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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/14/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0064
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
THOMAS GARY PEART,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-030367-001 SE

The Honorable Rosa Mroz, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and W. Scott Simon, Assistant Attorney General
Attorneys for Appellee

Robert L. Dossey, PC Chandler
By Robert L. Dossey
Attorneys for Appellant

J O H N S E N, Judge

¶1 Thomas Gary Peart appeals his conviction and sentence for sexual assault, a Class 2 felony. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 A grand jury indicted Peart on three counts of sexual contact with a person over the age of fifteen without her consent. Count One specified an act designated "the first time," which allegedly occurred between May 1 and May 31, 2008. Count Two referred to another event, designated "the time after the movie," which allegedly occurred between May 1 and May 31, 2008. Count Four referred to an act that occurred on or about June 20, 2008. The grand jury also indicted Peart on two counts of sexual assault on the same victim, again without consent. Count Three allegedly occurred between June 1 and June 15, 2008; Count Five allegedly occurred on or about June 20, 2008.

¶3 The victim testified that Peart, her stepfather, touched her breast and penetrated her with his finger.¹ She testified about three specific incidents. She said the first time Peart touched her inappropriately was in May 2008, when he touched her breasts. The victim testified that another time,

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Peart. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

after a movie, Peart both touched her breasts and penetrated her with his finger. She testified the final time Peart touched her breasts and penetrated her with his finger occurred after she returned from a summer camp that began on June 21, 2008, and lasted about a week.

¶4 Peart moved for judgment of acquittal on all counts, arguing with respect to Count Three that the victim had failed to testify about any sexual assault occurring between June 1 and June 15, the timeframe specified in Count Three. Although, consistent with Count Two, the victim had testified about inappropriate acts that had occurred after a movie in May, she did not testify about acts that occurred after a movie in June, which was the timeframe specified by Count Three of the indictment. The prosecutor responded that the conduct underlying Counts Two and Three had occurred at the same time, and the date range specified in Count Three of the indictment was a mistake. The court allowed Count Three to be amended to conform to the evidence, so that it alleged the act took place "after the movie," between May 1 and May 31. The court then denied Peart's motion for judgment of acquittal on Count Three.²

² The court also granted the State's motion to amend Counts Four and Five of the indictment to conform to the victim's testimony that these offenses occurred between June 28 and July 1, 2008.

¶15 Peart subsequently testified he had not committed any of the alleged sexual offenses and asserted the victim was angry with him because he was a strict disciplinarian, and it was possible that she had fabricated the allegations in retaliation.

¶16 The jury acquitted Peart of the offenses alleged in Counts Four and Five but convicted him of the other charges. The court sentenced Peart to seven years in prison on the sexual assault and suspended imposition of sentence and ordered lifetime probation for the other offenses. Peart filed a timely notice of appeal of the conviction on Count Three. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033 (2012).³

DISCUSSION

A. Amendment of the Indictment.

¶17 Peart argues the superior court erred by allowing the State to amend the indictment after the close of its case to change the date of the alleged offense in Count Three to conform to the victim's testimony. He argues he was prejudiced because he lost the opportunity to cross-examine the victim when she testified at trial inconsistently with statements she gave to police. He contends the court allowed the amendment only after

³ Absent material revisions after the date of an alleged offense, we cite a statute's current Westlaw version.

he argued in support of his Rule 20 motion that the victim had not testified to a sexual assault during the time specified in Count Three of the indictment.

¶8 We review for abuse of discretion the superior court's decision to allow an indictment to be amended. *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000). No abuse of discretion occurred in this case. An indictment may be amended to "correct mistakes of fact or remedy formal or technical defects" and "shall be deemed amended to conform to the evidence adduced at any court proceeding." Ariz. R. Crim. P. 13.5(b). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Freaney*, 223 Ariz. 110, 112, ¶ 11, 219 P.3d 1039, 1041 (2009) (quotations omitted).

¶9 Pursuant to the plain language of Rule 13.5(b), Count Three of the indictment was "deemed amended" to conform to the victim's testimony about the date of the alleged assault. Moreover, the date of the act is not an element of sexual assault; accordingly, the change in the date alleged in the indictment did not change the nature of the offense. See *State v. Jones*, 188 Ariz. 534, 543-44, 937 P.2d 1182, 1191-92 (App. 1996) ("An error as to the date of the offense alleged in the indictment does not change the nature of the offense, and

therefore may be remedied by amendment."); *State v. Verdugo*, 109 Ariz. 391, 392, 510 P.2d 37, 38 (1973) ("The exact time [is] not a material ingredient of the crime, unless it deprive[s] the defendant of his defense of alibi.").

¶10 In determining whether prejudice occurred, we consider the effect of the amendment on the defendant's right to notice of the charge and opportunity to defend against it. *Johnson*, 198 Ariz. at 248, ¶ 8, 8 P.3d at 1162.⁴ A defendant bears the burden of showing that he suffered actual prejudice from the amendment. *Jones*, 188 Ariz. at 544, 937 P.2d at 1192.

¶11 Peart has failed to show that he was actually prejudiced by the amendment. The victim testified the sex act charged in Count Three occurred "after the movie." Peart did not offer an alibi defense to any of the offenses, including the sexual abuse offense alleged in Count Two, which the indictment charged also took place "after the movie" in May 2008. His sole defense at trial was that he had not committed any of the alleged offenses and the victim had fabricated the allegations because she wanted to escape his strict discipline.

⁴ We also consider the effect on Peart's right to double jeopardy protection from a subsequent prosecution on the original charge. *Johnson*, 198 Ariz. at 248, ¶ 8, 8 P.3d at 1162. Peart does not argue, however, that the amendment violated his right to protection from double jeopardy.

¶12 Peart argues on appeal that he was prejudiced because his lawyer did not choose to impeach the victim when she testified inconsistently with her pretrial statements because the lawyer recognized that the victim's testimony on direct had not established any date for the offense charged in Count Three. This argument fails, however, both because Peart did not seek leave to recall the victim to testify after the court granted the amendment, and because on appeal he offers no citation to the record to establish how the victim's trial testimony was inconsistent with her pretrial statements.

B. Sufficiency of Evidence on Count Three.

¶13 Peart next argues the superior court erred by denying his motion for judgment of acquittal on Count Three.

¶14 As an initial matter, we understand Peart does not attack the legal sufficiency of Count Three of the indictment, but rather challenges the sufficiency of the evidence to support the conviction on Count Three. In any event, Peart waived any claim of defect in the indictment by failing to raise it by motion 20 days before trial. See Ariz. R. Crim. P. 13.5(d) and 16.1(b) and (c).

¶15 We review *de novo* the superior court's ruling on a motion for judgment of acquittal. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). "On all such motions, the relevant question 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." *Id.* at ¶ 16 (quotations omitted).

¶16 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against the defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quotations omitted).

¶17 The court did not err in denying Peart's motion for judgment of acquittal on Count Three. In that count, the indictment charged Peart "intentionally or knowingly engaged in sexual intercourse or oral sexual contact with" the victim without her consent. See A.R.S. § 13-1406(A) (2012). "Sexual intercourse" is defined in pertinent part as "penetration into the . . . vulva . . . by any part of the body." A.R.S. § 13-1401(3) (2012). As noted, neither the date, the time, nor the location of the conduct is an element of sexual assault. See A.R.S. § 13-1406(A); *Jones*, 188 Ariz. at 544, 937 P.2d at 1192.

¶18 As recounted above, *supra* ¶ 3, the victim testified Peart committed an act constituting unconsented-to sexual

intercourse after a movie during May 2008. That evidence is sufficient to support Peart's conviction on Count Three after the court granted the State's motion to amend the indictment to modify the date of the offense charged in Count Three. See *Verdugo*, 109 Ariz. at 393, 510 P.2d at 39 (testimony by victim is sufficient to support conviction).

C. Right to Fair Trial and Effective Representation.

¶19 Peart finally argues that the rights of victims under Arizona law, in conjunction with Arizona Rule of Criminal Procedure 13.5(b), deprived him "of a fair trial and effective assistance of counsel in violation of the Sixth Amendment of the U.S. Constitution, resulting in reversible, fundamental error."⁵ He argues that because he was unable to interview the victim before trial pursuant to A.R.S. § 13-4433(A) (2012), after the court allowed the indictment to be amended to conform to the evidence at trial pursuant to Arizona Rule of Criminal Procedure 13.5(b), he was deprived of adequate notice of the charges, was unable to prepare an effective defense to the charges, and was forced to change his litigation strategy "on the fly."

⁵ As relevant, the Sixth Amendment provides a criminal defendant the right to "be informed of the nature and cause of the accusation" against him and assistance of counsel. U.S. Const. amend. VI. The Fourteenth Amendment provides that a state may not deprive a person of life, liberty or property without due process of law. U.S. Const. 14th amend. XIV.

¶20 As an initial matter, Peart's argument that he was deprived of effective assistance of counsel is not cognizable on direct appeal but only may be raised in a petition for post-conviction relief. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶21 Arizona law affords crime victims certain rights and protections, including the right "[t]o refuse an interview, deposition, or other discovery request by the defendant." Ariz. Const. art. 2, § 2.1(A)(5); A.R.S. § 13-4433(A); Ariz. R. Crim. P. 39(b)(11). A defendant bears the burden of demonstrating that his due-process right to present a meaningful defense conflicts with and overrides the victim's rights. *See State v. Connor*, 215 Ariz. 553, 558, 560, ¶¶ 11-12, 17, 161 P.3d 596, 601, 603 (App. 2007).

¶22 We do not accept Peart's argument that his due-process rights were violated because he was unable to interview the victim prior to trial. He argues that without an interview, he was surprised when Count Three of the indictment was amended. But because neither the victim's interview with police nor the grand jury testimony is part of the record on appeal, we cannot conclude that the victim's testimony at trial differed from her pre-trial interview with police with respect to the date the incident in Count Three occurred.

¶23 Count Three charged Peart with engaging in sexual intercourse or oral sex with the victim in June 2008. This allegation provided constitutionally adequate notice to Peart of the "nature and cause of the accusation." See U.S. Const. amend. VI (requiring the accused in a criminal prosecution "to be informed of the nature and cause of the accusation"); *Freeney*, 223 Ariz. at 115, ¶ 29, 219 P.3d at 1044 ("[T]he touchstone of the Sixth Amendment notice requirement is whether the defendant had actual notice of the charge, from either the indictment or other sources."). As we have said, the amendment changing the date of the offense to conform to the victim's testimony that it occurred in May 2008, at the same time as the sexual abuse charged in Count Two, neither changed the nature of the offense nor actually prejudiced Peart. See *Freeney*, 223 Ariz. at 115, ¶¶ 29-30, 219 P.3d at 1044 (reasoning that the same factors that rendered amendment harmless error supported conclusion that Sixth Amendment rights were not violated).

¶24 On this record, Peart has not shown he was actually prejudiced by the amendment to the indictment or by his inability to interview the victim prior to trial.

CONCLUSION

¶25 For the foregoing reasons, we affirm Peart's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge