

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SCOTT BRUCE KING,

Defendant-Appellant.

UNPUBLISHED

November 12, 2002

No. 232327

St. Joseph Circuit Court

LC No. 00-010106-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of 17 ½ to 35 years. Defendant appeals as of right. We affirm.

Defendant first claims that the prosecutor failed to produce sufficient evidence at trial to sustain a conviction for first-degree criminal sexual conduct. We disagree.

When reviewing a sufficiency of the evidence challenge, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

To support a conviction for first-degree criminal sexual conduct in this case, it is necessary for the prosecution to have proven, beyond a reasonable doubt: (1) the sexual penetration of another person; and (2) the other person was under the age of thirteen. MCL 750.520b(1)(a). It is defendant's contention that the evidence presented at trial was insufficient to show beyond a reasonable doubt the necessary penetration element.

The Legislature has defined "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or an other intrusion, however slight, of any part of a person's body into the genital or anal openings of another person's body . . ." MCL 750.520a(1). Further, this Court has specifically determined that testimony that the defendant's hand had made contact with the inside of the victim's genitals was sufficient evidence to establish the penetration

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

element of first-degree criminal sexual conduct. *People v Reinhardt*, 167 Mich App 584, 599: 423 NW2d 275 (1988), vacated on other grounds 436 Mich 866 (1990).

The evidence in this case was sufficient, when viewed in a light most favorable to the prosecution, to allow the jury to conclude, beyond a reasonable doubt, that defendant committed first-degree criminal sexual conduct. The victim testified that defendant “licked his thumb, and put it inside me . . . inside my privates, the front ones.” Moreover, the examining physician corroborated the victim’s testimony, testifying that upon his examination of the victim’s vagina, he discovered “red” and “irritated” mucus membranes. Specifically, the physician indicated that this could not have been accomplished without penetration of the vagina. The physician also opined that such penetration occurred within the time frame of the alleged occurrence. Therefore, defendant’s argument fails.

Defendant also claims that he was denied due process and the right to present a defense by the trial court’s allowance of the prosecutor’s amendment of the information concerning the date of the occurrence. We disagree.

The amendment of the information in a felony proceeding is reviewed for abuse of discretion. *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Wilhite*, 240 Mich App 587, 595; 618 NW2d 386 (2000).

A trial court may amend the information at any time before, during, or after trial in order to cure a variance between the information and the proofs as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. MCR 6.112(H); *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). When the defendant has objected to such an amendment, the reviewing court must determine whether defendant has been prejudiced by the amendment or unfairly surprised. MCR 6.112(H). Prejudice occurs when the defendant does not admit guilt and is not given a chance to defend against the crime. *Stricklin*, *supra* at 633.

Time is not of the essence nor a material element in criminal sexual conduct cases involving a child victim. *Id.* at 634. The prosecutor requested to amend the date of the occurrence to conform to the proofs presented at trial. This date, however, conflicted with defendant’s alibi defense. Consequently, defendant asserts that “with the amendment the prejudice was fatal to defendant’s only defense.”

We, however, do not find that defendant was deprived of the opportunity to defend against the charged crime. While the information was amended to reflect a variance in the date of the occurrence, the amendment did not result in the charge of a new crime. Further, not only did the information fail to result in additional charges against defendant, the amendment did not result in any changes to the substance of the charges already pending against defendant. Moreover, nothing in the record suggests that defendant would have presented an alternate defense. This is evidenced by the fact that defendant, after conferring with counsel, did not move for a continuance even though such action was suggested by the trial court. Defendant

used the change in time frame to attack the victim's credibility. Accordingly, defendant had adequate notice of the charges against him as well as the opportunity to defend against them.

Based on the foregoing, the amendment of the information did not unfairly prejudice or surprise defendant. Therefore, it cannot be said that there was no justification for the trial court's determination to allow the amendment of the information, or that allowing the amendment was so palpably and grossly violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or the exercise of passion or bias so as to be an abuse of discretion. Accordingly, defendant's argument is without merit.

Defendant further claims that his trial court counsel was ineffective for failing to request a continuance after the amendment of the information. Again, we disagree.

The determination as to whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The judge must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 302-303.

Even if the first prong of the test was satisfied, and it is found that a reasonable attorney would have requested a continuance, defendant fails to show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Specifically, the evidence of defendant's guilt was overwhelming. Other witnesses confirmed the victim's explicit testimony implicating defendant. Moreover, defendant has failed to proffer a viable defense. Accordingly, there are no circumstances that undermine the confidence in the jury's determination of guilt.

Furthermore, defendant offers no support for his contention that the defense could have been restructured even if the continuance had been granted. When the information was amended, the trial court indicated that a continuation would be allowed if requested. Defense counsel indicated that he would need to confer with defendant. One hour passed before trial resumed, at which time defense counsel did not request a continuation, nor indicate that he had an alternative defense. Hence, it follows that a continuation was considered and rejected. This Court will not second guess counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Based on the foregoing, defendant suffered no prejudice on account of counsel's actions or inactions; therefore, defendant fails to overcome the presumption of counsel's competence.

Next, defendant asserts that the trial court committed error in permitting the examining physician to testify to the statements of the victim identifying defendant as the perpetrator and for allowing the prosecutor to elicit testimony from the physician regarding events involving “other peculiarities” between the victim and defendant. We disagree.

MRE 803(4) allows the admission of hearsay statements made for “purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.”

Our Supreme Court has ruled that a child sexual assault victim’s identification of the perpetrator to the examining physician falls within the hearsay exception for medical diagnosis and treatment. Specifically, the Court stated that “we find that the identification of the assailant is necessary to adequate medical diagnosis and treatment.” *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The Supreme Court also recognized that “[i]dentification can be as important to the health of the child as treatment of the physical injuries that are apparent to the physician,” *id.* at 328, and that

[d]isclosure of the assailant’s identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician’s choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.

In addition to the medical aspect explained above, the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child’s household” [*Id.* at 329.]

Accordingly, it cannot be said that the trial court abused its discretion by allowing the testimony of the examining physician relating to the victim’s identification of her assailant or the circumstances of the assault.

Defendant also asserts that the prosecutor committed misconduct in eliciting testimony from the examining physician regarding other “peculiarities.” Defense objected on the grounds that the question was intended, in violation of the rules of evidence, to elicit the inference that defendant was a pedophile and that he acted in conformity with this character trait in the instant action.

When analyzing a prosecutorial misconduct claim, this Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. *People v Kris Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). A prosecutor’s attempt to reveal inadmissible evidence to the jury might constitute misconduct. See *People v Leo*, 188 Mich App 417, 428; 470 NW2d 423 (1991). However, in the instant action the trial court instructed the jury not to speculate as to what “peculiarities” the witness had made reference to, and it told the jury to disregard the evidence. Moreover, defendant was not prejudiced in light of the overwhelming evidence of guilt. MCL 769.26. Accordingly, it cannot be said that the vague

statement as to “other peculiarities not involving touching” denied defendant a fair and impartial trial.

Finally, defendant contends that the trial court erred by imposing a maximum guidelines sentence on defendant, where it articulated intent to impose a mid-guidelines sentence. Again, we disagree.

Regardless of whether the issue was properly preserved, there is no evidence indicating the trial court was mistaken in its imposition of the sentence, which was within the appropriate sentence range of 10 ½ to 17 ½ years. The record indicates that the trial court carefully considered appropriate factors and that its decision reflected the court’s carefully considered intention. Contrary to defendant’s assertion, the trial court did not state that its intention was to impose a midrange sentence. The trial court did note that a midrange sentence would be adequate to accomplish the goal of punishment. However, it went on to say, “I’m satisfied that the guidelines are high enough to satisfy the public protection goal.” Thus, the court’s reference to the midrange sentence was addressed to only one of the goals of sentencing. Because this sentence is within the guidelines, and because defendant has not shown that the circuit court committed an error, the sentence must be affirmed. MCL 769.34(10).

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof