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No. 97150-1

NO. 50299-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH CHANCE BROOKS,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Brooks' conviction for child molestation in the third degree should be affirmed because:

(1) Brooks waived the issue he now raises when he did not object on this basis at trial; and

(2) After Brooks testified to molesting C.H. in May rather than January of 2014, the trial court did not abuse its discretion in permitting the State to amend the information to adjust the date range for the crime of child molestation in the third degree.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

A. When Brooks did not object on the basis of being denied the opportunity to raise an alibi defense at trial, may he now raise this issue for the first time on appeal?

B. After Brooks admitted to molesting C.H., but suggested he did so in May rather than January of 2014, did the trial court abuse its discretion in permitting the State to amend the information to adjust the date range?

III. STATEMENT OF THE CASE

C.H. was born on November 4, 1998. RP1 at 47.[1] In 2014, C.H. was 15-years-old until her birthday in November, when she turned 16. RP1 at 48. In 2014, C.H. lived with her mother and her sister in an apartment on 42nd Avenue in Longview. RP1 at 49-50. C.H.'s brother was six years older than her. RP1 at 50. Although C.H.'s brother did not live with her, he would come over to the apartment frequently. RP1 at 50.

C.H.'s brother's best friend was Kenneth Brooks. RP1 at 51. Brooks was eight years older than C.H. RP1 at 52. In 2014, when C.H. was 15, Brooks was 23. RP1 at 52. C.H. had known Brooks since she was 9. RP1 at 51. C.H. considered Brooks to be like a brother to her. RP1 at 53.

In January of 2014, Brooks was living in California, but came to visit both C.H.'s family and his own. RP1 at 53. Sometimes Brooks would stay at C.H.'s apartment. RP1 at 53. During this time, Brooks and C.H. would watch Netflix alone together in the living room. RP1 at 54. While watching Netflix with C.H., Brooks would cuddle with her. RP1 at 55.

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[1] The verbatim report of proceedings provided by Brooks contained two volumes. The first volume includes the first day of trial, February 22, 2017. The second volume includes the second day of trial, February 23, 2017. The first volume will be referred to as "RP1," and the second volume will be referred to as "RP2."

One evening, Brooks and C.H. watched Netflix while lying on the couch together. RP1 at 55. Both were laying on their sides, with C.H. laying in front of Brooks. RP1 at 55. While they were laying together, Brooks reached into C.H.'s shirt and touched her breast. RP1 at 56. After touching C.H., Brooks began to rub her breast. RP1 at 56. C.H. became frightened and stiffened up. RP1 at 56. Brooks continued to rub C.H.'s breast for about five minutes. RP1 at 56. C.H. did not reciprocate. RP1 at 56. Eventually, Brooks stopped. RP1 at 57.

C.H. was upset. RP1 at 57. Brooks told C.H. it would never happen again, and that he did not want her to tell her mother. RP1 at 57. Two days later, C.H. told her mother what had happened. RP1 at 57. However, C.H.'s mother did not contact the police. RP1 at 57. Brooks returned to California. RP1 at 57.

In the summer of 2014, Brooks returned to visit with his girlfriend from California, and they stayed with C.H.'s family. RP1 at 58. Brooks and his girlfriend slept in C.H.'s room on her bed, and C.H. slept on the couch in the living room. RP1 at 59. Eventually, Brooks' girlfriend left and Brooks continued to stay at C.H.'s apartment. RP1 at 60. After Brooks' girlfriend left, he began sleeping on the living room couch, and C.H. returned to sleeping in her bed. RP1 at 60.

On the evening of August 16, 2014, C.H, her sister, and Brooks were at home, downstairs. RP1 at 61. C.H.'s mother was upstairs. RP1 at 61. C.H., her sister, and Brooks played Monopoly while drinking beer and vodka. RP1 at 62. After Monopoly, they played another "drinking game" with cards. RP1 at 62. They played games and drank for four to six hours. RP 1 at 63. They continued drinking until after midnight, into the morning of August 17, 2014. RP1 at 63. C.H., who was 5'1½" and weighted around 80 pounds, was intoxicated. RP1 at 64. C.H. remembered sitting in the kitchen, then "everything went black." RP1 at 65.

C.H. woke up gasping and naked in the shower. RP1 at 65. C.H. was in a fetal position in the bathtub with water running on her from the showerhead above. RP1 at 65-66. C.H. was cold and shaking. RP1 at 66. Brooks turned the water off and carried C.H. from the bathtub. RP1 at 66. Brooks placed C.H. on her bed. RP1 at 67. The bedding to C.H.'s bed had been removed, and a sleeping bag was placed on it. RP1 at 67. Brooks told C.H. she had "puked up all over" her bed and herself. RP1 at 67. Brooks took C.H.'s boxer shorts and a tie-dye shirt from her pajama drawer and dressed her in them. RP1 at 67. C.H. had worn these boxers since the second grade. RP1 at 68.

C.H. could not move and was going black. RP1 at 68. Brooks told C.H. he had "fingered" her and that she was "wet" and "moaning loudly." RP1 at 68-69. Brooks removed C.H.'s boxers and shirt. RP1 at 69. Brooks licked C.H.'s vagina. RP1 at 69. Brooks obtained a condom, then inserted his penis into C.H.'s vagina and had sex with her. RP1 at 69. Brooks ejaculated into C.H. RP1 at 70. C.H. fell asleep. RP1 at 70.

C.H. woke and noticed her clothes were gone. RP1 at 70. Brooks told C.H. she had a "tight pussy." RP1 at 70. C.H. fell back to sleep. RP1 at 70. When she woke again Brooks was gone. RP1 at 71. C.H. was still intoxicated and vomited until 2:00 that afternoon. RP1 at 71-72. C.H. told her sister what had happened. RP1 at 72. The police were notified. RP1 at 72. The police came, and C.H. provided them with the boxers, tie-dye shirt, and sleeping bag. RP1 at 72.

C.H.'s brother confronted Brooks on August 17, 2014. RP1 at 102-03. Brooks told C.H.'s brother he had touched C.H. outside of her pants. RP1 at 103. C.H.'s brother then "beat him up." RP1 at 103. On August 17, 2014, Brooks called C.H.'s mother and left a voicemail stating he would tell her what happened, and he would apologize. RP1 at 114-15. Brooks returned to California. RP2 at 74.

The right hem in the crotch region of the boxers was tested at the Washington State Crime Laboratory and found to contain both semen and

human amylase—which is usually associated with saliva. RP 2 at 33. In the location where these human fluids were found was a mixture of DNA matching Brooks and C.H. RP2 at 39. Brooks was charged with rape of a child in the third degree for raping C.H. on or about August 17, 2014, and child molestation in the third degree for molesting C.H. at a time on or about or between January 1, 2014 and January 31, 2014. CP at 1. On February 22, 2017, the case proceeded to trial. RP1 at 4.

At trial, after the State rested, Brooks testified. RP2 at 51. Brooks testified that on occasions in 2014, when he would visit from San Francisco, he would stay at C.H.'s apartment on 42nd Avenue. RP2 at 54. Brooks said that he could not say whether he was in Washington in January of 2014, but knew he was in Washington in May of 2014. RP2 at 54. Brooks testified that while he and C.H. were at her apartment on 42nd Avenue watching a movie, he touched C.H.'s breasts inappropriately with his hand. RP2 at 54, 56. Brooks said this was the first and only time that he touched C.H. inappropriately. RP2 at 57. Brooks believed he touched C.H. in May because he claimed this was when he had sent a text message apologizing to C.H. RP2 at 56-57.

Brooks also testified that he drank with C.H. and her sister on the night of August 16, 2014, after playing board games. RP2 at 58-59. Brooks testified that C.H. was intoxicated. RP2 at 59. Brooks said that

C.H. was kind of passing out, so he took her upstairs to her room so she could go to bed. RP2 at 60. Brooks said C.H. became ill in her bed, and because he "didn't want her sleeping in puke," he took her to the bathroom. RP2 at 60. Brooks testified that he carried C.H. to the bathroom, and then removed her clothes and put her in the shower. RP2 at 61. Brooks testified that he removed the bedding from C.H.'s bed, laid a sleeping bag on it, then got C.H. a tie-dye shirt and traditional women's underwear out of her drawer. RP2 at 63-64. Brooks testified that he helped C.H. out of the shower and helped her get dressed. RP2 at 63-64. Brooks said he then took C.H. to her room and laid her down. RP2 at 64. Brooks denied having sex with C.H. RP2 at 68.

Although the boxers were obviously too small for him to wear, Brooks claimed they were his. RP2 at 65, 81-82. Brooks claimed he had gained 60 pounds since August of 2014, and that even at the time the boxers had been tight on him, causing him to have to pull them down to avoid cutting off his circulation. RP2 at 65-66.

After Brooks testified, the defense rested. RP2 at 83. Prior to instructing the jury, the State moved to amend the information, expanding the date range on the child molestation in the third degree charge. RP2 at 84-85. Brooks objected, but provided no basis for his objection. RP2 at 88. The court granted the motion to amend the information. RP2 at 88.

The amended information provided a date range of on or about or between January 1, 2014 and May 31, 2014. CP at 8; RP2 at 85.

In closing argument, Brooks' attorney agreed that the State had proved beyond a reasonable doubt that Brooks was guilty of child molestation in the third degree. RP2 at 123-24. Brooks' attorney argued that Brooks had admitted to this crime and apologized for it. RP2 at 123-24. Brooks' attorney contrasted his admission to molesting C.H. with his denial of sexual intercourse to support his argument that the State had not proved the rape beyond a reasonable doubt. RP2 at 132. The jury found Brooks guilty of both rape of a child in the third degree and child molestation in the third degree. RP2 at 144-45.

IV. ARGUMENT

A. BECAUSE BROOKS DID NOT OBJECT TO THE AMENDED INFORMATION ON THE GROUNDS HE NOW ASSERTS ON APPEAL, HE FAILED TO PRESERVE THIS ISSUE FOR REVIEW

When the State moved to amend the information at trial, Brooks did not object on the basis he now asserts on appeal; therefore he failed to preserve this issue for review. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *see also* RAP 2.5(a). When the State moved to amend the information, Brooks objected without providing any basis for the objection. RP2 at 88. Because Brooks did not claim the amendment frustrated his opportunity to present an alibi defense at trial, he cannot make this claim for the first time on appeal, unless he shows a manifest error affecting a constitutional right. His argument here fails to demonstrate a manifest error affecting a constitutional right.

An error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP

2.5(a). "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). "A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence. And a theory not presented to the trial court may not be considered on appeal." *State v. Price*, 126 Wn.App. 617, 637, 109 P.3d 27 (2005). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court to correct them.[2] *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

When a basis for an objection was not made at trial, appellate courts routinely refuse to consider that basis when brought for the first time on appeal. For example, in *State v. Sims*, 77 Wn.App 236, 238, 890 P.2d 521 (1995), the court refused to hear the appellant's argument that hearsay statements were improperly admitted as excited utterances because the declarant had made inconsistent statements that indicated fabrication, when the argument had not been presented to the trial court and was not preserved for appeal. In *State v. Saunders*, 132 Wn.App. 592,

[2] Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

607, 132 P.3d 743 (2006), trial counsel had objected at trial to admission of the victim's statements as hearsay, but on appeal the defendant argued that the statements included an identification of the perpetrator and thus fell outside the medical diagnosis exception; because this was a new argument against the statements, the court refused to consider it. In *State v. Mathes*, 47 Wn.App. 863, 868, 737 P.2d 700 (1987), trial counsel had objected to the admission of a document as a recorded recollection, arguing the document was not authenticated because the witness had no independent recollection of the events. However on appeal, the argument shifted to a claim the document was not authenticated as the witness had not signed it. Though the objection remained the same, authentication, the appellate court steadfastly refused to consider the new claim. *Id.*

Although an argument must be raised at trial to be preserved for review, in certain limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration has been satisfied. In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a "manifest error affecting a constitutional right" are not unlimited stating:

> RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on

> appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be "manifest," otherwise, the word "manifest" could be removed from the rule. *Id.* The court explained: "[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts." *Id.* at 344.

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is "manifest;" an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term "manifest" means "unmistakable, evident or indisputable as distinct from obscure, hidden or concealed." *Id.*

An error that is abstract and theoretical, does not meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

On multiple occasions Washington courts have found there is no constitutional right to charging a date range in a sex case that allows for alibi defense. "A defendant has no due process right to a reasonable opportunity to raise an alibi defense in single or multiple act sexual assault charges." *State v. Hayes*, 81 Wn.App. 425, 441, 914 P.2d 788 (1996). "Whether single or multiple incidents of sexual contact are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense." *State v. Cozza*, 71 Wn.App. 252, 259, 858 P.2d 270 (1993) (finding no due process violation where the State's information alleged a three-year date range, and the defendant argued this precluded him from raising a meaningful alibi defense).

Here, Brooks did not suffer a manifest error affecting a constitutional right, therefore he may not claim he was denied the opportunity to raise an alibi defense for the first time on appeal. Brooks' claim fails to even suggest a constitutional issue, because there is no due process right to the opportunity to raise an alibi defense. Further, his

claim of having his alibi defense frustrated had no impact on the trial. Brooks admitted to molesting C.H. He did not raise an alibi by admitting he committed the crime.[3] And, the "on or about" language that already existed in the original information prior to the amendment would have still permitted the jury to find him guilty of the child molestation charge that he confessed to. Thus, even if the amendment had been an error, the result of the trial would still have been the same.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED THE STATE'S MOTION TO AMEND THE INFORMATION.

Because Brooks did not raise an alibi defense at trial when he admitted to molesting C.H., the trial court did not abuse its discretion by permitting the State to amend the information to adjust the date range.[4] "[A]n amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." *State v. DeBolt*, 61 Wn.App. 58, 62, 808 P.2d 794 (1991) (motion to amend permitted after the defendant had testified). On appeal, Brooks asserts that the trial court abused its discretion in permitting the motion to amend, because he now

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[3] For a fuller discussion, *see infra* Part IV-B.

[4] Brooks provides no other argument for prejudice other than frustrating a claim of alibi. Therefore, any response to his notice argument is subsumed by the response to his frustrated alibi claim. In making this analysis, it is important to note that Brooks had already admitted to molesting C.H. prior to the amendment, so his possible defenses were severely limited by his own testimony.

characterizes his testimony as an alibi. However, Brooks' testimony was not that he could not have committed the crime because he was elsewhere, but rather that the crime that he did commit occurred at a different time than the victim had testified to. Because no alibi defense was raised, the trial court did not abuse its discretion in permitting the motion to amend.

A trial court's decision regarding a motion to amend an information is reviewed for abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995). CrR 2.1(d) states: "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." "A defendant cannot claim error from the amendment of an information unless he can show he was prejudiced thereby." *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). "The defendant has the burden of showing prejudice." *State v. Statler*, 160 Wn.App. 622, 640, 248 P.3d 165 (2011) (citing *Brown*, 74 Wn.2d at 801). Failure to request a continuance after an information has been amended has been found to be "persuasive of a lack of surprise and prejudice." *See Brown*, 74 Wn.2d at 801 (citing *State v. Estill*, 50 Wn.2d 245, 310 P.2d 885 (1957)).

"Cases involving the amendment of the charging date in an information have held that the date is usually not a material element of the

crime."[5] *DeBolt*, 61 Wn.App. at 61-62. "[T]he allegation of time in an indictment or information is immaterial other than it must be shown . . . that the right to prosecute for the crime charged is not barred by the statute of limitations." *State v. Osborne*, 39 Wn. 548, 551, 81 P. 1096 (1905). "'[W]here the information alleges that an offense occurred 'on or about' a certain date, the defendant is deemed to be on notice that the charge is not limited to a specific date.'" *Statler*, 160 Wn.App at 640-41 (quoting *State v. Bergin*, 214 Conn. 657, 574 A.2d 164, 173 (1990)).

With regard to crimes of sexual abuse of children, the precise date is not a material part of a criminal charge because "[c]hildren often cannot remember the exact date of an event, and in the cases of sexual abuse, they may repress memory of that date." *DeBolt*, 61 Wn.App. at 62. If no alibi is claimed, a change to an information is immaterial when the elements remain the same before and after amendment, and only the date has changed.[6] *State v. Allyn*, 40 Wn.App. 27, 35, 696 P.2d 45 (1985). Further, "[t]ime is not the essence of sexual assault charges, and it does

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[5] When an amendment of a date is not a material part of the criminal charge, then the rule from *State v. Pelkey*, 109 Wn.2d, 484, 491, 745 P.2d 854 (1987), requiring that an information not be amended after the State has rested, does not apply. *See DeBolt*, 61 Wn.App. at 62 (1991) ("Since the date here was not a material part of the 'criminal charge', this case falls outside the ambit of *Pelkey*.").

[6] *See also*, *State v. Goss*, 189 Wn.App. 571, 576, 358 P.3d 436 (2015); *Debolt*, 61 Wn.App. at 62; *State v. Forler*, 38 Wn.2d 39, 42, 227 P.2d 727 (1951).

not become an element of an offense merely because the defendant pleads an alibi defense." *Hayes*, 81 Wn.App. at 441.

Alibi is Latin for "elsewhere" and is defined as "1. A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time[;] 2. The fact or state of having been elsewhere when an offense was committed." BLACK'S LAW DICTIONARY 1061 (7th ed.1990). An alibi defense has two components: (1) that the defendant was not present at the scene of the crime, and (2) that the defendant did not commit the charged crime. *See Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995) (reasoning that Duckett's alibi defense was designed to rebut the prosecution's argument "that Duckett was present at the scene of the crime and committed the charged acts"); *see also, State v. Johnson*, 19 Wn.App. 200, 205, 574 P.2d 741 (1978) ("[B]y asserting that he was at another place at the time when the alleged crime was committed, the defendant is denying by necessary implication, if not expressly, the allegations set forth in the charge."). The Washington Supreme Court has expressly stated: "An alibi defense denies that the defendant committed the crime." *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994).[7] It follows that unless

[7] The *Riker* Court was concerned with contrasting the defenses of alibi and duress; while an alibi denies the defendant committed the crime, duress admits the defendant committed the unlawful act but pleads an excuse for doing so. *Id.* at 367-68.

one is claiming both to have not been present and to have not committed the crime, one is not asserting an alibi defense.

When only one crime is committed, "on or about" language does not deprive a defendant of an alibi defense, even when the defendant presents evidence that he or she was elsewhere when the crime occurred. *See State v. Druxman*, 88 Wash. 424, 427-28, 153 P.381 (1915) ("The evidence offered no room for confusion; hence no ground for an election between times or crimes. The question of the appellant's presence at the scene of the crime was merely one of credibility."). Further, a defendant claiming alibi "should not escape his transgressions merely because the time of commission of the crime cannot be fixed in precise terms." *State v. Pitts*, 62 Wn.2d 294, 299, 382 P.2d 508 (1933). "On or about" language has been found to provide sufficient notice for sex offenses occurring outside the date range specified. *See Hayes*, 81 Wn.App. at 430, n.12 (citing *State v. Osborne*, 39 Wn. 548, 81 P. 1096 (1905) (rape evidence at trial established the rape occurred a week or two weeks prior to the date alleged in the information); *State v. Oberg*, 187 Wash. 429, 432, 60 P.2d 66 (1936) (prosecution for sodomy where the State alleged the act occurred 'on or about April 3' but the victim testified that the act occurred over two months later on June 20)).

Here, at trial, Brooks did not claim an alibi; rather, he admitted to committing the crime. Just as C.H. testified, Brooks testified that while at C.H.'s apartment, on 42nd Avenue, he touched her breasts inappropriately with his hand while watching a movie. RP2 at 54-56. Brooks also testified this was the only time he had touched C.H. inappropriately. RP2 at 57. While C.H. testified this event had occurred in January of 2014, Brooks testified that it had occurred in May of 2014, because this was when he claimed to have sent a text message apologizing to C.H. RP2 at 56-57. There was no question that the same event was being described by both Brooks and C.H. Brooks' attorney even used his admission to molesting C.H. to contrast with his rape charge—which Brooks denied—during his closing argument. RP2 123-24. Thus, Brooks made no claim that he had not committed the crime charged; rather, he confessed to molesting C.H.

Further, Brooks did not testify that he had not been present in January, but merely claimed the crime had occurred at a different time. This was not an alibi. He testified that he could not say whether or not he had been present in January. RP2 at 54. He also testified that he had stayed at C.H.'s apartment on occasions in 2014, when he was up visiting. RP2 at 54. Thus, although Brooks testified that he molested C.H. in May, he did not testify that he was elsewhere in January of 2014. Because

Brooks did not claim he was not present at the scene of the crime and agreed that he had committed the crime, Brooks did not claim either component of an alibi defense.[8]

Additionally, the amendment caused Brooks no prejudice. Had the date range remained as originally charged, the "on or about" language would still have permitted the jury to find Brooks guilty.[9] Considering his admission to committing the crime, it most certainly would have. His attorney even told the jury to find him guilty. RP2 at 123. Of course, before the amendment, Brooks made no claim of alibi, which necessarily entails a denial of committing the crime. There is no suggestion in the record that his admission to molesting C.H. was an effort to establish an alibi. And, when the amendment was proposed, he made no claim of an alibi defense being frustrated. Because Brooks did not claim he was not present, admitted to committing the crime, did not claim he was raising an alibi defense, and still would have been convicted with the "on or about" language in the original information, he suffered no prejudice. Therefore, the court did not abuse its discretion in granting the motion to amend.[10]

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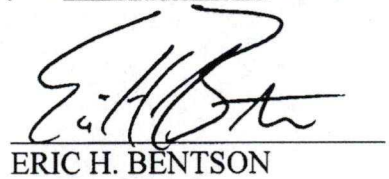
[8] *See supra Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995); *State v. Johnson*, 19 Wn.App. 200, 205, 574 P.2d 741 (1978).
[9] *See supra Hayes*, 81 Wn.App. at 430, n.12. (citing examples of cases where "on or about" language permitted convictions outside the date range provided).
[10] Because the court did not abuse its discretion, Brooks' conviction for child molestation in the third degree should remain a part of his offender score.

V. CONCLUSION

For the above stated reasons, Brooks' conviction for child molestation in the third degree should be affirmed.

Respectfully submitted this 13th day of March, 2018.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 13th, 2018.

Michelle Sasser

Michelle Sasser