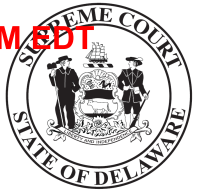
EFiled: Jul 29 2024 12:25PM EDT
Filing ID 73825590
Case Number 150,2024



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Oscar Tucker's July 2, 2024 Opening Brief in this direct appeal. This is the State's Answering Brief in opposition to Tucker's Opening Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. Viewing the evidence in the light most favorable to the prosecution, the trial testimony of the complaining witness T.A. and her mother was sufficient to establish the three statutory elements of the three counts of second degree unlawful sexual contact challenged in this appeal. The trial judge correctly denied Tucker's motion for a judgment of acquittal on the USC charges. (A-215-16).

The time periods alleged for the three unlawful sexual contact allegations are not essential elements of the charged offenses. (A-322). If Tucker was unsure of the pertinent time frame, he could have requested a bill of particulars or moved to quash the indictment. In any event, Tucker cannot demonstrate any prejudice. Tucker testified at trial and categorically denied any sexual misconduct. Thus, the dates alleged for the unlawful sexual contact charges had no effect on his trial defense.

II. DENIED. The "exact times and dates" jury instruction (A-322) was an accurate statement of Delaware law, and there is no evidence of jury confusion. Even if not waived, Tucker has demonstrated no plain error.

III. DENIED. There were two inaccuracies in the second amended re-indictment (A-16) drafted during the trial. Nonetheless, when the jury was instructed

as to what the State was required to prove in Counts 3 and 4, the trial court properly charged the jury that the State had to prove the victim was less than 16 years old when the sexual contacts occurred. (A-317-18, 321). Since the jury was correctly instructed as to the law, Tucker can demonstrate no plain error concerning the amendment drafting deficiencies.

IV. DENIED. By not objecting to the State's motion to amend Count 2 of the reindictment (A-137-38), Tucker waived any right to challenge the propriety of that amendment even for plain error.

V. DENIED. Aggregating four claims that are not reversible error individually does not provide an independent basis for appellate relief based on a claim of cumulative error.

STATEMENT OF FACTS

T.A., the complaining witness, was born in April 1984, and was 39 years old at the time of Oscar Tucker's October 2023 Kent County Superior Court jury trial. (A-142). T.A. had three younger brothers, and her mother, Latonia Tucker ("Latonia"), moved the family to a rented three bedroom townhouse in Dover, Delaware in 1995. (A-143, 193). At that time T.A. was 11 years old. (A-143).

In 1996, when T.A. was 12 years old and in sixth grade (A-144-45), her mother Latonia married Oscar Tucker ("Oscar" or "Tucker") (A-195), a minister (A-200, 248), Latonia met at church. (A-195). Subsequently, Oscar moved into the family home. (A-144-45).

One night when T.A. was 12 years old, she was awakened from sleep when she felt her stepfather Oscar touching her vaginal area. (A-145-46). T.A. told her mother shortly after the incident about that vaginal touching above her clothes. (A-146-47).

A second sexual contact by Oscar also occurred when T.A. was aged 12. (A-147). On this second occasion, T.A. was sitting on her parents' bed next to her stepfather when "he started kissing me on my breasts." (A-147). When the second sexual contact took place, T.A. testified that she was "[s]cared. Confused." (A-148). This second sexual incident was also reported by T.A. to her mother. (A-148). At

trial, T.A.'s mother, Latonia, confirmed that her daughter told her twice about Oscar touching T.A. (A-185).

In addition to the two sexual contacts when she was 12 years old that were reported to the mother (A-147-48), T.A. stated at trial: "There were numerous times where he [Oscar] would hug me and rub his erect penis on me. A lot of times he would be naked up under his robe. He would ejaculate on me." (A-148). T.A. added that the first hugging ejaculation episode was when she was 12 or 13 years old (A-148), and the incident occurred "numerous times" in the townhouse's living room, kitchen and master bedroom. (A-153-54). The last incident of "him having his penis out and hugging me" (A-156), occurred when T.A. was still a minor in tenth or eleventh grade. (A-148).

After T.A. told her mother twice about the two sexual contacts when T.A. was 12 years old, T.A. did not feel there was anybody else to go to about Oscar's sexual assaults. (A-151). During her trial testimony, T.A. described how she felt "about how disgusting and perverted [Oscar] is and how horrible he made me feel." (A-149).

Latonia stated that her husband Oscar was not working when T.A. was in the sixth through eighth grade (A-196-97), and that Oscar was home alone with the

children. (A-197). Latonia added that she did not feel comfortable leaving her minor daughter alone in the home with Oscar "[b]ecause I didn't trust him." (A-197).

In 2011 Latonia ended her relationship with Oscar (A-197), and she moved to South Carolina. (A-198). Latonia testified that Oscar later telephoned and requested a three-way call with T.A. (A-198). During this telephone call, Oscar told Latonia: "I just want to apologize to you. That my love for [T.A.] turned into touching. And then it turned into feeling." (A-199). T.A. confirmed that Oscar apologized during the call, and "[h]e admitted to my mom that he started to love me in the wrong way." (A-158).

Testifying in his own defense at trial (A-226-30, 248-74), Oscar denied the sexual assault allegations by T.A. (A-252). Oscar said he denied to his wife that he sexually assaulted T.A. (A-262-63). Also, Oscar denied making any three-way phone call about touching T.A. (A-264, 273-74), and claimed he never admitted guilt as to any of the sexual assault allegations. (A-268).

The jury found Oscar guilty of all four counts of sexual assault. (A-337-39).

ARGUMENT

I. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVICT TUCKER OF THREE COUNTS OF UNLAWFUL SEXUAL CONTACT SECOND DEGREE.

QUESTION PRESENTED

Whether there was sufficient evidence of three counts of unlawful sexual contact second degree, when viewed in the light most favorable to the State, for any rational trier of fact to have been able to find Tucker guilty beyond a reasonable doubt.

STANDARD AND SCOPE OF REVIEW

Appellate review of a trial judge's denial of a defense motion for judgment of acquittal (A-214-16) is *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the essential elements of unlawful sexual contact second degree (A-321-22) beyond a reasonable doubt.[1] In making this inquiry, this Court does not distinguish between direct and circumstantial evidence.[2] However, this Court generally declines to

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[1] *See Howell v. State*, 268 A.3d 754, 775 (Del. 2021); *Castro v. State*, 266 A.3d 201, 205 (Del. 2021); *Smiley v. State*, 2024 WL 2744562, at *4 (Del. May 28, 2024).
[2] *Howell*, 268 A.3d at 775.

review arguments or questions not raised below and not fairly presented to the trial court for decision "unless the interests of justice require such review."[3]

MERITS OF THE ARGUMENT

The Kent County Superior Court conducted a 3-day jury trial on October 3-5, 2023 for Oscar W. Tucker on seven indicted sexual offenses–one count of continuous sexual abuse of a child and six counts of unlawful sexual contact ("USC") second degree. (A-3-5, A-12-14). At the conclusion of the State's case-in-chief on October 4, 2023 (A-204), Tucker moved for a judgment of acquittal on the continuous sexual abuse of a child and two counts of USC second degree (Counts 1, 2, and 7 of the Amended First Re-indictment, respectively). (A-205-11). On the continuous sexual abuse of a child charge, Tucker argued that there was insufficient evidence that Tucker committed three acts of sexual misconduct against T.A. while T.A. was under the age of 14. (A-205-11). As for Tucker's challenge to two counts of USC, he contended that there was no specific testimony regarding those alleged incidents. (*Id.*). The State opposed the defense motion, arguing, *inter alia*, that the exact time and date when the alleged sexual contact occurred was not an essential element of the charged USC offenses. (A-211-13). At the conclusion of argument, the Superior Court denied Tucker's motion, ruling:

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[3] *Hardin v. State,* 844 A.2d 982, 990 (Del. 2004); Supr. Ct. R. 8.

So the Defense has moved for motion for judgment of acquittal as to Rule 29 with respect to three of the counts in the indictment. And, of course, the standard here is the Court must view the evidence presented in a light most favorable to the non-moving party, the State in this case. So turning first to Count 1, Continuous Sexual Abuse of a Child, this is the Court's recollection of the victim's testimony. And, again, I did take notes when she was testifying. She testified that when she was 12 there was an incident where the defendant allegedly touched her vagina area over her clothes while she was sleeping or awakened her and did that when she was sleeping. So that was when she was 12. There was an incident she testified about when the defendant allegedly kissed her breasts. That was when she was 12. And then she also testified that there were numerous times when the defendant would hug her and rub his erect penis on her and ejaculate on her. I believe she also testified he was either naked or wearing a robe, only a robe when doing this. My recollection of her testimony is that these events occurred numerous times and that they began when she was 12 to 13 and continued into high school. So that gives us the three incidents that are required for a charge of Continuous Sexual Abuse of a Child. So the motion is denied as to Count 1.

Moving to Count 2, the Unlawful Sexual Penetration in the Third Degree – I'm sorry. It's now Unlawful Sexual Contact in the Second Degree. That charge requires that the victim be less than 18. She, apparently – and I did not write this down specifically – did not set that in a timeframe as far as an age. I understand that the indictment indicated this occurred on the 1st day of September 1998 when she was 14.

Again, the Delaware Supreme Court has made clear in the cases of *Phipps v. State* and *Clark v. State*. *Phipps v. State*, a 1996 decision, and *Clark v. State*, a 2006 decision, that the date of crime is not an element of the charge or element of the crime.

And viewing the testimony in the light most favorable to the State, the Court does find that a fact finder could conclude that the State had carried its burden to show that there was Unlawful Sexual

> Contact in Second Degree with regard to the alleged digital penetration of the alleged victim's vagina.
>
> So the motion is denied as to Count 2 of the indictment.
>
> Moving to Count 7 of the indictment, that alleges that on or about the 21st day April 1998, when the alleged victim was 13, that the defendant rubbed his erect penis on her body until he ejaculated.
>
> Again, the Court's recollection is that the alleged victim testified that these numerous events of hugging and rubbing his erect penis occurred from the age of 12 to 13 to high school.
>
> So, given that, the Court finds that the motion as to Count 7 should be denied.

(A-214-16).

The next day, the State *nolle prossed* Count 7 and two other counts of USC second degree (Counts 5-6 of the Amended First Re-indictment) (A-4, A-12-14), and filed a Second Amended Re-indictment removing those counts, amending the specific age of the victim requirement for Count 2 (USC) from 18 years of age to 16 years of age, and adjusting T.A.'s age at the time of the abuse in Counts 3 and 4. (A-4, 15-16). Prior to instructing the jury, the court recognized that Counts 3 and 4 contained similar age inaccuracies as Count 2 and made corrections to reflect that T.A. was "less than 16 years of age" at the time of the alleged sexual contacts. (A-282-83, 316-18). Finally, the parties agreed to amend the outside date of the continuous sexual abuse of a child count. (A-287-88).

On appeal, Tucker now raises two contentions about his three USC convictions (Counts 2-4 of the Second Amended Re-indictment). (Opening Brief at 10). First, he claims the trial evidence was insufficient as to the three charges. (Opening Brief at 10). Second, he argues that "the indictment did not provide adequate notice of the conduct to be tried as constitutionally required." (Opening Brief at 15-17). Tucker failed to move for judgment of acquittal on Counts 3 and 4, and he did not raise his second contention below. (*See* A-205-11). Thus, his arguments regarding Counts 3 and 4 and inadequate notice are waived on appeal, unless Tucker can show plain error.[4] He cannot. Further, even if Tucker had not waived this issue, neither contention is a basis for appellate relief on any of the USC convictions.

The Superior Court's denial of a motion for a judgment of acquittal (A-215-16) is reviewed *de novo* on appeal "…to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt of all the elements of the crime."[5] "Delaware law draws no distinction between direct and circumstantial evidence."[6]

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[4] Supr. Ct. R. 8; *Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992).

[5] *Lum v. State*, 101 A.3d 970, 971 (Del. 2014). *See also Bethard v. State*, 28 A.3d 395, 369 (Del. 2011); *Seward v. State*, 723 A.2d 365, 369 (Del. 1999); *Smith v. State*, 2024 WL 2744562, at *4 (Del. May 28, 2024).

[6] *Thomas v. State*, 2016 WL 3913460, at *2 (Del. June 1, 2016) (citing *Morgan v. State*, 922 A.2d 395, 400 (Del. 2007)).

The trial testimony of the complaining witness T.A. was sufficient to prove the three allegations of second degree USC submitted to the jury. To prove second degree USC, the State was required to establish beyond a reasonable doubt three elements: (1) Tucker had "sexual contact" with T.A.; (2) T.A. was less than 16 years of age; and (3) Tucker acted intentionally.[7] (A-321-22).

"'Sexual contact' means defendant intentionally touched a person's anus, breast, buttocks or genitalia where a reasonable person, under the circumstances, would find the touching was intended to be sexual in nature. Sexual contact includes touching through clothing." (A-320).

As to the allegation in Count 2 that "Tucker, on or about the 1st day of September 1998, … did intentionally have sexual contact with T.A., who was less than 16 years of age, … [by] intentionally touch[ing] the vagina of T.A., who was less than 14 years of age, with his hand" (A-15, 317), T.A. testified at trial, "[t]here was a time that he put his finger in my vagina." (A-154). For Count 3, which alleged that "Tucker, on or about the 1st day of September 1996 … did intentionally have sexual contact with T.A., who was less than 16 years of age, … [by] intentionally touch[ing] the vagina of T.A., who was 12 years old, with his hand" (A-316-17), T.A. testified that when she was 12 years old and sleeping in bed, she felt Tucker

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[7] 11 *Del. C.* § 768 (1995).

touching her vaginal area over her clothing. (A-145-46). Also, when she was 12 years old, T.A. testified that while sitting on her parents' bed, Tucker "started kissing me on my breasts" over my clothes. (A-147). The breast kissing incident was Count 4 in the indictment, which alleged that "Tucker, on or about the 1st day of September 1996, … did intentionally have sexual contact with T.A., who was less than 16 years of age … [by] intentionally touch[ing] the breasts of T.A., who was 12 years old, with his lips and mouth." (A-318). This trial testimony of T.A. (A-145-47, 154), considered in the light most favorable to the prosecution, established a reasonable basis for the jury to find the three statutory elements of second degree USC (A-321-22) beyond a reasonable doubt, and was thus a sufficient basis for the trial judge who had heard T.A.'s trial testimony earlier that day to deny the defense motion for a judgment of acquittal as to one of the three challenged allegations of second degree USC. (A-215-16).

In addition to challenging the sufficiency of the evidence for Counts 2-4 of the amended indictment, Tucker now argues that the indictment did not provide him with adequate notice as to the dates when the three incidents of second degree USC occurred. (Opening Brief at 15-17). Tucker's argument is without merit. Tucker's jury was instructed that, "[t]he exact times and dates when the alleged crimes

occurred are not essential elements of the charged offenses." (A-322). This jury instruction is an accurate statement of Delaware law.[8]

An indictment has two functions: (1) placing the accused on notice as to what he must defend; and (2) identifying the matter sufficiently to preclude a subsequent prosecution for the same offense.[9] The dual purposes of providing notice and affording double jeopardy protection are fulfilled if the indictment "contains a plain statement of the elements or essential facts of the crime."[10] In determining whether an indictment provides fair notice, the allegations are accorded "the most liberal construction."[11]

Tucker's indictment (A-15-16), as amended at the beginning of trial without defense objection (A-136-38), was sufficient to charge a crime and inform the defendant of the allegations against him. It appears that a reason for the indictment amendments was to amend Count 2 to a USC second degree charge (A-12), which count had previously been charged in the June 5, 2023 re-indictment as fourth degree rape (A-6, 136-38) and in the July 3, 2023 second re-indictment as third degree

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[8] *See Monastakes v. State*, 127 A. 153, 154 (Del. 1924); *Clark v. State*, 2006 WL 1186738, at *1 (Del. May 2, 2006) ("[P]roof of when the acts allegedly occurred is sufficient if the offenses were committed within the applicable statute of limitations."); *Phipps v. State*, 1996 WL 145739, at *2 (Del. Feb. 16, 1996).

[9] *Malloy v. State*, 462 A.2d 1088, 1092 (Del. 1983); *Brooks v. State*, 2018 WL 5980577, at *3 (Del. Nov. 13, 2018).

[10] *Malloy*, 462 A.2d at 1092; Del. Super. Ct. Crim. R. 7 (c)(1).

[11] *Howard v. State*, 2009 WL 3019629, at *4 (Del. Sept. 22, 2009).

unlawful sexual penetration. (A-9, 136-38). The October 5, 2023 second amended re-indictment (A-15-16, 317) left Count 2 factually the same, but corrected the victim's age requirement set forth in 11 *Del. C.* § 768. It also dropped three of the other USC allegations. (*Compare* A-12-14 *with* A-15-16). While the offense charged in Count 2 changed several times (A-6, 9, 12, 15, 317), the pertinent time period ("on or about the 1st day of September 1998") alleged remained the same. Similarly, the alleged pertinent time period ("on or about the 1st day of September 1996") did not change for Counts 3 and 4. (A-6, 10, 13, 16, 317-18).

If Tucker was concerned about the time period alleged in Counts 2, 3, and 4, his pretrial remedy was to move to quash those Counts in the June 5 re-indictment.[12] Superior Court Criminal Rule 12(b)(2) requires that an objection based on defects in an indictment, other than lack of jurisdiction or failure to charge a crime "must be raised prior to trial."[13] A failure to challenge an indictment pretrial is deemed a waiver.[14] If an accused is unsure as to what conduct is being alleged in an indictment, the defendant may also request a bill of particulars.[15] Tucker took no

[12] *See State v. Deedon*, 189 A.2d 660, 663 (Del. 1963).
[13] *See Malin v. State*, 2008 WL 2429114, at *2 (Del. June 17, 2008); *Shockley v. State*, 2004 WL 1790198, at *2 (Del. Aug. 2, 2004).
[14] *See Malloy*, 462 A.2d at 1092.
[15] *See* Del. Super. Ct. Crim. R. 7(f); *Luttrell v. State*, 2014 WL 3702683, at *5 (Del. July 15, 2014).

such pretrial action to clarify any of the time periods alleged in Counts 2 thru 4, charging second degree USC.

Tucker cannot demonstrate any prejudice to his trial defense as a result of the indictment amendments or the time periods alleged for Counts 2 thru 4. Tucker testified in his own defense at trial. (A-248-74). In his testimony, he denied all of the allegations of sexual misconduct involving T.A. (A-252, 262-63, 268). Likewise, Tucker denied making a 3-way incriminatory telephone call to T.A. and her mother where he apologized for his misconduct. (A-264, 273-74). Given this defense of a blanket denial of all criminal allegations, the time periods alleged for the USC charges were of no importance to the trial defense Tucker presented.

II. THERE WAS NO EVIDENCE OF JURY CONFUSION IN THE INSTRUCTIONS.

QUESTION PRESENTED

Whether the jury instruction stating that "[t]he exact times and dates when the alleged crimes occurred are not essential elements of the charged offenses" (A-211), created jury confusion.

STANDARD AND SCOPE OF REVIEW

Where an objection was raised, "[a] trial judge's evidentiary rulings will not be set aside by this Court absent an abuse of discretion."[16] Evidentiary issues that were not raised before the trial court may be reviewed only if the error constitutes plain error affecting substantial rights.[17] Evidentiary issues that are affirmatively waived are not properly reviewable on appeal under any standard.[18]

MERITS OF THE ARGUMENT

During the trial, the State advised the trial judge about two cases, Richard Phipps and James T. Clark, holding that "the exact time of an offense is not an

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[16] *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008) (citations omitted).
[17] *Lowther v. State*, 104 A.3d 840, 845 (Del. 2014). *See Kostyshyn v. State*, 51 A.3d 416, 419 (Del. 2012).
[18] *See Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) (citing *King v. State*, 239 A.2d 707, 708 (Del. 1968)). *See also Pumphrey v. State*, 2019 WL 507672, at *3 (Del. Feb. 8, 2019).

essential element."[19] (A-188-89). The next morning at the in-chambers prayer conference (A-282-87), the State requested that the draft jury instruction be modified to state: "The exact times and dates when the alleged crimes occurred are not essential elements of the charged offenses." (A-285). When the trial judge then asked if there was any objection to the modification, Tucker's defense counsel said, "I don't have an objection." (A-285). This affirmative statement of no objection by defense counsel constitutes a waiver of any objection to the later jury instruction to the same effect.[20] (A-322).

On appeal, new counsel for Tucker now argues, "The trial court did not explain how this instruction interacted with the age element of the offenses, and thus, at a minimum, created a reversable 'potential for juror confusion' by suggesting that the State was not strictly required to meet its burden as to the age element." (Opening Brief at 18-19). Even if this belated objection is not waived (A-285), and is reviewed on appeal for plain error,[21] Tucker has not carried his burden of persuasion in demonstrating any jury confusion.[22]

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[19] *Phipps v. State*, 1996 WL 145739, at *2 (Del. Feb. 16, 1996); *Clark v. State*, 2006 WL 1186738, at *1 (Del. May 2, 2006).
[20] *See Stevenson*, 149 A.3d at 509 (citing *King*, 239 A.2d at 708). *See also Pumphrey*, 2019 WL 507672, at *3.
[21] Del. Supr. Ct. R. 8; *Gregory v. State*, 293 A.3d 994, 998 (Del. 2023).
[22] *See Swan v. State*, 820 A.2d 342, 355 (Del. 2003).

"The primary purpose of jury instructions is to define with substantial particularity the factual issues and clearly to instruct the jury as to the principles of law [that] they are to apply in deciding the factual issues presented in the case before them."[23] Superior Court Criminal Rule 30 provides: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." "The purpose of the rule is to alert the trial judge to an objection and to provide the court with a chance to address the objection before the jury deliberates."[24] Here, there was no defense objection to the now challenged jury instruction at the prayer conference (A-285), nor any defense exception to the charge after the jury was instructed. (A-335).

Jury instructions must be viewed as a whole with no statement "viewed in a vacuum."[25] Thus, the instruction about "the exact times and dates" (A-322) must be read in conjunction with the other jury instructions that set forth the specific age of the victim requirement for each of the four crimes. (A-319, 321). Any inaccuracy

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[23] *Zimmerman v. State*, 565 A.2d 887, 890 (Del. 1989) (quoted in *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001)).
[24] *Hastings v. State*, 289 A.3d 1264, 1290 (Del. 2023).
[25] *See Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998); *Flamer v. State*, 490 A.2d 104, 128 (Del.), *cert. denied*, 464 U.S. 856 (1983).

in the jury instructions only requires reversal if the deficiency "undermined…the jury's ability to 'intelligently perform its duty in returning a verdict.'"[26]

Here, the jury was instructed that in order to convict Tucker of Count 1 charging continuous sexual abuse of a child, they had to find beyond a reasonable doubt that "The child was less than 14 years of age at the time of the sexual acts." (A-319). For Counts 2, 3, and 4, the jury was informed that they had to find that each sexual contact occurred when the child "was less than 16 years of age…." (A-321). A jury is presumed to follow the trial judge's instructions.[27]

If Tucker did not waive any objection (A-285, 335) to "the exact times and dates" jury instruction (A-322), "an unpreserved claim that a jury instruction was erroneous is subject to plain-error review."[28] "Under plain error review, the error complained of must be so clearly prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial."[29] The burden of persuasion in demonstrating that the belatedly claimed error is prejudicial is on the defendant.[30]

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[26] *Flamer*, 490 A.2d at 128 (quoting *Newman v. Swetland*, 338 A.2d 560, 562 (Del. 1975)).
[27] *See Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017); *Hamilton v. State*, 82 A.3d 723, 726 (Del. 2013); *McNair v. State*, 990 A.2d 398, 403 (Del. 2010).
[28] *Howell v. State*, 268 A.3d 754, 771 (Del. 2021).
[29] *Swan*, 820 A.2d at 355 (citing *Capano v. State*, 781 A.2d 556, 653 (Del. 2001)).
[30] *See Morgan v. State*, 962 A.2d 248, 254 (Del. 2008); *Hastings*, 289 A.3d at 1271.

Tucker has not carried his burden of persuasion in demonstrating any plain error in the challenged jury instruction. (A-322). While Tucker argues that the instruction created the potential for jury confusion, the jury did not send out any questions after retiring to deliberate. (A-334-38). Thus, the claim of jury confusion about the instructions amounts only to speculation without any evidentiary support. This is insufficient to establish plain error.

The "exact times and dates" (A-322) jury instruction accords with long standing Delaware law. In 1924, this Court noted in *Monastakes v. State* that, "It has been repeatedly held in this [S]tate as well as elsewhere that in a criminal prosecution the [S]tate is not bound to prove the precise date laid in the indictment, it being sufficient if the evidence shows the alleged offense to have been committed at any time within the period mentioned by the applicable statute of limitations if any."[31] More recently, this Court has continued to follow the *Monastakes* precedent.[32] The jury instruction was legally correct, and Tucker has shown no plain error.

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[31] *Monastakes v. State*, 127 A. 153, 154 (Del. 1924).
[32] *Clark, supra*, at *1; *Phipps, supra*, at *2.

III. INACCURACIES IN THE SECOND AMENDED RE-INDICTMENT WERE CORRECTED IN THE FINAL JURY INSTRUCTIONS.

QUESTION PRESENTED

Whether inaccuracies in Counts 3 and 4 (A-16) of the second amended re-indictment filed during trial, but corrected in the Superior Court's final jury instructions (A-317-18, 321), were prejudicial to the defendant.

STANDARD AND SCOPE OF REVIEW

When no timely and pertinent objection is raised to arguments complained of on appeal, this Court reviews only for plain error.[33] The burden is on the defendant to demonstrate plain error.[34]

MERITS OF THE ARGUMENT

On October 4, 2023, the State filed an amended seven count indictment in Tucker's prosecution. (A-12-14). Thereafter, during the trial, the presiding judge asked the State to file an amended indictment after it granted the State's unopposed request to amend Count 2 from unlawful sexual penetration third degree to USC second degree. (A-136-38, 221-22). In response, the State on October 5 filed the

[33] Del. Supr. Ct. R. 8; *Gregory v. State*, 293 A.3d 994, 998 (Del. 2023); *Pollard v. State*, 284 A.3d 41, 44 (Del. 2022).
[34] *Id.*

requested second amended re-indictment, which also removed three counts of USC (previous Counts 5-7) from the prior amended indictment. (A-15-16). Counts 3 and 4 charging second degree unlawful sexual contact (USC) in the second amended re-indictment (A-16) contained inaccuracies, however.

The statute in effect in 1996 for second degree USC required that the victim be less than 16 years of age.[35] Counts 3 and 4 of both the first amended indictment (A-13) and the second amended re-indictment (A-16) charged that the victim, T.A., "was less than eighteen years of age." (A-13, 16). This was incorrect. Counts 3 and 4 should have alleged that the victim was "less than 16 years of age."[36]

The second amended re-indictment contained an additional drafting error in Counts 3 and 4. (A-16). This last amendment charged that T.A. "was 16 years old" at the time of the USC offenses. (A-16). In the first amended indictment, Counts 3 and 4 alleged that the USC conduct occurred when T.A. "was 12 years old." (A13). Thus, there were two inaccuracies in Counts 3 and 4 of the second amended re-indictment. (A-16). At trial, there was no defense objection to the two drafting errors in Counts 3 and 4 of the second amended re-indictment.

On appeal, Tucker argues that his convictions for two counts of second degree USC as delineated in Counts 3 and 4 of the second amended re-indictment (A-16,

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[35] 11 *Del. C.* §768 (1995 Replacement Volume).
[36] *Id.*

338) must be reversed because of the two age drafting errors in Counts 3 and 4 of the second amended re-indictment. (Opening Brief at 21-22). There was no defense objection to the second amended re-indictment (A-15-16) filed during the trial. (A-221-22). In the absence of any defense trial objection to the two drafting errors in Counts 3 and 4 (A-16), this claim is waived and may now only be reviewed on appeal for plain error.[37]

To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial.[38] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[39] In demonstrating that a forfeited error is prejudicial, the burden of persuasion is on the defendant.[40]

Tucker has not carried his burden of persuasion in demonstrating plain error in the drafting deficiencies of Counts 3 and 4 of the second amended re-indictment. (A-16). While the second amendment contained two inaccuracies, it appears to have been drafted in haste during the trial between the conclusion of testimony and the

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[37] Del Supr. Ct. R. 8; *Hastings v. State*, 289 A.3d 1264, 1269-70 (Del. 2023); *Trump v. State*, 753 A.2d 963, 970 (Del. 2000).
[38] *See Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.), *cert. denied*, 479 U.S. 869 (1986).
[39] *Wainwright*, 504 A.2d at 1100.
[40] *United States v. Olano*, 507 U.S. 725, 734 (1993); *Swan v. State*, 820 A.2d 342, 355 (Del. 2003); *Stevenson v. State*, 709 A.2d 619, 633 (Del. 1009).

State's closing argument the next morning. (A-293-300, 282-83). In closing argument, the prosecutor made it clear that the allegations for both Counts 3 and 4 concerned a time when the complaining witness was 12 years old. (A-299).

Not only did the prosecution in closing argument expressly state that the two allegations of USC in Counts 3 and 4 concerned a time when T.A. was 12 years old (A-299), but the trial court's instructions to the jury thereafter correctly stated that the two charges of USC involved a time when T.A. "was less than 16 years of age" and that the actual criminal conduct by Tucker occurred when T.A. "was 12 years old." (A-317-18). In explaining the elements of proof required for the USC allegations, the trial judge expressly instructed the jury that the State had to prove that the victim "was less than 16 years of age at the time of the charged offense." (A-321).

Regardless of the deficiencies in the second amended re-indictment (A-16), the actual jury instructions (A-317-18, 321) accurately informed the jury what the State was required to prove as to the victim's age. Under these circumstances Tucker can show no plain error. He was convicted of two counts of USC in Counts 3 and 4 based upon accurate jury instructions.

IV. TUCKER WAIVED ANY OBJECTION TO THE AMENDMENT OF COUNT 2 OF THE INDICTMENT.

QUESTION PRESENTED

Whether defense counsel waived any objection when the State moved to amend Count 2 of the July 3, 2023 re-indictment. (A-136-38).

STANDARD AND SCOPE OF REVIEW

"This Court has held that where a party elects not to object, then a waiver has occurred, and plain error review is not available."[41] Issues that are affirmatively waived (A-136-38) are not reviewable on appeal.[42]

MERITS OF THE ARGUMENT

T.A., the complaining witness, was born in 1984, and was 39 years old when Tucker's trial commenced in October 2023. (A-142). At trial T.A. testified that Tucker began sexually molesting her when she was 12 years old after Tucker married her mother and moved into her mother's home. (A-144-47). Thus, by the time of

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[41] *Jones v. State*, 2015 WL 6941516, at *3 (Del. Nov. 9, 2015). *See also Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009) ("The plain error standard of appellate review is predicated upon the assumption of oversight."); *Mullen v. State*, 2024 WL 3421441, at *3 (Del. July 16, 2024).

[42] *See Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) (citing *King v. State*, 239 A.2d 707, 708 (Del. 1968)); *Pumphrey v. State*, 2019 WL 507672, at *3 (Del. Feb. 8, 2019).

trial in 2023, the allegations of sexual misconduct by Tucker were over two decades old. This passage of time apparently led to some uncertainty by the State as to the appropriate charge for Count 2 of the indictment where it was alleged that Tucker digitally penetrated T.A.'s vagina. (A-154).

Count 2 of the June 5, 2023 re-indictment charged this offense occurring on or about September 1, 1998 as fourth degree rape. (A-6). Count 2 in the July 3, 2023 re-indictment contained the same factual allegation of digital penetration of T.A.'s vagina, but denominated the offense as third degree unlawful sexual penetration. (A-9).

On the morning of the second day of trial (October 4, 2023), the trial judge informed counsel that after researching the statutory history, it appeared that the sexual misconduct alleged in Count 2 as third degree unlawful sexual penetration, a Class C felony, was changed in 1998. (A-136-37). In response to this information provided by the Superior Court, the prosecutor stated: "Given what Your Honor has presented, I think at this point in time the State would like to amend Count 2 to Unlawful Sexual Contact, in that date range, Second Degree, rather than the USP." (A-137). Defense counsel then informed the Court, "Since we're going from a Class C felony to a Glass G felony, there's no objection." (A-138). With no defense objection, the trial judge granted the State's request to amend Count 2 to charge second degree unlawful sexual contact (USC). (A-138).

Count 2 of the October 4, 2023 amended re-indictment now charged Tucker with second degree USC for intentionally touching T.A.'s vagina with his hand. (A-12). Thereafter, although Count 2 was corrected to reflect the correct victim age requirement ("less than 16 years of age") set forth in 11 *Del. C.* § 768 (1995), the factual allegation in Count 2 was unchanged in the October 5, 2023 second amended re-indictment. (A-15).

On appeal, Tucker argues that the October 4 amendment of Count 2 to charge second degree USC was improper and that his conviction for that Count (A-338) must be reversed. (Opening Brief at 23-24). Tucker is incorrect because defense counsel at trial affirmatively waived any objection to the re-indictment amendment. (A-138).

Superior Court Criminal Rule 7(e) provides: "The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged, and if substantial rights of the defendant are not prejudiced."[43] Here, the amendment of Count 2 of Tucker's re-indictment (A-137-38) did charge a new offense. Nonetheless, by affirmatively agreeing to the

[43] *See Benson v. State*, 2020 WL 6554928, at *5 (Del. Nov. 6, 2020); *Shockley v. State*, 2004 WL 1790198, at *2 (Del. Aug. 2, 2004).

amendment (A-138), defense counsel waived any right to contest this matter further even for plain error.[44]

"[T]he plain error standard is intended to correct errors that are forfeited, not those that are waived…."[45] "Plain error assumes oversight."[46] "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional' relinquishment or abandonment of a known right."[47]

"[O]nly forfeited errors are reviewable for plain error."[48] When a failure to object is coupled with counsel's affirmative statements to a court agreeing to the amendment (A-138), any claim that the amendment is improper is waived.[49] Tucker's defense counsel affirmatively stated that he was refraining from objecting to the re-indictment amendment because the defendant would be facing a less punitive charge ("we're going from a Class C felony to a Class G felony….") (A-138). This was a reasonable strategic decision by experienced defense counsel. Any belated argument about the propriety of the re-indictment amendment (A-138) was

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[44] *See Bordley v. State*, 2020 WL 91078, at *5 (Del. Jan. 7, 2020).
[45] *Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) (Walsh, J., Dissent).
[46] *Robinson v. State*, 3 A.3d 257, 261 (Del. 2010).
[47] *United States v. Olano*, 507 U.S. 725, 733 (1993).
[48] *Warner v. State*, 2001 WL 1512985, at *1 (Del. Dec. 12, 2001). *See also Williams v. State*, 34 A.3d 1096, 1098 (Del. 2011); *Stevens v. State*, 3 A.3d 1070, 1076-77 (Del. 2010).
[49] *See Pierce v. State*, 270 A.3d 219, 230 (Del. 2022) (admission of palmprint evidence).

affirmatively waived at trial, and the question may not be reviewed here on appeal even for plain error.[50] This fourth appellate claim should be summarily rejected as waived.

Tucker can also demonstrate no prejudice to his subsequent trial defense after Count 2 was amended. (A-138). The complaining witness testified, "There was a time that he put his finger in my vagina." (A-154). Tucker's trial defense was a blanket denial of all allegations of sexual misconduct toward T.A. (A-252, 268). Amending Count 2 before the witness testimony commenced did not impact the trial defense of Tucker.

[50] *Stevenson*, 149 A.3d at 509.

V. THERE WAS NO CUMULATIVE ERROR.

QUESTION PRESENTED

If the individual claims of error are insufficient, is a claim of cumulative error an independent basis for appellate relief.

STANDARD AND SCOPE OF REVIEW

"Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[51]

MERITS OF THE ARGUMENT

Tucker claims that cumulative errors in the multiple indictments and amendments in his case require reversal of his jury convictions. (Opening Brief at 25-26). However, "[c]umulative-error must derive from multiple errors that caused 'actual prejudice.'"[52] Tucker has failed to establish cumulative error because none of his four preceding claims is meritorious, nor has he established prejudice as a result of any of those claims.[53]

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[51] *Swan v. State*, 248 A.3d 839, 869 (Del. 2021) (quoting *Michaels v. State*, 970 A.2d 223, 231-32 (Del. 2009)). *See Hoskins v. State*, 102 A.3d 724, 735 (Del. 2014).
[52] *Michaels*, 970 A.2d at 231 (citing *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008)).
[53] *Id.*, at 232. *See also Ashley v. State*, 85 A.3d 81, 89 (Del. 2014); *Abbatiello v. State*, 2020 WL 7647926, at *6 (Del. Dec. 22, 2020); *Crump v. State*, 2019 WL 494933, at *6 (Del. Feb. 7, 2019); *Johnson v. State*, 2015 WL 8528889, at *3 (Del. Dec. 10, 2015).

"[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."[54] The applicable adage is that "zero plus zero equals zero."[55] Aggregating non-errors is not a basis for appellate relief here.

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[54] *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990).
[55] *In re Virsnieks*, 2011 WL 2449278, at *8 (Wisc. App. June 21, 2011).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: July 29, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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