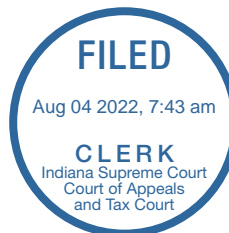


## MEMORANDUM DECISION

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

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James Edward Rudolph,

*Appellant-Defendant,*

v.

State of Indiana,

*Appellee-Plaintiff*

August 4, 2022

Court of Appeals Case No.  
21A-CR-2583

Appeal from the Madison Circuit  
Court

The Honorable Andrew R.  
Hopper, Judge

Trial Court Cause No.  
48C03-1908-F1-2018

**Crone, Judge.**

## Case Summary

- [1] A jury found James Edward Rudolph guilty of raping his wife at gunpoint. On appeal, Rudolph argues that the trial court erred in instructing the jury. Finding no reversible error, we affirm.

## Facts and Procedural History

- [2] The facts most favorable to Rudolph’s conviction are as follows. Rudolph met A. when she was nine, and they got married in 2012 when she was nineteen. They had two children: An., born in 2014, and R., born in 2016. After R. was born, the family moved into a home in Anderson. At that time, the couple verbally “fought a lot[,]” and they “kept growing apart.” Tr. Vol. 1 at 132. A. worked at a call center, and Rudolph “stayed home with the boys” but “never helped” around the house. *Id.*
- [3] In May 2019, Rudolph began accusing A. “of cheating on him[,]” and he “started becoming very obsessive about where [she] was, when [she] was leaving, how long it took [her] to get from point A to point B. [A]nd it was just getting out of control.” *Id.* at 135. At the end of July, A. told Rudolph that she “was extremely dissatisfied with the marriage” and “wanted to be out of it.” *Id.* at 134. Rudolph “started crying” and “took his gun and said that he was gonna go shoot himself.” *Id.* at 137. Rudolph had made similar threats before “for attention[,]” so A. was not “concerned about” it. *Id.*
- [4] Later that night, they exchanged texts, and Rudolph apologized “for all the verbal abuse” and promised “that he would be a different man and that he

would work towards being a better man for [their] family.” *Id.* at 139. A. told him to “come home” so they could “talk about it[,]” which they did. *Id.* She told him that he could “try to win [her] back[,]” but “more than likely it wouldn’t work because [she] didn’t fall out of love with him just that year.” *Id.* at 140. Nevertheless, they agreed that they would “see how it was like being separated” during the month of August while living in the same house, and that starting in September, they would “kinda work together as a family because of [their] children.” *Id.*

[5] A. had started dating her boss at the beginning of July,<sup>1</sup> and she continued to do so during August. Rudolph “accus[ed] [her] of doing a lot of stuff that [she] wasn’t doing[,]” but she replied that she did not need to tell him what she was doing “because of [their] agreement of living separate lives.” *Id.* at 144. At one point, he asked her to go bowling, and she accepted. While they were bowling, A. told Rudolph that she “was gonna be on a date at the movie theater[,]” and he “was not happy.” *Id.* at 145. Rudolph became “more obsessive” and “wanted to be in [A.’s] phone all the time” and “read [her] text messages.” *Id.* at 146. So she “put a lock on [her] phone so that [she] could keep him away from [...] seeing anything that would make him more upset than what he already was.” *Id.* at 146-47.

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<sup>1</sup> According to A., after Rudolph “accused [her] of cheating consistently” for several weeks, she “kinda had the mindset of, you know, well if he’s just gonna accuse me of it, then I might as well just do it.” Tr. Vol. 1 at 142-43.

- [6] Throughout August, “every time [Rudolph] would try to be affectionate with [A., she] advised him that [she] wasn’t in love with him, [she] didn’t want to be with him.” *Id.* at 151. On August 23, A. and Rudolph went to a gun range, where he taught her how to shoot his handgun, and then they went to a casino and the State Fair. A. “made it clear that [they] were doing this as friends[.]” *Id.*
- [7] On August 24, A. went to work for a few hours. She came home, unlocked her phone so that R. could play a game, and fell asleep. When she awoke, she noticed that her phone had been moved. She “assumed that [Rudolph] got into [her] phone just because he had been trying.” *Id.* at 153. Afterward, everyone gathered in the living room to “have a family day[.]” and they played cards and ordered pizza. *Id.* at 154. A. was getting warm, so she removed her long-sleeved shirt that was layered over a tank top. Rudolph “saw some hickeys on [her] neck. And it made him upset.” *Id.* at 155.
- [8] That evening, Rudolph told A. that he wanted to go to a racetrack and left the home. While he was gone, he texted A. about an upcoming concert and about their marriage, saying that he was sorry for “being verbally abusive” and “destroying [their] family.” *Id.* at 159. A. responded to the concert texts but did not respond to the other texts. When Rudolph got home around 10:30 p.m., A. was in the living room and the children were in bed. Rudolph “had the gun to his side” and said, “I’ve been doing a lot of thinking and I decided if I can’t have you, nobody can.” *Id.* at 161. A. told him to put the gun away. Rudolph told her that he was “not kidding.” *Id.* A. did not believe him and got up to walk past him. He “grabbed [her] by the face and he threw [her] back into the

living room.” *Id.* at 161. He threw her onto the couch, put the gun to her head, and asked, “Do you want me to shoot you first or the kids?” *Id.* at 164. A. started screaming “Stop” and kicking and swinging at Rudolph, “trying to get the gun away from him.” *Id.*

[9] R. came into the living room and started crying. A. asked Rudolph to stop. Rudolph kept “talking about [her] sleeping with everybody” and said that “he was going to get what [she] was giving everybody else.” *Id.* at 165. He “got [A.] onto the floor beside [the] couch[,]” “yanked [her] underwear down” from beneath her skirt, removed his shorts, and began raping her. *Id.* at 166. He held the gun to her head with one hand and put his other hand on her throat. A. “quit fighting with him because [she] wanted it to be over.” *Id.* at 167. After three minutes, Rudolph ejaculated, and A. “shoved him off [her] when [she] knew he was done.” *Id.* at 168. She carried R. back to his room. Rudolph told A. to shoot him because “[h]e’d rather be dead than go to jail.” *Id.* at 172. She told him that she was not going to kill him, and he gave her the gun. She removed the bullets and put them in her pocket, and she locked the gun in a safe and hid the keys. A. told Rudolph that her elbow was injured, and she persuaded him to let her leave the house so she could get it examined at the hospital.

[10] A. did not want to call the police because Rudolph was in the house with the children. She walked to the end of the alley behind her house and called her mother. “[C]rying” and “screaming[,]” A. told her mother that Rudolph “had beat her and raped her at gunpoint.” Tr. Vol. 2 at 7. Her mother told her to go

to a friend's house and call the police, which she did. A. arranged to meet the officers at her house, called Rudolph, and met him at the back door. He opened the door and said he had the gun in his pocket. He heard an officer's radio and said, "I know you guys are out there. You might as well just come out." Tr. Vol. 1 at 188. The officers disarmed Rudolph and arrested him. A.'s mother took A. to the emergency room to get her elbow examined and then "took her to the women's center to get a rape kit[,]" Tr. Vol. 2 at 9-10, which confirmed the presence of Rudolph's DNA. A detective interviewed Rudolph, who claimed that he performed consensual oral sex on A. and ejaculated on her genital area without attaining an erection.

[11] The State charged Rudolph with level 1 felony rape and several other counts that were dismissed before trial. A three-day jury trial began on September 27, 2021. A. and other State's witnesses testified to the foregoing facts. Rudolph also testified. He claimed that on the evening of August 24, 2019, he and A. engaged in consensual foreplay; that he performed oral sex on her and ejaculated on her genital area without attaining an erection; that they got into a shoving match after he confronted her about the hickeys on her neck, during which she fell and injured her elbow; and that she left the home and called the police after he threatened to "fil[e] for custody of the kids." Tr. Vol. 3 at 33. The jury found Rudolph guilty as charged, and the trial court sentenced him to thirty years executed. This appeal ensued. Additional facts will be provided as necessary.

## Discussion and Decision

### **Section 1 – The trial court did not abuse its discretion in denying Rudolph’s request to amend its final jury instruction regarding rape.**

[12] At the beginning of trial, the trial court gave the following preliminary instruction to the jurors without objection:

The crime of rape is defined by law as follows: A person, who knowingly or intentionally has sexual intercourse with another person or causes another person to perform or submit to other sexual conduct when the other person is compelled by force or imminent threat of force commits Rape, a Level 3 Felony.<sup>[2]</sup> The offense is a level 1 felony if it is committed while armed with a deadly weapon. Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt: 1) the Defendant, 2) knowingly or intentionally, 3) had sexual intercourse with [A.] or caused [A.] to perform or submit to other sexual conduct, 4) when [A.] was compelled by force or imminent threat of force, and 5) ... the Defendant committed the offense while armed with a deadly weapon. If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Rape, a Level 1 Felony, as charged in Count I.

Tr. Vol. 1 at 118-9. The record indicates that the trial court intended to give the same instruction as a final instruction. Rudolph’s counsel requested that

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<sup>2</sup> “Sexual intercourse” is defined as “an act that includes any penetration of the female sex organ by the male sex organ.” Ind. Code § 35-31.5-2-302. “Other sexual conduct” is defined in pertinent part as an act involving the sex organ of one person and the mouth of another person. Ind. Code § 35-31.5-2-221.5.

“without consent” be inserted after “3) had sexual intercourse” on the basis that “if sex was consensual then it can’t be rape.” Tr. Vol. 2 at 156-57. The prosecutor objected, observing that “[t]he actual language of [...] the court’s proposed instruction tracks not only the statute<sup>[3]</sup> but the actual charge that was filed [in] this case.[...] I think [...] compelled by force or threat of force speaks to [...] non-consensual.” *Id.* at 157. The trial court denied Rudolph’s counsel’s request.

[13] On appeal, Rudolph argues that the trial court erred. “The purpose of a jury instruction ‘is 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.’” *Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) (quoting *Chandler v. State*, 581 N.E.2d 1233, 1236 (Ind. 1991)). Instructing the jury lies within the trial court’s sole discretion. *Eberle v. State*, 942 N.E.2d 848, 861 (Ind. Ct. App. 2011), *trans. denied*. “We review a trial court’s decision to give or refuse to give an instruction for an abuse of discretion.” *Id.*<sup>4</sup> “An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.” *Id.* In determining whether the trial court abused its discretion in declining to give a tendered instruction, we consider “(1)

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<sup>3</sup> See Ind. Code § 35-42-4-1 (defining rape in pertinent part as set forth in trial court’s instruction).

<sup>4</sup> Rudolph acknowledges that he did not tender his own written instruction as required by Indiana Criminal Rule 8(A), but the State does not argue that he thereby waived his claim of error, and “it is apparent from the record that the trial court, in fact, had a reasonable opportunity to consider and implement [his] request” to amend the instruction. *Garrett v. State*, 964 N.E.2d 855, 857 (Ind. Ct. App. 2012) (declining to find waiver under similar circumstances), *trans. denied*.



whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given.” *Lampkins v. State*, 778 N.E.2d 1248, 1253 (Ind. 2002).

[14] Here, we agree with the State that Rudolph’s proposed amendment does not correctly state the law, in that it “decouples ‘compulsion’ from ‘consent’ and tells the jury that both states can exist simultaneously, so that a victim who is compelled to submit to intercourse under force or imm[i]nent threat of force may still have ‘consented.’” Appellee’s Br. at 13. Moreover, although evidence was presented at trial to support Rudolph’s consent defense, the substance of Rudolph’s proposed amendment, i.e., that the State had to prove that he engaged in sexual activity with A. without her consent, was covered by the existing language requiring the State to prove that A. was compelled to engage in that activity by force or imminent threat of force. By definition, a person who is compelled by force or imminent threat of force to engage in an activity does not consent to engaging in that activity. Accordingly, we cannot conclude that the trial court abused its discretion in denying Rudolph’s request to amend its instruction. *See Warren v. State*, 470 N.E.2d 342, 344 (Ind. 1984) (holding that trial court did not err in refusing to give rape/criminal deviate conduct defendant’s instruction regarding defense of consent, where record showed that court “properly charged the jury regarding all the elements of each crime, including the lack of consent element”).

## **Section 2 – The lack of an instruction regarding Rudolph’s testimony did not result in fundamental error.**

[15] At the beginning of trial, the court gave the following preliminary instruction to the jurors:

You are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it’s your duty to decide the value you give to the exhibits you receive and the testimony you hear. In determining the value to give to a witness’s testimony, some factors you may consider are: The witness’s ability and opportunity to observe; the behavior of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with people involved in the case; the reasonableness of the testimony considering the other evidence; your own knowledge, common sense, and life experiences. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony, you should first attempt to reconcile the conflicts in testimony under the theory that every witness has testified to the truth. If you are unable to do so, you must then determine which of the witnesses you will believe and which of them you will disbelieve.

Tr. Vol. 1 at 121-22. When the parties discussed final instructions, it had not yet been determined whether Rudolph would testify, and thus it had not yet been determined whether the trial court would give final instruction 23, which read, “No defendant may be compelled to testify. A defendant has no obligation to testify. You must not consider this in any way.” Tr. Vol. 3 at 141. The prosecutor acknowledged, “I mean, if [Rudolph] testifies, obviously, there’d be a different instruction that would be needed.” Tr. Vol. 2 at 158. The court

replied, “Yes. Of [c]ourse.” *Id.* Rudolph ultimately elected to testify. The jurors were again given the foregoing instruction regarding their duty as exclusive judges of the evidence, and final instruction 23 was given without objection. Tr. Vol. 3 at 141.

[16] Rudolph now argues that instead of giving final instruction 23, the trial court should have given Indiana Pattern Criminal Jury Instruction 13.2500: “You should judge the testimony of the Defendant as you would the testimony of any other witness.” Rudolph contends that this alleged failure to properly instruct the jurors resulted in fundamental error. “The fundamental error doctrine provides a vehicle for the review of error not properly preserved for appeal. In order to be fundamental, the error must represent a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process.” *Hoglund v. State*, 962 N.E.2d 1230, 1239 (Ind. 2012). “To establish fundamental error, the defendant faces the heavy burden of showing that the alleged error was so prejudicial to his rights as to make a fair trial impossible.” *Gary v. State*, 113 N.E.3d 237, 242 (Ind. Ct. App. 2018), *trans. denied* (2019).

[17] Here, the jurors were properly instructed how to judge a witness’s testimony, both before and after Rudolph testified, and they were not instructed that Rudolph’s testimony was to be judged any differently from that of any other witness. Rudolph’s assertion that an “average juror would likely look with suspicion on the claims of a defendant who testified” is pure speculation, Appellant’s Br. at 13, and it falls well short of carrying his burden to establish

that the alleged instructional error was so prejudicial to his rights as to make a fair trial impossible. Consequently, we affirm his conviction.

[18] Affirmed.

Vaidik, J., and Altice, J., concur.