

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37050

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 500
	)	
<b>Plaintiff-Respondent,</b>	)	<b>Filed: May 31, 2011</b>
	)	
v.	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
OMAR ESCOBEDO,	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Defendant-Appellant.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Randy J. Stoker, District Judge.

Judgments of conviction for lewd conduct with a minor under sixteen and sexual abuse of a child under the age of sixteen, affirmed.

Fuller Law Offices; Daniel S. Brown, Twin Falls, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Omar Escobedo appeals from his judgments of conviction entered upon a jury verdict finding him guilty of lewd conduct with a minor under sixteen and sexual abuse of a child under the age of sixteen. We affirm.

**I.**

**FACTS AND PROCEDURE**

According to the state’s evidence, while his girlfriend’s daughter, A.G., was in third grade, Escobedo came home early one morning during A.G.’s Christmas break from school. He spent the night in her mother’s room, and then around 7 a.m., entered her room where she and her six-year-old brother were playing video games. He proceeded to commit an act of manual to genital contact upon her and then rubbed his penis on her arm and stomach. After Escobedo told her not to tell anyone, she did not report the incident to her mother for over a year and did not report the incident to police until March 2005. She indicated on several occasions--including to

a detective and the CARES interviewer--that she believed the abuse had occurred the morning of January 1, 2004, based on the fact that it was the latter half of her Christmas break and her mother's indication as to when Escobedo had gotten a new tattoo, which A.G. had noticed on him while the abuse was occurring.

Escobedo was charged by indictment with one count of lewd conduct with a minor under sixteen, Idaho Code § 18-1508, and one count of sexual abuse of a child under sixteen, I.C. § 18-1506, each alleged to have occurred "on or about the 1st day of January 2004." At trial, Escobedo presented an alibi defense, contending that he was with friends and family from December 31, 2003, between 5 p.m. and 7 p.m. through the day of January 1. This included testimony from his mother and stepfather that he had come to their home on the night of December 31 at approximately 3:30 a.m. and that they had seen him downstairs at breakfast on the morning of January 1 at approximately 7 a.m.

At trial, Escobedo objected to jury instruction 13C, which mirrored Idaho model jury instruction 208 and stated in relevant part, "It is alleged that the crime charged was committed 'on or about' a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date." He contended that the instruction did "nothing but confuse the jury," because the jury would already be instructed that the crime must have occurred "on or about" January 1 and it interfered with Escobedo's alibi defense. The trial court disagreed and included the instruction.

The jury found Escobedo guilty of both counts, and he now appeals.

## **II. ANALYSIS**

Escobedo contends that the district court erred in giving jury instruction 13C because it was "misleading and substantially prejudiced" his case and constituted a fatal variance because it "effectively altered the nature of the charges contained within the Indictment."<sup>1</sup>

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<sup>1</sup> Escobedo also contends in a single sentence that the district court erred in failing to give his requested alibi jury instruction and does not support the assertion with argument or citations to authority. It is well established that party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Accordingly, we do not reach this issue on appeal.

In addition, he lists as an issue a sufficiency of the evidence argument and includes the standard of review for appeals challenging the sufficiency of the evidence and one line in his brief that "there was not substantial evidence upon which any rational trier-of-fact could have

The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

The existence of an impermissible variance is a question of law over which we exercise free review. *State v. Alvarez*, 138 Idaho 747, 750, 69 P.3d 167, 170 (Ct. App. 2003); *State v. Sherrod*, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). Our task in resolving the issue presented is two-fold. First, we must determine whether there is a variance between the information used to charge the defendant and either the instructions presented to the jury or the evidence adduced at trial. See *State v. Brazil*, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001). Second, if a variance exists, we must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. *Id.* A determination of whether a variance is fatal depends on whether the basic functions of the pleading requirement have been met. *Brazil*, 136 Idaho 330, 33 P.3d at 221; *State v. Windsor*, 110 Idaho 410, 417, 716 P.2d 1182, 1189 (1985). A charging instrument meets the basic functions of the pleading requirement if it fairly informs the defendant of the charges against which he or she must defend and enables him or her to plead an acquittal or conviction in bar of future prosecutions for the same offense. *United States v. Bailey*, 444 U.S. 394, 395 (1980); *Brazil*, 136 Idaho at 330, 33 P.3d at 221. A variance is fatal if it amounts to a “constructive amendment.” *State v. Jones*, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003). A constructive amendment occurs if a variance alters the charging document to the extent that the defendant is tried for a crime of a greater degree or a different nature. *Jones*, 140 Idaho at 49, 89 P.3d at 889; *State v. Colwell*, 124 Idaho 560, 566, 861 P.2d 1225, 1231 (Ct. App. 1993).

During the jury instruction conference, Escobedo objected to the trial court’s giving the jury instruction 13C, contending that the “on or about” language would confuse the jury and that the instruction was substantially prejudicial and cumulative. Specifically, he argued that the jury “already knows that the crime must be committed on or about January 1st” as set forth in the

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found the essential elements of the crime beyond a reasonable doubt.” However, he made no argument regarding the issue and thus we will not address the merits on appeal. *Id.*

elements of the crime and that the “on or about” instruction was ambiguous because it did not define how close to January 1 the act must have occurred and thus essentially allowed expansion of the crime such that the jury could find him guilty if it found the acts had occurred several days before or after January 1. This was problematic, he contended, because he had asserted an alibi defense as to his activities over the twenty-four-hour period of January 1, and it broadened the crime charged in the indictment.

In denying Escobedo’s request, the district court first indicated that I.C. § 19-1414 does not require that the state prove that a crime occurred on a specific date, except for certain inapplicable exceptions. The court then determined that there was not a variance, because like the jury instruction, the indictment on both counts alleged that the offenses occurred “on or about” January 1. The court recognized that Escobedo’s defense in the case was an alibi defense, and noted that while he may have interpreted the evidence and the state’s charge to conclude that the state would prove that the crime occurred on January 1, he was not entitled to the remedy requested.

On appeal, Escobedo concedes that pursuant to I.C. 19-1414, the state need not have identified a specific date on which the act occurred, but contends that since it did so, it was erroneous to instruct the jury that it could find the acts occurred “on or about” January 1 and that the state need not prove that the crime “was committed on that precise date.” Escobedo contends that in reliance on the state’s representation, he introduced an alibi defense, and that by instructing the jury pursuant to instruction 13C, the court “single-handedly did away with” his alibi defense at trial, and it was probable that the jury found that the events occurred outside of his alibi defense. He further contends that the instruction “basically eliminated any evidentiary burden that the [state] may have had in regards to presenting evidence of timing, in spite of [the state’s] repeated assertions/representations that the complained of events occurred on January 1, 2004.” Escobedo appears to rely on the victim’s pretrial statements that the act occurred on January 1 and the district court’s interpretation that the act had occurred within a twenty-four-hour span on January 1 for his assertion that the state “chose” to commit itself to the charge that the act occurred on a specific date. He does not cite to any authority, however, that such statements can be the basis for a variance where the indictment, evidence adduced at trial, and jury instructions all echo the “on or about” concept. Any “understanding” that he may have had that the trial would be restricted to showing that the act occurred exactly on January 1 was relied

on *in spite* of the indictment which used the “on or about” language--and then in spite of the evidence adduced at trial where the victim clearly did not state with certainty that the incident occurred exactly on January 1.

We conclude there is no variance. As between the indictment and the jury instruction there is no variance, where both the indictment and the jury instruction at issue consistently use the term “on or about” in reference to the date of the alleged crime. We do not comprehend how, based on this language, Escobedo can assert that the indictment “clearly” states that the act occurred on January 1 *only*. In this same regard, his assertion that it was not until trial that he first became aware that the prosecution was pursuing charges that occurred sometime other than January 1 is unavailing--the indictment states that each count occurred “on or about” January 1 and thus, Escobedo had proper notice of the charges against which he would have to defend.

There was also no variance between the indictment and the evidence adduced at trial. It is true that a variance arises when the evidence adduced at trial establishes facts different from those alleged in the charging document. *Dunn v. United States*, 442 U.S. 100, 105 (1979). A review of the trial testimony indicates that the victim testified multiple times that she knew that the incident occurred over Christmas break when she was in third grade, but was not sure exactly what date. She later stated that while it had probably occurred on January 1, it could have been a few days earlier or a few days later; however, she was sure that it was at the end of Christmas break. On cross-examination she again indicated that she believed the incident had occurred on January 1, but could not say for sure. She remembered that Escobedo’s tattoo had been red and fresh and that her mother had indicated that it was around the first of January when he got the tattoo. The victim’s mother also testified that she believed the incident had occurred around January 1--and that it had definitely occurred after Christmas and shortly after Escobedo had gotten his new tattoo. This testimony is consistent with the indictment which stated that the incidents occurred “on or about” January 1 and the jury instruction which indicated as much. It does not, as Escobedo tries to argue, point to the incident having occurred exclusively on January 1.

In addition, for these reasons, we also conclude that the instruction given was not misleading or prejudicial. Idaho Code § 19-1414, specifically states that the “precise time at which the offense was committed need not be stated in the indictment” unless it is material to the offense. In *State v. Roberts*, 101 Idaho 199, 200, 610 P.2d 558, 559 (1980), our Supreme Court

specifically held that time is not a material ingredient in the offense of lewd and lascivious conduct with a minor. Thus, the use of “on or about” in the indictment and jury instruction was proper.

To the extent that Escobedo argues that his assertion of an alibi defense changes these baseline rules, he is mistaken and cites no authority for that proposition. In *State v. Taylor*, 118 Idaho 450, 453, 797 P.2d 158, 161 (Ct. App. 1990), we noted that *Roberts* should *not* be read to mean that when an alibi defense is asserted, time becomes a material element of the offense. Escobedo seems to rely, at least partly, on an unspecified “right” to assert an alibi defense, and the duty of the court to not instruct the jury in a way that would lessen the efficacy of such a defense. However *Taylor* made it clear that such was not the case. The *Taylor* Court noted that courts generally recognize that a defendant who has a close association with a minor over a protracted period of time and who is charged with a continuous conduct of sexual abuse will have no practical defense of alibi. This general recognition arises from the nature of sexual abuse crimes in that they are often not promptly reported and may occur many times before there is disclosure to a responsible adult, and from the fact that fear, shame, confusion, naiveté or weakness of the victim can be exploited by the abuser to prevent disclosure of the acts. *Id.* at 452, 797 P.2d at 160. We observed that courts recognize that dates and times often go unnoted until they cannot be recalled by the victim, and that the more that incidents are repeated, the more difficult it becomes to pinpoint the individual events. *Id.* And while we recognize that Escobedo is not charged with a continuing course of conduct, neither was the defendant in *Taylor*, and yet we applied the aforementioned principle and held that in such cases, the date of each alleged incident should be set forth with as much specificity as possible, and that “*the customary ‘on or about’ language will be sufficient,*” even where a defendant is asserting an alibi defense as in *Taylor*. *Id.* (emphasis added).

Accordingly, we conclude that the district court did not err in giving the jury instruction 13C. Escobedo’s judgment of conviction is affirmed.

Judge LANSING and Judge MELANSON **CONCUR.**