argues that even if A.C.'s out-of-court statements were hearsay, they were properly admitted under the excited utterances exception to the hearsay rule.

In the first instance, K.C. testified that she confronted A.C. about Defendant's conduct on June 17, 2003, after K.C. and A.C. arrived home from Defendant's house. K.C. stated that she asked A.C. "what [Defendant] was doing to her, and she [A.C.] just ran out of the room." In the second instance, Mr. Campbell testified that he took A.C. out on the porch later that evening. Mr. Campbell informed A.C. that K.C. had told him about Defendant's conduct. Mr. Campbell said that A.C. "immediately began to cry."

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801. A "statement" is defined as an oral or written assertion or nonverbal conduct intended as an assertion. Tenn. R. Evid. 801(a). Generally, hearsay statements are inadmissible unless they fall within a recognizable exception.

When K.C. and Mr. Campbell separately asked A.C. whether Defendant had inappropriately touched her on June 17, 2003, A.C. responded through conduct, that is, by bursting into tears when questioned by her father, and, when confronted by K.C., by running from the room. Although the Tennessee Rules of Evidence do not define the term "assertion," this Court has previously observed that the term "'has the connotation of a forceful or positive declaration.'" *State v. Land*, 34 S.W.3d 516, 525 (Tenn. Crim. App. 2000) (quoting Webster's Ninth New Collegiate Dictionary 109 (1985 ed.)). Based on our review, we conclude that A.C.'s non-verbal responses to K.C.'s and Mr. Campbell's questions about Defendant's conduct were assertions as contemplated under Rule 801 of the Tennessee Rules of Evidence. The State's apparent purpose of offering this testimony was to confirm that Defendant had engaged in inappropriate conduct with A.C., and the non-verbal assertions thus were offered for the truth of the matter asserted. *See State v. Burns*, 29 S.W.3d 40, 47 (Tenn. Crim. App. 1999) (finding that the witness's testimony concerning the victim's negative reaction to hearing the defendant's name spoken was non-verbal conduct intended as an assertion offered to prove the defendant's identity).

The State in its brief contends that A.C.'s non-verbal responses to K.C.'s and Mr. Campbell's questions were admissible under the excited utterance exception to the general rule against hearsay. *See* Tenn. R. Evid. 803(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Tenn. R. Evid. 803(2); *see also State v. Gordon*, 952 S.W.2d 817, 819 (Tenn. 1997). In order for a statement to qualify as an excited utterance: (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant is under the stress or excitement from the event or condition. *Gordon*, 952 S.W.2d at 829. The underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *Land*, 34 S.W.3d at 628-29. "The ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." *State v. Smith*, 857 S.W.2d 1, 9 (Tenn.1993) (citations omitted).

The startling act does not have to be the conduct comprising the underlying offense with which the defendant is charged. *Gordon*, 952 S.W.2d at 820. "[R]ather, a subsequent startling event or condition which is related to the prior event can produce an excited utterance." *Id*. (concluding that the startling event which prompted the victim's identification of the defendant as the perpetrator was the pain suffered by the victim during urination after the rape, and not the rape itself).

Defendant relies on *State v. Burns*, 29 S.W.3d 40 (Tenn. Crim. App. 1999) in support of his position that the challenged testimony was inadmissible. In *Burns*, the defendant was charged with inflicting severe burns on the three-year-old victim. An investigator with the Department of Children's Services attempted to interview the victim about his injuries and testified that the victim refused to talk. The investigator began to name the individuals in the victim's household, and when she said the defendant's name, the victim began "screaming and crying." *Id*. at 45. This Court concluded that even if the speaking of the defendant's name was considered a startling event under *Gordon*, the probative value of the evidence did not outweigh its prejudicial effect because there was no showing that the startling event was related to the offense with which the defendant was charged. *Id*. at 47 (citing Tenn. R. Evid. 403).

K.C. testified that she saw A.C. in Defendant's bed before breakfast that morning. The victims were picked up from Defendant's house by their mother around 10:00 a.m. K.C. decided that afternoon to tell her mother what she had seen and confronted A.C. about Defendant's conduct first. Both victims testified that Defendant had warned them not to talk about the sexual contacts because their parents would be angry with them. Under the facts presented in this case, we conclude that K.C.'s confrontation with A.C. about Defendant's conduct only a few hours after A.C.'s last encounter with Defendant, and about conduct which the victims had previously kept secret, constituted a sufficiently startling event to which A.C. responded by running from the room in tears. The startling event, K.C.'s confrontation with A.C. over Defendant's conduct, was directly related

to the underlying sexual offense, and, under the facts presented, we conclude that the probative value of the evidence outweighed its prejudicial effect. *See* Tenn. R. Evid. 403.

Mr. Campbell's confrontation with A.C. about Defendant's inappropriate conduct later that evening, however, presents a different situation. The evidence appears to be admissible under Rule 803(3) to show the victim's state of mind when she heard Defendant's name, that is, that the victim was fearful of Defendant or associated some other negative emotion with Defendant. However, if admitted for this purpose, the evidence would not then be relevant because A.C.'s state of mind is not directly probative of whether Defendant had sexually abused her. *Burns*, 29 S.W.3d at 47 *(*citing *State v. Smith*, 868 S.W.2d 561, 573 (Tenn.1993); Neil P. Cohen, et al., *Tennessee Law of Evidence* § 803(3).2 (3d ed.1995)).

Mr. Campbell's conversation with A.C. on the porch occurred some hours after A.C. first learned that K.C. was going to disclose Defendant's conduct to her parents, and after K.C. had told her mother that Defendant had inappropriately touched A.C. Presumably, A.C. was thus aware that her parents would ask her about the incident. Although obviously still emotional over the subject of Defendant's conduct, Mr. Campbell's questions could not have been so unanticipated, and thus startling, as to cause the stress or excitement to qualify A.C.'s non-verbal conduct as an excited utterance. Nonetheless, even if not an excited utterance, we conclude that the admission of Mr. Campbell's testimony about A.C.'s crying response to his question was harmless in light of the brevity of the comment, and A.C's testimony during redirect examination that she found it very difficult to talk to her father about the incident which occurred on June 17, 2003. *See* Tenn. R. Crim. P. 52(b).

Defendant also argues that Mr. Campbell's testimony at trial concerning A.C.'s demonstration to him of how Defendant had touched her was inadmissible. The State argues that even if it were error to allow the testimony, any error was harmless in light of A.C.'s substantially similar testimony during her direct examination.

Mr. Campbell testified that he asked A.C. to show him how Defendant had touched her by pretending that Mr. Campbell's knee was A.C.'s private part. Mr. Campbell stood up to demonstrate A.C.'s gestures. The following colloquy occurred:

> [MR. CAMPBELL]: And she took her hand and she put it on my knee and she went like that and then she just stopped and she started crying.
>
> [THE STATE]: Okay. For the record, what you've done is you've taken your hand, put it on your knee and rubbed back and forth on your knee, is that, am I correct?
>
> [MR. CAMPBELL]: Right.

Mr. Campbell's testimony concerning A.C.'s out-of-court demonstration of Defendant's inappropriate touching was clearly a non-verbal hearsay statement offered for the truth of the matter asserted therein. Nonetheless, although we find that the trial court erred in admitting this evidence, we find the admission to be harmless error in view of A.C.'s substantially similar testimony during her direct examination, and the strength of the evidence supporting Defendant's conviction of aggravated sexual battery as to this count of the indictment. In addition, K.C.'s testimony as to what she had seen the morning of June 17, 2003, was substantially similar to A.C.'s description of the event. Defendant is not entitled to relief on this issue.

Defendant contends that the trial court erred in allowing Ms. Campbell to describe her reaction to K.C.'s disclosure of Defendant's conduct as follows:

[MS. CAMPBELL]:	I had a conversation with [K.C].
[THE STATE]:	All right. And [K.C.] told you why she was upset?
[MS. CAMPBELL]:	Yes, sir.
[THE STATE]:	And what did you do when you learned that, how did you act, what did you do?
[MS. CAMPBELL]:	Well, I guess when you had learned what has been done to your children, you[r] world goes down. I got on the floor, and I started crying and I —
[DEFENSE COUNSEL]:	If Your Honor please, I object to the relevance.
[THE COURT]:	Objection overruled. You may proceed.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Tenn. R. Evid. 403. The trial court has discretion in determining whether evidence meets the test for relevancy. *State v. Forbes*, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995). Assessing the probative value and danger of unfair prejudice regarding the evidence also falls within the trial court's discretion. *State v. Burlison,* 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993). This court will only reverse a trial court's decision on relevancy grounds if the trial court abused its discretion. *State v. Williamson,* 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995).

We agree with Defendant's assessment that Ms. Campbell's testimony describing her reaction to K.C.'s disclosure was not relevant to a material issue at trial, but we conclude that this testimony did not affect the outcome of the trial when considering the record as a whole. *See* Tenn.

R. App. P. 36(b). Accordingly, the error was harmless. Defendant is not entitled to relief on this issue.

B. Medical History

Defendant argues that the trial court erred in allowing Ms. Smeltzer to testify about A.C.'s medical history which she obtained from A.C.'s parents, and not A.C. herself. Defendant contends first that Rule 803(4) of the Tennessee Rules of Evidence covers statements made by a patient for the purpose of diagnosis and treatment, but not statements made by third parties about the patient's medical history.

At trial, Ms. Smeltzer testified that during the course of a patient's diagnosis and treatment, she considers the patient's medical history, which, in the case *sub judice* was obtained from A.C.'s parents. Ms. Smeltzer's examination revealed a healed hymenal transaction. Ms. Smeltzer stated that Mr. and Ms. Campbell informed her during the gathering of A.C.'s medical history that A.C. had not suffered any prior injury to the genital area.

Rule 803(4) of the Tennessee Rules of Evidence provides that statements made for the purpose of medical diagnosis and treatment are admissible as an exception to the hearsay rule. Specifically, the Rules states that:

> [s]tatements made for the purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

Tenn. R. Evid. 803(4).

Although a medical history is generally provided by the patient, "Rule 803(4) does not bar the admission of a medical history related to a health care provider by a third person, particularly a parent or a grandparent." *State v. Rucker*, 847 S.W.2d 512, 516-17 (Tenn. Crim. App. 1992) (citations omitted).

"Rule 803(4) is based upon the notion that statements made under conditions prescribed by the Rule are presumptively trustworthy." *State v. McLeod*, 937 S.W.2d 867, 870 (Tenn. 1996). When the declarant is someone other than the patient, "[t]he rationale for this rule is the third person's desire to (a) obtain medical assistance for the patient and (b) make sure that the diagnosis made and treatment provided by the health care provider is accurate so that the patient will recover from the illness or injuries sustained as quickly as possible." *Rucker*, 847 S.W.2d at 517.

The trial court held a hearing out of the presence of the jury prior to the admission of Ms. Smeltzer's testimony concerning A.C.'s medical history. Ms. Smeltzer stated that as part of the procedure for the diagnosis and treatment of a patient, she considers the patient's medical history.

The medical history gathered from A.C.'s parents indicated no prior genital injury. The trial court ruled that Mr. and Ms. Campbell's statements to Ms. Smeltzer pertaining to A.C.'s medical history were admissible under Rule 803(4). Trial courts have broad discretion in determining the admissibility of evidence , and their rulings will not be reversed absent an abuse of discretion. *McLeod*, 937 S.W.2d at 871 (citing *State v. Campbell*, 904 S.W.2d 608, 616 (Tenn. Crim. App. 1995); *State v. Baker*, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989)). The admissibility of a patient's medical history for the purposes of medical diagnosis and treatment "should be based on a thorough examination of all of the circumstances surrounding the statement." *McLeod.* 987 S.W.2d at 871.

Based on our review, we conclude that the trial court did not err in allowing the admission of the Campbell's out-of-court statements to Ms. Smeltzer concerning A.C.'s prior medical history. Defendant is not entitled to relief on this issue.

VI. Lesser Included Offense

Defendant argues that the trial court erred in not charging the jury with attempted rape as a lesser included offense of rape. Relying on *State v. Page*, 184 S.W.3d 223 (Tenn. 2006), the State contends that Defendant has waived this issue on appeal by failing to request the instruction in writing prior to the trial court's charge to the jury. The State submits, therefore, that Defendant's issue may only be reviewed if it rises to the level of "plain error." *Page*, 184 S.W.3d at 226.

Prior to 2002, Tennessee Code Annotated section 40-18-110 placed the burden on the trial court to instruct the juries in all criminal prosecutions "as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." T.C.A. § 40-18-110(a)(2001). Thus, under prior law, a defendant need not have requested an instruction on a lesser included offense in order to preserve the issue for appellate review. *Page*, 184 S.W.3d at 229. "Therefore, all the a defendant need do to assign error to a trial court's failure to instruct on a lesser-included offense was to raise that issue on appeal." *Id*.

Section 40-18-110, as amended, now requires a defendant to submit a written request for an instruction on a lesser included offense in order to raise the trial court's failure to do so on appeal, as follows:

> (a) When requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment or presentment. However, the trial judge shall not instruct the jury as to any lesser included offense unless the judge determines that the record contains any evidence which reasonable minds could accept as to the lesser included offense. In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of evidence. The trial judge

> shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.
>
> (b) *In the absence of a written request* from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but *no party shall be entitled to any lesser included offense charge*.
>
> (c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, the lesser included offense instruction is waived. *Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for a new trial or on appeal*.

T.C.A. § 40-18-110(2002)(emphasis added).

The legislature's amendment to section 40-18-110 in 2001 was effective for all trials conducted on or after January 1, 2002. 2001 Pub. Acts ch. 338 § 2. Defendant's trial commenced on September 28, 2004, and the statute, as amended, was clearly applicable to Defendant's case.

In *Page*, our Supreme Court concluded that the waiver of a lesser included offense instruction for plenary appellate review is constitutionally permissible. *Page*, 184 S.W.3d at 229-30. The court explained:

> Accordingly, [under section 40-18-110, as amended] if a defendant fails to request an instruction on a lesser-included offense in writing at trial, the issue will be waived for purposes of plenary appellate review and cannot be cited as error in a motion for a new trial or on appeal. *See id*.; *State v. Terry*, 118 S.W.3d 355, 359 (Tenn. 2003). While a defendant's failure to request a lesser-included offense instruction in writing waives the right to raise such omission as an issue on appeal, the right itself is not waived because the trial court may still charge the jury on any instructions supported by the evidence. *See* Tenn. Code Ann. § 40-18-100(b). The trial court would presumably still give lesser-included offense instructions, even when not requested, when those instructions are necessary for a fair trial.
>
> Irrespective of section 40-18-110, a defendant has a constitutional right to a correct and complete charge of the law to ensure that he receives a fair trial. *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990). This right encompasses the right to have the jury instructed on all lesser-included offenses supported by the evidence. While an erroneous or inaccurate jury charge may be cited as error for the first time in a motion for a new trial or on appeal, a trial court's incomplete jury charge may be cited as error on appeal only if the defendant requested a lesser-included offense charge at trial. *See State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). The current version

> of section 40-18-110(c) subjects the right to lesser-included offense instructions to the general rule that issues concerning incomplete instructions are deemed waived in the absence of an objection or special request. *See State v. Cravens*, 764 S.W.2d 754, 757 (Tenn. 1989).
>
> Furthermore, the waiver of a lesser-included offense for purposes of plenary appellate review is constitutionally permissible. A trial court's failure to instruct on lesser-included offenses is not a structural error. *See State v. Allen*, 69 S.W.3d 181, 190-91 (Tenn. 2002) (holding that failure to instruct on lesser-included offenses is subject to constitutional harmless error analysis). As a non-structural constitutional error, the omission of a lesser-included offense instruction is subject to waiver for purposes of plenary appellate review when the issue is not timely raised and properly preserved. *See State v. Terry*, 118 S.W.3d 355, 359 (Tenn. 2003) (defendant's failure to request lesser-included offense instruction at trial or in a motion for a new trial waived issue). Similarly, issues involving other non-structural constitutional errors must be preserved to receive plenary appellate review. *See State v. Gomez*, 163 S.W.3d 632, 645 (Tenn. 2005) (Sixth Amendment right to confront witnesses). Accordingly, we conclude that Tennessee Code Annotated section 40-18-110(c) does not violate the constitutional right to trial by jury.

Page, 184 S.W.3d at 229 -230 (Tenn. 2006); *see also State v. Wilson*, __ S.W.3d __, 2007 WL 171719 (Tenn. 2007); *State v. Rice*, 184 S.W.3d 646, 676-677 (Tenn. 2005).

The crux of Defendant's challenge centers around what he perceives to be a "new rule of law" announced in *Page* concerning waiver, which Defendant submits should not be applied retroactively. Defendant argues that, unlike the defendants in *Page*, he raised the issue of a lesser included offense instruction in his motion for new trial. Under prior law, Defendant argues that his issue would have been properly preserved for appellate review under a constitutional harmless error analysis. *See State v. Locke*, 90 S.W.3d 663, 671 (Tenn. 2002) (The right to receive lesser included offense instructions "is constitutional in nature" and the State "bears the burden of showing that a deprivation of this right is harmless beyond a reasonable doubt."). Under *Page*, Defendant now faces a "plain error" analysis on appeal, notwithstanding his raising the issue in his motion for new trial, the principle distinction of which is that the defendant bears the burden of persuasion with respect to plain error claims. *U.S. v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993).

Defendant does not challenge the constitutionality of Tennessee Code Annotated section 40-18-110. Defendant submits, however, that under section 40-18-110(b), as amended, the trial court retains the duty to charge the jury on all applicable lesser included offenses even in the absence of a written request to do so. Defendant contends that when a defendant raises the failure of the trial court to properly instruct the jury on lesser included offenses in a motion for new trial, the trial court's error is subject to constitutional harmless error analysis notwithstanding a defendant's failure to request an instruction in writing. Defendant argues that the *Page* court's conclusion that relief

will be afforded only if the trial court's omission rises to the level of plain error announced a "new rule of law" not subject to retroactive application.

First, we note that the *Page* decision did not announce a new rule of law. As set forth in *State v. Denton*, 938 S.W.2d 373, 377 (Tenn. 1996), "a case announces a new rule of law when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (quoting *Teague v. Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed. 2d 334 (1989)).

The *Page* court concluded, in the exercise of its authority to interpret and apply law, that the procedures established in section 40-18-110 for preserving an issue as to lesser included offense instructions for appellate review did not violate constitutional principles. The statute, as amended, was in effect more than two years prior to Defendant's trial and clearly provided notice that the failure of a trial court to instruct the jury as to a specific lesser included offense could not be presented as a ground for relief either in a motion for new trial or on appeal absent a written request for the instruction. Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that errors which were not properly preserved for plenary appellate review may still be recognized by an appellate court at any time "[w]hen necessary to do substantial justice." *See Page*, 184 S.W.3d at 230 (concluding that appellate courts are not precluded by section 40-18-110 from "sua sponte reviewing this issue under the plain error doctrine).

Thus we will proceed to consider Defendant's argument that the trial court erred in not instructing the jury on the lesser included offense of attempted child rape under a plain error analysis.

When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal. *See also* Tenn. R. App. P. 36(b). The factors to be considered when deciding whether an error constitutes "plain error" in the trial are: "'(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)). 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 [proceedings]," 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.

Defendant's theory of defense at trial was based on his assertion that he had never penetrated A.C., and thus was not guilty of the offense of rape of a child. For the two counts of rape, the trial court instructed the jury on the lesser included offenses of aggravated sexual battery, child abuse, and assault. The State entered a nolle prosequi as to the charge of rape of a child in count three of

the indictment. Defendant has failed to show that he did not waive this issue for tactical reasons. Moreover, in view of our modification of Defendant's conviction of rape of a child to aggravated sexual battery, Defendant has failed to show that a substantial right was adversely affected. Therefore, the trial court's failure to instruct on attempted rape does not rise to the level of plain error. *Page*, 184 S.W.3d at 231. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we conclude that the proof fails to establish penetration as required by the offense of rape of a child as charged in count one of the indictment. We find the evidence is legally sufficient, however, to support a conviction of aggravated sexual battery for count one of the indictment. Accordingly, Defendant's conviction for rape of a child in count one is modified to aggravated sexual battery, the sentence for Defendant's rape conviction is vacated, and the case is remanded to the trial court for resentencing for the offense of aggravated sexual battery. We affirm the trial court's judgments in all other respects.

_____

THOMAS T. WOODALL, JUDGE