

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT RICHARD NISWANDER,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 174530

LC No. 93-28408-FC

Before: Saad, P.J., and Corrigan and R.A. Benson,* JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentence to two concurrent terms of imprisonment of twelve to thirty years. We affirm.

The victim, defendant's half-sister, was nearly sixteen years old at the time of trial. She testified that defendant sexually abused her from the time she was nine years old until she was fifteen. The two charges against defendant resulted from separate incidents of digital penetration and cunnilingus. One charged incident took place during a 1990 summer visit by defendant, then in the National Guard, and one incident occurred during the Christmas season in 1989 or 1990.

The information originally stated that the charged acts occurred between August and November 1990. The court allowed amendment of the information on the trial date to provide that the charged acts occurred between December 1989 and November 1990. The trial judge found that one offense occurred between June 5 and June 14, 1990, and the other occurred during Christmas 1989; neither period was specifically covered by the original information. Defendant presented an alibi defense for the period between June 16 through October 24, 1990.

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

Defendant first asserts that he was prejudiced by the late amendment of the information. A trial court may permit amendment of an information at any time before, during or after trial. That decision will not be reversed absent a finding of prejudice to the defendant or a failure of justice. MCL 767.76; MSA 28.1016; MCR 6.112(G); *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980). An information shall contain the time of the charged offense as near as may be, but no variance as to time is fatal unless time is of the essence of the offense. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). Time is not of the essence, nor a material element, in a criminal sexual conduct case that involves a child, especially recognizing children's difficulty with the concept of time. See, e.g. *Commonwealth v Gamache*, 35 Mass App Ct 805, 808-809; 626 NE2d 616 (1994); *State v Allen*, 69 Ohio App 3d 366, 370-371; 590 NE2d 1272 (1990). Cf. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990); *Stricklin*, *supra* at 634-635. Defendant was not prejudiced by the amendment. Defendant's alibi witnesses had not been with defendant for twenty-four hours a day during the period for which they provided alibis. In addition, defendant confessed that he had abused his sister once between the time he was eleven and fifteen years old. He also admitted that an incident of digital penetration occurred in either November or August of 1990.

Defendant next asserts that the trial judge abused his discretion in failing to grant a continuance after the information was amended. *People v Wilson*, 397 Mich 76; 243 NW2d 257 (1976). In determining whether the trial judge properly exercised his discretion, this Court considers whether:

- (1) the defendant was asserting a constitutional right;
- (2) he had a legitimate reason for asserting that right;
- (3) he was not negligent in asserting it;
- (4) prior adjournments of trial were not at his request; and
- (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. [*Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995) (citations omitted).]

For the same reasons noted above, defendant cannot show that he was prejudiced by the trial court's refusal to grant a continuance.

Defendant next asserts that by permitting the prosecutor to expand the offense date, the trial court rendered defense counsel unable to defend him, thus depriving him of effective assistance of counsel. Again, defendant is required to show prejudice to prevail on a claim of ineffective assistance of counsel. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). For the reasons noted above, defendant cannot show prejudice.

Finally, defendant asserts that his sentence was disproportionate, although it is within the guidelines, because of his own past history of sexual abuse as a child and because of his honorable service in the National Guard. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The trial judge, in imposing sentence, noted defendant's history of sexual abuse but also noted defendant's refusal to admit to any adult wrongdoing. The judge expressed doubt about defendant's potential for rehabilitation and concern about defendant's propensity to repeat his offenses. Defendant's juvenile record was serious, and his adult record contained multiple felony offenses. The guidelines

recommended minimum range was eight to twenty years. The trial judge did not abuse his discretion in imposing twelve-year minimum sentences. Defendant's sentences were proportionate both to the offense and to the offender.

Affirmed.

/s/ Henry William Saad

/s/ Maura D. Corrigan

/s/ Robert A. Benson