STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2004
v	No. 247599 Wayne Circuit Court
REGINALD EUGENE TURNER, Defendant-Appellant.	LC No. 02-012504-01 ON RECONSIDERATION

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of criminal sexual conduct in the first degree (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(a), and one count of criminal sexual conduct in the second degree (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a), entered after a jury trial. We previously affirmed defendant's convictions. *People v Turner*, unpublished memorandum opinion of the Court of Appeals, issued September 30, 2004 (Docket No. 247599). Defendant subsequently moved for rehearing, and we granted the motion and vacated our previous opinion. On reconsideration, we affirm.

Complainant, who was seven years old at the time of trial, testified that when she was five and six years old, defendant, her father, placed his penis in her mouth, penetrated her vagina with his tongue, and touched her vagina over her clothing. Complainant's mother testified that she and defendant did not argue and that she never observed defendant act inappropriately with complainant.

Defendant argues that trial counsel rendered ineffective assistance by failing to present certain protective services records he asserts would have shown that complainant's mother complained about his behavior, and might have shown that complainant was sexually abused by other children. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must

show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. The defendant bears the burden of proving that counsel rendered ineffective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); see also *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004).

Because defendant did not request a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Reviewing defendant's assertions regarding the contents of the protective services records, we hold that because defendant failed to produce any evidence to establish that the records contain any relevant information, any decision trial counsel made regarding the records was trial strategy. Defendant has also failed to demonstrate that had the records been introduced into evidence, they would have produced a different result. Given the lack of relevant information concerning the records and the overwhelming evidence of defendant's guilt, we reject defendant's claim of error in this regard.

In his Standard 11 brief, defendant raises two arguments regarding the dates of the offenses in the information. Defendant first argues that the dates of the offenses were not stated with sufficient specificity in the information under MCL 767.45(1)(b) and MCL 767.51 and that the trial court erred in denying defendant's motion to require plaintiff to provide specific dates in the information. We disagree. The trial court's determination regarding the degree of specificity required in the information regarding the time of the offense will not be reversed absent an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

An information need only state "[t]he time of the offense as near as may be." MCL 767.45(1)(b). However, "the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge." MCL 767.51. The trial court should consider the following non-exclusive factors in determining whether the time of the offense is sufficiently specific in the information: "(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*, 233-234.

Defendant incorrectly asserts in his Standard 11 brief that the amended information did not contain the dates the offenses allegedly occurred. In fact, the amended information listed the date of the CSC I offense as "2000" and the date of the CSC II offense as "2001." In addition, the caption in the information lists the date of the offense as "07/04/2002." Neither MCL 767.45(1)(b) nor MCL 767.51 require the specification of an exact date of the offense in the information. See *id.*, 234 n 2. Moreover, temporal variances are not fatal "unless time is of the essence of the offense." MCL 767.45(1)(b); *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). Time is not of the essence nor a material element in a criminal sexual conduct case when the victim is a child. *Stricklin, supra*, 634.

We find that given the circumstances in this case, the trial court did not abuse its discretion in not requiring more specificity in the information regarding the dates of the offenses. The victim was five and six years old when defendant abused her. "[C]hildren who are victims of ongoing sexual assaults have difficulty remembering the exact dates of the individual assaults." *Naugle, supra*, 235. The child's inability to remember the exact dates in turn renders it difficult for the prosecutor to specify a date in the information. We are not persuaded by

defendant's contention that the lack of a specific date precluded an alibi defense. Neither MCL 767.45(1)(b) nor MCL 767.51 require the specification of an exact date of the offense in the information. See *Naugle, supra*, 234 n 2. Moreover, under the circumstances, offering an alibi for an extended period of time would have been a futile gesture. See *id.*, 234-235. Under the facts of this case, the offense dates in the information were identified "as nearly as the circumstances [would] permit." MCL 767.51. The trial court did not abuse its discretion in holding that the information was sufficiently specific.

We also reject defendant's contention that the prosecutor abused its discretion in charging defendant because the information alleges that defendant committed an offense against the victim on July 4, 2002, and defendant was incarcerated at that time. As we previously observed, temporal variances in the information are not fatal unless time is of the essence, MCL 767.45(1)(b), and time is not of the essence in a criminal sexual conduct case when the victim is a child. *Stricklin, supra*, 634. Moreover, the prosecutor has broad charging discretion to bring any charges that are supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Even if defendant was incarcerated on one of the dates the information alleged that he committed an offense, the evidence supported the charges. We therefore find no merit to defendant's contention that the prosecutor abused its discretion in charging defendant.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood