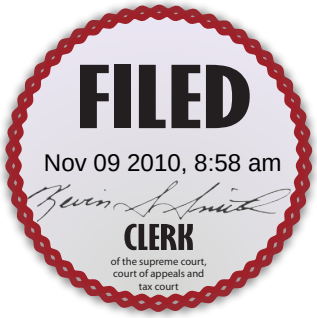

ATTORNEY FOR APPELLANT:

MONICA FOSTER
Foster & Long-Sharp
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JESS DAVID WOODS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0909-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Linda Ralu Wolf, Judge
Cause No. 18C03-0803-MR-2

November 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jess Davis Woods was convicted after a jury trial of murder[1] and conspiracy to commit murder[2] and was sentenced to an aggregate sentence of one hundred years executed. He appeals, raising the following restated issues:

I. Whether the trial court erred when it admitted evidence of statements made by Woods's co-conspirator;

II. Whether the trial court properly admitted evidence of Woods's past treatment of an ex-wife; and

III. Whether the trial court erred when it admitted evidence of Woods's possession of, and familiarity with, weapons, specifically handguns and homemade silencers.

We affirm.

FACTS AND PROCEDURAL HISTORY

Teresa ("Teresa") and Anthony French ("French") were married in 1979 when Teresa was fifteen and pregnant. During their marriage, they had numerous marital difficulties and separated several times. In 1992, Teresa filed for dissolution, but she and French reconciled. In 1993, they lived on Cromer Street in Muncie, Indiana with their three children, ages thirteen, five, and two. At that time, they also owned a rental property on Milton Street in Muncie, a van, a truck, and a boat.

On January 9, 1993, French went to the home of Teresa's sister, Jennifer Nye ("Nye"), pushed his way inside looking for Teresa, demanded to know where she was, and told Nye, "next time you see her she'll be in the hospital." *Tr*. at 329. The next time Nye saw Teresa was the following day, and Teresa was in the hospital. Teresa's face and

[1] *See* Ind. Code § 35-42-1-1.

[2] *See* Ind. Code §§ 35-41-5-2, 35-42-1-1.

nose were swollen, she had a black eye, and she was very upset. She made a police report, and French eventually pleaded guilty to battery. After this incident, Teresa lived with Nye for a few months. While Teresa lived at Nye's home, French called there and told Nye "that he either was going to talk to Teresa or he'd kill everybody in the house." *Id*. at 334. Before Nye hung up, French said, "we're going to kill the f**kin' bitch." *Id*. Teresa reinstated the dissolution proceedings, the court ordered French to move out of the Cromer Street residence, granted temporary custody of the children to Teresa, and gave Teresa possession of the van and the Cromer Street address. French was ordered to pay child support, expenses on the Cromer Street house, and attorney fees. The trial court also determined that the boat should be sold, and the profits divided between Teresa and French; instead, French paid Teresa $12,500 for her share of the boat and never sold it. The Cromer Street address was also to be sold, and a closing date was set for May 14, 1993.

During the course of the dissolution proceedings, French moved in with, Oren Johnson ("O.J."), a co-worker French met through his brother. When French lived with O.J., he was very angry about the dissolution and about losing his children and his property. He often referred to Teresa as "a bitch, a whore, and a slut." *Id*. at 468.

While French was staying at O.J.'s house, O.J. introduced French to his friend Woods. Woods would visit O.J., and French would speak to Woods about his pending dissolution. O.J. often overheard these conversations and heard French refer to Teresa as his "problem." *Id*. at 471. French told Woods that he wanted "his problem" to be "taken care of," which meant he "wanted her eliminated from the face of this earth." *Id*. Woods

told French that he could "probably accommodate his needs." *Id*. Woods was also having "women problems" at this time, and both men showed a negative attitude toward women. *Id*. at 477. French told Woods that he did not want to lose any of his property and did not want "the divorce proceedings to go through before he took care of his problem." *Id*. at 479. French had previously asked another friend if he knew of anyone who would kill his wife, and this friend stated he did not. Woods agreed to kill Teresa and to help French out with "his situation" by making sure "she was taken off the face of the earth." *Id*. at 471, 478-79. French told Woods that was what he wanted done, and "he was ready to go." *Id*. at 479.

In their original plan, Woods was going to have a man named "Chad" commit the murder, and he set up a meeting between "Chad" and French at Woods's house. *Id*. at 1055-56. The price for the murder was agreed to be $5,000. Woods had French provide a description of Teresa, and French also supplied a picture of Teresa. The two discussed how to gain access to the Cromer residence; the plan was to pose as a real estate inspector who needed to inspect the garage for the pending sale of the home. French told Woods the murder should occur in the garage because he did not want blood splattered in the house. He also told Woods when the children would not be at home. Woods brought a .22 caliber semi-automatic handgun with a homemade silencer over to O.J.'s house and showed it to French. Woods had made the silencer himself with automotive parts and had also attached a green canvas bag to the weapon that would catch the casings when they were ejected. Woods and French fired the gun several times on O.J.'s property.

Woods and French discussed the murder of Teresa about half a dozen times in the weeks prior to the murder. French expressed a sense of urgency throughout this time and wanted it done before the dissolution was final and before the sale of the house on Cromer Street. The man named "Chad" was not doing the job according to the original plan, so Woods decided to commit the murder himself. O.J. loaned $2,500 to French, and French gave the money to Woods as half payment for the murder.

On May 13, 1993, Woods told French to be at work and to be seen by as many people as possible, which French did. On that date, Woods took the .22 caliber handgun and silencer from a toolbox at work, told his boss he was going to test drive a car, left, changed into a suit, went to Teresa's home on Cromer Street, and knocked. At approximately 10:25 a.m. on October 13, 1993, Teresa was talking on the telephone to her friend Ginger Engle ("Ginger"). She told Ginger that there was a man in a suit at the door and that she would call Ginger back later. Through the phone, Ginger could hear the man say "inspector," followed by a few more words. *Id*. at 860-61. Woods shot Teresa at close range multiple times inside the garage, killing her. Teresa was shot twice in the head and three times in the chest, as well as in the right leg and right hand with .22 caliber bullets. No shell casings were found at the scene. After Woods killed Teresa, he changed his clothes, returned to work, and called O.J. to tell him "it was done." *Id*. at 1057. Woods called O.J. within a week of the murder to make sure that French knew Woods wanted the rest of his money. Woods repeatedly called O.J. after the murder regarding his money until O.J. told Woods to stop talking to him about the murder.

Teresa's murder case remained unsolved until 2008. O.J. was arrested in November 2007 for crimes unrelated to the murder, and at that time, he came forward with information about Teresa's death. O.J. gave a statement to the police and entered into a use immunity agreement with the prosecutor's office. The agreement required O.J.'s cooperation and honesty and stated that anything he said could not be used against him in prosecution for conspiracy to commit murder; however, it made no promises regarding his pending charges and did not promise immunity for any evidence of his commission of violent acts. Pursuant to the agreement, O.J. participated in interviews with the police and agreed to wear a recording device during two meetings with French. These meetings occurred on March 11 and 12, 2008.

In the time since the murder, Woods had moved to California and was apprehended by police there. Woods denied killing Teresa and knowing French. The State charged both Woods and French with murder and conspiracy to commit murder, and the two were tried separately.

At Woods's jury trial, his ex-wife Vicki Armstrong ("Vicki"), to whom he was married at the time of the murder, testified that Woods owned guns and made his own silencers. *Id*. at 956-57. She testified that she saw Woods and French together before the murder and overheard French complain to Woods about losing his property and children to Teresa. *Id*. at 957, 961, 968. She also stated that French told Woods that he would see Teresa dead first. *Id*. at 1001. Woods told Vicki about Teresa's murder at some point after it occurred and told her that someone had used an excuse to enter the house, took Teresa to the garage, that Teresa had begged for her life, and that the person made sure

she was dead by shooting her in the head. *Id*. at 973, 1003-04. Vicki also testified that Woods had a dispute with French about French owing him money. *Id*. at 973-74.

Another of Woods's ex-wives, Mary Dabbs ("Mary"), to whom he was married from 1996 to 1997, testified at the trial. She testified that he owned a lot of guns and several silencers, which he made himself. *Id*. at 1044-45. In the summer of 1997, Mary went to O.J.'s house with Woods. She overheard a conversation between O.J. and Woods, where Woods asked O.J. what he had told the police about Teresa's murder. *Id*. at 1052. O.J. also asked Woods about "Chad." *Id*. at 1053. As a result of this conversation, Woods became very upset and anxious, and Mary asked him what the conversation was about, but Woods told her to "shut up and leave him alone." *Id*. On the way home, she insisted on knowing what Woods and O.J. had been talking about, and finally, Woods told her that it was about how "he had to kill Teresa French." *Id*. at 1054-55. Woods told Mary everything, including that: French went to O.J. to get Teresa murdered because they were going through a divorce and Teresa was about to get everything; O.J. introduced Woods to French; the original plan was to have a man named "Chad" kill Teresa; the murder would cost $5,000; Woods told French to go to work and be seen by several people the day of the murder; Woods used a gun with a silencer; Woods left work, changed into a suit, and went to Teresa's house; French wanted the murder to take place in the garage because he "didn't want a mess"; Teresa was on the telephone when he knocked on the door; Teresa told the caller that someone from the real estate company was there; and Woods shot her at close range. *Id*. at 1055, 1056, 1057, 1058, 1066-67. Woods also told Mary that French thought that "Chad" had shot Teresa

and that she was the only one who actually knew that Woods was the killer. *Id*. at 1057-58. He threatened her and told her he would kill her if she told anyone. *Id*. at 1058.

During the trial, Woods objected to the admission of statements made by French, including statements made to Nye, Ginger, and other friends regarding threats about Teresa. He also objected to the admission of statements made by French to O.J. when O.J. met with French while wearing a recording device on March 11 and 12, 2008. In all of the instances, the trial court admitted the evidence over Woods's objections. Additionally, Woods objected when the State asked Vicki on redirect examination about why she was unhappy in her marriage to Woods and if it was because he hurt her. *Id*. at 997. This testimony was allowed to be admitted over his objection. The State also admitted evidence that Woods owned and used guns and made his own silencers, to which Woods objected. At the conclusion of the jury trial, Woods was found guilty of murder and conspiracy to commit murder. He was sentenced to fifty-five years for murder and forty-five years for conspiracy to commit murder with the sentences to run consecutively for an aggregate sentence of one hundred years. Woods now appeals.

DISCUSSION AND DECISION

The admission or exclusion of evidence is entrusted to the discretion of the trial court. *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004), *trans. denied* (2005). We will reverse a trial court's decision only for an abuse of discretion. *Id*. We will consider the conflicting evidence most favorable to the trial court's ruling and any uncontested evidence favorable to the defendant. *Taylor v. State*, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), *trans. denied*. An abuse of discretion occurs when the trial court's decision is

clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.* In determining whether an error in the introduction of evidence affected an appellant's substantial rights, we assess the probable impact of the evidence on the jury. *Oldham v. State*, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002). Admission of evidence is harmless and is not grounds for reversal where the evidence is merely cumulative of other evidence admitted. *Pavey v. State*, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), *trans. denied*.

I. Co-conspirator's Statements

Woods argues that the trial court abused its discretion when it allowed various witnesses to testify about statements made by French, his co-conspirator. He specifically asserts that it was error to admit the statements under the hearsay exception for statements made by a co-conspirator. He contends that some of the statements were admitted in error because they were made prior to the time the conspiracy came into existence as they were made before French and Woods even had met. He further claims that the statements made by French to O.J. during their recorded conversations were not admissible because the statements were made fifteen years after the murder and therefore after the conspiracy had ended. He also argues that these statements by French to O.J. should not have been admitted because they were testimonial evidence and violated Woods's rights under the Confrontation Clause.

Hearsay is a statement made out of court that is offered into evidence to prove the truth of the fact or facts asserted in the statement itself. Ind. Evidence Rule 801(c); *Simmons v. State*, 760 N.E.2d 1154, 1159 (Ind. Ct. App. 2002). Hearsay statements are

generally inadmissible unless they fall within one of several exceptions found in the Indiana Rules of Evidence 802, 803, and 804. A statement made by a co-conspirator is not considered hearsay when that statement is made during the course and in furtherance of the conspiracy. Evid. R. 801(d)(2)(E); *Camm v. State*, 908 N.E.2d 215, 230 (Ind. 2009). In order for a statement to satisfy this rule, the State must prove, by a preponderance of the evidence, (1) the existence of a conspiracy between the declarant the party against whom the statement is offered and (2) that the statement was made in the course and in furtherance of the conspiracy. *Roush v. State*, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007).

Woods first takes issue with several statements made by French in 1993 prior to when Woods and French were introduced to each other.[3] First, Nye testified that French called her house in January 1993 and told her that "he was either going to talk to Teresa or he'd kill everybody in the house." *Tr*. at 334. She also stated that before she hung up the phone, French said, "we're going to kill the f**kin' bitch." *Id*. Second, Ginger testified that, in January 1993, French told her that, "I'm going to f**kin' kill her," referring to Teresa. *Id*. at 848. Third, Harrington Rowe ("Rowe"), a friend of Teresa and French, testified that French told him "on quite a few occasions that he was going to kill the f**kin' bitch," referring to Teresa. *Id*. at 1230-31.

[3] We note that at trial Woods objected to some of these statements on the grounds that they violated his right to confrontation under both the United States and Indiana Constitutions. On appeal, he only contends that the admission of these statements was an abuse of discretion because they constituted hearsay. He has therefore waived any arguments regarding the violation of his right to confrontation as to these statements. "'A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.'" *Wingate v. State*, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009).

The trial court did not abuse its discretion when it allowed the above statements to be admitted into evidence. "Only statements which are capable of being proven true or false can constitute hearsay. Accordingly, the hearsay rule does not bar commands, requests, or questions." *Pierce v. State*, 705 N.E.2d 173, 176 n.3 (Ind. 1998). The above statements by French were not offered to prove the truth of the matter asserted, but were instead introduced to show French's state of mind as to his relationship with Teresa and the circumstances which led to her death. *See Hughes v. State*, 546 N.E.2d 1203, 1208 (Ind. 1989) (testimony that victim had told witness that curfew was imposed on daughter held not to be hearsay and admissible because not offered to prove truth of statement but introduced to establish victim's state of mind and circumstances leading to victims' death). We therefore conclude that the statements by Nye, Ginger, and Rowe were properly admitted.

Additionally, any error in the admission of the statements was harmless because the evidence was merely cumulative of other properly admitted evidence. Other witnesses testified regarding the violent nature of the Frenches' relationship, *Tr*. at 393, 395, 396, 408, the fact that French was angry with Teresa about losing his property in the dissolution, *id*. at 961, 1010, and that he wanted her murdered because she was about to get everything in the dissolution. *Id*. at 1055. Therefore, any error was harmless. *Pavey*, 764 N.E.2d at 703.

Woods next asserts that the statements by French to O.J. during their recorded conversations in March 2008 were improperly admitted. During O.J.'s testimony at trial, the State introduced the recordings and transcripts of these conversations. As to Woods's

hearsay argument, statements made by a co-conspirator are not considered hearsay when the statements are made during the course and in furtherance of the conspiracy. Evid. R. 801(d)(2)(E). However, statements made by a co-conspirator after the conspiracy has been effected and crime has been perpetrated are not admissible in evidence against any person except the person making the declarations. *Mayhew v. State*, 537 N.E.2d 1188, 1190 (Ind. 1989). "'For purposes of admitting a co-conspirator's declaration, the conspiracy and its objectives will not always be terminated upon the successful completion of the underlying offense.'" *Willoughby v. State*, 660 N.E.2d 570, 581 (Ind. 1996) (quoting *Wallace v. State*, 426 N.E.2d 34, 42-43 (Ind. 1981)).

Here, although the statements were made fifteen years after the murder occurred, the statements were still made in furtherance of the conspiracy. The statements made by French to O.J. concerned either payment or avoiding detection. There were statements regarding a third-party's request for money in order to influence the outcome of a lie-detector test of Woods, *State's Ex*. 8 at 132, 136, and evidence regarding the payment of money for the murder. *Id*. at 134; *State's Ex*. 9 at 143. Additionally, there were many statements by French regarding avoiding detection by claiming he did not know Woods. *State's Ex*. 8 at 132,133,136; *State's Ex*. 9 at 145, 146, 147, 148, 149, 151, 166, 167. These statements constituted co-conspirator's statements made in the furtherance of the conspiracy because they occurred in the concealment of conspiracy. Therefore, the statements were admissible, and the trial court did not abuse its discretion.

Woods also contends that the admission of these statements was a violation of his right to confrontation under the United States Constitution. The Confrontation Clause of

the Sixth Amendment of the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, "the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006). In order for the admission of the statements at issue to constitute a violation of the Confrontation Clause, they must be hearsay statements. Here, the statements are not hearsay as they are statements by a co-conspirator during the furtherance of the conspiracy under Evidence Rule 801(d)(2)(E). As the challenged statements are, by definition, not hearsay, *Crawford* does not apply.

Additionally, any error in the admission of these statements was merely cumulative of other properly admitted evidence. Other witnesses testified that French knew Woods, *Tr*. at 469-70, 957-68, 1011, 1054-54, and that there was a money dispute between Woods and French. *Id*. at 973-74. Therefore, any error was harmless. *Pavey*, 764 N.E.2d at 703.

II. Evidence of Treatment of Ex-Wife

Woods argues that the trial court abused its discretion when it allowed evidence of his treatment of his ex-wife Vicki to be admitted into evidence on redirect examination. He contends that this evidence was inadmissible under Evidence Rule 404(b) and that he did not open the door to such evidence during his cross-examination of Vicki. Woods claims that his questions to her on cross-examination were merely a general discussion of

marriage and divorce and, therefore, did not open the door to a specific discussion of their marriage.

Under Indiana Evidence Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Otherwise inadmissible evidence may be admitted where the defendant opens the door to questioning on that evidence. *Clark v. State*, 915 N.E.2d 126, 130 (Ind. 2009). "'Where evidence on a certain issue is introduced by one party, and it appears likely that the other party will be prejudiced unless he is permitted to introduce contradictory or explanatory evidence, such evidence should be permitted.'" *Pavey*, 764 N.E.2d at 705 (quoting *Fahler v. Freeman*, 143 Ind. App. 493, 498, 241 N.E.2d 394, 396 (1968)).

Here, during cross-examination of Vicki, the following questions were asked:

Q: Would you agree, Ms. Armstrong, that when you, that when you marry someone that you're in love with them?

A: Yeah.

Q: Usually when you first get married to someone would you agree that the relationship is on good terms?

A: Yes.

Q: When you're first married to someone you're happy with that person?

A: I would hope.

Q: And then when the marriage starts to end and you go through the divorce process would you agree that it is not a happy time?

A: Yeah.

Tr. at 980-81. During redirect examination, the State asked Vicki if Woods ever threatened her during their marriage, which she answered affirmatively. *Id*. at 997. The State also asked her if she was ever hurt during the marriage, and Vicki stated that Woods had bruised her face and threw her down the stairs. *Id*. at 997-98. Vicki further testified that the reason she no longer wanted to have a relationship with Woods was because he had threatened to kill her. *Id*. at 999-1000.

This evidence was cumulative of other properly admitted evidence. Prior to the admission of the evidence at issue, Vicki testified without objection that Woods had threatened her life. *Id*. at 966. O.J. also testified that Woods frequently threatened Vicki and that Woods specifically told her he would "blow her brains out if she didn't keep her mouth shut." *Id*. at 766-67. Additionally, O.J.'s son testified that Woods told at least one ex-wife that if she did not "straighten herself up that she would end up like Frenchie's old lady," meaning Teresa. *Id*. at 1014. Therefore, we conclude that any error in the admission of this evidence was harmless. *Pavey*, 764 N.E.2d at 703.

III. Admission of Evidence of Guns and Silencers

Woods argues that the trial court abused its discretion when it allowed evidence of homemade silencers and silencer and gun parts, which were never connected to Teresa's murder, to be admitted into evidence. Woods claims that, since the murder weapon was never recovered and there was no weapon to compare with the admitted evidence, such evidence constituted inadmissible bad act evidence under Evidence Rule 404(b) because it tended to show that he was a violent person.

As previously stated, under Indiana Evidence Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. "However, it is 'by no means clear that weapons possession, evidence of gun sales, and the like, are necessarily prior "bad acts" for 404(b) purposes.'" *Pickens v. State*, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (quoting *Williams v. State*, 690 N.E.2d 162, 174 (Ind. 1997)). Nevertheless, even assuming arguendo that possession of the various gun parts and silencers is a "bad act" for purposes of Evidence Rule 404(b), the trial court did not abuse its discretion. In determining the admissibility of evidence under Evidence Rule 404(b), a trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect. *Id*. "Evidence that a defendant had access to a weapon of the type used in a crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Id*.

Here, evidence was presented that Woods owned silencers, which he hand-made out of automotive parts. One of these silencers was admitted into evidence, and testimony established that, shortly before the murder, Woods had possession of a handgun with a homemade silencer attached. This evidence was relevant to show that Woods had access to a weapon of the type used in the murder.

Woods contends that any probative value of the challenged evidence was outweighed by its prejudice because the evidence was seized five years after the crime was committed. Despite the length of time between the murder and the seizure of the

complained of evidence, it had high probative value to show that Woods has access to the type of weapon and silencer used in Teresa's murder. As to prejudice, Woods has not pointed to any danger of unfair prejudice other than a generalized concern that the evidence showed that he was a violent person. We conclude that the possibility of unfair prejudice in this case is outweighed by the probative value of the evidence that Woods had access to the type of weapon used in Teresa's murder.

Further, any error in admitting the evidence was harmless at most. Several witnesses testified that Woods owned silencers and that he hand-made his silencers from automotive parts. They also testified that Woods was familiar with and used, for shooting practice, a gun of the same caliber as that used in Teresa's murder. Further, there was testimony that he had guns with special attachments to catch the spent casings when the guns were fired. Therefore, we conclude that any error in the admission of this evidence was harmless as it was merely cumulative to other properly admitted evidence. *Pavey*, 764 N.E.2d at 703.

Affirmed.

RILEY, J., and BAILEY, J., concur.