IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-334

Filed 16 April 2024

Iredell County, Nos. 14 CRS 52571-579

STATE OF NORTH CAROLINA

v.

LARRY TERRY RUDISILL

Appeal by Defendant from Judgments rendered 26 August 2022 by Judge Patrick T. Nadolski in Iredell County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Lawrence, for the State.

Mark Hayes for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Larry Terry Rudisill (Defendant) appeals from Judgments rendered pursuant to jury verdicts finding him guilty of eight counts of Taking Indecent Liberties with a Child, two counts of Disseminating Obscenity to a Minor Under 13, two counts of Disseminating Obscenity to a Minor Under 16, and one count of First-Degree Sex

Offense With a Child Under 13. The Record before us, including evidence presented at trial, tends to reflect the following:

R.B. and her older brother J.B.[1] lived with their parents in Statesville, North Carolina at the time of the alleged incidents. Defendant lived next door to them. J.B. was homeschooled in middle school and frequently went to talk to Defendant on Defendant's front porch after he was done with his schoolwork. J.B. stated in a forensic interview and at trial that he and Defendant would talk about a range of topics, including sexual topics. Defendant's conversations with J.B. moved into Defendant's house because it was hot outside.

According to both R.B. and J.B., they began watching television in Defendant's living room. Defendant then began turning to pornography channels and watching them with J.B. and R.B. While watching pornography with R.B. and J.B., Defendant suggested they all masturbate. R.B. testified they did so. R.B. stated at one point Defendant instructed her to masturbate him.

According to R.B., about one month after Defendant began showing R.B. and J.B. pornography, Defendant moved them to his bedroom to perform more masturbation and sexual acts and molested R.B. R.B. stated in her forensic interview this occurred when she was in fifth grade and "a little bit younger than 12[.]" This was the last time the interactions with Defendant occurred. Neither R.B. nor J.B.

[1] Although R.B. and J.B. were adults at the time of trial, they were minors when the alleged offenses occurred, thus we refer to them using initials.

reported these incidents to anyone at the time or for several years afterward.

On 7 May 2014, when R.B. was in eleventh grade, Colleen Medwid conducted a forensic interview with R.B. Medwid was a forensic interviewer of children at Dove House Children's Advocacy Center. In the interview, R.B. told Medwid that Defendant had molested her, and made her watch pornography and masturbate. Although R.B. expressed some uncertainty as to the dates of these incidents, she stated she "could've been a little bit younger than 12" and in "[f]ifth or sixth" grade. R.B. told Medwid and testified at trial she had not started her menstrual period when the offenses occurred, and she began her menstrual period in sixth grade.

Following this interview, on 27 May 2014, Detective Sergeant Amy Dyson, an officer with the Statesville Police Department, conducted an interview with Defendant at his house. In that interview, Defendant acknowledged that he had lived next door to R.B. and J.B., and stated he had allowed J.B. to come to his house and watch pornography. He also stated R.B. and J.B. would watch through the door when Defendant watched pornography. On or about 8 December 2014, Defendant was indicted on eight counts of Indecent Liberties With a Child, four counts of Disseminating Obscenity to a Minor Under 13, four counts of Disseminating Obscenity to a Minor Under 16, and one count of First-Degree Statutory Sex Offense with a Child Under 13.

Defendant's trial began 22 August 2022. After the close of the State's case in chief, Defendant moved to dismiss "due to insufficient evidence[.]" Defendant

specifically argued the State had not presented evidence the materials shown to R.B. and J.B. were pornography, nor had the State presented evidence to support the number of instances to correlate to the number of counts charged for each offense. The trial court denied Defendant's Motion in part and allowed it in part, dismissing two counts of Disseminating Obscenity to a Minor for each victim. At the close of all of the evidence, Defendant again moved to dismiss for insufficient evidence. Again, Defendant's argument centered on whether the State had produced evidence establishing the materials shown to R.B. and J.B. were pornographic. The trial court denied Defendant's Motion.

On 26 August 2022, the jury returned verdicts finding Defendant guilty of the remaining charges—eight counts of Taking Indecent Liberties With a Child, two counts of Disseminating Obscenity to a Minor Under 13, two counts of Disseminating Obscenity to a Minor Under 16, and one count of First-Degree Sex Offense With a Child Under 13. The trial court consolidated four counts of Taking Indecent Liberties With a Child into two Judgments for two counts each. The trial court sentenced Defendant to 17 to 21 months of imprisonment for each single count of Taking Indecent Liberties With a Child and the two consolidated Judgments to run consecutively. The trial court arrested judgment on the four counts of Disseminating Obscenity to a Minor Child. The trial court sentenced Defendant to 260 to 321 months of imprisonment for First-Degree Sex Offense With a Child to run at the expiration of the prior sentences. Defendant timely filed Notice of Appeal on 8 September 2022.

Issues

The issues are whether: (I) the trial court erred in denying Defendant's Motion to Dismiss; and (II) Defendant was prejudiced by his reliance on the indictment dates to the extent those dates varied from the evidence produced at trial.

Analysis

I. Motion to Dismiss

Defendant contends the trial court erred by denying his Motion to Dismiss because there was a fatal variance between the indictments and the evidence presented at trial. Specifically, Defendant argues the State failed to present evidence that the offenses occurred within the time period alleged in the indictments.

A. Preservation

As a preliminary matter, the State contends this issue is not preserved for review because Defendant failed to raise a fatal variance argument as to the indictment dates. Further, the State argues a motion to dismiss based on insufficient evidence does not preserve a fatal variance argument for appellate review. We disagree.

This Court has repeatedly noted, in light of *State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020), "any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence." *State v. Brantley-Phillips*, 278 N.C. App. 279, 287, 862 S.E.2d 416, 422 (2021) (quoting *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020) (citation omitted)). This Court in *Gettleman*

explained, "[o]ur Supreme Court made clear in *Golder* that 'moving to dismiss at the proper time . . . preserves *all* issues related to the sufficiency of the evidence for appellate review.'" 275 N.C. App. at 271, 853 S.E.2d at 454 (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790) (emphasis in original). In *Gettleman*, this Court determined the defendant failed to preserve a fatal variance argument regarding the jury instructions and indictment because the defendant failed to move to dismiss the charge in question. *Id.* Considering *Gettleman* and *Golder*, this Court in *State v. Brantley-Phillips* stated "it would appear" the defendant preserved a fatal variance argument by timely moving to dismiss all charges, but expressly declined to explicitly decide the issue of preservation. 278 N.C. App. at 287, 862 S.E.2d at 422.

Here, Defendant lodged a timely Motion to dismiss all charges based on insufficient evidence both at the close of the State's evidence and again at the close of all evidence. After the jury rendered its verdict, defense counsel clarified for the record that he wanted to "renew the prior motions" and "more specifically for the record" state the basis for those motions: "the indictment had a fatal variance from the evidence that was presented at trial with regard to the time frames of when the acts or incidents occurred[.]" The trial court denied the Motion. In light of the foregoing precedent, we consider Defendant's argument regarding a fatal variance between the indictments and evidence presented at trial preserved for review.

B. Fatal Variance

"It is a rule of universal observance in the administration of criminal law that

a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018) (quotation marks omitted) (quoting *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016)). "The purpose of the indictment is to put the defendant on 'notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense.' " *State v. Collins*, 245 N.C. App. 478, 486, 783 S.E.2d 9, 15 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985)). "Thus, '[i]f the indictment's allegations do not conform to the "equivalent material aspects of the jury charge," this discrepancy is considered a fatal variance.' " *Locklear*, 259 N.C. App. at 380, 816 S.E.2d at 202-03 (alteration in original) (quoting *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016) (quoting *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986)).

"Generally, an indictment must include a designated date or period within which the offense occurred." *Collins*, 245 N.C. App. at 486, 783 S.E.2d at 15 (citation omitted). However, our Supreme Court has repeatedly stated "the date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date." *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 382 (1984); *see also State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). "[V]ariance between allegation and proof as to time is not material where no statute of limitations is involved." *State v. Burton*, 114

N.C. App. 610, 612, 442 S.E.2d 384, 385 (1994) (citations and quotation marks omitted).

In cases involving sexual assaults of children, our Supreme Court has relaxed the temporal specificity requirements the State must allege in the indictment. *Id.* at 613, 442 S.E.2d at 386.

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted). "Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where . . . the allegations concern instances of child sex abuse occurring years before." *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386. Thus, "[u]nless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991) (citations omitted).

Our statutes support this policy of leniency by explicitly providing no stay or reversal of a judgment on an indictment when time is not of the essence of the offense: "No judgment upon any indictment . . . shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved . . . nor for omitting to state the

time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly[.]" N.C. Gen. Stat. § 15-155 (2021). Further, "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." N.C. Gen. Stat. § 15A-924(a)(4) (2021).

In this case, Defendant was indicted for eight counts of Taking Indecent Liberties With a Child pursuant to N.C. Gen. Stat. § 14-202.1(a), four counts of Disseminating Obscenities to a Minor Under Age 16 pursuant to N.C. Gen. Stat. § 14-190.7, four counts of Disseminating Obscenities to a Minor Under Age 13 pursuant to N.C. Gen. Stat. § 14-190.8, and one count of First-Degree Sex Offense With a Child Under 13 pursuant to N.C. Gen. Stat. § 14-27.4(a)(1).[2] The indictments for all of these offenses alleged a date range of 1 January 2007 to 30 September 2007. Time is not of the essence nor a required element for any of the offenses for which Defendant was indicted. Further, each of the offenses charged was charged as a felony, and "[i]n [North Carolina] no statute of limitations bars the prosecution of a felony." *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969). Defendant does not argue to the contrary.

[2] This offense has, since the time of charging, been recodified as N.C. Gen. Stat. § 14-27.29. *See* N.C. Gen. Stat. § 14-27.29(a) (2023) ("A person is guilty of first-degree statutory sexual offense if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.").

Moreover, there was sufficient evidence presented at trial to support the indictment date range. At trial, the State presented a recording and transcript of R.B.'s forensic interview. In that interview, R.B. stated she did not know with certainty how old she was when the incidents with Defendant occurred, but she "could've been a little bit younger than 12" and in "[f]ifth or sixth [grade]." At trial, R.B. testified she was eleven years old, possibly "between 5th and 6th" grade. R.B. stated in her interview and testified at trial these incidents occurred prior to her starting her menstrual period, which she testified began in the sixth grade. R.B. was in eleventh grade at the time of her forensic interview in May 2014, thus she was in sixth grade from the fall of 2008 to the spring of 2009 and fifth grade from fall 2007 to spring 2008. This places the time of the incidents sometime around 2007 to fall 2008. Further, R.B. testified it was "summerish" when the incidents occurred, which is consistent with J.B.'s testimony the incidents occurred when it was "pretty hot" outside. J.B. also testified the incidents occurred when he was in middle school. J.B. is two years older than R.B. and so would have been in seventh or eighth grade at the time of the incidents.

The indictments alleged the offenses occurred between 1 January 2007 and 30 September 2007. The evidence presented at trial established the incidents occurred sometime in 2007, when R.B. was in fifth grade, and when it was "pretty hot" or "summerish" outside, which would include August to September 2007. Although these dates are not exact, our precedent clearly holds temporal uncertainty,

particularly in cases involving sexual offenses against children, is matter of weight in considering a motion to dismiss. *Everett*, 328 N.C. at 77, 399 S.E.2d at 307.

Further, "[n]onsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense." *Wood*, 311 N.C. at 742, 319 S.E.2d at 249. Here, the essential elements of each offense were (1) the occurrence of the specified sexual act; and (2) that the victim was a minor at the time of the act.[3] R.B. and J.B. both testified to the occurrence of the incidents in support of the first element. Although they could not state with precision when the incidents occurred, R.B.'s testimony placed her definitively under the age of 13 and J.B.'s testimony placed him under the age of 16. Thus, the State provided sufficient evidence of each of the essential elements of the offenses. Therefore, the alleged variance between the indictments and offenses proved at trial, to the extent it exists, is not fatal.

[3] Our statute defines the offense of Taking Indecent Liberties With a Child as follows: "A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2021). Disseminating Obscenities to a Minor Under 13 is described: "Every person 18 years of age or older who knowingly disseminates to any minor under the age of 13 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be punished as a Class G felon." N.C. Gen. Stat. § 14-190.8 (2021). The offense of Disseminating Obscenities to a Minor Under 16 is identical, except that the victim must be under 16 years of age. N.C. Gen. Stat. § 14-190.7 (2021). Our statute regarding First Degree Statutory Sexual Offense states: "A person is guilty of first-degree statutory sexual offense if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.29(a) (2021). In this case, Defendant's age and his age relative to R.B. and J.B. were not in issue. Thus, the remaining essential elements were limited to the occurrence of the sexual acts and R.B.'s and J.B.'s ages.

Consequently, the trial court did not err by denying Defendant's Motion to Dismiss.

II. Material Reliance

Defendant contends he is entitled to a new trial because he materially relied on the dates in the indictment and the State did not prove the offenses occurred within the indictment's date range. We disagree.

"Time variances do not require dismissal if they do not prejudice a defendant's opportunity to present an adequate defense." *State v. McGriff*, 151 N.C. App. 631, 637, 566 S.E.2d 776, 780 (2002). Further, "[a] defendant suffers no prejudice when the allegations and proof substantially correspond; when defendant presents alibi evidence relating to neither the date charged nor the date shown by the State's evidence." *Id.* (quoting *State v. Booth*, 92 N.C. App. 729, 731, 376 S.E.2d 242, 244 (1989) (citations omitted)).

In this case, Defendant did not present an alibi defense at all. Rather, Defendant's case at trial centered on attempting to poke holes in the State's evidence around the dates the incidents occurred. Indeed, in his brief, Defendant contends he "was found guilty after reasonably believing that the holes in the State's evidence as to the offense dates would preclude conviction, and after presenting a defense based on the mismatch of dates." At trial, Defendant did not call any alibi witness nor provide any evidence to support an alibi defense. At no point has Defendant presented any evidence showing he was surprised by the State's evidence or that he intended to present an alibi defense, or any defense based on the dates alleged in the

indictment. *See State v. Effler*, 309 N.C. 742, 750, 309 S.E.2d 203, 208 (1983) (Holding defendant did not establish prejudice where "[t]he record is devoid of any indication whatsoever that defense witnesses were unavailable; that defendant was surprised in any way by the State's evidence; or that defendant intended to present an alibi defense.")

Additionally, as described above, the State presented sufficient evidence establishing the offenses occurred during the date range alleged in the indictments. R.B. stated the incidents occurred when she was in fifth grade, possibly "between 5th and 6th" grade and was eleven years old. She further stated it was "summerish" when the incidents occurred. J.B. similarly provided a time frame for the incidents by reference to his grade level, stating he was in middle school at the time of the incidents. This is consistent with the way our Courts have addressed similar cases involving minor victims in which defendants challenged the specificity of the date ranges alleged in the indictments.

In *State v. Blackmon*, the defendant alleged the trial court erred in denying his motion to dismiss the indictments because the indictments failed to charge offenses with sufficient specificity. 130 N.C. App. 692, 696, 507 S.E.2d 42, 45 (1998). There, the indictments alleged the offenses, which as in this case involved sexual offenses with a child, occurred between 1 January and 12 September 1994. *Id.* at 697, 507 S.E.2d at 45. This Court specifically rejected the defendant's argument the lack of specificity in the indictments "den[ied] him the opportunity to raise an alibi defense

and possibly expos[ed] him to double jeopardy." *Id.* The Court stated:

> Indeed, in a case such as this, in which the minor child testified at trial that the sexual acts and indecent liberties committed by defendant occurred when she was seven years old and that some of those acts happened when it was cold outside and some when it was warm outside, any variance between the indictments brought against defendant and the proof presented at trial is not fatal to the propriety of the indictments brought by the State.

Id. at 697, 507 S.E.2d at 45-46. Similarly, in this case, R.B. and J.B. testified to the time frame of these incidents by reference to their grade levels. R.B. also testified by reference to her age, stating at trial she was eleven years old. Both R.B. and J.B. also testified about the time frame by reference to the weather, just as the victim in *Blackmon* did. Thus, having presented no alibi evidence and given there was sufficient evidence to support the dates alleged in the indictment, Defendant was not prejudiced by any discrepancy between the indictment dates and evidence presented at trial. Therefore, the trial court did not err in submitting the case to the jury or entering judgment against Defendant. Consequently, Defendant is not entitled to a new trial.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgments.

NO ERROR.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).