

NOTICE

Decision filed 02/02/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-08-0332

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 07-CF-562
)	
TREVIS THOMPSON,)	Honorable
)	W. Charles Grace,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Donovan and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

Held: Trial counsel was not ineffective for failing to seek a discharge on speedy-trial grounds where there was no "reasonable probability" that the defendant would have been discharged; no due process violations occurred at the defendant's trial; and the defendant was not denied the right to participate in every critical stage of the jury trial where the bailiff communicated directly with jurors and where the defendant was not present when a note sent to the judge was considered by the judge in front of the defendant's counsel, who did not request the defendant's presence.

Following a trial by jury, the defendant, Trevis Thompson, was convicted of aggravated unlawful restraint and was sentenced to serve five years in prison. In this direct appeal, he contends that (1) trial counsel's failure to move for a discharge on the basis of a violation of the defendant's speedy-trial rights amounted to ineffective assistance of counsel, (2) multiple due process violations deprived him of a fair trial, and (3) he was denied the right to participate in every critical stage of his jury trial. For the reasons that follow, we affirm.

FACTS

On October 17, 2007, the defendant was charged, by information, with the aggravated unlawful restraint and aggravated battery of Michael Greene. He spent the next 172 days in custody. A trial by jury in his case began on April 8, 2008. Prior to that, on January 2, 2008, the State moved, pursuant to section 103-5(c) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/103-5(c) (West 2006)), to continue the previously set trial date of January 7, 2008, on the basis that additional time was needed to locate Greene and obtain a DNA sample from him. On January 3, 2008, a hearing was held on the motion, at which the assistant State's Attorney handling the case informed the trial judge that Greene had been located the previous day and would provide a sample on January 3 or January 4, 2008. Also at the hearing, Detective Kevin Banks of the Carbondale police department testified that despite repeated attempts to do so, neither he nor any other Carbondale officers had been able to locate Greene between November 8, 2007, when they were asked to obtain a sample from Greene, and January 2, 2008. Banks testified in detail about the attempts made to locate Greene during that time. At the conclusion of the hearing, the trial judge concluded that the State had exercised due diligence in attempting to locate Greene to obtain a sample from him and granted the State's motion to continue pursuant to section 103-5(c) of the Code (725 ILCS 5/103-5(c) (West 2006)).

At the trial, both Greene and witness Treavon Triplett testified that the defendant removed Greene from a car at gunpoint and then led him into the defendant's home. The defendant testified to the contrary, as did the defendant's father. Following the trial, the defendant was convicted and sentenced as described above, and this timely appeal followed. Additional facts will be provided as necessary throughout the remainder of this order.

ANALYSIS

We begin by noting that although the defendant originally raised five issues on appeal,

this court entered an order on October 28, 2010, dismissing two of those issues as moot, due to the fact that the defendant has already served his sentence in this case and has been released from all custody restrictions related to this case and therefore cannot secure relief on those issues. Accordingly, we shall consider only the three remaining issues raised by the defendant in his brief on appeal.

The defendant first contends that his trial counsel's failure to move for a discharge on the basis of a violation of the defendant's speedy-trial rights amounted to ineffective assistance of counsel. The State counters that no speedy-trial violation occurred and that, accordingly, counsel could not be ineffective for failing to file a motion for a discharge. We agree with the State. As stated above, the defendant was charged and arrested on October 17, 2007, and remained in custody until his trial began 172 days later. Pursuant to the Code, a defendant who remains in custody must be brought to trial within 120 days. 725 ILCS 5/103-5(a) (West 2006). If the defendant is not brought to trial within that time, the defendant must be discharged from custody. 725 ILCS 5/103-5(d) (West 2006). However, exceptions within the Code suspend the running of the 120-day term. The exception of relevance to this case allows the State to move for an additional 120 days within which to bring a defendant to trial, if the court makes a determination "that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case," as long as there are "reasonable grounds" to conclude that the results may be obtained at a later day. 725 ILCS 5/103-5(c) (West 2006). In the case at bar, the State so moved and the motion was granted.

A trial court must determine, on a case-by-case basis, whether the State has met its burden of proving that it exercised due diligence in attempting to obtain DNA testing results. *People v. Colson*, 339 Ill. App. 3d 1039, 1047 (2003). We will not disturb a trial court's ruling on due diligence unless that ruling amounts to a clear abuse of discretion. *Colson*, 339

Ill. App. 3d at 1047. The defendant contends that the State did not exercise due diligence, because "Greene had a DNA sample on file with the Department of Corrections since 2005, and the police never contacted Greene's parole officer." However, at the hearing on the State's motion, Detective Banks testified that his understanding was that the crime lab needed "a new sample that they can actually break down in regards to the lab evidence," rather than an old sample already on file. The defendant did not offer any evidence to rebut the testimony of Banks. With regard to contacting Greene's parole officer, Banks testified that he was not aware that Greene was on mandatory supervised release, and the defendant presented no evidence to counter that testimony. Nor did trial counsel for the defendant present any evidence, at any time, to show that Greene actually was on mandatory supervised release, stating instead that the knowledge came directly from the defendant during the course of the hearing. Moreover, as discussed above, Banks testified in detail about the repeated attempts by himself and other officers to locate Greene. Against this factual backdrop, we simply cannot conclude that the trial judge clearly abused his discretion in concluding that the State had exercised due diligence in obtaining a DNA sample from Greene. Accordingly, trial counsel was not ineffective for failing to seek a discharge. See *People v. Murray*, 379 Ill. App. 3d 153, 158 (2008) (the failure to seek a discharge on speedy-trial grounds is only ineffective assistance of counsel if there is a "reasonable probability" that the defendant would have been discharged).

The defendant next contends that multiple due process violations deprived him of a fair trial. Specifically, he claims that he received ineffective assistance of counsel because his trial attorney failed to impeach the victim with the victim's alleged criminal record and failed to seek proper jury instructions regarding the use of prior statements of witnesses as substantive and corroborative evidence against him. He also claims that the State committed various discovery violations. We shall address each of these contentions in turn.

With regard to the defendant's claim that he received ineffective assistance of counsel because counsel failed to impeach the victim with the victim's alleged criminal record, we note that the materials the defendant attempted to supplement the record on appeal with to support this claim were stricken from the record by this court in an order dated May 4, 2010, because those materials were never presented to the trial court so it could render a proper ruling on them. See *People v. Burns*, 304 Ill. App. 3d 1, 11-12 (1999) (where claims of ineffective assistance of counsel are beyond the record on direct appeal, it is appropriate for the reviewing court to decline review if the contentions may be raised in a postconviction petition). Accordingly, the only "evidence" to support the defendant's claim of ineffective assistance of counsel based on counsel's failure to impeach Greene with his criminal record is the unsubstantiated claim of the defendant that Greene was on mandatory supervised release. As discussed above, this claim was made by the defendant to his counsel during the January 3, 2008, hearing on the State's motion to continue. Although it is understandable that counsel could not verify the claim during the course of the hearing, the claim was never substantiated at any time before the trial court and is not ripe for our consideration. It would have to be adjudicated, if at all, in postconviction proceedings.

The defendant next contends that he received ineffective assistance of counsel because counsel failed to seek a proper jury instruction. Specifically, he claims that "counsel allowed the jury to be told that the only substantive evidence from Triplett to corroborate [the defendant's] assertion that he had no gun was inadmissible for that purpose." According to the defendant, counsel should have made sure the jury was instructed that "Triplett did not see [the defendant] with a gun" and that "Triplett admitted that he said nothing to the police" about the defendant having a gun. The State counters that there was no ineffective assistance of counsel because counsel cannot be deemed ineffective for failing to take a pointless action and that even if counsel had requested the instruction, the judge would have legitimately

refused to give it. We agree with the State. As the State points out, the defendant's argument is premised on the existence of a prior inconsistent statement by Triplett. However, as explained below, no such statement exists in this case.

In his initial statement to authorities in Williamson County, Triplett did not mention that he saw the defendant with a gun. That is because the focus of the questioning in Williamson County was on the murder of Ben Slaughter (who had been present in the same car Greene was removed from by the defendant), not the unlawful restraint of Greene, and Triplett was neither asked nor did he volunteer information about whether the person who took Greene from the car in Carbondale was armed. As the State points out, although a prior statement of a witness may be considered an inconsistent statement if it lacks particular facts that, under the circumstances surrounding the giving of the statement, it would be "incumbent upon," or "likely" for, the witness to state (see, e.g., *People v. Batchelor*, 202 Ill. App. 3d 316, 327-28 (1990)), in the case at bar it was not "incumbent upon," or "likely" for, Triplett to mention whether the defendant had a gun while taking Greene from the car when the focus of Triplett's statement to authorities was a subsequent murder, in a different county, at the scene of which neither the defendant nor Greene was present. There is simply no merit to the defendant's prior-inconsistent-statement theory, and had trial counsel attempted to obtain a jury instruction on the basis of a prior inconsistent statement by Triplett, his request properly would have been denied. Accordingly, counsel was not ineffective for failing to make a futile request.

We turn next to the defendant's contention that the State committed various discovery violations. With regard to the defendant's claim that the State hid from him the fact that Triplett would testify he had seen the defendant with a gun when the defendant forced Greene from the car, we agree with the State that there is no evidence to support the defendant's theory that the State attempted to hide information from him. During jury

selection in this case, the defendant's trial counsel stated that he believed that Greene would be the only witness to testify that the defendant had a gun. The assistant State's Attorney then informed the defendant's attorney that on the previous day, the assistant State's Attorney had been told by Triplett that Triplett had seen the defendant holding a gun. The trial judge asked if Triplett's statement was in writing, and the assistant State's Attorney answered that it was not. The defendant's counsel had not interviewed Triplett but was granted a continuance so that he could do so. The following morning, defense counsel reported that he had spoken with Triplett, and he did not request a further continuance.

The defendant concedes, as he must, that an oral statement never memorialized need not be disclosed to the defense, unless bad faith on the part of the State can be shown. See *e.g.*, *People v. Williams*, 262 Ill. App. 3d 808, 823-24 (1994). However, he contends, correctly, that the State must correct false impressions formed by its earlier disclosures. See *e.g.*, *People v. Tripp*, 271 Ill. App. 3d 194, 205 (1995). The problem for the defendant is that in this case the State did just that, disabusing defense counsel of the mistaken impression that only Greene would testify that the defendant had a gun. This correction occurred the day after the State learned that Triplett, too, would testify about the defendant's possession of the gun and just minutes after the State learned that defense counsel harbored the false impression that Triplett would not so testify. A continuance was granted so that defense counsel could conduct an independent interview of Triplett. There is no evidence of bad faith on the part of the State, and the State fulfilled its duty to timely correct any misleading characterizations it might have made regarding Triplett.

With regard to the defendant's contention that the State violated discovery rules in its documentation and disclosure of an interview with Greene conducted by authorities on October 17, 2007, we note that the trial judge found two discovery violations related to the interview: the inadvertent failure by police to record approximately 18 minutes of the audio

of the interview and the inadvertent failure by police to timely supply the defense with a transcript of the interview. With regard to the failure to record, the judge found no bad faith on the part of the police, finding instead that the failure was the result of the misapprehension by police that even if a separate audio cassette stopped recording, the DVD audio feed (which accompanied the video recording) would continue, when in fact it would stop recording as well. With regard to the failure to timely supply a transcript of the interview, the judge found that this, too, was inadvertent and appeared to have occurred because of the multicounty nature of the investigation of the unlawful restraint of Greene and the murder of Slaughter. As a sanction for these inadvertent discovery violations, the trial judge ruled that the defense could use the DVD or the transcript to impeach Greene, which was a departure from the trial judge's normal practice of allowing a transcript to be used only by agreement. The defendant nevertheless complains that the trial judge should have issued different sanctions, such as instructing the jury "that it could presume that the missing audio material contained evidence that harmed the State's case."

When a trial judge determines that a discovery violation has occurred and the judge crafts sanctions to remedy that violation, "the judgment of the trial judge is given great weight." *People v. Weaver*, 92 Ill. 2d 545, 558-59 (1982). If a defendant can show that he or she is prejudiced by a discovery violation and that the trial court failed to eliminate that prejudice, however, we will find an abuse of the trial judge's discretion. *Weaver*, 92 Ill. 2d at 559. In the case at bar, we cannot conclude that the trial judge abused his discretion when he crafted a remedy for the inadvertent discovery violations. First, the DVD was never even offered into evidence by the State. Second, although counsel for the defendant knew he could use the DVD or the transcript to impeach Greene, he chose not to avail himself of these tools. Third, there is simply no evidence that the missing audio of the interview would have been of benefit to the defense, even if the DVD had been admitted. In sum, the defendant's

contentions are short on facts and long on unsubstantiated innuendo and do not provide a basis upon which to find that the trial judge's sanction was deficient or improper.

The defendant also contends a discovery violation occurred when the State failed to turn over to the defendant handwritten notes taken by police during the interview of Greene. However, as the State points out, counsel for the defendant could have filed, but did not, a written request that the trial judge conduct an *in camera* inspection of the handwritten notes to determine if they contained substantially verbatim reports of oral statements and thus needed to be turned over to the defendant. In the case at bar, the trial judge twice noted that counsel could have made that request, and he concluded that there was no issue before him regarding the notes. Moreover, as the State also points out, "the failure to request a court's *in camera* inspection amounts to a waiver of this right" (*People v. Wilson*, 32 Ill. App. 3d 842, 845-46 (1975)). Forfeiture notwithstanding, the trial judge in this case actually watched the DVD to determine the extent of note-taking and concluded that the officers had taken very few notes and that thus the notes could not provide substantially verbatim reports of oral statements. There was no error and the defendant's contentions to the contrary are without merit.

The defendant next claims the State improperly bolstered the testimony of Greene by pointing out that Greene's trial testimony was consistent with his initial statement to police. However, as the State points out, the contentions of error raised by the defendant were not raised below and have been forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Moreover, no attempt is made to demonstrate that any alleged errors constituted plain error, and the defendant has forfeited the consideration of this issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing).

Forfeiture notwithstanding, we agree with the State that the comments made by the State in closing argument were not made in error and thus could not constitute reversible error.

Although the defendant claims that cumulative errors related to discovery violations and closing argument deprived him of a fair trial, we have found no errors and thus cannot agree. See *e.g.*, *People v. Phillips*, 392 Ill. App. 3d 243, 276 (2009) (where there are no individual errors, there is no cumulative error).

The final contention raised by the defendant on appeal is that he was denied the right to participate in every critical stage of his jury trial. Specifically, he claims that "the jury was given instructions by a bailiff off the record, and a question from the jury was considered outside the presence of the defendant." With regard to the jury question that was considered outside the presence of the defendant, the State correctly notes that counsel for the defendant was present during the discussion, did not request the presence of the defendant at the discussion, and did not argue in his motion for a new trial that the defendant's presence was required. Accordingly, the issue has been forfeited and may be reviewed only for plain error (see, *e.g.*, *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), which the defendant bears the burden of proving. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). However, the defendant has not presented coherent argument or citation to authority regarding the presence of plain error with regard to this issue, and he has therefore forfeited the further consideration of this issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing). Forfeiture notwithstanding, there is no merit to the defendant's claim. As the Illinois Supreme Court has held, "a defendant's right of presence is violated under Illinois law only when the defendant's absence results in the denial of an underlying substantial right." *People v. McLaurin*, 235 Ill. 2d 478, 490-91 (2009).

Underlying substantial rights include the right to confront witnesses against the defendant, the right to present a defense, or the right to secure an impartial jury. *McLaurin*, 235 Ill. 2d at 491. In this case, the instruction given by the trial judge in response to the note was appropriate and in conformance with the law; accordingly, even if the defendant had presented argument on this issue, rather than forfeiting it, we would find no merit to this contention. Nor may we find that the defendant's federal right of presence was violated, for that occurs only when a reviewing court concludes, in light of the entire record before the reviewing court, that the defendant's absence resulted in the defendant being denied a fair trial. *McLaurin*, 235 Ill. 2d at 492. The record before this court leads to no such conclusion.

With regard to purported error related to the bailiff, the defendant states that "Supreme Court Rule 608(a)(8) requires that instruction to, and communications with, the jury be conducted with a verbatim record." As the State points out, however, Supreme Court Rule 608 is a directive to the court clerk and provides no remedy beyond supplementing the record on appeal with additional portions of the circuit court record. Ill. S. Ct. R. 608(a)(8) (eff. Dec. 13, 2005). The defendant provides no coherent argument or supporting authority for the proposition that he is entitled to relief for this "violation" of Rule 608; accordingly, the defendant has forfeited consideration of this issue. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing). Moreover, we agree with the State that forfeiture notwithstanding, and assuming, *arguendo*, that Rule 608 may be violated in the manner proposed by the defendant, there was no violation of Rule 608 in this case because within minutes of the bailiff's communication to the jury, he appeared before counsel and the judge and described, for the record, that communication. The trial judge found that the bailiff's communication to the jurors that they should keep deliberating

if they could not reach a verdict was harmless, because the bailiff "essentially" did what the trial judge would have done under the same circumstances. The defendant's trial counsel, apparently satisfied with this response, did not move for a mistrial, instead asking only that the judge inform the jury to direct future questions to the court, not to the bailiffs. There is no merit to either of the defendant's "right to participate" claims.

CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction and sentence.

Affirmed.