IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
v.	)	**NO. M2024-00288-CCA-R3-CD**
	)	
JOHN DAVID CUNNINGHAM,	)	**RUTHERFORD COUNTY**
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE RUTHERFORD COUNTY CIRCUIT COURT

BRIEF OF THE APPELLANT

PATRICK T. MCNALLY
McNALLY LAW
40 Burton Hills Blvd., Suite 200
Nashville, Tennessee 37215
(615) 480-8921
attorney@patrickmcnallylegal.com
B.P.R. No. 010046

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

Whether the trial court abused its discretion by admitting into evidence, the second forensic interview of A.C. upon a showing of severe untrustworthiness of the second forensic interview, and the child did not testify, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording as required under Tenn. Code Ann. § 24-7-123(b)(1).

II

Whether the evidence was insufficient as a matter of law to sustain convictions of Rape of a Child and Aggravated Sexual Battery.

III

Whether the trial court erred by permitting testimony about Mr. Cunningham's alleged prior bad acts.

IV

Whether the trial court abused its discretion by sentencing Mr. Cunningham to an excessive sentence of 100 years.

V

Whether the trial court abused its discretion by requiring Mr. Cunningham to turn over copies of deposition transcripts to the State and preventing Mr. Cunningham from taking any further depositions as it related to his divorce proceedings with Victoria Cunningham.

VI

Whether the trial court abused its discretion by allowing the State to utilize an unauthenticated excerpt of a transcript lacking the court reporter's certification during Dr. Berryman's direct examination.

STATEMENT OF THE CASE

John David Cunningham was indicted on seven (7) Counts of Rape of a Child in violation of Tenn. Code Ann. § 39-13-522 and six (6) Counts of Aggravated Sexual Battery in violation of Tenn. Code Ann. § 39-13-504(a)(4). These charges stemmed from allegations made by A.C., Mr. Cunningham's daughter.

On September 21, 2022, a pretrial hearing was held to decide numerous defense and state motions. (III, 1). On November 29, 2022, another pretrial hearing was held to determine whether A.C.'s forensic interview would be admitted at trial. (IV, 1). During that hearing, Elizabeth Benton, the forensic interviewer, testified. (IV, 6.) At the conclusion of that hearing, it was determined that the forensic interview would be admitted. (IV, 17). The child, A.C., was not called as a witness and thus did not testify that the offered video was a true and correct recording of the events contained in the video as required by Tenn. Code Ann. § 24-7-123(b)(1). (IV, 1-39).

On November 2, 2022, the State filed a Motion to Compel Compliance with Rule 15 of the Tennessee Rules of Criminal Procedure, arguing that Mr. Cunningham should be compelled to produce a copy of all transcripts in his possession and prevented from conducting any further depositions in his pending divorce case. (I, 41-4). Mr. Cunningham filed a response on November 9, 2022. (I, 66 - 75). On November 10, 2022, the trial court issued an order finding that Rule 15 did not apply, but nonetheless, requiring both parties to turn over complete copies of deposition transcripts intended to be used at trial for impeachment purposes. (I, 76-77). Additionally, the trial court further

ordered that no additional deposition of any potential State witnesses may be conducted in the divorce proceedings without leave of the court. (I, 77).[1] Mr. Cunningham complied with this order and provided the State with all deposition transcripts in his possession.

On November 29, 2022, a pretrial hearing was held wherein arguments were made about an unauthenticated excerpt of a transcript of A.C.'s testimony in chambers during a hearing on Mr. Cunningham's request for visitation with A.C. before Judge Scarlett. (IV, 22). Specifically, A.C.'s mother, Victoria Cunningham, gave the State an excerpt of A.C.'s testimony in chambers during the visitation hearing. (IV, 24-25). There was no identifying information nor authentication/verification on the transcript (i.e., the court reporter's certification, the date, time, location of the proceeding, or the court reporter's name). The State gave notice it might use the excerpt of the transcript during the trial to show A.C. made a prior consistent statement regarding the alleged abuse. (IV, 27). However, the State did not provide or make any attempt to secure a complete copy of the transcript of the proceeding before Judge Scarlett or to have the excerpt certified as accurate by the undisclosed court reporter. (IV, 25-26). The trial court denied Mr. Cunningham's request to either preclude the State from using this transcript or order the State to provide the court reporter's name so Mr. Cunningham could order a complete copy for trial purposes. (IV, 30).

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[1] The parties' divorce proceedings were in the Chancery Court of Rutherford County before Judge Darell Scarlett. (I, 41, 66).

On December 7, 2022, the case proceeded to a jury trial, and at the conclusion, Mr. Cunningham was found guilty of all counts. (X, 155). On April 11, 2023, Mr. Cunningham was effectively sentenced to 100 years of incarceration. (XI, 57-58).

On May 4, 2023, Mr. Cunningham filed a Motion for New Trial and a First Amended Motion for New Trial on January 30, 2024. (II, 163; 167). On February 8, 2024, a hearing was held on the Motions for New Trial, which were denied by a ruling from the bench that same day. (II, 175).

On February 24, 2024, Mr. Cunningham filed a Notice of Appeal. (II, 172). An order denying Mr. Cunningham's Motions for New Trial was entered thereafter on May 14, 2024. (II, 175).

STATEMENT OF THE FACTS

I. John David Cunningham's background.

Mr. Cunningham is the son of Mary Kathryn and John Elliott Cunningham. (XI, 28, 40-1). He is thirty-four (34) years old and attended Ravenwood High School in Brentwood, Tennessee, graduating in 2006. (XVII, 18, 26).[2] Mr. Cunningham is a gifted musician and videographer.

At age eight, Mr. Cunningham, a budding composer, won the Texas State Music Theory Award. (XI, 29-30). At age twelve, he built a computer and began composing music (XI, 30). He also worked with computers and related technology (XI, 30; XVII, 26). He interned with Sound Kitchen Recording Studios (XI, 30). This led to employment with Creative Services Company, where he produced animations for their clients—all before graduating from high school (XI, 31).

While in high school, he released many CD recordings under the name Karius Vega (XI, 30). He also toured and performed with Skrillex, a major entity in the Intelligent Dance Music and Electronic Music industries. (XI, 31).[3]

Elliott Cunningham testified during the sentencing hearing and described his teenage son as follows:

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[2] Volume XVII contains two exhibits from the Sentencing Hearing. Exhibit No. 1 is the Presentence Report and two Addendums. Exhibit No. 2 is a collection of letters in support of John David Cunningham. Vol. XVII has 56 pages. Page references in Vol. XVII will be to the actual page numbers in numerical order, 1 – 56.

[3] The transcript incorrectly identified the entity as "ADMC" instead of "IDM."

> [H]e [John David] was teaching himself engineering and computer technology, server management. He was always very dedicated. John David would go to school. He would come home. He wasn't really interested in going out and doing a lot of other extracurricular things. He wasn't -- he [had] done BMX, but he wasn't really into sports or anything. But he really loved computers, technology.

(XI, 30). Elliot Cunningham continued explaining that his son "is very creative. John David has a creative personality. * * * He is an interesting person. You walk into a room with John David, and people want to know who he is." (XI, 36).

After beginning a family, Mr. Cunningham transitioned from the freelance economy with its ups and downs in cash flows to a salaried employee (XI, 32, 35). He was employed at Blue Cross Bule Shield of South Carolina as an "E-Business web content specialist from 2017 to 2020. (XVII, 26). He later became employed by GSI Pharma, a Medicare/Medicaid company.[4] (XI, 32; XVII, 26). He kept his company, Karius Vega Productions, active, handling broadcast television shows, commercial productions, and music productions. (XVII, 26).

Before being taken into custody, Mr. Cunningham was employed by GSI Pharma and Karius Vega Productions. (XVII, 26).

The Presentence Investigation Report reports that Mr. Cunningham has no prior criminal record. (XVII, 16).

Mr. Cunningham was married to Victoria "Vica" Cunningham and the couple had two children, A.C. and E.C. (VI, 130-31, 135). Mr.

[4] The transcript incorrectly identified the company as "GCS" instead of "GSI."

Cunningham has always maintained steady employment and provided financially for his wife and children. (XI, 33).

II. Development of the inconsistent accusations--Pretrial.

A. First disclosure by the mother, Victoria Cunningham.

The trial court observed the testimony about the dates and time span of alleged sexual abuse is "not clear." (XI, 60). The accusations appeared to begin on May 28th, 2019. When Victoria Cunningham arrived at her neighbor's house, Jessica Bratcher, with her two children on that date. (VI, 50). Victoria looked disheveled and claimed she needed to speak with Ms. Bratcher. *Id*. Victoria informed Ms. Bratcher that Mr. Cunningham had been molesting their daughter, A.C., and that it had been happening for a long time. (VI, 51-52). Ms. Bratcher then called a woman from the women's group at her church to give Victoria a ride to her mother's house, Connie Reguli. (V, 53).

Victoria Cunningham moved in with her mother, and Ms. Bratcher and Ms. Cunningham stayed in touch until a rift developed. (VI, 54). When Ms. Bratcher asked whether Victoria Cunningham had reported the incident to the police, Ms. Cunningham informed Ms. Bratcher she had done so, but the case had been dropped. (VI, 56). After that, Ms. Bratcher became suspicious that Ms. Cunningham did not report the alleged abuse to the police. (VI, 57). Ms. Bratcher concluded that Ms. Cunningham was lying to her. (VI, 59, 67, 69, 71. 72). Eventually, Ms. Cunningham stopped responding to Ms. Bratcher. (VI, 58).

On June 6, 2019, Ms. Bratcher went to the Smyrna Police Department to report what Victoria Cunningham had told occurred on

May 28, 2019. (VI, 70). Detective James Scott left a voice message for Victoria Cunningham but received no response. (VI, 198-99). A report was made with the Tennessee Department of Children's Services by Detective James Scott from the Smyrna Police Department. (VI, 200). On June 7, 2019, the Department of Children's Services opened an investigation, and Child Protective Services Investigator (*CPSI*) Tameika Gray was assigned to investigate the case. (VI, 220).

B. Victoria Cunningham and the grandmother, Connie Reguli, obstruct the Child Protective Services investigation.

On June 10, 2019, Child Protective Services Investigator (*CPSI*) Tameika Gray contacted Victoria Cunningham to discuss the allegations and inform her she would need to meet with A.C.(VI, 222). Ms. Cunningham declined to allow A.C. to be interviewed and asked CPSI Gray to contact Victoria's mother, an attorney, Connie Reguli. (VI, 221, 232). The following day, on June 11, 2019, Ms. Reguli, not Ms. Cunningham, brought A.C. to the DCS office to meet with CPSI Gray. (VI, 222). Mr. Reguli informed CPSI Gray that Ms. Cunningham will not be attending. (*Id*.) She further stated that she was there as the grandmother and attorney. (VI, 239).

However, A.C.'s interview was abruptly aborted. Ms. Reguli stated that CPSI Gray was not permitted to interview A.C. privately. (VI, 223, 238). CPSI Gray offered Ms. Reguli the opportunity to observe the interview from the "observation room," which Ms. Reguli declined, stating she would not allow A.C. to be interviewed that day. (VI, 223, 239).

Ms. Reguli inquired about the next steps in the investigation, and CPSI Gray informed her that a forensic interview would be scheduled with the Child Advocacy Enter (*CAC)*. (VI, 224). Ms. Reguli informed CPSI Gray she would not be taking A.C. to the CAC but rather to psychologist Dr. Janie Berryman. (VI, 225, 229, 236). She admonished Ms. Gray that A.C. would go to the CAC only if Dr. Berryman recommended it. (VI, 225). CPSI Gray explained that it is essential for CAC to conduct a forensic interview first to prevent the interview from being tainted by the influence of other people. (VI, 236-37). Ms.

Reguli pulled out a tape recorder to audio record the visit, and CPSI Gray ended the contact, informing Ms. Reguli she would contact A.C.'s mother for the next appointment.

C. The litigation battles are initiated.

On June 12, 2019, DCS attorney Matthew Wright informed CPSI Gray that the Rutherford County Juvenile Court issued an emergency order instructing Victoria Cunningham to bring A.C. to the Child Advocacy Center for the forensic interview instead of meeting with Dr. Jani Berryman first. (VI, 226, 239, 242).[5] On the same day, she proceeded to Ms. Reguli's residence to serve the court order on Victoria Cunningham, requiring her to take A.C. to the Child Advocacy Center for a forensic interview on June 13, 2019. (*Id*.; VI, 228, 241). Ms. Cunningham received the court order and handed it to her mother. Ms. Reguli's first response was that Judge Davenport was not "allowed to

[5] Judge Davenport is named as the Rutherford County Juvenile Court Judge. (VI, 240).

hear any of her cases." (VI, 227, 242). Ms. Gray explained the order was directed to the mother, Ms. Cunningham, not Ms. Reguli. (*Id*).

Ms. Reguli "kicked" CPSI Gray out of the home. (VI, 240). A.C. was not taken for the forensic interview. (VI, 228-29, 243). CPSI Gray telephoned Dr. Berryman and informed her of the court order that she was not to interview A.C. until after the Child Advocacy Center interviewed A.C. (VI, 244).

Connie Reguli blocked the forensic interview by initiating a civil lawsuit in federal court to prevent the forensic interview the next day, June 14, 2019. (VI, 230, 245, 248-49; XIV, 27-50, Exhibit no. 4, Verified Complaint).[6] The suit named the Department of Children's Services and Commissioner Jennifer Nichols, Juvenile Court Judge Donna Davenport, Tameika Gray, and Mattew Wright as defendants. (XIV, 27). The lawsuit filed by Connie Reguli listed the plaintiffs as Victoria Cunningham and A.C. (VI, 249-50; XIV, 27, 50). The lawsuit sought to enjoin enforcement of the juvenile court order and enjoin DCS from performing a forensic interview until Victoria Cunningham has taken A.C. to "her psychologist of her choice" [Dr. Janie Berryman]. (XIV, 42-43). The plaintiffs sought $1,000,000 in damages. (VI, 250; 50).

The United States District Court dismissed the lawsuit, and the dismissal was affirmed on appeal. (VI, 252-53).

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[6] Volume XIV contains four exhibits. Page references in Vol. XIV will be to the actual page numbers in numerical order, 1 – 50. The full title of the complaint is Verified Complaint for Declaratory Judgment, Prayer for Emergency Injunctive Relief and for Damages. (XIV, 27).

CPSI Gray was removed from the case due to being named a defendant in the lawsuit. (VI, 231, 250-51, 253). Shaneka Morgan is with DCS and replaced Ms. Gray. (VII, 8-10, 23). Ms. Morgan was Ms. Gray's supervisor. (VII, 23).

On July 30, 2019, the court entered a second order requiring Victoria Cunningham to cooperate with getting the forensic interview completed. (VII, 28-30). On October 17, 2019, a forensic interview for A.C. was scheduled. A.C. (VII, 12, 31). However, A.C. was not brought to the Child Advocacy Center for the interview. (*Id*.) The grandmother, Connie Reguli, not the mother, later texted a message that A.C. was on a field trip and the interview needed to be rescheduled. (VII, 13, 32).

Ms. Morgan had to return to court to get another court order. On October 29, 2019, a third, more strongly worded court order sought to complete a forensic interview at the Child Advocacy Center. (VII, 14). This time, the court ordered the forensic interview to occur on November 7, 2019. (VII, 14). Ms. Morgan explained the prolonged delay of four months was because "[t]he grandmother, or Ms. Reguli, wanted someone else to do the interview" and would not comply with court orders. (VII, 30).

D. A.C. states that no inappropriate sexual conduct happened during her forensic interview, and DCS closes the case.

On November 7th, Connie Reguli brings A.C. to the Child Advocacy Center for an interview. (VII, 33). During the interview, A.C. was cooperative and made no disclosures of sexual abuse. (VII, 13, 34, 38; XV

Ex 2, forensic interview, Nov. 7, 2019).[7] A.C. said nothing happened. (VII, 57).

On November 20, 2019, the Child Protective Investigative Team reviewed the investigation. (VII, 21, 53). The team classified it as "allegations unsubstantiated, perpetrator unsubstantiated." (VII, 21, 55). DCS closed the case. (VII, 21, 55, 59).).

E. New allegations are made.

Despite being aware of the ongoing conflict about the forensic interview and DCS's admonishment not to meet with A.C., Dr. Berryman conducted an intake and began meeting with A.C. in October 2019 before any forensic interview was completed. (VIII, 81, 84, 89-91, 103-105). Three months later, on February 4, 2020, the DCS abuse hotline received a report from Dr. Janie Berryman alleging that A.C. had disclosed sexual abuse. (VIII, 56, 57). In her session with Dr. Berrymen, A.C. reportedly disclosed that something bad had happened. (VIII, 57).

On February 10, 2020, a second forensic interview of A.C. took place. (VII, 206, XV, Ex 2, forensic interview, Feb. 10, 2020). Elizabeth Benton, who conducted the first interview in November 2019, conducted this second interview. (VII, 2060). Unlike the first interview, during the second interview, A.C. made several disclosures of sexual abuse. Specifically, A.C. stated that Mr. Cunningham puts his private ("Winky")

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[7] The record contains two Volumes labeled 15. One is labeled "Vol 15 Ex 2" and the other is "Vol. 15 12722 Exhibits 5-6 & 2." The latter, volume 15, contains the two DVD recordings of the interviews admitted at trial. MP4 reproductions of the video recordings of the forensic interviews conducted on November 7, 2019, and February 10, 2020, are "Collective Exhibit 2" in Vol. 15 Ex 2 and can be played with a media player.

where "girls go pee," that "it hurts," and that she witnessed whitish yellow stuff come out of his privates. (XV, Ex. 2, forensic interview, Feb. 10, 2020). A.C. stated this happened "almost a million times," and the first time was "when she was a baby." (*Id.*). She further disclosed that Mr. Cunningham had licked her privates and that he attempted to make her lick his privates, but she did not because she was watching YouTube. (*Id.*). She also stated that when she is with Mr. Cunningham, she sleeps in his bed, and her brother sleeps in a separate room. (*Id.*).

At the beginning of the interview, A.C. revealed that on the ride to the interview, her mother spoke to her about her dad being "inappropriate" with her—"doing things not supposed to do." (*Id.*). She also disclosed that her mother knew about the inappropriate conduct because she "would always see." (*Id.*). Finally, in response to the interviewer's question, A.C. explained that she did not discuss inappropriate conduct during the first interview because the interviewer "never asked me." (*Id.*).

F. The forensic physical examination does not corroborate penetration.

On February 19, 2020, A.C. was scheduled to have a forensic medical examination at Our Kids Center, an outpatient branch of Nashville General Hospital. (VII, 64). However, when Victoria Cunningham arrived with A.C. and was provided with an explanation of the process, Ms. Cunningham abruptly left the interview room. (VII, 70-71, 73). In the lobby, Ms. Cunningham explained she had consulted with her attorney and was advised not to proceed with A.C. undergoing the examination. (VII, 73).

Eight months later, on October 5, 2020, Victoria Cunningham and Connie Reguli brought A.C. to Our Kids Center for a forensic medical examination. (VII, 108; 112). As part of the examination, A.C. was interviewed. During the interview, A.C. stated that her dad's private parts touched her "lady parts" but that she was unsure if it went inside. (VII, 109, 156). She further stated that he licked her "lady parts." (VII, 109). Other disclosures were consistent with the forensic interview on February 10, 2020. (VII, 110).

The physical examination was normal, and A.C. exhibited no injuries in the genital or anal regions. (VII, 154, 182, 184-85; XV, Exhibit 5, Our Kids Center report, pp. 4-5). There was no evidence of penetrating injuries. (*Id.*). The physical examination revealed an "unremarkable and atraumatic minora." (VII, 185, XV, Exhibit 5, Our Kids Center report, pp. 5). The examiner, Lori Littrell, testified that based on the exam, she "cannot say whether [the abuse] occurred or did not occur." (VII, 195). Her findings and opinions were reviewed and approved by a colleague. (VII, 196-97; XV, Exhibit 5, Our Kids Center report, pp. 5).

III. The trial testimony.

A. A neighbor reported the allegations because the mother, Victoria Cunningham, declined to report the accusations.

Mr. Cunningham proceeded to a jury trial on December 5, 2022. Jessica Bratcher was the first witness to testify. (VI, 45). She and her husband lived next door to the Cunninghams, and their children played together. (VI, 48). On May 28, 2019, Victoria Cunningham appeared on her front porch wearing pajama pants and a brazier, visibly distraught.

(VI, 50). She believed it was the middle of the day when Ms. Cunningham arrived. (VI, 64). Victoria Cunningham disclosed that A.C. had been sexually abused. Ms. Bratcher confirmed she did not speak with A.C. about these allegations. (VI, 52).

Ms. Bratcher followed up with Victoria Cunningham numerous times regarding the criminal investigation. (VI, 54). Still, she became suspicious that Ms. Cunningham had not reported the alleged abuse to the Department of Children Services or law enforcement. (VI, 57-8). Ms. Bratcher concluded that Ms. Cunningham was lying to her. (VI, 59, 67, 69, 71. 72). Ms. Bratcher testified that after she reported to the police, Victoria was very upset with her and stopped communicating with her. (VI, 58).

Ms. Bratcher further confirmed that Victoria Cunningham informed her she was filing for divorce from Mr. Cunningham. (VI, 67). To Ms. Bratcher's surprise, Ms. Cunningham said she wanted Mr. Cunningham to have supervised visits with his children. (VI, 68).

The State introduced a text message thread between Ms. Bratcher and Victoria Cunningham (VI, 63; XIV, Exhibit 1, Text Messages, pp. 4-20).[8] Many of the messages corroborated Ms. Brasher's testimony about her conversations with Ms. Cunningham to convince Ms. Cunningham to report the allegations and Ms Cunningham lying to Ms. Brasher. Over defense objection, the irrelevant and unfairly prejudicial text messages in the thread assailing Mr. Cunningham's character were introduced.

[8] As explained in fn. 6, Volume XIV contains four exhibits. Page references in Vol. XIV will be to the actual page numbers in numerical order, 1 – 50.

(VI, 62; XIV, Exhibit 1, Text Messages, pp. 12, 14-5). The jury read text messages where Ms. Bratcher characterized Mr. Cunningham as "a powerful manipulative narcissist," "cheat, "a liar who has coldly disregarded your heart for many years," who has "screwed with your mind for lots of years." (XIV, Exhibit 1, Text Messages, pp. 12, 14-5). Ms. Brasher likewise testified to the character assassination. (VI, 70). Ms. Bratcher elaborated during her testimony about the text messages that her husband saw Mr. Cunningham in a vehicle with another woman and that Ms. Bratcher frequently observed bruises on Victoria. (VI, 70-1).

B. A.C. admits she lied during her forensic interviews and cannot recall what she lied about in the second interview, presenting a lack of memory of abuse and confusing and questionable testimony.

1. The Rule 404(b) hearing.

A.C. was questioned outside of the jury's presence regarding an alleged incident during an overnight visit with Mr. Cunningham at his parent's home in Williamson County, Tennessee. (VI, 84). A.C. testified that she could not remember the details of that specific incident. (VI, 91-92). A.C. testified that she remembered her parents fighting and some hitting and shoving. (VI, 94). A.C. testified that she remembered police coming to her house one night. *Id*. A.C. further testified that she remembered speaking with Dr. Janie Berryman but did not recall telling Dr. Berryman any details about the incident. (VI, 96).

Following this hearing outside the presence of the jury, the court ruled that Dr. Berryman could testify that A.C. disclosed to her that sexual abuse by her father at her grandparent's house on an overnight

visit. (VI, 119-20). Further, the trial court ruled that A.C. may testify that she saw her father hitting, pushing, and shoving her mother. (VI, 122).

2. Trial testimony.

In the jury's presence, A.C. testified that she was ten (10) years old, in third grade, and understood the difference between truth and lies. (VI, 129-130). A.C. testified that she previously lived with her mother, father, and brother in the "little house." (VI, 136). A.C. testified that her father would do inappropriate things but that she could not remember. (VI, 137). Specifically, when asked about inappropriate touching, A.C. stated, "I don't really remember. But I know that he would sometimes touch me where it was not okay. But I don't remember." (VI, 137). A.C. circled on a female anatomical drawing the areas that were not okay to touch. (VI, 138-139).

The prosecutor asked what parts of your father's body he used when he inappropriately touched you, and A.C. responded with his hand. (VI, 140). The prosecutor's next question asked A.C. where on her body her father would touch her with his hand. (*Id.*). A.C. testified that her father touched her on her ribs and rib cage. (*Id.*). She testified that Mr. Cunningham did not touch her privates with his hand. (VI, 140-141).

On direct, A.C. was asked whether Mr. Cunningham ever "touched your private with his privates?" (VI, 141). A.C. testified multiple times that Mr. Cunningham's privates did not touch her privates. (VI, 141, 142, 157). When asked directly whether her father touched her face with his private, A.C. responded, "No." (VI, 149). She also testified that her father never had her touch him in any manner. (VI, 141). A.C. testified that once Mr. Cunningham touched her legs with his privates. (VI, 142).

A.C. testified that she would lay with her father under the blanket in his bedroom and that she "knew something was happening that was not supposed to" but that she did not know what. (VI, 144). A.C. testified that she remembered seeing "white, yellowish, chunky like" stuff from her father's private. (VI, 144-145). A.C. testified that this substance would sometimes go on her chest and that Mr. Cunningham would clean it up with a paper towel or lick it off. (VI, 145). A.C. denied that Mr. Cunningham touched her face with his privates. (VI, 149-150).

A.C. claimed her mother had walked into the bedroom, observed her and her father under the blankets, and knew something wrong was occurring. (VI, 143). During the trial, the state did not call Victoria Cunningham to offer corroboration of this story. (See Indexes to volumes V – X).

A.C. recalled speaking with the forensic interviewer twice. (VI, 147). When asked why she said no inappropriate things during the first interview, A.C. responded that she was uncomfortable during that interview. (VI, 148).

A.C. was asked whether she was telling the truth during the second interview when she said that her father's privates went into her privates. (VI, 149). A.C. responded she did not know because, in that video, she "also did tell some things that weren't true." *Id.* A.C. explained, "I don't know [what was untruthful]. Like a lot of things. Mostly a lot." (VI, 149). A.C. stated that she tried to be truthful during the forensic interview. (VI, 156).

A.C. was shown a male anatomical drawing and clarified what a male private part was. (VI, 157). Again, A.C. was then asked, "has that

part of your dad's body [the penis] ever touched your body anywhere that you can remember?" (VI, 157). A.C. stated," [n]ot that I can remember." (VI, 157). When asked if she remembered Mr. Cunningham asking her to cross her legs, she said she did not. *Id*. When asked whether she remembered anybody licking anything, A.C. stated she remembered one occasion where Mr. Cunningham licked her privates and then changed her answer to possibly three or four times. (VI, 157-158).

While responding to the prosecutor's leading question, A.C. contradicted her prior admissions of being untruthful during the second forensic interview when she disclosed inappropriate touching by her father. (VI, 158-59). A.C. stated she had been truthful during the interview. (VI, 159).

On cross-examination, A.C. stated she watched the forensic interviews four times, including the day before, to prepare for her testimony. (VI, 160-61). A.C. enjoyed spending time with her father. (VI, 163). Her mother and grandmother told her they were trying to keep her safe by keeping her from seeing Mr. Cunningham and that it related to the divorce. (VI, 168-169).

A.C.'s mother asked her if her father had done anything "inappropriate." (VI, 166). Her mother was the first person A.C. talked to about inappropriate conduct. (VI, 166-67). Her mother did nothing. (VI, 167). A.C. was five years old at the time and continued to live with her father until she was six years old when she moved in with her grandmother. (VI, 168).

A.C. testified that she believed she told the forensic interviewer first about the abuse allegations and not Dr. Berryman. (VI, 178). A.C.

admitted she "told a lot of lies that were not true" during the second forensic interview but could not remember what she lied about. (VI, 179, 180-181). A.C. further testified that some lies dealt with the "inappropriate stuff" with her father. (VI, 181).

A.C. did not testify that the recorded video of her second forensic interview was a true and correct recording of the events contained in the video as required by Tenn. Code Ann. § 24-7-123(b)(1). (VI, 127-195).

C. Detective James Scott closes his investigation.

Detective Scott has been employed with the Smyrna Police Department for the past twenty-seven (27) years. (VI, 196). Detective Scott met with Jessica Bratcher when she came into the police station to report the alleged abuse. (VI, 198). The meeting was on June 6, 2019. (VI, 201, 209). Detective Scott then attempted to reach Victoria Cunningham to discuss the allegations and facilitate a forensic interview. (VI, 199, 201). However, Ms. Cunningham never responded to his voice messages during the entirety of his investigation. (VI, 199, 201, 205, 211). Detective Scott considered the mother's lack of cooperation unusual in an inquiry. (VI, 211-12.) Victoria Cunningham and Connie Reguli refused to cooperate with Detective Scott's investigation. (VI, 213).

Detective Scott then made a Department of Children Services referral. (VI, 200). Investigator Tameika Gray with DCS was assigned to the investigation. (VI, 210). Detective Scott opined that a forensic interview is a "very important part" of the investigation and that the interview should occur close to the time of the allegations. (VI, 203, 205, 212). Ms. Gray informed Detective Scott that a civil suit had been filed to prevent the forensic interview from being completed. (VI, 202).

Eventually, Detective Scott marked the case filed as "Closed/inactive, pending new leads." (VI, 216).

D. Connie Reguli and Victoria Cunnigham thwart Child Protective Services Investigator Tameika Gray's investigation.

Tameika Gray has been employed with DCS for approximately nine and a half (9 1/2) years as a Child Protective Services Investigator. (VI, 219). Ms. Gray spoke with Victoria Cunningham, asking her to make A.C. available for a meeting to discuss the allegations. (VI, 221). However, Ms. Cunningham informed Ms. Gray she would need to contact her mother, Connie Reguli, who was also her attorney. (VI, 221). Shortly after that conversation, Connie Reguli telephoned Ms. Gray, and a meeting with A.C. was scheduled for the next day. (VI, 222).

On June 11, 2019, Ms. Reguli, not Ms. Cunningham, brought A.C. to the DCS office to meet with Ms. Gray. (VI, 222). Mr. Reguli informed Ms. Gray that A.C.'s mother would not be attending. (*Id.*) She further stated that she is here as the grandmother and attorney. (VI, 239).

Following protocol, Ms. Gray asked to speak with A.C. privately, but Ms. Reguli refused to allow A.C. to be interviewed. (VI, 223, 238). Ms. Reguli informed CPSI Gray she would not take A.C. to the Child Advocacy Center (*CAC*) because she did not trust the staff. (VI, 224). Ms. Reguli was taking A.C. to psychologist Dr. Janie Berryman. (VI, 225, 229, 236). She admonished Ms. Gray that A.C. would go to the CAC only if Dr. Berryman recommended it. (VI, 225) Ms. Gray explained that it is essential for the CAC to conduct a forensic interview first to prevent

the interview from being tainted by the influence of other people. (VI, 236-37).

The next day, a juvenile court order was issued instructing Victoria Cunningham to bring A.C. to the CAC for a forensic interview rather than to Dr. Berryman. (VI, 226, 239, 242). Ms. Gray went to Ms. Reguli's home to deliver the court order and for a home visit. (VI, 226, 239, 242). After handing the court order to Victoria Cunningham, who passed it to Ms. Reguli, Ms. Gray was "shooed" and "kicked" out of her house. (VI, 228, 240). The interview did not take place. (VI, 228).

On June 14, 2019, Ms. Reguli filed a lawsuit against Ms. Gray, the DCS attorney Matthew Wright, and Judge Davenport, who issued the court order instructing them to take A.C. in for a forensic interview. (VI, 230; XIV, 27-50, Exhibit no. 4, Verified Complaint). The lawsuit sought to enjoin enforcement of the juvenile court order and enjoin DCS from performing a forensic interview until Victoria Cunningham has taken A.C. to "her psychologist of her choice" [Dr. Janie Berryman]. (XIV, 42-43). The plaintiffs sought $1,000,000 in damages. (VI, 250; 50). Ms. Gray contacted Dr. Berryman to confirm A.C. had not been brought to her for an interview. (VI, 244). Dr. Berryman confirmed Ms. Reguli had canceled the interview. *Id*. Dr. Berryman added she had a good working relationship with Ms. Reguli. (VI, 245). Because of the lawsuit, CPSI Gray testified she was removed from the case. (VI, 251).

E. Sheneka Morgan continues the DCS investigation, leading to the Child Protective Investigation Team closing the case as "allegations unsubstantiated, perpetrator unsubstantiated."

Ms. Morgan is employed at the Tennessee Department of Children's Services and was the lead investigator for Rutherford County Child Protective Services. (VII, 8-9). She took over A.C.'s case after Tameika Gray was removed. (VII, 10). Ms. Morgan explained that DCS received no cooperation from Victoria Cunningham and Connie Reguli during the investigation. (VII, 25). The juvenile court entered a second order requiring Ms. Cunningham to produce A.C. for a forensic interview. (VII, 28-30). After lengthy delays and cancellations, Connie Reguli brought A.C. to the CAC for a forensic interview on November 7, 2019. (VII, 12-14, 31-32). Ms. Morgan explained the prolonged delay of four months was because "[t]he grandmother, or Ms. Reguli, wanted someone else to do the interview" and would not comply with court orders. (VII, 30).

Ms. Morgan testified that during the interview, A.C. was cooperative and made no disclosures of sexual abuse. (VII, 13, 34, 38; XV Ex 2, forensic interview, Nov. 7, 2019). A.C. said nothing happened. (VII, 57).

Connie Reguli obstructed DCS's home visit, which was intended to ensure the welfare of A.C. Arrangements were made for Ms. Morgan to visit the Reguli home after the forensic interview. (VII, 16, 35). Ms. Morgan attempted to make the home visit after the forensic interview. (VII, 14, 35). However, when she arrived at the home, she knocked on the door, and no one answered. (VII, 14-15). Shortly after that, Ms. Reguli

texted Ms. Morgan, who explained that she had come by, and no one was home. (VII, 16). Ms. Reguli responded by calling Ms. Morgan a liar and stating her son was home the entire time. (VII, 58).

On November 15, 2019, Ms. Morgan testified that she interviewed Mr. Cunningham. (VII, 17). Mr. Cunningham stated he believed Victoria and Ms. Reguli were fabricating these allegations to get a favorable outcome in the divorce proceeding and to withhold the children from him. (VII, 17). He further suggested that Ms. Cunningham was attempting to get a large amount of money from him and that these allegations were made out of spite. (VII, 47; 49).

Mr. Cunningham explained that on May 28th, he had purchased a bath bomb for A.C., and A.C. had asked Mr. Cunningham if he was going to take a bath with her. (VII, 18). He argued with Ms. Cunningham, and he removed her from the house. *Id*. Mr. Cunningham denied ever bathing with the children. (VII, 47). Mr. Cunningham disclosed further that his wife was drinking excessively and taking hard drugs. (VII, 41). While drunk, Ms. Cunningham had shaved their dog and was not properly looking after the kids while he was not home. (VII, 42). Mr. Cunningham added that before their separation, a domestic dispute resulted in Ms. Cunningham being arrested, and he had to bail her out of jail. (VII, 53).

Mr. Cunningham told Ms. Morgan that Ms. Cunningham had sent him messages telling him the allegations were going away because there was no evidence. (VII, 50).

Victoria Cunningham never made herself available for Ms. Morgan to interview. (VII, 19, 42). When asked point blank by the prosecutor during her investigation, "did you get any indication from anyone

involved in the case that these allegations were not true," Ms. Morgan answered, "I didn't get that they were true from Mr. Cunningham. I didn't speak to Ms. Cunningham. And [A.C.] didn't make a disclosure." (VII, 20).

Ms. Morgan testified that on November 20, 2019, the case was submitted to the Child Protective Investigation Team for review. (VII, 21, 53). The team consists of law enforcement, medical professionals, the Child Advocacy Center, DCS personnel, a district attorney's office member, and court representatives. (VII, 20). Each professional provides input on the analysis. (VII, 20-21). The team classified this case as "allegations unsubstantiated, perpetrator unsubstantiated." (VII, 21, 55). Ms. Morgan testified the case was labeled this way because there was insufficient proof of the allegations. Ms. Morgan approved the case for closure. (VII, 59). As such, DCS closed the case. (VII, 21, 55, 59).

F. After new allegations were made in February 2020, Victoria Cunningham aborts a forensic medical examination at Our Kids Center.

Lisa Milam is employed at Our Kids Center in Nashville as a social worker, and Our Kids provides forensic medical exams for children when there are concerns or allegations of sexual abuse. (VII, 63). Ms. Milam was familiar with Ms. Reguli due to receiving subpoenas to testify in some of Ms. Reguli's cases. (VII, 64). Ms. Milam was once named in a lawsuit filed by Ms. Reguli. (VII, 67).

Victoria Cunningham brought A.C. in for a forensic medical exam on February 19, 2020, and Ms. Milam met them. (VII, 64). A.C. arrived

around forty (40) minutes late for the examination, and her mother appeared in a hurry. (VII, 65; 70).

Ms. Milam explained that the standard procedure was to obtain medical history information before physically examining the child. (VII, 70-71). However, Victoria Cunningham, without explanation, refused to provide any information. (70-71, 73). Ms. Cunningham "just kept saying that she wanted to leave." (VII, 70).

Realizing Ms. Milam was not getting Ms. Cunningham's cooperation on the medical history, she offered to skip the medical history and just perform the physical examination. (VII, 72). Ms. Milam left to get the nurse for the exam and, upon her return, discovered that the mother and daughter had left the interview room. (VII, 72-73). Ms. Milam testified that she found Ms. Cunningham in the lobby. (VII, 73). She told her she had consulted with her attorney and was advised not to have A.C. undergo the exam. (*Id.*).

G. Jill Howlett with Our Kids Center interviews A.C.

Ms. Howlett is employed with Our Kids Center as a social worker. (VII, 103). On October 5, 2020, eight months after the aborted forensic examination, Victoria Cunningham and Connie Reguli brought A.C. in for a forensic exam. (VII, 108; 112). Ms. Howlett obtained A.C.'s medical history from Victoria Cunningham. (VII, 108).

During her interview with A.C., the child disclosed her dad touched her genital area but was unsure whether there was penetration. (VII, 109). A.C. further alleged Mr. Cunningham "licked my lady parts." (*Id.*) A.C. further disclosed to Ms. Howlett that Mr. Cunningham made her

touch his private with her hand and sometimes her mouth. (VII, 110). A.C. told Ms. Howlett she saw "weird stuff" from his private. (VII, 110).

H. All aspects of the forensic physical examination were normal, revealing no injuries in the genital or anal regions, thus no corroboration of penetration.

Lori Littrell is employed as a nurse practitioner by Our Kids Center. (VII, 134). Ms. Littrell was, without objection, deemed an expert in pediatric forensic evaluations. (VII, 142-43). Ms. Littrell testified that on October 5, 2020, she performed the forensic physical examination of A.C. (VII, 154). Ms. Littrell testified that there were no findings of significance in her anal/genital examination, and there were no penetrating injuries. (VII, 154, 182; XV, Exhibit 5, Our Kids Center report, pp. 4-5). Ms. Littrell further testified that the outside of the female genitalia of A.C. was unremarkable and atraumatic. (VII, 184-185; XV, Exhibit 5, Our Kids Center report, pp. 4-5). Ms. Littrell testified that based on the exam, she "cannot say whether [the abuse] occurred or did not occur." (VII, 195). Her findings and opinions were reviewed and approved by a colleague. (VII, 196-97; XV, Exhibit 5, Our Kids Center report, pp. 5).

I. The video recordings of the two forensic interviews are admitted during Elizabeth Benton's testimony.

Ms. Benton is a forensic interviewer with the Child Advocacy Center. (VII, 202). She conducted both forensic interviews of A.C.—on November 7, 2019, and February 10, 2024. (VII, 206). During Ms.

Benton's testimony, video recordings of both forensic interviews were introduced. (VII, 216; XV, Ex 2).[9]

Ms. Benton stated she got two contradicting sets of answers from A.K. to her interview questions during the two interviews. (VII, 221). During the first interview, A.C. indicated she had never been touched inappropriately. (VII, 226-27; XV, Ex 2 November 7, 2019 interview.)

Ms. Benton explained that it is better to interview a child as close to the time of abuse as possible to avoid inappropriate outside influences from shaping, changing, or otherwise manipulating and tainting the child's answers. (VII, 219-20). Likewise, the forensic interview should be conducted before any other counselor or therapist sees the child. (VII, 220). She acknowledged that a child's disclosure of sexual abuse does not mean it is true. (VII, 226).

J. Dr. Janie Berryman discusses her close relationship with Connie Reguli and interviews with A.C.

Dr. Janie Berryman has known and worked with Connie Reguli for a long time (VIII, 74). She characterized their relationship as "professionally friendly." (VIII, 40). Ms. Reguli has retained Dr. Berryman as an expert witness for her clients in contested divorce cases. (VIII, 74-75).

[9] Vol. 15 12722 Exhibits 5-6 & 2 contains the DVD recordings admitted at trial. MP4 file reproductions of the video recordings of the forensic interviews conducted on November 7, 2019, and February 10, 2020, are "Collective Exhibit 2" in Vol. 15 Ex 2 and can be played with a media player.

In June 2019, Ms. Reguli contacted Dr. Berryman for this case. (VIII, 75). Connie Reguli wanted Dr. Berryman to conduct the forensic interview instead of DCS, which frustrated DCS's efforts to schedule the forensic interview. (VIII, 75, 77, 85). A member of DCS admonished Dr. Berryman not to talk with A.C. until the forensic interview was completed. (VIII, 81; VI, 244).

Despite being aware of the ongoing conflict about the forensic interview and DCS's admonishment, Dr. Berryman conducted an intake and began meeting with A.C. in October 2019 before any forensic interview was completed. (VIII, 81, 84, 89-91, 103-105). Dr. Berryman knew a forensic interview was scheduled for the same month—October—but proceeded with the intake and meetings with A.C. on October 8, 16, and 29, 2019. (VIII, 81, 84, 88, 89, 91). Dr. Berryman attempted to justify her decision to meet with A.C. for "therapeutic" and "adjustment" purposes and not to conduct a forensic interview. (VIII, 40, 89). However, this explanation contradicted Victoria Cunningham's and Connie Reguli's request for Dr. Berryman to "help Anouk kind of with her truth." (VIII, 82). Furthermore, the "therapeutic" explanation is inconsistent with ceasing sessions with Dr. Berryman right after A.C. makes her first allegation of sexual misconduct by Mr. Cunningham. (VIII, 67, 68). Five months later, the sessions were restarted to prepare for a court hearing in which Victoria Cunningham sought to terminate Mr. Cunningham's visitation with A.C. (VIII, 68, 70, 112, 163).

As evidence of Dr. Berryman's bias, she only reviewed the second forensic interview. (VIII, 104). She discounted the first one as unnecessary to review, where A.C. stated her father did not engage in

sexual misconduct. (*Id.*). Dr. Berryman admitted that many of the allegations of sexual misconduct and bad conduct by Mr. Cunningham she described were provided by Victoria Cunningham and Connie Reguli and not A.C. (VIII, 131, 81-2, 86, 93, 94). Further, Ms. Cunningham and Ms. Reguli had primed her about sexual misconduct, domestic violence, and bad acts of Mr. Cunningham before any disclosures by A.C. (*Id.*). Dr. Berryman became an advocate for Victoria Cunningham as an expert witness in the divorce case. (VIII, 112, 163). She wrote a letter to the court recommending Mr. Cunningham's visitation privileges be suspended. (VIII, 139-40, 70).

Dr. Berryman was permitted over defense objection to refer to an unauthenticated excerpt of a purported transcript of A.C.'s testimony in chambers before Judge Scarlett. (VIII, 175-77). Judge Scarlett doubted that A.C.'s testimony in his chambers was truthful or uninfluenced by her mother or grandmother, as he asked A.C. multiple times who told her to say these things. (IX, 170). He ruled that Mr. Cunningham would have visitation with his daughter, A.C. (IX, 178).

IV. John David Cunningham is sentenced to 100 years.

Following the conclusion of the jury trial, Mr. Cunningham was found guilty on all counts. He was sentenced on April 12, 2023, to an effective sentence of 100 years. During his sentencing hearing, Mr. Cunningham had five witnesses appear to give statements on his behalf,

including his parents. (XI, 10-43). Numerous letters of support were also submitted on his behalf. (XVII, 37-56).[10]

John David Cunningham was a first-time offender. (XVII, 17, Presentence Investigation Report; XI, 59). For counts 1 through 7, Rape of a Child under 13, the range of sentencing was 25 to 40 years as a Range II, Multiple Offender under Tenn Code Ann. § 39-13-522(2)(A). Counts 8 through 13 ranged from 8 to 12 years as a Range I, Standard Offender. (Tenn. Code Ann. § 39-13-504(a)(4)).

Before rendering its sentence, the trial court noted the specific dates of the offenses, and the time span of the criminal activity is unclear. (XI, 60). The trial court found two enhancement factors should be applied. (XI, 55). The trial court found Counts 1 through 7 were committed to gratifying the Defendant's desire for pleasure or excitement under Tenn. Code Ann. § 40-35-114(7). (XI, 55-6). The court further found that the defendant had abused a position of trust under Tenn. Code Ann. § 40-35-114(14) for Counts 1 through 13. (*Id.*). The court said it considered mitigating factors under the "catch-all factor" under Tenn. Code Ann. § 40-35-113(13), but did not identify the mitigation nor articulate the purposes of the Sentencing Act related to the mitigation. (XI, 56-7). The trial court stated it would give no weight to the lack of a criminal history. (XI, 57).

[10] Again, the page numbers in volume XVII are based on the actual page numbers in the volume. Volume XVII contains the Presentence Investigation Report and a collective exhibit of letters in support of Mr. Cunningham.

The trial court sentenced Mr. Cunningham in Counts 1 through 7 to thirty (30) years on each count. The court imposed a ten (10) year sentence on Counts 8 through 13. (XI, 57).

The court found that Tenn. Code Ann. § 40-35-115(2)—extensive criminal activity and § 40-35-115(5)—conviction for two or more offenses involving sexual abuse of a minor to justify consecutive sentencing. (XI, 60-61). The trial court imposed a sentence where Counts 1 and 3 ran concurrently, 3 and 4 were concurrent, 5 and 6 concurrent, and Count 7 was concurrent to 1 through 6. (XI, 62). Counts 1 and 2 were ordered to run consecutive to Counts 3 and 4, which are consecutive to Counts 5 and 6. (*Id.*). Counts 8 through 13 were ordered to run concurrently with each other but consecutive to Counts 1 through 6. (*Id.*).

ARGUMENT

I. The trial court abused its discretion by admitting into evidence the second forensic interview of A.C. upon a showing of severe untrustworthiness of the second forensic interview, and the child did not testify, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording as required under Tenn. Code Ann. § 24-7-123(b)(1).

A.C. admitted numerous times at trial that she lied during her forensic interview. (VI, 149; 179-180). She further admitted she lied about things involving Mr. Cunningham during the second interview. (VI, 180). These statements cast serious doubt on the trustworthiness of the second forensic interview, and as such, the trial court abused its discretion by admitting the video into evidence.

Generally, questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this Court will not interfere with exercising that discretion absent a clear showing of abuse appearing on the face of the record. *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014). "A trial court abuses its discretion only when it applies an incorrect legal standard or makes a ruling that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *Id.* However, even when there is "virtually perfect compliance with the statute, but the court fails to make complete findings of fact" regarding the admissibility of a forensic interview, appellate review is de novo." *State v. Tyler*, No. W2015-00161-CCA-R3-CD, 2016 WL 1756419, at *5-6 (Tenn. Crim. App. Apr. 29, 2016).

A. The forensic interview lacked particularized guarantees of trustworthiness as required under Tenn. Code Ann. § 24-7-123.

Tennessee Code Annotated § 24-7-123 allows a child victim's forensic interview to be introduced into evidence at the trial judge's discretion if specific requirements are met. See Tenn. Code Ann. § 24-7-123(a). The statutory requirements are that "[t]he child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination[.]" *Id* at § 24-7-123(b)(1). The statute provides that the video recording must be shown to the trial court in a pre-trial hearing and possess "particularized guarantees of trustworthiness," which is to be determined by the trial court. *Id*. at § 24-7-123(b)(2). In making such a determination, the statute outlines several factors for the trial court to consider:

> (A) The mental and physical age and maturity of the child;
> (B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;
> (C) The timing of the child's statement;
> (D) The nature and duration of the alleged abuse;
> (E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
> (F) Whether the statement is spontaneous or directly responsive to questions;
> (G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;

> (H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
> (I) The relationship of the child to the offender;
> (J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and
> (K) Any other factor deemed appropriate by the court[.]

Id. § 24-7-123(2)(A)-(K). If the trial court determines that the video recording is untrustworthy, the inquiry ends, and the evidence will not be admitted. *Id*.; *State v. Franklin*, 585 S.W.3d 431, 449 (Tenn. Crim. App. 2019)

During the pre-trial hearing to determine whether the video should be admitted, the trial court heard only the testimony of Elizabeth Benton, the interviewer. (IV, 4). Ms. Benton testified that she was unaware of the divorce proceedings between A.C.'s mother and Mr. Cunningham and that she does "not have any opinion as to whether there was [bias or coercion]" on A.C. by her mother, who brought her to the interviews. (IV, 14).

At the conclusion of the hearing, the trial court made a finding that the interviewer met the qualifications proscribed under the statute and that "based on the testimony today, I'm reasonably satisfied that the video recording possesses particularized guarantee of trustworthiness, specifically based on cross-examination questions." (IV, 17).

The trial court based its finding that the video possessed particularized guarantees of trustworthiness on only a few factors outlined in the statute and failed to consider the others, such as the mental and physical age of A.C., her maturity, or the spontaneity of the

statements. The trial court did not review the video during the pre-trial hearing. A.C. did not testify at the pre-trial hearing and did not recall the events talked about in the video during her trial testimony. A.C.'s statements in the first forensic video contradicted her statements in the second forensic interview and her statements at trial under oath. Further, A.C. outright admitted that she lied during the second forensic interview, incriminating Mr. Cunningham, and made numerous false statements to the interviewer. (VI, 149). Specifically, A.C. testified:

> Q. Okay. Now, when you talked to her on that second interview, and if you had said that his private went into your private in that interview, were you trying to tell her the truth or was that made up?
> A. I don't know. Because in the video I also did tell somethings that weren't true.
> Q. Like what?
> **A. I don't know. Like a lot of things. Mostly a lot**.

(VI, 149), *emphasis added*. On cross-examination, when asked about the two interviews, A.C. testified:

> Q. And would you agree with me that you tell—you don't tell the same story on the second interview, is that right?
> A. Yes. In one of them, I told a lot of lies that were not true.
> Q. Tell me about that. Tell me about what were the lot of lies that were not true?
> **A. I don't remember all of them. But I do know that most of them were not true.**
> **Q. Okay. Is it when you were talking about being inappropriate?**
> **A. Yes.**
> Q. So, it was the second interview. Because the first interview you didn't say anything was happening, correct?
> A. Yes.
>
> ***

Q. And, so, on the second one where you are talking about what happened, did you tell any lies in that one?
A. Yeah, a few.
Q. Okay. But do you remember what they were?
A. No.
Q. Did they have to do with the inappropriate stuff?
A. Some of them, yes.
Q. But, again, you can't remember which ones?
A. Yes, I can't remember.

(VI, 179-180), *emphasis added*. Despite A.C. stating that she lied during her second forensic interview and, specifically, that she lied about her father, Mr. Cunningham, sexually abusing her, the trial court allowed the video to be admitted into evidence and played for the jury. (VII, 216).

Given all the indicia of untrustworthiness, the trial court abused its discretion by determining that the second forensic interview video possessed particularized guarantees of trustworthiness required under Tenn. Code Ann. § 24-7-123 and admitting it into evidence.

B. Mr. Cunningham was denied his right to confront the victim when the victim was unable to discuss details of the alleged abuse at trial and specificity about her "lies."

The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." This has long been read as securing an adequate opportunity to cross-examine adverse witnesses. *United States. v. Owens*, 484 U.S. 554, 557 (1988). Likewise, article 1, section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused hath the right ... to meet the witnesses face to face," extending even greater rights than the

Confrontation Clause of the United States Constitution. *State v. Deuter*, 839 S.W.2d 391, 395 (Tenn.1992).

Traditionally, Tennessee courts have interpreted the right of confrontation as affording "two types of protection for criminal defendants: the right to physically face the witnesses who testify against the defendant, and the right to cross-examine witnesses." *State v. Williams*, 913 S.W.2d 462, 465 (Tenn.1996) (citing *State v. Middlebrooks*, 840 S.W.2d 317, 332 (Tenn.1992); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)). The Confrontation Clause is designed "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *State v. McCoy*, 459 S.W.3d 1, 13 (Tenn. 2014)(citing *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)).

In *State v. McCoy*, our Supreme Court addressed whether the admission of a forensic interview video at trial violated the defendant's rights under the Confrontation Clause. 459 S.W.3d 1 (Tenn. 2014). The court found that the "only circumstance under which a child victim's video-recorded statements may be admitted in a manner consistent with both section 24–7–123 and the right of confrontation is when the witness first authenticates the video recording and then appears for cross-examination at trial to defend or explain the prior recorded statements." *Id*. at 15. As the *McCoy* court noted, "[a]lthough the Confrontation Clause does not guarantee 'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,' it does require that a

defendant be given 'an opportunity for effective cross-examination' of the witness." *Id.* at 15 (quoting *United States v. Owens*, 484 U.S. at 559).

Here, Mr. Cunningham was effectively denied his opportunity to cross-examine A.C. regarding the statements made in the video because cross-examination of the victim was not feasible due to her lack of memory and reluctance to testify. Specifically, at trial, A.C. denied almost all allegations of sexual abuse she previously disclosed in the second forensic interview. A.C. testified that she did not remember stating things in the interview. Further, A.C. admitted to lying during her forensic interview, particularly about the allegations of sexual abuse. A.C.'s statements at trial were utterly inconsistent with those in the forensic video.

Thus, although A.C. was present and available for cross-examination, Mr. Cunningham was denied his opportunity to effectively cross-examine her regarding her statements in the forensic interview, as she was unresponsive regarding those allegations or did not remember. As such, the trial court abused its discretion by admitting the video into evidence.

C. A.C. did not testify that the forensic video recording of the second interview was a true and correct recording of the events contained in the video recording as required under Tenn. Code. Ann. § 24-7-123(b)(1).

The State failed to have A.C. testify under oath at either the pretrial hearing or at trial as to the accuracy and authenticity of the recordings of the second forensic interview as required under Tenn. Code. Ann. § 24-7-123(b)(1).

A.C.'s testimony suggests that had the prosecutor asked the requisite question, she would not be able to recall if the video was a true and correct recording of the events. A.C. testified she watched the two videos in the prosecutor's office four times. (VI, 147, 160). The last viewing was the day before her testimony. (VI, 160-61). A.C. admitted she made "a lot of lies that were not true" during her interview. (VI, 179). In response to questions asking what she lied about, A.C. stated:

Q. Tell me about that. Tell me about what were the lot of lies that were not true?

A. I don't remember all of them. But I do know that most of them were not true.

Q. Okay. Is it when you were talking about being inappropriate?

A. Yes.

Q. So, it was the second interview. Because the first interview you didn't say anything was happening, correct?

A. Yes.

(VI, 179). And again, A.C. explained she did not remember what content she lied about:

Q. So, what was the lie there?

A. I can't really remember.

Q. And, so, on the second one where you are talking about what happened, did you tell any lies in that one?

A. Yeah, a few.

Q. Okay. But do you remember what they were?

A. No.

(VI, 180). A.C.'s lack of recall of which content in the video was lies after watching the videos four times as recently as the day before her testimony raises a reasonable inference that the State did not ask her to address the accuracy and authenticity of the second video because she would not have answered the question in the affirmative.

However, speculation as to why the prosecutor did not ask A.C. the question is unnecessary. This Court in *State v. Stegall* held the statute requires "the child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording . . . ." W2022-00628-CCA-R3-CD, 2023 WL 6319610, at *5 (Tenn. Crim. App. July 14, 2023), reh'g denied (Sept. 27, 2023) citing Tenn. Code Ann. § 24-7-123(b)(1).

The trial court erred in admitting the video recording of the second forensic interview. *Stegall*, 2023 WL 6319610, at *7.

II. The evidence was insufficient as a matter of law to sustain convictions of Rape of a Child and Aggravated Sexual Battery.

The evidence presented at trial was insufficient to support Mr. Cunningham's convictions. A.C. denied multiple times that Mr. Cunningham ever touched her "privates" or had her touch his. A.C. does not testify to any details during the trial that would support the elements for either of Mr. Cunningham's offenses. Furthermore, the forensic video was improperly admitted. Without the forensic interview, the State is left

with virtually nothing proving the elements of Rape of a Child or Sexual Battery.

The United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. A state shall not deprive a criminal defendant of his liberty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In determining whether a state has met this burden following a finding of guilt, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, the defendant has the burden on appeal of illustrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). If a convicted defendant makes this showing, the finding of guilt shall be set aside. Tenn. R. App. P. 13(e).

As relevant to this case, Tenn. Code Ann. § 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." Sexual penetration is defined 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[ ]." Tenn. Code Ann. § 39-13-501(7). Additionally, a

conviction of aggravated sexual battery requires proof of "unlawful sexual contact with a victim. . . who is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-504(a)(4). Sexual contact is the "intentional touching of the victim's ... intimate parts" if the touching can be "reasonably construed as being for the purpose of sexual arousal or gratification." *Id.* § 39-13-501(6).

A.C.'s testimony at trial was inconsistent. Specifically, A.C. testified:

> Q. All right. So, when your dad did inappropriate things, what parts of his body touched you?
> A. Sometimes hand.
> Q. Okay.
> A. And sometimes privates.
> Q. Okay. And tell the jury where all he would touch you with his hand.
> A. Mostly like the ribs like the ribs from my rib cage sometimes.
> Q. Okay. Were there any times that he would touch you on your privates with his hand?
> A. Not that I can remember, no.
> Q. Okay. Were there times when he would touch you on the butt with his hand?
> A. No.
> Q. Okay. Where would he touch you with his privates? Okay. So when he would—did he ever touch your private with his private?
> A. No.
> Q. Okay. Did he ever have you touch him in any way?
> A. No.
> Q. What about mouths? Was anybody's mouths involved in anything.
> A. No, not that I know of.
>
> ***

Q. Okay. Were there any times when his private touched your private?
A. No.

***

Q. Okay. Do you remember a time that he touched you on your face with his private?
A. No.
Q. Okay. You don't remember that?
A. No.

(VI, 140-141;142; 149-150). A.C. testified that she was "not so scared and nervous[,]" during her testimony. (VI,149; 153).

After the prosecution had A.C. clarify on a male anatomical drawing what a boy's private was, A.C. was asked by the prosecutor, "[s]o, has that part of your dad's body ever touched your body anywhere that you can remember?" (VI, 157). A.C. confirmed it did not. *Id*. A.C. testified she remembered one incident where Mr. Cunningham licked her privates but then quickly changed the number of times it occurred. (VI, 158). This testimony also conflicted with her prior testimony that Mr. Cunningham never touched her privates, as well as her testimony that mouths were never involved. (VI, 140-142).

Testimony from a single witness will be disregarded when the testimony "is not of a cogent and conclusive nature, and 'if it is so indefinite, contradictory or unreliable that it would be unsafe to rest a conviction thereon.'" *Letner v. State*, 512 S.W.2d 643, 649 (Tenn. Crim. App. 1974) (quoting 23 C.J.S. Criminal Law § 903). Here, A.C. made multiple contradictory sworn statements, and her testimony is unsafe on which to rest a conviction. Further, she repeatedly denied any touching had occurred. While she continued to say Mr. Cunningham was

"inappropriate," she could not give specific details and denied he ever touched her privates. What is more, A.C. admitted she lied during her forensic interview and that some lies were concerning the "inappropriate stuff" with Mr. Cunningham, but that she could not remember what lies she told specifically. Finally, A.C.'s medical exam did not reveal evidence of sexual assault or penetration.

Given the above and the contradictory and unreliable nature of A.C.'s testimony, the evidence was insufficient as a matter of law to convict Mr. Cunningham. This Court should reverse his conviction.

III. The trial court erred by permitting testimony about Mr. Cunningham's alleged prior bad acts.

The trial court abused its discretion by allowing the State to introduce evidence that Mr. Cunningham cheated on his wife and was previously violent or committed domestic assault.

The State introduced a text message thread between Ms. Bratcher and Victoria Cunningham (VI, 63; XIV, Exhibit 1, Text Messages, pp. 4-20). Many messages corroborated Ms. Brasher's testimony about her conversations with Ms. Cunningham to convince Ms. Cunningham to report the allegations and Ms Cunningham lying to Ms. Brasher.

Over defense objection, the irrelevant and unfairly prejudicial text messages in the thread assailing Mr. Cunningham's character were admitted. (VI, 62; XIV, Exhibit 1, Text Messages, pp. 12, 14-5). The jury read text messages where Ms. Bratcher characterized Mr. Cunningham as "a powerful manipulative narcissist," "cheat, "a liar who has coldly disregarded your heart for many years," who has "screwed with your

mind for lots of years." (XIV, Exhibit 1, Text Messages, pp. 12, 14-5). Ms. Brasher likewise testified to the character assassination. (VI, 70). Ms. Bratcher elaborated on the text messages, stating that her "husband saw [Mr. Cunningham] in the car with another girl when he was supposed to be on his way to work one day. (VI, 70-71). Ms. Bratcher testified that she "saw bruises on Victoria frequently when she would come to my house. I saw many, many evidences of him being a cheat and a liar and just an all around not good man to her." (*Id.*).

The standard of review is well settled:

> [This Court] generally review[s] evidentiary rulings under an "abuse of discretion" standard. However, when we consider evidence that implicates Tenn. R. Evid. 404(b), we review the trial court's admissibility ruling de novo unless the trial court substantially complied with the procedures outlined in Rule 404(b). If the trial court substantially complied with Tenn. R. Evid. 404(b), we will overturn the ruling only if the trial court abused its discretion. *State v. Kiser*, 284 S.W.3d 227, 288–89 (Tenn.2009); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn.1997). A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *State v. Banks*, 271 S.W.3d 90, 116 (Tenn.2008).

State v. Clark, 452 S.W.3d 268, 287 (Tenn. 2014).

When a trial court errs by admitting evidence barred under the Tennessee Rules of Evidence, an appellate court will address this non-constitutional error using the harmless error analysis of Tenn. R. App. P. 36(b). Under Tenn. R. App. P. 36(b), the defendant must prove that the erroneous evidence "more probably than not" affected the verdict. Under

Tenn. R. App. P. 36(b), this Court reviews the entire record to ascertain the evidentiary basis for the jury's verdict. *Id*. The crucial consideration is what impact the error may reasonably have had on the jury's decision-making process. *Id*. When the error, more probably than not, had a substantial and injurious impact on the jury's decision-making process, it is not harmless. In general, the more evidence there is to support the defendant's guilt, the more likely it will be that the error was harmless. *State v. Rodriguez*, 254 S.W.3d 361, 371–72 (Tenn. 2008).

This error undermined the fairness of Mr. Cunningham's trial and, more probably than not, affected the jury's assessment of his character, which was a pivotal issue. This testimony was not harmless. There was no corroborative evidence of A.C.'s allegations. A.C. initially denied any sexual abuse by her father, admitted she lied during her forensic interviews, and waffled on the allegations. There was not sufficient evidence to support Mr. Cunningham's convictions, and the character assassination likely tipped the scales unfairly against Mr. Cunningham. This testimony unfairly prejudiced him, and the trial court abused its discretion by permitting such to be introduced.

IV. The trial court abused its discretion by sentencing Mr. Cunningham to an excessive sentence of 100 years.

When an accused challenges the length of a sentence or manner of service, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012); *see also State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (applying the *Bise*

standard to "questions related to probation or any other alternative sentence"). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001).

This court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. Under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). 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). *See id*. at 344.

Ultimately, in sentencing a defendant, a trial court should impose a sentence that is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(2), (4). "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305 (Tenn.

2020) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)).

A. The trial court abused its discretion by applying two sentencing enhancement factors and discounting the substantial mitigation.

The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the court's findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210(d)-(f); *Carter*, 254 S.W.3d at 342-43. Misapplication of an enhancement or mitigating factor no longer "invalidate[s] the sentence imposed unless the trial court wholly departed from the Sentencing Act, as amended in 2005." *Bise*, 380 S.W.3d at 706. This Court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id*. at 709-10.

Here, the State asked the trial court to consider sentencing enhancement factor Tenn. Code Ann. § 40-35-114(4), relating to the fact that the victim of the offense was particularly vulnerable because of age or physical or mental disability, as well as factor 7 that the offense involved a victim and was committed for a defendant's pleasure. (XI, 54). Additionally, the State argued that factor 14 applied to a defendant abusing a position of public or private trust. (XI, 54). Ultimately, the trial court declined to apply enhancement factor 4 but applied the other two factors. Specifically, the trial court applied factor 7 to counts 1 through 7

involving rape of a child, finding the offenses were committed to gratify Mr. Cunningham's "desire for pleasure and excitement." (XI, 55-56). Additionally, the trial court found that enhancement factor 14 applied to counts 1 through 13. *Id.* The trial court erred by applying the sentencing enhancement factors, as the evidence deduced at trial did not support such a finding.

The trial court failed to consider Mr. Cunningham's lack of criminal record as a mitigating factor, stating, "I'm not going to rely on lack of criminal history. I think as citizens we are expected to comply with the law." (XI, 57). Further, the trial court failed to give due consideration to the testimony of several defense witnesses at the sentencing hearing that testified to Mr. Cunningham's character. As such, the trial court abused its discretion in sentencing Mr. Cunningham.

B. The trial court abused its discretion by running Mr. Cunningham's sentences consecutively, resulting in a manifestly excessive sentence of 100 years.

In determining an appropriate sentence, the Sentencing Act provides that the trial court shall consider:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;

> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee;
> (7) Any statement the defendant wishes to make on the defendant's own behalf about sentencing; and
> (8) The result of the validated risk and needs assessment conducted by the department and contained in the presentence report.

Tenn. Code Ann. § 40-35-210(b).

Additionally, the Sentencing Act identifies various purposes of sentencing at Tenn. Code Ann. § 40-35-102. *See Bise*, 380 S.W.3d at 691. Likewise, the Sentencing Act also identifies various sentencing principles, sometimes referred to as "considerations," in Tenn. Code Ann. § 40-35-103. *See Bise*, 380 S.W.3d at 689 n.7. These purposes and principles, in the context of consecutive sentencing, reflect that "[a]lthough statutory criteria may support the imposition of consecutive sentences, the overall length of the sentence must be 'justly deserved in relation to the seriousness of the offense[s],' Tenn. Code Ann. § 40-35-102(1), and 'no greater than that deserved' under the circumstances." *Id.* at § 40-35-103(2). *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002).

A trial court may order multiple offenses to be served consecutively if it finds by a preponderance of the evidence that a defendant fits into at least one of the categories in Tenn. Code Ann. § 40-35-115(b). This Court must give deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the. . . grounds listed in Tenn. Code Ann. § 40-35-115(b). *State v. Pollard*, 432 S.W.3d 851, 862 (Tenn. 2013).

In issuing Mr. Cunningham's sentence, the trial court determined:

> Counts 1 and 2 are concurrent to one another. Counts 3 and 4 are concurrent to one another. Counts 5 and 6 are concurrent to one another. Count 7 will be concurrent to Counts 1 through 6 and 8 through 13. However, Counts 1 and 2 will be consecutive to Counts 3 and 4, which will be consecutive to Counts 5 and 6. In Counts 8 through 13, I find the appropriate sentence again is 10 years. That's in the middle of the range from 8 to a 12 year sentence. I'm going to find that Counts 8 through 13 are all concurrent to one another. However, they are consecutive to Counts 1 and 2, 3 and 4, and 5 and 6.

(XI, 62). In imposing a consecutive sentence, the trial court relied on Tenn. Code Ann. § 40-35-115(b)(2), which authorizes consecutive sentencing for an offender "whose record of criminal activity is extensive," and § 40-35-115(b)(5), which authorizes consecutive sentencing for a defendant convicted of two or more offenses involving sexual abuse of a minor considering the aggravating circumstances. These aggravating circumstances arise from the relationship between the defendant and victim, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts, and the extent of the residual, physical, and mental damage to the victim. T. C. A. § 40-35-115(b)(5).

Regarding § 40-35-115(b)(2), the statute does not define what constitutes an "extensive" record of criminal activity. Our Supreme Court recently defined this as "that which is considerable or large in amount, time, space, or scope." *State v. Perry*, 656 S.W.3d 116, 128 (Tenn. 2022). "Thus, in making the finding that an offender has an extensive record of criminal activity, courts should look to those facts from which they can determine that the defendant's record of criminal activity is considerable

or large in amount, time, space, or scope." *Id*. Courts should look to the following non-exclusive considerations in evaluating whether the proof establishes that the defendant is an offender whose record of criminal activity is extensive:

> (1) The amount of criminal activity, often the number of convictions, both currently before the trial court for sentencing and prior convictions or activity;
> (2) The time span over which the criminal activity occurred;
> (3) The frequency of criminal activity within that time span;
> (4) The geographic span over which the criminal activity occurred;
> (5) Multiplicity of victims of the criminal activity; and
> (6) Any other fact about the defendant or circumstance surrounding the criminal activity or convictions, present or prior, that informs the determination of whether an offender's record of criminal activity was considerable or large in amount, time, space, or scope.

Perry, 656 S.W.3d at 129. Mr. Cunningham has no prior criminal record. Thus, the trial court was limited in considering the convictions before it, which amounted to 13 counts. There was no supporting testimony to conclude that the misconduct occurred over a long span of time. At sentencing, the trial court noted the offenses' specific dates, and the criminal activity's time span was unclear. (XI, 60). Likewise, there was no supporting testimony to determine the frequency within that time span nor the geographical range. Finally, there were no other alleged victims. These facts do not support a finding that consecutive sentences are warranted.

Likewise, the trial erroneously determined that consecutive sentencing should be applied under Tenn. Code Ann. § 40-35-115(b)(5).

Undisputably, Mr. Cunningham is A.C.'s father and lived with her. However, A.C. recanted and denied much of the sexual abuse during her testimony. Further, A.C. could not recall details about the alleged abuse or the time span when it happened.

Finally, there was no testimony concerning residual mental damage that resulted from the alleged abuse. Dr. Berryman testified that A.C. was more disturbed by or "focused on" her parents fighting than the alleged sexual abuse. (VIII, 71).

The trial court erred by determining that § 40-35-115(b)(2) and (5) applied in imposing consecutive sentences on Mr. Cunningham. Imposing consecutive sentences resulted in a manifestly excessive sentence that is not justly deserved nor in line with the purposes of the Sentencing Act.

V. The trial court abused its discretion by requiring Mr. Cunningham to turn over complete copies of deposition transcripts to the State and preventing Mr. Cunningham from taking any further depositions in his divorce proceedings with Victoria Cunningham.

Mr. Cunningham and Victoria Cunningham were six months into a contentious divorce when criminal charges were filed against Mr. Cunningham. (I, 67). After charges were filed against Mr. Cunningham, the parties agreed to a stay in discovery. *Id*. After consideration, however, Mr. Cunningham requested the divorce court, specifically Judge Darrell Scarlett, to lift the stay. *Id*. Victoria Cunningham requested the court leave the stay in place. *Id*. However, following a hearing, Judge Scarlett lifted the stay. *Id*. Mr. Cunningham began discovering the matter, starting with a deposition of Victoria Cunningham. *Id*. During the

deposition, Victoria referenced specific individuals that directly impacted the outstanding custody determination. *Id*. Mr. Cunningham then coordinated several subpoenas and paid significant money to coordinate the deposition and other potential witnesses. *Id*.

Afterward, the State contacted the court reporter and Mr. Cunningham's counsel, requesting a copy of the deposition transcripts and information concerning future depositions. (I, 68). The State then filed a motion to ask the court to compel the deposition transcripts. The State argued it was entitled to the transcripts under Rule 15 of the Tennessee Rules of Criminal Procedure.

The trial court entered an order on November 10, 2022, finding that Rule 15 does not apply because the depositions were not taken under any permissible purposes of the Rule. (I, 76). Nonetheless, the trial court found it was an issue of pretrial scheduling and issued the following scheduling order:

> Any deposition transcript that is subject to the State's motion cannot be used as substantive evidence in the trial of this case.
>
> Both parties shall turn over full copies to opposing counsel of any deposition transcripts that are intended to be used, or may be used, at trial for impeachment purposes, 15 days before trial, meaning at least by 5pm on November 21, 2022.
>
> By 5pm on November 21, 2022, the Defense shall turn over to the State a copy of any deposition transcript of any of the State's witnesses, even if it is not anticipated to be used for impeachment purposes. The State shall return the transcript, and any copies made, to the Defense within 5 days of the end of trial, or, if needed, after a motion for new trial is heard.

> The Court recognizes the common interplay between civil divorce cases and criminal cases involving some or all of the same parties and/or witnesses. However, the Court has a duty to ensure a fair trial for both the State and the Defendant. Therefore, the Court further orders that there shall be no further depositions of any of the State's potential witnesses in this case without leave of **this** court. To facilitate compliance with this order, the State shall turn over to the Defense its list of witnesses reasonably expected to be called during trial of this case by 5 PM on November 14, 2022.

(I, 76-77).

The trial court abused its discretion by ordering that no further depositions take place in Mr. Cunningham's divorce case. The case was in a separate court and governed by a separate judge, and the trial court overstepped its authority in halting further discovery on the matter. This decision prejudiced Mr. Cunningham, both in his criminal and divorce cases. Further, the trial court abused its discretion by requiring Mr. Cunningham to turn over all deposition transcripts to the State before trial. The trial court cited no authority for such a ruling. Additionally, this gave the State an unfair advantage in previewing its potential witness's testimony and deciding whether to call certain witnesses or not. Mr. Cunningham was prejudiced and denied a fair trial because he did not have this same advantage. As such, the trial court erred in issuing its November 10, 2022 order.

VI. The trial court abused its discretion by allowing the State to utilize an unauthenticated excerpt of a transcript lacking the court reporter's certification during Dr. Berryman's direct examination.

The trial court abused its discretion by permitting the State to utilize an unauthenticated excerpt of a purported transcript of A.C.'s testimony in chambers with Judge Scarlett during Dr. Berryman's testimony. The excerpt was neither complete nor bore any indications of reliability. No court reporter certificate verified the document's accuracy, and there was no date, time, or even the identity of the court reporter.

Weeks before the trial, a hearing was held on the State's intent to use an excerpt of A.C.'s in chambers testimony from a hearing before Judge Scarlett on visitation to show a prior consistent statement by A.C. (IV, 22). The Defendant objected because the excerpt contained no identifying information regarding its authenticity and accuracy. There was no certificate from the court reporter. (IV, 24-26). The trial court denied Mr. Cunningham's request to either preclude the State from using this transcript or order the State to provide the court reporter's name so Mr. Cunningham could order a complete copy for trial purposes. (IV, 30).

At trial, the State changed its argument. It sought during Ms. Berryman's direct examination, over defense objection, to have Dr. Berryman read it and display it to the jury on the overhead, arguing, "I think it'll assist the trier of fact to know just what kind of proof is in front of the Court, [divorce court] and make their own assessment as to what kind of decision that was" [referring to Judge Scarlet granting Mr. Cunningham visitation with A.C.]. (IX, 170).

The trial court ruled that the state could use the excerpt to refresh Dr. Berryman's recollection if they could lay the proper foundation. (IX. 171, 170, 172). However, before the ruling or any indication that Dr. Berryman's memory needed to be refreshed, Dr. Berryman was handed a copy of the excerpt and admitted to reading through it while the State and defense counsel argued the objection. (IX, 172, 173).

A. Rule 612, Tennessee Rules of Evidence—the foundational requirements to refresh memory.

Rule 612 of our Rules of Evidence, which governs the use of writings to refresh a testifying witness's memory, provides:

> If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires; in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Tenn. R. Evid., Rule 612. The proper procedure for refreshing the memory of a witness is included in the Advisory Commission Comments on the rule:

> Only if a witness's memory requires refreshing should a writing be used by the witness. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory.

Tenn. R. Evid. 612, Advisory Commission Comments. Thus, "[p]rior to using a writing to refresh a testifying witness's recollection pursuant to Rule 612, an attorney must show that the witness's memory requires refreshing and that the writing will be helpful in that regard. *State v. Price*, 46 S.W.3d 785, 814 (Tenn. Crim. App. 2000).

It was error by the trial court to allow the state to examine Dr. Berryman with the excerpt in this manner. The trial court should have required the State to establish a proper foundation before allowing Dr. Berryman to refresh her recollection with the document, as required under Rule 612. There is no indication in the record that the transcript was taken back from Dr. Berryman before her testimony about what A.C. testified to. Based on the quotation marks in the record, it appears Dr. Berryman was permitted to read the excerpt while testifying. (IX, 175). Notably, Dr. Berryman testified that she was not even in the room while A.C. was testifying but that she could supposedly hear it from the other room. (IX, 173).

The trial court's error was compounded by the fact that the transcript lacked any indication of reliability. The State received the transcript from the victim's mother. (IV, 24-25). The transcript was incomplete and missing any information on when the testimony took place, where the testimony took place, who was present for the testimony, or who transcribed the testimony. There was no identification of the court

reporter nor a certificate of accuracy by the court reporter. There was no way for Mr. Cunningham to obtain a full copy of the transcript or confirm its accuracy. Even though the trial court previously ordered the State and Defendant to turn over all deposition transcripts in its custody, the State never supplied Mr. Cunningham with a complete copy of the transcript. (I, 76-77). Mr. Cunningham could not obtain a copy of the transcript in its entirety with no identifying information on the transcript, such as the court reporter.

Clearly, Judge Scarlett doubted that A.C.'s testimony in his chambers was truthful or uninfluenced by her mother or grandmother, as he asked A.C. multiple times who told her to say these things. (IX, 170). At the conclusion of the hearing, Mr. Cunningham was awarded visitation with his children. (IX, 178). It was prejudicial for Mr. Cunningham not to have a complete copy of the transcript to use at trial, especially because this hearing ultimately ended in his favor and cast doubt on the veracity of A.C.'s allegations.

This was not a harmless error. The entire case hinged on A.C.'s credibility, specifically as it pertained to the inconsistencies in her statements. Additionally, the evidence was not cumulative. A.C.'s testimony at trial corroborated none of the previous statements she made during her forensic interviews.

Allowing Dr. Berryman to review and read from the transcript excerpt greatly prejudiced Mr. Cunningham. Mr. Cunningham was curtailed to challenge the accuracy of the excerpt by the trial court's pretrial ruling. If the relevance of the excerpt, as the State argued, was to provide the jury with a sampling of the evidence during the visitation

hearing, Mr. Cunningham was put at a disadvantage to develop other testimony favoring his position because he did not have a complete transcript or at least the name of the court reporter in order procure a complete transcript before the trial commenced. Allowing the State to use an unauthorized excerpt of an unverified transcript undermined confidence in the proceedings. This Court should reverse the judgment and remand this matter for a new trial.

CONCLUSION

For the reasons stated, the trial court's judgment should be reversed and the case dismissed or remanded for a new trial.

Respectfully submitted,

/s/ Patrick T. McNally
Patrick T. McNally
McNally Law
40 Burton Hills Blvd., Suite 200
Nashville, TN 37215
(615) 480-8921
attorney@patrickmcnallylegal.com
B.P.R. No. 010046

Counsel for the Appellant,
John David Cunningham

CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46, Rule 3.02, the total number of words in this brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance, is 15,183. This word count is based upon the word processing system used to prepare this brief.

/s/Patrick T. McNally
PATRICK MCNALLY