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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-746

Filed 6 August 2024

Hertford County, Nos. 20CRS275-78

STATE OF NORTH CAROLINA

v.

EDRITH GERARD GATLING, Defendant.

Appeal by defendant from judgment entered 6 January 2023 by Judge Cy A. Grant Sr. in Superior Court, Hertford County. Heard in the Court of Appeals 20 February 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Elly S. Young, for the State.*

*Drew Nelson for defendant-appellant.*

STROUD, Judge.

Defendant appeals a judgment convicting him of incest, statutory rape, statutory sex offense, and indecent liberties with a child. Because Defendant was properly tried under superseding indictments, we conclude there was no error, though we remand for correction of a clerical error.

**I. Procedural Background**

The State’s evidence tended to show that Defendant was indicted for two counts of incest in File No. 20CRS000275 (“275”) and two counts of statutory rape and indecent liberties with a child in File No. 20CRS000276 (“276”), among other offenses. Defendant’s trial began on 3 January 2023, and that morning the State issued superseding indictments in both 275 and 276; the only change in the charges was the date range. In the original indictments, the dates of the offenses were from 5 December 2019 through *5 January 2020* but in the superseding indictments the dates were from 5 December 2019 through *25 January 2020*.

Although Defendant made no specific motion or objection regarding the superseding indictments, Defendant’s counsel stated, “the only problem” was he had “not prepared any witnesses . . . [or] even [his] client regarding that date.” The State responded: (1) Defendant had notice of the dates due to the discovery materials from 9 December, produced over three weeks before the trial date, and (2) it had also informed Defendant about the superseding indictments a few days before the trial. Thereafter, the trial court stated Defendant should be served with the superseding indictments and the trial would begin the next day. The jury found Defendant guilty of all charges. The trial court entered judgments, and Defendant appeals.

## **II. Superseding Indictments**

In Defendant’s brief, four-page argument, Defendant contends “the trial court erred by allowing the State to proceed to trial under the superseding indictment.” (Original in all caps.) The State responds to Defendant’s argument stating that “the

trial court did not abuse its discretion in denying Defendant’s motion for a continuance” due to the superseding indictments. But Defendant makes no argument regarding a motion for continuance; in fact, his primary brief on appeal does not mention it at all.<sup>1</sup> Furthermore, in Defendant’s reply brief, he specifically requests this Court not review the issue as a denial of a motion to continue. Accordingly, we will address the argument before us.

This Court reviews a trial court’s granting of the State’s motion to amend an indictment *de novo*. A change of the date of the offense is permitted if the change does not substantially alter the offense as alleged in the indictment. Where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment.

*State v. Pierce*, 238 N.C. App. 141, 146, 766 S.E.2d 854, 858 (2014) (citations and quotation marks omitted). Defendant does not contend that “time” was an “essential element” of the crimes. *See id.* Defendant argues only that he was prejudiced by lack of adequate notice of the changed dates of the offenses.

The trial court explained its reasoning for allowing the superseding indictments, including that it was initially inclined to rule for Defendant:

[I]f we were to try this case and he’s found guilty and I allow — and I don’t allow his motion, that is going to be a

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<sup>1</sup> On 4 January 2023, Defendant’s counsel “renew[ed] the motion to continue” although the record and transcript do not show any motion to continue was made on the prior day. Furthermore, even if a motion had been made, Defendant does not address the denial of a motion to continue in his brief but argues only that the indictments with the revised dates should be vacated due to the trial court’s error in allowing the State to amend them.

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major issue on appeal. And as an appellate judge, I can definitely see an appellate judge say, no, he was not given ample opportunity to prepare based upon the new date that was presented to the grand jury literally the day before trial. I understand.

But when the trial court questioned Defendant about receiving discovery about the relevant dates, including dates after 5 January 2020, Defendant's counsel explained he received that notice over three weeks earlier, to which the trial court responded, "You had the discovery though. All right, I'm going to change my mind. I'm going to deny your motion based on that." In other words, the trial court would not have allowed the superseding indictments if Defendant had not had adequate notice of the change in the dates, as he would need the opportunity to present alibi witnesses or other evidence addressing the specific dates. But because Defendant had three weeks prior notice of the additional dates, and the State had later informed him it would seek superseding indictments, the trial court allowed the superseding indictments. Defendant did not argue to the trial court or to this Court that additional notice, beyond the three weeks, would have made any difference in his preparation for trial. Defendant's only argument on appeal is that he was prejudiced by lack of advance notice as to the dates, but he has failed to demonstrate prejudice on this basis. *See State v. Wallace*, 179 N.C. App. 710, 718, 635 S.E.2d 455, 461 (2006) (concluding there was no error to an amended indictment where the "[d]efendant was provided sufficient notice to present an alibi or reverse alibi defense"). Accordingly, we conclude there was no error.

### **III. Clerical Error**

Defendant's only other issue on appeal is noting three clerical errors in the judgment which the State concedes and also requests remand of these judgments. Accordingly, we remand file numbers 20CRS000275, -76, -78, for as the State notes, the "multiple clerical errors" within them, including (1) "file numbers 275, 277, and 278 run concurrently with *count II* in file number 276[;]" (2) "file number 275 and 276 should show a date of January 2020[;]" and (3) file number 275 should be noted as a Class B1 felony rather than Class F.

### **IV. Conclusion**

Because the trial court did not err in allowing the State to proceed under the superseding indictments, we conclude there was no error but remand judgments 20CRS000275, -76, and -78 for correction of clerical errors.

NO ERROR and REMANDED IN PART.

Chief Judge DILLON and Judge STADING concur.

Report per Rule 30(e).