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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN COATS,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0607-CR-610
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause Nos. 49G06-0204-FB-119172, 49G06-0506-FA-94350

September 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

John Coats was found guilty by a jury of sexual misconduct with a minor as a Class B felony,¹ sexual misconduct with a minor as a Class C felony, and child molesting as a Class C felony.² The court enhanced one of Coats' sentences because he is a repeat sexual offender and ordered all of his sentences served consecutively. Coats appeals the sentence enhancement, alleging the court erred by allowing the State to amend the charging information after the deadline for amendments of substance.³ We affirm.

FACTS AND PROCEDURAL HISTORY

Near the end of May 2005, Coats met fourteen-year-old T.M. On June 1, Coats approached T.M. in her garage and requested that she perform oral sex on him. Although she did not want to perform oral sex, she did so for three to five minutes until her step-father called for her.

On June 2, T.M. was in her bedroom with her friend J.H., who was thirteen years old. The girls were on the bed when Coats came to T.M.'s room to speak with her. Coats turned off the light and got in the bed. He whispered in T.M.'s ear and touched her thighs and her vagina. Coats then put his mouth on J.H.'s breasts and put his penis in her vagina.

¹ Ind. Code § 35-42-4-9.

² Ind. Code § 35-42-4-3.

³ Coats also argues the controlling statutes prohibited the court from ordering his enhanced sentences served consecutively. They did not. Under Ind. Code § 35-50-2-1.3, which governed the imposition of consecutive terms when Coats was sentenced, a trial court was not required to impose the advisory sentence when sentencing a defendant to consecutive terms. *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007)

On June 6, 2005, the State charged Coats with Class A felony child molesting, two counts of Class B felony sexual misconduct with a minor, Class C felony child molesting, and Class C felony sexual misconduct with a minor.⁴ On November 4, 2005, the State moved to amend the information to add an allegation Coats' sentence could be enhanced because he was a repeat sexual offender. The court granted that motion three days later.

A jury heard evidence regarding all charges except the repeat sexual offender enhancement allegation. The jury found Coats guilty of sexual misconduct with a minor as a Class B felony, sexual misconduct with a minor as a Class C felony, and child molesting as a Class C felony. The court found Coats was a repeat sexual offender. For the Class B felony conviction, the court sentenced Coats to fifteen years imprisonment and enhanced the sentence by ten years because of the repeat sexual offender finding. The court sentenced Coats to six years imprisonment for each of the Class C felony convictions. The court ordered all three of those sentences served consecutively.

DISCUSSION AND DECISION

On the omnibus date, the State moved to amend the charging information to add the repeat sexual offender count. The trial court granted the State's amendment and Coats' request for a continuance. On appeal, Coats asserts the amendment was improper under Ind. Code § 35-34-1-5. The State asserts Coats waived this argument by failing to raise it at trial.

⁴ The State also charged Coats with Class D felony possession of cocaine. Ind. Code § 35-48-4-6. After the jury trial, Coats pled guilty to possession of cocaine. He does not challenge that conviction on appeal.

Not only did Coats fail to raise the argument at trial, he explicitly told the court the amendment was not late because of plea negotiations. At a pre-trial hearing on August 23, 2005, counsel for Coats said:

And on, on the point that [prosecutor] and I discussed, Your Honor, just to make my point, I think that there is possibly another challenge that I could make to this repeat offender, but I will not make an objection, because of the extension of, of the offer, I will not make an objection because this is filed late. So that's my position. I think that's what we discussed. If there are other constitutional issues or something that I feel the need to raise, I don't think that those would be excluded per our agreement.

(Tr. at 11.) At the October 4, 2005 pre-trial hearing, Coats' counsel again asserted: "And while I believe that there may be another argument for why the Sexual Offender Enhancement cannot be filed, I will not argue that lateness is one of those . . . because of negotiations." (*Id.* at 17.) Because Coats conceded the timeliness of the filing of the amendment, we will not find error. *See Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (where State told trial court convictions should be merged, the State was estopped from arguing error because after "inviting the merger, it cannot now take advantage of that error on appeal").

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.