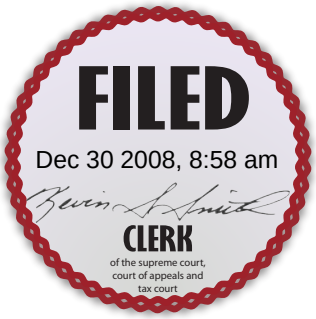

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM CORNETT,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 82A01-0803-CR-130
	)	
STATE OF INDIANA	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Mary Margaret Lloyd, Judge
Cause No. 82D02-0706-FB-546

December 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

INTRODUCTION[1]

William Cornett appeals from his conviction for Class B felony Robbery.[2] We affirm.

ISSUES

Cornett raises four issues on appeal.

I. Whether the trial court abused its discretion in denying Cornett's motion for mistrial, which was based on the fact that the State had mentioned that a tipster had caused the police to include Cornett in the photo array from which the victim identified him.

II. Whether the trial court committed reversible error in communicating *ex parte* with the jury during deliberations.

III. Whether the trial court abused its discretion in admitting what Cornett contends is an unacceptably unclear surveillance videotape of the robbery in question.

IV. Whether the trial court abused its discretion in instructing the jury when it delivered what Cornett contends is an impermissible mandatory instruction.

FACTS AND PROCEDURAL HISTORY

At approximately 10:30 p.m. on June 9, 2007, Derek Tines was working at the Bonker's convenience store in Vanderburgh County. As Tines stood outside, preparing to smoke a cigarette, Cornett pulled up. Cornett, who was wearing a camouflage shirt and a baseball cap with an "O" on it, followed Tines into the store, and then said, "[G]ive me the

[1] We heard oral argument in this case on December 11, 2008, at Terre Haute South Vigo High School. We would like to thank the school and members of the Vigo County bench and bar for their hospitality and commend counsel on the quality of their arguments.

[2] Ind. Code § 35-42-5-1 (2006).

money." Tr. p. 40. Cornett removed what appeared to be a gun and pointed it at Tines, and Tines handed Cornett most of the money from the cash register. Cornett reached over and took the approximately $50 that remained in the drawer and left the store.

Later that night, police showed Tines a person they had apparently detained nearby and asked if he was the robber. Tines responded in the negative. Eventually, Police showed Tines two photo arrays, each containing six photographs, the first soon after the robbery and the second a few days later. Tines did not identify any of the persons pictured in the first array as his assailant but identified Cornett as the robber from the second. Cornett's photograph was included in the second array apparently as the result of an anonymous tip. When police executed a search warrant for Cornett's automobile and home, they found an air pistol underneath the spare tire in the trunk of Cornett's automobile, a beige baseball cap with an "O" on the front underneath the front seat, and a camouflage shirt in Cornett's home.

On June 19, 2007, the State charged Cornett with Class B felony robbery. On December 21, 2007, the State also alleged that Cornett was a habitual offender. Prior to trial, Cornett filed a motion *in limine*, seeking to prevent the State from mentioning that an anonymous tip had led to his inclusion in the second photo array. The trial court denied Cornett's motion, and the State mentioned the tip during its opening statement. Specifically, the prosecutor said during opening, "A few days [after the robbery], the police received an anonymous tip, which prompt[ed] them to place the Defendant's photograph in a photo lineup." Tr. p. 11-12. Cornett objected to the mention of the tip on the ground raised in his motion *in limine*, an objection the trial court overruled. Prior to the presentation of evidence,

however, the trial court reconsidered its ruling and granted Cornett's motion *in limine*. Cornett refused the trial court's offer to admonish the jury after his motion *in limine* was granted and moved for a mistrial based on the earlier comment by the State, a motion the trial court denied.

During trial, the trial court allowed the admission of a surveillance videotape of the robbery over Cornett's objection that it was not sufficiently clear. After the presentation of evidence, the trial court, *inter alia*, instructed the jury that

> [t]he term "deadly weapon" is defined by law as meaning: a loaded or unloaded firearm, or pellet or BB gun, or a weapon, device, taser or electric stun weapon, equipment, chemical substance, or other material that in the manner it is used or could ordinarily be used, is readily capable of causing serious bodily injury.

Appellant's App. p. 25.

During deliberations, the jury sent out the following question: "Can we see the video again & if possible in our jury room[?]" Appellate Ex. 10. Without consulting counsel, the trial court responded with a question of its own: "Is there a disagreement as to what is on the videotape?" Appellate Ex. 11. The jury responded to the trial court's question in the affirmative. Appellate Ex. 11. At this point, counsel was told of the jury's request, and the trial court agreed to show the videotape to the jury again over Cornett's objection. After being shown the videotape again in the courtroom, the jury found Cornett guilty as charged. The trial court sentenced Cornett to fifteen years of incarceration, enhanced by ten years by virtue of Cornett's status as a habitual offender.

DISCUSSION

I. Cornett's Motion for Mistrial

Cornett contends that the trial court abused its discretion in denying his mistrial motion, which was, as previously mentioned, based on the State's mention of the anonymous tip that brought him to the attention of the police.

> We review a trial court's decision to deny a mistrial for abuse of discretion because the trial court is in "the best position to gauge the surrounding circumstances of an event and its impact on the jury." *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004). A mistrial is appropriate only when the questioned conduct is "so prejudicial and inflammatory that [the defendant] was placed in a position of grave peril to which he should not have been subjected." *Mickens v. State*, 742 N.E.2d 927, 929 (Ind. 2001) (quoting *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989)). The gravity of the peril is measured by the conduct's probable persuasive effect on the jury. *Id*.

Pittman v. State, 885 N.E.2d 1246, 1255 (Ind. 2008).

We conclude that Cornett has waived this issue by refusing the trial court's offer to admonish the jury. "When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006) (citing *Dumas v. State*, 803 N.E.2d 1113, 1117 (Ind. 2004); *Brewer v. State*, 605 N.E.2d 181, 182 (Ind. 1993)). "If the party is not satisfied with the admonishment, then he or she should move for mistrial." *Id*. (citing *Dumas*, 803 N.E.2d at 1117). "Failure to request an admonishment or to move for mistrial results in waiver." *Id*. (citing *Dumas*, 803 N.E.2d at 1117). Because Cornett declined the trial court's offer to admonish the jury, he has waived this issue for appellate review.

II. *Ex Parte* Communication

Cornett contends that the trial court's response to the jury's question regarding the surveillance videotape of the robbery constitutes an *ex parte* communication that warrants reversal. Cornett makes both Indiana statutory and constitutionally-based arguments. The State concedes that the trial court's response to the jury question was improper. The State, however, argues that the response did not violate Indiana Code section 34-36-1-6 (2006) because it did not provide any information and that it did not violate the Indiana or federal Constitutions because it did not improperly influence the jury.

A. Statutory Argument

Indiana Code section 34-36-1-6 provides as follows:

> If, after the jury retires for deliberation:
>
> (1) there is a disagreement among the jurors as to any part of the testimony; or
>
> (2) the jury desires to be informed as to any point of law arising in the case;
>
> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

The Indiana Supreme Court has explained that Indiana Code section 34-36-1-6 "does not require the presence of or notice to the parties or their attorneys whenever the trial court responds to a jury request. Rather, notice or presence is required when "information" is given." *Pendergrass v. State*, 702 N.E.2d 716, 720 (Ind. 1998). Quite simply, the trial court's question did not impart any information to the jury, so Indiana Code section 34-36-1-6 was not implicated.

B. Constitutional Argument

The Indiana Supreme Court has repeatedly noted that, where the jury requests additional guidance during deliberations,

> the proper procedure is for the judge to notify the parties so they may be present in court and informed of the court's proposed response to the jury *before* the judge ever communicates with the jury. When this procedure is not followed, it is an *ex parte* communication and such communications between the judge and the jury without informing the defendant are forbidden. However, although an *ex parte* communication creates a presumption of error, such presumption is rebuttable and does not constitute *per se* grounds for reversal.

Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998) (citations omitted).

The prohibition against *ex parte* communication "is designed to prevent the jury from being improperly influenced by the judge." *Id.* at 629. Here, the trial court's question regarding whether there was disagreement about the content of the videotape did not improperly influence the jury. The trial court's response did not express any opinion as to the weight the jury should give (or not give) to the videotape or any other piece of evidence. We conclude that the State has overcome the presumption that the trial court's *ex parte* communication with the jury was prejudicial to Cornett.

III. Surveillance Videotape

Cornett contends that the trial court abused its discretion in allowing the admission of the surveillance videotape of the robbery, on the grounds that it is not clear enough. The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002), *trans. denied*. We will only reverse a trial court's decision on the admissibility of evidence upon a showing of an abuse of that discretion. *Id.*

An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id*. The Court of Appeals may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court. *Moore v. State*, 839 N.E.2d 178, 182 (Ind. Ct. App. 2005), *trans. denied*. We do not reweigh the evidence but consider the evidence most favorable to the trial court's ruling. *Hirsey v. State*, 852 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), *trans. denied*.

The Indiana Supreme Court has concluded that "[t]he foundational requirements for the admission of a tape recording made in a non-custodial setting are: (1) that the recording is authentic and correct; (2) that it does not contain evidence otherwise inadmissible; and (3) that it be of such clarity as to be intelligible and enlightening to the jury." *Kidd v. State*, 738 N.E.2d 1039, 1042 (Ind. 2000) (citing *McCollum v. State*, 582 N.E.2d 804, 811-12 (Ind. 1991)). In such cases, the Indiana Supreme Court had determined that our review will be essentially *de novo*, with our judgment regarding the clarity and helpfulness of the videotape substituted for that of the trial court. *Lamar v. State*, 258 Ind. 504, 512, 282 N.E.2d 795, 800 (1972).

After viewing the surveillance video, we conclude that it was properly admitted. While the video is not perfect, the figure's appearance is consistent with the photograph of Cornett that appeared in the second photo array shown to Tines. Moreover, the figure's shirt appears to be camouflage and his cap sports what appears to be an "O" on the front, which is consistent with Tines's testimony and with items found in Cornett's home and automobile.

In other words, because the videotape is of sufficient clarity to corroborate several other items of evidence in the record, we conclude that it was sufficiently intelligible to be of assistance to the jury. The trial court did not abuse its discretion in admitting the surveillance videotape.

IV. Instructions

Cornett contends that the trial court abused its discretion in instructing the jury that

> [t]he term "deadly weapon" is defined by law as meaning: a loaded or unloaded firearm, or pellet or BB gun, or a weapon, device, taser or electric stun weapon, equipment, chemical substance, or other material that in the manner it is used or could ordinarily be used, is readily capable of causing serious bodily injury.

Appellant's App. p. 25.

"Instructing the jury lies solely within the discretion of the trial court, and we will reverse only upon an abuse of that discretion." *Schmid v. State*, 804 N.E.2d 174, 182 (Ind. Ct. App. 2004), *trans. denied*. In determining whether the trial court properly refused a tendered instruction, we consider three factors: (1) whether the tendered instruction correctly states the law; (2) whether there was 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. *Id*. Jury instructions are to be considered as a whole, and we will not find that the trial court abused its discretion unless we determine that the instructions taken as a whole misstate the law or otherwise mislead the jury. *Id.*

Cornett argues that the instruction in question essentially told the jury which particular items are deadly weapons, thereby invading the province of the jury to be the sole judge of

the law and facts. Article I, Section 19 of the Indiana Constitution states, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." A mandatory instruction that binds the minds and consciences of the jury to return a verdict of guilty upon finding certain facts therefore invades the province of the jury under this provision of Indiana's Constitution. *White v. State*, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006), *trans. denied*.

The instruction in question is supported by evidence that Cornett brandished what appeared to be a semiautomatic handgun during the robbery and that a pellet gun resembling such a weapon was found in his automobile. Moreover, the instruction is a correct statement of the law. *See, e.g.*, *Davis v. State*, 835 N.E.2d 1102, 1112-13 (Ind. Ct. App. 2005) (concluding that pellet gun can be deadly weapon), *trans. denied*; *see also* Ind. Code § 35-41-1-8 (2006) (defining "deadly weapon"). Even so, the instruction would still be improper if it were mandatory.

We cannot conclude, however, that the instruction, read as a whole, is mandatory. We agree that the language of approximately the first half of the instruction does seem to suggest that a pellet or BB gun is necessarily a "deadly weapon." The second half, however, modifies the first half, providing that an object may be a deadly weapon if, "in the manner it is used or could ordinarily be used, [it] is readily capable of causing serious bodily injury." Appellant's App. p. 25. Read as a whole, the instruction did not require the jury to conclude that Cornett used a deadly weapon if it found that he brandished a pellet gun. Rather, the instruction allowed the jury to find that Cornett had brandished a pellet gun–but that it was

not a deadly weapon–if it found that he had not used it in a manner readily capable of causing serious bodily injury. We conclude that the instruction at issue was not impermissibly mandatory.

Even if we were to conclude that the instruction in question was a mandatory instruction with regard to the deadly weapon element of Class B felony robbery, it was accompanied by a contemporaneous instruction that "[u]nder the Constitution of Indiana, you have the right to determine both the law and the facts." Appellant's Supplemental App. p. 30. It is well-settled that "reversible error does not necessarily occur when [a mandatory instruction] is accompanied by another instruction informing the jury that it is the judge of the law and the facts." *Parker v. State*, 698 N.E.2d 737, 742 (Ind. 1998). While there are exceptions to this general rule, this does not seem to be one of them. *See id*. at 742-43 (concluding that "judge of law and facts" instruction given during guilt phase did not render harmless a mandatory instruction given two weeks later during habitual offender phase). We conclude that the trial court did not abuse its discretion in instructing the jury.

The judgment of the trial court is affirmed.

BAKER, J., and CRONE, J., concur.