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**IN THE
COURT OF APPEALS OF INDIANA**

JOHNNY WALKER,)
)
Appellant-Defendant,)
)
vs.) No. 71A05-0705-CR-246
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0702-FA-12

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Johnny Walker appeals his conviction for Attempted Criminal Deviate Conduct, as a Class A felony, following a bench trial. He presents a single issue for our review, namely, whether the trial court erred when it permitted the State's untimely amendment to the charging information.

We affirm.

FACTS AND PROCEDURAL HISTORY

On November 8, 2006, Walker entered Audrey Campbell's bedroom while she was sleeping. Walker straddled Campbell's chest with his penis exposed, held a knife against Campbell's side, and demanded that she perform oral sex on him. Campbell resisted and offered Walker money to let her go. Campbell eventually escaped the house and contacted police.

On November 9, the State charged Walker with residential entry, a Class D felony. The trial court set the omnibus date for January 15, 2007. On December 19, 2006, the State amended its information to add a new charge, namely, attempted criminal deviate conduct, as a Class A felony.

On the first day of trial, March 15, 2007, Walker objected to the State's amended information adding the second charge "as not being timely." Transcript at 3. The trial court stated, "if the timeliness of the filing is the only objection, then we'll proceed over objection. Unless there is some preparation issue?" Id. at 4. Walker's counsel responded that timeliness was the only issue and did not make any contention that Walker was unprepared for trial. Walker's counsel did not request a continuance. At the

conclusion of the bench trial, the trial court entered judgment of conviction on both counts and sentenced Walker accordingly. This appeal ensued.

DISCUSSION AND DECISION

Walker contends that the State's amendment to the charging information was untimely under Indiana Code Section 35-34-1-5(b), which provides:

The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

- (1) thirty (30) days if the defendant is charged with a felony; or
- (2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date.

(Emphases added). Here, the omnibus date was January 15, 2007, and the State filed its amendment on December 19, 2006. As such, the amendment to add a new felony charge was untimely under the statute. See Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007).

However, it is well settled that a defendant must request a continuance in addition to making an objection to a trial court's grant of a motion to amend. Wright v. State, 690 N.E.2d 1098, 1104 (Ind. 1997). Absent a motion to continue, the issue is waived on appeal. Id.; Haak v. State, 695 N.E.2d 944, 951 n.5 (Ind. 1998).

After Walker's counsel objected to the amended charge, the trial court specifically asked him whether he wanted more time to prepare for trial. Walker's counsel did not move for a continuance, but merely reiterated his objection. The issue is waived. See, e.g., Absher v. State, 866 N.E.2d 350, 356 (Ind. Ct. App. 2007) (holding defendant

waived issue of untimely amended information adding two new charges where no contemporaneous objection made, and no showing of fundamental error).

Affirmed.

MATHIAS, J., and BARNES, J., concur.