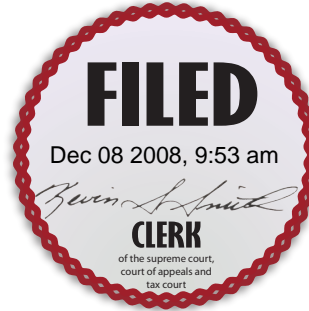


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOEL M. SCHUMM
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MATTHEW WHITMIRE
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

REYEL TARVER,)

Appellant/Defendant,)

vs.)

No. 49A02-0805-CR-460

STATE OF INDIANA,)

Appellee/Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Melissa Kramer, Commissioner
The Honorable Annie Christ-Garcia, Judge
Cause No. 49G17-0610-FD-205618

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Reyel Tarver appeals from his convictions of and sentences for Class D felony Domestic Battery,¹ Class D felony Strangulation,² and Class A misdemeanor Interfering with the Reporting of a Crime.³ Tarver contends that the trial court abused its discretion in declining to admit evidence of his prior military service and in sentencing him. We affirm.

FACTS AND PROCEDURAL HISTORY

Late on the evening of October 21, 2006, April Smith returned to her Indianapolis home after work. After Smith sat down in a chair, Tarver, who was Smith's ex-boyfriend and the father of one of her three children, came out of her bedroom and said that she could sleep in there. Soon after Smith lay down in bed, Tarver came in and told her that he wanted to speak to her. When Smith indicated that she would leave the bedroom if Tarver did not, he grabbed her. Smith managed to make it to the bathroom, intending to telephone the police. Tarver, however, forced the door open and broke Smith's mobile telephone.

Tarver pulled Smith out of the bathroom by her shirt and "choked" her with "his arm around [her] neck" until she began to lose consciousness. When Tarver released his hold, Smith fell and struck her head on the wall. Smith ran for the door, but Tarver pushed her by the neck into a chair. By this time, Smith's oldest son had awakened and jumped on Tarver's back, and her youngest child was "calling him to get him to stop."

¹ Ind. Code § 35-42-2-1.3 (2006).

² Ind. Code § 35-42-2-9 (2006).

³ Ind. Code § 35-45-2-5 (2006).

Tr. p. 15. When Smith's oldest son attempted to telephone the police, Tarver broke the son's mobile telephone and "jumped on [Smith] again in the hallway." Tr. p. 16.

On October 24, 2006, the State charged Tarver with Class D felony domestic battery, Class D felony strangulation, Class D felony theft, Class A misdemeanor domestic battery, Class A misdemeanor battery, and Class A misdemeanor interfering with the reporting of a crime. At trial, the following exchange occurred during Tarver's testimony:

Q. Um, have you ever been in the military?

A. Yes.

[Prosecutor]: Objection, Your Honor, that's not relevant to these charges.

THE COURT: How's this relevant as to what happened on October 21st, of 200[6]?

[Tarver's Attorney]: Well, she's been uh, there's been this alleged information regarding her being over powered I think we have, what I'm getting at eventually is that if he really wanted to hurt her he really could and he just didn't, I mean that's our position basically.

[Prosecutor]: Your Honor, these charges don't require that he hurt even more just he slightly touched her while he's angry?

THE COURT: Okay I'll sustain the objection.

Tr. pp. 38-39.

The trial court found Tarver guilty of Class D felony domestic battery, Class D felony strangulation, and Class A misdemeanor interfering with the reporting of a crime. On October 16, 2007, the trial court sentenced Tarver to an aggregate sentence of 365 days of incarceration with 339 suspended to probation. The trial court found, as mitigating circumstances, Tarver's lack of criminal history, his military service, that the offense was unlikely to recur, and that incarceration would work an undue hardship on

his dependents. The trial court found, as aggravating circumstances, that Tarver had not shown any remorse and that his crimes occurred in the presence of children.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused Its Discretion in Excluding Evidence of Tarver's Military Service

“The admission and exclusion of evidence falls within the sound discretion of the trial court.” *Hill v. State*, 825 N.E.2d 432, 435 (Ind. Ct. App. 2005). “We review the admission of evidence only for an abuse of discretion, which occurs when the decision is clearly against the logic and effect of the facts and circumstances.” *Id.*

Moreover, a claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. *Oldham v. State*, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002). A trial court ruling excluding evidence may not be challenged on appeal unless a substantial right of the party is affected and the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked. *Lashbrook v. State*, 762 N.E.2d 756, 758 (Ind. 2002). In addition, appellate review of the exclusion of evidence is not limited to the grounds stated at trial, but rather the ruling will be upheld if supported by any valid basis. *Id.*

Sargent v. State, 875 N.E.2d 762, 766 (Ind. Ct. App. 2007).

We conclude that Tarver did not make an adequate offer of proof and so failed to preserve this issue for appellate review. Quite simply, Tarver proffered nothing regarding what the substance of his testimony regarding his military service would be, and it is not apparent from the context what that substance would have been.

In any event, the exclusion of any such evidence could only be considered harmless error, even if we assume that its substance would have been what Tarver argues it was on appeal. “Errors in the admission or exclusion of evidence are to be disregarded

as harmless error unless they affect the substantial rights of a party.” *Gall v. State*, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004), *trans. denied*. An error will be found harmless if its probable impact on the trier of fact, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. *Id.*

The trial court heard Tarver’s testimony regarding the incident in question and specifically found him not to be credible. (Tr. 67). The trial court noted what it found to be inconsistencies in Tarver’s testimony, including his testimony that Smith was initially intoxicated to the point of being “passed out” but suddenly became coherent and that the police officer who responded did not detect any signs of intoxication in Smith. Tr. p. 68. The trial court also noted that Tarver could not account for the injuries observed on Smith’s neck. (Tr. 68). Finally, the trial court specifically found Smith, her oldest son, and the responding police officer to be credible. (Tr. 68).

Tarver argues that evidence of his military service would have likely convinced the trial court that he, as a person with military training, did not cause Smith’s injuries. In other words, Tarver argues that the evidence would have convinced the trial court that a person with military training would have caused far worse injuries than those suffered by Smith. Whatever relevance this evidence may have had, and even if the trial court had credited it, we find it unlikely that it would have had any effect on the trial court’s judgment, given that the trial court would also have had to accept the unpersuasive notion that a person with military training simply cannot touch another in anger without causing severe injury. Even if the trial court had abused its discretion in excluding evidence regarding Tarver’s military experience, we conclude that any such error was harmless.

II. Whether the Trial Court Abused Its Discretion in Sentencing Tarver⁴

Under Indiana’s current sentencing scheme, “the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence.” *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence for an abuse of discretion. *Id.* An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” *Id.*

A trial court abuses its discretion if it (1) fails “to enter a sentencing statement at all[,]” (2) enters “a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons,” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration,” or (4) considers reasons that “are improper as a matter of law.” *Id.* at 490-91. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” *Id.* at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

Tarver contends that, given his maintenance of innocence and the alleged weakness of the State’s case, the trial court abused its discretion in finding his lack of

⁴ The State contends that Tarver’s sentence challenge is moot and points to a telephone call between the State’s attorney and a member of the Marion County Probation Department during which the State’s attorney was told that Tarver’s case was closed on September 19, 2008. While we have no particular reason to dispute this information, it is nonetheless not part of the record on appeal and we will not consider it.

remorse to be an aggravating circumstance. While it is true that lack of remorse is not a proper aggravating circumstance where the defendant maintains innocence and the only evidence of guilt is the uncorroborated testimony of the victim, *see, e.g., Dinger v. State*, 540 N.E.2d 39, 40 (Ind. 1989), such is not the case here.

Smith testified to Tarver's attack on her, and that testimony was corroborated, at least in part, by the testimony of her oldest son and the responding police officer. Smith's son testified that he saw Tarver hitting his mother and that Tarver took his mobile telephone from him when Smith told him to call 911. Marion County Sheriff's Deputy Daryl Jones testified that Smith was upset, sobbing, and shaking and that her voice was "raspy" when he arrived. Tr. p. 27. Deputy Jones also noticed injuries consistent with Smith's version of the incident. Because Smith's version of the incident in question was corroborated, the trial court did not abuse its discretion in finding his lack of remorse to be an aggravating circumstance.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.