

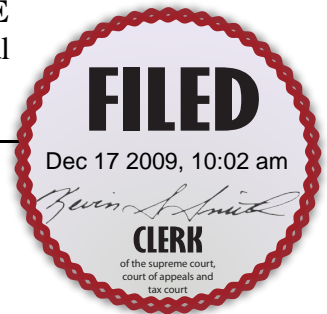
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

**MICHAEL C. KEATING**  
**YVETTE M. LAPLANTE**  
Keating & LaPlante, LLP  
Evansville, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana  
  
**TIFFANY N. ROMINE**  
Deputy Attorney General  
Indianapolis, Indiana



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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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BRYAN D. COWAN,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 63A05-0905-CR-286

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APPEAL FROM THE PIKE CIRCUIT COURT  
The Honorable Jeffrey L. Biesterveld, Judge  
Cause No. 63C01-0804-FA-228

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**December 17, 2009**

**MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION**

**DARDEN, Judge**

We hereby grant Cowan’s petition for rehearing for the purpose of responding to his petition and for clarification of our original opinion.

Cowan argues that he should be granted rehearing because our decision was based “at least in part, on [his] failure to include a copy” of the CD recording of C.C. (the victim), and he “did, in fact, include a copy of said exhibit.” Petition at 1.

On May 20-21, 2009, notice of completion of the trial court clerk’s record and completion of transcript was filed with our Clerk of Court.

On July 10, 2009, counsel for Cowan sent to our Clerk his briefs – an original and eight copies, and the Appendix. Counsel’s transmittal letter “[a]lso enclosed a copy of State’s Trial Exhibit 1 on audio cd.” The original appellant’s brief contains, stapled to the back cover, an envelope with what the brief describes as a CD “copy made by appellate counsel” of State’s Exhibit 1.

On July 14, 2009, our Clerk notified the trial court clerk to transmit the transcript. On July 20, 2009, our Clerk received from Olivia Norrick, Official Court Reporter of Pike Circuit Court, the transcript and “Volume of Exhibits.” The Clerk’s Volume of Exhibits does not contain the actual CD recording that was Exhibit 1 but rather states as follows:

CD (AUDIO) – INTERVIEW

(EXHIBIT RETAINED IN THE PIKE CIRCUIT COURT EVIDENCE LOCKUP)

STATE’S EXHIBIT NO. 1 . . . . 3/19/09 . . . . O. N.

(Exhibit Volume p. 3).

When the appeal was reviewed, only the non-presence of the CD in the official exhibit transmission was noted. The transmittal of the “copy made by appellate counsel” of the State’s Exhibit #1 CD -- attached to the back cover of the original appellant’s brief -- was not discovered until after the hand-down of our opinion. (Cowan’s Appellate Brief at 10, n.10).

Moreover, we presume that what is transmitted to us by the clerk of the trial court as the original record needs no modification. Should it need such, Indiana Appellate Rule 32 provides for the “correction or modification of” the Clerk’s Record or Transcript. Specifically, a party may “move the trial court,” which “retains jurisdiction to correct or modify the Clerk’s Record or Transcript at any time before the reply brief is due to be filed,” for such a correction or modification. Thereafter, the party “must move” this court to correct or modify the Clerk’s Record or Transcript” to “reflect[] what actually occurred” at trial. Cowan did not follow this procedure.

In addition, contrary to Cowan’s assertion on rehearing that our result was reached based upon our lack of consideration of State’s Exhibit #1, we find that it was for the jury to consider State’s Exhibit #1, which it did – in light of his counsel’s arguments as to the conflicts between her recorded statement and her trial testimony – and determine whether C.C.’s trial testimony was credible; we are not in a position to judge her demeanor and credibility. *See, e.g., Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (fact-finder’s role to assess witness credibility).

We find that Cowan received proper appellate review of his conviction and sentence, and hereby affirm the trial court.

MATHIAS, J., and ROBB, J., concur.