STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS KENNETH GROKE,

Defendant-Appellant.

UNPUBLISHED
July 1, 1997

No. 196694
Recorder's Court
LC No. 94-003791

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b), and indecent exposure, MCL 750.335a; MSA 28.567(1). The court sentenced defendant to fifteen years' imprisonment for the criminal sexual conduct conviction, and to time served for the indecent exposure conviction. We affirm the criminal sexual conduct conviction and reverse defendant's indecent exposure conviction.

Defendant claims that he was denied his right to a speedy trial -- he was not. In *People v Gilmore*, ___ Mich App ___; ___ NW2d ___ (Docket No. 193063, issued 3/25/97, slip op at 7-8), this Court summarized the standard for evaluating this issue:

> Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. We review trial court factual findings under the clearly erroneous standard. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). We review constitutional questions of law de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). To determine whether a defendant has been denied his right to a speedy trial, this Court considers (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). A delay of more than eighteen months is presumed to be prejudicial; the prosecution bears the burden of proving lack of prejudice to the defendant. *Id.* The establishment of a presumptively prejudicial delay

> "triggers an inquiry into the other factors in balancing the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Id*. at 109-110.

Although trial commenced twenty-two months after defendant's arrest, much of the delay is attributable to defendant. See *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). The bulk of the delay occurred because defendant was being tried on another offense, a circumstance attributable to him. *People v Collins*, 388 Mich 680, 688; 202 NW2d 769 (1972); *People v Lewandowski*, 102 Mich App 358, 366: 301 NW2d 860 (1980). Additionally, many of the scheduling delays in the first trial were due to defense counsel's tardiness and scheduling concerns. Moreover, defendant did not formally demand a speedy trial until the day of trial. See, generally, *People v Harris*, 110 Mich App 636, 647; 313 NW2d 354 (1981). Further, defendant does not establish how the delay impacted the prosecution's failure to call an alleged res gestate witness. Nor has defendant provided an explanation of how the delay caused the absence of his alleged alibi witness. In any event, this case does not lend itself to an alibi defense because the allegations cover a long time span where defendant and the victim lived in the same house. Thus, the delay did not prejudice defendant's defense. See *People v Wickham*, 200 Mich App 106, 109: 503 NW2d 701 (1993); *People v Bennett*, 84 Mich App 408, 411; 269 NW2d 618 (1978). Balancing these factors against any delays attributable to the prosecution, we conclude that defendant was not denied his right to a speedy trial.

Defendant asserts that the trial court committed error requiring reversal in convicting him of indecent exposure. Defendant contends that he was not adequately notified that he was required to defend himself against this charge. He is correct. A court may not consider a lesser offense over defendant's objection unless the language of the charging document gives the defendant fair notice that he might be charged with the lesser offense. *People v Adams*, 389 Mich 222; 205 NW2d 415; 59 ALR3d 1288 (1973); *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992); *People v Quinn*, 136 Mich App 145, 147; 356 NW2d 10 (1984). The notice is adequate if the latter charge is a lesser included offense of the original charge. *People v Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975); *Usher, supra* at 231-232. In *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996), this Court summarized the standard for determining whether a crime is a lesser included misdemeanor of the charged offense:

> In *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982), our Supreme Court held that a court must instruct concerning a lesser included misdemeanor where (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. See also *People v Hendricks*, 446 Mich 435, 444-446; 521 NW2d 546 (1994); *People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994). Offenses are inherently related if they relate to the protection of the same interests *and* are related in an evidentiary manner such that, generally, *proof of the misdemeanor is necessarily presented in proving the greater*

> *offense*. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987), see also *Hendricks, supra* at 445; *Stephens, supra* at 262, quoting *United States v Whitaker*, 144 US App DC 344, 349; 447 F2d 314 (1971). [Emphasis added.]

Here, the information charged defendant with second-degree criminal sexual conduct under a theory that defendant perpetrated a sexual touching with a minor living in the same household. See, generally, *Jones, supra* at 389. This crime, which requires an illicit sexual touching, CJI2d 20.2; 20.4, has no element concerning the exposure of one's genitals. See CJI2d 20.33. Because the proof of intentional, illicit exposure is not necessarily presented in proving second-degree criminal sexual conduct, indecent exposure is not a lesser included misdemeanor of second-degree criminal sexual conduct. Additionally, the language in the felony information gives no indication that defendant would be called to defend himself against an indecent exposure charge. Therefore, the trial court abused its discretion in granting the prosecution's posttrial motion to consider the indecent exposure charge which must therefore be reversed. *Stephens, supra* at 265.

Defendant further contends that the prosecution failed to present sufficient evidence to support his conviction for second-degree criminal sexual conduct. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant's sole argument pertaining to the sufficiency of the evidence concerns the evidence presented to establish that he and the victim were members of the same household when the offense occurred. According to defendant, he was not a member of the victim's household because he was a temporary resident who lacked authority to make rules for the victim. However, in *People v Garrison*, 128 Mich App 640, 646-647; 341 NW2d 170 (1983), we held that

> the term "household" has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit. The "same household" provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure.

This defendant had been living with the victim's family for a month and a half and had no other residence during the time he lived with the victim's family. Although he had no blood relationship with the victim, he slept in the victim's mother's bedroom during his stay and, presumably, accessed common areas in the house where the victim lived. In light of the analysis in *Garrison*, these facts establish sufficient evidence for a rational factfinder to conclude that defendant was a member of the victim's household at the time of the offense. We note that defendant's apparent lack of rule-making authority is irrelevant in light of the fact that exploiting authority over a young victim is a separate and completely distinct aggravating factor under the criminal sexual assault statute. Nevertheless, we consider evidence

that defendant, who is much older than the victim, slept in the victim's mother's bedroom sufficient to establish that defendant had some authority over the victim.

Finally, defendant argues that the trial court abused its discretion in allowing the victim to testify about defendant's prior bad acts. However, the victim only described conduct defendant committed within the time frame outlined in the felony information. Therefore, the complained-of testimony was not bad acts evidence, but evidence germane to the pending charges. The trial court did not abuse its discretion in admitting this relevant evidence.

Defendant's second-degree criminal sexual conduct conviction is affirmed. Defendant's indecent exposure conviction is reversed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad