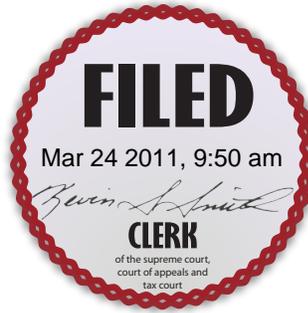


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**MARIELENA DUERRING**

South Bend, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**

Attorney General of Indiana

**RICHARD C. WEBSTER**

Deputy Attorney General

Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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STEVEN GREEN, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 71A03-1008-CR-466

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT

The Honorable R.W. Chamblee, Judge

Cause No. 71D08-0903-FB-19

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**March 24, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Steven Green appeals his conviction for sexual misconduct with a minor, as a Class B felony, following a jury trial. Green raises a single issue for our review, namely, whether the trial court abused its discretion when it refused to allow Green to call two witnesses because he did not inform the State of his intent to call those two witnesses until the day before his jury trial began. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In November of 2008, Green and his wife, Destiny, decided to spend some time apart, and Green moved into his parents' home. In December, Green's sister "introduced" him to C.M., who was fifteen. Transcript at 212. Green and C.M. began a sexual relationship shortly thereafter. Green was twenty-two at the time and had two children through his marriage to Destiny.

Between December 2008 and February 4, 2009, Green and C.M. had sexual intercourse three times. Destiny learned of the relationship and informed the Mishawaka Police Department near the beginning of February 2009. Around that same time, the St. Joseph County Special Victim's Unit ("SVU") received information from the Indiana State Police that an adult male named Steven Green and a minor female with C.M.'s name were involved in a possible sexual relationship and had conversed on MySpace and by telephone.

SVU officers interviewed C.M. and Green separately. Both of them initially denied a relationship but then told officers that they had had sexual intercourse three times. Green told the officers that, at first, he had believed C.M. to be older than fifteen.

However, Green admitted that he still engaged C.M. in at least one act of sexual intercourse after he had learned of her real age. Id. at 119-20.

On March 10, 2009, the State charged Green with sexual misconduct with a minor, as a Class B felony. On June 14, 2010, the day before Green's jury trial was to commence, Green's attorney filed a witness list that included the names of James and Nancy Ludington. Neither of the Ludingtons had previously been disclosed as possible witnesses. At the commencement of trial the next morning, the prosecutor objected to the appearance of either James or Nancy "based on lack of notice," although the prosecutor acknowledged that Green's counsel had just learned of the possible witnesses himself. Id. at 3. The court took the matter under advisement and the parties proceeded to jury selection.

Following lunch on the first day, the trial court revisited the issue of whether the Ludingtons would be permitted to testify. The prosecutor renewed his objection, stating that he had spoken with both of them, that "[t]hey told . . . several stories," and that permitting their testimony would "prejudice[] the [S]tate because we can't talk to folks. We don't know whether or not they have impeachables. We can't verify their story. We are really at a disadvantage because we can't explore what they are telling me." Id. at 72.

According to Green, the Ludingtons' testimony was necessary to impeach C.M.'s testimony and to establish Green's affirmative defense that he reasonably believed C.M. to be sixteen or older at the time he had engaged her in sexual intercourse. The trial court denied Green's request to call the Ludingtons as witnesses. Neither party requested a continuance, but Green did make an offer of proof. Pursuant to the offer of proof, James

testified that C.M. had represented to him that she was eighteen; that C.M. had dated a friend of his that was in his mid-twenties; that he had seen C.M. drive a car and smoke. Nancy also testified that C.M. had told her she was eighteen and that Nancy had seen C.M. drive a car.

During his case-in-chief, Green testified on his own behalf. According to Green, when he learned that C.M. was fifteen he “put the sexual relationship on hold . . . [e]xcept for the night before [Green and C.M.] were questioned by police.” *Id.* at 208. The jury found Green guilty as charged and the trial court sentenced him to twelve years. This appeal ensued.

### **DISCUSSION AND DECISION**

Green argues on appeal that the trial court’s exclusion of the Ludingtons as witnesses was an abuse of discretion because it denied him his right to present his defense. Our standard of review of a trial court’s admission of evidence is an abuse of discretion. *Speybroeck v. State*, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court’s ruling and any unrefuted evidence in the defendant’s favor. *Dawson v. State*, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

It is well established that 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.’ ” *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005) (quoting Ind. Evidence Rule 103(a). That

is, even if the trial court had committed the error complained of on appeal, we will “disregard any error or defect which does not affect the substantial rights of the parties.” Bass v. State, 797 N.E.2d 303, 307 (Ind. Ct. App. 2003). “The improper admission of evidence is harmless error when the conviction is supported by such substantial evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.” Id.

Here, assuming that the trial court erroneously excluded the testimony of the Ludingtons, that error is plainly harmless. Green contends that their testimony was essential to his affirmative defense under Indiana Code Section 35-42-4-3(c) and to impeach C.M.’s credibility. We cannot agree.

Indiana Code Section 35-42-4-9(c) provides for an affirmative defense to conduct such as Green’s when “the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct.” But Green himself testified that, the night before he spoke with the SVU officer, he knew that C.M. was fifteen and engaged her in sexual intercourse anyway. And the SVU officer likewise testified that Green had told him that fact during their discussion. In light of his own statements, there is no substantial likelihood that the Ludingtons’ testimony would have exonerated him. Likewise, although the Ludingtons’ testimony would have conflicted with C.M.’s in some respects, those conflicts are obviated by Green’s own admissions.

Thus, Green’s conviction is supported by substantial evidence of his guilt, and we are satisfied that there is no likelihood that the Ludingtons’ testimony would have

contributed to the jury's deliberations. As such, even if the trial court erred by excluding their testimony, such error would be harmless, and we affirm Green's conviction.

Affirmed.

DARDEN, J., and BAILEY, J., concur.