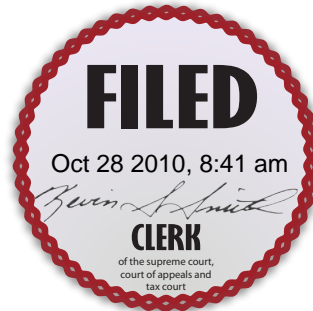


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD K. WILBURN,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 45A03-1001-CR-24

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0906-FB-58

October 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The State charged Donald K. Wilburn with class B felony burglary, class B felony rape, class B felony criminal deviate conduct, and class D felony residential entry. Wilburn admitted engaging in sexual activity with the victim, with whom he was having an intimate relationship, but claimed that the activity was consensual. Over Wilburn's objection, the trial court allowed the State to elicit testimony from the victim that Wilburn had been physically violent with her in the past. The jury convicted Wilburn of rape and criminal deviate conduct. Wilburn contends that the trial court committed reversible error in admitting the victim's testimony regarding his prior bad acts. Because Wilburn did not object to a police officer's testimony regarding past violence between him and K.T. and offered the relevant police reports into evidence during his case in chief, we find no reversible error and affirm his convictions.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that Wilburn and K.T. dated from 1996 to 2004 and had two sons together. The relationship resumed in 2008. Up to three times per month, Wilburn would contact K.T. and then visit her home and engage in consensual sex.

On June 15, 2009, approximately one week after their most recent sexual encounter, K.T. exchanged several texts and phone calls with Wilburn, who indicated that he wanted to see her. K.T. informed Wilburn that she was not at home and eventually stopped responding

to his texts and phone calls. Around midnight, Wilburn called K.T., who again informed him that she was not at home. K.T. arrived home shortly thereafter and went to bed.

K.T. awoke to find someone pulling on her underwear. She turned on the light and saw that it was Wilburn, who had entered her home through the bedroom window. Wilburn attempted to unhook K.T.'s bra. When she pushed him away and told him to stop, Wilburn "told [her] that [she] knew what [he] came for and to give it to him." Tr. at 91. K.T. asked Wilburn, "[W]hat [are you] gonna do, rape me?" *Id.* He replied, "[Y]es, if [I have] to." *Id.* K.T. started hitting Wilburn, who threw her to the floor. K.T. screamed, and Wilburn covered her mouth with his hands and told her to be quiet or he would kill her.

Wilburn removed K.T.'s clothes, straddled her on the bed, and attempted to put his penis in her mouth. When K.T. resisted, Wilburn angrily punched the bed and the wall and performed oral sex on her. Wilburn then straddled K.T. and forced his penis into her mouth. He then attempted to penetrate her anally, inserted his penis into her vagina, and again attempted to put his penis in her mouth. K.T. resisted, and Wilburn ejaculated on her face. Wilburn told K.T. to lie down on the bed with him. When her alarm went off at 4:00 a.m., K.T. told Wilburn that she had to get ready for work. He kissed her on the forehead and left.

K.T. called her daughter and asked her to come over. When her daughter arrived, K.T. was crying and had swollen lips and bruises on her neck and forehead. K.T.'s daughter told her that "[i]f she wanted some help, then she should call the police." *Id.* at 279. K.T. did not want to do so because Wilburn had their children and she did not want to make him angry. Notwithstanding these concerns, K.T.'s daughter called the police.

The State charged Wilburn with class B felony burglary, class B felony rape, class B felony criminal deviate conduct, and class D felony residential entry. At trial, over Wilburn's objection, the court permitted the State to elicit testimony from K.T. that Wilburn "had become physical" with her on two prior occasions. *Id.* at 112. On November 12, 2009, the jury found Wilburn guilty of rape and criminal deviate conduct and not guilty of burglary and residential entry. Wilburn now appeals.

Discussion and Decision

Wilburn contends that the trial court committed reversible error in admitting K.T.'s testimony regarding his prior acts of violence against her.

We review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party.

Pitts v. State, 904 N.E.2d 313, 318 (Ind. Ct. App. 2009) (citations omitted), *trans. denied*.

"An error in the admission of evidence is not prejudicial if the evidence is merely cumulative of other evidence in the record." *Pavey v. State*, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), *trans. denied*.

During cross-examination by Wilburn's counsel, Hammond Police Detective Mark Biller testified without objection regarding prior violence involving Wilburn and K.T. *See* Tr. at 447 ("There had been multiple violent issues in the past. To the best of my knowledge, those always occurred in the home between the two of them."); *id.* at 463 ("[K.T.] did relay [her apprehension of Wilburn] to me in her statement. All of the violence within the

relationship was between the two of them, between the two adults. There was no indication at all that the children were in any harm.”). Additionally, during Wilburn’s case in chief, his counsel offered into evidence the police reports regarding the prior violent incidents in an effort to persuade the jury that K.T. had falsely accused him of rape to regain possession of their children.¹ As the State points out, the police reports “contained far more detail and prejudicial material than that provided in K.T.’s testimony.” Appellee’s Br. at 11. Given that Detective Biller’s testimony was merely cumulative of K.T.’s testimony and that Wilburn himself offered the relevant police reports into evidence to bolster his defense, we find no reversible error and affirm Wilburn’s convictions.²

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.

¹ The incidents occurred in June 2003 and June 2004. In closing argument, Wilburn’s counsel sought to establish a pattern of K.T. accusing Wilburn of violence in order to gain possession of their children for the summer. Tr. at 521-25.

² We also note that Wilburn’s counsel did not object to a question from a juror regarding whether Wilburn had “ever threatened to kill [K.T.] before[,]” to which K.T. responded, “Yes.” Tr. at 263.