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IN THE
COURT OF APPEALS OF INDIANA

HAROLD E. MUMMEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A04-0903-CR-140
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall Johnson, Judge
Cause No. 27D02-0701-FA-5

September 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Harold E. Mummey appeals his convictions for class A felony rape, two counts of class A felony criminal deviate conduct, class B felony criminal confinement, class B felony armed robbery, class A misdemeanor resisting law enforcement, and class B misdemeanor false informing. We affirm.

The relevant facts indicate that on January 8, 2007, V.C. was walking to a friend's house when Mummey approached her from behind, grabbed her by the hair, and forced her into a car. Mummey placed a cloth hood over V.C.'s face and held a screwdriver to her neck. Mummey drove V.C. to a remote area and raped her. In addition to placing his penis inside V.C.'s vagina, Mummey placed his fingers inside her vagina. Mummey also placed his penis inside V.C.'s mouth. After raping V.C., Mummey removed the hood from V.C.'s head and took a gold necklace and a ring from her person. Mummey then pushed V.C. out of the car and drove away.

Shortly thereafter, V.C. called 911 and provided a description of both Mummey and the vehicle. Deputy Dale Beck of the Grant County Sheriff's Department quickly located Mummey at a gas station. After giving a false name to Deputy Beck, Mummey ran from the scene. He was apprehended and arrested after a brief chase.

The State charged Mummey with seven criminal counts related to his actions on January 8, 2007.[1] On March 5, 2008, Mummey filed an amended motion in limine asking the trial court to exclude from evidence any testimony regarding a rape allegation based upon

[1] The State originally charged Mummey with an additional count of class A felony rape and an additional count of class B felony criminal confinement. Because those counts alleged a separate incident and a different victim, the trial court granted Mummey's motion for severance of those counts.

an incident that occurred on November 5, 2004, involving a different victim.[2] Additionally, Mummey requested that the trial court exclude evidence of prior rape and attempted rape convictions for which Mummey was already serving sentences. On April 22, 2008, the trial court granted Mummey's motion in limine. However, following a hearing on the State's motion to reconsider the admission of evidence of other crimes, wrongs, or acts, the trial court reversed its previous order. The court ordered that, in the event Mummey offered a defense of consent, such prior acts would be admissible pursuant to Indiana Rules of Evidence 403 and 404(b). Following a trial, the jury found Mummey guilty as charged.

Mummey's sole contention on appeal is that the trial court committed fundamental error when it denied his amended motion in limine which permitted the State to introduce evidence of prior misconduct. Specifically, he argues that the trial court limited his ability to present his defense of consent and that he could not testify without running the risk of the jury believing he acted in conformity with his prior acts. A ruling on a motion in limine is not a final ruling on the admissibility of evidence and, therefore, is not reviewable on appeal. *Black v. State*, 829 N.E.2d 607, 610 (Ind. Ct. App. 2005), *trans. denied*; *Carter v. State*, 634 N.E.2d 830, 832 (Ind. Ct. App. 1994). The proper procedure in such a situation is "for the party to take the witness stand and object when and if the prosecution attempts to extract evidence" of the prior bad acts. *Reynolds v. State*, 569 N.E.2d 680, 683 (Ind. Ct. App. 1991). Failure to do so results in waiver of the issue on appeal. *Id*.

[2] Mummey also asked that the trial court exclude evidence of pornography and sexual paraphernalia seized from his residence.

Because Mummey neither testified nor objected at trial, his only recourse is to establish that fundamental error occurred when the trial court denied his motion in limine. "To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). The fundamental error exception to the waiver rule is extremely narrow and "available only when the record reveals clearly blatant violations of basic elementary principles of due process, and the harm or potential for harm cannot be denied." *Id*. (citations omitted).

Mummey points to nothing in the record to establish fundamental error. While he argues that evidence of his prior misconduct would have prejudiced the jury against him had it been admitted, the State never introduced any such evidence. As we have stated, harmful error can only occur when the prior misconduct evidence is actually offered at trial. *Reynolds*, 569 NE.2d at 683. Moreover, Mummey's decision not to testify was a tactical decision on his part and provides no basis for appeal. *See id*. The trial court did not commit fundamental error when it denied Mummey's motion in limine.

Affirmed.

MAY, J., and BROWN, J., concur.