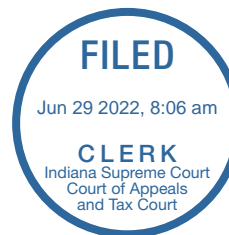


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Paul Michael Cape,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 29, 2022

Court of Appeals Case No.
21A-CR-2439

Appeal from the St. Joseph Superior
Court

The Honorable John M. Marnocha,
Judge

Trial Court Cause No.
71D02-2102-F3-6

Friedlander, Senior Judge.

- [1] Paul Cape appeals his conviction of rape, asserting the evidence was insufficient to support the conviction. Concluding there was sufficient evidence to sustain Cape's conviction, we affirm.

[2] The facts most favorable to the verdict follow. C.D. set up a profile on the MeetMe app. Cape contacted C.D. through the app, and then the two messaged through the app. Cape also gave C.D. his cell phone number, and they exchanged texts and phone calls, including sexually explicit texts. During their communications, Cape mentioned his penchant for dominant and submissive sexual roles, but C.D. never agreed to that type of relationship. Cape and C.D. communicated over a one- to two-week period before deciding to meet in person. The night before they met, C.D. sent Cape pictures of her nude breasts and vagina. Cape replied, “Come suck me, honey,” to which C.D. responded, “Come make me daddy.” *Id.* at 61-62. Prior to meeting with Cape, C.D. had agreed to sexual intercourse but then later changed her mind and indicated such during their text conversation.

[3] C.D. gave Cape her address for him to pick her up but told him he was not permitted to enter the apartment. When Cape arrived, he entered the apartment anyway and propositioned C.D.’s roommate, but she declined. Cape “got extremely creepy,” and C.D. wanted him to leave. Tr. Vol. II, p. 36. C.D., however, did not believe Cape would leave without her, so she left the apartment with him.

[4] Cape drove them to his house forty minutes away. Cape directed C.D. to his bedroom where they were going to watch movies, and he went to get a drink. C.D. sat on the floor to stretch out and get some relief from abdominal pain she was experiencing. When Cape returned, he walked over to C.D., took his penis out, and directed her to perform fellatio. C.D. told Cape that her stomach hurt

and that she did not want to do that, but he put his hand on the back of her head and put his penis in her mouth. C.D. pulled her head back a few times, but Cape continued to pull her closer and place his penis in her mouth, and eventually he lifted C.D. from the floor to his bed.

[5] Once on the bed, Cape removed C.D.'s pants. She continued to tell him that she was in pain and that she did not want to have sexual intercourse, but Cape replied that it would not hurt her stomach and that it was okay. C.D. was scared and did not say any more because she "had already said [she] didn't want to a few times already [sic], that it wasn't gonna stop him." *Id.* at 43. Cape inserted his penis, as well as a vibrator, into C.D.'s vagina, and when C.D. objected, he held her hands above her head.

[6] Cape then attempted to position C.D. for anal sex. C.D. again told Cape that her stomach was hurting, that she should not be engaging in sex, and that she did not want to do it. Cape inserted his penis into C.D.'s anus, and when he was finished, he got up and went to the bathroom. C.D. put her clothes back on, and when Cape returned from the bathroom, he turned on the television and sat on the bed. Eventually, Cape drove C.D. back to her apartment.

[7] C.D. began to cry when she entered the apartment and told her roommate what had happened. The roommate's boyfriend drove C.D. to the police station and then to the hospital so that a sexual assault kit could be prepared. Based on this

incident, the State charged Cape with rape as a Level 3 felony.¹ A jury found Cape guilty as charged, and the court sentenced him to an executed term of fourteen years. Cape now appeals.

[8] Cape's sole contention on appeal is that the evidence is insufficient to sustain his conviction. When we review a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Sandleben v. State*, 29 N.E.3d 126 (Ind. Ct. App. 2015), *trans. denied*. Instead, we consider only the evidence most favorable to the verdict and any reasonable inferences drawn therefrom. *Id.* If there is substantial evidence of probative value from which a reasonable fact-finder could have found the defendant guilty beyond a reasonable doubt, the verdict will not be disturbed. *Labarr v. State*, 36 N.E.3d 501 (Ind. Ct. App. 2015).

[9] In order to obtain a conviction for rape as a Level 3 felony, the State must have proved beyond a reasonable doubt that (1) Cape (2) knowingly or intentionally (3) had sexual intercourse with C.D. (4) or caused C.D. to perform or submit to other sexual conduct (5) when C.D. was compelled by force or imminent threat of force. *See* Appellant's App. Vol. 2, p. 17; *see also* Ind. Code § 35-42-4-1(a)(1).

[10] Cape challenges the State's evidence only as to the element that he used force or the imminent threat of force to compel C.D. to engage in the sexual acts. It is the victim's perspective, not the assailant's, from which the presence or absence

¹ Ind. Code § 35-42-4-1(a) (2014).

of forceful compulsion is to be determined. *Johnson v. State*, 6 N.E.3d 491 (Ind. Ct. App. 2014). This is a subjective test that looks to the victim’s perception of the circumstances surrounding the incident. *Id.* Thus, the issue is whether the victim perceived the aggressor’s force or imminent threat of force as compelling her compliance. *Id.*

[11] Here, C.D. clearly testified that she did not engage in these sexual acts with Cape willingly. When Cape returned to his bedroom, he “just kind of took his penis out and was like, ‘You’re going to suck it.’” Tr. Vol. II, p. 41. C.D. told Cape her stomach hurt and she did not want to perform that act. Cape then walked closer to C.D. and put his hand behind her head. C.D. testified:

A. He had an open palm and put it like in my hair and then pulled me closer to him.

Q. What happened when he pulled you closer to him?

A. He kept trying to put it in my mouth. And I was like, “My stomach hurts.” And then eventually, he just put it in there. And then I moved my head back. And then he pushed his hand closer.

Q. He put what in where?

A. His penis in my mouth.

Q. Did you push back against his hand?

A. Yeah. I pulled my head back.

Q. What did you say to him when this was happening?

A. “My stomach hurts. I don’t want to do this right now.”

Q. Did he say anything back to you?

A. Yeah. He was just like, “It’s fine.” He said, “You can lay on

the bed if it makes you feel better.” I said, “No. My stomach hurts.” And he just did it again.

Q. He did what again?

A. Pulled me closer to him, and put it in my mouth.

Q. How did you respond to that?

A. Pushed my head back again. And then he, like, kind of roughly put me on the bed from the ground.

. . . .

Q. What were you thinking when this happened?

A. Well, after I said no and I didn’t want to do it, I was like maybe he’s helping me on the bed ‘cause he thought my stomach hurt and he would stop. I mean, he didn’t. He just pushed me back onto the . . . bed. [] On my back.

Id. at 41-42.

[12] C.D. further testified that once she was on the bed,

A. He climbed, like, not overall on me but over my legs. And then he kept trying to take my pants off.

Q. Did you say anything to him?

A. That my stomach was still hurting, and I didn't want to do it.

Q. Did he say anything?

A. He -- he was talking about how it wouldn’t hurt my stomach, that my stomach won’t feel bad, that it’s okay.

Q. What did he do?

A. Took my pants off and then took his off.

Q. What did you do while he was trying to take your pants off?

A. Just laid there.

Q. Did you say anything?

. . . .

A. No. 'Cause I figured I had already said I didn't want to a few times already, that it wasn't gonna stop him.

Q. How were you feeling about stopping him?

A. Scared because I was in South Bend. I didn't know where I'd go. I was like 40 minutes from my house. The boys weren't home. [C.D.'s roommate] don't have her license. I would've just been stuck in South Bend.

. . . .

Q. . . . After he took your pants off and then his pants off, what happened?

A. He pulled out a [vibrator]. And then he put [his penis] in [my vagina] and tried to put the [vibrator] in me [also]. And I took the [vibrator] out and put it by me, and he put it back in and told me to stop taking it out. And then he grabbed my hands and put [them] above my head.

Id. at 42-44.

[13] C.D. then testified to a third act:

A. And then he tried to put me in the position to do anal.

Q. And after he tried to put you into a position to do anal, what did he do?

A. First, I told him my stomach was still hurting and that I shouldn't even be having sex at all. He just kind of propped my butt up. And I was like, "I really don't want to do it. My stomach still hurts." And he just put it in.

Q. What was he doing with the rest of his body?

A. It was on top of me.

Q. Did you ever tell him no or stop?

A. Yeah. I said I didn't want to do it.

Q. When he was inside of you, did you say anything to him?

A. Yeah. My stomach was hurting.

Q. Did you tell him to stop?

A. No. I mean, I figured I've told him enough at that point that if he wasn't going to do it, he was not doing it now. So I just kept repeating that my stomach was hurting.

Q. Did you tell him to stop before that?

A. Yes.

Id. at 46, 47. When asked why she waited for Cape to take her back to her apartment, C.D. responded, "I didn't know where I was at. I didn't have a ride. I didn't have an active phone." *Id.* at 48.

[14] Thus, the evidence at trial showed that C.D. told Cape numerous times that she did not want to engage in any of these sexual acts. Nevertheless, even after her protests, Cape pushed C.D.'s mouth onto his penis, and when she tried to pull away, he held her head with his hand. Cape then removed C.D.'s pants and put both his penis and a vibrator in her vagina. When C.D. continued to protest, Cape instructed her to stop and pinned her hands above her head. Cape also engaged in anal sex with C.D. after she told him she did not want to do it. C.D. testified she was scared because she was 40 minutes from her apartment with no car, no one to call for a ride, and no active cell phone. This evidence

clearly demonstrates that Cape forced C.D. to engage in these sexual acts with him. *See Stewart v. State*, 601 N.E.2d 1 (Ind. Ct. App. 1992) (evidence demonstrated sufficient force to sustain rape conviction where defendant locked doors to his office, lifted victim onto his desk and began kissing her, victim resisted and told defendant to get away, and defendant held her wrist, pushed her onto couch, and had sexual intercourse with her).

[15] Moreover, the jury is the judge of the credibility of the witnesses, and a result of this function is that it is free to believe whomever it wishes. *Klaff v. State*, 884 N.E.2d 272 (Ind. Ct. App. 2008). The jury heard the evidence, made credibility determinations, and found Cape guilty of rape. His argument on appeal is simply an invitation for us to invade the exclusive province of the jury and reassess witness credibility, and we cannot accept. *See Brasher v. State*, 746 N.E.2d 71 (Ind. 2001) (it is within jury's province to judge credibility of witnesses).

[16] Based on the foregoing, we conclude the State presented evidence sufficient to support Cape's conviction.

[17] Judgment affirmed.

Bailey, J., and May, J., concur.