ATTORNEY FOR APPELLANT:

TODD A. WOODMANSEE
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL HILL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0701-CR-110
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0508-FA-144651

October 23, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Michael Hill (Hill), appeals his conviction for attempted sexual misconduct with a minor, a Class B felony, Ind. Code §§ 35-42-4-9, 35-41-5-1.

We reverse and remand with instructions.

ISSUES

Hill raises two issues on appeal, which we restate as follows:

(1) Whether the trial court erred by permitting the State to amend the charging Information by adding Count III, attempted sexual misconduct with a minor, after the omnibus date; and

(2) Whether Hill presented evidence beyond a preponderance that he believed P.C. was at least sixteen years of age at the time the instant offense occurred.

FACTS AND PROCEDURAL HISTORY

In July and August 2005, thirteen-year-old P.C., while representing herself to be seventeen years old, called an adult personal chat line on multiple occasions. Through the chat line, P.C. began communicating with a man who identified himself as James[1], who was twenty-six years old. P.C. lived with her mother, stepfather, and two brothers. There were two phones lines in their house.

[1] At trial, P.C. identified Hill as being James. We will refer to him as Hill for the duration of this opinion.

Eventually, Hill gave P.C. his telephone number, and consequently obtained her number from his caller identification. Between August 8 and August 11, 2006, Hill and P.C. spoke over the telephone at least eighteen times. P.C.'s mother spoke with Hill four to five times and informed Hill that P.C. was fourteen years old.

On August 11, 2005, at 11:18 p.m., Hill spoke with P.C. for eight minutes while P.C. directed him to her house. P.C. opened the door without Hill ringing the doorbell. P.C. and Hill went directly to P.C.'s room where she closed and locked her door. P.C and Hill talked and watched television for a while. Then, Hill removed his pants and P.C.'s pants. Hill put on a condom, but before the two could engage in sexual intercourse, P.C.'s stepfather knocked on the door. P.C. opened the door and told her stepfather she was sleeping. However, her stepfather did not believe her and entered the room. First he checked the closet, believing someone else was in the room with P.C. Then, he found Hill under P.C.'s bed wearing socks and a condom. Upon being discovered, Hill attempted to put on his pants and leave. P.C.'s stepfather grabbed Hill, and placed him in a chokehold rendering him unconscious until the police arrived.

Lawrence Police Officer Erika Schneider (Officer Schneider) responded to the call. When Officer Schneider arrived, Hill, unconscious on the chaise lounge, was still wearing the condom and socks, with his pants around his ankles. Officer Schneider performed a sternum rub to wake up Hill. While Hill was being transported to an ambulance, he jumped off the gurney and outran Officer Schneider and two firefighters. In the process, however, he

ran not only out of his shoes, but his condom as well. The police were able to locate Hill who walked home as a result of leaving his car at P.C.'s home.

On August 23, 2005, the State filed an Information charging Hill with Count I, attempted child molesting, a Class A felony, I.C. §§ 35-42-4-3, 35-41-5-1; and Count II, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3. On August 24, 2005, an initial hearing was held at which time an omnibus date of October 21, 2005,[2] was set. On October 27, 2005, the State filed an amended Information adding Count III, attempted sexual misconduct with a minor, a Class B felony, I.C. §§ 35-42-4-9, 35-41-5-1. Over Hill's objection, the trial court accepted the State's amended Information adding Count III, attempted sexual misconduct with a minor.

July 10 and 11, 2006, a jury trial was held. Hill was found not guilty of Count I, however was found guilty of Count II, resisting law enforcement, a Class A misdemeanor, and Count III, attempted sexual misconduct with a minor. On July 26, 2006, the trial court sentenced Hill to one year for Count II, resisting law enforcement, and ten years for Count III, attempted sexual misconduct with a minor, with the sentences to be served concurrently.

Hill now appeals. Additional facts will be provided as necessary.

---

[2] The omnibus date is the date from which various procedural deadlines are to be established. I.C. § 35-36-8-1 provides that the judicial officer must set an omnibus date at the initial hearing. The date must not be sooner than forty-five days or later than seventy-five days after the initial hearing, unless the prosecution and defense agree otherwise. With few exceptions, as listed in I.C. § 35-36-8-1(d), the omnibus date is maintained until final disposition of the case. *Fajardo v. State*, 859 N.E.2d 1201, 1203 n. 4 (Ind. 2007).

DISCUSSION AND DECISION

I. *Amendment of Charging Information*

Hill first argues that the trial court erred by permitting the State to amend the charging Information by belatedly adding a third Count, attempted sexual misconduct with a minor. Specifically, Hill contends Count III was added after the omnibus date, and amendments to the charging Information relating to matters of substance must be filed thirty days before the omnibus date.

The charging Information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information. *Fajardo v. State*, 859 N.E.2d 1201, 1204 (Ind. 2007). I.C. § 35-34-1-5 governs such amendments. Subsection (a) permits an amendment at any time "because of any material defect," and lists nine examples. *See* I.C. § 35-34-1-5. Similarly, subsection (c) permits "at any time before, during, or after the trial, . . . an amendment to the indictment or [I]nformation in respect to any defect, imperfection, or omission *in form* which does not prejudice the substantial rights of the defendant." *See id.* (emphasis added). In contrast, subsection (b) expressly limits the time for certain other amendments, specifically:

> (b) The indictment or [I]nformation 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*:
>
> (1) up to:
>
> (A) *thirty* (30) days if the defendant is charged with a felony; or
> (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date . . . .

I.C. § 35-34-1-5(b) (emphasis added).[3]

Indiana criminal procedure has long distinguished between amendments to matters of substance and to matters of form. *See, e.g.*, *State ex rel Kaufman v. Gould*, 98 N.E.2d 184, 185 (Ind. 1951). Originally, the rule applied was:

> If a defense under the affidavit [now, the Information] as it originally stood would be equally available after the amendment is made, and if any evidence the accused might have would be equally applicable to the affidavit [Information] in one form as in the other, then the amendment is one of form and not substance.

Id. In *Souerdike v. State*, 102 N.E.2d 367, 368 (Ind. 1951), our supreme court extended the rule adding, "if the amendment is such that it is not essential to the charging of a crime, then it is not one of substance but one of form." Today, these two rules have been implemented as follows:

> An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the [I]nformation in either form. Further, an amendment is of substance only if it is essential to making a valid charge of the crime.

Fajardo, 859 N.E.2d at 1205; *McIntyre v. State*, 717 N.E.2d 114, 125-26 (Ind. 1999); *Haak v. State*, 695 N.E.2d 944, 951 (Ind. 1989), *cert. denied*, 494 U.S. 1031 (1990). Therefore, "the first step in evaluating the permissibility of amending an . . . [I]nformation is to

---

[3] After *Fajardo* was decided, the General Assembly amended I.C. § 35-34-1-5 so that charging Information may be amended at any time prior to trial as to either form or substance, so long as such amendment does not prejudice the substantial rights of the defendant. *See* P.L. 178-2007 § 1 (emergency eff. May 8, 2007); *see*

determine whether the amendment is addressed to a matter of substance or one of form of immaterial defect." *Fajardo*, 859 N.E.2d at 1207.

The amendment in the instant case changes a two-Count Information charging attempted child molesting as a Class A felony and resisting law enforcement as a Class A misdemeanor to a three-Count Information additionally charging attempted sexual misconduct with a minor as a Class B felony. Both Count I, attempted child molesting, and, the later added, Count III, attempted sexual misconduct with a minor, involve conduct with the same girl, a child under fourteen years of age, with the essential difference between the two offenses being the age of the child. For attempted child molesting as a Class A felony to have occurred, Hill must have attempted to "perform[] or submit[] to sexual intercourse or deviate sexual conduct" with P.C., a child who was then under the age of fourteen, while himself being at least twenty-one years of age. I.C. § 35-42-4-3(a). For the Class B felony attempted sexual misconduct with a minor charged in Count III, Hill must have attempted to "perform[] or submit[] to sexual intercourse or sexual deviate conduct" with a child who is "at least fourteen (14) years of age but less than (16) years of age." I.C. § 35-42-4-9(a).

Applying the rule for distinguishing between amendments to matters of form and those of substance, we find that the addition of Count III charging a new separate offense constituted an amendment to matters of form only. Any evidence offered by Hill to dispute the occurrence of the original charge would be "equally applicable" to dispute P.C.'s age in the separate additional charge added by the amendment. *Fajardo*, 859 N.E.2d at 1205.

---

also Laney v. State, 868 N.E.2d 561, 565 n.1 (Ind. 2007). "Obviously we will address the statute in effect at

Particularly, the defense to the original charge, attempted child molesting, and a defense to the amended charge, attempted sexual misconduct with a minor, is "that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct." I.C. §§ 35-42-4-3(c), 35-42-4-9(c). We note that there are additional defenses to a charge of sexual misconduct with a minor that are not available to a charge of child molesting, but Hill makes no argument with respect to being precluded from developing these defenses; Hill solely focuses on his reasonable belief that P.C. was at least sixteen years old as a defense. As we decline to make any additional possible defense arguments for Hill, we will not consider whether the availability of such additional arguments would have caused amending the Information to be an amendment of substance. Rather, because Hill argues only with respect to the defense mutually shared by the attempted child molesting and attempted sexual misconduct with a minor charges, we find the challenged amendment is an amendment in form only and therefore the trial court did not err by allowing the State to amend the Information after the omnibus date.

II. *Sufficiency of the Evidence*

Additionally, Hill argues he proved by a preponderance of the evidence that he reasonably believed P.C. was at least sixteen years of age. However, Hill fails to argue that due to P.C.'s age at the time of the instant offense, statutorily he could not be convicted of attempted sexual misconduct with a minor. We *sua sponte* find this issue dispositive and will address its impact on Hill's conviction for attempted sexual misconduct with a minor.

---

the time of [Hill's] trial and *Fajardo's* interpretation of it." *Laney*, 868 N.E.2d 565.

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *White v. State*, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.*

To convict Hill of attempted sexual misconduct with a minor as a Class B felony the State was required to prove beyond a reasonable doubt that (1) Hill was at least twenty-one years of age; (2) P.C. was at least fourteen (14) years of age but less than sixteen (16) years of age; and (3) Hill attempted to perform or submit to sexual intercourse or deviate sexual conduct with P.C. *See* I.C. §§ 35-42-4-9(a)(1), 35-41-5-1. Our review of the record indicates the evidence was insufficient to prove the required elements beyond a reasonable doubt. Specifically, we find the State failed to prove P.C. was at least fourteen (14) years of age but less than sixteen (16) years of age at the time the instant offense occurred.

P.C. testified she was thirteen years old on August 11, 2005, stating she was born January 2, 1992. Additionally, P.C.'s mother testified P.C. was thirteen years old on August 11, 2005.[4] The State offered no evidence to prove P.C. was fourteen on August 11, 2005.

[4] P.C.'s mother testified P.C.'s date of birth was "2-1-92." (Transcript p. 80). Additionally, P.C.'s mother testified she told Hill over the phone that P.C. was fourteen. However, she also stated, "I think she was thirteen. She might have been fourteen." (Transcript p. 92).

Thus, we find P.C. was thirteen years old on August 11, 2005, and as such insufficient evidence exists to support Hill's conviction for attempted sexual misconduct with a minor.

CONCLUSION

Based on the foregoing, we conclude that (1) the trial court did not err by permitting the State to amend the charging Information by adding Count III, attempted sexual misconduct with a minor, after the omnibus date; and (2) the State did not present sufficient evidence to convict Hill of attempted sexual misconduct with a minor. As a result we remand to the trial court to vacate Hill's conviction for Count III, attempted sexual misconduct with a minor.

Reversed and remanded with instructions.

SHARPNACK, J., and FRIEDLANDER, J., concur.