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IN THE
COURT OF APPEALS OF INDIANA

KOREY A. ALWOOD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0504-CR-305
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0310-FB-0380

July 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Korey Alwood appeals his conviction for Being a Prisoner Possessing a Dangerous Device or Material,[1] a class B felony. Alwood raises the following arguments: (1) he received the ineffective assistance of trial counsel; (2) the prosecutor committed misconduct; (3) the trial court committed a number of errors; (4) the evidence supporting his conviction is insufficient; and (5) the trial court erroneously denied his motion for a new trial based on newly-discovered evidence. Finding no error, we affirm the judgment of the trial court.

FACTS

In January 2003, Alwood was an inmate living in cellblock G at the Pendleton Correctional Facility. On January 24, 2003, Alwood was moved from cellblock G to general administrative segregation. Alwood's property had been placed into two boxes and was searched in the general administrative segregation unit by Correctional Officer John Baldwin. At the bottom of one of the boxes, Officer Baldwin discovered a paper bag containing "a home made knife that was wrapped in toilet paper . . . ." Tr. p. 146.

Inmates Mike Gibson and Douglas Callagee later claimed that they had previously seen Alwood with that knife. After identifying the knife to a guard, Callagee denied at a deposition having seen the knife but testified at Alwood's trial that he had, in fact, seen Alwood with the knife. Inmate Robert Sulitz testified that Alwood had threatened him with a knife.

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[1] Ind. Code § 35-44-3-9.5.

On October 2, 2003, the State charged Alwood with class B felony being a prisoner possessing a dangerous device or material. Alwood's jury trial took place on February 9-15, 2005. At trial, the State presented evidence that Alwood and Gibson were members of a race-related prison gang and were planning a takeover of the cellblock. Alwood offered the testimony of inmate Ryan Burton, who testified that Sulitz had asked him to take a bag up to Alwood's cell and that he did so, throwing the bag into a box sitting on the floor of the cell. Alwood also offered a letter that he had written and that he alleged had been signed by Correctional Officer Henry Miller, indicating that the officer had heard that Alwood had been set up for the crime. Id. at 444, 458. The officer denied signing the letter. The jury found Alwood guilty as charged and, on March 14, 2005, the trial court sentenced Alwood to eighteen years in the Department of Correction, to be served consecutively to his prior sentences. Alwood now appeals.

DISCUSSION AND DECISION

I. Ineffective Assistance of Counsel

Alwood first argues that he received the ineffective assistance of trial counsel. When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and

Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

A. Losing Original Copy of Letter

Alwood first contends that his trial counsel was ineffective because he lost the original copy of the letter drafted by Alwood and purportedly signed by Officer Miller. Alwood states, and the State agrees, that only an original document may be used for accurate handwriting analysis. Appellant's Br. p. 18 n.5. Because his attorney lost the original, therefore, Alwood was unable to find an expert to authenticate Officer Miller's signature.

To establish that he was prejudiced by the loss of the original copy, however, Alwood must prove that Officer Miller's signature could have been authenticated if the original was available. Ind. Evid. Rule 901. He has presented no such evidence. In fact, Officer Miller denied that he signed the letter. Tr. p. 436. And in any event, the jury was provided with exemplars of Officer Miller's handwriting to compare to the duplicate of the letter offered into evidence by Alwood. Under these circumstances, we find that Alwood suffered no prejudice as a result of the loss of the original copy of the letter.

B. Failing to Impeach Sulitz

Alwood next argues that his attorney was ineffective because he failed to conduct an adequate investigation of Sulitz, who testified that Alwood held a knife to his throat, and that he failed to impeach Sulitz during cross-examination. But Alwood has failed to direct our attention to specific evidence establishing that further investigation would have resulted in significant impeachment evidence. Furthermore, the jury was well aware that Sulitz was in jail at the time of his testimony for a probation violation, that he is a drug user, and that his problems in prison stemmed from his admitted efforts to avoid paying his debts. As described by the State, "Sulitz was never presented as a particularly trustworthy, credible witness." Appellee's Br. p. 21. Under these circumstances, Alwood has neither demonstrated that his attorney's performance was deficient nor that he was prejudiced by the absence of investigation and/or impeachment of Sulitz.

C. Failing to Object at Trial

1. Gibson's testimony

When the prosecutor cross-examined Gibson, he explored the relationship between Gibson and Alwood and attempted to discover whether the two inmates considered themselves to be part of a "race-related prison gang." Id. at 16. The prosecutor asked Gibson whether "in fact just about everything you do is about race, isn't it?" Tr. p. 348. Alwood's attorney objected and the objection was sustained, but Alwood argues that his counsel should have moved to strike the question and moved for a mistrial. It would have been reasonable for the attorney to have concluded that moving to strike the question would

merely have drawn more attention to it and that the matter was sufficiently addressed when the trial court sustained the objection. Given that we do not second-guess trial strategy and tactics, Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998), we do not find that Alwood's attorney was deficient for failing to move to strike the question.

As for the failure to move for a mistrial, we note that a mistrial is an extreme remedy that is warranted only when no other curative measure will rectify the situation. Burks v. State, 838 N.E.2d 510, 519 (Ind. Ct. App. 2005), trans. denied. Here, the jurors were already privy to evidence that Alwood referred to Gibson as "honkey," ex. 8, and that the two men referred to each other repeatedly as "PALS," id., which is apparently code used by prison gangs. Consequently, it is highly unlikely that the trial court would have found the prosecutor's question about race so inappropriate and prejudicial that a mistrial was required. Alwood, therefore, has failed to establish that his attorney was deficient for failing to move for a mistrial on this basis.

Alwood also argues that his attorney should have objected to the prosecutor's leading questions during Gibson's cross-examination. Leading questions are generally permitted, however, during cross-examination. Ind. Evid. Rule 611(c). Alwood further contends that the prosecutor's questions impermissibly referenced Alwood's prior criminal history in violation of Indiana Evidence Rule 404(b). Specifically, Alwood objects to the following colloquy:

> Q. But I think you testified yesterday that you've known [Alwood] for years. How have you known him for years?
> A. Prior commitment. He went home.

> Q. Oh, I see. So he was in before and then he got out and then he got back in, is that right?
> A. Yes. We were at a different facility together.

Tr. p. 347. The State's questions did not necessarily suggest prior incarceration and could have been answered in a manner that excluded that information. Moreover, it was reasonable for the State to question Gibson on the details of his prior relationship with Alwood because it relates to Gibson's credibility as a witness. Finally, the jurors were aware that Alwood was an inmate and that he had been disciplined in prison for disorderly conduct. Under these circumstances, we cannot conclude that Alwood was prejudiced by his attorney's failure to object to this line of questioning.

2. Sulitz's testimony

Alwood contends that his attorney should have objected to statements made by Sulitz during his testimony that he had heard "through the grapevine," id. at 180, that "several individuals," id. at 238, were planning on taking over the cellblock. This testimony is cumulative of the letter between Alwood and Gibson, which discussed the planned takeover, and Gibson's testimony, which contained an admission of his involvement in the takeover plan. See Tobar v. State, 740 N.E.2d 106, 108 (Ind. 2000) (holding that evidence that is merely cumulative need not be excluded and does not warrant reversal). Consequently, Alwood has not established that he was prejudiced as a result of his attorney's failure to object to Sulitz's testimony.

3. Officer Rains's testimony

Alwood next contends that his attorney should have objected to the portion of Officer Rains's testimony in which the officer stated that Callagee had identified the recovered knife.

Specifically, Alwood argues that this testimony contained impermissible hearsay. Our review of the record reveals that Officer Rains testified that he presented Callagee with the recovered knife for purposes of identification. Tr. p. 295, 488. This testimony was not hearsay, inasmuch as it was based on the officer's own actions and grounded in his personal knowledge. Although Officer Rains's statements that Callagee identified the recovered knife as belonging to Alwood might have been impermissible hearsay, Callagee had already testified that he had, in fact, identified the knife to Officer Rains. Consequently, the officer's testimony about the identification was cumulative and the remaining testimony was not hearsay. An objection to the testimony as impermissible hearsay, therefore, would not have been successful and Alwood has failed to establish that his counsel was ineffective on this basis.

4. Prosecutor's closing argument

Alwood argues that his attorney was ineffective based on a failure to object to a number of statements made by the prosecutor during closing argument. Alwood characterizes the prosecutor's statements as follows: "the prosecutor stated in his closing argument that Larry Randt, a State's witness, had testified to examining [Officer Miller's] signature on [the allegedly exculpatory letter drafted by Alwood] and concluding that it was not an authentic signature." Appellant's Br. p. 19 (emphasis in original). All that the prosecutor stated, however, was that "I believe Randt is talking about he was able to pull signatures out of original signatures and checked 'em." Tr. p. 645. It is not apparent that the prosecutor's inarticulate comment related to the letter drafted by Alwood and, in any event,

the prosecutor does not argue that Randt arrived at a conclusion regarding the authenticity of the signature. Consequently, Alwood's attorney was not ineffective for failing to object to this statement.

Alwood next contends that his attorney should have objected to the prosecutor's comments during closing argument regarding Callagee's identification of the knife. Specifically, the prosecutor characterized the evidence as follows:

> both of 'em [Callagee and Gibson] go in and [sic] Rains office and Rains shows 'em the knife and they say, yeah, that's the one Alwood had. Gibson wouldn't have none of that in this trial. Said, no, I didn't say that at all. Callagee said, yeah. . . . Anyway, Callagee said, yeah, I'd been there and I saw it and that's, uh, yeah, that's it. . . . He did identify the knife and told you straight on this . . . .

Id. at 625-26. Alwood contends that in making these statements, the prosecutor was falsely stating that Callagee had identified the actual knife at trial.[2] It is apparent, however, that the prosecutor was merely summarizing the facts as supported by the evidence—Callagee identified the knife to Officer Rains and then testified at trial that he had, in fact, identified the knife as Alwood's. Consequently, Alwood's attorney was not ineffective for failing to object to these statements.

Also during closing argument, the prosecutor made the following comments: "Is there any question in your mind what Gibson would do for [Alwood]? What you've seen in here and what you saw in those letters? [Alwood's] running the place down there. These are his boys." Id. at 649. Alwood contends that his attorney should have objected to the statement

[2] The prosecutor did not show Callagee the knife at trial.

that he was "running the place" because evidence to that effect was not admitted during the trial and it was "clearly stated to prejudice the jury." Appellee's Br. p. 24. It is apparent, however, that the prosecutor was merely concluding, based on the evidence, that Alwood and his "boys" planned to take over the cellblock and that Gibson was prepared to follow Alwood's instructions. See Gasper v. State, 833 N.E.2d 1036, 1042-43 (Ind. Ct. App. 2005), trans. denied (holding that it is proper for a prosecutor to draw conclusions based on his or her analysis of the evidence). Moreover, although Alwood argues that the prosecutor made these statements to prejudice the jury, he has not even attempted to establish that he was, in fact, prejudiced thereby. Consequently, we find that Alwood did not receive the ineffective assistance of counsel on this basis.

5. Reasonable doubt jury instruction

Alwood argues that his attorney should have objected to the reasonable doubt jury instruction and proffered an instruction stating that to convict on the basis of circumstantial evidence alone, the jury must find that the evidence excludes every reasonable hypothesis of innocence beyond a reasonable doubt. Appellant's Br. p. 23 (citing Myers v. State, 532 N.E.2d 1158, 1159 (Ind. 1989)). Admittedly, our Supreme Court has found that defendants are entitled to an additional jury instruction when the State's evidence is entirely circumstantial. Kizer v. State, 437 N.E.2d 466, 467 (Ind. 1982). Here, however, the State presented both direct and circumstantial evidence of Alwood's constructive possession of the knife. Specifically, the State presented direct evidence that two inmates had seen Alwood with that particular knife; consequently, the evidence was not entirely circumstantial and a

special instruction was not required. Alwood's attorney was not ineffective, therefore, for failing to object to the reasonable doubt jury instruction or proffering his own version thereof.

D. Closing Argument

Alwood argues that his attorney was ineffective for making a statement during closing argument about the letter drafted by Alwood and purportedly signed by Officer Miller. It does, indeed, appear that Alwood's attorney misstated the evidence when he remarked that "[Officer] Randt says he thinks it's not [Officer Miller's] signature," tr. p. 628, when, in fact, Officer Randt did not provide testimony to that effect.

Alwood has not established that he was prejudiced by this misstatement, however, inasmuch as the jury also heard Officer Randt's testimony and was in as good a place as defense counsel to remember the content thereof. Moreover, Officer Randt was not an expert in handwriting identification; consequently, his opinion would have had no greater weight than the jurors' own abilities to compare the signature in the letter with exemplars of Officer Miller's signature. Finally, Officer Miller explicitly testified that he did not sign the letter. Under these circumstances, we find that Alwood did not receive the ineffective assistance of counsel based on the misstatement during closing argument.

E. Motion to Correct Error

Alwood contends that his attorney was ineffective for improperly supporting a claim of newly-discovered evidence in his motion to correct error. Specifically, Alwood complains that counsel failed to include supporting affidavits as required by Indiana Trial Rules 59(h)

and Criminal Rules 16 and 17. The record reveals, however, that despite the lack of affidavits, the trial court considered the merits of Alwood's claim of newly-discovered evidence and found that no new trial was required. As will be explored more fully below, Alwood's purportedly newly-discovered evidence was cumulative of the evidence admitted at trial and, in any event, did not qualify as newly-discovered evidence and consisted largely of impermissible hearsay. Consequently, Alwood cannot establish that he was prejudiced as a result of his attorney's failure to attach supporting affidavits to the motion to correct error.

G. Cumulative

Finally, Alwood argues that if his attorney's alleged errors are considered cumulatively, we must conclude that he was ineffectively assisted by his counsel. Errors by counsel "that are not individually sufficient to prove ineffective representation may add up to ineffective assistance when viewed cumulatively." French v. State, 778 N.E.2d 816, 826-27 (Ind. 2002). As we have already concluded, any errors made by Alwood's attorney were harmless—in other words, Alwood has not established that he has suffered any prejudice as the result of his attorney's actions or inactions. Examining his attorney's conduct as a whole does not lead us to alter this conclusion. Consequently, we find that Alwood did not receive the ineffective assistance of counsel.

II. Prosecutorial Misconduct

In reviewing a claim of prosecutorial misconduct, we employ a two-step analysis. First, we consider whether the prosecutor engaged in misconduct. Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). If so, we then consider whether, given all of the

circumstances of the case, the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. Id. The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision, rather than the degree of the impropriety of the conduct. Id.

Initially, we observe that a claim of prosecutorial misconduct is waived when a defendant fails to object immediately, request an admonishment, and move for a mistrial. Id. Inasmuch as Alwood took none of these steps before the trial court, he has waived all of his claims of prosecutorial misconduct. Waiver notwithstanding, we will briefly address his contentions.

A. Evidentiary Harpoons

Alwood first argues that the prosecutor committed misconduct through a number of evidentiary harpoons. An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against a defendant. Kirby v. State, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002).

1. Racial epithet

Alwood first complains about the prosecutor's questioning of Gibson about Alwood's use of the racial epithet "honkey[.]" Tr. p. 213. In the letter that Alwood wrote to Gibson, he twice used that epithet. The prosecutor asked Gibson what that word means. Additionally, the prosecutor asked Gibson: "everything you do is about race, isn't it?" Id. at 348.

As we have already noted herein, it appears that the State wanted to pursue evidence of Alwood's racial bias in the context of his membership in a race-related prison gang and its

plan to take over the cellblock. This evidence bolstered the State's argument that Alwood had the knife in anticipation of that plan. Consequently, we cannot conclude that the State placed this evidence before the jury with the deliberate purpose of prejudicing the jurors against Alwood. Moreover, Alwood's attorney objected to this line of questioning and the trial court sustained the objection; thus, Alwood has not proved that he was placed in a position of grave peril. Ultimately, therefore, Alwood has not established that the prosecutor committed misconduct by using an evidentiary harpoon on this basis.

2. Placing a knife in front of Alwood

Alwood argues that the prosecutor intentionally prejudiced the jury by placing a knife in front of him. The transcript, however, merely indicates that "the knife itself was laying on counsel[']s table and that the security officers behind it were almost out of their seats . . . ." Tr. p. 687. This statement made by Alwood's attorney during the sentencing hearing does not indicate that the prosecutor deliberately created tension by placing the knife in front of Alwood. Indeed, there is no evidence that the prosecutor was responsible for the placement in the knife. Consequently, this claim of misconduct must fail.

3. Eliciting testimony about Alwood's prior commitments

Alwood next complains that the prosecutor improperly attempted to elicit testimony from Gibson and another witness about Alwood's prior commitments. As noted above, however, the questioning of Gibson was not explicitly designed to reveal that information and was merely a reasonable attempt to illuminate the relationship between Gibson and Alwood. The other series of questions that Alwood contends was an improper attempt to

seek information about his prior commitments dealt only with his present period of incarceration. Id. at 488-91. We see no indication that the testimony related to other crimes or disciplinary problems. Consequently, this claim of prosecutorial misconduct must also fail.

B. Offering False Testimony

Alwood next contends that the prosecutor committed misconduct by knowingly allowing two witnesses to present perjured testimony. See Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that a prosecutor may not knowingly use false evidence). Contradictory or inconsistent testimony does not necessarily constitute perjury. Timberlake v. State, 690 N.E.2d 243, 253 (Ind. 1997).

1. Sulitz

Sulitz testified that Alwood threatened him with a knife. Alwood argues that this testimony must be perjury because Alwood was on administrative hold on the day on which Sulitz claims the incident took place. Although there are inconsistencies between Sulitz's testimony and the prison's record of when Alwood was on administrative hold, this does not mean that Sulitz offered perjured testimony. Indeed, Sulitz acknowledged that his memory was not perfect, inasmuch as his testimony took place nearly two years after the event had occurred. Tr. p. 240-41. Moreover, because Alwood was released from administrative hold one day before Sulitz left the cellblock, he did have an opportunity to threaten Sulitz shortly before the knife was found. Under these circumstances, we conclude that Alwood has not established that the prosecutor knowingly offered perjured testimony.

2. Callagee

Callagee's testimony at trial that he had observed Alwood with a knife conflicted with his deposition testimony in which he attested that he had never seen Alwood with a weapon. Id. at 188, 193-94. Alwood argues that this contradiction necessarily means that the prosecutor knowingly allowed Callagee to present perjured testimony. Nothing in the record, however, shows that Callagee's trial testimony was inaccurate or untruthful. Indeed, the State presented evidence that Callagee may have changed his testimony after he left prison because there was no longer a risk of reprisal. Moreover, the testimony was consistent with Callagee's identification of the knife as Alwood's during the prison investigation. Consequently, we cannot conclude that the prosecutor knowingly offered perjured testimony.

D. Presenting Evidence of Alwood with a Knife

Alwood next argues that the prosecutor committed misconduct by presenting evidence of past incidents when Alwood was seen with a knife. Evidence of other crimes or acts of misconduct that are intrinsic to the charged offense or complete the story of the crime are not excluded under Rule 404(b). Lee v. State, 689 N.E.2d 435, 438-39 (Ind. 1997). Here, the State presented the testimony of Sulitz and Callagee—who both testified that they observed Alwood with a knife—as evidence that Alwood was in possession of the knife that was later discovered in his belongings. The mere fact that Alwood was seen with a knife in prison, where knives are not readily available and mere possession constitutes a class B felony, supports a strong inference that it was the same knife later found with his belongings. Under

these circumstances, we find that the prosecutor did not commit misconduct by eliciting testimony regarding Alwood's prior possession of a knife in prison.

E. Closing Argument

Alwood next contends that the prosecutor committed misconduct by stating during closing argument that Callagee had seen Alwood with the knife in question. As we concluded above, however, the statements to which Alwood directs our attention are merely the prosecutor's attempt to summarize the facts as supported by the evidence—Callagee identified the knife to Officer Rains and then testified at trial that he had, in fact, identified the knife as Alwood's. The prosecutor did not state that Callagee had identified the knife during trial.

Alwood also complains, again, that the prosecutor improperly stated that Officer Randt had determined that the signature on the letter drafted by Alwood was not Officer Miller's signature. As noted above, it is not apparent that the prosecutor's comment related to the letter drafted by Alwood and, in any event, the prosecutor did not argue that Officer Randt arrived at a conclusion regarding the authenticity of the signature.

Finally, Alwood again argues that the prosecutor improperly stated that Alwood was "running the place down there[.]" Tr. p. 649. As we concluded above, it is apparent that the prosecutor was merely concluding, based on the evidence, that Alwood and his "boys" planned to take over the cellblock and that Gibson was prepared to follow Alwood's instructions. Under these circumstances, we find that Alwood has failed to establish prosecutorial misconduct based on statements made during closing argument.

F. Cumulative

Alwood argues that the cumulative effect of the prosecutor's actions is such that he was denied a fair trial. We disagree, inasmuch as Alwood has failed to establish that the prosecutor committed any acts of misconduct. Consequently, the cumulative effect of the prosecutor's actions certainly did not place Alwood in a position of grave peril.

III. Trial Court Conduct

A. Admission of Evidence

Alwood argues that the trial court erroneously admitted certain evidence. The admissibility of evidence is within the trial court's sound discretion and we will only reverse upon a showing of an abuse of that discretion. Curley v. State, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002). An abuse of discretion occurs 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. Smith v. State, 751 N.E.2d 280, 281 (Ind. Ct. App. 2001).

1. Cellblock takeover

Alwood contends that the trial court erroneously admitted evidence of the planned cellblock takeover in violation of Evidence Rule 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b) specifies, however, that evidence of other bad acts may be admissible for proof of motive. See also Sanders v. State, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000) (holding that evidence of other crimes or bad acts that is relevant to a defendant's motive and is inextricably bound with the charged crime is admissible).

Here, the trial court concluded that evidence of the planned cellblock takeover was inextricably bound to the charge against Alwood because it indicated his motive for possessing a knife. Under these circumstances, the admission of this evidence did not violate Rule 404(b). We also conclude that the evidence was not unduly prejudicial given that it is inextricably bound to the charged offense against which Alwood was defending.

Alwood also argues that evidence of the planned takeover was not relevant because there was insufficient evidence linking him to the plot. The State, however, sufficiently established a nexus between Alwood and the planned cellblock takeover through letters and testimony of Gibson, Callagee, and Sulitz. Ex. 7, 8; Tr. p. 180, 222, 238, 345. Under these circumstances, we find that the trial court did not abuse its discretion by admitting evidence of the planned cellblock takeover.

2. Racial epithet

Next, Alwood argues that the trial court erroneously permitted the prosecutor to question Gibson about Alwood's use of the racial epithet, "honkey[.]" Tr. p. 213-14. Alwood did not object to this line of questioning, however. Moreover, Alwood had already questioned Gibson about the meaning of that word. See Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000) (holding that otherwise inadmissible evidence may become admissible if the defendant "opens the door" through evidence or argument that leaves the jury with a false or misleading impression). Finally, we again observe that this line of questioning was related to the prosecutor's legitimate inquiry into Alwood's involvement with a race-related prison gang. We also emphasize that the trial court did limit the line of questioning, sustaining

Alwood's objection to the prosecutor's comment to Gibson that "just about everything you do is about race, isn't it?" Tr. p. 348.[3] Under these circumstances, the trial court did not abuse its discretion in admitting evidence surrounding Alwood's use of a racial epithet.

3. Sulitz's testimony

Alwood also insists that the trial court erroneously admitted Sulitz's testimony that Alwood had threatened him with a knife in violation of Evidence Rule 404(b). He also complains that Sulitz committed perjury based on confusion surrounding the date of the incident. As we have already found herein, however, evidence of this altercation is relevant because it establishes that Alwood was in possession of a knife shortly before a knife was found in his belongings, giving rise to a strong inference that it was the same knife. Inasmuch as this evidence is intrinsic to the charged offense, it is not excluded pursuant to Rule 404(b). Moreover, as noted above, the fact that Sulitz was concededly confused about the date of the altercation because it had occurred two years prior to his testimony does not establish that he perjured himself. Consequently, we find that the trial court did not abuse its discretion in admitting this evidence.

B. Denial of Motion to Continue

During Officer Miller's pretrial deposition, he denied signing the letter drafted by Alwood. Following that deposition, Alwood requested to continue the trial so that he could obtain an expert to compare the signature in Alwood's letter to exemplars of Officer Miller's

[3] To the extent that Alwood suggests that the trial court should have struck the question and given a curative instruction or admonishment, we note that he did not request either course of action. Consequently, he has waived the argument.

signature. The trial court denied the motion to continue, and Alwood argues that the denial was erroneous. The decision to grant or deny a nonstatutory request to continue a trial is within the sound discretion of the trial court and we will not reverse absent a clear showing of an abuse of that discretion. Harris v. State, 659 N.E.2d 522, 527 (Ind. 1995). The appellant must overcome a strong presumption that the trial court properly exercised its discretion, Warner v. State, 773 N.E.2d 239, 247 (Ind. 2002), and must "make a specific showing of how he was prejudiced as a result of the trial court's denial of his motion," Harris, 659 N.E.2d at 527.

Here, Alwood has not established that he was prejudiced as a result of the denial of his motion to continue the trial. Specifically, he has failed to provide evidence that an expert review of the signature would have resulted in exculpatory evidence. Moreover, the trial court found that authenticating the signature would have caused great delay and could not have occurred in any event unless the original of the letter was found. Under these circumstances, we find that the trial court did not abuse its discretion in denying the motion to continue the trial.

C. Jury Instruction on Burden of Proof

Alwood next contends that the trial court erroneously instructed the jury on reasonable doubt. Jury instruction lies within the trial court's discretion and we will not reverse the trial court's decision absent an abuse of that discretion. Forte v. State, 759 N.E.2d 206, 209 (Ind. 2001). Jury instructions are to be considered as a whole and in reference to each other, and we will not reverse unless the instructions as a whole mislead the jury as to the law of the

case. Carter v. State, 766 N.E.2d 377, 382 (Ind. 2002). Initially, we again observe that Alwood has waived this issue by failing to make a timely and precise objection before the trial court.

Waiver notwithstanding, we again note that although defendants are entitled to an additional jury instruction when the State's evidence is entirely circumstantial, Kizer, 437 N.E.2d at 467, here the State presented both direct and circumstantial evidence of Alwood's constructive possession of the knife. Thus, a special instruction was not required.

D. Cumulative

Alwood argues that the cumulative effect of the trial court's errors is such that he was denied a fair trial. We have concluded that the trial court did not abuse its discretion in any of the rulings complained of by Alwood; consequently, there are no errors to accumulate and this argument must fail.

IV. Sufficiency of the Evidence

Alwood next complains that there is insufficient evidence to support his conviction. When reviewing claims of insufficient evidence, we consider only the probative evidence and reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, and determine therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Miller v. State, 770 N.E.2d 763, 774 (Ind. 2002).

To convict Alwood of the charged offense, the State was required to prove beyond a reasonable doubt that Alwood knowingly or intentionally possessed a deadly weapon while

incarcerated in a penal facility. I.C. § 35-44-3-9.5. To prove constructive possession, the State must establish that Alwood had the intent and capability to maintain dominion and control over the knife. Iddings v. State, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002). To prove intent, the State must establish the defendant's knowledge of the presence of the contraband, which may be inferred from the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. Id. Knowledge can be inferred through, among other things, incriminating statements made by the defendant, proximity of the contraband to the defendant, and the mingling of the contraband with other items owned by the defendant. Tardy v. State, 728 N.E.2d 904, 908 (Ind. Ct. App. 2000). The capability requirement is met when the State shows that the defendant is able to reduce the contraband to the defendant's personal possession. Iddings, 772 N.E.2d at 1015. Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain control and dominion over the item in question.

Here, the State presented evidence that the knife was found at the bottom of Alwood's box of belongings, which had already been filled and sealed when Officer Simon arrived to remove Alwood from his cell. Tr. p. 124, 127, 130-31, 141-42, 146. Furthermore, the State presented the testimony of two inmates who had seen Alwood with that knife. Id. at 188, 192-93, 488. Additionally, Sulitz testified that Alwood had threatened him with a knife shortly before the knife was recovered. Id. at 237, 240-41. This is sufficient evidence from

which the jury could have reasonably inferred that Alwood had the intent and capability to maintain dominion and control over the knife. Alwood directs our attention to other evidence in the record allegedly contradicting the State's version of events and allegedly establishing inconsistencies in certain witnesses' testimony, but these are merely requests that we reweigh the evidence and judge witness credibility—a practice in which we do not engage when evaluating the sufficiency of the evidence.[4] Consequently, we find that there is sufficient evidence supporting Alwood's conviction.

V. Newly-Discovered Evidence

Finally, Alwood argues that the trial court erroneously denied his request for a new trial based on newly-discovered evidence. Motions for a new trial based upon newly-discovered evidence are viewed with disfavor. Denney v. State, 695 N.E.2d 90, 93 (Ind. 1998). Indeed, our Supreme Court has developed a nine-part test to be used to evaluate a claim of newly-discovered evidence, pursuant to which a movant must prove

> (1) that the evidence has been discovered since the trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.

Id. The new evidence must be submitted by affidavit. Ind. Trial Rule 59(h); Ind. Crim. Rules 16, 17.

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[4] Alwood attempts to invoke the incredible dubiosity rule, but that rule does not come into play unless there is a sole witness who presents inherently improbable testimony and a complete lack of circumstantial evidence. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). Here, there were multiple witnesses and a wealth of circumstantial evidence of Alwood's guilt. Consequently, the incredible dubiosity rule does not apply.

Alwood did not submit his newly-discovered evidence by affidavit. Procedural improprieties notwithstanding, the first piece of evidence was a letter from inmate Josh Ketchem. Ketchem wrote that Sulitz had informed him that he had set up Alwood because Sulitz owed money that he was unable to pay.[5] To that end, Sulitz allegedly told Ketchem that Sulitz put a knife in a paper bag and asked inmate Ryan Burton to put the bag in Alwood's cell. Appellant's App. p. 125-26. But Burton and Gibson testified to that effect at Alwood's trial and, as put by the trial court, their testimony "was rejected by the jury." Id. at 139. Thus, this letter is largely cumulative of evidence admitted at trial. Moreover, the trial court found Ketchem's credibility to be questionable inasmuch as he is merely "another Alwood supporter" in addition to Burton and Gibson. Id. We find, therefore, that the trial court properly refused to grant a new trial based on the Ketchem letter.

The other new evidence was a letter from inmate Mickey Thomas, about which the trial court concluded as follows:

> The Thomas letter is . . . cumulative, has questionable credit worthiness [sic], and there has been no showing that the information could not have been developed before trial or that a different result would be reached upon retrial. Alwood's counsel fully explored in pretrial discovery the [subject matter of the letter]. In the end, counsel was shoveling smoke. . . . More importantly, Thomas was not at the facility where the offense occurred, he had no direct knowledge about the events at Pendleton, and his letter is filled with opinion and hearsay.

[5] We also note that this letter constitutes impermissible hearsay. Ind. Evid. Rule 801(c).

Id. Given that the subject matter of the letter was cumulative and that Thomas had no personal knowledge about the subject matter of the prosecution, we find that the trial court properly denied the motion for a new trial based on the Thomas letter.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.