IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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STATE OF ARIZONA, *Appellee*,

*v.*

JAMIE BRENT CHANDLER, *Appellant*.

No. 1 CA-CR 15-0520
FILED 6-21-2016

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Appeal from the Superior Court in Maricopa County
No. CR-2010-007672-001
The Honorable Virginia L. Richter, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force
*Counsel for Appellant*

## MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kent E. Cattani joined.

**K E S S L E R**, Judge:

**¶1** Appellant Jamie Brent Chandler ("Chandler") contends that the trial court erred in granting the State of Arizona's ("State") motion to amend the dates in the indictment against him for six counts of sexual conduct with a minor. For the reasons that follow, we affirm.

## FACTUAL AND PROCEDURAL HISTORY

**¶2** In October 2010, a grand jury indicted Chandler on three counts of sexual conduct with a minor under the age of fifteen and one count of molestation of a child, class 2 felonies and dangerous crimes against children. The charges stemmed from allegations that he engaged in sexual misconduct with a relative when she visited Chandler in Arizona.

**¶3** In the initial indictment, the State alleged that counts 1 and 2 were committed "on or between the 1st day of March, 2001 and the 1st day of October, 2001." In that same indictment, the State alleged that counts 3 and 4 were committed "on or between the 1st day of March, 2010 and the 1st day of October, 2010." Chandler successfully moved to remand the indictment to the grand jury, in part because the police officer who had testified to the grand jury had not conducted an independent investigation but had relied on an investigation by an Illinois detective on an unrelated offense.[1] The Illinois investigation showed the victim claimed the crimes in Arizona had occurred when she was 12 or 13, which would have been in the summers of 2002 or 2003, not 2001. Thus, Chandler argued there was no evidence the crimes occurred in the summer of 2001 as alleged in the

[1] Chandler was convicted in Illinois for sexual conduct with the same victim prior to his move to Arizona.

indictment.[2] Upon remand, the grand jury indicted Chandler ("Remanded Indictment") on six counts[3] of sexual conduct with a minor under the age of fifteen, class 2 felonies and dangerous crimes against children. The State alleged that all six offenses were committed "on or between June 1, 2002 and August 31, 2003."

**¶4** At trial, the victim (who was born in January 1990) testified that Chandler had sexual contact with her in Arizona when she spent a summer there between fifth and sixth grade, which the record shows would have been in either 2001 or 2002. She testified that Chandler lived in Glendale, Arizona at the time. It was undisputed that the offenses in Arizona occurred only during one summer.

**¶5** On cross-examination, the victim was asked to explain her previous statement to the Illinois detective concerning her age when Chandler had sexual contact with her in Arizona. The victim testified that she may have been off on the year by a summer when she spoke to the detective, that the contact occurred in the summer between fifth and sixth grade, and the corresponding year may have been 2001, but she was not certain. On redirect, the victim testified that while she was not certain as to the date of the offenses, she remembers it being around fifth and sixth grade and that she was either 11 or 12 years old at the time.

**¶6** Subsequent to the victim's testimony on redirect, the State moved to amend the Remanded Indictment to reflect a time frame of "on or between May 1, 2001 and August 31, 2003." The defense objected on the ground that the proposed amendment would prejudice Chandler by precluding him from preparing and presenting an alibi defense.

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[2] In the motion to remand for redetermination of probable cause, Chandler's counsel wrote that a Glendale police officer reported that he had spoken with Chandler's ex-wife and she "confirmed that the couple moved to Glendale in 2001 and then moved to Peoria, Arizona, where they lived from 2002-2007."

[3] *Count 1*: the alleged first time Chandler performed oral sex on victim, *count 2*: the alleged first time Chandler digitally penetrated victim's vagina, *count 3*: the alleged first time Chandler had penile or vaginal intercourse with victim, *count 4*: the alleged last time Chandler performed oral sex on victim, *count 5*: the alleged last time Chandler digitally penetrated victim's vagina, *count 6*: the alleged last time Chandler had penile or vaginal intercourse with victim.

Specifically, the defense argued that had Chandler known 2001 was still at issue, he would have performed a more thorough investigation and prepared a more effective defense because he did not move to Arizona until after the summer of 2001.[4]

**¶7** Before the State rested, the trial court granted the State's motion to amend the indictment to conform to the evidence adduced at trial pursuant to Arizona Rule of Criminal Procedure 13.5(b) ("Rule 13.5(b)") and in accordance with the State's requested time frame. Chandler did not present any evidence regarding his alleged 2001 alibi, and he did not seek a continuance to obtain any such evidence.

**¶8** The trial court granted Chandler's motion for acquittal on count 4. The jury found Chandler guilty on counts 1, 2, 5, and 6, but not guilty on count 3. With respect to the guilty counts, the jury also found that the victim was 12 years old or younger, which would mean the crimes occurred before January 29, 2003. The trial court imposed mandatory consecutive terms of life imprisonment on each count for which Chandler was found guilty. Chandler timely appealed.

## JURISDICTION AND STANDARD OF REVIEW

**¶9** This Court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes §§ 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A) (2010).[5] Recognizing that "the trial court is invested with considerable discretion in resolving [post-trial motions to amend indictments]," *State v. Sammons*, 156 Ariz. 51, 54 (1988), we review its order on such a motion for an abuse of discretion, *State v. Buccheri-Bianca*, 233 Ariz. 324, 329, ¶ 16 (App. 2013).

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[4] Before the amendment, Chandler sought to admit his Arizona driver's license to show that he was not present in Arizona in the summer of 2001. The driver's license showed that Chandler obtained it in September 2001. The court ruled that the license was irrelevant because "[m]any people don't obtain their driver's license immediately upon moving." Chandler does not appeal from that ruling.

[5] We cite to the current version of the relevant statutes unless revisions material to this decision have occurred.

## DISCUSSION

**¶10** Chandler argues that the trial court improperly granted the motion to amend to include 2001 as a possible date of the offenses in violation of Rule 13.5(b). He contends that the amendment deprived him of his Sixth Amendment right to notice of the charges against him and prejudiced him because if he had had notice of the 2001 date prior to trial, he would have developed an alibi showing that he did not live in Arizona until after the summer of 2001.

**¶11** "Rule 13.5(b) is a prophylactic rule of criminal procedure." *State v. Freeney*, 223 Ariz. 110, 114, ¶ 25 (2009). While it is designed to ensure that the Sixth Amendment's notice requirement has been satisfied, "[a] violation of Rule 13.5(b) . . . does not necessarily infringe on a defendant's Sixth Amendment rights." *State v. Baltes*, No. 1 CA-CR 10-0090, 2011 WL 3240678, at *2, ¶ 7 (Ariz. App. July 28, 2011) (mem. decision). Rule 13.5(b) provides:

> The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be *amended only to correct mistakes of fact or remedy formal or technical defects*, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

(Emphasis added). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423 (1980).

**¶12** Chandler concedes the amendment did not change the nature of the underlying charged offenses. Thus, we look only to see if he was prejudiced by the amendment, that is, if he had sufficient notice with an ample opportunity to prepare his defense. *See State v. Barber*, 133 Ariz. 572, 577 (App. 1982) (holding that in determining the propriety of an amendment to an indictment, we must look to see if the amendment violated the defendant's right to "notice of the charges against him with an ample opportunity to prepare to defend against them").[6] "To be

[6] We also look to see if the indictment, as amended, provides "double jeopardy protection from a subsequent prosecution on the original charge."

meaningful, an 'ample opportunity to prepare to defend' against amended charges generally must occur before the state has rested its case." *State v. Johnson*, 198 Ariz. 245, 249, ¶ 13 (citation omitted). The burden is on the defendant to demonstrate that he has suffered actual prejudice from the amendment. *Id.* at 248, ¶ 8. He cannot merely allege theoretical prejudice. *See State v. Jones*, 188 Ariz. 534, 544 (App. 1996). If an amendment violates the defendant's right to notice, "the amendment has not corrected a technical defect and is impermissible." *Johnson*, 198 Ariz. at 248, ¶ 8.

**¶13** Chandler avers that he was "surprised" by the victim's testimony in the State's case-in-chief because he was not put on notice that 2001 was in issue as a possible time for when the alleged sexual conduct occurred. Chandler argues that, similar to *Johnson*, once the State amended the original indictment to exclude 2001, he had no reason to expect that the victim would testify in accordance with the year in the original indictment.

**¶14** We disagree with Chandler. In the motion to remand the original indictment to the grand jury, Chandler argued that there was no evidence to support the police officer's testimony before the grand jury that the crimes had occurred in 2001 so that the inclusion of 2001 was in error. Chandler asserted that without an independent investigation, the State had to rely on the Illinois detective's report to support the time frame in its indictment. As noted above, that report stated that the victim was 12 or 13 years old, which would have been after January 29, 2002. The Remanded Indictment limited the range of dates to 2002 and 2003.

**¶15** The trial court did not err in finding that Chandler was not "surprised" by the amendment to the Remanded Indictment. We defer to the trial court's factual findings unless they are clearly erroneous. *State v. Rosengren*, 199 Ariz. 112, 116, ¶ 9 (App. 2000). The trial court was best situated to determine whether Chandler was "surprised" by the victim's time frame testimony, and whether he had notice that the precise time frame was unsettled. The record supports the superior court's decision that Chandler was on notice that there was a discrepancy as to the dates of the offense; the only reason the dates were changed to 2002 and 2003 was because of the Illinois detective's report. The exact range of dates of the offenses would depend on what the victim testified to at trial.

**¶16** Additionally, Chandler's reliance on *Johnson* is misplaced. In *Johnson*, we found the trial court had reversibly erred in allowing the

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*Barber*, 133 Ariz. at 577. Chandler does not contend that the amendment violated any double jeopardy protection.

amendment of the indictment after the close of the State's case-in-chief because the amendment related to the nature of the sexual conduct alleged, not the dates of the sexual contacts as Chandler argues. 198 Ariz. at 248, ¶¶ 10, 11. Thus, the amendments in *Johnson* went directly to the substance of the charges in the indictment, leading the court to conclude that the amendments prejudiced Johnson's ability to defend himself by preparing cross-examination of the victim and the State's experts. *Id*. at 248-49, ¶¶ 11-12. Here, however, we are merely dealing with a non-substantive change in the indictment's time frame. Moreover, the record shows that, unlike in *Johnson*, the court here granted the motion to amend the Remanded Indictment before, not after, the State rested.

**¶17** Even if the court erred in granting the motion to amend, which we hold it did not, Chandler has not established prejudice. In the superior court, Chandler contended that he was not in Arizona during the summer of 2001, but was still living in Illinois. On appeal, he argues that he would have developed this alibi had he known that 2001 was still in play. This argument fails for several reasons. First, after 2001 resurfaced at trial as the possible year the sexual contacts occurred and the State rested, Chandler did not present any evidence to establish he was not in Arizona during the summer of 2001. Second, because the amendment came before the State rested, Chandler could have, but did not, seek to recall the victim or any of the witnesses to testify about the 2001 date. Third, even though Chandler's counsel argued that he could have developed the alibi had he known 2001 was at issue, he did not request a continuance to get the possible evidence to do so.

**¶18** Finally, even if Chandler could have developed an alibi about 2001, the jury found the crimes occurred when the victim was 12 years old or younger, which coincides with the victim's testimony that she was either 11 or 12—that is, the sexual contacts occurred in 2001 or 2002. Chandler's contended alibi would not have affected a conviction based on the events occurring in the summer of 2002. *See State v. Hamilton*, 177 Ariz. 403, 410 & n.6 (App. 1993) (holding that, "[a]lthough the indictment does allege time periods in which the offenses were alleged to have occurred ranging up to one year, defendant does not show any *actual* prejudice therefrom. . . . Defendant's assertion that he was unable to present an alibi defense . . . is a theoretical, not an actual, prejudice that could be asserted any time an offense was alleged to have occurred over a period of time").

## CONCLUSION

**¶19** For the aforementioned reasons, the trial court did not abuse its broad discretion in granting the State's motion to amend the time frame in the Remanded Indictment as to all counts. We affirm Chandler's convictions and sentences.