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IN THE
COURT OF APPEALS OF INDIANA

ARIN JEFFREY HOKEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 21A01-0410-CR-452
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FAYETTE CIRCUIT COURT
The Honorable Daniel Lee Pflum, Judge
Cause No. 21C01-0002-CF-27

October 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Arin Jeffrey Hokey appeals his convictions for Child Molesting, as a Class A felony, and Sexual Misconduct with a Minor, as a Class B felony. Hokey raises four issues for our review:

1. Whether Hokey's due process rights were violated by the lack of exact dates in the charging information.

2. Whether the trial court properly admitted evidence of Hokey's prior molestations of the same victim.

3. Whether Hokey received the effective assistance of trial counsel.

4. Whether Hokey's convictions are supported by sufficient evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

Hokey is the biological father of J.H., who was born in March of 1983. J.H. lived with Hokey and her mother, Joy. One day, when J.H. was between five and seven years old, J.H.'s mother left J.H. alone with Hokey. Hokey went into J.H.'s room, removed her clothes, "put his penis between [her] legs and . . . moved." Appellant's App. at 262. J.H. did not tell anyone about that incident until she was fifteen years old. Because so much time had passed, she stated that she did not know exactly how old she was when that incident took place. But she believed that other such incidents had occurred prior to that one because she remembered already being afraid of Hokey. J.H. further stated that Hokey told her that "that was the way he showed me he loved me," and that Hokey would bribe her with gifts. Id. at 263.

When J.H. was between eleven and thirteen years old, Hokey engaged in sexual

intercourse with her for the first time. At approximately the same age, Hokey forced J.H. to perform oral sex on him. Hokey would force J.H. under a table to perform oral sex so he could watch for unexpected visitors, or he would engage her in the laundry room, where Hokey could watch out a window during either intercourse or oral sex. Each time, Hokey would send any family members out of the house on errands or to play in the yard so that he and J.H. were alone inside. J.H. testified that all of those acts continued until she turned fifteen, in 1998.

In early 1998, J.H. attempted to hide from Hokey, but he found her and again engaged her in sexual intercourse. In May of that year, Hokey forced J.H. over a pool table in their home and, while he was behind her, he had vaginal intercourse with her. Hokey pulled out of her and ejaculated on the floor. On either that day or a few days thereafter, J.H. visited Ron Wilson in Fayette County's Division of Family and Children and explained her home environment. Wilson placed J.H. in foster care and referred the matter to law enforcement. J.H. lived with three families and in three facilities before being adopted at age seventeen. J.H. has since legally changed her name, but testified that she has attempted suicide twice, she is not comfortable around other people, she has depression, and her childhood is "all I ever think about." Id. at 278.

On February 1, 2000, the State charged Hokey with child molesting, as a Class A felony, for occurrences alleged "in or about the year 1994 when the child was 11 years of age." Appellant's Brief at 3. The State also charged Hokey with sexual misconduct with a minor, as a Class B felony, "alleged to have taken place on May 7, 1998," and child molesting, as a Class C felony, "alleged to have taken place in or about the year of 1990."

Id. Regarding the latter charge, the State alleged the felony "to have taken place in or about the year of 1990, when the child was 7 years of age." Id. On August 17, 2004, at the close of Hokey's trial, Hokey's attorney moved to dismiss the Class C felony charge alleging a violation of the applicable statute of limitations. The trial court granted Hokey's motion, and the jury convicted Hokey on the Class A and Class B felony counts. On October 1, the trial court entered judgment accordingly and imposed a fifty-year sentence for the Class A felony conviction and a consecutive twenty-year sentence for the Class B felony conviction. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Charging Information

Hokey contends that the trial court erred in denying his motion to dismiss with respect to the breadth of the charging information and that he therefore was denied due process. Prior to trial, Hokey filed a motion to dismiss, arguing that the charging information alleged two counts of child molesting[1] but that the factual basis for the charging information alleged the child molesting offenses were committed over a period of at least four years. Moreover, he alleged, the charging information did not identify a specific instance of child molesting. The trial court denied the motion, stating that J.H.'s young age at the time of the alleged abuses may have prevented her from recalling dates with specificity.

Indiana Code Section 35-34-1-2(a)(5) provides that a charging information must "[state] the date of the offense with sufficient particularity to show that the offense was

[1] As the trial court subsequently dismissed the third count, child molesting as a Class C felony, we discuss it only as it pertains to the factual background of this case.

committed within the period of limitations applicable to that offense[.]" Our supreme court has addressed the requirements of that provision in a case similar to the instant case. In Love v. State, 761 N.E.2d 806 (Ind. 2002), the charging information contained three separate counts that identified the dates of the respective child molestation offenses as occurring during time periods ranging from one to four months. Each count alleged one instance of child molesting by sexual intercourse, but the State presented evidence that the defendant molested the victim continually from April of 1997 to April of 1999. On appeal, the defendant argued that the charging information filed by the State alleged facts that were different from the evidence actually presented to the jury. In rejecting that argument, the supreme court discussed Indiana Code Section 35-34-1-2(a)(5) as follows:

> Indiana Code § 35-34-1-2(a)(5) requires 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." The State must also "[state] the time of the offense as definitely as can be done if time is of the essence of the offense." Where time is not of the essence of the offense, however, it is well established that "the State is not confined to proving the commission on the date alleged in the affidavit or indictment, but may prove the commission at any time within the statutory period of limitations." See Herman v. State, 247 Ind. 7, 17, 210 N.E.2d 249, 255 (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.").

Id. at 809 (citations omitted). The court went on to hold that time was not of the essence in cases involving child molesting, reasoning that the exact date of the offense "becomes important only in circumstances where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." Id. at 806.

Love is instructive here because it provides authority for the principle that time is

not of the essence in an information alleging child molesting unless the age of the victim serves to elevate the charged offense. That principle also was exemplified in Buzzard v. State, 712 N.E.2d 547 (Ind. Ct. App. 1999), trans. denied. There, as here, the defendant was alleged to have committed multiple acts of child molesting, and the charging information alleged that they occurred over a period of time. The defendant claimed that a lack of specificity in the charging information with respect to the time of the molestations hindered the presentation of his defense. This court reiterated that "the time of the offense is not of the essence in cases involving allegations of child molesting," and that "the exact date of the offense becomes important only in circumstances where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." Id. at 547, 551.

In the instant case, the charging information alleged that Hokey committed two acts of child molesting in 1990 and 1994. The trial court subsequently dismissed the 1990 charge based on the statute of limitations. Because the classification of the remaining charge of child molesting was not in question, the exact date of the offense was not important. Under those circumstances, the trial court did not err in denying Hokey's motion to dismiss, nor was Hokey denied due process.[2] See id.

[2] In Ross v. State, 172 Ind. App. 484, 488, 360 N.E.2d 1015, 1018 (1977), we addressed the issue of the difficulty of preparing a defense when time is not of the essence, there on a charge of delivery of marijuana. That language is informative:

> We are satisfied that the offense charged in the information is stated with such certainty that the accused, the court, and the jury could determine the crime for which conviction was sought. Blackburn v. State (1973), 260 Ind. 5, 291 N.E.2d 686.
>
> If Ross had made multiple deliveries of marijuana in Sullivan County on May 24, 1975, we can appreciate that he might have some difficulty determining the specific crime for which conviction was being sought and some difficulty preparing an intelligent defense.

Issue Two: Evidence of Hokey's Prior Molestations of J.H.

On July 20, 2004, Hokey filed a motion in limine to bar the introduction of evidence "concerning other misconduct" pursuant to Indiana Evidence Rule 404(b). Appellant's App. at 133. The motion made no reference to specific evidence of other misconduct. The trial court granted Hokey's motion. At trial, during the State's examination of J.H., the State inquired about specific acts of sexual conduct Hokey committed against her that had not been specifically charged in the information. Hokey's trial attorney objected on multiple occasions, citing the motion in limine. The trial court overruled the objections, noting that it construed the motion as barring only evidence that Hokey had molested other children. Hokey now appeals the trial court's rulings on those objections.

Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rationale underlying Rule 404(b) is that the jury is precluded from making the "forbidden inference" that the defendant has a criminal propensity and therefore committed the charged conduct. Gillespie v. State, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005). Rule 404(b) does not bar, however, evidence of uncharged criminal acts that are "intrinsic" to the charged offense. Lee v. State, 689 N.E.2d 435, 439 (Ind.

> That possibility exists with any offense which is subject to repetition, and, as we see it, only by making time of the essence for such offenses and requiring that the time of the offense be specified in an information will an accused be positively apprised of the specific offense being charged. Despite that reasoning, we will not impair the efficacy of the information simply because an accused has or could have committed repeated offenses on the date alleged in the information. The information in the case at bar complies with [the Indiana Code]. We find no error in the overruling of the motion to dismiss.

Id., 172 Ind. App. at 488, 360 N.E.2d at 1018.

1997). When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed "extrinsic." Id. (quoting United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1995)).

Here, Hokey objects to the admission of the following testimony of J.H., arguing that their admission was "either in violation of the . . . motion in limine or presentation of evidence in the First Count[, that is, child molesting as a Class A felony,] of the Information": (1) that Hokey had sex with her on the floor of the basement on an occasion not identified in the charging information; (2) that J.H. told her Uncle that nothing had happened with Hokey; (3) that J.H. attempted to hide from Hokey, but that he found her and forced her to have intercourse; (4) that Hokey would have sex with J.H. only when her mother was gone and Hokey sent her younger brother outside to play; (5) that Hokey would ejaculate on the floor; (6) that Hokey forced J.H. to perform oral sex on him while she was under a table; (7) that J.H.'s mother once walked in on her and Hokey during oral sex, and that Hokey told J.H.'s mother that J.H. was just tickling him; and (8) that Hokey engaged J.H. in sexual intercourse in their laundry room. Appellant's Brief at 17-18. We cannot agree.

The State charged Hokey with child molesting and sexual misconduct with a minor. The first count, child molesting, occurs as a Class A felony when "a person [at least twenty-one years of age] who, with a child under fourteen years of age, performs or submits to sexual intercourse or deviate sexual conduct." Ind. Code § 35-42-4-3(a). "Sexual misconduct with a minor" as a Class B felony occurs when a "person at least [twenty-one] years of age who, with a child at least fourteen years of age but less than

sixteen years of age, performs or submits to sexual intercourse or deviate sexual conduct." Ind. Code § 35-42-4-9(a). The State based its charging information on incidents alleged to have taken place "in or about" 1994, when J.H. was eleven years old, and on an incident alleged to have occurred on May 7, 1998, when J.H. was fifteen. Appellant's Brief at 3.

As indicated above, time is not of the essence in sex crimes against children. Warren v. State, 701 N.E.2d 902, 907 (Ind. Ct. App. 1998). "Where time is not of the essence . . . it is well established that 'the State is not confined to proving the commission on the date alleged in the affidavit or indictment, but may prove the commission at any time within the statutory period of limitations.'" Love, 761 N.E.2d at 809 (quoting Herman v. State, 247 Ind. 7, 17, 210 N.E.2d 249, 255 (1965)). Each of the facts Hokey now argues against occurred within the limitations period of both counts and before the filing of the indictment. Hence, the State was "not confined to proving the commission on the date alleged" and was permitted to use those facts to "prove the commission at any time." Id. That said, our review of the record indicates that only facts (7) and (8) even could pertain to the first count, as J.H. was at least fourteen years of age for the remaining facts.[3] Hokey does not challenge the admissibility of any facts under the second count. Hence, we do not address facts (1) through (6).

Facts (7) and (8) were intrinsic to the charge of child molesting as a Class A

[3] J.H. testified that facts (1) through (3) each occurred "[m]aybe a few months before" the May, 1998, incident. Appellant's App. at 270. Her testimony regarding facts (4) and (5) was specifically within the context of the May, 1998, incident, and she testified that she was fifteen when fact (6) occurred. Facts (7) and (8), on the other hand, both occurred at her home on Iowa Avenue (also referred to as Iowa Street in the record). J.H. lived on Iowa Avenue immediately before moving to Walnut Street, and she testified that she was fourteen when she lived on Walnut Street. J.H. explicitly stated that she was "no younger than eleven and no older than thirteen" regarding fact (8). Id. at 276.

felony. We addressed a similar issue in Garner v. State, 754 N.E.2d 984, 993 (Ind. Ct. App. 2001), summarily aff'd on this issue, 777 N.E.2d 721, 723 n.4 (Ind. 2002), in which the defendant argued that the admission of evidence of multiple acts of child molesting, the crime with which the State charged the defendant, violated Rule 404(b). In disagreeing, we stated:

> Each of the acts to which [the victim] testified is direct evidence that [the defendant] committed the charged offenses. Thus, it was not evidence of an unrelated bad act occurring at another time offered only to create the inference that [the defendant] is a man of bad character. Instead, this evidence was direct evidence that [the defendant] molested [the victim] during the charged time period. In terms of the language of Rule 404(b), it is not evidence of "other" wrongs, but of the charged offense.

Id. at 993. Here, facts (7) and (8) were offered as direct evidence that Hokey committed child molestation on J.H. Thus, those facts were intrinsic to the charge of child molesting and therefore outside of Rule 404(b). See Lee, 689 N.E.2d at 439.

Insofar as Hokey argues that facts admitted on the sexual misconduct count were used improperly to support the child molestation count, Hokey has waived that argument. Hokey's trial attorney filed a pretrial motion for severance of the counts, which the trial court denied. The record does not reflect that Hokey renewed his motion for severance at the close of the evidence at trial pursuant to Indiana Code Section 35-34-1-12(b). Thus, Hokey has not preserved that issue for appeal. See Barajas v. State, 627 N.E.2d 437, 440 (Ind. 1994) (DeBruler, J., concurring).

Issue Three: Effective Assistance of Trial Counsel

Hokey contends that he was denied the effective assistance of trial counsel. There is a strong presumption that counsel rendered effective assistance and made all significant

decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption. Gibson v. State, 709 N.E.2d 11, 13 (Ind. Ct. App. 1999), trans. denied. To make a successful ineffective assistance claim, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness as determined by prevailing professional norms; and (2) the lack of reasonable representation prejudiced him. Mays v. State, 719 N.E.2d 1263, 1265 (Ind. Ct. App. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. Even if a defendant establishes that his attorney's acts or omissions were outside the wide range of competent professional assistance, he must also establish that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. See Steele v. State, 536 N.E.2d 292, 293 (Ind. 1989). We need not evaluate counsel's performance if the defendant suffered no prejudice from that performance. See Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (quoting Strickland, 466 U.S. at 697)).

Here, Hokey first argues that his counsel's failure to move the trial court to dismiss the Class C child molesting count under the statute of limitations until after the presentation of evidence prejudicially allowed the introduction of inadmissible evidence. We cannot agree. Our review of the record indicates that J.H. testified to only one occasion supportive of the Class C child molesting count. In that testimony, J.H. described a time when she was between five and seven years old and Hokey went into her room, removed her clothes, "put his penis between [her] legs and . . . moved." Appellant's App. at 262. Given the overwhelming weight of evidence, however, there is

no reasonable probability that the jury's verdict would have been different without that particular piece of J.H.'s testimony. Thus, any error by the trial counsel on the delay in dismissing the Class C child molesting charge did not prejudice Hokey.

Hokey also argues that his trial counsel was ineffective for failing to object when Hokey's former wife, Joy, testified that he threatened her and that he physically abused her. However, "[t]actical choices by trial counsel do not establish ineffective assistance of counsel even though such choices may be subject to criticism or the choice ultimately proves detrimental to the defendant." Garrett v. State, 602 N.E.2d 139, 142 (Ind. 1992). Rather, "counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." Conner, 711 N.E.2d 1238, 1248 (Ind. 1999). Here, an examination of the record reveals that Hokey's trial counsel made the strategic decision not to object to Joy's testimony in an attempt to impeach Joy. On cross-examination, Hokey's trial counsel participated in the following exchange with Joy:

> Q: Do you remember coming into my office and talking to me last week?
> A: Yes I do.
> Q: Do you remember telling me that you did not see any kind of that activity . . . any kind of sexual activity?
> A: Yes, I did say that because I was scared. I was threatened.
> Q: Did I threaten you?
> A: I was scared of him.
> Q: Was he in the office at that time?
> A: No he wasn't.
> Q: Okay. Do you remember telling me that had you known of that activity or anyone told you, you would have reported it? Joy, that's what you told me. Right?
> A: Yes. I said that but the reason is because I told you I'm scared.
> Q: You told me you hated . . .
> A: I'm very scared.
> Q: You told me that you hated Arin Hokey but that you didn't see anything and nobody told you anything. Is that what you told me

last week?
A: Yeah, I did say that.
Q: Okay, so that was a lie last week?
A: But I'm telling you the truth now.

Appellant's App. at 344-45. This exchange makes clear trial counsel's impeachment strategy, which, potentially, would have been eviscerated by an objection to Joy's testimony on direct. As such, Hokey was not denied the effective assistance of trial counsel.

Issue Four: Sufficiency of the Evidence

Finally, Hokey contends that the State did not present sufficient evidence to support his convictions. 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). We look only to the probative evidence supporting the verdict 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.

As stated above, child molesting as a Class A felony and sexual misconduct with a minor as a Class B felony require the State to prove beyond a reasonable doubt that Hokey was at least twenty-one years of age. Hokey's sole challenge here is that the State failed to meet that burden. At trial, Joy and Hokey's brother, Brian, each testified as to Hokey's age.[4] Hokey now argues that such testimony was hearsay, but Hokey has waived this argument by failing to object to the alleged hearsay at trial. See, e.g., Crafton

[4] In his brief, Hokey only raises this issue with respect to Joy's testimony. For thoroughness, we apply it to the testimony of both Joy and Brian.

v. State, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005). We conclude that the evidence is sufficient to support Hokey's convictions.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.