STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2009
v	No. 280691 Oakland Circuit Court
SHELDON WAYNE CONE, Defendant-Appellant.	LC No. 2006-207653-FH

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC2), MCL 750.520c(1)(b) (related by blood), and two counts of third-degree criminal sexual conduct (CSC3), MCL 750.520d(1)(a) (sexual penetration of a person 13 to 15 years old). He was sentenced to 6 to 15 years' imprisonment for each count, the sentences to run concurrently. Defendant appeals as of right and we affirm.

I. Facts and Procedural History

This case arises out of allegations that defendant had sexual contact, including sexual penetration, with his sibling who, at the time of the alleged offenses was thirteen years old. Initially, the felony information alleged that the incident occurred between May 24, 2003, and September 30, 2003. However, at the preliminary examination, the prosecution moved to amend the information to allege that the events occurred during the summer of 2004, between June 1, 2004, and September 15, 2004. The prosecution's motion was based on the victim's testimony. The victim initially indicated that the offense occurred between June 2003 and September 2003 when she was 13 years old and staying overnight at her grandparents' house. However, during cross-examination, the victim testified that the offense must have occurred in 2004 because that was when she lived with her grandparents and that it was warm outside. The court granted the amendment.

Before trial, defendant moved to admit evidence that the victim had made prior false accusations of rape against her step-grandfather. Police had investigated the allegations against the step-grandfather, but he was never charged. Defendant did not provide any evidence that the accusation was false. The trial court denied the motion.

At trial, the victim testified that defendant licked her breasts, digitally penetrated her vagina, forced her to perform fellatio on him, and forced her to have vaginal intercourse with him. Although the victim admitted that she was uncertain when the events occurred, she consistently testified that they occurred when she was 13 years old, living at her grandparents' house, and defendant had come to spend the night. However, according to other testimony, the only point in time in which the victim was 13 years old and living with her grandparents was from mid-January 2004 to April 17, 2004. Thus, the testimony contradicted the time frame indicated in the felony information, which alleged that the events occurred in the summer of 2004. Despite this testimony, the prosecution did not move to amend the information at this point. Detective Matich, who was involved in investigating the matter, testified that defendant had admitted to touching the victim's breasts and digitally penetrating the victim's vagina when he was ten years old. Defendant's written statement was admitted.

Defendant also presented evidence indicating that defendant never spent the night at the grandparents' home during the summer of 2004. Defendant, however, conceded that he spent two nights at the grandparents' house in February 2004. Defendant also elicited inconsistent testimony from the victim regarding how frequently defendant had had sexual contact with her in the past.

At the close of testimony but before closing argument, defendant requested a limiting instruction with respect to the statements defendant made to Detective Matich. Specifically, defendant proposed that in conjunction with CJI2d 4.1[1], the jury also be instructed that: "You must not, however, consider this statement in itself as evidence that the Defendant committed the offense for which he is charged with today." The trial court ultimately decided to give the unaltered version of CJI2d 4.1 to the jury.

The prosecution then moved to amend the information to include a date range of January 2004 to September 2004, thereby including the time period in which defendant spent the night at the grandparents' house when the victim was 13 years old and residing at the house. Defense counsel objected to the amendment, stating that he "may have been able to bring in more

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[1] Pursuant to CJI2d 4.1, the jury is instructed:

> (1) The prosecution has introduced evidence of a statement that it claims the defendant made.
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> (2) Before you may consider such an out-of-court statement against the defendant, you must first find that the defendant actually made the statement as given to you.
>
> (3) If you find that the defendant did make the statement, you may give the statement whatever weight you think it deserves. In deciding this, you should think about how and when the statement was made, and about all the other evidence in the case. You may consider the statement in deciding the facts of the case [and in deciding if you believe the defendant's testimony in court].

witnesses on that."[2] Defense counsel further argued that amendment at this point in the proceedings would be "unfair," and a denial of due process, because both parties had known "forever" that defendant had spent the night on two nights in February 2004 and that the victim had indicated that the alleged offense occurred when it was warm outside in 2004. After extended argument, the trial court offered to declare a mistrial, but defense counsel declined the offer and requested a dismissal instead. Defendant did not move to reopen the proofs or for a continuance to produce any additional witnesses.

Subsequently, the prosecution withdrew its motion to amend the information. The trial court then indicated that it was satisfied that the defense had covered the entire year of 2004. The court stated, "[Defendant] can argue . . . that the information stated the time period in which this incident occurred. [The prosecutor] can argue that that time element—that is not an element of the crime. You can both argue different points."

Before the jury was excused for deliberations, the trial court instructed them, with respect to each count, that "[t]ime is not of the essence, nor is it a material element in a criminal sexual conduct case where the victim is a child." Subsequently, defendant was convicted and sentenced. After sentencing, defendant moved for a new trial on the basis that the verdict was against the great weight of the evidence. The trial court denied the motion. This appeal followed.

II. The Information

Defendant contends that the trial court erred by permitting the prosecutor to argue that the alleged crime occurred on dates not included in the felony information, thereby violating his constitutional right to due process. We disagree. We review the alleged denial of due process de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

It is well established that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant a "meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citation omitted); *Chambers v Mississippi*, 410 US 284, 294-295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). This fundamental right includes a "person's right to reasonable notice of a charge against him . . . ." *Chambers*, *supra* at 294 (quotation marks and citation omitted). Accordingly, a prosecution must be based on an information, or an indictment, MCR 6.112(B), and "[t]o the extent possible, the information should specify the time and place of the alleged offense." MCR 6.112(D).

Pursuant to MCL 767.45(1), an information must include in relevant part:

> (a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.

[2] It appears from the record that defense counsel was referring to defendant's brother, who had spent the two nights in February 2004 with defendant at their grandparents' house. Defendant's brother, however, was not endorsed as a witness.

> (b) The 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.* [Emphasis added.]

In addition, MCL 767.51 provides:

> Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet[3], shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

MCL 767.51 "clearly endows the trial court with discretion to determine when and to what extent specificity will be required." *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). "Nonetheless, . . . certain factors should be included in making such a determination, including but not limited to the following: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *Id*. at 233-234. "Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation," this Court is "disinclined to hold that an information or bill or particulars are deficient for failure to pinpoint a specific date." *Id.* at 234. Thus, in *Naugle* this Court concluded that the offense dates were identified as nearly as the circumstances would permit, noting that "the victim was thirteen years old at the time of the alleged offenses," and "she testified that the defendant had been molesting her since she was approximately eight years old." *Id*. at 235. Clearly, "children who are victims of ongoing sexual assaults have difficulty remembering the exact dates of the individual assaults," and this Court held that under such circumstances, "it [was] conceivable that specific dates would not stick out in her mind." *Id*.

Likewise, in *People v Sabin*, 223 Mich App 530, 532; 566 NW2d 677 (1997), rev'd on other grounds 463 Mich 43 (2000), we found that a failure to pinpoint a specific date did not deny the defendant due process of law. The *Sabin* Court noted that "[i]n criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element." *Id*. Noting that the young victim in *Sabin* could not recall a specific offense date and that "[t]he record [did] not sustain defendant's claim that the time of the offense was essential to the alleged crime," this Court concluded that defendant had not established that he was prejudiced by failure to establish an exact offense date. *Id*. Thus, the prosecution's failure to

[3] "A *videlicet* avers a date tentatively, and unless a particular . . . date is essential to a crime there is no variance if evidence show that the crime charged was committed on a different date." *People v Jones*, 308 Mich 43, 46; 13 NW2d 201 (1944) (citation and quotation marks omitted).

specify the exact offense date did not constitute manifest injustice entitling the defendant to a reversal of his conviction. *Id.*

We find the circumstance presented in this case similar to *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007). In *Dobek*, the defendant was charged with numerous counts of criminal sexual conduct against his stepdaughter. The defendant offered an alibi defense and argued that the trial court's instruction that the prosecution need not prove the date and time of the offense negated his alibi. In affirming the convictions, we reiterated:

> An information is required to contain the "time of the offense as near as may be"; however, "[n]o variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b). Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990); *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987); *People v McConnell*, 122 Mich App 208, 212; 332 NW2d 408 (1982), rev'd on other grounds 420 Mich 852 (1984); *People v Bowyer*, 108 Mich App 517, 523; 310 NW2d 445 (1981). [*Id.* at 82-83 (alterations in original).]

Our review of the record testimony reveals that while the victim contradicted herself throughout the stages of the criminal process with regard to the timing of the alleged offenses, her testimony with respect to the specific acts of the charged offenses, however, was substantially consistent. Despite the victim's changing testimony on the dates, both parties knew throughout the majority of the proceedings that defendant had not spent the night at his grandparents' house during the summer of 2004, but had spent the night twice during February 2004, whereas the victim had testified consistently that the alleged offense occurred when she was 13 years old and she was at her grandparents' house while it was warm outside. Defendant used the victim's confusion over the dates to argue that her testimony was inherently unreliable and raised significant doubt as to whether the offenses even occurred. The alleged error complained of has not resulted in a miscarriage of justice such that reversal is warranted. MCL 769.26.

Moreover, even were we to find that time was of the essence, we find that defendant has waived this issue. While neither of the parties addressed this issue, this Court has the discretion to review legal issues not raised by the parties. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). "Waiver has been defined as the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal quotation marks and citations omitted). A party who waives a known right cannot seek review of the alleged deprivation of those rights because his waiver has extinguished the error. *Id.* Here, defense counsel objected to the prosecution's motion to amend on due process grounds, indicating that the amendment prejudiced him because he was not able to present a substantial and complete defense. After lengthy argument, the trial court asked defense counsel if he would like a mistrial which would have remedied the complained of error, as defendant would have been able to present additional witness and would have been given a new trial. Defense counsel, however, unequivocally stated that he did not want a mistrial. Defendant chose to submit the case to the jury, presumably based on the strategy that the jury would acquit defendant because the prosecution relied primarily upon an inherently incredible witness and to avoid a retrial on a

properly amended information. Because we conclude that defendant specifically rejected the option of a mistrial, we decline to grant the relief requested.

III. Evidentiary Rulings

Defendant next argues that the trial court erred by denying defendant's motion to admit evidence of prior false accusations made by the victim and by refusing to permit testimony regarding the process used to obtain the arrest warrant. We disagree. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion if its decision is outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A. Motion to Introduce Prior False Accusation

Defendant alleges his Sixth Amendment right to confrontation was violated because he was not permitted to cross-examine the victim with respect to alleged prior false accusations. While "the Confrontation Clause . . . guarantees . . . [a] defendant a reasonable opportunity to test the truth of a witness' testimony[,]" this right is by no means unlimited. *People v Hackett*, 421 Mich 338, 346-348; 365 NW2d 120 (1985). Thus, evidence of prior false sexual assault allegations may be admissible at trial, but there must be a sufficient showing of falsity prior to its introduction. *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993).

In the present matter, defendant made no showing in his motion below that the prior allegations against the victim's step-grandfather were false. That the step-grandfather was never convicted of the crime does not prove falsity. *People v Yarger*, 193 Mich App 532, 538; 485 NW2d 119 (1992). Further, we do not consider defendant's affidavit submitted for the first time on appeal, which posits that the allegation was falsely made, because a party may not expand the record on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). The trial court did not abuse its discretion when it denied defendant's motion. *Aldrich*, *supra* at 113.

B. Arrest Warrant

Defendant asserts that his purpose in questioning a police officer about the warrant process was to impeach the victim's credibility. Defendant gives this argument only cursory treatment on appeal and he cites no authority in support of his assertion. Thus, we consider this argument abandoned. *Badiee v Brighton Area Schools*, 265 Mich App 343, 359-360; 695 NW2d 521 (2005). Nonetheless, we fail to see how this line of questioning was relevant to the victim's veracity, MRE 401, and we cannot conclude that the trial court abused its discretion in prohibiting this testimony. *Babcock*, *supra* at 269.

IV. Great Weight of the Evidence

Defendant further contends that the jury's verdict was against the great weight of the evidence and, therefore, defendant is entitled to a new trial. We do not agree. We review for an abuse of discretion a trial court's determination whether to grant a new trial based on the ground that the verdict was against the great weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). The trial court may only grant the motion if defendant has shown that the evidence preponderates so heavily against the verdict that to allow the verdict to

stand would constitute a miscarriage of justice. *Id.* Generally, conflicting testimony and witness credibility do not provide sufficient reasons for granting a new trial as matters of witness credibility are typically left to the finder of fact. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). However, courts have carved a very narrow exception to this rule, which in exceptional circumstances allows courts to "take testimony away from the jury." *Id.* In such instances, directly contradictory testimony must be impeached to the extent that it is deprived of probative value or the jury could not reasonably believe it, or it must defy physical reality or indisputable physical facts. *Id.* at 643-644.

Again, our review of the record testimony reveals that the victim contradicted herself throughout the stages of the criminal process with regard to the timing of the alleged offense. Her testimony with respect to the specific acts of the offense, however, was substantially consistent. Thus, the victim's testimony was not impeached to the extent that it lacked all probative value. Nor was her testimony inherently implausible or a defiance of physical reality. While it is possible that the victim was lying, matters of witness credibility are better left to the jury. *Id.* at 642. We will not upset the jury's verdict on this basis alone and defendant has not otherwise shown a miscarriage of justice. *Unger*, *supra* at 232.

V. Jury Instructions

Lastly, defendant argues that the trial court erred by denying his request for a limiting instruction. We disagree. This Court reviews preserved claims of instructional error de novo. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). A criminal defendant is entitled to a properly instructed jury. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *Id.* If an applicable instruction that was properly requested by a defendant was not given, the defendant will not be afforded relief unless he can demonstrate a miscarriage of justice. *Id.* In other words, the defendant's conviction will be affirmed unless he can show that it is more probable than not that the error was outcome determinative. *Id.* at 124-125.

At the conclusion of trial, defendant proposed an addition to CJI2d 4.1, which provided, "You must not, however, consider this statement in itself as evidence that the Defendant committed the offense for which he is charged with today." The trial court gave the unaltered version of CJI2d 4.1.[4]

Defendant has not shown that the court's refusal to provide the requested instruction was outcome determinative. Defendant contends that the jury could have determined that defendant's statement amounted to a confession of the present charge. Defendant's position, however, is untenable. Immediately after reading that instruction, the trial court instructed the jury as follows:

[4] See footnote 1, *supra*.

> You've heard evidence that was introduced to show that Defendant has engaged in improper sexual conduct for which the Defendant is not on trial. If you believe this evidence, you must be very careful to consider it for only one limited purpose, that is to help you to judge the believability of the testimony regarding the acts for which the Defendant is now on trial.
>
> You must not consider the evidence for any other purpose. For example, you must not decide that it shows that Defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the Defendant here, because you think he is guilty of other bad conduct.

Accordingly, we conclude that defendant has failed to show a miscarriage of justice, *Riddle, supra* at 124-125, and the trial court's instruction was proper.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio