

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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Josue Lozano-Capistran,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 13, 2024

Court of Appeals Case No.  
23A-CR-1630

Appeal from the Vanderburgh  
Superior Court

The Honorable Robert J. Pigman,  
Judge

Trial Court Cause No.  
82D03-2111-F6-6457

**Memorandum Decision by Judge Riley.**  
Judges Foley and Felix concur.

**Riley, Judge.**

## **STATEMENT OF THE CASE**

[1] Appellant-Defendant, Josue Lozano-Capistran (Lozano-Capistran), appeals his conviction for voyeurism, a Level 6 felony, Ind. Code § 35-45-4-5(b)(2).

[2] We affirm.

## **ISSUE**

[3] Lozano-Capistran presents this court with one issue on appeal, which we restate as: Whether witness testimony referring to a ‘victim’ invaded the jury’s constitutional right to determine the law and the facts.

## **FACTS AND PROCEDURAL HISTORY**

[4] On November 26, 2021, Black Friday, K.G. went shopping with her family at Forever 21 in Vanderburgh County, Indiana. Wanting to try on some clothes, K.G. made her way to the dressing rooms. Forever 21 has eighteen dressing rooms which are not separated by gender. Each room is longer than it is wide with a floor length mirror hung on the back wall. The dividers between the separate unisex dressing rooms were high, beginning almost at K.G.’s knee and leaving a “large gap” between the privacy divider and the floor. (Transcript Vol. II, pp. 177-78). As she was undressing, K.G. noticed a phone on the ground in the dressing room next to hers, propped up on a boot and angled in such a way that its camera was facing her mirror. K.G. knew the phone was turned on because the phone’s screen emitted a glow onto the boot. K.G. became scared and “threw [her]self up against the side because [she] had underwear on . . . and wanted him to see as little as possible.” (Tr. Vol. II, p.

181). After getting dressed quickly, K.G. left the dressing room and informed a store employee. While she was speaking with the employee, K.G. heard the occupant of the dressing room say, “Shoot.” (Tr. Vol. II, p. 182). The store manager was informed, and she knocked on the fitting room door. The occupant, who was later identified as Lozano-Capistran, exited with two pairs of jeans, explaining that he needed a different size. Lozano-Capistran, who was wearing the boots K.G. had noticed, then immediately left the store. The store’s surveillance system showed Lozano-Capistran entering the fitting room at 11:34 a.m., K.G. entering her fitting room at 12:12 p.m. and exiting at 12:22 p.m., and Lozano-Capistran exiting his fitting room at 12:24 p.m.

[5] On November 30, 2021, the State filed an Information, charging Lozano-Capistran with Level 6 felony voyeurism. On May 24, 2023, a jury trial was conducted. During her testimony, the store manager referred to K.G. as ‘the victim,’ to which Lozano-Capistran objected as “a fact not in evidence.” (Tr. Vol. II, p. 159). The trial court overruled the objection. During the testimony of the investigating officer, K.G. was twice referred to as ‘the victim.’ Prior to handing the case to the jury, the trial court instructed the jury that it had “the right to determine both the law and the facts,” and that it could determine the credibility of each witness. (Tr. Vol. III, p. 32). At the close of the evidence, the jury returned a guilty verdict. On June 16, 2023, during the sentencing hearing, the trial court sentenced Lozano-Capistran to two years in the Department of Correction.

[6] Lozano-Capistran now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

- [7] Lozano-Capistran contends that the trial court abused its discretion when it permitted K.G. to be characterized as ‘the victim’ over his objection during witness testimony. He maintains that because it was the jury’s province to identify the victim, this characterization of K.G. infringed upon the jury’s constitutional authority to decide the law and the facts. *See* Ind. Const. Article 1, § 19.
- [8] The trial court has wide discretion in determining the manner in which evidence will be presented at trial. *Stowers v. State*, 657 N.E.2d 194, 198 (Ind. Ct. App. 1995), *trans. denied*. In order to obtain a reversal upon a decision regarding the presentation of evidence, a defendant must show not only that the trial court abused its discretion, but also that he was prejudiced by an abuse of that discretion. *Id.* at 199.
- [9] Although K.G. was described as ‘the victim’ during the testimony of two State witnesses, our supreme court has previously noted that the word “victim” is not a legal term of art because it can describe anyone who has experienced “an untoward event.” *Agee v. State*, 544 N.E.2d 157, 159 (Ind. 1989). “It is common to speak of ‘victims of circumstance’ or the ‘victim’ of a disease, or the ‘victim’ of any of the myriad of mishaps that might befall a human being.” *Id.*
- [10] In examining the record in this case, it cannot be said that the use of the word “victim” was done vindictively or in a way particularly calculated to prejudice the jury against Lozano-Capistran; rather, it was only an inadvertent manner of

speaking to identify a person who had experienced an unfortunate and untoward event in a public dressing room. At no point did the testimony reflect that the respective roles of victim and perpetrator were set and the jury's input was no longer required. *See id.* (State's reference to the decedent as "the victim" was not prejudicial because it was inadvertent and unlikely to affect the jury's perception of the defendant). Even though K.G. was depicted as a victim of a perceived voyeuristic situation, the State still carried the burden of establishing that Lozano-Capistran "knowingly or intentionally peep[ed] into an area where an occupant of the area reasonably can be expected to disrobe." *See* I.C. § 35-45-4-5(b)(2). Moreover, because the jury was instructed that it had "the right to determine both the law and the facts," and jurors are presumed to follow the trial court's instructions, we reject Lozano-Capistran's contention that K.G.'s characterization infringed upon the jury's constitutional authority. *Ward v. State*, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019).<sup>1</sup>

## CONCLUSION

[11] Based on the foregoing, we hold that witness testimony referring to K.G. as the 'victim' did not invade the jury's province to determine the law and the facts.

[12] Affirmed.

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<sup>1</sup> In his reply brief, Lozano-Capistran contends that the depiction of K.G. as the victim violated Indiana Evidence Rule 704. Because it is the first time Lozano-Capistran raises this argument, it is waived for our review. *Dunn v. State*, 202 N.E.3d 1158, 1165 n.3 (Ind. Ct. App. 2023) ("An argument raised for the first time in a reply brief is waived").

[13] Foley, J. and Felix, J. concur