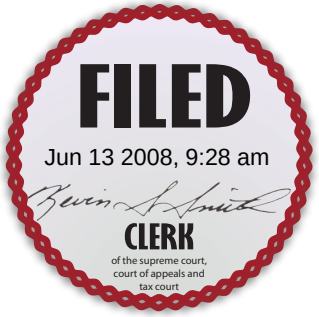

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IN THE
COURT OF APPEALS OF INDIANA

ALONZO HIGGINBOTHAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1042
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Annie Christ-Garcia, Judge
Cause No. 49G17-0706-CM-120348

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Alonzo Higginbotham appeals his conviction for Invasion of Privacy, as a Class A misdemeanor, following a bench trial. Higginbotham raises two issues for our review, which we consolidate and restate as whether the State presented sufficient evidence to support his conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

In July of 2003, Higginbotham married Melissa Graham. However, their marriage collapsed in the fall of that year, and Melissa petitioned the trial court for a protective order against Higginbotham. The court granted Melissa's request.[1] In the fall of 2005, Melissa requested that the protective order be extended through the fall of 2015.[2] In response to Melissa's petition for an extension of the protective order, Higginbotham, then an inmate with the Department of Correction, handwrote a letter to the court "asking the court to give [Melissa] her new order for protection . . . , because I . . . have know [sic] more to give this lady and wish to be left be." State's Exh. 3. The court granted Melissa's request for an extension of the protective order and Higginbotham was required, among other things, to not contact Melissa and to stay away from her residence at 313 South Edgehill Road in Indianapolis.

On May 5, 2007, Higginbotham drove a white pickup truck to Melissa's residence and parked nearby. At the time, Melissa was in the front yard doing yard work.

[1] The court granted Melissa's request for a protective order pursuant to Indiana Code Chapter 34-26-5.

[2] We note that Indiana Code Section 34-26-5-9(e) states that "[a]n order for protection . . . is effective for two (2) years after the date of issuance unless another date is ordered by the court."

Higginbotham exited the vehicle and approached her, and Melissa yelled for her fiancé, who was in the back of the house. Higginbotham turned around, got back into the pickup truck, and left. However, about ten minutes later, Melissa and her fiancé again saw Higginbotham drive by Melissa's residence. And about fifteen minutes after that, Melissa and her fiancé saw Higginbotham's truck drive past with Higginbotham in the passenger's seat.

On July 6, 2007, the State charged Higginbotham with invasion of privacy, as a Class A misdemeanor, for violating the protective order "on or about" May 5. Appellant's App. at 14. On July 19, Higginbotham waived his right to a jury trial. And at the subsequent bench trial, Melissa and her fiancé each testified that they saw Higginbotham at Melissa's residence during "the first part of May," "the beginning of May," and "May 5th or 6th." Transcript at 8-9, 12. Without objecting to the State's evidence, Higginbotham's two defense witnesses emphasized that Higginbotham was working for them on May 5, 2007, and that Higginbotham usually drives a red pickup truck.

After the court released the defense's first witness but before the defense called its second witness, the State objected that the first defense witness had informed the second witness of his testimony. The trial court questioned the two witnesses, after which it found that the first witness had violated the court's admonishment not to speak with other witnesses. The court then concluded that its finding would "reflect on the credibility of this witness and the other witnesses." Id. at 27.

After the presentation of Higginbotham's defense, the State called Melissa back to the stand in rebuttal. Melissa testified that Higginbotham lived and worked "[a]pproximately ten minutes" from her residence. Id. at 34. The court then found Higginbotham guilty as charged and sentenced him to one year in the Department of Correction. This appeal ensued.

DISCUSSION AND DECISION

Higginbotham asserts that the State did not present sufficient evidence to sustain his conviction beyond a reasonable doubt. In particular, Higginbotham maintains that "there was a material variance between the date alleged in the information and the testimony of the State's witnesses" and that there is no evidence that Higginbotham "knowingly violated" the protective order. Appellant's Brief at 4, 6. We cannot agree.

When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). Rather, we look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. To prove invasion of privacy, as a Class A misdemeanor, the State was required to prove beyond a reasonable doubt that Higginbotham "knowingly or intentionally violate[d] . . . a protective order to prevent domestic or family violence issued under IC 34-26-5." Ind. Code § 35-46-1-15.1(1) (2004).

Higginbotham first asserts that "there was a material variance between the date alleged in the information and the testimony of the State's witnesses." Appellant's Brief at 4. "[W]here there is an essential difference between proof and pleading, a variance exists." Hall v. State, 791 N.E.2d 257, 261 (Ind. Ct. App. 2003). As we have explained:

> The law is well settled that where time is not an element or "of the essence of the offense," the State need not prove the precise date alleged in the indictment or information but may prove that the crime occurred at any time within the statutory period of limitations. Quillen v. State, 271 Ind. 251, 391 N.E.2d 817, 818-19 (1979); Cf. Herman v. State, 247 Ind. 7, 210 N.E.2d 249, 256 (1965) ("where time is not of the essence of the offense, under an allegation of a specific date, the offense may ordinarily be proved as having occurred at any date preceding the filing of the affidavit or indictment which is within the statute of limitations.").
>
> Generally, variance between the date alleged and the State's proof at trial does not mandate acquittal or reversal. A variance between the date alleged in a charging information and the evidence at trial is not fatal unless it misleads the defendant in the preparation of his defense or when it subjects him to the likelihood of another prosecution for the same offense. Downs v. State, 656 N.E.2d 849, 852 (Ind. Ct. App. 1995).

Sangsland v. State, 715 N.E.2d 875, 878-79 (Ind. Ct. App. 1999), trans. denied; see also Winn v. State, 748 N.E.2d 352, 356 (Ind. 2001). We have further recognized that a defendant's "[f]ailure to make a specific objection at trial waives any material variance issue." Hall, 791 N.E.2d at 261.

Here, the State alleged that Higginbotham committed invasion of privacy "on or about 5/5/2007." Appellant's App. at 14. The State's witnesses then testified that they each saw Higginbotham at Melissa's residence during "the first part of May," "the beginning of May," and "May 5th or 6th." Transcript at 8-9, 12. Higginbotham now alleges, for the first time, that there exists an essential difference between the State's

proof and pleading such that he was misled by the State in the preparation of his defense.[3] However, as Higginbotham did not make a specific objection on this issue at trial, it is waived. Hall, 791 N.E.2d at 261; see Childers v. State, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004).

Waiver notwithstanding, the State's evidence was consistent with the timeframe set forth in the State's information. Again, the State alleged that Higginbotham's act of invasion of privacy occurred "on or about" May 5, 2007, which was affirmed by the testimony of the State's two witnesses. See Appellant's App. at 14. As such, it cannot be said that the State's information "misled" Higginbotham in the preparation of his defense, even if he chose to limit his defense to other events occurring on May 5, 2007. See R.L.H. v. State, 738 N.E.2d 312, 317-18 (Ind. Ct. App. 2000); Sangsland, 715 N.E.2d at 879. And insofar as Higginbotham requests that we reweigh the evidence of his activities on May 5, 2007, we may not do so. R.L.H., 738 N.E.2d at 318.

Higginbotham also argues that he did not knowingly violate the protective order because "the evidence clearly shows that [he] was looking for an address rather than intentionally violating a protective order." Appellant's Brief at 6. But it is not disputed that Higginbotham knew of the protective order, that a term of the protective order was that he not go to Melissa's residence, and that each of the State's two witnesses testified that they saw Higginbotham at Melissa's residence. Higginbotham's arguments on appeal that that evidence is insufficient and that his evidence to the contrary "clearly shows" something else are merely requests for this court to reweigh the evidence. See id.

[3] Higginbotham does not argue that the purported variance submits him to double jeopardy.

We will not do so. Jones, 783 N.E.2d at 1139. The State presented sufficient evidence to support Higginbotham's conviction.

Affirmed.

DARDEN, J., and BROWN, J., concur.