

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs June 23, 2026

FILED

10/22/2026

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. JOSEPH DAVIS**

**Appeal from the Criminal Court for Shelby County**  
**No. C23-02567      Chris Craft, Judge**

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**No. W2025-01215-CCA-R3-CD**

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The Defendant, Joseph Davis, was convicted by a Shelby County Criminal Court jury of rape of a child, a Class A felony; two counts of aggravated sexual battery, a Class B felony; two counts of especially aggravated sexual exploitation of a minor, a Class B felony; and criminal attempt to commit aggravated sexual battery, a Class C felony, and received an effective sentence of forty-nine years. *See* T.C.A. §§ 39-13-522 (2018) (subsequently amended) (rape of a child), 39-13-504 (2018) (subsequently amended) (aggravated sexual battery), 39-17-1005 (2025) (especially aggravated sexual exploitation of a minor), 39-12-101(a)(3) (2025) (criminal attempt). On appeal, the Defendant contends that the evidence is insufficient to support his convictions. Because we agree that the evidence is insufficient to support the especially aggravated sexual exploitation of a minor convictions in Counts 3 and 5, we vacate those convictions and judgments and remand the case. We affirm the Defendant's remaining convictions.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and STEVEN W. SWORD, JJ., joined.

Phyllis Aluko, District Public Defender; Tony N. Brayton (on appeal), Assistant District Public Defender – Appellate Division; and Robert C. Felkner (at trial), Assistant District Public Defender, for the appellant, Joseph Davis.

Jonathan Skrmetti, Attorney General and Reporter; William C. Lundy, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Nicole Germain and Venecia Patterson, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

The Defendant's convictions relate to a period between December 2016 and December 2019, when the Defendant lived with his wife, their daughter, D.<sup>1</sup>, and his wife's children, Y.L., Ma.F., and Mi.F.<sup>2</sup> As a result of incidents that took place during that time, the Shelby County Grand Jury indicted the Defendant as follows:

Count 1: Rape of a child involving Ma.F.

Count 2: Aggravated sexual battery involving Mi.F.

Count 3: Especially aggravated sexual exploitation of a minor involving Y.L.

Count 4: Especially aggravated sexual exploitation of a minor involving Y.L.

Count 5: Especially aggravated sexual exploitation of a minor involving Y.L.

Count 6: Aggravated sexual battery involving Y.L.

Count 7: Attempted aggravated sexual battery involving Y.L.

At the trial, J.D., the Defendant's wife, testified that she had four children: Y.L., Ma.F., Mi.F., and D. J.D. confirmed that the Defendant was the biological father only of D. J.D. said that she separated from the Defendant in 2020, when Y.L. was admitted to a health care facility after Y.L. began harming herself. J.D. recalled that after speaking with personnel at the health care facility regarding Y.L.'s allegations of inappropriate sexual behavior by the Defendant, she took Y.L. to the Memphis Child Advocacy Center (MCAC). J.D. said that she spoke to the Defendant about the allegations and that the Defendant told her that, if he were guilty of Y.L.'s allegations, it was because he had been drunk. J.D. identified Facebook messages from March 2020 between her and the Defendant in which the Defendant wrote that he did not blame Y.L. for not wanting to talk to him because he "hurt her." A copy of the messages was received as an exhibit.

J.D. testified that in March 2022, Ma.F. saw a photograph of the Defendant and said, "that man gay." When J.D. asked Ma.F. about his statement, Ma.F. told her that he was in his bedroom and "woke up one night in the middle of the night and [Ma.F.'s] penis was in [the Defendant's] mouth." J.D. stated that on the same day that Ma.F. told her about the incident in his bedroom, his twin sister told J.D. that the Defendant had touched her inappropriately. J.D. confronted the Defendant, but he seemed not to know "what was going on." J.D. related that she took the children to the MCAC and that she did not notice a significant change in any of the children. J.D. acknowledged that she had been satisfied as a stay-at-home wife who could work outside the home when and if she wanted and that she had no reason to separate from the Defendant except for the children's allegations.

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<sup>1</sup> We will refer to the minor victims and their siblings by initials.

<sup>2</sup> Ma.F., who is male, and Mi.F., who is female, are twins.

On cross-examination, J.D. testified that she had lived with the Defendant in a three-bedroom house in Memphis, that a den had been converted into a bedroom, and that the house had one bathroom. J.D. confirmed that a “number” of people had lived at the house at various times, including herself, her four children, her two sisters, her three nephews, Jamarcius Fuller, and the Defendant’s grandmother, who owned the house. J.D. recalled that the converted den had only a curtain that served as a door. J.D. confirmed that no one in the house ever heard or saw anything related to the children’s allegations against the Defendant. J.D. explained that Y.L. began harming herself as a result of mental health issues for which she went to a mental health facility in 2019. J.D. recalled that, in 2019, the Defendant worked eight-hour shifts five or six days each week. She stated that she never saw the Defendant act inappropriately with the children, that at the time of the trial she had not yet divorced the Defendant because she did not have the money to pay for a divorce, and that she only talked to the Defendant when it regarded D. J.D. acknowledged that her sisters, her brother, and her mother lived in the house at some period of time and likely during the time of the alleged offenses. J.D. believed that her children had no reason to lie about what happened to them.

Y.L. testified that she was currently age fifteen and that she recalled living at the Memphis house with the Defendant, her mother, the Defendant’s grandmother, Mi.F., Ma.F., and D. She said she had a good relationship with the Defendant until she was age ten or eleven when he “touched” her. Y.L. explained that when she, her siblings and her cousins wrestled, the Defendant “pulled down” the top of her halter dress and touched her breasts. Y.L. said that she thought it was an accident until it “happened again and then I got away.” Y.L. recalled a different incident when she was wearing a nightgown, pretending to be asleep, and lying on her mother and the Defendant’s bed. She said that she felt the Defendant slide her underwear below her hips and that she immediately acted as if she had just awakened and left the room. Y.L. could not explain why she initially did not tell anyone about the two incidents.

Y.L. testified that the house had one bathroom, that on one occasion she noticed the Defendant’s cell phone positioned under the tub on the bathroom floor, and that she saw the phone recording her using the toilet. Y.L. recalled a second incident when she found the Defendant’s cell phone in the bathroom, on a shelf above the toilet. Y.L. explained that the cell phone’s camera lens hung over the edge of the shelf, that the camera pointed down toward the toilet, and that it recorded her sitting on the toilet. Y.L. acknowledged that both times she found the Defendant’s cell phone in the bathroom, she deleted the phone’s recordings.

Y.L. testified that the Defendant also used his cell phone to record her while she was in her bedroom. Y.L. explained that the Defendant entered the bedroom, where she and her sisters were getting dressed for school, that his cell phone was in his shirt pocket, and that it was recording. Y.L. said that she and the other girls wore only their

“undergarment” and that the Defendant “insist[ed] that we turn[] around and face him.” Y.L. said that she knew the cell phone was recording because she could see the video recording timer on the phone’s screen through the Defendant’s shirt pocket. Y.L. acknowledged that she did not say anything to the Defendant about any of those incidents.

Y.L. testified that the Defendant’s inappropriate behavior occurred over a period of several months and that, as a result, she became depressed and began harming herself. Y.L. recalled that in 2020, at the end of her fifth-grade year, she told her mother about the Defendant’s conduct and how Y.L. felt. Y.L. and her mother decided Y.L. should be treated at a mental health facility. Y.L. said that after she revealed what had happened to her, her mother told her that she was not allowed to talk to the Defendant and that she, her mother, and her siblings moved out of the house shortly thereafter. Y.L. recalled being interviewed at the MCAC. Y.L. said that she currently was not in therapy but had “a lot of emotions” regarding the Defendant.

On cross-examination, Y.L. testified that she did not know why she did not disclose them to a family member or a teacher at the time of the incidents. Y.L. acknowledged that both the Defendant and her mother worked at the time. On redirect examination, Y.L. explained that the Defendant would be with her and the other children when her mother was at work. Y.L. recalled that she did not tell anyone about the Defendant’s behavior because “that was my dad” and she did not want anything to happen to him.

Ma.F. testified that he was currently age thirteen, that he had a twin sister, Mi.F., and that he lived with his mother and his sisters. Ma.F. recalled that, in the past, he lived with his mother, sisters, and the Defendant at the Memphis house. Ma.F. said that when he was age seven or eight, he woke in the night on three occasions to find himself in his bedroom and on the Defendant’s lap and that “[Ma.F.’s] penis was in [the Defendant’s] mouth.” Ma.F. recalled that he went to sleep on the top bunk bed, that he wore pants when he went to bed, and that his pants had been pulled down when he awoke in the Defendant’s lap. Ma.F. said that when he woke up, the Defendant told him to go back to sleep. Ma.F. stated he shared that bedroom with his sisters and his cousins. Ma.F. said that he told his mother about these incidents when he was age ten or eleven and that he did not tell anyone about them before that time. Ma.F. remembered being interviewed at the MCAC after talking to his mother.

On cross-examination, Ma.F. testified that none of the other children sleeping in his bedroom woke during the incidents with the Defendant. Ma.F. acknowledged that he did not tell anyone about what happened because he thought he might have been dreaming and that he only understood that he had not dreamed the incidents when he learned what had happened to Y.L.

Mi.F. testified that she was currently age thirteen and that when she was younger, she, Ma.F., Y.L., and D., lived with her mother and the Defendant. Mi.F. recalled that she had a good relationship with the Defendant until he began opening the door and walking into her bedroom or bathroom when she was changing clothes. Mi.F. said that she did not talk to the Defendant about these incidents because she was “scared to stand up for [her]self.” Mi.F. also recalled when she was age seven or eight that the Defendant told her to come into his bedroom, that he pulled her onto the bed with him, and that his hand touched the top of her vagina under her clothes. She said this happened on several occasions. Mi.F. said that she never told anyone about the incident. Mi.F. remembered seeing the Defendant’s cell phone in the bathroom and assumed he had left it there by accident. Mi.F. stated that she, her mother, and her siblings moved out of the Defendant’s house and that, at the time, she did not know why. Mi.F. acknowledged that she only told her mother what had happened to her after Y.L. was in therapy and Mi.F. knew the Defendant “couldn’t get to [her.]” Mi.F. recalled being interviewed at the MCAC when she was age eleven.

On cross-examination, Mi.F. testified that she had a good relationship with the Defendant and that she considered him to be her father. Mi.F. stated that, when the incidents occurred, her mother, her siblings, her aunts, and the Defendant lived with her at the house.

Memphis Police Department Sergeant Douglas Haskin testified that he investigated a case involving Ma.F. and Mi.F. in March 2022. Sergeant Haskins said that he did not locate the Defendant and that he did not speak to J.D. or Y.L. Sergeant Haskins stated that, based on the forensic interviews of Ma.F. and Mi.F, he charged the Defendant. On cross-examination, Sergeant Haskins said that he did not search or take any photographs of the Memphis house.

Teresa Onry, a forensic interview expert, testified that she interviewed Y.L. at the MCAC. Ms. Onry said that she asked open-ended and non-leading questions during the interview so that Y.L. could express herself in her own words. Ms. Onry stated that she saw no signs that Y.L. had been coached. Ms. Onry explained that it was not unusual for a teenager who had been sexually abused to self-harm. On cross-examination, Ms. Onry explained that a DCS investigator had a duty to determine whether abuse occurred. A video recording of Y.L.’s forensic interview was received as an exhibit and played for the jury.

During the interview, Y.L. said that the Defendant acted inappropriately toward her on several occasions when her mother was at work. Y.L. described one such occasion when she, the Defendant, and her brother wrestled, her dress fell from her shoulder, and the Defendant rubbed his hand around her breast. Y.L. demonstrated during the interview how the Defendant touched her breast. Y.L. also related two incidents when she found the

Defendant's cell phone in the bathroom and that it "was recording when I went to the bathroom." Y.L. said that she picked up the phone, confirmed that it was recording, and then deleted the recording. Y.L. indicated that the phone did not record her genital area because she had barely lowered her pants when she used the toilet. She said that she was age nine at the time. Y.L. said that she asked the Defendant why his cell phone was under the tub in the bathroom, and he told her that he always left it there. Y.L. said that she tried to warn her siblings about the Defendant's leaving a cell phone in the bathroom and that she "watched out" for them. Y.L. said that the Defendant also attempted to record her brother when her brother and her cousin changed clothes by placing a cell phone in his front shirt pocket and requesting that they change clothes in the Defendant's room.

In the forensic interview, Y.L. recalled that when she was age eight and asleep in her mother and the Defendant's bed, she woke to feel the Defendant pulling down her underwear. After she woke, the Defendant told her that he was "fixing her underwear" and requested that she stay. Y.L. left the room. She related that she began harming herself after these incidents, that she completed treatment at a mental health facility, and that she still received counseling. She said the Defendant never showed his naked body to her. Y.L. said that she saw the Defendant "last year" and that she felt very uncomfortable. She related that she, her mother, and her siblings moved out of the Memphis house and into an apartment and that the Defendant did not know the apartment's address. She stated that she had not seen her biological father since she was age five and that he had never acted inappropriately toward her. Y.L. related that after she told her mother about the Defendant's behavior, her mother told her not to talk to him.

Forensic interview expert Patricia Lewis testified that she interviewed Ma.F. and Mi.F. separately at the MCAC in February 2022. Recordings of those interviews were received as exhibits and played for the jury. Ms. Lewis said that Ma.F. and Mi.F. were "easy to talk to" and that she did not see any signs that Ma.F. or Mi.F. had been coached. On cross-examination, Ms. Lewis said that Ma.F.'s realization that what happened to him was not a dream was not necessarily attributable to Y.L.'s disclosures. Ms. Lewis stated that often children remember additional details after being interviewed.

Ma.F. said in his forensic interview that when he was age seven or eight, he woke during the night to find himself in the Defendant's lap with his penis in the Defendant's mouth. Ma.F. said this happened three times and always in his bedroom at night while everyone else in the room was asleep. Ma.F. recalled that he shared a bedroom with his sisters and four cousins. Ma.F. said that when this happened, he went to sleep in his bed and woke lying on his back in the Defendant's lap on a corner of a bed on which his cousins were sleeping. Ma.F. explained that he thought it was a dream until "it started to sound believable." Ma.F. stated that he was a "deep sleeper." Ma.F. acknowledged that he never told anyone about these incidents because he was unsure that they happened. Ma.F. said that the Defendant never asked him to touch the Defendant's body and that he never saw

the Defendant do anything to his sisters, although he was aware of Y.L.'s allegations and that she had been interviewed.

Mi.F. said in her forensic interview that she was currently in the fifth grade and that the Defendant sexually assaulted when she was age 7 and lived with him. She said that when the Defendant became intoxicated, which was "most of the time," he called her into his bedroom while the other people in the house watched television. In the bedroom, he made her get in bed with him or put her on his lap or made her sit on the bed, and he touched her vagina under her clothes with his hand. Mi.F. said that each time he touched her she told him to stop but that he would not stop. She said that this happened multiple times. Mi.F. said these incidents happened when her mother was at work. Mi.F. stated that she was too scared to tell anyone what happened until more recently, when she realized that the Defendant could not hurt her. She explained that she only recently understood that Y.L. had been in therapy as a result of sexual abuse.

At the conclusion of the State's case-in-chief, it provided the following election of offenses:

Count 3: Especially aggravated sexual exploitation of a minor – In count three the State has elected to submit for your consideration the alleged act as described by Y.L. of the defendant recording Y.L. on the toilet by placing the phone under the tub when she was nine or ten years old . . . .

Count 4: Especially aggravated sexual exploitation of a minor – In count four the State has elected to submit for your consideration the alleged act of the defendant recording Y.L. on the toilet by placing the phone on top of the mirror above the toilet when she was between nine and ten years old . . . .

Count 5: Especially aggravated sexual exploitation of a minor – In count five the State has . . . elected to submit for your consideration the defendant recording Y.L. in the bedroom, while she was in her underwear by placing the phone in his shirt pocket when she was between nine and ten years old . . . .

Count 6: Aggravated sexual battery – In count six the State has elected to submit for your consideration the alleged act of the defendant touching Y.L. on the breasts when she was between nine and ten years old . . . when they were wrestling with her brothers and cousins.

Count 7: Attempted aggravated sexual battery – In count seven the State has elected to submit for your consideration the alleged act of the defendant in

pulling down Y.L.'s underwear in the bedroom when she was between nine and ten years old . . . .

The State did not elect a specific incident for Count 1 (rape of a child involving Ma.F.) or Count 2 (aggravated sexual battery of Mi.F.).

The Defendant testified that, from December 2016 through December 2019, he lived at the house in Memphis with J.D., whom he married in 2015, and with her children, Y.L., Ma.F., and Mi.F. He said that he and J.D. had one child together, D., who also lived with them. The Defendant stated that he worked eight or more hours, six days per week. The Defendant said that he considered J.D.'s children to be his own and that they called him "Dad." The Defendant said that he was "sickened" by the allegations against him and that Y.L. only mentioned being bullied at school as a reason for needing mental health treatment. The Defendant recalled that after Y.L. had begun treatment, J.D. told him of Y.L.'s accusations and left with the children. The Defendant said that he last saw D., Y.L., Mi.F., and Ma.F. at a family party in June 2020. The Defendant also recalled that he kept D. for a day and that J.D. brought Ma.F. and the Defendant's nephews to spend the day with the Defendant. The Defendant said that twelve people lived at the Memphis house and that J.D.'s mother also lived there for a period of time. The Defendant related that he was never asked to stay away from anyone's children. The Defendant explained that when he sent a text message to J.D. saying that he "hurt" Y.L., he meant that he let Y.L. down because he was not "there more emotionally for her."

The Defendant testified that since the allegations, he and J.D. had kept in touch regarding the children. He acknowledged that he drank alcohol "to excess" and that drinking caused him to "blackout." The Defendant did not believe that he committed the charged offenses during a blackout. The Defendant stated that he did not commit the charged offenses, that he did not touch any child inappropriately, and that he had never previously been accused of inappropriate behavior toward children. The Defendant related that he was sad to hear Ma.F.'s testimony because they had always had a close friendship. The Defendant explained that the dining room, which was used as a bedroom, had a curtain instead of a door. The Defendant also recalled that the den, which he and J.D. used as a bedroom, had no door. The Defendant said that eight children lived in the house and that they shared one bedroom, with one king-sized mattress on the floor.

On cross-examination, the Defendant testified that the eight children, who ranged in age from six to eleven, all slept in a row on the mattress. The Defendant explained that the room previously had bunk beds but that the bunk beds had been removed. The Defendant denied that he ever left his cell phone in the bathroom and that it stayed clipped to his belt. The Defendant said that he did not know why the children would make false

allegations against him and that the children appeared stressed when they testified. The Defendant believed that J.D.'s family caused the children to create allegations of abuse because her family referred to the Defendant as an alcoholic. The Defendant stated that J.D. told him she was leaving because of his alcohol use, that, after she left, he went to a mental health facility for alcohol addiction treatment, and that he was in recovery. The Defendant related that Y.L. never explained why she ended her relationship with him. The Defendant said that he regretted not trying to "save the family more" when they left.

The State dismissed Count 4, and the jury found the Defendant guilty of rape of a child in Count 1, aggravated sexual battery in Count 2, especially aggravated sexual exploitation of a minor in Counts 3 and 5, aggravated sexual battery in Count 6, and attempted aggravated sexual battery in Count 7. After a sentencing hearing, the court ordered the Defendant to serve an effective forty-nine-year sentence in confinement. The court denied the Defendant's motion for a new trial. This appeal followed.

The Defendant contends that the evidence is insufficient to support his convictions. He argues that the testimony of the victims was untrustworthy, given the crowded conditions in the house and the lack of specific facts regarding the allegations. The State responds that the evidence supports the convictions.

In determining the sufficiency of the evidence, the standard of review 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 State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence . . . are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.'" *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). We apply the same standard of review, whether the evidence is direct or circumstantial. *Id.*

1. *Rape of a Child (Count 1)*

For Count 1, the Defendant was convicted of rape of a child. At the time of the incidents, rape of a child was defined as “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). Sexual penetration was 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[.]” *Id.* § 39-13-501(7) (2025).

The Defendant argues that Ma.F.’s testimony provided the only evidence of this offense, that his testimony was not credible given the crowded conditions in the house, and that there was no physical evidence to corroborate his testimony. Our supreme court has stated that “[t]he credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact.” *Dorantes*, 331 S.W.3d at 379 (citations omitted). A victim’s testimony alone is sufficient to support the Defendant’s conviction. *See State v. Elkins*, 102 S.W.3d 582-83 (Tenn. 2003) (stating a child victim’s testimony regarding sexual contact can be sufficient to support a conviction); *State v. Wyrick*, 62 S.W.3d 751, 767 (Tenn. Crim. App. 2001) (“[A] defendant may be convicted upon the uncorroborated testimony of one witness.”).

Viewed in the light most favorable to the State, the evidence showed that Ma.F., who was age seven or eight at the time, awoke in the night to find his pants pulled down and his penis in the Defendant’s mouth. Ma.F. recalled that this happened three times in the bedroom that he shared with his siblings and cousins. Ma.F. testified that the Defendant told him to go back to sleep. Ma.F. explained that he delayed disclosing these events because he initially thought he might have been dreaming. The jury had the opportunity to hear Ma.F.’s testimony, assess his credibility, consider that Ma.F. shared a bedroom with other children, and consider Ma.F.’s reason for not disclosing the rape for several years. The jury’s verdict reflects that it credited Ma.F.’s testimony. We conclude that the evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that the Defendant committed the act of unlawful sexual penetration of Ma.F. The evidence is sufficient to support the conviction of rape of a child in Count 1.

2. *Aggravated Sexual Battery (Count 2)*

For Count 2, the Defendant was convicted of aggravated sexual battery of Mi.F. The Defendant argues that Mi.F.’s testimony is contradicted by the crowded conditions of the house, the lack of privacy in the converted bedroom, and the victim’s delayed disclosure.

Aggravated sexual battery is defined, in relevant part, as “unlawful sexual contact with a victim by the defendant or the defendant by a victim . . . [when] the victim is less than thirteen (13) years of age.” T.C.A. § 39-13-504(a)(4). Sexual contact, in relevant part, is “the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s or any other person’s intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification[.]” *Id.* § 39-13-501(6). “‘Intimate parts’ includes semen, vaginal fluid, the primary genital area, groin, inner thigh, buttock or breast of a human being[.]” *Id.* at (2).

Viewed in the light most favorable to the State, the evidence showed that when Mi.F. was age seven or eight, the Defendant called her into his bedroom, pulled her onto the bed, and touched her vagina under her clothes with his hand. Mi.F. recalled that this happened more than twice. The jury had the opportunity to hear Mi.F.’s testimony, to assess her credibility, to consider that the Defendant’s bedroom had only a curtain for privacy, and to consider Mi.F.’s reason for not disclosing the sexual battery for several years. The jury’s verdict reflects that it credited Mi.F.’s testimony. We conclude that the evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that the Defendant engaged in unlawful sexual contact with Mi.F. The evidence is sufficient to support the conviction of aggravated sexual battery in Count 2.

### 3. *Election of Offenses in Counts 1 and 2*

When evidence is presented of multiple offenses that would fit the allegations of the charge, the State must elect the particular offense for which a conviction is sought, and the trial court must instruct the jury as to the need for jury unanimity regarding the finding of the particular offense elected. *See, e.g. State v. Brown*, 762 S.W.2d 135, 137 (Tenn. 1988); *State v. Walton*, 958 S.W.2d 724, 727 (Tenn. 1997). “The purpose of election is to ensure that each juror is considering the same occurrence. If the prosecution cannot identify an event for which to ask [for] a conviction, then the court cannot be assured of a unanimous decision.” *State v. Shelton*, 851 S.W.2d 134, 138 (Tenn. 1993). “Our cases have not required that a jury unanimously agree as to facts supporting a particular element of a crime so long as the jury agrees that the appellant is guilty of the crime charged.” *State v. Adams*, 24 S.W.3d 289, 297 (Tenn. 2000) (citations omitted); *see State v. Charles D. Perry*, No. M2022-00643-CCA-R3-CD, 2023 WL 6150852, at \*8 (Tenn. Crim. App. Sept. 21, 2023).

“[A]pplying the election doctrine in child sexual abuse cases presents practical difficulties” when victims are unable to “identify specifically when each alleged act occurred” and, instead, testify to generic evidence of abuse. *State v. Qualls*, 482 S.W.3d 1, 10-12 (Tenn. 2016). Accordingly, “in generic evidence cases the prosecution need not elect a specific criminal act or incident as the basis of a conviction for each charge.” *Id.* at 17. In generic evidence cases, “the election doctrine may be satisfied . . . by the trial court

providing a modified unanimity instruction that allows a conviction only if the jury unanimously agrees the defendant committed all the acts described by the victim.” *Id.* “[T]he trial court must determine at the conclusion of the State’s case-in-chief whether the proof is sufficiently specific as to apply the strict election requirement or whether the election requirement may be satisfied by giving the modified unanimity instruction.” *Id.* (citation omitted). When victims “describe[] with clarity the type of sexual battery perpetrated” and “describe[] a pattern of abuse that occurred over an extended period of time,” courts have “termed this type of testimony ‘generic evidence.’” *Id.* at 11-12.

The State did not elect to proceed with a specific incident of child rape in Count 1 or of aggravated sexual battery in Count 2, although the victims testified that the incidents occurred on more than one occasion. Additionally, the trial court failed to give a modified unanimity instruction for those counts. Because neither party raised this issue on appeal, we asked the parties to provide supplemental briefing to address the question of whether the trial court erred by failing to require the State to elect a particular incident for Count 1 and Count 2 or erred by failing to give a modified unanimity instruction in Count 1 and Count 2.

In their briefs, the parties agreed that the proof consisted of generic evidence for Counts 1 and 2, that an election of a specific incident was not required, and that the trial court erred by failing to give a modified unanimity instruction. Count 1 of the indictment stated that the Defendant “between December 14, 2016, and December 14, 2019 . . . did unlawfully sexually penetrate [Ma.F.]” Ma.F. testified that on three occasions he woke in his bedroom to find that he was on the Defendant’s lap and that his penis was in the Defendant’s mouth. Count 2 of the indictment stated that the Defendant “between December 14, 2016, and December 14, 2019 . . . did unlawfully and intentionally engage in sexual contact with [Mi.F.]” Mi.F. testified that when she was age seven or eight, the Defendant touched her vagina under her clothes with his hand and that this happened in the Defendant’s bedroom more than twice.

We agree with the parties that the proof for Count 1 and Count 2 consisted of generic evidence, that an election of a specific incident was not required for Count 1 and Count 2, and that the trial court erred by failing to give a modified unanimity instruction. The Defendant acknowledges that, as this issue was not raised in the trial court, it is subject to plain error review and argues that the trial court’s failure to give a modified unanimity instruction in Count 1 and Count 2 meets the necessary factors for plain error relief. The Defendant also asserts that the State bears the burden of demonstrating that the court’s error in its failure to give a modified unanimity instruction was harmless beyond a reasonable doubt. The State counters that the Defendant is not entitled to plain error relief because the Defendant cannot establish that a substantial right was affected and that consideration of the error is necessary to do substantial justice.

Plain error relief is limited to errors which are “clear, conspicuous, or obvious” and which affect the defendant’s substantial rights. *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016). Five factors are relevant

when deciding whether an error constitutes “plain error” in the absence of an objection at trial: “(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is ‘necessary to do substantial justice.’”

*State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); see *State v. Minor*, 546 S.W.3d 59, 70 (Tenn. 2018).

All five factors must exist in order for plain error to be recognized. *Smith*, 24 S.W.3d at 283. “[C]omplete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” *Id.* In order for this court to reverse the judgment of a trial court, the error must be “of such a great magnitude that it probably changed the outcome of the trial.” *Id.*; *Adkisson*, 899 S.W.2d at 642. “[T]he ‘defendant bears the burden of establishing all [plain error] elements.’” *State v. Pewitte*, 739 S.W.3d 240, 249 (Tenn. Crim. App. 2025) (citation omitted).

The Defendant argues that the State must demonstrate that the trial court’s error was harmless beyond a reasonable doubt, even as a matter of plain error review. Plenary review is not appropriate in this case because the Defendant’s claim of error was not properly preserved in the trial court. See *State v. Vance*, 596 S.W.3d 229, (Tenn. 2020). As a result, the Defendant’s claim of error is limited to plain error review on appeal. *Id.* This court has held that the State is not required to prove that a trial court’s error was harmless as part of a plain error inquiry. *State v. Maddin*, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005) (“[f]or a ‘substantial right’ of the accused to have been affected[,] . . . it must have affected the outcome of the trial court proceedings . . . [,]but the appellant bears the burden of persuasion with respect to plain error claims”); see *Pewitte*, 739 S.W.3d at 249.

As to the first factor for plain error relief in Count 1, the record clearly establishes what occurred in the trial court. Ma.F. testified that on three occasions he woke in his bedroom to find that he was on the Defendant’s lap and that his penis was in the Defendant’s mouth. The trial court provided the jury with the following instruction regarding a unanimous verdict:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

....

In deciding your verdict, you shall first consider the offense charged in Count One of the Indictment. If you find the defendant guilty of that offense beyond a reasonable doubt, you shall return a verdict of guilt of that offense. . . .

In closing argument, the State reiterated Ma.F.'s testimony and argued that the three instances of sexual contact demonstrated the intentional nature of the conduct.

As to the second factor, the record reflects that a clear and unequivocal rule of law was breached. "[T]he trial court must determine at the conclusion of the State's case-in-chief whether the proof is sufficiently specific as to apply the strict election requirement or whether the election requirement may be satisfied by giving the modified unanimity instruction." *Qualls*, 482 S.W.3d at 17 (citation omitted). Here, the State proceeded with generic evidence, but the court did not give the modified unanimity instruction. The State, likewise, did not request the instruction.

As to the third factor of whether consideration of this error is necessary to do substantial justice, we conclude that no "genuine risk that the jury's verdict rested on different incidents" existed. *Pewitte*, 739 S.W.3d at 255. Ma.F. described the rape, saying that on three occasions he woke in his bedroom to find himself in the Defendant's lap with his penis in the Defendant's mouth. The Defendant's guilt or innocence hinged on the jury's assessment of Ma.F.'s credibility, as the Defendant denied that the alleged conduct occurred. Other elements of child rape were established by undisputed proof. The trial court instructed the jury about the need for juror unanimity and required the jury to find beyond a reasonable doubt that the Defendant engaged in the conduct alleged by Ma.F. in order to find the Defendant guilty of child rape. Although Ma.F. identified three incidents of sexual contact, each was described in the same manner. No likelihood existed that the jury deliberated on conduct other than that described by Ma.F. or that the lack of a modified unanimity instruction would have changed the verdict. The jury expressed its unanimous conclusion that Ma.F. was credible and that the Defendant committed all the acts described by Ma.F. Nothing in the record suggests "juror confusion or divided reliance on separate acts" or that the jury verdict was compromised. *See id.* Defendant has failed to establish that the trial court's error was so significant that it probably changed the outcome of the trial. Consideration of the remaining factors is not necessary when at least one of the factors cannot be established. *Smith*, 24 S.W.3d at 283. The Defendant is not entitled to plain error relief for Count 1.

As to the first factor for plain error relief in Count 2, the record clearly establishes what occurred in the trial court. Mi.F. testified that when she was age seven or eight, the Defendant touched her vagina under her clothes with his hands and that this happened in the Defendant's bedroom more than twice. The trial court instructed the jury that their verdict must be unanimous and that they must find the Defendant guilty of the offense beyond a reasonable doubt. In closing argument, the State reiterated Mi.F.'s testimony and argued that the Defendant's conduct was intentional because the incident occurred more than twice.

As to the second factor, the record reflects that a clear and unequivocal rule of law was breached. "[T]he trial court must determine at the conclusion of the State's case-in-chief whether the proof is sufficiently specific as to apply the strict election requirement or whether the election requirement may be satisfied by giving the modified unanimity instruction." *Qualls*, 482 S.W.3d at 17 (citation omitted). Here, the State proceeded with generic evidence, and the court did not give the modified unanimity instruction. The State, likewise, did not request the instruction.

As to the third factor, we conclude that no "genuine risk that the jury's verdict rested on different incidents" existed. *Pewitte*, 739 S.W.3d at 255. Mi.F. described the sexual contact, saying that when she was age seven or eight, the Defendant touched her vagina under her clothes with his hands and that this happened in the Defendant's bedroom more than twice. The Defendant denied that the alleged conduct occurred. The Defendant's guilt or innocence hinged on the jury's assessment of Mi.F.'s credibility. See *Qualls*, 482 S.W.3d at 18. The trial court instructed the jury about the necessity of juror unanimity and required the jury to find beyond a reasonable doubt that the Defendant engaged in the conduct alleged by Mi.F. before finding the Defendant guilty of aggravated sexual battery. Although Mi.F. identified more than one incident of sexual contact, each incident was described in the same manner. No likelihood existed that the jury deliberated on conduct other than that described by Mi.F. or that the lack of a modified unanimity instruction would have changed the verdict. The jury expressed its unanimous conclusion that Mi.F. was credible and that the Defendant committed all the acts described by Mi.F. Nothing in the record suggests "juror confusion or divided reliance on separate acts" or that the jury verdict was compromised. See *Pewitte*, 739 S.W.3d at 255. Accordingly, the Defendant has failed to establish that the trial court's error was so significant that it probably changed the outcome of the trial. Because consideration of all the factors is not necessary when at least one of the factors cannot be established, the Defendant is not entitled to plain error relief for Count 2.

4. *Aggravated Sexual Battery (Count 6)*

For Count 6, the Defendant was convicted of aggravated sexual battery of Y.L. The Defendant argues that the evidence failed to establish that any touching was intentional, as opposed to accidental. The State counters that the Defendant acted intentionally when he moved Y.L.'s dress to uncover her breasts.

“[W]ith an attack on the sufficiency of the evidence of the defendant’s intent, we note that intent is almost always proven circumstantially.” *State v. Hayes*, 899 S.W.2d 175, 180 (Tenn. Crim. App. 1995) (citing *Hall v. State*, 490 S.W.2d 495, 496 (Tenn. 1973)). In this case, Y.L. testified that, when she was age ten or eleven, the Defendant “pulled [her] dress down” and touched her breast. Y.L. demonstrated the Defendant’s circular hand movement on her breast during her forensic interview, the video recording of which was played for the jury. Y.L. testified that this occurred while she and her brothers and cousin wrestled with the Defendant. Y.L. further testified that after the wrestling incident, “it happened again and I got away.” Viewed in the light most favorable to the State, the Defendant “pulled down” Y.L.’s halter dress to uncover her breast and then rubbed her breast with his hand. This occurred when J.D. was not home and happened on more than one occasion, allowing a jury to conclude it was not accidental. The jury credited Y.L.’s testimony. We conclude that the evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that the touching was intentional and for the purpose of sexual arousal or gratification. The evidence is sufficient to support the conviction of aggravated sexual battery in Count 6.

5. *Attempted Aggravated Sexual Battery (Count 7)*

For Count 7, the Defendant was convicted of attempted aggravated sexual battery of Y.L. He argues that, because he only pulled down Y.L.’s underwear and did not stop her from leaving the bedroom, the entire course of his action was not corroborative of an intent to commit aggravated sexual battery. The State counters that the Defendant completed every step necessary to commit aggravated sexual battery except the touching.

Criminal attempt is committed when

(a) A person . . . acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

(b) Conduct does not constitute a substantial step under subdivision (a)(3), unless the person's entire course of action is corroborative of the intent to commit the offense.

*Id.* § 39-12-101(a), (b) (2025). “[I]n order to obtain a conviction for attempted aggravated sexual battery . . . , the State had to establish that [the Defendant] had the intent to commit the offense of aggravated sexual battery and that he took a substantial step toward the commission of this offense, as corroborated by his entire course of action.” *State v. Michael Scott Knerr*, No. M2012-02486-CCA-R3-CD, 2014 WL 879200, at \*5 (Tenn. Crim. App. Mar. 5, 2014), *perm. app. denied* (Tenn. June 25, 2014).

Y.L. testified that she was lying on the Defendant and J.D.'s bed wearing a nightgown, that she appeared to be asleep but was not, and that she felt the Defendant slide her underwear down from her hips. Y.L. testified that she immediately acted like she awoke, that the Defendant claimed he was “fixing her underwear,” and that she left the room. Viewed in the light most favorable to the State, the evidence showed that the Defendant, when J.D. was not home, entered the bedroom where it appeared Y.L. was sleeping and began to pull down her underwear until he stopped when Y.L. pretended to wake and then left the room. A rational jury could infer that Y.L. left the room to stop the Defendant's conduct that she reasonably believed would have resulted in sexual contact. We conclude that the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that the Defendant's pulling down Y.L.'s underwear was a substantial step toward the commission of sexual battery and that the Defendant's conduct is corroborative of his intent to commit the offense because it occurred during his wife's absence and when he believed Y.L. to be asleep. The evidence is sufficient to support the conviction of attempted aggravated sexual battery in Count 7.

#### 6. *Especially Aggravated Sexual Exploitation of a Minor (Counts 3 and 5)*

The especially aggravated sexual exploitation of a minor statute provides, in pertinent part, that it 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[.]” T.C.A. § 39-17-1005. At the time of the offenses, the definition of “sexual activity” included any acts that were:

. . . .

(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.

*Id.* § 39-17-1002(10)(F)-(G) (2018) (subsequently amended).

For Count 3, the Defendant was convicted of especially aggravated sexual exploitation of a minor for recording Y.L., using a cell phone placed under a tub while she was sitting on the toilet in the bathroom. The Defendant argues that the proof was insufficient to support his conviction because no photographs or recordings were introduced as evidence. The State counters that the recording of Y.L. using the toilet constituted sexual activity as defined by the statute because it is a patently offensive depiction of her excretory functions.

At issue is whether the Defendant’s recording of Y.L. sitting on the toilet was using a minor in the production of a patently offensive depiction of excretory functions. *See* T.C.A. § 39-17-1002(10)(F). Whether material is “patently offensive” is to be “determined by contemporary community standards” and these determinations are “intensely fact-bound question[s.]” *See State v. Whited*, 506 S.W.3d 416, 428-31 (Tenn. 2016). In our determination of the sufficiency of the evidence, we must be mindful of the distinction between the offense of sexual exploitation of a minor and offenses that criminalize voyeurism.<sup>3</sup> *See id.* at 446-47. For example, in *Whited*, our supreme court concluded that secreted recordings of young victims who were undressed and engaging in everyday activities were not sexual or lascivious within the ordinary meaning of those terms. *Id.* at 447. The *Whited* court explained that “if the nude videos of the victim, coupled only with the depiction of the defendant hiding the camera, were deemed prohibited material under the child sexual exploitation statutes, it would be difficult to distinguish the offense of production of child pornography from the lesser offenses that essentially criminalize voyeurism[.]” *Id.* at 446-47. Similarly, in *State v. Robert Grisham*, this court held that a secreted camera in a bathroom that recorded images of a nude victim preparing to take a

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<sup>3</sup> The Defendant was not charged with unlawful photographing in violation of privacy, T.C.A. § 39-13-605 (Supp. 2016) (subsequently amended) (effective date July 1, 2016) and (2018) (subsequently amended) (effective date July 1, 2018).

shower and of the victim “remov[ing] her clothes while using the bathroom” did not constitute sexual activity but, instead, showed the victim “engaged ‘in everyday activities that are appropriate for the setting[.]’” No. E2015-02446-CCA-R3-CD, 2017 WL 1806829, at \*24 (Tenn. Crim. App. May 5, 2017) (quoting *Whited*, 506 S.W.3d at 447), *perm. app. denied* (Tenn. Sept. 20, 2017).

Here, the prosecution failed to elicit testimony about the contents of the recordings. Y.L. testified that she found the Defendant’s cell phone on the bathroom floor and that it was recording “when [she] went to the bathroom.” During her forensic interview, Y.L. stated that the camera did not record images of her genital area because she only slightly pulled down her pants before sitting on the toilet. Though Y.L. testified that she deleted the video recording on the cell phone, she did not provide any testimony about the contents of the recorded images that she saw before deleting them, and no recording was introduced into evidence. The evidence is insufficient for a rational jury to conclude beyond a reasonable doubt that the recording produced depicted the victim engaged in a patently offensive depiction of excretory functions. *See* T.C.A. § 39-17-1002(10)(F). We vacate the Defendant’s conviction and judgment for especially aggravated sexual exploitation of a minor in Count 3.

For Count 5, the Defendant was convicted of especially aggravated sexual exploitation of a minor for producing a video recording of Y.L. when she was in her bedroom getting ready for school with the other girls in the house and wearing only her “undergarment.” The Defendant argues that the recording, which was not introduced into evidence, depicted minors in everyday activities and not in a lascivious manner. The State counters that the Defendant not only recorded Y.L. but also directed Y.L. to turn and face him so that he could record her wearing only her underwear and that such a recording constituted a lascivious exhibition of Y.L.’s breasts, genitals, or buttocks.

Whether a recording depicts a minor engaging in the lascivious exhibition of their private body areas is “an intensely fact-bound question.” *See Whited*, 506 S.W.3d at 431. Our supreme court in *Whited* considered the following when determining whether recorded depictions of minor victims were lascivious:

the level and nature of the nudity in the videos, the emphasis on the minor victims’ private body areas, the fact that the victims were engaged in everyday activities ordinarily performed nude, the defendant’s audible comments and interactions with the victims recorded on the videos, and the defendants’ recorded actions depicting his voyeurism in setting up the camera.

*Id.* at 447. Here, the State failed to elicit testimony about the specific images on the recording. Y.L. testified that she saw a cell phone in the Defendant’s shirt pocket and that,

through the fabric of his shirt, she could see the light of the phone's recording timer, which she understood indicated that the phone was recording a video. The State did not elicit testimony about the specifics of Y.L.'s clothing, the extent her body was exposed, and any gestures the Defendant directed, aside from telling her to turn.

Viewed in the light most favorable to the State, the evidence showed that the Defendant had his cell phone in his shirt pocket, that he appeared to be recording a video of Y.L. wearing an undergarment while she was getting ready for school, and that the Defendant told Y.L. to turn around. The evidence is insufficient for a rational jury to determine the contents of the recording and whether the recording was of a "lascivious exhibition of [Y.L.'s] breasts or [her] genitals, buttocks, anus or public or rectal area," or whether the recording merely depicted the minor victim wearing only her underwear and engaged in everyday activities ordinarily done in private. *See id.* at 446-47; T.C.A. § 39-17-1002(G).

In reaching the conclusion, we have considered the State's reliance on *United States v. Ward*, in which a defendant secreted a camera and "positioned [the victim] using verbal commands and touching her body, so that the secret camera repeatedly filmed her pubic area." 686 F.3d 879, 883 (8th Cir. 2012). The *Ward* court held that "[w]hen a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject pursuing activities unrelated to sex." *Id.* at 883-884 (citation omitted). We, however, conclude that *Ward* is distinguishable from the present case. In *Ward*, the victim was positioned by the defendant to display her pubic area, and the jury was able to view the recording and consider it in light of the statutory elements of the offense. In contrast, the Defendant in the present case asked Y.L. to turn around, with only vague evidence to establish what she wore, what his cell phone recorded, and whether Y.L.'s breasts or other private areas were recorded. Here, the State failed to elicit sufficient factual specificity from Y.L. to determine whether the Defendant produced and recorded sexual activity of a lascivious nature. Because the evidence is insufficient, we vacate the Defendant's conviction and judgment for especially aggravated sexual exploitation of a minor in Count 5.

Having reversed the convictions in Counts 3 and 5, we must determine how the case should proceed. "[W]here a conviction for an offense is reversed on appeal for insufficient evidence, double jeopardy protects the accused from retrial on *that* offense, but he may still be tried on lesser offenses if the evidence at the first trial was not insufficient, as a matter of law, to support a conviction of those lesser offenses." *State v. Maupin*, 859 S.W.2d 313, 317 (Tenn. 1993) (emphasis in original) (citation omitted); *Whited*, 506 S.W.3d at 447-48. A person commits criminal attempt of especially aggravated sexual exploitation of a minor if the person "[i]ntentionally engages in action or causes a result that would constitute [that] offense, if the circumstances surrounding the conduct were as the person believes them to be[.]" T.C.A. § 39-12-101(a)(1); *see Whited*, 506 S.W.3d at 448. In *Whited*, the trial court

instructed the jury as to especially aggravated sexual exploitation of a minor but not the lesser included offense of attempted especially aggravated sexual exploitation of a minor. On appeal in *Whited*, our supreme court reversed the defendant's conviction for especially aggravated sexual exploitation of a minor and remanded the case, holding that double jeopardy did not prevent the State from retrying the defendant on the lesser included offense of attempt. *Whited*, 506 S.W.3d at 448.

The *Whited* court determined that although the evidence was insufficient to support the defendant's conviction for especially aggravated sexual exploitation of a minor, that decision was “‘not tantamount to a finding of insufficiency on’ attempt.” *Id.* (Cf. *Maupin*, 859 S.W.2d at 318). The *Whited* court noted that the case presented “a close question regarding whether the defendant intended to capture exactly what he recorded in the videos—minors engaged in everyday activities ordinarily done nude—or whether he intended to ‘cause a result that would constitute the offense’ of production of child pornography by recording the minors engaged in a lascivious exhibition.” *Id.* Likewise, in this case, the jury was not instructed on attempted especially aggravated sexual exploitation of a minor in either Count 3 or Count 5, and the evidence presents a question regarding whether the Defendant intended to capture Y.L. engaged in everyday activities that exposed her body or whether he intended to cause a result that would produce and capture activity which would constitute the offense of especially aggravated sexual exploitation of a minor. See T.C.A. § 39-12-101(a). Therefore, we remand Counts 3 and 5 to the trial court. On remand, the State may retry the Defendant on the lesser-included offense of attempted especially aggravated sexual exploitation of a minor, if it so chooses. See *Whited*, 506 S.W.3d at 449.

In consideration of the foregoing and the record as a whole, the convictions in Counts 1 (rape of a child), 2 (aggravated sexual battery), 6 (aggravated sexual battery), and 7 (attempt to commit aggravated sexual battery) are affirmed. The convictions and judgments in Counts 3 and 5 for especially aggravated sexual exploitation of a minor are vacated. The case is remanded for further proceedings consistent with this opinion.

**s/Robert H. Montgomery, Jr.**  
ROBERT H. MONTGOMERY, JR., JUDGE