# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 10, 2008 |
| v | No. 276081<br>Ottawa Circuit Court |
| MICHAEL EDWARD KEITH, JR.,<br><br>Defendant-Appellant. | LC No. 06-030274-FC |

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13). The trial court sentenced defendant to concurrent terms of 108 months' to 240 months' imprisonment for each conviction. We affirm.

During the summer of 2003, defendant babysat for the victim and the victim's brothers. The victim was then six-years-old, and her brothers ranged in age from seven to 10 years. The victim described three specific occasions during that summer on which defendant entered her bedroom, took off her pants and underwear, and "put his private in mine." She testified that the assaults caused her to experience pain, but denied that they caused her to bleed. Defendant informed her that if she told anyone about what happened, he would hurt her family.

The victim first revealed the abuse several years later, after attending a school program concerning "safe and unsafe touches" that included a video presentation entitled, "Break the Silence." Dr. N. Debra Simms, a pediatrician specializing in child abuse and neglect, examined the victim, and testified that she possessed an intact hymen, but had a posterior labial adhesion that "could have" been caused by a genital injury three years earlier. Based on an interview of the victim "and the fact that her physical examination was consistent with the statements that she made," Simms concluded that the victim had "probably" suffered sexual abuse. Simms further explained that the majority of child sexual assault cases involve "vulvar coitus" rather than penetration of the vagina, because a six-year-old child would bleed, "scream and yell," and immediately report vaginal penetration. In Simms's opinion, the victim's description of what occurred was consistent with "rubbing along the outside of the vulvar structures but between the lips."

Defendant first contends that the trial court erred by amending the information in response to his motion for a directed verdict of acquittal. The original information alleged three

counts of "sexual penetration to-wit: penal [sic]/vaginal with [the victim], said person being under 13 years of age; contrary to MCL 750.520b(1)(a)." Defendant argued in the trial court that Dr. Simms's testimony established that no "penetration of the victim's vagina by . . . defendant's penis" occurred. The trial court denied defendant's motion, and amended the information to substitute "penile/genital opening" in place of "penal [sic]/vaginal" contact.

We review for an abuse of discretion a trial court's decision to amend the information. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). "Both MCL 767.76 and MCR 6.112(H) authorize a trial court to amend an information before, during, or after trial." *Id*. at 686. The court's ability to amend an information is circumscribed by the requirement that amendment may not "unfairly surprise or prejudice the defendant." MCL 6.112(H). Unacceptable prejudice includes the provision of inadequate notice or an insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant contends that the trial court's amendment of the information deprived him of a fair trial because he had previously rejected the prosecutor's offer to add alternative counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant complains that the prosecutor "knew" that the evidence would not prove "penile/vaginal penetration," but instead demonstrated only "sexual contact," consistent with a CSC II charge. According to defendant, he refused the prosecutor's offer to add alternate CSC II charges "for strategic reasons and without any knowledge that the prosecutor would be seeking to establish penetration of anything other than penis into vagina," and he would have accepted the prosecutor's offer had he known that the information would be amended.

"Where the original information is sufficient to inform a defendant of the nature of the charge against him, the defendant is not prejudiced by an amendment to cure a defect in the information." *People v Newson*, 173 Mich App 160, 164; 433 NW2d 386 (1988). At the time of the offense, MCL 750.520a(o)[1] defined "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." In *People v Bristol*, 115 Mich App 236, 237-238; 320 NW2d 229 (1981), this Court held that the Legislature intended the phrases "intrusion, however slight," and "genital … openings" within the definition of "sexual penetration" to include any intrusion between the labia majora. Therefore, even if the prosecutor here failed to present proof of vaginal penetration, evidence of penetration of the victim's labia majora could satisfy the "sexual penetration" element of CSC I. *Id*.

The original information sufficiently informed defendant that the prosecutor intended to prove penetration of the victim's genital opening. In *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987), we upheld the defendant's CSC I conviction despite an amendment of the information "to reflect a variance in the type of penetration." This Court observed in *Stricklin* that the amended information did not allege a new crime, and did not deprive the defendant of an opportunity to defend at trial. *Id*. We similarly conclude that the amendment of

[1] Former subsection (o) currently appears as subsection (r).

the instant information to specify the precise type of sexual penetration committed by defendant did not prejudice him.

We additionally reject defendant's claim that he would have agreed to the addition of alternate CSC II charges if he had known that the information would be amended. At trial, defendant vehemently denied that he ever touched any portion of the vicitm's body with his penis, and he does not specifically explain on appeal how, if facing CSC II charges, his trial defense would have differed. Furthermore, defendant could have requested an instruction for CSC II, but failed to do so. We thus conclude that the amendment did not unfairly surprise defendant or deprive him of a sufficient opportunity to present a defense.

Defendant next argues that insufficient evidence supported his CSC I convictions because the prosecutor failed to prove penile-vaginal penetration. We review de novo defendant's sufficiency of the evidence claims. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotation omitted).[2]

To establish CSC I as charged in this case, the prosecutor had to prove "sexual penetration with another person," and that the other person "is under 13 years of age." MCL 750.520b(1)(a). Defendant does not dispute that the victim was under 13 years of age. As we have previously discussed, evidence of penetration of the labia majora fulfills the "sexual penetration" requirement of the statute. *Bristol*, *supra* at 237-238. Viewing the evidence in the light most favorable to the prosecutor, the victim's testimony provided the jury with sufficient evidence to conclude that defendant sexually penetrated her. The victim repeatedly identified defendant as her assailant, testified that defendant "put his private in mine," and that after each incident, her "private hurt." In addition, Dr. Simms testified that the victim "described [the assault] as being inside, which would mean along the inner labial lips." Although defendant maintains that the victim's version of events contained inconsistencies undermining her credibility, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). We conclude that the record contains sufficient evidence to support a rational jury's determination beyond a reasonable doubt that defendant committed all three CSC I counts, and that the trial court properly denied his motion for a directed verdict. *People v Strunk*, 184 Mich App 310, 325; 457 NW2d 149 (1990).

Defendant finally argues that the trial court erred by denying his motion for a new trial. We review for an abuse of discretion a trial court's denial of a motion for a new trial. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Defendant has not fully briefed this argument, his entire analysis of which consists of one paragraph. A party may not simply

[2] A similar standard governs this Court's review of a trial court's ruling on a motion for directed verdict. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

announce a position and leave it for this Court to discover and rationalize the basis for his claim. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Nevertheless, because we have determined that the trial court did not err when it amended the information and denied defendant's motion for a directed verdict of acquittal, we conclude that the trial court did not abuse its discretion in denying the motion for new trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher