

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs June 2, 2026

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. DAVID PRUETT

Appeal from the Criminal Court for Shelby County

No. 22-03863

Paula L. Skahan, Judge

No. W2025-00963-CCA-R3-CD

The Defendant, David Pruett, was convicted in the Shelby County Criminal Court of rape of a child, a Class A felony; especially aggravated sexual exploitation of a minor, a Class B felony; and two counts of sexual exploitation of a minor, a Class D felony, and received an effective sentence of forty years in confinement. On appeal, he claims that the evidence is insufficient to support his convictions and that his sentence for rape of a child is excessive. Based upon our review, we affirm the judgments of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JILL BARTEE AYERS, JJ., joined.

Jerri Green, Public Defender; Tony N. Brayton (on appeal) and Amy Mayne (at trial), Assistant Public Defenders, Memphis, Tennessee, for the appellant, David Pruett

Jonathan Skrmetti, Attorney General and Reporter; Leslie Renee Byrd, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Robert M. Steele and Drew Carpenter, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

In September 2022, the Shelby County Grand Jury indicted the Defendant for one count of rape of a child, a Class A felony; two counts of especially aggravated sexual exploitation of a minor, a Class B felony; and one count of sexual exploitation of a minor, a Class D felony. The Defendant proceeded to a bench trial on May 9, 2024.

At trial, Amy Kehayias testified that she had known the Defendant about twenty years. He was the brother of Ms. Kehayias's boyfriend and the boyfriend of Ms.

Kehayias's sister, L.F.¹ L.F. had three sons: H.F., P.F., and W.F. In April 2019, the Defendant, L.F., and L.F.'s three sons were living with Ms. Kehayias's mother and Ms. Kehayias's mother's boyfriend in the Raleigh or Frayser area of Memphis.

Ms. Kehayias testified that on April 29, 2019, her son brought his cellular telephone to her. She said she looked at the telephone and saw a photograph on Facebook of a boy "putting his mouth on" a penis. She recognized the boy as her nephew, H.F., and immediately telephoned the police.

Officer Ethan Vandevoorde of the Memphis Police Department ("MPD") testified that on April 29, 2019, the MPD received two calls about a photograph involving the victim. L.F. had placed one of the calls, and Ms. Kehayias had placed the other call. Officer Vandevoorde responded to L.F.'s call and went to her home on Old Allen Road. L.F. told Officer Vandevoorde that she questioned the victim about the photograph. The victim told his mother that the Defendant made him perform the sex act and that the Defendant photographed the act. Officer Vandevoorde said he had a "[v]ery limited" conversation with the victim. He detained the Defendant, put the Defendant into the back of his patrol car, and transported the Defendant to the MPD's Internet Crimes Against Children ("ICAC") Unit.

Major Adam Pickering testified that he was a member of the ICAC Unit, which was responsible for investigating electronic crimes against children, child pornography, statutory rape, and human trafficking. He examined L.F.'s cellular telephone and obtained an image from the Facebook Messenger application stored inside the telephone. The image appeared to show the victim performing oral sex on an unknown male. Major Pickering developed the Defendant as a suspect and conducted a manual search of the Defendant's cellular telephone. He said that he also used software to examine the telephone and that the telephone "looked like it had been reset to factory. There was no data stored. No phone numbers. Nothing."

Major Pickering testified that he located a Facebook page that appeared to be related to this case. He sent a search warrant to Facebook and learned that the email address used to create the Facebook account was playboy20181989@gmail.com. The photograph of the victim performing the sex act had been posted on the Facebook page. In addition, someone had posted the following statement on April 29, 2019: "I need some big dick deep inside me. It can be grown or little. It doesn't matter to me." Per police policy, the victim was sent for a forensic interview.

¹ In order to protect the minor victim's identity, we will refer to him and some of his family members by their initials.

On cross-examination, Major Pickering clarified that the photograph and the statement had been posted in the Facebook Messenger application associated with the Facebook account. The statement was posted separately from the photograph.

The victim testified that he was born in January 2009, that he was fifteen years old at the time of trial, and that he had known the Defendant more than ten years. The Defendant used to be in a relationship with the victim's mother and lived on Old Allen Road with the victim and his family, which included the victim's mother, father, brothers, and two uncles. The State asked if the Defendant ever did anything that caused the victim to feel "uncomfortable," and the victim responded, "A lot. A lot." The victim said he was uncomfortable with "the way [the Defendant] cut his mustache" and "the way [the Defendant] walked around the house." Moreover, on one occasion, the victim's mother sent the victim and P.F. to walk to a nearby store with the Defendant "to get some snacks." The victim said that as the three of them were walking home with drinks and candy, the Defendant told them to go behind a vacant house "to do stuff." The victim and P.F. did not want to go behind the house with the Defendant, so they ran home and told their mother. However, their mother did not believe them. The Defendant grabbed and broke P.F.'s telephone. The Defendant also poured out their drinks and gave their candy to their brother, W.F. The victim was nine or ten years old at the time of the incident.

The victim testified that he and his brothers slept on "pallet[s]" on the floor of their father's bedroom. One time when the victim's father was in the hospital, the victim was asleep on the floor and "felt the covers moving off" and "felt [his] shorts coming down." The victim awoke with his shorts below his knees and saw the Defendant walking out of the bedroom. The Defendant kept motioning for the victim to go back to sleep. The victim told one of his uncles about the incident, and his uncle told the victim's mother. However, the victim's mother did not believe the victim. The victim said he was nine or ten years old at the time of the incident and that his brothers were also asleep in the bedroom.

The victim testified that the Defendant had an application on the Defendant's cellular telephone that allowed the Defendant to see everything the victim was doing on the victim's cellular telephone. On one occasion, the Defendant locked the victim's telephone but continued to send text messages to the victim. The victim said the messages threatened to harm his parents if he did not come into L.F.'s bedroom and suck the Defendant's "private." The victim went into L.F.'s bedroom because he was afraid the Defendant would hurt his parents. The Defendant's pants were pulled down and his shirt was off. The Defendant told the victim to get onto the victim's knees, and the victim did so. The Defendant put his penis inside the victim's mouth briefly and photographed the act. The Defendant heard the victim's mother walking down the hallway, so he pushed the victim away and ran into the bathroom. The victim's mother came into the bedroom and wanted to know what the victim was doing there. The victim stated, "And I told her nothing

because, you know -- because I knew if I would have told her then he would have probably hurt my dad or my mom.” The victim was ten or eleven years old at the time of the incident.

The victim testified that the photograph taken by the Defendant ended up on the internet. The police arrested the Defendant, and the victim participated in a forensic interview. The victim identified the photograph for the trial court and said the photograph showed the Defendant’s penis in his mouth. The victim said that he had his own Facebook account, that he set up the account with his own email, and that no one else had access to his account. The victim said he did not post the photograph or the statement on Facebook.

On cross-examination, the victim testified that family members, including his mother, brothers, and both of his uncles, saw the photograph on the internet. The victim denied telling the forensic interviewer that he was asleep in his mother’s bedroom when the photograph was taken. On redirect-examination, the victim acknowledged that another incident occurred while he was asleep in his mother’s bedroom. The State did not question the victim about that incident.

Pat Lewis testified that she was a forensic interviewer at the Memphis Child Advocacy Center and that she interviewed the ten-year-old victim on May 2, 2019. Only the victim and Ms. Lewis were present in the interview room, but a law enforcement officer observed the interview on a television in Ms. Lewis’s office.

The State played a video recording of the interview, and we have reviewed the recording. The victim told Ms. Lewis that his aunt had obtained custody of him and his two older brothers because the Defendant made him suck the Defendant’s private part. The incident occurred in the victim’s mother’s bedroom, and the Defendant photographed the act. Afterward, the victim ran out of the room and was afraid to tell anyone because the Defendant had threatened to harm the victim’s mother. The Defendant posted the photograph on Facebook, and the police arrested him. The victim did not know the photograph was on Facebook until his uncle showed him the photograph.

James Taylor testified that in April 2019, he was a lieutenant with the MPD. On April 30, the Defendant waived his rights and gave a statement to Lieutenant Taylor. In the statement, the Defendant said that he had a Facebook account and that the email address he used to set up the account was hotboy201989@gmail.com. The victim also had a Facebook account, and the Defendant gave the victim an email address and password to access the account. The email address was playboy20181989@gmail.com, and the password was bigpapa2021. Lieutenant Taylor said that he asked the Defendant about his relationship with the victim and that the Defendant stated, “I’m just the mother’s boyfriend. I don’t get [a] relationship with the kids. I play ball with them. Other than that no.” The Defendant told Lieutenant Taylor that he lived with the victim and the victim’s

parents, that he slept with the victim's mother, and that the victim and the victim's brothers slept with their father. The Defendant had been living with the victim's family since 2013. He denied having the victim perform oral sex on him or posting a photograph of the act on the internet.

Aaron J. Kant, an investigator with the Shelby County District Attorney's Office, testified that on November 3, 2021, he took a statement from inmate Mark Phillips. Mr. Phillips did not want anything in exchange for his information, and the district attorney's office did not promise him anything for his information. Investigator Kant learned from Mr. Phillips that child pornography was in a storage unit on Summer Avenue and that the unit had been rented in the name of the Defendant's mother, Debra Pruett. Based on Mr. Phillips's information, Investigator Kant ordered recordings of jailhouse telephone calls between the Defendant and Ms. Pruett. He also began visiting storage businesses on Summer Avenue and discovered that Ms. Pruett had rented a storage unit at U-Stor Self Storage. No one had accessed the unit for almost one year. On November 9, 2021, Investigator Kant and several other officers executed a search warrant for the unit and found a plastic tote containing electronic storage devices.

Mark Phillips testified that he and the Defendant were in jail together in September or October 2019. Mr. Phillips said the Defendant told him that the Defendant "had a little boy suck his penis and he took pictures of it while doing it." The Defendant told Mr. Phillips that the boy was eight or nine years old and that the Defendant "was shooting downward with the camera." Mr. Phillips said the Defendant claimed he sent the photograph "to some guy that he knew."

Mr. Phillips testified that the Defendant claimed that a laptop and a cellular telephone were in a storage unit on Summer Avenue and that the unit was rented in the name of the Defendant's mother. Mr. Phillips said that the State had not promised him anything in exchange for his testimony and that he was testifying "[b]ecause anybody that would do that to a child deserves to be in prison."

On cross-examination, Mr. Phillips acknowledged that he was in jail in 2019 for aggravated sexual exploitation of a minor. He pled guilty to attempted aggravated sexual exploitation of a minor and received a five-year probation sentence.

Charita Travis, a detective for Homeland Security in the Shelby County Sheriff's Office, testified that she maintained recordings of jailhouse telephone calls placed by inmates. Detective Travis identified three calls placed by the Defendant on March 26, October 20, and November 3, 2021, and the State played the calls for the trial court. During the March 26 call, the Defendant told his mother that "I know my W-2 [forms] are in the storage in a box. It's in a box that has my clothes in it." During the October 20 call, the

Defendant told his mother that he needed her to “put something together for me” when she returned to the storage unit. The Defendant’s mother asked, “What do you mean?” The Defendant responded, “I’ll let you know when you come up here. I’ll tell you where to put it and everything.” During the November 3 call, the Defendant asked his mother, “Did you call the storage on Summer and pay it?” The Defendant’s mother responded, “Oh, s***! This is the 3rd too, right?” She thanked the Defendant for reminding her to pay for the storage unit, and the Defendant said, “Go ahead and do that because we can’t lose that s***.”

Ryan Hunt testified that he was the District Manager for Samuel Management Group, which owned and operated U-Stor Self Storage in Memphis. Mr. Hunt identified a rental agreement for a storage unit at the U-Stor on Summer Avenue. The agreement was signed by “Debra Pruett” on June 10, 2019, and named the Defendant as an authorized user.

Sergeant Paul Hutchinson testified that he was assigned to the MPD’s ICAC Task Force and that he assisted with the search of the storage unit. Officers found three or four hard drives, a PlayStation, and a cellular telephone. They collected the devices, and Sergeant Hutchinson performed “extractions.” On the first hard drive, the user’s name was “David,” and Sergeant Hutchinson found a self-produced photograph, also known as a “selfie,” of the Defendant. Search terms on the hard drive included “Gay teen videos,” “boys first time,” “young gay boys’ videos,” “young gay black teens,” and “hot ass teen gets dark meat.” Sergeant Hutchinson said he also found “four photos that depicted minors engaged in sexual activity” and identified the photographs for the trial court.

Sergeant Hutchinson testified that on the second hard drive, he found three selfies of the Defendant, a Facebook entry authored by “David William Pruett,” and photographs of three time slips for the start and end of work shifts for “David P.”² Sergeant Hutchinson found the following search terms on the hard drive: “Hung white boy’s gallery,” “young gay teens,” and “gay boys dick picks.” He also found the photograph of the victim with a penis in the victim’s mouth. Sergeant Hutchinson said the photograph was “high quality,” which indicated that “at some point this image existed or was saved to this hard drive as opposed to having been accessed as a preview from like a cloud source.” Additionally, Sergeant Hutchinson said he found a high-quality photograph of an adult’s hand holding a prepubescent boy’s penis³ and “some additional child sex abuse material.” Sergeant

² The time slips are dated November 10, 2018; November 12, 2018; and February 11, 2019.

³ We note that the photograph of the victim with a penis in his mouth was introduced into evidence as sealed exhibit 1 and that the photograph of the adult hand holding a boy’s penis was introduced into evidence as sealed exhibit 12. We have reviewed the exhibits. The envelope that is supposed to contain exhibit 12 includes a Consent Order Correcting and Modifying the Record in which the trial court allowed the parties to transmit an “exact duplicate” of exhibit 12 with the appellate record because the original

Hutchinson then identified five images for the trial court. One of the images showed two teenage males engaging in anal, penile contact. On the third hard drive, Sergeant Hutchinson found three selfies of the Defendant and the following search terms: “teen gay boy porn” and “teen gay boys.” He also found “child sex abuse material” on the hard drive and identified one image for the trial court.

Sergeant Hutchinson testified that a Toshiba laptop computer was in the storage unit and that he linked the laptop to the Defendant through a user account that included the Defendant’s photograph. Sergeant Hutchinson did not find any child sex abuse material on the laptop, but search terms in the laptop included “boy deep sleep and cum on face”; “young gay boys sleep over”; and “cute young gay boys”; and “young gay teen boys.” A Motorola cellular telephone found in the storage unit contained the email address playboy20181989@gmail.com, and the telephone contained a photograph of a male’s penis. The photograph was taken in a bathroom, and a visitor sticker was visible on the bathroom floor. The letters V-I-D, which were the last three letters of the Defendant’s first name, and “Pruett,” the Defendant’s last name, were visible on the sticker.

At the conclusion of Sergeant Hutchinson’s testimony, the State rested its case and made the following election of offenses: count two, especially aggravated sexual exploitation of a minor, the photograph of the victim with a penis in his mouth; count three, especially aggravated sexual exploitation of a minor, the photograph of an adult hand holding a prepubescent boy’s penis; and count four, sexual exploitation of a minor, the image of two teenage males engaged in anal, penile contact. The Defendant did not present any evidence, and the trial court found him guilty of rape of a child, especially aggravated sexual exploitation of a minor, and sexual exploitation of a minor as charged in counts one, two, and four, respectively, of the indictment. In count three, the trial court found him guilty of sexual exploitation of a minor as a lesser-included offense of especially aggravated sexual exploitation of a minor.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant claims that the evidence is insufficient to support his convictions. Regarding his convictions of rape of a child and especially aggravated sexual exploitation of a minor, he contends that the only direct evidence of his guilt was the child victim’s testimony, noting that none of the victim’s adult family members, such as L.F., testified to

exhibit 12 had been lost. However, the photograph attached to the order is a duplicate of exhibit 1. Upon our opening of sealed exhibit 1, we discovered that the envelope contained exhibit 1 and exhibit 12. Apparently, exhibit 12 was not lost but was inadvertently sealed in the envelope for exhibit 1. We have left the exhibits in the condition in which they were received by this court.

corroborate the victim's claims. Regarding his convictions of sexual exploitation of a minor, the Defendant contends that the only evidence that linked him to the images on the hard drives were the selfies on the hard drives and the testimony of Mr. Phillips, a self-serving jailhouse informant. The State argues that the evidence is sufficient. We agree with the State.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-91 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). Thus, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from it. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983).

All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, in a bench trial, the trial judge, as the trier of fact, must resolve all questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). The trial judge's verdict carries the same weight as a jury verdict. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

The guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of review for the sufficiency of the evidence is the same whether the conviction is based on direct or circumstantial evidence or a combination of the two. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011).

At the time of the offenses, rape of a child was "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a)

(2018).⁴ “Sexual penetration” is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body, but emission of semen is not required[.]” Tenn. Code Ann. § 39-13-501(7). As charged in this case, the statute for especially aggravated sexual exploitation of a minor provides that “[i]t is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material that includes the minor engaging in . . . [s]exual activity[.]” Tenn. Code Ann. § 39-17-1005(a)(1). At the time of the offenses, “sexual activity” meant

(A) Vaginal, anal or oral intercourse, whether done with another person or an animal;

(B) Masturbation, whether done alone or with another human or an animal;

(C) Patently offensive, as determined by contemporary community standards, physical contact with or touching of a person’s clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;

(D) Sadomasochistic abuse, including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;

(E) The insertion of any part of a person’s body or of any object into another person’s anus or vagina, except when done as part of a recognized medical procedure by a licensed professional;

(F) Patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions; or

(G) Lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person.

Tenn. Code Ann. § 39-17-1002(8) (2018).

⁴ Effective July 1, 2020, the statute was amended to change the minimum age of the victim from “more than three (3) of age” to “more than eight (8) years of age.” Tenn. Code Ann. § 39-13-522(a) (Supp. 2020).

The statute for sexual exploitation of a minor prohibits a person from knowingly possessing material that includes a minor engaged in sexual activity. Tenn. Code Ann. § 39-17-1003(a)(1). Possession may be actual or constructive. *See State v. Fayne*, 451 S.W.3d 362, 370 (Tenn. 2014). Actual possession refers to a defendant's physical control over an item whereas constructive possession requires only that the defendant has the power and intention to exercise dominion and control over the item. *Id.* "In essence, constructive possession is the ability to reduce an object to actual possession." *State v. Brown*, 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995). Constructive possession is determined by the totality of the circumstances and may be based on circumstantial evidence. *Dorantes*, 331 S.W.3d at 379.

Here, the victim testified that the Defendant put the Defendant's penis into the victim's mouth in L.F.'s bedroom and that the Defendant photographed the act. As noted by the State, a child victim's testimony alone can be sufficient to support a defendant's convictions. *See State v. Elkins*, 102 S.W.3d 578, 582-83 (Tenn. 2003). That said, the victim's testimony was not the only evidence of the Defendant's guilt. Taken in the light most favorable to the State, the Defendant told Mr. Phillips that he had a little boy suck his penis and that he was "shooting downward" with a camera while the boy was engaged in the act. The photograph of the victim that was the basis of the charge for especially aggravated sexual exploitation of a minor in count two matches that description. The evidence is more than sufficient to support the Defendant's convictions of rape of a child and especially aggravated sexual exploitation of a minor.

As to the Defendant's convictions of sexual exploitation of a minor, the evidence established that the Defendant told Mr. Phillips that a storage unit rented by the Defendant's mother on Summer Avenue contained child pornography. Sergeant Hutchinson found the storage unit and learned the Defendant was an authorized user. Upon searching the unit, officers found three hard drives that contained images of minors. One of the images showed an adult hand holding a child's penis, and another image showed two teenagers, who appeared to be minors, engaged in anal, penile contact. Both of the images were on the second hard drive. The second hard drive contained three selfies of the Defendant, a Facebook post authored by the Defendant, and time slips for the Defendant. Telephone calls between the Defendant and his mother showed that the Defendant knew about the storage unit and that he kept his personal property in the unit. From this evidence, the trial court reasonably could have concluded that the Defendant constructively possessed the hard drive and, therefore, that he knowingly possessed material of minors engaged in sexual activity. The evidence also is sufficient to support his convictions of sexual exploitation of a minor.

II. Excessive Sentence

The Defendant claims that his sentence for rape of a child is excessive. The State argues that the trial court properly sentenced the Defendant. We agree with the State.

The trial court held a sentencing hearing on May 9, 2025. No witnesses testified at the hearing, but the State introduced the Defendant's presentence report and psychosexual risk assessment into evidence. According to the presentence report, the then thirty-four-year-old Defendant had previously been enrolled in a home-based educational program until he dropped out in the tenth grade. In the presentence report, the Defendant described his physical and mental health as "good" and said that he first used alcohol at eighteen years old and marijuana at seven years old. He stated that he had not consumed alcohol or marijuana since 2019 and 2023, respectively. The report showed that the Defendant worked as a maintenance worker for McDonalds from November 2017 to July 2019 and as a maintenance worker for Service Masters from January 2014 to January 2016. The following misdemeanor convictions and disposition dates were listed in the report: driving on a suspended, cancelled, or revoked license in July 2016; possession of marijuana in July 2013; and theft in February 2011.

Donna L. Moore, a licensed psychologist, prepared the Defendant's psychosexual risk assessment. According to Dr. Moore's report, the assessment included an interview, testing, and Dr. Moore's review of records related to this case, including the victim's forensic interview. During the Defendant's interview, he told Dr. Moore that he did not do anything to the victim and that the victim lied in the victim's forensic interview and at trial. According to testing, the Defendant reported a moderate sexual interest in adult females and no sexual interest in adult males, adolescent females, adolescent males, female children, or male children. However, his visual fixation and sexual visual fixation on male and female children six to twelve years old suggested "a history of acting out sexually, or sexualized relationships with male children." Dr. Moore wrote in her report that the Defendant's credibility regarding his denial of sexually abusing the victim was poor and that "[h]is current level of honesty is associated with a poor prognosis in community-based treatment." The Defendant's overall risk to reoffend was classified as moderate with "a 12.5% predicted recidivism arrest risk in five years." Dr. Moore made multiple recommendations regarding treatment and recommended that the Defendant not have any contact with minors or the victim.

The trial court applied enhancement factors (1), "[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range[,]" and (7), "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement[,]" to all of the convictions. Tenn. Code Ann. § 40-35-114(1), (7). The trial court found that enhancement

factor (14), “[t]he defendant abused a position of . . . private trust . . . in a manner that significantly facilitated the commission or the fulfillment of the offense,” applied to his convictions of rape of a child and especially aggravated sexual exploitation of a minor. *Id.* at § 40-35-114(14). The trial court noted that the Defendant never admitted guilt and that he accused the victim of lying even though the proof at trial was “very strong.” The trial court stated that “if and when he gets out of custody he will harm others” and ordered that the Defendant serve forty years for rape of a child, a Class A felony; twelve years for especially aggravated sexual exploitation of a minor, a Class B felony; and four years for each conviction of sexual exploitation of a minor, a Class D felony.⁵ Each sentence was the maximum punishment in the range for the offense. *See id.* at 40-35-112(a)(1), (2), (4). The State argued that the Defendant should serve the sentences consecutively pursuant to Tennessee Code Annotated section 40-35-115(b)(5), but the trial court rejected that argument.⁶ Accordingly, the Defendant received an effective forty-year sentence.

This court reviews the length, range, and manner of service imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). In determining a defendant’s sentence, the trial court is to consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the mitigating and enhancement factors, (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee, (7) any statement by the Defendant in his own behalf about sentencing, and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. Tenn. Code Ann. § 40-35-210(b); *see also Bise*, 380 S.W.3d at 697-98.

In sentencing a defendant, a trial court should impose a sentence that is “no greater than that deserved for the offense committed[.]” and that is “the least severe measure

⁵ The Defendant was statutorily required to serve the sentences for rape of a child and especially aggravated sexual exploitation of a minor at one hundred percent. *See* Tenn. Code Ann. § 40-35-501(i)(2)(H), (N).

⁶ Tennessee Code Annotation section 40-35-115(b)(5) provides for consecutive sentencing if the trial court finds by a preponderance of the evidence that:

The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant’s undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

necessary to achieve the purposes for which the sentence is imposed[.]” Tenn. Code Ann. § 40-35-103(2), (4). Additionally, a trial court is to consider a defendant’s potential or lack of potential for rehabilitation or treatment. *Id.* at § 40-35-103(5). The burden is on the Defendant to demonstrate the impropriety of his sentence. *See id.* at § 40-35-401, Sent’g Comm’n Cmts. This court will uphold the trial court’s sentencing decision “so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute.” *Bise*, 380 S.W.3d at 709-10.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c). The trial court should consider enhancement and mitigating factors, but the statutory factors are advisory only. *See id.* at § 40-35-114; *see also Bise*, 380 S.W.3d at 701; *State v. Carter*, 254 S.W.3d 335, 343-44 (Tenn. 2008). Our supreme court has stated that “a trial court’s weighing of various mitigating and enhancement factors [is] left to the trial court’s sound discretion.” *Carter*, 254 S.W.3d at 345. In other words, “the trial court is free to select any sentence within the applicable range so long as the length of the sentence is ‘consistent with the purposes and principles of [the Sentencing Act].’” *Id.* at 343 (quoting Tenn. Code Ann. § 40-35-210(d)). Appellate courts are “bound by a trial court’s decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act.” *Id.* at 346.

The Defendant first claims that his forty-year sentence for rape of a child is excessive because the trial court found, without sufficient evidence, that he abused a position of private trust. He asserts that “[t]he court seems to have merely assumed that because [he] was living within the same household with the victim and in a relationship with the victim’s mother that he was in a position of trust.” We disagree with the Defendant.

Our supreme court has explained that

application of the factor requires a finding, first, that [the] defendant occupied a position of trust, either public or private. The position of parent, step-parent, babysitter, teacher, coach are but a few obvious examples. The determination of the existence of a position of trust does not depend on the length or formality of the relationship, but upon the nature of the relationship. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith.

State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996). In applying this factor, the trial court stated,

[The Defendant] clearly abused a position of private trust as the mother's boyfriend. She left him there to watch, you know, her nine-year-old, ten-year-old son, however old he was at that point[,] and he used that private trust to call the boy into her bedroom and tell him to perform oral sex.

The record supports the trial court's application of factor (14). The Defendant was the victim's mother's boyfriend and had been living with the victim's family since 2013. Therefore, at the time of the offenses in 2019, he had been living with the victim five to six years. The victim testified that his mother sent him and his brother to the store with the Defendant and that his mother did not believe them when they told her about the Defendant's wanting them to go behind the house to "do stuff." This evidence was sufficient to show that the Defendant stood in a relationship with the victim that promoted confidence, reliability, or faith. Thus, the trial court properly applied enhancement factor (14).

The Defendant also contends that the trial court erred by enhancing his sentence based on the court's finding that he would harm others when released from confinement because there is no proof he would harm others after serving twenty-five years in prison. However, the Defendant's psychosexual evaluation classified his risk to reoffend as moderate. Moreover, he has refused to accept any responsibility for his actions despite strong proof of his guilt, and Dr. Moore considered his potential for rehabilitation to be poor. The trial court properly applied three enhancement factors and sentenced the Defendant within the applicable range of punishment. We conclude that the trial court did not abuse its discretion by sentencing the Defendant to forty years for rape of a child.

CONCLUSION

Upon our review, we affirm the judgments of the trial court.

S/ JOHN W. CAMPBELL
JOHN W. CAMPBELL, SR., JUDGE