

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND CRAIG JONES,

Defendant-Appellant.

UNPUBLISHED

September 22, 2009

No. 276690

Wayne Circuit Court

LC No. 06-005379-01

ON REMAND

Before: Markey, P.J., and Wilder and M. J. Kelly, JJ.

M. J. Kelly, J. (*dissenting*).

Because I conclude that the trial court abused its discretion when it permitted the prosecution to amend the information and that this error was not harmless, I would reverse and remand for a new trial. For that reason, I must respectfully dissent.

Our court rules give trial courts the discretion to permit the prosecutor to amend the information “before, during, or after trial” so long as the proposed amendment does not “unfairly surprise or prejudice” the defendant. MCR 6.112(H). Whether an amendment under MCR 6.112(H) prejudices a defendant will depend on both the substance of the amendment and its timing. See *People v Martin*, 482 Mich 851, 852 n 4; 752 NW2d 457 (2008) (Kelly, J. *concurring*). Generally, in criminal sexual conduct cases, time is not of the essence and is not a material element. See *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). However, in this case, the timing of the offense was a significant factor in the defense actually pursued by defendant’s trial counsel.

At trial, defendant’s trial counsel presented a traditional innocence defense: he argued that the accusation against his client was false. In order to give substance to that defense, defendant’s trial counsel sought to elicit testimony on cross-examination of the prosecution’s witnesses that demonstrated the implausibility of the complainant’s story. Specifically, defendant’s trial counsel sought to show that the complainant’s testimony about the timing of the alleged assault was inconsistent with evidence that defendant could not drive during that time period. By permitting the prosecution to amend the information to include a time period within which defendant could drive, the trial court significantly undermined defendant’s trial counsel’s efforts to attack the complainant’s credibility based on the alleged timing of the offense. Because the trial court’s decision to permit the amendment occurred after defendant’s trial counsel had already pursued a defense based on the time specified in the original information, the amendment prejudiced defendant. Therefore, the trial court abused its discretion when it

permitted the amendment. MCR 6.112(H). Further, given that this case was largely depended on the credibility of the complainant, I cannot conclude that the error was harmless.

For these reasons, I would reverse and remand for a new trial.

/s/ Michael J. Kelly