MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dominick D.L. Conley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 22, 2022

Court of Appeals Case No. 21A-CR-1809

Appeal from the Hamilton Circuit Court

The Honorable Paul A. Felix, Judge

Trial Court Cause No. 29C01-2002-F3-1323

Bailey, Judge.

Case Summary

[1] Dominick D.L. Conley ("Conley") appeals his conviction, following a jury trial, of rape, as a Level 3 felony.[1] He raises one issue on appeal, namely, whether the trial court abused its discretion when it instructed the jury regarding the term "force."

[2] We affirm.

Facts and Procedural History

[3] On the evening of November 23, 2019, then-high-school-senior M.R., Conley, DeShawn King ("King"), and Whitney Reynolds ("Reynolds") attended a party at the home of Dalton Gray ("Gray"). Reynolds drove the other three to the party and, on the way to the party, M.R., Conley, and King shared "a fifth" of vodka. Tr. v. III at 37.

[4] Less than thirty minutes after M.R. arrived at the party, the party moved from the house to a barn in the back of the house. After being in the barn for about forty-five minutes, M.R. and Conley went outside to the back of the barn to have sexual intercourse where they could not be seen. Conley then "pinned" M.R. against the side of the barn and the two began to have consensual vaginal intercourse. *Id*. at 69. At one point during vaginal intercourse, Conley told

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[1] Ind. Code § 35-42-4-1(a)(1).

M.R. that he wanted to "do anal" intercourse with M.R. *Id*. M.R. looked directly at Conley, grabbed him by his chin, and repeatedly told him "no" to anal sex. *Id*. at 70. However, Conley turned M.R. around, pinned her against the barn wall again, and had anal intercourse with her.

[5] M.R. continued to tell Conley "no" while her penetrated her anally. *Id*. at 71. At one point, M.R.'s cell phone rang and she attempted to grab it to answer. However, Conley stated, "Put your f---ing phone away," and knocked the phone out of M.R.'s hand. *Id*. M.R. unsuccessfully tried to retrieve the phone and fell down on the floor. Conley then picked M.R. back up, turned her around by holding her throat, again pushed her against the barn wall, and continued to have anal intercourse with her. The anal intercourse was painful to M.R.

[6] Eventually, Conley "just stopped" having anal intercourse with M.R. and walked back toward the barn entrance. *Id*. at 72. M.R. pulled up her pants, returned to the barn, and approached Reynolds. M.R. was crying and informed Reynolds that she had been with Conley "behind the barn" and that she thought she had just been raped. *Id*. at 73. Someone at the party pointed out that M.R. had blood on her sweatshirt, and Reynolds then also noticed that there was blood around the collar of M.R.'s sweatshirt. Reynolds then drove M.R. to Reynolds's house. The party in the barn continued and Gray subsequently noticed that Conley had blood on his hands and his shirt.

[7] By the time Reynolds and M.R. arrived at Reynolds's house, M.R. was still "very upset" and "slightly crying," but had "calmed down a little bit." *Id*. at 32. Reynolds put M.R.'s sweatshirt in the wash, and M.R. went to a bathroom to clean herself up with a wet wipe. M.R. noticed bright red blood on the wet wipe after she wiped her anus. When M.R. then used a bidet to rinse herself off, "it hurt really bad." *Id*. at 75.

[8] Reynolds and M.R. discussed what they should do next, and M.R. decided to call another friend, Ethan Cunningham ("Cunningham"). Cunningham and another friend came to Reynolds's house, and M.R. then called her father. It was decided that M.R. should report Conley's actions to the police, and M.R., Reynolds, and Cunningham all drove to the police together. After making her report to the police, M.R. went to St. Vincent's hospital for a sexual assault examination. Registered Nurse Julia Weems ("Nurse Weems") conducted the sexual assault examination of M.R.'s anus and noted that there was a superficial tear of the anal tissue. However, none of the swabs of M.R.'s body contained a sufficient quantity of male DNA to allow for further analysis.

[9] Detective Wade Heiny ("Det. Heiny") of the Indiana State Police met M.R. at the hospital and spoke with her. Det. Heiny subsequently submitted a preservation order to Snapchat and obtained a search warrant to search Conley's Snapchat social media account. Det. Heiny located a November 25, 2019, Snapchat conversation between Conley and a user named "aiden.venturi07" in which Conley stated, "Imma rape a dog so I can plead

crazy," and "I might have to kill her to cover it up." *Id.* at 165, 166; State's Ex. 10.

[10] The State charged Conley with rape, as a Level 3 felony. The charging information stated in relevant part, "on or about November 23, 2019, Dominick Conley did knowingly or intentionally have other sexual conduct with Victim[] when such person was compelled by force, to wit: pushing her against a barn and penetrating Victim's anus after [Victim] repeatedly telling the defendant no." Amended App. (hereinafter, "App.") v. II at 25.

[11] The jury was given written preliminary and final instructions which the trial court also read aloud. Both preliminary and final instructions number two instructed the jury it must "consider all the instructions together." *Id.* at 126, 142. Preliminary and final instructions number three contained the same language as the charging information. Preliminary instruction four and final instruction five stated:

> The crime of rape is defined by law as follows:
>
> A person who knowingly or intentionally 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.
>
> Before you may convict the Defendant, the State must prove each of the following beyond a reasonable doubt:
>
> 1. The Defendant

2. Knowingly or intentionally

3. [C]aused [M.R.], another person, to perform or submit to other sexual conduct

4. When [M.R.] was compelled by force or imminent threat of force.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find Defendant not guilty of rape, a Level 3 felony, charged in Count I.

Id. at 128, 145. Preliminary instruction five and final instruction eight defined the term "other sexual conduct" as including "an act involving a sex organ of one person and the mouth or anus of another person." *Id*. at 129, 148. The preliminary and final instructions also included instructions regarding the presumption of innocence and the burden of proof beyond a reasonable doubt.

[12] The State also requested a final jury instruction stating as follows:

Force need not be physical or violent[] but may be implied from the circumstances. It is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined.

Id. at 109. Conley objected to the State's proposed instruction and argued that a definition of force was not "needed." Tr. v. III at 195. The trial court's final instruction regarding force did not include the last sentence of the State's

proposed instruction. Instead, final instruction nine[2] states, in full: "Force need not be physical or violent but may be implied from the circumstances." App. v. II at 149.

[13] The jury found Conley guilty as charged. The trial court sentenced Conley to nine years in the Indiana Department of Correction with three years executed and six years suspended. This appeal ensued.

Discussion and Decision

[14] We review a trial court's decision to tender or reject a jury instruction for an abuse of discretion. *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019). In reviewing a trial court's decision to give or refuse tendered jury instructions, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given. *Guyton v. State*, 771 N.E.2d 1141, 1144 (Ind. 2002). If an instruction is erroneous, we consider the effect of the erroneous instruction "in light of the jury instructions as a whole." *Inman v. State*, 4 N.E.3d 190, 200 (Ind. 2014) (quotation and citation omitted). An instructional error is harmless where a conviction is "clearly sustained by the evidence and

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[2] Final instruction number nine was erroneously labeled "State's Proposed Final Instruction No. 3" but was given as the ninth final jury instruction. *Id.* at 149. For ease of reference, we refer to the final instruction regarding force as "final instruction number nine."

the jury could not properly have found otherwise." *Batchelor*, 119 N.E.3d at 562 (quoting *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001)). The error will result in reversal "when we cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction not been given." *Ramirez v. State*, 174 N.E.3d 181, 200 (Ind. 2021) (quoting *Dill*, 741 N.E.2d at 1233).

[15] Conley challenges final instruction number nine which, again, states in full: "Force need not be physical or violent but may be implied from the circumstances." App. v. II at 149. As Conley admits, that instruction is a correct statement of the law. *See Newbill v. State*, 884 N.E.2d 383, 392 (Ind. Ct. App. 2008) (holding the forcible compulsion element of rape may be inferred from the circumstances), *trans. denied*. Moreover, there is evidence in the record supporting the giving of that instruction; although M.R. did consent to vaginal intercourse, there is evidence that she did not consent to anal intercourse but Conley nevertheless pushed her against the wall and anally penetrated her. Thus, whether the force is characterized as "violent," "physical," or otherwise, there is evidence that Conley compelled M.R. by force to submit to anal intercourse. *See id*. And while other jury instructions made it clear that the State must prove force, none of the other jury instructions addressed whether the State must prove violent or physical force in order to obtain a rape conviction of Conley. The factors articulated by the Indiana Supreme Court in *Guyton* are met here. *See Guyton*, 771 N.E.2d at 1144.

[16] On appeal, Conley argues for the first time that the instruction was erroneous because it stated only what the term "force" is not required to include and failed to state what the term "force" does include. First, Conley did not raise that ground in his objection below, so he has waived it on appeal. *See White v. State*, 772 N.E.2d 408, 411 (Ind. 2002) ("A party may not object on one ground at trial and raise a different ground on appeal."). Second, and waiver notwithstanding, we note that the trial court had discretion as to whether or not to define the term "force" at all, *see e.g.*, *Erickson v. State*, 439 N.E.2d 579, 580 (Ind. 1982), and was only required to do so if the word had a "technical or legal meaning normally not understood by jurors unversed in the law," *Barthalow v. State*, 119 N.E.3d 204, 212 (Ind. Ct. App. 2019) (quotation and citation omitted). Because the word "force" is commonly understood, the court did not abuse its discretion by failing to provide a comprehensive definition of it. *See Barthalow*, 119 N.E.3d at 212 (holding the trial court did not abuse its discretion by failing to define "bodily injury" because the "jury could likely infer from common sense the meaning" of that term).

[17] Third, the instruction the court chose to give regarding force was not erroneous merely because it stated what the term "force" is not required to include and did not state what it is required to include. *See, e.g.*, *Ramirez v. State*, 174 N.E.3d 181, 199 (Ind. 2021) (holding a jury instruction was not erroneous merely because it stated "what the State did not have to prove instead of what it did"); *Erickson*, 439 N.E.2d at 580 (noting the court has discretion regarding whether or not to define a common word). And, finally, nothing in instruction number

nine "relieved [the State] of its burden" to prove force, as Conley claims. Appellant's Br. at 12. This is especially true given preliminary instruction four and final instruction five, both of which specifically state that the State must prove the element of force beyond a reasonable doubt. *See, e.g.*, *Inman*, 4 N.E.3d at 200 (noting the court must consider the jury instructions as a whole).

[18] In addition, even if the jury instruction regarding force was given in error, any such error would be harmless because Conley's conviction was clearly sustained by the evidence. *See Batchelor*, 119 N.E.3d at 562. M.R. testified that she repeatedly and emphatically told Conley "no" to anal intercourse both before and during such intercourse. She testified that, despite her clear lack of consent, Conley turned her around, pushed her against the wall, and had anal sex with her.[3] That testimony alone was sufficient evidence to support the jury's verdict. *See Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012) ("A conviction can be sustained on only the uncorroborated testimony of a single witness, even when that witness is the victim."). Moreover, M.R.'s testimony was corroborated by other witness testimony regarding: M.R.'s behavior and demeanor following the rape; blood on M.R. and Conley following the rape; Conley's statements on social media following the rape; and the sexual assault examination showing a superficial tear on M.R.'s anus following the rape.

[3] Thus, Conley is mistaken when he asserts that M.R. testified "there was no physical or violent act," and that the State presented no evidence that Conley used physical force to have anal intercourse with M.R. as charged. Appellant's Br. at 12.

[19] The trial court did not abuse its discretion by giving jury instruction number nine regarding the word "force."

[20] Affirmed.

Najam, J., and Bradford, C.J., concur.