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IN THE
COURT OF APPEALS OF INDIANA

Gabriel Cabrera,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 18, 2021

Court of Appeals Case No. 21A-CR-446

Appeal from the Marion Superior Court

The Honorable Sheila A. Carlisle, Judge

The Honorable Stanley E. Kroh, Magistrate

Trial Court Cause No. 49D29-2001-F1-3192

Mathias, Judge.

[1] Gabriel Cabrera was convicted of child molestation and sexual misconduct with a minor after a bench trial held by the Marion Superior Court. Cabrera now appeals, arguing that he was denied a fair trial. We disagree and affirm.

Facts and Procedural History

[2] In 2013, thirty-five-year-old Cabrera married B.L.'s mother and became nine-year-old B.L.'s stepfather. Two years later, B.L's mother took a trip to Mexico and left B.L in Cabrera's care. While B.L.'s mother was out of town, Cabrera had sexual intercourse with B.L., who was then just eleven years old and in the sixth grade. Cabrera continued having sexual intercourse with B.L. as many as three times each week until 2019, just before B.L. turned sixteen.

[3] On January 23, 2020, the State charged Cabrera with eight counts: four counts of Level 1 felony child molestation; two counts of Level 4 felony child molestation; and two counts of Level 4 felony sexual misconduct with a minor. Appellant's Conf. App. pp. 31–32. On March 12, 2021, following a bench trial, the trial court found Cabrera guilty of the four counts of Level 1 felony child molestation and the two counts of Level four 4 felony sexual misconduct with a minor. The same day, the trial court sentenced Cabrera to thirty years in the Indiana Department of Correction with three years suspended to probation. *Id.* at 23.

[4] Cabrera now appeals.

Discussion and Decision

[5] Cabrera's sole claim on appeal is that he "was denied his right to a fair trial, and the ability to present a full defense" because "the charging information failed to state with sufficient particularity the facts that formed the basis of the criminal charges." Appellant's Br. at 7. Cabrera specifically asserts that he was

improperly made "to defend against action [that] occurred over the course of fifty (50) months." *Id*. at 8. We do not agree.

[6] A challenge to the sufficiency of a charging information must be raised in a pre-trial motion to dismiss. *Neff v. State*, 915 N.E.2d 1026, 1030–31 (Ind. Ct. App. 2009). Cabrera concedes that he did not file a motion to dismiss or otherwise raise any objection to the sufficiency of the charging information before or during his trial, and that he raises this challenge for the first time on appeal. He has therefore waived this claim. However, in an attempt to avoid waiver, Cabrera asserts that the trial court committed fundamental error by holding a trial. This argument is unavailing.

[7] The fundamental error exception to our waiver rule is extremely narrow and applies only when the error constitutes a blatant denial of basic due process principles and makes it impossible to receive a fair trial. *See Ryan v. State*, 9 N.E.3d 663, 667–68 (Ind. 2014); *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013). The exception is meant to permit correction of only the most egregious trial errors; it does not provide a second bite at the apple where defense counsel ignorantly, carelessly, or strategically failed to object. *Ryan*, 9 N.E.3d at 668 (citing *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012)).

[8] No fundamental error occurred here. The State's charging information alleged a limited time period for each of the eight charged counts, respectively, and none of those time periods spanned longer than one year. Specifically, the State alleged that the offenses charged in counts one, two, and three occurred "[o]n

or about or between August 1, 2015, and July 1, 2016"; that counts four and five occurred "[o]n or about or between August 1, 2016, and July 1, 2017"; that count six occurred "[o]n or about or between August 1, 2017, and November 20, 2017"; that count seven occurred "[o]n or about or between November 21, 2017, and July 1, 2018"; and that count eight occurred "[o]n or about or between May 1, 2019, and September 30, 2019." Appellant's Conf. App. pp. 31–32.

[9] Indiana Code section 35-34-1-2(a)(5) requires only that an information state the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense. *Neff*, 915 N.E.2d at 1031. The limitations period for both child molestation and sexual misconduct ends on "the date that the alleged victim of the offense reaches thirty-one (31) years of age." Ind. Code § 35-41-4-2(e). B.L. turned sixteen years old in December 2019, and the time periods alleged by the State only covered dates through September 2019. Thus, the charging information showed that each of the charged offenses was committed within the applicable limitations period.

[10] Moreover, it is well-established that where time is not of the essence of the offense "the State is not confined to proving the commission on the date alleged . . . but may prove the commission at any time within the statutory period of limitations." *Love v. State*, 761 N.E.2d 806, 809 (Ind. 2002). Time is generally not of the essence in the crimes of child molesting or sexual misconduct with a minor. Indeed, as is often true in such cases, "[i]t is difficult

for children to remember specific dates," and an abused child often "loses any frame of reference in which to compartmentalize the abuse into distinct and separate transactions." *Baker v. State*, 948 N.E.2d 1169, 1174 (Ind. 2011). So, in cases like the one before us, the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies. *Id.* And, even in those circumstances, the State need only allege the date of the offense "as definitely as can be done." Ind. Code. § 35-34-1-2(a)(6).

[11] The time frames alleged by the State here satisfy this requirement, as well. The respective date ranges covering each offense spanned no more than one year. Plus, as the State highlights, B.L.'s recall of each of Cabrera's offenses was relative to her grade in school. *See* Appellee's Br. at 13. The State crafted each time frame to correspond with B.L.'s progression through each grade in school, which is as definitely as the State could have framed them. Cabrera's repeated reference to a fifty-month time period is therefore inapt, and under these facts and circumstances the State's allegation of separate time frames spanning less than one year did not deprive him of a fair trial.

Conclusion

[12] For all of these reasons, Cabrera has failed to demonstrate that the trial court committed fundamental error.

[13] Affirmed.

Tavitas, J., and Weissmann, J., concur.