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IN THE
COURT OF APPEALS OF INDIANA

VINCENT B. HUNTER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-1012-CR-788
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-1006-FB-82

July 18, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Vincent B. Hunter, Jr., and a friend broke into a home, shot the owner's dog, and stole multiple items. At trial, Hunter's cellmate and his friend's girlfriend testified for the State. Hunter objected to his cellmate's testimony that Hunter had previously used the handgun to shoot a dog. The trial court sustained Hunter's objection and admonished the jury not to consider the statement. The jury convicted Hunter of burglary and animal cruelty.

On appeal, Hunter argues there is insufficient evidence to support his convictions and that the trial court erred in failing to sua sponte order a mistrial based on the cellmate's testimony regarding Hunter's previous use of the handgun. Concluding that the evidence is sufficient and that there was no error, we affirm.

Facts and Procedural History

On November 9, 2009, Dan Warner arrived at his South Bend home after work and discovered that someone had broken his bedroom window, entered his house, and stolen his plasma-screen television, a ceremonial knife, jewelry, rolls of change, bottles of alcohol, and two laptop computers. In addition, Warner's three-legged sheepdog, Linus, had been shot and killed. Warner found Linus hidden under a bedcover in the kitchen. He also found a shell casing nearby on the floor. A picture of Linus wearing sunglasses served as a homescreen, or screensaver, on one of the stolen laptops. However, Warner did not mention this detail when he described the stolen items to police.

On the morning of November 9, 2009, Hunter was looking for his best friend, Bret Walker, and called Walker's girlfriend, Jacqueline Nicholson. Nicholson told Hunter that

Walker was asleep and asked Hunter what was going on. Hunter told Nicholson that he was "trying to hit a lick," that is, commit a burglary. Tr. at 235. Before she left for a doctor's appointment, Nicholson told Walker that Hunter had called. Later that day, when Nicholson returned to her apartment, Hunter and Walker were there with a laptop, some liquor, and some change. Nicholson noticed that the screensaver on the laptop was a photograph of a white, fluffy, three-legged dog. Hunter told Nicholson that he shot the dog. Nicholson knew that Hunter had a handgun because she had seen it in the past, but she was not sure whether she saw a handgun that day. Hunter and Walker sold the other stolen items.

On the morning of November 30, 2009, South Bend Police Sergeant Robert Stoynoff received a call that police officers were in pursuit of two men fleeing on foot. To try to intercept the men, Sergeant Stoynoff parked in an area where he thought they might pass. He saw two men come running out between two houses. He exited his car, yelled, "Police, stop," and drew his service weapon. *Id*. at 263. Hunter stopped and surrendered. Walker turned and ran back the way they had come. Other officers arrived and apprehended Walker nearby.

Later that day, a resident of the area where Hunter and Walker were apprehended saw a handgun on the ground and informed police. Police found the handgun on the ground not far from where Walker was caught. Forensic examination of the handgun and the casing found in Warner's home established that the casing was fired from that handgun.

On June 24, 2010, the State charged Hunter with class B felony burglary[1] and class D felony animal cruelty.[2] While Hunter was in jail he shared a cell with Gregory Downey. Downey was in jail awaiting sentencing for a federal counterfeiting charge. Hunter talked to Downey about committing the burglary and shooting the dog. Hunter told Downey that he and a friend broke into a house and shot a three-legged dog that was in the bedroom where a flat-screen television that they wanted to steal was located. Hunter told Downey that a photograph of the dog wearing sunglasses was the screensaver on one of the laptops they stole from the house. Hunter said that he and his friend took the stolen items to his friend's girlfriend's home and later sold them. Hunter also told Downey that he threw his handgun away while being chased by police, but the police found the handgun and matched it to the shell casing found by the dog Hunter had shot.

Trial was held on November 22 and 23, 2010. Nicholson and Downey testified for the State. The jury found Hunter guilty as charged. The trial court sentenced Hunter to an aggregate term of ten years, executed. Hunter appeals his convictions. Additional facts will be provided as necessary.

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[1] Ind. Code §§ 35-43-2-1 (burglary), 35-43-4-2 (theft; receiving stolen property), 35-41-2-4 (aiding, inducing, or causing an offense).

[2] Ind. Code §§ 35-46-3-12(d), 35-41-2-4.

Discussion and Decision

I. Sufficiency of the Evidence

Hunter asserts that the testimony of Nicholson and Downey is incredibly dubious, and therefore the evidence is insufficient to identify him as one of the perpetrators. Our standard of review is well settled:

> When reviewing a claim of insufficient evidence, we consider only evidence that supports the verdict, and draw all reasonable inferences therefrom. We do not reweigh the evidence nor do we judge the credibility of witnesses. We uphold a conviction if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt.

Warren v. State, 725 N.E.2d 828, 834 (Ind. 2000) (citations omitted).

The incredible dubiosity rule permits an appellate court to "impinge upon the jury's responsibility to judge the credibility of witnesses [] when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408 (Ind. 2002). The rule applies only "'where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt.'" *Id*. (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)).

Hunter's argument essentially boils down to an attack on the credibility of both Downey and Nicholson. According to Hunter, Downey is not a reliable witness because he is an experienced felon who was trading his testimony for a lighter sentence, and Nicholson testified against him to protect Walker, her boyfriend and father of her child. We observe that neither Downey nor Nicholson presented contradictory or equivocal testimony, and

Hunter has failed to present any argument that Downey's or Nicholson's testimony was coerced. Hunter has failed to show that the incredible dubiosity rule is applicable, and therefore we are not permitted to impinge on the jury's duty to judge the credibility of the witnesses. We conclude that the evidence was sufficient to sustain Hunter's convictions.

II. Mistrial

During the State's case in chief, the prosecutor asked Downey what Hunter had told him about the handgun used to shoot the dog. Downey testified, "[Hunter] said he was running from police, I guess, and he threw it. Then the police ended up recovering it, and finding out that it was the gun that killed the dog. He also said that there was … that he shot another dog previously with the same gun." Tr. at 207. Hunter objected to the last statement and asked the trial court to instruct the jury to disregard it. The State had no objection to such an instruction, and the trial court admonished the jury as follows:

> Ladies and Gentlemen, the last comment concerning any prior use of the … alleged prior use of the weapon, is something which I am directing that you shall not consider in this case.
>
> Normally we use the term "stricken from the Record." But quite honestly, when you say that you're striking something from the Record, all that does is put that you're striking that from the Record on the Record. And so I'm directing you should not consider that last statement in any way, okay?

Id. at 207-08.

On appeal, Hunter asserts that the trial court committed fundamental error in failing to sua sponte order a mistrial. Hunter did not move for a mistrial. However, even if Hunter had moved for a mistrial, the trial court's denial of such a motion would not have constituted reversible error. As such, the trial court's failure to sua sponte order a mistrial was not

reversible error. The remedy of mistrial is "extreme," and should be prescribed only when "no other action can be expected to remedy the situation at the trial level." *Lucio v. State*, 907 N.E.2d 1008, 1011 (Ind. 2009) (citation and quotation marks omitted). To establish reversible error, the appellant must establish that he was "placed in a position of grave peril to which he should not have been subjected." *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). "The gravity of the peril is determined by the probable persuasive effect on the jury's decision." *Beer v. State*, 885 N.E.2d 33, 47 (Ind. Ct. App. 2008).

Here, the trial court admonished the jury not to consider in any way Downey's statement regarding Hunter's alleged prior use of the handgun. "'A timely and accurate admonition is presumed to cure any error in the admission of evidence.'" *Banks v. State*, 761 N.E.2d 403, 405 (Ind. 2002) (quoting *Heavrin v. State*, 675 N.E.2d 1075, 1084 (Ind. 1996)). The adequacy of striking improper testimony and admonishing the jury may be assessed by considering a number of factors including the following:

> (1) the effect of constitutional provisions, statutes or rules relating to harmless error; (2) the degree of materiality of the testimony; (3) other evidence of guilt; (4) other evidence tending to prove the same fact; (5) other evidence that may cure the improper testimony; (6) possible waiver by the injured party; (7) whether the statement was volunteered by the witness and whether there had been deliberate action on the part of the prosecution to present the matter to the jury; (8) the penalty assessed; (9) whether or not the testimony, although volunteered by the witness, was in part brought out by action of the defendant or his counsel; (10) the existence of other errors; (11) whether the question of guilt is close or clear and compelling; (12) the standing and experience of the person giving the objectionable testimony; and (13) whether or not the objectionable testimony or misconduct was repeated.

White v. State, 257 Ind. 64, 69, 272 N.E.2d 312, 314-315 (1971).

In the case at bar, Downey volunteered that Hunter told him that he had previously shot a dog; there is no indication that the prosecutor deliberately tried to present the evidence to the jury. In addition, Downey's statement was the single reference to Hunter's prior use of the handgun. Finally, the evidence of Hunter's guilt is clear and compelling. We conclude that the trial court's admonishment was adequate under the circumstances and that it committed no error, let alone fundamental error, in failing to order a mistrial sua sponte.

Affirmed.

ROBB, C.J., and NAJAM, J., concur.