STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY G. TOWNS,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 202034
Oakland Circuit Court
LC Nos. 96-146431 FC
96-146434 FC

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (person under thirteen years of age), and one count of second-degree CSC, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (person under thirteen years of age). Defendant subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to fifteen to thirty years in prison for the first- and second-degree CSC convictions but vacated that sentence in lieu of an identical sentence for the habitual offender conviction. Defendant now appeals as of right. We affirm.

I

Defendant argues that the trial court erred in granting the prosecution's motion to amend the information after the close of proofs. Because the victim testified inconsistently at the preliminary examination and at trial about the timing of the sexual assaults, the prosecution moved to amend the information to reflect that the charges of first-degree CSC were committed between December 25, 1995 and January 5, 1996 (the victim's Christmas break from school), rather than between March 20 and 21, 1996 (the victim's winter break from school), which the information originally stated.

The trial court's decision to grant the prosecution's motion is governed by MCL 767.76; MSA 28.1016, which provides in relevant part the following:

> The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance

> with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury.

Even if an objection is made and the trial court allows an amendment of the information, this Court will not reverse such a decision unless it finds that the defendant was prejudiced in his defense or that a failure of justice resulted. *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982). Prejudice occurs when the defendant does not admit guilt and is not given a chance to defend against the crime. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Here, we find that defendant was not prejudiced by the amendment of the information. First, a variance in the time of the offense listed in the information is not fatal because time is not of the essence, nor a material element, in a criminal sexual conduct case where a child is involved. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Even though the victim varied in her descriptions of when the conduct occurred, the substance of her testimony regarding the nature of the conduct for which defendant was charged, bound over, and convicted did not vary. Second, because part of the victim's testimony at the preliminary examination was that defendant penetrated and fondled her during Christmas vacation within a couple days of each other, her testimony nonetheless put defendant on notice regarding the December dates. Last, defendant defended the original charges by asserting that he never molested the victim; therefore, there is nothing in the record to suggest that defendant would have presented a different defense at trial had the date of the charge been originally stated as dates during Christmas break. See *Stricklin, supra* at 634. For all of these reasons, we find no error in the trial court's decision to amend the information to reflect the early dates from the 1995-96 winter rather than the later originally charged dates of the occurrences.

II

Defendant also argues that the trial court should have instructed the jury that the charge of second-degree CSC was for touching the victim's vagina, not for touching the victim's breast. According to defendant, the victim's testimony on this charge at the preliminary examination was limited to her allegation that defendant touched her vagina; therefore, defendant contends that the court improperly expanded the scope of the information by instructing the jury that the charge of second-degree CSC was for touching the victim's breast. In general, we review jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Here, defendant's acceptance at trial of the instructions given waived any error unless relief is necessary to avoid manifest injustice. See *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

We note that the information in this case referred only to "sexual contact" regarding the second-degree CSC charge. An information is presumed to be framed with reference to the facts disclosed at the preliminary examination. *Stricklin, supra* at 633. Contrary to defendant's representation, our review of the transcript of the preliminary examination reveals that the victim testified that defendant touched both her vagina and breasts and that the court did not specify upon which allegation it based the bind-over of defendant. Indeed, defense counsel specifically asked the victim at the preliminary examination whether defendant touched her breast, to which the victim answered affirmatively. Similarly, the victim testified at trial that defendant touched her breasts and vagina. We cannot find that manifest injustice resulted from the second-degree CSC instruction given at trial.

III

Last, defendant argues that the trial court abused its discretion in denying his request to recall a police officer to impeach the victim's credibility. In seeking to recall the officer to testify, defense counsel stated that he wished to have the officer clarify several points in his police report because the report contained statements that the victim allegedly made to the officer that were inconsistent with the victim's previous testimony about the timing and the nature of the criminal sexual conduct at issue. The court ruled that the officer could not be recalled because defendant had failed to satisfy the foundational requirements for the introduction of his testimony. The court noted that during cross-examination of the victim, defense counsel failed to directly question the victim about the alleged prior statements to the officer, even though defense counsel asked the victim about her conversation with the officer. We review a court's denial of a request to recall a witness to determine if there has been an abuse of discretion. *Potts v Shepard Marine Constr Co*, 151 Mich App 19, 26; 391 NW2d 357 (1986), citing *People v Raetz*, 15 Mich App 404, 406, 166 NW2d 479 (1968).

MRE 613(b) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Here, defendant did not question the victim about the statements that she allegedly made to the officer; therefore, the victim did not have an opportunity to explain or deny the statements she allegedly made to the officer. However, "[t]he rule contains no particular sequence or timing so long as the witness has the opportunity to explain the statement." *Westphal v American Honda Motor Co*, 186 Mich App 68, 71; 463 NW2d 127 (1990). Therefore, to the extent that the trial court denied defense counsel's request to admit the officer's testimony on the basis of defense counsel's failure to first give the victim an opportunity to explain or deny the alleged prior statements, the trial court was mistaken. See, e.g., *People v Parker*, ___ Mich App ___ ; ___ NW2d ___ (No. 199568, issued 7/14/98), slip op p 2.

Although the victim did not have to be confronted with the prior statement before the officer could be called to testify, requiring defense counsel to follow the traditional foundational requirements does not rise to the level of an abuse of discretion. *Parker, supra* at ___. Especially in cases where the prior statement is hearsay, the traditional method of presenting the alleged inconsistent statement to the witness on cross-examination is still preferred because it "helps to assure that the prior statement will not be incorrectly interpreted by a jury as substantive evidence." *Id* at slip op p 3. Here, the alleged

inconsistent statements were part of the officer's police report; therefore, it is clear that defendant knew about the prior inconsistent statements before the victim was called to testify and could have satisfied the foundational requirements for the introduction of the officer's testimony.

Moreover, the record is replete with examples of defense counsel's challenges to the victim's credibility. For example, the jury heard the inconsistent testimony of the victim about the conduct at issue, the testimony of the victim and her legal guardian about an incident where the victim accused her legal guardian of physically abusing her, the testimony of the legal guardian that the victim was taking medication during the time period in question, the admission of the victim that she had lied in the past about other topics, and the victim's testimony that she did not like defendant and had been angry with him for telling her legal guardian that she was suspended from school. Indeed, defense counsel at trial twice impeached the victim's credibility with her testimony from the preliminary examination. Because the issue of the victim's credibility was already before the jury, we are especially disinclined to find that the court abused its discretion in declining to recall the young child to testify in court again. For all of these reasons, we find that the trial court's decision to deny defendant's request to recall the police officer was not an abuse of discretion.[1]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] Defendant also argues that the trial counsel's failure to lay a sufficient foundation for impeachment was a violation of defendant's right to effective assistance of counsel; however, we decline to review this argument because defendant did not identify it in his statement of questions. See, e.g., *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992).