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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

GREGORY BOWES
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LEONARD D. REED,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0807-CR-603

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0803-FD-064571

May 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After the jury trial of Leonard Reed, the trial court entered judgment of conviction for Class A misdemeanor battery, Class B felony criminal confinement, and Class C felony battery. On appeal, Reed argues that the trial court erroneously allowed the State to ask the victim questions on redirect examination that exceeded the scope of cross-examination and that two of the trial court's preliminary jury instructions were erroneous. Concluding that the State's questions were within the proper scope of redirect to clarify questions asked by defense counsel on cross-examination and that both challenged preliminary jury instructions are correct statements of law, we affirm.

Facts and Procedural History

On March 22, 2008, Reed's birthday, Reed picked up his girlfriend P.S. from her niece's home, where P.S. had been for the previous two days due to a death in her family. When Reed picked up P.S., he informed her that they would be attending a barbecue with his family to celebrate his birthday. At the barbecue, Reed did not eat anything but did drink gin and beer throughout the evening. An hour or two before midnight, Reed, then intoxicated, drove home with P.S.. After the pair arrived at their Marion County home, Reed accused P.S. of being with another man while she was visiting her niece. He told her that he "should have come over there and killed both of [them]." Tr. p. 72. Reed then left to purchase more alcohol.

Reed returned with more gin and beer, and the argument resumed. At this point, Reed was sitting at a table and began manipulating a handgun. He again threatened P.S., who decided to leave. P.S. tried to reach for her shoes, but Reed grabbed the shoes from

her and threw them away. He then pushed P.S. and struck her face with the gun. P.S. fell onto a bed that was in the room, and Reed climbed on top of her and straddled her chest, pinning her down. P.S. tried to escape by swinging her arms, but she was unable to free herself. Reed then pressed the handgun against her forehead hard enough to leave a red mark in the shape of the gun barrel. Reed continued to hold the gun to P.S.'s head and strike her. Reed told P.S. that he would kill her, and he then pulled the trigger on the gun. Although P.S. heard a click, the gun did not fire. She then freed herself, grabbed a pot of hot water, and threw it at Reed. P.S. fled from the apartment and called 911 from a nearby gas station.

P.S. was taken to a hospital for treatment, and Officer Jason Stump of the Indianapolis Metropolitan Police Department arrived at the home and found Reed there. After Officer Stump entered the home, he found a handgun on the bed and discovered that the weapon had bullets in the magazine but not in the chamber. Reed, initially cooperative, became angry. Reed did not appear intoxicated to Officer Stump, but Officer Stump “wasn’t looking for his intoxication.” *Id.* at 164.

The State charged Reed with criminal recklessness as a Class D felony,¹ pointing a firearm as a Class D felony,² domestic battery as a Class A misdemeanor,³ and battery as a Class A misdemeanor.⁴ The State later amended the information to add criminal

¹ Ind. Code § 35-42-2-2(c)(2).

² Ind. Code § 35-47-4-3(b).

³ Ind. Code § 35-42-2-1.3(a).

⁴ Ind. Code § 35-42-2-1(a)(1)(A).

confinement as a Class B felony,⁵ criminal confinement as a Class C felony,⁶ and battery as a Class C felony.⁷

Before Reed's jury trial commenced, the trial court reviewed the preliminary jury instructions with the parties. Reed objected to two of the preliminary jury instructions. In Preliminary Instruction 22, Reed objected to language stating that "[i]f you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve." Tr. p. 42. Reed also objected to Preliminary Instruction 17, which provided a definition of the term "confinement," on the ground that it invaded the province of the jury members to use their common sense to find a definition of the term. *Id.* at 38. The trial court overruled both objections and gave the instructions.

Reed's jury trial then commenced. During the direct examination of P.S., the State elicited testimony that Reed had confined her on the bed. On cross-examination, defense counsel asked P.S. if she ever told Reed that she wanted to leave. P.S. responded that she had not but that she was trying to leave. On redirect examination, P.S. testified that Reed held her down and would not let her leave. Reed objected on the ground that the questions were beyond the scope of cross-examination. The trial court overruled the objection. At the conclusion of the State's case-in-chief, Reed rested without presenting evidence.

⁵ Ind. Code § 35-42-3-3(b)(2).

⁶ I.C. § 35-42-3-3(b)(1).

⁷ I.C. § 35-42-2-1(a)(3).

The jury found Reed guilty of all the charges except domestic battery. The court merged criminal recklessness and pointing a firearm, pointing a firearm and Class B felony criminal confinement, and Class B felony and Class C felony criminal confinement. The trial court entered judgment of conviction for Class A misdemeanor battery, Class B felony criminal confinement, and Class C felony battery. After a sentencing hearing, the trial court sentenced Reed to eight years for Class B felony criminal confinement, four years for Class C felony battery, and one year for Class A misdemeanor battery, all to be served concurrently in the Indiana Department of Correction. Reed now appeals.

Discussion and Decision

On appeal, Reed argues that the trial court abused its discretion by allowing the State to conduct redirect examination of P.S. on a subject outside the scope of cross-examination. Reed also argues that the trial court abused its discretion by giving erroneous preliminary instructions to the jury.

I. Redirect Examination

Reed contends that the trial court abused its discretion by allowing the State to question P.S. on redirect examination regarding the details of her confinement. Reed argues that the questions on redirect were both outside the scope of cross-examination and overly repetitive.

The trial court has broad discretion in determining the scope and extent of both cross-examination and redirect examination. *Burks v. State*, 838 N.E.2d 510, 523 (Ind. Ct. App. 2005) (citing *Smith v. State*, 765 N.E.2d 578 (Ind. 2002), *reh'g denied*), *trans.*

denied. Absent an abuse of that discretion, the trial court's ruling will not be disturbed. *Meagher v. State*, 726 N.E.2d 260, 266 (Ind. 2000). "The role of redirect examination is to address new matters brought up upon cross-examination, and to correct false or misleading impressions left after cross-examination." *Lycan v. State*, 671 N.E.2d 447, 455 (Ind. Ct. App. 1996). Our Supreme Court has stated that "[t]he scope of permissible cross-examination extends to all phases of the subject matter covered in direct examination and may include any matter which tends to elucidate, modify, explain, contradict, or rebut testimony given in chief by the witness." *Smith*, 765 N.E.2d at 588 (quotation omitted). We have found that this reasoning applies equally to cross-examination and redirect examination. *See Burks*, 838 N.E.2d at 523. Once a party opens up a topic on cross-examination, he cannot close the subject on redirect examination at his own convenience. *See id.*

We first address Reed's argument that the testimony to which he objected was outside the scope of cross-examination. On direct examination, the State elicited testimony from P.S. describing Reed's actions confining her. P.S. testified that Reed pushed her onto the bed and sat on top of her, Tr. p. 78, that he told her she "ain't going nowhere" and pushed down on her chest, *id.* at 79-81, that she unsuccessfully tried to escape by swinging her arms, *id.* at 81, and that he then hit her with the handgun and held it to her head, *id.* at 84. During cross-examination, Reed's counsel asked P.S. several questions regarding the events of March 22, including, "And you never told Leonard that you wanted to leave?" *Id.* at 108. P.S. responded, "No, I was trying to leave." *Id.* at 109. This question could have left the jury with the impression that P.S. had either

consented to her confinement or did nothing to indicate to Reed that she did not consent to the confinement.

On redirect examination, the State clarified that P.S. did not consent to the confinement or fail to indicate to Reed that she did not consent to the confinement even though she did not ask to leave. The following exchange occurred:

Q And in what manner were you being restrained?

A He wouldn't—he held me down, wouldn't let me go.

Q I'm sorry, can you . . .

A He held me down and wouldn't let me go.

Q And is that the part you're talking about with the straddling part?

A Yes.

[Defense counsel]: Judge, I'm going to object, that's beyond the scope of cross.

THE COURT: Overruled.

Q And at that point what were you doing when he was holding you down?

A Trying to find—wiggle my way out.

Q Okay. You did not want to be in that position, is that correct?

A No.

Q You did not give him permission to straddle (sic) you in any other, correct.

[Prosecutor]: Okay. Nothing further, Your Honor.

Id. at 121-22. It was proper for the State to clarify that P.S. did not consent to the confinement even though she did not tell Reed that she wanted to leave. *See Rebstock v. State*, 451 N.E.2d 1083, 1086 (Ind. 1983) (“This testimony was properly admitted on redirect examination to meet any implications raised during cross-examination that the victim consented to or requested this treatment.”). As a result, the trial court did not abuse its discretion by allowing the State to introduce this testimony on redirect examination.

As for Reed's argument that the testimony was overly repetitive, Reed failed to object on this ground at trial. A party may not object on one ground at trial and then seek

reversal using a different ground on appeal. *Malone v. State*, 700 N.E.2d 780, 784 (Ind. 1998). Reed has waived this issue. *See id.* Waiver notwithstanding, we do not find that the testimony is overly repetitive. *See May v. State*, 502 N.E.2d 96, 102 (Ind. 1986) (finding that trial court did not abuse its discretion in refusing to allow appellant's attempt to merely re-ask the same questions that were previously answered on direct examination).

II. Jury Instructions

Reed also argues that the trial court erred in its preliminary instructions to the jury. Specifically, Reed objects to Preliminary Instruction 22 and Preliminary Instruction 17. Instructing the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. *Overstreet v. State*, 783 N.E.2d 1140, 1163-64 (Ind. 2003). “The purpose of an 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.” *Id.* at 1163. When reviewing a challenge to a jury instruction, we consider whether: (1) the instruction is a correct statement of the law; (2) there was evidence in the record to support giving the instruction; and (3) the substance of the instruction was covered by other instructions given by the trial court. *Hubbard v. State*, 742 N.E.2d 919, 921 (Ind. 2001). The trial court ruling will not be reversed unless the instructions, taken as a whole, misstate the law or mislead the jury. *Snell v. State*, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007). In order to be entitled to a reversal, the defendant must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Id.*

A. Preliminary Instruction 22

Reed challenges the portion of Preliminary Instruction 22 which reads, “If you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve.” Appellant’s App. p. 87. Reed objected at trial to this language, particularly the word “must,” on the ground that it created a mandatory instruction misstating the law. Tr. p. 42-43. Reed argued to the trial court that the jury members could lawfully determine that they could not decide which witness to believe and find Reed not guilty as a result but that the mandatory language precluded this possible outcome. The trial court overruled the objection and gave the instruction. On appeal, Reed argues that this instruction is a mandatory instruction that relieved the State of its burden to prove its case.

First, we note that the trial court’s Preliminary Instruction 22, including the sentence challenged by Reed, is identical to Indiana Pattern Jury Instruction (Criminal) 1.17 (3d ed. 2008). Turning to the instruction itself, there is nothing in the language of the instruction that would suggest to a reasonable jury that it is required to accept one witness’s version of events in its entirety over another witness’s version. The instruction states that “[i]f you find conflicting *testimony*, you must determine which of the witnesses you will believe and which of them you will disbelieve.” Appellant’s App. p. 87 (emphasis added). Through its use of the word “testimony,” the instruction advises that, if there is conflicting evidence on a particular point, the jury should then determine which assertions or interpretations provided, if any, to believe. This is a correct statement of the law. *See Gantt v. State*, 825 N.E.2d 874, 879 (Ind. Ct. App. 2005). The word “must” in

the instruction does not change the meaning of this instruction to one demanding that the jury choose one witness's *entire account* over another witness's account, as Reed claims. Consideration of the jury instructions as a whole makes Reed's argument that the trial court issued a mandatory instruction impinging on the jury's duty even less plausible. *See* Appellant's App. p. 65 (Preliminary Instruction 1 – "[T]he Court has no right to assume, and does not assume that any fact or facts will be established, it being your exclusive right and duty under the Constitution of the State of Indiana to determine from all the evidence what has and what has not been proven."); 67 (Preliminary Instruction 3 – "[Y]ou have the right to determine both the law and the facts."); 87 (Preliminary Instruction 22 - "You are the exclusive judges of the evidence In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear."). Further, the testimony that Reed points to in support of his argument is not conflicting.⁸ In sum, the preliminary instruction given by the trial court was a correct statement of law regarding the jury's duty to weigh the evidence and make credibility determinations.

We must turn to *Gantt* for an example of a truly mandatory instruction. The trial court in that case instructed the jury that "you must decide who you believe and who you disbelieve if you can't believe two or more" witnesses and gave a lengthy explanation of its understanding of this principle, stating, in part:

⁸ Reed argues that there is conflicting testimony regarding whether he was intoxicated. P.S. testified that Reed was intoxicated at the time of the events. Tr. p. 69. Officer Stump testified that Reed did not appear intoxicated, but that he was not looking for signs of intoxication. *Id.* at 164. Officer Stump did not testify contrary to P.S.'s assertion that Reed was intoxicated; instead, he merely stated that Reed did not appear to be so but that he was not looking for intoxication.

[I]f we have a situation where there is no ambiguity and there is contradictory testimony, and then the principle of noncontradiction is it can't be one way and the other way. It has to be one way or the other. . . . [The instruction] says you must – if you find so much conflict between the testimony of two or more witnesses that you cannot believe each of them, then you must decide. You must decide which witnesses you will believe and which you will disbelieve.

So the answer to your question is you must.

Gantt, 825 N.E.2d at 877-78. On appeal, this Court held that the trial court's instruction was an erroneous statement of the law and that it invaded the jury's province to determine credibility and accept or reject evidence as it sees fit. *Id.* at 878; *see also Oatts v. State*, 899 N.E.2d 714, 727 (Ind. Ct. App. 2009). We stated that it is not true that the jury *must* believe one witness or the other when faced with contradictory testimony; rather, “[t]he jury may choose to believe neither witness, believe aspects of the testimony of each, or believe the testimony but also believe in a different interpretation of the facts than that espoused by the witnesses, among other possibilities.” *Gantt*, 825 N.E.2d at 879. We concluded that the trial court's extensive instructions could have led the jury to believe that it was required to choose one witness's account in whole over another witness's account. Because the case turned primarily on whether the jury found the defendant's account or the victim's account more credible, the trial court's error in this regard was not harmless. *Id.*

The instruction given in this case is distinguishable from the objectionable language in *Gantt*. Most importantly, the instruction given in this case deals with conflicts in *testimony*. However, the jury in *Gantt* could have reasonably believed that the trial court instructed it in terms of which *witness* to believe. *See id.* at 877 (“[Y]ou must decide who you believe and who you disbelieve if you can't believe two or more.”);

878 (“It says you must – if you find so much conflict between the testimony of two or more witnesses *that you cannot believe each of them*, then you must decide. You must decide which of the witnesses you will believe and which you will disbelieve.”) (emphasis added). The trial court in *Gantt* agreed that the instruction was mandatory. *Id.* at 878. Second, the contested language at issue here is merely one sentence, unlike the extended instruction the trial court issued to the jury in *Gantt*. Third, unlike in *Gantt*, the jury here did not ask for clarification regarding whether jury members were required to believe one witness or the other. Finally, the alleged conflict regarding intoxication has no bearing on Reed’s convictions, which are supported by ample evidence—P.S.’s testimony about the attack, the mark on her forehead left by the muzzle, and the gun found on the bed. We cannot say that a reasonable jury interpreting the preliminary instruction would find that it was required to believe one witness in its entirety over another witness. Thus, we conclude that the trial court did not abuse its discretion by giving this preliminary instruction to the jury.

B. Preliminary Instruction 17

Reed also challenges Preliminary Instruction 17, which provides, “The term ‘Confine’ is defined by law as meaning to substantially interfere with the liberty of another person.” Appellant’s App. p. 82. At trial, Reed objected on the ground that the instruction invaded the province of the jury to use their common-sense definition of the word “confine.” Tr. p. 38. Reed now argues that this instruction overemphasized the State’s confinement evidence. Because he makes this argument for the first time on appeal, it is waived. *Malone*, 700 N.E.2d at 784.

Waiver notwithstanding, the instruction was a correct statement of law and did not overemphasize the State's evidence; rather, it defined the crime. The instruction is a correct statement of Indiana law. Ind. Code § 35-42-3-1 ("As used in this chapter, "confine" means to substantially interfere with the liberty of a person."); *see also Dewald v. State*, 898 N.E.2d 488, 491 (Ind. Ct. App. 2008).

Reed is correct that "[i]nstructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved." *Ham v. State*, 826 N.E.2d 640, 641-42 (Ind. 2005) (quotation omitted). This instruction, however, does not emphasize any particular piece of evidence. It merely informs the jury of the definition of "confinement" under Indiana law. While the question of whether Reed confined P.S. is a factual question for the jury to decide, it is "well-established that while the jury is to determine both the law and the facts in criminal cases, the trial court's instructions are the best source of the law, and in determining the law, jurors are required to stay within the law as it exists." *Gravens v. State*, 836 N.E.2d 490, 495 (Ind. Ct. App. 2005), *trans. denied*. The trial court's instruction provides the definition of "confinement" and does not emphasize any particular evidentiary fact, witness, or phase of the case. *See Gebhart v. State*, 525 N.E.2d 603, 605 (Ind. 1988) ("The challenged instructions merely defined particular terms used in that definition. The instructions were not so repetitive as to unduly emphasize a particular point or amount to argument by the court."). The trial court did not abuse its discretion in giving this instruction.

Affirmed.

RILEY, J., and DARDEN, J., concur.