

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEYS FOR APPELLANT

Valerie K. Boots
Joshua Vincent
Marion County Public Defender Agency
Appellate Division
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Kathy Bradley
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Kevin Webster,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 29, 2023

Court of Appeals Case No.
23A-CR-799

Appeal from the Marion Superior
Court

The Honorable Cynthia L. Oetjen,
Judge

Trial Court Cause No.
49D30-1808-F4-28533

Memorandum Decision by Judge Brown

Judges Vaidik and Bradford concur.

Brown, Judge.

[1] Kevin Webster appeals his conviction for failing to warn persons at risk that he is a dangerous communicable disease carrier as a level 6 felony. Webster claims the evidence was insufficient to sustain his conviction and the court committed fundamental error in instructing the jury. We affirm.

Facts and Procedural History

[2] In August or September 2017, Amanda Allen and Jason Smith lived on 41st Street in Indianapolis and held a homecoming celebration attended by Webster, who was born in 1983, S.M., who was fifteen years old, S.M.'s father, the girlfriend of S.M.'s father, and others who were all deaf. The celebration was "a whole week long thing." Transcript Volume III at 20. S.M.'s father allowed her to drink, and Allen told him that S.M. was too young to drink. S.M. and Webster "bumped into each other" and introduced themselves. Transcript Volume II at 240. At some point on the day following a cookout, the girlfriend of S.M.'s father caught Allen's attention, and Allen went upstairs and observed Webster and S.M. sitting on the bed in the master bedroom. Allen asked S.M. what happened, and S.M. told her "there was nothing sexual." *Id.* at 202.

[3] At another time, Smith observed Webster and S.M. in the bedroom "wrestling" or "roughhousing," and Smith said: "Hey, get out of here." *Id.* at 220-221. Smith asked Webster what was going on because he did not think "adults should interact with younger individuals that way." *Id.* at 221.

[4] During the night, S.M. lay down on the couch on the main floor to go to sleep because all of the beds were taken. Webster approached S.M. and touched her

“all over,” and she was not “comfortable with . . . it.” *Id.* at 242. Webster removed her pants, held her arms down, and his “dick” penetrated her vagina. *Id.* at 244. S.M. “could tell he was drunk.” *Id.* She did not scream because everyone was deaf. Webster told her not to tell other people, and S.M. was scared.

[5] On a later night, S.M. was in the basement dancing alone “right next to the speakers.”¹ *Id.* at 246. Webster approached her, pulled down her pants, lifted her up, placed her onto the laundry machine, and inserted “his dick into [her] vagina.” *Id.* at 248. Webster also asked S.M. to “suck his dick,” and S.M. did so. *Id.*

[6] On another occasion, Webster approached S.M. while she was walking in the hallway, took her into the bathroom, and closed the door. Webster then “f---- [her] on the toilet and then on the sink,” and S.M. “sucked his dick too.” *Id.* at 250. At one point, S.M. was taking a nap in Allen’s room, and Webster touched her and kissed her on the mouth.

[7] “Many of” the people present during this time period asked S.M. “what was going on,” but she was not “really comfortable talking to them about it.” Transcript Volume III at 2-3. Webster never told S.M. that he had HIV “before

¹ S.M. testified: “Deaf people can feel vibrations from music and music that has, like, really good rhythm – and some deaf people can hear some, too.” Transcript Volume II at 247.

he did these things” to her. *Id.* at 3. At some point, S.M. became aware that Webster was HIV positive.

[8] In December 2017, after an interview on an unrelated matter, Jennifer Alka, a case manager at Deaf Community Services, observed S.M., her father, and her father’s girlfriend signing something about someone that caused her concern. She observed them sign the name of an individual which “would be the initials of the person” and “[i]n this particular case, it was a KW on the . . . shoulder.”² Transcript Volume II at 185-186. Alka informed “the team that was still in the other room” what she had observed. *Id.* at 185. On December 29, 2017, Emily Perry, the founder, executive director, and a child forensic interviewer at Susie’s Place Child Advocacy Centers, met with S.M. who disclosed sexual abuse. Indiana State Police Detective Adam Buell obtained a document from the Department of Health indicating that Webster tested positive for HIV on September 20, 2011.

[9] On August 27, 2018, the State charged Webster with four counts of sexual misconduct with a minor as level 4 felonies under Counts I through IV, sexual misconduct with a minor as a level 5 felony under Count V, child solicitation as a level 5 felony under Count VI, and dangerous communicable disease carrier – failure to warn as a level 6 felony under Count VII.

² Alka testified: “In our culture, in deaf culture, we assign name signs as opposed to spelling out full names. It could be related to a personality trait or a physical trait. . . . Deaf people all have different name signs. Kevin’s happens to be a KW on the shoulder.” Transcript Volume II at 186.

[10] On January 30, 2023, the court held a jury trial. Upon questioning by the court, Webster’s counsel indicated that he had an opportunity to review the preliminary instructions and had no objection. Preliminary Instruction No. 5 provided that the charging information for Count VII alleged that Webster “did knowingly or intentionally violate or fail to comply with the requirements of Indiana Code Section 16-41-7-1 by not informing [S.M.] of his HIV status” Appellant’s Appendix Volume III at 41 (capitalization omitted). Preliminary Instruction 5G provided:

The crime of dangerous communicable disease carrier-failure to warn, as charged in Count VII, is defined by law as follows:

A person who recklessly violates or fails to comply with IC 16-41-7 commits recklessly violating or failing to comply with IC 16-41-7, a class B misdemeanor.

The offense is a level 6 felony if the person knowingly or intentionally violates or fails to comply with IC 16-41-7.

Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The defendant, Kevin Webster
2. Recklessly
3. Violated or failed to comply with IC 16-41-7
4. The defendant knowingly or intentionally
5. Violated or failed to comply with IC 16-41-7.

If the State fails to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of dangerous communicable disease carrier-failure to warn, a level 6 felony, charged in Count VII.

Id. at 49 (capitalization omitted).

[11] The State presented the testimony of multiple witnesses including Alka, Allen, Smith, S.M., Perry, and Detective Buell. After the presentation of the evidence, the parties discussed the jury instructions. The court asked Webster’s counsel if he had any objection “as to the Court’s final instructions that have already been given to you,” and he answered in the negative. Transcript Volume III at 81. The jury found Webster guilty as charged. The court sentenced Webster to an aggregate sentence of fourteen years with seven years suspended to probation.

Discussion

I.

[12] Webster argues the State failed to present evidence from which the jury could conclude that he had HIV at the time of the offense. He acknowledges that the State presented evidence that he tested positive for HIV in 2011 but asserts that the only other evidence was S.M.’s testimony that “at some point” she discovered that he was HIV positive and the State offered no evidence of his HIV status when the events occurred in 2017. Appellant’s Brief at 17 (quoting Transcript Volume III at 3). He also asserts that, because the statute allowed for third party notice “and S.M. did not say how or when she became aware of [his] status, [her] testimony was insufficient to establish that [he] had failed to ‘inform or cause to be notified by a third party’ prior to engaging in a high-risk activity with S.M.” *Id.* at 18.

[13] Ind. Code § 35-45-21-3 is titled “Violation of IC 16-41-7; penalty” and subsection (b) provides: “A person who knowingly or intentionally violates or

fails to comply with IC 16-41-7-1 commits a Level 6 felony.” At the time of the offense, Ind. Code § 16-41-7-1 provided:

(a) This section applies to the following dangerous communicable diseases:

- (1) Acquired immune deficiency syndrome (AIDS).
- (2) Human immunodeficiency virus (HIV).
- (3) Hepatitis B.

(b) As used in this section, “high risk activity” means sexual or needle sharing contact that has been demonstrated epidemiologically to transmit a dangerous communicable disease described in subsection (a).

(c) As used in this section, “person at risk” means:

- (1) past and present sexual or needle sharing partners who may have engaged in high risk activity; or
- (2) sexual or needle sharing partners before engaging in high risk activity;

with the carrier of a dangerous communicable disease described in subsection (a).

(d) Carriers who know of their status as a carrier of a dangerous communicable disease described in subsection (a) have a duty to warn or cause to be warned by a third party a person at risk of the following:

- (1) The carrier’s disease status.
- (2) The need to seek health care such as counseling and testing.

(Subsequently amended by Pub. L. No. 112-2020, § 22 (eff. July 1, 2020)).

[14] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[15] The record reveals that S.M. answered affirmatively when asked: “At some point did you become aware that [Webster] was HIV positive?” Transcript Volume III at 3. The prosecutor asked: “Did he ever tell you that he had HIV before he did these things to you?” *Id.* S.M. answered: “No, no.” *Id.* When asked to tell the jurors about finding out that Webster had HIV and how she reacted to that, she answered: “Scared. What if I have it? I’m so young. I haven’t even had a good life yet. It scared me.” *Id.*

[16] Detective Buell testified that he subpoenaed records with respect to Webster confirming that Webster was HIV positive. The State introduced and the court admitted a document Detective Buell obtained from the Department of Health indicating that Webster was HIV positive. The document provided an “HIV+ Test Date” of September 20, 2011. Exhibits Volume I at 7. It also included the following section which was signed by Webster and dated September 20, 2011:

In accordance with Indiana Code IC 16-41-7, I understand that I am prohibited from any of the following behaviors without first informing all present and future partners of my HIV+ status: 1. Engaging in any protected or unprotected sexual act with

anyone, including other HIV+ individuals, and allowing my partner the opportunity to refuse to participate in the act.

Id. at 8.

[17] Based upon the record, we conclude that evidence of probative value was presented from which a reasonable jury could find beyond a reasonable doubt that Webster was guilty of failing to warn persons at risk that he is a dangerous communicable disease carrier as a level 6 felony.

II.

[18] Webster concedes that he did not object to the jury instructions but argues the trial court committed fundamental error. He asserts Instruction 5G did not inform the jury they had to find that he “was HIV positive, knew he was HIV positive, engaged in a high-risk activity or that he failed to warn S.M.” Appellant’s Brief at 12. He argues that “the instructions, taken as a whole, erroneously assumed the jury knew the contents and requirements of I.C. § 16-41-7 and could determine if [he] had violated or failed to comply.” *Id.* He further contends that “[w]ithout being provided the content of the statute, no reasonable jury could have concluded that Webster ‘violated or failed to comply with I.C. § 16-41-7.’” *Id.* at 15.

[19] At trial, Webster did not object to Instruction 5G, and thus he has waived the issue for appellate review. *See Baker v. State*, 948 N.E.2d 1169, 1178 (Ind. 2011) (finding the appellant had neither objected to the trial court’s instruction nor offered an instruction of his own and accordingly waived the issue), *reh’g denied*;

Ind. Trial Rule 51(C) (“No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.”).

[20] To the extent Webster asserts fundamental error, fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). It is error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.* This exception is available only in “egregious circumstances.” *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010), *reh’g denied*. “Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error.” *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh’g denied*.

[21] Preliminary Instruction 5G provided:

The crime of dangerous communicable disease carrier-failure to warn, as charged in Count VII, is defined by law as follows:

A person who recklessly violates or fails to comply with IC 16-41-7 commits recklessly violating or failing to comply with IC 16-41-7, a class B misdemeanor.

The offense is a level 6 felony if the person knowingly or intentionally violates or fails to comply with IC 16-41-7.

Before you may convict the defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The defendant, Kevin Webster
2. Recklessly
3. Violated or failed to comply with IC 16-41-7
4. The defendant knowingly or intentionally
5. Violated or failed to comply with IC 16-41-7.

If the State fails to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of dangerous communicable disease carrier-failure to warn, a level 6 felony, charged in Count VII.

Appellant’s Appendix Volume III at 49 (capitalization omitted). While Preliminary Instruction 5G did not set forth any particular section of Ind. Code Chapter 16-41-7, Preliminary Instruction No. 5 provided:

In this case, the State of Indiana has charged the defendant, Kevin Webster, with

The charges read as follows:

* * * * *

Count VII

On, or about, or between June 13, 2017 and December 19, 2017, Kevin Webster *did knowingly or intentionally violate or fail to comply with the requirements of Indiana Code Section 16-41-7-1 by not informing [S.M.] of his HIV status*

Id. at 39, 41 (capitalization omitted and emphasis added). Further, the jury was instructed to “not single out any certain sentence or any individual point or instruction and ignore the others” and that “in considering any one instruction

you should construe it in connection with, and in light of, every other instruction given.” *Id.* at 63-64 (capitalization omitted). Based upon the record and in light of the jury instructions, we conclude that Webster has not demonstrated fundamental error.

[22] For the foregoing reasons, we affirm Webster’s conviction for failing to warn persons at risk that he is a dangerous communicable disease carrier as a level 6 felony.

[23] Affirmed.

Vaidik, J., and Bradford, J., concur.