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# IN THE COURT OF APPEALS OF INDIANA

Chad A. Keister,

*Appellant-Defendant,*

v.

State of Indiana,

*Appellee-Plaintiff.*

February 8, 2023

Court of Appeals Case No. 22A-CR-1531

Appeal from the Warrick Circuit Court

The Honorable Greg A. Granger, Judge

Trial Court Cause No. 87C01-1605-F4-217

**Opinion by Judge Robb**

Judges Mathias and Foley concur.

**Robb, Judge.**

# Case Summary and Issue

[1] Following a jury trial, Chad Keister was convicted of two counts of child molesting, one as a Class C felony and one as a Level 4 felony. He was given an aggregate sentence of six years with two years suspended to probation. Keister appeals his convictions, raising one issue for our review: whether the trial court erred in instructing the jury. Concluding the trial court gave an instruction that was not supported by the evidence and the error prejudiced Keister's substantial rights, we reverse in part and remand.

# Facts and Procedural History

[2] In 2008, Keister began dating A.L. A.L. had a daughter, A.W., who was born in August of 2001. After approximately a year of dating, Keister and A.L. moved in together, living first in Evansville and then in Newburgh. They lived on Kenwood Court in Newburgh for three or four years and then moved to Richmond Drive in Newburgh. They lived on Richmond Drive for three years.

[3] "Around 2012" when A.W. was eleven years old and the family was living on Kenwood Court, Keister touched A.W. inappropriately while purportedly giving her a massage. Transcript, Volume II at 14. He did this "[a]round eight times." *Id.* at 15. This continued until A.W. was twelve years old and "stopped agreeing" to the massages that precipitated the touching. *Id.* at 17. Once while they still lived on Kenwood Court and once in 2014 after they

moved to Richmond Drive, Keister inappropriately touched A.W. while they were playing computer games. *See id.*

[4] A.W. was reluctant to tell her mother about the molestation because her mother loved Keister and she "didn't want to hurt her." *Id.* at 22. But after a sex education talk at school in December 2015 when A.W. was fourteen years old that instructed students "if something has happened to you[,] you should say something[,]" she spoke to a school counselor and disclosed the molestation. *Id.* at 21. She later spoke to a forensic interviewer at Holly's House and described the incidents. Both in this interview and in her testimony at trial, A.W. was unable to pinpoint the exact dates that the incidents occurred. The interviewer noted that "we really don't try to get dates and times, that's very specific for children. We try to get a timeframe." *Id.* at 55 (cleaned up). "Especially if they associate it with trauma, it can be hard to recall dates and times." *Id*. at 58. After the disclosure, Keister and A.L. broke up and no longer lived together.

[5] In May 2016, the State charged Keister with two counts of child molesting as follows:

> Count 1:
> Child Molesting
> I.C. 35-42-4-3(b)
> A Class C Felony
>
> [B]etween August 27, 2012 and June 30, 2014 . . ., Chad Keister did perform fondling or touching with A.W., a child under the

> age of fourteen years, with the intent to arouse or satisfy the sexual desires of the child or [himself.]
>
> * * *
>
> Count 2:
> Child Molesting
> I.C. 35-42-4-3(b)
> A Level 4 Felony
>
> [B]etween July 1, 2014 and August 26, 2015 . . ., Chad Keister did perform fondling or touching with A.W., a child under the age of fourteen years, with the intent to arouse or satisfy the sexual desires of the child or [himself.]

Appellant's Appendix, Volume 2 at 29-30.

[6] A jury trial was held in 2022. A.W. testified that Keister first touched her breasts while giving her a massage in 2012 but she did not recall what month or season it was. He touched her breasts while giving her massages several additional times in 2012. Once, also in 2012, he put his hand down her pants and touched her vaginal area over her underwear. Nothing happened in 2013 but in 2014, Keister touched her abdomen and breasts while she was playing a game.

[7] After both sides had presented their evidence, the State proposed the following final jury instruction:

> No. 6, the State is not required to prove that the crime charged was committed on the particular date or during a particular time period alleged in the charging Information.

Tr., Vol. II at 78.[1] Keister lodged an objection:

> [P]art of this requires them to prove this occurred while or before she was 14 years of age. So, they have to prove with some specificity . . . when this occurred. [Indiana Code] 35-34-1-2 subsection (5) requires they must charge with sufficient particularity to show that it's within the period of limitations applicable. I'm concerned that A, this proposed instruction's gonna be confusing to the jury. [A]nd B, they need to allege with some sufficiency what dates these occurred. We can't give three-year periods and expect people to be able to defend against that.

*Id.* at 65-66 (cleaned up). The trial court gave the instruction to the jury over Keister's objection. The jury found Keister guilty of both counts. He now appeals.

# Discussion and Decision

[8] Keister contends the trial court erred in instructing the jury, specifically by giving the jury an instruction that contained a misstatement of law and could have misled the jury.

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[1] The jury instruction quoted here is the instruction as the trial court gave it to the jury. The proposed jury instruction is not part of the record. When offering it, the State asserted it was a pattern jury instruction that is applicable when there is a difference between the dates charged in the information and the evidence at trial. *See* Tr., Vol. II at 64.

# I. Standard of Review

[9] We review a trial court's decision to give or refuse a jury instruction for an abuse of discretion. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). When we evaluate a challenge to the giving of a certain jury instruction on appeal, we look at whether the instruction correctly states the law and whether there is evidence in the record to support the giving of the instruction.[2] *Id.* Instructional errors are harmless where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict, *Randolph v. State*, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004), *trans. denied*, and we will reverse a conviction only if the appellant demonstrates that the error prejudiced his substantial rights, *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019). In other words, an instructional error will result in reversal only when we "cannot say with complete confidence" that a reasonable jury would have returned a guilty verdict even if the instruction had not been given. *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (citation omitted).

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[2] The standard statement of reviewing jury instructions includes a third consideration – "whether the substance of the proffered instruction is covered by other instructions." *See, e.g.*, *Seal v. State*, 38 N.E.3d 717, 722-23 (Ind. Ct. App. 2015), *trans. denied*. However, this consideration would seem to be applicable only when the challenge is to the trial court *refusing* to give a tendered instruction and not to a situation where the challenge is to the trial court's *giving* of a certain instruction. *See Davidson v. State*, 849 N.E.2d 591, 593 (Ind. 2006) ("A trial court erroneously *refuses* a tendered instruction if: (1) the instruction correctly states the law; (2) evidence supports the instruction; and (3) no other instructions cover the substance of the tendered instruction.") (emphasis added). In the case of a refused instruction, it is logical to consider whether its substance is otherwise covered by the trial court's instructions; in the case of a *given* instruction, less so.

# II. Jury Instruction

[10] Keister was charged with committing two counts of child molesting by fondling or touching a child under fourteen years of age. Count I alleged an act of molestation that occurred between August 27, 2012 and June 30, 2014, and Count II alleged an act of molestation that occurred between July 1, 2014 and August 26, 2015. A.W. testified that Keister touched her inappropriately approximately eight times in 2012 and once in 2014. Presumably, the reason for splitting the charges in this manner was that the criminal code was revised effective July 1, 2014, and what had been a Class C felony prior to July 1, 2014 was a Level 4 felony after. *See Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015) ("Effective July 1, 2014, the criminal code was subject to a comprehensive revision[.]"), *trans. denied*; Ind. Code § 35-42-4-3(b) (2014) (describing offense as a Level 4 felony); Ind. Code § 35-42-4-3(b) (2007) (describing offense as a Class C felony). Notably, a Class C felony was punishable by two to *eight* years with an advisory sentence of four years, Ind. Code § 35-50-2-6(a), whereas a Level 4 felony is punishable by two to *twelve* years with an advisory sentence of four years, Ind. Code § 35-50-2-5.5.

[11] At the close of evidence in this case, the State proposed an instruction advising the jury "that the State does not have to prove dates." Tr., Vol. II at 64. Keister objected, noting that the State was required "to prove this occurred while or before she was 14 years of age." *Id.* at 65. He further expressed concern that the instruction would be confusing to the jury. *See id.* at 66.

[12] Indiana Code section 35-34-1-2(a)(5) requires that an information state "the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense." The State must also allege "the time of the offense as definitely as can be done if time is of the essence of the offense[.]" Ind. Code § 35-34-1-2(a)(6). Where time is not of the essence of the offense, however, the State is not confined to proving the commission of the offense on the date alleged in the information but may prove the commission at any time within the statutory period of limitations. *Love v. State*, 761 N.E.2d 806, 809 (Ind. 2002).

[13] Our supreme court has concluded that in most circumstances, time is not of the essence in the crime of child molesting. *Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). "It 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." *Id.*

[14] Based on the above, we agree with the State that the instruction is generally a correct statement of law. We further agree that the instruction is supported by the evidence insofar as the evidence showed A.W. was under fourteen when Keister molested her. *See* Tr., Vol. II at 10 (A.W. testifying that her date of birth is August 27, 2001); *id.* at 26-27 (A.W. testifying that Keister inappropriately touched her multiple times in 2012 and once in 2014). Even though the two-count information collectively alleged that the acts occurred on

or before August 26, 2015 – the day before A.W. turned fourteen – there is no evidence to support any acts occurring in 2015 such that the jury could have used the challenged instruction to find that Keister touched A.W. inappropriately when she was over the age of fourteen.

[15] But proving the age of the victim falls within the parameters of the statute at the time of the offense is not the only circumstance in which time is of the essence. *See Barger*, 587 N.E.2d at 1307 (stating the exact date is important in limited circumstances, *including* where the victim's age falls at or near the dividing line between classes of felonies). And we believe the facts of this case present another of those limited circumstances.

[16] A.W. testified Keister committed multiple acts of molestation in 2012. Count I, alleging acts from August 27, 2011 to June 30, 2014, is clearly proven by A.W.'s testimony about the 2012 acts even without more specific testimony. The trial court's instruction is not troublesome as to Count I.

[17] But A.W. also testified to one act of molestation in 2014. She did not pinpoint a more specific date or a narrower time period, and the State did not try to elicit any testimony from which a date or a time period could be inferred, such as which grade she was in at school, or what type of clothing she was wearing (i.e. shorts versus a winter coat) when it happened. With the entirety of 2014 on the table as to the date of the offense, the question is whether instructing the jury that the specific time period does not matter is problematic as to Count II. For the following reasons, we conclude it was.

[18] The evidence showed the single 2014 act *may* have occurred in the time period alleged in Count II (July 1, 2014 to August 26, 2015) but it also may also have occurred in the time period alleged in Count I (August 27, 2011 to June 30, 2014). Because the classification of and penalties for crimes changed in mid-2014, it *does* matter to that extent when the 2014 molestation occurred. Based on the evidence elicited by the State, we simply cannot know into which count the 2014 act should be sorted.

[19] The trial court did read the charging information as part of the final instructions, including the date ranges alleged for each count. *See* Tr., Vol. II at 76-77. But by instructing the jury thereafter that the State did not have to prove the 2014 offense occurred on a particular date *or during the particular time period* alleged in the information, the jury could have been misled into believing that if the single act of molestation occurred *anytime* in 2014, it could find Keister guilty of Count II. Because the two counts split 2014 in half, to convict Keister of Count II as a Level 4 felony, the State was at least required to prove that the 2014 act occurred after July 1, 2014, when that classification became the law. But the instruction tendered by the State and given by the trial court did not require the jury to make that distinction.

[20] The error in giving the instruction prejudiced Keister's substantial rights. If all the acts occurred prior to July 1, 2014, he was guilty of only Count I and should not have been convicted of a second count and subject to a second penalty. And not only was he subjected to a second penalty, but it was also a *harsher* possible penalty. If Keister committed the 2014 act of molestation in the first

half of 2014, it would have been a Class C felony punishable by up to eight years. But he was convicted of committing an act of molestation in the last half of 2014, and therefore the crime was a Level 4 felony punishable by up to twelve years.

[21] The trial court should refuse ambiguous and confusing instructions. *Dill*, 741 N.E.2d at 1232. Under these circumstances, the giving of the instruction alleviating the State's burden to prove the date of the offense was not supported by the evidence and was likely to confuse the jury. Keister's substantial rights were prejudiced by the error because his conviction on Count II was not clearly sustained by the evidence, and we cannot say with complete confidence that the jury would have found him guilty of that count if the instruction had not been given. Accordingly, we must reverse Keister's conviction of Count II.

[22] Where a conviction is reversed because of an instructional error, retrial is permissible when the State presented sufficient evidence in the original trial to sustain the conviction. *Yeary v. State*, 186 N.E.3d 662, 682 (Ind. Ct. App. 2022). Here, however, there is insufficient evidence that Keister committed an act of child molesting after July 1, 2014. Therefore, we remand to the trial court to vacate Keister's conviction of Count II and issue a new sentencing order on Count I only.

# Conclusion

[23] The trial court erred in giving the challenged instruction and the error was not harmless. Therefore, Keister's conviction of Count II is reversed and remanded to the trial court with instructions.

[24] Reversed in part and remanded.

Mathias, J., and Foley, J., concur.