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IN THE
COURT OF APPEALS OF INDIANA

CHARLES A. HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0708-CR-478
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0603-FB-41137

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Charles A. Harris appeals his conviction of attempted criminal deviate conduct, a Class B felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

Harris is a deaf man from Chicago. The weekend of March 4, 2006, he was in Indianapolis for a basketball tournament for deaf people. After the tournament, he went to a club for deaf people. R.J., whom he had known for several years, was also there. After the club closed, Harris asked R.J. to give him a ride to his hotel, and she agreed. Harris was drunk and had difficulty giving R.J. directions to the hotel. He asked her to pull over several times so he could send text messages asking for directions. The third time they pulled over, Harris forced himself on R.J.

Harris was charged with rape, a Class B felony,[2] and criminal deviate conduct, a Class B felony. The criminal deviate conduct charge alleged Harris committed the offense by placing his mouth on R.J.'s vagina. On the day of the trial, the State moved to amend the criminal deviate conduct charge to attempted criminal deviate conduct. The amended charge alleged Harris took a substantial step toward the commission of criminal deviate conduct "by leaning down toward [R.J.'s] vagina with his mouth." (Appellant's App. at 71.) The trial court permitted the amendment.

R.J. described the encounter as follows:

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[1] Ind. Code § 35-41-5-1 (attempt); § 35-42-4-2 (criminal deviate conduct).

[2] I.C. § 35-42-4-1.

> He just got on top of me, and you've got to understand now, before this he was touching me, and I was, like, no, no, I don't want to. I'm trying to push him away, and he's on top of me. I said, no, I don't want to. And, of course, then pulled my pants off, and he tried to smell me, and I'm, like, no, I don't want to, and he kept going down on me . . . . [W]e struggled for two hours . . . . [H]e kept trying to grab my hands, and I was, stop. All I could do was just move my legs, and he . . . got his penis into me . . . .

(Tr. at 96-97.)

Harris admitted he had intercourse with R.J., but described it as a consensual act:

> I was licking her breasts and I was, had my finger in her, and then I took my head and moved it down and she pushed my head and said, no. I said, I won't eat your pussy, I just want to smell it. So she didn't say anything. Then I told her that you smell very good.
>
> * * * * *
>
> I kept my finger in her and I was still licking her, and while she was enjoying it, you know, and then she wanted, I was taking my pants off.
>
> * * * * *
>
> Okay, then I planned to go into her, but she held my dick and she shook her head no. . . . So I just kept licking her. . . . Then later when her hands, when she let go, then I finally went in.

(*Id*. at 285-86.)

A jury found Harris guilty of attempted criminal deviate conduct, but not guilty of rape.

DISCUSSION AND DECISION

1. Sufficiency of the Evidence

In reviewing the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Dinger v. State*, 540 N.E.2d 39, 39 (Ind. 1999). We consider the evidence most favorable to the verdict, along with all reasonable inferences, to determine whether a reasonable trier of fact could have found the defendant guilty

beyond a reasonable doubt. *Id*. at 39-40. The testimony of a single witness can sustain a conviction. *Hobbs v. State*, 548 N.E.2d 164, 168 (Ind. 1990).

Harris argues the evidence was insufficient to convict him of attempted criminal deviate conduct because "[a]ll of the evidence, both from the victim and the defendant, provided that Harris leaned over toward [R.J.'s] vagina 'to smell it.'" (Appellant's Br. at 9.) This argument mischaracterizes R.J.'s testimony. She did testify Harris tried to smell her, but she also testified "he kept going down on me." (Tr. at 96.) She did not testify that these repeated movements of his head toward her vagina were all for the purpose of smelling her. Instead, she described his conduct as "going down on" her, a phrase that is well-understood by laypeople.[3]

Harris directs us to his own testimony that he told R.J. he wanted only to smell her. It is the province of the jury to weigh credibility, and it was not required to believe Harris' explanation of his conduct. R.J.'s testimony, which the jury presumably credited, established the elements of attempted criminal deviate conduct, and the evidence was sufficient to convict Harris of that offense.[4]

2. Amendment of Charges

Harris also argues the trial court erred by permitting the State to amend the charges on the day of his trial.

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[3] Harris suggests this phrase might have an alternative, non-sexual meaning, but does not offer any such definition. Harris acknowledges "some sexual slang terms have acquired such common acceptance as to be susceptible of only one definition." (Appellant's Br. at 10.)

[4] In a footnote, Harris suggests the jury returned inconsistent verdicts, but he does not develop that argument.

> [T]he 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. . . . [A]n 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.

Fajardo v. State, 859 N.E.2d 1201, 1207 (Ind. 2007).[5] If the amendment is one of form, it is permissible if it does not prejudice the defendant's substantial rights. *State v. O'Grady*, 876 N.E.2d 763, 766 (Ind. Ct. App. 2007).

Laney v. State, 868 N.E.2d 561 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 209 (Ind. 2007), is instructive. Laney was babysitting twelve-year-old K.F. Harley Plummer called, and when Laney finished speaking to him, Laney told K.F. Plummer was coming over and they were going to have a threesome. Laney put make-up on K.F. while they waited for Plummer to arrive. Plummer had sexual intercourse with K.F., but Laney did not participate in any sex act with K.F.

Laney was charged with child molesting. The charge initially alleged she had personally committed child molesting, but the State amended the charge to allege she was Plummer's accomplice. We concluded the amendment was one of form and not of substance because the amendment "was not necessary to make a valid charge." *Id*. at 565. We reasoned:

> This is because it is axiomatic in Indiana that one may be charged as a principal yet convicted on proof that he or she aided another in the commission of a crime. Even where a defendant is charged as a principal,

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[5] *Fajardo* interpreted an earlier version of Ind. Code § 35-34-1-5 (governing amendment of charges) that was in effect at the time of Harris' trial.

> the jury may be instructed on accessory liability where the evidence presented at trial supports such an instruction.

Id. at 565-66.

Likewise, a defendant may be charged with a greater offense, but if the evidence supports a lesser offense, the State may have the jury instructed on the lesser-included offense. *See Garrett v. State*, 756 N.E.2d 523 (Ind. Ct. App. 2001) (in murder case, it was appropriate to give State's tendered instruction on the lesser-included offense of reckless homicide where the evidence could support the instruction), *trans. denied* 761 N.E.2d 424 (Ind. 2001). Attempted sexual deviate conduct is a lesser-included offense of sexual deviate conduct. *See* Ind. Code § 35-41-1-16 (defining "included offense"). The evidence supported an instruction on attempted deviate conduct, and such instruction could have been given even if the State had not amended the charge.[6]

Laney lost a defense in that she could no longer argue she did not personally commit child molesting, but that did not matter under *Fajardo* because the State was never precluded from arguing she acted as an accomplice. Here, Gunnell may have lost his defense that there was no contact between his mouth and R.J.'s vagina,[7] but there was nothing to prevent the State from seeking a conviction on a lesser-included offense if that

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[6] Harris argues the instruction could not have been given because all the evidence indicated he was trying only to smell R.J. As explained above, this is a mischaracterization of R.J.'s testimony.

[7] Harris argued to the trial court and to this court that his original defense was "it didn't happen." (Tr. at 60); (Appellant's Br. at 15). We assume for the sake of argument that he means contact between his mouth and R.J.'s vagina did not happen. We note, however, that if this vague statement refers to his claim he was only smelling her, that defense is available under either charge.

is what the evidence supported. As in *Laney*, the amendment represents a shift in the State's theory of the case, but not a substantive change necessary to make a valid charge.

Furthermore, we have found a defendant's substantial rights are not prejudiced by an amendment from a greater offense to a lesser-included offense. *O'Grady*, 876 N.E.2d 763. O'Grady was charged with battery as a Class A misdemeanor. The charge alleged O'Grady caused physical pain. However, at trial, the victim testified she had not suffered physical pain. At the conclusion of the State's case-in-chief, O'Grady moved for a directed verdict based on the lack of evidence of physical pain. The State moved to conform the charge to the evidence by amending the charge to the lesser-included offense of Class B misdemeanor battery, which does not require proof of physical pain.

We held the amendment was one of form and did not prejudice O'Grady's substantial rights, noting "the original information already encompasse[d] charges of both Class A and Class B misdemeanor battery." *Id*. at 767. O'Grady had been "given sufficient notice of the inherently-included lesser charge and . . . has had an opportunity to be heard regarding that charge." *Id*. As in *O'Grady*, Harris' original charge encompassed the amended charge, and he thereby received notice of the lesser offense. Therefore, we conclude the amendment was one of form and Harris' substantial rights were not prejudiced.

Affirmed.

RILEY, J., and KIRSCH, J., concur.