STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2012
v	No. 305989 Arenac Circuit Court
MICHAEL HENRY TROUT, Defendant-Appellant.	LC No. 10-003511-FC

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and a jury convicted him of two counts of first-degree CSC. The trial court sentenced defendant to concurrent prison terms of 15 to 30 years. Defendant appeals as of right. We affirm.

Defendant first contends that he was denied due process because the prosecutor did not provide specificity regarding the dates of the alleged incidents. Defendant did not raise this issue below. Thus, this issue is unpreserved. An unpreserved constitutional claim is reviewed for plain error affecting a defendant's substantial rights. *People v. Pipes*, 475 Mich 267, 270; 715 NW2d 290 (2006). Under the plain error rule, a defendant must show that "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *Id.* at 279. "Generally, the third factor requires a showing of prejudice – that the error affected the outcome of the proceedings." *Id.*

"The Due Process Clause of the Fourteenth Amendment mandates that a state's method for charging a crime give a defendant fair notice of the charge against the defendant, to permit the defendant to adequately prepare a defense." *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009). "The information duly notifies a defendant of the charges instituted against the defendant and further eradicates double jeopardy issues in the event of a retrial." *People v Waclawski*, 286 Mich App 634, 706; 780 NW2d 321 (2009). MCL 767.45(1)(b) provides that the information shall contain "[t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.51 further provides that a trial court may, on a party's motion, require the prosecutor to state the time of the offense as nearly as the circumstances permit to enable the accused to meet the charge. Here, defendant did not bring such a motion.

In this case, the information complied with the requirements of MCL 767.45(1)(b). In the felony complaint, warrant, and information, the date of each offense is listed as having occurred between August 1995 and December 1995. Although the information indicated only a range of four months and not specific dates, this Court has held that time is not of the essence, nor is it a material element, in a criminal sexual conduct case, at least where the victim is a child *Waclawski*, 286 Mich App at 707-708. The victim was twelve years old during this time frame. Her testimony at the preliminary examination that defendant stuck his hand down her pants and digitally penetrated her vagina as she sat in his lap in a reclining chair in defendant's mobile home at least fifty times between August 1995 and December 1995 provided further information on location and time frame. The defense theory was that no sexual contact occurred, and that the victim was not credible. Defendant does not indicate how he would have presented a different defense had additional details about the alleged offenses been provided in the information. Accordingly, we conclude that defendant was not denied his constitutional right to notice of the charges against him.

Defendant also argues that he was denied his right to clear and adequate jury instructions because the jury instructions, like the information, included multiple, undifferentiated counts of CSC and, therefore, the jury was left to guess which act corresponded to which count. Defense counsel's affirmative expression of satisfaction with the trial court's jury instructions waived any alleged error with the jury instructions. *Chapo*, 283 Mich App at 372-373. However, we will provide a brief review of the issue as unpreserved because defendant uses it as a basis to claim ineffective assistance of counsel. An unpreserved instructional error is reviewed for plain error. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). A trial court must "instruct the jury regarding the law applicable to the case, . . . and fully and fairly present the case to the jury in an understandable manner." *People v Moore*, 189 Mich App 315, 319; 472 NW1 (1991), citing MCL 768.29. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

Defendant contends that error occurred when the trial court gave a single generic instruction on first-degree criminal sexual conduct that applied to all four counts, and left it to the jury's speculation how the instructions applied to the facts. However, "[i]t is the trial judge's duty to inform the jury on the law, so that they may understand and apply the law to the facts of the case." *People v Lewis*, 91 Mich App 542, 545; 283 NW2d 790, 792 (1979). The trial court instructed the jury that defendant was charged with four counts of the crime of first-degree criminal sexual conduct. The trial court specified the elements of CSC I. Because the four counts were identical the single instruction was appropriate.

After reiterating that defendant was charged with four counts of CSC I, the court additionally instructed the jury that "[T]hese are separate crimes, and the prosecutor's charging that the defendant committed all of them. You must consider each crime separately in light of all the evidence in the case. You may find the defendant guilty of all or any one, or any combination of these crimes, or not guilty." Thus, even if there had been error, defendant suffered no prejudice because "[j]urors are presumed to follow their instructions, and instructions

are presumed to cure most errors." *Chapo*, 283 Mich App at 370 (quotations and citation omitted).

Finally, defendant contends he was denied effective assistance of counsel because his trial counsel failed to object to the notice provided and to the jury instructions. Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. For all of the reasons stated above, defendant received adequate notice of the charges against him and his jury was adequately instructed. "Counsel is not ineffective for failing to advocate a meritless position." *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (quotation and citation omitted).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot