IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-945

Filed: 17 October 2017

Graham County, No. 13CRS050226

STATE OF NORTH CAROLINA

v.

MICHAEL LEE WHITE, Defendant.

Appeal by Defendant from judgment entered 9 September 2015 by Judge J. Thomas Davis in Graham County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant.

INMAN, Judge.

Michael Lee White ("Defendant") appeals from a judgment entered following a jury trial finding him guilty of a sexual offense with a child by an adult offender. Defendant contends that the trial court: (1) lacked jurisdiction to enter a judgment against him because his indictment was facially defective; and (2) erred by denying

Defendant's motion to dismiss based on a fatal variance as to the date of the offense and allowing the State's motion to amend the indictment. After careful review, we conclude that Defendant has failed to demonstrate error.

I. Facts and Procedural Background

The evidence at trial tended to show the following:

At all times relevant to this appeal, Defendant was older than eighteen years old and lived in a trailer-home in Stecoah, township in Graham County, North Carolina. The minor victim, H.K. ("Hannah")[1], was born on 11 September 2003, and at the time of the sexual assault at issue she was seven years old. Hannah's mother ("Beverly") was a transient drug user who lived in and around Graham and Cherokee Counties from 2010 through 2013; Beverly did not have a permanent residence for herself or Hannah. On 26 December 2010, Beverly asked Defendant if she and Hannah could stay with him, and Defendant allowed the two to stay with him beginning in late December 2010 and at various times thereafter in 2011.

One day during a two-week stay at Defendant's trailer, Hannah was sick and did not go to school. Hannah went into Defendant's bedroom and fell asleep on his bed. She woke up a short time later to find Defendant lying on the bed beside her with his hand down her pants and two of his fingers inserted into her vagina. Defendant asked Hannah if she wanted him to stop, and she answered yes.

[1] We refer to the minor victim and her mother by pseudonyms to protect the minor victim's privacy.

Defendant told Hannah not to tell anyone about the assault. Hannah did not immediately tell her mother because she thought her mother would neither believe nor protect her, and Hannah admitted that she had been on a "lying streak" at the time when Defendant assaulted her.

Hannah did not tell an adult about Defendant's molesting her until two years later, in 2013, when she was living with her aunt. Hannah's aunt reported Hannah's revelation to the Department of Social Services ("DSS") and to the Graham County Sheriff's Department on 25 March 2013. An officer with the Graham County Sheriff's Department scheduled a forensic interview with Hannah shortly thereafter. During the interview, Hannah again relayed the details of the assault.

A detective assigned to Hannah's case encountered Defendant during an unrelated matter at the Graham County courthouse and scheduled an interview with Defendant. Defendant came to the interview appointment voluntarily, was not placed in custody, and was allowed to leave after the interview concluded. The interview was conducted primarily by Trooper Brad Hoxit of the North Carolina State Highway Patrol.

During the course of the interview with Trooper Hoxit, Defendant made a written confession that included the following statement: "I guess she was in bed about 15 minutes and I rolled over and started rubbing on her and I put my pinkie

half in her vagina." Defendant made additional oral statements of the same nature during the remainder of the interview.

On 1 May 2013, an arrest warrant was issued for Defendant, alleging probable cause to believe that Defendant "unlawfully, willfully and feloniously did engage in a sex offense with [Hannah],[2] a child under the age of 13 years" between 10 February 2011 and 13 June 2011. On the same day, Defendant was arrested and charged with one count of first degree sex offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a) (now recodified as N.C. Gen. Stat. § 14-27.28 (2015)). A grand jury returned a true bill of indictment on this charge on 8 July 3013. The indictment accurately identified Hannah by her first and last names and alleged the date of offense to be between 1 February 2011 and 23 May 2011. A grand jury subsequently returned a superseding indictment on 18 May 2015 charging Defendant with one count of sexual offense upon a child by an adult, stating he "engaged in a sexual act with Victim #1, a child who was under the age of 13 years, namely 7 years old[,]" and a new count of indecent liberties with a child, alleging that "[t]he name of the child [victim] is Victim #1." The superseding indictment also altered the dates of the alleged offenses to between 10 February 2011 and 13 June 2011, consistent with the arrest warrant. The State filed a dismissal of the original indictment on 20 May 2015 on the ground

[2] The warrant accurately identified the minor victim by her first and last names.

that the "Superseding Indictment in [the] same file number corrects [the] date of offense and increases [the] level of charged felony."

Defendant's case came on for trial on 1 September 2015, and the State voluntarily dismissed the indecent-liberties charge in the course of the proceedings. At the close of the State's evidence, Defendant moved to dismiss the sex-offense charge, and did so again at the close of all evidence on the ground that there was a fatal variance between the dates of the offense put forth in the superseding indictment and those established by the evidence. In response, the State moved to amend the superseding indictment to change the dates of offense to between 26 December 2010 and June of 2012. The trial court allowed the State's motion to amend and denied Defendant's motion to dismiss.

On 9 September 2015, the jury returned a verdict finding Defendant guilty of sexual offense with a child by an adult offender. The trial court imposed an active sentence of 300 to 369 months of imprisonment and also imposed a requirement of lifetime satellite-based monitoring. Defendant gave notice of appeal in open court.

II. Analysis

A. The Indictment Was Not Fatally Defective

Defendant contends that because the superseding indictment used the language "Victim #1, a child who was under the age of 13 years, namely 7 years old" to identify the victim of the charged offense, it was facially defective and thus invalid.

Defendant further argues that the trial court lacked jurisdiction to try the case against him or to enter a judgment against him because of the invalid indictment. We disagree.

This Court reviews indictments claimed to be facially invalid *de novo*. *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citations omitted). "[A]n indictment must allege every element of an offense in order to confer subject matter jurisdiction." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 713 (2008) (emphasis omitted) (quoting *State v. Kelso*, 187 N.C. App. 718, 654 S.E.2d 28, 31 (2007)). A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case. *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 151 L.Ed.2d 548 (2001). However, "[o]ur courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006).

Challenges to a court's subject matter jurisdiction may be raised at any time. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Because litigants cannot consent to jurisdiction not authorized by law, they may challenge 'jurisdiction over the subject matter . . . at any stage of the proceedings, even after judgment.' ") (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L.Ed.2d 96 (1962)). "Arguments regarding

subject matter jurisdiction may even be raised for the first time before [an appellate] [c]ourt." *T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793; *see also In re M.S.*, 199 N.C. App. 260, 262, 681 S.E.2d 441, 443 (2009).

Our Legislature has authorized the use of a short-form indictment as a charging instrument for statutory sex offenses. N.C. Gen. Stat. § 15-144.2(b) (2015). The statute provides that a short-from indictment need not allege the particulars of the sex offense charged, but must set forth the elements of the offense and the name of the victim. "If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, *naming the child*, and concluding as aforesaid." *Id.* (emphasis added).

This Court considered what constituted "naming" for purposes of short-form indictments in *State v. McKoy*, 196 N.C. App. 650, 675 S.E.2d 406 (2009). There, we acknowledged that there was "no decision by our North Carolina Courts directly interpreting whether 'naming' the victim can only be satisfied by using the victim's full name, or whether a nickname, initials or other identification method would be sufficient." *Id.* at 657, 675 S.E.2d at 411. We rejected an argument that a person's name is the only permitted identifier, noting that if the indictment "fairly identifies the right person and the defendant is not misled to his prejudice, he has no

complaint," and we set forth the test for analyzing the sufficiency of an identifier used in place of a victim's name:

> [I]n order to determine if the lack of the victim's full name renders the indictments in the present case fatally defective, we will apply the tests set forth in *Coker* and *Lowe* to inquire (1) whether a person of common understanding would know that the intent of the indictments was to charge Defendant with [a crime], and (2) whether Defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected by the use of the [alternative identifier].

Id. at 657, 675 S.E.2d at 411-12 (internal citations and quotation marks omitted). We thereafter looked at whether the initials in the indictment at issue in *McKoy* "accomplish[ed] the common sense understanding that initials represent a person[,]" and then we examined the arrest warrant, the statements of the defendant to police concerning the victim, whether the defendant claimed any difficulty in preparing his case, and the fact that the alleged victim testified and identified herself as such. *Id.* at 657-58, 675 S.E.2d at 412.

In the case at hand, the initial indictment named Hannah outright. The superseding indictment, by contrast, omitted Hannah's name and instead identified the victim as "Victim #1." Following the analysis required by *McKoy*, the question then becomes whether the use of "Victim #1" as a designation interfered with (1) the ability of a person of common understanding to discern the intent to charge Defendant with the crime of sexual offense with a child by an adult, and (2) the

adequate protection of Defendant's notice and double jeopardy rights. *McKoy* at 657, 675 S.E.2d at 411-12 (citing *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984) *and State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978)).

Based on our review as prescribed by *McKoy*, we hold that the superseding indictment was not facially invalid. As to the first step of the analysis, the superseding indictment tracks both the language of the short-form indictment statute under which Defendant was charged, N.C. Gen. Stat. § 15-144.2(b), and the statute for the crime alleged, N.C. Gen. Stat. § 14-27.4A(a). Such an indictment does not lose its plain meaning to a person of common understanding when it identifies a victim by something other than her full name. *McKoy*, 196 N.C. App. at 657, 675 S.E.2d at 411-12.

We next apply the second step of the *McKoy* analysis and, using the same elements of the record that were dispositive in that case, conclude that the superseding indictment was not fatally defective even though it did not identify Hannah by name. The warrant issued in this case plainly stated Hannah's full first and last names. The original indictment likewise identified Hannah by her first and last names. While the superseding indictment replaced Hannah's name with the designation "Victim #1," it was filed in the same criminal case bearing the same file number as the warrant and original indictment, and the dismissal filed by the State expressly notes that the only substantive changes between the original and

superseding indictments were a "correct[ion of the] date of offense and [an] increase[in the] level of charged felony." The arrest warrant, the initial indictment, and the State's notice of dismissal of the initial indictment gave Defendant notice of the identity of the victim. *McKoy*, 196 N.C. App. at 657-58, 675 S.E.2d at 412.

The superseding indictment introduced no apparent confusion regarding the identity of the victim that would interfere with the notice to Defendant of whom he was alleged to have sexually assaulted. At no point during the trial did Defendant contend that the identity of the victim was in question or that he faced any difficulty in preparing his defense,[3] and he raises no such argument on appeal. The record reflects no confusion on the part of Defendant as to the identity of the victim and does not otherwise indicate that his ability to prepare for trial was hampered. Consistent with the record reviewed in *McKoy*, Defendant here was given notice as to the identity of the victim, and nothing in the record demonstrates that such notice was affected by the superseding indictment. 196 N.C. App. at 657-58, 675 S.E.2d at 412.

Defendant also argues on appeal that the superseding indictment could subject him to double jeopardy. However, nothing in the record, in our statutes, or in our

[3] At trial, the parties' opening statements to the jury treated Hannah as the only alleged victim. While defense counsel noted that there was at one point an investigation into Defendant's conduct with another minor, he made clear that the other investigation was "[u]nwarranted [and d]etermined to be an unfounded accusation," acknowledging that he and Defendant understood those allegations to be distinct from the case being tried. Defendant's counsel later remarked to the trial court that "our entire defense and notice has been geared around the proof or lack thereof in the date range as set out in the superceding [sic] indictment" rather than around any question as to the identity of the victim.

precedent supports this argument. "The test for determining if a defendant has been impermissibly placed in double jeopardy involves examining whether the evidence required to support the two convictions is identical." *State v. Chang Yang*, 174 N.C. App. 755, 762, 622 S.E.2d 632, 637 (2005). The identity of the victim is relevant to this test. *State v. Miller*, ___ N.C. App. ___, ___, 782 S.E.2d 328, 331 (2016) (holding that double jeopardy does not arise where the identities of the victims are different, as "the existence of two different victims requires an additional fact to be proven for each offense that is not required to prove the other offense"). Here, there is no question in the evidence as to the identity of the victim, as no evidence was introduced regarding Defendant's contact with any other minor. Hannah herself testified at trial and identified herself in open court as the victim. Defendant is thus insulated against double jeopardy. *McKoy*, 196 N.C. App. at 658, 675 S.E.2d at 412.

Defendant contends that the North Carolina Supreme Court's holding in *State v. Ellis*, 368 N.C. 342, 776 S.E.2d 675 (2015), precludes us from engaging in a review of any information outside the superseding indictment itself. Specifically, Defendant points us to the Supreme Court's observation in *dicta* that facial invalidity "should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading." *Id.* at 347, 776 S.E.2d at 679. We do not read this language so broadly as to preclude the review employed in *McKoy,* which

considered other pleadings regarding the same criminal charge in determining the sufficiency of an identifier contained in an indictment.

First, we note that the question in *Ellis* was whether a charging instrument alleging the defendant stole, damaged, and trespassed upon the property of North Carolina State University ("NCSU") and "NCSU High Voltage Distribution" sufficiently alleged that the two identified victims were entities capable of owning property as required to confer subject matter jurisdiction. *Id.* at 343-44, 776 S.E.2d at 677. In holding that the charging instruments were facially valid, the Supreme Court itself looked beyond the four corners of the documents to the language of N.C. Gen. Stat. § 116-3 (2015), which authorizes NCSU to own property, to reach that result. *Id.* at 345, 776 S.E.2d at 678.

Second, the language cited by Defendant from *Ellis* was offered to explain the distinction between cases concerning fatal variance and those involving facial invalidity. *Id.* at 346-47, 776 S.E.2d at 678-79. The former challenge constitutes "in essence a failure of the State to establish the offense charged" on the evidence, *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 656 (1971), while the latter asks whether the charging document has "allege[d] lucidly and accurately all the elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (citation omitted), *cert. denied*, 539 U.S. 985, 156 L.E.2d 702 (2003). In *McKoy*, we did not look to the record to determine whether the State proved its

allegations, but instead to determine whether the notice given the defendant in the indictments was sufficient in the first instance. We engage in an identical analysis here, and, in keeping with *Ellis*'s observation, it is the sufficiency of the allegations as contained in the indictment that controls the outcome of this case, not the adequacy of the evidence compared thereto.

B. The Trial Court Did Not Err in Denying Defendant's Motion to Dismiss Based on Fatal Variance and Allowing the State's Motion to Amend

Defendant argues in the alternative that the trial court was compelled to dismiss the charges against him for a fatal variance as to the dates alleged in the superseding indictment and the evidence introduced at trial. Specifically, Defendant argues that he presented a reverse alibi defense and that the dates alleged in the superseding indictment were therefore essential elements of the crime charged. We disagree.

As a general matter, a " 'variance between allegation and proof as to time is not material where no statute of limitations is involved.' " *State v. Riggs*, 100 N.C. App. 149, 152, 394 S.E.2d 670, 672 (1990) (quoting *State v. Trippe*, 222 N.C. 600, 601, 24 S.E.2d 340, 341 (1943)). We have held, and Defendant concedes, that this rule is particularly relevant in child sex abuse cases, as "temporal specificity requirements are further diminished." *State v. Burton*, 114 N.C. App. 610, 613, 442 S.E.2d 384, 386 (1994) (citation omitted). This is so because "[c]hildren frequently cannot recall exact

times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony." *Id.* at 613, 442 S.E.2d at 386 (citation omitted). "Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring years before." *Id.* at 613, 442 S.E.2d at 386. These considerations do not apply, however, where a "defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance." *Id.* at 613, 442 S.E.2d at 386.

In the present case, Hannah testified that she was assaulted during a two-week stay with Defendant in 2012 while in third grade. Defendant offered conflicting testimony that the two-week stay occurred in late December 2010 and early January 2011. Under the superseding indictment, however, the State alleged that the crime occurred between February and June of 2011, a timeframe outside both Hannah's and Defendant's testimonies. Defendant contends that his efforts to establish that the two-week stay fell outside the dates alleged in the indictment constitute a reverse alibi defense.

We note that Defendant's evidence failed to foreclose that the two-week stay occurred within the dates alleged in the superseding indictment. On cross examination, Defendant testified that Hannah and her mother stayed with him in February of 2011 and beyond, which placed Hannah in contact with Defendant within

the dates alleged in the superseding indictment. Assuming *arguendo* that this does not dispose of Defendant's argument by itself, we still do not hold that the trial court erred.

Defendant attempts an analogy to several cases in which our appellate courts have found fatal variances in the evidence compared to indictments alleging the sexual abuse of a minor. Each of those cases is distinguishable.

In *State v. Stewart*, 353 N.C. 516, 546 S.E.2d 568 (2001), our Supreme Court held that a fatal variance existed where a defendant was charged with a sex offense against a minor occurring in the month of July 1991. 353 N.C. at 518, 546 S.E.2d at 569. "[D]efendant prepared and presented alibi evidence *in direct reliance on those dates*" by providing evidence of his whereabouts for each and every day of that month, as well as reverse alibi evidence as to the location of the alleged victim. *Id.* at 518-19, 546 S.E.2d at 569 (emphasis added). Based on the "unique facts and circumstances of this case," the Supreme Court held that the dates alleged in the indictment were relied upon by the defendant such that they became an essential element of the crime and created a fatal variance resulting in prejudice. *Id.* at 519, 546 S.E.2d at 570.

Similarly, in *State v. Custis*, 162 N.C. App. 715, 591 S.E.2d 895 (2004), this Court held that a fatal variance occurred between the evidence and an indictment for a sex offense against a minor where the indictment alleged the offense occurred on a

single date, 15 June 2001. 162 N.C. App. at 717, 591 S.E.2d at 897. In defending the charges, the defendant built an alibi defense showing that he had been admitted to a hospital in the predawn hours of that morning and was not released for seven days. *Id.* at 716, 591 S.E.2d at 897. We held that the defendant's appeal "involve[d] almost the same 'unique facts and circumstances' as *Stewart*" and held that a fatal variance existed as to the dates alleged in the indictment and the evidence presented, all to the defendant's prejudice. *Id.* at 718-19, 591 S.E.2d at 898.

Stewart and *Custis* are inapposite here. In the instant case, the evidence is unequivocal that the alleged abuse occurred in a two-week stay at Defendant's home; the only question presented by Defendant's defense is when the stay occurred. Rather than showing that a two-week stay did not occur, or presenting evidence showing Defendant did not have contact with Hannah during such a stay, Defendant admitted that Hannah resided with him for a two-week period but offered a general denial that any sexual abuse took place in that timeframe. Defendant's denial is a far cry from the particularized defenses put forth in *Stewart* and *Custis*, which sought specifically to disprove that the abuse could have occurred, rather than to vary the timeframe in which the offense could have occurred.

Defendant argues that our decision in *State v. Khouri*, 214 N.C. App. 389, 716 S.E.2d 1 (2011) is the most relevant to our decision on this point. We agree, although for different reasons. In *Khouri*, the defendant was alleged to have committed a

sexual offense against a minor while on a vacation. 214 N.C. App. at 395, 716 S.E.2d at 6. However, the evidence at trial showed that the vacation in question did not take place within the dates alleged in the indictment, and we held that the trial court erred in failing to dismiss the charge for insufficiency of the evidence. *Id.* at 395-96, 716 S.E.2d at 6. The holding was not, however, based upon the defendant's argument that he had presented an alibi defense and therefore suffered prejudice from a fatal variance. Rather we held that:

> An indictment may be amended where the date of the crime is not an essential element of the offense. However, *there is no indication in the record that the State made any attempt to amend [the] indictment . . . to include the proper date range for the alleged crimes on the vacation . . . .* Accordingly, these charges must be vacated . . . .

Id. at 395-96, 716 S.E.2d at 6 (emphasis added). *Khouri*, therefore, does not support Defendant's position, but instead bolsters our holding that the defense in the case at bench failed to make the date of the alleged crime an essential element.[4]

Because the date of the assault in this case was not an essential element of the sex offense charged, the trial court did not err in allowing the State to amend the superseding indictment. "When time is not an essential element of the crime, an amendment in the indictment relating to the date of the offense is permissible since

[4] We also note that in *Khouri*, *Custis*, and *Stewart* there was no evidence in the record showing that the offenses must have taken place within the timeframes alleged. *Khouri*, 214 N.C. App. at 395, 716 S.E.2d at 6; *Custis*, 162 N.C. App. at 718, 591 S.E.2d at 898; *Stewart*, 353 N.C. at 519, 546 S.E.2d at 570. Defendant in this case testified that Hannah was staying with him within the timeframe alleged in the superseding indictment.

the amendment would not substantially alter the charge set forth in the indictment." *State v. Whitman*, 179 N.C. App. 657, 665, 635 S.E.2d 906, 911 (2006). Because the time stated in the indictments was not an essential element of the crime alleged, Defendant has failed to demonstrate error.

III. Conclusion

For the aforementioned reasons, we hold that the superseding indictment was sufficient to confer subject matter jurisdiction on the trial court and that the trial court did not err in denying Defendant's motion to dismiss and granting the State's motion to amend.

NO ERROR.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).