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Case Number 150,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OSCAR TUCKER, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 150, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Oscar Tucker was arrested on December 19, 2022, and charged with various offences stemming from a late reported series of alleged sexual assaults beginning in the mid-to-late 1990s. A1.

- Tucker was first indicted on April 3, 2023.[1] A1, D.I.#4.

- Tucker was reindicted on June 5, 2023, on one count of Continuous Sexual Abuse of a Child, one count of Rape Fourth Degree, three counts of Unlawful Sexual Contact First Degree, and two counts of Unlawful Sexual Contact Second Degree. A6—8.

- Tucker was reindicted again (a third indictment) on July 3, 2023 on one count of Continuous Sexual Abuse of a Child, one count of Unlawful Sexual Penetration in the Third Degree, and five counts of Unlawful Sexual Contact Second Degree. A9—11.

Tucker was tried before a jury from October 3, 2023 through October 6, 2023, during which the third indictment was amended twice:

- On October 4, 2023, during trial, the third indictment was amended to charge one count of Continuous Sexual Abuse of a Child, and six counts of Unlawful Sexual Contact Second Degree. A12—14.

- Finally, the third indictment was amended for a second time (making this the fifth iteration of charges Tucker was forced to defend against) on October 5, 2023 to charge one count of Continuous Sexual Abuse of a Child, and three counts of Unlawful Sexual Contact Second Degree. A15—16.

[1] The April 3, 2023, indictment was not part of the superior court's file, nor provided to Counsel by trial counsel.

Each iteration of the indictment, as to all counts but Count 1, alleges that the pertinent conduct occurred "on or about" specifically identified dates certain and Count 1 alleges conduct occurring before a date certain. During trial, the State failed to present evidence aligning the criminal conduct with the timing alleged in the indictment. After the State rested, Tucker motioned for judgment of acquittal, relying in part, on the absence of timing evidence. The trial court denial of Tucker's motion rested, in part, on a position that the State had no obligation to prove that the conduct occurred "on or about" the indicted dates. Exhibit B.

The jury convicted Tucker of all four counts of the second amendment to the second re-indictment. A3, D.I. #25. On March 14, 2024, Tucker was sentenced to twenty-six years of incarceration, suspended after nine-and-a-half years, for probation. Exhibit A.

This is Tucker's Opening Brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. As to Counts II, III, and IV, rather than alleging that Tucker committed the indicted crimes at some point within a broad time range corresponding to what the evidence shows the prosecution departed from that prevailing practice for late reported sexual assault prosecutions and instead alleged (in each of the five iterations of the charges) that Tucker had committed the charged offences "on or about" specifically identified dates.

Although the prosecution is not required to identify specific dates, when it *chooses* to do so, as it did here, a conviction requires the State to prove that the criminal conduct occurred as indicted, *i.e.,* "on or about" the identified dates. In this case, the jury convicted Tucker despite having no evidence upon which to infer that the conduct occurred as indicted. Therefore, Tucker's convictions must be reversed because (1) no rational trier of fact could find that the State met its burden, and (2) the indictment misled Appellant as to the crimes to be prosecuted; thereby depriving him of the notice to which he was constitutionally entitled.

2. The age of the complaining witness was a material element of each charge submitted to Tucker's jury. And age, of course, is a function of the date. The State asserted, *via* each of its numerous indictments, that it would satisfy its burden as to the age element by proving the complaining witness was in fact a specifically

identified age and the conduct occurred "on or about" a specifically identified date (or, as to Count 1, that it occurred before the identified date).

Nonetheless, the trial court instructed the jury that "[t]he exact times and dates when the alleged crimes occurred are not essential elements of the charged offenses." The trial court did not explain how this instruction interacted with the age element of the offences, and thus, at a minimum, created a reversible "potential for juror confusion" by suggesting that the State was not strictly required to meet its burden as to the age element.

3. Counts III and IV of the second amendment to the third indictment each charge a violation of a previous version of our Unlawful Sexual Assault Second Degree statute, pursuant to which the complaining witness must be *under sixteen*. However, the indictment misdescribed the age element as under *eighteen* (in line with the current statute), and identified the complaining witness as being sixteen (not *under* sixteen). Because these counts of the third indictment do not accurately describe the elements of the crime, and the alleged conduct does not constitute the crime, it was a nullity, and the resulting conviction must be reversed.

4. In Count II of the third indictment the grand jury charged Unlawful Sexual Penetration, which ceased to be a crime in 1998. At trial, the State presented evidence of a single incident of unlawful penetration, but no evidence as to when

that incident occurred. Because there is no basis to conclude that the offence occurred prior to the repeal of the pertinent statute, the indicted charge was a nullity. Although it was subsequently amended to charge Unlawful Sexual Conduct, such a change required a reindictment, not an amendment, because it was effectively a brand new, and previously unindicted charge.

5. Claims I, III, and IV flow from various errors flowing from a poorly drafted indictment. The impact of these errors, which largely comes down to the dates specifically alleged in the indictment, was magnified by the trial court's instruction that the indicted dates were insignificant (Claim II). As a result, even if the errors do not mandate reversal when considered on their own, when considered in the aggregate, Tucker was deprived of his right to a fair trial by the misleading description of when the conduct occurred in the repeated reindictments and amendments, and that the trial court's instructions which encouraged the jury to disregard the most important issue in this case.

STATEMENT OF FACTS

T.A.[2]

T.A. testified that she was born on April 21, 1984, and was thirty-nine at the time of her testimony. A142. She has a master's degree in social work and is employed in that field. A143 From 11 years old until her mid 20's, T.A. lived in Dover with her mother, Latonia Tucker ("Latonia"), and younger brothers. Oscar Tucker married Latonia when T.A. was approximately 12 and moved into the home. A144. T.A. testified that she was in sixth grade at the time but did not remember the year. A145; A161. T.A. denied meeting Tucker in church, and claimed they first met at the house. A160. However, both Tucker and Latonia contradicted T.A.'s claim. A195; A250.

T.A. claimed that when she was 12, Tucker came into her bedroom and touched her "vagina area" over the clothes. A145—46. She also claimed that once later on, but when she was still 12, Tucker kissed her breasts over the clothes when the two were sitting on Tucker's bed together. A147. T.A. says she informed Latonia about each incident. A147—48.

T.A. claims that, beginning when she was 12 or 13 through 10th or 11th grade, there were "numerous times" that Tucker hugged her while he was naked under a

[2] T.A. was an adult throughout the pendency of the prosecution, however, she was a child during the alleged conduct. A pseudonym was assigned in the indictments and maintained herein. *See* Supr. Ct. R. 7.

robe, rubbed his erect penis on her, and ejaculated on her. A148. However, she later contradicted herself by claiming "most of the time" when it happened her mom was out working her night shift (A155); which her mom testified did not begin until 2003 when T.A. was 19 years old and no longer living in the house. A196; A157. T.A. also testified that "[t]here was a time" that Tucker put his finger in her vagina but did not indicate when this allegedly occurred. A154—55. T.A. testified that at some unidentified point in time, Tucker "admitted to [her] mom that he started to love [T.A.] in the wrong way" and apologized while the three were on the phone. A158.

T.A. claimed she was 17 or 18 when the last "incident" occurred. A155. T.A moved out for college in 2002. A157. In 2010 T.A. got married; Tucker officiated the wedding. A173.

Latonia Tucker

Latonia is T.A.'s mother, and Tucker's ex-wife. A185. She and her children moved to Delaware in 1995. A193. She disputed T.A.'s claim and testified that T.A. and Tucker had in fact first met in church. A195. She testified that Tucker moved into the home after they married in 1996. A195. She described Tucker as taking on a father-like role to the children. A196. Latonia testified that T.A. twice claimed that Tucker touched her (A185), and that that Tucker apologized for touching and having feelings for T.A. during a three-way phone call. A198—99. She testified that T.A. did not want Tucker to officiate her wedding, but Tucker insisted. A202.

Oscar Tucker

Oscar Tucker has been a pastor since 1997. A248. He was 71 at the time of the trial. A249. He met T.A., Latonia, and Latonia's other children at a church service in Delaware where he had been invited to speak. A250. Tucker and Latonia were married on September 6, 1996. A251. Tucker testified that T.A. frequently came to him for advice, and that she specifically asked him to officiate her wedding. A258; A262.

Tucker testified that he first became aware of these accusations around 2000. A253. He was "shocked, "appalled," and "denied it." A251—52; A262—63. He was accused a second time, he believes it was in 1998, or 1999, when T.A. was in high school, and this time got angry. A257—58; A263. The second time he was accused, he inquired with T.A. about what specifically she was referring to, and she told him "the hugs." A263. Tucker responded that he was "communicating love" through his hugs, and denied there was a pedophilic component. A263—64. He denied ever apologizing for inappropriate touches, or otherwise admitting to as much, but did say (to Latonia) "if I've done anything to offend you … forgive me." A268. Tucker said he was not aware that T.A. was on the phone when he made this statement to Latonia. A273—74.

I. BY ALLEGING, IN THE INDICTMENT, THAT THE CHARGED CONDUCT OCCURRED ON OR ABOUT SPECIFIC DATES, AND THEN WHOLLY FAILING TO PROVE AS MUCH, THE STATE (a) FAILED TO MEET ITS BURDEN, AND (b) PROSECUTED TUCKER UNDER A THEORY OF LIABILITY FOR WHICH HE WAS NOT ADEQUATELY NOTICED.

Question Presented

Whether the State fails to meet its burden, and deprives a defendant of requisite notice, when it alleges in an indictment that the conduct occurred on or about specific dates, but then fails to prove as much. A188—89; A205—16.[3]

Scope of Review

This Court "review[s] the denial of a motion for judgment of acquittal *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt."[4] This Court reviews *de novo* claims of infringement of constitutional rights (such as an indictment),[5] and reviews the denial of a motion to dismiss counts of an indictment for abuse of discretion.[6]

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[3] The Defendant's Motion for Judgement of Acquittal was premised on the view that the State was obligated to abide by the dates in the indictment. The trial court's denial of the motion was based in part on a rejection of that premise, and thus preserves the instant claim. Exhibit B.

[4] *Pardo v. State*, 160 A.3d 1136, 1149–50 (Del. 2017) (internal quotation marks and citation omitted).

[5] *Williamson v. State,* 707 A.2d 350, 362 (Del.1998).

[6] *See State v. Harris,* 616 A.2d 288, 291 (Del.1992).

Merits of Argument

Counts II—IV of the indictment charge conduct alleged to have occurred "on or about" dates certain, specifically identified in the indictment. A15—16. In particular, the incidents underlying Count II and IV are alleged to have occurred "on or about the 1st day of September 1998," and Count III "on or about the 1st day of September 1996." Nonetheless, at trial, no evidence connected the allegations to those dates.[7] As a result of this variance, Tucker's convictions violate two constitutional rules; each independently justifying the reversal: (1) no rational trier of fact could find beyond a reasonable doubt that he committed the charged conduct, and (2) the indictment did not provide adequate notice of the conduct to be tried as is constitutionally required.

a. *No rational trier of fact could conclude beyond a reasonable doubt that Tucker committed the indicted crimes "on or about" the indicted dates.*

The State is not generally required to allege a specific date in the indictment, but is required "to prove [its case] … in a manner consistent with the facts set forth

[7] T.A. testified to two incidents in which Tucker is alleged to have touched her vagina. As to the first, she specified that she was 12 years old, and in 1996 (A144—146). As to the second, which allegedly involved digital penetration, she did describe when it occurred. A154. This evidence cannot support that he touched her vagina in September 98 when she was 14 (Count II), or when she was 16 (Count III). T.A. testified to one incident of Tucker touching breasts, which she alleged happened when she was 12 (A147), a full four years before the incident charged in the indictment (Count IV), which is alleged to have occurred when she was 16.

in the indictment;[8] therefor, when it chooses to specify a date, prove as much.[9] In other words, "[o]nce incorporated in the indictment, the original averments …[including those unrelated to the] characterization of the crime or … any elements of the offense bec[o]me material allegations which the State was required to prove."[10]

In *Stirone v. United States*, the United States Supreme Court reviewed a prosecution in which the indictment charged a violation of the Hobbs Act by unlawfully interfering with interstate commerce with respect to importation of *sand* from out of state manufacturers of ready-mix concrete.[11] At trial, the government introduced evidence suggesting that the defendant had interfered with the

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[8] *Duncan v. State*, 791 A.2d 750 (Del. 2002).

[9] *State v. Hudson*, 91 A.2d 535, 536–37 (Del. Super. Ct. 1952) ("Though it may not have been necessary to [name the victim], … [the victim was named] and became a material averment …the State was obliged to prove …[t]he defendant was entitled to be tried only for the charges made against him and on the issues presented by his plea of not guilty."); *Monastakes v. State*, 127 A. 153 (Del. 1924) (reversing conviction where indictment charged drug sales on April 11 and April 14, the State dismissed the April 14 charge, and then only proved a drug sale on April 14); *McRoy v. United States*, 106 A.3d 1051, 1062 (D.C. 2015) ("it is difficult for child witnesses to identify exact times, dates, and locations. For this reason, we have consistently given prosecutors and grand juries leeway in terms of the particularity required …However, *a conviction may only be sustained if the evidence establishes that the offense was committed on a date reasonably close to the one alleged.*") (internal citations/quotations omitted); *United States v. N.A. Juvenile*, 7 Fed. Appx. 663 (9th Cir. 2001) ("The government ordinarily need prove only that the crime occurred on a date reasonably near the one alleged in the indictment, not on the exact date.")

[10] *Keller v. State*, 425 A.2d 152, 155 (Del. 1981).

[11] *Stirone v. United States.*, 361 U.S. 212 (1960).

importation of *steel*, and the trial court instructed the jury that they could convict the defendant based on his interference with either sand or steel. In reversing the conviction, the United States Supreme Court explained:

> *a court cannot permit a defendant to be tried on charges that are not made in the indictment … Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel … The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of … And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned.*

The variance in our case is analogous to that in *Stirone*. Counts 2, 3, and 4 each identify specific days which the alleged crimes occurred "on or about." But the record contains no evidence that would allow the jury to conclude any crimes occurred "on or about" those dates. *see* n.7 *infra*. Thus, just as in *Stirone*, "[t]he indictment here cannot fairly be read as charging" conduct occurring at some unidentified point in an extended date range, and "[t]he grand jury which found this indictment was satisfied to charge" offences occurring on the identified dates, "[b]ut neither this nor any other court can know that the grand jury would have been willing to charge" Tucker for conduct alleged to have occurred during the rest of the years long time period that the petit jury was permitted to consider. "And it cannot be said

with certainty that with a new basis for conviction added, [Tucker] was convicted solely on the charge made in the indictment the grand jury returned."[12]

In addressing Tucker's motion for judgement of acquittal, the State successfully argued that the indicted dates were irrelevant in reliance on *Phipps v. State*[13] and *Clark v. State*[14] which held that a date is not an essential element of a crime. The State – and the trial court – misread these precedents, which stand for the proposition that, because a date is not an essential element of an offense, the State is not required to specify the date in the indictment; but it does not follow that where the State chooses to specify a date in the indictment, they need not prove it. Exhibit B. In addressing circumstances analogous to ours, this Court has described instructions which inform the jury that "[i]t is the burden of the State to prove that the defendant committed the crime *as the indictment describes its commission* by evidence that is beyond a reasonable doubt" – as "clearly [] proper."[15] Moreover, in cases like this, where age is a material element, dates are effectively material.[16]

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[12] *See Id.*
[13] *Phipps v. State*, 676 A.2d 906 (Del. 1996).
[14] *Clark v. State*, 900 A.2d 100 (Del. 2006).
[15] *Wilson v. State*, 567 A.2d 425 (Del. 1989); *see Johnson v. State*, 705 A.2d 244 (Del. 1998) (affirming denial of MJA where evidence supported that incident occurred within reasonably close time of that alleged in indictment and without suggesting the indicted dates are immaterial).
[16] *United States v. Goldstein*, 502 F.2d 526, 528 (3d Cir. 1974) ("Ordinarily, a mere change in dates is not considered a substantial variation in an indictment, but an exception exists when a particular day may be made material by the statute creating

The State could have indicted whatever date range it had evidence to support;[17] instead, the prosecutor chose to make the atypical decision – in each of the five iterations of the charges – to allege Tucker engaged in the relevant conduct on dates certain, despite (as it turned out) being wholly unable to prove as much, and thereby evincing disregard of this Court's *repeated* directive to the Attorney General to "review the internal practices and procedures employed in the preparation of indictments ... with particular attention to quality and *uniformity of draftsmanship*."[18] The reversal in *Stirone* flowed from a similar prosecutorial decision to seek to convict the defendant based on conduct that arguably fell within the scope of the pertinent statute but was clearly outside of the conduct identified in the indictment:

> *when only one particular kind of commerce is charged … a conviction must rest on that charge and not another, even though … under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened*.[19]

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the offense."); *United States. v. Sumner*, 89 F. Supp. 3d 1161 (N.D. Okla. 2015) (dismissing prosecution for failure to register because indictment alleged offence occurred in a time period not supported by the evidence); *see Dahl v. State*, 926 A.2d 1077, 1081 (Del. 2007) ("amendment of the specific date … in the indictment is permitted [only] if the date alleged in an indictment is immaterial [and] ... the date is not an essential part of the crime.")

[17] *See State v. Harris*, 2016 WL 5867433, at *4-5 (Del. Com. Sept. 26, 2016) (compiling cases which stand for proposition that indicted date ranges need not be more precise than evidence permits).

[18] *Reyes v. State*, 2024 WL 1505677, at *7 (Del. Apr. 8, 2024) (internal quotations omitted).

[19] *Stirone v. United States.*, 361 U.S. 212, 217–19 (1960).

The superior court recently relied on this exact distinction (between the lack of an obligation to include dates in an indictment, and the obligation created by the prosecutorial decision to include dates in an indictment) in granting a defendant's motion for judgement of acquittal in *State v. Brown*.[20] The *Brown* Court analogized its facts to "sex offenses where minor victims cannot give anything but date ranges," explained that the State could have, but chose not to indict such a range, and instead charged alleged that the theft occurred on November 2, 2019, but – as in our case – the evidence at trial did not establish that the conduct occurred near that date.

b. *The indictment failed to provide notice adequate for Tucker to defend himself at trial.*

Another way in which the State's strategy – identifying specific dates in the indictment, and then arguing at trial that it need not prove those dates – prejudiced Tucker is by depriving him of the notice to which he was constitutionally entitled. To provide adequate notice, an indictment must provide a reasonable opportunity to prepare a defense.[21] Even though dates are not generally elements of crimes, "[a]dequate notice[] may [and often does] require that the State allege a general time frame within which a crime was committed."[22]

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[20] *State v. Brown*, 2022 WL 2204890, at *1–3 (Del. Super. Ct. June 16, 2022).
[21] Super. Ct. Crim. R. 7(c); *see Owens v. State,* 449 A.2d 200 (1982).
[22] *Adekale v. State*, 344 P.3d 761, 769 (Wyo. 2015) (internal citations omitted); *State v. Wheeler*, 989 N.W.2d 728, 738 (Neb. 2023) ("The timeframe [] in the complaint…is imperative to allow the criminal defendant to prepare."); *State v. Blasius*, 559 A.2d 1116, 1118 (Conn. 1989) (holding State required "to inform a

In this case, the indictment did not just fail to provide adequate notice, it affirmatively provided misleading notice by informing Tucker that the State would seek to prove he engaged in the pertinent conduct on specific dates, and then (successfully) arguing at trial that it had no obligation to do so. A188—89. In cases where the complaining witness alleges repetitive similar assaults, identifying a specific date in the indictment– as the prosecutor did – signals to the defense that the prosecution will (attempt) to convict the defendant based on a particular assault which occurred "on or about" the specified date. A defendant is entitled, and has every reason, to rely on that notice.[23] Just as in *Brown,* "[t]he State had the opportunity to amend the Information to include a range of dates … [but instead] chose to pick a specific date… [and] Defendant is entitled to rely upon the date alleged … and prepare his defense accordingly."[24] Or, as the Third Circuit has held, when "the indictment [] specifically confines its allegations… [to specifically

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defendant, within reasonable limits, of the time when the offense charged was alleged to have" occurred); *Cunningham v. State*, 683 P.2d 500, 502 (Nev. 1984) ("fail[ure] to allege any date whatsoever … clearly deprive[s] the defendant of adequate notice"); *Com. v. Riggle*, 119 A.3d 1058, 1069–70 (Pa. Super. Ct. 2015) ("It is the duty of the prosecution to fix the date when an alleged offense occurred with reasonable certainty") (citations and quotations omitted); *See State v. Gulbransen*, 106 P.3d 734, 738–39 (Utah 2005) (finding statutory requirement to specify date of offence "designed to give … sufficient notice to prepare a defense.")

[23] *United States v. Somers*, 496 F.2d 723, 745 (3d Cir. 1974) (holding where "grand jury identifies specific dates for an offense… it is reasonable to assume that the grand jury was indicting the defendant for acts occurring on the specific dates charged.")

[24] *Brown*, 2022 WL 2204890, at *1.

identified dates] the defendant cannot be subjected to prosecution for [conduct on other dates] which the grand jury did not charge."[25] From a notice perspective, preparing a defense against allegations "on or about" a specific date is fundamentally different than doing so for an extended time range because only the former lends itself to (i) alibi defenses,[26] and (ii) sufficiency of the evidence arguments like Claim 1 herein.

Additionally, the notice was separately misleading because the final indictment contains internal contradictions regarding the age of T.A. – a material element to the charges:[27] Count 1 suggests that T.A. turned 14 on April 20, 1998; Count 2 suggests she was still 14 on September 1, 1998; and Counts 3 and 4 suggest she was 16 on September 1, 1996). A15—16. Inconstant notice of what age the prosecution would attempt to prove unfairly impeded Tucker's ability to prepare a defense which challenges the State's evidence as to the element of age.

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[25] *United States v. Critchley*, 353 F.2d 358, 361–62 (3d Cir. 1965).

[26] The fact that an alibi defense was not presented on the record is just as plausibly attributable to the trial court's position on the immateriality of the date as it is to a factual unavailability of such a defense.

[27] *United States v. Rajarantnam*, 2014 WL 1554078, at *6 (S.D.N.Y. Apr. 17, 2014) ("An indictment is defective if it contains logically inconsistent counts."); *United States v. Cantrell,* 612 F.2d 509, 511 (10th Cir.1980) (reversing verdict based on self-contradictory indictment).

II. INSTRUCTING THE JURY THAT EXACT DATES ARE NOT ELEMENTS, DESPITE THAT AGES ARE ELEMENTS, CREATES THE POTENTIAL FOR JURY CONFUSION.

Question Presented

Whether instructing the jury that exact dates are not elements, despite that ages are elements, creates a potential for juror confusion.[28] A188—89; A205—16.[29]

Scope of Review

Preserved objections to jury instructions are reviewed *de novo*.[30] Unpreserved objections to jury instructions are reviewed for plain error.[31]

Merits of Argument

T.A.'s age at the time of the alleged conduct was an essential element of each charge. And an individual's age is, by definition, not a constant but a function of the date; nonetheless, the trial judge instructed the jury that "[t]he exact times and dates when the alleged crimes occurred are not essential elements of the charged offenses." A285; A232. The trial court did not explain how this instruction interacted

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[28] Supr. Ct. R. 8.

[29] A specific objection to the jury instruction below was not required to preserve the issue because the trial court had already ruled on the underlying legal issue in its ruling on Tucker's MJA,– which was denied based on the trial court's view that the State need not stick to the dates in the indictment. D.R.E. 103(b); Exhibit B.

[30] *Perkins v. State*, 920 A.2d 391, 398 (Del. 2007) ("The test is whether the jury instruction "correctly states the law and is not so confusing or inaccurate as to undermine the jury's ability to reach a verdict.")

[31] *Lowther v. State*, 104 A.3d 840, 845 (Del. 2014).

with the age element of the offences, and thus, at a minimum, created a reversible "potential for juror confusion" by suggesting that the State was not strictly required to meet its burden as to the age element.[32]

Even if the date and age instructions are not mutually exclusive, it is difficult to imagine how a jury could not be confused by the undeniable tension in instructing that says age is an element, but dates are not. Afterall, even the prosecutor's closing argument recognized – as it must – that liability hinged on the jury finding that conduct preceded an *exact* date. A287 ("anything past th[at] date is above her 14th birthday, and anything before …is under 14."); and the judge amended the indictment, and drafted jury instructions which recognize that even a single day can make a difference. A287—88.

The jury is likely to have understood the instruction as relieving the State of its responsibility to prove the age element because such an interpretation would have been the only way for them to make sense of (i) the inconsistencies about T.A.'s age in the indictment,[33] and in T.A.'s testimony,[34] and (ii) the prosecutor's assertion that

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[32] *Probst v. State*, 547 A.2d 114, 119–20 (Del. 1988) ("We need not, and indeed probably could not in each case, satisfy ourselves that the jury was *in fact* confused.")

[33] Count 1 suggests T.A. was under 14 up until April 20, 1998; Count 2 suggests she was 14 on September 1, 1998; Counts 3 and 4 suggest she was 16 on September 1, 1996. A15—16.

[34] At one-point T.A. alleged Tucker repeatedly hugged her with his penis out beginning when she was "12 or13" (A148); elsewhere she contradicted herself, testifying that "most of the time" when it happened her mom was out working her

the jury was permitted to "find that the charged USC Seconds work as the[] prior three events" (A298) for the continuous sexual abuse of a child charge, despite that Count II addresses conduct alleged to have occurred on September 1, 1998 – more than four months after T.A. turned 14; and Counts II and III charge conduct alleged to have occurred when the complaining witness was 16. Given the overwhelming number of contradictions related to T.A.'s age, it is reasonably likely that the jury understood the instruction as permitting them to disregard her age.

And finally, the prosecutor provided the jury with a policy rational which supports an interpretation of the instruction pursuant to which the State need not prove age element of the offences:[35]

> [*i*]*n cases such as this, child victims can rarely tell you exactly a day in time things happened…think about whether a child can recall something that happened on a specific day, years and years later*. A295—96.

night shift (A155); which her mom testified did not begin until 2003 when T.A. was 19 years old and no longer living in the house. A196; A157.

[35] *See United States v. Palo*, 2017 WL 6594196, at *6 (W.D. Pa. Dec. 26, 2017) ("inconsistency in a charging instrument fosters confusion for both the defendant and the jury."); *United States v. Eason*, 434 F. Supp. 1217, 1221 (W.D. La. 1977) (explaining "inconsistency breeds confusion, both for defendant and the jury" and ordering government to decide which of three counts to pursue).

III. TUCKER'S CONVICTIONS FOR COUNTS 3 AND 4 MUST BE REVERSED BECAUSE THE INDICTMENT ALLOWED FOR LIABILITY FOR VICTIMS AGES SIXTEEN AND OLDER, AND ALLEGED THE VICTIM TO BE SIXTEEN, DESPITE THAT THE GOVERNING STATUTE REQUIRES THE VICTIM TO BE *UNDER* SIXTEEN.

Question Presented

Whether an indictment is valid if it allows for liability for victim's ages sixteen and older, and alleges the victim to be sixteen, despite that the governing statute requires the victim to be *under* sixteen?[36]

Scope of Review

Claims of infringement of constitutional rights (such as an indictment) are reviewed *de novo*,[37] and unpreserved objections to the adequacy of an indictment for plain error. [38]

Merits of Argument

A valid indictment requires "a plain, concise and definite written statement of the essential facts constituting the offense charged."[39] A prosecution must be "based on an indictment which sets forth the constituent elements of the crime with which

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[36] Supr. Ct. R. 8.
[37] *Williamson v. State,* 707 A.2d 350, 362 (Del.1998).
[38] *Mott v. State*, 9 A.3d 464, 467 (Del. 2010).
[39] Super. Ct. Crim. R. (7)(c)(1).

the prisoner is charged. This proposition is fundamental."[40] "When undertaking to draft an indictment, counsel for the State … write a count that does not omit allegations of an essential element of the offense. Failure to do so is negligence."[41]

Tucker's convictions of Counts 3 and 4 must be reversed because "the essential facts" included in the indictment do not constitute a crime, and "the constituent elements of the crime" are misdescribed. A16. In particular, Counts 3 and 4 allege that a conviction of Unlawful Sexual Contact Second Degree applies to victims "less than eighteen years of age," and that the victim in this case "was 16 years old." The errors here are twofold. First, while the current Unlawful Sexual Contact Second Degree statute applies to victims "less than 18 years of age,"[42] the pre-2009 version of the statute under which Tucker was convicted requires that the alleged victim is "less than 16."[43] Secondly, the indictment alleges the victim was in fact 16 at the time of the incidents, such that it does not actually allege a violation of the governing statute (which requires the victim be *less than* 16).

Reversal is required because this error is plain on the face of the indictment, and prejudicially stripped Tucker of his constitutional right to an indictment.

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[40] *Miller v. State*, 233 A.2d 164, 165 (Del. 1967) (citing 4 WHARTON'S CRIM. L. & PRO., §1760).
[41] *Malloy v. State*, 462 A.2d 1088, 1094 (Del. 1983).
[42] 11 *Del.C.* §768.
[43] 2009 Delaware Laws Ch. 148 (S.B. 185) *available* at https://legis.delaware.gov/SessionLaws/Chapter?id=17269; 11 *Del. C.* §768 (1995 Replacement Vol.). A352.

IV. TUCKER'S CONVICTION OF COUNT II MUST BE REVERSED BECAUSE THE INDICTMENT AND THE EVIDENCE ALLOWED FOR LIABILITY FOR UNLAWFUL PENETRATION DURING A PERIOD OF TIME AFTER THE GENERAL ASSEMBLY'S REPEAL OF THE UNLAWFUL PENETRATION STATUTE.

Question Presented

Whether a conviction can be upheld when the indictment allowed for liability during a period of time after the general assembly's repeal of the statute?[44]

Scope of Review

Claims of infringement of constitutional rights (such as an indictment) are reviewed *de novo*,[45] and unpreserved objections to an indictment for plain error.[46]

Merits of Argument

Count two of the July 3, 2023, reindicment charged "UNLAWFUL SEXUAL PENETRATION IN THE THIRD DEGREE ("USP Third"), a felony, in violation of Title 11, Section 770(a)(2) … OSCAR W. TUCKER, *on or about the 1st day of September 1998*…" A9 (emphasis added). Eight days after the indicted date, or 90 days after the 139th General assembly passed Senate Bill No. 226, the USP Third statute was repealed.[47] Given the trial court's limitation on the role of dates in the

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[44] Supr. Ct. R. 8.
[45] *Williamson v. State,* 707 A.2d 350, 362 (Del.1998).
[46] *Mott v. State*, 9 A.3d 464, 467 (Del. 2010).
[47] In accordance with Senate Bill No. 226 of the 139th General assembly, on June 11, 1998. 1998 Delaware Laws Ch. 285 (S.B. 226) *available at* https://legis.

indictment, this count subjected Tucker for USP Third liability for conduct occurring after USP Third was repealed.

Nor did the evidence at trial restrict liability to dates before USP Third was repealed. No evidence allowed the jury to narrow down the date of the single alleged USP incident beyond the six-year period when the misconduct as a whole is alleged to have occurred. A145—48; A154—57. Thus, if Tucker's liability for this Count was not limited to conduct "on or about" the indicted date, then the second re-indictment charged a crime which was not a crime.[48]

During trial the trial court provided the parties with research conducted by the judge's clerk[49] (A136), which seems to have prompted the State to amend the charge to unlawful sexual contact second degree on October 4, 2023. However, given that Count 2 of the second reindictment is a nullity, converting it to a validly alleged Unlawful Sexual Contact charge required a reindictment, not an amendment.[50]

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delaware.gov/SessionLaws/Chapter?id=20130. The indictment alleged the conduct occurred "on or about the 1st day of September 1998." A9.

[48] And if his liability was limited to conduct on or about the date in the indictment, then he was convicted without the necessary proof (as argued *infra* Claim I).

[49] The research was not preserved but is described in the record. A136.

[50] Super. Ct. Crim. R. 7(e).

V. CUMULATIVE ERRORS WITHIN THE NUMEROUS INDICTMENTS DEPRIVED TUCKER OF A FAIR TRIAL AND REQUIRE REVERSAL.

Question Presented

Whether – in the aggregate – the repeated reindictments, two amendments to the final indictment during trial, the variance between that final indictment and the evidence at trial, and the confusing jury instructions in this case deprived Tucker of a fair trial?[51]

Scope of Review

Where there are multiple material errors in a trial, the Court weighs their cumulative effect to determine if, combined, they are prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[52] The relevant inquiry is, after considering the errors, "whether we can be confident that the jury's verdict would have been the same,"[53] or if the defendant was deprived of their right to a fair trial.[54]

Merits of Argument

In this case, poor draftsmanship of the indictment, including two midtrial amendments led to the numerous errors described in the preceding claims, which –

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[51] Supr. Ct. R. 8.
[52] *Starling v. State*, 130 A.3d 316, 336 (Del. 2015).
[53] *Id.*
[54] *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

given their common source – are arguably best understood cumulatively. The indictment in place at the beginning of trial is exceedingly different than that which was provided to the jury, and that which was provided to the jury is both internally inconsistent, and inconsistent with evidence and arguments put forth by the State. The repeated moving of the goal posts and the confusing role of dates of the offences described by the trial court deprived Tucker of a fair opportunity to defend against the allegations, and the jury was not instructed in a way that should leave this Court confident in the results.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions[55] should be vacated.

Respectfully submitted,

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DATED: July 2, 2024

[55] Claim I applies to Counts 2—4; Claim II applies to all counts; Claim III applies to Counts 3 and 4; Claim IV applies to Count 2; and Claim V applies to all counts.