

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT JEFFREY GARY, a/k/a JEFFERY  
SCOTT GARY, SR.,

Defendant-Appellant.

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UNPUBLISHED  
November 8, 2007

No. 269315  
Kalamazoo Circuit Court  
LC No. 05-000236-FC

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to object to several alleged references to the victim's prior consistent statements. We disagree. To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different; and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Pursuant to a motion in limine, the trial court ruled that the testimony of several witnesses regarding the victim's earlier disclosure to them of defendant's alleged sexual assaults would be prohibited in the prosecutor's case-in-chief. Defendant argues that, in light of this ruling, his trial counsel should have objected during the prosecutor's opening statement, during the victim's direct examination, and during the prosecutor's closing argument, when the prosecutor referred to and questioned the victim regarding the victim's prior statements. Defendant also argues that the failure of his trial counsel to object during the prosecutor's opening statement was especially egregious, because of its proximity to the trial court's ruling on defendant's motion in limine, and because a "prompt objection might have impeded the prosecutor's plan" to refer to the victim's prior statements.

We first observe that the court's ruling pertained to the testimony of three friends of the victim, and did not refer to testimony of the victim herself. Further, the only evidence admitted was the victim's assertion that she told three friends about the abuse at various times before telling her mother. Defense counsel questioned what was said during closing argument, and we are satisfied that the victim's assertion that she had made the prior statements, without more, added nothing to her credibility. Defendant cannot show that he was prejudiced by the failure to object to the testimony or argument.

Defendant next argues that the trial court abused its discretion by denying defendant's pretrial motion to require the prosecutor to further specify the dates of the alleged incidents of sexual misconduct by defendant. We disagree. A trial court's determination regarding the specificity of the date required in an information is reviewed for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). MCL 767.45(1)(b) provides that an information must contain the time of the offense "as near as may be;" however, "no variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.51 allows a trial court to "require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge." However, it also provides that, when time is not an element of the offense, "any allegation of the time of the commission of the offense . . . shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged."

Defendant argues that the trial court abused its discretion when ruling on his motion to require the prosecutor to further specify dates, by taking into account defendant's attempt, during the preliminary examination, to narrow the dates of the alleged incidents through the cross-examination of the victim. We disagree. In ruling on a motion to further specify the date of an alleged crime, certain factors should be considered, "including but not limited to (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *Naugle, supra* at 233-234. Here, the trial court took into account the nature of the charge, the victim's inability to specify a particular date, her young age at the time of the alleged offense, and defendant's futile efforts to more exactly pinpoint a date through cross-examination during the preliminary examination. The trial court took into account appropriate factors consistent with this Court's opinion in *Naugle*, and it was not improper for the trial court to also consider that, on cross-examination at the preliminary examination, the victim could not be more specific. The trial court did not abuse its discretion in denying defendant's motion for a more definite statement.

Defendant argues that the failure to more closely specify the dates of the alleged incidents of sexual conduct deprived him of the ability to maintain a defense, particularly the ability to present a defense of alibi. The *Naugle* Court observed that where a defendant resides in the same house with his victim over an extended period of time, and the victim was often left solely in the defendant's care, "creating a viable alibi defense [is] not a realistic option." *Id.* at 235. In this case, defendant and the victim resided together over extended periods of time, and defendant often cared for the victim. An alibi defense was not realistic, and thus, such a defense was not prejudiced by the failure of the prosecution to more accurately specify the dates. Thus, the trial

court's decision to deny defendant's motion for a more definite statement was not outside of the range of principled outcomes.

Defendant next argues that the trial court abused its discretion by granting the prosecutor's motion to amend the information to conform to the testimony of the victim, to alter the date of the third count of the information from "fall, 1999," to "the fall of 1998." We disagree. We review a trial court's decision to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). A trial court may amend the information at any time during the trial, to cure any defect, imperfection, or omission in form or substance, including a variance between the information and proofs, so long as the amendment does not unduly prejudice the defendant. MCL 767.76; *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). An amendment to an information is unduly prejudicial if it unfairly surprises a defendant, causes a defendant to have insufficient notice of the charges, or deprives a defendant of a sufficient opportunity to present a defense. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant argues that the amendment unduly prejudiced him because it deprived him of the opportunity to present an alibi defense. However, when the original information is sufficient to inform a defendant of the nature of the charges against him, the defendant is not prejudiced by an amendment to cure a defect in the date of the crimes alleged in the information. *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980). And, when time is not of the essence of the offense charged, the trial court may amend the dates in the information, as long as the amended information does not introduce new or different charges. *People v Lee*, 307 Mich 743, 748-749; 12 NW2d 418 (1943). Time is not of the essence in a criminal sexual conduct case involving a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987).

Here, defendant admitted during direct examination that he resided in the same house as the victim including during the fall of 1998. Defendant also acknowledged during that period, there were occasions where he would care for the victim alone. Defendant testified that, although there were periods between 1996 and 1999 where he did not reside with the victim, the longest period was of five weeks, during the fall of 1997. Thus, defendant cannot show that the trial court's decision to allow the prosecutor to amend the information caused him undue prejudice, or was outside of the range of principled outcomes.

Affirmed.

/s/ David H. Sawyer  
/s/ Helene N. White  
/s/ Michael J. Talbot