COLORADO COURT OF APPEALS **2017COA1**

Court of Appeals No. 13CA2117
Boulder County District Court No. 12CR76
Honorable Roxanne Bailin, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Juvenal Onel Garcia,

Defendant-Appellant.

JUDGMENT AND SENTENCES AFFIRMED
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Dunn and Ashby, JJ., concur

Announced January 12, 2017

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¶ 1 Defendant, Juvenal Onel Garcia, appeals his convictions of first degree burglary, attempted sexual assault, unlawful sexual contact, third degree assault, violation of a protection order, and obstruction of telephone service; his sentences for attempted sexual assault and unlawful sexual contact; and an order designating him a sexually violent predator (SVP). We affirm the convictions and sentences and remand for reconsideration of the SVP designation.

I. Background

¶ 2 Garcia and the victim met in middle school and married after the victim turned eighteen. In August 2010, a protection order was issued that prohibited Garcia from contacting the victim. However, on occasion in April 2012, he would go to the victim's home to watch their children. One night, Garcia was late. When he arrived, the victim told him to leave because he had been drinking. Instead, he took her car keys and left. The victim eventually reported her car stolen after he did not return for several hours.

¶ 3 When Garcia came back, they physically struggled. According to the victim, Garcia forcefully tried to take off her clothes and initiate sexual intercourse but she fought him off, and he abruptly stood up and masturbated. They then resumed arguing, he

prevented her from calling 911, and he left, again taking her car. According to Garcia, their sexual contact was consensual and he voluntarily ended it before leaving. The victim was taken to the hospital.

¶ 4 At his March 2013 trial, Garcia was convicted as noted above and was sentenced to a term of ten years to life in the custody of the Department of Corrections. The trial court designated him an SVP. Garcia raises the following issues: (1) the trial court erred by failing to apply the "knowingly" mens rea to the "caused submission" element of the offenses of burglary and attempted sexual assault; (2) Garcia's conviction and sentence for class 4 attempted sexual assault and class 4 unlawful sexual contact must be vacated because the jury did not find that he knowingly used force to cause submission; (3) Garcia was improperly convicted of class 4 attempted sexual assault and class 4 unlawful sexual contact because the jury was not correctly instructed concerning force related to each offense, and therefore his convictions were unconstitutionally elevated; (4) the trial court erred by failing to instruct the jury that "knowingly" applied to every element of the offense of violation of a protection order; and (5) the trial court erred

in designating Garcia an SVP because he never established or promoted his relationship with the victim for purposes of sexual victimization as required by the statute.

II. Mens Rea for "Caused Submission"

¶ 5 Garcia contends that the trial court erred in not applying "knowingly" to every element of the offense of sexual assault, including the "caused submission" element of this offense. We perceive no reversible error.

¶ 6 At trial, the jury was instructed on the elements of sexual assault as follows:

> 1. That the defendant,
> 2. in the State of Colorado at or about the date and place charged,
> 3. knowingly, inflicted sexual penetration, or sexual intrusion, on a person, and
> 4. caused submission of the person by means of sufficient consequence reasonably calculated to cause submission against the person's will.

The instructions did not set off "knowingly" as a separate element of the offense. The instructions also informed the jury that, if it found Garcia guilty of attempted sexual assault, it should determine whether he attempted "to cause submission of the person through the actual application of physical force or physical violence."

A. Standard of Review

¶ 7 We review de novo whether instructions accurately informed the jury of the law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). Where a defendant does not object to an erroneous jury instruction, review is under the plain error standard and reversal is required when the error is obvious and substantial. *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001). A defendant must show that an error was "so clear cut, so obvious, a trial judge should be able to avoid it without benefit of objection." *People v. Ujaama*, 2012 COA 36, ¶ 42, 302 P.3d 296, 304. A defendant also has the burden of establishing that the error was "seriously prejudicial," that is, "so grave that it undermines the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the conviction." *Id.* at ¶ 43, 302 P.3d at 305.

B. Applicable Law

¶ 8 When a statutory offense such as sexual assault specifies a mental state, unless otherwise stated in its text, the culpable mental state applies to every element. *Copeland v. People*, 2 P.3d 1283, 1286 (Colo. 2000).

C. Analysis

¶ 9 Based on the jury instructions that existed at the time of trial in this case and the language of the statute, we find no plain error.

¶ 10 Garcia raises a fair point that offsetting "knowingly" in the jury instructions effectively demonstrates that it applies to every element of the offense. The current Colorado Model Jury Instructions indeed offset "knowingly" as a separate element to indicate that it applies to every other element of the offense. *See* COLJI-Crim. 3-4:01 (2015). However, the Colorado Model Jury Instructions applicable at the time of Garcia's trial did not offset "knowingly" from the other elements of the offense. *See* COLJI-Crim. 3-4:01 (2008). The instructions used at Garcia's trial match those in the Model Jury Instructions that existed at that time. Although "[t]he [model] instructions [had] not been approved as accurate reflections of the law," they were "intended as helpful resource material for both courts and criminal practitioners in their preparation of instructions for specific cases and should be used accordingly." Preface, COLJI-Crim. (2008).

¶ 11 Considering those model jury instructions, we conclude that any error in the jury instructions not defining "knowingly" as a separate element of the offense was not obvious.

¶ 12 Therefore, we conclude the trial court did not commit plain error, and we affirm Garcia's conviction for sexual assault.

III. Mens Rea for "Use of Force"

¶ 13 Garcia next contends that his conviction and sentence for both class 4 attempted sexual assault and class 4 unlawful sexual contact must be vacated because the jury was not instructed and thus did not find that Garcia knowingly used force to cause submission such that elevation of the offense to a higher class felony is warranted. We disagree.

¶ 14 Like the instructions in Part II, *supra*, the instruction on unlawful sexual contact had a force interrogatory that did not include a definition for "force." Garcia raises these contentions as separate issues related to each conviction, but because they rely on the same argument, we address them together.

A. Standard of Review

¶ 15 Interpretation of a statute is subject to de novo review. *People v. McKimmy*, 2014 CO 76, ¶ 19, 338 P.3d 333, 338.

¶ 16 Garcia incorrectly relies on *Medina v. People*, 163 P.3d 1136 (Colo. 2007), to assert that the standard of reversal is structural error. Instead, the proper standard is plain error. The supreme court in *Medina* relied on structural error review regarding the definition of a class 4 felony accessory conviction because the jury was actually instructed on the definition of a class 5 felony accessory charge, and both parties operated at trial under the assumption that the defendant had been charged with a class 5 felony. *Id.* at 1141-43.

¶ 17 Instead, the People correctly rely on *Washington v. Recuenco*, 548 U.S. 212, 221-22 (2006), to assert that, as in this case, an unobjected-to error in the form of a misdescription or omission of an element of an offense must be reviewed for plain error. *See Tumentsereg v. People*, 247 P.3d 1015, 1019 (Colo. 2011) (citing *Recuenco*). Trial error can rise to the level of plain error if there is a reasonable possibility that it contributed to the defendant's conviction or sentence. *Id.* at 1018-19; *see also Griego v. People*, 19 P.3d 1, 7-8 (Colo. 2001) (stating that when trial court misinstructs jury on element of offense, error is subject to constitutional

harmless or plain error analysis and is not reviewable under structural error standard).

¶ 18 Initially, we address and reject the People's argument that because Garcia briefed this issue on appeal only under a structural and not a plain error standard, his contention is waived.

¶ 19 The People rely on two Tenth Circuit cases, *United States v. Solomon*, 399 F.3d 1231, 1238 (10th Cir. 2005), and *United States v. LaHue*, 261 F.3d 993, 1009 (10th Cir. 2001), to support this contention. Both *Solomon* and *LaHue* held that the defendants waived plain error review by not raising a Sixth Amendment objection in the district court and not arguing plain error on appeal. However, these cases are distinguishable because the defendants there did not argue that an alternative standard of review, such as structural error, applied.

¶ 20 No Colorado case law supports the People's argument. Generally, when an error claimed on appeal was not presented in the trial court, we review the claim under the plain error doctrine. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

¶ 21 In fact, in *Griego*, 19 P.3d at 7, the supreme court addressed this issue and adopted the holding of *Neder v. United States*, 527

U.S. 1, 8-15 (1999), that the error of omitting an element in jury instructions is not amenable to structural error analysis but instead is subject only to harmless or plain error review. The *Griego* court then analyzed the defendant's claim under a plain error standard, rather than concluding it had been waived. *See Griego*, 19 P.3d at 8-9.

¶ 22 Based on *Griego*, we conclude that Garcia has not waived a plain error review of this particular claim on appeal simply because he asserted the incorrect standard of review.

B. Applicable Law

¶ 23 Under section 18-3-402(1)(a), C.R.S. 2016, if the means by which the actor causes submission involve the "actual application of physical force or physical violence," the felony level is raised from class 4 to class 3. *See* § 18-3-402(2), (4)(a).

¶ 24 Statutory provisions that raise the felony level of an offense are generally regarded as sentence enhancement provisions, not elements of the offense, because a defendant still may be convicted of the underlying offense without any proof of the enhancer. *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006); *see also Armintrout v. People*, 864 P.2d 576, 580 (Colo. 1993).

¶ 25 In *Santana-Medrano*, a division of this court considered this very issue: whether a special interrogatory to the jury on the question of "physical force or physical violence" was error because it did not include any reference to the mens rea of the offense. Based on the plain language of the statute, the division found that the intent of the General Assembly was to punish more severely those offenders who use physical force or violence in a sexual assault; therefore, "[t]he circumstances specified in § 18-3-402(4) do not require proof of a mens rea to convict the defendant of a class three felony." *Santana-Medrano*, 165 P.3d at 807-08. Accordingly, the division found that the interrogatory on the issue of "physical force or violence" without mens rea was not error. *Id.*

C. Analysis

¶ 26 Because there is a published opinion that rejects Garcia's contention, *see id.*, we conclude that any error made by the trial court in instructing the jury was not plain error because it was not obvious. *See People v. Stroud*, 2014 COA 58, ¶ 33, 356 P.3d 903, 910. Therefore, we affirm Garcia's class 4 felony convictions and sentences for sexual assault and unlawful sexual contact.

IV. The Meaning of Force

¶ 27 Garcia next contends that the trial court's interrogatory on force relating to attempted sexual assault and unlawful sexual contact was erroneous because the court did not define "force," "intimidation," and "threat," which, according to Garcia, are narrower in the legislative context than in common usage. According to Garcia, this failure to define these terms for the jury with the statutory meaning improperly lowered the prosecution's burden of proof. We disagree.

¶ 28 The relevant facts are recited in Part II, *supra*.

A. Standard of Review

¶ 29 Whether the instructions accurately informed the jury of the law is reviewed de novo. *Lucas*, 232 P.3d at 162. As above, where a defendant does not object to an erroneous jury instruction, we review his or her contention for plain error. *Garcia*, 28 P.3d at 344.

B. Applicable Law

¶ 30 A division of this court has endorsed giving jury instructions to clarify the sentence enhancer, "the actual application of physical force." These definitional instructions are considered supplemental and appropriate. *People v. Holwuttle*, 155 P.3d 447, 449-50 (Colo.

App. 2006). Such instructions are permissible so long as they properly state the law, even if they are unnecessary. *Id.* at 450. However, absent specific legislative definitions, "instructions must be read to convey normal meanings to juries in the context of the case in which they are given." *City of Aurora v. Woolman*, 165 Colo. 377, 382, 439 P.2d 364, 366 (1968).

¶ 31 Therefore, a trial court need not provide the jury with an instruction defining "force" in the sexual assault statute. *People v. Powell*, 716 P.2d 1096, 1100 (Colo. 1986); *People v. Johnson*, 671 P.2d 1017, 1021 (Colo. App. 1983). "Force" is understood as a common term: "Where . . . a jury properly is instructed that force is an element of the crime of first degree sexual assault, there is no reason to require a further instruction [to define] the commonly-used word 'force.'" *Powell*, 716 P.2d at 1100.

C. Analysis

¶ 32 Contrary to his arguments, Garcia's case is no different than *Powell*, which has already established that a trial court need not separately define "force" in instructions for a charge under the sexual assault statute. Accordingly, we conclude that the trial court did not err in not defining "force" in the instructions and

therefore did not commit plain error. Thus, we affirm Garcia's convictions and sentences for attempted sexual assault and unlawful sexual contact.

V. Mens Rea for Violation of Protection Order

¶ 33 Garcia next contends that the trial court erred by failing to instruct the jury that "knowingly" applied to every element of the crime of violation of a protection order. The People concede, and we agree, that the trial court erred, but we conclude there was no plain error.

¶ 34 The jury instructions provided the elements of violation of a protection order as follows:

> 1. That the defendant
> 2. In the State of Colorado, at or about the date and place charged,
> 3. Committed an act,
> 4. Prohibited by any court,
> 5. Pursuant to a valid order,
> 6. Issued pursuant to C.R.S. § 18-1-1001,
> 7. After the defendant had been personally served with any such order, or had otherwise acquired knowledge of the contents of any such order.

¶ 35 Again, "knowingly" was not listed as a separate element.

A. Standard of Review

¶ 36 The standard of review is the same as that recited in Part IV.A, *supra*.

B. Applicable Law

¶ 37 The mental state of knowingly applies to all relevant elements of the offense of violation of a protection order under section 18-6-803.5, C.R.S. 2016. *See People v. Coleby*, 34 P.3d 422, 424-25 (Colo. 2001). Failure to apply the proper mens rea to every element of the offense is considered error. *See Hendershott v. People*, 653 P.2d 385, 393 (Colo. 1982). However, not all errors of this nature require reversal. *Auman v. People*, 109 P.3d 647, 665 (Colo. 2005). Instead, we evaluate whether the existence of a culpable mens rea was a contested issue, "and, if so, whether there was overwhelming evidence of the defendant's guilt such that we can say that the error was effectively cured." *Id.* at 663-71; *see also Bogdanov v. People*, 941 P.2d 247, 255 (Colo. 1997), *amended by* 955 P.2d 997 (Colo. 1997), *disapproved of on other grounds by Griego*, 19 P.3d 1.

C. Analysis

¶ 38 It is clear that the instruction, by failing to apply "knowingly" to every element of the offense of violating a protection order, was

error. However, we conclude this error does not require reversal because there was overwhelming evidence of Garcia's guilt.

¶ 39 Garcia makes two contentions regarding his lack of knowledge in violating the protection order: first, he claims that he relied on the victim's belief that the protection order had expired; and second, he claims that even though he knew the order was in place and that he was prohibited from contacting the victim, his testimony suggests that he thought contact was allowed if the victim initiated it.

¶ 40 The record establishes that Garcia knew a protection order was in place and that he knew it prohibited him from contacting the victim or going to her home. He admitted that he knew the contents of the protection order and nevertheless still contacted the victim, saying their communications "went both ways." The fact that the victim believed the order had expired was irrelevant because Garcia knew otherwise. Furthermore, while Garcia argues that his testimony suggests that he thought contact was permitted if the victim initiated it, he never actually argued that was the case, even after he was asked why he contacted the victim despite the

order. He merely stated that "she contacted me and I contacted her."

¶ 41 The evidence at trial overwhelmingly establishes that Garcia went to the victim's home despite knowing that the protection order prohibited such conduct. Thus, the court's omission of the word "knowingly" from the jury instructions did not cast serious doubt on the reliability of Garcia's conviction. Therefore, we affirm his conviction for violation of a protection order.

VI. SVP Designation

¶ 42 Garcia next contends that the trial court erred in designating him an SVP because he neither established nor promoted his relationship with the victim for purposes of sexual victimization, as required by the statute. We remand this issue to the trial court to reconsider in light of two recent supreme court decisions.

A. Standard of Review

¶ 43 We interpret the SVP statute de novo and review the trial court's designation — a mixed question of law and fact — by deferring to the court's factual findings when they are supported by the record and reviewing de novo the trial court's legal conclusions

on whether an offender should be designated as an SVP. *Allen v. People*, 2013 CO 44, ¶ 4, 307 P.3d 1102, 1105.

B. Applicable Law

¶ 44 An offender is deemed an SVP if (1) he was at least eighteen years old when (2) he committed an enumerated sexual offense for which he was later convicted and (3) the victim was a stranger or one with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization, and (4) the offender is likely to recidivate. § 18-3-414.5(1)(a)(I)-(IV), C.R.S. 2016. The trial court determines whether a defendant satisfies the criteria and qualifies for SVP designation. *Uribe-Sanchez v. People*, 2013 CO 46, ¶ 8, 307 P.3d 1090, 1091-1092. Following the trial court's determination, the supreme court announced two opinions clarifying the meaning of the phrase "established or promoted a relationship." *People v. Gallegos*, 2013 CO 45, ¶ 8, 307 P.3d 1098, 1099; *Candelaria v. People*, 2013 CO 47, ¶ 21, 303 P.3d 1202, 1206.

¶ 45 In *Gallegos*, the court held that an offender promotes a relationship primarily for the purpose of sexual victimization if, "excluding the offender's behavior during the commission of the

sexual assault that led to his conviction, he otherwise encouraged a person with whom he had a limited relationship to enter into a broader relationship primarily for the purpose of sexual victimization." *Gallegos*, ¶ 14, 307 P.3d at 1100.

¶ 46 In *Candelaria*, the supreme court held that the SVP statute does not require an offender to have specifically intended to establish or promote his relationship with the victim for the primary purpose of sexual victimization because the plain language of the relationship criterion does not demand such a finding. *Candelaria*, ¶ 21, 303 P.3d at 1206.

C. Analysis

¶ 47 Because *Gallegos* and *Candelaria* were not decided at the time of Garcia's trial, we remand this issue to the district court for reconsideration and factual findings in light of those decisions. Because we remand, we do not address the People's argument that we should not review this issue on the ground that an SVP designation is a civil issue not reviewable by this court when not objected to in the trial court.

VII. Conclusion

¶ 48 The judgment and sentences are affirmed, and the SVP designation is remanded for reconsideration in accordance with this opinion.

JUDGE DUNN and JUDGE ASHBY concur.