

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR08-680

DAVID CHILDRESS,

APPELLANT

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered 1 APRIL 2009

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT,
[NO. CR-2006-600]

THE HONORABLE LANCE L.
HANSHAW and BILL MILLS, JUDGES

AFFIRMED

D.P. MARSHALL JR., Judge

A Lonoke County jury convicted David Childress of raping his stepdaughter. He was sentenced to fifteen years' imprisonment. On appeal, he challenges the sufficiency of the evidence. He argues that the State failed to prove that the rape occurred within the time period prescribed by the circuit court. Childress does not challenge the State's proof on any of the rape elements.

The criminal information alleged that Childress raped his stepdaughter sometime between 1 January 2003 and 6 October 2006. At an early pretrial hearing, while clarifying the allegations in the information, the State said it believed the evidence would show that the rape occurred while the victim was in fifth grade—the 2003–2004 school year. The State, however, did not amend the information. Then,

at another pretrial hearing on the day of the trial, at Childress's request the circuit court limited the State's proof to incidents occurring during the 2003–2004 school year. The prosecutor resisted and pressed the circuit court about whether Childress would receive a directed verdict if the victim—a child witness—testified that the rape happened outside of the 2003–2004 school year. The trial judge responded that “[w]e will play it by ear and see how it goes.” Again, the State did not amend the information.

During the trial, the victim gave shifting testimony. She was “pretty sure” the rape occurred during the 2003–2004 school year. The victim also testified that she told several friends that the rape occurred when she was in the fifth grade. But the victim wrote about the incident in her journal in an entry dated 8 March 2003. She further testified that she did not write about the incident in her journal on the exact day it happened, but that the actual rape had occurred “maybe half of a year before.” She also said that she could not remember specific dates.

Childress moved for a directed verdict at the appropriate times. He argued, in part, that the State had not proven that the incident occurred during the time period limited by the court. The circuit court denied the motions. Childress makes the same time-period-limitation argument on appeal.

“Our state constitution provides that only the prosecutor can file a criminal

information. It necessarily follows that neither the trial judge nor the appellant has the authority to amend the information. That authority rests solely with the prosecutor.” *Simpson v. State*, 310 Ark. 493, 497, 837 S.W.2d 475, 477–78 (1992); Ark. Const. amend. 21, § 1. Here, the circuit court’s attempt to limit the State’s proof to the 2003–2004 school year could not and did not amend the time period set out in the criminal information. Further, the circuit court seemed to remove any limitation when the State pressed the court about the consequences of the victim testifying that the rape occurred outside of the 2003–2004 school year. Playing the matter “by ear” and seeing “how it goes” left the time period in flux. Later in the trial, when faced with Childress’s motion for a directed verdict on this ground, the court denied the motion, stating “I’m going to allow latitude to the [S]tate.” Whether considered as a matter of the governing law or the facts of record, the time period alleged in the criminal information was left undisturbed.

Particularly when dealing with sexual crimes against children, “the time a crime is alleged to have occurred is not of critical significance, unless the date is material to the offense.” *Martin v. State*, 354 Ark. 289, 295, 119 S.W.3d 504, 508 (2003). “[T]ime is not an essential element of rape.” *Bonds v. State*, 296 Ark. 1, 4, 751 S.W.2d 339, 341 (1988). Even the complete omission of a specific date or a time-frame from a criminal information alleging rape is not necessarily fatal. *Ibid.*

Because the precise date the rape occurred is of no legal consequence in this case, Childress's sufficiency challenge fails in any event.

Childress also argues that, because the trial court limited the proof to the 2003–2004 school year, he was not put on notice of any charges outside of that time period. But our supreme court has held that “in crimes of [a sexual] nature against family members, as compared to offenses against victims with whom the accused had no prior contact, an accused is more likely to be aware of the specifics of the charges against him and therefore better able to prepare his defense.” *Bonds*, 296 Ark. at 4–5, 751 S.W.2d at 342. Also, because Childress's defense was that he never raped his stepdaughter and that his stepdaughter fabricated the allegations, “the lack of exact dates [was] not prejudicial to [Childress].” *Martin*, 354 Ark. at 295–96, 119 S.W.3d at 508. Childress's argument about lack of notice thus fails too.

Even if the date was important, the victim's testimony, though somewhat in conflict, provided evidence about when the rape occurred. It was the jury's duty, not ours, to determine the victim's credibility and resolve any conflicts in her testimony. *Bell v. State*, 371 Ark. 375, 381, 266 S.W.3d 696, 702 (2007). Viewing the evidence supporting Childress's conviction in the light most favorable to the State, substantial evidence showed that Childress raped his stepdaughter sometime between 1 January 2003 and 6 October 2006. *Gillard v. State*, 372 Ark. 98, 100–01, 270 S.W.3d 836,

838 (2008).

Affirmed.

GRUBER and GLOVER, JJ., agree.