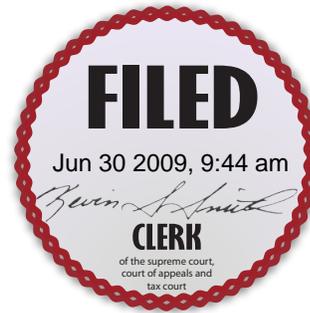


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|----------------------|---|----------------------|
| TERRY FENNESSEE, |) | |
| |) | |
| Appellant-Defendant, |) | |
| |) | |
| vs. |) | No. 71A03-0903-CR-97 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Plaintiff. |) | |

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0704-FA-23

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Terry Fennessee appeals his conviction for Attempted Murder, a Class A felony, following a jury trial. He presents two issues for our review:

1. Whether the trial court abused its discretion when it permitted the State to introduce into evidence a redacted copy of a protective order against him.
2. Whether the trial court abused its discretion when it permitted the State to question him regarding prior threats against a witness.

We affirm.

FACTS AND PROCEDURAL HISTORY

Fennessee married Tasha Townsend in 2002, and, in early 2007, Townsend filed for divorce. In March 2007, Townsend obtained an ex parte protective order against Fennessee, which barred him from Townsend's residence. Fennessee was not personally served with the protective order, but a copy of the order was left at his residence.

On April 15, 2007, Timothy Watson, who has a fourteen-year-old daughter with Townsend, was visiting Townsend and their daughter at Townsend's apartment. Watson's two other children and a young relative accompanied him. At approximately 10:00 p.m., Townsend was walking Watson and the children out of her apartment building when they found Fennessee standing outside. Townsend reminded Fennessee about the protective order, but he did not leave. Watson walked toward his car to try to leave, but Fennessee kept talking to Watson, asking him whether he had been "messing around" with Townsend. Transcript at 73. Watson said no, and he turned his back to Fennessee to leave. Fennessee then shot Watson several times in the back. After that,

Fennessee walked over to Watson and shot him in the back of his head. Watson survived his injuries.

The State charged Fennessee with attempted murder, and a jury found him guilty as charged. The trial court entered judgment accordingly and sentenced Fennessee to forty years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Protective Order

Fennessee first contends that the trial court abused its discretion when it permitted the State to introduce into evidence a redacted copy of the protective order that prohibited him from visiting Townsend's residence. Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of evidence only for an abuse of discretion. Mathis v. State, 859 N.E.2d 1275, 1279 (Ind. Ct. App. 2007). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Id.

Fennessee maintains that the admission into evidence of the protective order violated Indiana Evidence Rules 403 and 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” Ind. Evidence Rule 404(b). In assessing the admissibility of 404(b) evidence, a trial court must undertake a two-step analysis. It must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect.

The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the “forbidden inference” that the defendant had a criminal propensity and therefore engaged in the charged conduct. The list of “other purposes” in the Rule is not exhaustive; extrinsic act evidence may be admitted for any purpose not specified in Rule 404(b) unless precluded by the first sentence of Rule 404(b) or any other Rule.

The second step of a 404(b) analysis is to balance the probative value of the evidence against its prejudicial effect. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Ind. Evidence Rule 403. “The trial court has wide latitude, however, in weighing the probative value of the evidence against the possible prejudice of its admission.”

Goldsberry v. State, 821 N.E.2d 447, 455 (Ind. Ct. App. 2005) (citations omitted).

Here, Fennessee asserted a self-defense claim, stating that he shot Watson because he thought Watson had a gun. One element of a self-defense claim is that the defendant was in a place where he had a right to be. See Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995). The protective order against Fennessee prohibited him from visiting Townsend’s apartment, where the shooting occurred. The State proffered the order to disprove Fennessee’s self-defense claim. The trial court found the protective order relevant to the issue of self-defense and found that the probative value outweighed any prejudice. The trial court noted that protective orders are frequently issued in conjunction with dissolution petitions.

On appeal, Fennessee maintains that he did not violate the protective order because he did not know that the order had been issued. But that contention is not well

taken. Once the trial court issued the protective order and it was served on Fennessee,¹ he was prohibited from visiting Townsend's apartment. Regardless, there is evidence that Fennessee knew about the protective order. He cannot prevail on this issue. The trial court did not abuse its discretion when it admitted the redacted protective order into evidence.

Issue Two: Threats Against Townsend

Fennessee also contends that the trial court abused its discretion when it permitted the State to question him about past threats of physical violence he had made to Townsend, her mother, and her children. During his testimony, Fennessee described his relationship with Townsend as amicable. He stated that even after the dissolution petition was filed, he and Townsend "lived as husband and wife." Transcript at 408. And Fennessee testified that he gave Townsend flowers the week before the shooting.

On cross-examination, the State sought permission to ask Fennessee whether he had threatened the lives of Townsend, her mother, and her children. The trial court permitted the testimony on the grounds that Fennessee had opened the door to the question. Otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence. Roberts v. State, 894 N.E.2d 1018, 1026-27 (Ind. Ct. App. 2008). A party may "open the door" to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related. Id. at 1027. Because Fennessee's own testimony left the jury with the impression that he had a good relationship with

¹ Fennessee does not argue improper service on appeal, and the record indicates proper service on him.

Townsend, the State was entitled to rebut that impression by questioning him about the alleged threats.² The trial court did not abuse its discretion when it permitted the question.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.

² Fennessee denied having made any such threats.