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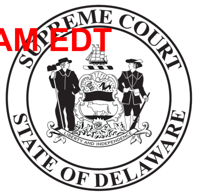

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

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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.

Merits of Argument

The Opening Brief (at 10—11) recognized that the State is generally not required to identify the date of the alleged conduct in an indictment but argued that *when it chooses to do so* – as it did in this case – it is required to prove as much. Because the Answer does not dispute any part of this argument, does not address controlling authority cited in the Opening Brief (nn. 9—12, 20),[1] and adopts (Answer at 1) Tucker's reading of the record, that "the State failed to present

[1] *Keller v. State*, 425 A.2d 152, 155 (Del. 1981) ("[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"); *Duncan v. State*, 791 A.2d 750 (Del. 2002) (requiring State "to prove [its case] … in a manner consistent with the facts set forth in the indictment"); *Stirone v. United States.*, 361 U.S. 212 (1960) (reversing conviction where statutory elements were supported by evidence, but specific averments in indictment were not); *see State v. Brown*, 2022 WL 2204890, at *1–3 (Del. Super. Ct. June 16, 2022) (distinguishing 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); *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").

evidence aligning the criminal conduct with the timing alleged in the indictment" (Op. Br. at 2), this claim should be deemed waived or conceded.

Similarly, when addressing the notice-based iteration of the claim (Op. Br. at 15—17) the Answer asserts (at 15) "[i]f Tucker was concerned about the time period alleged in Counts 2, 3, and 4, his pretrial remedy was to move to quash those Counts." This point is not responsive to the argument. Neither the Opening Brief, nor the record below suggest the issue was "concern[] about the time period alleged" in the indictment; to the contrary, he relied on and sought to enforce the time period alleged ("on or about" precisely identified dates), whereas the State apparently had concerns about its burden as to that time period for which the remedy was to reindict, or seek to amended to a date range that reflected the evidence.

Scope of Review

Tucker argued that this claim was preserved by his motion for judgement of acquittal (MJA) which "was premised on the view that the State was obligated to abide by the dates in the indictment [and that t]he trial court's denial of the motion was based in part on a rejection of that premise, and thus preserves the instant claim." Op. Br. n.3. The State agrees that the MJA preserved the issue for Count 2 but argues a technicality as to Counts 3 and 4: because the MJA did not target those counts, neither did it preserve the issue as to those counts. Answer at 11.

The State is correct that trial counsel only applied the argument to Count 2, but that fact is a red herring. Rule 8 considers whether "the question" was presented, and the question – whether the State is obligated to prove dates specifically identified in an indictment – was presented (as the State's concession as to Count 2 acknowledges); that trial counsel did not apply that question to Counts 3 and 4 is curious, but ultimately irrelevant to the standard of review because the State has not identified, or even suggested, that there is any meaningful difference in how "the question" would apply to those other counts, and has even adopted (Answer at 1) Tucker's description of the trial judge's MJA ruling as resting "in part, on a position that the State had no obligation to prove that the conduct occurred 'on or about' the indicted dates." Op. Br. at 3. Trial counsel does not need to repetitively apply legal arguments to preserve claims for appeal. D.R.E. 103(b).

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

The Op. Br. (at 18—19) argued that telling the jury that they need not "find beyond a reasonable doubt that it happened on a specific date" (A295) reversibly risked confusing the jury into believing that the State did have to prove the date alleged in the indictment, or date-dependent elements of the crimes such as the complaining witness's age. The Answer does not dispute that the instruction (A324) risked such confusion, and instead relies on two flawed legal propositions to argue that risk does not require reversal.

First, the Answer takes the novel position that instructions which risk confusing a jury as to their fundamental obligations are only problematic if the appellant proves the jury was in fact so confused. Answer at 18. Relying on this legal error, the State argues without a jury note reflecting confusion, this claim is "speculation." Answer at 21. This position is irreconcilable with *Probst v. State* in which the Court reversed based on the "*potential* for juror confusion" and explained "[w]e need not, and indeed probably could not in each case, satisfy ourselves that the jury was in fact confused."[2] Requiring evidence of actual confusion is unworkable because a confused jury may not produce evidence of that confusion.

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[2] *Probst v. State*, 547 A.2d 114, 119–20 (Del. 1988).

The State also argues that the instruction's suggestion that the State need not prove the date of the incident is a correct statement of the law. Answer at 21. It supports this with a quotation from *Monastakes v. State*,[3] a 100-year-old decision which it claims "this court has continued to follow" in two more recent opinions: *Clark v. State* and *Phipps v. State*.[4] Answer at 21. The State misreads all three cases. *Phipps* and *Clark* "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" (Op. Br. at 13) and are entirely unrelated to the issue and the trial court's reliance on them reflects its error. A190; A215. As to *Monastakes*, the quote provided by the State – "the [S]tate is not bound to prove the precise date laid in the indictment" – can be understood to support the State's contention when read in isolation, but in the context of the opinion as a whole, the *Monastakes* Court was not making the point which the State now attributes to it.

The *Monastakes* indictment alleged a crime on April 11, 1923. The State first convicted Monastakes in municipal court where it presented evidence of a crime on April 11, 1923, the indicted date. Monastakes appealed that conviction to the Court of General Sessions,[5] where the State filed an indictment which, again, alleged a

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[3] *Monastakes v. State*, 127 A. 153, 154 (Del. 1924).
[4] *Clark v. State*, 2006 WL 1186738, at *1 (Del. May 2, 2006); *Phipps v. State*, 1996 WL 145739, at *2 (Del. Feb. 16, 1996).
[5] *See Albence v. Higgin*, 295 A.3d 1065, 1076 n.58 (Del. 2022) ("the [Court of General Sessions] was responsible for, among other things, trying non-capital

crime on April 11, 1923. At trial in the Court of General Sessions, however, the State presented evidence and convicted Monastakes of a crime on April 14, 1923, three days after the indicted date. In reversing the Court of General Sessions' conviction, the *Monastakes* explained,

> *the state was at liberty when the case was before the municipal court ... to offer ... evidence of the crime said to have been committed on the 14th. It did not do this, however. It presented evidence in that court solely with respect to the transaction of the 11th. .. [and by doing so] it exhausted its right under the* ***general rule*** *to elect which of the two transactions it would rely on.*[6]

The *general rule* – "the state is not bound to prove the *precise* date laid in the indictment" – applied in *Monastakes* to explain why, in municipal court, the State would have been permitted to prosecute the April 14th incident; specifically, because it was a negligeable three days after the "precise date." But *precise date* is a loadbearing phrase: the *Monastakes* Court did not say or suggest that the State was wholly unbound by the date laid in the indictment (as argued in the Answer), and that the *Monastakes* Court would have permitted a three-day variance is not analogous to the circumstances herein where nothing remotely close to the "precise date" was established.

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criminal cases. The court was abolished in 1951, and its responsibilities were assumed by the newly organized Superior Court.")

[6] *Monastakes*, 127 A. at 154.

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.

The Opening Brief (at 22) argued that 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." The Answer (at 23) recognizes that Counts 3 and 4 failed to set forth the elements of the crime, and that "the essential facts" do not constitute the alleged crime. This is a concession that Tucker was deprived of his fundamental right to be prosecuted pursuant to an indictment issued by the grand jury and requires reversal.

The State is correct that the facts and elements addressed in the prosecutor's closing argument and identified in the instructions do not contain the same flaw as the indictment; but that doesn't matter unless the constitutional requirement of a grand jury issued indictment can be replaced by properly describing the allegations to the petit jury, a novel proposition for which the State has provided no support, and would effectively render DE CONST. Art. 1, § 8 superfluous.

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.

The Opening Brief (at 23—24) argued that the version of Count 2 of which Tucker was convicted was the result of an invalid amendment, and therefore the conviction must be reversed. The Answer (at 28) concedes this error, but argues the claim was affirmatively waived (28—30) and Tucker was not prejudiced (30).

As to the prejudice argument, this Court made clear in *Johnson v. State* that "the prejudice caused by the Superior Court's substantive amendment of an indictment is always the same—the defendant loses the protection of … [an] indictment by the grand jury, that is guaranteed by Delaware Constitution."[7]

The waiver argument is also flawed. While a "no objection" statement does generally waive "evidentiary issues,"[8] constitutional rights (like Tucker's right to an indictment) require knowing, intelligent, and voluntary waivers,[9] and waivers of indictment specifically require a defendant to be "advised of the nature of the charge

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[7] *Johnson v. State*, 711 A.2d 18, 26 (Del. 1998).
[8] *See Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) ("*Evidentiary issues* that are affirmatively waived are not reviewable on appeal") (emphasis added).
[9] *Wall v. State*, 865 A.2d 522 (Del. 2005).

and of the[ir associated] rights."[10] These requirements were not satisfied. The supposed waiver occurred during a prayer conference first thing in the morning, when Tucker may not have even been present. Further, given that this "amendment" was prompted *sua sponte* by the judge, Tucker could not have discussed it previously with trial counsel. And finally, even if the Court assumes Tucker was present, there is no record of him consenting to the amendment, there was no colloquy, and no waiver of indictment form. Especially given the irregularities and numerous amendments to the indictment, some guidance was certainly required for Tucker to intelligently waive this right.

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[10] Super. Ct. Crim. R. 7(b).

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

The State obtained three indictments, and two mid-trial amendments of the third indictment. Op. Br. at 1—2. Its errors were intimately related to what the Answer (at 24) describes as the "haste" in which (at least) the final version was apparently drafted. *Haste* is not acceptable when making drafting decisions which have *immediate* and *profound* impacts on the lives of presumptively innocent individuals whose rights prosecutors are tasked with protecting. *Haste* is also completely unnecessary; especially when the allegations at issue are alleged to have occurred nearly 20 years earlier. The State's suggestion that Tucker was indicted under the wrong statute because the "passage of time apparently led to some uncertainty by the State as to the appropriate charge" is just as concerning. Answer at 27. The State, of course, could have (*before* indicting) done the same research the judge's clerk did to determine the appropriate charge.

The State recognizes that (whether caused by haste, uncertainty, or something else), the indictment contained numerous errors (Answer at 23 and 27), and does not dispute that the prosecutor's abandonment of the prevailing practice of indicting a wide date range evinces a "disregard of this Court's *repeated* directive to the

Attorney General to 'review the internal practices and procedures employed in the preparation of indictments.'"[11] Op. Br. at 14. Reversal is appropriate.

[11] *Reyes v. State*, 2024 WL 1505677, at *7 (Del. Apr. 8, 2024).

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions[12] should be vacated.

Respectfully submitted,

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DATED: August 16, 2024

[12] 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.