

**FIRST DIVISION
BARNES, P. J.,
MARKLE and HODGES, JJ.**

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October 2, 2026

In the Court of Appeals of Georgia

A26A1499. BRADLEY v. THE STATE.

HODGES, Judge.

A jury found Michael Bradley guilty of incest, rape, sodomy, aggravated sodomy, first degree cruelty to children, and two counts of aggravated child molestation involving his stepdaughter, L. G.¹ Following the denial of his motion for new trial, as amended, he appealed. Bradley contends that (1) the evidence was insufficient to sustain his conviction for cruelty to children in the first degree, and that

¹ The trial court sentenced Bradley on Count 1 (incest) to serve 50 years consecutive to Count 3 (aggravated sodomy); on Count 2 (rape) to serve a life sentence consecutive to Count 1; on Count 3 to serve a life sentence consecutive to Count 2; on Count 4 (aggravated child molestation) to serve a life sentence concurrent with Count 3; on Count 5 (aggravated child molestation) to serve a life sentence concurrent with Count 3; on Count 6 (first degree cruelty to children) to serve 20 years consecutive to Count 1. The trial court merged Count 7 (sodomy) with Count 3.

the trial court erred (2) in permitting the State to introduce certain expert testimony and crime lab reports, (3) in its jury instructions, and (4) in failing to merge the aggravated sodomy count into one of the aggravated child molestation counts. For the reasons that follow, we affirm.

On appeal from a criminal conviction where the defendant has challenged the sufficiency of the evidence, we view that evidence “in the light most favorable to the verdict, and the appellant no longer enjoys the presumption of innocence.” *Ramirez-Ortiz v. State*, 361 Ga. App. 577, 579(1) (865 SE2d 206) (2021). Where the defendant does not challenge the sufficiency of the evidence “we evaluate his several claims of error ... in the light of the overall strength of the State’s case, and we do not present the evidence in the light most favorable to the verdict.” *Criswell v. State*, 379 Ga. App. 808 (931 SE2d 249) (2026) (punctuation omitted). “The appellate court does not reweigh evidence or resolve conflicts in testimony[.]” *Ramirez-Ortiz*, 361 Ga. App. at 579(1) (punctuation omitted).

So viewed, the record shows that L. G.’s mother and Bradley began a relationship in 2008 and later married. L. G.’s mother had four children at the time, including L. G., and Bradley had one child. L. G.’s mother, who ran a daycare out of

her home, then had two more children with Bradley. In 2016, when L. G. was 12 years old, Bradley began placing his penis on her mouth. He also placed his mouth on her vagina, and there was other evidence of multiple occasions where sodomy occurred. In October and November of 2016, he had sexual intercourse with her multiple times. She testified that the sexual intercourse hurt, and that she did not want to do these sexual acts with him, but he told her she had to “because [her] mama did it.” He forced her to stay in her room if she refused him, and told her not to tell anyone. She did not tell anyone because she was “scared.” Bradley also gave her what she believed to be a birth control pill.

In May 2017, about eight months after the sexual intercourse incidents mentioned above, L. G.’s stomach began to hurt. Unbeknownst to L. G. in that moment, she was pregnant with Bradley’s baby. She went to her room and took pain medication, but because she was experiencing some vaginal emissions, she began Googling what was wrong with her. She testified that “it started hurting and then ... I just start[ed] pushing — pushing [the baby] out because I felt it.” She called out to her nine-year-old sister, who helped deliver the baby, and L. G. cut the umbilical cord with scissors. L. G.’s little sister helped L. G. clean up the blood and the placenta. The

girls knew what to do because they had seen their mother give birth to some of their siblings.

L. G. sent a photo of the baby girl to Bradley's phone, and he told her not to tell anyone. She hid the baby in the playroom, which was accessed through her bedroom. A few days later, Bradley and L. G.'s mother came into the playroom while L. G. was breastfeeding the baby. At first, her mother thought the baby was a doll, then realized the child was alive when the infant's hand moved. Bradley reminded L. G.'s mother that he had told her L. G. was "fast" and "was having sex[,] " and he suggested the baby's father was a neighbor. L. G.'s mother insisted L. G. go to the hospital, and while L. G. was waiting for the car to take her there, Bradley told her to delete all messages and photos on her phone that were about the baby. The physician who cared for L. G. and examined her baby testified that the baby was born at eight months' gestation.

L. G. was afraid of losing the baby, so she lied to her mother and told her the father of the baby was a boy who had raped her at a park. She also told this to police in a forensic interview in June 2017. As time passed, however, the mother noticed that

the baby looked “exactly like” Bradley, and L. G. finally told her mother that Bradley was the baby’s father. The mother called law enforcement, and during a second forensic interview in September 2017, L. G. told police that Bradley had sexually assaulted her by, among other things, putting his penis in her vagina, and that he told her to lie about what had happened. DNA tests confirmed that Bradley was the baby’s father; the probability of paternity was 99.999 percent.

1. Bradley argues that the evidence was insufficient to sustain his conviction for first degree cruelty to children.² Specifically, he argues that there was no evidence at trial that he acted maliciously in causing his 12-year-old stepdaughter cruel and excessive mental and physical pain. Bradley does not argue that the evidence was insufficient to show he acted maliciously in causing L. G. to endure childbirth. We conclude that ample evidence exists to sustain Bradley’s conviction.

OCGA § 16-5-70(b) provides: “Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.” The indictment accused Bradley of

² He does not contest the sufficiency of the evidence as to his other convictions.

“maliciously ... caus[ing L. G.] ... cruel and excessive mental and physical pain by impregnating [her and] causing her to endure childbirth[.]”

“Malice means an actual intent to cause a particular harm — in this context, cruel or excessive physical or mental pain — *or* the wanton and willful doing of an act with awareness of a plain and strong likelihood that this particular harm may result.” *Jones v. State*, 301 Ga. 94, 99(2) (799 SE2d 749) (2017) (punctuation omitted and emphasis added). “[F]or the purposes of the child cruelty statute, malice implies the absence of all elements of justification or excuse[.]” *Jonker v. State*, 376 Ga. App. 344, 347(1) (918 SE2d 616) (2025). “[T]o act maliciously under the statute is to act with the intent to cause harm or with an awareness that harm may result, not with an intent to harm a person the defendant knows to be a minor.” *Id.* As our Supreme Court has determined, “[w]ith regard to the crime of cruelty to children, criminal intent may be inferred from conduct before, during and after the commission of the crime.” *Vasquez v. State*, 306 Ga. 216, 223(1)(a) (830 SE2d 143) (2019) (punctuation omitted).

Viewed in the light most favorable to the jury’s verdict, *Ramirez-Ortiz*, 361 Ga. App. at 579(1), the evidence shows that L. G. testified that she did not want to have sex with Bradley, and that it hurt and scared her. She also testified that giving birth

was painful, her stomach hurt, her legs were shaking, and she was unable to walk. The evidence further showed that she was still bleeding when she went to the hospital several days later. While our Supreme Court has yet to conclude that “evidence of childbirth or a pregnancy alone” is always sufficient to show physical injury, see *Daddario v. State*, 307 Ga. 179, 187(2)(a) n. 6 (835 SE2d 181) (2019), it is nonetheless clear, of course, that in some instances, appellate courts have “no trouble” concluding “that pregnancy and childbirth resulting from non-consensual sexual conduct constitute physical injury to the victim.” *Kendrick v. State*, 331 Ga. App. 682, 684 (769 SE2d 621) (2015) (punctuation omitted). Whether the physical or mental harm sustained by a victim is cruel or excessive is, of course, for the jury’s determination. *McDaniel v. State*, 360 Ga. App. 194, 202(1) (860 SE2d 806) (2021).

Here, there was sufficient evidence to sustain the jury’s finding that the 12-year-old’s fear, pain, and bleeding from pregnancy, caused by forced sex with her stepfather, constituted cruel or excessive physical and mental pain. See *Brewton v. State*, 266 Ga. 160, 160(1) (465 SE2d 668) (1996) (finding that a conviction for first degree child cruelty requires the State to show, among other things, “that the pain was

cruel or excessive”). “[T]he law does not set a bright line [regarding the determination of excessive mental or physical pain] but leaves [that] to the trier of fact, taking into account societal norms generally accepted, whether certain behavior inflicts ‘cruel’ or ‘excessive’ pain[.]” *Fraga v. State*, 371 Ga. App. 430, 435(2) (900 SE2d 737) (2024) (punctuation omitted).

As to Bradley’s malice, setting aside the issue of whether he acted with an actual intent to cause the particular harm produced, we conclude that a rational trier of fact could have found that his conduct in locking L. G. in her room when she refused to have sex with him, admonishing her to tell no one, giving her what appeared to be a birth control pill, and telling her to delete photos and messages about the baby from her phone, at the very least authorized the jury to infer that his actions were done wantonly and willfully with an awareness of “a plain and strong likelihood that such harm may result.” *Boles v. State*, 316 Ga. 209, 216(2) (887 SE2d 304) (2023). See *Vasquez*, 306 Ga. at 222(1)(a). Further, “[i]ntent is a question of fact to be determined upon consideration of words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.” *Boles*, 316 Ga. at 216(2). “[I]ntent to cause the particular harm is peculiarly a question for the jury in child

cruelty cases.” *Fraga*, 371 Ga. App. at 435(2). The trial court did not err in finding that the evidence was sufficient to sustain Bradley’s conviction for first degree cruelty to children.

2. Bradley next argues that the trial court erred in allowing the State to introduce a Georgia Bureau of Investigation (“GBI”) forensic DNA analyst’s reports, tests, and images, as well as the analyst’s related testimony regarding the testing of DNA samples which were first extracted by a different technician. Bradley argues that because the technician who performed the extraction did not testify at trial and was not subject to cross examination, and because GBI analyst Nicole Norvesh was not present at every step of the testing process, his Sixth Amendment Confrontation Clause rights were violated. We disagree.

Bradley asserts error as to Norvesh’s testimony, and the admission of State’s Exhibits 5-16.³ Norvesh was qualified as an expert witness without objection. Although

³ Bradley provides no record citations to the exhibits themselves. Further, the record citations he does provide do not always identify what the exhibits are. See *Brittain v. State*, 329 Ga. App. 689, 693(2) (766 SE2d 106) (2014) (“[T]his Court will not cull the record in search of error on behalf of a party, and if we have missed something in the record or misconstrued an argument, the responsibility rests with counsel.”) (punctuation omitted). Accord *Ball v. State*, 379 Ga. App. 500, 501 n. 2 (929 SE2d 845) (2026).

Norvesh did not handle the extraction process, she testified about how that process worked, and she testified that she performed all of the other steps in the testing process and confirmed the integrity of the processes. She testified, among other things, regarding the five-step process for performing a DNA analysis, including the initial extraction performed by the other technician, her own testing process in regards to the DNA samples, and her own conclusions, based on her testing, that the DNA evidence showed Bradley was the child's father.

Bradley's brief addresses this enumeration under the plain error standard because he did not object at trial or did not object on the bases raised on appeal. As he acknowledges, our review is for plain error only. *Carter v. State*, 315 Ga. 214, 222(3)(b) (881 SE2d 678) (2022). Under the plain error standard, Bradley must show that the trial court made an error that

(1) was not affirmatively waived, (2) was clear and obvious, which generally means there must be on-point controlling authority or the unequivocally clear words of a statute or rule that plainly establish that the trial court erred, (3) likely affected the outcome of the trial, and (4) seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Dees v. State, 322 Ga. 498, 500-01(2) (920 SE2d 626) (2025) (punctuation omitted). Accord *Gates v. State*, 298 Ga. 324, 327(3) (781 SE2d 772) (2016) (applying the plain error standard to the admission of evidence). The burden of establishing plain error “falls squarely on the defendant[.]” *Martin v. State*, 361 Ga. App. 511, 517(2)(a)(ii) (864 SE2d 693) (2021) (punctuation omitted).

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]” US Const. Amend. VI. “The Confrontation Clause generally prohibits the admission of out-of-court testimonial statements made by a declarant who is unavailable for cross-examination.” *Stafford v. State*, 312 Ga. 811, 824(5)(b) (865 SE2d 116) (2021). “A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution.” *Id.*

Bradley cites to *Smith v. Arizona*, which provides that

[a] State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation.

602 US 779, 802-03(IV) (144 SCt 1785, 219 LE2d 420) (2024) (citations omitted); *id.* at 791(I)(B), 797-98(II) (finding a Confrontation Clause violation where one forensic analyst ran tests on seized items and determined that they were particular drugs, but where another forensic analyst provided his own “independent opinion” of the absent analyst’s testing and of the drugs’ identity). The United States Supreme Court also stated, however, that

we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. ... [G]aps in the chain of custody normally go to the weight of the evidence rather than its admissibility.

Melendez-Diaz v. Massachusetts, 557 US 305, 311(II) n. 1 (129 SCt 2527, 174 LE2d 314) (2009) (citations and punctuation omitted).

In Georgia, our Supreme Court examined a similar issue in *Disharoon v. State*, 291 Ga. 45, 45-46 (727 SE2d 465) (2012), in which the defendant raised hearsay and Confrontation Clause objections to the testimony of an expert witness who personally performed DNA testing on the relevant samples, and who read the test results, but who was not present when another technician performed one part of the testing

process. The *Disharoon* Court analyzed the issue in light of the United States Supreme Court's decision in *Bullcoming v. New Mexico*, 564 US 647, 652 (131 SCt 2705, 180 LE2d 610) (2011), which held that the "surrogate testimony" of the "scientist who did not sign the certification or perform or observe the test reported in the certification" violated the Confrontation Clause. *Disharoon*, 291 Ga. at 46-58. The *Disharoon* Court noted that, "[p]rior to *Bullcoming*, Georgia courts consistently held that the Confrontation Clause does not require the analyst who actually completed the forensic testing used against a defendant to testify at trial." 291 Ga. at 46, citing *Carolina v. State*, 302 Ga. App. 40, 41-42 (690 SE2d 435) (2010) (testimony of lab supervisor who did not perform the tests on the substance at issue was not inadmissible hearsay that violated the Confrontation Clause). See also *Herrera v. State*, 288 Ga. 231, 234(4) (702 SE2d 854) (2010) (finding no Confrontation Clause violation in admission of lab report where lab supervisor who testified did not receive and process the sample, because lab supervisor was a toxicology expert and testified that he had developed the lab procedures, trained the staff, and supervised employees who conducted the tests); *Dunn v. State*, 292 Ga. App. 667, 671(1) (665 SE2d 377) (2008) (admission of laboratory supervisor's testimony and conclusions, which were based

on test conducted by a technician who did not testify at trial, did not violate Confrontation Clause). The *Disharoon* Court ultimately found no Confrontation Clause violation in the admission of the expert's testimony, and it did so by distinguishing *Bullcoming*. 291 Ga. at 47-48.

In *Bullcoming*, the defendant was arrested on charges of driving while intoxicated. 564 US at 651. The primary evidence against him was a forensic laboratory report certifying that his blood-alcohol concentration was above the legal limit. *Id.* The analyst who performed the forensic testing and signed the certification was not called as a witness at trial; instead, the State called another analyst who was familiar with the laboratory's testing procedures, but who had not participated in, observed, or reviewed the test. *Id.* The United States Supreme Court held that this "surrogate testimony" could not convey what the analyst who performed the testing and signed the certification knew or observed about the particular test and testing process discussed in the certification. *Id.* at 652. As the *Disharoon* Court reasoned, pertinently,

the *Bullcoming* Court found it "significant" that the analyst who had performed the tests had been placed on unpaid leave, and that the testifying witness had no knowledge of the reason why [the analyst] had

been placed on unpaid leave. The Court noted that, had the analyst who performed the tests been “on the stand, *Bullcoming*’s counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for his removal from his work station. However, without having the witness available at trial for cross-examination, the defendant was deprived of his right to confront this witness and explore such matters. *Under these circumstances*, the “surrogate testimony” of the scientist who did not sign the certification or perform or observe the test reported in the certification was inadmissible, and its admission violated the defendant’s right to confront the witness against him pursuant to the Confrontation Clause.

Disharoon, 291 Ga. at 47 (citations and punctuation omitted; emphasis added), quoting *Bullcoming*, 564 US at 652, 661-62(II)(B). Unlike with the absent analyst in *Bullcoming*, no facts tending to cast doubt on the work or processes of the absent expert are mentioned in the *Disharoon* opinion.

Further, the *Disharoon* Court stated that while the *Bullcoming* analyst was generally familiar with testing procedures, that analyst “had not specifically participated in, observed, or reviewed the test on the defendant’s blood sample.” 291 Ga. at 47-48. By contrast, *Disharoon* found no Confrontation Clause violation because the testifying witness exhibited a much greater level of participation than did the

testifying witness in *Bullcoming* in that she “completed every step of the test” save one, which was handled by the absent technician. Id. at 48.

We find that in the instant case, “the level of participation in the DNA testing by the testifying witness was significantly greater than that of the testifying witness in *Bullcoming*[,]” and the question thus is controlled by our Supreme Court’s reasoning in *Disharoon*. Id. Like the testifying witness in *Disharoon*,

[Norvesh] drafted the report, and had a substantial personal connection to the scientific test at issue (having actually performed the vast majority of the testing herself). Because the present case[] [does] not involve facts and circumstances that are controlled by the United States Supreme Court’s decision in *Bullcoming*, the [trial court] did not err in holding that it was not a violation of the Confrontation Clause to allow [Norvesh’s] testimony [and the admission of the challenged exhibits] in th[is] case[].

Id. at 48. Accord *Leger v. State*, 291 Ga. 584, 592-93(5) (732 SE2d 53) (2012). “We have said before that an expert need not testify to the validity of every step that went into the formulation of [her] results and may base [her] opinion on data collected by others.” *White v. State*, 310 Ga. App. 386, 390(2)(a) n. 8 (714 SE2d 31) (2011). It is

well established that “[a]n expert may base her opinions on data gathered by others.” *Watkins v. State*, 285 Ga. 355, 358(2) (676 SE2d 196) (2009).

Further, under the plain error standard, “the question is only whether on-point controlling authority makes it unequivocally clear” that the trial court erred by admitting the unobjected-to evidence at issue. *Dees*, 322 Ga. at 502(2) (punctuation omitted), citing *Hill v. State*, 321 Ga. 177, 181-82(2) (913 SE2d 547) (2025). Bradley has not cited to any such on-point controlling authority. See *State v. Kelley*, 290 Ga. 29, 33(2)(a) (718 SE2d 232) (2011) (finding that even if an appellant satisfies the first three prongs of the plain error test, the appellate court still retains discretion regarding remediation of the error, “discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. ... Satisfying all four prongs of this standard is difficult, as it should be.”) (punctuation omitted). Bradley has not satisfied the plain error requirements.

3. Bradley raises a multi-pronged assertion of error against the trial court’s non-pattern jury instruction on the injury element of aggravated child molestation. Although he objected to the charge in the trial court, he concedes that his attorney objected below “on grounds not raised here.” He now argues for the first time that

part of the charge was an incorrect statement of law, an improper comment on the evidence, a mandatory presumption, and not neutral. Accordingly, our review is for plain error only. *Grullon v. State*, 313 Ga. 40, 44-45(2) (867 SE2d 95) (2021) (applying plain error review to jury charges where no objection was raised or objections were raised on different grounds on appeal than in the trial court). In determining whether error has occurred, we consider jury instructions as a whole. *Wells v. State*, 323 Ga. 415, 416 (925 SE2d 551) (2026).

The trial court charged the jury generally on aggravated child molestation, as follows:

A person commits the offense of aggravated child molestation when that person does an immoral and indecent act to, with, or in the presence of a child under the age of 16 years with the intent to arouse or satisfy the sexual desires of the person or the child and the act physically injures the child or involves an act of sodomy.

This language tracks that of OCGA § 16-6-4(a)(1), (c). The trial court also charged the jury on the sodomy element of aggravated child molestation. Bradley does not assert error in this regard. Rather, he contends that the trial court erred in a different portion of the charge where the trial court charged the jury, albeit in slightly different language

than that requested by the State, that: “Pregnancy and childbirth resulting from nonconsensual sexual intercourse constitutes physical injury. An underage victim’s desire to endure pregnancy and deliver the baby is inconsequential because of the legal incapacity to consent to intercourse.”

(a) Bradley argues that the trial court erred in giving the charge because it was not a pattern jury instruction and no published appellate decision holds that it is an approved jury charge. He cites to no law requiring that a nonpattern charge be “approved” in a published opinion. Rather, “[t]he only requirement regarding jury charges is that the charges, as given, were correct statements of the law and, as a whole, would not mislead a jury of ordinary intelligence.” *Wright v. State*, 365 Ga. App. 288, 289(1) (878 SE2d 137) (2022). See *Showers v. State*, 353 Ga. App. 754, 760(2)(b)(ii) (839 SE2d 245) (2020) (“It is well-established that jury instructions do not need to track, exactly, the language of pattern jury instructions.”) (punctuation omitted). As our Supreme Court has held, “an error is plain if it is clear or obvious under current law. An error cannot be plain where there is no controlling authority on point.” *Ash v. State*, 312 Ga. 771, 794(5)(a) (865 SE2d 150) (2021) (punctuation omitted).

(b) Bradley contends the charge is an incorrect statement of law or an improper comment on the evidence because the aggravated child molestation statute does not define physical injury or an “act which physically injures the child[,]” and thus the charge language is an extrajudicial interpretation of the statute or a judicial opinion on whether a fact in issue has been proven.

First, the trial court relied upon the language in *Kendrick*, 331 Ga. App. at 682, in approving the charge in the instant case. *Kendrick* did not address a jury charge, but instead involved a challenge to the sufficiency of the evidence on an aggravated child molestation charge. Id. at 682-83. In *Kendrick*, the indictment alleged, in part, that the defendant committed aggravated child molestation “involving physical injury to said child by impregnating her[,] causing said child to endure childbirth.” Id. at 683. Even though the 13-year-old victim did not testify that she experienced pain or injury during intercourse, id., the Court of Appeals recognized that, “[i]t is axiomatic that a full-term pregnancy involves at least some impairment of physical condition, and furthermore, there was evidence in this case that the victim experienced pain during the two-day labor and delivery process.” Id. at 684. Specific to Bradley’s contention that the aggravated child molestation statute does not define physical injury, *Kendrick*

recognized that “the term injury means any wrong or damage done to another, either in [her] person, rights, reputation, or property, and more specifically, bodily injury means physical pain, illness, or any impairment of physical condition.” *Id.* (punctuation omitted). *Kendrick* then went on to conclude that the evidence of the victim’s pain during labor and delivery were sufficient to sustain the defendant’s conviction for aggravated child molestation. *Id.* Similarly, in *Daddario*, in which the indictment charged the defendant “with aggravated child molestation by alleging that he had sexual intercourse with his underage daughter, which resulted in physical injury to his daughter related to the delivery of her child[,]” the Supreme Court found the evidence was sufficient to show “the physical injury element of the charge.” 307 Ga. at 187(2)(a).

As a result, it is clear from both *Daddario* and *Kendrick* that evidence of physical injury resulting from pregnancy, labor, and delivery/childbirth can satisfy the physical injury element of the aggravated child molestation statute and is thus not an incorrect statement of the law. See *Daddario*, 307 Ga. at 187(2)(b) (finding that OCGA § 16-6-4(c) is not unconstitutionally vague “regarding whether an act of child molestation that causes a child under the age of 16 to endure childbirth can ‘physically injure’

her”) (punctuation omitted); *Kendrick*, 331 Ga. App. at 683-84 (finding evidence sufficient to show the physical injury element of aggravated child molestation although child “did not testify that the intercourse was physically forceful, painful, or otherwise physically injurious” where the evidence showed “the victim experienced pain during the two-day labor and delivery process”).

Further, the trial court’s charge was tailored to the facts alleged in the indictment with regard to the crime of aggravated child molestation, which could be proven in more than one way. See OCGA § 16-6-4(c) (providing that the crime may be committed by physical injury to a child or by an act of sodomy).

It is axiomatic that, in criminal prosecutions, the court’s instructions must be tailored to fit the charge in the indictment and the evidence adduced at trial. This is particularly true when the offense charged may be committed in one of several ways, but the indictment charges one specific method. Averments in an indictment as to the specific manner in which a crime was committed are not mere surplusage. Such averments must be proved as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant’s right to due process of law. Accordingly, the trial court’s instructions must sufficiently limit the jury’s consideration to the allegations and elements of the offense as charged in the indictment.

Clemens v. State, 318 Ga. App. 16, 19-20(2) (733 SE2d 67) (2012).

Looking at the charge as a whole, the trial court also instructed the jury that “[t]he burden of proof rests upon the State to prove every material allegation of the indictment and every essential element charged in the indictment beyond a reasonable doubt. There is no burden of proof upon the defendant whatsoever, and the burden never shifts to the defendant to introduce evidence or to prove innocence.”

Our courts have held that OCGA § 17-8-57, which prohibits judges from expressing or intimating their opinions in criminal cases regarding what facts have or have not been proven, “is violated only when the trial court’s instruction, *considered as a whole*, assumes certain things as facts and intimates to the jury what the judge believes the evidence to be.” *Parker v. State*, 276 Ga. 598, 600(5) (581 SE2d 7) (2003) (punctuation omitted; emphasis added). “When the charge on [aggravated child molestation] given in this case is considered in context, no reasonable juror could have construed it as an expression of the trial court’s own opinion[.]” *Id.* The “charge was adjusted to the evidence, and the trial court otherwise instructed that the jury alone would decide whether [Bradley] was guilty[.]” *Id.*

(c) Next, Bradley argues that when the trial court instructed the jury that “[p]regnancy and childbirth resulting from nonconsensual sexual intercourse

constitutes physical injury[.]” this amounted to an unconstitutional mandatory presumption which shifted to him the burden of proving either that his intercourse with L. G. was consensual or that he did not impregnate her or physically injure her by so doing.

First, as the Supreme Court recognized in *Daddario*, “a person of common intelligence would understand that an act of child molestation that results in the pregnancy of a 14-year-old girl could, at the least, cause her to sustain physical injury[.]” 307 Ga. at 188-89(2)(b). Here, L. G. was only 12 years old. Second, there was no mandatory presumption because, if anything, the wording of the charge enhanced the State’s burden, requiring it to prove that (i) the intercourse was nonconsensual, (ii) Bradley impregnated L. G., and (iii) he injured her physically in so doing. See generally *Lanwehr v. State*, 265 Ga. App. 359, 360(2) (593 SE2d 897) (2004) (finding any error in jury instruction harmless where instruction given increased the State’s burden of proof).

(d) Finally, Bradley argues that the charge was plain error because it was not neutral. Although this contention is not entirely clear, Bradley appears to argue that the charge “inappropriately highlighted” disputed facts in the case. It is probably fair

to say that almost anything alleged in the indictment in a case that goes to trial involves disputed facts. In this part of the enumeration, however, Bradley cites to no specific, factually on-point legal authority supporting his argument that the charge is not neutral. See generally *Parker*, 276 Ga. at 600(5) (finding that a contested charge on self-defense, which included the principle that no one is justified in committing an assault only in revenge for past wrongs, was neutral and adjusted to the evidence). Rather, he cites to a special concurrence and to statutes from foreign jurisdictions. As this Court has determined, even persuasive authority is insufficient to demonstrate plain error. *Tucker v. State*, 362 Ga. App. 489, 504(6) (869 SE2d 142) (2022). The authority Bradley cites does not amount to the controlling authority required to establish plain error.

Bradley has pointed to no on-point controlling authority showing clear or obvious error in this regard. *Ash*, 312 Ga. at 794(5)(a). He therefore has failed to show that the trial court plainly erred.

4. Bradley argues that the trial court erred in failing to merge his conviction for aggravated sodomy (Count 3) into one of his convictions for aggravated child molestation (Count 4).⁴ The trial court did not err.

“Whether offenses merge is a legal question, which we review de novo.” *Regent v. State*, 299 Ga. 172, 174 (787 SE2d 217) (2016).

To determine whether one offense should be merged into another, this Court has adopted the “required evidence” test outlined in *Drinkard v. Walker*, 281 Ga. 211 (636 SE2d 530) (2006): “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.”

Horton v. State, 310 Ga. 310, 315(1)(a) (849 SE2d 382) (2020) (punctuation omitted), quoting *Drinkard*, 281 Ga. at 215. “Where each offense requires an element of proof beyond the degree of injury or culpability that the other does not, neither of the offenses is included in the other, and the crimes do not merge under OCGA §§ 16-1-7

⁴ As stated in footnote 1, *supra*, the trial court sentenced Bradley to life in prison on Count 3, and to life in prison on Count 4 to run concurrent to Count 3.

(a)(1) and 16-1-6.” *Metcalf v. State*, 349 Ga. App. 408, 415(2)(a) (825 SE2d 909) (2019) (punctuation omitted).

OCGA § 16-1-7 provides, in pertinent part:

(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if:

(1) One crime is included in the other; or

(2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

OCGA § 16-1-6 provides:

An accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when:

(1) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged; or

(2) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

The following statutes address the crimes at issue here: First, “[a] person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” OCGA § 16-6-2(a)(1). Second, OCGA § 16-6-2(a)(2) provides, in pertinent part: “A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person[.]”

The version of OCGA § 16-6-4(a)(1) (2009) effective at the time the crimes were committed⁵ provided: “A person commits the offense of child molestation when such person: [] Does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person[.]” OCGA § 16-6-4(c) (2009) provided: “A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.”

⁵ See *Widner v. State*, 280 Ga. 675, 677(2) (631 SE2d 675) (2006) (“It has long been the law in this State that, in general, a crime is to be construed and punished according to the provisions of the law existing at the time of its commission.”) (citation and punctuation omitted).

Count 3 of the indictment charged that Bradley committed the offense of aggravated sodomy between October 1 and November 30, 2016, in that he: “unlawfully and with force perform[ed] a sexual act involving [his] MALE SEX ORGAN and the MOUTH of [L. G.] against the will of the said [L. G.], by placing accused’s PENIS into and upon the MOUTH of said [L. G.]”

Count 4 of the indictment charged that Bradley committed the offense of aggravated child molestation between October 1 and November 30, 2016, in that he: “did unlawfully commit an immoral and indecent act to ... and with [L. G.], a child under the age of sixteen (16) years, by placing said accused’s MALE SEX ORGAN into and upon the MOUTH of [L. G.], with the intent to arouse and satisfy accused’s sexual desires; said act involving an act of sodomy[.]”

Under the *Drinkard* required evidence test, again, the test we determine whether there are two offenses or one by examining “whether each provision requires proof of a fact which the other does not. If so, then two offenses exist, and one is not included in the other.” *Womac v. State*, 302 Ga. 681, 684(3) (808 SE2d 709) (2017) (citation and punctuation omitted); *Metcalf*, 349 Ga. App. at 419(2)(d).

[T]he important question is not the number of acts involved, or whether the crimes have overlapping elements, but whether, looking at the

evidence required to prove each crime, one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the other crime charged.

Drinkard, 281 Ga. at 216. Here, “[e]ach crime requires proof of at least one additional element which the other does not.” *Metcalfe*, 349 Ga. App. at 420(2)(d) (punctuation omitted). The *Metcalfe* Court found that attempted aggravated child molestation and attempted aggravated sodomy did not merge under the required evidence test because each crime had a required element that the other did not. *Id.* Here, as in *Metcalfe*, “aggravated child molestation requires proof that [Bradley sodomized L. G.] with the intent to arouse or satisfy” his own sexual desires or those of the child while “aggravated sodomy does not.” *Id.* Aggravated child molestation also requires that the victim be under 16 years of age, OCGA § 16-6-4(a)(1)(c), but aggravated sodomy, as charged in this case, does not. OCGA § 16-6-2(a)(2). See *Metcalfe*, 349 Ga. App. at 420(2)(d) (recognizing that a victim’s age can be an element of a crime). In addition, aggravated sodomy requires proof that Bradley sodomized L. G. “with force” and “against [her] will[,]” OCGA § 16-6-2(a)(2), while aggravated child molestation contains no such element. It is clear that each crime required proof of an element which the other did not. *Metcalfe*, 349 Ga. App. at 420(2)(d).

Bradley specifically contends that the same act of sodomy formed the basis of both counts, citing *Dobbins v. State*, 262 Ga. 161, 165(4) (415 SE2d 168) (1992), in which the Court found that aggravated sodomy and aggravated child molestation merged. “It is true that if only a single act of sodomy was proved during trial, the single act would be necessary to prove the aggravated sodomy count of the indictment, so that there is no remaining evidence upon which to base a defendant’s conviction for an additional count of aggravated child molestation.” *Hamby v. State*, 358 Ga. App. 105, 108(2) (853 SE2d 874) (2021) (punctuation omitted). *Dobbins* is distinguishable from the instant case however, because it specifically involved “only one act of sodomy.” *Dobbins*, 262 Ga. at 165(4).

Here, when considered in the light most favorable to the verdict to determine whether the offenses should have merged, the evidence showed multiple acts of sodomy, perpetrated at different times, and thus constituting separate crimes. See *Donaldson v. State*, 302 Ga. 671, 674(4) (808 SE2d 720) (2017) (providing, when determining whether crimes were committed in a single instance or separately for purposes of determining whether they should merge, that courts consider “the evidence viewed in the light most favorable to the verdict”) (punctuation omitted).

Accord *Rozier v. State*, 365 Ga. App. 178, 183(3) (877 SE2d 855) (2022). “Typically, the ‘same conduct’ refers to acts committed against the same victim at the same time. If crimes ... are separated by some time interval, they do not merge.” *Sillah v. State*, 315 Ga. 741, 758(7) (883 SE2d 756) (2023).

The indictment in this case charged Bradley with committing these crimes over a two-month span of time. See *Jones v. State*, 335 Ga. App. 591, 597(2) (782 SE2d 489) (2016) (finding that rape and aggravated child molestation did not merge where “the jury could have concluded from the evidence presented that there were separate factual incidents on which to base guilty verdicts” on both counts). See also *Brantley v. State*, 370 Ga. App. 757, 772-773(8) (899 SE2d 284) (2024) (finding that two counts of child molestation did not merge for sentencing purposes where the indictment charged defendant with committing the acts over an approximately three-year span of time and the victim testified the abuse had occurred on several different occasions). Although Bradley cites a pre-*Drinkard* case, *Lewis v. State*, 205 Ga. App. 29, 30 (421 SE2d 339) (1992), which found that aggravated child molestation and aggravated sodomy occurring on “more than one occasion” merged because they arose “out of the same described act” as charged in the indictment, *Lewis* is inapplicable here,

where there is evidence, which our Supreme Court requires us to view in the light most favorable to the jury's verdict when considering this type of merger question, *Donaldson*, 302 Ga. at 674(4), demonstrating that Bradley perpetrated these different crimes against L. G. on multiple, separate occasions.

Based on L. G.'s testimony and other evidence, a rational trier of fact could have found that there were different incidents of oral sodomy which occurred on multiple occasions in different locations, including a guest room and a bedroom. We find no error.

Judgment affirmed. Barnes, P. J., and Markle, J., concur.