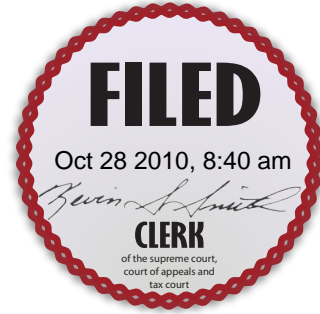


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RANDY A. CUMMINGS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 18A04-1001-CR-32

APPEAL FROM THE DELAWARE CIRCUIT COURT #5
The Honorable Thomas A. Cannon, Jr., Judge
Cause No. 18C05-0810-FA-5

October 28, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Randy A. Cummings (Cummings), appeals his conviction for attempted murder, a Class A felony, Ind. Code §§ 35-42-1-1; 35-41-5-1.

We affirm.

ISSUES

Cummings raises two issues for our review, which we restate as follows:

- (1) Whether the trial court abused its discretion when it limited Cummings' ability to cross-examine the victim; and
- (2) Whether the trial court abused its discretion by admitting into evidence a knife collected from the scene of the stabbing.

FACTS AND PROCEDURAL HISTORY

Cummings and Carolyn Dowling (Dowling) had been living together since 2007. On October 21, 2008, while the two were home together, Cummings began drinking alcohol. Dowling attempted to avoid Cummings while he was drinking because he often became argumentative and hostile, so she laid on the couch and tried to sleep. However, Cummings repeatedly tried to wake her and get her attention. At one point, he called his sister, Zula, to try and persuade her to talk Dowling into talking to him. While Dowling was talking to Zula on the telephone, Cummings came out of the kitchen with a knife in his hand and Dowling heard him say that "if he goes back to jail this time he was going to go for a reason." (Transcript p. 226). While on the phone with Zula, Dowling said "oh sh*t Zula he's got a knife" and then dropped the phone. (Tr. p. 226). Cummings began stabbing Dowling in her

right upper chest, while Dowling attempted to defend herself and fight him off. Dowling slid to the floor in an attempt to escape and Cummings stabbed her several more times.

After Cummings stopped stabbing Dowling, she told him she needed to call 911 because of her injuries. Cummings tried to call 911 but the phone would not work. Dowling was able to fix the phone and call for help. Meanwhile, Cummings paced the living room and waited for the paramedics to arrive. Once the paramedics arrived, she was transported to the hospital.

On October 28, 2008, the State filed an Information charging Cummings with attempted murder, a Class A felony, Ind. Code §§ 35-42-1-1; 35-41-5-1, battery by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-1(a)(3), and domestic battery, a Class A misdemeanor, I.C. § 35-42-2-1.3(a). The State dismissed the domestic battery charge on October 29, 2009. On November 3-5, 2009, a three-day jury trial was held and Cummings was found guilty of both attempted murder and battery by means of a deadly weapon. However, due to double jeopardy concerns, the trial court vacated the judgment entered for battery by means of a deadly weapon. On December 16, 2009, the trial court sentenced Cummings to thirty years in the Department of Correction.

Cummings now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Cross-examination

Cummings contends that the trial court abused its discretion by improperly limiting his ability to cross-examine, thus violating his Sixth Amendment right. Specifically, he argues

that he should have been given the opportunity to cross-examine Dowling about her desire to dismiss the instant charges against him in order to attack her credibility.

The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution and is one of the fundamental rights of our criminal justice system. *Washington v. State*, 840 N.E.2d 873, 886 (Ind. Ct. App. 2006), *trans. denied*. However, this right is subject to reasonable limitations imposed at the discretion of the trial court. *Id.* Trial courts retain wide latitude to impose reasonable limits on the right to cross-examine based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Id.* We will find an abuse of discretion when the trial court controls the scope of cross-examination to the extent that a restriction substantially affects the defendant's rights. *Id.*

A defendant's Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of State witnesses to test their believability. *State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999). Further, Indiana Evidence Rule 616 proves that, "for the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." As this court has recognized, evidence of bias, prejudice, or ulterior motives, on the part of a witness, is relevant at trial because it may discredit the witness or affect the weight of the witness's testimony. *Kirk v. State*, 797 N.E.2d 837, 840 (Ind. Ct. App. 2008), *trans. denied*. Our supreme court has stated, however, that Evidence Rule 616 "should be read in conjunction with Rule 403's required balancing of probative value against the danger of

unfair prejudice.” *Ingram v. State*, 715 N.E.2d 405, 407 (Ind. 1999). Evidence Rule 403 reads, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

Cummings appears to argue that the trial court misunderstood his line of cross-examination which he intended to demonstrate that Dowling was a mentally unstable witness and had a prior pattern of “alleging criminal activity against [Cummings] and then changing her mind and requesting a dismissal.” (Appellant’s Br. p. 11). In response, the trial court stated that this line of questioning was irrelevant, because “a victim does not dictate what cases are pursued so [] how can that be relevant to the decision as to guilt or innocence?” (Tr. p. 186). As a result, he argues, the trial court prevented him from effectively impeaching Dowling with evidence of dependency on medication and her mental instability.

Cummings has failed to demonstrate how his inability to ask about her intention to dismiss charges against Cummings deprived him of the opportunity to effectively cross-examine Dowling. During the trial, Cummings questioned Dowling extensively about her recollection of the stabbing and pointed out inconsistencies between her trial testimony and accounts of her statements to police on or near the time of the stabbing. Cummings was permitted to question Dowling about her request to have charges against him in a prior battery and strangulation case dismissed: “I want to clarify something here that back in October of 2008, you were in this [c]ourt and you requested the State to have the battery and strangulation dismissed, is that right?” (Tr. p. 288). Additionally, Cummings thoroughly

questioned Dowling about her mental capacity by questioning her medical conditions and medications that she took at the time of the stabbing, which he suggested could have impacted her ability to perceive or remember the events. For example, he asked her the following:

[DEFENSE]: And back then, on October 21st, you were taking amitriptyline?

[DOWLING]: Could have been.

[DEFENSE]: Okay, you don't doubt it?

[DOWLING]: I'm not anymore, no, yes.

...

[DEFENSE]: Clozapam [?]

[DOWLING]: Yes.

[DEFENSE]: And gabopentin you just mentioned?

[DOWLING]: uh-huh (affirmative response).

[DEFENSE]: And hydrocodine?

[DOWLING]: I don't take that anymore.

[DEFENSE]: But back then you were taking it?

(Tr. p. 250). Finally, Cummings asked Dowling explicitly whether she had in fact stabbed herself. He asked:

[DEFENSE]: Okay. Did you ever tell anything that [Cummings] didn't do this to you? I'm going to ask you again . . .

[DOWLING]: []. No.

...

[DEFENSE]: Did you ever tell anyone you had to right a wrong, meaning that this wasn't true?

[DOWLING]: No.

(Tr. p. 273). It is clear from Cummings' line of questioning that he received the opportunity to effectively cross-examine Dowling, test the veracity and accuracy of her testimony, and probe her credibility for any potential bias or prejudice against Cummings.

II. Admission of Evidence

Cummings next contends that the trial court erred when it admitted a knife into evidence. Specifically, Cummings argues that (1) the State failed to establish a foundation or chain of custody for the knife and, ultimately, (2) the only purpose for the State to admit the knife was to “inflamm[e] the jury against him.” (Appellant’s Br. p. 13).

It is well settled that an exhibit is admissible if the evidence regarding its chain of custody strongly suggests the exact whereabouts of the evidence at all times. *Culver v. State*, 727 N.E.2d 1062, 1067 (Ind. 2000). That is, in substantiating a chain of custody, the State must give reasonable assurances that the property passed through various hands in an undisturbed condition. *Id.* We have also held that the State need not establish a perfect chain of custody whereby any gaps go to the weight of the evidence and not to admissibility. *Id.*

Here, the State presented the following evidence regarding the chain of custody of the knife collected from the scene: Officer Eric Henry (Officer Henry) testified that while wearing rubber gloves, he collected a knife from the kitchen that had blood on it. He placed the knife in an evidence box and then sealed, initialed and assigned a unique case number to the box. After he sealed the box, he secured it in the crime lab, which has limited access, and there he stored it in the property room. At the State’s request, he removed the knife from the property room prior to trial and heat-sealed the knife with a plastic sleeve so that no one would touch it during the trial. He then resealed the knife within the box in which it was being stored when brought into trial. This testimony is more than sufficient to indicate the

whereabouts of the knife from the time it left the scene until it was presented in court and constituted an adequate foundation for admission of the knife into evidence.

Next, Cummings argues that the knife was irrelevant and prejudicial against him because Dowling testified that the knife introduced as one of the State's exhibits was not the knife used by Cummings to stab her. Evidence is relevant, and thus generally admissible, if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401, 402. When faced with an Evid. Rule 401 question, we "must determine whether the evidence tends to prove or disprove a material fact in the case or sheds any light on the guilt or innocence of the accused." *Brown v. State*, 747 N.E.2d 66, 68 (Ind. Ct. App. 2001). However, Ind. Evidence Rule 403 states that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence."

In this case, the State introduced the knife it alleged as the weapon used to stab Dowling. Specifically, the State introduced the actual thirteen-inch kitchen knife found by the police in the sink of the apartment as State's Exhibit 3, a picture of that same knife wrapped in plastic as State's Exhibit 4, and a photograph of the knife as it was found by police in the sink with blood on it as State's Exhibit 5. Dowling testified that the State's Exhibits 3 and 4 may have been a knife from her kitchen, but was not the one Cummings used to stab her because the knife used had a serrated blade. However, she went on to

identify the knife shown in State's Exhibit 5, which was a photograph of a knife in the sink, as the knife used by Cummings to stab her.

Following this testimony, the State called Officer Henry to identify the knife he collected from the kitchen sink, which he identified as State's Exhibits 3, 4 and 5. Despite Cummings argument that Dowling's testimony refutes the possibility that the knife in State's Exhibits 3 and 4 was used by Cummings to stab her, the evidence is clear that Officer Henry found one knife in the kitchen with blood on it, and that State's Exhibits 3-5 all depict the same knife. Any discrepancy between Dowling's testimony and dispute as to whether the knife in the exhibits are the same knife and the one used to stab Dowling were questions of fact for the jury to resolve. Thus, the evidence was relevant and was not prejudicial and the trial court did not abuse its discretion when it admitted the knife into evidence.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it limited Cumming's cross-examination and admitted the knife collected at the scene as evidence.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.