STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Maite Murphy, Circuit Court Judge

Appellate Case No. 2015-001370

THE STATE, ...RESPONDENT

v.

MICHAEL GENTILE .....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly found Appellant's indictment for lewd act upon a child under sixteen was not unconstitutionally overbroad where Appellant knew the State was planning to obtain indictments covering the period between January 1, 2010, and September 1, 2012, and the State was unable to further narrow the period in which Appellant committed the offense.

STATEMENT OF THE CASE

On March 7, 2013, the Dorchester County Grand Jury indicted Appellant for criminal sexual conduct (CSC) with a minor, first-degree, occurring on or about January 1, 2009 (2012-GS-18-1480). On June 4, 2015, the Dorchester Grand Jury issued an amended indictment for the CSC with a minor charge, covering an expanded time frame of January 1, 2010, and September 1, 2012. That same day, the grand jury also issued an indictment for lewd act upon a child under sixteen involving the same time period (2015-GS-18-0598).

On June 15, 2015, Appellant proceeded to trial before the Honorable Maite Murphy. Pierce Wehman, Esquire, and John Loy, Esquire, represented Appellant; and Assistant Solicitors Kyle Ward, Esquire, and Sheila Mims, Esquire, represented the State. During pretrial motions, Counsel moved to quash the indictments, arguing the time period listed in the indictments was so broad Appellant was unable to avail himself of an alibi or other defense to the State's allegations. The trial judge denied the motion.

The main trial began the following day, June 16, 2015. Appellant was convicted of the lewd act charge as indicted, but acquitted of the CSC with a minor charge. The trial judge sentenced Appellant to fifteen years' incarcerations, suspended upon the service of fourteen years and four years' probation. The trial judge also ordered Appellant receive sexual assault counseling and treatment, and that he register as a sex offender.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Victim's mother ("Mother"), began dating Appellant in May 2010. Shortly thereafter, he moved in with Mother, Victim, and Victim's brother ("Brother") into their two-bedroom, one-bath apartment. At that time, Mother worked from 9:00 a.m. to 6:00 p.m., during which time Appellant would watch the kids. When Appellant moved in, Victim was seven years' old. (Trial Tr.p.51, line 6–Tr.p.53, line 2).

On the night of August 31, 2012, while Victim was nine years' old, Mother found Victim's phone on the couch, and decided to go through it. During her search of the phone, she discovered unsettling material[1] which caused her to contact the police. Shortly thereafter, Victim was interviewed at the Dorchester County Children's Center by forensic interviewer Helen Boyle. (Trial Tr.p.53, line 15–Tr.p.55, line 2; Tr.p.79, lines 4–10).

On March 7, 2013, the Dorchester County Grand Jury indicted Appellant for CSC with a minor, first-degree, taking place on or around January 1, 2009. On June 4, 2015, eleven days before trial, the State obtained an amended indictment for the CSC with a minor, first-degree, and a new indictment for lewd act upon a child under sixteen. The time frame listed in both indictments was between January 1, 2010, and September 1, 2012. (Pretrial Tr.p.16, lines 9–16; CSC indictment; Amended CSC Indictment; Lewd Act Indictment).

[1] The "unsettling material" was not presented at trial. During the June 15, 2015 hearing, however, the parties informed the trial judge that the material involved a text message exchange between the Victim and Appellant in which Victim sent Appellant a picture with her shirt pulled up, exposing her breasts. Due to various issues with the text message exchange and the photo, such as authenticating who actually sent the messages and whether Appellant ever accessed the picture, the trial judge found the probative value of the texts and picture did not outweigh their prejudicial effect and prevented the State from introducing them at trial. (June 15, 2015 Tr.p.21, line 2–Tr.p.40, line 25).

During pretrial motions, Counsel moved to quash Appellant's indictments. Counsel argued the indictments violated South Carolina law, complaining that the thirty-three month period covered by the indictments was so broad that it was impossible, even with enough preparation time, to present any alibi defense. Counsel noted that Appellant worked as a truck driver and spent "long periods of time" traveling at the time of the assaults, and if the indictments covered a narrower period Appellant may have been able to provide alibi evidence. (Pretrial Tr.p.14, line 25–Tr.p.17, line 4; Tr.p.17, lines 11–20)

Counsel also argued the indictments violated federal law because the vague time period in the indictments violated Appellant's due process rights because he was unaware of the exact incident for which he was being tried, preventing him from being sufficiently able to protect himself from further prosecution for allegations of similar misconduct occurring during that time frame. (Pretrial Tr.p.20, lines 3–14).

However, Counsel conceded that she was well-aware of thirty-three month time frame well before trial, and that the basis of her motion was not that the time frame of the indictments was expanded shortly before trial; they admitted they had "candid conversations" which made them well-aware the State would use the thirty-three month time frame in the indictments. (Pretrial Tr.p.17, lines 5–10).

The trial judge denied Counsel's motion, finding the thirty-three month period was not overly broad. The trial judge noted the indictments had sufficient certainty and particularity to apprise Appellant of: (1) the elements of the offenses with which he was charged; and (2) what he is called upon to know and answer so that he may plead accordingly. The trial judge also found the indictments were sufficient to enable the

court to know which judgment to pronounce. (Pretrial Tr.p.19, lines 10–23; Tr.p.20, lines 21–24).

ARGUMENT

The trial court properly found Appellant's indictment for lewd act upon a child under sixteen was not unconstitutionally overbroad where Appellant knew the State was planning to obtain indictments covering the period between January 1, 2010, and September 1, 2012, and the State was unable to further narrow the period in which Appellant committed the offense.

Appellant argues the trial judge erred in denying his motion to quash the indictments, arguing his state and federal constitutional rights were violated by the State's use of the lewd act indictment. He contends the thirty-three month time frame listed in the lewd act indictment were overbroad and vague, considering: (1) the indictment was obtained only eleven days prior to trial; (2) the indictment covered a thirty-three month time frame; (3) Appellant's original CSC with a minor indictment, obtained twenty-seven months prior to his trial, only pertained to events occurring on or about January 1, 2009; and (4) the State failed to show "special circumstances" warranting the expanded time frame in the indictment. The State disagrees with Appellant's allegations of error: (1) Appellant was informed well-before even the June 4, 2015 indictments that Appellant would be tried for sexual assaults occurring between January 1, 2010, and September 1, 2012; (2) the thirty-three month time frame contained in the indictments was justified by the circumstances of the case; and (3) Appellant failed to demonstrate he was unfairly prejudiced by the use of the thirty-three month time frame.

The indictment is a notice document, and any challenge to the sufficiency of an indictment must be made before the jury is sworn. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005).

> If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining

> whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

Id. at 102-103; 610 S.E.2d at 500 (citing S.C. Code Ann. § 17-19-20 (2003); State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)).

Further, in determining whether an indictment is sufficient, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991); State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct. App. 2007), cert. denied, November 7, 2008 (citing, inter alia, State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353-54 (2006)). An indictment generally passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Id. at 98, 654 S.E.2d at 853 (citing State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002)).

"Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred." State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App. 2005) (quoting State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991)). A two-prong test exists for determining the sufficiency of an indictment involving a purportedly overbroad time period: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 853-854.

"Time is not a material element of . . . committing a lewd act on a minor." Id. at 101, 654 S.E.2d at 855; see also, S.C. Code Ann. § 16-15-140 (2015) ("It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.").

Initially, the State notes that any arguments Appellant makes regarding an inability to defend himself based on the State "surprising" him with the expanded time frame in the June 4, 2015 indictments is not preserved for review. Counsel failed to contest the indictments on that basis during the pretrial hearing; in fact, Counsel admitted they had "candid conversations" with solicitors well-before trial during which they were told the State would use the expanded time frame in the indictments. Accordingly such argument is not preserved. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (stating an appealing party to preserve an issue for appellate review, it must have raised the issue and the grounds supporting it to the trial judge; a party may not argue one ground at trial and an alternate ground on appeal). Moreover, even if such argument was preserved, Counsel's admissions prove they had sufficient time to investigate the expanded time frame and possible defenses.

Similarly, Appellant's arguments regarding the State's failure to demonstrate "special circumstances" justifying the thirty-three month time frame in the lewd act indictment were not raised during the pretrial hearing, and are not preserved for appellate review. Even if said argument were preserved, Appellant's argument mischaracterizes South Carolina law; the State submits this language implies Appellant's indictments were

out of the ordinary or in violation of state law. However, no "special circumstances" standard exists under South Carolina law; rather, a trial court must look at the circumstances of each individual case warrants an extended time frame in an indictment. In Wade, the Supreme Court of South Carolina stated it was "inappropriate" to create a per se rule of insufficiency in an indictment because it contained a two-year time frame for the charged offense. The Court found that under the facts of the case, the time span stated for Wade's first-degree CSC with a minor indictment was narrowed as much as possible under the circumstances, given the young age of the victim and that children often have "little concept of dates and time." The Court justified its position by noting that in certain scenarios, although there is proof positive that a person committed a crime, that same person could be unindictable. The Court also stated:

> [Wade]'s logic that a two year indictment period is overbroad because one cannot possibly account for his whereabouts during that span is a slippery slope. In most situations, an individual could not account for his whereabouts on every day during a one year, six month, one month, or even shorter span.

Wade, 306 S.C. at 84, 409 S.E.2d at 783.

Similarly, in Tumbleston, the Court of Appeals found indictments first-degree CSC with a minor and lewd act upon a minor covering a three-year period between 2001 and 2004 were warranted based upon the facts of the case, noting "the stealth and repetitive nature of the alleged conduct compels identification of the broader time period. The victim is a young child, whom one cannot reasonable expect to recall the exact dates of the sexual abuse." Tumbleston, 376 S.C. at 101–02, 654 S.E.2d at 855.

However, in State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), the Supreme Court of South Carolina found a trial judge erred in failing to quash indictments against

the defendant which were amended two weeks before trial to expand the time frame for the alleged offenses from the summer months of three years to a continuous six-year period.[2] Examining the indictments "with a practical eye in view of all the surrounding circumstances," the Court found the defendant was prejudiced because "he was undoubtedly taken by surprise and significantly limited in his ability to combat the charges against him." Id. at 589–90, 769 S.E.2d at 864. The Court noted the new indictments were "unconstitutionally overbroad and vague, in violation of the defendant's due process rights, because they lacked specificity as to when the alleged acts occurred." The Court also noted: (1) the defendant was taken by surprise by the last-minute amendment of the charges; (2) there was no way for the defendant to know whether he could plead an acquittal; and (3) the defendant was given only two weeks to complete the task of developing a defense for a continuous, six-year period; and (4) defendant had prepared a defense based on the original indictments, but due to the State's belated presentation of the new indictments, was unable to obtain additional evidence to defend against the expanded time frame, such as employment records for the period before 2000, which had been destroyed at some point prior to the State obtaining the amended indictments. Id. at 591–92, 769 S.E.2d at 864–65. This Court put special emphasis on the defendant's ability to craft an alibi. The Court noted the defendant's "only complete defense would be that of an alibi, "noting a successful alibi must necessarily cover the entire time period alleged in the indictment, and it was "unable to discern how any defendant could effectively defend himself against a six-year time

[2] Baker involved the State obtaining four amended indictments against the defendant, two weeks prior to trial, based on new allegations by the victims. The indictments, which were for committing lewd acts upon a minor, originally covered events occurring between: May 1, 2002 until September 1, 2002; May 1, 2003 until September 1, 2003; and June 1, 2004 until June 20, 2004. The amended indictments alleged the lewd acts occurred between June 1, 1998 and September 1, 2004.

frame." Id. at 591, 769 S.E.2d at 864. However, by way of footnote, the Court emphasized that its decision did not preclude the State from reindicting Baker, so long as it limited the time frame in the indictments to the summer months 1998 through 2004. Id. at 602, 769 S.E.2d at 870.

In the instant case, there was no need for the State to prove the lewd act occurred at a specific time or date. See S.C. Code Ann. §§ 16-3-655, 16-15-140 (2015); Tumbleston, 376 S.C. at 99, 654 S.E.2d at 854 (stating time is not a material element of either CSC with a minor or committing lewd act on a minor, and finding indictments which stated the charged crimes occurred "on or between 2001 and June 2004" was sufficient). Looking at Appellant's case, in light of the surrounding circumstances, it is clearly distinguishable from Baker, and similar to Wade and Tumbleston. Contrary to Appellant's assertion, the State's timespan was relatively narrow; the majority of the indictment's time frame consisted of the period during which Appellant lived with the Victim and her family, the period during which, based on the Victim's statements, the assault occurred. However, due to the Victim's young age, she had difficulty remembering when exactly she was assaulted. See, e.g., Wade, 306 S.C. at 84, 409 S.E.2d at 783 (noting an eight-year-old victim, due to her age, had difficulty pinpointing the exact date when she was sexually assaulted). Admittedly, the 2015 indictments did include a period of several months before Appellant lived with the Victim. However, Appellant had a defense for that period because he did not know Victim and her family during that time, and thus he could not have assaulted her prior to May 2010.

Moreover, unlike the defendant in Baker, Appellant was unable to prove he was prejudiced by the new indictments. The State informed counsel well-before trial that it

sought to prosecute Appellant using the expanded time frame. Additionally, Appellant failed to present any evidence that the State's use of the expanded time frame impacted his defense strategy. In Baker, the defendant presented the trial court with concrete examples of evidence he was unable to obtain because he was surprised with amended indictments encompassing a six-year time period; here Appellant informed the trial judge that he "might" have alibi evidence through work records if the State could narrow the time frame to "one day or [] two day[s] or [a] week . . . ," but failed to even allege that the indictments impacted any actual theory or evidence he had prepared for trial.

Appellant, like the defendants in Ward and Tumbleston, was forced to defend a two to three year time frame, which was reasonable based upon the Victim's age and the State's inability to narrow the time frame of the assaults beyond the period during which Appellant lived with her. Accordingly, the trial judge did not did not err in refusing to quash Appellant's lewd act indictment. Appellant's conviction and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 6, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Maite Murphy, Circuit Court Judge

Appellate Case No. 2015-001370

THE STATE,.....RESPONDENT

v.

MICHAEL GENTILE.....APPELLANT.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served. This 25th day of April, 2016.

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April 25, 2016

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RE: State v. Michael Gentile
Appellate Case No. 2015-01370

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

William F. Schumacher, IV
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Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services