IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SOSAIA L. MISA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13390 Trial Court No. 3AN-13-08056 CR MEMORANDUM OPINION No. 7063 — June 21, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Catherine M. Easter, Judge.

Appearances: Susan Orlansky, Reeves Amodio LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge HARBISON.

Sosaia L. Misa was convicted, following a jury trial, of three counts of first-degree sexual abuse of a minor and one count of attempted first-degree sexual abuse of

a minor for conduct involving three girls, R.Y., S.Y., and M.S.[1] He was sentenced to the minimum composite sentence available to the court — a total of 51 years and 3 months, with 5 years suspended (46 years and 3 months to serve). Misa raises a number of issues on appeal.

First, Misa argues that there was insufficient evidence to support his conviction of attempted first-degree sexual abuse of a minor. The State concedes that the evidence presented at trial was insufficient, and we conclude that the State's concession of error is well-founded. We therefore reverse Misa's conviction for attempted first-degree sexual abuse of a minor.

Second, Misa challenges the denial of his motion for a new trial on one of the counts of first-degree sexual abuse of a minor — the count alleging conduct with R.Y. that occurred "on or about 2011." Misa claims that he was prejudiced when the evidence presented at trial expanded the approximate date of this offense into 2012. For the reasons provided in this opinion, we reject this claim of error.

Third, Misa claims that the superior court erroneously denied his proposed statutory mitigating factor that his conduct was among the least serious contemplated by the definition of the offense. We have reviewed the record, and we see no error in the court's decision to reject this mitigating factor.

Finally, Misa argues that a jury, rather than the sentencing court, was required to determine the date that two of the offenses were committed — since the determination impacted whether or not Misa would be entitled to good time credit (and thereby mandatory parole release) on the sentences imposed for these convictions. Because we find that there was a reasonable doubt as to whether the jury would have found that the date of the relevant offenses was proved at trial, we remand this case to

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[1] AS 11.41.434(a)(1) and AS 11.41.434(a)(1) & AS 11.31.100(a), respectively.

the superior court so that the State may choose whether to take this issue to a jury or have the court amend Misa's sentence by applying good time credit to all of his convictions.

Underlying facts and proceedings

Sosaia L. Misa moved to Alaska in mid-2012 and lived in the garage of a home belonging to members of his extended family. Finau Inoke, a matriarch in the family, lived in the house and was the primary caretaker for three of her young granddaughters — R.Y., S.Y., and M.S.

On July 23, 2013, Inoke overheard the three girls discussing how "Uncle Sia" — referring to Misa — had put his "wee wee" in their mouths. Inoke immediately contacted the police, and the girls were taken to a children's advocacy center to be interviewed. Their interviews, which were recorded and played for the jury at trial, formed the basis of the charges in this case.

Misa was indicted on four counts of first-degree sexual abuse of a minor. Count I alleged that Misa engaged in sexual penetration with S.Y. (penis to mouth) on or about July 22, 2013. S.Y., who was seven years old at the time of the interview, stated that she had gone into Misa's room in the garage and he asked her if she wanted to "play a game." When she agreed, he placed a hat over her eyes and asked her to open her mouth. He then inserted his penis into her mouth. S.Y. stated that this abuse occurred "today."

Count II alleged that Misa engaged in sexual penetration with R.Y. (penis to mouth) on or about 2011. R.Y., who was eight years old at the time of the interview in July 2013, described a first instance of abuse as having happened when she "was six" (which would have been in 2011) or "about a year ago" (which would have been in mid-2012). She stated that Misa had put a blindfold on her and asked her to open her mouth and count to 100. He then placed his penis into her mouth.

Count III alleged that Misa encouraged R.Y. to engage in sexual penetration with him (penis to mouth) on or about 2013.[2] This count was based on R.Y.'s description of a second incident where Misa asked her if she wanted to play a game, but she said no — stating that she remembered the "game" he was talking about and she did not want to do it again. However, at trial, the State amended the charge to the lesser included offense of attempted first-degree sexual abuse of a minor.

Count IV alleged that Misa engaged in sexual penetration with M.S. (penis to mouth) on or about July 22, 2013. Like S.Y., M.S. (who was six years old) stated that Misa "put his private part in [her] mouth" when she was in his room in the garage. She described that Misa had put a hat on her and told her to close her eyes. M.S. stated that this abuse occurred "yesterday."

The same day that the girls were interviewed at the children's advocacy center, troopers also spoke with Misa. Misa initially denied any wrongdoing, but eventually he admitted to sexually abusing two of the girls.

At trial, Misa testified in his defense and denied all of the allegations. He told the jury that he only confessed because he was tired and the officer kept insisting that he was guilty. He also called an expert witness to provide testimony on coerced confessions. In addition, Misa presented evidence that he was not in Alaska prior to mid-2012 and his attorney argued to the jury that this fact rebutted R.Y.'s claim that Misa had sexually abused her in 2011 — as alleged in Count II.

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[2] *See* AS 11.41.434(a)(1) ("the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or *encourages* a person who is under 13 years of age to engage in sexual penetration *with another person*" (emphasis added)). At trial, the State conceded that the "encouragement" theory of first-degree sexual abuse of a minor, which formed the basis for Misa's indictment, was at best a minority view on how the statute could be read and applied — since there was no third party involved, but rather Misa was encouraging R.Y. to engage in sexual penetration with himself.

In response, the State argued to the jury during closing argument that the date provided in the charging document was approximate — that R.Y. had stated in her July 2013 interview that the first incident of abuse happened when she was six years old (which would have been in 2011) but also that it happened about a year ago (which would have been in 2012) — and that the State did not have to prove the exact date of the offense. Misa's attorney objected, and the superior court agreed that the defense had relied on the date alleged in the indictment. However, the court allowed the State to argue that the phrase "on or about 2011" contained in the indictment did not mean that the offense had to have occurred directly within 2011 — *i.e.*, that the phrase "on or about" could include a time period extending into 2012. The court also provided an additional jury instruction, over Misa's continuing objection, which read:

> It is alleged that the crime was committed on or about a certain date. It is not necessary that the State prove the crime was committed on that precise date. It is sufficient that the proof shows that the crime was committed on or about that date.

Ultimately, the jury found Misa guilty of all the charged offenses. Misa then renewed his argument regarding the discrepancy in the date provided for Count II in a motion for a new trial. The superior court denied the motion, finding that Misa had not been prejudiced because it was apparent that a single, specific incident was alleged, regardless of when precisely it occurred.

At sentencing, Misa asked the court to find that his conduct was among the least serious punishable by the statute. The court denied this request, noting that there were multiple victims, the victims were very young, Misa was in a "position of trust," and that his actions showed some level of planning.

Misa also argued that a change in the law impacting sentences for sexual felonies committed on or after July 1, 2013 could not be applied to him absent a jury

finding as to whether the offenses he was convicted of occurred on or after July 1, 2013. The State conceded that the trial evidence did not support applying the statutory restriction to the sentences imposed for Counts II and III, because the evidence indicated that the incidents involving R.Y. occurred prior to July 1, 2013. But the State contended that credible evidence established that the conduct underlying Counts I and IV (involving S.Y. and M.S.) occurred on July 22, 2013, and that the court could make this finding by a preponderance of the evidence.

The superior court accepted the State's position, and found that the change in the sentencing law would not apply to Counts II and III, but would apply to Counts I and IV. The court imposed a composite term of incarceration of 51 years and 3 months, with 5 years suspended (46 years and 3 months to serve).

This appeal followed.

Misa's claim that there was insufficient evidence to support his conviction for attempted first-degree sexual abuse of a minor

Misa first argues there was insufficient evidence to support his conviction of attempted first-degree sexual abuse of R.Y. (Count III) — the charge based on R.Y.'s description of what occurred in 2013. The State concedes that the evidence presented at trial was insufficient to support this conviction. We have reviewed the record, and we conclude that the State's concession of error is well-founded.[3]

To convict a defendant of an attempt offense, the State must prove that the defendant "engage[d] in conduct which constitutes a substantial step toward the

[3] *See Boles v. State*, 210 P.3d 454, 455 (Alaska App. 2009) (noting this Court's independent duty to evaluate whether a State's concession of error is well-founded (citing *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972))).

commission of that crime."[4] A "substantial step" is one that is "strongly corroborative of the actor's criminal purpose."[5] When a defendant challenges the sufficiency of the evidence to support a criminal conviction, we view the evidence, and all reasonable inferences from that evidence, in the light most favorable to upholding the jury's verdict.[6] We then ask whether a reasonable juror could find that the State had proved the defendant's guilt beyond a reasonable doubt.[7]

In this case, even when viewed in the light most favorable to the jury's verdict, the evidence does not support a conclusion that Misa's conduct constituted a "substantial step" toward the commission of first-degree sexual abuse of R.Y. The evidence presented was that R.Y. went into Misa's room of her own accord — Misa did not invite or maneuver R.Y. into his room. Once R.Y. was in his room, Misa then asked her "if she wanted to play a game" and she declined. Thus, Misa's conduct — asking R.Y. if she wanted to play a game after she came into his room — appears merely preparatory and is not strongly corroborative of Misa's criminal purpose.[8] We therefore conclude that the State's concession that there was insufficient evidence to support

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[4] AS 11.31.100(a).

[5] *Avila v. State*, 22 P.3d 890, 893 (Alaska App. 2001) (quoting Alaska Criminal Code Revision, Part II, at 72-74 (Tent. Draft Feb. 1977)).

[6] *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

[7] *Id.*

[8] *See Sullivan v. State*, 766 P.2d 51, 54 (Alaska App. 1988) (concluding that a defendant who sent a letter to an eight-year-old victim asking if she would kiss him and let him feel private parts of her body had engaged in "preparatory conduct" but had not taken a substantial step toward sexual contact).

Misa's conviction for attempted first-degree sexual abuse of a minor is well-founded, and we reverse his conviction.[9]

Misa's claim that there was a variance between the indictment and the evidence presented at trial with regard to the date of offense alleged in Count II

Misa next argues that the superior court erred in denying his motion for a new trial on Count II — the conviction for completed first-degree sexual abuse of R.Y. — based on a variance between the date alleged in the indictment and the date described by the evidence presented at trial.

The final indictment alleged that the incident forming the basis for Count II took place "on or about 2011," but during his closing argument, the prosecutor argued to the jury that this was an approximate range and could include conduct that took place in 2012 as well. On appeal, Misa claims that he suffered prejudice as a result of this discrepancy — because he detrimentally relied on the date in the indictment to structure his defense and because the ambiguity in the date of the offense could create double jeopardy concerns if R.Y. were to accuse him of additional conduct from the same time period.

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[9] Misa also argues on appeal that there was a fatal variance between the indictment and the proof presented at trial for this count because he claims the State changed its theory of the offense between the two proceedings. However, because we reverse Misa's conviction for attempted first-degree sexual abuse of a minor based on insufficient evidence, which has the effect of prohibiting it from retrial, we do not reach this alternative claim. *See Howell v. State*, 115 P.3d 587, 592 (Alaska App. 2005) ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceedings." (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978))).

In claiming that the alleged variance between the date on the indictment and the date described by the evidence prejudiced him, Misa relies on the fact that, prior to his trial, the State obtained a superseding indictment in this case, which changed the date range for Count II from "on or about 2011 through 2013" to "on or about 2011." Misa asserts that he reasonably understood that this narrowed time frame indicated that the State was abandoning its initial claim that Count II could have occurred "through 2013," or at any point after the end of 2011.

But the narrowed time frame for Count II was intended to differentiate the conduct in Count II from the separate allegation involving R.Y. that was alleged in Count III. The original indictment accused Misa of two counts of first-degree sexual abuse of R.Y. (Counts II and III), and indicated that each of these acts occurred "on or about 2011 through 2013." The prosecutor changed the time frame for these counts in the superseding indictment in response to a question from a grand juror who was confused because both counts alleged the same date range of "2011 through 2013." After the change, the indictment alleged that Count II occurred "on or about 2011" and that Count III occurred "on or about 2013," thus establishing that Count II referred to Misa's first act of penetrating R.Y.'s mouth with his penis, while Count III referred to his subsequent act of "encouraging" R.Y. to allow him to put his penis in her mouth.

Under Alaska law, unless the defendant's age is in dispute or the date is important for distinguishing between multiple counts, the day the offense is committed is not an element of the offense.[10] Accordingly, interpretation of the term "on or about" is generally quite broad, and when the State alleges that an offense occurred "on or about" a certain date, it is usually not necessary that the proof establish with certainty the exact date of the alleged offense. Instead, it is sufficient if the State proves "that the

[10] *See George v. State*, 362 P.3d 1026, 1033 n.25 (Alaska 2015).

offense was committed on a date reasonably near the date alleged."[11] This is particularly important in child sexual abuse cases where the victim, often the only eyewitness, is a young child who is unlikely to recall exact dates.[12] We have thus explained that "[a] variance between the date alleged and the date proved will not undermine a criminal conviction unless the defendant shows that the variance prejudiced their substantial rights."[13]

In this case, Misa claims that he was unaware during the trial that Count II might refer to an act that took place in the middle of 2012 and that, if he had known that, he may have chosen to present more specific testimony about his date of arrival or his work and living situation during the summer of 2012.

But the record shows that Misa was on notice that Count II might refer to an act that took place anytime from the beginning of 2011 through about the middle of 2012. The evidence presented in support of Count II showed that R.Y. was interviewed about Misa's abuse of her in July 2013 at a children's advocacy center. During the interview, R.Y. told the interviewer that Misa placed his penis in her mouth when she "was six" (*i.e.*, in 2011) or "about a year ago" (*i.e.*, about the middle of 2012).

When R.Y. testified, she told both the prosecutor and the defense attorney that while she remembered the abuse occurring, she did not remember how old she was when it occurred. During the State's case-in-chief, the prosecutor played the recording of R.Y.'s interview at the children's advocacy center. The prosecutor also played the recording of Misa's July 2013 interview, in which Misa stated that he put his penis in

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[11] *Selman v. State*, 411 P.2d 217, 225 n.24 (Alaska 1966).

[12] *Horton v. State*, 758 P.2d 628, 632 (Alaska App. 1988); *Simpson v. State*, 705 P.2d 1328, 1330 (Alaska App. 1985).

[13] *Larkin v. State*, 88 P.3d 153, 158 (Alaska App. 2004).

R.Y.'s mouth some months prior to the interview. This record does not support Misa's contention that he was not aware until the State's closing argument that the State was claiming that the conduct could have occurred in the middle of 2012.

Additionally, Misa did not give notice of an alibi defense prior to trial.[14] And, during opening statements, the defense attorney did not indicate that he would rely on Misa's absence from the state at the time of the crime to establish that he was not guilty, instead asserting that the three girls were not credible because of inconsistencies in their accounts. Misa also expressly argued that he was not relying on an alibi defense in his motion for new trial. As a result, Misa never gave the prosecutor any reason to believe that it was necessary to provide further clarification of the possible dates that applied to Count II.

Misa also asserts that the variance prejudiced his substantial rights because it undermined his argument that R.Y. was not credible. He notes that his defense attorney specifically argued that R.Y.'s claim was not credible because Misa was not living in Alaska in 2011, and that this was when she said the offense took place.

But the evidence showed that during R.Y.'s interview at the child advocacy center, she was inconsistent about the timing of the offense, stating both that it took place when she was six and also that it took place about a year prior to the interview. And during her trial testimony, she explained that while she remembered the offense occurring, she did not remember how old she was when it occurred. In other words, R.Y. was never clear about when the offense occurred, and the date range in the indictment — whether limited to 2011 or expanded to include 2012 — had no bearing

[14] *See* Alaska R. Crim. P. 16(c)(5) (providing that "the defendant shall inform the prosecutor of the defendant's intention to rely upon a defense of alibi" no later than 10 days before trial).

on R.Y.'s credibility. The indictment, not R.Y. herself, alleged that the offense took place "on or about 2011."

Misa lastly claims that the lack of clarity regarding the date for Count II prejudiced him by exposing him to double jeopardy if R.Y. were to accuse him of additional conduct from the same time period.[15] But as the superior court explained, only a single incident of completed first-degree sexual abuse of a minor involving R.Y. was charged and proven at trial — the incident in which Misa blindfolded her and then inserted his penis into her open mouth. As a result, if the State were to charge Misa for this same conduct, Misa would clearly be protected by the guarantee against double jeopardy, and nothing about the ambiguity in the date of the offense would undermine that protection.

For these reasons, we conclude that the superior court did not abuse its discretion in determining that any variance in the approximate dates for Count II did not prejudice Misa's defense.

Misa's claim that the superior court erred in rejecting his proposed statutory mitigator under AS 12.55.155(d)(9)

Misa next challenges the superior court's decision to deny his proposed statutory mitigating factor that his conduct was among the least serious conduct included in the definition of the offense.[16] He contends that the court erred in basing its decision on the following facts: there were multiple victims, the victims were very young, Misa was in a "position of trust," and his actions showed some level of planning.

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[15] *See* Alaska Const. art. I, § 9 ("No person shall be put in jeopardy twice for the same offense.").

[16] *See* AS 12.55.155(d)(9).

Whether the superior court erred in rejecting a proposed mitigating factor is a mixed question of law and fact.[17] We review the court's factual findings for clear error,[18] and will conclude that a finding is clearly erroneous only if we are left with a definite and firm conviction that a mistake has been made.[19] In this case, all three victims testified to a similar pattern of abusive conduct: Misa would ask them if they wanted to play a game, blindfold them, and then insert his penis into their mouth. The victims were between approximately six to eight years old at the time of the incidents, which meant they were in the middle of the age range specified by the offense, and they each referred to Misa as "Uncle Sia." Although Misa was not in an official position of authority over the girls, as the superior court acknowledged, he was still a trusted member of the family living in the same home. We accordingly conclude that the superior court's factual findings are well-supported by the record.

Whether the facts establish that the defendant's conduct is "among the least serious" prohibited by a statute is a question of law that we review *de novo*.[20] According to Misa, the superior court erred by relying on the fact that there were multiple victims because doing so violated the prohibition against double punishment established in *Juneby v. State*.[21] Misa contends that the court's reliance on this fact effectively punished Misa more severely for one offense because he committed multiple offenses.

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[17] *See Michael v. State*, 115 P.3d 517, 519 (Alaska 2005).

[18] *Id.*

[19] *Olmstead v. State*, 477 P.3d 656, 662 (Alaska App. 2020).

[20] *Michael*, 115 P.3d at 519.

[21] *Juneby v. State*, 641 P.2d 823, 842 (Alaska App. 1982), *modified on other grounds on reh'g*, 655 P.2d 30 (Alaska App. 1983).

In *Juneby*, the superior court based a significant part of its finding that the defendant's offense was the most serious within the definition of the offense on consideration of conduct for which the defendant had been separately convicted and sentenced. On appeal, this Court concluded that, in doing so, the superior court had punished Juneby twice for the same conduct in violation of the prohibition against double punishment.

By contrast, in this case, the superior court did not rely on the fact that there were multiple offenses to increase Misa's sentence above the presumptive range or to otherwise increase his sentence. Instead, the superior court relied on the fact that there were multiple victims who each reported a similar pattern of abuse to conclude that the incidents required some level of forethought and planning. The court then relied on this determination, as well as on the other circumstances of the case, when it found that Misa's offenses were not "least serious" and imposed the minimum composite sentence based on the presumptive range for each offense. This did not violate the rule set out in *Juneby*.

We conclude that the facts found by the superior court — *i.e.*, that there were multiple victims, the victims were very young, Misa was in a "position of trust," and his actions showed some level of planning — support its determination that Misa's conduct was not among the least serious conduct included within the definition of the offense. Instead, as the superior court found, the offenses were fairly typical first-degree sexual abuse of a minor offenses. We accordingly reject Misa's claim of error.

Misa's claim that a jury was required to find the date the offenses occurred for Counts I and IV beyond a reasonable doubt

Finally, Misa argues that he was entitled to a jury finding on the date that the acts underlying Counts I and IV (sexual penetration of S.Y. and M.S.) took place.

Under *Blakely v. Washington*, criminal defendants are entitled to a jury verdict on "any question of fact which, if resolved in the government's favor, will subject the defendant to a greater maximum sentence than would otherwise apply to the defendant's crime."[22] A restriction on a defendant's eligibility for mandatory parole is considered "a greater maximum sentence" for purposes of *Blakely*.[23]

In 2013, the Alaska legislature amended AS 33.20.010(a)(3)(B) — the statute governing good time credit — so that defendants who commit first-degree sexual abuse of a minor under AS 11.41.434(a)(1) are no longer eligible for good time credit (and thereby are ineligible for release on mandatory parole).[24] This amendment went into effect on July 1, 2013.[25]

The State indicted Misa for abusing S.Y. and M.S. "on or about July 22, 2013." In the interviews conducted at the child advocacy center on July 23, 2013, S.Y. and M.S. stated that Misa abused them "today" and "yesterday," respectively. However, R.Y.'s statements were conflicted regarding the timing of the abuse of S.Y. and M.S. — suggesting that the abuse may have taken place a year earlier. Thus, in the present case, there was ambiguity as to whether the conduct for which Misa was convicted took place after the effective date of the statutory amendment restricting eligibility for good time credit, and the jury was not asked to resolve this ambiguity.

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[22] *State v. Clifton*, 315 P.3d 694, 702 (Alaska App. 2013) (citing *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004)).

[23] *Forster v. State*, 236 P.3d 1157, 1170 (Alaska App. 2010).

[24] SLA 2013, ch. 43, § 33; *see also* AS 33.16.010(c) ("[A] prisoner . . . shall be released on mandatory parole for the term of good time deductions credited under AS 33.20").

[25] SLA 2013, ch. 43, §§ 33, 46(a), 48 (providing that amendments to AS 33.20.010(a)(3)(B) had an effective date of July 1, 2013).

If Misa committed the offenses underlying Counts I and IV during the month of July 2013, he is ineligible for good time and mandatory parole under the statute. If the incidents took place prior to July 1, 2013, then the legislative amendment would not apply and he would be eligible for good time and mandatory parole.

At sentencing, the superior court found that Misa was ineligible for good time credit on these two offenses because credible evidence was presented at trial that the incidents occurred after July 1, 2013.[26] Misa now argues that he is entitled to a jury finding on this issue.

Ordinarily, as we have previously discussed, the date an offense occurred is not an element that the State has to prove beyond a reasonable doubt.[27] But when the date of an offense is the demarcation line between a higher penalty, other jurisdictions have found that the burden falls on the State to prove the date.[28] And if there is a reasonable doubt as to whether the jury would have found that the conduct occurred at

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[26] The State conceded that the trial evidence did not support applying the statutory restriction to the sentences imposed for Counts II and III, because the evidence indicated that the incidents involving R.Y. occurred prior to July 1, 2013. The superior court agreed and found that Misa was eligible for good time credit on Counts II and III.

[27] *See George v. State*, 362 P.3d 1026, 1033 n.25 (Alaska 2015); *Larkin v. State*, 88 P.3d 153, 156 (Alaska App. 2004).

[28] *See People v. Hiscox*, 136 Cal. App. 4th 253, 256, 38 Cal. Rptr. 3d 781, 782 (Cal. App. 2006) ("[I]t is the prosecution's responsibility to prove to the jury that the charged offenses occurred on or after the effective date of the statute providing for the defendant's punishment. When the evidence at trial does not establish that fact, the defendant is entitled to be sentenced under the formerly applicable statutes[.]"); *see also People v. Rojas*, 237 Cal. App. 1298, 1306-07, 188 Cal. Rptr. 3d 811, 817-18 (Cal. App. 2015); *State v. Jackson*, 896 S.W.2d 77, 84 (Mo. App. 1995); *State v. Heckinlively*, 83 S.W.3d 560, 569 (Mo. App. 2002); *State v. Ragas*, 744 So.2d 99, 106 (La. App. 1999).

a time that would justify the higher penalty, then the State has not met its burden and the lower penalty range applies.[29]

We now adopt the same approach. In this case, we conclude that there was a reasonable doubt as to whether the jury would have found that the incidents underlying Counts I and IV occurred after July 1, 2013. There was conflicting evidence at trial regarding when the events with S.Y. and M.S. took place, given that R.Y. made statements indicating the abuse had perhaps occurred much earlier with all three girls. The date was not listed as an element of any offense provided to the jury, and the State told the jury in closing arguments that "the [S]tate does not have to prove the date."

Accordingly, we remand this case to the superior court for resentencing on Counts I and IV. On remand, the State may choose whether to take the issue of when the offenses were committed to a jury, or whether the court should amend the sentence previously imposed to render Misa eligible for good time credit on all of his convictions.[30]

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[29] *See Jackson*, 896 S.W.2d at 84 (concluding that "trial court could not sentence the defendant to the more severe punishment since some of the offenses could have occurred prior to the effective date of the amendment" and "[m]anifest injustice would result if these sentences were left uncorrected"); *Heckinlively*, 83 S.W.3d at 569 (remanding for resentencing where defendant was sentenced under amended statute without sufficient proof that the offense alleged was committed after the enhanced sentencing provision became effective); *Ragas*, 744 So.2d at 106 (amending sentence to delete stipulation that it be served without benefit of probation, parole, or suspension of sentence when no rational trier of fact could have found beyond a reasonable doubt that at least one act constituting the crime occurred after the effective date of the statute).

[30] In his reply brief, Misa agrees that the State should be given the opportunity to seek a jury determination of the date of the offense. He does not argue that the remedy should be limited to altering the judgment to ensure that Misa is eligible for good time credit for that count. Accordingly, we do not address whether the State has waived its opportunity to obtain (continued...)

Conclusion

For the reasons provided, we REVERSE Misa's conviction for attempted first-degree sexual abuse of a minor (Count III). We otherwise AFFIRM Misa's convictions, but we REMAND Counts I and IV to the superior court. On remand, the State may elect to have the court empanel a jury to determine the date of the offenses alleged in Counts I and IV or, alternatively, the State may elect to proceed without this determination. However, unless the State submits the question to a jury and the jury finds that these offenses were committed on or after July 1, 2013, the court must vacate its order denying Misa good time eligibility for those counts.

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[30] (...continued)
a jury determination of the date of the offense by failing to obtain a jury finding on the issue at the original trial.