STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2009
v	No. 276690 Wayne Circuit Court
RAYMOND CRAIG JONES, Defendant-Appellant.	LC No. 06-005379-01 ON REMAND

Before: Markey, P.J., and Wilder and M. J. Kelly, JJ.[1]

PER CURIAM.

Defendant was convicted after a jury trial of first-degree criminal sexual conduct involving a person under the age of 13, MCL 750.520b(1)(a). The trial court sentenced defendant to 45 months to 20 years in prison. In defendant's appeal by right, a divided panel of this Court reversed and remanded for a new trial.[2] On the prosecution's application for leave to appeal, our Supreme Court reversed in part the judgment of this Court that defendant had been denied the effective assistance of counsel for the reasons stated by Judge Wilder in his partial concurrence. *People v Jones*, 483 Mich 899 (2009). The Court remanded this case to this Court "for consideration of whether [a] midtrial amendment of the information entitles defendant to a new trial." *Id*. at 900. We now conclude that defendant has not demonstrated he was unfairly surprised or prejudiced by the amendment, MCR 6.112(H), and therefore, we affirm.

Defendant argues that the trial court abused its discretion when it granted the prosecution's motion to amend the information during trial to expand the time frame during which the offense was alleged to have occurred from 12 to 18 months. We disagree.

A trial court's decision to grant a motion to amend the information is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of

[1] Judge Michael J. Kelly has substituted for former Court of Appeals Judge Helene N. White.

[2] *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2008 (Docket No. 276690).

reasonable and principled outcomes." *Id*. at 217; *In re Kostin Est*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

In this case, the complaining witness consistently testified that the incident occurred when he was five years old and a kindergarten student. The complainant testified that defendant picked him up from school and talked to his teacher. The teacher told defendant that the complainant had gotten in trouble for "talking and playing." In response to this, defendant angrily pushed the complainant into the car and "plucked" him on the head. When they returned to the complainant's house, they went into the basement. Defendant told the complainant that he was going to punish him, and defendant pulled down his own pants. The complainant testified that he saw defendant's penis, and defendant wanted him to "suck it." The complainant refused and defendant forced his penis inside the complainant's mouth. The complainant testified that defendant "peed in [his] mouth." Defendant then forcibly took the complainant to the bathroom and made him hold defendant's penis while he urinated.

Despite the fact that the complainant unequivocally recalled the incident as having occurred when he was in kindergarten, the complainant's mother, the police, and the prosecution were apparently confused about what year the complainant was in kindergarten. The complainant's mother testified that the incident happened during her son's kindergarten year and that he started kindergarten in the fall of 2002. She also said that the incident happened in May 2003, and that the complainant's grandfather was alive at the time of the incident. The investigating police officer testified that children are not very accurate in their recollection of dates and that Lee could not "pin down a date." So, his report noted the year of the offense as 2003. The complainant's mother did not learn of the incident until December 2005 and testified that whatever information she gave to the police regarding dates was based on her son's statements to her. Judge White's lead opinion of this Court's prior decision rightfully criticized the prosecution regarding its drafting of the information following the preliminary examination:

> In this case, the information listed the date of the offense as "Year of 2003." Only complainant testified at the May 9, 2006 preliminary examination. He testified that he was eight years old, that the incident occurred three years earlier (than the preliminary examination, i.e., in 2003), that the incident occurred in March of 2003, and that he was in kindergarten at Burton School and five years old at the time. He also testified, however, that he started at Burton School in 2003, i.e., September 2003. The prosecution was apprised as of the preliminary examination that complainant was born in February 1998, and maintained that the incident occurred when he was in kindergarten. By simple math, the prosecution would have realized complainant was in kindergarten from September 2003 through June 2004, and that if the incident occurred in March, it must have been in 2004. [*People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2008 (Docket No. 276690), slip op at 6 (White, J.).]

Judge White also described the confusing testimony leading up to the prosecution's motion to amend the alleged date of the offense to include the first six months of 2004, i.e., to cover the entire school year of 2003-2004:

> At trial, in January 2007, complainant testified that he was in the third grade, and that he was in kindergarten and five years old when defendant

> assaulted him. Complainant's mother testified that complainant told her that the incident happened in May of 2003. Complainant testified that the incident occurred in March of 2003, but later testified that his grandfather had died before the incident. Several witnesses testified that complainant's grandfather died in January 2004. Complainant later testified that he started kindergarten in September 2003, and that the incident occurred in March of 2004. On the third and final day of trial, after all prosecution witnesses had testified and two of the four defense witnesses had testified, the prosecutor moved to amend the information to include the first six months of 2004. [*Id*.]

The prosecutor argued in support of the amendment that the charged date was an "oversight," that the proposed amendment would conform the information to the proofs at trial, and that defendant would not suffer unfair surprise or prejudice. MCR 6.112(H). Defense counsel argued to the contrary, noting that the child's mother, the officer in charge of the case, and the prosecutor should have known the dates of the child's attendance at school. The trial court granted the motion, finding that the evidence at trial supported the amendment. The trial court also reasoned that time is not of the essence of the charged offense and that the amendment was not unfairly prejudicial or surprising to defendant. We agree.

The prosecutor must file information that states the "time of the offense as near as may be." MCL 767.45(1)(b). But "[n]o variance as to time shall be fatal unless time is of the essence of the offense." *Id*. Time is not of the essence, nor is it a material element in criminal sexual conduct cases, especially those involving young children. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Furthermore, "[a] trial court may amend the information at any time before, during, or after trial in order to cure a variance between the information and the proofs as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H).

We conclude that defendant cannot claim the amendment was an unfair surprise. As noted *supra*, the amended timeframe for the offense was readily discernable from the complainant's preliminary examination testimony. "Where a preliminary examination is held on the very charge that the prosecution seeks to [prove], the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial . . . ." *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998). In arguing against granting the amendment in the trial court, defense counsel noted that the determination of the dates that the complainant attended kindergarten was an "almost ministerial" act. Of course, the facts necessary to make that determination were as available to defense counsel as they were to the prosecutor.

We also conclude that defendant has not established that the amendment unfairly prejudiced his defense. Defendant's claim in this regard is based on the complainant's testimony that on the day in question defendant drove to pick him up from school, while defendant did not receive his driver's license until October of 2003. Still, defendant has not identified how his defense might have differed if the information had originally alleged the offense occurred between January 2003 and June 2004. Indeed, defendant's defense was unchanged by the amendment; he claimed he did not commit the crime and that he never drove alone to pick the complainant up at school, either in 2003 or 2004. As Judge White previously observed:

> . . . Defendant, his mother, and his sister testified that defendant did not drive alone to pick up complainant before defendant obtained his driver's license in late October 2003. Defendant and his mother testified that defendant did not drive alone to pick up complainant thereafter, either, but at times accompanied complainant's mother to pick him up at school—defendant would go into the school to retrieve complainant while complainant's mother waited in the car. [*Jones, supra*, slip op at 5 (White, J.).]

On appeal, defendant has not suggested what different defense he might have pursued if the amended information had been filed in the first instance. Consequently, defendant has not shown he was unfairly surprised, or that he had an insufficient opportunity to defend against the charge. See *People v Hunt*, 442 Mich 359, 365; 501 NW2d 151 (1993). Because defendant has not established actual prejudice, he has not established that reversal is warranted. *People v McGee*, 258 Mich App 683, 702; 672 NW2d 191 (2003). The trial court did not abuse its discretion by granting the motion to amend the information. *Unger, supra* at 217, 221-222.

We affirm.

/s/ Jane E. Markey