

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Terry P. Bever,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 15 2022

Court of Appeals Case No.
22A-CR-265

Appeal from the
Cass Superior Court

The Honorable
James K. Muehlhausen, Judge

Trial Court Cause No.
09D01-2012-F6-401

Molter, Judge.

[1] A jury convicted Terry P. Bever of Level 6 felony intimidation after the trial court, without objection, instructed that a conviction required proof beyond a

reasonable doubt that Bever communicated a threat to commit a forcible felony while intending to place the victim in fear that he would carry out the threat. Bever's threat was to tell a correctional officer: "I'll bash your face in and kill you." Tr. at 85. Bever acknowledges the instruction tracked the statutory elements perfectly, but he contends the speech protections in the federal and state constitutions required the court to add an element, which is that the threat was likely to cause a reasonable person to fear for their safety. He also argues it makes no difference that he agreed to the court's instruction because the omission of the additional element he proposes was either a fundamental error or a structural error.

- [2] We do not decide whether it is fundamental or structural error to omit an element of the crime from a jury instruction because there was no such omission here. All agree the trial court instructed the jury on every element in the statute. Whatever force Bever's argument for an additional element might have in a case where the intimidation charge is based on speech that includes constitutionally-protected speech, that argument fails here because Bever does not argue that his conviction was based on constitutionally-protected speech. Finding no error in the trial court's instruction, we affirm.

Facts and Procedural History

- [3] In November 2020, while a resident at Cass Pulaski Community Corrections, Bever attacked Linda Sweet, a former correctional officer. That began when Sweet approached Bever in his dormitory to discuss his destruction of the facility's Christmas tree, and he greeted her with profanities. Sweet continued

to approach Bever to tell him that he could not “destroy company property.”
Id. at 83–84, 98–99.

[4] Bever then splashed water in Sweet’s face and told her that he would throw a shower caddy at her if she did not leave. Undeterred, Sweet remained in Bever’s dormitory and tried to reach for the shower caddy, which was full of water, and asked Bever to stop acting out. However, Bever tipped the shower caddy over Sweet’s head, pouring water onto her, and then threw the shower caddy at her, hitting her in the face and chest. He then approached Sweet while gripping a combination lock and told her that he would “bash” her face in and kill her if she did not leave his dormitory. *Id.* at 85–86.

[5] The State charged Bever with battery against a public safety official, a Level 6 felony, intimidation, a Level 6 felony, and disorderly conduct, a Class B misdemeanor. It also alleged that Bever was a habitual offender.

[6] At Bever’s September 2021 jury trial, and as relevant here, the trial court instructed the jury on intimidation as follows:

The crime of . . . intimidation is defined by law as follows: A person who commits a threat to another person with the intent that the other person be placed in fear that the threat would be carried out commits intimidation. The offense is a [L]evel 6 felony if the threat is to commit a forcible felony. Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt: Number 1) the defendant, Number 2) communicated a threat to Linda Sweet, Number 3) with the intent that Linda Sweet be placed in fear that the threat would be carried out, and Number 4) that the threat

was to commit a forcible felony. If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of intimidation, a [L]evel 6 felony.

Id. at 132–33.

[7] Further, at trial, Sweet and Bever testified about the incident in Bever’s dormitory. Bever denied making any threats toward Sweet—particularly that he would “bash” her head in or kill her. *Id.* at 121–22. Also, Sweet testified as to her state of mind during the incident. At one point, she described how she flinched away from Bever because she thought he was going to “headbutt [her],” and when asked if she was “actually in any fear” of Bever striking or killing her, she responded, “[Y]es and no.” *Id.* at 87, 95. Sweet elaborated that if Bever were to carry his threats out against her, the other residents at the facility would have gotten involved to stop the fight. She also described how, as a woman who is four feet and nine inches tall, she could not afford to show any of the residents, including Bever, that she was in any fear because “they [c]ould take advantage of that.” *Id.* at 86.

[8] The jury found Bever guilty on all counts. It also found him guilty of being a habitual offender after a bifurcated trial. Due to double jeopardy concerns, the court merged Bever’s conviction for disorderly conduct with his conviction for battery against a public safety official. The court also affirmed the jury’s habitual offender finding, and it sentenced Bever to an aggregate sentence of seven years. Bever now appeals.

Discussion and Decision

I. Standard of Review

[9] Jury instructions are intended “to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” *Isom v. State*, 31 N.E.3d 469, 484 (Ind. 2015) (cleaned up), *cert. denied* (2016). We review jury instructions for an abuse of discretion. *Id.*

II. Intimidation

[10] Bever contends the trial court erred by failing to properly instruct the jury on the elements of intimidation. Particularly, while acknowledging the instruction tracked the statutory elements of intimidation perfectly, he asserts the speech protections in the federal and state constitutions required the court to add an element—that the threat was likely to cause a reasonable person to fear for their safety. Bever also argues that, although he waived this issue on appeal by failing to object to the instruction at trial, *Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022), we should still address his arguments because his claim of error is either fundamental or structural. But, because the trial court was not required to add an element to its intimidation instruction, we do not address whether the trial court committed fundamental or structural error.

[11] Under Indiana Code section 35-45-2-1(a)(4), “[a] person who communicates a threat with the intent . . . that another person be placed in fear that the threat will be carried out . . . commits intimidation, a Class A misdemeanor.”

However, the offense is a Level 6 felony if the threat is to commit a forcible felony. Ind. Code § 35-45-2-1(b)(1)(A). Here, Bever's threat was telling Sweet that he would "bash [her] face in and kill [her]," which is a threat to commit the forcible felony of murder. Tr. at 85. The trial court instructed the jury on intimidation as follows:

The crime of . . . intimidation is defined by law as follows: A person who commits a threat to another person with the intent that the other person be placed in fear that the threat would be carried out commits intimidation. The offense is a [L]evel 6 felony if the threat is to commit a forcible felony. Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt: Number 1) the defendant, Number 2) communicated a threat to Linda Sweet, Number 3) with the intent that Linda Sweet be placed in fear that the threat would be carried out, and Number 4) that the threat was to commit a forcible felony. If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of intimidation, a [L]evel 6 felony.

Id. at 132–33.

- [12] Although he acknowledges the trial court instructed the jury on every element of intimidation as required by Indiana Code section 35-45-2-1(a)(4), Bever relies on a single case, *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014), to support his argument that the speech protections in the federal and state constitutions required the court also to instruct the jury that the State also had to prove his threat was likely to cause a reasonable person to fear for their safety. But *Brewington* cuts in the other direction.

[13] In that case, a “disgruntled divorce litigant dissatisfied with a child-custody evaluator’s recommendation . . . waged an obsessive years-long campaign” against the child-custody evaluator and the judge who presided over the matter, and a grand jury indicted the defendant for intimidation and attempted obstruction of justice. *Id.* at 954–56. That campaign included showing the victims that he knew where they lived, which “was clearly intended to place them in fear . . . for their homes and safety.” *Id.* at 954. Our Supreme Court held that constitutional speech protections do not cover those sorts of threats. *Id.* at 953 (explaining there is no speech protection for “true threats,” which are those where “the totality of the circumstances shows that they were intended to put the victims in fear for their safety”).

[14] Unlike in this case, where Bever’s threat was to murder the victim, the charges in *Brewington* were based in part on the defendant’s threat to expose the victims to “hatred, contempt, disgrace or ridicule,” and to falsely harm the victim’s reputations, which the Court recognized is a way of criminalizing defamation. “The same constitutional free-speech protections that apply in civil defamation cases therefore must apply to prosecutions” for threatening to harm a victim’s reputation, which means liability can only arise for statements about a public official or a public concern if the defendant acts with actual malice. *Id.* at 958–59. It is in that context the Court said its “inquiry cannot end with the statutory definition” of the crime, which is a statement on which Bever relies heavily. *Id.* at 958. But the Court did not suggest that where instead the intimidation is

based on a threat to commit a forcible felony like murder, the trial court must further instruct the jury on free speech protections.

[15] Just the opposite, the Court explained that, consistent with the speech protections in the state and federal constitutions, the State may ban “true threats,” which are threats where (1) the speaker intends the communication to put the target in fear of their safety, and (2) the communication is “likely to actually cause such fear in a reasonable person similarly situated to the target.” *Id.* at 963. It went on to conclude there was sufficient evidence to sustain Brewington’s convictions that were based on true threats. *Id.* at 965–72. Important here, it did not say a trial court must instruct the jury on the two elements of true threats in addition to the statutory elements for the crime of intimidation. And while there may be a need for additional instructions grounded in speech protections where the alleged intimidation is intertwined with constitutionally-protected speech, *id.* at 971–75, that makes no difference here because Bever’s statement that he would kill Sweet was not intertwined with any constitutionally-protected speech which could improperly form the basis for his conviction.

[16] In short, as both parties recognize, the trial court instructed the jury on each of the offense’s statutory elements, which is all that was required under Indiana law. *See Campbell v. State*, 9 N.E.3d 271, 277 (Ind. 2014) (“It is of course the case that an instruction which tracks verbatim the language of a statute is presumptively correct.”). Accordingly, the trial court did not abuse its discretion when it instructed the jury on intimidation.

[17] Affirmed.

Mathias, J., and Brown, J., concur.