IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

GERALDINE MARIE SANCHEZ,
Defendant-Appellant.

SUPREME COURT NO. 2010-SCC-0035-CRM
SUPERIOR COURT NO. 09-0232E

OPINION

Cite as: 2014 MP 3

Decided March 17, 2014

Eden L. Schwartz, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellant Geraldine Sanchez
James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

CASTRO, C.J.:

¶ 1 Defendant Geraldine Marie Sanchez ("Sanchez") appeals her convictions for sexual abuse of a minor in the first degree and sexual abuse of a minor in the second degree. Sanchez claims (1) the trial court erred in failing to include her proposed jury instruction on the common-law coming-of-age rule ("common-law-age rule"), and (2) the trial court's jury instructions were misleading and inadequate because they contained numerous errors. The Commonwealth disagrees, asserting: (1) the trial court's exclusion of the common-law-age rule complied with Commonwealth law; (2) the alleged errors in the trial court's jury instructions were not misleading or inadequate, and any erroneous instruction, if found, was harmless. For the following reasons, we VACATE Sanchez's convictions for sexual abuse of a minor in the first and second degrees.

I. Factual and Procedural Background

¶ 2 A jury found Sanchez guilty of sexual abuse of a minor in the first degree, 6 CMC § 1306, and sexual abuse of a minor in the second degree, 6 CMC § 1307,[1] and acquitted Sanchez of sexual abuse of a minor in the fourth degree, 6 CMC § 1309. To convict in the first degree, an offender must be at least eighteen and the minor under sixteen. 6 CMC § 1306(a)(3). A conviction in the second degree requires an offender to be sixteen or older and the minor to be thirteen, fourteen, or fifteen and "at least three years younger than the offender." 6 CMC § 1307(a)(1). A conviction in the fourth degree is appropriate where the victim is sixteen or seventeen and the offender is at least eighteen. 6 CMC § 1309(a)(2).

¶ 3 The victim testified to having sexual intercourse with Sanchez sometime "early in the morning" before his sixteenth birthday on September 6, 2009.[2] Trial Tr. at 52-53. On September 6, 2009, neighbors informed the victim's mother about the sexual encounter between the victim and Sanchez. When the victim's mother confronted Sanchez shortly after receiving this information, Sanchez admitted to having sex with her son.[3]

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[1] The trial court included a lesser-included-offense instruction. The instruction provided that sexual abuse of a minor in the second degree includes the lesser offense of sexual abuse of a minor in the third degree. The statutory age requirements are the same; the major difference is the type of sexual contact involved.

[2] Specifically, the victim testified Sanchez "told [him] to have sex with her," which he did. Trial Tr. at 52. This occurred "[b]efore [he] turned 16," on September 6, 2009. *Id.* He later testified the incident occurred "early in the morning." *Id.* at 53.

For the first time on appeal, Sanchez questions the victim's birth year because the transcript states the victim testified his birthday was September 6, 1992. In the audio recording, however, the victim clearly testified that he was born in 1993. All the witnesses corroborated the victim's date of birth.

[3] There are conflicting testimonies as to the date on which the victim's mother confronted Sanchez. On direct examination, the victim's mother testified that she confronted Sanchez a few days after the victim's birthday, the

¶ 4 On September 13, 2009, the victim's mother filed a complaint. Officer Joseph Muna, the preliminary responding officer, spoke with the victim's mother and prepared an incident report. Officer Muna testified he learned from the victim's mother that the victim was fifteen at the time of the incident. However, the incident report actually indicated the victim was born on September 6, 1993, and was sixteen at the time of the incident. Officer Muna then referred the case to the appropriate personnel.

¶ 5 Detective Vincent Mareham reviewed the incident report and continued the investigation. Detective Mareham interviewed Sanchez on September 24, 2009. During the interview, Sanchez admitted to having sexual intercourse with the victim on September 22, 2009, whom Sanchez claimed was fifteen years old at the time.

¶ 6 The time of the incident and the victim's age were at issue throughout the trial. To address this issue, Sanchez proposed the trial court include a common-law-age instruction, which considers a person a year older on the day before his or her birthday. The trial court rejected the instruction based on the untimely nature of the proposed instruction and the Commonwealth's lack of opportunity to respond to the instruction.

¶ 7 Sanchez also objected to the trial court's jury instructions on no proof of exact time and fresh complaint. Sanchez only made oral objections to the trial court's instructions, despite the court's request that the parties submit additional instructions about two weeks before trial. *Commonwealth v. Sanchez*, No. 09-0232E (NMI Super. Ct. July 14, 2010) (Memo to Parties on CNMI vs. Geraldine Marie Sanchez, Crim. Case No. 09-0232E).[4] The Commonwealth submitted jury instructions by the deadline, while Sanchez did not offer written instructions.

¶ 8 Ultimately, the jury convicted Sanchez of sexual abuse of a minor in the first and second degrees. Based on the alleged errors by the trial court, Sanchez appeals her convictions.

II. Jurisdiction

¶ 9 We have jurisdiction over final judgments and orders of the Superior Court. NMI CONST. art. IV, § 3; 1 CMC § 3102(a). Sanchez timely appealed the Superior Court's final judgment. Therefore, we have jurisdiction. 1 CMC § 3105; NMI SUP. CT. R. 4(b)(1)(A)(i).

III. Standards of Review

¶ 10 We address two issues: (1) the trial court's exclusion of the common-law-age rule, and (2) the trial court's jury instructions on: (a) no proof of exact time, (b) fresh complaint, and (c) the elements of sexual abuse in the first and second degrees. The court's failure to instruct the jury on a defense theory,

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same day she spoke to her son about the incident. On cross examination, however, she stated that she confronted Sanchez on September 13, 2009.

[4] Five months before trial, the trial court ordered the parties to prepare for a discussion of jury instructions, review the court's proposed instructions, and submit instructions on or before the day of trial. *Sanchez*, No. 09-0232E (NMI Super. Ct. Feb. 26, 2010) (Pretrial Order at 2, 4).

the common-law-age rule, is a question of law reviewed de novo. *See Commonwealth v. Demapan*, 2008 MP 16 ¶ 12 (citing *Commonwealth v. Ramangmau*, 4 NMI 227, 238 (1995); *United States v. Joetzki*, 952 F.2d 1090, 1095 (9th Cir. 1991)); *see also Commonwealth v. Camacho*, 2002 MP 6 ¶ 18 ("A trial court's ruling to preclude a defendant's proffered defense is reviewed de novo."). Because the instruction involved an essential element of the crimes charged (age), we consider whether the rejection of Sanchez's requested common-law-age instruction warrants reversal. Reversal is appropriate where jury instructions fail to include the essential elements of an offense, but only for plain error. *Camacho*, 2002 MP 6 ¶ 18. Under the plain-error standard, an appellant must show: "(1) there was an error; (2) the error was 'plain' or 'obvious'; (3) [and] the error affected the appellant's 'substantial rights' . . . or affected the outcome of the proceeding." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 29 (citation omitted).

¶ 11 The standard applied to the alleged errors in other jury instructions "depends on the nature of the claimed error." *Guerrero v. Tinian Dynasty Hotel & Casino*, 2006 MP 26 ¶ 25 (internal quotation omitted). We review the no–proof-of-exact-time and fresh-complaint instructions, challenged as misstatements of law, de novo. *Id.* (citing *Mockler v. Multnomah Cty.*, 140 F.3d 808, 812 (9th Cir. 1998)). When reviewing such instructions, we "determine[] whether the instructions contained all the legal elements of the statute." *Guerrero*, 2006 MP 26 ¶ 25 (citing *United States v. You*, 382 F.3d 958, 965 (9th Cir. 2004)). "Otherwise, [the court] has substantial latitude in tailoring jury instructions," reviewed for abuse of discretion. *Guerrero*, 2006 MP 26 ¶ 25 (citing *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999)) (internal quotation omitted). Thus, we employ the abuse of discretion standard in examining the instructions on first- and second-degree sexual abuse of a minor, and consider whether the instructions were wholly misleading or inadequate. *Guerrero*, 2006 MP 26 ¶ 25; *Esteves*, 3 NMI 447, 454 (1993) (citing *Stoker v. United States*, 587 F.2d 438, 440 (9th Cir. 1987)).

IV. Discussion

¶ 12 Sanchez argues for reversal of her convictions because (1) the trial court excluded her proposed common-law-age instruction because age was an element of the sexual abuse of a minor offenses, and (2) the trial court's jury instructions on (a) no proof of exact time, (b) fresh complaint, and (c) elements of sexual abuse were wholly misleading or inadequate. We address each issue in turn.

A. Common-Law-Age Instruction

¶ 13 At the core of Sanchez's appeal is the trial court's rejection of the common–law-age instruction.[5] Sanchez contends the instruction was necessary because the defense theory at trial focused on the victim's age, an element of sexual abuse of a minor offenses. A statutory analysis of the term "age" in the context of sexual abuse of a minor is a novel one.

[5] Sanchez did not offer specific language for the instruction on the common-law-age rule. Under the rule, a person becomes a year older the day before their birthday anniversary. *See infra* note 7.

¶ 14 We review statutory language for its plain meaning if it is "clear and unambiguous." *Aurelio v. Camacho*, 2012 MP 21 ¶ 15; *accord Hossain*, 2010 MP 21 ¶ 12 (citing *Commonwealth v. Peter*, 2010 MP 15 ¶ 12). If a statute is "'capable of more than one meaning,'" however, it is deemed ambiguous. *Office of the Att'y Gen. v. Phillip*, 2008 MP 1 ¶ 6 (quoting *Commonwealth v. Taisacan*, 1999 MP 8 ¶ 7). In reviewing an ambiguous statute, we examine the statute as a whole "to ascertain the legislature's intent," *Aurelio, 2012 MP 21 ¶ 15* (citation omitted), and "avoid reading a statute in a way that defies common sense." *Id.* (citing *Commonwealth v. Minto*, 2011 MP 14 ¶ 34).[6]

¶ 15 Sanchez contends the statutes are silent as to the calculation of age. Because the statutes fail to offer guidance in this regard, she asserts the Court must turn to the common law as provided in 7 CMC § 3401 for a resolution. Sanchez specifically requests that the Court apply the common-law-age rule, where one turns a given age the day before a birthday anniversary.[7] Without an instruction on the

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[6] In construing ambiguous criminal statutes, Sanchez asserts we must follow the rule of lenity, which requires us to resolve the ambiguity in favor of the defendant. Indeed, the term "age" may be construed differently based on the age-computation rule applied. The rule of lenity, however, is one of last resort. The rule only applies if "'after considering text structure, history, and purpose, . . . a grievous ambiguity or uncertainty [exists] in the statute such that the Court must simply guess as to what [the legislature] intended.'" *Maracich v. Spears*, ___ U.S. ___, 133 S. Ct. 2191, 2290 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, ___, 130 S. Ct. 2499, 2508 (2010)). If explicit legislative intent resolves statutory ambiguity, we will "not strike down a statute on vagueness grounds." *Commonwealth v. Manglona*, 1997 MP 28 ¶ 7. Because the Commonwealth Legislature explicitly addressed the interpretation of words and phrases in the sexual abuse of a minor statutes, discussed in more detail later in this opinion, the rule of lenity does not apply here.

[7] Sanchez cites five cases to support her contention on the common-law-age rule. The common-law-age rule, derived from the law of the seventeenth century, is a traditional-common-law rule for computing age. *Mason v. Bd. of Educ. of Baltimore Cnty.*, 826 A.2d 433, 435 (Md. 2003) (applying the common-law-age rule in a negligence action). The common-law-age rule is "the product of a legal fiction, adopted by the law for the sake of expedience and uniformity of interpretation, in the absence of contradictory statutory language," *id.* At 435, and has been followed for "a long period of time, " *id.* at 437 (internal quotation omitted). *See Turnbull v. Bonkowski*, 419 F.2d 104, 104-06 (9th Cir. 1969) (applying the common-law-age rule to Alaska's statute at the time it reflected the common law). The rule does not recognize fractions of a day when computing age. *Mason*, 826 A.2d at 435 (citations omitted). Thus, one's date of birth is part of the age calculation, and a person turns a given age the day preceding a birthday anniversary. *Id.* at 434. The common-law-age rule involves a mathematical and equitable rationale. *Id.* at 436. The mathematical explanation, developed from a fiction, is that a person exists on the day of birth and lives "one year and one day on the first anniversary of his birth." *Id.* The equitable rationale is that "the rule is necessary to protect individuals who would be harmed by the law's refusal to recognize fractions of days," so individuals could take advantage of the benefits of voting, for instance. *Id.*

Courts that have adopted the common-law-age rule have done so "'on the basis that [the rule] was so well established over a long period of time,'" rather than its soundness in application. *Fields v. Fairbanks N. Star Borough*, 818 P.2d 658, 661 (Alaska 1991) (quoting *United States v. Tucker*, 407 A.2d 1067, 1070 (D.C. 1979)).

> The *old* practice of deeming a person to have achieved a given age on the day prior to his or her birthday is contrary to the popular understanding of birthdate. Moreover, it is inconsistent with the common application of other legal concepts . . . dependent on the computation of . . . age, such as the determination of juvenile status in criminal matters . . . .

Fields, 818 P.2d at 661 (emphasis added); *see State v. Alley*, 594 S.W.2d 381, 382-83 (Tenn. 1980) (referring to the common-law rule as "ancient" and reversing the lower court's conviction based on the rule); *see also State v. Stangel*, 284 N.W.2d 4 (Minn. 1979) ("[T]he common-law rule is so at odds with common understanding that it

calculation of age, Sanchez claims the jury could only speculate when the victim legally turned sixteen—the day before the victim's birthday anniversary on September 5; at midnight on September 6, the victim's birthday anniversary; or at the exact time of birth on September 6. In contrast, the Commonwealth maintains legislative intent does not support the common-law-age rule. The Commonwealth argues that the seventeenth-century-common-law-age rule does not represent the common law "as generally understood and applied in the United States." 7 CMC § 3401. If the Court adopts a common-law rule, the Commonwealth suggests this Court instead adopt the birthday rule, a modern-age-computation rule where one becomes a year older on his or her birthday anniversary.

¶ 16 In scrutinizing the meaning of "age" in the context of sexual abuse of a minor, we consider the statutory framework as a whole. Sections 1306(a)(3) and 1307(a)(1) of the Commonwealth Code limit the offenses of sexual abuse of a minor in the first and second degrees to minors "under 16 years of age" and "13, 14, or 15 years of age" respectively. While the statutes do not provide a calculation for age, 6 CMC § 104(b) instructs that words in the sexual abuse of a minor statutes be "read within their context and . . . construed according to the common and approved usage of the English language." The Code also dictates that sexual abuse of a minor provisions "shall be construed according to the reasonable construction of their terms, with a view to effect the plain meaning of its object." 6 CMC § 104(d). The Court only turns to the common law if written law, local customary law, or the restatements are silent. 7 CMC § 3401; *see Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11 ¶ 64 ("[R]estatements are the operative rules of decision in the Commonwealth, even when the relevant provision does not accord with United States common law."). Because we find the statutory backdrop instructive in construing the definition of age, we need not turn to the common law.

¶ 17 The Commonwealth Code confirms that the "common and approved usage" of terms in the sexual abuse of a minor statutes apply. This includes the "common and approved usage" of the term "age." The modern birthday rule reflects the common method of calculating age. In *State v. Munoz*, the Arizona Court of Appeals reviewed age in the context of an aggravated assault statute criminalizing an assault on a child who is fifteen "or under" by one who is at least eighteen. 228 P.3d 138, 139 (Ariz. Ct. App. 2010). In construing age, the court noted the significance of "giv[ing] words in statutes their ordinary meaning unless the context or other circumstances suggest a different meaning." *Id.* at 140-41 (citations omitted). It then consulted the definition of "age" in Black's Law Dictionary: a "'period of time'" or "'individual existence.'" *Id.* at 141 (quoting BLACK'S LAW DICTIONARY 66 (8th ed. 2004)). Black's Law Dictionary explained: "[i]n American usage, age is stated in full years completed (so that someone [fifteen] *years of*

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should be abandoned, at least in determining when a person was under the age at which the . . . court gains jurisdiction over [those] charged with committing criminal acts.").

age might actually be [fifteen] years and several months old)." BLACK'S LAW DICTIONARY 66 (8th ed. 2004). The court noted that the common usage of "age" is referenced "in terms of years, not in months or days." *Munoz*, 228 P.3d at 141. The court ultimately applied the common and approved usage of the term "age" and determined "the phrase 'fifteen years of age or under'" included those who have passed their fifteenth birthday but have not yet reached their sixteenth birthday." *Id.* at 139.

¶ 18 Like *Munoz*, other courts have adopted the common understanding of the term "age." The California Supreme Court in *People v. Cornett* examined the meaning of "age" in a case involving sex offenses with two minors. 274 P.3d 456, 457-58 (Cal. 2012). The court determined a ten-year old as one who "reached his or her [tenth] birthday but who has not yet reached his or her [eleventh] birthday," consistent with the explanation of "age" in Black's Law Dictionary. *Id.* at 458-59 (citing BLACK'S LAW DICTIONARY 70 (9th ed. 2009)). *Cornett* expanded *In re Harris*, where the court rejected the common-law-age rule and adopted the birthday rule instead. *In re Harris*, 855 P.2d 391, 392 (Cal. 1993) ("[Eighteen] years from the first minute of life would expire—that is, the 19th year would begin—at that same minute on a person's 18th birthday, i.e., the day 'corresponding' to the day of birth."); *see Johnson v. Superior Court*, 256 Cal. Rptr. 651, 652 (Cal. Ct. App. 1989) (holding a juvenile reaches a given age on the juvenile's birthday—not the day before); *cf. Coley v. Morrow*, 52 P.3d 1090, 1093 (Or. Ct. App. 2002) (rejecting the idea that one may avoid conviction for a crime committed before the exact time of one's date of birth).

¶ 19 In light of these authorities, we find the "common and approved usage" of the term "age" means one turns a given age on the anniversary of birth. Here, the victim here turned sixteen on his birthday anniversary: September 6, 2009. The trial court's rejection of the common-law-age instruction, therefore, was not erroneous and reversal on this basis is unwarranted.

B. Objections to Jury Instructions

¶ 20 The next issue on appeal is whether the trial court erred in instructing the jury on no proof of exact time,[8] fresh complaint,[9] and statutory elements of sexual abuse of a minor.[10] The trial court must

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[8] The court provided the following no-proof-of-exact-time instruction:

> When, as in this case, it is alleged that the crime charged was committed "on or about" a certain date, if the jury finds that the crime was committed[,] it is not necessary that the proof show that it was committed on that precise date; it is sufficient if the proof shows that the crime was committed on or about that date.

Sanchez, No. 09-0232E (NMI Super. Ct. July 27, 2010) (Closing Jury Instructions).

[9] The court gave the following fresh-complaint instruction:

> In this case, evidence of [the victim's] silence or failure to complain was introduced to prove that sexual abuse did not occur. You are instructed that a child may not complain or tell anyone of sexual abuse for a myriad of reasons, including fear, ignorance, or confusion. You, therefore[,]

instruct the jury on "essential questions of law" irrespective of a request for such an instruction by the parties. *Demapan*, 2008 MP 16 ¶ 12 (quoting *Esteves*, 3 NMI at 454) (internal quotation omitted). While a party may not claim error in an instruction unless the party objected to the instruction before the jury retired, NMI R. CRIM. P. 30, the trial court cannot "side-step its duty to properly instruct the jury." *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 40 n.37.

1. No-Proof-of-Exact-Time Instruction

¶ 21 Sanchez asserts the instruction on no proof of exact time contravened the burden of proof for sexual abuse of a minor in the first and second degrees. The no-proof-of-exact-time instruction stated if the jury found the defendant committed the crime, proof establishing the crime was committed "on or about" a date was sufficient. The instruction did not require the crime to be committed by the victim's sixteenth birthday. However, the statutes underlying Sanchez's convictions provide the victim must be under sixteen years of age and at least thirteen, fourteen, or fifteen years old.

¶ 22 In *Commonwealth v. Attao*, a case involving prostitution, we held proof of exact time was not required when not an essential element of an offense. 2005 MP 8 ¶ 28. This case is distinguishable from *Attao* because under the first- and second-degree sexual-abuse-of-a-minor statutes, the Commonwealth must prove that the offense occurred within the statutory age limit for victims. In other words, unlike *Attao*, exact time is an essential element here. Thus, Commonwealth precedent does not address the specific issue before us.

¶ 23 Other jurisdictions, however, have addressed the issue of time in jury instructions. In *State v. Packed*, a case involving rape and sexual contact with a child, the South Dakota Supreme Court found

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> may not consider the child's failure to complain as evidence weighing against the credibility of the child because silence is one of the many ways a child may respond to sexual abuse.

Sanchez, No. 09-0232E (NMI Super. Ct. July 27, 2010) (Closing Jury Instructions).

[10] The instruction on sexual abuse of a minor in the first degree stated:

> An offender commits the crime of sexual abuse of a minor in the first degree if[,] being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim.

Sanchez, No. 09-0232E (NMI Super. Ct. July 27, 2010) (Closing Jury Instructions). The instruction on sexual abuse of a minor in the second degree provided:

> An offender commits the crime of sexual abuse of a minor in the second degree if[,] being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age, and at least three years younger than the offender,
>
> [o]r aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person.

Id.

error in an instruction allowing the jury to find a crime occurred "on a date reasonably near the date alleged," instead of the stipulated "on or about" date. 736 N.W.2d 851, 860-61 (S.D. 2007). "When time is a material element of the crime . . . , it *may* be error for a trial court to instruct the jury that a defendant can be found guilty if the jury finds that the crime occurred at a date reasonably near the date alleged." *Id.* at 861 (citation omitted) (emphasis added). Similarly, in *State v. Sonen*, the South Dakota Supreme Court remanded for a new trial because the "on or about" instruction denied the defendant his alibi defense to charges of sexual contact with a child under sixteen. 492 N.W.2d 303, 304-07 (S.D. 1992). "Except where time is of the essence, it is not error to give an instruction that submits the happening of the offense at anytime [sic] within the limitation period." *Id.* at 305; *see People v. Smith*, 786 N.E.2d 1121, 1125 (Ill. App. Ct. 2003) ("The State is generally not required to prove that a crime was committed at a particular time, unless the allegation of a particular time is an essential ingredient of the offense . . . involved." (citation omitted)). In contrast, time was critical in the matter before our Court because the statutes underlying the conviction require the victim to be under sixteen, and at least thirteen, fourteen, or fifteen.

¶ 24 The no-proof–of-exact-time instruction failed to include a cutoff date based on the varying statutory age requirements. The evidence presented at trial established the incident occurred close to, but not necessarily on or after, the victim's sixteenth birthday. The legal importance of establishing whether the act took place on or after the victim's birthday reinforces the significance of a cutoff date in the instruction. Yet the lack of a cutoff date in the instruction allowed the jury to find the crime of sexual abuse of a minor in any degree even if it occurred during the first week of September 2009, which included the victim's sixteenth birthday. This is a misstatement of law with respect to the first and second degrees. Not only was the instruction an obvious error, it was also one that affected Sanchez's substantial rights. We therefore find reversal on this basis appropriate.

2. Fresh-Complaint Instruction

¶ 25 We next review the fresh-complaint instruction. Sanchez contends the instruction misstated the law and was misleading and inadequate. The instruction stated: "[e]vidence of [the victim's] silence or failure to complain was introduced to prove that sexual abuse did not occur," and the jury "may not consider the child's failure to complain as evidence weighing against the credibility of the child because silence is one of the many ways a child may respond to sexual abuse." *Sanchez*, No. 09-0232E (NMI Super. Ct. July 27, 2010) (Closing Jury Instructions at 28). Sanchez contends the instruction allowed the jury to infer guilt based on silence, and did not give the jury discretion to consider that no sexual abuse occurred based on the initial silence.[11]

[11] At trial, Sanchez maintained the instruction contrasted with the fresh-complaint testimony. Sanchez argued the trial court allowed fresh-complaint testimony through the victim's mother, who testified her son initially did not complain and later admitted to the incident with Sanchez. The trial court responded with the purpose of the instruction—to highlight that "most people [do not] complain about [sexual abuse] right away." Trial Tr. at 117.

¶ 26 This Court has yet to address the fresh-complaint rule. The fresh-complaint doctrine allows "an out-of-court complaint seasonably made by the complainant in a sexual [offense] case to be admitted as part of the prosecution's case-in-chief." *Commonwealth v. King*, 834 N.E.2d 1175, 1189 (Mass. 2005) (citations omitted) (internal quotation omitted). The doctrine is a common-law rule that applies in cases involving a sexual offense. *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994). The traditional prerequisites of the instruction[12] require that (1) a person volunteer the information in a complaint and (2) the complaint be recent. *Id.* at 951, 955. Fresh-complaint evidence serves the narrow purpose of establishing that the victim complained at a certain time, rather than for corroboration purposes. *State v. W.B.*, 17 A.3d 187, 204 (N.J. 2011). The rule is used to "to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement." *Brown*, 883 P.2d at 955.

¶ 27 The fresh-complaint instruction at issue on appeal mirrors an instruction later modified in *State v. P.H.*, 840 A.2d 808 (N.J. 2004). In *P.H.*, the New Jersey Supreme Court reviewed together a fresh-complaint instruction and an instruction on child-sexual-abuse-accommodation syndrome. *Id.* at 813-14. The *P.H.* court reversed the defendant's convictions of sexual assault and child endangerment and remanded for a new trial in part because the lower court's jury instructions "effectively barred the jury from considering [the victim's] delayed disclosure when assessing [the victim's] credibility." *Id.* at 821-22. The court determined the jury should have been allowed to consider relevant testimony in examining the credibility of a witness and subsequently modified the fresh-complaint instruction to include language regarding stereotypes of sexual assault complainants. *Id.* at 820-21. The modified instruction reads:

> The law recognizes that stereotypes about sexual assault complainants may lead some of you to question [complaining witness's] credibility based solely on the fact that [he or she] did not complain of the alleged abuse sooner. You may not automatically conclude that [complaining witness's] testimony is untruthful based only on [his or her]

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[12] This traditional application has been criticized by numerous legal scholars and commentators because modern thinking and empirical studies have discredited its underlying stereotypical rationale that each victim responds to sexual violations promptly and in the same manner. *Brown*, 883 P.2d at 950 (noting that one of the premises for the doctrine "has been discredited substantially in contemporary times"). Courts have still continued to apply the rule, but for different reasons. *See, e.g.*, *King*, 834 N.E.2d at 1189 ("'With regard to child victims, our fresh complaint jurisprudence has adopted the [theory that] a child's circumstances commonly make it difficult, if not impossible, for the child to make a prompt complaint of sexual assault and, contrary to the theoretical justification for the doctrine, a child's much later report of sexual assault is admitted as "fresh complaint" whenever there is a reasonable explanation for the child's failure to make a prompt complaint.'" (alteration in original) (quoting *Commonwealth v. Montanez*, 788 N.E.2d 954, 965 (2003) (Sosman, J., concurring))); *Commonwealth v. Licata*, 591 N.E.2d 672, 674 (Mass. 1992) (concluding that "fresh complaint evidence should remain admissible on the ground that a victim's failure to make [a] prompt complaint might be viewed by the jury as inconsistent with the charge of sexual assault . . . ." (internal quotation omitted)); *Battle v. United States*, 630 A.2d 211, 217 (D.C. 1993) (noting that fresh complaint evidence "negates prejudices held by some jurors by showing that the victim behaved as society traditionally has expected sexual assault victims to act, i.e., by promptly telling someone of the crime . . . . [and] rebuts an implied charge of recent fabrication, which springs from some juror's assumptions that sexual offense victims are generally lying and that the victim's failure to report the crime promptly is inconsistent with the victim's current statement that the assault occurred")).

> silence/delayed disclosure. Rather, you may consider the silence/delayed disclosure along with all of the other evidence including [complaining witness's] explanation for his/her silence/delayed disclosure when you decide how much weight to afford to [complaining witness's] testimony. You also may consider the expert testimony that explained that silence is, in fact, one of the many ways in which a child may respond to sexual abuse. Accordingly, your deliberations in this regard should be informed by the testimony you heard concerning child abuse accommodation syndrome.

Id. at 821. Where a lack of fresh complaint exists and expert testimony on child-sexual-abuse-accommodation syndrome is admitted to rebut such, the *P.H.* court held the modified instruction should be provided. Where no evidence of the child-sexual-abuse-accommodation syndrome is given, then the last two sentences of the modified instruction should be eliminated from the instruction. *Id.* at 821-22.

¶ 28 The fresh-complaint instruction in *P.H.* was substantively similar to the trial court's fresh-complaint instruction in this case.[13] The factual background contrasts that of the instant matter, however. In *P.H.*, the victim waited approximately seven years to disclose her experience with sexual abuse for a period of six years despite several opportunities to reveal the abuse. *Id.* at 811-12. The victim's credibility was a major issue in *P.H.* The victim here, however, revealed the sexual encounter to his mother within a week after denying the sexual encounter with Sanchez. Moreover, the trial court in the instant matter admitted the fresh-complaint testimony for a limited purpose of establishing the initial silence, not for proof of the sexual abuse. The trial court subsequently provided a fresh-complaint instruction for precautionary purposes, namely because "most people [do not] complain about [the sexual abuse] right away," Trial Tr. at 117, not as an assertion that sexual abuse occurred.

¶ 29 The fresh-complaint instruction on appeal may not have allowed the jury to consider the initial silence against the credibility of the victim. The silence, however, was not a critical issue in this matter. The jury was still instructed on credibility of witnesses, allowing them to consider the witness' memory, manner, interest in the outcome of the case, bias or prejudice, contradictory evidence, reasonableness of the testimony, and other factors. We thus find any error resulting from the instruction harmless.[14]

3. Instructions on Sexual Abuse of a Minor

¶ 30 We finally consider the instructions on the elements of sexual abuse of a minor in the first and second degrees. Sanchez asserts, for the first time on appeal, error in the instructions on sexual abuse of a

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[13] The major difference between the fresh-complaint instruction in *Sanchez* and *P.H.* is that the *P.H.* instruction included the victim's name, an additional phrase, and two more sentences. *Compare P.H,* 840 A.2d at 813-14, *with Sanchez*, No. 09-0232E (NMI Super. Ct. July 27, 2010) (Closing Jury Instructions). The additional phrase in *P.H.* is most relevant. While the trial court in *Sanchez* instructed the jury that they "may not consider the child's failure to complain as evidence weighing against the credibility of the child because silence is one of the many ways a child may respond to sexual abuse," the *P.H.* instruction added "*if it has occurred*" at the end of the instruction. *P.H,* 840 A.2d at 813.

[14] Our determination is limited to the facts in this appeal. We decline to review the admission of a fresh-complaint instruction with a different factual scenario.

minor in the first and second degrees. She argues the instructions did not specify each element of the statutory instructions had to be proven beyond a reasonable doubt and failed to itemize the statutory elements.[15]

¶ 31 We do not consider new issues on appeal unless a narrow exception applies. *Minto*, 2011 MP 14 ¶ 17. An exception applies when:

> (1) a new theory or issue arises because of a change in the law while the appeal was pending; (2) the issue is . . . one of law not relying on any factual record; or (3) plain error occurred and an injustice might otherwise result if the [Court] does not consider the issue.

Id. (internal quotation omitted).

¶ 32 Though the instructions on sexual abuse on appeal may involve issues of law, Sanchez's contentions on the format of the instructions do not. Rather, her arguments concern style. The instructions on sexual abuse of a minor mirrored the exact text of the statutes. The instructions listed each element of the statutes, except in paragraph form. The trial court also included instructions on the burden of proof and the definition of reasonable doubt. Contrary to Sanchez's assertions, the instructions specifically stated that the government had to prove "every element of each charge beyond a reasonable doubt." *Sanchez*, No. 09-0232E (NMI Super. Ct. July 27, 2010) (Closing Jury Instructions). And if the government failed, the instruction mandated the jury to produce a not guilty verdict. *Id.* Because Sanchez challenges the style of the instructions rather than their legal substance, Sanchez's claims do not trigger any exception. Therefore, we do not review the issue.

¶ 33 In sum, we find the no-proof-of-exact-time instruction improper; the fresh-complaint instruction harmless; and the instructions on first- and second-degree sexual abuse of a minor not reviewable on appeal.

V. Conclusion

¶ 34 For the preceding reasons, we affirm the trial court's rejection of the common-law-age rule instruction. We also hold harmless the trial court's inclusion of the fresh-complaint instruction, and do not review the formatting issue concerning the first- and second-degree sexual-abuse-of-a-minor instructions. Finally, we hold the trial court committed reversible error in instructing the jury that the crime did not have to be committed by a certain date because age was an essential element underlying the charges. Accordingly, we VACATE Sanchez's convictions for first- and second-degree sexual abuse of a minor and REMAND to the trial court for a new trial.

SO ORDERED this 17th day of March, 2014.

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[15] Sanchez's contentions conflate with her arguments on the age and no-proof-of-exact-time instructions.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice