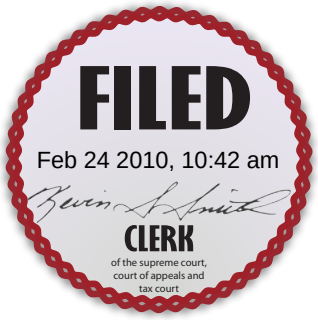

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IN THE
COURT OF APPEALS OF INDIANA

LAQUINTIN ABBEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0905-CR-230
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0810-FB-92

February 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

LaQuintin Abbey appeals his conviction of Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony.[1] We affirm.

Issues

Abbey presents four issues, which we restate as follows:

I. Whether the trial court abused its discretion in instructing the jurors and alternate jurors;

II. Whether the defendant waived his right to challenge the trial court's exclusion of evidence where the defendant failed to make an offer of proof;

III. Whether the trial court abused its discretion in prohibiting Abbey from referring to matters not in evidence in his closing argument; and

IV. Whether there was sufficient evidence to support the verdict.

Facts and Procedural History

Shemeika White was in her second-floor apartment one afternoon in October, when she heard gunshots. She looked out her window and saw a skinny, black male with dark jeans and a hooded, white, multi-colored sweater shooting a black gun. The man was later identified as Abbey. She continued to observe him while she called 9-1-1. The man was alone; he was twenty-five feet away from White, but she did not get a good look at his face. It was light, but raining.

East Chicago Police Department ("ECPD") Officer Gabriel Nava received a dispatch

[1] Ind. Code § 35-47-4-5.

and reached the vicinity of White's apartment complex in approximately three minutes. He saw an individual matching the description walking along a fence in a field near White's apartment complex. As he was unable to approach the suspect in his vehicle, Officer Nava advised other officers in the area, ECPD Officers John Richmond and Randy Morris, of the suspect's location.

Officer Richmond entered the field on foot and observed the suspect, who dropped a black object as soon as he saw Officer Richmond. After Officers Richmond and Morris detained the suspect, Officer Richmond found a black, 380-caliber handgun with five live rounds in the area where he had observed the suspect drop a black object. The firearm could hold as many as eight or ten cartridges and smelled like it had been recently fired.

The State charged Abbey with Unlawful Possession of a Firearm by a Serious Violent Felon and Carrying a Handgun without a License.[2] A jury found him guilty as charged and the trial court entered judgment of conviction.

Abbey now appeals.

Discussion and Decision

I. Alternate Jurors' Discussion of Evidence

Abbey argues that the trial court abused its discretion in instructing the jurors and alternate jurors that they could discuss the evidence in advance of the jury's deliberations. "The manner of instructing the jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion." Henson v. State, 786 N.E.2d 274, 277 (Ind. 2003).

[2] The second count was later dismissed.

The trial court included the following in its preliminary instructions:

> You are permitted to discuss the evidence and testimony of the witnesses among yourselves in the jury room during recesses from the trial. But only when all jurors are present. You should not form or express any conclusion or judgment about the outcome or verdict in the case until the Court submits the case to you for your deliberations.

Appendix at 49. Then in its final instructions, it specifically addressed the two alternate jurors:

> The alternate jurors may retire to the jury room with the regular members of the jury, but the alternate jurors are not to participate in or contribute to the discussions or deliberations of the regular members of the jury.

Id. at 81.

On appeal, Abbey acknowledges that, in so instructing the jury, the trial court complied with the jury rules, including the requirement to instruct the jurors that they:

> are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

Ind. Jury Rule 20(a)(8) (West 2009). Nonetheless, he argues that he was deprived of his constitutional right to a jury trial because discussing evidence and deliberating are one and the same; thus, the alternate jurors engaged in deliberation.

> [B]oth empanelled members and the alternates were allowed to discuss the evidence when they were all together. Therefore, the alternates, by commenting on the evidence, by discussing the evidence, by reflecting upon the evidence, and by considering the evidence, engaged in deliberations.

Appellant's Brief at 9.

This Court has held otherwise. Weatherspoon v. State, 912 N.E.2d 437, 440 (Ind. Ct.

App. 2009), trans. denied. The Weatherspoon Court noted that the most recent amendment to this rule, effective on January 1, 2008, was explicit that alternate jurors could participate in pre-deliberation discussions of the evidence. Id. (citing J. R. 20(a)(8) (West 2009)). We agree with the analysis in Weatherspoon and conclude that the trial court did not abuse its discretion in instructing the jury.

II. Scope of Cross-Examination

Abbey argues that the trial court abused its discretion in not allowing his attorney to ask whether a witness had been convicted of a crime. "Trial courts have wide discretion to determine the scope of cross-examination, and a trial court's decision as to the appropriate extent of cross-examination will only be reversed for an abuse of discretion." McCorker v. State, 797 N.E.2d 257, 266 (Ind. 2003). Where the error is predicated upon the exclusion of evidence, "the defense must have made an offer of proof or the evidence must have been clear from the context." Ind. Evidence Rule 103(a)(2); see Vasquez v. State, 868 N.E.2d 473, 476 (Ind. 2007). Such is necessary to allow trial and appellate courts to determine the admissibility of the testimony and whether prejudice resulted from the exclusion of the evidence. Woods v. State, 892 N.E.2d 637, 641 (Ind. 2008).

Evidence of a conviction of certain crimes is admissible to attack a witness' credibility. Ind. Evidence Rule 609(a). The rule's application, however, is limited to nine specified offenses and "a crime involving dishonesty or false statement." Id. Furthermore, evidence of such a conviction is not admissible if the witness received a pardon for the conviction:

> Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Ind. Evidence Rule 609(c).

Here, the State objected when Abbey asked Officer Richmond if he had been convicted of a crime. The following colloquy occurred at the bench:

> State: I would ask that that be stricken from the record, your Honor. This is totally prejudicial to the State and it's [an] improper attempt at an impeachment.
>
> Court: [Defense counsel?]
>
> Defense: I received this from [the State].
>
> State: I would ask that we . . .
>
> Court: Well, if it was expunged, you can't . . .
>
> Defense: Expunged doesn't mean it's been set aside or anything.
>
> State: Yes, it does; yes, it does.
>
> Court: That's what expunged means. Do you have some contradictory – did he ever make a statement that said he wasn't?
>
> Defense: No, not to me. I was just going by what's furnished to me.
>
> Court: Yeah, well.
>
> State: I would ask if we're going to talk about this, to clear the courtroom, your Honor.
>
> Court: We're not going to talk about it anymore. Your motion is granted. We're going to strike it from the record, and I'm going

to advise the jury to disregard it.

State: Thank you, your Honor.

Transcript at 115-17. After the trial court instructed the jury not to consider the question, Abbey's attorney proceeded to cross-examine the officer.

Abbey did not make an offer of proof as he did not identify the offense of which Officer Richmond was allegedly convicted. Nor did he say anything in response to the State's argument that the conviction had been expunged. Even if, as Abbey contends, the State had the burden of establishing that there had been a pardon, it was Abbey's duty to promptly request an opportunity for fact-finding relevant to the determination of admissibility. Without the development of a record, we cannot conduct a meaningful review. Abbey therefore waived the issue.

III. Closing Argument

Abbey argues that the trial court committed reversible error in not allowing him to assert in closing argument what Officer Morris ostensibly would have said if he had testified at trial. Control of final argument is within the trial court's discretion. Rouster v. State, 600 N.E.2d 1342, 1347 (Ind. 1992). We will not disturb the trial court's ruling unless there was an abuse of discretion "clearly prejudicial to the rights of the accused." Id. It is improper for counsel to comment during closing argument on matters not in evidence. Jefferson v. State, 891 N.E.2d 77, 87 (Ind. Ct. App. 2008), trans. denied.

Here, Abbey's attorney remarked on the State's failure to call Officer Morris to testify. When defense counsel continued to speculate regarding what Officer Morris would

have said, the State objected:

> Defense: Now the State has never called Mr. Randy Morris to testify, and Mr. Morris was operating with Mr. Richmond when all these events occurred. Presumably, if they occurred, the other police officer would have come in and testified that he saw the same thing . . .
>
> State: Objection, your Honor, he's trying to say what evidence . . .
>
> Court: Sustained. That's not evidence that's in . . .
>
> Defense: Pardon me?
>
> Court: That's sustained. You're arguing evidence that's not before the jury.
>
> Defense: Well . . .
>
> Court: He didn't come to testify, that's a fact, but don't . . .
>
> Defense: Well . . .
>
> Court: Move on from there.
>
> Defense: Well . . .
>
> Court: Don't make any presumptions about what he would have said . . .

Tr. at 270-71. The trial court, quite properly, allowed Abbey to note that Officer Morris did not testify, but prohibited Abbey from suggesting what the officer's testimony would have been. Doing so was not an abuse of discretion.

IV. Sufficiency of the Evidence

Finally, Abbey argues that there was insufficient evidence to support the verdict. In reviewing such a challenge, we consider only the probative evidence and reasonable

inferences supporting the verdict, even when confronted with conflicting evidence. Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007). We do not assess witness credibility or reweigh the evidence, affirming a conviction unless no reasonable factfinder could find the elements proven beyond a reasonable doubt. Id. "It is therefore not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" Id. at 147 (quoting Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995)).

It is a Class B felony for a serious violent felon to knowingly possess a firearm. Ind. Code § 35-47-4-5. A "serious violent felon" is defined as a person who has been convicted of Robbery, among other offenses. Id. Abbey admitted that he had two convictions of Robbery. Thus, the question is whether the evidence was sufficient to prove beyond a reasonable doubt that Abbey knowingly possessed a firearm.

The State introduced photographs of a white, red, black, green, and yellow jacket with a pattern of dragon heads. White testified that she saw a black man in that jacket shooting a firearm near her apartment building. She continued to observe him while communicating with 9-1-1.

At trial, Officer Nava testified that he initially saw the suspect walking in the field and that later he was able to see him more closely while the suspect was detained in a squad car. Officer Nava identified Abbey as the man he saw that afternoon.

Finally, Officer Richmond identified the jacket at trial and identified Abbey as the man he had seen wearing it on the afternoon in question. Officer Richmond also stated that, after he detained Abbey, he went to the area where Abbey had been when Abbey first saw the

officer and dropped a black object. There, Officer Richmond recovered a black firearm. Viewing the facts most favorable to the verdict, there was sufficient evidence for the jury to find beyond a reasonable doubt that Abbey committed Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony.

Conclusion

The trial court did not abuse its discretion in instructing the jury or in prohibiting Abbey from referring to matters not in evidence in his closing argument. The defendant waived his right to challenge the trial court's exclusion of evidence. Finally, there was sufficient evidence to support the verdict.

Affirmed.

BAKER, C.J., and ROBB, J., concur.