No. 127757

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, Second District,
Plaintiff-Appellee,	)	Nos. 2-19-0329 & 2-19-0452
	)	
	)	There on Appeal from the Circuit
	)	Court of the 22nd Judicial
v.	)	Circuit, McHenry County, Illinois,
	)	No. 15 CF 467
	)	
ROBERT LIBRICZ,	)	The Honorable
	)	James Cowlin,
Defendant-Appellant.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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8/10/2022 9:54 AM
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POINTS AND AUTHORITIES

NATURE OF THE CASE

In 2015, defendant was charged with committing numerous sexual offenses, including two counts of predatory criminal sexual assault of a child based on acts of sexual penetration that occurred between 1995 and 1997. Following a bench trial, defendant was convicted of the predatory criminal sexual assault counts, along with other offenses, and sentenced to 18 years in prison. The Illinois Appellate Court affirmed the circuit court's judgment. A question is raised on the charging instrument: whether the counts of predatory criminal sexual assault were defective because sexual penetration of a child, though a crime throughout the period alleged, was not labeled "predatory criminal sexual assault of a child" until May 29, 1996.

ISSUES PRESENTED FOR REVIEW

1. Whether defendant's challenge to the indictment, raised for the first time on appeal, must fail because he cannot demonstrate that he was prejudiced in the preparation of his defense.

2. Whether the charges were sufficient, given that it is proper to allege that an act of sexual abuse occurred over a range of dates and the charges properly set forth all of the elements of the crime, regardless of whether the crime is labeled aggravated criminal sexual assault (as it was from 1995 to 1996) or predatory criminal sexual assault of a child (as it was from 1996 to 1997).

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted leave to appeal on January 26, 2022.

STATEMENT OF FACTS

A. Criminal Charges

In 2015, defendant was charged with 11 counts relating to sexual abuse of two of his daughters when the girls were minors. SC52-57.[1] The charges were timely filed within 20 years of each victim attaining the age of 18. *See id.* (citing 720 ILCS 5/3-6(j)(2)).

Counts 1 and 2 alleged predatory criminal sexual assault and criminal sexual assault of D.H. between 1999 and 2006. SC52.[2]

The remaining nine counts alleged abuse of K.L. Counts 3 through 5 pertained to acts between 1987 and 1994. SC53-54.

Counts 6 through 9 charged defendant with committing acts "on or between March 27, 1995 and March 27, 1997, inclusive." SC54-56. Count 6 alleged that defendant "committed the offense of predatory criminal sexual assault of a child" when he "knowingly committed an act of sexual penetration with K.L., who was under the age of 13 years," by "caus[ing] his

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[1] "SC_, " "SR_," "Def. Br.," and "A_" refer, respectively, to the secured common law record, secured report of proceedings, defendant's opening brief, and the appendix to that brief.

[2] The victim, called "D.L." in the indictment, was referred to by her married name, "D.H.," in subsequent proceedings.

penis to make contact with the vagina and/or anus of K.L.," in violation of 720 ILCS 5/12-14.1(a)(1). SC54. Count 7, based on the same act of sexual penetration, alleged that defendant committed the offense of aggravated criminal sexual assault in violation of 720 ILCS 5/12-14(b)(1). SC55; *see* SC275-76 (Counts 6 and 7 were based on a single act). Count 8 alleged that defendant committed predatory criminal sexual assault of a child when he "inserted his penis inside the vagina of K.L."; Count 9, based on that same act, alleged that defendant committed aggravated criminal sexual assault. SC55-56; *see* SC275-76.

Counts 10 and 11 charged defendant with criminal sexual assault between 1996 and 1998 for "plac[ing] his mouth and tongue on the vagina of K.L." and "insert[ing] his penis into the vagina of K.L." SC56-57.

B. Pretrial Motions

Defendant moved for a bill of particulars to further specify the dates on which the alleged offenses occurred. SC245-46. He acknowledged that "in cases of this nature[,] courts have allowed flexibility on date ranges in the charging instrument," but contended that "the threshold for charging a crime is not necessarily congruent with that necessary for the defendant to prepare a defense." SC245. Defendant asserted that "[t]here have been substantive law changes . . . within the date ranges," and that "in 1987 alone," during the time period referenced in Count 3, "there were two versions of Criminal Sexual Assault . . . at various points in the same year." *Id.*

The People responded that defendant had received extensive discovery setting forth the accusations of D.H. and K.L., which clarified the circumstances of each crime sufficiently to prepare his defense. SC274. Furthermore, despite the date ranges provided in each count, "there really were no changes in the law" because "the same type of sexual conduct" was criminalized; there was "simply renumbering and retitling of the same charges." SR1165.

The circuit court denied the motion for a bill of particulars, SC281, emphasizing that "the date of the offense is not an essential factor in child sex offense cases" and "[i]t is permissible to allege a range of dates in which the offenses allegedly occurred," SR1176. "As long as the crime occurred within the statute of limitations and prior to the return of the charging instrument, the State need only provide the Defendant with the best information it has," and here "the particular counts allege adequate information to allow the defense to prepare for trial." SR1177.

Defendant subsequently moved to dismiss the indictment as barred by the statute of limitations in effect at the time of each crime. SC249-54. His motion again acknowledged that the date on which a sexual offense occurred is not an element of the offense, but argued that "for purposes of the prosecution being barred, 'the allegation of a special time is an essential ingredient of the crime or the running of the period of limitation.'" SC251 (quoting *People v. Taylor*, 391 Ill. 11, 14 (1945)). The circuit court denied the

motion, SC332, holding that the charges were subject to legislative extensions of the statutes of limitations and were properly alleged to be timely, SR1302-03; *see* SC52-57 (citing 720 ILCS 5/3-6(j)(2)).

C. Bench Trial

The circuit court severed the counts pertaining to the two victims, SC137, and the People proceeded first with the crimes against K.L., SC316. The day before defendant's bench trial, the People dismissed Counts 7 and 9 (aggravated criminal sexual assault), SC336, and thus proceeded only on Counts 6 and 8 (predatory criminal sexual assault) with respect to the acts of sexual penetration that occurred between March 27, 1995 and March 27, 1997. The People also proceeded on Counts 3, 4, 5, 10, and 11.

K.L. testified that her date of birth was March 27, 1984, SR1331, and defendant's date of birth was August 8, 1960, SR1335. Her "earliest memory" was of riding in a car in her father's lap after a Christmas party between 1987 and 1989, when she awoke to find him fondling her vagina, with his fingers under her underwear. SR1341-44, 1417.

When K.L. was around 5 years old, between 1989 and 1990, defendant showered with her and asked her to "help clean him." SR1344. Defendant's "penis was erect" as he instructed her on how to clean it using a back and forth motion. SR1344-45. Defendant told her that she "was doing a very good job." *Id.*

When K.L. was "about nine years old," she was sleeping in her parents' bedroom when she awoke to find defendant "performing oral sex" on her. SR1347. Around the same "time frame," when she was 9 or 10, she was again in her parents' bedroom for "[o]ne of the first times he ever placed his penis inside [her]." SR1347-48. She guessed that she was nine but stressed, "I don't have a time machine to go back" and say "it was exactly this day." SR1348. She recalled that defendant "was going very slow" and "rubbing his penis" against her and "slowly sticking the tip in" her vagina. SR1348-49.

When K.L. was "about 11," she was sleeping face down on the couch in the living room when she "woke up with him on top" of her trying to "penetrate [her] from behind." SR1349. Defendant was "trying to penetrate [her] vagina," but "he couldn't get it in," and his penis kept "slipping up" and "almost going into [her] anus." SR1351. She kept "pulling away from it because it hurt." *Id.* This ended when defendant saw K.L.'s sister watching. SR1353-54.

K.L. next recounted an incident that took place around the time of "a sixth grade dance." SR1355. She asked defendant for permission to attend the dance, and he told her she had to shower first. SR1355. Halfway through the shower, defendant came in. SR1356. Defendant "bent [her] over" and put her "on [her] knees," then penetrated her from behind with his penis. SR1357-58.

When K.L. was "between 12 and 13 years old," she was again sleeping in her parents' bed and woke to find defendant "performing oral sex" on her. SR1359. They heard her mother enter the house through the garage door, and defendant jumped up and told her to run to her room. SR1359-60. Around the same time, when K.L. was between 12 and 13 years old, and while everyone was using the pool in the backyard in the summer, she went inside the house. SR1361. Defendant followed her, brought her to the kitchen table, bent her over, moved her swimsuit to the side, and "then he penetrated [her] from behind again with his penis." SR1362.

K.L. testified that in 2015, she went to the McHenry County Sheriff's Office with her sister, D.H., to report defendant's abuse. SR1372-73.

D.H. testified about the other charged acts of abuse. *See* SC179-83 (motion to admit evidence of other crimes pursuant to 725 ILCS 5/115-7.3), SC185 (granting motion). She was born on May 4, 1992, SR1473, and when she was between 5 and 7 years old, she recalled going to a dance with defendant and wearing a white dress with a flower on the chest, SR1478. That night she was in defendant's bedroom with her dress off, and he picked her up by the shoulders, seated on her on a desk, spread her legs open, and "put his pinky finger in [her] vagina." SR1479-80. When D.H. was around 13 years old, she fell asleep in her parents' bed and awoke to find defendant's hand inside of her underwear, and "he was rubbing the outside of [her] vagina and sticking his fingers inside of [her] vagina." SR1480-81.

The circuit court convicted defendant of Counts 4, 5, 6, 8, 10, and 11, but acquitted him of Count 3. SC345. The court found that "[t]he State has proven beyond a reasonable doubt the age elements," and "[t]he issue in dispute is whether or not penetration occurred" for each count. SR1813. "Although the Court [found K.L.] to be a credible witness pertaining to all of the testimony she gave," with respect to Count 3, it could not "say beyond a reasonable doubt that penetration occurred based on a memory of an event occurring at such a young age." SR1814.

But the court found beyond a reasonable doubt that the remaining incidents of sexual abuse occurred. SR1815-22. With respect to Count 6, the court found that K.L. credibly testified that defendant penetrated her while she slept on a couch in the living room. SR1817-18. The court was "convinced beyond a reasonable doubt the incident occurred when [K.L.] was under age 13," but it could not be more precise because K.L. "could only say she was around 11." SR1819. And the court convicted defendant of Count 8 based on K.L.'s credible testimony about a sexual assault on the night of a sixth grade dance. SR1819-20.

D. Sentencing, Guilty Plea, and Appeals

The court sentenced defendant to concurrent prison terms of 5 years on Counts 4 and 10; 8 years on Count 11; 12 years on Counts 5 and 6; and 18 years on Count 8. SC615; SR1951-53. The court explained that although Counts 5, 6, and 8 were all Class X felonies, "an additional six years was

imposed on Count 8" because "the Court gave more weight to the aggravating factor of defendant's position of trust and authority over the victim." SR1953. It emphasized that defendant "commanded his daughter to shower before she could go to the dance, and when she obeyed, he invaded her privacy by entering the shower and penetrating her," and "[d]efendant's use of his position of trust and authority over his daughter to make her submit to that act just so she could go to the school dance is reprehensible and extremely outrageous." SR1953-54. Defendant filed a motion to reconsider sentence, SC646, 651-52, which the circuit court denied on March 28, 2019, SC657.

On April 11, 2019, defendant pleaded guilty to one count of predatory criminal sexual assault of D.H.; the People dismissed the second charge; and the circuit court sentenced defendant to 6 years in prison, to be served concurrently with his sentences for the convictions relating to K.L. SC661.

On April 22, 2019, defendant filed a notice of appeal from the March 28, 2019 judgment, SC670, and a motion to correct fines and fees, SC666-68. The court denied the motion to correct on May 13, 2019, SC673, and defendant filed a second notice of appeal from that order, SC678.

E. Appeal

Defendant argued that the charges of predatory criminal sexual assault of a child, predicated on acts committed between 1995 and 1997, were defective because the predatory criminal sexual assault statute took effect on

May 29, 1996. A30, ¶ 33. The appellate court noted that defendant raised this challenge for the first time on appeal. *Id.* "'In such a case, it is sufficient that the indictment apprised the accused of the precise offense charged with enough specificity to (1) allow preparation of his defense and (2) allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct.'" A31, ¶ 35 (quoting *People v. DiLorenzo*, 169 Ill. 2d 318, 322 (1996)). Although the appellate court agreed that Counts 6 and 8 "were defective" for charging defendant with committing predatory criminal sexual assault over dates in which that statute was not in effect, A35, ¶ 40, it held that defendant failed to demonstrate that he was prejudiced in preparing his defense, A35-39, ¶¶ 42-46, and affirmed, A40, ¶ 51.

STANDARD OF REVIEW

This Court reviews de novo whether a charging instrument was deficient and whether defendant suffered prejudice from that deficiency. *People v. Carey*, 2018 IL 121371, ¶ 19.

ARGUMENT

I. Defendant's Challenge to the Indictment, Raised for the First Time on Appeal, Must Fail Because He Was Not Prejudiced in the Preparation of His Defense.

The People charged and proved that defendant committed two acts of sexual penetration against K.L. when she was between 11 and 13 years old. Defendant contends that Counts 6 and 8 of the indictment were fatally flawed because they labeled these acts "predatory criminal sexual assault of a

child" over a time range that included dates before the predatory criminal sexual assault statute took effect. This claim fails because defendant did not file a pretrial motion to dismiss the charges on this basis, and he cannot demonstrate that the purported defect prejudiced him in preparing his defense.

A. Defendant fails to satisfy the requirement that he demonstrate prejudice.

To protect a defendant's "right to be informed of the nature and cause of criminal accusations made against him," *People v. Espinoza*, 2015 IL 118218, ¶ 15, a charging instrument must set forth (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," 725 ILCS 5/111-3(a).

A defendant may move to dismiss a charge that fails to meet these criteria. 725 ILCS 5/114-1(a)(8). A pretrial motion is "[t]he proper procedure to challenge a defective indictment," and failure to file one results in "waiver." *People v. Peebles*, 125 Ill. App. 3d 213, 221 (1st Dist. 1984). Thus, "[t]he timing of a challenge to a charging instrument is significant in determining whether a defendant is entitled to reversal of his or her conviction based on charging instrument error." *Carey*, 2018 IL 121371, ¶ 21. If the defendant moved to dismiss the charging instrument as

defective before trial, the appellate court asks whether the charges strictly comply with 725 ILCS 5/111-3(a). *Espinoza*, 2015 IL 118218, ¶¶ 15, 23-24.

However, "the sufficiency of a charging instrument attacked for the first time on appeal is not determined by strict compliance with the statute but rather 'by a different standard.'" *Carey*, 2018 IL 121371, ¶ 22 (quoting *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975)). In such circumstances, "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." *People v. Rowell*, 229 Ill. 2d 82, 94 (2008). Faced with such a challenge, "'the appellate court should consider whether the defect in the information or indictment prejudiced the defendant in preparing his defense.'" *Carey*, 2018 IL 121371, ¶ 22 (quoting *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991)). Defendant calls this "the *DiLorenzo* standard," Def. Br. 7 (citing *People v. DiLorenzo*, 169 Ill. 2d 318, 323 (1996)), but this Court has repeatedly reiterated, before and after *DiLorenzo*, that a defendant who challenges an indictment for the first time on appeal must demonstrate prejudice. *Carey*, 2018 IL 121371, ¶ 22; *Espinoza*, 2015 IL 118218, ¶ 23; *Rowell*, 229 Ill. 2d at 94; *People v. Cuadrado*, 214 Ill. 2d 79, 88 (2005); *People v. Davis*, 217 Ill. 2d 472, 478-79 (2005); *Thingvold*, 145 Ill. 2d at 448; *Pujoue*, 61 Ill. 2d at 339.

In evaluating prejudice, a reviewing court must view the indictment as a whole, *Carey*, 2018 IL 121371, ¶ 28, and consider the full "record and transcript of proceedings" to ascertain a defendant's understanding of the charges, *DiLorenzo*, 169 Ill. 2d at 324. The charges generally must inform the defendant of the elements of the offense so the defendant may contest those elements at trial. *See Rowell*, 229 Ill. 2d at 95-96 (defendant was prejudiced where charge failed to allege that "thefts were in furtherance of a single intention and design," and defendant did not contest that element at trial).

As the appellate court correctly held, defendant failed to demonstrate that he was prejudiced in the preparation of his defense. A35-39, ¶¶ 42-46. The charges notified defendant of the acts of sexual penetration that he was alleged to have committed, identified the window of time in which those acts occurred, and alleged that K.L. was under the age of 13 and defendant was over the age of 17 at the time of the offenses. He defended against the charges by disputing that the acts of penetration occurred. Defendant does not assert that he was impeded in mounting that defense.

Rather, he claims that "'he was forced to answer for crimes for which he could not have been lawfully convicted.'" Def. Br. 14 (quoting *People v. Wasson*, 175 Ill. App. 3d 851, 855 (4th Dist. 1988)). But defendant was properly prosecuted for committing acts of sexual penetration against K.L. when she was under the age of 13, whether those acts occurred in 1995 or

1997. "[B]etween March 27, 1995 and March 27, 1997," SC54-56, it was a crime for an adult to commit an act of sexual penetration against a child under the age of 13. Prior to 1995, such sexual penetration of a child was called aggravated criminal sexual assault. *See* 720 ILCS 5/12-14(b) (1994). Although the General Assembly passed legislation in 1995 to name these acts "predatory criminal sexual assault of a child," *see* Pub. Act No. 89-428, art. 2 (eff. Dec. 13, 1995), the legislation was invalid because it violated the Single Subject Clause of the Illinois Constitution, *Johnson v. Edgar*, 176 Ill. 2d 499, 518 (1997). The General Assembly then passed new legislation, again renaming the offense predatory criminal sexual assault of a child, with an effective date of May 29, 1996. *See* Pub. Act No. 89-462 (eff. May 29, 1996).

Because the amending legislation rejected in *Johnson* was "void ab initio," *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999), the legislative scheme reverted back to the way it existed before that amendment, *People v. Gersch*, 135 Ill. 2d 384, 390 (1990). Consequently, an act of sexual penetration between an adult and a child under the age of 13 taking place before May 29, 1996, was called aggravated criminal sexual assault. *See Tellez-Valencia*, 188 Ill. 2d at 529-30 (Rathje, J., dissenting). After that date, the same act was called predatory criminal sexual assault of a child. *See* 720 ILCS 5/12-14.1(a)(1) (1998).

But the charges against defendant placed him on notice that the acts of penetration constituted *either* aggravated criminal sexual assault *or*

predatory criminal sexual assault. Until just before trial, defendant was charged in Counts 7 and 9 with committing the same acts under the label "aggravated criminal sexual assault." These "counts of the indictment, read as a whole, were available to inform defendant of the charges against him while he prepared for trial from the date of his arraignment . . . until the commencement of trial." *Carey*, 2018 IL 121371, ¶ 28 (citation omitted). Thus, read together, the charges alleged that defendant engaged in acts of sexual penetration between 1995 and 1997 that constituted "aggravated criminal sexual assault" (until May 29, 1996) or "predatory criminal sexual assault" (after May 29, 1996).

Defendant cites Counts 7 and 9 as evidence that he was prejudiced, contending that it was problematic that "at all times prior to trial [defendant] was charged with two different offenses, each with the same essential elements, for the same alleged conduct." Def. Br. 14-15. 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 removed any possibility of prejudice.

Defendant again misapplies the prejudice requirement when he argues that Counts 7 and 9 were also fatally defective in ways that mirrored Counts 6 and 8. Def. Br. 15. According to defendant, because the acts of sexual

penetration alleged in Counts 6 through 9 constituted aggravated criminal sexual assault from 1995 to 1996, and predatory criminal sexual assault from 1996 to 1997, all four charges covered periods in which the operative statute defining the offense was not in effect, and, therefore, *all* were fatally defective. Def. Br. 15-16. But it only aided defendant in preparing his defense — the sole question presented when charges are challenged for the first time on appeal — to inform him that the People were prosecuting two acts of sexual penetration, based on uncertain dates, under whichever provision was in effect at the relevant time.

Finally, even assuming that defendant could defend against Counts 6 and 8 on the theory that he could not be convicted of predatory criminal sexual assault for acts of sexual penetration that occurred before May 29, 1996, defendant had the opportunity to raise such a defense before and at trial. He simply chose not to do so. At trial, he focused solely on *whether* the acts occurred and not *when* they occurred. Thus, he neither cross-examined K.L. on the dates of these crimes nor argued that the court should acquit him of Counts 6 and 8 based on any uncertainty about the dates of the offenses. Defendant's failure to offer the defense that he now raises for the first time on appeal was not for lack of notice.

In sum, defendant received sufficient notice to prepare his defense, and his challenge to Counts 6 and 8, raised for the first time on appeal, must fail.

B. Defendant may not avoid the established rule requiring that he show prejudice.

Although defendant did not move to dismiss the charges before trial on the basis he asserts on appeal, he argues that he is not subject to the prejudice requirement. *See* Def. Br. 7-8, 11-13. This argument fails. To the extent defendant further argues that this Court should not reject his challenge to the indictment as "forfeited" or should review it under the plain-error doctrine, Def. Br. 20-21, the general doctrine of forfeiture does not separately bar his challenge. "The failure to charge an offense is the kind of defect which implicates due process concerns," so "[s]uch a defect may[ ] . . . be attacked at any time." *DiLorenzo*, 169 Ill. 2d at 321. However, defendant's failure to timely raise the claim in circuit court is still consequential: when "the sufficiency of a charging instrument is attacked for the first time on appeal, the standard of review is more liberal." *Id.* at 321-22.

1. Because sexual penetration of a child was a crime throughout the period alleged in the indictment, defendant may not avoid the prejudice requirement on the theory that he was charged with a nonexistent crime.

Defendant argues that he is not required to show prejudice because he was charged with a nonexistent offense, claiming that the offense of predatory criminal sexual assault was "void." Def. Br. 9. But this argument is incorrect. Even assuming that it would be a fatal defect to

charge a defendant with a crime when his actions did not constitute a criminal offense, that is not the case here.

As discussed above, there was no period in which the acts alleged in Counts 6 and 8 were not criminal. Nor has defendant claimed that there was any change in the elements of the offense, the statute of limitations, or the applicable punishment that would warrant treating this act of sexual penetration differently depending on whether it occurred before or after May 29, 1996. Only the name of the crime and its statutory citation changed. To the extent that *Tellez-Valencia*, 188 Ill. 2d at 523, suggested that it is a fatal defect to charge a defendant with predatory criminal sexual assault for acts occurring before that statute took effect, it is distinguishable and should not be extended.

Tellez-Valencia did not address the import of raising such a claim for the first time on appeal — the decisive issue here. The defendants there were charged with, and convicted of, predatory criminal sexual assault before the statute was struck down in *Johnson*, 176 Ill. 2d 499. Thus, the defendants could not have pursued their challenge to the charging instrument through a pretrial motion, and this Court did not consider their challenge waived and require a showing of prejudice. *Tellez-Vallencia* thus did not cite, much less deliberately depart from, this Court's long-established precedent requiring a showing of prejudice for a challenge to a defective charging instrument that a defendant failed to pursue through a proper

pretrial motion. Defendant here could have challenged the indictment based on this Court's 1999 decision in *Tellez-Valencia* after the charges were filed in 2015, but he failed to do so. That defeats his claim.

Moreover, *Tellez-Valencia* is 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. Here, in contrast, Counts 6 and 8 covered a period in which the crimes *were* properly labeled predatory criminal sexual assault. As discussed in Section II, *infra*, this critical distinction means that the charges should not be deemed defective at all — but, at a minimum, they were not defective in the sense that they charged defendant with a wholly nonexistent offense.

Finally, *Tellez-Valencia*'s holding, even in the circumstances of that case, was questionable, as the dissenting justice explained. 188 Ill. 2d at 534-35 (Rathje, J., dissenting). The acts of sexual penetration constituted a crime (aggravated criminal sexual assault), and the charges set forth the elements of that crime but called it 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. *Id.* Thus, the charges in *Tellez-Valencia* should not have been found fatally defective. And because *Tellez-Valencia* was wrongly decided even on its own facts, its reasoning should not be extended. Alternatively, if this Court were to conclude that *Tellez-Valencia* compels a different result, then it should overrule that case.

See discussion *infra* pp. 28-29 (explaining that *Tellez-Valencia*, to the extent it compels a finding that defendant's charges were fatally defective, should be overruled); *see also People v. Williams*, 235 Ill. 2d 286, 294 (2009) (*stare decisis* does not require continued adherence to poorly reasoned precedent).

The remaining cases cited by defendant also do not warrant a departure from this Court's established rule requiring a showing of prejudice for challenges to a charging instrument raised for the first time on appeal. Defendant correctly notes that *Wasson*, 175 Ill. App. 3d at 851, granted relief even though defendant had filed no pretrial motion to dismiss the charges. Def. Br. 9. There, defendant was charged with aggravated criminal sexual assault under a statutory provision not in effect during the entire period alleged in the indictment, and the appellate court held that this defect required reversal. *Wasson*, 175 Ill. App. 3d at 854-55. But *Wasson* did not explain its departure from the well-established principle, reiterated both before and after that case, that a defendant who challenges an indictment for the first time on appeal must demonstrate prejudice. Moreover, *Wasson*, unlike this case, involved a statutory provision that had substantively changed over the period alleged in the indictment. *See Tellez-Valencia*, 188 Ill. 2d at 534-35 (Rathje, J., dissenting).

People v. Mescall, 379 Ill. App. 3d 670 (2d Dist. 2008), upon which defendant also relies, confronted a claim under *Tellez-Valencia* in the context of a petition for relief from judgment under 735 ILCS 5/2-1401. The

defendant there was charged with predatory criminal sexual assault for acts that occurred wholly before the effective date of the statute. The appellate court held that the defendant was not entitled to pursue such a claim through an untimely § 2-1401 petition, because the indictment was not "void." *Mescall*, 379 Ill. App. 3d at 673-78. The court noted that the indictment was potentially "voidable" under *Tellez-Valencia*, *id.*, but it did not hold, as defendant suggests, that such a challenge would succeed as long as a defendant raised it on direct appeal, *see* Def. Br. 10-11. A defendant raising such a challenge on direct appeal remains subject to the usual rule that failure to file a proper pretrial motion waives a challenge to the indictment and must demonstrate prejudice to prevail. That issue, not presented in *Mescall*, is dispositive here.

2. A showing of prejudice is required irrespective of whether the defect is characterized as "substantive" or "formal."

Nor can defendant avoid the requirement to show prejudice on the theory that the alleged defect in Counts 6 and 8 was "substantive" rather than "formal." *See* Def. Br. 11-13. A showing of prejudice is required regardless of how a defect is characterized.

Defendants are not entitled to reversal of their convictions even if an indictment fails to properly set forth the elements of an offense — a substantive defect — unless that defect prejudiced them. For example, in *Cuadrado*, this Court held that a charge was defective where it alleged that

defendant had "solicited" another to commit murder, but the statute required that he "procure" another. 214 Ill. 2d at 88. It held that reversal was nevertheless unwarranted because defendant was not prejudiced in preparing his defense. *Id.* And, in other cases, this Court has declined to address whether a charge omitted an essential element of an offense because it concluded that such a defect was not prejudicial in any event. *See Davis*, 217 Ill. 2d at 478-79 (declining to address whether charge was defective for failing to allege that defendant was "family or household member"); *DiLorenzo*, 169 Ill. 2d at 323-25 (declining to consider whether charge, which failed to allege that sexual contact was "for sexual gratification," complied with requirement to set forth elements of offense).

Thus, the statute categorizing defects as "formal" does not govern whether a showing of prejudice is required on appeal, but whether the prosecution may amend a defective charge before trial without seeking reindictment. It comes into play only if an indictment otherwise complies with 725 ILCS 5/111-3. *See* 725 ILCS 5/111-5 ("An indictment, information or complaint which charges the commission of an offense in accordance with [725 ILCS 5/111-3] shall not be dismissed and may be amended on motion by the State's Attorney or defendant at any time because of formal defects[.]"). Although "grand jury indictments are to be amended only by the grand jury itself," an exception exists for "formal" defects because "the offense which the grand jury intended to bring was clear." *People v. Betts*, 78 Ill. App. 3d 200,

201-02 (1st Dist. 1979). Formal defects include such technicalities as misspellings; grammatical errors; misjoinder of parties or offenses; unnecessary allegations; "[t]he failure to negative any exception, any excuse or proviso contained in the statute defining the offense"; or "[t]he use of alternative or disjunctive allegations." 725 ILCS 5/111-5.

This Court held in *Tellez-Valencia* that it is not a "formal" defect to call the offense of "aggravated criminal sexual assault" by the name of "predatory criminal sexual assault of a child" when that statute was not in effect at the time of the crime. *See* 188 Ill. 2d at 527-28 (holding that defect could not be characterized as "formal"). But *Tellez-Valencia* did not consider a waived challenge to an indictment, and this Court has never limited the prejudice requirement to "formal" defects.

In short, defendant's argument that the alleged defect in the indictment was not "formal" does not answer whether he is required to show prejudice due to his failure to challenge the charges before trial, and the fact that the defect may have been "substantive" does not relieve him from this burden. Because defendant failed to file a pretrial motion challenging Counts 6 and 8 as charging him with "predatory criminal sexual assault of a child" over dates in which that crime instead constituted "aggravated criminal sexual assault," he is entitled to reversal only if this purported defect prejudiced him. *E.g., DiLorenzo*, 169 Ill. 2d at 323-25; *Davis*, 217 Ill. 2d at 478-79.

Defendant was not prejudiced in the preparation of his defense, *see supra* Section I.A, so this Court should affirm his convictions for predatory criminal sexual assault.

II. The Charges Were Sufficient and Strictly Complied with the Charging Statute.

Because defendant has failed to demonstrate prejudice, this Court need not decide whether the charges were defective. *See DiLorenzo*, 169 Ill. 2d at 323-25 (declining to consider whether charge was defective due to lack of prejudice); *Davis*, 217 Ill. 2d at 478-79 (same). However, the charges were *not* defective, and this Court may affirm the appellate court's judgment on that basis. *See People v. Burnett*, 237 Ill. 2d 381, 391 (2010) ("we are in no way constrained by the appellate court's reasoning and may affirm on any basis supported by the record").

As required, the indictment informed defendant of "the nature and cause of criminal accusations made against him." *Espinoza*, 2015 IL 118218, ¶ 15. Counts 6 through 9 informed defendant that he was accused of committing acts of sexual penetration against K.L. between 1995 and 1997, when K.L. was under the age of 13. The indictment therefore satisfied 725 ILCS 5/111-3(a), which protects a defendant's right to notice by requiring 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." Counts 6 through 9 set forth the elements of offenses and cited *both* the aggravated criminal sexual assault statute (in Counts 7 and 9) and the predatory criminal sexual assault statute (in Counts 6 and 8) that were in effect over portions of the time range alleged in the charges. Had defendant filed a pretrial motion to dismiss, it would not have succeeded. And though the People dismissed Counts 7 and 9 just before trial began, defendant failed to object that doing so undermined the validity of Counts 6 and 8 based on their citations to the predatory criminal sexual assault statute for acts that may have occurred prior to May 29, 1996. In any event, even these 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.

It was not error for the People to provide two-year time periods for defendant's commission of the acts underlying Counts 6 through 9. The date of commission of a sexual offense is not an element that the People must prove. "Proof of the precise date as alleged is unnecessary unless the allegation of a special time is an essential ingredient of the crime or the running of the period of limitation," *People v. Taylor*, 391 Ill. 11, 14 (1945), and "[t]he date of the offense is not an essential factor in child sex offense cases," *People v. Guerrero*, 356 Ill. App. 3d 22, 27 (1st Dist. 2005). Indeed, the victims of child sex offenses are often unable to pinpoint dates; the People

accordingly may allege that an act of sexual abuse occurred within a range of dates. *See id.* ("In cases involving the sexual abuse of a child, flexibility is permitted regarding the date requirement necessary under the Code."); *People v. Miller*, 222 Ill. App. 3d 1081, 1086 (3d Dist. 1991) ("the charging instruments did not allege specific dates upon which the offenses occurred, but rather gave a general time frame," and "the exact date of the offenses was not an element of the crimes charged").

"To hold otherwise would be to jeopardize large numbers of prosecutions, particularly with very young children, simply because they could not provide specific dates and times." *People v. Burton*, 201 Ill. App. 3d 116, 123 (4th Dist. 1990). Notably, the extended limitations period that the General Assembly has enacted to ensure the prosecution of child sexual abuse, *see* 720 ILCS 5/3-6(j)(2), encompasses acts that occurred decades before charges were filed. Such remote acts may rest on testimony that is imprecise on timing, and requiring firm testimony as to dates of sexual abuse, even though this is not an element of the offense and the name of the offense may simply have evolved over time, may preclude such prosecutions. *See* SR1348 (K.L. testifies that she must approximate ages because "I don't have a time machine to go back" and say "it was exactly this day").

Thus, "[a]s long as the crime occurred within the statute of limitations and prior to the return of the charging instrument, the State need only provide the defendant with the best information it has as to when the

offenses occurred." *Guerrero*, 356 Ill. App. 3d at 27. The People filed Counts 6 and 8 within the statute of limitations. SR1302-03. They notified defendant that he was charged with committing two acts of sexual penetration over a two-year time period in which K.L. was under the age of 13, and throughout which the acts constituted a crime with the same elements, subject to identical punishments.

Although Counts 6 and 8 covered relatively broad two-year periods, the same logic would apply to any charge that straddled even a narrow period in which the law changed. Counts 6 and 8 could have alleged acts of sexual penetration between May 28, 1996, and May 30, 1996, and they would have suffered from the same "defect" that defendant characterizes as fatal here. Such acts should not be immune from prosecution simply because the name of the crime changed. If the People were required to divide a defendant's conduct into charges alleging the same act within a narrower period under different titles, it would be imposing on the People a burden to prove a date that is neither relevant to the statute of limitations nor an element of the offense (whether aggravated criminal sexual assault or predatory criminal sexual assault of a child) to obtain a conviction.

Again, contrary to defendant's suggestion, *Tellez-Valencia*, 188 Ill. 2d 523, does not require a finding that Counts 6 and 8 are defective. The charges in that case alleged that defendant committed acts of predatory criminal sexual assault of a child throughout a period in which the act was

instead labeled aggravated criminal sexual assault. That is not true here. And as the dissent in that case pointed out, the Court's holding that the defendant was entitled to vacate his convictions and proceed to a new trial to prove the same acts under a different name was questionable. *See* 188 Ill. 2d at 529-30 (Rathje, J., dissenting). *Tellez-Valencia* should not be extended where, as here, the same act constituted predatory criminal sexual assault of a child over at least part of the time range alleged in the indictment.

Notably, in *Tellez-Valencia*, the People could simply obtain a new indictment — and a new conviction — by designating the crime aggravated criminal sexual assault, because it was clear that the acts in that case took place before the statute redefining this offense as predatory criminal sexual assault took effect. But where the date of an alleged crime straddles two periods in which the same act is criminalized under different provisions, amending the charge is not as straightforward. Adopting a rule that would find the charges fatally defective in such a circumstance would enable a defendant to escape responsibility where the name of his offense changed and the victim was unable to pinpoint the date of the offense with respect to the statutory amendment.

Because *Tellez-Valencia* is distinguishable, this Court should limit its holding to its unique facts and decline to extend it here. However, if this Court were to conclude that *Tellez-Valencia* compels a different result, then it should overrule that case. "The doctrine of *stare decisis* expresses the policy

of the courts to stand by precedents and not to disturb settled points," but it is "not an inexorable command." *Williams*, 235 Ill. 2d at 294 (internal quotations omitted). This Court has good cause to overrule a precedent if its rule proves to be "badly reasoned," "unworkable," or results in "serious detriment prejudicial to public interests." *Id.* The rule in *Tellez-Valencia* does not protect a defendant's interest in obtaining notice of the accusations against him, and it elevates form over substance to enable a defendant to escape liability for a clearly criminal act solely because the legislative label attached to that criminal act changed.

This Court should find that the charges here were sufficient because they notified defendant that he was accused of committing acts of sexual penetration against K.L. between 1995 and 1997, at a time when such acts were criminalized, and for which he remained liable under the extended statute of limitations.

Accordingly, lack of prejudice aside, defendant is not entitled to reversal of his convictions. The appellate court's judgment should be affirmed because the charges in this case were not defective and even would have survived a pretrial motion to dismiss, had defendant filed one.

CONCLUSION

This Court should affirm the appellate court's judgment.

August 10, 2022

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 30 pages.

/s/ Erin M. O'Connell
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CERTIFICATE OF FILING AND SERVICE

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 10, 2022, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on counsel at the following email address:

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