



Shane L. Cummings (“Cummings”) appeals from his convictions of five counts of child molesting<sup>1</sup>; one as a Class C felony, three as Class A felonies, and one as a Class B felony. Cummings presents the following restated issues for our review:

- I. Whether the trial court erred by allowing the State to amend the charges against him after the omnibus date; and
- II. Whether two of Cummings’ convictions of child molesting violate double jeopardy principles.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

J.F. was born on March 22, 1988, and had an older sister, Shannon, and a brother, Cummings. When J.F. was approximately ten years old, her mother told her she could no longer care for her, and left her in Cummings’ care. Cummings was born on March 19, 1975.

Cummings and J.F. moved to a house on Elgin Street in Elkhart. Although J.F. had her own room in this home, she had to stay in Cummings’ bedroom and sleep in his bed. While living at this residence on Elgin Street, Cummings first touched J.F.’s vagina, both over and then under her shorts, and touched her breasts under her clothing. J.F. was eleven years old at the time, and Cummings persisted in touching J.F. in those ways while living at the house on Elgin Street.

Cummings and J.F. lived at the house on Elgin Street for approximately a year and a half before moving to a house on Moyer Street. Although J.F. also had her own room at this house, she slept in Cummings’ room, which had only one bed. Cummings continued to touch

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<sup>1</sup> See Ind. Code § 35-42-4-3.

J.F. inappropriately and started having intercourse with J.F. while living at this residence. The first time Cummings forced J.F. to have intercourse it was in the living room. Cummings held her down, moved her hands, and told her that what they were doing was not wrong. J.F. cried and told Cummings to stop, but he continued nonetheless.

Cummings had sexual intercourse with J.F. numerous times while living at the residence on Moyer Street, putting his penis in her vagina, and engaging in digital penetration of her vagina. Cummings forced J.F. to have sexual intercourse “everywhere” in the house, compelling her to do so almost daily. Cummings told J.F. not to tell anyone about their activities, and J.F. complied because she was afraid that Cummings, whom she described as violent and quick-tempered, would hurt someone if she said anything. At trial, J.F. testified that the sexual intercourse occurred at least two different times while living there.

J.F. and Cummings lived on Moyer Street for approximately one year before moving to a house on U.S. 33. As before, J.F. had her own room, but slept in Cummings’ bed with him. J.F.’s sister, Shannon, visited with them at times in the morning, and observed that J.F. was in Cummings’ bed with him. Shannon was not concerned by this observation, however, because she trusted her brother.

The first day they moved to the house on U.S. 33, Cummings had intercourse, with J.F., placing his penis in her vagina. This behavior persisted on an almost daily basis. Cummings told J.F. that what they were doing was not wrong and that he loved her.

Whenever Cummings molested J.F., she attempted to refuse, told him “no,” and tried

to move away. *Tr.* at 411. Her attempts to refuse made Cummings angry, caused him to become violent, and he punched the wall. These actions caused damage to the walls at the house on U.S. 33, and Shannon described the holes in the wall as about the size of a baseball or a bowling ball. At all times when Cummings abused J.F. he was over the age of twenty-one.

While they lived together, Cummings financially supported J.F. and purchased clothes for her. However, Shannon noted that J.F.'s clothes were "skimpy [and] tight" and that she would not want her little girl dressed that way. *Id.* at 330-31. Shannon's perception of J.F.'s relationship with Cummings while they were living together and the way they related to one another was that of a dating relationship. Shannon heard Cummings tell J.F. that he did not want anyone else to see J.F.'s breasts and that she needed to keep them covered up outside the house.

Shannon and J.F. took a trip to Tennessee to visit their mother in February 2004. On their return trip home, Shannon noticed that J.F.'s behavior was agitated and that she did not want to go home. When Shannon inquired about this, J.F. told Shannon not to be angry, and asked for a pen and a piece of paper, upon which she wrote "He messes with me." *Id.* at 342, 412.

Shannon was shocked upon reading the note, and J.F. was upset and crying. Instead of returning J.F. to Cummings' home, Shannon took J.F. to her home. Shannon later took J.F. to Cummings' house to retrieve J.F.'s possessions, but the house was boarded up and all of J.F.'s possessions were in a burn pile behind the house.

The next time Shannon and Cummings talked about J.F., he said that he wanted J.F. returned to him. A few weeks later, Shannon confronted Cummings in person about his relationship with J.F. Cummings stated to Shannon either that he loved J.F. as a girlfriend, or that he loved her and wanted to marry her. He acknowledged that he and J.F. often had sexual intercourse. When Shannon talked to Cummings about the fact that he and J.F. were brother and sister, Cummings told Shannon that “it was only wrong in the eyes of the beholder.” *Id.* at 353. Shannon took J.F. to the police department where they gave statements about Cummings’ molestation of J.F.

On March 22, 2004, the State originally charged Cummings with sexual misconduct with a minor as a Class B felony. The original omnibus date was set for November 18, 2004. After several continuances, the trial was set for February 25, 2008. On September 10, 2007, the State moved to amend the information by adding four counts of child molesting, three as Class A felonies, and one as a Class C felony, and one count of sexual misconduct with a minor, as a Class B felony. After several hearings on the motion, the State filed a second motion for leave to amend the information adding the same counts on February 21, 2008. At a hearing the same day, the trial court granted the State’s motion to amend, and Cummings moved for a continuance of the trial date. The trial court denied the motion for continuance, but gave Cummings the option of severing the five counts added by the amended information. Cummings requested that severance, which the trial court granted.

A trial on the original charge began on February 25, 2008, and concluded the next day. The jury found Cummings guilty of sexual misconduct with a minor as a Class B felony.

Cummings appealed his conviction, and this court affirmed his conviction by memorandum decision. *Cummings v. State*, No. 20A05-0808-CR-476 (Ind. Ct. App. Dec. 10, 2008).

After several continuances, the jury trial on the severed charges was scheduled for July 26, 2010. At the conclusion of Cummings' jury trial, he was found guilty of all counts. At Cummings' sentencing hearing, the trial court sentenced him to a term of six years for child molesting as a Class C felony, terms of forty years for each of his convictions for Class A felony child molesting, and to a term of fifteen years for Class B felony sexual misconduct with a minor, each term to be served concurrently, and concurrently with his sentence on the original charge. Cummings now appeals.

## **DISCUSSION AND DECISION**

### **I. Amendment of Charges**

Cummings contends that the trial court erred by allowing the State to amend the charging information after the omnibus date to add five new counts against him. As previously stated, on March 22, 2004, the State charged Cummings with child molesting, and the original omnibus date was set for November 18, 2004. After several continuances, the matter was set for trial on February 25, 2008. On September 10, 2007, the State moved to amend the information by adding five new charges against Cummings. After several hearings on the State's motion, the State filed a second motion for leave to amend the information adding the same counts. Ultimately, the trial court granted the State's motion on February 21, 2008. Cummings moved for a continuance of the trial, which was denied by the trial court. However, the trial court allowed Cummings the option of severing the five new

counts against him from the original charge he faced. Cummings requested the severance, and a trial was held on the original charge as scheduled. The jury found Cummings guilty of that charge. The trial on the severed charges was held in July 2010, thus giving Cummings almost three years from the time he learned of the new charges, September 2007, to prepare for trial on those charges.

Cummings argues that the propriety of the amendment of the information should be analyzed by the law in effect at the time of the original charge, not at the time of the actual amendment. For reasons we explain below, we agree with the State that the same result obtains.

At the time Cummings was originally charged in 2004, the law in effect provided that substantive amendments could be made to the charging information so long as the substantial rights of the defendant were not prejudiced. *Hurst v. State*, 890 N.E.2d 88, 95 (Ind. Ct. App. 2008). Our Supreme Court's opinion in *Fajardo v. State*, 859 N.E.2d 1201, 1207 (Ind. 2007), represented a change in course by holding that the statute, Indiana Code section 35-34-1-5(b), clearly required amendments of substance to be made not less than thirty days before the omnibus date even if the defendant's substantial rights are not prejudiced by the amendment. The legislature immediately responded to *Fajardo* by amending the statute, effective May 8, 2007, to restore the law to its pre-*Fajardo* status, i.e., substantive amendments could be made to the charging information at any time before trial so long as the defendant's substantial rights are not prejudiced. Ind. P.L. 178-2007, § 1. Thus, regardless of which time is chosen, March 2004 or February 2008, the result is the same, and *Fajardo*

does not control.

Further, we find that Cummings' substantial rights were not prejudiced by the amendment to the charging information. Cummings had two and one-half years to prepare for trial on the severed charges. We have held, in pre-*Fajardo* cases, that significantly less time for preparation to defend against new charges did not result in prejudice to the defendant's substantial rights because the defendant had notice and the opportunity to be heard on the amendment. *See e.g., Townsend v. State*, 753 N.E.2d 88, 92-95 (Ind. Ct. App. 2001) (seven-day continuance to prepare for amended charge did not prejudice defendant's substantial rights); *Tripp v. State*, 729 N.E.2d 1061, 1063-65 (Ind. Ct. App. 2000) (fifty-three-day continuance to prepare for amended charge did not prejudice defendant's substantial rights).

The trial court's use of the post-*Fajardo* version of Indiana Code section 35-34-1-5 does not run afoul of ex post facto clause prohibitions either. We previously have stated the following on this question:

The ex post facto clauses prohibit Indiana from enacting a law that imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. The focus of the ex post facto inquiry is not on whether the legislative change causes a disadvantage. Instead, we must determine whether the change increases the penalty by which a crime is punishable or alters the definition of criminal conduct.

We have previously stated that the constitutional prohibitions against ex post facto criminal sanctions require that criminal proceedings be governed by the statutory provision in effect at the time of the offense. . . . We . . . have noted that the ex post facto clause does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The clause was not designed to limit legislative control of remedies and modes of

procedure which do not affect matters of substance. Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.

*Ramon v. State*, 888 N.E.2d 244, 251 (Ind. Ct. App. 2008) (internal citations and quotations omitted). We then held that the legislative amendment to Indiana Code section 35-34-1-5 in response to *Fajardo* was procedural and not substantive, thus comporting with the ex post facto clause considerations. *Id.* at 252. The trial court did not err by allowing the State to amend the charging information here.

## **II. Double Jeopardy**

Cummings argues that two of his convictions of child molesting as Class A felonies violate Indiana's prohibition against double jeopardy. In particular, he argues that two of the convictions were based on allegations that he molested J.F. in the same way, at the same location, and during the same time frame. We conclude that they do not.

The federal Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional provision includes protection from multiple punishments for the same offense. *Brown v. State*, 912 N.E.2d 881, 892 (Ind. Ct. App. 2009). Because this argument presents an issue of statutory interpretation, which is an issue of law, we review it de novo. *Id.* at 893. "The classic test for multiplicity is whether the legislature intended to punish individual acts separately or to punish the course of action which they make up." *Pontius v. State*, 930 N.E.2d 1212, 1216 (Ind. Ct. App. 2010).

Indiana Code section 35-42-4-3 provides that it is a Class A felony if a person, who is at least twenty-one years of age, performs or submits to sexual intercourse or deviate sexual

conduct with a child who is under fourteen years of age. Our Supreme Court has stated the following:

When separate and distinct offenses occur, even when they are similar acts done many times to the same victim, they are chargeable individually as separate and distinct criminal conduct. . . . We do not approve any principle which exempts one from prosecution from all the crimes he commits because he sees fit to compound or multiply them. Such a principle would encourage the compounding and viciousness of the criminal acts.

*Brown v. State*, 459 N.E.2d 376, 378 (Ind. 1984).

Cummings misconstrues the holding in *Blockburger v. United States*, 284 U.S. 299 (1932), by claiming that because the two offenses with which he is charged contain identical elements, the convictions cannot stand. The question presented in *Blockburger* was whether a defendant could be charged with two different crimes for the same offense. *Blockburger* stands for the proposition that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test is whether each provision requires proof of a fact which the other does not. 284 U.S. at 304.

The two challenged convictions each alleged that, from January 2000 through March 21, 2002, while at the Moyer Street residence, Cummings performed or submitted to sexual intercourse with J.F. At trial, J.F. testified that the sexual intercourse occurred at least two different times while living there. Therefore, we find no violation of federal double jeopardy principles here.

The Indiana Double Jeopardy Clause provides, “No person shall be put in jeopardy twice for the same offense.” Ind. Const. art. I, §14. Two or more offenses are the same offense in violation of the state double jeopardy clause if, with respect to either the statutory

elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Bunch v. State*, 937 N.E.2d 839, 845 (Ind. Ct. App. 2010).

The objective of the statutory elements test is to determine whether the essential elements of separate statutory crimes charged could be established hypothetically. *Merriweather v. State*, 778 N.E.2d 449, 453 (Ind. Ct. App. 2002). The charged offenses are identified by comparing the essential elements of one charged offense with the essential elements of the other charged offense. *Id.* We then review the relevant statutes and charging instruments to determine the identity of the offense charged. *Id.* After identifying the essential elements of each charged offense, we then determine whether the elements of one of the challenged offenses could be established by evidence that does not also establish the essential elements of the other challenged offense. *Id.* at 454.

Under the actual evidence test, we examine the actual evidence presented at trial in order to determine whether each challenged offense was established by separate and distinct facts. *Id.* To succeed on his claim, a defendant must show a reasonable possibility that the evidentiary facts used by the fact finder to establish the essential elements of one offense may also have been used to establish the essential elements of the other challenged offense. *Id.*

Cummings attempts to illustrate a reasonable possibility that the same facts were used by the jury to establish both offenses by citing to a question posed by the jury to the trial court after retiring to deliberate. That note stated:

Counts III and IV appear to be very similar. Are we to decide whether we believe there was intercourse more than once while J.F. was under the age of 14? Is that the purpose of two counts?

*Tr.* at 579. The trial court, by agreement of the parties, answered the jury question by responding as follows:

It is this court's experience that most jury questions can be answered through a review of the evidence presented and the instructions of law given to the jury by the court. Please review the court's instructions.

*Id.* The jury then continued to deliberate. The final instructions to the jury regarding the challenged offenses specifically stated that to convict Cummings of the offenses charged, the jury must find that he committed the offenses on different occasions. *Appellant's App.* at 339-40.

The evidence adduced at trial established that Cummings had sexual intercourse with J.F. at the Moyer Street residence on multiple occasions. In fact, the first time Cummings forced J.F. to engage in sexual intercourse was in the living room at that home the day they moved in. J.F. testified that she was forced to have sexual intercourse with Cummings throughout the house, almost daily, and that it happened at least two different times. We find that Cummings has failed to establish a violation of state double jeopardy principles here.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.