STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2011
v	No. 298960 Kent Circuit Court
SHANE VICTOR CURLEY, Defendant-Appellant.	09-006895-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced to imprisonment for 25 to 50 years for each CSC I conviction. The sentences were to run consecutively to each other. Defendant was sentenced to imprisonment for 43 months to 15 years for each CSC II conviction. The CSC II sentences were to run concurrently with each other, but consecutively to the two CSC I sentences. For the reasons set forth in this opinion, we affirm defendant's convictions. However, because the trial court erred in imposing consecutive sentences, we remand this case to the trial court to correct the judgment of sentence to indicate that defendant's sentences all run concurrently.

Defendant's convictions stem from his sexual abuse of his young daughter. Defendant's daughter was seven years old at the time of trial. She testified that defendant made her "suck on his private" in his bed on more than two occasions. She stated that she was "[s]ix and five" years old when this happened. She also testified that defendant made her "rub his private" with his hand on more than two occasions. Defendant's son was eight years old at the time of trial. He testified that his sister told him that defendant "was making her suck on his private." One night when he, his sister and defendant were sleeping in the same bed, he heard defendant telling his sister "'suck—suck on it'" and he heard his sister say, "'[c]an I be done now?'" On another occasion, defendant asked his daughter to come downstairs for a "private talk" and told his son not to come downstairs.

At the conclusion of a five-day jury trial, the jury found defendant guilty of two counts of CSC I and two counts of CSC II, and he was sentenced as explained above. Defendant appeals as of right.

Defendant first argues that the trial court erred in instructing the jury that evidence of defendant's flight might indicate consciousness of guilt because the flight instruction was not supported by the facts of this case.

As this Court explained in *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007):

> Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004); *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. *People v Hawthorne*, 265 Mich App 47, 57; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 174 (2006). The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. *Fennell*, *supra* at 265. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. *Id.* Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

"It is well established in Michigan law that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term "flight" applies to such actions as fleeing the scene of a crime, leaving the jurisdiction, running from the police, resisting arrest and attempting to escape custody. *Id.* Evidence of flight by itself is insufficient to sustain a conviction; however, "[s]uch evidence is probative because it may indicate consciousness of guilt . . . ." *Id.* It is for the jury to determine whether flight occurred under circumstances as to indicate guilt. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993).

In this case, the parties stipulated that defendant failed to attend his preliminary examination on March 30, 2009. At trial, the trial court instructed the jury pursuant to CJI2d 4.4:

> There has been some evidence that Mr. Curley did not appear for a scheduled court proceeding on March 30th of 2009. This evidence does not prove guilt. A person may fail to appear for a court hearing for innocent reasons such as panic, mistake, or fear. However, a person may also fail to appear for a court hearing because of a consciousness of guilt.
>
> You must decide whether the evidence is true, and, if true, whether it shows that Mr. Curley had a guilty state of mind.

In deciding to instruct the jury pursuant to CJI2d 4.4, the trial court relied on *People v Wright*, unpublished opinion per curiam of the Court of Appeals, issued June 27, 2006 (Docket No. 261040). In *Wright*,[1] the defendant was arrested in Detroit and charged with numerous offenses. *Id.*, slip op p 1. He missed his preliminary examination because he was working. *Id.* He was arrested in Mackinac County and returned to Detroit for trial. *Id.* He challenged the trial court's determination that the flight instruction was applicable to the facts of the case. This Court held:

> The evidence revealed that defendant was aware of his preliminary examination date. Further, defendant did not return to Detroit on his own recognizance. Defendant only appeared for the preliminary examination after he was taken into custody by the Mackinac County Sheriff's Department and returned to Detroit by an officer with the Detroit Police Department. Moreover, the trial court gave the proper flight instruction pursuant to CJI2d 4.4. The instruction allowed the jury to decide whether defendant fled, and, if he had fled, whether defendant did so for innocent reasons or because he had a guilty conscience. The challenged instruction "fairly presented the issues for trial and sufficiently protected" defendant's rights. [*People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).] Therefore, the flight instruction was supported by the facts of the case and the trial court did not abuse its discretion in giving the flight instruction to the jury. [*Id.*, slip op pp 2-3.]

Defendant's trial testimony shows that he was aware of his preliminary examination date. Defendant concedes that he was not present at his preliminary examination, but contends that there was no evidence that he was fleeing. When asked why he did not attend his preliminary examination, he responded:

> I mean, I now know it was a big mistake. But at the time—I mean, I went to work. I went to work . . . right in town. It's not like I was taken [sic] off or anything. I'm like, "This is such bullshit. You guys are"—I didn't know, I didn't know what to make of it. I felt like nobody was there to help me. Nobody was there to give me, you know, to straighten this out at all.

Detective Ed Kolakowski called defendant's boss and advised him that defendant was supposed to be in court the day of his preliminary examination. Kolakowski was able to locate defendant and perform a traffic stop on the truck in which defendant was a passenger, handcuff him and take him to the Kent County Jail. Kolakowski said that defendant did not fight when he was handcuffed and put in the back of the police car.

We find that the flight instruction was supported by the facts of the case. The facts show that defendant failed to attend his preliminary examination even though he knew the date it was

[1] This Court's unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). We include a discussion of *Wright* in this opinion because the trial court relied on it in deciding to give the CJI2d 4.4 instruction.

scheduled to take place. Furthermore, defendant's explanation regarding why he failed to attend the preliminary examination also supports the giving of the flight instruction. According to defendant, he did not attend because the case was "bullshit" and he felt like nobody was there to help him and straighten things out. In addition, defendant had to be tracked down by Kolakowski, handcuffed, and taken to jail. The trial court's flight instruction was proper under CJI2d 4.4. In light of defendant's awareness of the preliminary examination, his comments regarding his decision not to attend, and the fact that the police had to track him down, it was proper for the jury to be given the opportunity to decide whether defendant fled, and, if he had fled, whether defendant did so for innocent reasons or because he had a guilty conscience. Thus, the challenged instruction fairly presented the issues for trial and sufficiently protected defendant's rights. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994). The trial court did not err in giving the flight instruction.

We reject defendant's contention that *Wright* is distinguishable from the facts of this case because the defendant in *Wright* left the jurisdiction, so a flight instruction was proper, whereas in the present case defendant was working within the jurisdiction and was not therefore trying to evade the authorities. For all the reasons articulated above, the flight instruction was supported by the facts of the case even though defendant did not leave the jurisdiction like the defendant in *Wright*.

Defendant next argues that the trial court abused its discretion in permitting the prosecutor to amend the information at the close of the prosecutor's proofs to change the date of the charged offense from "on or about 11/25/2007" to a thirteen-month time frame from January 2008 to March 2009.

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). The abuse of discretion standard recognizes "'that there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In *Dobek*, 274 Mich at 82-83, this Court stated:

> 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. . . .

"A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Unger*, 278 Mich App at 221. Prejudice may be found where the defendant shows unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant contends that he was prejudiced by the amendment because his defense was that there was no way the offense could have occurred on November 25, 2007, because the victim was only 3-1/2 years old at that time, and she testified that the sexual abuse occurred when she was five and six years old. As stated above, time is not of the essence in criminal sexual conduct cases involving a child victim. *Dobek*, 274 Mich App at 83. Moreover, the prosecutor stated during her opening argument that there were not exact dates when the prosecutor was alleging the improper acts occurred, but that the focus was on the "on or about" November 25, 2007, language in the information. Given the difficulty in establishing precise times and dates of sexual abuse of child victims, and the fact that defendant was on notice of this difficulty, we reject defendant's claim of prejudice.

At trial, defendant's daughter testified that she was "[s]ix and five" when defendant sexually abused her. The victim's birth date is January 14, 2003. During the time frame of January 2008 to March 2009, the victim would have been five and six-years-old. By allowing the amendment to the information, the trial court was permitting the prosecution to correct a variance between the information and the proofs. MCL 767.76; MCR 6.112(H). The trial court did not abuse its discretion in allowing the prosecutor to amend the information.

Defendant finally argues that he is entitled to be resentenced because the trial court imposed consecutive sentences in the absence of statutory authority to do so. As indicated above, defendant was sentenced to two consecutive sentences of 25 to 50 years for the CSC I convictions and two 43 month to 15 year sentences for the CSC II convictions that were to run concurrently with each other, but consecutively to the two CSC I sentences. According to defendant, MCL 750.520b(3) does not authorize consecutive sentencing in this case because there is no evidence that any one offense arose from the same transaction as any other offense. The prosecutor agrees that defendant's sentences must be concurrent.

Defendant did not object to the imposition of consecutive sentences. Therefore, this Court's review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). Plain error occurs at the trial court level if: (1) error occurred, (2) the error was clear or obvious, and (3) the error affected substantial rights, which generally requires a showing that the error affected the outcome of the lower court proceedings. *Id.* at 763. We ultimately "will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

In Michigan, "concurrent sentencing is the norm." *People v Alvarado*, 192 Mich App 718, 720; 481 NW2d 822 (1992). "A consecutive sentence may be imposed only if specifically authorized by statute." *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). Under MCL 750.520b(3), "[t]he court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the *same transaction*." (Emphasis added.)

In this case, the victim's testimony indicated that defendant made her "suck on his private" in his bed on more than two occasions and that he made her "rub his private" with his

hand on more than two occasions. Thus, there were at least four criminal acts arising from four different transactions. MCL 750.520b(3) does not permit consecutive sentencing on multiple counts of CSC I and CSC II where the counts concern separate acts that occur on different occasions and therefore are not part of the same transaction.[2] Accordingly, we remand this case to the trial court with instructions to amend the judgment of sentence to indicate that defendant's sentences for CSC I and CSC II are all to run concurrently with each other. The trial court is further instructed to ensure that a copy of the corrected judgment of sentence is delivered to the Department of Corrections. *People v Brown*, 220 Mich App 680, 685; 560 NW2d 80 (1996).

Affirmed in part and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello

[2] Although not precedentially binding, we observe that this Court has held, in an unpublished opinion, that "MCL 750.520b(3) was not intended to allow consecutive sentencing on multiple counts of the offense of CSC 1, where the counts concern separate acts of CSC 1 occurring on different occasions and therefore are not part of the same transaction." *People v Bekele*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2011 (Docket No. 294592), slip op p 16.