STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AMANDA BREWSTER McCALLISTER, a Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMANDA BREWSTER McCALLISTER,

Defendant-Appellant.

UNPUBLISHED
June 26, 1998

No. 198423
Wayne Juvenile Court
LC No. 94-322854

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial in juvenile court, of two counts of second-degree criminal sexual conduct, MCL 750.520c(1); MSA 28.788(3)(1). She was sentenced to home probation. She now appeals by leave granted and we reverse.

Defendant was originally charged with first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1), based upon an allegation that she engaged in sexual penetration with two girls that she was babysitting. Specifically, it was alleged that defendant put ice into the vaginas and anuses of the victims. It was alleged that defendant put popcorn into one of the victim's vagina. There was conflicting testimony at trial whether defendant had engaged in the alleged conduct, though defendant did admit that she had put ice down the back of one of the victims as a joke. The trial court convicted defendant on the lesser offense of second-degree criminal sexual conduct.

Defendant raises a number of issues on appeal, one of which is dispositive. Defendant argues that the trial court lacked the authority to convict her of the lesser offense of CSC-2. We agree.

A trial court may not convict a defendant of an offense not specifically charged unless the defendant had adequate notice. *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993). Where, as here, the charge of which the defendant was convicted is a cognate lesser offense of the

originally charged offense and was not included in the charging document, the facts of the particular case must be examined to determine whether the defendant had adequate notice of the need to defend against the newly added charge. *Id.* at 387-388. We consider the following factors in reaching that determination: the language contained in the charging document, the similarity or dissimilarity between the charged offense and the added offense, and when the defendant learned of the additional charge. *Id*. at 389-391.

In the case at bar, the first factor favors defendant: the charging document did not give defendant adequate notice. It merely alleged CSC-1, which required proof of sexual penetration for any purpose. CSC-2, on the other hand, requires proof of sexual contact for the specific purpose of sexual arousal or gratification.

The second factor is, at best, a close call. CSC-1 and CSC-2 are similar in that both involve sexual activity. With respect to the activity alleged in this case, there is some similarity between inserting an object into the vagina or anus and rubbing an object over the genitals or anal opening. On the other hand, as noted above, for CSC-2 it must be demonstrated that defendant acted with the purpose of sexual arousal or gratification, while no such requirement exists for CSC-1.

The third factor heavily weighs in favor of defendant. Defendant simply did not learn of the need to defend against a CSC-2 charge until the trial court announced its decision. The prosecutor never requested a CSC-2 conviction, nor did defendant request the trial court to consider the lesser offense. For that matter, the trial court never stated that it was considering such a conviction until it announced its findings and conclusions.

Simply put, it was inappropriate for the trial court to sua sponte consider CSC-2 without notice because that action deprived defendant of adequate notice of the need to defend against such a charge.

In light of our resolution of the above issue, we need not address defendant's remaining issues.

Reversed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff