State v. Grammer

Court of Criminal Appeals of Tennessee, At Knoxville

June 27, 2006, Assigned on Briefs ; February 26, 2007, Filed

No. E2005-02604-CCA-R3-CD

Reporter
2007 Tenn. Crim. App. LEXIS 171 *; 2007 WL 595908

STATE OF TENNESSEE v. SCOTT W. GRAMMER

Subsequent History: Appeal denied by State v. Grammar, 2007 Tenn. LEXIS 549 (Tenn., June 18, 2007)

Post-conviction relief denied at Grammer v. State, 2011 Tenn. Crim. App. LEXIS 408 (Tenn. Crim. App., June 6, 2011)

Writ of habeas corpus denied, Dismissed by, Motion denied by, As moot, Certificate of appealability denied Grammer v. Easterling, 2013 U.S. Dist. LEXIS 64111 (E.D. Tenn., May 3, 2013)

Related proceeding at State v. Grammer, 2017 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App., Mar. 29, 2017)

Prior History: [*1] Tenn. R. App. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed. Appeal from the Hamilton County Criminal Court. No. 247368. Jon Kerry Blackwood, Senior Judge.

Disposition: Judgments of the Criminal Court Affirmed.

Core Terms

trial court, photographs, contends, sexual, touched, poem, sexual battery, aggravated, sexual abuse, preparation, discovery, speedy trial right, reflects, records, indictment, offenses, sex, instances, remember, vagina, bill of particulars, entitled to relief, inappropriately, penis, probative value, jury's verdict, speedy trial, convicted, election, arrest

Case Summary

Procedural Posture

A jury for the Hamilton County Criminal Court (Tennessee) found defendant guilty of three counts of aggravated sexual battery. The trial court sentenced defendant to 11 years for each conviction and ordered two of the sentences be served consecutively, resulting in an effective sentence of 22 years. Defendant appealed.

Overview

The child victim stated that defendant began sexually abusing her when she was nine years old. The victim's psychological instability was a valid reason for the 17-month period of time between arrest and trial. However, defendant did not show prejudice resulting from the delay. Furthermore, given the valid reasons for the delay, it could not be said that his pretrial incarceration, by itself, so prejudiced defendant that his right to a speedy trial under Tenn. Const. art. I, § 9 and Tenn. Code Ann. § 40-14-101 was violated. In addition, the evidence was sufficient to support the jury verdict finding defendant guilty of three counts of aggravated sexual battery because (1) the victim testified that while she and defendant were watching a movie, he inserted his finger and tongue into her privates; (2) she remembered one incident in which defendant had her lie on top of him with her hind end over his face and defendant performed oral sex on her and put his fingers in her privates while she masturbated him; and (3) she stated that during another incident defendant pulled the victim close, gave her an open mouthed kiss, started touching her private areas, and had her remove her clothes.

Outcome

The appellate court affirmed the trial court's judgment.

LexisNexis® Headnotes

Evidence > Admissibility > Conduct

Evidence > Prior Acts, Crimes & Wrongs

HN1[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). It may, however, be admissible for other purposes.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN2[] **Sexual Assault, Abuse of Children**

There is no general "sex crime" exception to the general rule against admitting evidence of other crimes, Tenn. R. Evid. 404(b). However, there is a limited exception that the State should be allowed some latitude in the prosecution of criminal acts committed against young children who are frequently unable to identify a specific date on which a particular offense was committed.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Evidence > Relevance > Relevant Evidence

HN3[] **Sexual Assault, Abuse of Children**

Where the indictment charges that sex crimes occurred over a span of time, evidence of unlawful sexual contact between a defendant and a child victim allegedly occurring during the time charged in the indictment is admissible. The State, however, must elect at the close of its proof-in-chief as to the particular offense or offenses for which it is seeking a conviction. Evidence of a prior sex crime that is necessarily included within the charge of the indictment is also necessarily relevant to the issues being tried and, therefore, is admissible.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN4[] **Preliminary Questions, Admissibility of Evidence**

When a party does not object to the admissibility of evidence, the evidence becomes admissible notwithstanding any other rule of evidence to the contrary, and the jury may consider that evidence for its natural probative effects as if it were in law admissible.

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN5[] **Objections & Offers of Proof, Objections**

In the absence of a contemporaneous objection to proffered evidence in a criminal prosecution, the evidence is competent, and any complaint about the admission of such evidence risks waiver.

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > ... > Conduct Evidence > Sex Offenses > Rape Shield Laws

HN6[] **Trials, Judicial Discretion**

The admissibility of evidence of a victim's other sexual activity pursuant to Tenn. R. Evid. 412 rests in the discretion of a trial court.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > ... > Conduct Evidence > Sex Offenses > Rape Shield Laws

HN7[] **Preliminary Questions, Admissibility of Evidence**

Tenn. R. Evid. 412(c)(4)(ii) mandates that evidence of specific instances of a victim's sexual behavior is inadmissible unless the evidence concerns sexual behavior with persons other than an accused and is offered to prove or explain the source of semen, injury, disease, or knowledge of sexual matters.

Evidence > ... > Conduct Evidence > Sex Offenses > Rape Shield Laws

HN8 **Sex Offenses, Rape Shield Laws**

Tenn. R. Evid. 412(c)(4)(ii) will most frequently be used in cases where a victim is a young child who testifies in detail about sexual activity. To disprove any suggestion that the child acquired the detailed information about sexual matters from the encounter with an accused, the defense may want to prove that the child learned the terminology as the result of sexual activity with third parties. However, even if those requirements are satisfied, before admitting such evidence, a trial court must also determine that the probative value of the evidence outweighs its unfair prejudice to the victim. Tenn. R. Evid. 412(d)(4).

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > General Overview

HN9 **Discovery by Defendant, Reports of Examinations & Tests**

See Tenn. R. Crim. P. 16(a)(1)(F).

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Types of Evidence > Circumstantial Evidence

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > ... > Examination > Cross-Examinations > General Overview

HN10 **Abuse of Discretion, Evidence**

With regard to medical and psychological records evidence discovered pursuant to Tenn. R. Crim. P. 16(a)(1)(F), a trial judge, in his sound judicial discretion, must be the arbiter of the probative value either as direct evidence or as a source of cross-examination of the findings. The admissibility, relevancy, and competency of evidence are matters entrusted to the sound discretion of a trial court. With that principle in mind, an appellate court reviews the trial court's evidentiary rulings for abuse of discretion.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Records

Evidence > Inferences & Presumptions > Presumptions

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

HN11 **Preservation for Review, Records**

Generally, when the appellate record is inadequate, an appellate court is precluded from considering an issue, and a trial court's ruling is presumed correct.

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

HN12 **Discovery by Defendant, Reports of Examinations & Tests**

See Tenn. Code Ann. § 37-1-612.

Criminal Law & Procedure > ... > Discovery by Defendant > Reports of Examinations & Tests > General Overview

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

HN13 **Discovery by Defendant, Reports of**

Examinations & Tests

Because Tenn. Code Ann. § 37-1-612 makes reports of child sexual abuse confidential, an appellate court does not reach the question of whether a summary is subject to disclosure under Tenn. R. Crim. P. 16. Although Tenn. Code Ann. § 37-1-612 identifies exceptions to the prohibition against production of child sexual abuse reports, the appellate court has held that production to individuals accused of child sexual abuse is not among the exceptions.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN14 **Criminal Process, Speedy Trial**

Criminal defendants are statutorily and constitutionally entitled to a speedy trial. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Tenn. Code Ann. § 40-14-101.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN15 **Criminal Process, Speedy Trial**

The right to a speedy trial, U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Tenn. Code Ann. § 40-14-101, protects an accused from oppressive pretrial incarceration, anxiety, and concern arising from unresolved criminal charges, and the possibility that the accused's defense will be impaired by fading memories and the loss of exculpatory evidence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN16 **Criminal Process, Speedy Trial**

The right to a speedy trial, U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Tenn. Code Ann. § 40-14-101, attaches at the time of arrest or indictment, whichever comes first, and continues until the date of the trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN17 **Criminal Process, Speedy Trial**

In determining whether a defendant's right to a speedy trial, U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Tenn. Code Ann. § 40-14-101, has been compromised, four factors must be weighed: the length of the delay; the reason for the delay; the defendant's assertion of his right to a speedy trial; and any prejudice to the defendant caused by the delay. Prejudice is the single most important factor in the balancing test, and the most important issue concerning prejudice to the defendant is the impairment of the ability to prepare a defense. However, it is not necessary for a court to consider those factors unless there has been some delay which is presumptively prejudicial. Such a delay must approach one year to trigger an analysis of the remaining factors although the line of demarcation depends on the nature of the case.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN18 **Criminal Process, Speedy Trial**

In reviewing a trial court's determination regarding whether a defendant's right to a speedy trial was violated, U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Tenn. Code Ann. § 40-14-101, an appellate court should use an abuse of discretion standard of review. If a court concludes that a defendant was denied the right to a speedy trial, constitutional principles demand that the defendant's conviction be reversed and that the criminal charges be dismissed.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN19 **Criminal Process, Speedy Trial**

In determining whether a defendant's right to a speedy trial was violated, U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Tenn. Code Ann. § 40-14-101, the most important inquiry with regard to prejudice is whether the delay impaired a defendant's ability to prepare a defense.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN20 **Discovery by Defendant, Tangible Objects**

See Tenn. R. Crim. P. 16(a)(1)(F).

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > General Overview

HN21 **Discovery & Inspection, Discovery Misconduct**

When arguing that the State has violated Tenn. R. Crim. P. 16, a defendant bears the burden of showing the degree to which the impediments to discovery hindered trial preparation and defense at trial. Failure by either party to comply with the discovery rule authorizes a court to fashion an appropriate remedy which it deems just under the circumstances. Tenn. R. Crim. P. 16(d)(2). Thus, it is clear that the court has wide discretion to fashion a remedy that is appropriate for the circumstances of each case and the sanction must fit the circumstances of that case. Despite that broad discretion, evidence should not be excluded except when it is shown that a party is actually prejudiced by the failure to comply with the discovery order, and the prejudice cannot be otherwise eradicated.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

Criminal Law & Procedure > Trials > Judicial Discretion

HN22 **Abuse of Discretion, Evidence**

The admissibility of photographs is a matter within the discretion of a trial court, and the trial court's ruling concerning the admission into evidence of the photographs will not be overturned on appeal except upon a clear showing of an abuse of discretion.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

Evidence > Relevance > Relevant Evidence

HN23 **Preliminary Questions, Admissibility of Evidence**

To be admissible, photographs must be relevant to some issue at trial and their probative value must outweigh their undue prejudicial effect, if any.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Evidence > Relevance > Relevant Evidence

HN24 **Preliminary Questions, Admissibility of Evidence**

The Tenn. R. Evid. 402 states that all relevant evidence is generally admissible.

Evidence > Relevance > Relevant Evidence

HN25 **Relevance, Relevant Evidence**

Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence. Tenn. R. Evid. 401.

Evidence > Relevance > Exclusion of Relevant
Evidence > Confusion, Prejudice & Waste of Time

HN26[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Tenn. R. Evid. 403.

Counsel: Larry Young and Susie Lodico, Chattanooga, Tennessee, for the appellant, Scott W. Grammer.

Robert E. Cooper, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William H. Cox, III, District Attorney General; and ***Mary Sullivan Moore*** and Rachel Winfrey, Assistant District Attorneys General, for the appellee, State of Tennessee.

Judges: ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and JAMES CURWOOD WITT, JR., J., joined.

Opinion by: ROBERT W. WEDEMEYER

Opinion

A Hamilton County jury convicted the Defendant, Scott W. Grammer, of three counts of aggravated sexual battery. The trial court sentenced the Defendant to eleven years for each conviction and ordered two of the sentences be served consecutively, resulting in an effective sentence of twenty-two years. The Defendant now appeals, asserting that: (1) the trial court erred when it permitted the victim to testify to instances of sexual abuse not included **[*2]** in the indictment; (2) the trial court erred when it excluded, pursuant to Rule 412 of the Tennessee Rules of Evidence, evidence of an alternative source of the victim's sexual knowledge; (3) the trial court erred when it denied the Defendant's motion for discovery of the victim's medical and psychological records; (4) the Defendant's right to a speedy trial was violated; (5) the State violated Rule 16(c) of the Tennessee Rules of Criminal Procedure by failing to provide the Defendant with some photographs and a poem written by the victim; (6) the trial court erred when it permitted the State to introduce excessive photographs of the victim into evidence; and (7) the jury's verdict was improper. We affirm the judgments of the trial court.

OPINION

I. Facts

A Hamilton County jury convicted the Defendant of three counts of aggravated sexual battery of his step-daughter, "A.G." [1] At the Defendant's trial, the following evidence was presented: Mark Haley of the Chattanooga Police Department testified that on December 1, 2003, he was called to an apartment in Chattanooga in response to a sex crime, and he interviewed the Defendant, the victim, and the victim's mother. Based **[*3]** on the information he received, he contacted the Detectives Bureau.

Eva Grammer testified that she is A.G.'s mother, and A.G. is her daughter from a previous marriage. In 1995, when A.G. was five years old, Grammer married the Defendant. She and the Defendant almost ended their relationship in 1993 because the Defendant had told her that he had "a problem with attraction to young girls and he was afraid that he may possibly act that attraction out with [A.G.] . . . ." Grammer stated that the Defendant used to give A.G. extended massages, and "[t]here were times when [the Defendant] appeared like he didn't want to stop touching [A.G.'s] skin."

Grammer testified that in November of 2003, A.G. became depressed and had begun cutting herself with knives. A.G. was hospitalized for depression in late November and released on December 1, 2003. During A.G.'s first night out **[*4]** of the hospital, Grammer attended a meeting and was away from the home until around 11:00 p.m. When she returned home, the Defendant informed her that A.G. was agitated and needed attention. When Grammer spoke with A.G., A.G. stated that she wanted to cut herself and that she did not think she could keep herself safe overnight. Grammer testified that she contacted A.G.'s caseworker at the hospital to inquire about checking A.G. back into the hospital. The caseworker indicated that A.G.'s behavior was not atypical because many young people

[1] We will refer to the Defendant's step-daughter by her initials, "A.G.," or as "the victim" to protect the identity of this minor victim.

develop close friendships while hospitalized and will "act up" in order to be readmitted. When Grammer finished the phone conversation with the caseworker, A.G. told Grammer that she wanted Grammer to read some of the poetry A.G. had written while in the hospital. The poem read, in part, ". . . you have shown me things/ A child shouldn't see/ Things a child shouldn't know/ Things that make me feel disgusting/ And I want to die!" Grammer asked A.G. if someone had touched her inappropriately, and A.G. indicated that the Defendant had. Grammer testified that she then confronted the Defendant, that the Defendant appeared to go into shock, simply repeating **[*5]** "no, no, no" to all of Grammer's inquires on the subject.

Grammer stated that she called 911, but the Defendant took the phone from her hand and hung it up. Grammer and the Defendant discussed the situation, and she told the Defendant that she was taking A.G. and leaving. According to Grammer, the Defendant asked her not to leave, and she replied that if she were going to stay, the Defendant would have to tell her the truth. The Defendant took several deep breaths and stated: "I've touched [A.G.] inappropriately." Grammer recalled yelling at the Defendant and crying, and the Defendant was also crying and apologizing profusely. Shortly thereafter, two police officers arrived and separated Grammer and the victim from the Defendant. Grammer visited the Defendant while he was incarcerated, and she indicated that during each visit he expressed remorse for what had happened. Grammer testified that the Defendant had walked around their apartment nude in front of A.G., and, at one point, she found pornographic pictures of children on the Defendant's computer.

A.G. testified that, at the time of the trial, she was fourteen years old, and she considered the Defendant to be her father. A. **[*6]** G. said that the Defendant normally wore boxer shorts or would be naked while they were at home, and the Defendant often lay in bed with her completely naked, which made her uncomfortable. A.G. stated that the Defendant began sexually abusing her when she was nine years old, and the first sexual abuse occurred in March or April of 2000, while her mother was away at a weekly social group. A.G. was at home with the Defendant watching the film Pleasantville, and there was a scene involving female masturbation. A.G. indicated that, at the time, she did not know that the character in the film was masturbating and she had at that time never engaged in masturbation. During this scene, the Defendant "French kiss[ed]" her. She said that the Defendant then had her take off her clothes, touched her breasts and vagina, and performed oral sex on her. A.G. testified that the Defendant "masturbated" her by touching her on the outside of her vagina and by sticking his finger inside of her. He then made her lay down on her back and inserted his tongue into her vagina. A.G. testified that she thought that what the Defendant was doing was appropriate because she loved the Defendant. At one point, A. **[*7]** G. asked the Defendant if there was anything wrong with it, and he responded that "not everyone thinks this is right." A.G. said she then asked him, "Does [m]ommy think this is al[]right?" He responded, "No, so you shouldn't tell her." A.G. testified she did not ask the Defendant any further questions because she trusted him.

A.G. estimated that similar incidents started taking place about once a week and that the incidents usually took place while her mother was away with her social group. A.G. agreed that sometimes the abuse would take place while her mother was asleep and A.G. was in bed with her mother and the Defendant. She testified that once, in June or July, on a Sunday afternoon, she was taking a nap on the bed that her mother and the Defendant shared and, when her mother fell asleep, the Defendant kissed her and touched her breasts and vagina.

A.G. testified that another time, also in the summer and during the day, the Defendant came into A.G.'s room while A.G.'s mother was asleep. A.G. was having trouble with a video game called "Pets," and the Defendant determined that a piece of software needed to be downloaded to fix the game. While the software was downloading, **[*8]** the Defendant kissed A.G. and had her take off her clothes.

A.G. stated that an additional episode of abuse occurred one night in the living room. A.G. was uncertain where her mother was, but she believed her mother was at the store. A.G. said that she and the Defendant had just returned to the house, and the Defendant proceeded to remove all of his clothing, "French kiss" her, and touch her breasts. This incident was interrupted by a neighbor knocking on their door.

A.G. described another encounter in the bedroom shared by her mother and the Defendant, where the Defendant asked A.G. to touch his erect penis. She recalled that she was reluctant to do so and that he took her hand and guided it to his penis. She said that she just remained still because she did not know what was expected of her and that eventually the Defendant guided her hand so that she was rubbing his penis up

and down. A.G. said that the Defendant then ejaculated and that she got semen on her hand. She described his semen as "clearish white," and she said, "It came out of the top [and] just kind of flowed down it, because he was lying on his back." She said that she was "kind of grossed out," and she scrubbed **[*9]** her hands "like they wouldn't come clean." A.G. estimated that she had masturbated the Defendant around fifteen times and that the Defendant had performed oral sex on her twenty to twenty-five times.

A.G. stated that on several occasions the Defendant had her lie on top of him. She described one such incident in detail saying:

> [H]e had me lay on top of him with my hind-end like over his face, and he performed oral sex on me and put his tongue and fingers inside of me and had me masturbate him. . . . I remember it was daylight, warm outside, because I remember while this was happening, a lot of times I would look out the window, because I didn't want to pay attention to what was happening.

A.G. testified that in November of 2003, after a fight with her mother, she began thinking about the abuse and decided to start cutting herself to feel better. She indicated that some friends at school were very involved in cutting themselves and told her that it would make her feel much better. On November 24, 2003, A.G. was admitted to the hospital for the psychological and emotional problems she was having. On December 1, 2003, she was released, and the following day she disclosed **[*10]** the abuse she had suffered. A.G. also recalled the Defendant acknowledging "I touched her inappropriately" when A.G.'s mother threatened to leave the Defendant if he did not tell her the truth.

A.G. testified that sometimes during the abuse she would ask the Defendant to stop, and he would momentarily stop and then commence what he was doing. She said that the abuse finally ceased when she was around eleven years old. She recalled that the Defendant never inserted his penis into her.

On cross-examination, A.G. agreed that sometimes she cut herself because she was upset about breaking up with a girlfriend. A.G. also acknowledged that during her initial interview regarding the abuse, she may have said that she could not remember anything specific and that her memory of the incidents was "fuzzy." She testified that as time has passed, she has begun to remember things better.

The Defendant testified that he had a good relationship with A.G. However, he felt that the relationship became strained when A.G. began to go through puberty. According to the Defendant, A.G.'s behavior further deteriorated through 2003, and A.G. began cutting herself in November of 2003 when A.G. broke up with **[*11]** her girlfriend. The Defendant said that he and his wife responded by taking A.G. to an inpatient facility, but A.G. was allowed to return home after "contracting" that she would not hurt herself. Shortly thereafter, A.G. woke the Defendant and his wife up one night and said that she wanted to cut herself, which they later learned was actually an aborted suicide attempt. A.G. was readmitted into the psychiatric hospital and remained there for several days.

The Defendant testified that, upon A.G.'s return home, A.G. informed her mother that the Defendant had been touching her inappropriately. The Defendant stated that he was first made aware of this accusation while A.G.'s mother was on the phone with what he believed was the psychiatric hospital. He said that he took the phone and hung it up out of "instinct" and that he did not know that A.G.'s mother was actually on the phone with a 911 operator. The Defendant denied ever making the statement "I touched her inappropriately" during the initial confrontation with A.G.'s mother. The Defendant stated that a few minutes later the police arrived, and he was told that he had to leave and to contact Detective Akins in the morning. The Defendant **[*12]** testified that he never expressed any form of sexual attraction to children.

On cross-examination, the Defendant denied walking around the house naked in front of A.G. He stated that Grammer had insisted it was fine for him to be naked in front of A.G. when she was young, but he never felt comfortable being nude in her presence and stopped when A.G. was seven or eight years old. The Defendant indicated that Grammer had testified that the Defendant said "I touched her inappropriately" because Grammer wanted to facilitate a divorce with him. The Defendant stated that he never contacted any girls A.G.'s age on the internet but that he did communicate on the internet with a couple of girls three or four years older than A.G. He was referred to these girls' online diary entries from A.G.'s online diary, and he read them because they were similar in content to A.G.'s and would allow him to better understand how A.G. was thinking.

The Defendant denied ever having pornography on the computer in the home and indicated that he had not fought with Grammer about the issue. The Defendant testified that A.G. would lie to get out of trouble and that,

in spite of the allegations leveled against **[*13]** him, he still loved A.G. He indicated that A.G. had severe problems and that he did not hold her responsible for her words or actions in this case. The Defendant denied sexually abusing A.G., and he stated that he did not deny the allegation to the police when they arrived because he was "mortified" and did not know what to say. The Defendant indicated that he never apologized to Grammer for anything that transpired between the Defendant and A.G. He also did not recall A.G. ever writing poetry.

II. Analysis

On appeal, the Defendant asserts that: (1) the trial court erred when it permitted the victim to testify to instances of sexual abuse not included in the indictment; (2) the trial court erred when it excluded, pursuant to Rule 412 of the Tennessee Rules of Evidence, evidence of an alternative source of the victim's sexual knowledge; (3) the trial court erred when it denied the Defendant's motion for discovery of the victim's medical and psychological records; (4) the Defendant's right to a speedy trial was violated; (5) the State violated Rule 16(c) of the Tennessee Rules of Criminal Procedure by failing to provide the Defendant with some photographs and a poem written by **[*14]** the victim; (6) the trial court erred when it permitted the State to introduce excessive photographs of the victim into evidence; and (7) the jury's verdict was improper.

A. Victim's Testimony

The Defendant contends that the trial court erred when it refused to limit the victim's testimony to three instances of sexual abuse. Specifically, the Defendant contends that the victim's testimony about ongoing and continual abuse violated Tennessee Rule of Evidence 404(b). The State contends that the trial court properly refused to limit the victim's testimony to three instances of sexual abuse.

The record reflects that, at trial, A.G. testified in detail about three particular incidents. The victim also provided the following testimony:

> General Moore: Did he ever ask you to touch him?
> A.G.: Yes.
> General Moore: Could you describe that for the jury?
>
> A.G.: I remember one time, it was in their bedroom, and he asked me to touch him. I was kind of reluctant and, so, he took my hand, and not like forcefully, like he was going to break my hand if I didn't, but he took my hand and placed it on his penis. And I just kind of sat there for a while and I looked at him and I was just **[*15]** kind of like what do I do now. And he took my hand and he had me rub it up and down his penis and -
> General Moore: And what?
> A.G.: And, eventually, he ejaculated, and I got semen on my hand at that time.
> General Moore: What did the semen look like?
> A.G.: It was sort of a clearish white.
> General Moore: And how did it come out of his penis?
> A.G.: It came out of the top, just kind of flowed down it, because he was lying on his back.
> General Moore: And what did you think about that?
> A.G.: I was kind of grossed out. I was just kind of like - it was just kind of like one of those things where I'm like what do I do now, what is this, what's going on. And I remember I washed my hands and I just kept scrubbing, like they wouldn't get clean.
> General Moore: How may times would you estimate that you've masturbated your stepfather?
> A.G.: Not very often, maybe fifteen.
> General Moore: Fifteen times in a year or fifteen times total?
> A.G.: Total.
> General Moore: And how many times would you estimate your stepfather inserted his finger in your vagina?
> A.G.: Almost every time that he performed oral sex on me, so that would have been like 20, 25 times.
>
> General Moore: Twenty-five times per **[*16]** year or total?
> A.G.: Total.

HN1[↑] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). It may, however, be admissible for other purposes. Id. In State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994), the Tennessee Supreme Court held that ***HN2***[↑] there is no general "sex crime" exception to the general rule against admitting evidence of other crimes. See also State v. Burchfield, 664 S.W.2d 284, 287 (Tenn. 1984). However, the Rickman court recognized that, as a limited exception, the State should be allowed some latitude in the prosecution of criminal acts committed against young children who are frequently unable to identify a specific date on which a particular offense was committed. Rickman, 876 S.W.2d at 828.

The Rickman court explained that:

> [W]here ***HN3***[] the indictment charges that sex crimes occurred over a span of time, evidence of unlawful sexual contact between the defendant and the victim allegedly occurring during the time charged in the indictment is admissible. The State, however, must elect **[*17]** at the close of its proof-in-chief as to the particular offense or offenses for which it is seeking a conviction . . . .
>
> [E]vidence of a prior sex crime that is necessarily included within the charge of the indictment is also necessarily relevant to the issues being tried and, therefore, is admissible.

Id. at 828-29 (citations omitted).

First, we note that the Defendant has risked waiver of his right to appeal this issue by failing to object to the testimony at trial. By not objecting at trial, the Defendant "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). ***HN4***[] "When a party does not object to the admissibility of evidence, . . . the evidence becomes admissible notwithstanding any other [r]ule of [e]vidence to the contrary, and the jury may consider that evidence for its 'natural probative effects as if it were in law admissible.'" State v. Smith, 24 S.W.3d 274, 280 (Tenn. 2000) (quoting State v. Harrington, 627 S.W.2d 345, 348 (Tenn. 1981). ***HN5***[] In the absence of a contemporaneous objection to proffered evidence in a criminal prosecution, **[*18]** the evidence is competent, and any complaint about the admission of such evidence risks waiver. State v. Hopper, 695 S.W.2d 530, 536 (Tenn. Crim. App. 1985).

However, in addressing this issue on its merits, we conclude that the case under submission falls squarely within the Rickman exception. The indictment is not time specific and alleges only that the offenses occurred prior to October 21, 2003. The victim's testimony about other instances of sexual abuse described events that occurred prior to October 21, 2003. The victim explained that she was only able to remember "bits and pieces" of individual instances of abuse. The Defendant contends that the bill of particulars in the case under submission took the case outside the purview of the Rickman exception because the State was able to outline a few details of the abuse. However, for the purposes of the Rickman exception, the relevant inquiry is not the information in the bill of particulars but the information set forth in the indictment. See Rickman, 876 S.W.2d at 829.

Additionally, the State's election of offenses was not identical to the information contained in the bill of particulars. **[*19]** For instance, one offense alluded to in the bill of particulars was completely absent from the election of offenses. The election of offenses provided details of how the Defendant inserted his tongue into the victim's vagina while she masturbated him with her "hind-end" in his face while the victim looked out the window. The bill of particulars did not describe this instance. The victim's trial testimony also provided other details that were absent from the bill of particulars but were included in the election of offenses. These differences between the bill of particulars and the election of offenses illustrate the uncertainty on the part of the prosecution and demonstrate that the State needed the "latitude in the prosecution of criminal acts committed against young children" discussed in Rickman. Id. Therefore, the Rickman exception applies to the case under submission, and the Defendant is not entitled to relief on this issue.

B. Victim's Prior Sexual Relationship

The Defendant contends that the trial court erred when, pursuant to Tennessee Rule of Evidence 412, it excluded evidence of the victim's prior lesbian relationship. Specifically, the Defendant argues **[*20]** that the trial court should have allowed him to question the victim regarding her sexual experiences with her former girlfriend in order to show that the victim's knowledge of sexual matters was obtained from persons other than the accused. The State contends that the trial court properly exercised its discretion by excluding evidence of the victim's prior relationship.

The record reflects that in A.G.'s Children's Advocacy Center interview, conducted shortly after her accusations, the interviewer wrote, "I asked her if someone else has licked her privates, and she stated, 'my girlfriend, my ex, that is.'" The trial court held that the prejudicial effect of the evidence outweighed its probative value and excluded the evidence. The court said it would revisit the issue if the proof showed that the events for which the Defendant was charged occurred after her sexual activity with her ex-girlfriend. The record reflects that all of the instances of abuse occurred before that sexual activity.

HN6[] The admissibility of evidence pursuant to Tennessee Rule of Evidence 412 rests in the discretion of the trial court. State v. Sheline, 955 S.W.2d 42, 46 (Tenn. 1997). ***HN7***[] Rule 412 (c)(4)(ii) **[*21]**

mandates that evidence of specific instances of a victim's sexual behavior is inadmissible unless the evidence concerns sexual behavior with persons other than the accused and is offered to prove or explain the source of semen, injury, disease, or knowledge of sexual matters. The Advisory Commission Comments state that ***HN8***[] Rule 412(c)(4)(ii):

> will most frequently be used in cases where the victim is a young child who testifies in detail about sexual activity. To disprove any suggestion that the child acquired the detailed information about sexual matters from the encounter with the accused, the defense may want to prove that the child learned the terminology as the result of sexual activity with third parties.

Id. Advisory Comm'n Cmts. However, even if these requirements are satisfied, before admitting such evidence, the trial court must also determine that the probative value of the evidence outweighs its unfair prejudice to the victim. See id. 412(d)(4).

The trial court properly exercised its discretion when it excluded evidence of the victim's prior relationship. The important factors in the State's case were the victim's clear and detailed account of the abuse **[*22]** and the fact that the Defendant admitted to the victim's mother that he had touched the victim inappropriately. As the State asserts, the victim's prior sexual behavior and the basis of her knowledge of sexual matters had no relevance to these elements of the State's case.

Furthermore, considerable prejudice against the victim may have resulted from allowing the Defendant to make public the fact that the victim had the previous experiences with her ex-girlfriend. Again, we agree with the State's argument that the record is clear that the victim's relationship with her ex-girlfriend was a factor that had complicated the victim's struggle with depression. Therefore, the trial court properly considered the unfair prejudice to the victim. The trial court did not abuse its discretion, and the Defendant is not entitled to relief on this issue.

C. Motion for Discovery

The Defendant contends that the trial court erred when it denied his motion for discovery of the victim's medical and psychological records. Specifically, the Defendant contends that, pursuant to Tennessee Rule of Criminal Procedure 16(a)(1)(D), he was entitled to inspect the victim's medical and psychological records **[*23]** in order to prepare his defense. The Defendant further contends that his inability to view these records hindered his ability to prepare for trial and to conduct an effective cross-examination of the victim. The State contends that the trial court properly denied the Defendant's motion for discovery of the victim's medical and psychological records. The State further argues that the records were not material to the preparation of the defense and that they were confidential pursuant to Tennessee Code Annotated section 37-1-612.

The record reflects that the trial court conducted an in camera inspection of the requested records to determine whether they had any probative value to the Defendant in the preparation of his defense. The trial court concluded that the requested records were of no value to the preparation of the defense.

HN9[] Pursuant to Tennessee Rule of Criminal Procedure 16(a)(1)(F):

> Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control **[*24]** of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney general and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

First we note that, ***HN10***[] with regard to such evidence, "the trial judge, in his sound judicial discretion, must be the arbiter of the probative value either as direct evidence or as a source of cross-examination of the findings." State v. Brown, 552 S.W.2d 383, 387 (Tenn. 1997). The admissibility, relevancy, and competency of evidence are matters entrusted to the sound discretion of the trial court. With that principle in mind, we review the trial court's evidentiary rulings for abuse of discretion. See State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997); State v. Gray, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997). After a thorough review of the record, we could not locate the requested records at issue. ***HN11***[] Generally, when the appellate record is inadequate, the appellate court is precluded from considering the issue, and the trial court's ruling is presumed correct. See State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App.1991); **[*25]** State v. Matthews, 805 S.W.2d 776, 778 (Tenn. Crim. App.1990); State v. Roberts, 755 S.W.2d at 836. Without the medical records at issue, we must presume that the trial court's

ruling was supported by the evidence.

Furthermore, ***HN12***[] Pursuant to Tennessee Code Annotated section 37-1-612:

> In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, all records concerning reports of child sexual abuse, including files, reports, records, communications and working papers related to investigations or providing services; video tapes; reports made to the abuse registry and to local offices of the department; and all records generated as a result of such processes and reports, shall be confidential and exempt from other provisions of law, and shall not be disclosed.

In State v. Kevin Hunter Biggs, No. E2005-01402-CCA-R3- Cust. Dec., 218 S.W.3d 643, 2006 Tenn. Crim. App. LEXIS 654, 2006 WL 2457669, at *16 (Tenn. Crim. App., at Knoxville, Aug. 25, 2006), *no Tenn. R. App. P. 11 application filed*, this court held that a defendant was not entitled to a copy of the victim's interview at the Children's **[*26]** Advocacy Center. This Court explained that:

> ***HN13***[] Because Tennessee Code Annotated section 37-1-612 makes reports of child sexual abuse confidential, we do not reach the question of whether the summary is subject to disclosure under Rule 16. Although the statute identifies exceptions to the prohibition against production of child sexual abuse reports, this court has held that production to individuals accused of child sexual abuse is not among the exceptions.

Id. (citations omitted). Therefore, Tennessee Code Annotated section 37-1-612 precluded discovery of the victim's mental health records, and the Defendant is not entitled to relief on this issue.

D. Right to a Speedy Trial

The Defendant contends that his right to a speedy trial was violated because he was arrested on December 19, 2003, and his trial began on May 17, 2005. The State contends that the Defendant's right to a speedy trial was not violated because the delay was caused by the victim's psychological instability.

HN14[] Criminal defendants are statutorily and constitutionally entitled to a speedy trial. See U.S. Const. amend. VI; Tenn. Const. art. **[*27]** I, § 9; Tenn. Code Ann. § 40-14-101. ***HN15***[] The right to a speedy trial protects the accused from oppressive pretrial incarceration, anxiety and concern arising from unresolved criminal charges, and the possibility that the accused's defense will be impaired by fading memories and the loss of exculpatory evidence. See Doggett v. United States, 505 U.S. 647, 654, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); State v. Simmons, 54 S.W.3d 755, 758 (Tenn. 2001). ***HN16***[] "The right to a speedy trial attaches at the time of arrest or indictment, whichever comes first, and continues until the date of the trial." State v. Vickers, 985 S.W.2d 1, 5 (Tenn. Crim. App. 1997).

HN17[] In determining whether a defendant's right to a speedy trial has been compromised, four factors must be weighed: the length of the delay; the reason for the delay; the defendant's assertion of his right to a speedy trial; and any prejudice to the defendant caused by the delay. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); State v. Utley, 956 S.W.2d 489, 492 (Tenn. 1997); State v. Bishop, 493 S.W.2d 81, 83-84 (Tenn. 1973). **[*28]** "[P]rejudice [is] the single most important factor in the balancing test," State v. Baker, 614 S.W.2d 352, 356 (Tenn. 1981), and the most important issue concerning prejudice to the defendant is the impairment of the ability to prepare a defense. Id. However, it is not necessary for a court to consider these factors unless there has been "some delay which is presumptively prejudicial." Barker, 407 U.S. at 530; see also Doggett, 505 U.S. at 651-52. Such a delay must "approach one year" to trigger an analysis of the remaining factors although "the line of demarcation depends on the nature of the case." Utley, 956 S.W.2d at 494; see also Vickers, 985 S.W.2d at 5.

HN18[] In reviewing the trial court's determination regarding whether a defendant's right to a speedy trial was violated, this Court should use an abuse of discretion standard of review. See State v. Jefferson, 938 S.W.2d 1, 14 (Tenn. Crim. App. 1996). If a court concludes that a defendant was denied the right to a speedy trial, constitutional principles demand that the defendant's conviction be reversed and that the criminal **[*29]** charges be dismissed. See State v. Bishop, 493 S.W.2d 81, 83 (Tenn. 1973).

In this case, the Defendant was arrested on December 17, 2003, and his right to a speedy trial attached on that day. See Vickers, 985 S.W.2d at 5. The Defendant filed a motion to assert his right to a speedy trial on February 11, 2005. The Defendant's trial began three months later on May 17, 2005. Therefore, the delay between his arrest and the trial spanned approximately seventeen

months.

The State set forth compelling reasons for the delay in prosecution. The record reflects the Defendant was arrested sixteen days after the victim was released from the hospital where she was receiving inpatient treatment for her psychiatric problems. The record further reflects that the victim was engaging in self-mutilation and that she had attempted suicide. The Defendant "respectfully suggests that, if the prosecuting witness was in fact so mentally unstable, perhaps the State should have reconsidered the strength of her allegations in the first place." In our view, a victim's psychiatric problems should not preclude the State from pursuing a defendant who is alleged to have sexually **[*30]** abused that victim, and the record in this case indicates that the victim's psychiatric problems were severe enough to warrant hospitalization. For these reasons, the victim's psychological instability in this case is a valid reason for the seventeen-month period of time between arrest and trial.

Further, the Defendant has shown no prejudice resulting from the delay. ***HN19***[] "The most important inquiry with regard to prejudice is whether the delay impaired the defendant's ability to prepare a defense." State v. Smythers, No. E2001-02806-CCA-R3- Cust. Dec., 2003 Tenn. Crim. App. LEXIS 433, 2003 WL 21145428, at *13 (Tenn. Crim. App., at Knoxville, May 19, 2003), *perm. app. denied* (Tenn. Oct. 27, 2003). The Defendant contends that he was prejudiced by the delay because it brought about the impossibility of asserting an alibi defense and presenting the testimony of unnamed defense witnesses who moved or became unavailable. However, the Defendant fails to state who these potential defense witnesses were or what their testimony likely would have been. He claims that his ability to communicate with his counsel and participate in his defense was diminished, but he fails to provide concrete examples to substantiate **[*31]** these claims. The only allegation of prejudice that has any substance is that the Defendant was incarcerated during the delay. However, given the valid reasons for the delay, it cannot be said that this pretrial incarceration, by itself, so prejudiced the Defendant that his right to a speedy trial was violated. For these reasons, we are unconvinced that the Defendant was prejudiced by the delay in this case. Considering all of the factors, it is clear that there was no denial of the right to a speedy trial in this case, and the Defendant is not entitled to relief on this issue.

E. Discovery Rule 16

The Defendant contends that the State violated Rule 16 of the Tennessee Rules of Criminal Procedure by failing to provide the Defendant with some photographs of the victim and a poem written by the victim. The State contends that by failing to raise timely objections the Defendant waived the issue of the State's failure to provide these items during discovery.

The record reflects that a poem written by the victim was displayed on a video screen before the jury while Grammer testified about how she learned that the Defendant had abused the victim. Grammer acknowledged that this **[*32]** was not the actual poem that she saw and that she re-wrote the poem according to her best recollection. The Defendant failed to register a contemporaneous objection to the admission of the poem. He brought the matter to the trial court's attention after the poem had been identified and read to the jury and a recess had been taken. The record also reflects that the Defendant failed to make timely objections to the admission of the photographs about which he now complains. He contends that, at trial, the State introduced several photographs of the victim which he had not previously seen. The State concedes that it should have made the photographs available to the Defendant pursuant to Rule 16 (a)(1)(F). [2]

We note that the Defendant risks waiver because he did not make timely objections based on Rule 16 or request a continuance. See Tenn. R. App. P. 36(a); State v. Robert Frost, No W2001-00818-CCA-R3, 2003 Tenn. Crim. App. LEXIS 463, 2003 WL 21339225, at *5 (Tenn. Crim. App., at Jackson, May 16, 2003), **[*33]** *no Tenn. R. App. P. 11 application filed*. Nevertheless, we will address this issue on the merits.

HN20[] According to Tennessee Rule of Criminal Procedure 16 (a)(1)(F):

> Upon request of the defendant, the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

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[2] We note that the applicable subsection in the old version of the Tennessee Rule of Criminal Procedure is subsection (a)(1)(C).

HN21[↑] When arguing that the State has violated Rule 16, a defendant bears the burden of showing "the degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Thomas Dee Huskey, No. E1999-00438-CCA-R3- Cust. Dec., 2002 Tenn. Crim. App. LEXIS 550, 2002 WL 140059, at *56 (Tenn. Crim. App., at Knoxville, June 28, 2002), *perm. app. denied* (Tenn. Feb.18, 2003) (quoting State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992)). Failure by either party to comply with **[*34]** the discovery rule authorizes the court to fashion an appropriate remedy which "it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2); see also State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). "Thus, it is clear that the court has wide discretion to fashion a remedy that is appropriate for the circumstances of each case and the sanction must fit the circumstances of that case." State v. Dennie Ray Loden, No. 03C01-9311-CR-00380, 1995 Tenn. Crim. App. LEXIS 46, 1995 WL 23351, at *2 (Tenn. Crim. App., at Knoxville, Jan. 19, 1995), *perm. app. denied* (Tenn. June 12, 1995) (citing State v. James, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984)); see State v. Leon Goins, No. W1999-01681-CCA-R3-Cust. Dec., 1999 Tenn. Crim. App. LEXIS 1291, 1999 WL 1531111, at *2 (Tenn. Crim. App., at Jackson, Dec. 27, 1999), *perm. app. denied* (Tenn. July 17, 2000). Despite this broad discretion, evidence should not be excluded except when it is shown that a party is actually prejudiced by the failure to comply with the discovery order, and the prejudice cannot be otherwise eradicated. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981).

In the case **[*35]** under submission, the trial court did not abuse its discretion when it allowed the poem and the photographs into evidence. The poem was not discoverable under Rule 16 (a)(1)(C) because it was not a document or a tangible object. The State did not possess the original poem. Instead, Grammer reconstructed the poem, and it was displayed on a screen before the jury. Further, the Defendant has failed to establish that by not receiving the poem in discovery he was hindered in trial preparation or his defense at trial. In a similar manner, the Defendant has failed to show that his ignorance of the photographs that the State introduced impeded his trial preparation. Absent a showing that the admission of the photographs affected the result of the trial, any error would be harmless. See Tenn. R. Crim. P. 52(a). Therefore, the Defendant is not entitled to relief on this issue.

F. Photographs of the Victim

The Defendants contends that the trial court erred when it permitted the State to introduce numerous photographs of the victim into evidence. At trial, during A.G.'s testimony, the State showed the jury numerous photographs and a video taken of A.G. during the time frame that the **[*36]** alleged abuse was occurring. The record reflects that the trial court kept several photographs from being entered into evidence.

The Tennessee Supreme Court has determined that ***HN22***[↑] the admissibility of photographs is a matter within the discretion of the trial court, and a trial court's ruling concerning the admission into evidence of photographs "will not be overturned on appeal except upon a clear showing of an abuse of discretion." State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). ***HN23***[↑] "To be admissible, photographs must be relevant to some issue at trial and their probative value must outweigh their undue prejudicial effect, if any." State v. Gann, 733 S.W.2d 113, 115 (Tenn. Crim. App. 1987).

HN24[↑] The Tennessee Rules of Evidence state that all relevant evidence is generally admissible. Tenn. R. Evid. 402. ***HN25***[↑] Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. ***HN26***[↑] However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by **[*37]** the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

In State v. Roy Laverne Morris, No. 10, 1991 Tenn. Crim. App. LEXIS 102, 1991 WL 16289, at *4 (Tenn. Crim. App., at Jackson, Feb. 13, 1991), *perm. app. denied* (Tenn. Oct. 19, 1998), this Court determined that the trial court did not abuse its discretion when it allowed photographs into evidence to prove that the victim was less than thirteen years of age despite a defendant's claim that the victim's age was not at issue. The Court acknowledged that the exhibit's probative value was questionable but concluded that "it does not appear that the admission of this photograph was a clear abuse of discretion. Even if we had found its admission to be an abuse of discretion, the error would have been harmless beyond a reasonable doubt." Id. (citations omitted).

In the case under submission, we believe that the

photographs had some relevance because they showed the jury what the victim looked like at the age when the alleged offenses occurred as opposed to how she looked when she testified at trial. **[*38]** The Defendant has not shown that he was prejudiced by the admission of the photographs. Furthermore, any error by the admission of the photographs was clearly harmless. The Defendant is not entitled to relief on this issue.

G. Jury's Verdict

The Defendant contends that the jury's verdict was improper. Specifically, the Defendant alleges that, by finding him guilty of three counts of aggravated sexual battery, the jury returned a compromise verdict that was not unanimous as required by Tennessee Rule of Criminal Procedure 31(a). The Defendant contends that his first two convictions constitute "compromise verdicts" because the jury should have found that either the Defendant penetrated the victim and thereby committed child rape or the events did not occur, and he should have been acquitted. The State contends that the jury's verdict was proper.

The record reflects that a Hamilton County Grand Jury returned an indictment charging the Defendant with two counts of child rape and one count of aggravated sexual battery. The jury convicted the Defendant of three counts of aggravated sexual battery. In State v. Jordan, 116 S.W. 3d 8 (Tenn. Crim. App. 2003) this Court **[*39]** addressed a similar situation in which the defendant suggested that the lesser-included offense of aggravated sexual battery should not have been an option for the jury to consider and explained that:

> In his argument of this issue, the defendant . . . avers that the jurors faced an "all or nothing" situation and that their aggravated sexual battery convictions should be invalidated as a compromise verdict under this set of facts. However, he cites no direct controlling authority for this proposition. Furthermore, we believe that his position conflicts with Tennessee case law governing the charging of lesser included offenses.

Id. at 15 n.5 (citations omitted). We conclude that this reasoning is applicable here, and thus the jury verdict finding the Defendant guilty of aggravated sexual battery is not problematic.

In the case under submission, the evidence is sufficient to support the jury verdict finding the Defendant guilty of three counts of aggravated sexual battery. The victim testified that while she and the Defendant were watching Pleasantville, the Defendant inserted his finger and tongue into her vagina. This evidence is sufficient to support **[*40]** the first aggravated sexual battery conviction. The victim also testified that she remembered one incident in which the Defendant had her lie on top of him with her "hind end" over his face and the Defendant performed oral sex on the victim and put his fingers in her vagina while she masturbated him. She recalled that it was daylight and warm outside during this event. This evidence supports the second aggravated sexual battery conviction. Finally, the victim testified that on another occasion in the summer, while the victim's mother was taking a nap, the victim was trying to get a video game to work and asked the Defendant to help her fix the game. She testified that while the Defendant was in her room, he pulled the victim close, gave her a "French kiss," started touching her private areas, and had her remove her clothes. This evidence supports the third conviction for aggravated sexual battery.

Because the Defendant has failed to demonstrate that the jury's verdicts were not unanimous, and because the evidence is sufficient to support each of the Defendant's three convictions for aggravated sexual battery, the Defendant is not entitled to relief on this issue.

III. Conclusion

[*41] In accordance with the foregoing reasoning and authorities, the judgments of the trial court are affirmed.

ROBERT W. WEDEMEYER, JUDGE