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**IN THE  
COURT OF APPEALS OF INDIANA**

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TONY JOHNSON, )

Appellant/Defendant, )

vs. )

No. 49A04-0808-CR-494

STATE OF INDIANA, )

Appellee/Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tanya Walton-Pratt, Judge  
Cause No. 49G01-0712-FA-260814

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**May 13, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Defendant Tony Johnson appeals from his convictions of and sentences for two counts of Class A felony Criminal Confinement,<sup>1</sup> Class B felony Criminal Confinement,<sup>2</sup> and three counts of Class C felony Sexual Battery<sup>3</sup> and the determination that he is a Habitual Offender.<sup>4</sup> Johnson contends that the trial court erred in allowing the State to amend its charging information during trial and that his aggregate seventy-year sentence is inappropriate. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Early in the morning of September 1, 2005, L.L. was awakened in the bedroom of her Indianapolis apartment when she felt Johnson lying on her back. L.L. suffers from a deteriorating left hip and was disabled at the time. L.L.'s then-two-year-old son was also sleeping in L.L.'s bed at the time. L.L.'s son suffers from septo-optic dysplasia and chronic asthma and is required to sleep attached to a machine that provides oxygen. At first, L.L. thought that Johnson was a friend and said, "Lamonte, get off of me." Tr. p. 30. Johnson replied, "This ain't no m\*\*\*\*\*f\*\*\*\*\* Lamonte" and struck L.L. in the head with a knife. Tr. p. 30. Johnson held the knife to the back of L.L.'s head, removed her pants, and told her to "get that s\*\*\* up." Tr. p. 31. After Johnson told L.L. to "open that s\*\*\* up which meant

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<sup>1</sup> Ind. Code § 35-42-4-2(b)(1) (2004).

<sup>2</sup> Ind. Code § 35-42-3-3(b)(2)(A) (2004).

<sup>3</sup> Ind. Code § 35-42-4-8(b)(2) (2004).

<sup>4</sup> Ind. Code § 35-50-2-8 (2004).

to spread [her] legs apart[,]” he inserted his fingers into her vagina. Tr. p. 32. Johnson then performed oral sex on L.L.

At some point, Johnson told L.L. to turn on her side and repeatedly asked her, “where’s it at[?]” Tr. p. 35. L.L. retrieved the knife from the floor, which Johnson had apparently dropped, and began swinging it. When Johnson attempted to retrieve the knife, he was struck by the blade “a couple of times.” Tr. p. 36. Johnson retreated into an adjacent bathroom, followed by L.L. When L.L. told Johnson to leave and he refused, another struggle ensued for the knife. Eventually, L.L. was knocked to the floor, but she managed to throw the knife through the window, whereupon Johnson fled the apartment. By this time, L.L.’s son was awake and standing in the bathroom door, having witnessed the struggle.

Approximately two years later, Johnson’s DNA was found to match samples recovered from L.L.’s body and apartment the night of the attack. On December 6, 2007, the State charged Johnson with Class A felony rape, two counts of Class A felony criminal deviate conduct, Class A felony burglary, Class B felony criminal confinement, and three counts of Class C felony sexual battery. On January 22, 2008, the State charged Johnson with being a habitual offender.

On June 30, 2008, the first day of trial, the State moved to amend its charging information to reflect that Johnson was alleged to have committed his crimes between August 2, 2005, and September 1, 2005, rather than on August 2, 2005, as the information originally provided. The next day, the trial court granted the State’s motion to amend its charging information. A jury found Johnson guilty of two counts of Class A felony criminal deviate

conduct, Class B felony criminal confinement, and three counts of Class C felony sexual battery. After the second phase of a bifurcated trial, the trial court found Johnson to be a habitual offender.

The trial court sentenced Johnson to forty years of incarceration for each of his two convictions for Class A felony criminal deviate conduct (one of which was enhanced thirty years by virtue of Johnson's status as a habitual offender), twenty years for Class B felony criminal confinement, eight years for each of his convictions for Class C felony sexual battery, all sentences to be served concurrently, for an aggregate sentence of seventy years. The trial court found, as aggravating circumstances, Johnson's criminal record and that his offenses were particularly heinous. The trial court found the hardship that Johnson's long-term incarceration would have on his family to be a mitigating circumstance.

## **DISCUSSION**

### **I. Whether the Trial Court Erred in Allowing the State to Amend its Charging Information**

Indiana Code section 35-34-1-5 (2007) governs amendments to criminal indictments or informations and provides, in relevant part, as follows: "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."

The first step in evaluating the permissibility of amending an information is to determine whether the amendment was addressed to a matter of substance or one of form or immaterial defect. *Fajardo v. State*, 859 N.E.2d 1201, 1207 (Ind. 2007), *superseded in part*

*on other grounds*, Ind. Code § 35-34-1-5, effective May 7, 2007. “[A]n 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.” *Id.* Even if an amendment fails to satisfy the above criteria, the amendment may yet be one of form, because “an amendment is one of substance only if it is essential to making a valid charge of the crime.” *Id.*

The question of form versus substance is key here, because if the amendment was one of substance, the trial court was not permitted to allow it, regardless of prejudice or lack thereof, because it occurred after trial started. *See* Ind. Code § 35-34-1-5(b)(2). Johnson essentially argues that the amendment here was one of substance in that it denied him two defenses at trial, prevented him from investigating a third, and that his evidence would not apply equally to both informations. Specifically, Johnson contends that his trial counsel had prepared to defend him (and was prevented from doing so) on the bases that (1) his arrest on August 2, 2005, on an unrelated matter revealed no indication of the type of wounds that L.L.’s attacker would have had and (2) the DNA evidence introduced at trial was unreliable because medical reports showed that samples were taken from L.L. on September 1, 2005, a month following the supposed date of the attack. Johnson also contends that his substantial rights were prejudiced because the mid-trial testimony regarding the true date of the attack made it impossible for his defense counsel to investigate whether he might have an alibi for September 1, 2005.

In this case, we need not determine if the amendment denied Johnson a defense or if

his evidence would have applied to each form of the information equally. The amendment is not one of substance because the amendment to the date on which the crime was alleged to have happened was not essential to making a valid charge of the crimes. In other words, the State was not required to prove that Johnson committed his crimes on any particular date, only that he committed them. *See* Ind. Code §§ 35-42-4-2(b)(1), 35-42-3-3(b)(2)(A), 35-42-4-8(b)(2), 35-50-2-8(a); *see also Souerdike v. State*, 230 Ind. 192, 195-96, 102 N.E.2d 367, 368 (1951) (concluding, in driving while under the influence of liquor case, that amendment of information to change location from State Highway “45” to “445” was one of form only because “[i]t is not essential to the charge of driving while under the influence of liquor to name the exact place within the county where the driving was done”).

We also conclude that Johnson’s substantial rights were not affected by the amendment. “These substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge.” *Sides v. State*, 693 N.E.2d 1310, 1312-13 (Ind. 1998) (citing *Hegg v. State*, 514 N.E.2d 1061, 1063 (Ind. 1987)), *abrogated in part on other grounds, Fajardo*, 859 N.E.2d at 1206. “Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges.” *Id.* at 1313.

Johnson has not established that he was unfairly prejudiced by the amendment here. The record indicates that Johnson discovered, *inter alia* and at the very least, a supplemental case report filed September 2, 2005, an Indianapolis Police Department inter-department communication, and L.L.’s medical records, all of which clearly indicate that the offenses occurred on September 1, 2005. Moreover, Johnson was also provided with a crime scene

diagram prepared on September 1, 2005, and evidence that L.L.'s Sexual Assault Evidence Collection Kit was prepared on September 1, 2005. It is worth noting that all of the above items were apparently prepared at the time of or very soon after the attack. In contrast, the only discovery item indicating that the attack occurred in August of 2005 was a supplemental case report that was prepared beginning in late January of 2006, several months later.

Quite simply, the bulk of discovery material pointed to a September 1, 2005, attack date, and Johnson should not have been surprised when the State attempted to prove just that. We conclude that the discovery materials provided Johnson with a reasonable opportunity to defend and prepare for the charges. *See id.* (concluding, in case where trial court allowed State to amend habitual offender information to change "auto theft" to "theft" when discovery documents indicated that prior conviction was for theft, that defendant "was neither surprised nor substantively affected by the State's amendment, and we find no error in allowing it"). As for Johnson's contention that the incorrect charging information made it impossible for him to investigate a possible alibi for September 1, 2005, we similarly conclude that he was given sufficient discovery materials indicating that the attack occurred on that date to put him on notice to investigate a possible alibi. In summary, we conclude that the amendment at issue was one of form and did not prejudice Johnson's substantial rights. As such, the trial court did not err in allowing it.

## **II. Whether Johnson's Sentence is Appropriate**

Johnson also contends that his aggregate seventy-year sentence is inappropriate. We "may revise a sentence authorized by statute if, after due consideration of the trial court's

decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied.” *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

The nature of Johnson’s offenses is a home invasion and a sexual assault on a disabled victim that culminated in an armed struggle witnessed by her also-disabled two-year-old son. L.L. moved from her apartment due to the attack and, over two years later, was still receiving counseling. Moreover, L.L.’s son’s medical equipment was destroyed in the attack. Finally, L.L. incurred \$2408.00 in out-of-pocket expenses as a direct result of Johnson’s attack. Given L.L.’s physical condition and the presence of her son, we consider Johnson’s offenses to be somewhat more egregious than normal.

Johnson’s character demonstrates an almost complete contempt for the law and authority in general. Johnson’s first involvement with the criminal justice system came at the age of fifteen, and his three arrests as a juvenile resulted in findings that he had committed what would have been auto theft, resisting law enforcement, driving with a suspended license, and disorderly conduct if committed by an adult. As an adult, Johnson has prior felony convictions for Class B felony burglary, Class D felony cocaine possession, and Class B felony unlawful possession of a firearm by a serious violent felon. Johnson also has prior

misdemeanor convictions for two counts of resisting law enforcement, three counts of criminal trespass, and public intoxication.

Even beyond Johnson's extensive criminal history, the record indicates an almost complete contempt for the law and authority. Johnson has been placed on probation four times; twice it has been revoked and another probation violation proceeding was pending as of sentencing in this case. Moreover, Johnson's conduct record during his frequent incarcerations has been, in a word, appalling. Since August of 1997, Johnson has earned no fewer than twenty-three written and verbal reprimands, has had his privileges revoked on sixteen occasions, has lost his accumulated credit time fourteen times, has been segregated six times, and has been demoted in credit class five times. Given the egregious nature of Johnson's offenses and his character, he has not established that his seventy-year aggregate sentence is inappropriate.

The judgment of the trial court is affirmed.

CRONE, J., and BROWN, J., concur.