MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Love Barefield,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff.

December 20, 2023

Court of Appeals Case No. 23A-CR-686

Appeal from the Marion Superior Court

The Honorable Jeffrey Marchal, Judge
The Honorable Jane S. Craney, Senior Judge

Trial Court Cause No. 49D31-1901-F5-1023

Memorandum Decision by Judge Pyle

Judges Vaidik and Mathias concur.

Pyle, Judge.

Statement of the Case

[1] Love Barefield ("Barefield") belatedly appeals, following a jury trial, his conviction for Level 5 felony child solicitation.[1] Barefield argues that the trial court abused its discretion by allowing the State to amend the charging information during his trial. Concluding that the trial court did not abuse its discretion, we affirm the trial court's judgment.

[2] We affirm.

Issue

> Whether the trial court abused its discretion by allowing the State to amend the charging information during Barefield's trial.

Facts

[3] In the afternoon of December 4, 2018, fourteen-year-old E.W. was inside a laundromat in Marion County, where she was waiting for her mother ("E.W.'s mother) to pick her up after school. As E.W. was sitting in a chair by the door and listening to music through her earbuds, Barefield walked into the

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[1] IND. CODE § 35-42-4-6.

laundromat. Barefield, who was forty-four years old, walked around the laundromat and "roam[ed] around [E.W.]." (Tr. Vol. 3 at 123). Barefield sat in the area behind E.W., began to masturbate, and walked past E.W. with a visible erection. Barefield then approached E.W. and began talking to her, and E.W. took out her earbuds. Barefield asked E.W. if she "want[ed] to make some money." (Tr. Vol. 3 at 123). E.W. initially thought that Barefield needed help with his laundry. However, Barefield, who had his pajama pants unbuttoned and his erect penis sticking out through the button area, showed E.W. a "porn" video of a "man and a woman having sex" on his phone. (Tr. Vol. 3 at 124, 149). E.W. then realized that Barefield "wanted to have sexual contact with [her]." (Tr. Vol. 3 at 124). Barefield told E.W. to "[c]ome on" in a tone of voice that "was a demand" and "not an ask." (Tr. Vol. 3 at 127, 150). E.W. then ran out of the laundromat.

[4] E.W.'s mother arrived around that time and saw that E.W. was "crying" and "hysterical." (Tr. Vol. 3 at 85). E.W. told her mother what Barefield had done. E.W.'s mother took a photograph of Barefield as he walked out of the laundromat, and she also took a photograph of the license plate on his truck. E.W.'s mother also called the police, and an Indianapolis Metropolitan Police Department officer ("the IMPD officer") was dispatched to the scene. E.W.'s mother gave the IMPD officer the photographs of Barefield and his license plate. E.W.'s mother also posted the photo of Barefield on Facebook to ask if anyone could identify him. E.W.'s mother received some responses to her post and then gave that information to the police. The police also obtained the

surveillance camera videos from inside the laundromat, which the State introduced at trial.

[5] The State charged Barefield with Level 5 felony child solicitation, Level 6 felony performance harmful to minors, and Class A misdemeanor public indecency. In regard to the child solicitation charge, the State alleged that, under INDIANA CODE § 35-42-4-6(c), Barefield had knowingly or intentionally solicited E.W. "to engage in sexual intercourse[.]" (App. Vol. 2 at 47).

[6] The trial court held a two-day jury trial in August 2022. Barefield's theory of defense was that he had the presumption of innocence and that the State would not be able to meet its burden of proof. On the first day of trial, E.W.'s mother and the IMPD officer testified. E.W.'s mother testified that when E.W. met her mother in the laundromat parking lot, E.W. had stated that "[t]he man inside the laundromat tried to rape me." (Tr. Vol. 3 at 85).

[7] On the morning of the second day of trial, before E.W. testified, the State moved to amend the child solicitation charge "to include the remainder of the statute . . . under the same prong[.]" (Tr. Vol. 3 at 111). The State explained that E.W. had stated, at the time of the offense and during trial prep, that Barefield had solicited her to have "sex." (Tr. Vol. 3 at 111). The State informed the trial court that the State had taken "for granted [that] sex [wa]s sex" while E.W. had "just mean[t] sexual contact." (Tr. Vol. 3 at 112). The State indicated that it anticipated that E.W. would testify that Barefield had solicited her to engage in "either sexual intercourse, other sexual conduct,

and/or fondling or touching as is allowed in that statute[,]" and it sought to amend the charging information to include those allegations. (Tr. Vol. 3 at 111).

[8] Barefield objected, arguing that the trial court had already given preliminary instructions to the jury and that "at some level it becomes prejudicial." (Tr. Vol. 3 at 112). The trial court stated that it would consider the State's motion and would wait to rule on it until after E.W. had testified so that the trial court could see "how she explain[ed] the discrepancy or possible discrepancy." (Tr. Vol. 3 at 114).

[9] During E.W.'s testimony, she set forth the facts of Barefield's offenses as set forth above. During E.W.'s redirect examination, the State pointed out that E.W. had previously used the phrase "have sex with [her]" when describing Barefield's offense to the police, to the prosecutor's office, and during her deposition. (Tr. Vol. 3 at 148). The State asked E.W. what she had meant by the use of that "have sex" phrase, and E.W. responded that it meant "[a]ny sexual contact." (Tr. Vol. 3 at 148).

[10] Following E.W.'s testimony, the State renewed its motion to amend the charging information to include the remaining part of the child solicitation statute and pointed out that E.W. had specifically testified that "sex to her mean[t] sexual contact." (Tr. Vol. 3 at 152). Barefield again objected and argued that the State had charged "sexual intercourse" and not "other sexual

conduct" and that he had "clearly [gone] to trial on sexual intercourse because that's the best case [he] ha[d.]" (Tr. Vol. 3 at 152).

[11] The trial court granted the State's motion over Barefield's objection. The trial court explained that the State was "allowed to amend [the] charging information to conform with the evidence" and that the amendment did not "substantially change[]" the theory of the case. (Tr. Vol. 3 at 152). Thereafter, the amended child solicitation charge alleged that Barefield had knowingly or intentionally solicited E.W. "to engage in sexual intercourse, other sexual conduct, and/or fondling or touching intended to arouse or satisfy the sexual desires" of E.W. and/or Barefield. (App. Vol. 3 at 26).

[12] During Barefield's closing argument, he recognized that the surveillance video had shown Barefield engaging in "self-pleasure behavior[.]" (Tr. Vol. 3 at 208). Barefield acknowledged that the State had met its burden of proving the Class A misdemeanor public indecency charge and argued that the case was really just a public indecency case. As for the child solicitation charge, Barefield argued that this charge required the jury to improperly "speculate" as to whether Barefield knew or should have known E.W.'s age and as to whether his comments to her intended to be a request for "sexual intercourse or other sexual conduct[.]" (Tr. Vol. 3 at 212). He further argued that there was "nothing sinister or wrong" and "nothing overtly sexual" about his question of whether E.W. wanted to make some money. (Tr. Vol. 3 at 212). Barefield argued that the State had met neither its burden of overcoming Barefield's

presumption of innocence nor its burden of proving that he had committed the offense of child solicitation.

[13] The jury found Barefield guilty as charged. The trial court merged the counts, entered judgment of conviction on the Level 5 felony child solicitation conviction, and imposed a six (6) year executed sentence for that conviction.

[14] Barefield now belatedly appeals.

Decision

[15] Barefield argues that the trial court abused its discretion by allowing the State to amend the charging information during his trial. We disagree.

[16] We review the trial court's decision on whether to permit an amendment to a charging information for an abuse of discretion. *Johnson v. State*, 194 N.E.3d 98, 115 (Ind. Ct. App. 2022), *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.* at 116. "'A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information.'" *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014) (quoting *Fajardo v. State*, 859 N.E.2d 1201, 1203 (Ind. 2007), *superseded in part by subsequent amendment to* I.C. § 35-34-1-5), *reh'g denied*.

[17] Amendments to a charging information are governed by INDIANA CODE § 35-34-1-5. Subsection (a) of this statute provides that an amendment may be made

"at any time" because of an "immaterial defect" in the information, including "the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged[.]" I.C. § 35-34-1-5(a)(5). Subsection (a) also provides that the State may "at any time" amend "any other defect which does not prejudice the substantial rights of the defendant." I.C. § 35-34-1-5(a)(9). Additionally, a trial court "may, at any time before, during, or after the trial," allow the State to amend an information "in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant." I.C. § 35-34-1-5(c) (emphasis added). An amendment to an information involving "matters of substance" may be done, in relevant part, prior to the commencement of trial and where "the amendment does not prejudice the substantial rights of the defendant." I.C. § 35-34-1-5(b). "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." *Erkins*, 13 N.E.3d at 405.

[18] Our Indiana Supreme Court has explained that "the first step in evaluating the permissibility of amending an . . . information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect." *Fajardo*, 859 N.E.2d at 1207. "'[A]n amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the information in either form.'" *Erkins*, 13 N.E.3d at 406 (quoting *Fajardo*,

859 N.E.2d at 1205). "'[A]n amendment is of substance only if it is essential to making a valid charge of the crime.'" *Id.*

[19] Barefield argues that the amendment was improper because it was an amendment of substance, rather than of form, and that it violated his substantial rights. He acknowledges that INDIANA CODE § 35-34-1-5(a)(9) would apply to the trial court's decision to allow the amendment, but he contends that his substantial rights were affected because his defense was not equally available after the amendment.

[20] The State, on the other hand, argues that the amendment was proper under INDIANA CODE § 35-34-1-5(a)(5) because "it corrected an immaterial defect regarding the use of alternative or disjunctive allegations as to the acts or means charged." (State's Br. 11). The State asserts that "[t]he child solicitation statute prohibits, in the disjunctive, the solicitation of sexual intercourse, other sexual conduct, or fondling" and that "the amendment at issue merely added the last two alternative forms of sexual contact so that the charged mirrored the language of the statute." (State's Br. 9). The State further argues that the amendment was an "immaterial change" because it did not alter the theory of the case, which was that Barefield had "solicited E.W. to engage in sexual conduct when he exposed his erect penis and asked her if she wanted to make some money." (State's Br. 11). Additionally, the State argues that the amendment was also permitted under INDIANA CODE § 35-34-1-5(a)(9) and INDIANA CODE § 35-34-1-5(c) because the amendment was "an amendment of form that did not prejudice [Barefield's] substantial rights, and such

amendments are also allowed to be made at any time during the trial." (State's Br. 9). We agree with the State.

[21] Here, the amendment to the information included an alternative allegation as to the disjunctive forms of sexual contact that Barefield was prohibited from soliciting under the child solicitation statute. The amendment alleged that Barefield had committed a single act of child solicitation with alternative intents, and it did not alter the theory of the case or the identity of the crime charged. Accordingly, we conclude that the trial court properly allowed the amendment under INDIANA CODE § 35-34-1-5(a)(5). *See Tague v. State*, 539 N.E.2d 480, 481-82 (Ind. 1989) (holding that the trial court did not err by permitting the State to amend a charging information on the morning of trial to add the words "and/or sexual intercourse" to the allegation of performing "deviate sexual conduct" because the "statute [wa]s worded in the alternative" and the amendment "did not alter the theory of the case or the identity of the crime charged"); *Brown v. State*, 512 N.E.2d 173, 175 (Ind. 1987) (explaining that the State's amendment to the defendant's murder charge—to include "shaking" in addition to the alleged means of "squeezing" and "throwing"—was an alternative allegation of a means of inflicting the fatal wounds on the infant victim and was an "immaterial change" that did not alter the theory of the case).

[22] Moreover, the amendment was one of form that did not affect Barefield's substantial rights. The amendment was not essential to making a valid charge of the crime and was, therefore, not an amendment of substance. *See Erkins*, 13

N.E.3d at 406. The charge before and after the amendment was child solicitation, and the evidence applied equally to the information in either form. Additionally, Barefield's defense—that the State would not meet its burden of showing that his actions of walking up to E.W. with his erect penis exposed, showing her pornography on his phone, and asking her if she wanted to make some money was sufficient to show that he had committed the offense of child solicitation—applied equally after the amendment. Because the amendment was one of form that did not affect Barefield's substantial rights, we conclude that the trial court properly allowed the amendment under INDIANA CODE § 35-34-1-5(a)(9) and INDIANA CODE § 35-34-1-5(c). *See Brown v. State*, 912 N.E.2d 881, 891-92 (Ind. Ct. App. 2009) (holding that the trial court did not abuse its discretion by allowing the State, on the third day of trial, to amend the charging information to include the intent language to conform to the child pornography statute because the amendment was one of form and did not affect the defendant's substantial rights), *trans. denied*. *See also Blythe v. State*, 14 N.E.3d 823, 828-29 (Ind. Ct. App. 2014) (affirming the trial court's ruling to allow the State's amendment to the defendant's forgery charge—to include "made" in addition to the alleged means of "utter"—because it was an amendment of form and did not affect the defendant's substantial rights).

[23] We hold that the trial court did not abuse its discretion by granting the State's motion to amend the charging information. Thus, we affirm the trial court's judgment.

[24] Affirmed.

Vaidik, J., and Mathias, J., concur.