MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Ricardo Sandoval, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 31, 2023

Court of Appeals Case No. 23A-CR-643

Appeal from the Vanderburgh Circuit Court

The Honorable Celia M. Pauli, Magistrate

Trial Court Cause No. 82C01-2204-FA-2332

Memorandum Decision by Judge Bradford
Judges Vaidik and Brown concur.

Bradford, Judge.

Case Summary

[1] In April of 2022, Ricardo Sandoval, Jr. was charged with twelve counts of child molesting and seven counts of sexual battery for acts involving A.S., his daughter, which were alleged to have occurred over a nine-year period. After completing its presentation of its case-in-chief but prior to resting its case, the State moved to amend four of the charges to conform to the evidence, seeking to reduce the level of felony in three of the charges and to increase the level of felony in one of the charges. Sandoval objected to the amendments but did not request a continuance. The trial court granted the State's request and the trial continued. The jury found Sandoval guilty of one count of Level 1 felony child molesting, three counts of Level 4 child molesting, three counts of Class C felony child molesting, one count of Level 4 felony sexual battery, four counts of Level 6 sexual battery, and two counts of Class D felony sexual battery.[1] The trial court sentenced Sandoval to an aggregate forty-year sentence. On appeal, Sandoval contends that his conviction for Level 1 felony child molesting cannot stand because the trial court erred in allowing the State to amend the charging information relating to this charge at trial. We affirm.

Facts and Procedural History

[1] Of the remaining counts, the State dismissed one count, the trial court granted Sandoval's request for a directed verdict on three counts, and the jury found Sandoval not guilty of one count.

[2] Sandoval and Y.V. were married for fifteen years and are the parents of three children, including A.S., who was born in 2005. When A.S. was six years old, Sandoval touched the outside of her vagina with his hand. A.S. asked Sandoval to stop but he did not listen.

[3] When A.S. was eight years old, Sandoval began entering her bedroom at night and would touch her vagina with his hand. He would move his hand around on her vagina. Each episode would last for "thirty minutes to an hour." Tr. Vol. II p. 104. Sandoval continued to engage in this behavior "more than" once a week until A.S. was fourteen years old. Tr. Vol. II p. 77. Sandoval ignored A.S.'s requests for him to stop and instructed her to be quiet and "to never tell anybody," threatening that if she did, he and her mother would have to divorce. Tr. Vol. II p. 80.

[4] Some nights when Sandoval entered A.S.'s room, he would give her a sleeping pill and a drink. Sandoval would direct her to swallow the pill even if A.S. indicated that she did not want to take it. Also, in an apparent attempt to "make it seem like [his actions were] okay," Sandoval would sometimes make A.S. watch pornography depicting father/daughter sexual activity with him. Tr. Vol. II p. 82. In addition to fondling her, when A.S. was eleven or twelve years old, Sandoval placed his penis in her mouth and forced her to perform oral sex on him. He also placed his mouth on her vagina and performed oral sex on her. Sandoval stopped molesting A.S. when she was fourteen years old. However, there was one final incident when Sandoval "got drunk" and touched A.S.'s "butt." Tr. Vol. II p. 86.

[5] Sandoval and Y.V. divorced in December of 2019. Although A.S. initially lived with Y.V. after the divorce, at some point she decided to move to Texas to live with Sandoval and her grandfather "[b]ecause [she] didn't want to [ ] look at [her] mom and not be able to tell her" about what Sandoval had done to her. Tr. Vol. II p. 85. While A.S. was living in Texas, Sandoval began dating a woman who had a son and a daughter. At that point, A.S. decided to report Sandoval's behavior because she was afraid of Sandoval spending time with another young girl.

[6] On April 28, 2022, the State charged Sandoval with three counts of Class A felony child molesting, two counts of Class C felony child molesting, seven counts of Level 4 felony child molesting, two counts of Class C felony sexual battery and five counts of Level 4 felony sexual battery. The case proceeded to a jury trial on January 11–12, 2023.

[7] After completing its case in chief, the State moved to amend Counts I, II, III and VII to conform to the evidence. Specifically, the State moved to reduce the Class A felony child-molesting charges alleged in Counts I through III to Class C felonies and to elevate the Level 4 felony child-molesting charge alleged in Count VII to a Level 1 felony. The trial court granted the State's motion over Sandoval's objection. The State subsequently dismissed the remaining Class A felony child-molesting count and the trial court granted Sandoval's motion for a directed verdict on one count of Class C felony child molesting and two counts of Level 4 felony child molesting.

[8] At the conclusion of trial, the jury found Sandoval guilty of one count of Level 1 felony child molesting, three counts of Level 4 child molesting, three counts of Class C felony child molesting, one count of Level 4 felony sexual battery, four counts of Level 6 sexual battery, and two counts of Class D felony sexual battery. The jury found Sandoval not guilty of one count of Level 4 felony child molesting. On February 23, 2023, the trial court sentenced Sandoval to an aggregate forty-year sentence.

Discussion and Decision

[9] Sandoval contends that the trial court erred in allowing the State to amend the charging information to conform to the evidence. The State asserts that Sandoval has failed to preserve this challenge because he did not request a continuance after objecting to the amendments. However, given our preference for deciding cases on the merits, we will address the merits of Sandoval's claim regardless of whether he should have been required to request a continuance to preserve the issue for appellate review.[2]

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[2] In support, the State cites to the Indiana Supreme Court's decisions in *Miller v. State*, 753 N.E.2d 1284, 1288 (Ind. 2001); *Haak v. State*, 695 N.E.2d 944, 951 n.5 (Ind. 1998); *Wright v. State*, 690 N.E.2d 1098, 1104 (Ind. 1997); *Haymaker v. State*, 667 N.E.2d 1113, 1114 (Ind. 1996); *Daniel v. State*, 526 N.E.2d 1157, 1162 (Ind. 1988); and *Lisenby v. State*, 493 N.E.2d 780, 782 (Ind. 1986). In response, Sandoval asserts that to the extent that the above-cited decisions had required a defendant to request a continuance in order to preserve an appellate challenge to an amendment to a charging information, the requirement was overruled by the Indiana Supreme Court's decision in *Fajardo v. State*, 859 N.E.2d 1201, 1206 (Ind. 2007). However, because we have chosen to reach the merits of Sandoval's claim, we need not decide whether *Fajardo* has overruled the portion of the above-cited decisions that required a defendant to request a continuance in order to preserve an appellate challenge.

[10] "'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*, 859 N.E.2d at 1203). "Whether an amendment to a charging information is a matter of substance or form is a question of law." *Id.* "We review questions of law de novo." *Id.* (citing *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997)).

[11] Amendments to a charging information are governed by Indiana Code section 35-34-1-5, which provides as follows:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:
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> (1) any miswriting, misspelling, or grammatical error;
> (2) any misjoinder of parties defendant or offenses charged;
> (3) the presence of any unnecessary repugnant allegation;
> (4) the failure to negate any exception, excuse, or provision contained in the statute defining the offense;
> (5) the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;
> (6) any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;
> (7) the failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;
> (8) the failure to state an amount of value or price of

any matter where that value or price is not of the essence of the offense; or
(9) any other defect which does not prejudice the substantial rights of the defendant.

(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.

(d) Before amendment of any indictment or information other than amendment as provided in subsection (b), the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare the defendant's defense.

Sandoval does not challenge the trial court's decision to allow the State to amend Counts I, II, or III, but argues that the trial court erred in allowing the State to amend Count VII because the amendment was both one of substance and prejudicial to his substantial rights.

I. Whether the Amendment was Prejudicial to Sandoval's Substantial Rights

[12] "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 (quoting *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.'" *Erkins*, at 405–06 (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).

[13] In arguing that the amendment was prejudicial to his substantial rights, Sandoval looks to Count VII in isolation, not as a part of the larger whole, arguing that the amendment was prejudicial because it "added an additional potential thirty-eight years of incarceration" to his overall sentence. Appellant's Br. p. 16. However, as the State points out, we must look to the charging information as a whole to determine whether Sandoval received adequate notice of the charges against him. *See Bartlett v. State*, 711 N.E.2d 497, 500 n.1 (Ind. 1999) (providing that notice is given by the information as a whole with

the purpose of providing a defendant with notice of the crime for which he is charged so that he is able to prepare a defense).

[14] Sandoval was originally charged with nineteen counts for numerous sex crimes which were alleged to have been committed against his daughter between March of 2011 and March of 2020. The original charges included three counts of Class A felony child molesting for allegedly engaging in "deviate sexual conduct." The amended Level 1 felony charge alleged that Sandoval had engaged in the same conduct, referring to it as "other sexual conduct." "Deviate sexual conduct" used to be defined, and "other sexual conduct" is defined, "as an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-94 (effective July 1, 2012 to June 30, 2014) (defining "deviate sexual conduct"); Ind. Code § 35-31.5-2-221.5 (effective July 1, 2014) (defining "other sexual conduct"). The General Assembly merely adopted a different term to describe the same conduct as of July 1, 2014, which was within the timeframe during which Sandoval was alleged to have committed his criminal acts involving A.S. As such, Sandoval had been informed of the acts which the State alleged he had committed, and the amendment merely reflected a change in date to conform with the evidence at trial. Had the General Assembly not updated the criminal code during the relevant timeframe, no amendment to the felony classification or change in terms would have been necessary to outline the alleged criminal behavior.

[15] As the State points out, the "only real difference was the dates, as Count VII was alleged to have occurred between 2016 and 2017, while Counts I through III were alleged to have occurred between 2011 and 2015." Appellee's Br. p. 13. Both this court and the Indiana Supreme Court have previously held that "'[t]ime is not of the essence in the crime of child molesting.'" *Baber v. State*, 870 N.E.2d 486, 492 (Ind. Ct. App. 2007) (quoting *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992)), *trans. denied*. The Indiana Supreme Court has further recognized that

> [i]t is difficult for children to remember specific dates, particularly when the incident is not immediately reported as is often the situation in child molesting cases. The exact date becomes important only in limited circumstances, including the case where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies.

Barger, 587 N.E.2d at 1307. Under both the original charging information and the amended charging information, A.S. was alleged to have been under the age of fourteen, and the instant case does not fall under the above-described limited circumstance of A.S.'s age falling at or near the dividing line between classes or levels of felonies. As such, time was not of the essence in the instant case.

[16] Again, the record reflects that the substance of the State's allegations against Sandoval remained the same under both the original and amended charging informations. Under both, the allegations remained the same, *i.e.*, that Sandoval had placed his penis in A.S.'s mouth and placed his mouth on her vagina. The State merely sought to amend the charging information to

conform with the dates between which Sandoval's acts were alleged to have occurred based on the evidence at trial. Sandoval was aware of the allegations against him, and his defense remained the same, *i.e.*, a general denial of the allegations. Given these facts, together with the fact that the amendment was only necessary due to a change in the criminal code during the alleged timeframe, we conclude that the amendment did not prejudice Sandoval's substantial rights.

II. Whether the Amendment Involved a Matter of Substance

[17] Our analysis above applies equally to the question of whether the amendment involved a matter of substance. The Indiana Supreme Court has held that

> "[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. Further, an amendment is of substance only if it is essential to making a valid charge of the crime."

Fajardo, 859 N.E.2d at 1205 (quoting *McIntyre v. State*, 717 N.E.2d 114, 125–26 (Ind. 1999)).

[18] Again, Sandoval had been made aware of the allegations against him and his defense remained the same as the nature of the allegations remained the same under both the original and the amended charging informations, *i.e.*, that Sandoval had placed his penis in A.S.'s mouth and placed his mouth on her

vagina. The State merely sought to amend the charging information to conform with the dates between which Sandoval's acts were alleged to have occurred based on the evidence at trial. Further, the changes to the level of felony and terminology describing the behavior were only necessary due to a change in the criminal code that occurred during the period in which Sandoval's criminal behavior was alleged to have occurred. As such, for the reasons stated above, we also conclude that the amendments were not untimely amendments of substance.

[19] The judgment of the trial court is affirmed.

Vaidik, J., and Brown, J., concur.