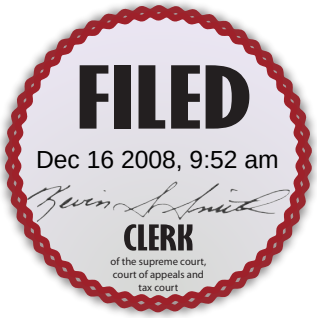


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# IN THE
# COURT OF APPEALS OF INDIANA

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| JAMES F. FROMAN IV, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 06A05-0712-CR-681 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE BOONE SUPERIOR COURT II
The Honorable Rebecca S. McClure, Judge
Cause No. 06D02-0605-MR-432

**December 16, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, James F. Froman IV (Froman), appeals his conviction for Count I, murder, a felony, Ind. Code 35-42-1-1; Count II, false informing, a Class B misdemeanor, I.C. § 35-44-2-2; and his habitual offender adjudication, I.C. § 35-50-2-8.

We affirm.

## ISSUES

Froman raises six issues on appeal, which we consolidate and restate as the following five issues:

(1) Whether the trial court abused its discretion when it admitted into evidence the testimony of a witness who recanted his statement implicating a third person in a murder after a meeting with that third person and the State;

(2) Whether the trial court abused its discretion by denying Froman's request for a continuance and motion for a mistrial;

(3) Whether the trial court abused its discretion by excluding evidence of the victim's uncharged misconduct;

(4) Whether the trial court abused its discretion by rejecting Froman's proposed jury instruction on reckless homicide; and

(5) Whether the trial court could use Froman's criminal history both as an aggravator and as support for a habitual offender finding in sentencing Froman.

## FACTS AND PROCEDURAL HISTORY

On Sunday, May 14, 2006, Froman called Adria Heineman (Heineman) and made arrangements to ride with her from Lebanon to Indianapolis. After they arrived in Indianapolis, they went to Dwight Green's (Green) home. While at Green's home, Froman disclosed to him that he felt sexually attracted to Heineman and asked to be left alone with her. Green refused. Froman and Heineman left Green's residence sometime that afternoon.

Later that night, Froman visited Chris Sparks at Sparks' residence in Lebanon. Froman was hysterical, and his pants were wet from the knees down. He told Sparks that he had "fucked up" and killed Heineman. (Tr. p. 421). After being questioned by Sparks, Froman explained that on their drive back to Lebanon earlier that day, he and Heineman had been joined by an unnamed man. He said they ended up at Boone's Pond, in Boone County. There, Froman was removed from the car at gunpoint by the individual. He claimed that the man pulled the trigger but the weapon failed to fire. Froman continued that he started fighting with the person, but Heineman tried to intervene. Turning on Heineman, Froman pulled Heineman's ponytail and snapped her neck. Froman indicated that when Heineman fell face down he feared that he had killed her. After Froman left Sparks' house, Sparks drove to Boone Pond because he didn't believe Froman's story. He exited his car and used a flashlight to search the shore from the parking lot. After finding nothing, Sparks returned home.

Meanwhile, Froman drove to a local tavern where he told the bartender that he had "fucked up" and needed a place to go. (Tr. p. 231). After being told that the tavern was not a good place because of the presence of video cameras, Froman left.

On Monday morning, fishermen at Boone's Pond discovered Heineman's body lying face down in a thicket of reeds. Though the cause of death was later determined to be asphyxia by drowning, the body also showed signs of blunt force trauma to the head and abdomen. From the evidence at the scene, it appeared as if Heineman's body had been dragged to the water. The pathologist opined that Heineman had been rendered unconscious by blows to the head and later drowned as she was lying prone and partially submerged. The pathologist explained that the blunt force trauma, if left untreated, would have been sufficient to cause death.

That same morning, Sparks heard the broadcast about the discovery of Heineman's body and contacted the police. At that time, Froman was at Jacob White's (White) residence in Lebanon. He told White that "he was trying to [] figure out how to beat a murder case." (Tr. p. 402). Explaining his statement, Froman gave White a story similar to the one given to Sparks. Specifically, Froman told White that while he, Heineman, and an unidentified male returned from Indianapolis, a gun was pointed to his head and he was told to pull over. After pulling over and exiting the car, the gun was placed in his mouth. He added that when the gun did not fire, Heineman and the other individual began to laugh. Froman "freaked out and attacked." (Tr. p. 407). Froman told White that he threw Heineman on the ground and then beat up the man. When they were no longer moving, Froman dragged them to the water

where he stepped on them until he thought they had stopped breathing. After Froman left White's home, White contacted the Boone County Sheriff's Department.

On Monday evening, Froman visited with Eric Beard (Beard), Samantha Orrell (Orrell), and Jordan Cox (Cox). They eventually ended up at a barn in Mechanicsburg where they shared a bottle of vodka. At some point, Beard and Orrell left, while Froman and Cox spent the night in the barn. The next morning, Froman revealed to Cox that he had killed two people. This time, he specifically referred to the unnamed individual as "Mac." (Tr. p. 362). The remainder of Froman's story remained unchanged, including the fact that he stomped on the victims while they were in the water. After Beard returned, the three left for Orrell's apartment. Later that day, the police arrested Froman at Orrell's apartment.

Shortly after being taken into custody, Froman agreed to talk with investigators. During this interview, which was captured on videotape, Froman admitted that he was with Heineman on May 14, 2006. He essentially told the same story as he told Cox. He stated that after he had twisted Heineman's neck and she had fallen on the ground, he kicked her with steel-toed boots. However, he informed police that Mac was the only one left in the water and the only one that he thought was dead. Froman added that Heineman was lying motionless on the ground when he left Boone Pond.

Following Froman's statement, an Indiana State Police helicopter and a Department of Natural Resources dive team spent two days searching for a gun and a second body. None of these searches resulted in any additional discoveries or information. A search of Heineman's car, which Froman had left at a hotel in Lebanon, revealed a business card bearing, among

other things, the name "Mac" and a telephone number. Boone County Sheriff's Department Detective Thomas Beard (Detective Beard) used the phone number to contact Mac and identified him as Green. Green informed Detective Beard that he had never been to Boone's Pond.

On May 17, 2006, the State filed an Information, charging Froman with Count I, murder, a felony. On June 7, 2006, the State added Count II, false informing, a Class A misdemeanor. Then, on July 17, 2006, the State filed an habitual offender charge. While awaiting trial, Froman was housed in the Boone County jail. At some point, James Wilhoite (Wilhoite) was incarcerated in the same area. Wilhoite also had contact with Sparks, who by then was an inmate. After Sparks had informed Wilhoite that he had gone to Boone's Pond to look for bodies, Wilhoite wrote a statement implicating Sparks in Heineman's murder, which reads, in pertinent part, as

> Chris Sparks stated that on or about the 12th day of May 2006 he went out to Boone[']s Pond to get rid of any evidence they may have gotten back to [Froman]. He found the young girl lieing (sic) in the parking lot and draged (sic) her to the pond. He also stated that he noticed that she was still breathing as he put her into the pond.

(State's Exh. 86). Wilhoite handed this statement to Froman, who, in turn, gave it to his attorney. The State eventually obtained a copy of Wilhoite's statement.

On June 14, 2007, twelve days before the start of Froman's jury trial, the State convened a meeting at the jail with both Wilhoite and Sparks. While seated at the conference table, the prosecutor handed both inmates a copy of Wilhoite's statement. When he read the statement, Sparks asked to be restrained. Wilhoite did not appear to be afraid of Sparks and

did not retract his statement. However, after Sparks had left the room, Wilhoite admitted that his statement was false.

On June 26, 2007 through June 29, 2007 a jury trial was held. At the close of the evidence, the jury found Froman guilty of murder and false informing. Thereafter, the trial court adjudicated Froman to be an habitual offender. On September 14, 2007, during a sentencing hearing, the trial court sentenced Froman to sixty-five years for murder and one hundred and eighty days for false informing, with the sentences to be served concurrently. The trial court enhanced Froman's sentence by an additional thirty years for the habitual offender adjudication. Froman's aggregate sentence is ninety-five years.

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

## DISCUSSION AND DECISION

### I. *Admission of Evidence*

Froman first contends that the trial court abused its discretion when it admitted into evidence Wilhoite's testimony. Prior to trial, Froman had filed a Motion to Suppress Wilhoite's statement, arguing that the statement was the product of prosecutorial misconduct and interfered with his right to present a defense. The trial court denied his motion. Prior to Wilhoite's testimony, Froman objected again on the same basis. The trial court affirmed its earlier ruling.

Although Froman characterizes his argument as a challenge to the trial court's denial of his motion to suppress, he did not seek an interlocutory appeal after the denial of his motion. Therefore, as we review Froman's claim following his jury trial, the issue is more

appropriately framed as whether the trial court abused its discretion when it admitted the challenged evidence at trial. 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*.

Froman complains that the State committed misconduct by convening a meeting between Wilhoite, Sparks, and a prosecutor after Wilhoite had written a statement implicating Sparks in Heineman's murder. He maintains that the State's conduct, which resulted in a recantation of Wilhoite's statement, interfered with Froman's right to a fair trial. A claim of prosecutorial misconduct requires a determination that there was misconduct by the prosecutor and that the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Hyppolite v. State*, 774 N.E.2d 584, 599 (Ind. Ct. App. 2002), *trans. denied*. The gravity of peril is measured not by the degree of the misconduct but by the probable persuasive effect on the jury's decision. *Id.*

Here, we find that the State committed prosecutorial misconduct. When meeting at the jail with both Wilhoite and Sparks, the prosecutor handed both inmates a copy of Wilhoite's statement. When he read the statement, Sparks asked to be restrained. However, Wilhoite did not retract his statement. Nevertheless, after Sparks had left the room, Wilhoite admitted that his statement was false. The prosecutor informed him that he "could be charged with a crime of any type" if he was lying. (Tr. p. 457).

In *Diggs v. State*, 531 N.E.2d 461, 464 (Ind. 1988), *cert. denied*, 490 U.S. 1038 (1989), the prosecutor approached a defense witness, Harold Bowers, in the hallway just before the presentation of evidence for the defense. The prosecutor informed Bowers that if he testified to "the same statements he did in his deposition, he [could] be charged according to his own testimony." *Id*. When called as a witness, Bowers invoked his Fifth Amendment right and refused to testify. *Id*. Our supreme court stated that "[a] prosecutor's warning of criminal charges during a personal interview with a witness improperly denies the defendant the use of that witness' testimony regardless of the prosecutor's good intentions." *Id*. (citing *United States v. Morrison*, 535 F.2d 223 (3rd Cir. 1976)). "A prosecutor may not prevent nor discourage a defense witness from testifying." *Id*. (citing *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

In a more current case, *Collins v. State*, 822 N.E.2d 214, 220 (Ind. Ct. App. 2005), *trans. denied*, the prosecutor interviewed a defense witness, Blount, in her home regarding her potential testimony. After informing the prosecutor that she would testify to a version of events favoring the defendant, the prosecutor told Blount that he would arrest her "the

moment she stepped off the witness stand." *Id*. Blount then informed defense counsel that she would not testify at trial. Citing Diggs, the Collins court stated that "[o]ur case law is clear that this type of threat violates the Sixth Amendment." *Id*. at 221. A fundamental element of due process of law is the right of a defendant to present witnesses in his own defense; those witnesses must be "free to testify without fear of governmental retaliation." *Id*. at 220. *See also Shouse v. State*, 849 N.E.2d 650, 656 (Ind. Ct. App. 2006), *trans. denied* (where the State had informed a witness' counsel that if the witness insisted on testifying on the defendant's behalf, the State could seek drug charges against the witness).

After writing the statement implicating Sparks in Heineman's murder, Wilhoite undeniably became a witness for the defense. As such, in line with *Diggs*, *Collins*, and *Shouse*, the State's warning, given during a private meeting with Wilhoite, amounted to prosecutorial misconduct in that it violated Froman's right to call witnesses. Nevertheless, we conclude that this misconduct was harmless because there is no evidence that Froman was placed in a position of grave peril as a result of the State's conduct. *See Hyppolite*, 774 N.E.2d at 599. Wilhoite's original statement, implicating Sparks, was placed in evidence together with the evidence of Wilhoite's recantation. Thus, the jury was presented with both versions and it was within the jury's province to determine which version was most credible. Therefore, the trial court did not abuse its discretion when it admitted Wilhoite's testimony.

II. *Motion for Mistrial and Request for Continuance*

Next, Froman argues that the trial court abused its discretion in refusing to grant a continuance or a mistrial prior to Green's testimony at trial. The State had first disclosed

Green as a potential witness in August of 2006. Despite Froman's and the State's attempts to depose Green, Green never showed for his scheduled depositions. During a pre-trial conference on June 20, 2007, Froman requested and was granted permission to depose Green should he be found and called by the State at trial. At the start of the second trial day, the State indicated to the trial court and defense counsel that it had secured Green's attendance. During the lunch hour that day, Froman's counsel was able to depose Green. On the morning of the third day of trial, Froman moved for a continuance, citing the need for further investigation following Green's deposition. The trial court denied the motion, noting that Froman had been able to depose Green and could have been more diligent in locating the witness prior to trial. Upon the denial of the continuance, Froman moved for a mistrial, which was also denied by the trial court. Froman now contests both rulings.

A. *Motion for Continuance*

Froman does not argue that his motion for continuance was based on a reason identified in I.C. § 35-36-7-1 which governs continuances. Rulings on nonstatutory motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice. *Stafford v. State*, 890 N.E.2d 744, 750 (Ind. Ct. App. 2008). An abuse of discretion occurs only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* We will not conclude that the trial court abused its discretion unless the defendant can demonstrate prejudice as a result of the trial court's denial of the motion for continuance. *Id.* Continuances to allow more time for

preparation are not favored and are granted only by showing good cause and in the furtherance of justice. *Id*.

We cannot say that the trial court's refusal to grant a continuance on the third day of trial amounted to an abuse of discretion. Froman had taken Green's deposition during the court's lunch recess the day before Green testified. During Green's cross-examination, Froman's counsel used the statements Green had made during the deposition to her client's advantage. *See Simmons v. State*, 506 N.E.2d 25, 27 (Ind. 1987) (trial court's denial of defendant's motion for continuance was not an abuse of discretion where defense counsel cross-examined the witness using statements the witness had made in a deposition taken the day before). Given the circumstances of this case, we cannot say that the trial court abused its discretion.

B. *Motion for Mistrial*

Froman's request for a mistrial was based on the State's "mischaracterization of [Green's] cooperation and availability." (Appellant's Br. p. 27). On appeal, the trial court's discretion in determining whether to grant a mistrial is afforded great deference because the court is in the best position to gauge the surrounding circumstances of an event and its impact on the jury. *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004), *reh'g denied*. We therefore review the trial court's decision solely for an abuse of discretion. *Id*. After all, a mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation. *Id*. To succeed on appeal from the denial of a motion for mistrial, a defendant must demonstrate that the conduct complained of was both error and had a

probable persuasive effect on the jury's decision. *Booher v. State*, 773 N.E.2d 814, 820 (*Ind.* 2002).

In support of this argument, Froman points to Detective Beard's testimony in which he stated that he had remained in contact with Green after making initial contact with him upon locating his telephone number in Heineman's car. Froman asserts that this picture of a cooperating and available witness was contrary to what the State had led Froman's counsel to believe. Specifically, on the first day of trial, during a bench conference outside the presence of the jury, the State had informed the trial court and Froman's counsel that it was doubtful that Green would testify.

Without having to decide whether the trial court's denial of Froman's motion amounted to error, we conclude that Green's testimony had no probable persuasive effect on the jury. Rather, the testimony, while no doubt detrimental to Froman, was merely cumulative of a wealth of additional evidence presented by the State. In this light, the record demonstrates that, despite an extensive search, no evidence of a second body was ever found. Numerous witnesses testified to Froman's admission to kicking Heineman in the head and leaving her for dead. As such, the trial court did not abuse its discretion.

III. *Uncharged Misconduct by the Victim*

Focusing on the videotaped statement he gave to investigators after being taken into custody, Froman next maintains that the trial court abused its discretion by refusing to present his entire statement to the jury. Relying on the doctrine of completeness, as included in Indiana Evidence Rule 106, Froman asserts that the jury should have been informed that

Froman and Heineman had visited a crack house in Indianapolis on the day of Heineman's murder, where they had used drugs and where Heineman had prostituted herself in exchange for more drugs.

Indiana Evidence Rule 106 provides that

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

However, the State never offered the videotaped statement or a transcript thereof into evidence. Rather, Detective Beard testified at length concerning the contents of Froman's videotaped statement with the omission of Heineman's illicit actions. As the doctrine of completeness only pertains to the admission of complete documents "[w]hen a writing or recorded statement or part thereof is introduced" into evidence, Ind. Evidence Rule 106 does not apply to Beard's testimony. Therefore, we refuse to disturb the trial court's ruling.

## IV. *Jury Instruction*

Froman contests the trial court's refusal to tender his proposed instruction on reckless homicide to the jury. Specifically, Froman asserts that the instruction should have been given because reckless homicide is an inherently lesser included offense of murder and there existed a serious evidentiary dispute regarding the culpability element distinguishing the two charges. It is well established that instructing the jury is within the discretion of the trial court. *Perez v. State*, 872 N.E.2d 208, 210 (Ind. Ct. App. 2007). Jury instructions are to be

considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Id*.

In *Wright v. State*, 658 N.E.2d 563 (Ind. 1995), *reh'g denied*, our supreme court set forth a three-part test a trial court should employ to determine whether to give a jury instruction on a lesser included offense. First, the trial court should determine whether the lesser included offense is inherently included in the crime charged. *Id*. at 566. If it is not included, then the trial court must make a determination of whether the lesser included offense is factually included in the crime charged. *Id*. at 567. Finally, if the offense is either inherently or factually included in the charged offense, then the trial court should look at the evidence presented to determine whether there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. *Id*. In other words, if the trial court determines that the lesser included offense is either factually or inherently included, and it determines there is a serious evidentiary dispute about the distinguishing elements, then the lesser-included instruction should be given.

It is undisputed that reckless homicide is an inherently lesser included offense of murder. *Id*. at 567; *Horan v. State*, 682 N.E.2d 502 (Ind. 1997), *reh'g denied*. Thus, under Wright's three-step test, we turn to step three of the analysis and evaluate whether the evidence demonstrates a serious evidentiary dispute which would warrant the giving of a reckless homicide instruction. We find it does not.

A person acts recklessly "if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial

deviation from acceptable standards of conduct." I.C. § 35-41-2-2(c). Murder requires the killing to have been committed knowingly or intentionally. I.C. § 35-42-1-1. A person acts knowingly if, when he engages in the conduct, he is aware of a high probability that he is doing so. I.C. § 35-41-2-2(b). The evidence here was so overwhelming that there was no serious evidentiary dispute that when Froman left Heineman at Boone's Pond, he was aware of the high probability that his conduct would result in her death.

The record reflects that when the gun failed to fire at Boone's Pond, Froman "freaked out and attacked." (Tr. p. 407). Froman told White and other witnesses that he threw Heineman on the ground and kicked her several times in the head with steel-toed boots. When she was no longer moving, Froman admitted to dragging her to the water where he stepped on her until he thought she had stopped breathing. Under these circumstances, the jury could not conclude that the lesser offense was committed but not the greater. *See Horan*, 682 N.E.2d at 508. Thus, the trial court did not err when it refused to tender the reckless homicide instruction.

## V. *Sentence*

Lastly, Froman contends that the trial court's use of his criminal history both as an aggravator and as a basis for an habitual offender adjudication constitutes an impermissible double enhancement of his sentence. We disagree. In *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008), our supreme court concluded that

> when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender's sentence. Whether a sentence on the higher end of the sentencing range is appropriate under such circumstances

> will vary from offense to offense and from one prior criminal record to another.

As Froman fails to make an appropriateness argument, we refuse to disturb the trial court's imposed sentence.

## CONCLUSION

Based on the foregoing, we conclude that (1) the trial court's admission of a witness' testimony amounted to harmless error; (2) the trial court did not abuse its discretion by denying Froman's request for a continuance and motion for mistrial; (3) the trial court did not abuse its discretion by excluding evidence of the victim's uncharged misconduct; (4) the trial court properly rejected Froman's proposed jury instruction on reckless homicide; and (5) the trial court was permitted to use Froman's criminal history as both an aggravator and as support for an habitual offender finding in sentencing Froman.

Affirmed.

BAILEY, J., concurs.

BRADFORD, J., concurs in result with opinion.

# IN THE
# COURT OF APPEALS OF INDIANA

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|---|---|---|
| JAMES F. FROMAN IV, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 06A05-0712-CR-681 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

**BRADFORD, Judge, concurring in result.**

I fully concur with the majority's analysis in Parts II through V but write separately to convey my disagreement with the analysis in Part I which concludes that the prosecutor's actions rose to the level of misconduct. Of course, as the majority observes, the prosecutor unadvisedly convened a jail meeting with both Wilhoite and Sparks, whom Wilhoite had just implicated in this murder. While convening such a meeting was backed by noble motives, namely to ferret out the truth, its unintended consequences had the potential to create a chilling effect on possible defense witnesses. This chilling effect was potentially heightened

by the fact that the meeting was in the jail where both Wilhoite and Sparks were detained. The prosecutor could have pursued the goal of truth-finding by holding separate interviews with Wilhoite and Sparks, which would have reduced the potential chilling effect and shielded the prosecutor from criticism in this case. Nevertheless, as the majority points out, here Wilhoite did not appear to fear Sparks and did not retract his statement until after Sparks left the room. Any chilling effect caused by the meeting itself, therefore, appears to have been minimal. Absent proof of an ulterior motive by the prosecutor, I cannot agree that his actions amounted to prosecutorial misconduct.

In finding misconduct, the majority is particularly concerned with the prosecutor's warning to Wilhoite that he could be charged with a crime if he were lying. I understand and agree that certain warnings by prosecutors against defense witnesses may be construed to constitute misconduct insofar as they deny the defendant the use of witness testimony. *See Diggs v. State*, 531 N.E.2d 461, 464 (Ind. 1988); *Collins v. State*, 822 N.E.2d 214, 220 (Ind. Ct. App. 2005), *trans. denied*; *see also Shouse v. State*, 849 N.E.2d 650, 656 (Ind. Ct. App. 2006), *trans. denied*. I further understand that this can be so regardless of the prosecutor's good intentions. *See Diggs*, 531 N.E.2d at 464. Here, however, the prosecutor merely warned Wilhoite that he might face charges for being untruthful. The prosecutor specifically did *not* threaten Wilhoite with charges for testifying on behalf of the defense. Indeed, there is no suggestion from the record that the prosecutor's warning was based upon the presumption that Wilhoite was a defense witness. The prosecutor warned Wilhoite only *after* he recanted, at a moment when Wilhoite's position, with respect to the prosecution of

Froman, would have been more pro-State than pro-defense. Given the timing of the prosecutor's warning, it could just as easily, if not more easily, have been construed by Wilhoite as a caution against testifying in the State's favor to a false recantation.

Given the fleeting nature of the truth in this case, and with due consideration for the prosecutor's efforts to pin it down, I cannot conclude that his actions were anything graver than unadvisable.

In any event, I fully concur that, however this conduct is construed, any error was harmless. In all other respects, I concur with my colleagues.