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IN THE COURT OF APPEALS OF INDIANA

Donald Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 19, 2022

Court of Appeals Case No. 21A-CR-1234

Appeal from the Porter Superior Court

The Honorable Jeffrey Clymer, Judge

Trial Court Cause No. 64D01-1403-FC-002217

May, Judge.

[1] In this interlocutory appeal, Donald Johnson appeals the denial of his motion to dismiss the seventeen Class C felony securities-related charges filed against him. He presents multiple issues for our review, which we revise and restate as:

1. Whether the trial court abused its discretion when it denied Johnson's motion to dismiss because:

1.1. some of the charges were filed outside the statute of limitations period for those crimes;

1.2. the charging information failed to state the crimes with sufficient certainty; and

1.3. pursuant to the relevant statutes, the financial instruments at issue were not securities, Johnson was not a broker-dealer, and the transactions were exempt as limited offerings;

and

2. Whether the trial court abused its discretion when it allowed the State to amend the charging information.

We affirm in part, reverse in part, and remand.

Facts and Procedural History[1]

[2] On January 21 and 30, 2012, Jeffrey Knutilla filed a complaint with the Office of the Secretary of State and the Chesterton Police Department, respectively, regarding certain financial transactions involving Johnson. Officer Charles

[1] We held oral argument in this case on March 24, 2022, at Indiana University East in Richmond, Indiana. We thank the university staff for their hospitality, the students for their excellent questions, and distinguished guests for their attendance. We also thank counsel for their able presentations.

Williams of the Prosecution Assistance Unit of the Indiana Secretary of State's Office, Securities Division, investigated Knutilla's complaint and discovered other possible victims, with whom he spoke on September 19, 2012. On March 14, 2014, Williams alleged in his affidavit of probable cause for the issuance of an arrest warrant, which was filed simultaneous with the charging information:

> Johnson solicited monies from individuals by guaranteeing a certain high-interest return on their money; usually in real-estate development. Investors in this case typically rolled-over IRA accounts to Equity Trust Company, an independent IRA custodian, and then money would go to Johnson's company Private Lending, LLC. Investors received promissory notes showing the guaranteed interest rate return and were [sic] signed by Johnson. Many investors were unaware that their money was missing because Equity Trust would continue to send statements showing the money was in their accounts and bill them for custodial fees. In some cases, investors received interest payments as promised from Johnson for a period of time. When interest payments stopped and investors requested their investments back, Johnson told them that it was unavailable.

(App. Vol. II at 3.) Williams' affidavit also included specific allegations from six alleged victims and noted, "no security registration, or request for exemption, exists for Don Johnson, . . . or Private Lending, LLC, individually, nor is there any evidence that any was even filed." (*Id*. at 8.)

[3] Based thereon, the State charged[2] Johnson with:

- COUNT I: Class C felony offer or sale of unregistered security;[3] alleged victim Jeffrey Knutilla on or about September 2009

- COUNT II: Class C felony transacting business by an unregistered broker-dealer;[4] alleged victim Jeffrey Knutilla on or about September 2009

- COUNT III: Class C felony offer or sale of unregistered security;[5] alleged victim Randall Hunt on or about July 2007

- COUNT IV: Class C felony transacting business by an unregistered broker-dealer;[6] alleged victim Randall Hunt on or about July 2007

- COUNT V: Class C felony offer or sale of unregistered security; alleged victim Joey Wrigley on or about December 2007

- COUNT VI: Class C felony transacting business by an unregistered broker-dealer; alleged victim Joey Wrigley on or about December 2007

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[2] Crimes alleged to have been committed prior to July 1, 2008, are charged under the now-repealed version of the statute, which was repealed and replaced by the Indiana Uniform Securities act in P.L. 27-2007 and became effective July 1, 2008.

[3] Ind. Code § 23-19-3-1 (2008).

[4] Ind. Code § 23-19-4-1 (2008).

[5] Ind. Code § 23-2-1-3 (2007).

[6] Ind. Code § 23-2-1-8 (2007).

- COUNT VII: Class C felony offer or sale of unregistered security; alleged victim Thomas Diehl on or about September 2007

- COUNT VIII: Class C felony transacting business by an unregistered broker-dealer; alleged victim Thomas Diel on or about September 2007

- COUNT IX: Class C felony offer or sale of unregistered security; alleged victim Gloria Thornton on or about September 2010

- COUNT X: Class C felony transacting business by an unregistered broker-dealer; alleged victim Gloria Thornton on or about September 2010

- COUNT XI: Class C felony offer or sale of unregistered security; alleged victim Colleen Watson on or about March 2008

- COUNT XII: Class C felony transacting business by an unregistered broker-dealer; alleged victim Colleen Watson on or about March 2008

- COUNT XIII: Class C felony securities fraud[7]

- COUNT XIV: Class C felony securities fraud

On April 10, 2015, the State filed another probable cause affidavit and charged Johnson with:

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[7] Ind. Code § 23-19-5-1 (2008); Ind. Code § 23-2-1-12 (2007).

- COUNT XV: Class C felony offer or sale of unregistered security; alleged victim Michael Jeffress between September 12, 2013, and January 6, 2014

- COUNT XVI: Class C felony transacting business by an unregistered broker-dealer; alleged victim Michael Jeffress between September 12, 2013, and January 6, 2014

- COUNT XVII: Class C felony securities fraud

On May 12, 2016, the State amended Count V, Count VI, and Count XI to allege Johnson concealed his actions such that the alleged victims "would not know the investment was not valid." (*Id*. at 23-4.) Further, the amended charges alleged the State could not have discovered the alleged crimes until they were reported by the alleged victims on September 19, 2012, and March 22, 2013.

[4] On June 22, 2016, Johnson filed a motion to dismiss Counts III, IV, V, VI, VII, VIII, XI, XII, and XIII, arguing they were "barred by the relevant statute of limitations." (*Id*. at 27.) On August 24, 2016, the trial court denied Johnson's motion to dismiss by summary order. On September 28, 2016, Johnson filed a motion to certify the trial court's order for interlocutory appeal. The trial court granted Johnson's request on October 3, 2016. On December 2, 2016, the Indiana Court of Appeals denied Johnson's motion for interlocutory appeal.

[5] On July 16, 2018, Johnson filed a renewed motion to dismiss, arguing new case law, *Dvorak v. State*,[8] 78 N.E.3d 25 (Ind. Ct. App. 2017), *trans. denied*, was "on all fours with the current case." (App. Vol. II at 47.) Johnson renewed his argument that Counts III, IV, V, VI, VII, VIII, XI, XII, XIII, and XIV "must be dismissed because they violate the statute of limitations[.]" (*Id*. at 50) (original formatting omitted). He additionally asserted all of the counts should be dismissed "because they fail to state the offenses with sufficient certainty[,]" "because the financial instruments are not securities[,]" and "because the State did not allege that Mr. Johnson knowingly violated securities law[.]" (*Id*. at 52-54) (original formatting omitted). He also alleged Counts II, IV, VI, VIII, X, XII, and XVI should be dismissed "because Mr. Johnson was not required to register as a broker-dealer[.]" (*Id*. at 58) (original formatting omitted). Finally, Johnson contended "all counts should be dismissed "because the financial instruments are exempt from securities registration by statute[.]" (*Id*. at 59) (original formatting omitted).

[6] On April 1, 2021, after a series of continuances by both parties and the court, substitution of counsel, retirement of the original judge, and appointment of a special judge, the State responded to all of Johnson's arguments. The State additionally requested leave to amend the charges against Johnson "to the extent any charging documents or specific counts are deemed insufficient[.]"

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[8] The official case citation refers to the appellant by his initials, *P.T.D.*, and the State cites the case using *P.T.D*. However, the trial court referred to the case as *Dvorak* in its order, and we will follow the trial court's lead.

(*Id*. at 77.) The State argued it should be granted its request to do so because "such amendments do not meaningfully prejudice the Defendant and the Defendant is already on reasonable and sufficient notice of any claims in his Motion to Dismiss that warrant an amended information or probable cause affidavit." (*Id*. at 78.)

[7] In his response to the State's request for leave to amend the charges against him, Johnson asserted the State's call to amend "is an open acknowledgement that these fossilized charges must be dismissed" and that it is time for the State to "put up or shut up." (*Id*. at 79-80.) He also argued the amendments would be of substance and not form, and thus would prejudice him "given the length of the case and that the amendments are coming almost three years after this motion to dismiss was filed and approximately 7 years after the omnibus date." (*Id*. at 81.) Johnson claimed "[a]ny amendments would require Mr. Johnson to file and litigate a third motion to dismiss" and give the State "a fourth bite of the proverbial apple." (*Id*.)

[8] The trial court held a hearing on Johnson's motion to dismiss on April 19, 2021. On April 21, 2021, the trial court issued its order denying Johnson's motion to dismiss and granting the State's leave to amend the charges against Johnson, stating:

> The State is granted leave to amend to incorporate the statutory mens rea requirement. Although some of the alleged crimes occurred in 2007, in addition to those alleged in 2009, the Defendant is not prejudiced by the delay for two reasons: this

> Court has not yet set a trial date, and, [sic] he is responsible for some of the delay himself.

(*Id*. at 99) (footnote omitted). On May 20, 2021, Johnson filed a petition to certify the trial court's order for interlocutory appeal and to stay the proceedings pending the outcome. The trial court granted Johnson's requests on May 26, 2021. This court accepted jurisdiction over the interlocutory appeal on July 16, 2021.

Discussion and Decision

[9] Our standard of review for a trial court's decision on a motion to dismiss is well-settled:

> We review a trial court's denial of a motion to dismiss for an abuse of discretion. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances or when the trial court has misinterpreted the law. We may affirm a trial court's judgment if it is sustainable on any basis in the record.

Estrada v. State, 969 N.E.2d 1032, 1038 (Ind. Ct. App. 2012) (internal citations omitted), *trans. denied*. When, as here, a defendant has filed a motion to dismiss a criminal information, "we take the facts alleged in the information as true." *Dvorak*, 78 N.E.3d at 27. "Questions of fact to be decided at trial or facts constituting a defense are not properly raised by a motion to dismiss." *Id.* (quoting *Lebo v. State*, 977 N.E.2d 1031, 1035 (Ind. Ct. App. 2012)).

[10] "The purpose of the charging information is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense." *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010), *trans. denied*. A charging information must be in writing and state: the name of the offense; the statute violated; the elements of the offense charged; the date, time, and location of the offense to indicate it occurred within the limitations period and within the jurisdiction of the court where filed; and the name of every defendant. Ind. Code § 35-34-1-2(a). "The State is not required to include detailed factual allegations in a charging information." *Laney v. State*, 868 N.E.2d 561, 567 (Ind. Ct. App. 2007), *trans. denied*.

> "An information that enables an accused, the court, and the jury to determine the crime for which conviction is sought satisfies due process." *Lampitok v. State*, 817 N.E.2d 630, 636 (Ind. Ct. App. 2004), *trans. denied* (2005). "Errors in the information are fatal only if they mislead the defendant or fail to give him notice of the charge filed against him." *Gordon v. State*, 645 N.E.2d 25, 27 (Ind. Ct. App. 1995), *trans. denied*.

Dickenson v. State, 835 N.E.2d 542, 550 (Ind. Ct. App. 2005), *trans. denied*. "[W]here a charging instrument may lack appropriate factual detail, additional materials such as the probable cause affidavit supporting the charging instrument may be taken into account in assessing whether a defendant has been apprised of the charges against him." *Laker*, 939 N.E.2d at 1113.

1.1. Statute of Limitations

[11] Johnson first argues the trial court abused its discretion when it denied his motion to dismiss certain charges based on the applicable statute of limitations. It is well-established:

> "For misdemeanors and most classes of felonies, Indiana has enacted statutes of limitations, which permit the commencement of criminal proceedings against defendants only within a fixed period of time from the commission of a crime." *Sloan* [*v. State*], 947 N.E.2d [917,] 920 [(Ind. 2011)]. The "primary purpose is to protect defendants from the prejudice that a delay in prosecution could bring, such as fading memories and stale evidence." *Id.* (citing *Kifer* [*v. State*], 740 N.E.2d [586,] 587 [(Ind. Ct. App. 2000)]). Statutes of limitations are also intended to "strike[ ] a balance between an individual's interest in repose and the State's interest in having sufficient time to investigate and build its case." *Sloan*, 947 N.E.2d at 920 (citing *Heitman v. State*, 627 N.E.2d 1307, 1309 (Ind. Ct. App. 1994)). "Formerly, statutes of limitations were looked upon with disfavor ... [n]ow, however, the judicial attitude is in favor of statutes of limitations ... since they are considered as statutes of repose and as affording security against stale claims." *Shideler v. Dwyer*, 275 Ind. 270, 417 N.E.2d 281, 283 (1981) (internal quotation omitted). Accordingly, "[a]ny exception to the limitation period must be construed narrowly and in a light most favorable to the accused." *State v. Lindsay*, 862 N.E.2d 314, 317 (Ind. Ct. App. 2007) (citing *State v. Jones*, 783 N.E.2d 784, 787 (Ind. Ct. App. 2003)).

Study v. State, 24 N.E.3d 947, 953 (Ind. 2015), *cert. denied* 577 U.S. 962 (2015).

[12] All the crimes Johnson is charged with committing are Class C felonies. Pursuant to Indiana Code section 35-41-4-2(a): "Except as otherwise provided in this section, a prosecution for an offense is barred unless it is commenced: (1)

within five (5) years after the commission of the event, in the case of a . . . Class C . . . felony (for a crime committed before July 1, 2014)[.]" When considering whether the limitation period was tolled, "a prosecution is considered commenced on . . . (1) The date of filing of an indictment, information, or complaint before a court having jurisdiction." Ind. Code § 35-41-4-2(i)(1).

[13] However, Indiana law also provides the

> period within which a prosecution must be commenced does not include any period which . . . (2) the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence[.]

Ind. Code § 35-41-4-2(h)(2). Thus, if the State alleges and ultimately proves the defendant committed positive acts of concealment to evade the detection of his crime, the statute of limitations period is tolled until the State becomes aware of the alleged commission of the crime. *See id.* Our Indiana Supreme Court has held: "The application of the concealment-tolling provision under Indiana Code § 35-41-4-2(h)(2) requires a positive act by the defendant that is calculated to conceal the fact that a crime has been committed." *Study*, 24 N.E.3d at 957.

[14] In *State v. Chrzan*, we explained that concealing evidence of the offense "must be held to mean concealment of the fact that a crime has been committed, unconnected with the fact that the accused was the perpetrator" and that "the concealment of the fact of the crime must be the result of some positive act done by the accused, and calculated to prevent discovery of the fact of the

offense of which he stands charged." 693 N.E.2d 566, 567 (Ind. Ct. App. 1998) (quoting *State v. Holmes*, 181 Ind. App. 634, 637, 393 N.E.2d 242, 244 (1979)). We have held several types of actions constitute positive acts of concealment. *See, e.g., M.A. v. State*, 83 N.E.3d 1221, 1230 (Ind. Ct. App. 2017) (sending periodic updates on specific dates within the statute of limitations regarding the status of securities to investors was a positive act of concealment); *and see Gilliland v. State*, 979 N.E.2d 1049, 1060 (Ind. Ct. App. 2012) (Gilliland engaged in a positive act of concealment when he did not immediately report that a student reported the assistant volleyball coach was inappropriately touching her when he was required to do so by law when that concealment occurred within the statute of limitations); *and see Sloan v. State*, 947 N.E.2d 917, 921-3 (Ind. 2011) (defendant's act of telling victim that she would go to jail if she disclosed defendant's molestation was a positive act of concealment but the positive act of concealment was not within the statute of limitations).

[15] Additionally, the omission of relevant information, or the failure to share pertinent information, could constitute a positive act of concealment.[9] For

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[9] Our holding that an omission can be a positive act of concealment rejects the holding by another panel of our Court in *Dvorak v. State*, 78 N.E.3d 25 (Ind. Ct. App. 2017), *trans. denied*. We note that, while we are respectful of the decisions of other panels, Indiana does not recognize horizontal stare decisis. *In re F.S.*, 53 N.E.3d 582, 596 (Ind. Ct. App. 2016). Thus, we "may repudiate" other decisions from this Court "if strong reason exists to do so." *Lincoln Utils., Inc. v. Office of Util. Consumer Counselor*, 661 N.E.2d 562, 565 (Ind. Ct. App. 1996), *reh'g denied*, *trans. denied*. "[E]ach panel of this Court has coequal authority on issues and considers any previous decisions by other panels but is not *bound* by those decisions." *In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009) (emphasis in original).

In *Dvorak*, the State alleged Dvorak committed Class C felony offer or sale of an unregistered security and Class C felony acting as an unregistered agent. The crimes allegedly were committed on July 9, 2007, and

example, in *Rushville Nat. Bank of Rushville v. State Life Ins. Co*., 1 N.E.2d 445, 210 Ind. 492 (1936), our Indiana Supreme Court examined a fact scenario in which Walter Emsweller[10] applied for life insurance and did not disclose his brother's suicide as required in the application for life insurance despite knowing "that, within a few months prior to the application for insurance, a brother of the applicant Emsweller committed suicide while insane." *Id*. at 447, 210 Ind. at 495. State Life Insurance Company alleged the policy was fraudulently procured, as Emsweller had omitted the required information about his deceased brother. *Id*. at 448, 210 Ind. at 500.

[16] In considering whether Emsweller engaged in an act of concealment, our Indiana Supreme Court adopted long-standing precedent from the Supreme Court of Illinois:

> It was said by the Supreme Court of Illinois in *Linington v. Strong et al*. (1883) 107 Ill. 295, 303: "We consider that where it appears

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the State did not file charges against Dvorak until June 2015. 78 N.E.3d at 26. The State also alleged Dvorak "concealed his true actions" from the alleged victim "by structuring the Promissory Note and Agreement to Lend and Borrow Money so that they did not mature until July 9, 2010" and thus the alleged victim "would not know that the investment was not valid until July 9, 2010." *Id*. at 26-7. Additionally, the State alleged Dvorak concealed his actions by not registering as an agent with the Indiana Secretary of State as required and thus the offenses "could not have been discovered by the State of Indiana" until after the alleged victim "made his complaint to the Indiana Secretary of State, Securities Division on September 1, 2011." *Id*. at 27.

Dvorak held the structuring of the security, such that the investor could not discover the fraud until after the statute of limitations had run, was not an act of concealment. Moreover, because the investor could have discovered the security was not properly registered and/or Dvorak was not registered as a broker-dealer by checking certain public records, the *Dvorak* panel held Dvorak's omission of that information from the details he gave the investor was not a positive act of concealment. *Id.* at 30.

[10] Rushville National Bank of Rushville became involved in the case because it was named trustee of the life insurance policy.

> that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled, or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care."

Id. at 450, 210 Ind. at 503. Our Indiana Supreme Court further stated, "[c]oncealment implies intention. Omission[11] to state a fact may imply only negligence, but the charge that a fact is concealed implies an intention to withhold or cover up information so that the one entitled to be informed may remain in ignorance." *Id*. at 450, 210 Ind. at 505.

[17] As we have set forth some examples of concealment, we now turn to the standard by which we consider the sufficiency of the allegations of concealment in the charging information and probable cause affidavit. "When the State has relied on [the concealment] exception, courts have required the State to plead those circumstances in the information so that a defendant is apprised of the facts upon which the State intends to rely and may be prepared to meet that proof at trial." *Willner v. State*, 602 N.E.2d 507, 508-9 (Ind. 1992). To determine whether the State adequately alleged concealment in a charging

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[11] *Dvorak* did not address whether an omission, generally, could be a positive act of concealment. Instead, it rejected the holding in *Manns v. Skolnik*, 666 N.E.2d 1236, 1249 (Ind. Ct. App. 1996), *trans. denied*. *Dvorak*, 78 N.E.3d 25, 29. *Manns* held the failure to disclose that a security was not registered and that the seller was not registered as a broker-dealer were "material omission[s]" that violated the requirement of Indiana Code section 23-2-1-12 that a seller not "omit to state a material fact necessary in order to make the statements . . . not misleading[.]" *Manns*, 666 N.E.2d at 1248-49. Because *Manns* was concerned with statutory language regarding omitting information, rather than "concealment," we do not rely on *Manns*.

information, we must examine whether the defendant was on notice that concealment would be alleged at trial and not whether the positive acts of concealment were proven, as that is a function for the fact finder. *See Woods v. State*, 980 N.E.2d 439, 444 (Ind. Ct. App. 2012) (facts alleging concealment are sufficient if they put the defendant on notice that the State intends to present evidence of the concealment at trial; the fact-finder must determine if the concealment tolled the statute of limitations period). *See also Reeves v. State*, 938 N.E.2d 10, 15-16 (Ind. Ct. App. 2010) ("whether the State has met its burden of *proving* that the crimes charged fall within the statute of limitation . . . is an issue that will be presented and ultimately fleshed out at trial") (emphasis added), *reh'g denied*, *trans. denied*.

[18] Johnson argues the trial court abused its discretion when it denied his motion to dismiss because the State did not file Counts III, IV, V, VI, VII, VIII, XI, and XII, XIII, and XIV within the applicable statute of limitations. Accordingly, we look closely at each of those charges and the portion of the probable cause affidavit relevant to each to determine whether the State's charging information adequately alleged concealment to put Johnson on notice that the issue would be litigated at trial.

1.1.1 Randall Hunt - Counts III and IV

[19] The charging information for Count III, Class C felony offer or sale of an unregistered security, alleges:

> [O]n or about July, 2007, in the County of Porter, State of Indiana, **DONALD JOHNSON**, did offer or sell a security to Randall Hunt, where said security was neither registered with the Indiana Secretary of State, Securities Division, a federal covered security, nor was it exempted from registration under I.C. 23-2-1-1; in violation of IC 23-2-1-3 (2007).

(App. Vol. II at 11) (emphasis in original). The charging information for Count IV, Class C felony transacting business by an unregistered broker-dealer, alleges "that on or about the [sic] July, 2007, in the County of Porter, State of Indiana, **DONALD JOHNSON**, did offer or sell a security to Randall Hunt, without being registered to do so, in violation of IC 23-2-1-8 (2007)." (*Id.*) (emphasis in original).

[20] The portion of the probable cause affidavit concerning Johnson's interactions with Hunt states:

> Mr. Hunt said that he knew of Mr. Johnson because his wife had worked for Johnson for about fifteen years. In the summer of 2007, sometime before July 26, 2007, Mr. Hunt said that Mr. Johnson had told him about a Tennessee real-estate project that Mr. Johnson was investing. Mr. Johnson told Mr. Hunt that he could make a profit of 100% in one year if he invested his 401K retirement fund in the Tennessee project. On or about July 3, 2007, JP Morgan Retirement Plan Services LLC transferred $101,463.55 to Equity Trust Company, and on or about that same day Equity Trust Company did an Investment Wire Transfer to Fifth Third Bank, Private Lending LLC, Johnson's company. Mr. Hunt said that Mr. Johnson prepared two promissory notes, but the first had an error. The second promissory note was prepared by Mr. Johnson and dated July 26, 2007, for $100,000, payable at 100% per year to Equity Trust

> Company, with a due date of July 31, 2008. Equity Trust Company gave Hunt an IRA based on the promissory note wherein Johnson would return $200,000 in Mr. Hunt's Equity Trust Company account. Mr. Hunt said that he had received between $35,000 and $36,000 from Mr. Johnson, and that the invested funds were 80% of his retirement funds.

(*Id*. at 5.) The State charged Johnson with Counts III and IV on March 14, 2014. Thus, the alleged crimes must have happened after March 14, 2009, unless the State sufficiently alleged Johnson committed a positive act of concealment as to toll the statute of limitations period until Hunt reported the alleged crimes to the State.

[21] Here, the facts alleged occurred in 2007 and 2008. While the charging information and probable cause affidavits are sufficient to outline the State's allegations of the crimes, they do not specifically allege Johnson committed a positive act of concealment in his interactions with Hunt as to toll the statute of limitations. Thus, on their face the allegations against Johnson as they pertain to Hunt were filed outside of the statute of limitations, despite the fact that Hunt did not report them to the State until 2012, because the State did not allege Johnson committed a positive act of concealment to toll the limitations period. Therefore, we reverse the trial court's denial of Johnson's motion to dismiss Counts III and IV because the charges were filed outside the statute of limitations and the State failed to allege positive acts of concealment to put Johnson on notice that the State intended to prove Johnson's actions made the charges timely. *See Reeves*, 938 N.E.2d at 17 (holding trial court should have

dismissed charges because "the charging informations contain absolutely no allegation of the concealment of evidence exception").

1.1.2. Joey Wrigley - Counts V and VI

[22] In Counts V and VI, the State charged Johnson with Class C felony offer or sale of an unregistered security and Class C felony transacting business by an unregistered broker-dealer. The information indicates both crimes occurred in around December 4, 2007, and involved Joey Wrigley. The State filed those charges on March 14, 2014. Thus, the alleged crimes must have happened after March 14, 2009, unless the State sufficiently alleged Johnson committed a positive act of concealment to toll the statute of limitations period until Wrigley reported the alleged crimes to the State.

[23] Here, as to both charges, the State alleged Johnson engaged in multiple acts of positive concealment as to toll the statute of limitations until Wrigley reported the alleged crimes to the State. First, the State alleged Johnson "concealed his true actions from Joey Wrigley by structuring the Promissory Note so that it did not mature until December 4, 2009; therefore, Joey Wrigley would not know that the investment was not valid until December 4, 2009." (App. Vol. II at 24.) Further, the State alleged that, at some point prior to the maturity of the promissory note, Wrigley received communication about these promissory notes, indicating he needed to pay maintenance fees, which he did. (*Id.* at 5.) Additionally, the State alleged that when Wrigley realized his promissory note had no value, he asked Johnson why, and Johnson responded there had been a

downturn in the real estate market and the project in which Wrigley invested was on hold. (*Id*. at 6.) Finally, the State alleged

> Johnson concealed his actions from the State of Indiana by offering and selling the security while not registered with the Indiana Secretary of State. Because the security was not registered and because Johnson was not registered to offer or sell securities, he kept himself out of the purview of both law enforcement and industry regulators. This offense could not have been discovered by the State of Indiana until after Joey Wrigley provided information to the Indiana Secretary of State, Securities Division and/or the Chesterton Police Department on September 19, 2012.

(*Id*. at 23 & 24.) Based thereon, the trial court did not abuse its discretion when it denied Johnson's motion to dismiss Counts V and VI because the State alleged Johnson committed multiple positive acts of concealment to put Johnson on notice that the State intended to prove concealment tolled the statute of limitations. *See Woods*, 980 N.E.2d at 444 (charging information and probable cause affidavit together sufficiently allege concealment).

1.1.3. Thomas Diehl - Counts VII and VIII

[24] In Counts VII and VIII, the State charged Johnson with Class C felony offer or sale of an unregistered security and Class C felony transacting business by an unregistered broker-dealer. The information indicates both crimes occurred in September 2007 and involved Thomas Diehl. The State filed these charges on March 14, 2014. Thus, the alleged crimes must have happened after March 14, 2009, unless the State sufficiently alleged Johnson committed a positive act of

concealment to toll the statute of limitations period until Diehl reported the alleged crimes to the State.

[25] The State alleged that, on or around September 28, 2007, Diehl invested money with Johnson. (App. Vol. II at 12.) The probable cause affidavit indicates Johnson told Diehl the turnaround on his investment would be two years as part of a real estate project. (*Id*. at 5.) Diehl told the State he received several statements and incurred a $440 maintenance fee on the investment account. (*Id*.) Diehl also told the State that when he inquired about the status of his investment, Johnson told him there had been a downturn in the economy and the project had been put on hold. (*Id*.) In addition to these alleged acts, the probable cause affidavit asserted Johnson did not tell Diehl that the security was unregistered or that Johnson was not registered as a broker-dealer. (*Id*.) Based on the foregoing, the trial court did not abuse its discretion when it denied Johnson's motion to dismiss as it pertains to the statute of limitations argument regarding Counts VII and VIII, because the State sufficiently alleged that Johnson committed positive acts of concealment to put Johnson on notice that the State would be proving concealment at trial. *See Woods*, 980 N.E.2d at 444 (charging information and probable cause affidavit together sufficiently allege concealment).

1.1.4. Colleen Watson - Count XI and XII

[26] In Counts XI and XII, the State charged Johnson with Class C felony offer or sale of an unregistered security and Class C felony transacting business as an unregistered broker-dealer. The information indicates both crimes occurred "on

or about March 19, 2008" against Colleen Watson. (Appellant's App. at 24, 25.) The State filed these charges on March 14, 2014, which is past the five-year limitations period for a Class C felony. Thus, the trial court should have dismissed these charges unless the State asserted Johnson committed an act of concealment to toll the limitations period.

[27] Here, the State alleged Johnson engaged in multiple acts of positive concealment to toll the statute of limitations until Watson reported the alleged crimes to the State. First, Johnson "concealed his true actions from Colleen Watson by structuring the Promissory Note so that it did not mature until February 28, 2013; therefore, Colleen Watson would not know that the investment was not valid until February 28, 2013." (*Id*. at 25.) Further, at some point prior to the maturity of the promissory note, Watson received communication that money had been withdrawn from her account for maintenance fees. (*Id*. at 8.) Additionally, Johnson allegedly told Watson that the project in which she invested had been halted due to a downturn in the economy. (*Id*.) Finally, the State alleged

> Johnson concealed his actions from the State of Indiana by offering and selling the security while not registered with the Indiana Secretary of State. Because the security was not registered and because Johnson was not registered to offer or sell securities, he kept himself out of the purview of both law enforcement and industry regulators. This offense could not have been discovered by the State of Indiana until after Colleen Watson provided information to the Indiana Secretary of State, Securities Division and/or the Chesterton Police Department on March 22, 2013.

[28] (*Id*. at 25.) Based thereon, we conclude trial court did not abuse its discretion when it denied Johnson's motion to dismiss Charges XI and XII as is relevant to his statute of limitations argument because the State alleged Johnson committed multiple positive acts of concealment that, if proved, could have tolled the statute of limitations. *See Woods*, 980 N.E.2d at 444 (charging information and probable cause affidavit together sufficiently allege concealment).

1.1.5. Counts XIII and XIV

[29] In Counts XIII and XIV, the State alleged Johnson committed Class C felony fraudulent or deceitful acts with the offer, sale, or purchase of a security, alleges:

> [O]n or about the time period of July 2007 through September, 2010, **DONALD JOHNSON**, in the county of Porter, State of Indiana, in connection with the offer or sale of a security, directly or indirectly:
>
> (1) employed a device, scheme or artifice to defraud,
>
> (2) made an untrue statement of material fact, or omitted to state a fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading; or,
>
> (3) engage [sic] in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person by omitting to state to Jeffrey Knutilla and/or Randall Hunt, and/or Joey Wrigley, and/or Thomas Diehl, and/or Gloria Thornton, and/or Collen

> Watson that JOHNSON was not registered as a broker-dealer in the state of Indiana, and/or by omitting to state that the securities sold by DONALD JOHNSON were not registered, all in violation of IC 23-19-5-1; IC 23-2-1-12 (2007).

(App. Vol. II at 13) (emphasis in original). The charging information for Count XIV, Class C felony fraudulent or deceitful acts with the offer, sale, or purchase of a security, alleges:

> [O]n or about the time period of July 2007 through September, 2010, **DONALD JOHNSON**, in the county of Porter, State of Indiana, in connection with the offer or sale of a security, directly or indirectly:
>
> (1) employed a device, scheme or artifice to defraud,
>
> (2) made an untrue statement of material fact, or omitted to state a fact necessary to order to make the statement made, in the light of the circumstances under which they were made, not misleading; or,
>
> (3) engage [sic] in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person by omitting to state to Jeffrey Knutilla and/or Randall Hunt, and/or Joey Wrigley, and/or Thomas Diehl [sic], and/or Gloria Thornton, and/or Collen Watson that JOHNSON was not registered as a broker-dealer in the state of Indiana, and/or by omitting to state that the securities sold by DONALD JOHNSON were not registered, all in violation of IC 23-19-5-1; IC 23-2-1-12 (2007).

> Specifically, **DONALD JOHNSON** informed Jeffrey Knutilla and or Randall Hunt, and/or Joey Wrigley, and/or Thomas Diehl, and/or Gloria Thornton, and/or Colleen Watson that their money was to be used for investment purposes, but instead used said monies for personal living expenses of JOHNSON in violation of IC 23-19-5-1; IC 23-2-1-12 (2007).

(*Id*.) (emphasis in original).

[30] Johnson argues Counts XIII and XIV were filed outside the statute of limitations because some of the alleged crimes against the alleged victims occurred outside of the statute of limitations. However, as we have held *supra*, except for those charges specific to Hunt, all of the allegations involving the other alleged victims[12] alleged a positive act of concealment that, if proven, may toll the statute of limitations. Thus, the trial court did not abuse its discretion when it denied Johnson's motion to dismiss Counts XIII and XIV because the relevant charges upon which they were based, absent the allegations involving Hunt, alleged a positive act of concealment that may toll the statute of limitations. We remand to allow the State to amend Counts XIII and XIV to remove Hunt's name from the list of alleged victims based on our holding that the State failed to allege acts of concealment that could permit Counts III and IV involving Hunt to have been filed inside the statute of limitations.

[12] Johnson does not allege the counts involving Knutilla and Thornton were filed outside the statute of limitations.

1.2. Sufficient Certainty

[31] Johnson next[13] asserts the trial court abused its discretion by denying his motion to dismiss because the charges against him lacked sufficient certainty.[14] It is well-established that:

> The accused in a criminal case has the right to require that the allegations contained in the charging instrument state the crimes charged with sufficient certainty to enable him to anticipate the evidence adduced against him at trial, thereby enabling him to marshal evidence in his defense. *Moran v. State*, 477 N.E.2d 100, 103 (Ind. Ct. App. 1985). The offense charged must also be described with sufficient particularity to permit a defense of double jeopardy in the event of a subsequent prosecution. *Taylor v. State*, 677 N.E.2d 56, 67 (Ind. Ct. App. 1997), *trans. denied*. The indictment must state the crime charged in direct and unmistakable terms. *Moran*, 477 N.E.2d at 103 (citing *Garcia v. State*, 433 N.E.2d 1207, 1209 (Ind. Ct. App. 1982)). Any

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[13] Johnson's second assertion of error in the trial court's denial of his motion to dismiss is that the charges should have been dismissed because the State failed to include the mens rea in the charging information for each crime. Because we hold, *infra* section 2, that the trial court did not err when it allowed the State to amend the charges to include the word "knowingly," we need not address's Johnson's assertion that the trial court erred on that basis when denying the motion to dismiss.

[14] In his brief, and several times during the oral argument, Johnson relied upon Justice Boehm's concurrence in *Healthscript, Inc. v. State*, 770 N.E.2d 810, 817 (Ind. 2002). While we agree with the general sentiment of Justice Boehm's concurrence – specifically that an indictment must "state the crime charged in direct and unmistakable terms[,]" *id*. at 818 (quoting *Moran v. State*, 477 N.E.2d 100, 103-4 (Ind. Ct. App. 1985)) – the facts of *Healthscript* are distinguishable from those before us. Healthscript was charged with Class C felony Medicaid fraud under Indiana Code section 35-43-5-7.1(a) and filed a motion to dismiss for lack of sufficient certainty. Our Indiana Supreme Court held:

> Here, to understand what conduct Ind. Code § 35-43-5-7(a)(1) prohibits requires following a cross-reference to Ind. Code § 12-15, then through the 50 pages and 280 sections of that article, and then to the language of an agency regulation in the Indiana Administrative Code. This lacks the "sufficient definiteness" that due process requires for penal statutes.

Id. at 816. Here, no such cross-referencing to large swaths of Indiana Code was required to understand the charges against Johnson.

> reasonable doubt as to the offense charged must be resolved in favor of the accused. *Garcia*, 433 N.E.2d at 1209.

Wurster v. State, 708 N.E.2d 587, 595 (Ind. Ct. App. 1999), *aff'd by Wurster v. State*, 715 N.E.2d 341 (Ind. 1999), *reh'g denied*. "The State is not required to include detailed factual allegations in the charging instrument, though it may choose to do so." *Tanoos v. State*, 137 N.E.3d 1008, 1015 (Ind. Ct. App. 2019), *trans. denied*. Further, "[s]ince the charging information and probable-cause affidavit are filed together, they should be viewed in tandem to determine if they satisfy the goal of putting the defendant on notice of the crimes with which she is charged during the applicable statute of limitations period so that she can prepare an appropriate defense." *Woods*, 980 N.E.2d at 443.

[32] Johnson specifically contends the State "fails to identify with direct and unmistakable terms the alleged security violation at issue" and the counts "even fail to specify whether the alleged security was merely offered or sold." (Br. of Appellant at 15.) We disagree. The probable cause affidavits allege specific amounts the alleged victims indicated they invested with Johnson, how they came to invest with Johnson, what Johnson told them, and how they eventually discovered Johnson's alleged crimes. It is well-established that the probable cause affidavit may assist the charging information in providing sufficient notice of the crimes. *See Laker*, 939 N.E.2d at 1113 ("even where a charging instrument may lack appropriate factual detail, additional materials such as the probable cause affidavit supporting the charging instrument may be taken into

account in assessing whether a defendant has been apprised of the charges against him").

[33] Johnson also asserts the charging informations do not state the date on which the offense was claimed to have occurred with "sufficient particularity[.]" (Br. of Appellant at 15.) Each charge pled has a date range in which the alleged crimes were committed, and the probable cause affidavit contains additional dates, which are sufficient to put Johnson on notice regarding the timeframe in which the crimes for which he is charged allegedly occurred. *See Garner v. State*, 754 N.E.2d 984, 991 (Ind. Ct. App. 2001) (holding charging information that provided a five-month date range was sufficiently specific for defendant to prepare a defense, and noting *Merry v. State*, 166 Ind. App. 119, 210, 335 N.E.2d 249, 256-7 (1975), affirmed a three-year range of time in the same situation), *reh'g denied*, *trans. granted*, *opinion affirmed on relevant issues*, *reversed on other issues*, 777 N.E.2d 721 (Ind. 2002).

[34] Regarding the counts of Class C felony securities fraud, Johnson asserts the "repetitive" use of "and/or" when listing the alleged victims of securities fraud is not sufficiently certain because "[i]t is not clear what the State would have to prove to sustain a conviction – that Mr. Johnson used all *monies* from every investor for personal living expenses, or as little as $1 from one of them." (Br. of Appellant at 15) (emphasis in original). However, our longstanding rules of construction regarding these conjunctions makes clear that the State would need to prove Johnson committed securities fraud as to only one of them to be found guilty. *See*, *e.g.*, *Lainhart v. State*, 916 N.E.2d 924, 942 (Ind. Ct. App.

2009) (in a case wherein the State charged a single crime with multiple victims using and/or language, our court did not find charging information written in the disjunctive was improper, but held the trial court erred when it did not issue a jury instruction indicating the jury had to reach a unanimous decision regarding a victim to convict); *and see*, *e.g.*, *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999) (statute written in disjunctive requires proof of only one of the disjunctive elements), *reh'g denied*, *trans. denied*, *cert. denied* 534 U.S. 1161 (2002).

[35] To the extent Johnson argues he cannot defend himself against these allegations because the charging information is insufficient, we find his argument unavailing as he proffered defenses to the crimes in his motion to dismiss and in his brief on appeal. We hold the trial court did not abuse its discretion when it denied Johnson's motion to dismiss as it relates to the sufficiency of the State's charging information.

1.3. Securities, Broker-Dealer, and Exemptions

[36] Finally, Johnson argues the trial court abused its discretion when it denied his motion to dismiss because, pursuant to the relevant statutes, the financial instruments at issue were not securities, he was not required to register as a broker-dealer, and the transactions were exempt from statutory obligations as limited offerings. However, these allegations are not proper for a motion to dismiss because they are factual matters to be determined at trial. *See Yao v. State*, 975 N.E.2d 1273, 1282 (Ind. 2012) (holding questions of fact to be proven or disproven based on evidence presented at trial could not be determined as

part of a pre-trial motion to dismiss). As these arguments are not ripe for consideration at the motion to dismiss stage, *see Ceaser v. State*, 964 N.E.2d 911, 918 (Ind. Ct. App. 2012) ("facts constituting a defense are not properly raised by a motion to dismiss"), *trans. denied*, the trial court could not have abused its discretion by denying Johnson's motion to dismiss on this basis.

2. Amendment of Charging Information

[37] Next, we address Johnson's assertion the trial court erred when it allowed the State to amend the charging information. We review a trial court's decision regarding such a request for an abuse of discretion. *Howard v. State*, 122 N.E.3d 1007, 1015 (Ind. Ct. App. 2019), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. *Id.* Amendments to charging informations are governed by Indiana Code section 35-34-1-5, which states in relevant part:

> (b) The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:
>
> (1) up to:
>
> (A) thirty (30) days if the defendant is charged with a felony; or
>
> (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

> before the omnibus date; or
>
> (2) before the commencement of trial;
>
> if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.
>
> (c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

Johnson argues the trial court abused its discretion when it granted the State's motion to amend the charges against him to include the statutorily-required mens rea element because: (1) the proposed amendments are of substance and not form, and (2) any amendment to the charging information would prejudice him because to date the facts alleged "constitute a civil violation not criminal conduct." (Br. of Appellant at 28.)

[38] Our Indiana Supreme Court discussed whether an amendment to a charging information is one of form or substance in *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). The *Fajardo* court explained:

> [T]he first step in evaluating the permissibility of amending an indictment or information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. As noted above, an amendment is one of form, not substance, if both (a) a defense under the original

> information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

859 N.E.2d at 1207. The State's amendments to the charging informations, which would insert the word "knowingly" to fulfill the mens rea requirement under Indiana Code section 23-19-5-8, constitute an amendment of substance because the word "knowingly" is essential to making a valid charge of the crime. Ind. Code § 35-34-1-2(a)(4) (requiring the charging information to set "forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition").

[39] As the amendments are of substance, we must next determine if Johnson is substantially prejudiced by them. Our Indiana Supreme Court has explained:

> A defendant's substantial rights "include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights." *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009), *trans. denied*. "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." *Sides v. State*, 693 N.E.2d 1310, 1313 (Ind. 1998), *abrogated on other grounds by Fajardo*, 859 N.E.2d. at 1206-07.

Erkins v. State, 13 N.E.3d 400, 405-6 (Ind. 2014), *reh'g denied*, *cert. denied* 574 U.S. 1087 (2015). Johnson argues he is substantially prejudiced "given the

length of the case and that the amendments are coming almost three years after this motion to dismiss was filed and approximately seven years after the omnibus date. Any amendments would require Mr. Johnson to file and litigate a third motion to dismiss." (Br. of Appellant at 27.) Additionally, he asserts "[t]o allow the [S]tate to make changes now would substantially prejudice Mr. Johnson by alleging crimes not previously alleged." (*Id*. at 28.) Finally, Johnson contends:

> The State has already filed charges, added charges, and amended charges. Under no circumstances should it be given a fourth bite of the proverbial apple more than seven years after the omnibus date, nine years after the investigation began, and 14 years after the alleged conduct. If the State is permitted to amend now with this case's timeline and alleged facts, then no defendant could ever establish prejudice.

(*Id*.)

[40] However, as the State notes, Johnson "has been on notice since 2014 as to the alleged acts of concealment and fraudulent scheme" and his claim "that the State has had sufficient time to make these amendments simply does not establish prejudice[.]" (Br. of Appellee at 36.) We also note that a trial date has yet to be scheduled. So far there have been two motions to dismiss, two requests for certification of interlocutory appeal, one rejection and one acceptance of appellate jurisdiction, two judges, multiple prosecutors, two sets of defense counsel, and over twenty continuances granted, with most of the requests for continuance filed by Johnson. This case has been pending for over

eight years, and both parties have been active participants in the delays. This is not a situation where prosecution has been unnecessarily delayed or where the State has added charges late in the proceedings. These amendments formalize what Johnson has had notice of for the majority of the case; something he could easily, and likely did, glean from the information in the probable cause affidavits. To argue now, after knowing the charges against him for over five years, that he is prejudiced by allowing the State to add language that was always assumed is disingenuous. Indiana's appellate courts have not found prejudice to a defendant in cases involving more substantial amendments, including the addition of new charges, within a much tighter time frame than exists in this case. *See*, *e.g.*, *Mays v. State*, 120 N.E.3d 1070, 1080-81 (Ind. Ct. App. 2019) (state's amendment of charges in a case pending for two years made approximately two months prior to trial did not prejudice defendant because defendant knew the amendment likely would occur and the amendment did not change his defense), *reh'g denied*, *trans. denied*. Based thereon, we hold the trial court did not abuse its discretion when it allowed the State to amend the charging information to include the word "knowingly."

Conclusion

[41] The State sufficiently alleged Johnson committed positive acts of concealment that tolled the statute of limitations in all of the challenged charges except two. Additionally, the charging information for all remaining fifteen counts against Johnson were pled with sufficient certainty based on the language in the

charging informations and the probable cause affidavits. Finally, the arguments Johnson sets forth regarding the elements of the alleged crimes cannot be considered by this court as they are to be decided by the fact-finder, not within a motion to dismiss. Based thereon, the trial court did not abuse its discretion when it denied Johnson's motion to dismiss, with the exception of the charges involving Hunt, which we reverse. Further, the trial court did not abuse its discretion when it granted the State permission to amend the charges against Johnson to include the word "knowingly."

[42] Therefore, we affirm the trial court's denial of Johnson's motion to dismiss in part, we reverse the portion of the trial court's order that concerns Counts III and IV involving Hunt, and remand for amendment of Counts XIII and XIV to exclude Hunt as an alleged victim. We also affirm the trial court's decision to allow the State to amend the charges against Johnson, and we remand this matter to the trial court for further proceedings in accordance with this opinion.

[43] Affirmed in part, reversed in part, and remanded.

Riley, J., and Weissmann, J., concur.