STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 5, 2002
v	No. 227627 Shiawassee Circuit Court
CHRIS ALLAN HOWARD, Defendant-Appellant.	LC No. 99-003372-FC

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with a victim under age thirteen), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a victim under age thirteen). The trial court sentenced defendant to concurrent terms of 9 to 20 years for the CSC I convictions and 6 to 15 years for the CSC II conviction. Defendant appeals as of right. We affirm.

I

Defendant first contends that the trial court improperly permitted the victim to testify about uncharged sexual incidents between himself and defendant. The decision whether other acts evidence is admissible rests within the trial court's discretion and will only be reversed when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Other acts evidence that reveals a defendant's character generally may be admitted only when it is not introduced to show propensity, but for a proper purpose such as to show an opportunity, scheme, plan or system in doing an act. MRE 404(b)(1); *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). Under MRE 404(b), other acts evidence may be admitted if (1) the prosecutor offers the evidence for purposes other than to prove the defendant's character and his action in conformity therewith, (2) the evidence is relevant under MRE 402, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, MRE 403. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996). A trial court has discretion to admit evidence of prior acts of sexual intimacy between a defendant and a victim because the prior acts often have the proper purpose of corroborating evidence of the charged crimes and helping to explain an

otherwise incredible charge. *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973).

In this case, the prosecutor offered the victim's testimony of other sexual contacts between the victim and defendant for the proper purpose of showing defendant's scheme or system in carrying out the charged crimes. MRE 404(b)(1). The victim's testimony regarding both the charged and uncharged sexual acts indicated that defendant's scheme or system in carrying out his acts consisted of waiting until he believed that he and his victim were isolated from other individuals, then systematically beginning each sexual assault by rubbing the victim's penis on the outside of his pants or by having the victim rub defendant's penis on the outside of his pants, before escalating or attempting to escalate the assault to sexual penetration.

Not only did the other acts testimony tend to show that defendant had a scheme or system for carrying out his assaults, it also demonstrated a sexual familiarity between defendant and the victim that tended to bolster the credibility of the victim's testimony regarding a seemingly isolated incident that might otherwise have appeared incredible. *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989). The similar acts evidence tended to establish that the charged sexual incident represented only a part of the ongoing pattern or scheme of abuse that defendant inflicted on the victim during the summer of 1986 and beyond. We note that the other acts evidence had special relevancy toward ameliorating the possibility that the victim fabricated the charged incident, given that the victim had delayed reporting the assault for thirteen years. *Id*.

Although defendant likely experienced some prejudice arising from the other acts testimony, the probative value of other similar acts in a CSC case outweighs the disadvantage to the defendant when, as in this case, the evidence shows a sexual familiarity between the defendant and his victim. *DerMartzex*, *supra* at 413. Furthermore, the trial court appropriately minimized any prejudice to defendant arising from the disputed testimony by instructing the jury that it could not consider the other acts when determining defendant's guilt of the charged offenses. *Crawford*, *supra* at 385.[1]

II

Defendant next asserts that the trial court abused its discretion when it permitted the prosecutor to amend the date of the sexual assault charge. This Court reviews for an abuse of discretion a trial court's ruling to amend an information and will not reverse unless the defendant

[1] To the extent that defendant alleges as error (1) the victim's mention during trial that his revelations of abuse came pursuant to his mother's statement that "other family members" had claimed abuse by defendant, and (2) a state trooper's reference to his interview notes, which reflected that when the trooper questioned the victim regarding defendant's abuse the victim recalled that the abuse "occurred a lot throughout the summer, approximately forty to sixty times," defendant failed to object to these statements at trial. Even assuming that some plain error occurred in the admission of these statements, the error did not affect the outcome of defendant's trial in light of the ample other evidence of defendant's guilt of the charged crimes and the trial court's provision of a limiting instruction regarding evidence of uncharged acts. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

suffered prejudice in his defense or a failure of justice occurred. MCL 767.76; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

An information must contain the time of the offense as near as may be ascertained. No variance with respect to time is a fatal defect unless time is of the essence of the offense. MCL 767.45(1); *People v Higuera*, 244 Mich App 429, 443-444; 625 NW2d 444 (2001). A court may amend an information at any time before, during or after trial to cure any defect, imperfection or omission in form or substance, including a variance between the information and the proofs, as long as the defendant suffers no prejudice from the amendment and the amendment does not charge a new crime. MCL 767.76; MCR 6.112(H); *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998).

Defendant's argument lacks merit because he failed to show that the amendment caused him any prejudice, especially given that the facts regarding the alleged crimes otherwise remained unchanged. Time is neither of the essence nor a material element in a CSC case involving a child victim. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Moreover, our review of the record reveals that the prosecutor conducted a reasonable investigation into the charges against defendant, and that despite the amendment defendant had adequate time to prepare his defense and reconstruct the events for the summer of 1986.

Defendant also argues that the trial court should have granted him a continuance to develop his defense. Because defendant never requested a continuance, however, the trial court did not err in failing to grant one. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995). Regardless, defendant had adequate time to prepare his case and no injustice has occurred.

III

Defendant next claims that he should receive a new trial because it is impossible to determine whether the jury convicted him of the charged offenses or convicted him on the basis of the testimony regarding uncharged sexual acts involving the victim. Our review of the record convinces us that defendant's suggestion lacks merit. From the parties' opening statements through the trial court's final instructions to the jury, the acts for which defendant was charged remained easily distinguishable from evidence of defendant's uncharged sexual acts with the victim.

In her opening statement, the prosecutor clearly explained that defendant was charged with two counts of CSC I, involving placement of the eight year-old victim's penis into defendant's mouth and penetration by defendant's penis into the victim's anus, and one count of CSC II, involving defendant's fondling of the victim's genital area, all arising from one continuous criminal transaction that occurred during the summer of 1986. The prosecutor subsequently clarified that the victim also would testify "about a couple of other incidents that happened later in his life with his Uncle Chris, incidents that he can remember specifically, not the date, but because of the events that surrounded the incident." During trial, the victim's testimony plainly described the occurrence of the three acts for which defendant was charged, acts that clearly occurred one after the other on the same day during the summer of 1986. The victim clearly explained that the acts for which defendant stood charged constituted the first sexual acts between himself and defendant. The victim then testified to the two uncharged acts

of sexual intimacy that happened sometime after the charged crimes, both of which were easily distinguishable from the crimes charged: one of the uncharged acts involved the only record instance of defendant's forced placement of his penis into the victim's mouth; while the second uncharged incident involved a touching of the victim's genital area similar to the charged CSC II crime, the uncharged act occurred inside a trailer and was the only act that did not occur while defendant and the victim walked in the woods. In her closing argument, the prosecutor reiterated the elements of the charged crimes. In its instructions to the jury, the trial court stated in relevant part as follows:

> Now remember that there are three counts in this Information. In Counts I and II the Defendant, Mr. Howard, is charged with Criminal Sexual Conduct in the First Degree. As to Count I, and remember Criminal Sexual Conduct First Degree in Count I is fellatio, so to prove that charge the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> *First, that Defendant engaged in a sexual act that involved touching of [the victim]'s penis with the Defendant's mouth or tongue*.
>
> The second element of that charged crime is that [the victim] was less than thirteen years old at the time of the alleged act. That's Count I.
>
> Count II, which also charges Criminal Sexual Conduct in the First Degree by virtue of anal penetration, requires . . . that the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, *that the Defendant engaged in a sexual act that involved entry into [the victim]'s anus by the Defendant's penis*. Any entry, no matter how slight, is enough. . . . .
>
> The second element of the Count II charge of Criminal Sexual Conduct First Degree is that [the victim] was less than thirteen years old at the time of the alleged act.
>
> The Defendant, Mr. Howard, is charged in Count III with the crime of Second Degree Criminal Sexual Conduct. To prove this charge the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, *that the Defendant intentionally touched [the victim]'s genital area or the clothing covering that area*.
>
> Second, that this was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.
>
> And the third element of Criminal Sexual Conduct in the Second Degree is that [the victim] was less than thirteen years at the time of the alleged act. [Emphasis added.]

The trial court then instructed the jury regarding the limited appropriate use of the testimony regarding the uncharged sexual acts, without further specifying what the other acts involved.

We reiterate that we find it plain from this record, throughout defendant's trial, which acts represented the charged acts and which acts constituted the uncharged acts introduced for a limited purpose. To the extent that defendant challenges the trial court's instructions to the jury, we note that defendant waived this claim at trial when his counsel affirmatively approved the instructions given by the court. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Moreover, we conclude that the trial court properly instructed the jury because the instructions fairly presented the issues for trial and sufficiently protected defendant's rights. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

IV

Defendant lastly contends that the trial court erred by assessing twenty-five points for offense variable two (OV 2) because no evidence supported the trial court's finding that the victim suffered bodily injury. Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided that evidence on the record supports a particular score. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). Application of the guidelines states a cognizable claim on appeal only when a factual predicate is wholly unsupported, a factual predicate is materially false, and the sentence is disproportionate. *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998). Because the establishment of factual assertions underlying the scoring of the sentencing guidelines requires a lower standard of proof than that needed for a conviction, a fact can be established for guidelines calculations purposes even though it was not found for purposes of conviction. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

The victim testified that he screamed in pain when defendant began placing his penis into the victim's anus and that he suffered rectal bleeding on the night of or day after defendant sexually penetrated his anus. Although the victim also testified that he previously had suffered rectal bleeding associated with a childhood disease, the trial court did not err in assessing twenty-five points for OV 2 because the court reasonably concluded that the rectal bleeding was caused by defendant's assault. Furthermore, defendant's concurrent sentences are presumed proportionate because they fell within the guidelines range. Defendant has presented no unusual circumstances to overcome this presumption. *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996). Defendant's sentences adequately reflect the seriousness of the crimes committed. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997).

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter