

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BRANT CAROEN,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 261929

Montmorency Circuit Court

LC No. 03-000536-FH

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under thirteen), and two counts of accosting a child under sixteen for an immoral purpose, MCL 750.145a. The trial court sentenced him to concurrent prison terms of eighteen months to six years for each accosting conviction and three years to 22½ years for the CSC II conviction. We affirm.

Defendant first argues that an error requiring reversal occurred when the trial court denied his motion to suppress certain evidence obtained during a search of his home. We disagree that reversal is warranted. Even assuming, for purposes of argument, that the search of defendant's home was unlawful under *Georgia v Randolph*, 547 US 103; 126 S Ct 1515; 164 L Ed 2d 208 (2006), any error in denying the motion to suppress was nonetheless harmless, given the weight of the other evidence presented at trial. "A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (alteration by *Mass*).

According to one of the complainants, CF, defendant placed CF's hand on the "private area" of another complainant, CJ, who was defendant's stepdaughter. This was confirmed by CJ. The girls' consistent testimony regarding the presence of adult magazines and videos, and about defendant's offers to pay them money in exchange for their touching their own genitals or causing defendant to orgasm supports the conclusion that defendant placed CF's hand on CJ for a sexual purpose. This evidence also supports the conclusion that defendant accosted and solicited both girls with the intent to get them to engage in an immoral act. Further, the other-acts evidence established that defendant had employed a characteristic scheme or plan in carrying out the charged activities.

Additionally, the evidence that was the subject of defendant's motion to suppress consisted of sexually explicit magazines and videotapes. Yet other magazines, which came from defendant's gun cabinet, were also introduced at trial. Defendant's argument on appeal is not directed toward these additional magazines. One featured "wicked daughters seducing their dads," one featured "[s]ecrets to getting two girls in bed," and one featured "young females having sex with each other." In light of these additional magazines and the relationship their content bore to the circumstances of the charged crimes, we simply cannot conclude that the introduction of the magazines and videotapes found during the search of the home affected the outcome of the case.

Defendant next argues that that an error requiring reversal occurred with respect to the specified date of the charged offense. Defendant was originally scheduled for trial on August 19, 2003, and on that date the prosecutor asked to amend the date on which the offense was alleged to have occurred, which at that time was November 9, 2002. According to the prosecutor, the November 9, 2002, date was based on the complainants' statements that the incident occurred about two weeks before they reported it on November 23, 2002. Defendant had filed a notice of an alibi defense for November 9, 2002.

According to the prosecutor, the week before the scheduled trial date, defendant's wife reminded the prosecutor that the children had apparently been watching a "Scooby Doo" movie on the night of the alleged sexual misconduct. According to the prosecutor, she asked defendant's wife to obtain a record of the movie rental, which revealed that the movie was rented on October 26, 2002. Defendant objected to the prosecutor's request to change the date in the information to October 26, arguing that once the alibi defense was put forth, the prosecution could no longer change the date because it would be "greatly prejudicial" to him. The trial court agreed and refused to amend the information, instead dismissing the case without prejudice. During the course of the proceedings, the trial court asked the prosecutor whether the new date was final, and the prosecutor agreed that the October 26, 2002, date was "not to ever be changed." Defendant filed another notice of an alibi defense for October 26, 2002.

At trial, defendant objected to the trial court's decision to give the jury an instruction that the prosecutor did not have to prove that the crime was committed on the exact date given, but only that it was committed reasonably near that date. Defendant argued that the instruction was improper in light of his alibi defense and the fact that the prosecution had already changed the date once before. The trial court, however, concluded that a specific date was not required in criminal sexual conduct cases.

On appeal, defendant again contends that the prosecutor should have been obligated to use the October 26, 2002, date as the date of the offense and that an "on or about" instruction was inappropriate and improperly curbed defendant's ability to present a defense. We disagree.

We review de novo whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Claims of instructional error that involve questions of law are also reviewed de novo, but the trial court's determination of whether a particular instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The trial court's determination with regard to the specificity of the date required in an

information is also reviewed for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

Under MCL 767.45(1)(b), an information must contain the time of the offense “as near as may be,” but “[n]o variance as to time shall be fatal unless time is of the essence of the offense.” Further, when time is not an element of the offense, “any allegation of the time of the commission of the offense . . . shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged” MCL 767.51. Accordingly, as a general rule, “a defendant is, ‘at least within reasonable bounds, required to ‘take notice that the prosecution may . . . offer proof of another date than that expressly alleged.’” *People v Smith*, 58 Mich App 76, 90; 227 NW2d 233 (1975), quoting *People v Fitzsimmons*, 320 Mich 116, 123; 30 NW2d 801 (1948). As long as time is not of the essence of the offense, and there is uncertainty with regard to the actual date of the offense, “some variance between charge and proofs is not fatal.” *People v King*, 365 Mich 543, 545; 114 NW2d 219 (1962).

In *Smith*, *supra*, 58 Mich App at 91-93, the Court concluded that a variance between the date of the offense alleged in the information and the date suggested by the evidence presented at trial was not fatal to the defendant’s conviction. *Smith*, *supra*, 58 Mich at 93. The Court noted that, although there was uncertainty with regard to the exact date of the offense, “there was no ambiguity as to whether only one offense was involved,” and the jury clearly did not find the defendant guilty of an offense other than the one with which he was charged. *Id.* at 93.

Moreover, “[t]ime is not of the essence nor a material element in a criminal sexual conduct case, at least where the victim is a child.” *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). For example, in *Naugle*, *supra*, 152 Mich App at 230, the defendant was charged with criminal sexual conduct involving his former stepdaughter, who testified with regard to three incidents that took place when she was thirteen years old. The child could not remember exactly when the events took place, but she was able to narrow the time periods in which they occurred to a range of possible dates spanning approximately four months. *Id.* at 232. The defendant argued that the lack of specific dates “precluded him from preparing an alibi defense” and that he was denied his right to due process by the trial court’s failure to require that the dates of the offenses be alleged with greater specificity. *Id.* at 233.

The *Naugle* Court set forth a non-exhaustive list of factors to be considered in making a determination of when and to what extent specificity should be required: “(1) the nature of the crime charged; (2) the victim’s ability to specify a date; (3) the prosecutor’s efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense.” *Naugle*, *supra*, 152 Mich App at 233-234. The Court held that, although a “defendant’s intention to assert an alibi defense should be a consideration in the trial court’s determination, we do not believe that it must necessarily militate in favor of either requiring specificity or dismissing the charges against a defendant.” *Id.* at 234. The Court reasoned that doing so would permit a defendant to assert an alibi defense simply to avoid prosecution in cases in which a child is confused with regard to the date of a sexual assault. *Id.*

The *Naugle* Court further noted that the pertinent statutes do not require that an exact date be specified and that, because the defendant was living in the same house with the victim over an extended period of time, creating a viable alibi defense “was not a realistic option.” *Naugle*, *supra*, 152 Mich App at 234-235. Accordingly, it concluded that the offense dates were

specified as closely as possible under the circumstances, particularly given that child victims of ongoing sexual assaults often have difficulty remembering specific dates. *Id.* at 235. It further noted that the prosecution made a “good-faith effort” to specify the dates and that “time is not an element of a sexual assault offense.” *Id.*

In *People v Taylor*, 185 Mich App 1, 3; 460 NW2d 582 (1990), the defendant was charged with first-degree criminal sexual conduct for raping a twelve-year-old girl. The complainant testified that she “was certain the crime occurred on December 4, 11, or 18, 1983.” *Id.* at 7. The defendant “offered alibi testimony for each of the possible dates on which the offense could have occurred.” *Id.* at 4. As in the present case, the jury was instructed that the proofs were sufficient if they showed that the crime was committed “reasonably near” the date charged. *Id.* at 7. The defendant objected, arguing that the instruction “allowed the jury to find that the rape could have occurred on a date other than the three dates alleged in the information.” *Id.* This Court found no error with regard to the instruction. *Id.* It also rejected the defendant’s argument that the trial court erred by allowing the prosecutor to allege three possible dates in the information, noting that time is not of the essence in criminal sexual conduct cases involving children. *Id.* at 7-8.

These cases illustrate that the failure to prove that the charged offense occurred on the date specified in the information is not itself a due process violation, and defendant’s assertion of an alibi defense does not necessitate that the prosecution commit to a specific date. See, generally, *Naugle, supra*, 152 Mich App at 234. Defendant acknowledges that, in general, the prosecution is not required to prove a specific date in cases involving criminal sexual conduct. He argues, however, that this rule is inapplicable here because there was ample evidence to establish a date and the prosecution committed on record to October 26, 2002.¹ We do not agree that the facts of this case vitiate the stricture that time is not of the essence in criminal sexual conduct cases involving children. Moreover, a defendant should not be permitted to use an alibi defense to avoid prosecution because a child is confused with respect to the date of an alleged assault. *Naugle, supra*, 152 Mich App at 234. It was clear from the beginning of the case that the prosecutor could not pinpoint an exact date. Despite this obvious uncertainty, defendant chose to rely in part on an alibi defense, which, as noted in *Naugle, supra*, 152 Mich App at 234-235, may not be “a realistic option” when a defendant and victim live in the same house over an extended period of time.

We conclude that the trial court did not err in instructing the jury that the prosecution only had to prove that the offenses were committed “reasonably near” October 26, 2002.

¹ We note that, in reference to her request to change the date of the information, the prosecutor agreed that the October 26, 2002, date would not “ever be changed.” Instead of allowing an amendment of the information, however, the trial court dismissed the case without prejudice. The new information indicated that the crimes occurred “[o]n or about 10/26/2002.”

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Alton T. Davis