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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-198

Filed 3 December 2024

Guilford County, Nos. 20CRS70443-45, 20CRS73673-74

STATE OF NORTH CAROLINA

v.

CHRISTOPHER ARNELL HOLLAND, Defendant.

Appeal by Defendant from judgment entered 1 May 2023 by Judge Aaron J. Berlin in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Christopher J. Heaney for Defendant.

GRIFFIN, Judge.

Defendant Christopher Arnell Holland appeals after a jury found him guilty of three counts of sex acts with a student, two counts of statutory sex offenses with a child, and two counts of statutory rape of a child. Defendant contends the trial court erred by denying his Motion to Dismiss the charge of sex act with a student in file 20 CRS 70445. Defendant makes two arguments that are essentially tied together.

Defendant challenges the sufficiency of the evidence and asserts a fatal variance between the indictment date and the evidence presented at trial. We hold the trial court did not err.

I. Factual and Procedural Background

P.O.¹ attended high school at James B. Dudley High School in Greensboro, North Carolina from 2016–2020. During the first half of her freshman year, P.O. began dating a member of the Dudley basketball team, and Defendant was the junior varsity basketball coach. P.O. met Defendant through her boyfriend, and Defendant began regularly giving P.O. rides home from school after sports practices her freshman year.

During high school, P.O. volunteered with the exceptional children's class located inside the Dudley gym, where Defendant was a teacher's assistant. One day while P.O. was volunteering, Defendant showed her photographs of his erect penis. The same day, Defendant called P.O. out of her precalculus class, took her to an empty classroom, undressed himself, lifted her dress, and had vaginal sex with her. Defendant also forced P.O. to perform oral sex on him during the interaction. P.O. was fifteen years old at the time. Immediately following this incident, for a second time on that same school day, Defendant asked P.O. to step into the kitchen attached to Defendant's classroom, where he again had vaginal sex with P.O. and forced P.O.

¹ Pursuant to N.C. R. App. P. 42(b), all parties have stipulated to referring to the complaining witness and victim by her initials.

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to perform oral sex on him. For the third time on that same school day, Defendant brought P.O. into the coach's office bathroom and forced her to perform oral sex on him again.

Throughout P.O.'s high school experience, Defendant continuously forced P.O. to engage in vaginal and oral sex. The repeated instances of vaginal and oral sex happened in various spaces within the school, inside the fieldhouse bathroom, and at Defendant's apartment. After P.O. became aware of another student who was allegedly sexually assaulted by Defendant, P.O. told a host of administrative officials and law enforcement officers at Dudley about the sexual assaults committed by Defendant.

On 22 June 2020, a grand jury indicted Defendant on three counts of sex acts with a student. On 8 September 2020, a grand jury also indicted Defendant for two counts of statutory rape of a child under fifteen, and two counts of statutory sex offenses with a child under fifteen. At Defendant's trial in April 2023, the State presented testimony of P.O., along with testimony from N.L., Z.H., and A.R.². In addition to P.O., all three witnesses testified Defendant sexually assaulted them while they were students at Dudley. At the close of the State's evidence, Defendant moved to dismiss the charges, alleging the State had not met its burden to prove "the times" stated in the indictments and because there was "a fatal variance in some of

² Pursuant to N.C. R. App. P. 42(b), all parties have stipulated to referring to the 404(b) witnesses as "N.L., A.R., and Z.H."

the indictments.” The trial court denied Defendant’s Motion, and Defendant did not present any evidence. Defendant renewed his Motion at the end of trial, and it was again denied.

The jury returned a verdict finding Defendant guilty of all seven offenses. The court sentenced Defendant to a consolidated sentence of 230 to 336 months in files 20 CRS 73673 and 20 CRS 73674 and an additional consolidated sentence of 10 to 21 months in files 20 CRS 70443-45. Immediately following his sentencing hearing, Defendant expressed a desire to appeal, but he did not explicitly state he was entering a notice of appeal. Recognizing this deficiency, Defendant filed a Petition for Writ of Certiorari.

II. Petition for Writ of Certiorari

Defendant’s notice of appeal failed to comply with the requirements of Rule 4(a) of the North Carolina Rules of Appellate Procedure. Defendant did not affirmatively give oral notice of appeal or file a written notice of appeal within fourteen days after entry of judgment. We grant Defendant’s Petition for Writ of Certiorari in our discretion. N.C. R. App. P. 21(a)(1). *See State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 43 (2018) (holding the Court of Appeals has discretionary authority to grant or deny a defendant’s petition for writ of certiorari).

III. Analysis

Defendant contends the trial court erred by denying his Motion to Dismiss. Specifically, Defendant argues there was insufficient evidence to convict him of sex

act with a student in 2016, the date alleged in file 20 CRS 70445 or, in the alternative, that there was fatal variance between the indictment's date of offense and the evidence presented at trial.

This Court reviews a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020). “This Court has held that ‘any fatal variance argument is, essentially, an argument regarding the sufficiency of the State’s evidence.’” *State v. Lopez* _ N.C. App. _, _, 905 S.E.2d 272, 277 (2024) (quoting *State v. Gettleman*, 275 N.C. App. 260, 271, 853 S.E.2d 447, 454 (2020), disc. review denied, 377 N.C. 557, 858 S.E.2d 286 (2021)). In reviewing challenges to sufficiency of the evidence, “we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

In criminal trials, the standard of review for a motion to dismiss is whether the State has presented substantial evidence of (1) each essential element of the charged offense and (2) the defendant being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.” *Id.* (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265

S.E.2d 164, 169 (1980). Substantial evidence may be direct or circumstantial, and the test for sufficiency of the evidence is the same for both. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Id.* (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). When the evidence presented is circumstantial, the trial court must consider whether a “reasonable inference of [the] defendant’s guilt may be drawn from the circumstances . . . then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.” *Id.* (citation and internal quotations omitted).

In reviewing a challenge to sufficiency of the evidence, it is not this Court’s job to “weigh the evidence, but to determine whether there was substantial evidence to support the adjudication, viewing the evidence in the light most favorable to the State, and giving it the benefit of all reasonable inferences.” *In re Heil*, 145 N.C. App. 24, 29, 550 S.E.2d 815, 819 (2001) (citation omitted).

Here, Defendant was charged with sex act with a student in violation of N.C. Gen. Stat. § 14-27.32(a), which requires proof of four elements: (1) the defendant is a teacher, school administrator, student teacher, school safety officer, or coach; (2) the defendant is employed, assigned, or volunteers at the same school as the victim; (3) the victim is a student at the defendant’s school at the time of offense; and (4) the

defendant engages in vaginal intercourse or a sexual act with the student-victim. N.C. Gen. Stat. § 14-27.32(a) (2023).

Defendant only disputes the fourth element and argues the State did not offer substantial evidence to prove that Defendant engaged in a sexual act with P.O. in 2016, the date listed in file 20 CRS 70445. Defendant relies on *State v. Khouri*, a case where this Court held the State failed to present substantial evidence to support a conviction of child sexual assault where there was *no* evidence to show the incidents occurred in the year charged. *State v. Khouri*, 214 N.C. App. 389, 395, 716 S.E.2d 1, 11–12 (2011). In *Khouri*, the date listed in the indictment stated the defendant committed sexual offenses between 30 March 2000 and 31 December 2000. *Id.* at 395, 716 S.E.2d at 11. At trial, the State presented evidence the first sexual offense occurred on a vacation trip in the spring of 2001. *Id.* This Court held that because there was “no evidence” that the trip took place in 2000, the State did not present substantial evidence to support a conviction of sexual assault in the year 2000. *Id.* at 395–96, 716 S.E.2d at 12. Defendant asserts the facts here are analogous to those in *Khouri*. While we find *Khouri* instructive, it is distinguishable from the present case because it does not discuss fatal variance, an essential component here.

Instead, we hold this case is analogous to this Court’s opinion in *State v. Lopez* where this Court addressed the same issue raised here. *Lopez*, _ N.C. App. at _, 905 S.E.2d at 277–78. In *Lopez*, the defendant argued the trial court erred in denying his motion to dismiss because “the State failed to produce substantial evidence to prove

the dates of the alleged offenses or, in the alternative, because there was a fatal variance between the indictments and the proof at trial.” *Id.* at 277 (internal quotations omitted). More specifically, the defendant contended the State “failed to present evidence that the offenses occurred within the time period alleged in the indictments, that is, during the period from 1 January 2016 to 31 December 2016.” *Id.* at 278. The defendant stated it was “undisputed that D.M. was born in 2005, and that D.M. testified that the offenses occurred during a period when she was nine years old.” *Id.* (internal marks omitted). Further, the defendant argued “D.M. would have been nine years old in 2014-2015, not 2016, and consequently, the State failed to prove that the offenses occurred during the date range specified in the indictments.” *Id.* (internal marks omitted).

This Court merged the substantial evidence and fatal variance arguments stating, “any fatal variance argument is, essentially, an argument regarding the sufficiency of the State’s evidence[,]” and held the variance between the indictment date and the evidence presented at trial was not fatal because the defendant did not “demonstrate any prejudice to his defense arising from the variance in the dates of the alleged offenses.” *Id.* at 277–78. Like *Lopez*, Defendant, here, failed to demonstrate any prejudice to his defense.

When information stated in an indictment is inconsistent with the evidence presented at trial, a defendant may argue that there is a fatal variance. *State v. Tarlton*, 279 N.C. App. 249, 253, 864 S.E.2d 810, 813 (2021). To prevail, the

defendant must show that the variance is material, involving an essential element of the crime charged. *See Lopez*, _ N.C. App. at _, 905 S.E.2d at 278 (“A variance between an indictment and the evidence produced at trial ‘is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.’”) (quoting *Tarlton*, 279 N.C. App. at 253, 864 S.E.2d at 813)).

Generally, the date or time listed in an indictment is not an essential element of the crime charged. *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961). “[T]he State may prove that [the crime] was in fact committed on some other date.” *Id.* Further, N.C. Gen. Stat. § 15-155 provides that “[n]o judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed for . . . omitting to state the time at which the offense was committed in any case where time is not of the essence.” N.C. Gen. Stat. § 15-155 (2023). This statute “expressly excuses the failure to state an exact date” on an indictment. *State v. Sills*, 311 N.C. 370, 376, 317 S.E.2d 379, 383 (1984).

Moreover, our Courts have routinely held we should afford leniency to a minor’s ability to recall dates in cases involving sexual offenses against children. *See State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001) (“[S]ome leniency surrounding the child’s memory of specific dates is allowed. ‘Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs.’” (quoting *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991))). “[A] child’s uncertainty as to the time or particular day the offense

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charged was committed goes to the weight of the testimony rather than its admissibility.” *State v. Effler*, 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983) (citations omitted). When sufficient evidence has been presented to the court that a defendant committed each essential act of the offense, “a child’s uncertainty as to the time or particular day the offense charged was committed” shall not be grounds for dismissal. *State v. Hicks*, 319 N.C. 84, 91, 352 S.E.2d 424, 428 (1987) (citation and internal quotations omitted).

Although P.O. testified her sex acts with Defendant began in September 2017, and the date listed in the indictment is 2016, our Supreme Court “has recognized that a judgment should not be reversed when the indictment lists an incorrect date or time if time was not of the essence of the offense, and the error or omission did not mislead the defendant to his prejudice.” *Stewart*, 353 N.C. at 517, 546 S.E.2d at 569 (citation and internal marks omitted).

An inaccurate date stated on an indictment is generally of “negligible importance” except under certain circumstances. *Hicks*, 319 N.C. at 91, 352 S.E.2d at 428. An inaccurate date on an indictment goes beyond what is usually considered negligible importance “*when it deprives a defendant of an opportunity to adequately present his defense,*” thus rendering the time “of the essence.” *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (emphasis added) (quoting *State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984)). However, when a defendant does not assert a time-based

defense or rely on the indictment date in preparing his defense, the variance in the dates is not material, and time is not “of the essence.” *Id.*

Here, Defendant fails to show he was deprived of the opportunity to present his defense for the offense listed in file 20 CRS 70445. Defendant elected to not put on any evidence, which is starkly different from an inability to present a defense. Defendant neither asserted any time-based defense nor demonstrated that he relied on the indictment’s September 2016 date in bringing forth witnesses, preparing evidence, or providing testimony. Defendant failed to show the variance between the indictment date and the State’s evidence was material to his defense.

Our Supreme Court has condemned the “bait and switch routine” where a defendant comes to trial prepared to defend himself against the date listed in the indictment but at trial is forced to defend himself against the State’s evidence that differs from the indictment date. *State v. Christopher*, 307 N.C. 645, 650, 300 S.E.2d 381, 384 (1983). For example, in *Whittemore*, the defendants, in preparation for trial, relied on the time stated in the indictment and brought multiple witnesses to support their alibi on the indictment date. *Whittemore*, 255 N.C. at 592, 122 S.E.2d at 403. However, the State presented evidence outside the timeframe stated in the indictment and, after the trial court erroneously instructed the jury that the date charged was immaterial, the jury found the defendants guilty. *Id.* Likewise, in *Christopher*, the defendant came to trial prepared to defend criminal charges that allegedly occurred only in December, but he was forced to defend himself against the

State's evidence suggesting the crime was committed over a three-month period. *Christopher*, 307 N.C. at 649, 300 S.E.2d at 383. In both cases, the Supreme Court found fatal variances because the defendants had relied on the indictment date in preparing for trial and were therefore prejudiced.

Unlike the facts in *Whittemore* and *Christopher*, here, Defendant offers a generic denial of the date charged in file 20 CRS 70445 but fails to show he relied on or was misled by the September 2016 date. Unlike being forced to defend himself against a date that he was not expecting at trial, Defendant responded to the charges by cross-examining P.O. about multiple sexual encounters, but Defendant never offered any witnesses or evidence of his own to challenge or refute P.O.'s testimony.

Prejudice may also be established when defense witnesses are unavailable, the defendant is surprised by the State's evidence, the defendant intends to present an alibi defense and is not able, or he presents an affidavit regarding prospective testimony from witnesses not called at trial. *Effler*, 309 N.C. at 750, 309 S.E.2d at 208. However, "[t]ime variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved." *State v. Booth*, 92 N.C. App. 729, 731, 376 S.E.2d 242, 244 (1989). *See State v. Locklear*, 33 N.C. App. 647, 654, 236 S.E.2d 376, 380 (1977) (holding no prejudice when the defendant presented an alibi relating neither to the date charged nor the date shown by the State's evidence). *See also Sills*, 311 N.C. at 375, 317 S.E.2d at 382 (holding no prejudice when the defendant testified and put on several witnesses in support of his alibi and did not show "how

his defense tactics would have varied if the motion [for a more definite bill of particulars] had been allowed or how the court's denial of his final motion . . . prejudiced his efforts to conduct his case").

Here, Defendant did not present an alibi. Defendant did not suggest any defense witnesses were unavailable. Defendant did not suggest he was surprised by the State's evidence in any way. There is nothing in the record indicating Defendant intended to present an alibi defense but was not able, nor is there evidence of an affidavit regarding prospective testimony from witnesses not called at trial. Defendant also did not file a motion requesting that the State provide the specific time and date of the alleged sex act. Though not dispositive, Defendant has also conceded that the outcome of this appeal will not affect his sentence. Defendant previously agreed that even in the presence or absence of prejudice, his sentence will not vary.

Ultimately, Defendant has not shown that he was prejudiced by the indictment date in 20 CRS 70445. Thus, we hold the variance between the date alleged in the indictment and the date for which the State provided evidence was not fatal.

IV. Conclusion

We hold the trial court properly denied Defendant's Motion to Dismiss.

NO ERROR.

Judge ARROWOOD concurs.

Judge MURPHY respectfully dissents from the Majority's decision to allow

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Defendant's Petition for Writ of Certiorari and would not reach the merits of Defendant's appeal.

Report per Rule 30(e).