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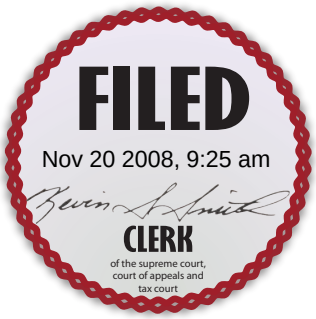

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-305
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0603-MR-50890

November 20, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Robert Wilson (Wilson), appeals his conviction for Count I, murder, a felony, Ind. Code 35-42-1-1; and Count III, carrying a handgun without a license, a Class A misdemeanor, I.C. § 35-47-2-1.

We affirm.

ISSUES

Wilson raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by admitting two firearms which were not the murder weapons; and

(2) Whether the trial court abused its discretion by allowing the State to present character evidence.

FACTS AND PROCEDURAL HISTORY

On the evening of February 26, 2006, Wilson, Eric Burdine, Jr. (Burdine), and William Berry (Berry) spent time together, socializing and drinking. They first gathered at the home of Lepoleon Trodder (Trodder), at 33rd Street and Denny in Indianapolis, Indiana, where they were joined by Eric Searcy (Searcy). At some point during this visit, while Wilson, Burdine, and Berry sat in Berry's car, Wilson lit a cigarette. Berry warned Wilson several times not to get any ashes on his jacket or he would break Wilson's jaw. While Burdine understood Berry's comment to be a joke, Burdine thought Wilson took it seriously.

Eventually, the group, including Trodder and Searcy, went to the home of Laquita Brown (Brown), located at 5251 East 27th Street. The group gathered in front of Brown's

house and continued drinking. Around 10:00 p.m. that night, the men broke up and started departing. Burdine and Berry were standing shoulder to shoulder, facing towards the front of Berry's car. Wilson walked around the back of the vehicle. Suddenly, Burdine heard shots being fired. When he turned, he saw Wilson firing several shots at Berry. Berry collapsed and later died of the gunshot wounds.

After Wilson shot Berry, Wilson called out to Burdine to leave with him in his car. In the car, Wilson repeatedly told Burdine that "he had to do it" and asked if Burdine was "mad at him." (Transcript p. 145). Wilson drove to the house of Rochelle, "Big Bird," where he left the gun. (Tr. p. 148). Then, he drove Burdine to his parent's house. On March 9, 2006, Burdine surrendered to police and gave a statement. The police never recovered the gun used in Berry's shooting.

On March 17, 2006, the State filed an Information, charging Wilson with Count I, murder, a felony, I.C. § 35-42-1-1; Count II, unlawful possession of a firearm by a serious violent felon, a Class B felony, I.C. § 35-47-4-5; and Count III, carrying a handgun without a license, a Class A misdemeanor. On May 19, 2006, the State amended its Information, by adding a habitual offender enhancement, I.C. § 35-50-2-8. On February 11 and 12, 2008, a jury trial was held. At the close of the evidence, the jury found Wilson guilty of murder, a felony and carrying a handgun without a license, a Class A misdemeanor. The State dismissed the remaining Counts. On February 29, 2008, during the sentencing hearing, the trial court sentenced Wilson to sixty years for murder and a term of three hundred and sixty-five days for carrying a handgun without a license, with sentences to run concurrently.

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

DISCUSSION AND DECISION

I. *Admission of Two Firearms*

Wilson contends the trial court abused its discretion when it admitted at trial, over his objection, two firearms which were unrelated to Berry's shooting. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error, if the error is inconsistent with substantial justice or if a substantial right of the party is affected. *Id*. Any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted. *Id*.

Furthermore, we note that the admission of physical evidence is governed by the rules of relevancy and materiality that govern the admission of testimonial evidence. *Brown v. State*, 747 N.E.2d 66, 68 (Ind. Ct. App. 2001). In determining whether evidence is relevant and admissible, this court 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. *Id*.

The gun used to kill Berry was never located and retrieved. Nevertheless, at the crime scene, the police found several 9 millimeter Lugar shell casings. At trial, the State introduced, over Wilson's objection, a 9 mm pistol, which the police had found during a

search of a residence at 1146 Gent, and a .25 caliber Lorcin pistol, recovered during a search at 2818 Steward. Wilson contends that the admission of these firearms was error. He asserts that they were irrelevant as they lacked any connection to the murder and were introduced by the State merely to prejudice Wilson in the eyes of the jury. The State concedes that the none of the weapons admitted at trial was the weapon used to shoot Berry, but argues that they were admissible nonetheless because the weapons were found "through the course of [the police's] investigation" and showed the "depth of the police investigation." (Appellee's Br. pp. 4, 5).

Admission of the two firearms did not tend to prove or disprove a material fact or shed any light on whether Wilson was guilty of murder. The weapons were not used in the charged crime, nor was their admission necessary to establish the thoroughness of the police procedures. At trial, the jury was informed that neither of the weapons was the gun used in Berry's murder. Even though we find that the firearms should not have been admitted because they are irrelevant, we conclude that this error was harmless under the circumstances. Detective Alan Leinberger and Michael Taylor, an employee with the Marion County Forensic Services Agency, had testified to the presence of the weapons to indicate the due diligence used by the police to recover the weapon used in Berry's murder. Thus, as the jury had already been informed that weapons had been found, the introduction of the actual physical evidence was merely cumulative evidence. Therefore, the admission of the two firearms—although irrelevant to the instant charge—amounted to evidence that was cumulative to otherwise properly admitted evidence. *See, e.g., Tynes v. State*, 650 N.E.2d

685, 687 (Ind. 1995) (admission of two guns unrelated to the crime was harmless because the existence of the weapons had been testified to by witnesses and amounted to cumulative evidence).

II. *Character Evidence*

Next, Wilson claims that the trial court abused its discretion when it allowed the State to introduce evidence at trial that showed that Wilson was easily offended. Again, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McVey*, 863 N.E.2d at 440. We will only reverse if the error is inconsistent with substantial justice or if a substantial right of the party is affected. *Id.*

At trial, Burdine testified that he had known Wilson for seven to eight years, and that they were close friends. Over Wilson's objection, Burdine told the jury that Wilson does not "suffer an insult easily." (Tr. p. 119). Combined with Burdine's statement that Berry had threatened to break Wilson's jaw, the State used Wilson's inability to take insults lightly as a possible motive for the murder. Wilson now contends that this is impermissible character evidence pursuant to Indiana Evidence rule 404(a).

Generally, proof of a person's character or trait of character is inadmissible to prove that the person acted in a manner consistent with that character on the occasion in question, except: "(1) . . . [e]vidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same." Ind. Evidence Rule 404(a); *Brooks v. State*, 683 N.E.2d 574, 576 (Ind. 1997). Here, however, Wilson never introduced any character evidence and thus,

the State could not elicit any evidence of Wilson's character trait as there is no evidence yet "to rebut." *See* Evid. R. 404(a).

Nevertheless, even though the jury was told that Wilson is easily offended, Burdine still testified that Wilson shot Berry several times. As such, we find the impact of the impermissible character evidence sufficiently minor so as not to affect Wilson's substantial rights. *See Berry v. State*, 715 N.E.2d 864, 867 (Ind. 1997). Therefore, the admission amounted to harmless error.

CONCLUSION

Based on the foregoing, we conclude that even though the trial court abused its discretion in admitting the challenged evidence, in both instances, the admission of the evidence amounted to harmless error.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.