# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 22, 2007 |
| v | No. 266615<br>Kent Circuit Court |
| BRIAN KEITH LAGRONE,<br><br>Defendant-Appellant. | LC No. 05-000656-FH |

Before: O'Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct (CSC), MCL 750.520e(1)(a), sexual contact with a person between the ages of thirteen and sixteen, with the actor more than five years older than the other person. He was sentenced as an habitual offender, second offense, to 18 months to 3 years' imprisonment. We affirm.

Defendant was accused of sexually assaulting the fourteen-year-old sister of his girlfriend. The victim wrote a letter to a friend, which her sister later turned over to authorities, in which the victim stated that defendant sucked her breasts and she squeezed his penis. The victim also claimed that defendant forced her to have penile-vaginal intercourse on another occasion, in March 2004. Defendant was initially charged with one count of third-degree CSC, based on sexual penetration with a victim thirteen to sixteen years old, and one count of accosting a child for immoral purpose, MCL 750.145a, along with habitual and sexual offender enhancements. Shortly before trial began, the information was amended to add the fourth-degree CSC charge and delete the charge of accosting a child for immoral purpose.

Defendant first argues that he was denied due process because he did not receive a copy of the amended information until the last day of trial, so he was unaware of the added charge until the prosecution's opening statement. We find no support for defendant's argument in the record.

We review a trial court's decision whether to permit amendment of an information for an abuse of discretion. *People v McGhee*, 258 Mich App 683, 686-687, 699; 672 NW2d 191 (2003). An abuse of discretion occurs when the trial court fails to select a "principled outcome" where more than one outcome is possible. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Amendment of an information to add a charge once trial is complete, or even nearly complete, deprives a defendant of sufficient time to prepare a proper defense. *People v Adams*,

202 Mich App 385, 391; 509 NW2d 530 (1993). However, adding a charge on the first day of a trial, before jury selection and the opening of proofs, is not error as long as defendant is not unfairly prejudiced by unfair surprise, inadequate notice or insufficient opportunity to prepare a defense against the new charge. MCR 6.112(H); *McGhee, supra* at 690, 701-702.

The amended information here was filed with the court on the first day of trial and read to the prospective jury panel before voir dire, including the fact that defendant was charged with both third- and fourth-degree CSC. The trial was adjourned after the jury was impaneled, at approximately 1 p.m., and it did not resume until the following morning at 9:00 a.m. Defendant was clearly aware of the additional charge with ample time either to prepare a defense or to move for a continuance.

More importantly, however, we do not see how defendant's defense would have been affected by the amended charge. A person is guilty of third-degree CSC, one of the crimes for which defendant was initially charged, if he engages in sexual penetration with another person if the other person is between the ages of thirteen and sixteen. MCL 750.520d(1)(a). A person is guilty of fourth-degree CSC if he or she engages in sexual contact with another person and the other person is between the ages of thirteen and sixteen, and the actor is five or more years older. MCL 750.520e(1)(a). Although fourth-degree CSC is not legally a lesser included offense of third-degree CSC, it is almost always a factually included lesser offense, as we believe it is in this case. *People v Baker*, 103 Mich App 704, 713; 304 NW2d 262 (1981). None of the relevant parties' ages could seriously have been in dispute, and defendant's theory of the case was that *nothing* took place between himself and the victim. His defense was that his "relationship" with the victim was entirely fabricated by his girlfriend out of a desire for revenge for cheating on her.

Given this theory, the distinction between "sexual penetration" and "sexual contact" would have been irrelevant. The original information amply informed defendant that the entirety of his "relationship" with the victim was at least potentially at issue, and this is what he defended against. The additional charge did not call for any change to defendant's defense strategy. Therefore, defendant was not unfairly surprised or prejudiced, and the trial court did not abuse its discretion when it allowed the prosecution to amend the information to add a new charge before the trial began. Defendant was not denied due process because of the amendment.

Defendant next argues that he served 304 days in jail awaiting trial and should have received credit for that time against his sentence for this offense. We disagree. MCL 769.11b requires that a defendant who is "denied or unable to make bond" must be given credit for the time served against the sentence for the offense for which he is jailed. However, defendant was on parole when he committed the offense in this case. Defendant was held on a parole detainer; the question of bond was never an issue, so MCL 769.11b is inapplicable. *People v Seiders*, 262 Mich App 702, 706-708; 686 NW2d 821 (2004). Any jail time served pursuant to such a parole detainer may only be credited to the original sentence for which the defendant was paroled, not the new offense. *Id.* at 705. Defendant argues that he had served his full minimum sentence for the first offense, so there was no time on that offense against which his jail time could be credited. However, it does not follow that the credit must therefore be applied against his new sentence. Jail credit while on a parole detainer may only be applied to the prior offense. *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006). Jail credit while awaiting a new sentence may only be applied to the new sentence if the defendant was "denied or unable to

make bond." MCL 769.11b. Neither situation applied here. Therefore, the trial court correctly found that defendant was not entitled to credit for time served against his sentence in this case.

Defendant finally argues that because he was acquitted of third-degree CSC, the victim's claim of sexual penetration should be deleted from the presentence investigation report (PSIR) to prevent its consideration by the Department of Corrections. We disagree. The PSIR is an information-gathering tool that requires a very broad scope. *Morales v Parole Board*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003). The report must include "a complete description of the offense and all the circumstances surrounding it." *Id.* at 46; MCR 6.425(A)(2). We conclude that the allegation of penetration was properly included because it completes the description of the circumstances surrounding defendant's convicted offense. Moreover, the PSIR makes it clear that the statement was an allegation by the victim and was denied by defendant; the trial court also added a notation to the statement that the jury acquitted defendant of the "charge alleging penetration." "A court in fashioning an appropriate sentence may consider the evidence offered at trial, including other criminal activities established even though the defendant was acquitted of the charges, and the effect of the crime on the victim." *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998) (citations omitted). The trial court did not abuse its discretion when it held that the information should remain in the PSIR.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis