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SJC-13750

COMMONWEALTH vs. SCOTT McCAFFREY.

Plymouth. September 8, 2025. - January 12, 2026.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

Rape. Practice, Criminal, Amendment of indictment or complaint, Indictment. Constitutional Law, Indictment. Statute, Construction.

Indictments found and returned in the Superior Court Department on June 29, 2020.

A motion to amend indictments was heard by Susan E. Sullivan, J., and the cases were tried before Brian A. Davis, J.

After review by the Appeals Court, 104 Mass. App. Ct. 642 (2024), the Supreme Judicial Court granted leave to obtain further appellate review.

Emma Quinn-Judge for the defendant.

Arne Hantson, Assistant District Attorney, for the Commonwealth.

Claudia Leis Bolgen, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

BUDD, C.J. Here we are asked to determine whether it is permissible to amend an indictment to change the subsection of

the aggravated child rape statute (G. L. c. 265, § 23A) under which the defendant was charged. As discussed infra, because the amendments changed an essential element of the crime charged, we reverse those convictions.<sup>1</sup>

1. Factual and procedural background. The following facts are undisputed. A grand jury heard evidence that from 2013 to 2015, the defendant, who was forty-seven to forty-nine years old, sexually abused the victim on multiple occasions when she was eight to ten years old. Thereafter, the defendant was indicted on six counts of aggravated rape of a child in violation of G. L. c. 265, § 23A (b) (§ 23A [b]). However, § 23A (b) punishes the rape of a child who is twelve to sixteen years of age, where a more than ten-year age difference exists between the defendant and the victim. Because the victim was not yet twelve years of age when the crimes were alleged to have been committed, the Commonwealth sought to amend the indictments to change the subsection under which the defendant was charged to G. L. c. 265, § 23A (a) (§ 23A [a]), which punishes rape of a child under twelve years of age, where a more than five-year age difference exists between the defendant and the victim. The motion was granted over the defendant's objection, and the case was tried to a jury. The defendant moved for a required finding

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<sup>1</sup> We acknowledge the amicus brief submitted by the Massachusetts Association of Criminal Defense Lawyers.

of not guilty at the close of the Commonwealth's evidence, on grounds that the amendments to the indictments were improper.

The motion was denied, and the defendant was found guilty of five of the six counts of aggravated rape of a child under § 23A (a).<sup>2</sup> The Appeals Court affirmed the convictions.

Commonwealth v. McCaffrey, 104 Mass. App. Ct. 642 (2024). We granted the defendant's application for further appellate review.<sup>3</sup>

2. Discussion. There is no dispute that based on the victim's age during the relevant time period, the subsection under which the defendant should have been indicted was § 23A (a). Although the defendant does not claim that the amendments took him by surprise or forced him to change his defense, he argues that they were impermissible because the change was not of form but of substance. We agree.

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<sup>2</sup> The defendant was also convicted of one count of disseminating obscene matter to a minor in violation of G. L. c. 272, § 28; one count of lewd, wanton, and lascivious conduct in violation of G. L. c. 272, § 53; and four counts of indecent assault and battery on a child under the age of fourteen in violation of G. L. c. 265, § 13B.

<sup>3</sup> The defendant sought further appellate review on the amendments to the indictments and multiple other errors. We granted review limited to the issues of the amendments to the indictments and the defendant's request for a lesser included offense instruction.

Article 12 of the Massachusetts Declaration of Rights guarantees that "no one may be convicted of a crime punishable by a term in the State prison without first being indicted for that crime by a grand jury." Commonwealth v. Barbosa, 421 Mass. 547, 549-550 (1995), and cases cited. Consistent with this principle, rule 4 (d) of the Massachusetts Rules of Criminal Procedure allows amendments to indictments only with respect to matters of form, not substance. See Mass. R. Crim. P. 4 (d), 378 Mass. 849 (1979).<sup>4</sup> In addition, amendments of form are permissible only if they would not result in prejudice or "materially change[] the work of the grand jury" (citation omitted). Commonwealth v. Knight, 437 Mass. 487, 491-492 (2002).

Amendments as to form are those that do not change the essential elements of the crime. Knight, 437 Mass. at 492, quoting Commonwealth v. Snow, 269 Mass. 598, 606 (1930) ("Matters of form are those that are 'not essential to the description of the crime charged'"). See, e.g., Commonwealth v. Bolden, 470 Mass. 274, 282 (2014) (changing victim's name amendment of form as victim's name not essential element of

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<sup>4</sup> Rule 4 (d) states: "Upon his own motion or the written motion of either party, a judge may allow amendment of the form of a complaint or indictment if such amendment would not prejudice the defendant or the Commonwealth."

crime); Knight, supra at 493 (date of offense, same). Because they do not alter the crime charged, amendments as to form do not implicate a defendant's art. 12 rights.

Amendments as to substance, on the other hand, violate art. 12 as the crime for which the defendant was indicted would be different from the crime for which he was tried. See Snow, 269 Mass. at 606 (noting amendments of substance "impair the integrity of the functions of the grand jury as established by the Constitution"). See, e.g., Commonwealth v. McGilvery, 74 Mass. App. Ct. 508, 509, 512-513 (2009) (substantive amendment to change indictment from possession of class A controlled substance to possession of class B controlled substance).

One way to determine whether an amendment is of form or of substance is to consider whether successive prosecutions of the defendant under both the original and the amended indictments would be a double jeopardy violation, as the principles of double jeopardy protect against a second prosecution for the same offense.<sup>5</sup> Knight, 437 Mass. at 491-493. Under this test, an amendment generally is considered one of form if double jeopardy principles would prohibit successive prosecutions under

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<sup>5</sup> "The double jeopardy clause . . . protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." Commonwealth v. Crawford, 430 Mass. 683, 686 (2000), quoting Mahoney v. Commonwealth, 415 Mass. 278, 283 (1993).

the original and the amended indictments. Id. at 493.

Conversely, the amendment is a substantive one if successive prosecutions would not present a double jeopardy issue.<sup>6</sup> See id.

General Laws c. 265, § 23, punishes child rape, which is (1) sexual intercourse or unnatural sexual intercourse with (2) a child under sixteen years of age. Commonwealth v. Bernardo B., 453 Mass. 158, 172 (2009). The elements of aggravated child rape consist of the two aforementioned elements comprising the base offense plus one of the following three sets of circumstances:

"(a) there exists more than a [five] year age difference between the defendant and the victim and the victim is under [twelve] years of age;

"(b) there exists more than a [ten] year age difference between the defendant and the victim where the victim is between the age of [twelve] and [sixteen] years of age; or

"(c) at the time of such intercourse, [the defendant] was a mandated reporter as defined in [G. L. c. 119, § 21]."

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<sup>6</sup> The double jeopardy test does not serve, however, to differentiate between amendments of form and those of substance where the original indictment charged the defendant with a lesser included offense of the amended indictment. In that circumstance, successive prosecutions would violate double jeopardy principles. See Commonwealth v. Rodriguez, 476 Mass. 367, 371 (2017). The amendment, however, would nevertheless be considered substantive because of the added essential element. See, e.g., Commonwealth v. Williams, 73 Mass. App. Ct. 833, 836-838 (2009) (adding "death resulting" to operating to endanger charge was amendment of substance despite double jeopardy bar to successive prosecutions); Commonwealth v. Ruidiaz, 65 Mass. App. Ct. 462, 463-464 (2006) (amendment adding "over sixty" to armed assault with intent to rob indictment, same).

G. L. c. 265, § 23A.

Subsections 23A (a) and (b) require the Commonwealth to prove two different age-related statutory elements: (1) the age gap between the victim and the defendant, and (2) the age of the victim. The more than five-year age gap required in § 23A (a) is a subset of the more than ten-year age gap required in § 23A (b). That is, proof of the latter also serves as proof of the former. However, § 23A (a) requires proof that the child was under the age of twelve at the time of the offense, whereas § 23A (b) requires proof that the child was twelve to sixteen years of age. As it is not possible to prove that one was both under twelve years of age and twelve to sixteen years of age during a single offense, the amendment replacing § 23A (b) with § 23A (a) changed the elements to be proved.

The double jeopardy test confirms this conclusion. Hypothetically, had the defendant been prosecuted and adjudicated for violations of § 23A (b), the Commonwealth would have been able to retry the defendant under § 23A (a) without violating double jeopardy principles because, by virtue of their mutually exclusive age requirements, the subsections do not punish the same offense.

The Commonwealth contends that the subsections of § 23A require proof of the same three elements: (1) sexual intercourse; (2) with a child under the age of sixteen; and (3)

an "aggravating factor," which may be proved as described in each subsection. The Commonwealth goes on to reason that as the aggravating factor referenced in both § 23A (a) and § 23A (b) is proof of "a significant age difference," the amendment at issue did not change any elements and was therefore one of form, not substance.

This view conflicts with the statutory language. The term "aggravating factor" may describe generally the collections of elements in the subsections under § 23A for aggravated child rape. The statutory language quoted supra, however, clearly sets forth the specific elements required for a conviction under each subsection.<sup>7</sup> See Commonwealth v. Burke, 390 Mass. 480, 483 (1983) ("[a]n element is a fact that must be proved by the prosecution in order to sustain a conviction").<sup>8</sup>

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<sup>7</sup> The Commonwealth analogizes the subsections in § 23A to elements of other offenses that can be proved by multiple theories, for example, the element of possession in possessory offenses where the statute is silent on whether actual possession or constructive possession is required. The Commonwealth contends that, just as changing the theory of possession would not change the crime charged, the aggravating factor "element" in § 23A is not altered when the Commonwealth elects to satisfy it by a different theory of proof under a different subsection. However, as discussed, because the subsections under § 23A set forth specific elements whereas the other statutes do not specify how to prove the relevant element, the comparison is inapposite.

<sup>8</sup> Notably, the trial judge correctly instructed the jury that to prove the defendant guilty of § 23A (a), the Commonwealth was required to prove beyond a reasonable doubt that the defendant had sexual intercourse with the victim, that

As discussed supra, rather than "a significant age difference," § 23A (a) and § 23A (b) each require proof of a particular age gap between the victim and the defendant, and each prescribes distinct, mutually exclusive requirements for the age of the victim. Contrast Commonwealth v. Hobbs, 385 Mass. 863, 870 (1982) (amendment changing felonies defendant intended to commit for burglary not substantive because "the particular felony intended . . . was not necessary to describe the crime of burglary; intent to commit any of the felonies . . . would constitute a state of mind sufficient to support conviction"). Because the defendant was indicted under one theory of aggravated child rape but convicted under a different theory with mutually exclusive elements, the amendment was substantive and therefore impermissible. See, e.g., Commonwealth v. Mayotte, 475 Mass. 254, 264-265 (2016) (conviction reversed where defendant indicted for reckless endangerment of child under one theory but convicted under another with different elements); Commonwealth v. Garcia, 95 Mass. App. Ct. 1, 5-6 (2019) (conviction reversed where defendant indicted for aggravated child rape by natural sexual

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the victim was under twelve years of age at the time of the incident, and that there existed more than a five-year age difference between the defendant and the victim.

intercourse but convicted based on evidence of unnatural sexual intercourse).

The Commonwealth additionally argues that the amendments should be permitted because they neither prejudiced the defendant nor changed the work of the grand jury. We note that the question of prejudice becomes relevant only when the amendment at issue is one of form. Substantive amendments are constitutionally defective regardless of whether they would prejudice the defense. See Barbosa, 421 Mass. at 550, 554 (substantive amendment impermissible even though grand jury heard relevant evidence and defendant had notice). "Where there is a substantial risk that the defendant was convicted of a crime for which he was not indicted by a grand jury, we cannot apply a harmless error standard." Id. at 554.

3. Conclusion. The judgments convicting the defendant of aggravated child rape are reversed, and those verdicts are set aside.<sup>9</sup> We remand the case to the Superior Court for entry of judgments of not guilty on those indictments and for resentencing. See Commonwealth v. Walters, 479 Mass. 277, 283

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<sup>9</sup> We also granted further appellate review to consider whether the trial judge erred by declining to issue a jury instruction on indecent assault and battery on a child under fourteen as a lesser included offense of aggravated child rape. Because the improper amendments require that we reverse the defendant's aggravated rape convictions, we do not reach that issue.

(2018), quoting Commonwealth v. Leggett, 82 Mass. App. Ct. 730, 735 (2012) ("The subtraction of one or more of the scheme's interdependent elements may disrupt its intended proportions and purposes, and warrant its entire reconstruction within statutory limits by the sentencing judge or a successor").

So ordered.