



Following a jury trial, Perry Jerome Towne was convicted of attempted robbery<sup>1</sup> as a Class B felony. Towne raises two issues on appeal, which we restate as follows:

- I. Whether the State presented sufficient evidence to identify Towne as the individual who attempted to rob the Smokes for Less store on March 2, 2008; and
- II. Whether the trial court committed fundamental error by not conducting the trial in an impartial manner.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On Sunday March 2, 2008, Marilyn Miosi was the only employee working at Smokes for Less, a convenience store located in South Bend. Around 12:30 p.m., a black man wearing a heavy coat with a fur-lined hood ran into the store, came up to the counter, and told Miosi to open the cash register. She looked at the man's face and then looked down and noticed that he had a knife in his hand. Miosi fled into the office located directly behind the counter, locking the door behind her. As she dialed 911, Miosi was able to watch the man on a surveillance monitor located in the office. The man ran behind the counter and tried to open the office door but was unsuccessful. Miosi saw the man look at the cash register for a few seconds and then run out of the store. As the man was leaving the store, Miosi noted that "North Carolina" was written on the back of the man's coat. *Tr.* at 205. After she was certain the man had left the building, Miosi exited the office and locked the front doors of the store. From the front doors, Miosi was able to see the man running away from the store going north.

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<sup>1</sup> See Ind. Code §§ 35-42-5-1 and 35-41-5-1.

A few minutes later, Officer Derek Dieter arrived at the Smokes for Less store and spoke with Miosi. She told Officer Dieter that a black male wearing a blue stocking cap and a dark coat with a fur-lined hood and the words "North Carolina" written on the back had attempted to rob the store and was last seen leaving the store heading north. Officer Dieter communicated this information to other officers in the area. Approximately five minutes later, Officer Mark Chabot located an individual that matched this description who was less than half a mile away from the Smokes for Less store. Officer Chabot stopped this individual, who was later identified as Towne. A pat down search of Towne revealed that he was in possession of a knife.

Fifteen or twenty minutes after the attempted robbery, officers transported Towne back to the Smokes for Less store. The officers parked approximately fifteen feet away from the store and had Towne stand next to an officer's car. Miosi then went to the front door of the store and identified Towne as the man who had attempted to rob the store. The officers also showed Miosi the knife that was found in Towne's possession. Miosi identified this knife as the one that was used in the attempted robbery.

On March 4, 2008, the State charged Towne with attempted robbery as a Class B felony. Towne's jury trial began on October 27, 2008. During trial, Miosi testified, without objection from Towne's counsel, that on March 2, 2008 she identified Towne as the individual who had attempted to rob the Smokes for Less store. Additionally, when asked whether she saw in the courtroom the person who had attempted to rob the store on March 2, 2008, Miosi identified Towne.

During the course of the trial, the jury asked each of the witnesses several questions. Each juror question was submitted to the trial judge in writing. The trial judge reviewed each question with counsel for the State and for Towne. After the trial judge determined that a question was appropriate, he posed the question to the witness. Towne's counsel objected to one of the questions posed to a witness. When the trial judge asked a witness what he saw on a surveillance video, Towne's counsel objected, arguing that the best evidence of what was on the surveillance video was the video itself. The trial judge did not specifically rule on Towne's objection, but did not pursue that line of questioning.

At the conclusion of the trial, the jury found Towne guilty of attempted robbery. The trial court sentenced Towne to fifteen years to be served consecutively to a five-year sentence Towne was serving in an unrelated case. Towne now appeals.

## **DISCUSSION AND DECISION**

### **I. Sufficiency of the Evidence**

Towne first contends that the State did not present sufficient evidence to identify him as the individual who attempted to rob the Smokes for Less store on March 2, 2008, and, therefore, did not present sufficient evidence to support his conviction for attempted robbery. Towne specifically characterizes Miosi's identification of him on March 2, 2008 as being "an inherently suggestive one-person lineup." *Appellant's Br.* at 5.

In reviewing sufficiency of the evidence claims, we do not reweigh the evidence or judge the credibility of the witnesses. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). We only examine the evidence most favorable to the verdict and the

reasonable inferences drawn therefrom. *Id.* “We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.” *Id.*

Towne was convicted of Class B felony attempted robbery. The crime of robbery occurs when a person knowingly or intentionally takes property from a person or from the presence of that person by force or by placing the person in fear. Ind. Code § 35-42-5-1. Robbery is a Class B felony if it is committed while armed with a deadly weapon. *Id.* An attempt occurs when a person, acting with the required culpability, takes a substantial step toward the commission of a crime. Ind. Code § 35-41-5-1.

Towne’s principal argument is that there was insufficient evidence to identify him as the individual who attempted to rob the Smokes for Less store on March 2, 2008. He highlights inconsistencies in Miosi’s testimony and points out that Miosi was unable to pick him out from a photographic lineup. However, as already stated, in reviewing a sufficiency of the evidence claim we only consider the evidence most favorable to the verdict. *Klaff*, 884 N.E.2d at 274. Towne’s argument asks us to reweigh the evidence, which we will not do. *Id.*

Towne also contends that the show-up identification conducted on March 2, 2008 was inherently suggestive. We review claims that a show-up identification was unduly suggestive by examining the totality of the circumstances surrounding the identification including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of his or her prior description of the criminal; (4) the level of certainty demonstrated by the witness at the

confrontation; and (5) the length of time between the crime and the confrontation. *Lyles v. State*, 834 N.E.2d 1035, 1044-45 (Ind. Ct. App. 2005), *trans. denied*.

Our Supreme Court has stated that one-on-one confrontations, such as the one here, are not *per se* improper. *Gray v. State*, 563 N.E.2d 108, 110 (Ind. 1990). “Identifications of a freshly apprehended suspect have been held to be not unnecessarily suggestive despite the suggestive factors unavoidably involved in such confrontations because of the value of the witness’s observation of the suspect while the image of the offender is fresh in his mind.” *Lewis v. State*, 554 N.E.2d 1133, 1135 (Ind. 1990). The courts of this state have held that show-up identifications similar to the one in this case were not unduly suggestive. *See Gray*, 563 N.E.2d at 109-10 (show-up identification not unduly suggestive where defendant was only black person at scene not wearing police uniform, was in handcuffs, and was identified at a location different from where robbery occurred); *Lyles*, 834 N.E.2d at 1045 (show-up identification not unduly suggestive where defendant was only black person present and was presented for identification in handcuffs standing between two police officers at the end of a line of police cars); *Adkins v. State*, 703 N.E.2d 182, 185 (Ind. Ct. App. 1998) (show-up identification not unduly suggestive where defendant was only person present who was not a police officer, was in handcuffs, and stood next to police car), *trans. denied*.

In examining the totality of the circumstances surrounding Miosi’s identification of Towne, we note that Towne entered the Smokes for Less store during daylight hours around 12:30 p.m. Towne went up to the counter where Miosi was working and told her to open the cash register. Miosi first looked at Towne’s face and then looked down and

saw that he was holding a knife. Miosi fled into the office located behind the counter where she was able to watch Towne on a surveillance monitor. Thus, Miosi had a sufficient opportunity to observe Towne at the time of the crime.

When Officer Dieter arrived at the Smokes for Less store, Miosi provided him with an accurate description of Towne. She told Officer Dieter that a black man wearing a blue stocking cap and a dark coat with a fur-lined hood and the words “North Carolina” written on the back had attempted to rob the store while armed with a knife. Approximately five minutes after Officer Dieter communicated this information to other officers in the area, Officer Chabot located a black man who was less than half a mile away from the Smokes for Less store that matched the description provided by Miosi. Officer Chabot stopped this individual, who was later identified as Towne. Upon closer inspection, officers determined that Towne’s coat bore a North Carolina logo and that Towne was in possession of a knife.

Twenty minutes after the attempted robbery, Towne was returned to the Smokes for Less store where Miosi unequivocally identified him as the man who had attempted to rob the store. Miosi also identified the knife found in Towne’s possession as the knife used in the attempted robbery. Based on the totality of the circumstances, we conclude that the show-up identification was not unduly suggestive.

Additionally, we have previously stated that “it is well settled that where a witness had an opportunity to observe the perpetrator during the crime, a basis for in-court identification exists, independent of the propriety of pre-trial identification.” *N.W.W. v. State*, 878 N.E.2d 506, 509 (Ind. Ct. App. 2007) (quoting *Adkins*, 703 N.E.2d

at 185). In this case, Miosi testified that when Towne ran up to the counter and demanded that she open the register, she was able to look at his face. After Miosi retreated into the office, she was still able to observe Towne through the store's surveillance monitor. Miosi then had an opportunity to observe Towne during the crime. These observations provided a basis for Miosi's in-court identification of Towne during trial as the individual who attempted to rob the Smokes for Less store on March 2, 2008. The evidence regarding the show-up identification that occurred on March 2, 2008 was merely cumulative of the in-court identification. *See N.W.W.*, 878 N.E.2d at 509. "The erroneous admission of evidence that is merely cumulative of other evidence in the record is not reversible error." *Id.* (quoting *Beach v. State*, 816 N.E.2d 57, 59 (Ind. Ct. App. 2004)).

Because the show-up identification was not unduly suggestive and because Miosi made an in-court identification of Towne, the State presented sufficient evidence to identify Towne as the individual who attempted to rob the Smokes for Less store on March 2, 2008. Therefore, sufficient evidence was presented to support Towne's conviction for Class B felony attempted robbery.

## **II. Impartial Trial**

Towne argues that the trial judge failed to conduct the trial in an impartial manner. He specifically contends that the trial judge became an advocate by using questions from the jury to elicit evidence from witnesses. Towne concludes that this ultimately denied him his right to due process and a fair trial.

"It is well established that a trial before an impartial judge is an essential element

of due process.” *Ruggieri v. State*, 804 N.E.2d 859, 863 (Ind. Ct. App. 2004). “The trial court has the duty to remain impartial and refrain from making unnecessary comments or remarks; the judge should refrain from actions that would indicate any position other than strict impartiality.” *Hackney v. State*, 649 N.E.2d 690, 693 (Ind. Ct. App. 1995), *trans. denied*. To assess whether the trial judge crossed the barrier of impartiality, we examine both the trial judge’s actions and demeanor. *Ruggieri*, 804 N.E.2d at 863. “However, we are mindful that the trial judge must be given latitude to run the courtroom and maintain discipline and control of the trial.” *Id.*

Here, Towne takes issue with the manner in which the trial judge asked witnesses questions posed by members of the jury. He contends that in this process, the trial judge crossed the barrier of impartiality and became an advocate. However, our review of the record before us shows that Towne’s counsel did not object to any of the questions posed by the jury and only objected once to the manner in which the trial judge asked a juror’s question. The sole objection raised by Towne’s counsel concerned what a witness saw on a surveillance video, and that objection was implicitly sustained in that the trial court did not pursue that line of questioning. Towne’s failure to raise an objection or move for a mistrial results in waiver of this issue. *Hackney*, 649 N.E.2d at 694.

Because Towne has waived this issue, to prevail, he must show that the trial court’s actions constituted fundamental error. *Prewitt v. State*, 761 N.E.2d 862, 871 (Ind. Ct. App. 2002).

The fundamental error exception to the waiver rule is an extremely narrow one. To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.

This exception permits reversal only when there has been a blatant violation of basic principles that denies a defendant fundamental due process.

*Caron v. State*, 824 N.E.2d 745, 751 (Ind. Ct. App. 2005), *trans. denied*.

As evidence of the trial judge's partiality, Towne notes that "[o]n at least ten (10) separate occasions, the trial judge essentially interviewed witnesses thereby admitting evidence on his own not presented by either the State or defense counsel." *Appellant's Br.* at 5. We first note that the trial court did not err by questioning witnesses. A trial judge may, within reason, question a witness, so long as the questioning is for the purpose of aiding the jury in its fact-finding duties, and is done in a manner so that the judge does not improperly influence the jury. *Stellwag v. State*, 854 N.E.2d 64, 69 (Ind. Ct. App. 2006). The questions the trial judge posed to the witnesses were prompted by questions from members of the jury. Pursuant to Indiana Jury Rule 20(7) and Indiana Evidence Rule 614(d), jurors may ask questions of witnesses. So long as the trial judge determines that the question is appropriate and the parties do not object to the question, it is within the trial judge's discretion to propound the question to a witness. *Burks v. State*, 838 N.E.2d 510, 518 (Ind. Ct. App. 2005), *trans. denied*.

With regard to Towne's contention that the trial judge's examination of witnesses elicited evidence not previously admitted by the State or defense counsel, we note that Towne does not specifically identify what evidence the trial judge elicited that had not already been admitted by the parties. Without knowing what this evidence was, we cannot determine whether the trial judge displayed partiality in asking the questions that elicited this evidence. Nor can we assess whether this evidence was so prejudicial to

Towne's rights that it made a fair trial impossible.

Towne does specifically argue that the trial judge's questions to Miosi went beyond the scope of the questions posed by members of the jury. The jury posed the following questions to Miosi: (1) "How long did you observe the suspect before you ran into the office? Please try to be as specific as possible in terms of seconds." (2) "How far were you from the suspect when you saw the suspect from behind? In feet." (3) "How long did you observe the suspect from behind (in seconds) as he was fleeing?" (4) "Was the knife the same knife that you saw in the holdup as later seen when the police brought the suspect and the knife back to identify?" and (5) "Did the witness recognize the length of the knife or any imperfections or jagged edges other than silver?" *Tr.* at 235, 237.

After the trial judge read the first three questions, Towne's counsel stated, "I understand what they're asking. It's a little cumbersome, but I think it's a legitimate question. I'd be amenable to the Court maybe rephrasing it." *Id.* at 235-36. With this comment, to some extent, Towne's counsel invited any error made by the trial judge in posing the jury's questions to Miosi and cannot now request relief on this ground. *See Lyles*, 834 N.E.2d at 1051 ("A defendant cannot invite error and then request relief on appeal based upon that ground.").

Regardless of whether Towne invited any error, our review of the record indicates that the trial judge did not stray beyond the scope of the jury's questions. The trial judge asked Miosi questions about the appearance of the knife, her observations of Towne after he entered the store and as he left the store, and her proximity to Towne during the attempted robbery. Many of the trial judge's questions to Miosi were aimed at clarifying

her testimony. A trial judge may, in his discretion, intervene in the fact-finding process in order to promote clarity. *Hackney*, 649 N.E.2d at 693. Additionally, many of Miosi's answers to the trial judge's questions duplicated her earlier testimony. The erroneous admission of evidence that is merely cumulative of other evidence in the record is not reversible error. *Collins v. State*, 826 N.E.2d 671, 679 (Ind. Ct. App. 2005), *trans. denied*. Towne does not specifically point to and we cannot find any indication of partiality in the trial judge's examination of Miosi.

Towne also contends that on two occasions the trial judge relinquished his neutrality by intervening during the testimony of two police officers to inform the jury that information the officers received from police dispatch was hearsay. Towne's counsel did not raise an objection to this testimony even though he could have nor did he object to the trial court's intervention. In this instance, we believe that the trial court properly intervened in the fact-finding process in order to promote fairness and clarity. *See Hackney*, 649 N.E.2d at 693 (trial court has duty to conduct trial in manner calculated to promote fairness and clarity). Ultimately, the trial court's actions benefitted Towne and, thus, do not indicate any partiality on the trial judge's part towards the State.

After examining the trial judge's actions and demeanor, we cannot say that he crossed the barrier of impartiality. Towne has failed to show that the trial judge's examination of witnesses during trial constituted fundamental error.

Affirmed.

NAJAM, J., and BARNES, J., concur.