

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE THOMAS CURTIS,

Defendant-Appellant.

UNPUBLISHED

February 12, 1999

No. 204731

Lapeer Circuit Court

LC No. 96-005923 FC

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant, who was forty-five at the time of the incident underlying this case, was convicted of two counts of first degree criminal sexual conduct (CSC I) and one count of aiding and abetting CSC I, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), involving a fifteen-year-old girl. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to serve twenty-five years to forty years' imprisonment on each count. Defendant appeals by right. We affirm.

I

Defendant first argues that the trial court erred in admitting into evidence statements defendant made to a police officer while in custody and finding that defendant did not want his attorney present during defendant's conversation with the officer. Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). *Miranda* warnings are not required, however, unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384, 391-392; 415 NW2d 193 (1987); *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1996).

Testimony revealed that defendant sent Officer Parks a note stating that he needed to speak with Parks. Parks testified that he said "what can I do for you," and defendant began telling Parks what really happened, i.e., that he just gave the other two men implicated in the rape and the victim alcohol and marijuana. Defendant refused to wait until the following week at the continuation of his preliminary

examination to speak with Parks and his lawyer. Indeed, defendant stated that he did not want his attorney present. The officer testified that he did not question or interrogate defendant, so he did not read defendant his *Miranda* rights again, and that defendant spoke freely.

We conclude that the officer's conduct did not constitute an "interrogation" triggering *Miranda* because there was no express questioning or a practice that the officer knew or reasonably should have known was likely to invoke an incriminating response. *Anderson, supra* at 532-533. Although defendant and the officer tell different stories regarding what was said during their conversation, deference must be given to the trial court's findings as to witness credibility. See *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J.), 44 (Weaver, J.; Cavanagh, J.), 58 (Mallet, C.J.); 551 NW2d 355 (1996); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). Accordingly, this incident did not constitute a custodial interrogation and the statements were not admitted into evidence in violation of defendant's Fifth Amendment rights.

We also find that defendant's Sixth Amendment right to counsel also was not violated.¹ To constitute an effective waiver of defendant's Sixth Amendment right to counsel it must be shown that defendant's waiver was knowingly, intelligently and voluntarily given. "The existence of a knowing and intelligent waiver of the Sixth Amendment right to counsel depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996), citing *People v Riley*, 156 Mich App 396, 399; 401 NW2d 875 (1986). Even though the issue of voluntariness is a question of law for the court, this Court will not disturb a trial court's factual finding regarding a knowing and intelligent waiver unless the ruling is clearly erroneous. *Cheatham, supra* at 27-30, 44; see also *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1994).

Here, we find no evidence that defendant's statements were made involuntarily, or that he was coerced. Defendant initiated the conversation and does not argue that he was threatened or coerced in any way; indeed, he testified that Officer Parks did not intimidate him. Moreover, defendant was aware of his right to counsel because he was given *Miranda* warnings when he was arrested. See, e.g., *McElhaney, supra* at 276-277. Notably, defendant's statements were made between the first and second days of his preliminary examination where he was present and represented by counsel, and the officer attempted to convince defendant to wait until the next preliminary examination hearing to discuss these matters, but defendant did not want to wait and did not want his attorney present. Accordingly, defendant's statements to Officer Parks were "knowingly" made with an appreciation of his rights. Again, although defendant's testimony regarding this conversation conflicted with Officer Parks' testimony, the trial court found the officer to be the more credible witness, and this Court will defer to the trial court's findings as to the credibility of witnesses. *People v Stricklin*, 162 Mich App 635, 636; 413 NW2d 457 (1987). Thus, based on the totality of the circumstances, including defendant's age and prior experience with law enforcement, we conclude that defendant knowingly and intelligently waived his Sixth Amendment rights. *McElhaney, supra*.

II

Defendant next argues that the trial court erred in allowing the prosecution to amend the information after the prosecution presented its case in chief and after defendant examined all witnesses. We review for an abuse of discretion the amendment of a criminal information. *People v Coles*, 28 Mich App 300, 302; 184 NW2d 214 (1970).

MCL 767.76; MSA 28.1016 provides in part that a trial court may “at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence.” The statute “permits only [the] cure of defects in the statement of the offense which is already sufficiently charged to fairly apprise the accused and court of its nature.” *People v Price*, 126 Mich App 647, 651-652; 337 NW2d 614 (1983), citing *People v Sims*, 257 Mich 478, 481; 214 NW 247 (1932). We conclude that the trial court properly amended the information to include a count of aiding and abetting.

In Michigan, the distinction between being a principal of a crime and an aider and abettor to a crime has been abolished by statute. MCL 767.39; MSA 28.979.² Accordingly, it is not necessary for a prosecutor to charge a defendant in any other form than as a principal, *People v Lamson*, 44 Mich App 447, 450; 205 NW2d 189 (1973); *People v Dockery*, 20 Mich App 201, 207; 173 NW2d 726 (1969), but a defendant may be charged as a principal and convicted as an aider and abettor, *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995). The amendment did not improperly add a new offense; rather, it added an additional count of the same offense. Cf. *Price*, *supra* at 651. The question then is whether defendant was prejudiced in his defense by the amendment. *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

“Even if an objection is made and the trial court allows an amendment of the information, this Court will not reverse such a decision unless it finds that the defendant was prejudiced in his defense or that a failure of justice resulted.” *Id.*; MCL 767.76; MSA 28.1016. The Supreme Court has phrased the question of prejudice as whether a requested amendment would unduly prejudice the defendant because of “unfair surprise, inadequate notice, or insufficient opportunity to defend.” *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998), quoting *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Here, at defendant’s preliminary examination, the victim testified that she heard defendant tell Justin Marsh to kill her just before Marsh forced her to perform fellatio on him while attempting to strangle her with twine. Furthermore, defendant knew or should have known prior to trial that both Justin Marsh and Josh Miller, two boys who were also charged with raping the victim, would testify at trial. Therefore, we find no unfair surprise regarding the aiding and abetting count. As for notice, the statute allows a trial court to amend an information at any time. Because an aider and abettor may be charged as a principal, defendant was at least on constructive notice that he could be charged and convicted as an aider and abettor. Finally, defendant testified that he never had sexual relations with the victim, and that everything the victim, Marsh, and Miller had said implicating him was a lie. Defense counsel cross-examined all the witnesses, drawing out some facts that weakened their testimony. We conclude that the amendment of the information against defendant was not prejudicial to his defense because it did not appear that there was any other defense he could have offered other than to say that he was telling the truth and that other witnesses were lying. Accordingly, defendant was not unfairly

surprised or given inadequate notice, and he had a sufficient opportunity to defend regarding the amended charge. *Goecke, supra* at 462. Thus, no abuse of discretion occurred in allowing the amendment.

III

Defendant next argues that the trial court abused its discretion by granting the prosecutor's motion to endorse late witnesses. We review for an abuse of discretion a trial court's endorsement or deletion of witnesses to be called at trial. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). A trial court may permit the late endorsement of witnesses at any time upon leave of the court and for good cause shown. MCL 767.40a(4); MSA 28.980(1).

Here, the trial court chastised the prosecutor for waiting until two weeks before trial to endorse Justin Marsh, Faye Marsh and Vera Kaake as witnesses, but it found that defendant suffered no surprise as a result. These witnesses were directly involved in the rape (Justin Marsh), present at the hospital as the victim's mother when the victim gave her statement to the police (Vera Kaake), and spoke to defendant on the night of the rape (Faye Marsh). The court believed the only surprise was in the prosecutor's decision to call them, and defendant would not be prejudiced by their inclusion, despite the two-week window of time left to interview these witnesses.

Although the prosecutor could have articulated more carefully why good cause was shown to endorse these witnesses, we conclude that a reading of the entire motion transcript evidences that the court believed good cause existed. The prosecutor informed the court that both Justin Marsh and Faye Marsh testified at Justin's probate court trial, which resulted in his conviction. Although the record does not reveal when that trial ended, the prosecutor explained that he waited for the trial to conclude to avoid any Fifth Amendment claims that Justin could assert; apparently, Faye Marsh's testimony at that trial also evidenced her value as a *res gestae* witness. Notably, the court ordered the probate trial transcript prepared for defendant. Vera Kaake's testimony would touch on the victim's credibility and her long-term learning disability, which might be beneficial to defendant. We also believe that defense counsel should have had considered these individuals to be potential witnesses and already had a good idea as to the potential contents of their testimony.

Even assuming error in the late endorsement, the error was harmless because defendant failed to show that the late endorsement was prejudicial. MCR 2.613(A); MCL 769.26; MSA 28.1096; *Burwick, supra*. The testimony of Faye Marsh and Vera Kaake did not particularly incriminate defendant, and while Justin Marsh's testimony was highly incriminating, it was consistent with the highly incriminating testimony of the victim and Miller. Thus, it is not clear that, given the weight of the other evidence, the witnesses' testimony affected the reliability of the jury's verdict. *People v Mateo*, 453 Mich 203, 212-215; 551 NW2d 891 (1996).

IV

Finally, defendant argues that the trial court erred in allowing improper rebuttal testimony. A trial court's decision to admit rebuttal evidence will not be disturbed on appeal absent a clear abuse of

discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). “[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor’s case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant.” *Figgures, supra* at 399. Rebuttal evidence must also relate to a substantive rather than a collateral matter. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994).

Here, defendant testified that he had only seen the victim three times, that he bore her no ill will, and that he had lied to the police in order to protect her. The rebuttal witness testified that defendant told her that the victim had a big mouth that needed to be taken care of and that defendant would tie bricks on the victim’s feet and throw her in a lake. This testimony was proper rebuttal evidence in that it directly contradicted defendant’s testimony during trial that he was friendly with the victim. *Figgures, supra* at 399. Furthermore, this rebuttal evidence properly related to a substantive matter as defendant’s credibility is a substantive matter. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995); *Okopski, supra*. Thus, the trial court did not clearly abuse its discretion. *Figgures, supra* at 390.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

¹ A defendant’s Sixth Amendment right to counsel “attaches only at or after the initiation of adversary proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment.” *People v Bladel (After Remand)*, 421 Mich 39, 52; 365 NW2d 56 (1984), aff’d sub nom *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Here, defendant’s Sixth Amendment right to counsel had attached because his preliminary examination was initiated before the conversation at issue.

² MCL 767.39; MSA 28.979 states that “[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried, and on conviction shall be punished as if he had directly committed such offense.”