

FILED: December 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RICKY LEE DIGESTI, aka Ricky Lee Digest,
Defendant-Appellant.

Deschutes County Circuit Court
12FE0233

A152522

Roger J. DeHoog, Judge.

Argued and submitted on September 23, 2014.

Neil Francis Byl, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Jennifer S. Lloyd, Attorney-in-Charge, argued the cause for respondent. On the answering brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Shannon T. Reel, Assistant Attorney General. With her on the supplemental answering brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

TOOKEY, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 TOOKEY, J.

2 Defendant appeals a judgment of conviction for two counts of sexual abuse
3 in the first degree, (Counts 1 and 2), ORS 163.427,¹ raising five assignments of error.
4 We reject without discussion defendant's third and fourth assignments of error. In his
5 first and second assignments of error, defendant argues that the trial court erred in
6 denying his motion for judgment of acquittal on Count 1 and Count 2, respectively,
7 because "[f]orcefully keeping a door closed in an effort to prevent the victim from
8 leaving [the bathroom] is not 'physical force' within the meaning of ORS 163.305(2),^[2]
9 the statute defining 'forcible compulsion.'" In a supplemental assignment of error,
10 defendant argues that the trial court committed plain error by improperly instructing the

¹ ORS 163.427 provides, in part:

 "(1) A person commits the crime of sexual abuse in the first degree
 when that person:

 "(a) Subjects another person to sexual contact and:

 "* * * * *

 "(B) The victim is subjected to forcible compulsion by the actor[.]"

² ORS 163.305(2) provides:

 "'Forcible compulsion' means to compel by:

 "(a) Physical force; or

 "(b) A threat, express or implied, that places a person in fear of
 immediate or future death or physical injury to self or another person, or in
 fear that the person or another person will immediately or in the future be
 kidnapped."

1 jury and asks us to exercise our discretion to correct that plain error under ORAP 5.45(1).
2 *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991)
3 (describing plain error doctrine). For the reasons that follow, we affirm.

4 The record discloses the following facts. At the time of the events in
5 question, the victim, S, was 15 years old, and defendant was 48 years old. S was the
6 daughter of defendant's neighbor. S, her mother, and other people, including defendant,
7 were having a bonfire at S's house, and S went into her house to use the bathroom. In S's
8 house, the bathroom door opened into the bathroom, and the door lock was broken.

9 While S was finishing using the bathroom and pulling up her pants,
10 defendant opened the bathroom door, entered the bathroom, and turned off the lights. He
11 also attempted to lock the bathroom door, but the door did not lock.

12 Defendant started "feeling [S] up." He placed his left hand on her breast
13 and his right hand on her buttocks; the "groping lasted roughly four to five minutes." S
14 told defendant that she wanted to leave and told defendant to leave. S did not scream, but
15 she tried to "lighten the situation" by calmly talking to defendant and trying to get him to
16 stop. She told him twice to stop, but defendant did not stop.

17 S put one hand on defendant's stomach, pushing him back, and put her
18 other hand on the door. She tried to open the door, but defendant pressed his foot against
19 the door so that S could not open it--that is, she could open the door "barely even an
20 inch" because defendant's left foot was "[s]quished underneath the crack." S tried three
21 times to open the door and leave, but each time, she could not open the door, because

1 defendant was blocking the door shut with his foot. S was shocked and shaking.

2 Defendant's girlfriend, Stolz, appeared and shoved the door partway open
3 from the other side--wider than S had been able to open it. Stolz got one hand in the door
4 and turned on the light. When the lights went on, S noticed that defendant's pants and
5 boxers were all the way down, so S backed up. Defendant then held the door shut with
6 his foot and shoulder.

7 Stolz pushed the door a second time and squeezed her way into the
8 bathroom. She pushed S out of the way and began slapping and yelling at defendant.
9 Defendant twice punched Stolz in the face. S placed her hand on the door, and she saw
10 defendant's fist hit Stolz "square on the face" a third time.

11 S then elbowed defendant into the wall and slammed the door inward on
12 him--that is, she "squished [defendant] in the door." S pushed Stolz out of the bathroom,
13 and they went outside.

14 Defendant was subsequently charged with two counts of first-degree sexual
15 abuse, and the case proceeded to trial. The trial court instructed the jury on the elements
16 of first-degree sexual abuse as follows:

17 "Now we're going to go into the--in the details of these charges. And we're
18 going to start with Count 1, which is Sexual Abuse in the First Degree, and
19 under Oregon law, a person commits the crime of Sexual Abuse in the First
20 Degree when the person intentionally subjects another person to sexual
21 contact *and the victim is subjected to forcible compulsion by the actor, by*
22 *the defendant.*

23 "Okay. So with regard to Count 1, to establish the crime of Sexual
24 Abuse in the First Degree, the State must prove beyond a reasonable doubt
25 the following four elements or facts:

1 "First, that the act occurred in Deschutes County, Oregon.

2 "Second, that the act occurred on or about February 24th, 2012.

3 "Third, that the defendant * * * intentionally subjected [S] to sexual
4 contact and specifically by touching her breast.

5 "And, last, that [S] was subjected to forcible compulsion by the
6 defendant.

7 "So * * * Count 2 is identical to Count 1. I'm not going to redefine
8 Sexual Abuse in the First Degree for you. But the difference is that the--
9 with regard to Count 2, the State has to prove that the defendant * * *
10 intentionally subjected [S] to sexual contact, and with regard to that count,
11 specifically by touching her buttocks. The State, of course, has to prove the
12 other material elements, too; Deschutes County, February 24th, *and that*
13 *[S] was subjected to forcible compulsion by the defendant.*"

14 (Emphases added.)

15 The court also instructed the jury that

16 "[f]orcible compulsion means to compel the victim by physical force. By
17 physical force, to submit to sexual contact against her will.

18 "Now there's more, though. Forcible compulsion by means of
19 physical force need not rise to the level of violence.

20 "However, the physical force has to be greater in degree or different
21 in kind from the simple movement and contact that is inherent in the act of
22 touching the intimate part of another.

23 "So it's not simply the act of the touching. It's got to be greater in
24 degree or different in kind. And the force must be sufficient to compel the
25 victim to submit to the sexual contact."

26 Defendant did not object to those instructions or propose different instructions. The jury
27 convicted defendant of both counts of first-degree sexual abuse, and defendant now
28 appeals.

29 On appeal, defendant first contends that the trial court erred in denying his

1 motion for judgment of acquittal on both counts of first-degree sexual abuse because
2 "[f]orcefully keeping a door closed in an effort to prevent the victim from leaving [the
3 bathroom] is not 'physical force' within the meaning of ORS 163.305(2), the statute
4 defining 'forcible compulsion.'" When reviewing the denial of a motion for judgment of
5 acquittal, "[w]e view the evidence in the light most favorable to the state to determine
6 whether a rational trier of fact, making reasonable inferences, could have found the
7 essential elements of the crime proved beyond a reasonable doubt." *State v. Hall*, 327 Or
8 568, 570, 966 P2d 208 (1998).

9 Pursuant to ORS 163.305(2), "'[f]orcible compulsion' means to compel by:
10 (a) [p]hysical force[] or (b) [a] threat[.]" In *State v. Marshall*, 350 Or 208, 225, 253 P3d
11 1017 (2011), the Oregon Supreme Court explained that "'forcible compulsion' by means
12 of physical force must involve physical force that is greater in degree or different in kind
13 than the minimal force that is inherent in 'subjecting' a victim to 'sexual contact.'" It also
14 stated that "[t]he physical force must be sufficient to 'compel' the victim, against the
15 victim's will, to submit to or engage in the sexual contact, but it need not rise to the level
16 of violence." *Id.* The court further stated:

17 "In determining whether the physical force used by the defendant against
18 the particular victim was sufficient to compel that victim to submit to or
19 engage in the sexual contact, the trier of fact may consider circumstances
20 known to the defendant that relate to whether the victim was in fact
21 'compelled,' such as the victim's age; the differences in age, size, and
22 strength between the victim and the defendant; the relationship between the
23 victim and the defendant; and similar facts."

24 *Id.* at 226.

1 The defendant in *Marshall* was convicted of two counts of first-degree
2 sexual abuse. The first count involved the defendant forcing the victim's hands down his
3 pants against his penis and the victim pulling her hand away. The second count involved
4 the defendant touching the victim's buttocks.

5 Regarding the first count, the court had "little trouble" concluding that a
6 jury could find that the defendant used physical force "different in degree or kind from
7 the simple movement and contact inherent in the act of the victim touching defendant's
8 penis." *Id.* at 227-28. The court determined that "the evidence could support a finding
9 that the physical force used was sufficient to compel a person in the victim's
10 circumstances to engage in the sexual contact[,]" stating:

11 "Here, the victim was a 14-year-old girl and the defendant was a 27-year-
12 old man, a friend of the victim's mother who had been living in the victim's
13 home for a short time. The crime took place in the victim's room, where
14 she had been sleeping in her bed when she awoke to find defendant lying
15 partially on top of her. The physical setting, the victim's age, the age
16 difference between the victim and defendant, and the fact that the victim's
17 mother had welcomed defendant into her home, all contributed to a
18 situation in which the jury reasonably could conclude that the physical
19 force that defendant exerted was sufficient to cause a person of that age and
20 in those circumstances to submit to the physical contact against her will."

21 *Id.* at 228.

22 Regarding the second count, the court reached the opposite conclusion.
23 When analyzing the evidence to support that count, the court concluded that nothing in
24 the record suggested that defendant's touching of the victim's buttocks "involved any
25 greater or different force than was inherent in that particular sexual contact" "or that
26 defendant exerted any physical force other than that involved in briefly touching the

1 victim's buttocks." *Id.* In so concluding, the court stated that,

2 "[a]lthough the state points to *other* prior acts involving physical
3 force--including defendant's prior act of forcing the victim's hand to his
4 penis--as providing the requisite evidence, there was no evidence that that
5 'physical force' *caused* the victim to submit to defendant touching her
6 buttocks or 'compelled' her to submit to that touching. That force did not
7 restrain, trap, or physically coerce the victim in order to cause her to submit
8 to defendant's later touching. To be sure, the victim did not consent to the
9 touching, and the jury could--and did--find that defendant subjected the
10 victim to unlawful sexual contact. However, to prove first-degree sexual
11 abuse, the state also had to prove that defendant used 'physical force'
12 sufficient to 'compel' the victim to submit to sexual contact against her will.
13 In light of the state's failure to prove any act of physical force by defendant
14 that could have compelled the victim to submit to the second sexual contact
15 charged, we conclude that the evidence of forcible compulsion as to that
16 latter charge was insufficient to create a question for the jury."

17 *Id.* at 228-29 (emphases in original).

18 In this case, the issue is whether, based on evidence that defendant, while
19 he was "groping" 15-year-old S, pressed his foot against the bathroom door, such that S
20 could not open the door and leave the bathroom for roughly four to five minutes, despite
21 her repeated attempts to do so, a jury reasonably could conclude that the physical force
22 that defendant exerted was sufficient to cause or compel a person of that age and in those
23 circumstances to submit to the sexual contact against her will. Defendant argues that that
24 evidence is insufficient because the *Marshall* inquiry centers on whether the physical
25 force used by the defendant *against the particular victim* was sufficient to cause or
26 compel the victim to submit to or engage in the sexual contact. According to defendant,
27 here, the physical force was not used against the particular victim, but against the door.

28 Defendant's argument is without merit. As noted, the evidence shows that

1 defendant pressed his foot against the door so that S could not open it--that is, she could
2 open the door "barely even an inch" because defendant's left foot was "[s]quished
3 underneath the crack." The evidence also shows that, while that was occurring, S
4 attempted to open the door and leave the bathroom three times. Furthermore, the
5 evidence shows that defendant and S engaged in a physical struggle, during which
6 defendant subjected S to "groping." The fact that there was a physical object (the door)
7 against which defendant applied physical force does not compel the trier of fact to
8 conclude that defendant applied force only to the door, and not to S, who was opposing
9 defendant's physical force by attempting to escape from defendant, while he was
10 "groping" her and preventing her escape. In other words, there is no requirement that the
11 physical force applied by a defendant must be applied directly to the victim's physical
12 body to constitute forcible compulsion under ORS 163.305(2)(a); rather, the requirement
13 is that the defendant "subjected" the victim to physical force in a way that caused or
14 compelled the victim to submit to the sexual contact, and a jury reasonably could
15 conclude that that occurred in this case.

16 In a supplemental assignment of error, defendant contends that the trial
17 court committed plain error when it failed to instruct the jury that, in order to convict
18 defendant of each count of first-degree sexual abuse, the state was required to prove that
19 defendant acted intentionally with respect to the element of "forcible compulsion." For
20 error to be plain error, "(1) it must be legal error; (2) it must be 'apparent,' such that 'the
21 legal point is obvious, not reasonably in dispute'; and (3) it must appear on the face of the

1 record, such that we 'need not go outside the record or choose between competing
2 inferences to find it, and the facts that comprise the error are irrefutable.'" *State v. Jury*,
3 185 Or App 132, 135, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003) (quoting *State v.*
4 *Brown*, 310 Or 347, 355, 800 P2d 259 (1990)).

5 To support his argument, defendant cites *State v. Nelson*, 241 Or App 681,
6 689, 251 P3d 240 (2011), *rev dismissed*, 354 Or 62 (2012), in which we concluded "that
7 the trial court erred by failing to instruct the jury that, in order to convict defendant of
8 first-degree rape and first-degree sexual abuse, the state was required to prove that
9 defendant knowingly subjected the victim to forcible compulsion[,]" and *State v. Gray*,
10 261 Or App 121, 322 P3d 1094 (2014), in which we concluded that the trial court's
11 failure to so instruct the jury was plain error. The state responds that defendant's claim
12 does not qualify for plain error review. According to the state, "[w]hether the trial court
13 committed error when it did not *sua sponte* give an instruction on 'intentionally' is not
14 beyond dispute and thus is not obvious."

15 Even assuming that the trial court committed plain error in this case, we
16 decline to exercise our discretion to correct the error. *See Gray*, 261 Or App at 130-31
17 (explaining that, "because not all plain error is reversible[,]" after we conclude that an
18 error is plain, "we must then decide whether to exercise our discretion to correct the
19 error"). In determining whether to correct a plain error, we consider several factors,
20 including the gravity of the error, the ends of justice in the particular case, and whether
21 the policies underlying the preservation requirement were served in another way. *Ailes*,

1 312 Or at 382 n 6. We also consider whether the error was harmless--that is, whether
2 there was little likelihood that the error affected the verdict. *See Gray*, 261 Or App at
3 131-32. Because "correction of an unpreserved error is contrary to the policies requiring
4 preservation[.]" we undertake the correction of an unpreserved error "with utmost
5 caution." *State v. Benson*, 246 Or App 262, 267, 265 P3d 58 (2011).

6 In *Gray*, we exercised our discretion to correct the trial court's plain error,
7 in part, because we agreed with the defendant that the error was not harmless--that is,
8 "the absence of a specific instruction with respect to defendant's mental state [could not]
9 be said to have had little likelihood to have affected the verdicts." *Gray*, 261 Or App at
10 131-32 (internal quotation marks omitted). In that case, at the time of the events giving
11 rise to the defendant's convictions, the defendant and the victim were living together as a
12 married couple, and certain behaviors, including hair-pulling and the defendant placing
13 his hands on the victim's neck, "had previously been accepted sexual behavior in their
14 relationship." *Id.* at 122. In that context, we agreed with the defendant that "a reasonable
15 juror might have doubted whether defendant knew that he had subjected [the victim] to
16 forcible compulsion[.]" *Id.* at 131.

17 After reviewing the facts of this case, however, we decline to exercise our
18 discretion to correct the trial court's alleged error because we conclude that any error was
19 harmless. The circumstances in this case are markedly different from those in *Gray*. As
20 noted above, the evidence of forcible compulsion in this case is that defendant, while he
21 was "groping" 15-year-old S, pressed his foot against the bathroom door, such that S

1 could not open the door and leave the bathroom for roughly four to five minutes, despite
2 her repeated attempts to do so. (Even defendant characterizes his conduct as "[f]orcefully
3 keeping a door closed in an effort to prevent the victim from leaving [the bathroom.]")
4 Under those circumstances, there is little likelihood that the jury would find that
5 defendant physically prevented S from leaving the bathroom for roughly four to five
6 minutes, overcoming by force her repeated attempts to open the door and leave and
7 compelling her to submit to sexual contact against her will, without intentionally doing
8 so--that is, without the "conscious objective" to do so. *See* ORS 161.085(7) (defining
9 "'intentionally' or 'with intent'" to mean "that a person acts with a conscious objective to
10 cause the result or to engage in the conduct" described by a statute defining a criminal
11 offense). Therefore, although defendant was convicted of a serious offense, we conclude
12 that "the absence of a specific instruction with respect to defendant's mental state [can] be
13 said to have had little likelihood to have affected the verdict[]." *Gray*, 261 Or App at
14 131 (internal quotation marks omitted).

15 Affirmed.