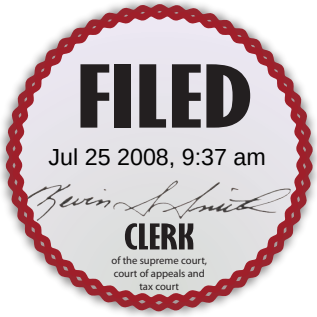

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IN THE
COURT OF APPEALS OF INDIANA

DONITA R. McMAHON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0711-CV-516
	)	
JOSEPH A. LOPAT,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Kevin Barton, Judge
Cause No. 41D01-0506-PL-00052

JULY 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Appellant-Defendant Donita R. McMahon appeals the jury's decision in favor of Appellee-Plaintiff Joseph A. Lopat. We affirm.

McMahon raises three issues for our review, which we restate as:

I. Whether the trial court abused its discretion in allowing Lopat to enter a receipt into evidence.

II. Whether the trial court abused its discretion in sustaining Lopat's objection to the testimony of a particular witness.

III. Whether the trial court abused its discretion in not giving an instruction on inter vivos gifts.

On February 19, 2004, Lopat gave McMahon a belated birthday card in which he asked her to marry him. In the card, Lopat said, "Your [McMahon's] love means more to me every day and will always be stronger. Please hold my hand through the next journey, and will you with all your heart marry me. P.S. See Joe Lopat for ring." (Plaintiff's Exhibit 2). Soon thereafter, he gave McMahon the ring that he testified cost him $5,997.00.

In December of 2004, the couple ended their relationship, and on January 4, 2005, Lopat asked for the return of the engagement ring. Subsequently, Lopat filed a complaint for replevin asking for return of the "engagement ring [given] in contemplation of marriage." Appellant's App. at 19-20. He also sought return of certain other personal items.

McMahon denied that the ring was given in contemplation of marriage and also filed a counterclaim for return of certain personalty. A jury found for Lopat on the ring's value of $5,997.00 and against McMahon. The jury also found against McMahon on her counterclaim for return of other personalty. This appeal followed.

I.

Lopat, who appeared pro se, offered to place a receipt for the ring into evidence. McMahon objected on the basis of "hearsay and also [the] best evidence rule." Appellant's App.

at 69. The trial court, apparently responding to the general hearsay objection, intervened and verified that Lopat was claiming the amount on the receipt was the amount he paid for the ring ($5,997.00). The trial court then admitted the receipt without any further discussion.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and it is not admissible unless it fits within an exception to the rule. Ind. Evidence Rule 801; *Jennings v. State*, 723 N.E.2d 970, 972-73 (Ind. Ct. App.2000). The exclusion of hearsay is meant to prevent the introduction of unreliable evidence that cannot be tested through cross-examination. *Serrano v. State*, 808 N.E.2d 724, 727 (Ind. Ct. App.2004), *trans. denied*.[1] Even though the admission of the receipt may have constituted admission of hearsay, it is harmless error under the circumstances of this case. Lopat testified without objection to the value of the ring, and the receipt is merely cumulative of Lopat's testimony. Admission of cumulative evidence is harmless error. *See Wright v. State*, 766 N.E.2d 1223, 1232 (Ind. Ct. App. 2002).[2]

II.

In presenting her case, McMahon attempted to call a witness who would testify that the receipt admitted into evidence did not refer to the ring presented by Lopat to McMahon. Lopat objected because the witness was not included on McMahon's witness list. The trial court conducted a hearing pursuant to Ind. Evid.R. 104, and determined that the witness' testimony should be excluded because the testimony pertained to McMahon's case-in-chief and McMahon did not disclose the witness to Lopat.

On appeal, McMahon argues that the witness was a rebuttal witness and that his testimony was necessary under Evid.R. 102 "to the end that the truth may be ascertained and proceedings justly determined." Appellant's Reply Brief at 8 (quoting rule). McMahon points

[1] *Serrano* was disapproved on other grounds by *Jaramillo v. State*, 823 N.E.2d 1187 (Ind. 2005).
[2] McMahon has wisely declined to argue the "best evidence rule" objection on appeal.

out that Lopat failed to comply with the trial court's discovery orders, and she argues that Lopat should not be rewarded for such failure.

This court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Freese v. Burns*, 771 N.E.2d 697, 700 (Ind. Ct. App. 2002), *trans. denied*. A trial court may exclude testimony offered in rebuttal that should have been presented in the party's case-in-chief. *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146, 1152 (Ind. 2003). This decision is also left to the sound discretion of the trial court. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993) (holding that the better practice is the exclusion of a previously unidentified rebuttal witness when the witness should have been known and anticipated). The court noted that a trial is, in part, a factual search for truth, and that disclosure of the identity of all witnesses fulfills the objectives of Indiana's evidence rules. *Id*. The court also noted that the purposes of our discovery rules are to provide parties with information essential to the litigation of all relevant issues, to eliminate surprise, and to promote settlement with a minimal amount of court involvement. *Id*.

In the instant case, it appears that the witness was a known and anticipated witness that was not disclosed to Lopat. We cannot conclude that the trial court abused its discretion in excluding this witness' testimony.

Furthermore, we note that the court's ruling was necessitated by McMahon's failure to comply with the trial court's discovery orders. It had no relation to Lopat's failure to comply with some of those orders. Lopat did not receive a windfall when the court ruled on McMahon's failure to comply with the court's discovery orders.

III.

The trial court gave the following instruction, which summarizes this court's holding in *Fowler v. Perry*, 830 N.E.2d 97 (Ind. Ct. App. 2005):

> If a ring is purchased and given to a party in contemplation of marriage, an engagement ring, the person who purchased the engagement ring is entitled to the monetary amount contributed toward the purchase of the ring. An engagement ring is considered to be a conditional gift so that the person presenting the ring is entitled to the monetary amount of the ring if the condition, the marriage, does not take place.

(Appellant's App. p. 86). McMahon agrees that the instruction properly summarizes the law as it pertains to conditional gifts; however, she argues that the trial court abused its discretion in not giving an instruction consistent with her defense that the ring was an inter vivos gift.

The instruction of a jury is left to the sound discretion of the trial court. *Northrop Corp. v. General Motors Corp.*, 807 N.E.2d 70, 94 (Ind. Ct. App. 2004), *trans. denied*. In the present case, McMahon neither objected to the instructions given by the trial court nor tendered an instruction on inter vivos gifts. Indeed, trial counsel specifically approved the trial court's instructions. (Tr. at 161). Accordingly, the issue has been waived. *See e.g., Estate of Hunt v. Bd. of Commissioners of Henry County*, 526 N.E.2d 1230, 1236 n. 5 (Ind. Ct. App. 1988), *trans. denied*.

On appeal, McMahon argues that because *Fowler* is a case of first impression on the effect of a conditional gift, this court should ignore trial counsel's errors and address the issue of jury instructions pertaining to conditional versus completed gifts as a matter of first impression. We decline this invitation; this is no matter of first impression.

Affirmed.

ROBB, J., and BRADFORD, J., concur.