

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH EDWARD MASON,

Defendant-Appellant.

UNPUBLISHED

September 17, 1996

No. 178962

LC No. 94-1077-FH

Before: Markey, P.J., and McDonald and M. J. Talbot*, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of assault with intent to commit second-degree criminal sexual conduct (CSC), MCL 750.520g(2), MSA 28.788(7)(2), and one count of attempted fourth-degree CSC, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). The trial court sentenced defendant to concurrent terms of eighteen to sixty months of imprisonment for the assault offense, and six months of imprisonment for the attempted CSC offense. Defendant appeals his convictions and sentence as of right. We affirm.

I

Defendant first argues that his motion for a directed verdict should have been granted because the evidence presented at trial regarding the dates upon which the charged offenses occurred differed from the dates contained in the information by more than one year. Defendant's argument ignores the fact that plaintiff is not required to prove the exact date of the charged offenses, as time is not of the essence or an element in a criminal sexual conduct case when the victim is a child. MCL 767.45(1)(b); MSA 28.985(1)(b), MCL 767.51; MSA 28.991, *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990); see *People v Schultz*, 238 Mich 15; 213 NW 135 (1927).

In addition, defendant has failed to demonstrate any resultant prejudice. Although the dates of the alleged incidents were uncertain, the occasions were not. Defendant testified regarding the two incidents at issue here, explained his behavior, and denied any inappropriate conduct with the

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

complainant. Defendant was in no way misled regarding when these offenses occurred, and he was not convicted for any offense other than those alleged in the information. *People v Howell*, 396 Mich 16, 27-29; 238 NW2d 148 (1976). The trial court properly denied defendant's motion for a directed verdict.

II

Defendant next claims the prosecutor improperly shifted the burden of proof during cross-examination of defendant and during closing argument. We review claims of prosecutorial misconduct de novo, keeping in mind that the test is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Because a defendant has no duty to prove his innocence, it is improper for the prosecutor to attempt to shift the burden of proof by suggesting a defendant must prove something or present a reasonable explanation for damaging evidence, *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987), or by asking the defendant to comment on the credibility of prosecution witnesses, *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995). We have reviewed the challenged questions and remarks and conclude that the prosecutor did nothing more than cross-examine defendant regarding his initial explanations to the investigating officer, and suggest to the jury that nothing in the evidence presented by either party could possibly give rise to a reasonable doubt.

Furthermore, any possible harm was cured by the trial court's prompt admonishments to the jury that defendant did not have to prove anything and that the prosecutor alone bore the burden of proof, and by the court's instructions regarding defendant's presumption of innocence and plaintiff's burden to prove defendant's guilt beyond a reasonable doubt. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

None of the challenged questions or remarks by the prosecutor, either alone or cumulatively, denied defendant a fair and impartial trial.

III

Defendant contends that at sentencing the court should not have considered a letter written by the complainant's uncle and that certain information should have been deleted from defendant's presentence report. Regardless of the merit of defendant's argument, this issue is moot as defendant has already fully served the sentence imposed by the trial court. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot