

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 11, 2026

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. BRANDON SCOTT WHITEHURST

Appeal from the Criminal Court for Sumner County
No. 2022-CR-648 Dee David Gay, Judge

No. M2025-00581-CCA-R3-CD

A Sumner County jury convicted the defendant, Brandon Scott Whitehurst, of sexual battery and aggravated statutory rape. The trial court merged the defendant's two convictions and sentenced the defendant to a term of eight years in confinement at 100%. On appeal, the defendant contends the trial court erred in admitting evidence of unrelated sexual conduct and in prematurely sustaining a Rule 412 objection. Upon our review, we affirm the judgments of the trial court; however, we remand the matter for imposition of a sentence for Count 1, sexual battery.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed;
Case Remanded**

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Jason Elliott, Gallatin, Tennessee (on appeal), and Ethan Ingham, Nashville, Tennessee (at trial), for the appellant, Brandon Scott Whitehurst.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Senior Assistant Attorney General; Joshua R. Gilbert, Legal Assistant (pro hac vice); Thomas Dean, District Attorney General; and Nathan S. Nichols and Tara Wyllie, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

In September 2022, a Sumner County grand jury indicted the defendant for aggravated rape (count one), aggravated statutory rape (count two), and the casual exchange of a Schedule II controlled substance to a minor (count three). The defendant was charged with abusing the victim, who was thirteen years old at the time of the incident and fifteen years old at the time of trial.

The allegations against the defendant arose on July 1, 2022. The victim initially met the defendant, a local musician who was twenty-seven years old at the time of the incident, in November 2021 when he sang at her thirteenth birthday party. Afterward, the victim and the defendant continued communicating through Snapchat. On the evening of July 1, 2022, the victim spent the night at her great-grandmother's house and was texting with a friend when she received several Snapchat messages from the defendant. The defendant commented on a picture of the victim, "talking about [her] body and calling [her] fine." The victim was confused and asked the defendant why he said that to her. The defendant apologized and stated that he was at a party for his album release. He called the victim and told her that he "needed a place to sober up." The victim also told the defendant that she was upset because she had not seen her father and brother in several years, and so when the defendant asked if "he could help [her] get [herself] together," she agreed.

The victim told the defendant to park in the driveway and that she would stay in the house and talk to him on the phone. However, when the defendant arrived at approximately 1:00 or 2:00 a.m., he called the victim and told her to come outside. Although she was initially reluctant, the victim eventually went outside and got into the defendant's vehicle. At first, the defendant talked about his music and played songs for the victim. He later gave the victim a drink to "help [her] feel better" which made her tongue numb. The defendant then retrieved a bag from his door, put some powder on his driver's license, and held it up to the victim's nose. Afterward, the defendant and the victim went swimming in the pool in the backyard. The victim was holding onto the edge of a pool float, and the defendant began rubbing the victim's thighs. The victim began hallucinating and wanted to return to the defendant's car. However, as they left the pool, the victim saw the defendant delete their Snapchat messages from the victim's cellphone.

Upon returning to the defendant's vehicle, the defendant disclosed that he was a sex addict. This made the victim uncomfortable, and she crossed her legs and sat further back in the passenger seat. However, the defendant put his hands on the victim's thigh and tried to force the victim to perform oral sex on him. Despite the victim's extreme impairment, she told the defendant "no." The defendant continued "touching [the victim] all over" and attempted to digitally penetrate her. At that point, the victim lost consciousness and awoke to the defendant having sexual intercourse with her. The victim began "yelling and screaming," but the defendant "kept going because [she] could not get him off of [her]."

After ejaculating, the defendant told the victim to get out of the vehicle, and she immediately went inside the house and called Ashleigh Taylor Colley, a family friend, via FaceTime. When Ms. Colley answered the phone, the victim seemed “panicked, very erratic, crying uncontrollably.” Ms. Colley saw that the victim’s “pupils were super dilated and she looked just super flushed.” Although the victim disclosed the details of the rape to Ms. Colley, she was initially reluctant to tell her mother what happened. However, Ms. Colley eventually convinced the victim to add the victim’s mother to the phone call, and the victim told her mother what the defendant had done. After the victim informed her mother of the situation, she immediately called the police.

Detective Javier Garcia, previously with the Hendersonville Police Department (“HPD”), responded to the victim’s great-grandmother’s house and spoke to the victim and her mother. After their initial conversation at the victim’s great-grandmother’s house, the victim’s mother took the victim to the police station, where she provided a statement naming the defendant as the individual involved. Detective Garcia attempted to locate the defendant but learned that he had fled to Florida. The defendant was later located in Mississippi and returned to Tennessee.

Justin Dodson, a friend of the victim’s family, sent the defendant an Instagram message on the morning of July 2nd, asking the defendant if he was in Hendersonville the previous night. The defendant initially denied knowing what Mr. Dodson was talking about. However, he later admitted to meeting with the victim, claiming that the victim told him that “two boys came and saw her.” According to the defendant, the boys gave the victim some weed that made her “feel funny,” so he went to her house to “check[] on her.” While she was sitting in his car listening to music, the victim stated that she did not “want to get pregnant.” She then “started getting upset and saying that if [the defendant] told anybody she would tell everyone that [the defendant] raped her.”

Pearl Stewart, a drummer in the defendant’s band, testified that she attended the defendant’s album release party on July 1, 2022. According to Ms. Stewart, they had a shot of alcohol at midnight, and the defendant left around 12:30 a.m. to take Shawn Keen, another band member, home. The next afternoon, Ms. Stewart and the defendant met for band practice at approximately 6:30 p.m. The defendant appeared “a little nervous, a little on edge.” During practice, Mr. Keen received a phone call and handed the phone to the defendant. Following the phone call, the defendant and Mr. Keen left the practice “pretty swiftly” and did not explain their abrupt departure.

Hollye Gallion, an expert in pediatric sexual assault examinations and a nurse practitioner at Our Kids Center in Nashville, performed a medical examination on the victim on July 2, 2022. Prior to the examination, the victim provided a history of the assault, which was read into the record:

[The victim] stated [the defendant] came to [her] 13th birthday and sang to us. [The victim] stated [the defendant] contacted her around 2:00 a.m. on July 2nd, 2022, and stated he needed a place to sober up.

So he came to where [the victim] was staying, which was at her maternal great-grandmother's home. And then [the victim] came out. She said when she got in his car – she stated, “When I got in, the seat was already down.”

[The victim] reported [the defendant] took her phone and stated, “I’d feel much better if I had this.” [The victim] stated, He said, “I have something that will make you feel better.” Then he took out his ID and a pack of powder and said, “Plug one nostril, sniff, shake your head and do it again.”

[The victim] reported following [the defendant's] instructions and taking the powder. [The victim] stated, “He gave me one to two grams. I don't know what I took. It's called DNT, but the full name starts with X.” [The victim] stated, “I'm still tweaking. I couldn't feel my nose and my face still feels tight.”

[The victim] stated, “I think he laced it with something.” [The victim] expressed concern about the potential continued side effects of the unknown substance.

When asked if [the defendant] touched any other part of her body, [the victim] stated, “He stuck his hand down there.” [The victim] gestured as though putting her hand under her shirt collar and touching her chest while she made this statement. When asked if he touched any other part of her body, [the victim] reported she was wearing boy's underwear at the time of the sexual contact, and stated he came and crawled on top of me and opened the slit.

I clarified, in her underwear. No consent or nothing, and he put it inside me. When asked what he put inside her, [the victim] stated “his little three-centimeter peter. It was small but it was thick. That's what hurt.” It was clarified that [the victim] was referring to penile genital penetration. [The victim] stated, “He's so big, I couldn't move and I told him it hurt.”

Then I asked if she had – if she had to touch any part of [the defendant's] body. And she said, “He wanted me to give him head, suck on him. I think that's what that meant.” When asked if she sucked on him, [the victim]

stated, I said, “no, and he pushed my head down. But I locked up and crawled over him and got out of the car.”

Later, I asked her about what happened between 2:00 a.m. and 4:00, around 4:00 or 5:00 a.m. that morning.

Ms. Gallion reported that she did not find any visible injuries and explained that this is not uncommon. Because there was a disclosure of drug ingestion, Ms. Gallion collected a urine drug screen, which tested positive for amphetamine and methamphetamine.

Dr. Laura Boos, an expert in forensic biology and previously a forensic biologist with the Tennessee Bureau of Investigation (“TBI”), analyzed the victim’s rape kit, which included vaginal swabs, inner labial swabs, outer labial swabs, perianal swabs, perineal swabs, underwear, a bra, a shirt, and a pair of jeans. Examinations of the underwear, jeans, bra, and shirt did not reveal the presence of semen. The perianal swabs did not indicate the presence of male DNA, and the perineal swabs were inconclusive. The outer labial swabs contained a DNA profile consistent with a mixture of at least two individuals, including at least one male. Although the major contributor profile was consistent with the victim, the minor contributor’s profile was limited and, therefore, interpretation of the minor profile was inconclusive. Swabs from the inside of the cups of the bra contained a DNA profile which was consistent with a mixture of three individuals, including at least one male. The deduced male profile was consistent with the standard from the defendant. Dr. Boos conducted additional Y-STR DNA testing, which tests specifically for the male chromosome, on the vaginal swabs, outer labial swabs, inner labial swabs, and swabs taken from the underwear. After testing the inner and outer labial swabs, Dr. Boos was able to obtain a partial Y-STR profile that matched the defendant, and therefore, “he could not be excluded as the source of that DNA[, a]nd barring a mutation, neither could any of his paternal male relatives.” The vaginal swabs and underwear swabs either did not contain a Y-STR profile or the profile was deemed to be inconclusive. Dr. Boos also tested a Twisted Tea can obtained from the victim’s great-grandmother’s residence. DNA located on the can was consistent with the standard from the defendant.

Special Agent John Dunn, an expert in fingerprint analysis with the TBI, identified three latent prints lifted from a Twisted Tea can taken from the victim’s great-grandmother’s residence as being a match to the defendant’s known fingerprints.

Detective Sergeant Chris Gagnon, an expert in digital forensics and a criminal investigation supervisor with the HPD, performed a physical extraction of the victim’s cell phone. He also received records of the defendant’s Snapchat communications on the night of July 1, 2022. The defendant exchanged several messages with two individuals discussing sex and drugs in the hours prior to arriving at the victim’s great-grandmother’s

residence. However, the majority of the defendant's texts with the victim were deleted and could not be recovered.

The defendant testified on his own behalf, admitting that he first met the victim when she contacted him on Snapchat to sing at her birthday party. The defendant agreed that he had subsequent communication with the victim following the party but denied that any of their conversations were sexual or explicit in nature. On July 1, 2022, the defendant attended a party for the release of his album. Throughout the night, he texted with two women with whom he had a casual sexual relationship in the hopes of meeting up and having sex. The defendant left the party at 12:30 a.m. and went to the home of one of the women, where they had sex and used cocaine. Afterward, the defendant went to a friend's house and noticed that one of his Snapchat messages was deleted. He began texting with the victim and realized that someone at the album party had posted something inappropriate on one of the victim's pictures. The defendant apologized multiple times and accidentally video-called the victim. They began talking, and the victim admitted that she was upset because she missed her father and brother. The defendant became concerned by some of the victim's words and asked if she was alone. The victim told the defendant that she was at her grandmother's house, and the defendant offered to stop by on his way to work.

The defendant arrived at approximately 4:00 a.m., and the victim walked to the defendant's vehicle and hugged him. The victim mentioned that she wanted to listen to music, so they entered the defendant's vehicle, and he played her some of his songs. Although the victim initially appeared excited, she soon "stop[ped] moving and she kind of like sinks back into the seat." The defendant noticed that the victim was acting incoherent and "loopy." She mentioned that "some boys came and saw her" and "that she's afraid that she's pregnant." The defendant asked the victim if she had sex with one of the boys, and the victim stated that she smoked some weed that made her "feel funny." The victim fell completely silent and closed her eyes, and the defendant repeatedly said her name until she woke up. The victim "start[ed] yelling at [the defendant], telling [him] she hates [him], [he] betrayed her, she trusted [him]." Eventually, the victim exited the vehicle, and the defendant apologized. The victim hugged the defendant and went into the house.

After leaving the victim's house, the defendant arrived at work at 5:30 a.m. He acknowledged that the victim sent him messages that morning asking, "What did you give me?" and stating, "I'm really sick." However, the defendant "didn't know exactly what she was trying to say." Additionally, when the defendant received the messages from the victim, he noticed that she had deleted all their texts from the prior evening. Because he was "still in a disturbed state of mind," the defendant panicked and deleted his messages as well. The defendant stated that he subsequently blocked the victim on Snapchat because she was acting erratically, and he did not feel like there was anything else that he could do for her. When the defendant arrived at band practice later that afternoon, he was "still kind

of bothered by the incident that happened [that] morning.” However, when he received a phone call that the police were looking for him, he initially believed that it was due to an incident from several weeks prior where his vehicle was used during a robbery. Additionally, the defendant’s father had had a heart attack that afternoon and was at the hospital. The defendant spoke to his father, who told him “to go take a trip or something. Just go drive[.] Just don’t worry about me.” Therefore, the defendant decided to visit family in Florida. The defendant testified that he did not know the victim’s exact age but was aware that she was a teenager. He did not think their interaction was inappropriate because he “has no inappropriate thoughts about why” he went to see her. He agreed that it was “a bad choice in judgment.” The defendant denied telling the victim that he was under the influence of drugs or needed somewhere to sober up. The defendant also denied giving the victim drugs, attempting to force the victim to perform oral sex on him, digitally penetrating the victim, or having sexual intercourse with the victim.

Following deliberations, the jury found the defendant guilty of the lesser-included offense of sexual battery (count one) and aggravated statutory rape (count two). The defendant was found not guilty on count three, casual exchange of a Schedule II controlled substance to a minor. The trial court subsequently imposed a sentence of eight years in confinement at 100%. The defendant filed a motion for new trial which the trial court denied. This timely appeal followed.

Analysis

On appeal, the defendant contends the trial court erred in admitting Rule 404(b) evidence of unrelated sexual conduct and in prematurely sustaining a Rule 412 objection. The State contends the defendant has waived his claims and is not entitled to plain error relief.

I. Prior Bad Acts – Rule 404(b)

The defendant argues the trial court erred in admitting “extensive Rule 404(b) evidence of unrelated sexual conduct.” The defendant contends the trial court admitted the evidence without identifying a specific material issue other than propensity supported by the record, without a finding that the proof of the unrelated act was established by clear and convincing evidence, and without meaningfully balancing the probative value of the evidence against the danger of unfair prejudice. The State contends the defendant waived this issue by raising it for the first time on appeal and is not entitled to plain error relief.

Tennessee Rule of Evidence 401 provides that “[r]elevant evidence” means 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. Relevant evidence is typically admissible, while irrelevant evidence is inadmissible. Tenn. R. Evid. 402. However, 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.

In addition, Rule 404(b) of the Tennessee Rules of Evidence generally prohibits “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity with the character trait.” Tenn. R. Evid. 404(b). However, Rule 404(b) permits evidence when offered to prove some issue other than character or propensity relevant to trial. *State v. Moore*, 6 S.W.3d 235, 239 (Tenn. 1999). Material issues on which 404(b) evidence may bear include: “(1) motive; (2) intent; (3) guilty knowledge; (4) identity of the defendant; (5) absence of mistake or accident; (6) a common scheme or plan; (7) completion of the story; (8) opportunity; and (9) preparation.” *State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004); *State v. Gilliland*, 22 S.W.3d 266, 271 n.6 (Tenn. 2000).

The rule sets out certain procedural requirements the trial court must satisfy before such evidence is admissible:

- (1) The court upon request must hold a hearing outside the jury’s presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(1)-(4). If the trial court substantially complies with the procedures set forth therein, this Court affords great deference to the trial court’s decision to admit evidence under Rule 404(b) and will only overturn that decision if the court abused that discretion. *State v. Hawkins*, 519 S.W.3d 1, 45 (Tenn. 2017).

Initially we note, as did the State, that the defendant failed to raise the issue presented on appeal in the trial court. At the 404(b) hearing prior to trial, the defendant conceded that the State had met its burden regarding any messages containing admissions of drug use. However, regarding the sexually explicit messages between the defendant and other women on the night of the incident, the defendant argued that they “are between consenting adults” and there is “not sufficient evidence that there was a crime or some type of wrongdoing.” The trial court agreed and indicated that it would instead analyze the

evidence under Rules 401, 402, and 403, and the defendant made arguments in support of his position. Immediately prior to trial, the trial court ruled that it would allow the admission of the defendant's texts with other women based on Rules 401, 402, and 403. The defendant now claims that the trial court admitted evidence of "prior sexual misconduct" which requires substantial compliance with Tennessee Rule of Evidence 404(b). Because the defendant failed to raise the instant claim at the trial level and raised it for the first time on appeal, the issue is waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *State v. Franklin*, No. M2017-00180-CCA-R3-CD, 2018 WL 1100962, at *4 (Tenn. Crim. App. Feb. 27, 2018) (holding the defendant's issue was "waived because the [d]efendant raised it for the first time on appeal"); *State v. Howard*, 504 S.W.3d 260, 277 (Tenn. 2016) ("It is well-settled that a defendant may not advocate a different or novel approach on appeal."); *State v. Johnson*, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996) ("Issues raised for the first time on appeal are considered waived.").

Moreover, the State specifically argued in its brief that the defendant waived the issue by failing to raise it in the trial court. Despite being notified that his issue may be waived, the defendant failed to respond to this argument or otherwise request plain error relief in a reply brief. "Where a defendant fails to respond to a waiver argument, only particularly compelling or egregious circumstances could typically justify our sua sponte consideration of plain error relief." *State v. Thompson*, No. W2022-1535-CCA-R3-CD, 2023 WL 4552193, at *5 (Tenn. Crim. App. July 14, 2023), *no perm. app. filed*; *State v. Powell*, No. W2011-002685-CCA-R3-CD, 2013 WL 12185202, at *8 (Tenn. Crim. App. Apr. 26, 2013), *perm. app. denied* (Tenn. Sept. 11, 2013). Because no "particularly compelling or egregious circumstances" exist here, we decline to consider plain error relief. The defendant is not entitled to relief on this issue.

II. Exclusion of Evidence – Rule 412

The defendant argues the trial court erred in sustaining a Rule 412 objection which "prevent[ed] the defense from developing credibility evidence." The defendant contends that the trial court's premature sustaining of his objection during the testimony of the victim's mother "restricted the development of credibility evidence central to the jury's evaluation of the complainant's testimony." Specifically, the defendant was prevented from questioning the victim's mother about the victim's sexual experiences before and after the incident. The State contends the defendant waived this issue by failing to raise it in his motion for new trial and is not entitled to plain error relief.

Under Rule 412, "[e]vidence of specific instances of a victim's sexual behavior is inadmissible unless" it is "[r]equired by the Tennessee or United States Constitution, or"

the defendant offers the evidence “on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim’s sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim.” Tenn. R. Evid. 412(c)(1)-(2).

The State argues that the defendant waived this argument by failing to raise it in his motion for new trial. While the defendant now argues the trial court’s error prevented him from cross-examining the victim’s mother, in his motion for new trial, the defendant argued the trial court erred in “denying the defendant the ability to fully cross-examine *the victim* in accordance with Tennessee Rule of Evidence 607, 608, and 412” (emphasis added). Because the defendant failed to raise this issue in his motion for new trial, the issue is waived. “Grounds not raised in a motion for new trial are waived for purposes of appeal.” *State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018); Tenn. R. App. P. 3(e). *See State v. Kennedy*, No. M2013-02207-CCA-R3-CD, 2014 WL 4953586, at *10 (Tenn. Crim. App. Oct. 3, 2014) (recognizing that by failing “to present this argument in the trial court, the trial court did not have the opportunity to pass on it, and we will not consider it.”), *no perm. app. filed*.

As with his Rule 404(b) argument, the defendant again did not request that we conduct plain error review and did not analyze any of the factors that could justify plain error review, even after the State argued waiver in its brief. Moreover, no “particularly compelling or egregious circumstances” exist to justify our sua sponte consideration of plain error relief. *See Thompson*, 2023 WL 4552193, at *5; *Powell*, 2013 WL 12185202, at *8. Accordingly, the defendant is not entitled to relief on this issue.

Finally, we note one issue concerning the judgments in this case. Upon merging the conviction of sexual battery into the conviction of aggravated statutory rape, the trial court entered judgments for both convictions. The judgment for sexual battery reflects that it merged into the conviction of aggravated statutory rape but does not reflect a sentence because the trial court did not sentence the defendant for sexual battery. “The judgment documents for the lesser (or merged) conviction should reflect the jury verdict on the lesser count and the sentence imposed by the trial court.” *State v. Berry*, 503 S.W.3d 360, 364 (Tenn. 2015). Therefore, we remand the case to the trial court to impose a sentence on the merged offense.

Conclusion

Based on the foregoing authorities and reasoning, the judgments of the trial court are affirmed. However, we remand this case for the court to impose sentence on count one, sexual battery.

s/ *J. ROSS DYER*
J. ROSS DYER, JUDGE