

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DALE BARMAN,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 185973

Ottawa Circuit Court

LC No. 93-017496-FC

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant was sentenced to ten to twenty years' imprisonment for his conviction. He appeals as of right and we affirm.

In May 1989, defendant committed the instant offense by engaging in vaginal intercourse with the victim, his five-year-old niece. At the time of the incident, defendant was living with his mother, who was responsible for baby-sitting the victim. Angela Crozier, defendant's former girlfriend, was present at defendant's mother's home when the incident occurred.

Defendant first claims that the trial court erroneously allowed the prosecution to amend the information the day the trial began to indicate that the incident occurred in May 1989 rather than April 1989. We disagree. This Court will not reverse a trial court's decision to amend the information unless the defendant was prejudiced in his defense or if a failure of justice resulted. MCL 767.76; MSA 28.1016; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982). "Where the original information is sufficient to inform a defendant of the nature of the charge against him, the defendant is not prejudiced by an amendment to cure a defect in the information." *People v Newson*, 173 Mich App 160, 164; 433 NW2d 383 (1988). Furthermore, temporal variances in an information are not fatal unless time is of the essence of the offense. See MCL 767.45(2); MSA 28.985(2); *People v Stricklin*, 162 Mich App 623, 624; 413 NW2d 457 (1987). In criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element. *Stricklin*, *supra* at 634; *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986).

The record does not sustain defendant's claim that time was essential to the alleged crime. Further, defendant's defense was not narrowly tailored to establish that he could not have committed the offense in April 1989. Rather, it encompassed the time frame of April and May 1989. Under these circumstances, we conclude that defendant was not prejudiced by the amendment to the information.

Defendant next argues that the trial court improperly admitted the rebuttal testimony of Angela Crozier. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Generally, a prosecutor cannot introduce rebuttal evidence that could have been introduced in the people's case in chief. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the other party. *Id.* The test whether rebuttal evidence was properly admitted is whether the evidence is responsive to evidence introduced by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). "As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

In the present case, defendant's witnesses testified that defendant's mother never baby-sat the victim in 1989 and that, at the time the incident allegedly occurred, defendant was living with Crozier at a home he was renting. Additionally, defendant testified that he and Crozier were never left alone with the victim. On rebuttal, Crozier testified that defendant's mother baby-sat the victim in 1989, and that, in one instance, she and defendant were left alone with the victim. Because Ms. Crozier's testimony directly refuted the testimony of defendant's witnesses, the trial court did not abuse its discretion in allowing her to testify even though she was not properly endorsed on the information as a potential witness. *Figgures*, *supra* at 399; see *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163 (1995), remanded on other grounds 449 Mich 851 (1995).

Finally, defendant contends that the trial court erred in denying his motion in limine to preclude the victim against referencing defendant's prior incarceration and his motion for a mistrial after the victim's mother mentioned defendant's past incarceration. We disagree. This Court reviews a trial court's grant or denial of a mistrial and a decision to admit evidence for abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996); *Coleman*, *supra*.

At trial, the victim's mother briefly mentioned during direct examination that defendant had been in jail. Additionally, the victim testified that because defendant was in and out of jail, she was afraid of him and, therefore, waited to inform someone about the incident. In *People v Johnson*, 171 Mich App 801; 430 NW2d 828 (1988), this Court addressed a similar issue. In *Johnson*, the defendant was convicted of two counts of first-degree criminal sexual conduct, kidnapping, and felony-firearm. *Id.* at 803. During trial, the court allowed the victim to testify that the defendant told her that he would kill her or her family if she told anyone about the incident, and that going to jail did not scare him because he had already been in jail. *Id.* This Court, in finding that the trial court did not abuse its discretion, held:

The victim's statements were not admitted merely to establish that defendant had a criminal record, but were relevant to the elements of coercion and the victim's mental

anguish. That is, the fact that the statements were made to the victim explains the victim's subsequent conduct and assisted the jury in determining whether the victim had suffered mental anguish. Thus, while defendant's prior incarceration was not directly relevant, his statement to the victim that he had been incarcerated was relevant. [*Id.* at 803-804.]

In this instance, like *Johnson*, defendant's incarceration is relevant to the victim's state of mind. It demonstrates the reason that she did not immediately inform someone about the incident. The trial court did not abuse its discretion in admitting this evidence and denying defendant's motion for a mistrial.

Defendant also asserts that the cumulative effect of the errors at trial resulted in an unfair trial. In view of our resolution of the preceding issues, this claim is without merit.

Affirmed.

/s/ Richard Allen Griffin

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman