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IN THE
COURT OF APPEALS OF INDIANA

RONALD McCASLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A05-0611-CR-650
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Andrea K. McCord, Judge Pro Tempore
Cause No. 47C01-0601-FA-27

December 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Ronald McCaslin appeals his convictions and sentence for four counts of class A felony child molesting and one count of class C felony child molesting. We affirm in part and vacate in part.

Issues

McCaslin raises three issues, only two of which we need address:

I. Whether the trial court erred in granting the State's motion to amend the charging information; and

II. Whether the trial court abused its discretion in admitting evidence of recorded telephone conversations between the victim and McCaslin.

Facts and Procedural History

The essential facts most favorable to the convictions indicate that T.S. was born to Brian and Cathy Schulz on September 29, 1996. Brian and Cathy separated in October 2003. Brian began dating Lisa Hawkins. Brian and Cathy were divorced in March 2005, and Brian was awarded primary custody of T.S. and her older brother, L.S. Brian and the children lived with Hawkins and her children in Hawkins's Bedford home.

Cathy met McCaslin in November 2002 through mutual friends Randy and Tyra Kennedy, and they later became engaged. Cathy occasionally lived in the Kennedys' home in Lawrence County. Cathy had visitation with T.S. and L.S. every other weekend. T.S.'s last visitation with Cathy occurred from Friday, January 6 through Sunday, January 8, 2006, at the Kennedys' home.

Later that week, T.S., Brian, and Hawkins were at T.S.'s grandfather's home. T.S. volunteered to help her three-year-old cousin use the restroom. Hawkins opened the

bathroom door to find T.S. holding the waist of her cousin, whose pants were down. Hawkins asked T.S. what she was doing. T.S. replied, "She wants to put her pee-pee on the knob." Tr. at 180. Hawkins and T.S. walked out to Brian's truck. Hawkins told Brian what had happened, and Brian scolded T.S. T.S. began "crying very hard" and pulled a blanket over her head. *Id*. at 183. Hawkins told T.S., "Your pee-pee is yours and hers is hers and you keep those to yourself[.]" *Id*. at 183-84. When Hawkins asked T.S. if someone had "bothered her in that way[,]" T.S. "cried harder and she started shaking and became more upset." *Id*. at 184. Hawkins repeated the query, and T.S. identified McCaslin as the person who had molested her.

Brian and Hawkins reported T.S.'s statement to Cami Terry of the Lawrence County Department of Child Services. Terry spoke with Brian, Hawkins, and T.S. on January 10, 2006. On Terry's recommendation, Brian and Hawkins took T.S. to a pediatrician for an examination that same day. The pediatrician's office contacted Lawrence County Sheriff's Detective James Slone. After the examination, Detective Slone took a statement from Hawkins and briefly spoke with T.S.

On January 11, 2006, Detective Slone went to Brian and Hawkins's home for the purpose of recording a telephone conversation between T.S. and McCaslin. Brian gave his permission, and T.S. "said she could do it." *Id*. at 394. Detective Slone instructed T.S. to tell McCaslin that she had seen a police mascot, Deputy Dog, that day at school, and that Deputy Dog had talked with the students "about good touch and bad touch and that if anybody ever did touch them inappropriately that they were to tell a teacher or a policeman." *Id*. Detective

Slone connected a recording device to the telephone and dialed the Kennedys' telephone number.

T.S. talked with Cathy and then asked to speak to McCaslin. T.S. told McCaslin what Detective Slone had instructed her to say. McCaslin replied, "Oh, Man. Cathy, come here. Hang on. Hey." State's Exh. 7A at 8. McCaslin told T.S. that he had a call on the other line and asked her to call him right back. T.S. did so and talked with both Cathy and McCaslin. T.S. accused McCaslin of touching her and asked him why he put his hands down her pants. McCaslin replied, "I rub your belly and stuff." *Id*. at 11. Cathy told T.S., "If you tell anybody that then they, they won't let me see you no more." *Id*. at 13.

Detective Slone interviewed T.S. on January 12, 2006, and interviewed McCaslin on January 13, 2006. On that date, the State charged McCaslin with one count of class A felony child molesting and one count of class C felony child molesting. On February 23, 2006, McCaslin filed a notice of alibi. The omnibus date was March 6, 2006. T.S. was deposed on September 1, 2006. On September 6, 2006, the State moved to amend the charging information to include four counts of class A felony child molesting (counts I through IV) and one count of class C felony child molesting (count V). On September 7, 2006, McCaslin filed an objection to the amended charging information and a motion to suppress evidence regarding his recorded telephone conversations with T.S. The trial court granted the State's motion to amend the charging information and denied McCaslin's motion to suppress.

McCaslin's trial lasted from September 19 through September 27, 2006. The jury found McCaslin guilty as charged. On October 25, 2006, the trial court sentenced McCaslin to fifty years on each class A felony conviction and eight years on the class C felony

conviction, with counts I and II to be served concurrently and the rest consecutively, for an aggregate sentence of 158 years. McCaslin now appeals his convictions and sentence. Additional facts will be provided as necessary.

Discussion and Decision

I. Amendment of Charging Information

In September 2006, when the State moved to amend the charging information, Indiana Code Section 35-34-1-5 provided that an information may be amended at any time because of any immaterial defect, including eight enumerated defects and "any other defect which does not prejudice the substantial rights of the defendant." Ind. Code § 35-34-1-5(a). The statute further provided,

> (b) 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.
>
> (c) 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.
>
> (d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the

> defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.[1]

Ind. Code § 35-34-1-5.[2]

In this case, the State moved to amend the charging information exactly six months after the March 6, 2006, omnibus date. On appeal, McCaslin characterizes amended counts II through V as matters of substance and contends that the State's motion to amend was untimely and should have been denied. We agree.

In *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), which was decided after McCaslin was convicted and sentenced, our supreme court attempted to clarify the difference between amendments of form and substance for purposes of Indiana Code Section 35-34-1-5. In that case, the State initially charged Fajardo with class C felony child molesting. Over Fajardo's objection, the trial court permitted the State to amend the charging information after the omnibus date to add one count of class A felony child molesting. A jury found Fajardo guilty as charged, and another panel of this Court affirmed his convictions. Our supreme court granted transfer.

After reviewing previous cases on the subject, the court explained,

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[1] McCaslin did not request a continuance after the trial court granted the State's motion to amend the charging information. On appeal, the State does not contend that McCaslin has therefore waived any challenge to the amendment. In *Fuller v. State*, 875 N.E.2d 326 (Ind. Ct. App. 2007), *trans. pending*, which involved the same version of Indiana Code Section 35-34-1-5 that we consider here, another panel of this Court held that a defendant is not required "to move for a continuance, in addition to objecting, before being permitted to challenge an untimely substantive amendment on appeal." *Id*. at 331 (footnote omitted).

[2] Effective May 8, 2007, Indiana Code Section 35-34-1-5 was amended to delete any mention of amendments to matters of form in subsection (b). The amended statute also provides that an information may be amended in matters of either substance or form at any time prior to trial if the amendment does not prejudice the defendant's substantial rights.

Subsection 5(b) presently prohibits any amendment as to matters of substance unless made thirty days before the omnibus date for felonies and fifteen days before the omnibus date for misdemeanors. The statutory prerequisite requiring that an amendment not prejudice the substantial rights of the defendant applies only to amendments of certain immaterial defects under subsection 5(a)(9), and to amendments related to a defect, imperfection, or omission in form as provided in subsection 5(c). But as to an amendment relating to matters of substance, the statute is clear: the only prerequisite is that it must be filed the specified number of days before the omnibus date, pursuant to subsection 5(b).

Therefore, the first step in evaluating the permissibility of amending an indictment or information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. As noted above, an 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. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

The amendment in this case changes a one-count information charging Child Molesting as a class C felony to a two-count information additionally charging Child Molesting as a class A felony. Both charged offenses involve conduct with the same girl, a child under fourteen years of age, and the essential differences between the two are the date of the offense and the accused's conduct, age, and intent. For the class C felony, alleged to have occurred during a two-year period after January 26, 2001, the defendant must have performed or submitted "to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person." Ind. Code § 35-42-4-3(b). For the class A felony charged in Count 2, alleged to have occurred at some point during a longer period, more than three years after January 26, 2001, the defendant must have been at least twenty-one years old and performed deviate sexual conduct, which is "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9.

Applying the rule for distinguishing between amendments to matters of form and those of substance, we find that the addition of Count 2 charging a new separate offense constituted an amendment to matters of substance. The defendant's evidence addressed to disputing the occurrence of the original charge would not be "equally applicable" to dispute the date nor the specific conduct alleged in the separate additional charge sought to be added by the amendment. And because the amendment charges the commission of a separate crime, it also is unquestionably essential to making a valid charge of

the crime, and thus it is not disqualified from being considered an amendment to a matter of substance.

Because the challenged amendment in this case sought to modify the original felony information in matters of substance, it was permissible only up to thirty days *before* the omnibus date. Ind. Code § 35-34-1-5(b). The amendment was not sought by the State, however, until seven days *after* the omnibus date, and thus failed to comply with the statute. The defendant's objection should have been sustained and the amendment denied. The conviction and sentence for Count 2, Child Molesting as a class A felony, must be vacated.

Id. at 1207-08 (footnote and some citations omitted).

In this case, the original charging information reads as follows:

COUNT I [class A felony]

On or about January 7, 2006, in Lawrence County, State of Indiana, Ronald K. McCaslin, a person over the age of twenty-one, did submit to deviate sexual conduct by having [T.S.], a child under the age of fourteen, place her mouth on his penis.

COUNT II [class C felony]

On or about January 7, 2006, in Lawrence County, State of Indiana, Ronald K. McCaslin did perform fondling upon [T.S.], a child under the age of fourteen, with the intent to arouse or satisfy his sexual desires.

Appellant's App. at 13.

The amended charging information reads as follows:

COUNT I. [class A felony]

On or about January 7, 2006, in Lawrence County, Indiana, Ronald K. McCaslin, a person over the age of twenty-one, did submit to deviate sexual conduct by having [T.S.], a child under the age of fourteen, place her mouth on his penis.

COUNT II. [class A felony]

On or about January 7, 2006, in Lawrence County, Indiana, Ronald K. McCaslin[,] a person over the age of twenty-one, did submit to deviate sexual conduct by having [T.S.], a child under the age of fourteen, place her mouth on his penis.

COUNT III. [class A felony]

> On or between 2004, and December 25, 2005, while by a truck at Bob Bell's house, in Lawrence County, Indiana, Ronald K. McCaslin, a person over the age of twenty-one, did submit to deviate sexual conduct by having [T.S.], a child under the age of fourteen, place her mouth on his penis.
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> COUNT IV. [class A felony]
> On or between 2004 and January 7, 2006, in Lawrence County, Indiana, Ronald K. McCaslin, a person over the age of twenty-one, did perform deviate sexual conduct by placing his finger in the vagina of [T.S.], a child under the age of fourteen.
>
> COUNT V. [class C felony]
> On or between 2004 and January 7, 2006, in Lawrence County, Indiana, Ronald K. McCaslin, a person over the age of twenty-one, did submit to touching by having [T.S.], a child under the age of fourteen, place her hand on his penis, with the intent to arouse or satisfy the sexual desires of Ronald K. McCaslin.

Id. at 58-59.

We observe that the count I class A felony counts in the original and amended informations are identical; that counts II through IV of the amended information allege new and separate offenses, three of which occurred at some point during a much longer period; and that the class C felony charge in count V of the amended information alleges different conduct that occurred at some point during a much longer period than that alleged in count II of the original information. In light of *Fajardo*, we must conclude that amended counts II through V constitute matters of substance. McCaslin's evidence addressed to disputing the occurrence of the original charges was not "equally applicable" to dispute the dates nor the

specific conduct alleged in counts II through V of the amended information.[3] Moreover, as stated in *Fajardo*, "because the amendment charges the commission of [separate crimes], it also is unquestionably essential to making a valid charge of the crime[s], and thus it is not disqualified from being considered an amendment to [matters] of substance." 859 N.E.2d at 1208.

Because amended counts II through V were matters of substance, the State was permitted to request such amendments only up to thirty days *before* the omnibus date. Ind. Code § 35-34-1-5(b). The State did not do so until six months *after* the omnibus date and thus failed to comply with the statute. As such, the trial court erred in granting the State's

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[3] In his reply brief, McCaslin elaborates on the evidence at trial that supported amended counts I through IV and his defenses thereto:

> His defense in Count 1 (oral sex in the bed at the [Kennedys'] house) was no one saw any unusual contact between McCaslin and T.S. and he denied the charge. His defense in Count 2 (oral sex in bathroom at [Kennedys'] house [which allegedly occurred later that same day]) was [that] no one saw him go in the bathroom with T.S., she did not mention the alleged offense to a therapist and the detective, he did not go in the bathroom with her and he denied the charge. His defense in Count 3 (oral sex in truck outside Bob Bell's house) was no one else saw him alone in the truck with T.S. on the few occasions he was at Bell's house, she did not mention the alleged offense to a therapist and the detective, and he denied the charge. His defense in Count 4 (inserted finger into vagina at Bell's house during a movie) was no one else witnessed offense, she did not tell the detective she was sexually abused at Bell's house and he denied the charge. McCaslin called different witnesses on the separate counts, they testified about different things on the separate charges and his defense was not merely a flat denial of committing any offense.

Appellant's Reply Br. at 3-4 (citations to transcript omitted). With respect to count V, McCaslin states,

> T.S.'s testimony indicates the fondling occurred on January 7, 2006 at the [Kennedys'] house which was the same date and location alleged in the original Count 2. However, the specific conduct alleged did change. In *Fajardo*, the Supreme Court noted the amended Count 2 differed from the original charge on the date of the offense, the accused's conduct, age and intent. The conduct charged in the original Count 2 (McCaslin fondled T.S.), differs from the conduct charged in Count 5 (McCaslin submitted to fondling from T.S.). The amendment changed the conduct alleged and was a change in substance.

Id. at 16 (citations and bold emphasis omitted).

motion to amend the charging information. We therefore vacate McCaslin's convictions and sentences for counts II through V.[4]

II. Admission of Phone Conversations

Next, McCaslin contends that Detective Slone violated the Indiana Wiretap Act in recording T.S.'s telephone conversations with him and that the trial court therefore erred in admitting evidence regarding the conversations.[5] Our standard of review is well settled:

> [T]he admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court.… As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Ramsey v. State, 853 N.E.2d 491, 502 (Ind. Ct. App. 2006) (citations omitted), *trans. denied*.

The Indiana Wiretap Act contains an exclusionary rule, which states in pertinent part:

> The contents of an interception under this article or evidence derived from the interception may not be received into evidence or otherwise disclosed during a court proceeding unless each party, not less than fourteen (14) days before the proceeding, has been furnished with a copy of the application, warrant, and any orders for an extension under which the interception was authorized.

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[4] Consequently, we need not address McCaslin's argument that the trial court "erred in ordering [him to] serve sentences above the advisory term in Counts 3, 4 and 5 because it was ordering those sentences to be served consecutively to the fifty (50) year terms in Counts 1 and 2." Appellant's Br. at 22 (citation to transcript omitted). We note, however, that our supreme court recently rejected such an argument in *Robertson v. State*, 871 N.E.2d 280 (Ind. 2007).

[5] As mentioned *supra*, McCaslin initially challenged the admissibility of the evidence via a motion to suppress, which the trial court denied. He did not seek an interlocutory appeal of that ruling and now appeals following a completed trial. "Thus, the issue is … appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003).

Ind. Code § 35-33.5-5-1. "Under the Indiana Wiretap Act, the recording of a telephonic or telegraphic communication is not an 'interception' if it is done with the consent of the sender or receiver of the communication." *Packer v. State*, 800 N.E.2d 574, 582 (Ind. Ct. App. 2003) (citing Ind. Code § 35-33.5-1-5), *trans. denied* (2004).

McCaslin contends that "[t]here is no evidence McCaslin as the receiver of the phone calls consented to their being recorded. Detective Slone acknowledged T.S., the sender, did not give a verbal consent to recording the calls." Appellant's Br. at 19 (citations to transcript omitted). We note, however, that T.S. knew that the calls were going to be recorded, that she said that she could make the calls, and that there is no evidence that she was coerced into making the calls. Thus, as the State contends, "even though T.S. did not explicitly use the magic words – 'I consent to the recording of this call' – the record supports a finding that she consented to have her call placed and recorded." Appellee's Br. at 29.

Moreover, in *Apter v. Ross*, 781 N.E.2d 744 (Ind. Ct. App. 2003), *trans. denied*, a civil case involving the Indiana Wiretap Act, we concluded that "a parent has the power to consent on behalf of his or her minor child to the recording of that child's phone conversations unless otherwise curtailed in some legal proceeding." *Id*. at 756 (citing Ind. Code § 29-3-3-3(a)).[6]

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[6] Indiana Code Section 29-3-3-3(a) provides in pertinent part,

> Except as otherwise determined in a dissolution of marriage proceeding, a custody proceeding, or in some other proceeding authorized by law, … and unless a minor is married, the parents of the minor jointly (or the survivor if one (1) parent is deceased), if not an incapacitated person, have, without the appointment of a guardian, giving of bond, or order or confirmation of court, the right to custody of the person of the minor and the power to execute the following on behalf of the minor:
>
> ….
>
> (5) Consents, waivers of notice, or powers of attorney under any statute[.]

Here, Brian consented to the recording of T.S.'s telephone conversations with McCaslin, and there is no indication that he had no power to do so. As such, we conclude that Detective Slone did not violate the Indiana Wiretap Act in recording the telephone conversations between T.S. and McCaslin and that the trial court did not abuse its discretion in admitting evidence regarding those conversations.

In sum, we affirm McCaslin's conviction and sentence for amended count I, class A felony child molesting, and vacate the convictions and sentences for amended counts II through V.

Affirmed in part and vacated in part.

DARDEN, J., and MAY, J., concur.