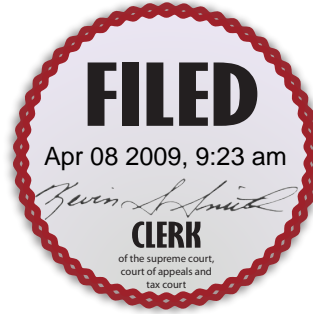


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

GARY L. GRINER
Mishawaka, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

O.C. JOHNSON,)
)
Appellant-Defendant,)
)
vs.) No. 71A03-0811-CR-551
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0702-FB-21

April 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant O.C. Johnson appeals his convictions for Criminal Deviate Conduct, as a Class B felony,¹ and Domestic Battery, as a Class A misdemeanor.² We affirm.

Issues

Johnson raises two issues on appeal:

- I. Whether the trial court violated his right to self-representation when it denied Johnson's request to proceed *pro se* on the second day of trial; and
- II. Whether the trial court abused its discretion in instructing the jury.

Facts and Procedural History

In February of 2007, Johnson was living with his girlfriend, E.A., and one of her daughters in St. Joseph County, Indiana. Johnson and E.A. had a child together, but that child was not living with them. On the fifth of that month, an argument between Johnson and E.A. erupted after E.A., as she was exiting her bed, tripped over a bowl of torch fluid, spilling it on the bedroom floor. Due to the smell, Johnson moved the box spring and mattress into the living room. As the two continued arguing, E.A. moved towards a phone in the bedroom, but Johnson reached it first. He threw the phone to the ground, breaking it, and began to hit E.A., landing blows to her back, face and head.

The argument then turned to E.A.'s recent purchase of a car. Holding a piece of glass to E.A.'s neck, Johnson ordered E.A. to call the person who sold her the car and demand her

¹ Ind. Code § 35-42-4-2(a).

² Ind. Code § 35-42-2-1.3(a).

money back. Before E.A. made the call, Johnson told E.A. that she “[b]etter not say the wrong thing.” Trial Transcript at 200.

Later that evening, E.A. went to lie on the mattress that Johnson had moved to the living room, but Johnson said, “You’re not going to sleep.” Tr. at 205 As Johnson flipped her over and started to rip her clothes off, E.A. screamed “no” and yelled for help. Johnson then bit E.A. “on the side of her eye.” Tr. at 203. At this point, E.A. stopped resisting, and Johnson sodomized her by sticking his penis into her anus.³ The next day, E.A. was able to call her sister for help when Johnson dealt with a maintenance man from the housing authority.

The State charged Johnson with Rape, as a Class B felony,⁴ Criminal Deviate Conduct, as a Class B felony, Confinement, as a Class B felony,⁵ and Domestic Battery, as a Class A misdemeanor. After a jury trial, Johnson was found guilty of Criminal Deviate Conduct and Domestic Battery, was found not guilty of Rape, and the jury was hung as to the Criminal Confinement charge. On a motion by the State, the trial court dismissed the count for Confinement. The trial court merged the Domestic Battery conviction into the Criminal Deviate Conduct conviction and sentenced Johnson to fifteen years imprisonment.

Johnson now appeals.

³ E.A. also testified that she thought Johnson also vaginally raped her, but she could not remember.

⁴ Ind. Code § 35-42-4-1(a).

⁵ Ind. Code § 35-42-3-3.

Discussion and Decision

I. Right to Self-Representation

First, Johnson contends that the trial court violated his right to self-representation under the federal and state constitutions. Essential to the fairness of a criminal proceeding is a defendant's right to counsel, guaranteed by the Sixth Amendment to the U.S. Constitution. Drake v. State, 895 N.E.2d 389, 392 (Ind. Ct. App. 2008) (citing Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963)). Implicit in the right to counsel is the right to self-representation. Faretta v. California, 422 U.S. 806, 819 (1975). Article I, Section 13 of the Indiana also guarantees the right to self-representation. Stroud v. State, 809 N.E.2d 274, 279 (Ind. 2004).

A request to proceed *pro se* is a waiver of the right to counsel, and consequently, there are several requirements to invoking the right to self-representation successfully. A defendant's request must be clear and unequivocal, and it must be made within a reasonable time prior to the first day of trial. In addition, a defendant's choice to proceed *pro se* must be knowing, intelligent, and voluntary.

Id. (citations and quotations omitted)

After the breakdown of the attorney-client relationship with his first appointed public defender, Johnson filed a complaint with the Disciplinary Commission against his second appointed public defender. At the subsequent pre-trial hearing, the trial court decided to reschedule the trial in order to appoint new defense counsel. Johnson responded, "I want to go and do my trial now, Monday, without a lawyer. . . . I'm not firing him, but if he don't want to represent, that's on him." Tr. at 22. The trial court expressed its concern about permitting Johnson to represent himself and rescheduled the trial so that the trial court could

have the opportunity to research whether it was required to permit self-representation when it had safety concerns. Johnson commented, “I mean I’m not comfortable representing myself either[.]” Tr. at 24. In the meantime, the trial court appointed Johnson a new public defender to either serve as counsel or standby counsel.

At the following pre-trial hearing, Johnson’s new counsel stated that he had spoken with Johnson and that Johnson indicated that he did not want to represent himself. Johnson was present and did not dispute this statement. While he complained about the performance of his counsel, Johnson did not make another request to represent himself until the end of the second day of trial. The trial court denied his request as being untimely.

At no time did Johnson make a clear and unequivocal request to represent himself until the end of the second day of trial. The majority of his statements prior to trial were complaints regarding his counsel. “Half-hearted expressions of dissatisfaction with counsel’ fail to meet the requisite clear and unequivocal assertion for the right of self-representation.” Dobbins v. State, 721 N.E.2d 867, 872 (Ind. 1999) (quoting Russell v. State, 270 Ind. 55, 61, 383 N.E.2d 309, 313 (1978)). Johnson’s expressions and acquiescence to be represented by new counsel are examples of such half-hearted requests. As to Johnson’s *pro se* demand during the course of trial, our Supreme Court has held that requests to proceed *pro se* on the morning of trial are per se untimely and the denial of such request is permissible. Campbell v. State, 732 N.E.2d 197, 204 (Ind. Ct. App. 2000). Therefore, the trial court properly denied Johnson’s mid-trial request to represent himself.

II. Jury Instruction

Second, Johnson argues that the trial court abused its discretion in instructing the jury on the requisite force or threat of force needed for Criminal Deviate Conduct. It is within a trial court's discretion to give instructions to a jury. Green v. State, 875 N.E.2d 473, 478 (Ind. Ct. App. 2007), trans. denied. We review jury instructions for an abuse of that discretion. Id. In reviewing a trial court's decision to use tendered jury instructions, we take into consideration: whether the instruction: (1) correctly states the law; (2) is supported by the evidence in the record; and (3) is covered in substance by other instructions. Alexander v. State, 819 N.E.2d 533, 540-41 (Ind. Ct. App. 2004).

Here, Johnson asserts that the following jury instruction is an incorrect statement of the law⁶:

A woman who is assaulted with an intent to commit rape upon her or to cause her to perform deviate sexual conduct is not required to resist by all violent means within her power. The law does not require that the woman shall do more than her age, strength, and all attendant circumstances make it reasonable for her to do in order to manifest her opposition.

There is no requirement that she[,] the victim[,] scream or physically resist when, by such act, she may very well anger or frustrate the assailant and thereby endanger her physical well being.

The requisite force need not be physical, but may be constructive or implied.

App. at 65. Johnson argues that this instruction misled the jury to believe that the State was not required to prove that the sexual deviate conduct was committed by force. We disagree.

⁶ In his appellate brief, Johnson also alleges that the instruction is inappropriate because it unnecessarily emphasizes the testimony of E.A. However, he has waived this argument as he did not raise it to the trial court. See Crafton v. State, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005) ("As a general rule, a party may not present an

First, an instruction setting forth the elements needed to substantiate a conviction for Criminal Deviate Conduct was provided in the final jury instructions and included the necessary “compelled by force” element. App. at 58. Second, an instruction on resistance informs the jury that, even though it is not an element of deviate sexual conduct, resistance is a means by which a victim can indicate that the act is against her will, i.e. forced upon the victim. Durbin v. State, 547 N.E.2d 1096, 1099 (Ind. Ct. App. 1989). Thus, this instruction specifically addresses that force may be evidenced by resistance.

Without citation to authority or a dictionary, Johnson also contends that the statement that “[t]he requisite force need not be physical, but may be constructive or implied” is a misstatement of the law based on giving “constructive” and “implied” their plain and ordinary meanings. He argues that the ordinary meaning of these terms, which he contends to be “oblique, obscure or disguised,” alleviated the State of its burden to prove force. To the contrary, this statement specifically requires that force be proven. Furthermore, no standard dictionary we consulted listed “oblique, obscure or disguised” as definitions for “constructive” and “implied.” Johnson’s argument is without merit. We therefore conclude that the trial court did not abuse its discretion in instructing the jury.

Affirmed.

DARDEN, J., and ROBB, J., concur.

argument or issue to an appellate court unless the party raised the same argument or issue before the trial court.”).