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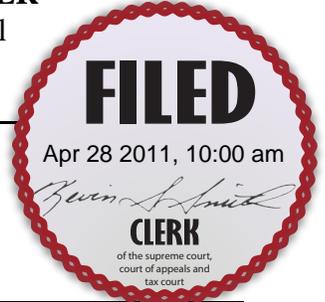
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**IN THE  
COURT OF APPEALS OF INDIANA**

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COREY PANNELL, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A04-1008-CR-513

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Steven R. Eichholtz, Judge  
The Honorable Michael Jensen, Magistrate  
Cause No. 49G20-1002-FB-7602

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**April 28, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Corey Pannell appeals from his convictions after a jury trial of class B felony Possession of a Firearm by a Serious Violent Felon,<sup>1</sup> class D felony Intimidation,<sup>2</sup> and class D felony Criminal Recklessness.<sup>3</sup> Pannell presents three issues for our review, which are as follows:

1. Did the trial court abuse its discretion by refusing to give Pannell's tendered instruction on circumstantial evidence, instead giving its own instruction on circumstantial evidence?
2. Did the trial court properly deny Pannell's motion for discharge pursuant to Indiana Criminal Rule 4?
3. Does sufficient evidence support Pannell's conviction for class B felony possession of a firearm by a serious violent felon?

We affirm.

Pannell and Briana Eines dated off and on from January 2007 until early February 2010. In late January 2010, Briana filed a complaint against Pannell for domestic abuse after which Pannell began making threatening telephone calls to Briana. On January 29, 2010, Pannell left a message on Briana's telephone voice mail threatening to kill her because she had filed the complaint against him. Briana believed Pannell's threat, was afraid, and changed her voice mail message, giving Pannell's full name and reporting that he had threatened to kill her. Briana took this measure because she wanted people who telephoned

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<sup>1</sup> Ind. Code Ann. § 35-47-4-5(c) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011).

<sup>2</sup> Ind. Code Ann. § 35-45-2-1(b)(1) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011).

<sup>3</sup> Ind. Code Ann. § 35-42-2-2(c)(2) (West, Westlaw current through 2011 Pub. Laws approved & effective through 2/24/2011).

her to know what had happened to her in the event that Pannell carried out his threat. When Pannell heard Briana's new telephone voice mail message, he left several threatening messages on Briana's telephone voice mail.

On the evening of January 29, 2010, Briana, her mother, and her friend, Octivia Shropshire, were at Briana's house. Shropshire slept downstairs on the couch, while Briana and her mother slept in the two upstairs bedrooms. Because of Pannell's threats, Briana and her mother switched rooms. Pannell, who had retained a key to Briana's house, entered the front door, saw Shropshire on the couch, and asked where Briana was. Shropshire observed that Pannell was holding a handgun and told him that Briana was upstairs. Pannell sounded angry and was yelling as he walked through the house looking for Briana.

Pannell went upstairs to Briana's room, found her mother there instead, and proceeded to the other bedroom. Briana was lying on the floor between the bed and the wall where Pannell could not see her. Pannell said, "Bitch, I know you are in here." *Transcript* at 45. Pannell left the house after failing to find Briana. Shropshire, who was upset about the incident, telephoned her brother who came to Briana's house and drove Shropshire home. Later that night, Pannell telephoned Briana, the two reconciled, and Pannell returned to Briana's house and spent the night.

The next day, Briana discovered that her silver gun was missing and believed that Shropshire had taken it without permission. Briana and Pannell drove to Shropshire's house and a physical confrontation occurred between Briana and Shropshire in the front of the residence. Pannell remained by the car that was parked on the street in front of the house as the women struggled. Shropshire heard Pannell yelling, "Stop, get off of her" and that he

would give them ten seconds to stop fighting. *Transcript* at 109-10. Pannell then began counting. Briana and Shropshire heard gunshots coming from the area where Pannell was standing and they quit struggling with each other. Shropshire observed Pannell with a gun in his hand. Briana ran back to the car and she and Pannell drove back to her house.

Indianapolis Metropolitan police officers investigated a report of shots fired at Shropshire's house. A shell casing was recovered from the street near where Pannell stood when he fired the gunshots in the air. The next day, January 31, 2010, police officers went to Briana's house and arrested Briana and Pannell. A search warrant was executed on Briana's residence and a black handgun was recovered from the register in Briana's bedroom. The shell casing recovered from the street in front of Shropshire's house was examined and a forensic scientist employed by the Indianapolis Metropolitan Police Department determined that the shell casing had been fired from the handgun retrieved from Briana's bedroom.

Charges were brought against Pannell and he filed a motion for speedy trial by jury on April 7, 2010. The trial court granted that motion on the same day and set Pannell's jury trial for June 10, 2010. On June 8, 2010, the State filed a motion for continuance because an essential witness to their case was scheduled to have oral surgery. A hearing was held on June 14, 2010, and the trial court granted the State's motion finding that a necessary witness would be unavailable due to an emergency. The trial court also found that the court's calendar was congested in that three matters were set for trial on June 10, 2010, including the present case, and one of the other two cases also involved a speedy trial request. The trial court reset the trial for July 15, 2010 over Pannell's objection. On June 17, 2010, Pannell

filed a motion to dismiss and for discharge. The trial court denied Pannell's motion on June 21, 2010.

On July 16, 2010, at the conclusion of the State's evidence, the State dismissed a count alleging that Pannell had committed auto theft. On that same date, the jury found Pannell guilty of two counts of unlawful possession of a firearm by a serious violent felon, intimidation, and criminal recklessness. The jury found Pannell not guilty of three other counts. On August 3, 2010, the State dismissed another count alleging unlawful possession of a firearm by a serious violent felon and Pannell admitted to the habitual offender allegation. The trial court sentenced Pannell to an aggregate sentence of twenty-three years. Pannell now appeals.

1.

Pannell alleges that the trial court abused its discretion by failing to give his tendered instruction on circumstantial evidence, instead giving its own instruction on the subject. The standard of review for challenges to jury instructions is well-settled:

The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury. Still, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.

In reviewing a challenge to a jury instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court.

*Rhoton v. State*, 938 N.E.2d 1240, 1244 (Ind. Ct. App. 2010) (internal quotations and citations omitted). In order to obtain a reversal, a defendant must affirmatively demonstrate that the instruction error prejudiced his substantial rights. *Hollowell v. State*, 707 N.E.2d 1014 (Ind. Ct. App. 1999).

Pannell tendered pattern jury instruction No. 12.01 on the subject of direct and circumstantial evidence. That instruction reads as follows:

Direct evidence means evidence that directly proves a fact, and that, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which you may conclude the existence of (an)other fact(s).

It is not necessary that facts be proved by direct evidence. Both direct and circumstantial evidence are acceptable as a means of proof. A conviction may be based solely on circumstantial evidence. Where proof of guilt is by circumstantial evidence only, it must be so conclusive and point so convincingly to the guilt of the accused that the evidence excludes every reasonable theory of innocence.

Indiana Pattern Jury Instructions-Criminal, Third Edition, Instruction No. 12.01. Over

Pannell's objection the trial court gave Instruction No. 20, which reads as follows:

Evidence relevant to the issues herein may be either direct or circumstantial. Direct evidence shows the existence of a fact in question without the intervention of proof of any other fact. It may be evidence of any eye witness to the main fact, or may be documentary in character, and if true, may immediately establish the main fact to be proved. Circumstantial or indirect evidence consists of proof of collateral facts and circumstances from which the existence of the main fact to be proved may be inferred according to reason and common experience.

Circumstantial evidence alone may be sufficient to prove any of the elements of the crime charged and no greater degree of certainty is required whether the evidence is direct or circumstantial, for in either case the burden of proof must be beyond a reasonable doubt.

*Appellant's Appendix* at 147.

While the language used in each instruction clearly is not identical, the substance is the same, save for the language in the tendered instruction regarding proof of guilt by circumstantial evidence only. Pannell's guilt was not established only by circumstantial evidence as there was direct evidence of his guilt, i.e., Shropshire's testimony that she observed him holding a gun when he entered Briana's house. The trial court correctly concluded that giving Pannell's tendered instruction would be erroneous as there was direct evidence of Pannell's guilt. *See Clemens v. State*, 610 N.E.2d 236 (Ind. 1993) (instruction must be given only where the evidence is wholly circumstantial). To the extent Pannell argues that Shropshire's testimony was not credible, thereby reducing the State's case to circumstantial evidence, this is a request for us to invade the province of the jury. The trial court's instruction is a proper instruction, and Pannell has failed to establish reversible error on this ground. *See Survance v. State*, 465 N.E.2d 1076 (Ind. 1984) (defendant would have had a valid objection to an instruction virtually identical to the one given in the present case that included language about proof of guilt by circumstantial evidence alone where there was direct evidence).

2.

Pannell asserts that the trial court improperly denied his motion for discharge under Crim. Rule 4(B). In reviewing a trial court's findings from the denial of a motion for discharge pursuant to Crim. Rule 4, we apply a clearly erroneous standard. *Lowrimore v. State*, 728 N.E.2d 860 (Ind. 2000). We will neither reweigh the evidence nor reassess the credibility of witnesses, but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. *Paul v. State*, 799 N.E.2d 1194 (Ind.

Ct. App. 2003). We will reverse only upon a showing of clear error, that is, error that leaves us with a definite and firm conviction that a mistake was made. *Id.*

A defendant's right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution, and by article 1, § 12 of the Indiana Constitution. The provisions of Crim. Rule 4 implement a defendant's right to a speedy trial as follows:

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time.

Nothing will prevent the operation of the rule but for its own exceptions. *Paul v. State*, 799 N.E.2d 1194.

Here, the trial court scheduled Pannell's jury trial for June 10, 2010, in compliance with Crim. R. 4. On June 8, 2010, the State filed a motion for continuance because an essential witness to its case was scheduled to have oral surgery. A hearing was held on June 14, 2010, and the trial court granted the State's motion finding that a necessary witness would be unavailable due to an emergency. The trial court also found that the court's calendar was congested in that three matters were set for trial on June 10, 2010, including the present case, and one of the other two cases also involved a speedy trial request. The trial court reset the trial for July 15, 2010 over Pannell's objection. On June 17, 2010, Pannell

filed a motion to dismiss and for discharge. The trial court denied Pannell's motion on June 21, 2010.

In Pannell's motion for discharge, he challenged only the trial court's finding that a continuance was appropriate as a necessary witness would be unavailable due to an emergency, i.e., oral surgery. Pannell noted in his motion that the State had not presented evidence that the witness had been served with a subpoena to appear for trial on June 10, 2010, and that there was a paucity of corroborating evidence that the medical procedure was an emergency. Here, on appeal, Pannell challenges both reasons relied upon by the trial court in granting the continuance, which leads us to another related matter.

The State has filed a verified motion to strike extra-record documents from the appellant's appendix. In that motion, the State notes that copies of the chronological case summaries from the two other cases that were noted by the trial court in its finding of a congested calendar, are included in the appendix, although they were not offered at the hearing on the State's motion to continue the trial. Ind. Appellate Rule 50(B) governs the contents of appendices in criminal appeals. As a general rule, matters not contained in the record are not proper subjects for review. *Herron v. State*, 808 N.E.2d 172 (Ind. Ct. App. 2004). Because the documents identified by the State in its motion to strike are not a part of the record on appeal, we grant the State's motion and strike those documents from the appendix. *See Appellant's Appendix* at 181-95.

We conclude that the only ground available for challenge on appeal was the trial court's finding that a necessary witness was unavailable due to an emergency. This was the only ground argued in the motion for discharge. Additionally, because the extra-record

documents used by Pannell to support his argument regarding court congestion have been excised from the appendix, we will not further address that issue as it is not properly before us.

Crim. Rule 4(D) states as follows:

If when application is made for discharge of a defendant under this rule, the court will be satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety (90) days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety (90) days, he shall then be discharged.

The absence of a key witness through no fault of the State is good cause for extending the time period requirements of Crim. Rule 4. *See Woodson v. State*, 466 N.E.2d 432 (Ind. 1984) (hospitalization of key witness for the State due to automobile accident is good cause for extending time period of the rule).

Here, Shropshire was a key witness to both incidents, on January 29 at Briana's house, and on January 30 at her residence, where Pannell, a serious violent felon, was in possession of a handgun. The State served Shropshire with a subpoena, albeit through regular mail, two weeks prior to trial. The attorney representing Shropshire in an unconnected matter was uncooperative in supplying a current address for Shropshire so that the State could personally serve the subpoena on her. That attorney informed the State that Shropshire was having oral surgery on June 9, 2010, the day before trial, and would be unable to speak for approximately two weeks. At trial, on cross-examination, Shropshire testified that she did, in fact, have oral surgery around that time, but could not supply an exact date. We cannot say that the trial court's decision to grant the continuance based on this ground was clearly erroneous.

3.

Pannell claims that there is insufficient evidence to support his convictions for two counts of class B felony unlawful possession of a firearm by a serious violent felon. When reviewing the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Jackson v. State*, 925 N.E.2d 369 (Ind. 2010). We consider only the probative evidence and reasonable inferences therefrom that support the verdict. *Id.* We will affirm if the probative evidence and reasonable inferences from that evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

In order to establish that Pannell had committed the offense of unlawful possession of a firearm by a serious violent felon, the State was required to show that Pannell knowingly or intentionally possessed a firearm and did so while being a serious violent felon. I.C. § 35-47-4-5. In Pannell's challenge to the sufficiency of the evidence, he claims that there is no evidence to show that he possessed a firearm, i.e., a handgun, at either Briana's house or Shropshire's house. We disagree.

Shropshire testified that on January 29, 2010, she observed Pannell come into Briana's house with a gun. She further testified that on January 30, 2010, during a scuffle with Briana at Shropshire's house, Shropshire heard a gunshot from the area where Pannell was standing by the car, and she observed a gun in his hand. Also, the forensic scientist testified that a shell casing that was recovered from an area near where Pannell stood on January 30, 2010, came from a gun that was hidden and recovered at Briana's house. Pannell claims that both Briana and Shropshire were inconsistent in their testimony about Pannell's possession of a

handgun on the two dates charged. Pannell was able to cross-examine Briana and Shropshire in an effort to show inconsistencies in their testimony and challenge their credibility. The jury is free to believe or disbelieve witnesses, as it sees fit. *McClendon v. State*, 671 N.E.2d 486 (Ind. Ct. App. 1996). We will not substitute our judgment for that of the jury. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005).

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.