

No. 127757

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF)	Appeal from the Appellate Court of
ILLINOIS,)	Illinois, No. 2-19-0329, 2-19-0452.
)	
Plaintiff-Appellee,)	There on appeal from the Circuit
)	Court of the Twenty-Second
-vs-)	Judicial Circuit, McHenry County,
)	Illinois, No. 15 CF 467.
)	
ROBERT LIBRICZ,)	Honorable
)	James Cowlin,
Defendant-Appellant.)	Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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ARGUMENT

The counts of the indictment charging Robert Libricz with predatory criminal sexual assault against K.L. contained fatal substantive defects that rendered them invalid by charging an offense that was not in effect during the time when the offense was alleged to occur.

Robert Libricz was charged with and convicted of two counts of predatory criminal sexual assault under counts 6 and 8 of an indictment alleging acts that occurred during a two-year period between March 27, 1995, and March 27, 1997. The offense of predatory criminal sexual assault did not take effect until May 29, 1996, so the offense did not exist during the first 14 months of the alleged time of the offense. The counts were fatally defective where the offense was not in effect during the entire two-year period charged in the indictment, and Libricz' convictions should be reversed on this basis. Alternatively, this Court should find Libricz was prejudiced in preparing a defense because of the substantive defects in counts 6 and 8, especially when considered in conjunction with related counts 7 and 9, which charged aggravated criminal sexual assault based on the same acts and which were dismissed on the day of trial,

The Charges Did Not Strictly Comply With The Charging Statute

The State argues that the indictment was not defective and "strictly complied" with 725 ILCS 5/111-3(a), which protects a defendant's right to notice and requires that the charges provide: (1) the name of the offense; (2) the statutory provision alleged to have been violated; (3) the nature and elements of the offense charged; (4) the date and county of the offense as definitely as can be done; and (5) the name of the accused. The State reasons that counts 6 through 9 were sufficient because they set forth the elements of both aggravated criminal sexual assault (counts

7 and 9) and predatory criminal sexual assault (counts 6 and 8) which were “in effect over portions of the time range alleged in the charges.” (State’s brief at 24-25) “[T]hese charges, standing alone, should be deemed compliant with § 111-3(a), because Counts 6 and 8 set forth the elements of the crime and at least one of the two identical legal provisions in effect over the time period alleged in the charges.” (State’s brief at 25)

The State does not explain how the individual counts in question comply with § 111-3(a)’s requirement that a charge provide “the name of the offense” and “the statutory provision alleged to have been violated.” Where neither the charged offense of aggravated criminal sexual assault nor predatory criminal sexual assault was in effect for the entire charged two-year period in each count, the defendant was not notified of the name of the offense or the statutory provision alleged to have been violated. Under the charging scheme here, Libricz was placed at risk of conviction for an offense that was not named or cited in the individual count of the indictment. The counts must be found to be defective where each of the four counts in question charges a substantial period of time when the named offense was not in effect. When the alleged time period straddles two different statutory offenses and only one is named in the indictment, the charge fails rather than “strictly complies” with § 111-3(a). The Second District in this case found the relevant counts of the indictment to be defective for this reason. *People v. Libricz*, 2021 IL App (2d) 190329-U, ¶ 40. This Court should similarly find counts 6 and 8 of the indictment to be defective and reject the State’s argument that the indictment “strictly complied” with § 111-3(a).

The State contends that “it would be imposing a burden on the People”

to “divide a defendant’s conduct into charges alleging the same act within a narrower period under different titles.” According to the State, such a burden runs counter to the rule that the date of the offense is not an element that the State must prove. (State’s brief at 25-26, 28) But this Court has recognized, “A defendant in a criminal prosecution has a fundamental due process right to notice of the charges against him; thus, a defendant may not be convicted of an offense he has not been charged with committing.” *People v. Clark*, 2016 IL 118845, ¶ 30. It must not be considered an undue burden on the State to comply with this due process right of a defendant. In fact, the reviewing court in *People v. Wasson*, 175 Ill.App.3d 851, 854-55 (4th Dist. 1988), prescribed that the State should charge defendants with separate offenses when the alleged time range of the charged acts straddles the effective date of related criminal statutes. The Court said the State should charge the defendant in that case under the old statute (aggravated indecent liberties with a child) for acts alleged to have occurred through the expiration of the old statute and to bring a separate charge under the new statute (aggravated criminal sexual assault) for acts committed after the effective date of the new statute. *Wasson*, 175 Ill.App.3d at 854-55. On remand, the State amended the information as suggested by the Fourth District and obtained convictions at a bench trial for charges brought under the older offense of aggravated indecent liberties with a child. *People v. Wasson*, 211 Ill.App.3d 264, 266 (4th Dist. 1991). This Court should find it would not be an undue burden on the State, especially in light of a defendant’s due process rights, to charge a defendant under the statute in effect at all times during the time period when the acts were alleged to have occurred.

The Substantive Defects In The Indictment Require Dismissal

The State argues the defects in the indictment do not warrant dismissal because there was no change in the elements of the offenses in question, the statute of limitations, or applicable punishment. “Only the name of the crime and its statutory citation changed.” (State’s brief at 18). To characterize the defect in the indictment as simply calling the offense by its wrong name greatly understates the nature of the defect. (State’s brief at 19) Rather, counts 6 and 8 charged Libricz and subjected him to prosecution for an offense that did not exist for 14 of the 24 months when act allegedly occurred. This is not a mere mislabeling of the charge and its statutory citation, but rather a substantial defect recognized to constitute plain error. *Wasson*, 175 Ill.App.3d at 854, citing *People v. Terry*, 170 Ill.App.3d 484 (4th Dist. 1988).

Further, this Court has recognized the defect caused by charging an offense based on a statute not in effect “is fatal, rendering the entire instrument invalid, and warranting reversal of defendants’ convictions.” *People v. Tellez-Valencia*, 188 Ill.2d 523, 527 (1999). The State argues *Tellez-Valencia* is distinguishable and should not control in this case. The State posits that the defendants in that case were charged with and convicted of predatory criminal sexual assault before the authorizing statute was found unconstitutional for violating the single subject rule in *Johnson v. Edgar*, 176 Ill.2d 499 (1997). (State’s brief at 18). The State argues *Tellez-Valencia* is further distinguishable because the charges of predatory criminal sexual assault in that case were based solely on acts that occurred before a crime existed under that name. (State’s brief at 19) In this case, the State argues, counts 6 and 8 included a period of time in which the crimes were properly labeled

predatory criminal sexual assault. Thus, the State argues, the indictment here was not defective or, alternatively, Libricz must demonstrate he was prejudiced by the defective indictment. (State's brief at 18-19)

The fact that the offense of predatory criminal sexual assault was in effect for the last 10 months of the 24-month period alleged in the indictment in this case does not render *Tellez-Valencia* inoperable here. In *Tellez-Valencia*, this Court favorably cited *People v. Wasson*, 175 Ill.App.3d 851, 854-55 (4th Dist. 1988), where, as in this case, the defective counts of the charging instrument alleged a time period when the offense both was in effect and was not in effect. *Tellez-Valencia*, 188 Ill.2d at 527. And, the Second District similarly cited *Wasson* in finding the indictments in this case to be defective.

As in *Wasson*, defendant was charged in counts VI and VIII with offenses that did not exist during a significant portion of the alleged periods. *Wasson* makes clear that those counts were defective to the extent they charged defendants for acts occurring prior to May 27, 1996, the effective date of the offense.

Libricz, 2021 IL App (2d) 190329-U, ¶ 40. Any factual distinction between *Tellez-Valencia* and the instant case does not mean that counts 6 and 8 are not fatally defective.

The State also argues that the charges in *Tellez-Valencia* should not have been found to be fatally defective and, therefore, *Tellez-Valencia* was wrongly decided. The State argues the dissent in *Tellez-Valencia* believed the charges set forth the elements of aggravated criminal sexual assault, but called the offense "by the wrong name," predatory criminal sexual assault. "The error could simply be cured by changing the name of the offense to aggravated criminal sexual assault." (State's brief at 19-20, citing *Tellez-Valencia*, 188 Ill.2d at 534-35 (Rathje, J.,

dissenting))

This Court rejected the same request by the State in *Tellez-Valencia* to amend the charging instruments on appeal to change the name of the offense charged from predatory criminal sexual assault to aggravated criminal sexual assault. The State reasoned that there was no prejudice to the defendants where each was apprised of the nature and elements from which he could prepare a defense, regardless of the name given to the offense. This Court found the amendment sought by the State would impermissibly cure a substantive, not a formal, defect, which may not be made on appeal. *Tellez-Valencia*, 188 Ill.2d at 527-28.

This Court should reject the State's invitation to overrule *Tellez-Valencia*. The reasoning of *Tellez-Valencia* is sound and protects the due process rights of Illinois criminal defendants to be notified of the precise offense of which they are charged. See *Clark*, 2016 IL 118845, ¶ 30. Overruling *Tellez-Valencia* and affirming Libricz' convictions would allow defendants to be charged and convicted of offenses that were not in effect at the time they were committed, an outcome that would seriously erode defendants' Fifth Amendment right to be informed of the nature and cause of the accusation against them and Illinois Constitution right to indictment by a grand jury. See *U.S. v. Ratliff-White*, 493 F.3d 812, 819-20 (7th Cir. 2007); U.S. Const. Amend. V; Ill. Const., Art. I, §7.

The Defendant Was Prejudiced By The Defective Indictment

The State argues that because Libricz challenges the sufficiency of the indictment for the first time on appeal, he must show he was prejudiced in preparing his defense. The indictment is sufficient if it "apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and to allow him

to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.” (State’s brief at 11-12, citing *People v. Rowell*, 229 Ill.2d 82, 94 (2008)) If Libricz must show prejudice from the defective counts of the indictment here, this Court should find he was prejudiced where the charged offenses were not in effect at all times alleged.

It is inherently prejudicial to be forced to answer to crimes for which a defendant cannot be lawfully convicted. The Fourth District in *Wasson* found a charging instrument, similarly defective to the indictment in this case, was fatally flawed and required dismissal, *Wasson*, 175 Ill.App.3d at 860. But the reviewing court also said that even though the information apprised the defendant of the nature, cause, and elements of the charge against him, he was prejudiced because it charged him for conduct which occurred before the statute came into effect. *Wasson*, 175 Ill.App.3d ta 860. This Court should apply this finding in *Wasson* and similarly find Libricz was prejudiced by being forced to defend against counts of an indictment where the charged offenses existed only for the final 10 months of the two-year period when the offenses were alleged to occur.

Libricz argued in his initial brief that the effect of counts 7 and 9 must be considered when assessing whether he was prejudiced when preparing his defense. Those counts alleged the same acts and time period as counts 6 and 8, but charged the offense of aggravated criminal sexual assault. Counts 7 and 9 contained the same defects as their counterparts by charging offenses that were not in effect at all times alleged in the indictments. Thus, Libricz was placed in the prejudicial position of being charged with alternative offenses alleging the same conduct, yet neither of the offenses was in effect for substantial periods of the two-year

time-frame alleged in the counts of the indictment. On the day of trial, the State dismissed counts 7 and 9 and proceeded to trial on the defective counts 6 and 8. (SC 1313)

The State argues that rather than impede Libricz' ability to prepare for trial, the contradictory counts assisted his trial preparation. "Although it was unnecessary for the People to charge the same conduct under two statutory names where the crimes were identical, charging guilt pursuant to alternative theories is neither unusual nor prejudicial. To the contrary, being charged under both names enabled defendant to defend against both of them and remove any possibility of prejudice." (State's brief at 15) The State's belief that the mirror-image defective counts of the indictment somehow aided Libricz' trial preparation is mistaken. Rather, Libricz was placed in the prejudicial position of being charged with alternative offenses alleging the same conduct, yet neither of the offenses was in effect for substantial periods of the two-year time-frame alleged in the counts of the indictment. Libricz actually faced substantially greater prejudice by being forced to defend multiple similarly defective indictments for each alleged act. The State's contention that multiple defective charges based on the same acts was beneficial for Libricz' trial preparation must be rejected.

The State further argues the charges in counts 6 and 8 sufficiently notified Libricz of the elements of the offenses and the window of time in which the acts occurred, and that Libricz defended against those charges at trial by disputing that the alleged acts of sexual penetration occurred. The State argues that because Libricz did not challenge the dates the offenses occurred, any uncertainty about the dates of the offenses did not prejudice him in preparing his defense. (State's

brief at 13, 16) But it must be recognized that the defense presented at trial was based on preparation under the defective indictments after the trial court denied his motion for a bill of particulars seeking to clarify the alleged dates of offenses in counts 6 through 9. It is unfair to say Libricz' denial of commission of the alleged acts demonstrates an ability to prepare a defense. It cannot be known what defenses Libricz might have presented if he had been able to prepare for trial under an indictment brought in proper form. This Court should reject the State's argument that Libricz' trial defense shows he was not prejudiced by the defective indictment.

Summary

Libricz has shown in his initial brief and this reply brief that counts 6 and 8 of the indictment are fatally defective by charging a 14-month time period before the offense of predatory criminal sexual assault was enacted into law. The Second District erred where it required Libricz to show he was prejudiced and concluded that Libricz suffered no prejudice from the defective indictment. This Court should reverse Libricz' two convictions and sentences for predatory criminal sexual assault resulting from the defective indictment. If this Court determines Libricz must show prejudice because he challenges the indictment for the first time on appeal, this Court should find Libricz has shown prejudice in preparation of his defense for trial and reverse his convictions and sentences for predatory criminal sexual assault.

CONCLUSION

For the foregoing reasons and those in his opening brief, Robert Libricz, respectfully requests that this Court reverse his convictions and sentences for predatory criminal sexual assault as charged in counts 6 and 8 of the indictment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 10 pages.

/s/Jeffrey Bruce Kirkham
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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 24, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Norma Huerta
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