[Cite as *In re S.J.*, 2017-Ohio-5499.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

IN RE: S.J.	:	Appellate Case No. 27287
	:	Trial Court Case No. 2016-1252
	:	(Appeal from Common Pleas Court-Juvenile Division)

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O P I N I O N

Rendered on the 23rd day of June, 2017.

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WELBAUM, J.

{¶ 1} In this case, Appellant, S.J., appeals from a judgment designating him as a Tier III juvenile offender registrant ("JOR"). In support of his appeal, S.J. contends that

the trial court committed plain error in classifying him as a JOR because he was not age-eligible for the designation at the time of his offenses. S.J. further contends that trial counsel rendered ineffective assistance of counsel by failing to educate himself about JOR registration and by failing to object to S.P.'s classification.

{¶ 2} We conclude that the trial court committed plain error by failing to determine whether S.J. was age-eligible to be designated as a JOR under R.C. 2152.83(B). S.J.'s age at the time of the offenses was disputed, and the error affected his substantial rights, because if he were not age-eligible, the trial court could not have designated him as a Tier III JOR. In view of this conclusion, the assignment of error pertaining to ineffective assistance of counsel is moot. Accordingly, the judgment will be reversed and vacated as to the classification of S.J. as a Tier III JOR, and will be remanded for a determination of whether S.J. may be classified as a JOR under R.C. 2152.83(B). In all other respects, the judgment will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} On February 27, 2016, the State filed a complaint in Montgomery County Juvenile Court, alleging that S.J., "a child about the age of 19 years (13 at time of offense), who appears to be delinquent in that on or about 01-01-10 – 01-01-11, in the County of Montgomery, State of Ohio, the youth * * * did engage in sexual conduct with another, not the spouse of the offender, to wit: C.T., who was less than 13 years of age, whether or not the offender knows the age of the other person; an act contrary to § 2907.02(A)(1)(b) O.R.C., a felony of the first degree, and in violation of § 2152.02 O.R.C." Doc. #33.

{¶ 4} The above charge comprised the first count; the complaint contained two

other counts of alleged rape: a second count involving C.T., and a third count involving another victim, A.S. The assertion that S.J. was 13 years old at the time of the offense pertained to all three counts. Adjudication occurred during hearings held in June and July 2016, during which the court heard testimony from the two victims, the mothers of the two victims, and S.J.

{¶ 5} According to the testimony, S.J. and his brother lived with their aunts, T.J. ("T.") and E.J. ("E."), during various times, including the spring/summer of 2010 and into the 2010 school year. S.J. also lived with T. for several months in 2013. Additionally, there was considerable interaction between the cousins and their families, with family get-togethers and people baby-sitting for each other's children.

{¶ 6} The boys lived first with T., who was A.S.'s mother. A.S. was a male, was born in 2005, and had turned five years old in the spring of 2010. S.J. was born on July 30, 1996, and turned 14 years old on July 30, 2010.

{¶ 7} T. first testified that S.J. and his brother might have lived with her in the spring of 2010, when they were there on break; then she said it was "possibly maybe 2009, like spring, summertime." Transcript of Proceedings, Vol. I, p. 14. T. also stated that S.J. was at least 15 at the time, which, given his birth date, would have been a time after July 30, 2011. *Id.* at p. 16. At another point, T. stated that S.J. and his brother moved out "possibly when they went to school, when they started school again." *Id.* at p. 17.

{¶ 8} After living with T., the boys stayed with E., who was C.T.'s mother. C.T. was a female and was born in June of 2002. C.T. would have turned eight years old in June of 2010.

{¶ 9} There was no testimony about when S.J. and his brother specifically moved

into E.'s house. E. stated that "[t]hey stayed with me from that summer of 2010 until school started." Transcript of Proceedings, Vol. II, p. 82-83. At another point, E. also stated that the boys "stayed with [T.] all that summer before they came with me." Transcript of Proceedings, Vol. II, p. 83.

{¶ 10} Both mothers testified about changes in their children's demeanor "after" 2010, and after S.J. had lived with them. T. indicated that after A.S. finished kindergarten, his demeanor changed. She did not indicate when A.S. finished kindergarten. T. stated that previously, A.S. had been an outgoing and playful child. However, in first grade, she received calls from A.S.'s teacher every day. A.S. was disruptive, had an explosive temper, and began wetting the bed.

{¶ 11} E. testified that before 2010, her daughter, C.T., was a very happy, perky child who was on the honor roll. After that, everything changed. E. thought the changes were due to C.T. "going through this little nine years old getting into the two digits, going – turning ten, you know." Transcript of Proceedings, Vol. I, p. 87.[1] Rather than being on the honor roll, C.T.'s grades changed to Bs and Cs, and then to Ds and Fs. In addition, C.T. did not want to be around S.J., which was out of the ordinary because C.T. had never reacted that way with any of her cousins.

{¶ 12} In January 2016, C.T. was in eighth grade. In January, while C.T. and E. watched a Tyler Perry movie, they observed a scene in which an older man attempted to rape a child. At that point, C.T. told her mother that this was what S.J. had done to her. E. then contacted the police.

{¶ 13} C.T. testified about one instance of sexual conduct that occurred at S.J.'s

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[1] C.T. did not turn nine years old until June of 2011, and did not turn 10 until June 2012.

own house and several instances of sexual conduct that occurred at a local park near C.T.'s home. In addition, C.T. related one incident that occurred in her home. This was an incident that took place in E.'s bedroom, during which S.J. pinned C.T. down to the bed. C.T. screamed, causing her brother to come downstairs. C.T. did not indicate that sexual contact occurred on that occasion. C.T. also stated that she "never really" remembered when S.J. lived with her family. Transcript of Proceedings, Vol. II, p. 67.

{¶ 14} After C.T. told her mother what had happened, E. spoke with two of her sisters, including T., on a three-way conference call, about what had happened to C.T. Because the speaker phone was on, A.S. heard what they were discussing and brought up something that had happened to him. T. and her sister, E., then contacted the police about what they had heard. Soon thereafter, a complaint was filed against S.J. on February 27, 2016, alleging that the offenses occurred when S.J. was 13 years old.

{¶ 15} During the adjudicatory hearing, A.S. testified that S.J. had tried to stick his penis inside A.S.'s behind while they were playing hide-and-seek in the basement of A.S.'s house. According to A.S., it hurt, and A.S. told S.J. to stop. On the same day, S.J. also tried to make A.S. suck his penis, but A.S. refused. A.S. did not tell anyone after this happened, because S.J. threatened him with a gun. As was noted, neither child was able to independently recall dates during which the sexual conduct occurred.[2]

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[2] C.T. indicated during her testimony that the events at the park, when S.J. asked her to do things, like "jack him off," and would "finger" her, occurred while S.J. lived with them. Again, the dates were not precise. C.T. also testified that S.J. had sexually assaulted her at his own home. She stated that these events occurred when she was nine or 10, which would not have been until June 2011, at the earliest. Transcript of Proceedings, Vol. II, pp. 74-75. Although S.J. would have been 14 at that time, and 15 a month later, any such time frames were not within the dates listed in the complaint.

At a minimum, the witness testimony during the adjudication hearing was confusing with respect to dates, and even years. This is not unexpected when

{¶ 16} S.J. also testified, and denied that he had engaged in any sexual conduct with his cousins. After hearing the evidence, the trial court adjudicated S.J. "to be a delinquent juvenile *as alleged in the complaint*." (Emphasis added.) Doc. #8, p. 1. The court did not make any other findings.

{¶ 17} At the dispositional hearing, the trial court sentenced S.J. to three consecutive terms of a minimum of one year in the Department of Youth Services, to a maximum of S.P.'s attainment of age 21. However, because S.J. was going to turn 21 in July 2017, the maximum time S.J. would actually serve was less than 11 months. The court also designated S.J. as a Tier III JOR. S.J. timely appealed from the court's judgment.

II. Did the Trial Court Commit Plain Error?

{¶ 18} S.J.'s First Assignment of Error states that:

> The Montgomery County Juvenile Court Committed Plain Error When It Classified S.J. as a Juvenile Sex Offender Registrant When He Was Not Age Eligible for Registration at the Time of the Offense. R.C. 2152.83(B), (A-1).

{¶ 19} According to S.J., the trial court committed plain error because R.C. 2152.191 only allows juvenile courts to classify juveniles as sex offenders if they are more

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witnesses, particularly children, testify about events that occurred several years earlier. In cases involving sexual misconduct with a child, the precise dates and times of alleged offenses often cannot be determined with specificity. *See, e.g., State v. Daniel*, 97 Ohio App.3d 548, 556, 647 N.E.2d 174 (10th Dist.1994). Thus, a trier of fact could conclude that S.J. had sexual contact with the victims at some point during the year listed in the complaint, and the finding that S.J. was delinquent has not been challenged on appeal. Nonetheless, as our discussion will indicate, the fact that an offense occurred during the time-span listed in a complaint is different from deciding a specific age that events occurred for purposes of designating a juvenile as a sex offender registrant. The latter determination is critical when age is a predicate for a classification.

than fourteen years old at the time of an offense. S.J. notes that, in contrast to the age requirement, the complaint, which spanned a year during which S.J. was both 13 and 14 years old, stated that S.J. was 13 years old at the time of the offenses. S.J. further focuses on the court's statement at the outset of trial that "the alleged charges are the result of complaints that were filed – a single complaint filed on February 27, 2016, acknowledging that the young man is nineteen years of age now but was thirteen years of age at the time of the – the alleged three counts of rape." Transcript of Proceedings, Vol. I, p. 6. S.J., therefore, contends that he could not be classified as a sex offender. S.J. did not raise this issue during the dispositional hearing.

{¶ 20} "Typically, if a party forfeits an objection in the trial court, reviewing courts may notice only '[p]lain errors or defects affecting substantial rights.' " *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15, quoting Crim.R. 52(B). Three limits are inherent in the rule. *Id.*

{¶ 21} " 'First, there must be an error, i.e., a deviation from the legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' " *Payne* at ¶ 16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶ 22} The Supreme Court of Ohio has also stressed that "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. The party

asserting plain error has the burden of proving it, and courts may reverse on this basis if the "outcome 'would have been different absent the error.' " *Payne* at ¶ 17, quoting *State v. Hill*, 92 Ohio St.3d 191, 203, 749 N.E.2d 274 (2001). (Other citation omitted.)

{¶ 23} R.C. 2152.191 states that:

> If a child is adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense, if the child is fourteen years of age or older at the time of committing the offense, and if the child committed the offense on or after January 1, 2002, both of the following apply:
>
> (A) Sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code apply to the child and the adjudication.
>
> (B) In addition to any order of disposition it makes of the child under this chapter, the court may make any determination, adjudication, or order authorized under sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code and shall make any determination, adjudication, or order required under those sections and that chapter.

{¶ 24} "The age of a delinquent child at the time the offense was committed determines whether and how the child may be classified as a sex offender." *In re D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027, 54 N.E.3d 1184, ¶ 13. "Thus, as a threshold matter, only a child 14 years of age or older at the time of the offense is subject to classification and the corresponding registration requirements." *Id.*

{¶ 25} If a child is 14 or 15 years of age at the time of an offense, the court has discretion over classifying a juvenile as a juvenile offender registrant, where the juvenile

is not a repeat offender or a serious youthful offender. *Id.* at ¶ 14, citing R.C. 2152.83(B) and *In re I.A.*, 140 Ohio St.3d 203, 2014-Ohio-3155, 16 N.E.3d 653, ¶ 6.

{¶ 26} "The court may impose classification under R.C. 2152.83(B) *only after it conducts a hearing to consider certain statutory factors and determine whether the child should be labeled a juvenile-offender registrant.*" (Emphasis added.) *Payne* at ¶ 14, citing R.C. 2152.83(B)(2). "If the judge determines that it is appropriate to impose juvenile-offender-registrant status, the judge must conduct a tier-classification hearing to determine whether the child should be classified as a Tier I, II, or III sex offender." *Id.*, citing R.C. 2152.83(C) and R.C. 2152.831.

{¶ 27} There is no dispute that R.C. 2152.83(B) is the pertinent provision for purposes of this case, as S.J. was not a repeat offender, nor was he designated a serious youthful offender under R.C. 2152.86. With respect to a JOR designation, R.C. 2152.83(D) mandates that:

> In making a decision under division (B) of this section as to whether a delinquent child should be classified a juvenile offender registrant, a judge shall consider all relevant factors, including, but not limited to, all of the following:
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> (1) The nature of the sexually oriented offense or the child-victim oriented offense committed by the child;
>
> (2) Whether the child has shown any genuine remorse or compunction for the offense;
>
> (3) The public interest and safety;
>
> (4) The factors set forth in division (K) of section 2950.11 of the

Revised Code, provided that references in the factors as set forth in that division to “the offender” shall be construed for purposes of this division to be references to “the delinquent child;”

(5) The factors set forth in divisions (B) and (C) of section 2929.12 of the Revised Code as those factors apply regarding the delinquent child, the offense, and the victim;

(6) The results of any treatment provided to the child and of any follow-up professional assessment of the child.

{¶ 28} The factors in R.C. 2950.11(K) include:

(1) The offender's age;

(2) The offender's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexually oriented offenses or child-victim oriented offenses;

(3) The age of the victim of the sexually oriented offense or child-victim oriented offense the offender committed;

(4) Whether the sexually oriented offense or child-victim oriented offense the offender committed involved multiple victims;

(5) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or child-victim oriented offense the offender committed or to prevent the victim from resisting;

(6) If the offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be a criminal offense, whether the offender

completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sexually oriented offense or a child-victim oriented offense, whether the offender or delinquent child participated in available programs for sex offenders or child-victim offenders;

(7) Any mental illness or mental disability of the offender;

(8) The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense the offender committed or the nature of the offender's interaction in a sexual context with the victim of the child-victim oriented offense the offender committed, whichever is applicable, and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(9) Whether the offender, during the commission of the sexually oriented offense or child-victim oriented offense the offender committed, displayed cruelty or made one or more threats of cruelty;

(10) Any additional behavioral characteristics that contribute to the offender's conduct.

{¶ 29} The factors under R.C. 2929.12(B) and (C) involve considerations of whether the offender's conduct was "more serious than conduct normally constituting the offense," or "less serious than conduct normally constituting the offense * * *."

{¶ 30} In the case before us, the trial court order designating S.J. a Tier III sex offender did not discuss S.J.'s age, nor did it discuss any of the above factors. At the

dispositional hearing, the court also did not discuss S.J.'s age. The court did discuss a few factors listed in R.C. 2152.83(D), but did not mention many other factors. The judge did say at the dispositional hearing that S.J.'s "SOAP" assessment (which is not in the record) was one of the "scariest" the judge had seen, and that S.J. had no regard for his victims and did not have empathy for anyone.

{¶ 31} Defense counsel did not ask for findings on S.J.'s age, nor did he object to the court's failure to articulate his findings regarding the factors in R.C. 2152.83(D), R.C. 2950.11(K), and R.C. 2929.12(B) and (C). As was noted, we review the failure to object to the age determination for plain error.

{¶ 32} In support of his position, S.J. cites *In re J.M.*, 7th Dist. Jefferson No. 09 JE 21, 2010-Ohio-2700, which involved a situation that is quite similar to the case before us. As here, the complaint in *J.M.* alleged that the offense occurred at a time when the juvenile could have been either 13 or 14 years old. *Id.* at ¶ 22. The trial court made no finding of the child's age at the time of the offense, and defense counsel made no objection to the classification. *Id.* at ¶ 13, 15, and 44-52. The evidence in the record was conflicting, and the court of appeals concluded there was an issue concerning whether the child was 14 at the time. This was so even though the incident report stated that the juvenile told the police that he was fourteen when the offense occurred. The juvenile also gave the police a written statement indicating he was "about fourteen" at the time of the offense. *Id.* at ¶ 22-24.

{¶ 33} The court of appeals found another problem with the trial court's decision because it appeared the trial court was unaware that it had discretion not to classify the offender. As a result of the errors, the court of appeals reversed and remanded for

redetermination of whether the child could be classified as a juvenile offender registrant. *Id.* at ¶ 1.

{¶ 34} The State distinguishes this case and others the defense cites because they involve admissions rather than trials, and there was insufficient evidence to make a decision. As an initial matter, this ignores the fact that the juvenile in *J.M.* actually told police before trial that he was 14 at the time of the offense.

{¶ 35} Furthermore, the State's distinction is inaccurate with respect to *In re N.Z.*, 11th Dist. Lake Nos. 2010-L-023, 2010-L-035, 2010-L-041, 2011-Ohio-6845, which was also cited by S.J. In *N.Z.*, the trial court held a trial during which it heard testimony from numerous witnesses. The court then concluded that the juvenile had raped his step-sister. *Id.* at ¶ 7-36. Subsequently, at a dispositional hearing, the court designated the juvenile as a Tier III sex offender "without making the necessary finding of his age at the time of his offense." (Citation omitted.) *Id.* at ¶ 113.

{¶ 36} As here, the complaint in *N.Z.* spanned a period during which the juvenile was 13 through 14 years of age. *Id.* at ¶ 111. The court of appeals concluded that "[w]ithout specifically finding [the juvenile] to be 14 at the time of the offense, the trial court could not designate him as a JOR subject to classification and the attendant registration requirements." *Id.* at ¶ 113.

{¶ 37} As further support for its position, the State argues that S.J. admitted at trial that he was 14. At trial, S.J. said he had stayed at T.'s house in the summer of 2011, when he and T.'s older son were working a job together. S.J. then said he lived with T. in the summertime around 2010 or 2011, and had also lived with E. in the 2010, 2011 time period. During cross-examination, S.J. also stated that he did not know how old A.S.

was in 2010-2011, that A.S. was probably 5, that C.T. was around 8 or 9 years old, that he (S.J.) was 14 or 15. Transcript of Proceedings, Vol. II, p. 122.

{¶ 38} The evidence just recited is not an admission that S.J. committed any offenses when he was 14. First of all, S.J. denied having any sexual contact with his cousins. He also stated (incorrectly) that he was 14 or 15 in 2010-2011, at least insofar as it relates to the offenses listed in the complaint. During the dates listed in the complaint, S.J. was 13 years old for seven months of 2010; 14 years old for five months in 2010; and 14 years old for one day in 2011. S.J. was not 15 during any of the times included in the complaint, although he was 13 and 14 years of age during 2010 and was 14 and 15 years of age during 2011. As a result, S.J.'s statement was nothing more than a response to his age during 2010 and 2011.

{¶ 39} In view of the testimony, we fail to see any evidence that S.J.'s testimony was an admission of his age at the time of the offenses.

{¶ 40} *D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027, 54 N.E.3d 1184, was decided after the decisions in *J.M.* and *N.Z.* In *D.S.*, the Supreme Court of Ohio held that:

> When a delinquent child disputes that he or she was at least 14 years old at the time the offenses were committed and age cannot be established from the undisputed allegations in the complaint, the juvenile court *must make a determination of age eligibility before or during the sex-offender classification hearing and prior to subjecting the child offender to registration and notification requirements* under R.C. 2152.82 through 2152.86 and Chapter 2950.

(Emphasis added.) *Id.* at paragraph one of the syllabus. This is consistent with the

decisions in *J.M.* and *N.Z.*, and requires the judge to make a determination of the juvenile's age before designating the juvenile a JOR.

{¶ 41} As was noted, S.J.'s age at the time of the offense was disputed, and could not be established from the undisputed allegations in the complaint. To the contrary, the complaint specifically alleged that S.J. was 13 years old at the time of the offenses. The trial court also stated at the outset of the adjudication hearing that the case involved offenses S.J. was alleged to have committed when he was 13. More importantly, the court's adjudication entry stated that the court found S.J. delinquent "*as alleged in the complaint.*" As noted, the complaint alleged that S.J. was 13 years old at the time of the offenses.

{¶ 42} By failing to make a determination of age eligibility before or during the sex-offender classification hearing, the trial court committed plain error. The error was also prejudicial and affected the outcome. *Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, at ¶ 15. Specifically, regardless of S.J.'s conduct, the court could not have found him a juvenile offender registrant if he were only 13 years old at the time of the offenses.

{¶ 43} Based on the preceding discussion, the First Assignment of Error is sustained. The judgment classifying S.J. as a Tier III JOR will, therefore, be reversed and vacated, and this cause will be remanded to the trial court for a redetermination of whether S.J. may be classified as a juvenile offender registrant.

III. Did Trial Counsel Render Ineffective Assistance of Counsel?

{¶ 44} S.J.'s Second Assignment of Error states that:

S.J. Was Denied the Effective Assistance of Counsel as Guaranteed

by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution.

{¶ 45} Under this assignment of error, S.J. contends that trial counsel rendered ineffective assistance of counsel by failing to educate himself about JOR procedures, by failing to recognize that S.J. was not age-eligible for JOR under R.C. 2152.83(B), and by stating that the trial court "had" to classify S.J. at the dispositional hearing. Because the judgment is being reversed and vacated with respect to S.J.'s Tier III JOR classification, and is being remanded for a redetermination of whether S.J. may be classified as a juvenile offender registrant, the Second Assignment of Error is moot.

IV. Conclusion

{¶ 46} S.J.'s First Assignment of Error having been sustained, and his Second Assignment of Error having been overruled as moot, the judgment of the trial court is reversed and vacated as to the designation of S.J. as a Tier III juvenile offender registrant, and this cause is remanded for a redetermination of whether S.J. may be classified as a juvenile offender registrant under R.C. 2152.83(B). In all other respects, the judgment of the trial court is affirmed.

DONOVAN, J., concurs.

HALL, P.J., dissenting.

{¶ 47} I would affirm the judgment of the trial court. The weight of the evidence does not support that appellant S.J. was under age 14 when he committed one of the rape offenses for which he was designated a juvenile sex offender. Accordingly, the sex offender designation does not constitute plain error because the appellant cannot demonstrate that the result would be different but for the error he alleges.

{¶ 48} Although the testimony surrounding some of the appellant's sexual conduct with the victims is unclear as to whether it occurred before or after he turned 14, the weight of the evidence about the second encounter with the second victim establishes that S.J. was 14 when he engaged in that conduct. The second victim, C.T., testified that the incidents at the park near her house occurred when S.J. was living with her family. The salient issue is when S.J. started living with her family. C.T.'s mother testified that S.J. and his brother stayed with her sister "all that [2010] summer until they came with me." Although the mother also said they stayed with her "from that summer of 2010 until school started," she testified that at the time her daughter was "eight years old going on nine." C.T. would have turned eight in June 2010, shortly before S.J. turned 14. C.T.'s mother also testified that at that time S.J. "was fifteen years old" (although in 2010 he would have only been 14).

{¶ 49} Prior to living with C.T.'s family, the boys lived with C.T.'s aunt, who also testified. The aunt testified, consistent with the testimony of C.T.'s mother, that the boys stayed with her the "entire summer" of 2010. Perhaps most telling is S.J.'s testimony when discussing the timing of his access to the children. He said he lived with C.T.'s aunt in the "[t]he summertime." After that he lived with C.T.'s family. When questioned about when he lived at C.T.'s house, he said the child was "around eight or nine years old." She would have turned eight within two months of when he turned 14. When asked about his own age at the time, he said he was "[f]ourteen, fifteen." Without doubt, S.J. turned 14 on July 30, 2010. In fact, according to S.J., the entire set of events happened in 2011, when he was fourteen and fifteen, not 2010. He was sure of this timing, explaining: "I caught my first juvenile case in 2011, and that's when I was going over their house, because we was

going – me and my brother was going through it with the courts. That's how I know it was 2011." It was the juvenile court cases that prompted S.J. and his brother to have to stay with the families of the victims.

{¶ 50} Given the above evidence, and upon review of all of the testimony, the weight of the evidence establishes that S.J. was 14 years old at the time of the offenses at the park near C.T.'s house. Therefore, S.J. cannot demonstrate that the result would be different but for the error he alleges, which is a necessary requirement to find plain error.

{¶ 51} My analysis of the plain-error issue is not affected or limited by the parenthetical "(13 at the time of the offense)" in the complaint. Notably, the complaint had a date range of "01-01-10 – 01-01-11." When viewed in context, it is impossible to conclude that the parenthetical constitutes limiting language regarding S.J.'s age at the time of the offenses. The date range in the complaint, which includes the entire year 2010, covers a time when he would have been 13 for the first seven months and 14 for the remaining five. Thus, the age parenthetical reasonably indicates only his age at the beginning of the date range. Furthermore, the parenthetical immediately follows an allegation that S.J. is "a child about the age of 19 years" and signals that, although he is now an adult, the juvenile court had jurisdiction because he was a minor at the time of the offenses.

{¶ 52} I likewise take into account that, because of delayed disclosure, the complaint was filed six years after the events occurred. "In many cases involving child sexual abuse, the victims are children of tender years who are simply unable to remember exact dates and times, particularly where the crimes involve a repeated course of conduct over an extended period of time." (Citation omitted.) *State v. Mundy*, 99 Ohio App.3d 275,

296, 650 N.E.2d 502 (2d Dist.1994). Even if the case that was actually tried included an offense or offenses after the date range in the complaint, here there was no objection and, in the absence of material detriment to the offender's ability to defend, the date range could have been amended. In *State v. Heisey*, 2015-Ohio-4610, 48 N.E.3d 157 (2d Dist.), we found no error when the amended indictment included a three-year time frame for incidents of sexual abuse involving a minor that had occurred more than ten years earlier. In *State v. Hannah*, 4th Dist. Highland No. 16CA17, 2017-Ohio-1239, the 2016 indictment included a date range for sex offenses against children of January 1, 2007 to January 1, 2008. A later-filed bill of particulars gave a date range for count two of the offenses of January 1, 2010 to January 1, 2013. The evidence at trial was that the count-two offense occurred between 2008 and 2010. At the close of the State's case, the defense moved for acquittal on count two based on the date range being outside the indictment. The trial court allowed the State to amend the indictment for that offense to a date range from January 1, 2007 to December 31, 2010 to conform to the evidence. The Fourth District held the amendment to a three-year date range to conform to the evidence was not an error or abuse of discretion. The same reasoning would have applied here if the defense had objected to the time frame after S.J.'s own evidence definitively demonstrated that the alleged offenses, if proven, would have occurred in 2011 when he was "[f]ourteen, fifteen."

{¶ 53} In my opinion, the appellant has not demonstrated plain error. The record supports that he was 14 years old at the time of at least one of the offenses, and I would affirm the judgment of the trial court.

. . . .

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