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IN THE COURT OF APPEALS OF INDIANA

Thomas A. Jackson, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 19, 2021

Court of Appeals Case No. 20A-CR-1315

Appeal from the Johnson Superior Court

The Honorable Lance D. Hamner, Judge

Trial Court Cause No. 41D03-1902-CM-181

Darden, Senior Judge.

Statement of the Case

[1] Thomas A. Jackson, Jr. appeals from his conviction after a bench trial of one count of Class A misdemeanor domestic battery,[1] contending that the domestic battery statute is unconstitutionally vague as applied; and, that the evidence is insufficient to sustain his conviction. The State contends that Jackson has waived the constitutional issue of vagueness for appellate review; and, that the evidence is sufficient to sustain his conviction. We affirm.

Issues

[2] Jackson presents the following issues for our review, which we restate as:

I. Is the phrase "dated or has dated" as contained in the definition of "family or household member" unconstitutionally vague such that Jackson's domestic battery conviction should be reversed?

II. Did the State present sufficient evidence that Jackson and the victim were married such that his domestic battery conviction can be sustained?

Facts and Procedural History

[3] The facts most favorable to the trial court's judgment are as follows. Jackson met Meiry Araujo, who was from Brazil, in 2015 on a website called RoseBride.com.

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[1] Ind. Code § 35-42-2-11.3(a)(1) (2016).

[4] Subsequently, over the following years Meiry visited with Jackson twice in Indiana, and he visited with her twice in Brazil. They also visited with each other while they were in Portugal.

[5] In September 2017, Meiry and Jackson were officially engaged to be married and he financially sponsored her entry into the United States by helping her obtain a fiancée visa, and financially supported her while living here. On November 3, 2018, she came to stay with him in his home in Greenwood, Indiana. Although she visited various places with friends while in Indiana and California, Jackson always paid for Meiry's living expenses. On December 14, 2018, they obtained a marriage license and were married by a Justice of the Peace in Louisville, Kentucky on December 20th. The marriage license was not filed with the clerk. For their honeymoon, Jackson reserved a suite at the Ironworks Hotel in Indianapolis, Indiana.

[6] After their wedding, Meiry, at Jackson's request, went to visit with friends in California for a month. On February 8, 2019, when Meiry returned from her visit to California, Jackson's girlfriend was inside his home, although Jackson was not present. Meiry had entered the home by using the passcode and both women remained inside until Jackson came home from work.

[7] When Jackson came home, he was surprised to find Meiry there, and they talked for more than an hour about Meiry's request for their marriage certificate because she wanted to file for dissolution of their marriage. Jackson refused to give her the certificate and tried to force her to leave. When Jackson left her to

talk with his girlfriend, Meiry attempted to call the police from one of the two cell phones she had in her possession.

[8] Ultimately, the argument became more bitter and Jackson pushed Meiry to the floor, pulled her hair, sat on her back, and forced her arm behind her back. Meiry testified through a translator that she was in pain and it felt as if he was trying to break her arm. Jackson called the police to report that Meiry was trespassing. Meiry was on the floor in the front room of the home when police officers arrived.

[9] The officers who arrived at the scene observed that some type of altercation had occurred between Jackson and Meiry. They had difficulty communicating with her because Portuguese was her native language. None of the responding officers spoke Portuguese, but they investigated the situation, nonetheless, including looking for potential injuries on Meiry, who was visibly upset. After speaking separately with both Jackson and Meiry, they determined that she needed to leave the premises. Jackson had told them that the two were not legally married. One of the officers gave Meiry a courtesy ride to a local McDonald's restaurant for her to await transportation elsewhere. Eventually, Meiry ended up staying in the home of Jackson's ex-wife and her children before moving to a women's shelter.

[10] The next day, Meiry took an Uber to the police station and spoke with another officer. She informed the officer that Jackson had injured her, and photographs were taken of the marks which were visible on her body.

[11] The State later filed charges against Jackson on February 25, 2019, for Class A misdemeanor domestic battery. Jackson did not file a motion to Dismiss the Charges prior to the bench trial, which was held on December 17, 2019. Testimony and exhibit evidence was submitted and the matter was taken under advisement. The trial court rendered its decision and found Jackson guilty as charged on January 8, 2020. On June 18, 2020, the trial court conducted a sentencing hearing and sentenced Jackson to one year of probation. He now appeals.

Discussion and Decision

I. Vagueness

Standard of Review

[12] The question of the constitutionality of a statute on its face is a question of law which we review de novo. *Wright v. State*, 772 N.E.2d 449, 457 (Ind. Ct. App. 2002). When the challenge to a statute concerns its validity, we start our analysis with a presumption of constitutionality. *Id.* The burden is on the challenger to rebut this presumption, and all reasonable doubts must be resolved in favor of the statute's constitutionality. *Id.*

[13] "A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it adequately to inform them of the proscribed conduct." *Id.* "The statute need only inform the individual of the generally proscribed conduct and need not list with exactitude each item of prohibited conduct." *Id.* Additionally, vagueness challenges to statutes that do not

involve First Amendment freedoms are to be examined in light of the facts of the case at hand. *Id*.

Waiver

[14] As an initial matter because it is potentially dispositive of the issue, we must address the State's argument that Jackson waived the constitutional vagueness issue for appellate review. The State asks this Court to decline to review Jackson's argument because: (1) Jackson has not asked this Court to exercise its discretion despite his waiver, let alone recognize that he has waived the argument; (2) Jackson is guilty of the offense under a different subsection of the statute "married or has been married," making our review of this specific argument "dating or has dated" merely advisory; and (3) Jackson has sandbagged. Appellee's Br. p. 10.

[15] The failure to file a pre-trial motion to dismiss raising a constitutional challenge results in waiver of the issue on appeal. *Payne v. State*, 484 N.E.2d 16, 18 (Ind. 1985). Jackson did not file a pre-trial motion to dismiss.

[16] Our Supreme Court has observed the following about waiver and forfeiture:

> In general[,] "waiver" connotes an intentional relinquishment or abandonment of a known right. And appellate review presupposes that a litigant's arguments have been raised and considered in the trial court. To abandon that principle is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error. Declining

> to review an issue not properly preserved for review is essentially a cardinal principal of sound judicial administration.
>
> Even though the general rule is that failure to challenge the constitutionality of a statute at trial results in waiver of review on appeal, this Court as well as the Court of Appeals has long exercised its discretion to address the merits of a party's constitutional claim notwithstanding waiver. It is in this light that *Morse* [*v. State*, 593 N.E.2d 194, 197 (Ind. 1992)] can best be understood. Essentially, *Morse* stands for the proposition that appellate courts are not prohibited from considering the constitutionality of a statute even though the issue otherwise has been waived. And indeed[,] a reviewing court may exercise its discretion to review a constitutional claim on its own accord.
>
> Unlike waiver, which involves the intentional relinquishment or abandonment of a known right, forfeiture is the failure to make the timely assertion of a right. Under this doctrine appellate courts may sua sponte find an issue foreclosed under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue.

Plank v. Cmty. Hosps. of Ind., Inc., 981 N.E.2d 49, 53-54 (Ind. 2013) (most internal citations and quotations omitted).

[17] In any event, as our Supreme Court has expressed,

> We prefer to decide issues on their merits, and not to erect procedural obstacles to their presentation. However, a prompt objection affords the trial court an opportunity to prevent or remedy prejudice to a defendant without the considerable waste of time and resources involved in the reversal of a conviction, and for this reason a contemporaneous objection is required as a condition to appellate review.

Maldonado v. State, 355 N.E.2d 843, 848 (Ind. 1976). Even though Jackson has not properly preserved the issue for review or explicitly asked us to exercise our discretion, we choose to address the merits of Jackson's claims in part to clarify our prior decisions.

Family or Household Member

[18] We discuss more fully the State's burden of proving that Jackson committed domestic battery in the next issue. But as it pertains to this issue, the State was required to prove that Jackson "knowingly or intentionally . . . touche[d] a family or household member in a rude, insolent, or angry manner." Ind. Code § 35-42-2-1.3(a)(1). At issue is whether Meiry qualifies as a family or household member. That term has been defined in Indiana Code sections 35-31.5-2-128(a)(1) and (2) (2012) in pertinent part to mean an individual who "is a current or former spouse of the other person," or "is dating or has dated the other person."

[19] Jackson argues that the statutory element that the person "is dating or has dated the other person," is unconstitutionally vague because it "encompasses the mundane to the intimate." Appellant's Br. p. 10. He argues that the definition "could include mundane appointments with friends, such as having coffee or could be as limited as intimate contact." *Id*. at 6.

[20] A discussion of the cases relevant to the issue follows. *Williams v. State*, 924 N.E.2d 121 (Ind. Ct. App. 2009), *trans. denied*, resulted in an affirmation of a domestic battery conviction involving a constitutional challenge under a prior

version of the statute–a statute that, written disjunctively, criminalized the conduct "is dating or has dated the other person or is or was engaged in a sexual relationship with the other person." *Id*. at 127 (internal quotation omitted). The *Williams* panel noted that the State, in *Collins v. State*, 911 N.E.2d 700, 713 (Ind. Ct. App. 2009), "conceded that the use of the term dating in a probation order was impermissibly vague," turning to the other ground provided under the statute to decide the issue. *Williams*, 924 N.E.2d at 127 (internal quotation omitted). The domestic battery statute was not found to be void for vagueness because the defendant and the victim currently or in the past had been engaged in a sexual relationship, and there was evidence of the same.

[21] *Collins* involved a challenge to new terms of probation entered in the case of the defendant convicted of a sex offense. The language of the new term at issue required the defendant to notify his probation officer of his "establishment of a dating, intimate, and/or sexual relationship." *Collins*, 911 N.E.2d at 705. Relying on the resolution of a challenge to similar language from *McVey v. State*, 863 N.E.2d 434 (Ind. Ct. App. 2007), and the State's concession that the term was impermissibly vague, this Court in *Collins* determined that the term "dating" relationship "was not sufficiently clear to inform the defendant of the prohibited or regulated conduct." 911 N.E.2d at 713.

[22] *McVey* was an appeal in which the constitutionality of the use of "dating" as a term of probation was raised. Noting that the term could encompass the mundane such as "going out for coffee with a friend" to "intimate occasions and sexual contact," this Court found the term, as used, was vague such that

the defendant was not sufficiently informed of prohibited conduct. 863 N.E.2d at 449. The matter was then remanded to the trial court for clarification. *Id*.

[23] Trial courts enjoy broad discretion when determining the appropriate conditions of probation. *Collins*, 911 N.E.2d at 712. Probation hearings are civil in nature. *Jordan v. State*, 60 N.E.3d 1062, 1068 (Ind. 2016) (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)). *Williams* did not decide whether "dating or has dated" was void for vagueness, instead, after acknowledging the State's concession in *Collins*, found that the alternate statutory language was not void for vagueness and affirmed the trial court's judgment. *Collins* and *McVey* involved a challenge to conditions of probation and *Williams* did not decide the issue.

[24] In the present case, however, we are addressing statutory language promulgated by our legislature establishing the element of a criminal offense. "We observe a high level of deference with respect to the General Assembly's decision-making, and any doubts are resolved in favor of constitutionality." *C.S. v. State*, 8 N.E.3d 668, 676 (Ind. 2014). "We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives." *Id.* (quoting *State v. Downey*, 476 N.E.2d 121, 122 (Ind. 1985)).

[25] "When a statute employs a word without defining it, courts generally should apply the word's plain, ordinary, and usual meaning, unless to do so would be contrary to the Legislature's intent; but technical words and phrases should be given their technical legal definitions." *Gill v. Evansville Sheet Metal Works, Inc.*,

970 N.E.2d 633, 639 (Ind. 2012). "In determining the plain and ordinary meaning of a statutory term, courts may use English language dictionaries as well as consider the relationship with other words and phrases." *State v. Eilers*, 697 N.E.2d 969, 971 (Ind. Ct. App. 1998).

[26] The word "date" used as a noun is defined in pertinent part as "an appointment to meet at a specified time," "especially a social engagement between two persons that often has a romantic character" and "a person with whom one has a usually romantic date." (Merriam-Webster.com/dictionary/dating 4 a & b, last visited 1/25/21). As a transitive verb, the word "dated; dating" means "to make a usually romantic social arrangement to meet with: to have a date with." *Id*. (date 4, last visited 1/25/21). Additionally, "dating or has dated" as used in the statute is among several enumerated relationships of the type and conduct involving more than meeting a friend or colleague for a cup of coffee. *See* Ind. Code § 35-31.5-2-128. While we do not disagree with our Court's decision in *McVey* that "dating" could be interpreted as including "the most mundane activities" or "intimate occasions and sexual contact," 863 N.E.2d at 449, especially as a term of a condition of probation, we conclude that "dating" is within the range of activities included in the statute, which as applied to the totality of the facts and circumstances of the case at hand, is sufficiently clear to have informed Jackson of the conduct that is prohibited.

[27] Here, Jackson and Meiry, multiple times, made arrangements to travel and physically meet each other in the country of Brazil and in the State of Indiana. When Meiry came to visit with Jackson in Indiana, she stayed in the home with

Jackson. Evidence was also introduced that they had a visit with each other in Europe during the relevant time period before becoming engaged. They then obtained a marriage license and went through a marriage ceremony in December 2018. The marriage license was not filed with the clerk. Jackson reserved hotel accommodations in Indianapolis, Indiana to celebrate their honeymoon on the night of their wedding. At trial, Jackson testified that Meiry had spent "a few days at [his] house" before the "relationship was over" in early January 2019. Tr. Vol. 2, pp. 81-82. Each of these activities were conducted at considerable effort and expense by both parties; the likely result being more than just a friendly or collegial relationship. These actions fall squarely within the dictionary definitions we have examined and our consideration of the relationship of other words and phrases in the context of the statute. The statutory elements "dated or has dated" as applied to the facts and circumstances found in the case at hand are not vague.

II. Sufficiency

Standard of Review

[28] Unlike challenges to the constitutionality of a statute, claims regarding the sufficiency of the evidence warrant a deferential standard of review. *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020). Appellate courts neither reweigh the evidence nor judge witness credibility on appeal. *Id.* This is so whether the evidence is circumstantial or direct. *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995). That evidence need not overcome every reasonable hypothesis of innocence. *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012). We consider only the

evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262. We will affirm the conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt. *Id*. at 263.

[29] Jackson next contends that the State failed to establish beyond a reasonable doubt that he and the victim were married. To prove beyond a reasonable doubt that Jackson committed Class A misdemeanor domestic battery, the State was required to establish that (1) Jackson (2) did knowingly or intentionally (3) touch Meiry E. Araujo, (4) a family or household member (5) in a rude, insolent or angry manner (by pulling her hair). *See* Ind. Code § 35-42-2-1.3(a)(1); Appellant's App. Vol. 2, p. 15.

[30] As mentioned above, a family or household member is defined in pertinent part as "a current or former spouse of the other person," a person who "is dating or has dated the other person," and a person who "is or was engaged in a sexual relationship with the other person." Ind. Code § 35-31.5-2-128(a)(1)-(3) (2012).

[31] Here, there are at least two subsections under which the trial court as trier of fact could have found that Meiry was a family or household member in relation to Jackson. They met online through RoseBride.com and Jackson found her page on Facebook. They both visited each other multiples times in Brazil and Indiana, and Meriy stayed in Jackson's home with him when she visited. In addition, they visited with each other while they were on separate trips to

Europe. Furthermore, they became legally engaged to be married and Jackson sponsored Meiry's fiancée visa and financially supported her in the United States. The two obtained a marriage license and they traveled to Kentucky where they had a Justice of the Peace perform a wedding ceremony. Jackson reserved a hotel room in Indianapolis for their honeymoon after the wedding ceremony. A dissolution of marriage proceeding had been initiated by the time of trial. This evidence is sufficient to establish that Meiry was a family or household member by virtue of her dating or having dated Jackson and/or by her being a spouse or former spouse of Jackson.

[32] At trial and here on appeal, Jackson argues that the marriage was invalid. However, on the other hand, he conceded that the two had been legally married by a Justice of the Peace in Louisville. He further admitted the marriage had not been voided, and, at other times saying it was not "canceled." Tr. Vol. 2, p. 57. In Kentucky, a couple obtains a license from a county clerk and the license does not expire until thirty days afterwards. Ky. Rev. Stat. Ann. §§ 402.080 (2018), 402.100 (2017), 402.105 (1984). After the license is obtained, the couple needs to find a qualified person to solemnize their marriage. KRS § 402.050 (1996). The person who solemnized the marriage then returns the license and certificate of marriage to the clerk. KRS § 402.220 (1994). In any event, Jackson's testimony corroborates Meiry's testimony concerning their relationship status in that he viewed it as a relationship that needed to be lawfully voided or canceled.

[33] Without reweighing the evidence or reassessing the credibility of witnesses, we conclude that the State presented sufficient evidence that Meiry was a family or household member to support Jackson's conviction for domestic battery.

Conclusion

[34] For the foregoing reasons, we affirm the trial court's judgment.

[35] Affirmed.

Riley, J., and Mathias, J., concur.