ATTORNEY FOR APPELLANT:

KAREN M. HEARD
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY ALVEY-WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0809-CR-457
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable David D. Kiely, Magistrate
Cause No. 82C01-0703-FA-338

October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Timothy Alvey-Williams appeals his convictions of two counts of child molesting as Class A felonies, incest as a Class B felony, and child molesting as a Class C felony. He argues the trial court should have dismissed the charges underlying three of those convictions and should have excluded certain evidence. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Overnight on March 9, 2007, Alvey-Williams watched his sister's children, four-year-old J.F. and three-year-old S.F. While J.F. and Alvey-Williams were in a bedroom, Alvey-Williams touched J.F.'s "peeper" with his hand and placed his mouth on it. (Tr. at 13.) Alvey-Williams also inserted his finger into J.F.'s anus while J.F. was in the bathtub.

The following day, J.F. told his mother Alvey-Williams pulled down J.F.'s pants, put his mouth to J.F.'s private part, and touched him. Around 10:00 p.m., J.F.'s parents called police. Detectives made contact with Alvey-Williams. Alvey-Williams agreed to speak with detectives at his apartment on the condition that his grandmother, Shirley Price, was present. When Price and two detectives arrived at Alvey-Williams's apartment, the detectives told him he had the right to refuse to answer their questions and at any time he could leave or ask the officers to leave.

Alvey-Williams did not ask for a lawyer, but when detectives asked for his consent to take his computer, Alvey-Williams said to his grandmother, "[D]o you think I should get an attorney?" (Suppression Hr. at 14.) She did not respond and Alvey-Williams continued to talk with detectives. Alvey-Williams told the detectives they

could not take his computer, and they left to try to obtain a search warrant for the computer. A uniformed officer was brought inside the apartment to make sure nobody tampered with the computer. The detectives could not secure a search warrant, and they returned to Alvey-Williams's apartment.

After the detectives returned, Alvey-Williams agreed the subject matter was difficult to discuss in front of his grandmother, and he asked her, one of the detectives, and the uniformed officer to step outside. He then allowed the remaining detective to record his statement. The detective asked Alvey-Williams, "[W]hen I came over and talked to you about this, I explained to you you're not under arrest and, you know, I told you you're free to leave and all that stuff, is that right?" Alvey-Williams replied, "Yes." (Defendant's Exhibit 1 at 3.)

Alvey-Williams said his mouth touched J.F.'s penis when he lost his balance holding J.F. in the air. This caused J.F. to come down while Alvey-Williams's mouth was open as he said "oh, shit." (*Id.* at 5.) Alvey-Williams signed a general consent to search and agreed to turn over the children's clothing. Investigators collected the clothing and took pictures of the apartment. Alvey-Williams reenacted his version of events for detectives, trying to position his body and head to show how he lost his balance.

A detective spoke with J.F., then returned to Alvey-Williams's apartment and took a second recorded statement. The detective told Alvey-Williams he was not under arrest. Alvey-Williams told the detective he was sitting on the edge of the bathtub and he picked up J.F. J.F. pulled away, causing Alvey-Williams to slip and hit his head on the tub. He

blacked out and when he came to J.F.'s "thing was in my mouth on the corner and in a little bit." (Defendant's Exhibit 2 at 5.) When asked whether he penetrated J.F.'s anus, Alvey-Williams stated when he rubbed lotion on J.F., "I kind of probably pushed a little too hard or something" around J.F.'s anus. (*Id*. at 2-3.) Alvey-Williams was arrested on March 23, 2007, twelve days after his initial statement.

Alvey-Williams moved to suppress his statements to police. After a hearing, the trial court denied the motion. On the opening day of Alvey-Williams's jury trial he moved to dismiss, as unconstitutionally vague, the two counts of child molestation as Class A felonies and one count of incest.[1] The trial court denied his motion. Over Alvey-Williams's objection, the trial court admitted his recorded statements into evidence. At the close of the State's case Alvey-Williams renewed, and the trial court denied, his motion to dismiss those three counts. A jury found him guilty of all three charges.

The trial court entered judgments of conviction and sentenced Alvey-Williams to thirty years for each Class A felony, ten years for the Class B felony, and four years for the Class C felony, with the sentences to run concurrently.

DISCUSSION AND DECISION

1. Charging Information

A defendant is entitled to be informed specifically of the crime or crimes with which he is charged so he may intelligently prepare a defense. *Dorsey v. State*, 254 Ind.

[1] He does not challenge on that ground the fourth count, child molesting as a Class C felony.

409, 412-13, 260 N.E.2d 800, 802-803 (1970). An information is sufficient if it tracks the language of the statute defining the crime. *Gordon v. State*, 645 N.E.2d 25, 27 (Ind. Ct. App. 1995), *reh'g denied, trans. denied*. The charging information must include the name of the offense in the words of the statute or any other words conveying the same meaning, and the nature and elements of the offense charged in plain and concise language without unnecessary repetition. Ind. Code § 35-34-1-2(a)(2), (4). The information "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. . . ." Ind. Code § 35-34-1-2(d). A statement informing the defendant of the statutory offense with which he or she is charged, the time and place of the commission of the offense, the identity of the victim of the crime (if any), and the weapon used (if any) generally is sufficient. *Moody v. State*, 448 N.E.2d 660, 662 (Ind. 1983). The State is not required to include detailed factual allegations in a charging information. *Richardson v. State*, 717 N.E.2d 32, 51 (Ind. 1999).

When an information does not state the offense with sufficient certainty, a motion to dismiss must be filed no more than twenty days prior to the omnibus date. Ind. Code § 35-34-1-4(b). Alvey-Williams's omnibus date was June 7, 2007, but he did not move to dismiss the charging information until September 28, 2008 − more than a year after the omnibus date. Failure to timely challenge a charging information results in waiver unless fundamental error has occurred. *Higgins v. State*, 690 N.E.2d 311, 312 (Ind. Ct. App. 1997), *reh'g denied*.

Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due

process. *Carter v. State*, 738 N.E.2d 665, 677 (Ind. 2000). The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. *Id.*

The charging information is sufficient. It reads:

> Count I: The undersigned, being duly sworn upon his oath, says that in Vanderburgh County, State of Indiana, on or about March 2007[,] Alvey-Williams, a person of at least twenty-one (21) years of age, did perform deviate sexual conduct with a child under the age of fourteen years, to-wit: J.F., date of birth REDACTED, contrary to the statues in such cases made and provided by I.C. 35-42-4-3(a)(1) and against the peace and dignity of the State of Indiana.
>
> Count II: The undersigned, being duly sworn upon his oath, says that in Vanderburgh County, State of Indiana, on or about March 2007[,] Alvey-Williams, a person of at least twenty-one (21) years of age, did perform deviate sexual conduct with a child under the age of fourteen years, to-wit: J.F., date of birth REDACTED, separate and distinct act from that alleged in Count I, against the peace and dignity of the State of Indiana.
>
> Count III: The undersigned, being duly sworn upon his oath, says that in Vanderburgh County, State of Indiana, on or about March 2007[,] Alvey-Williams being at least eighteen years of age, did knowingly engage in deviate sexual conduct with another person, to-wit: J.F., date of birth REDACTED, while knowing that said other person is related to the defendant biologically, the said J.F. being less than sixteen years of age, contrary to the form of the statues in such cases made and provided by I.C. 35-46-1-3 and against the peace and dignity of the State of Indiana.

(Appellant's App. at 17-18.)

Counts I and II alleged that Alvey-Williams performed deviate sexual conduct with a child under the age of fourteen. Count III alleged Alvey-Williams knowingly engaged in deviate sexual conduct with J.F., while knowing he was biologically related

to J.F. Alvey-Williams contends the phrase "deviate sexual conduct" does not place him on notice of the specific conduct charged, because none of the charges specify what deviate sexual conduct occurred.

"Deviate sexual conduct" is:

> [A]n 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.

In *Taylor v. State*, 614 N.E.2d 944, 948 (Ind. Ct. App. 1993), *trans. denied*, Taylor argued an information that charged him with performing or submitting to acts of molestation was too broad because it might have included a number of acts. In particular, Count IV alleged Taylor performed or submitted to deviant sexual conduct with A.C., a child under twelve years of age. *Id.* We stated that where a charging information tracks the language of the statue, it will usually be specific enough unless the statute defines the crime only in general terms. *Id.* We noted the language mirrored the statutory definition of child molestation and concluded "[t]he information properly informed Taylor that the State needed only to prove that Taylor either performed or submitted to the conduct charged to prove a conviction of child molesting." *Id.*

Alvey-Williams was alleged in Counts I and II to have performed deviate sexual conduct and in Count III to have knowingly engaged in deviate sexual conduct. As the charging information tracked the language of the statute defining the crime, it was sufficient. *Id.* Furthermore, Alvey-Williams acknowledged at trial the acts with which

he was being charged, stating J.F's "thing went, like he said, but like I said, I was referring when I . . . it landed in my mouth. . . " (Tr. at 288), and that he rubbed lotion on J.F.'s anus and "greased in between, you know, the . . . what do ya want to call 'em, the cheeks of the butt part . . . ." (*Id*. at 297-98.) Alvey-Williams has not shown the wording of the information hampered his ability to understand the nature of the charges or to prepare a defense.

2. Admission of Evidence

The initial questioning in Alvey-Williams's apartment on March 11, 2007, was broken up into two phases and lasted up to three hours.[2] The interview took place in the presence of Alvey-Williams's grandmother[3] and was conducted by two detectives. The interview began around 12:30 a.m. and ended around 4:00 a.m., with detectives leaving Alvey-Williams and his grandmother alone with a uniformed officer for, at most, an hour and fifteen minutes.[4] The detectives told Alvey-Williams he had the right at any time to refuse to answer their questions and leave his home.[5] Shortly after 4:00 a.m. Alvey-

[2] Alvey-Williams gave statements to the police on two separate days. Alvey-Williams and the State address only the initial police interview and develop no argument concerning the second interview two days later.

[3] The grandmother described Alvey-Williams as "dependent" on her, (Supp. Tr. at 50), and testified she is his social security payee. The trial court noted Alvey-Williams "functions at a mildly mentally retarded range." (App. at 6.)

[4] The State characterizes this as an interview "in the comfort and security of his own home," (Br. of Appellee at 8), and an interview "in the comfort of his own home with his grandmother by his side." (*Id.* at 6.)

[5] At some point the detectives asked Alvey-Williams for his consent to take his computer. Alvey-Williams told the detectives they could not take his computer, and they left to try to obtain a search warrant for the computer. A uniformed officer was brought inside the apartment to make sure nobody tampered with the computer. Police testified that officer would not have left the apartment if Alvey-Williams had asked him to. In response to a question whether Alvey-Williams "was not free to tell that

Williams gave a taped statement in the presence of one detective and he demonstrated his version of events in the bathroom. He was not arrested at that time. Alvey-Williams was interviewed again at his home two days later by one detective, and he gave a second recorded statement.

At a suppression hearing, the State bears the burden of demonstrating the constitutionality of measures it used to secure evidence. *McIntosh v. State*, 829 N.E.2d 531, 536 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 185 (Ind. 2005). The statements Alvey-Williams made to police were inadmissible because he was in custody and the police did not advise him of his *Miranda* rights.[6] A person who has been taken into custody or otherwise deprived of his freedom of action in any significant way must, before being subjected to interrogation by law enforcement officers, be advised of his rights to remain silent and to the presence of an attorney and be warned that any statement he makes may be used as evidence against him. *Id*. Statements elicited in violation of this rule are generally inadmissible in a criminal trial. *Loving v. State*, 647 N.E.2d 1123, 1125 (Ind. 1995) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

To determine if someone is in custody for purposes of *Miranda*, we apply an objective test: whether a reasonable person under the same circumstances would believe himself to be under arrest or not free to resist the entreaties of the police. *McIntosh*, 829

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officer to leave, right[?]," a detective responded "He was not." (Tr. at 155.) The detectives were not able to secure a search warrant, and they returned to Alvey-Williams's apartment and continued to question him.

The State does not acknowledge in its brief that the uniformed officer would have remained in the apartment even if Alvey-Williams left.

N.E.2d at 537. If a person is unrestrained and has no reason to believe he cannot leave, he is not in custody. *Id*. To be in custody, the defendant need not be placed under formal arrest. *Morris v. State*, 871 N.E.2d 1011, 1016 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 218 (Ind. 2007). A custody determination involves an examination of all the objective circumstances surrounding the interrogation. *Id*. An officer's knowledge and beliefs are relevant to the question of custody only if they are conveyed − through words or actions − to the person being questioned. *Id*. The test is how a reasonable person in the suspect's shoes would understand the situation. *Id*. Also relevant is the length of the detention and questioning. *Id*.

Alvey-Williams was in custody and therefore should have been advised of his *Miranda* rights before being subjected to interrogation by law enforcement officers. Alvey-Williams was questioned from shortly after midnight until sometime after 4:00 a.m. He was told he was free to leave, but "the only option given to [Alvey-Williams] by the police was to leave his own home in the middle of the night . . . to flee his home would mean to leave the police, who had already stated they were there investigating a crime in which he was a suspect, inside his home unsupervised." (Appellant's Br. at 18-19.) We decline the State's invitation to hold a person is free to leave, and therefore not under arrest and not entitled to an advisement of his *Miranda* rights, when that person's only option is to abandon his home in the middle of the night to the police officers who are investigating him.

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[6] As we find the statements should have been suppressed on that basis, we do not address Alvey-Williams's alternative argument police continued to question him after he asked for counsel.

While it was error to deny Alvey-Williams's motion to suppress his statements, the error was harmless. *Miranda* violations are subject to harmless error analysis. *Rawley v. State*, 724 N.E.2d 1087, 1090 (Ind. 2000). For error to be harmless, the conviction must be supported by substantial independent evidence of guilt that satisfies us there is no substantial likelihood the challenged evidence contributed to the conviction. We must find that the error did not contribute to the verdict − that is, it was unimportant in relation to everything else the jury considered on the issue in question. *Morales v. State*, 749 N.E.2d 1260, 1267 (Ind. Ct. App. 2001).

Even though Alvey-Williams was in custody and his statements should have been suppressed, the admission of the evidence was harmless. The record includes testimony from the victim, the victim's parents, and Alvey-Williams, and a videotape in which J.F. describes what happened. This evidence was admitted without objection and is not challenged on appeal. J.F. testified Alvey-Williams touched his penis while J.F. was standing up on Alvey-Williams's bed and Alvey-Williams sucked on his penis. J.F. testified Alvey-Williams put his finger in J.F.'s anus while J.F. was in the bathtub. J.F.'s parents testified J.F. told them Alvey-Williams had put his mouth on J.F.'s penis and that is why they called the police.

Alvey-Williams testified that when he lifted J.F. in the air from the bathtub, he fell because J.F. was rocking back and forth, then the tip of J.F.'s penis landed on the side of his cheek and lips. Alvey-Williams clarified that his penis "wasn't in my mouth like I was saying, it's like in the lips of my mouth . . . ." (Tr. at 307.) Alvey-Williams insisted he did not put his finger in J.F.'s anus, but that "I was always told to grease inbetween,

[sic] you know, the . . . what do ya want to call 'em, the cheeks of the butt part, so I just put a little lotion there . . . ." (*Id.* at 297-298.) Even though his statements to the police were obtained in violation of *Miranda*, the error was harmless as the statements were cumulative of other evidence properly before the jury.

3. Double Jeopardy

While the trial court properly denied Alvey-Williams's motion to dismiss the charges and the error in admitting his statements into evidence was harmless, we find *sua sponte* Alvey-Williams's convictions of child molesting as a Class C felony and incest violate the constitutional prohibition against double jeopardy because both are based on the same conduct alleged in Counts I and II.[7]

In accordance with the actual evidence test announced in *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), we examine the evidence presented at trial to determine whether each challenged offense was established by separate and distinct facts. If there is a reasonable possibility the evidentiary facts used by the fact-finder to establish the essential elements of one offense might also have been used to establish the essential elements of a second offense, a double jeopardy violation under Article I, Section 14 of the Indiana Constitution occurs. *Id.*

The State charged Alvey-Williams with two counts of child molesting as class A felonies, incest as a class B felony, and child molesting as a class C felony. The State alleged in counts I, II, and III that Alvey-Williams "perform[ed] deviate sexual conduct

[7] Alvey-Williams did raise a double jeopardy argument, but it was premised on the vagueness of the charging information, not that the same facts were used to support multiple convictions.

with . . . J.F. . . . on or about March 2007." (App. at 17-18.) Count IV alleged that Alvey-Williams "perform[ed] fondling or touching . . . with J.F." *Id.*

The evidence presented at trial established that Alvey-Williams touched J.F.'s "peeper" with his hand and placed his mouth on it, (Tr. at 13), and on another occasion, Alvey-Williams inserted his finger into J.F.'s anus while J.F. was in the bathtub. This evidence established Alvey-Williams committed only two acts of deviate sexual conduct, a class A felony, as charged in Counts I and II. Therefore, Alvey-Williams's conviction for Count IV of "fondling or touching" J.F. must be vacated, as there was no evidence presented of illegal fondling or touching other than that alleged in the first two counts. *See Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002) (if the State fails to establish by separate and distinct facts the commission of two separate offenses, a defendant may not be punished twice).

Count III alleged incest. Ind. Code § 35-46-1-3, provides

> A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest, a Class C felony. However, the offense is a Class B felony if the other person is less than sixteen (16) years of age.

Counts I and II were brought pursuant to Ind. Code § 35-42-4-3(a)(1), which states that "A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if: (1) it is committed by a person at least twenty-one (21) years of age. . . ."

The evidence presented at trial demonstrates the deviate sexual conduct offenses and the incest offense were not established by separate and distinct facts. Both the deviate sexual conduct convictions and the incest conviction were supported by the fact that Alvey-Williams performed deviate sexual conduct with J.F. There is, therefore, more than "a reasonable possibility" that the evidentiary facts presented by the State to prove the deviate sexual conduct offenses were also used to prove incest; exactly the same facts were used against Alvey-Williams on both charges. As a result, the convictions of both sexual deviate conduct offenses and the incest charges impermissibly punished Alvey-Williams twice for the same offense. *See Schaefer v. State*, 750 N.E.2d 787, 795 (Ind. Ct. App. 2001) (convictions of both child molesting and incest could not stand because it was "extremely likely" that the jury used the same evidentiary facts to establish the essential elements of both offenses). Alvey-Williams's conviction of incest must be vacated. *See Richardson*, 717 N.E.2d at 55 (when both convictions cannot stand, the conviction with the less severe penal consequences should be vacated). We accordingly vacate Alvey-Williams's convictions of Counts III and IV.

We affirm the convictions on Counts I and II but vacate the convictions on Counts III and IV.

Affirmed in part, reversed in part, and remanded.

BAKER, C.J., concurs.

BARNES, J., concurs in result.