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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY W. FRENCH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0901-CR-2
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Linda Ralu Wolf, Judge
The Honorable Robert Barnet
Cause No. 18C03-0803-MR-1

DECEMBER 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, S.J.,

Anthony French appeals his conviction by jury of murder and conspiracy to commit murder. We affirm.

French raises the following two issues for our review:

1. Whether the trial court committed reversible error in admitting evidence; and

2. Whether the trial court erred in refusing to give French's tendered jury instruction.

The facts most favorable to the verdict reveal that Anthony ("French") and Teresa ("Teresa") French were married in 1979 when Teresa was fifteen-years-old. They had three children, a son born in 1979; a daughter born in 1987; and another son born in 1990. During the course of their marriage, the Frenches acquired two houses, a boat, and several vehicles. The Frenches separated in 1992, and Teresa filed a petition for dissolution. They subsequently reconciled.

In early January 1993, French called Teresa's sister's house looking for Teresa. He told Teresa's sister that the next time she saw Teresa, Teresa would be in the hospital. The following day, Teresa's sister received a telephone call that Teresa was in the hospital with a broken nose and cheekbone caused by French punching her in the face. As a result of these injuries, Teresa needed immediate reconstructive surgery. The morning of the surgery, French told Teresa's friend, Ginger Engle, that he was going to kill Teresa. While Teresa was recuperating from surgery at her sister's house, French telephoned several times and threatened to kill her.

Teresa attended a provisional hearing at the end of January 1993. Following the hearing, the trial court ordered French to pay Teresa maintenance and child support. He was also ordered to pay the mortgage and utilities for the marital residence on Cromer Street where Teresa and the children would be living until it was sold. In addition, French was ordered to make Teresa's van payments and to sell his boat.

Shortly thereafter, French moved in with Oren Johnson, a Borg Warner co-worker. French told Johnson that Teresa had "thrown [him] out in the cold for no reason," and that he would rather see her dead than live without her. Tr. at 525. French was angry that he had to move out of the marital residence, pay maintenance and support to Teresa, and sell his boat.

One evening, Johnson introduced French to Jess David Woods. French told Woods about the situation with Teresa and that the way to end his problems was to have Teresa killed. Woods, who was having similar problems, told French he could help him. French told Woods that he wanted Teresa killed in the garage at the Cromer Street residence because "he didn't want the house shot up or blood all over the place." Tr. at 532. French wanted Teresa killed before all of his property was sold and his marriage was dissolved. He also wanted her killed while the three children were out of the house, and while he was at work. Johnson lent French $2500.00, which French gave to Woods as a down payment on the killing. Johnson overheard the agreement that French would pay Woods $5000.00 to "tak[e] Teresa off the face of this earth." Tr. at 538.

Woods later showed French a .22 caliber pistol with a homemade silencer and an attached canvas bag that caught the ejected shells. French and Woods shot off the gun in Johnson's backyard in early May 1993. French told Woods that this was the gun that would help them get away with murder. French also told Woods to lure Teresa into the garage by posing as a housing inspector who needed to look at the garage for his report.

In the spring of 1993, French told long-time friend Rick Engle and co-worker Joe Haskins that Teresa had filed a dissolution petition and that he was going to kill her. He also told Hank Roe, a neighbor at the Cromer Street residence, that he was losing his house and boat and that he was going to kill Teresa so he could have everything. French also told Roe to keep his girlfriend away from the Cromer Street house.

The closing for the sale of the Cromer Street house was scheduled for May 14, 1993, and the final dissolution hearing was scheduled for June 8, 1993. On the morning of May 13, 1993, Teresa was at home alone. Her two youngest children were out of town with her mother, and her oldest child was at school. French was at work at Borg Warner. At approximately 10:25 a.m., Teresa was talking on the phone to her friend Ginger Engle when a man wearing a suit knocked at the door. Engle overheard the man tell Teresa he was an inspector. Teresa told Ginger she would call her back. Teresa's body was found later that day in the garage. She had been shot multiple times in the head and chest with a .22. No shell casings were found at the scene.

Following Teresa's death, the closing on the house was cancelled, and French moved back into the family's home. He was able to keep all of his possessions and

received Teresa's life insurance benefits. He lived in the Cromer Street residence for the next fifteen years and raised his three children.

In 2007, Johnson was arrested and charged with possession of cocaine, battery, and driving while suspended. He gave a statement to the police about Teresa's death, and agreed to wear a recording device and meet with French. On March 11, 2008, Johnson drove to French's house and told him Woods was in trouble in California and was making comments about Teresa's murder. A few weeks later, Johnson met with French again and told him that Woods had confessed to the murder. French made some incriminating statements on the tape, and was eventually arrested and charged with murder and conspiracy to commit murder.

At trial, the court allowed Teresa's dissolution attorney, Linda Clark Dague, to testify over French's objection that at the provisional hearing, she and Teresa went in the back door of the court house for Teresa's protection. Dague also testified without objection that the Frenches' dissolution was the most violent dissolution she had ever seen.

Also at trial, the court allowed Woods' former spouse, Mary Dabbs, to testify over French's objection that in 1997, she and Woods went to Johnson's house and she overheard Johnson and Woods talking about Teresa's murder. On the way home, Dabbs asked Woods what he had been talking about. Woods pushed Dabbs against the car window and told her that he had killed Teresa and that he would kill her too if she ever told anyone what had happened. Woods told Dabbs that he went over to the Frenches'

house dressed in a suit, and that Teresa thought he was some kind of inspector. He further told Dabbs that he killed Teresa in the garage. Dabbs also testified that she and Woods subsequently visited Terry Fisher in Indianapolis who was supposed to have gotten rid of the gun for Woods. Fisher still had the gun, and Woods told him to "move it on down the line, get rid of it." Tr. at 788.

The jury convicted French of murder and conspiracy to commit murder. He appeals his convictions. Our discussion of the issues includes additional facts.

Admission of Evidence

The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. *Simmons v. State*, 760 N.E.2d 1154, 1158 (Ind. Ct. App. 2002). Moreover, a claim of error in the admission of evidence will not prevail on appeal unless a substantial right of the party is affected. *Oldham v. State*, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002), *trans. denied*. In determining whether an error in the introduction of evidence affected an appellant's substantial rights, we assess the probable impact of the evidence on the jury. *Id.* Admission of evidence is harmless and is not grounds for reversal where the evidence is merely cumulative of other evidence admitted. *Pavey v. State*, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), *trans. denied*. Cumulative evidence is "additional evidence that supports a fact established by the existing evidence (especially that which does not need further

support)." *Black's Law Dictionary* 596 (8th ed.2004) *cited in Witte v. Mundy ex. rel. Mundy*, 820 N.E.2d 128, 135 (Ind. 2005).

French first argues that the trial court erred in allowing Teresa's dissolution attorney, Linda Clark Dague, to testify over his objection that at the provisional hearing, she and Teresa went in the back door of the court house for Teresa's protection. French has waived appellate review of this issue because he includes no authority in support of his argument. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), *trans. denied*, (stating that a party waives the issue on appeal when the party fails to provide adequate citation to authority). Waiver notwithstanding, we find no error. Dague testified without objection that the Frenches' dissolution was the most violent dissolution she had ever seen. Dague's testimony that she took Teresa in the back door of the courthouse for her own protection is merely cumulative of this testimony. Any error in the admission of this evidence would have therefore been harmless and not subject to reversal.

French also argues that the trial court erred in allowing Dabbs to testify about what Woods told her about Teresa's murder. French contends that this testimony was inadmissible hearsay. He is correct. Hearsay is a statement made out-of-court that is offered into evidence to prove the truth of the fact or facts asserted in the statement itself. Ind. Evid. Rule 801(c); *Simmons*, 760 N.E.2d at 1159. Here, the contested portions of Dabbs' testimony constitute hearsay. Woods made the statements out-of-court, and Dabbs repeated the statements at trial for the purpose of proving the facts asserted in the

statements. Such hearsay is not admissible at trial unless it fits within some exception to the hearsay rule. *Id.*

The State argues that the Dabbs' testimony was admissible pursuant to Indiana Evidence Rule 801(d)(2)(E), which provides that a statement made by a co-conspirator of a party is not considered hearsay when that statement is made during the course and in furtherance of the conspiracy. However, statements made by a co-conspirator after the conspiracy has been effected and crime has been perpetrated are not admissible in evidence against any person except the person making the declarations. *Mayhew v. State*, 537 N.E.2d 1188, 1190 (Ind. 1989). Here, Teresa was murdered several years before Woods made the statements about which Dabbs was permitted to testify. Thus, the statements were made after the conspiracy had been effected and the crime had been perpetrated, not during its course. The trial court therefore erred in allowing Dabbs to testify about these statements. However, our review of the transcript reveals that Dabbs' testimony was merely cumulative of other testimony that Woods impersonated a housing inspector and murdered Teresa in the garage. The error was therefore harmless and not subject to reversal.

II. Jury Instructions

Lastly, French argues that the trial court erred in refusing to give the following tendered jury instruction:

> If the evidence in this case is susceptible of two (2) constructions or interpretations, one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that

> interpretation which is consistent with the Defendant's innocence, and reject that which points to his guilt.

Appellant's App. at 484.

Instructing the jury is within the discretion of the trial court. *Smith v. State*, 777 N.E.2d 32, 34 (Ind. Ct. App. 2002), *trans. denied*. We will reverse the trial court only if the court abuses that discretion. *Id.* An abuse of discretion occurs if the instructions, considered as a whole and in reference to each other, mislead the jury as to the applicable law. *Id.* In reviewing a trial court's decision to refuse a tendered instruction, we consider: 1) whether the instruction clearly states the law; 2) whether there is evidence in the record to support the giving of the instruction; and 3) whether the substance of the tendered instruction is covered by other instructions that are given. *Id.*

Here, we agree with the State that French's tendered instruction is essentially a specific example of reasonable doubt and was therefore unnecessary since reasonable doubt was already explained to the jury when the court instructed it as follows at trial:

> The burden is on the State to prove beyond a reasonable doubt the Defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the Defendant's guilt. But it does not mean a Defendant's guilt must be proved beyond all doubt. A reasonable doubt is a fair, and an actual and a logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from the lack of evidence. Reasonable [doubt] exists when you are not firmly convinced of the Defendant's guilt after you have weighed and considered all the evidence. A Defendant must not be convicted on suspicion or on speculation. It is not enough for the State to show the Defendant is probably guilty. On the other hand, very few things in the world we know with absolute certainty. The State does not have to overcome every possible doubt. The State must prove each element of the crime by evidence that firmly convinces each of you and leaves no

> reasonable doubt. The proof must be so convincing you can rely and act upon it in this matter of the highest importance. If you find there is reasonable doubt that the Defendant is guilty of the crimes, you must give the Defendant the benefit of that doubt and find the Defendant not guilty of the crimes here under consideration.

Tr. at 996-997.

Because the tendered instruction was covered by another instruction, the trial court did not abuse its discretion in refusing to give it. We find no error.

Affirmed.

BAKER, C.J., and MAY, J., concur.