IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-KA-00029-SCT

JAMES ROSS

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	12/11/2018
TRIAL JUDGE:	HON. M. JAMES CHANEY, JR.
TRIAL COURT ATTORNEYS:	RICHARD SMITH, JR. MARCIE SOUTHERLAND EUGENE A. PERRIER
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: KAYLYN HAVRILLA McCLINTON
DISTRICT ATTORNEY:	RICHARD EARL SMITH, JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 01/30/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., CHAMBERLIN AND ISHEE, JJ.

CHAMBERLIN, JUSTICE, FOR THE COURT:

¶1. A Warren County jury convicted James Ross of three counts of sexual battery against two victims under the age of fourteen in violation of Mississippi Code Section 97-3-95(1)(d) (Rev. 2014) and one count of statutory rape in violation of Mississippi Code Section 97-3-65(1)(b) (Supp. 2019). After the verdict, the Warren County Circuit Court sentenced Ross to serve three concurrent thirty-year terms in the custody of the Mississippi Department of

Corrections for the sexual-battery convictions and to a consecutive term of thirty years for the statutory-rape conviction with five years suspended.

¶2. Ross now appeals his convictions and sentences. He alleges two errors. First, he argues that the State failed to prove that the crimes occurred within a reasonable time frame of the dates alleged in the indictment. Second, Ross argues that his trial was rendered unfair because the jury was informed that his codefendant, Canary Johnson, pled guilty to child neglect mid-trial. Ross alternatively argues that his trial counsel was constitutionally ineffective for requesting that the jury be informed of Johnson's guilty plea. We find no error, and we affirm.

FACTS AND PROCEDURAL HISTORY

¶3. Canary Johnson and her boyfriend, James Ross, lived together in Vicksburg for several years leading up to the first week of January 2018. Johnson's two daughters, A.R. and B.R.,[1] also lived with Johnson and Ross. A.R. was born June 23, 2011, and B.R. was born March 4, 2010. Ross was born October 29, 1970. Although Ross was not the biological father of A.R. or B.R., both children referred to Ross as their "daddy."

¶4. On December 29, 2017, Canary Johnson called her longtime friend Tamisha Stowers and explained that A.R. and B.R. had disclosed to Johnson that Ross was making A.R. and B.R. perform oral sex on him while Johnson was away from the house. Stowers testified that A.R. and B.R. then disclosed the abuse to Stowers on January 4, 2018. That same day, Stowers contacted the Warren County Sheriff's Department and spoke with Investigator

[1] Fictitious initials have been substituted to protect the child victims' identity.

Stacy Rollison. Stowers reported to Rollison that A.R. and B.R. had disclosed to her that Ross was making them perform oral sex on him. Investigator Rollison and other members of the Warren County Sheriff's Department immediately responded to the residence to investigate the allegations. Rollison testified that she spoke with A.R. and B.R. at their house that day and asked if anyone in the home was hurting them. Rollison testified that both A.R. and B.R. "immediately said that their daddy makes them suck his d***." Rollison arranged for the children to undergo forensic interviews at the Children's Advocacy Center in McComb, Mississippi.

¶5. On January 5, 2018, A.R. and B.R. underwent separate forensic interviews. Both forensic interviews of A.R. and B.R. were characterized as disclosures of sexual abuse.

¶6. On August 1, 2018, Ross and Johnson were co-indicted on four counts—three counts of sexual battery in violation of Mississippi Code Section 97-3-95(1)(d) (Rev. 2014) and one count of statutory rape in violation of Mississippi Code Section 97-3-65(1)(b) (Supp. 2019).[2] Johnson was indicted on two additional counts of child neglect in violation of Mississippi Code Section 97-5-39(1)(e) (Rev. 2014). A joint trial against Ross and Johnson commenced in November 2018.

¶7. Before trial, the State entered a *nolle prosequi* regarding the sexual-battery and statutory-rape counts against Johnson. As a result, Johnson was only on trial for two counts

[2] Counts one through four charged that Johnson aided, abetted and/or acted in concert with Ross. Count one related to forcing A.R. to perform oral sex on Ross in violation of Section 97-3-95(1)(d); count two related to forcing B.R. to perform oral sex on Ross in violation of Section 97-3-95(1)(d); count three related to Ross's digital penetration of B.R. in violation of Section 97-3-95(1)(d); count four related to Ross's sexual intercourse with B.R. in violation of Section 97-3-65(1)(b).

of child neglect, as alleged in counts five and six of the indictment.

¶8. At trial, B.R. testified that Ross "made me suck his private" and that Ross "put his private in my private." B.R. explained that "[i]f I didn't want to do it, he would punch me in my stomach." B.R. testified that the sexual abuse began when she was seven and that it occurred "every day." Similarly, A.R. testified that Ross "made me suck his private." A.R. explained that B.R. was present when this happened and that B.R. would have to do it too. A.R. testified that this abuse happened "[a] lot." In addition to their testimonies, video recordings of B.R.'s and A.R.'s forensic interviews were admitted into evidence and shown to the jury.

¶9. During trial, Johnson decided to plead guilty to one count of child neglect; the other child-neglect count was *nolle prossed* as part of Johnson's plea deal. The State informed the trial court of Johnson's decision outside the presence of the jury. In light of Johnson's decision, the trial court suggested that it inform the jury that "the case concerning Canary Johnson has been concluded." The court asked if anything further should be disclosed to the jury, and the State suggested that nothing further be said because the State possibly would call Johnson as a witness. Ross's defense counsel then requested a break to research the situation and to decide whether to move for a mistrial.

¶10. During a later break, Johnson entered a guilty plea, which was accepted by the trial court. The trial court again suggested that the court "simply announce to [the jury] that the case against Canary Johnson is concluded and [the jury] won't be hearing [any more] evidence or argument concerning the charges against her." Ross's defense counsel

interjected and requested that the trial court inform the jury that Johnson pled guilty to child neglect "because, otherwise, it's going to be open to them . . . and I would never be able to . . . mention anything about it." At that same time, Ross's defense counsel expressly forewent moving for a mistrial.

¶11. The jury was brought back to the courtroom, and the trial court announced,

> [m]embers of the jury, during the recess the defendant Canary Johnson, pleaded guilty to the charge of child neglect. She will be sentenced on December 7th. So she and her attorney will not be present, and we will not hear [any more] evidence concerning the charges against her.

The trial continued with the testimony of four more witnesses for the State and the recall of one of the State's witnesses. The State rested, and the defense did as well.

¶12. The jury convicted Ross on all four counts, and the trial court sentenced Ross to serve three concurrent thirty-year terms in the custody of the Mississippi Department of Corrections for the sexual-battery convictions and to another consecutive term of thirty years for the statutory-rape conviction with five years suspended. Ross then filed an unsuccessful motion for a new trial or, in the alternative, a judgment notwithstanding the verdict.

¶13. Ross now appeals, arguing that the State failed to prove that the alleged crimes occurred "on or about December 2017," as alleged in the indictment. Additionally, Ross takes issue with the trial court's informing the jury that Johnson had pled guilty to child neglect. Ross argues that this was plain error. Alternatively, Ross argues that his defense counsel was constitutionally ineffective for requesting that the trial court specifically explain to the jury that Johnson had pled guilty to child neglect.

ANALYSIS

I. Whether the State presented sufficient evidence that the crimes occurred within a reasonable time frame of December 2017.

¶14. Ross first argues that the State did not prove that the crimes occurred within a reasonable time frame of December 2017. This argument challenges the sufficiency of the evidence. *See* ***McBride v. State***, 61 So. 3d 138, 148 (Miss. 2011). We find the testimony and evidence presented at trial sufficient.

¶15. When reviewing the legal sufficiency of the evidence, "this Court views the evidence in the light most favorable to the prosecution, and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Portis v. State***, 245 So. 3d 457, 472 (Miss. 2018) (citing ***McLendon v. State***, 945 So. 2d 372, 384 (Miss. 2006)). The State must be given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." ***Hughes v. State***, 983 So. 2d 270, 276 (Miss. 2008) (citing ***Wilson v. State***, 936 So. 2d 357, 363 (Miss. 2006)). "The evidence will be deemed sufficient if 'having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense . . . .'" ***Scott v. State***, 220 So. 3d 957, 962 (Miss. 2017) (internal quotation marks omitted) (quoting ***Hardy v. State***, 137 So. 3d 289, 304 (Miss. 2014)).

¶16. Ross's four-count indictment alleged that the conduct occurred "on or about December 2017." Ross does not argue that the evidence was insufficient to prove that he violated Section 97-3-95(1)(d) and Section 97-3-65(1)(b). Rather, Ross argues that no

evidence was presented that these violations occurred during December 2017 or within a reasonable period near December 2017.

¶17. This Court has explained that "an allegation as to the time of the offense is not an essential element of the offense charged in the indictment[.]" ***Chapman v. State***, 250 So. 3d 429, 450 (Miss. 2018) (internal quotation mark omitted) (quoting ***Daniels v. State***, 742 So 2d 1140, 1143 (Miss. 1999), *overruled on other grounds by* ***Wilson v. State***, 194 So. 3d 855, 867 (Miss. 2016)). "[W]ithin reasonable limits, proof of any date before the return of the indictment and within the statute of limitations is sufficient." ***Id.*** at 451 (internal quotation marks omitted) (quoting ***Daniels***, 742 So. 2d at 1143).

¶18. This Court must determine if "the evidence was sufficient to enable a reasonable juror to conclude that the sexual batter[ies and statutory rape] occurred within reasonable limits, or reasonably near, the timeframe set forth in the indictment . . . ." ***McBride***, 61 So. 3d at 150. In determining whether the proof of when the crime occurred is within reasonable limits, this Court "must consider whether the defendant had adequate notice of the charge(s) against him so that he was able to prepare his defense and not be surprised at trial." ***Id.*** (citing ***United States v. Cochran***, 697 F.2d 600, 604 (5th Cir. 1993)). Additionally, this "[C]ourt must also consider whether the defendant is protected against a second prosecution for the same offense." ***Id.*** (citing ***Cochran***, 697 F.2d at 604).

¶19. At trial, B.R. testified that Ross began sexually abusing her when she was seven and that it occurred "every day." Similarly, A.R. testified that Ross also sexually abused her "[a] lot," and A.R. explained that B.R. would be present when this happened and that Ross would

sexually abuse B.R. as well. In addition to B.R.'s and A.R.'s trial testimony, the jury was also shown video recordings of each of B.R.'s and A.R.'s January 5, 2018, forensic interviews. In B.R.'s forensic interview, she explained that Ross sexually abused her and A.R. "over and over" while their mother was away from the house. When the forensic interviewer asked B.R. the last time this sexual abuse had occurred, B.R. responded, "a few days ago."

¶20. Furthermore, a juror could reasonably infer that Ross had access to the two child victims during the month of December 2017. Stowers testified that Ross was staying at the home with A.R. and B.R. during the December 2017 and January 2018 time frame. Stowers testified further that she personally observed Ross at the home about a week before learning about and reporting the sexual abuse to Investigator Rollison.

¶21. Reviewing the evidence in the light most favorable to the verdict, a reasonable jury could have found that Ross did commit the crimes "on or about December 2017." On January 5, 2018, B.R. disclosed to the forensic interviewer that the last time Ross sexually abused the girls was "a few days ago." An exact date was not an essential element of the State's proof. *See* ***Bateman v. State***, 125 So. 3d 616, 624 (Miss. 2013). Additionally, the State's failure to prove an exact date did not prejudice Ross in any way. Ross never asserted an alibi defense or claimed that he was unable to adequately defend the charges against him at trial. Nor does Ross claim that he was surprised at trial. Lastly, Ross is adequately protected from any later prosecution for the same crimes. The record is clear that Ross's four-count indictment and convictions relate to four distinguishable crimes, and the testimony

of B.R. established the dates.

¶22. We find the evidence was sufficient for reasonable jurors to conclude that Ross committed these crimes within a reasonable time of the date listed in the indictment. Accordingly, this assignment of error is without merit.

II. Whether Ross's trial was rendered unfair by the trial court's informing the jury that Canary Johnson had pled guilty to one count of child neglect.

¶23. On appeal, Ross argues that his trial was rendered unfair by the jury's being informed that Johnson had pled guilty to child neglect. Ross maintains that this unfairly tainted the jury's consideration of the evidence against him. We decline to find that the trial court erred.

¶24. As previously mentioned, Johnson decided to plead guilty to one count of child neglect mid-trial. In light of Johnson's decision, the trial court suggested merely informing the jury that "the case against Canary Johnson [was] concluded" and that the jury "won't be hearing [any more] evidence or argument concerning the charges against her." Ross's defense counsel, however, requested that the trial court specifically inform the jury that Johnson had entered a guilty plea to child neglect.

¶25. "It is axiomatic that 'a defendant cannot complain on appeal of alleged errors invited or induced by himself.'" ***Thomas v. State***, 249 So. 3d 331, 347 (Miss. 2018) (quoting ***Galloway v. State***, 122 So. 3d 614, 645 (Miss. 2013)). The purpose for this rule is two-fold. It "bind[s] trial counsel to strategic decisions inducing judicial rulings with the purpose of obtaining favorable judgments for their client." ***Id.*** (internal quotation marks omitted) (quoting ***State v. Hargrove***, 293 P.3d 787, 795 (Kan. Ct. App. 2013)). This rule "also defeats

the disreputable strategy aimed at requesting a judge to act in a particular way to salt the record with error as an end in itself, thereby providing potential grounds for reversal of an adverse judgment." ***Id.*** (internal quotation marks omitted) (quoting ***Hargrove***, 293 P.3d at 795).

¶26. The record demonstrates that defense counsel's request was a strategic one. Defense counsel wanted the jury to know about Johnson's plea "because, otherwise, . . . [he] would never be able to . . . mention anything about it." Later in the proceedings, defense counsel unsuccessfully attempted to introduce into evidence the orders reflecting Johnson's plea and the counts *nolle prossed* against her. Defense counsel averred that the evidence was "relevant and beneficial to [Ross's] defense to show what the State has offered [Johnson] as part of the plea."

¶27. We decline to find any error. Ross cannot request that the jury be informed of Johnson's plea, have his request granted and then claim error and complain about the jury's being informed of Johnson's guilty plea on appeal. "To hold otherwise would allow the defendant to invite error and later take advantage of it on appeal." ***Ambrose v. State***, 254 So. 3d 77, 112 (Miss. 2018) (internal quotation marks omitted) (quoting ***Archer v. State***, 986 So. 2d 951, 957-58 (Miss. 2008)).

III. Whether Ross's defense counsel was constitutionally ineffective for requesting that the jury be informed of Johnson's guilty plea.

¶28. Ross alternatively claims that his defense counsel was constitutionally ineffective for requesting that the trial court inform the jury of Johnson's guilty plea to one count of child neglect. According to Ross, "no conceivable defense strategy would justify the jury being

informed about this."

¶29. "[G]enerally, ineffective-assistance-of-counsel claims are more appropriately brought during post-conviction proceedings." ***Bell v. State***, 202 So. 3d 1239, 1242 (Miss. 2016) (internal quotation marks omitted) (quoting ***Dartez v. State***, 177 So. 3d 420, 422–23 (Miss. 2015)). This Court will address such claims on direct appeal when "[1] the record affirmatively shows ineffectiveness of constitutional dimensions, or [2] the parties stipulate that the record is adequate and the Court determines that the findings of fact by a trial judge able to consider the demeanor of witnesses, etc.[,] are not needed." ***Id.*** (alterations in original) (internal quotation marks omitted) (quoting ***Read v. State***, 430 So. 2d 832, 841 (Miss. 1983)). This Court has also resolved ineffective-assistance-of-counsel claims on direct appeal when the record affirmatively shows that the claims are without merit. *See, e.g.*, ***Swinney v. State***, 241 So. 3d 599, 613 (Miss. 2018); ***Ashford v. State***, 233 So. 3d 765, 779–81 (Miss. 2017); *see also* M.R.A.P. 22.

¶30. We note that Ross contends that the record is adequate to address this issue on direct appeal. But we find that the record affirmatively shows that Ross's ineffective-assistance-of-counsel claim is without merit. Therefore, we fully resolve Ross's claim on direct appeal.

¶31. To successfully make an ineffective-assistance-of-counsel claim, Ross must make two showings. ***Ashford***, 233 So. 3d at 779. Ross is required to show that "(1) his counsel's performance was deficient, and (2) this deficiency prejudiced his defense." ***Id.*** (citing ***Puckett v. State***, 879 So. 2d 920, 935 (Miss. 2004) (citing ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 674 (1984))). "The Court strongly presumes that

counsel's conduct falls within the wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy." ***Swinney***, 241 So. 3d at 613 (citing ***Chamberlin v. State***, 55 So. 3d 1046, 1050 (Miss. 2010)). Thus, defense counsel is presumed competent. ***Id.*** "[E]ven [when] professional error is [proved], the Court must determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ***Id.*** (citing ***Chamberlin***, 55 So. 3d at 1050).

¶32. As we have previously explained above, it is apparent from the record that defense counsel's request was a strategic one. Defense counsel wanted the jury to know of Johnson's guilty plea to child neglect "because, otherwise, . . . [he] would never be able to . . . mention anything about it." Clearly, defense counsel sought the ability to expound on the theory asserted in his opening statement, in which he argued that Ross had left Johnson because Ross disagreed with how Johnson was handling his children. Defense counsel later explained to the trial court that Johnson's plea and the State's decision to forego further prosecution of Johnson was "relevant and beneficial to [Ross's] defense to show what the State has offered [Johnson] as part of the plea." Moreover, Ross points to no specific facts showing that counsel's decision was anything other than strategic. Thus, Ross has not overcome the strong presumption that counsel's request to have the jury informed of Johnson's plea was a strategic and reasonable decision. Accordingly, we find Ross's ineffective-assistance-of-counsel claim without merit.

CONCLUSION

¶33. Sufficient evidence was presented for reasonable jurors to conclude that Ross committed these crimes reasonably near the time frame set forth in the indictment. Furthermore, we decline to find that the trial court erred by informing the jury of Johnson's guilty plea to child neglect because Ross specifically requested that it be done. Lastly, Ross fails to make the requisite showing that he received ineffective assistance of counsel. Therefore, we affirm Ross's convictions and sentences, and we dismiss Ross's ineffective-assistance-of-counsel claim with prejudice.

¶34. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, ISHEE AND GRIFFIS, JJ., CONCUR.