

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAYTON RICHARD SMITH,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 217660

Midland Circuit Court

LC No. 98-008938-FC

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (penetration of a person under thirteen). Defendant was sentenced as an habitual offender, MCL 769.10, MSA 28.1082, to concurrent terms of twenty-five to fifty years' imprisonment for each conviction. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court erred in excluding his mother's testimony that there was something unusual about his penis as irrelevant under MRE 401. We disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

At trial, defense counsel sought to elicit testimony from defendant's mother that there was something different or unusual about defendant's penis in order to argue that the victim should have been able to identify the unusual characteristic. The prosecution objected and, outside the presence of the jury, the trial court allowed defendant to make a separate record of the proffered testimony in order to rule on the objection. Defendant's mother testified that, at birth, defendant's penis was smaller than that of her other sons and defendant was circumcised twice, leaving a brown ring around the top of his penis. She also testified, however, that she had not had a recent opportunity to view defendant's penis. Finally, defendant's mother testified that she worked at a nursing home and often changed the diapers of elderly men, none of which had brown rings around their penises. The trial court sustained the objection and excluded the evidence for lack of foundation under MRE 602, stating that "[w]hat a little boy with a circumcision looks like to a mother gives no foundation for what an adult male with a full erection in a sexual context would look like." The trial court also excluded the evidence on the basis that it was irrelevant in the context of this case under MRE 402. Because defendant does

not argue that the trial court erred in excluding the evidence for failure to lay a proper foundation, we need not consider the alternative basis for the trial court's ruling, that is, whether the evidence was irrelevant and thus inadmissible.¹ Accordingly, defendant is not entitled to any relief. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997).

Defendant next argues that the trial court erred in allowing the prosecution to amend the information at the close of its proofs to read that the events took place between the fall of 1990 and January 1992 to correspond with the victim's testimony. We disagree.

The trial court has broad discretion to permit amendments to the information to conform to the evidence at any time, even after trial has commenced. *People v Potts*, 44 Mich App 722, 727; 205 NW2d 864 (1973); MCL 767.76; MSA 28.1016. Under MCR 6.112(D), "[t]o the extent possible, the information should specify the time and place of the alleged offense." The trial court has discretion to determine the amount of specificity required in the information based on an examination of the nature of the crime charged, the victim's ability to specify times and dates, the prosecutor's efforts to pinpoint a date, and the prejudice to the defendant in preparing his defense. *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986). As a general rule, time is not of the essence nor a material element in a criminal sexual conduct case. *People v Bowyer*, 108 Mich App 517, 523; 310 NW2d 445 (1981); see also *People v Hawkins*, 17 Mich App 179, 181; 169 NW2d 189 (1969) ("no variance as to time shall be fatal unless time is of the essence of the offense").

The record in this case reveals that defendant maintained throughout trial that he never committed the charged offense; he did not argue that the crime did not occur at the time alleged by the prosecution. Further, defense counsel extensively cross-examined the victim regarding the specific dates of the crime and argued the victim's credibility during closing argument. Thus, we conclude that defendant was not misled regarding the particular actions on his part on which the charges were based. *Hawkins, supra*. To the contrary, defendant adequately presented his defense and was therefore not prejudiced by the amendment to the information. Accordingly, the trial court did not abuse its discretion in permitting the amendment.

Defendant next argues that his sentence was disproportionate. We disagree. This Court reviews sentencing matters for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Under the principle of proportionality, a defendant's sentence is reviewed to determine whether it is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* The sentencing guidelines do not apply to habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The maximum sentence for CSC I is life imprisonment. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Because defendant was previously convicted of a felony, the trial court had the option to enhance the sentence to 1½ times under MCL 769.10, MSA 28.1082. Moreover,

¹ We note that the trial court's ruling excluding the evidence for lack of foundation is entirely supported by the record. The record is clear that defendant's mother had not recently viewed defendant's adult penis and thus had no personal knowledge of whether it looked any different than that of other adult males.

defendant's prior felony conviction, in conjunction with the circumstances of the instant offense, demonstrate that he is unable to conform his conduct to the laws of society. *Hansford, supra*. We therefore conclude that defendant's sentence of twenty-five to fifty years' imprisonment, which was well within the statutory limits for an habitual offender, was proportionate and did not constitute an abuse its discretion.

Lastly, defendant argues that his sentence amounts to cruel and unusual punishment in violation of the United States Constitution, US Const, Am VIII, and the Michigan Constitution, Const 1963, art 1, § 16. We disagree. This Court reviews constitutional issues de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

This Court has previously determined that Michigan's habitual offender statute is constitutional and that a sentence imposed under the statute does not amount to cruel and unusual punishment. *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985). The purpose of the habitual offender statute is not to punish a defendant based on his status as an habitual offender, but to deter subsequent offenders from committing further offenses by providing courts with the discretion to impose harsher sentences. *Id.* Moreover, the statute under which defendant's sentence was imposed is constitutionally valid because this state has a right to protect citizens of this state from individuals who continue to engage in criminal activities. *People v Potts*, 55 Mich App 622, 639; 223 NW2d 96 (1974).

Here, defendant was convicted of three counts of first-degree criminal sexual conduct which each have a maximum penalty of life imprisonment. Defendant was also an habitual offender, second offense, because of a prior conviction of third-degree criminal sexual conduct. Because we have already concluded that defendant's sentence was proportionate to the crime, and because sentences that are proportionate do not amount to cruel and unusual punishment, *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993), we reject defendant's argument that his twenty-five to fifty year sentence amounted to cruel and/or unusual punishment under the state and federal constitutions. See *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866.²

Affirmed.

/s/ Kurtis T. Wilder

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

² We also reject defendant's argument that the textual difference between the Michigan constitution's prohibition of cruel *or* unusual punishment and the federal constitution's prohibition of cruel *and* unusual punishment provides a basis for relief. As noted previously, defendant's sentence was proportionate to the offense and did not constitute cruel or unusual punishment under either constitutional provision.