

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shamaquie Guider,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 24, 2024

Court of Appeals Case No.
23A-CR-433

Appeal from the Marion Superior
Court

The Honorable Cynthia Oetjen,
Judge
The Honorable Anne Flannelly,
Magistrate

Trial Court Cause No.
49D30-2104-F4-010641

Memorandum Decision by Judge May
Judges Bailey and Felix concur.

May, Judge.

- [1] Shamaquie Guider appeals her two convictions of Level 4 felony sexual misconduct with a minor.¹ Guider argues the trial court abused its discretion when it allowed the State, at the close of the State’s evidence, to amend the charging information by modifying the range of dates during which the sexual misconduct with a minor was alleged to have occurred. Because the amendment was of form, rather than substance, and did not impact the availability of the defense that Guider asserted at trial, we hold the trial court did not abuse its discretion. Accordingly, we affirm the trial court’s judgment.

Facts and Procedural History

- [2] In 2020, Guider worked as a Behavioral Health Associate at Resource Treatment Facility (“Resource”) in Indianapolis, which houses children with trauma and children who display sexually maladaptive behaviors. As a Behavioral Health Associate, Guider was tasked with monitoring children to ensure safety, deescalating any problems that may arise, and encouraging children to be productive with their time. Guider was also expected to maintain healthy boundaries with children in Resource. Nevertheless, other staff had to discuss with Guider on multiple occasions that she was not maintaining appropriate boundaries.

¹ Ind. Code § 35-42-4-9(a).

[3] Guider worked in the Serenity Unit, which housed teenage boys with sexually maladaptive behaviors. One boy, C.B., who was fifteen years old at the time, became her “favorite.” (Tr. Vol. 2 at 40.) Guider brought gifts to C.B., including clothes, candy, and shoes, and she was alone with C.B. “more than other kids.” (*Id.* at 37.) One day when Guider and C.B. were in the computer room while C.B. was doing his schoolwork, Guider wrote a note in C.B.’s notebook saying that she “likes” him. (*Id.* at 73.) C.B. was shocked by this and unsure what to think, so he wrote back to ask “if she like-liked me . . . as a relationship kind of like.” (*Id.*) Guider wrote back “yes[.]” (*Id.*) Guider and C.B. then began regularly writing notes back and forth, and Guider instructed C.B. to flush their notes down the toilet so he would not get caught with a note from her. Eventually, Guider indicated she wanted to kiss C.B., and they kissed in a bathroom in March 2020.

[4] A few days later, C.B. requested a time to make a phone call because he wanted to speak to his father. Phone calls occurred in the evening in a semi-private room where residents could speak to their family without the noise of other residents in the background. Guider indicated she would take him to make his phone call. C.B. spoke with his father, and after the call, Guider asked, “Can I suck your dick?” (*Id.* at 89.) C.B. allowed Guider to do so. He ejaculated outside her mouth and cleaned it up with a paper towel.

[5] Thereafter, Guider began giving C.B. oral sex “[a]lmost every day.” (*Id.* at 96.) The logs kept of residents’ phone calls indicated C.B. was attempting phone calls approximately three times a week, with Guider as the staff member present

for most of those calls. C.B. testified that Guider gave him oral sex every time he made a phone call and that sometimes he went to the phone call room to receive oral sex without making a phone call. C.B. also testified to an occasion when Guider asked him to ejaculate into a cup so she could drink it, and C.B. ejaculated into a cup. Guider also gave C.B. oral sex in his sleeping room on one occasion. Guider only denied a request for oral sex when her lip was injured. On C.B.'s sixteenth birthday, April 22, 2020, Guider gave C.B. oral sex and he placed his fingers in her vagina.

[6] On February 4, 2021, C.B. had a therapy session with Shanice Hall, his therapist at Resource, to discuss his treatment. During the session, C.B. reported that he was having trouble processing the sexual relationship he had with Guider. Hall reported C.B.'s disclosure to police and spoke to a staff person from the Department of Child Services. A detective came to Resource and interviewed C.B. On April 8, 2021, the State charged Guider with two counts of Level 4 felony sexual misconduct with a minor. The Information alleged Guider, who was over twenty-one years old, performed or submitted to other sexual conduct with C.B., who was between fourteen and sixteen years old, "between April 1, 2020 and April 30, 2020." (Appellant's App. Vol. 2 at 29.)

[7] Guider waived her right to a jury, and the trial court held a bench trial. At the end of the State's presentation of evidence, the State moved to amend the charging information:

[STATE]: Your Honor, at this time, before resting, the State would move to amend the charging information to reflect a date range of on or about or between March 1st, 2020, and April the 22nd, 2020.

[DEFENSE]: Judge, we would object to such a late change in the, an essential element of the charged crime this late in the proceedings, certainly this late in the trial.

THE COURT: Response?

[STATE]: Yes, Your Honor. With respect to sex crimes cases, time is not an element of the offense. Additionally, I would say that this information was just basically just brought from the stand today; whereas, initially we thought we were dealing with a time frame best recollection of the victim on this case is that it may have dated back into March. It doesn't change any of the -- it's not a substantial prejudice to the defendant. There's no substantive change to the charges.

THE COURT: Would you repeat? You said March 1st, 2020, and April 21st? Is that what you said?

[STATE]: No. April the 22nd, which would be -- or actually, I think I need to say April the 21st because he has to be under sixteen. So it would have to be through April the 21st, 2020.

THE COURT: All right. Arguments heard and concluded, the Court is going to grant that motion to amend. It was originally filed as on or about or between April 1st, 2020, and April 30th, 2020. The Court does see the March 1st, 2020, and April 21st, 2020, as significantly close to that time frame and the

time is not an element of the offense. So, I am allowing the amendment.

(Tr. Vol. 2 at 147-48.) After Guider presented evidence and the parties presented closing arguments, the trial court found Guider guilty as charged. The trial court imposed concurrent six-year sentences and ordered those six years served as follows: one year executed in the Department of Correction, two years executed on home detention through community corrections, and three years suspended on sex offender probation.

Discussion and Decision

[8] Guider argues the trial court abused its discretion when it granted the State's motion to amend the charging information at the close of the State's evidence.² We review decisions to permit or deny an amendment for an abuse of discretion. *State v. McFarland*, 134 N.E.3d 1027, 1030 (Ind. Ct. App. 2019), *trans. denied*. Such amendments are governed by Indiana Code section 35-34-1-

² Guider's briefs on appeal also asserted two conditions of Guider's probation were unconstitutional as applied to her because those standard conditions prohibited her from seeing her own children and from having sexual relations with her husband. After briefing was concluded, on October 19, 2023, Guider filed a Motion to Stay, Expedite, or Remand that asked us to stay the application of those two conditions to Guider, expedite her appeal, or remand for the trial court to determine whether it intended those conditions to apply to Guider. On November 17, 2023, we stayed Guider's appeal and remanded for the trial court to hold a hearing and determine whether those two challenged conditions applied to Guider's children and husband. On December 14, 2023, the trial court held a hearing and ordered those standard conditions were not to prohibit Guider from having sexual relations with her husband or to prohibit Guider from spending time with her children or stepchild. On December 18, 2023, Guider filed a Status Report that asked us to address only the issue she raised regarding the amendment of the charging information because the trial court had resolved the probation-conditions issue to Guider's satisfaction.

5. As the State’s motion to amend came during trial, subsection (c) controls herein, and it provides:

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.

Ind. Code § 35-34-1-5(c).

[9] The parties disagree whether the amendment of the dates herein was a change of form or of substance. That determination – whether an amendment was of form or substance – is a question of law that we review de novo. *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014), *reh’g denied*.

[A]n amendment is one of form, 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. Further, an amendment is of substance only if it is essential to making a valid charge of the crime.

Id. (quoting *Fajardo v. State*, 859 N.E.2d 1201, 1205 (Ind. 2007)).

[10] Guider argues the amendment “to exclude the period during which C.B. was sixteen was a change of substance because it went to an element of the offense.” (Br. of Appellant at 11.) While it is true that C.B.’s age was an element of Guider’s offense – sexual misconduct with a minor requires the child be “less than sixteen (16) years of age,” Ind. Code § 35-42-4-9(a) – the amendment was

not “essential to making a valid charge of the crime” against Guider because the original charging information already included twenty-one days during which C.B. was fifteen years old. Moreover, Guider’s defense – that sexual contact between herself and C.B. never happened – was equally available before and after the amendment. She had not asserted as a defense that C.B. was at least sixteen years old. *See* Ind. Code § 35-42-4-9(c) (creating explicit defense for those with reasonable belief that child was “at least sixteen”). Nor had she asserted that she was elsewhere during the timeframe when the misconduct was alleged to have occurred. *See Ricketts v. State*, 498 N.E.2d 1222, 1224 (Ind. 1986) (when information alleges “on or about” and no alibi was asserted, variance between information and evidence was not fatal to State’s case and information could be amended post-trial to conform to the evidence). We accordingly hold the amendment herein was an amendment of form, not substance, and thus was permissible as long as it did not “prejudice the substantial rights of the defendant.” Ind. Code § 34-35-1-5(c).

[11] “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 (quoting *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009), *trans. denied*). The ultimate question is “whether the defendant had a reasonable opportunity to prepare for and defend against the charges.” *Id.* at 406 (quoting *Sides v. State*, 693 N.E.2d 1310, 1313 (Ind. 1998), *abrogated on other grounds by Fajardo*, 859 N.E.2d at 1206-07).

Herein, Guider claims she had no “reasonable opportunity to prepare for and defend against the charges.” (Appellant’s Br. at 11) (quoting *Erkins*, 13 N.E.3d at 406). She has not, however, suggested her defense would have been any different than the defense that she presented, which asserted sexual contact between herself and C.B. never occurred. Accordingly, Guider’s substantial rights were not prejudiced. *See, e.g., Ricketts*, 498 N.E.2d at 1224 (“the amendments allowed here did not change the positions of either of the parties, and would be harmless error if indeed they were error at all”). The trial court did not abuse its discretion when it permitted the State to amend the information mid-trial to conform to the evidence. *See, e.g., Bright v. State*, 205 N.E.2d 1055, 1060 (Ind. Ct. App. 2023) (trial court did not abuse its discretion by permitting day-of-trial amendment that did not impair defendant’s ability to present his defense).

Conclusion

[12] The State’s proposed amendment was of form, rather than substance, and did not impair Guider’s substantial rights. Therefore, the trial court did not abuse its discretion when it permitted the State to amend the information to conform to the evidence presented at trial. We accordingly affirm the trial court’s judgment.

[13] Affirmed.

Bailey, J., and Felix, J., concur.