

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs June 2, 2026

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JOSE RUELAS

Appeal from the Criminal Court for Shelby County
No. 23-00735 James Jones, Jr., Judge

No. W2025-00996-CCA-R3-CD

Defendant, Jose Ruelas, appeals from his convictions for rape of a child, aggravated sexual battery and incest. On appeal, Defendant argues the evidence was insufficient to support his convictions for rape of a child and incest; the trial court erred in admitting the recording of the victim's forensic interview; and the State failed to elect offenses for rape of a child and incest. After a thorough review of the record, the parties' briefs, and the applicable law, we affirm the judgments of the trial court.

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

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

Jerri Green, Shelby County Public Defender; Barry W. Kuhn, Shelby County Assistant Public Defender (on appeal), Nicholas Cloud and John Cliff, Shelby County Assistant Public Defenders (at trial) for the appellant, Jose Ruelas.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Steve Mulroy, District Attorney General; and Alexia Crump and Gavin Smith Assistant District Attorneys General; for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

This case involves the prosecution of Defendant for sex offenses against his minor daughter, A.R.J.¹ The Shelby County Grand Jury entered a true bill charging Defendant with rape of child (count one), aggravated sexual battery (count two), especially aggravated sexual exploitation of a minor (count three) and incest (count four).

Pretrial Hearing on Victim's Forensic Interview Video – August 14, 2024

At the hearing on the State's motion to admit the recording of the victim's forensic interview, Lydia Criven, Deputy Director of the Memphis Child Advocacy Center ("CAC") testified that the CAC coordinates the multi-agency response to severe child abuse in Shelby County, works with law enforcement through the Child Protective Investigation Team, and provides a child-friendly facility and support services to assist in the investigation of child abuse allegations.

The victim, age seventeen at the time of the hearing, testified that, earlier that day, she met with the prosecutor and watched the video of her forensic interview taken at the CAC about a year before the hearing. The victim confirmed the recording accurately reflected her interview, had not been altered, and documented her account of what Defendant did to her when she was seven or eight years old. She affirmed that she was truthful in the interview and that the interviewer did not tell her what to say. She identified the thumb drive containing the recorded interview and her dated signature made after she watched the recording. The video was admitted as an exhibit.

During cross-examination, the victim acknowledged that during the interview, she used index cards on which she had written details about the incidents. She said her aunt encouraged her to record her thoughts and recollections about the abuse but denied that her aunt wrote on the cards or told her what to write down or say in the interview.

Letitia Cole, a forensic interviewer at the CAC, testified to her qualifications under Tennessee Code Annotated section 24-7-123(b)(3), including her education, specialized training, and thirteen years' experience as a forensic interviewer at the Memphis CAC. She confirmed that she participated in peer review, attended continuing-education training, and had no criminal history. She explained that forensic interviewers receive specialized training in the dynamics of child sexual abuse, child physical abuse, and

¹ It is the policy of this court to refer to minor victims and their relatives by their initials to protect their privacy.

situations in which a child has witnessed a violent crime, and that the purpose of conducting and recording a forensic interview is to limit how often a child must recount the abuse. Ms. Cole explained the method she used when interviewing the victim as a semi-structured protocol designed to build rapport, so the child feels safe and comfortable to talk at a pace suitable for the child; if a child discloses abuse, the interviewer explores it, and if not, the interview is concluded. She emphasized that she avoids leading questions, does not seek particular answers, and does not force a disclosure of abuse. Ms. Cole confirmed she had also watched the recording of the victim's forensic interview prior to trial.

After Ms. Cole concluded her testimony, the State argued that it had met the statutory requirements for admitting the forensic interview. The defense argued that admitting the forensic interview violated the ex post facto prohibition because, at the time of the incidents, the law permitted forensic interviews only when the child was thirteen years of age or younger. T.C.A. § 24-7-123(a) (2013). Trial counsel said he was aware that Tennessee courts have held that the statutory amendment expanding admissibility from children thirteen and under to those eighteen and under is a procedural change not subject to ex post facto limitations, but explained that he raised the issue solely to preserve it for appeal should the law change.² The defense also argued that the interview included a leading question contrary to the statute's reliability requirements and that the State failed to provide the required criminal-background check for Ms. Cole.

The trial court found, based on the testimony of Ms. Cole and the victim, that the forensic interview video was an accurate copy of the interview, that the CAC provided an appropriate setting with a qualified interviewer and seeing no improper questions, the trial court allowed the video into evidence with the parties' agreed-upon redactions concerning allegations of domestic violence. The trial court also accepted Ms. Cole's testimony that she had no criminal record, presuming the CAC conducted background checks and finding Ms. Cole's testimony sufficient to meet the statutory requirements. The trial court did not expressly address the ex post facto argument.

Trial – August 26-27, 2024

The victim testified that she lived with her mother and her brother; her older sister resided elsewhere. The victim identified Defendant in the courtroom and testified that he is her biological father.

² We are not aware of any authority addressing whether the amendment to Tennessee Code Annotated section 24-7-123 implicates the prohibition against ex post facto laws, and neither party has cited any.

The victim testified that the earliest incident of abuse occurred at Defendant's workplace, a loan office, when only she and Defendant were present. She explained that she often accompanied him there when he picked her up from school to be with him or to visit her grandfather who would sometimes come to the office. She recalled that not many clients visited the office.

She testified that Defendant took her into the bathroom with him. She thought it was so he could "keep [her] safe" because they were the only two people in the office. However, he took out his penis and washed it in the sink in front of her. He then cornered her and ordered her to put his penis in her mouth. She repeatedly told him no and backed up to get away from him, but he kept approaching her and put his penis so close to her face that her tongue touched the tip of his penis. She testified that Defendant "finally backed off." The victim explained that the incident left her deeply "traumatize[d]," to the point where she developed coping behaviors at school, such as licking her jacket in an effort to "get it off" and remove the memory of what had been done to her. She stated that this incident occurred in the early part of her third-grade year; she remembered that time frame because she switched schools that year.

The victim also testified that Defendant touched her at their home, taking her into the shower with him. In the shower, Defendant directed her to wash his penis, which became erect while she did. She said Defendant also positioned her so that her vaginal area rubbed against his leg. She recalled that her siblings and her mother were in another part of the house. She remembered that this incident occurred after the family moved to Arlington which occurred when she was in the third grade.

When the victim was seven or eight years old, Defendant took photographs of her vagina with his phone. He told her he deleted them, but then he later showed her one of the photographs while she was at her aunt's house. She said her siblings were home when this incident occurred because she recalled her sister trying to enter the bedroom and Defendant telling her to go away.

The victim testified that Defendant also had her watch pornographic videos in the loan office. She recalled one video depicted a man and a woman having intercourse and another video showing a woman giving a man oral sex.

The victim testified that after the incidents, Defendant had them pray for forgiveness. He instructed the victim not to tell her mother because he would get in trouble.

The victim stated that not long afterwards, while in a vehicle with her brother and Defendant, she told her brother what Defendant had done. When her brother asked

Defendant if he had abused the victim, Defendant hit the victim in the face and told her to tell her brother that she was lying. She cried from the pain of having been hit and from telling her brother she had lied because she had been truthful.

The victim did not tell anyone else about the sexual abuse until March 2022, when she told her sister Defendant had touched her inappropriately when she was seven or eight years old and in the third or fourth grade. Her sister told their mother, but the mother did not report the abuse. In October the same year, the victim was at her aunt's house when she told her aunt, M.R. about the abuse. The police were called and the victim spoke to a police officer about the abuse. She then told a forensic interviewer about the abuse in a recorded interview. She identified the thumb drive containing the recorded interview.

M.R., who was Defendant's sister and the victim's aunt, testified that she learned about the abuse in October 2022. M.R. explained that the victim's mother was hospitalized for surgery and had asked M.R. to check on the victim and her siblings. Defendant was in the hospital with his wife. M.R. and her husband went to the house to check on the victim and her siblings. After the victim revealed that Defendant had touched her inappropriately, M.R. took the children to her home because Defendant was expected to return from the hospital that night.

After consulting with members of the extended family, M.R. called the victim's mother and told her she would call the police if the victim's mother did not. The victim's mother initially opposed contacting the police, but changed her mind and called the police because "she was afraid" she would get in trouble for failing to act when she first learned of the abuse five months earlier. Memphis Police Officer Keland English arrived at M.R.'s home in response to the call and spoke briefly with the victim. He did not question Defendant.

The trial testimony of Ms. Cole, the forensic interviewer, was consistent with her testimony at the pretrial hearing regarding the admissibility of the recorded interview; without objection, she was tendered as an expert in forensic interviewing. Ms. Cole interviewed the victim on October 26, 2022, at the Memphis CAC. After she described the method of questioning used in a forensic interview, the video of the victim's forensic interview was played for the jury. The video was consistent with the victim's testimony regarding the nature of the abuse and the timeline and place of the charged offenses.

Memphis Police Officer Joseph Knight, an investigator in the Sex Crimes Division in the Juvenile Abuse Team, had requested the victim be interviewed at the CAC. He explained that a rape kit was not collected from the victim due to the length of time that had passed between the allegations and the report of abuse. Officer Knight interviewed

Defendant on December 29, 2022, and the interview was recorded on Officer Knight's body camera. Officer Knight testified that, although Defendant indicated a preference to converse in English, he had a fellow officer who was fluent in Spanish present for the interview.

The recording of Defendant's interview was exhibited to Officer Knight's testimony and played for the jury. During the interview, Officer Knight explained to Defendant several times that he was "not under arrest" and "was free to leave at any time." Defendant said he was aware of the victim's complaint against him and volunteered that the incidents underlying the complaint occurred about "ten years ago." Defendant had agreed to come in to be interviewed because "he's a new person now and God had sent him." After Officer Knight advised Defendant of his *Miranda* rights,³ Defendant stated that he understood and signed a waiver of rights form.

Defendant told Officer Knight that he had an addiction to pornography and masturbation since he was eleven years old. He acknowledged that his addiction "was not an excuse" for his conduct but thought it was necessary to disclose in order to explain his behavior. Defendant admitted he watched pornography with the victim "one time" when she was about five years old. They watched the video on his phone at the loan office where he worked. Defendant took the victim there once or twice. No one else was in the office when they watched the video.

Defendant then admitted that he had the victim shower with him and that he got an erection when the victim washed his penis. He recalled that the showers occurred "a couple of times" when the victim was five or six.

Defendant next admitted that he asked the victim to put his penis in her mouth, but she refused. He said this incident occurred while they were in the shower, not in the bathroom of the loan office. He denied that the victim's tongue touched the tip of his penis.

Defendant confirmed that he took a photograph of the victim's vagina with his phone. The victim was nude and was either five or six years old. He said he deleted the photo "right away" and that he no longer had the same phone. He apologized to the victim "a year ago" and said the two of them prayed together after the incidents and he asked God for forgiveness.

³ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding any statement made by the accused during a custodial interrogation without the benefit of procedural safeguards is inadmissible in court).

Following the conclusion of Officer Knight's testimony, the defense requested an election of offenses on the rape charge in count one and the incest charge in count four. The trial court denied the request and permitted the State to delay making an election until all the proof had been completed.

At the close of the State's proof, the trial court granted Defendant's motion for judgment of acquittal on count three, aggravated sexual exploitation of a minor, for the Defendant's photographing the victim's vagina. The proof had shown that conduct occurred outside Shelby County, leaving the court without jurisdiction to adjudicate the offense. The State conceded the jurisdictional defect.

Defendant moved for a mistrial on the grounds that the court's decision not to require an election at the close of the State's case in chief prejudiced his ability to seek a judgment of acquittal. The trial court denied the motion for mistrial but directed the State to elect offenses before Defendant offered proof. The State asserted that an election was required only for count two, the aggravated sexual battery, because the proof showed a single act of penetration supporting counts one and four. The defense agreed. The State then elected the following facts for count two: "where [] Defendant told [Officer] Knight that the victim bathed his penis and that he had an erection at the house on LaGrange Hill in Shelby County, Tennessee." The State then rested its case.

Defendant testified and identified the victim as his biological daughter. He confirmed that he was truthful in his interview with Officer Knight when he admitted to multiple incidents of sexual abuse against the victim. Defendant did not provide details about the offenses during direct examination but affirmed on cross-examination that he had shown the victim pornography when she was about five or six years old; that he showered with the victim and that he had an erection when she washed his penis; and that he had asked the victim to put his penis in her mouth. His testimony differed from the victim's in that he said the oral sex incident occurred while they were in the shower, not in the bathroom of the loan office. He said the abuse occurred approximately eleven years earlier, during a period when he felt controlled by an evil "spirit" or "force," and explained that his addiction to pornography and masturbation led him to harm the victim. He testified that he "just stopped" abusing the victim and that he had been publicly sharing his testimony about his spiritual "rebirth." He acknowledged committing the acts but maintained that he was not guilty because his spiritual transformation meant he was forgiven and no longer condemned.

After Defendant's testimony, the defense revisited the election issue and reversed the earlier concession, requesting elections on both counts one and four. Defendant argued that because both the victim and Defendant described a single act of oral sex but disagreed as to where it occurred – the loan office or in the shower – the State was

required to elect. The State responded that election was not necessary because the victim testified to only one instance of oral sex, and the discrepancy in location was a matter for the jury. The trial court agreed with the State and denied the request for an election on counts one and four.

Based on the evidence, the jury convicted Defendant of the remaining three counts as charged. The trial court sentenced Defendant to concurrent sentences of twenty-five years for rape of child, eight years for aggravated sexual battery, and three years for incest. T.C.A. § 39-13-522(b)(1) (2013-2015); - 39-13-504(b) (2013-2015); 39-15-302 (2013-2015). By operation of law, the twenty-five-year sentence for rape of a child was required to be served at one hundred percent (100%). T.C.A. § 39-13-501(i)(1), (2)(H) (2013-2015). Judgments were entered on May 14, 2025.

On June 16, 2025, Defendant filed an untimely motion for new trial.⁴ At the brief hearing, trial counsel acknowledged that because Defendant's motion for new trial – filed one day late – deprived the trial court of jurisdiction, no proof or argument was presented. Defendant moved this court for permission to accept the late-filed notice of appeal which this court granted. Tenn. R. App. P. 4(a) (“[I]n all criminal cases the ‘notice of appeal’ document is not jurisdictional and the timely filing of such document may be waived in the interest of justice.”). This appeal is now properly before the court.

Analysis

Defendant argues the evidence was insufficient to support his convictions for rape of a child and incest; the trial court erred in admitting the recording of the victim's forensic interview; and the trial court erred by not requiring the State to elect offenses for the rape of a child and incest counts. Defendant concedes that his motion for new trial was untimely filed. The failure to timely file a motion for new trial waives plenary review of all issues “except for sufficiency and sentencing.” *State v. Bough*, 152 S.W.3d 453, 460 (Tenn. 2004) *abrogated on other grounds by State v. Thomas*, 687 S.W.3d 223 (Tenn. 2024); *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). Accordingly, the only properly preserved issue in the case is his challenge to the sufficiency of the evidence supporting his convictions. His remaining issues – the admission of the victim's forensic interview video and the State's failure to elect offenses on counts one and four – are waived and subject to review under the heightened standard of plain error.

⁴ To be timely filed, the motion was due within thirty days of the date the judgments were entered, which was Friday, June 13, 2025. Tenn. R. Crim. P. 33(b).

I. Sufficiency of the Evidence

In his Statement of the Issues, Defendant lists sufficiency of the evidence for all three convictions; however, in his brief, he does not address sufficiency of the aggravated sexual battery conviction. Thus, Defendant has waived his sufficiency claim concerning that conviction. *Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012) (“An issue may be deemed waived, even when it has been specifically raised as an issue, when the brief fails to include an argument satisfying the requirements of Tenn. R. App. P. 27(a)(7).”).

As for the remaining convictions, rape of a child and incest, Defendant contends the evidence does not support them. The State disagrees and argues that the proof is more than sufficient. We agree with the State.

When a defendant challenges the sufficiency of the evidence, this court is obliged to review that claim according to certain well-settled principles. “A guilty verdict ‘removes the presumption of innocence and replaces it with a presumption of guilt.’” *State v. Reynolds*, 635 S.W.3d 893, 914 (Tenn. 2021) (quoting *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017)); *State v. Allison*, 618 S.W.3d 24, 33 (Tenn. 2021). The burden is shifted to the defendant on appeal to demonstrate why the evidence is insufficient to support the conviction. *Allison*, 618 S.W.3d at 33; *State v. Jones*, 589 S.W.3d 747, 760 (Tenn. 2019). The relevant question the reviewing court must answer 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.” *Allison*, 618 S.W.3d at 33-34 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also* Tenn. R. App. P. 13(e).

On appeal, “all reasonable and legitimate inferences from the evidence must be drawn in favor of the prosecution and all countervailing evidence discarded.” *State v. Weems*, 619 S.W.3d 208, 221 (Tenn. 2021); *State v. Rimmel*, 710 S.W.3d 640, 645 (Tenn. 2025). This court is precluded from re-weighing the evidence when evaluating the convicting proof. *State v. Stephens*, 521 S.W.3d 718, 724 (Tenn. 2017). Questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *Rimmel*, 710 S.W.3d at 645; *Allison*, 618 S.W.3d at 34; *Jones*, 589 S.W.3d at 760. “This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both.” *State v. Williams*, 558 S.W.3d 633, 638 (Tenn. 2018) (citing *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011)).

Defendant was convicted of rape of a child and incest. Rape of a child is “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.” T.C.A. § 39-13-522(a) (2013).⁵ “Sexual penetration” includes “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[.]” *Id.* § 39-13-501(7). “A person commits incest who engages in sexual penetration as defined [above], with a person, knowing the person to be, without regard to legitimacy: the person’s natural . . . child.” *Id.* § 39-15-302(a)(1) (2013).

Regarding both convictions, Defendant claims, “Without knowing upon which incident the jury based its decision, the court cannot know whether the evidence is sufficient.” Defendant frames his issue as a challenge to the sufficiency of the evidence, but the concern he identifies – uncertainty about which factual occurrence formed the basis of the verdict – relates to the requirement that the State elect the specific offense. Because Defendant’s claim is, in substance an election of offenses argument, he has not presented a cognizable sufficiency issue. Nonetheless, the proof clearly supports the convictions.

The victim testified that when she was seven or eight years old, Defendant took her into the bathroom of his workplace – a loan office – washed his penis in the sink and ordered her to put his penis in her mouth. Defendant persisted despite the victim’s refusals. He cornered her in the bathroom and forced the tip of her tongue to touch his penis. She was so traumatized by the incident that she licked her tongue on her jacket to “get it off” and clear herself of the memory. Defendant corroborated the victim’s account both in his interview and his trial testimony. The incident of intrusion in the loan office bathroom, “however slight,” constituted penetration, and was sufficient for a rational juror to conclude that Defendant intentionally or knowingly engaged in unlawful sexual penetration of the victim, then seven or eight years of age. The evidence supports his conviction for rape of a child. Defendant is not entitled to relief.

The evidence likewise supports the conviction for incest. Defendant acknowledged that he is the victim’s biological father and he admitted instructing her to place his penis in her mouth. The victim testified that Defendant repeatedly demanded this act despite her refusals and that, in the confined space of the bathroom of the loan office, he cornered her and compelled contact between the tip of her tongue and the tip of his penis. This proof is sufficient to sustain the conviction for incest; Defendant is not entitled to relief.

⁵ The statute for both rape of a child and penetration has been since been amended; the amendments do not affect our analysis.

II. Forensic Interview and Election - Plain Error Review

Defendant concedes that due to his untimely motion for new trial, plenary review is unavailable for his issues challenging the admission of the victim's forensic interview video and the State's failure to make an election in counts one and four. *See State v. Ruiz*, 716 S.W.3d 439, 453 (Tenn. Crim. App. 2024). He requests review under the plain error doctrine.

A defendant who fails to properly preserve an issue for appellate review, must seek plain error review and bears the burden of demonstrating that the asserted error warrants plain error relief. *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007) (citing *United States v. Olano*, 507 U.S. 725, 734, (1993)). To demonstrate plain error, Defendant must prove all of the following five factors: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been violated; (4) the accused must not have waived the issue for tactical reasons; and (5) consideration of the error is necessary to achieve substantial justice. *State v. Rimmer*, 623 S.W.3d 235, 255-56 (Tenn. 2021) (citing *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016)). “[A]n appellate court need not consider all criteria when the record demonstrates that one of them cannot be established.” *State v. Vance*, 596 S.W.3d 229, 254 (Tenn. 2020); *Reynolds*, 635 S.W.3d at 931. The complained-of error must have been of “sufficient magnitude that it probably changed the outcome of the trial.” *Vance*, 596 S.W.3d at 254 (quoting *State v. Banks*, 271 S.W.3d 90, 119 (Tenn. 2008)). “Whether the plain error doctrine has been satisfied is a question of law which we review de novo.” *State v. Pewitte*, -- S.W.3d --, No. W2024-01128-CCA-R3-CD, 2025 WL 3510902, at *4 (Tenn. Crim. App. Dec. 8, 2025) (quoting *State v. Knowles*, 470 S.W.3d 416, 423 (Tenn. 2015)), *perm. app. denied* (Tenn. May 21, 2026).

Admission of Victim's Forensic Interview Recording

Defendant claims that admission of the victim's forensic interview video was plain error, as application of the amended statute violates the prohibition against ex post facto laws. He argues that, at the time of the offenses, the statute permitted admission only of interviews of children thirteen years of age or younger, and the victim was sixteen when interviewed. The State counters that Defendant's claim of plain error fails because he cannot establish any of the required factors, let alone show that an unequivocal rule of law was breached. We agree with the State.

Both the federal and Tennessee constitutions prohibit ex post facto laws, and the scope of that prohibition is the same under each. *See* U.S. Const. art. I, 9, cl. 3; U.S. Const. art. I, § 10, cl. 1; Tenn. Const. art. I, § 11; *State v. Pruitt*, 510 S.W.3d 398, 416

(Tenn. 2016). The four categories of ex post facto laws articulated in *Calder v. Bull*, 3 U.S. 386, 390 (1798) remain the cornerstone of ex post facto jurisprudence. *Pruitt*, 510 S.W.3d at 411-16. Under *Calder*, an ex post facto law is one that: (1) criminalizes conduct that was lawful when performed; (2) increases the punishment for an offense after its commission; (3) imposes a more onerous penalty than that in effect when the offense occurred; or (4) alters the legal rules of evidence so as to permit conviction on less or different proof than was required at the time of the offense. *Id.* at 411 (quoting *Calder*, 3 U.S. at 390).

Tennessee Code Annotated section 24-7-123 governs the admission of forensic interview videos of child sex abuse victims. In its earlier form, the statute permitted admission of a video recording of a forensic interview when the child was thirteen years of age and younger at the time of the statement concerning the abuse. T.C.A. § 24-7-123(a) (2013). The statute was subsequently amended to extend coverage to children age eighteen and under. *Id.* § 24-7-123(a) (2023). Subsection (b) of the statute has however, remained largely unchanged.⁶ It requires prior to admitting a video recording, “the child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross-examination,” and the recording possesses “particularized guarantees of trustworthiness” to the “reasonable satisfaction” of the trial court. *Id.* § 24-7-123(b) (1) – (2). The nature of the statute is evidentiary and procedural, not substantive. The statute does not define criminal conduct, enhance punishment, or alter any element of a charged offense. *See Pruitt*, 510 S.W.3d at 417-18 (holding that the Exclusionary Rule Reform Act is procedural and remedial in nature because it governs the admission or exclusion of evidence and its placement within the criminal procedure title of the Tennessee Code reflects its nature as a modification of a procedural rule).

Here, the forensic interview statute, which expanded its applicability from children under thirteen to children under eighteen, does not implicate any of the categories identified in *Calder*. Contrary to Defendant’s assertion, the statute does not reduce the State’s burden of proof, eliminate any element of the offense, or lower the quantum of proof required for conviction, all actions characteristic of the fourth category identified in *Calder*. *See Carmell v. Texas*, 529 U.S. 513, 532, (2000). Moreover, the statute requires that the recording possess particularized guarantees of trustworthiness and that the child testify under oath and be available for cross-examination, conditions that were satisfied in this case. T.C.A. § 24-7-123(b). Defendant’s assertion that the victim must have been subject to cross-examination during the interview itself finds no support in the plain

⁶ Subsection (b) was also amended to allow the forensic interviewer who conducted the interview to authenticate the video. *Id.* § 24-7-123(b) (1) (2025). This change has no bearing on the resolution of this issue.

language of the statute. Furthermore, because the victim was under eighteen at the time of her forensic interview, the amended statute applied in this case, and its requirements were fully satisfied.

Tennessee Code Annotated section 24-7-123 does not constitute an ex post facto law, and it was properly applied in this case. Defendant has not shown that any clear and unequivocal rule of law was breached, and the requirements for plain error relief have not been met. As we noted above, because an appellate court “need not consider all of the elements when it is clear from the record that at least one [of] them cannot be satisfied,” *Reynolds*, 635 S.W.3d at 931, Defendant has not established plain error; he is not entitled to relief.

Election of Offenses

Defendant contends that an election for counts one and four was required because there were several incidents involving penetration, creating a risk that the jury’s verdicts for rape of a child and incest rested on different factual bases, thereby compromising unanimity. The State responds that election was unnecessary because the victim testified to one incident of penetration, and therefore no clear and unequivocal rule of law was breached. We agree with the State

The right to a unanimous jury verdict is inherent in a criminal defendant’s constitutional right to a trial by jury, as guaranteed by both the United States and Tennessee Constitutions. *See* U.S. Const. amends. VI, XIV; Tenn. Const. art. I, § 6; *Ramos v. Louisiana*, 590 U.S. 83, 92 (2020); *State v. Kendrick*, 38 S.W.3d 566, 568 (Tenn. 2001). To safeguard this fundamental right, the election doctrine was developed to ensure that jurors unanimously agree on the same criminal act when reaching their verdict. *Pewitte*, 2025 WL 3510902, at *3; *State v. Qualls*, 482 S.W.3d 1, 9 (Tenn. 2016). In addition to ensuring a verdict based on the same offense, the election requirement aids the defendant in preparing for and responding to the specific charges, protects against double-jeopardy concerns, enables the trial court to evaluate the weight of the evidence in its capacity as the thirteenth juror, and permits appellate courts to conduct a meaningful review of the sufficiency of the evidence. *Pewitte*, 2025 WL 3510902, at *3; *Qualls*, 482 S.W.3d at 10 (citing *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999)).

When the evidence presented at trial encompasses more incidents than the offenses charged, the election doctrine obligates the State to designate the specific act upon which it relies to secure a guilty verdict for each count. *Pewitte*, 2025 WL 3510902, at *3; *Qualls*, 482 S.W.3d at 9-10; *State v. Smith*, 492 S.W.3d 224, 232-33 (Tenn. 2016). The election requirement “applies to offenses, not to the facts supporting

each element of the offense.” *Pewitte*, 2025 WL 3510902, at *3 (quoting *Knowles*, 470 S.W.3d at 424). When the State charges a single offense and the proof establishes only that discrete act, the defendant’s right to a unanimous verdict is not implicated, and the State is not required to elect an offense. *State v. Johnson*, 53 S.W.3d 628, 631-35 (Tenn. 2001) (holding that the trial court did not err in declining to require an election and in failing to provide an enhanced unanimity instruction where the State charged only one offense and offered proof of one instance of sexual contact); *State v. Adams*, 24 S.W.3d 289, 297 (Tenn. 2000) (rejecting the claim that the State must elect the specific serious bodily injury because the defendants’ neglect of victim constituted a single, continuous offense and election applies to offenses, not facts); *Knowles*, 470 S.W.3d at 424 (holding that the State’s election and the jury instruction – identifying a specific date, location, and meaningful event – rendered any inaccuracy in describing the manner of penetration insufficient to create a risk of a non-unanimous verdict to constitute plain error).

Defendant argues for the first time on appeal that the proof showed two additional instances of penetration in the bedroom, in addition to the incident in the loan office bathroom. However, the record is clear that Defendant’s argument at trial court was different – he requested an election because he and the victim disagreed about the *location* of the incident. “An appellant cannot raise an issue for the first time on appeal nor can [he] change [his] arguments on appeal.” *State v. Hardison*, 680 S.W.3d 282, 309-10 (Tenn. Crim. App. 2023). The record further clearly establishes that only one instance of penetration was alleged and proven at trial. The victim testified to a single episode of penetration; she did not testify to any additional acts that could constitute separate offenses as charged under counts one and four. She described the incident in the loan office bathroom as a one-time occurrence; her trauma from the event underscored its singular nature. Because the proof showed only one penetration, the State was not required to elect, and the trial court did not err in permitting the jury to deliberate without an election on counts one and four. Thus, no risk of a non-unanimous verdict existed, and no clear and unequivocal rule of law was breached. Defendant has not met his burden of demonstrating plain error under all five factors. He is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

s/ *Jill Bartee Ayers*
JILL BARTEE AYERS, JUDGE