

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID C. BABBITT,

Defendant-Appellant.

UNPUBLISHED

June 21, 1996

No. 173802

LC No. 92-2197-FH

Before: Taylor P.J., Murphy and E. J. Grant,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), for having sexual contact with his step-daughter. He was sentenced to three to fifteen years' imprisonment. He appeals as of right and we affirm.

Defendant argues that the court abused its discretion in allowing the prosecution to endorse the complainant's two step-sisters (defendant's daughters) as witnesses on the day of trial. We disagree. A prosecutor's late endorsement of a witness is permitted at any time upon leave of the court and for good cause shown. MCL 767.40a(4); MSA 28.980(1)(4); *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). A trial court's decision to allow a late endorsement is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). We find no abuse of discretion and note that the court granted a one-day delay to allow defense counsel to question the witnesses.

Defendant also contends that the court abused its discretion in allowing complainant's sisters to testify regarding other bad acts pursuant to MRE 404(b). We disagree. After reviewing the record, we find no abuse of discretion and reject defendant's claim that the sisters' testimony was more prejudicial than probative. The challenged testimony was relevant to the issue of defendant's intent and rebutted any suggestion that defendant's touching of the complainant was accidental. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); MRE 404(b).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant further argues that the evidence was insufficient to support his conviction of CSC II. Viewing the evidence in a light most favorable to the prosecution, *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994), we find the complainant's testimony alone provided sufficient evidence to uphold defendant's conviction. The element's of CSC II are (1) sexual contact with another person (2) who is under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The complainant's testimony regarding her age and that defendant touched her inner thigh and breast after attempting to get her to look at a book or view a movie about "how babies were made" established these elements and her testimony did not need to be corroborated. MCL 750.520h; MSA 28.788(8); *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Defendant next argues that the court abused its discretion in allowing the prosecutor to amend the dates of the CSC II on the information. We disagree. An information need only provide the time of an offense "as near as may be" and a variance is not fatal unless time is of the essence. MCL 767.45(1)(b); MSA 28.985(1)(b). Time is not of the essence in criminal sexual conduct cases involving minors. *Taylor, supra* at 8. The trial court did not abuse its discretion. *People v Strickland*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Defendant also claims that he was overcharged and that the jury likely would have acquitted him of CSC II had he not been overcharged with an additional count of CSC I of which he was acquitted. Defendant was not overcharged. The complainant's testimony that defendant put his penis inside her "private part" and put his tongue on her "private spot" was sufficient to warrant CSC I charges. MCL 750.520a(1); MSA 28.788(1)(1); cf. *People v McClain*, 105 Mich App 323, 325-328; 306 NW2d 497 (1981).

Finally, defendant argues that his sentence was disproportionate. We disagree. Defendant's sentence was within the sentencing guidelines and was proportionate to the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Affirmed.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant