ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Clifton Newman, Circuit Court Judge

THE STATE,

Respondent,

vs.

VERNON GLEN EVANS,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in denying the motion to quash the indictment because the indictment was sufficiently tailored to the time periods the abuse occurred and Appellant was on notice of the charges he was facing and the facts supporting them.

STATEMENT OF THE CASE

Appellant Evans was indicted for criminal sexual conduct in the first degree. The jury found Evans guilty following jury trial on December 16-18, 2014. The Honorable Clifton Newman sentenced Evans to thirty years imprisonment.

Opposing counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On February 16, 2016, this Court ordered the parties to brief the issue of whether the trial court erred in denying the motion to quash the indictment on the theory it was overbroad. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant Evans would pick Victim and her sister, YB, up from their house and babysit them at his trailer on weekends from 2005 to 2009. Evans made Victim perform oral sex on him and also performed oral sex on Victim. YB saw this happen one time and so was an eyewitness to a sexual assault.

Victim was fourteen years old at the time of trial. She testified she knew Evans since she was small. Evans would babysit Victim and her sister at his trailer when she was "sevenish." Tr. pp. 96-97. Evans never watched her longer than a weekend. She testified she and her sister would sleep in his bed and he would also sleep on the bed. They typically ate dinners next door at Evans' mother's house. Tr. pp. 98-99. Victim testified as follows:

> Q: Okay. Did anything bad ever happen there?
>
> A: Yes.
>
> **Q: Okay. Do you remember about how old you were when the bad things happened?**
>
> **A: Still the sevenish age.**
>
> Q: Okay. Do you remember how old your sister was?
>
> A: Maybe six.
>
> Q: Okay. Where would the bad things happen to you?
>
> A: In his room.
>
> **Q: Okay. How many times did the bad things happen to you?**
>
> **A: Almost every time we went over there.**
>
> Q: Okay. And when you say bad things, what happened?

A: He would make me put my mouth on his private and he would put his mouth on my private.

Tr. p. 99, lines 2-16.

Victim testified YB saw the abuse happen once or twice. Tr. p. 99, lines 22-24. Evans told Victim not to tell anyone "or else." Victim did not know what "or else" meant. Tr. p. 101. Victim told her parents about the abuse but then recanted. She explained she recanted because she was scared and did not know what would happen. Tr. pp. 102-103. She later explained the reason for her recantation during redirect examination: "I was scared and I didn't want to go to court and I didn't know what was going to happen. I thought I might have gotten tooken from my parents." Tr. p. 112, lines 14-16.

However, later she and her sister told Brittany, their cousin, about the abuse. Thereafter, they went to the Julie Valentine Center to speak to "some lady." Tr. p. 103. Victim testified a police officer came to her school, but she did not tell him about the abuse, explaining, "Because it was at my school and that's like my safe place. I was kind of scared." Tr. p. 104, lines 3-13. However, she later told the officer what happened when she was home and felt safer with her parents around. Tr. p. 104. Victim testified at first that she did not want to be there at trial, but then clarified, "Like I really don't want to be here. I'd rather be at school. But I think it's something that needs to happen." Tr. p. 104, line 24 – p. 105, line 6. On cross-examination, Victim agreed that during the forensic interview, she said the abuse happened when she was eight or nine years old. Tr. p. 109. During the forensic interview (State's Exhibit #1), Victim described three incidents of sexual abuse, Victim thought the first occurred when she was eight or nine (7:00 to 7:30), and she thought the third occurred when she was ten years old (25:00-27:30).

YB verified she and Victim went to Evans' trailer, and he babysat them for just the weekend. She testified she mostly played games on his computer. YB testified Evans "would make my sister do stuff to him." Tr. p. 125, lines 18-21. She explained she knew, "[b]ecause I seen it once." Tr. p. 125, lines 22-24. YB explained they were in Evans' bedroom and she was on the computer. Evans and Victim were on the bed. She saw Evans' "private parts" and agreed she saw Victim doing something to Evans' private parts. Tr. p. 126. YB testified, "I sort of ignored it because I didn't know what was happening." Tr. p. 127, lines 3-6. YB explained she told her parents, but later she and Victim said they made it up because they were scared. Tr. p. 127. However, they later told Brittany about the abuse and YB told her mother again. Tr. pp. 128-129. She and her sister did not tell the police officer at the school about the abuse, but they later told the same officer at home. Tr. p. 129.

During the forensic interview, she told the interviewer she thought the incident occurred when she was eight years old. Defense Exhibit # 1 (approximately 20:00). She also told the interviewer that Evans told her to join them, but she declined. Defense Exhibit #1 (31:30-32:30). During the interview, she was more explicit about what she observed: she told the forensic interviewer she saw Evans guide her sister's head towards his lap and prodded her mouth open. YB did not want to see what was happening, she focused on the computer. Defense Exhibit #1 (20:00-21:30).

Florence McCollum testified she is like a grandmother to Victim and YB. Her daughter lives with the sisters' father. Grandmother testified a conversation occurred about two years ago concerning allegations of abuse. Law enforcement was not involved the first time. When the allegations surfaced again, Brittany called law enforcement. She testified they did not immediately

report the allegations because they were waiting for the parents "to do the right thing," but Brittany later called law enforcement. Tr. pp. 137-140.

Ester McCollum, Victim and YB's mother, testified they moved a lot between houses and changed schools often. Tr. p. 159. Victim was about five or six years old when Victim met Evans. Mother testified that when Evans picked the children up, she thought he was taking them to his mother's house. She testified Evans watched them on weekends for about two or three years, when Victim was about seven to nine years old. Tr. pp. 160-162. Mother testified she was unsure of the year or date when she became aware of the allegations. Tr. p. 162, lines 23-25. She told Victim's father. The girls subsequently denied abuse and they did not contact the police. Then the allegations came up again "probably around 2009, 2010." They did not call the police at that time either. Mother testified she was leaving it up to John, their father. Tr. pp. 163-164. Mother explained, "I was scared DSS might step in or he might leave me." Tr. p. 164, lines 2-6.

John Berry, the Father, testified he has known Evans since they were kids. Father testified that Evans started babysitting his daughters on weekends several years ago. Father testified that Evans babysat the daughters "[s]omwhere around two years, I'd say. I'm not exactly sure. I work a lot, so time just passes by real quick." Tr. pp. 172-174 (direct quote, p. 174, lines 12-14). Father was told about the allegations of abuse and also that the daughters denied the abuse. Father explained he did not report the abuse, "[b]ecause I battled DSS to get custody of them, and I didn't want to put them through the DSS thing again." Tr. p. 175, lines 3-4. He admitted he was afraid to report the abuse. Tr. p. 175.

Evans testified in his own defense. He claimed he "never messed with a child." Tr. p. 248. Evans testified he started keeping the children on weekends in 2005 and kept them from 2005 to

2009. Tr. pp. 248-251. Evans remembered the allegations first came up in 2006. Evans claimed the daughters' biological mother put them up to making up allegations, but two weeks later, he was watching them again. Tr. pp. 254-255. Evans estimated he watched the children sixty times between 2005 and 2009. Tr. p. 255. Evans' mother, Bernice Evans, claimed the daughters were with her mostly. Tr. p. 269-270.

ARGUMENT

The trial court did not err in denying the motion to quash the indictment because the indictment was sufficiently tailored to the time periods the abuse occurred and Appellant was on notice of the charges he was facing and the facts supporting them.

Appellant Evans complains the trial court erred in denying his motion to quash the indictment because it covered a four year period. Evidence at trial indicates that abuse occurred over the four year period and Evans was not prejudiced by the time span in the indictment. Evans admitted he watched Victim and her sister on many occasions over several years, so opportunity was not an issue. Evans did not pursue an alibi defense.

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). The Supreme Court further explained:

> 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)).

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. In Tumbleston, this Court determined that "[t]ime is not a material element of . . . committing a lewd act on a minor." Id. at 101, 654 S.E.2d at 855.

In Wade, the Supreme Court rejected Wade's call for a per se rule of insufficiency in an indictment because it contained a two-year time frame for the charged offense. The Court noted that Wade categorically denied any wrongdoing, arguing he was never alone with the victim. The Supreme Court further noted, "The jury did not believe the defendant." Wade, 306 S.C. at 81, 409 S.E.2d at 781.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 Supreme Court offered a hypothetical scenario where a decomposed murder victim was found and sagely noted that under Evans' per se argument, a murderer might become unindictable merely

because of the difficulty determining when the murder victim died. The Court also found:

> [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 the three-year window for the offense dates in the indictments for first-degree CSC with a minor and lewd act upon a minor was 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 reasonably expect to recall the exact dates of the sexual abuse." Tumbleston, 376 S.C. at 102, 654 S.E.2d at 855. This Court noted, "indictments for a sex crime that allege offenses occurred during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame." Id. This Court further rejected Tumbleston's argument that the broad time range kept Tumbleston from preparing his defense, noting "Tumbleston proceeded with the defense of denial, and the jury simply rejected this defense." Id.

In the instant case, Victim and her sister were young children and they could not reasonably be expected to recall exact dates or even limit the time frame due to their delayed disclosure of abuse. Their ability to pinpoint dates was further complicated by their multiple moves and changing schools. A treatise on abuse notes: "The legal system cannot depend on young children for dates and times. Fortunately, the time when abuse occurred is not an element of the crime. Courts understand children's difficulty with time." Myers, John E.B., Myers on Evidence Interpersonal Violence, § 1.05 Children's Understanding of Time and Number. Myers quotes extensively from a

study examining the difficulties in narrowing dates:

> Our results suggest caution in attempting to elicit temporal location information from children about abuse. Abuse is likely to be repeated over long periods of time, and children routinely delay disclosing, which means that when they do disclose, the initial abuse is quite remote. From a practical perspective, although it may be unrealistic to assume that children will be able to provide temporal estimates of abuse, it may be possible for adults to estimate dates based on what children can recall about abuse. . . . Because the law tends to require only so much information about the charged crime as the prosecution can reasonably provide, children's difficulties in providing accurate temporal estimates and their failure to register their uncertainty (as demonstrated by the infrequent "I don't know" response) counsels against insistent questioning of child victims about time and number.

L. Wandrey, et. al., Maltreated Children's Ability to Estimate Temporal Location and Numerosity of Placement Changes and Court Visits, 18 Psychol. Pub. Pol'y & L. 79-104 (2011).

Other jurisdictions note the problems with determining exact dates child abuse occurs. For instance, the Utah Supreme Court recognized "children are often not able to identify with a high degree of reliability, and sometimes not at all, when an event in the past took place." State v. Wilcox, 808 P.2d 1028, 1032 (Utah 1991) (citation and internal quotation marks omitted). The court further noted: "The problem of young children who are unable to specify a date on which abuse occurred or a location where it occurred is exacerbated by situations in which the abuse occurred on many occasions over a long period of time, a not-uncommon occurrence." Id. at 1033 (citations omitted). The court noted the dangers of imposing stringent standards on child victims:

> If we were to hold that in all such circumstances, no offense could be charged because the alleged victim is too young to testify with certainty concerning the time, dates, or places where the abuse occurred, we would leave the youngest and most vulnerable children with no legal protection. An abuser could escape prosecution merely by claiming that the child's inability to remember the exact dates and places of the abuse impaired the abuser's ability to prepare an alibi

defense.

Id.

The court rejected Wilcox's claim that he was prejudiced by the lack of specificity in the indictment, finding (1) "time does not become an element of an offense merely because the defendant pleads an alibi defense;" and (2) "it is doubtful that an alibi defense is a realistic possibility because Wilcox had continual contact with the child half of the time over the thirty-two-month period." Id. The court held, "Under these circumstances, we conclude that Wilcox has not shown any specific harm to his defense that he likely will suffer as a result of the lack of exact dates and times." Id.

The South Dakota Supreme Court noted "Children, especially those who suffered traumatic events, cannot always remember precise times and dates." State v. Brim, 789 N.W.2d 80, 84 (S.D. 2010). The court held the lack of precise dates in the indictments did not deprive Brim of his defenses. Id. The court explained as follows:

> The lack of precise dates of the abuse did not deprive Brim of his defense. . . . Brim's defense was a complete denial of any sexual act occurring during the entire period of time covered by the indictment. . . . He presented no alibi evidence, raised no statute of limitations defense, and did not argue that the State failed to establish the victims' ages at the time of the abuse. Instead, Brim attempted to undermine the victims' credibility by pointing out the inconsistencies in their stories and their inability to provide precise dates. Thus the essence of the trial was the credibility of the victims' testimony.

Id. (citations omitted).

New Jersey's Supreme Court opined as follows:

> [W]e need no battery of experts to convince us that a child of the age of five to seven years – the time span encompassed when the period from January 1983 through August 1984 is applied to this victim –

> cannot recall precise dates or even approximate times the way a normal adult can. Children of that age do not think in terms of dates or time spans. Unlike adults their lives are not controlled by the clock or the calendar – at least, not as rigidly and surely not as consciously. Nor do we need record support in the form of psychiatric testimony to establish the proposition that children frequently suppress the trauma of sexual molestation or encounter difficulty in isolating the experience, particularly when, as is now alleged to be the case here, that experience involves one with whom the victim shares living quarters or when the offender is an authority figure or relative who takes advantage of his close relationship with the victim.

In re K.A.W., 515 A.2d 1217, 1220 (N.J. 1986).

The recent case of State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015) is readily distinguishable. In a plurality opinion, 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. [1] 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 found 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

[1] 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

weeks to complete the task of developing a defense for a continuous, six-year period; and (4) defendant 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 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, Evans' counsel did not claim surprise and did not claim she needed more time to prepare. The indictment was issued thirty-four days before trial. Evans' counsel claimed difficulty in formulating a defense, but did not specify how she was prejudiced or claim she was trying to attain any records or was unable to attain relevant records as in Baker. This case only involves a four-year period, not the sixyear period found in Baker, and is tailored to fall between the ages when Victim claimed to be assaulted – at trial Victim testified the assaults started at age seven, but she indicated during the interview the assaults occurred between eight and ten years old. The indictment was sufficiently tailored to accommodate these dates. Accordingly, the trial court did not

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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.

abuse its discretion in denying the motion to quash the indictment. Tumbleston, 376 S.C. at 94, 654 S.E.2d at 851 ("The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion.").

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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June 24, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-002747

THE STATE,

Respondent,

v.

VERNON GLEN EVANS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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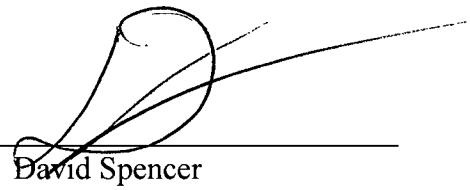
BY: 

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June 24, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
Clifton Newman, Circuit Court Judge

Appellate Case No. 2014-002747

THE STATE,

Respondent,

v.

VERNON GLEN EVANS,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Robert M. Pachak, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 24th day of June 2016.

Anne Mueller

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