

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2005 Session

STATE OF TENNESSEE v. CAYLE WAYNE HARRIS

**Appeal from the Circuit Court for Giles County
Nos. 8641, 8642 Robert L. Jones, Judge**

No. M2004-00049-CCA-R3-CD - Filed August 23, 2005

The defendant, Cayle Wayne Harris, was convicted of three counts of rape of a child, a Class A felony, involving two victims, and received an effective sentence of forty-two years in the Department of Correction. In this delayed appeal, he asserts the trial court erred by (1) not severing each of the three counts; (2) seating a disqualified juror; and (3) not requiring the State to elect offenses. Finding merit in the defendant's severance argument, we reverse and remand for new trials.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Reversed and Remanded for New Trials

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Stanley K. Pierchoski, Lawrenceburg, Tennessee, for the appellant, Cayle Wayne Harris.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; T. Michael Bottoms, District Attorney General; and Patrick S. Butler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts of this matter were set out in the defendant's first direct appeal to this court:

The defendant was the boyfriend of the mother of the two male victims. BT, who was born on November 6, 1987, and RT, who was born on July 31, 1989, lived in a trailer with their mother and younger brother. Sometimes their older sister resided with them. The defendant occasionally spent the night at the residence. BT testified that in 1997 he was asleep in his bedroom and awoke to

find the defendant on top of him with “his thing in my butt.” He described the penetration as “a little ways.” According to BT, his mother entered the room and ordered the defendant to leave. BT also testified to a second incident, almost identical in circumstances to the first, except that his mother was not a witness. RT testified that the defendant “stuck his thing in our butt[s]” and that it hurt. On cross-examination, both boys admitted telling different versions of the incidents during the course of the investigation. Each, however, testified that the defendant had accomplished anal penetration.

State v. Cayle Wayne Harris, No. M2000-02143-CCA-R3-CD, 2001 WL 1218582, at *1 (Tenn. Crim. App. Oct. 12, 2001) (footnote omitted), perm. to appeal denied (Tenn. Mar. 4, 2002). Because the defendant’s notice of appeal was untimely, the only issue considered by this court in his first direct appeal was the sufficiency of the evidence. Id. We determined that it was sufficient to sustain the convictions and affirmed the judgments of the trial court. Id. at *3.

PROCEDURAL HISTORY

_____ Due to the issues raised in the present appeal, it is helpful to set forth in detail the procedural history of this case.

On July 15, 1998, the Giles County Grand Jury charged the defendant with two counts of rape of a child, R.G.T., in indictment number 8641 and with two counts of rape of a child, B.J.T., in indictment number 8642.¹ Additionally, the defendant was charged in indictment number 8639 with the rape of three-year-old R.A.T., which was eventually dismissed.² On June 14, 1999, the State filed a motion to consolidate the defendant’s indictments together as well as with indictments 8644, 8645, 8646, and 8647, which charged the victims’ mother, Ann Marie Thornton Kelly, with various sexual offenses against the same victims.³ In that motion, the State, pursuant to Rule 13, Tennessee Rules of Criminal Procedure, asked that the court consolidate “the above-numbered and above-styled cases for trial on grounds that circumstances exist such that the same could have been joined in a single indictment pursuant to Rule 8, Tennessee Rules of Criminal Procedure.”⁴ On November 8, 1999, the State filed a motion for continuance which, among other things, stated that it “must now withdraw its motion to consolidate due to Bruton problems in the introduction of Ann Kelly’s statement in a trial of both defendants.” On November 15, 1999, the defendant filed a motion to sever offenses, listing in the caption indictments 8639, 8640, 8641, and 8642 and stating that “pursuant to Rule 14B of Tennessee Rules of Criminal Procedure,” the defendant “moves the Court to sever [sic] the

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

² The trial court dismissed the indictment involving R.A.T. on July 23, 2001, at the State’s request, “due to victim’s age and inability to testify.”

³ Ann Kelly was tried and convicted by a jury of various sexual offenses, but her convictions were reversed by this court on appeal due to her incompetency to stand trial. See State v. Ann Marie Thornton Kelly, No. M2001-01054-CCA-R3-CD, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002).

⁴ It is unclear whether the State was seeking mandatory joinder of indictments under Rule 8(a) or permissive joinder under Rule 8(b). However, the record as a whole strongly indicates the State was seeking permissive joinder under Rule 8(b). Furthermore, the parties, in their respective analyses of Rule 14(b), have focused exclusively on Rule 14(b)(1), which deals with severance following permissive joinder under Rule 8(b).

offenses in the above styled cause,” citing two then recent decisions of our supreme court, State v. Moore, 6 S.W.3d 235 (Tenn. 1999), and State v. Shirley, 6 S.W.3d 243 (Tenn. 1999), in support of his motion.

On November 17, 1999, the trial court conducted a pretrial hearing on various motions. The State withdrew its motions for continuance and to consolidate the defendant’s trial with that of Kelly’s. Defense counsel explained that the intent of his motion to sever was to sever all of the offenses against the defendant into separate trials and not just to sever the defendants from each other. No evidence was presented at the hearing, and the trial court decided the matter based on the arguments of counsel. The trial court took the motion “under advisement.”

At the June 13-14, 2000, trial, after voir dire but before evidence was presented, several matters were addressed. First, the State clarified that it was not proceeding to trial at that time on the indictments involving R.A.T. or P.M.T.⁵ The trial court denied the motion to sever. The State also advised that count 2 of indictment 8641 involving R.G.T had been *nolle prosequied*.

The defendant was convicted of count one of indictment 8641, charging the rape of R.G.T., and of counts one and two of indictment 8642, charging the rape of B.J.T, and was sentenced to twenty-one years for each of the three Class A felony rape of a child convictions. The sentences for the convictions involving B.J.T. were ordered to be served concurrently but consecutively to the sentence for the conviction involving R.G.T., for a total effective sentence of forty-two years at 100%. The jury also assessed fines of \$50,000 in each of the three convictions.

On August 22, 2000, the defendant filed a motion for new trial as well as a notice of appeal. A hearing was conducted on the motion for new trial on August 23, 2000, during which trial counsel acknowledged he had filed the motion for new trial a week late. In an order filed August 31, 2000, the trial court denied the motion for new trial because it was “late” and the court was “without jurisdiction to rule on the motion.” Thereafter, we issued our opinion finding there was sufficient evidence to sustain the convictions.

While his original appeal was pending in this court, the defendant filed a *pro se* petition for post-conviction relief, alleging ineffective assistance of counsel for, among other things, counsel’s not filing a timely motion for new trial, and seeking a “delayed appeal.” The trial court entered an order on July 24, 2001, dismissing the petition without prejudice as it was “premature in nature.”

After our first opinion on direct appeal was filed on October 12, 2001, the defendant, through counsel, filed a second petition for post-conviction relief. It appears that a hearing was held on the motion, although a transcript is not included in the record on appeal. In an “Agreed Order,” filed on October 28, 2002, and signed by the State and counsel for the defendant, the trial court dismissed the petition without prejudice and held that, pursuant to Gibson v. State, 7 S.W.3d 47 (Tenn. Crim. App. 1998), the defendant was entitled to a delayed appeal, giving him

⁵ P.M.T. is the sister of R.G.T. and B.J.T.

thirty days in which to file a motion for new trial. Subsequently, the defendant filed a timely motion for new trial, which was denied by the trial court, and this appeal ensued.

ANALYSIS

I. Delayed Appeal

We first must determine if this appeal is properly before the court. The Tennessee Rules of Appellate Procedure contemplate one direct appeal as of right from a judgment of conviction. See Tenn. R. App. P. 3, 4; Tenn. R. Crim. P. 37. However, under Tennessee Code Annotated section 40-30-113(a) (2003), a defendant may also be entitled to a delayed appeal if he was denied a direct appeal in violation of the Constitution of the United States or of Tennessee and there is an adequate record of the trial.

In its agreed order filed October 28, 2002, the trial court granted the defendant an additional thirty days to file a second motion for new trial. Subsequently, our supreme court, in Wallace v. State, 121 S.W.3d 652 (Tenn. 2003), considered a case factually similar to the present appeal in that the defendant's attorney in that case filed the motion for new trial more than two months after the mandatory thirty days set forth in Tennessee Rule of Criminal Procedure 33(b). The post-conviction court granted a delayed appeal, allowed a motion for new trial, and then denied the motion. Wallace, 121 S.W.3d at 655.

Our supreme court concluded that Wallace's counsel was deficient for failing to timely file a motion for new trial, saying that his deficient performance was "presumptively prejudicial," which "supported the trial court's grant of a delayed appeal under Tennessee Code Annotated section 40-30-113." Id. at 658. Explaining that counsel's failure constituted an "abandonment of his client at such a critical stage of the proceedings" which "resulted in the failure to preserve and pursue the available post-trial remedies" and which failed "to subject the State to the adversarial appellate process," the supreme court affirmed the trial court's grant of a delayed appeal and remanded the case to our court "for review of the issues presented by the defendant's appeal from the trial court's denial of his motion for a new trial." Id. at 658-60.

In the present appeal, trial counsel acknowledged at the hearing on the first motion for new trial that he had filed the motion a week late because he had his "Mondays confused." In the first motion for new trial, which the trial court properly refused to act on because of the late filing of the motion, the defendant raised the severance and election issues, and he raised those issues in his second motion for new trial as well. We conclude that the defendant established trial counsel was ineffective because of the late filing of the motion for new trial and he was prejudiced as a result. Accordingly, the defendant is properly before this court on his delayed appeal, and we will address the issues it raises.

II. Severance of Offenses

The defendant was charged in two two-count indictments, number 8641 charging he sexually penetrated RGT and number 8642 charging he sexually penetrated B.J.T. It appears that the two counts of indictments 8641 and 8642 were brought in the same indictment pursuant to Rule 8(b). However, we cannot discern from the record whether the indictments themselves

were consolidated with each other or simply set on the same day with the parties proceeding as if they had been consolidated. On June 14, 1999, the State filed a motion seeking to consolidate four indictments against the defendant, including indictments 8641 and 8642, with the four indictments against Ann Marie Thornton Kelly. This motion recited that it was filed pursuant to Tennessee Rule of Criminal Procedure 13, the State saying that the offenses could have been joined in a single indictment. Subsequently, counsel for the defendant filed a motion to sever the offenses charged in indictment numbers 8639-8642.

At the November 17, 1999, hearing on various pretrial motions, the court considered arguments on the contending motions to consolidate and to sever, and the State advised that it was withdrawing its motion to consolidate, in part because of an “obvious Bruton” problem in trying the two defendants together. Defense counsel explained to the court that the intent of his motion to sever was that there should be separate trials as to each count of each indictment. After hearing arguments of counsel but no proof, the court took under advisement the defendant’s motion. The defendant argues that the trial court erred in its ultimate denial of the motion to sever.

Our supreme court has considered various aspects of consolidation of indictments in State v. Denton, 149 S.W.3d 1, 3 (Tenn. 2004) (involving “three separate indictments with a total of twenty sexual offenses involving eleven different victims”); State v. Toliver, 117 S.W.3d 216 (Tenn. 2003) (involving the consolidation of two indictments entailing two separate offenses by the same defendant against the same victim); Spicer v. State, 12 S.W.3d 438 (Tenn. 2000); Moore, 6 S.W.3d at 239-40; and Shirley, 6 S.W.3d at 247-48. Moore and Shirley dealt with multi-count indictments, the defendant in each case requesting that certain counts be severed and tried separately. Spicer was similar to the present case in that it involved the consolidation for a single trial of two separate indictments, alleging child rape and aggravated sexual battery against two separate sibling victims.

Rule 8, Tennessee Rules of Criminal Procedure, requires joinder of offenses if they “are based on the same conduct or arise from the same criminal episode” and allows joinder if “the offenses constitute parts of a common scheme or plan or if they are of the same or similar character.” Tenn. R. Crim. P. 8(a), (b). As we have stated, it appears that the State, pursuant to Rule 8(b) allowing permissive joinder, had brought the two two-count indictments against the defendant. What is unclear, however, is how these two indictments came to be consolidated or whether they simply were set for trial on the same day and the parties proceeded as if they had been consolidated.

The defendant’s motion to sever the offenses sought to separate the indictments and the counts from each other, thus seeking four separate trials. Rule 13, Tennessee Rules of Criminal Procedure, provides that a court may sever offenses “if a severance could [have been] obtained on motion of a defendant or of the State pursuant to Rule 14,” which provides, in part, that, if offenses have been consolidated pursuant to Rule 8(b), the defendant has a “right to a severance of the offenses unless [they] are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.”

We utilize an abuse of discretion standard in reviewing a trial court's denial of a motion to sever. Spicer, 12 S.W.3d at 442. Thus, the determination of the trial court will be reversed only if it "applied the incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." Id. at 443 (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

In our review of this issue, we first will set out what occurred at the hearing on the defendant's motion to sever.

The State acknowledged that the indictments alleged the offenses had occurred during a particular period of time, but not on specific dates. The defense argued that the severance should be granted unless the State could show that a "unique method" had been used to commit the crimes. The State responded that, although there may not have been a unique method used in the offenses, they were "all the same":

[T]he things that happened in these cases with regard to these boys were all the same. In every situation, he would go to the bed where these boys stayed and he would, you know, pull part of their clothes down and part of his clothes down. And while the boys were laying [sic] on their stomach, he would insert his penis in their behind. You know, that is the only way he ever did it. That way every single time. You know, those seem to be similar enough, you know.

Thus, at the hearing on the motion to sever, the State argued, as we understand, not that a "unique method" was used to commit the crimes but, instead, that factually they were "all the same."

As for the exact testimony of the two victims, the State, in response to a question from the court, acknowledged that "you are asking me about the kind of proof that we are going to have at this trial, I will be frank with you, I don't know. I don't know what [the victims] are going to say." As for whether any of the assaults had occurred on the same night, the State acknowledged that, after interviewing the victims the day before, "I don't think we are going to have in our proof at the trial if it is what they said yesterday that this happened, that they are going to be able to testify that this same thing happened to both of them on a same night."

No proof was presented at the hearing, only the arguments of counsel.

On the morning of June 13, 2000, after voir dire and opening arguments, and with the jury out, the trial court denied the defendant's motion to sever:

Now, there had been a motion to sever, . . . before, based on I think a recent decision. And we had a hearing on that motion before and the Court concluded that the evidence would be so intermingled, especially since the children could not distinguish anything except first and second kind of things, that the Court was going to deny that motion to sever.

In the order denying the motion for new trial, the court recounted the State's position at the hearing on the motion as being that severance should be denied because each victim observed the acts being committed on the other victim:

At the pretrial hearing, the State maintained that each of the three incidents occurred in the presence of both children and that both children would be offering testimony that the charged acts against a particular child took place in the presence of the other child. Therefore, the State argued, the offenses were part of a common scheme or plan and the evidence of one would be admissible at the trial of the other. Following the remarks of counsel, the court found that the evidence was so intermingled that the cases should necessarily be tried together in accordance with Tennessee rules, statutes and cases.

For several reasons, as we will explain, we conclude that the trial court abused its discretion in denying the motion to sever the offenses.

Our supreme court explained, in Denton, 149 S.W.3d at 13, the showing which must be made by the State after a defendant has filed a severance motion:

[I]f the defendant objects to consolidation or moves to sever the offenses for trial, then Rule 14(b)(1) places the burden on the prosecution to show that the offenses are part of a common scheme or plan *and* the evidence of each crime would be admissible in the trial of the other. Spicer, 12 S.W.3d at 443.

In Denton, the court explained, as well, the three types of common scheme or plan evidence:

[U]nder Rule 14(b), there are three types of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. Shirley, 6 S.W.3d at 248.

149 S.W.3d at 13.

We understand the State's argument before the trial court to have been that the three offenses to be tried were "all the same." Even if true, the similarity would not require that these be "signature" crimes. Additionally, we do not believe the State argued before the trial court that the three offenses were part of "a larger, continuing plan" or part of the same criminal transaction. However, on appeal, relying on State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999), the State argues that the offenses of which the defendant was convicted constitute "signature crimes" because they are so unique and distinctive as to be like a signature. The basis for the State's argument is the "three virtually identical offenses . . . transpired each time in the same bed, in the same room and in the same house with each of the two brothers present." Additionally, the State argues that the three offenses were part of a common scheme or plan

because they were “part of a larger, continuing plan or conspiracy,” as evidenced by the fact of “the defendant’s continual, identical conduct in each of these offenses.”

We respectfully disagree with the State’s analyses of this matter. First, we note that, at the hearing on the motion to sever, the prosecutor admitted, “I don’t know if you would call it a unique method or not.” Thus, the State’s argument on appeal, that the defendant had committed crimes in such a unique way that they were “signature crimes,” was not made by the State at the evidentiary hearing. In fact, summarizing the three incidents which the State intended to prove at trial, the prosecutor said only that they “seem to be similar enough.”

For several reasons, we disagree with the State’s argument on appeal that severance should not have been granted. First, much of the State’s argument relies upon proof at the trial itself, ignoring the fact that no evidence, only arguments of counsel, was presented to the court at the hearing. As this court explained in State v. Roland R. Smith, No. M2004-01457-CCA-R3-CD, 2005 WL 1541874, at *14 n.15 (Tenn. Crim. App. June 29, 2005), “[l]ogic dictates that, on motions to sever, we consider only the evidence presented at [the] hearing, as well as the trial court’s findings of fact and conclusions of law.” Thus, although required to do so in response to the motion to sever, the State presented no proof at the severance hearing that the offenses were part of a common scheme or plan.

Further, we disagree with the State’s claim on appeal that the offenses were “signature crimes” or part of a continuing plan. Our supreme court has explained what is required to satisfy the “distinctive design” or “signature crimes” category:

The most common basis for offering evidence of a distinctive design is to establish the identity of a perpetrator. See State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996); State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985). In this case, the identity of the offender was the central issue at trial, and therefore, if a distinctive design could be shown, then evidence of offenses constituting a common scheme or plan would be relevant. However, before multiple offenses may be said to evince a distinctive design, the “modus operandi employed must be so unique and distinctive as to be like a signature.” State v. Carter, 714 S.W.2d 241, 245 (Tenn. 1986). Although the offenses need not be identical in every respect, Bunch v. State, 605 S.W.2d 227, 231 (Tenn. 1980), the methods used in committing the offenses must have “such unusual particularities that reasonable men can conclude that it would not likely be employed by different persons.” See Harris v. State, 189 Tenn. 635, 644, 227 S.W.2d 8, 11 (Tenn. 1950). Only when the method used to commit the crimes is so unique as to be like a signature can the inference of identity properly arise.

Shirley, 6 S.W.3d at 248 (footnote omitted).

In the present matter, neither was identity an issue nor were the three offenses, while similar, unique or unusual.

The State also asserts on appeal that the “defendant’s continual, identical conduct in each of these offenses is evidence that he committed these offenses as part of a larger, continuing plan or conspiracy.” This court has described what is required to support a finding that separate offenses are part of a continuing plan or conspiracy:

The second category, “continuing plan or conspiracy,” involves not the similarity between the crimes, but the common goal or purpose at which they are directed. N. Cohen, Tennessee Law of Evidence, _ 404.11 (2nd ed. 1990). In such circumstances, the proof sought is of a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial. Id. (citing Wigmore on Evidence 249 (Chadbourn rev. 1979)). E.g., State v. Brown, 823 S.W.2d 576, 585 (Tenn. Crim. App. 1991).

State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995), overruled on other grounds by Spicer v. State, 12 S.W.3d 438 (Tenn. 2000). The Tennessee Supreme Court has opined that “[a] larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses.” Denton, 149 S.W.3d at 15. Additionally, “[t]he argument that sex crimes can be construed as part of a continuing plan or conspiracy merely by the fact that they are committed for sexual gratification has previously been rejected.” Id. This court previously has held that “the larger, continuing plan category has typically been restricted to cases involving crime sprees, where the defendant commits several crimes quite closely in time to one another.” Allen Prentice Blye, No. E2001-01375-CCA-R3-CD, 2002 WL 31487524, at *6 (Tenn. Crim. App. Nov. 1, 2002), perm. to appeal denied (Tenn. Mar. 10, 2003) (citing State v. Hall, 976 S.W.2d 121, 146 (Tenn. 1998)). Thus, we disagree with the State’s argument on appeal that these offenses were part of a larger plan or conspiracy.

We respectfully disagree with the reasoning of the trial court in denying the motion to sever. Orally, the trial court said the motion would be denied because the evidence was “so intermingled.” Even if true, this is not a basis for denying a motion to sever. Likewise, we disagree with the finding in the trial court’s written order denying severance that, at the hearing, the State had maintained that each victim witnessed the offense committed on the other. In fact, the State said, as we understand, that it did not know “what [the victims] [were] going to say.” Additionally, the trial court did not find on the record that “the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant.” See Spicer, 12 S.W.3d at 445. We conclude, therefore, that the trial court abused its discretion by denying the defendant’s motion to sever.

Harmless Error

Having concluded that it was error for the three counts to be consolidated into a single trial, we next will determine whether new trials must be ordered.

No conviction is to be reversed on appeal “except for errors which affirmatively appear to have affected the result of the trial on the merits.” Tenn. R. Crim. P. 52(a); see also Tenn. R. App. P. 36(b). “[T]he line between harmless and prejudicial error is in direct proportion to the

degree . . . by which proof exceeds the standard required to convict” Spicer, 12 S.W.3d at 447 (quoting Delk v. State, 590 S.W.2d 435, 442 (Tenn. 1979)). According to the supreme court, “[t]he more the proof exceeds that which is necessary to support a finding of guilt beyond a reasonable doubt, the less likely it becomes that an error affirmatively affected the outcome of the trial on its merits.” Gilliland, 22 S.W.3d at 274.

We did not set forth a full summary of the trial testimony in our first opinion; however, it is now necessary that we do so.

B.J.T., who was twelve years old at the time of trial, testified that a “few years” before, he was living with his siblings and mother in a trailer park in Pulaski. B.J.T.’s two brothers, R.G.T. and R.A.T., lived at the trailer and his sister, P.M.T., visited on occasion. The sexual conduct with the defendant started in “cooler weather,” close to the victim’s birthday in November 1997, when he was nine or ten years old. The defendant was “seeing” the victim’s mother at the time, and when he came to visit, he was sometimes drunk and sometimes sober. The “first time” one of the “bad” things occurred with the defendant was when they were in B.J.T.’s bedroom. B.J.T., who was asleep in the bed with his brother R.G.T., stated that he awoke to find the defendant’s “thing in [his] butt.” He replied “yes” when asked if he meant the defendant’s penis. The defendant had pulled down B.J.T.’s pajama bottoms and was on top of B.J.T. as he lay on his stomach. The defendant moved “[a] little bit” and it “hurt.” The defendant’s penis was inside the victim “[a] little way,” or “[a]bout an inch.” B.J.T. told the defendant to “stop” and “[g]et off,” but the defendant did not stop and “kept going” until B.J.T.’s mother walked in and told the defendant to “get off” of him. B.J.T. testified that the same thing happened a second time: he was asleep in his bed and woke up with the defendant on top of him with his penis in B.J.T.’s “behind.” However, B.J.T. could not “remember most all of it” and could not recall any other details of the second incident.

On cross-examination, B.J.T. acknowledged inconsistencies in the various stories he had told to investigating law enforcement as well as social workers. For example, he told Sheila Smith with the Department of Children’s Services (“DCS”) that the defendant forced his head down onto the defendant’s private parts, but he did not mention, in his two interviews with Investigator Michael Chapman, that this had occurred. He also acknowledged telling Chapman that the defendant sexually assaulted him several times but clarified that he meant “twice.” B.J.T. said that he lied to Chapman when he told him the defendant made him put his privates into the defendant’s behind. Although he told Chapman that the defendant stuck his penis in him “pretty far,” he reiterated that it was only “[a] little bit.” B.J.T. also stated that he “went and called the cops” after the second incident of anal intercourse but later clarified that he meant he called the police on another occasion after the defendant and B.J.T.’s mother had been fighting. B.J.T. said his brother, R.G.T., woke up and saw the first incident. He acknowledged telling Chapman that the incidents happened after Valentine’s Day in 1998 but agreed that he was removed from the house by social services by February 10 and that nothing could have occurred after Valentine’s Day. He stated “it” happened “[r]eally earlier” than that, but it is unclear which incident he was referring to. He also acknowledged that he lied to “the people at the doctor’s office in Nashville” when he told them “everything was fine,” but he in fact was having problems when he “went to use the bathroom.”

Julie Rosof Williams, called as an expert witness by the State, testified that she is a faculty member at the Vanderbilt School of Medicine and that her “clinical setting” is her employment with Our Kids Clinic in Nashville. She evaluated and examined B.J.T. and R.G.T. on June 29, 1998. B.J.T. had a “normal examination” of his penis and “anal area.” These results “would not be inconsistent” with anal penetration during the prior November to February time frame. She explained B.J.T.’s normal examination by stating that “minor injuries” due to anal penetration “heal very quickly” and that the anus “is an organ that is very elastic and stretchable.” Her examination of R.G.T.’s penis and anus revealed a “normal examination.” The examination results from R.G.T. would also not be inconsistent with his having been penetrated several months before.

On cross-examination, Williams stated that the normal procedure for children at Our Kids Center was to be interviewed by a social worker prior to a physical examination. In these interviews, neither B.J.T. nor R.G.T. made any “disclosures of sexual contact” or indicated they had been touched inappropriately. She agreed that her findings were “not at all inconsistent” with what the boys told the staff and that her report indicated that R.G.T.’s rectal exam indicated a “[p]ositive tone and wink,” meaning that the muscle tone and strength around his anus was “normal.” Both boys also had normal “rugae,” which describes the “little folds” around the anus. There were no fissures, scars, or tears around either victim’s anus. Neither boy disclosed any trouble with bowel movements or stomach problems or complained of hurting “back there.” Finally, she acknowledged there was “no physical evidence, whatsoever, that either one of these boys had ever been sexually assaulted.”

R.G.T. testified that he lived with his mother and two brothers and that two or three years before, the defendant sometimes came to their trailer. During that time, he remembered the defendant doing something “bad” to him, but he could not remember if it was daytime or night. He stated he was asleep in his bedroom when he woke up and discovered that the defendant had “[s]tuck his thing in our butt,” then saying he meant “my butt.” He said that it felt “[b]ad” and that it “hurt.” R.G.T. testified the defendant was “[o]n top of us,” but then clarified that he meant “on top of me.” He also stated that he had been wearing pajama bottoms, which the defendant had pulled down.

On cross-examination, R.G.T. initially denied that he told Sheila Smith that the defendant forced him to perform oral sex on him. He could not remember many things, including being examined in Nashville or what he told the workers there. He also could not remember being interviewed by Investigator Chapman, but he did remember telling Chapman that “it” had happened twice. Asked about oral sex, he said, “It happened.” He also said that the defendant anally penetrated him “[t]wice.”

Michael Chapman, the Chief Investigator for the Giles County Sheriff’s Department, said he became involved in the case when he received a telephone call from DCS in April 1998. He interviewed B.J.T. and R.G.T. twice, the first time being at their school. During his investigation, he spoke with the boys’ mother, Ann Kelly, who also had “numerous charges pending against her,” and twice with the boys’ sister, P.M.T. On cross-examination, Chapman agreed that R.G.T. told him that “it” happened after Valentine’s Day and that it had never happened before Valentine’s Day. During one interview, B.J.T. stated he had been penetrated

“several times,” but in the other interview, he said he had been penetrated once. Chapman stated that during his two interviews with the boys, “the breadth and totality of what was divulged increased during those interviews” and that the boys “did say different things” at times. He agreed that there were inconsistencies and added that the boys were reluctant to talk. At one point, R.G.T. told Chapman that he had been penetrated six times. From the beginning of the investigation, there was never any “physical evidence . . . that would have been accessible.”

Testifying for the defense, Mickie Pearce, a team coordinator with DCS, stated that she coordinated services between the victims’ home and DCS between November 1997 and February 1998. In September 1997, a DCS worker was sent to the home to talk to the mother about “some allegations of neglect concerning [the] children.” Between November and February, approximately three different DCS workers were in the home “[p]robably” a dozen times. However, none were alerted to any sexual allegations until April 1998, after the boys had been removed from the home, which occurred on February 10, 1998.

Sonja Harris testified that she and the defendant married on March 5, 1998, and they had lived together for “about six or seven years” prior to that. They had a “falling out,” and he moved out in the fall of 1997. On Christmas Day, 1997, the defendant returned home and since then had spent every night at home. She said the defendant had a drinking problem, which ended on December 25, 1997.

The defendant did not testify.

We determined, in our earlier opinion, that the evidence presented at trial was sufficient beyond a reasonable doubt to sustain the convictions but did not opine as to whether it was “overwhelming.” In now making this determination, we note the inconsistencies between the victims’ trial testimony and statements given to investigators prior to trial as well as in the various stories told to the different investigators. Much of the victims’ testimony was “hardly unimpeachable.” Spicer, 12 S.W.3d at 448. For example, Julie Rosof Williams testified that both victims had normal examinations and that there was no way to physically confirm that either had been abused. The following is a portion of the cross-examination of B.J.T.:

Q. Did you tell him at that interview, to Investigator Chapman with Mrs. Pearce, that [the defendant] made you stick your privates into his behind?

A. No.

Q. That never happened?

A. I don’t remember.

Q. You don’t remember?

A. Huh-uh.

Q. You would forget a 55-year-old man assaulting you and making you stick your privates in his behinds [sic]?

A. Some.

Q. Well, did you tell Investigator Chapman that that day, and Mrs. Pearce?

A. Yes.

Q. So you did tell them?

A. Yes.

Q. Did that, in fact, happen?

A. No.

Q. Okay. So you lied to them on that occasion?

A. Yes.

Q. You lied to them?

A. Yes.

Q. Okay. And so when you told them this business about sticking your privates in [the defendant's] behind, you just made all of that up?

A. Yes -- no.

Q. You didn't make that up?

A. No. It didn't happen.

Q. Okay. Well, if it didn't happen, then you made it up, didn't you?

A. Yes.

Q. It was a lie. And even before, with Investigator Chapman and Mrs. Deason, when you told them it happened, that was a lie, too, wasn't it?

A. No.

Q. It wasn't a lie?

A. No.

Q. Was it the truth when you were telling Mrs. Deason but a lie when you told Mrs. Pearce?

A. Yes.

Q. It was a lie both times, wasn't it?

A. No.

Q. Was it the truth one of the times?

A. Yes.

Q. Okay. So one of the times when you told them that you had to stick your privates in [the defendant's] behind, it was the truth?

A. No.

Q. Okay. So both times that was a lie?

A. Yes.

.....

Q. Well, you said the second time [the defendant] put his privates inside your behind.

A. Yes.

Q. What happened? How did that end[?]

A. I went and called the cops.

Q. You went and called the cops?

A. Yes.

Q. The cops went right out to your house, didn't they?

A. Yes.

Q. Huh?

A. Yes.

Q. And you told them [the defendant] just did something bad to you?

A. No.

Q. Okay. What did you tell the cops?

A. I told them that that man . . . no, I didn't call the cops.

Q. So, you didn't call the cops, like you just sat here and told this jury, did you?

A. Yeah.

Q. I'm sorry?

A. No.

Q. No?

A. I didn't mean that.

Q. You didn't mean that? Well, how much of all of this story have you not meant?

A. Not all of it.

Q. Well, you just looked 14 people in the eye and told them you called the cops. And then you looked them back in the eye and said, no, I didn't. Now, that's a lie, isn't it?

A. Yes.

.....

Q. And did you tell them that it happened after Valentine's Day?

A. Yes.

Q. So you did tell them it happened after Valentine's Day?

A. Yes.

Q. Okay. Now, Valentine's days [sic] is the fourteenth of February, isn't it?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And isn't it true that you weren't in that house after the tenth of February?

A. No.

Q. So, --

A. I don't think.

Q. So it couldn't have happened after Valentine's Day, because you weren't even in the trailer on Valentine's Day, were you?

A. No.

Q. Okay. So that wasn't correct, either, was it?

A. No.

Q. Okay. So it didn't happen after Valentine's Day, after all?

A. No.

....

Q. Well, what sort of problems did you have?

A. When I went to use the bathroom.

Q. I'm sorry?

A. When I went to use the bathroom.

Q. But you didn't tell that to any of the people at the doctor's office in Nashville, did you?

A. No.

Q. In fact, you told them everything was fine, didn't you?

A. Yes.

Q. That was a lie, too, wasn't it?

A. Yes.

Q. Okay. You've told a lot of lies in all this, haven't you?

A. Yes.

Q. A whole lot?

A. Yes.

In the present appeal, there was no physical evidence or eyewitness testimony presented at trial, unlike in other cases where, on appeal, the court held that consolidation was harmless error, *see, e.g., Moore*, 6 S.W.3d at 242-43, and the defendant did not confess to the crimes, *State v. William Ramsey*, No. M2001-02735-CCA-R3-CD, 2003 WL 21658589, at *10 (Tenn. Crim. App. July 15, 2003), perm. to appeal denied (Tenn. Dec. 22, 2003).

Our supreme court previously has held “that joinder of open-dated indictments involving multiple victims is usually prejudicial because *State v. Rickman* [876 S.W.2d 824 (Tenn. 1994)] seems to allow the jury to hear evidence of countless sexual episodes⁶ from each of the different victims.” *Spicer*, 12 S.W.3d at 448. However, “joinder of open-dated indictments alleging offenses against multiple victims is” not “inherently prejudicial.” *Id.* Indeed, “[t]here may be some cases in which a jury is able to give separate attention and consideration to the evidence presented under each indictment such that an error in consolidation will not affirmatively affect the outcome of the trial.” *Id.* Accordingly, we must determine whether the “verdict[s] in this case probably resulted in part from unfair prejudice ensuing from improper consolidation” and whether “the consolidation error affirmatively affected the outcome of the trial.” *Id.*

In this matter, we conclude that consolidation of the offenses involving the two different victims likely unfairly prejudiced the defendant and affirmatively affected the outcome of the trial. Because of the problems and inconsistencies in each of the two victims’ testimony, we cannot conclude otherwise but that the testimony of each of the victims served to bolster the testimony of the other. “Failure to sever, under these circumstances, invited reliance on the ‘propensity’ notion: that is, if he did it to one, he did it to the other.” *State v. Hallock*, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1993). As our supreme court has said, “We can never know how evidence that should not have been admitted truly affected the minds of the jury members. . . . [C]ommon sense tells us that the jury probably believed the defendant had a propensity to commit such acts and that each victim’s testimony was made more credible by similar testimony coming from others.” *Denton*, 149 S.W.3d at 16-17. Accordingly, new trials are required to ensure that these verdicts were not the result of unfair prejudice.

Because of the possibility of further appellate review, we will address the defendant’s remaining two issues.

III. Improper Juror Selection

⁶ Although we would not characterize the testimony of the victims in the present case as detailing “countless sexual episodes,” we do note that on cross-examination, each of the boys referred to a larger number of occurrences than were charged in the indictments.

The defendant argues that the trial court erred by not excusing for cause a juror who was related to the prosecutor “by affinity within the fourth degree of kinship in violation of the statute of consanguinity and affinity.” The State responds that the juror in question was not actually related to the prosecutor at the time of trial due to an earlier divorce and that this claim is waived by the defendant’s knowing acceptance of the juror with knowledge of the relationship before the start of the trial. Additionally, the State argues that the prosecutor was not a “party” under Tennessee Code Annotated section 22-1-105, and, therefore, there was no “relationship” requiring disqualification. We will review how this issue developed at the trial.

After voir dire, but prior to opening statements, the prosecutor informed the trial court that his ex-wife was the first cousin of juror Mike Garrett, and the trial court then asked if defense counsel wanted to go into the matter further, counsel replying:

[DEFENSE COUNSEL]: Judge, I guess we’ll just about have to have Mr. Garrett there, but I think I asked if they knew you or were related in some way or the other, and he indicated no. So, I don’t know

[THE STATE]: He wouldn’t consider that he is.

THE COURT: Tell me, once more, what the relation is or has been.

[THE STATE]: My daughter’s mother is a first cousin of Mr. Garrett. The other way to put it is the way I did a while ago. Mike Garrett’s grandfather is my daughter’s great-grandfather.

THE COURT: I’m pretty sure that the statute only deals with the parties, --

[DEFENSE COUNSEL]: I think that’s true, Judge.

THE COURT: -- as far as mandating the disqualification. Do you need to be concerned about that question, or do you care about it, [defense counsel]?

[DEFENSE COUNSEL]: Judge, I asked them earlier if they knew [the prosecutor], and they said, no. And I presume if I bring him in here now and point out the obvious to him, I’d be better off just not doing it.

THE COURT: I’m inclined to agree with you.

Thus, the defendant, aware of the disclosed relationship, chose to proceed to trial with Mike Garrett as a juror. Accordingly, this issue has been waived. See Tenn. R. App. P. 36(a), Advisory Commission Cmts. (“The last sentence of this rule is a statement of the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error.”); State v. Lawson, 794 S.W.2d 363, 368 (Tenn. Crim. App. 1990) (holding that “a [juror] disqualification *propter defectum* . . . is deemed waived if no objection is entered prior to the swearing in of the jury”); see also Lindsey v. State, 225 S.W.2d 533, 537 (Tenn. 1949) (defining *propter defectum* objections as those based on “general disqualifications, such as age, residence, relationship, feeble mindedness

and the like” and holding that such objections are waived if not raised prior to the return of the jury verdict).

IV. Election of Offenses

The defendant asserts that the trial court erred by not requiring the State to make an election, at the close of its proof, as to offenses. The State responds that it was not required to do so because, in its case in chief, the only proof presented was as to the three charged offenses. Additionally, the State asserts that the trial court properly instructed the jury as to election of offenses, the time frame of the charged occurrences was sufficiently narrowed and identified, and the jury convicted the defendant on all three charged offenses. We will review this claim.

The doctrine of election requires the State to elect the facts upon which it is relying to establish a charged offense where there is evidence at trial that the defendant has committed multiple offenses against the victim. State v. Johnson, 53 S.W.3d 628, 630 (Tenn. 2001) (citations omitted). “The election requirement safeguards the defendant’s state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence.” Id. at 631 (citing State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999)). Our supreme court, in Burlison v. State, 501 S.W.2d 801 (Tenn. 1973), expressed the rule regarding election of offenses in cases involving evidence of separate incidents of sexual assault:

We hold that it was the duty of the trial judge to require the State, at the close of its proof-in-chief, to elect the particular offense of carnal knowledge upon which it would rely for conviction, and to properly instruct the jury so that the verdict of every juror would be united on the one offense.

Id. at 804. When a defendant is charged in an indictment which is “not time specific and when the evidence relates to sex crimes that allegedly occurred during the time as charged in the indictment,” the “other sex crimes” evidence is admissible; however, “the State must elect at the close of its proof-in-chief as to the particular incident for which a conviction is being sought.” Rickman, 876 S.W.2d at 829. “The defendant’s ‘right to a unanimous jury before conviction requires the trial court to take precautions to ensure the jury deliberates over the particular charged offense, instead of creating a ‘patchwork verdict’ based on different offenses in evidence.’” State v. Clabo, 905 S.W.2d 197, 204 (Tenn. Crim. App. 1995) (quoting State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993)).

The State advised that it intended to present proof only as to the three charged offenses and, on direct examination, elicited proof from the two victims only of those incidents. However, during cross-examination, as the two victims gave their responses, they alleged, by the defendant’s view, other offenses committed by him, thus necessitating an election by the State. In our review of this issue, we first will examine the victims’ testimony on which the defendant relies for this argument.

In his direct testimony, B.J.T. testified as to both incidents alleged in the indictments, describing, *inter alia*, where they had occurred and the details of each. During cross-examination, as he was asked about prior statements made to various investigators, he agreed he

had said, to at least one investigator, that “it happened several times.” In response to a series of questions, he denied saying it had happened one time, four or more times, or as many as six times or more. He said then, as he had during his direct examination, that the defendant had assaulted him twice. What the defendant argues on appeal, a reference to a third incident, occurred as defense counsel was questioning the victim during recross-examination:

Q. Okay. And that business about oral sex that you told Mrs. Smith about, that you didn't tell Investigator Chapman and you didn't tell Mrs. Deason and you didn't tell Mrs. Pearce, was that a lie or the truth?

A. Truth.

As we read the record and the defendant's brief, this exchange represents the sole reference to and the entire information about a so-called third incident, this consisting of “oral sex.”

As to R.G.T., the defendant argues that an election was required because he testified as to three incidents, although the defendant was being tried for only one as to him. We will review the trial testimony upon which the defendant relies for this assertion.

During his direct examination, the victim testified that the defendant had penetrated his rectum with his penis on one occasion. On cross-examination, the victim denied telling Investigator Chapman that the defendant had penetrated him “six” times or “three or four times.” The victim said he told Chapman it happened two times, and that it had. Asked whether oral sex had “happened,” the victim said, “It happened.” The victim was not asked to provide any details as to the second anal penetration or the oral sex and did not, otherwise, do so.

The State must make an election when there is proof of multiple offenses. See Brown, 992 S.W.2d at 391 (“This Court has consistently held that when the evidence indicates the defendant has committed multiple offenses against a victim, the prosecution must elect the particular offense as charged in the indictment for which the conviction is sought.”); see also State v. Kenneth Lee Herring, No. M1999-00776-CCA-R3-CD, 2000 WL 1208311, at *5 (Tenn. Crim. App. Aug. 24, 2000), perm. to appeal denied (Tenn. Feb. 20, 2001) (explaining that Burlison requires election “when the proof shows multiple offenses which each could sustain the allegations of the criminal charge”); State v. Arthur Clark, No. W1999-01747-CCA-R3-CD, 2000 WL 1224756, at *2 (Tenn. Crim. App. Aug. 25, 2000), perm. to appeal denied (Tenn. Feb. 12, 2001) (explaining that the “doctrine of election requires the State to elect a set of facts when it has charged a defendant with one offense, but there is evidence of multiple offenses”) (citing Brown, 992 S.W.2d at 391). As a part of the jury instructions, the trial court gave the following as to unanimity:

The offense charged in each separate count or indictment is a separate and distinct offense. You must decide each charge separately on the evidence and the law applicable to it. The defendant may be found guilty or not guilty on any or all of the offenses charged. Your finding as to each offense charged must be stated in your verdict.

When there is evidence of a victim being subject to similar acts on different occasions, without specific dates, the jury must be careful in their deliberations and their decisions to make certain that any verdict by the jury is unanimous as to a specific act on a specific occasion, even if the date is unknown. In other words, a verdict cannot be a patchwork of two or more groups of jurors thinking of two or more different acts, when deciding on one charge.

Even if an election were required, we conclude that the error in not doing so was harmless. First, as to B.J.T., we note especially the specificity with which he testified as to the offense occurring around his birthday in November 1997. For example, the Shelton court explained that “the trial court should bear in mind that the purpose of election is to ensure that each juror is considering the same occurrence. If the prosecution cannot identify an event for which to ask a conviction, then the court cannot be assured of a unanimous decision.” 851 S.W.2d at 138 (footnote omitted). We have previously held that “minor references” to other instances of sexual contact which are made “only in general terms,” and the subsequent failure to elect by the State, are, in some circumstances, harmless error beyond a reasonable doubt. See Kenneth Lee Herring, 2000 WL 1208311, at **7-8. This is particularly so when the witness describes the charged incident with “particularity,” in other words, with sufficient detail of time, place, and method, such that the jury is able to consider the charged incident and rely on the “one particular instance” in rendering its verdict. Id. at *7. Here, B.J.T. described the first incident of anal intercourse by the defendant with some particularity, saying that he was asleep in his bed, lying on his stomach wearing pajama bottoms, when he awoke to find his pajamas down and the defendant anally penetrating him with his penis. He described this incident as happening near his birthday around November 1997 and said that the defendant stopped raping him and left the room when B.J.T.’s mother came in. As to the second incident involving B.J.T., this court previously has determined that the evidence was sufficient to sustain the convictions. Given all of this, we cannot conclude that his uttering the word “truth,” when asked on recross examination as to whether the defendant had performed oral sex on him, could have resulted in juror confusion necessitating an election of offenses.

R.G.T. testified on direct examination as to a single act of anal intercourse which occurred as he had been sleeping in his bedroom at the trailer, the victim wearing his pajamas at the time. Previously, this court has held that the evidence as to this incident was sufficient to sustain the defendant’s conviction. The sole reference to a second incident occurred as R.G.T. was being questioned about telling investigators about incidents with the defendant and the varying numbers he had given. He responded that “[i]t happened” twice, after being asked if he had told one of the investigators there were two incidents. No information was given as to this second incident. As to the third incident, consisting of oral sex, he denied, at the beginning of his cross-examination, that he had performed oral sex on the defendant. Asked again during his cross-examination about oral sex he performed on the defendant, R.G.T. said, “It happened.” No details were given as to this incident.

As to the defendant’s claim that the State should have made an election as to R.G.T., we conclude, as we did for B.J.T., that an election requirement was not created by testimony as to

two other incidents. Although it would not operate as an election, we note that the State, in its opening statement, told the jury it was proceeding on three incidents.

CONCLUSION

_____ We conclude the trial court erred by not severing the three counts against the defendant into separate trials. Accordingly, we reverse the convictions and remand to the trial court for new trials.

ALAN E. GLENN, JUDGE