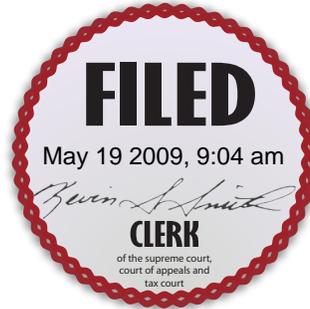


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**MICHELLE F. KRAUS**  
Fort Wayne, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**JOSEPH ROBERT DELAMATER**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

RUSSELL D. COX,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. 02A03-0808-CR-427

---

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable John F. Surbeck, Judge  
Cause No. 02D04-0708-FB-129

---

**May 19, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Russell Cox appeals his conviction, following a jury trial, of rape, a Class B felony. For our review, Russell raises a single issue, “[w]hether the State presented sufficient evidence on the element of force to sustain the conviction for rape.” Brief of Appellant at 1. Concluding sufficient evidence supports the conviction, we affirm.

## Facts and Procedural History

Seventeen-year-old A.B. spent the evening of May 2, 2007, with her friend, K. M., at the apartment of another friend, T.J. A.B. and K.M. planned to stay the night at T.J.’s apartment because T.J.’s mother was out of town, and T.J. did not want to be home alone. T.J.’s brother, M.J., was also at the house. Sometime after A.B. and K.M. arrived, Cox, who lived in the same apartment complex, came over to T.J.’s apartment to play video games with M.J. Later that night, A.B. began to fall asleep while sitting on the floor in front of a couch. T.J. brought out some blankets and pillows for A.B., and A.B. got onto the couch to sleep. T.J. went to her own bedroom, and K.M. and M.J. went to M.J.’s bedroom. A.B. did not know where Cox was, but assumed he had left the house.

A.B. awoke to the feeling of someone rubbing her legs and saw that it was Cox. A.B. told Cox to stop it, but Cox picked A.B. up off of the couch, put her on the floor, and got on top of her. A.B. again told Cox to stop, but Cox began trying to take off A.B.’s shorts and underwear. As Cox tried to pull her shorts down, A.B. struggled continuously to pull them up and told Cox to stop. Cox successfully got A.B.’s shorts and underwear off and began kissing her neck and fondling her genitals. A.B. told Cox to stop. Cox then took off his own pants and vaginally penetrated A.B. with his penis.

A.B. told Cox to stop. A.B. could not stop Cox from having sex with her, could not move away from Cox, and could not get up from the floor because Cox was bigger than her and on top of her.<sup>1</sup> Throughout the assault, Cox never threatened or struck A.B. and did not cover A.B.'s mouth to prevent her from calling for help. In response to A.B.'s constant pleas to stop, Cox just kept saying, it will be okay.

After Cox was finished, A.B. ran into the bathroom and texted K.M. to say she wanted to go home. When K.M. came out to check on A.B., Cox was gone. A.B. told K.M. that Cox wouldn't stop touching her. When K.M. asked if Cox had raped A.B., A.B. said, yes. A.B. spent the remainder of the night with K.M. and T.J. in T.J.'s bedroom. The next day, K.M. dropped A.B. off at school. At lunch, A.B. called her mother and said she did not want to go to work that day; however, A.B. did not tell her mother she had been raped. After school, A.B. went to K.M.'s house. A.B.'s mother called her to see what was wrong and A.B. told her mother she had been raped. Subsequently, A.B., her mother, her step-father, and K.M. went to the police to report the rape.

A.B. was taken to a sexual assault treatment center where she was examined and samples were taken for forensic testing. At the center, A.B. complained of painful urination after the rape and her underwear had a light red stain in the crotch. At trial, the parties stipulated that the DNA profile of semen samples taken from A.B. and from her underwear matched Cox's DNA profile.

---

<sup>1</sup> At the time of the rape, A.B. was 4'10" tall and weighed 130 pounds; Cox was thirty-four years old, 5'10" tall, and weighed 300 pounds.

On August 24, 2007, the State charged Cox with rape, a Class B felony. A jury trial was held from July 8-9, 2008, after which the jury found Cox guilty. The trial court held a sentencing hearing on August 11, 2008, and sentenced Cox to ten years executed with the Indiana Department of Correction. Cox now appeals.

## Discussion and Decision

### I. Standard of Review

In reviewing sufficiency of the evidence claims:

[we] must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. [T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations and quotations omitted) (emphasis in original).

### II. Rape

To sustain a conviction for Class B felony rape, the State must prove beyond a reasonable doubt that Cox knowingly or intentionally had sexual intercourse with A.B., a person of the opposite sex, when A.B. was compelled by force or imminent threat of force. See Ind. Code § 35-42-4-1(a). Although he concedes that he engaged in sexual intercourse with A.B., Cox argues that the evidence is insufficient to establish the force element of rape.

To prove the offense of rape, the State has to establish “the victim’s ‘submission was compelled by force.’” Newbill v. State, 884 N.E.2d 383, 391 (Ind. Ct. App. 2008) (quoting Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996)).

[I]t is the victim’s perspective, not the assailant’s, from which the presence or absence of forceful compulsion is to be determined. This is a subjective test that looks to the victim’s perception of the circumstances surrounding the incident in question. The issue is thus whether the victim perceived the aggressor’s force or imminent threat of force as compelling her compliance.

Tobias, 666 N.E.2d at 72. In addition, “the force necessary to sustain a conviction of rape need not be physical, and it may be inferred from the circumstances.” Newbill, 884 N.E.2d at 392 (quotations omitted). Force may be shown even without evidence of the attacker’s oral statement of intent or willingness to cause injury. Jones v. State, 589 N.E.2d 241, 243 (Ind. 1992).

The evidence here clearly establishes that Cox used force to compel A.B. to submit to sexual intercourse. Cox physically lifted A.B. off of the couch and put her on the floor. Cox then got on top of A.B. Cox struggled to pull off A.B.’s shorts and underwear as A.B. struggled continuously to pull them back up. Once Cox penetrated A.B., she was unable to stop him, to get up from the floor, or even to move because of Cox’s weight on top of her and the disparity of their weights. All of this occurred while A.B. continually told Cox to stop.

This court considered nearly identical circumstances in D.B. v. State, 842 N.E.2d 399 (Ind. Ct. App. 2006). There, the defendant sat on the victim while she was sleeping on a couch. Id. at 401. After the defendant kissed her, the victim said no and tried to nudge the defendant off of the couch, but she was unable to move because of the

defendant's weight on top of her. Id. at 403. The defendant then pulled down the victim's underwear and had sexual intercourse with her. Id. at 401. Although the defendant never spoke during the encounter and did not prevent the victim from crying out, the victim testified she did not call for help because she was afraid the defendant would hit her or something bad would happen. Id. at 403. The court concluded, "a factfinder could have concluded [the victim] perceived [the defendant] was compelling her compliance by force or an imminent threat of force. Accordingly, we hold the evidence was sufficient to support ... rape." Id.

Cox argues that he never hit A.B. or threatened to harm her. However, the statute only requires the use of force, not necessarily violent force, to compel the victim's submission. Here, A.B. resisted all of Cox's actions both physically and verbally, but Cox overcame her resistance with his superior weight and strength. Cox also argues that A.B. never called out for help although he did not cover her mouth to prevent it. At trial, A.B. testified that she did not call for help because she "didn't [know] what he was going to do." Trial Transcript at 154. In D.B., the victim similarly testified that she did not call for help although she could have because she was afraid the defendant might do something, but this court nonetheless found sufficient evidence of force. 842 N.E.2d at 403.

Cox relies heavily on our supreme court's decision in Jones v. State, 589 N.E.2d 241 (Ind. 1992), to support his insufficient evidence of force argument. In that case, Jones came into C.L.'s bedroom and asked her to have sex with him. Id. at 242. C.L. refused and Jones asked again. Id. C.L. refused a second time, but when Jones asked a

third time, C.L. testified she “‘just let him have it, you know.’ She was laying on her side, and he turned her over and had sexual intercourse with her.” Id. The court concluded the evidence did not constitute substantial evidence that Jones had sexual intercourse with C.L. by force or imminent threat of force. Id. at 243. Jones is easily distinguishable from the facts here. Cox never asked A.B. to have sex with him, rather he forced her to the floor, forcibly removed her shorts and underwear, and forcibly penetrated her. In addition, whereas C.L. relented to Jones after three requests, A.B. continually told Cox to stop at each step of the assault. In light of the above discussion, we hold the evidence is clearly sufficient to allow the jury to conclude that Cox used force to compel A.B. to have sexual intercourse with him.

#### Conclusion

The evidence presented at trial is sufficient to support Cox’s conviction for rape, a Class B felony.

Affirmed.

DARDEN, J., and BAILEY, J., concur.