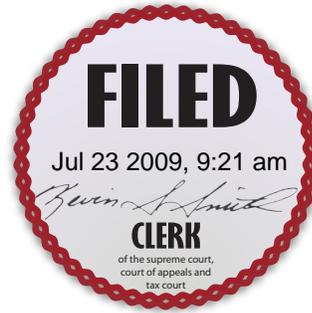


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES W. GARY, )

Appellant-Defendant, )

vs. )

No. 71A03-0812-CR-627

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable J. Jerome Frese, Judge  
Cause No. 71D03-0404-FA-43

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**July 23, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

James W. Gary appeals from his convictions for Possession of Cocaine, as a Class A felony, and Maintaining a Common Nuisance, as a Class D felony, following a jury trial. Gary raises three issues for our review, which we restate as the following four issues:

1. Whether he preserved his objections to the State's admission of drug evidence during his trial.
2. Whether the trial court abused its discretion when it admitted into evidence an aerial photomap and testimony that the place where Gary was arrested was within 1000 feet of a daycare.
3. Whether the State presented sufficient evidence that the daycare owned or rented the property on which it operated.
4. Whether the trial court abused its discretion when it instructed the jury.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On April 14, 2004, Corporal Dorian Finley of the South Bend Police Department submitted an affidavit in support of probable cause to obtain a search warrant for the residence at 423 South Illinois Street in South Bend. The trial court granted the warrant request, and officers executed the warrant on the morning of April 15. Gary and his girlfriend were alone in the house. Officers seized 5.78 grams of crack cocaine found on the living room floor, 2.57 grams of crack cocaine found in a toilet, and numerous documents bearing Gary's name and the residence's address.

On April 16, the State charged Gary with possession of cocaine, as a Class A felony, and maintaining a common nuisance, as a Class D felony. On March 23, 2006,

Gary filed a motion to suppress the evidence seized pursuant to the search warrant. The trial court held a hearing on Gary's motion on March 27, after which it denied his motion. Gary did not seek an interlocutory appeal of that decision.

The trial court held Gary's jury trial on November 17-20, 2008. At that trial, the court admitted into evidence the items seized from the Illinois Street residence pursuant to the search warrant without objection from Gary. The State also presented the testimony of Christine Dean, who testified that she had worked at Lovie's Quality Child Care ("Lovie's"), a licensed daycare, for fifteen years, and that for each of those fifteen years Lovie's was located at 436 South Kenmore Street in South Bend. Dean further testified that the daycare's hours of operation were 7:00 a.m. to 5:30 p.m. And the State presented the testimony of John McNamara, the St. Joseph County Surveyor. McNamara, relying upon an aerial photomap, testified that Gary's residence was within 1000 feet of Lovie's. Gary objected to the admission of McNamara's testimony, but the trial court overruled Gary's objections. In his defense, Gary called Deborah Johnson. Johnson testified that Gary did not live at the Illinois Street residence and that the drugs found at that residence belonged to a third party. Johnson also stated that Gary had arrived at that location at midnight on April 15th and that the warrant was executed "a little before eight" that same morning. Transcript at 382.

The jury found Gary guilty as charged. The trial court entered its judgment of conviction and sentenced Gary to an aggregate term of forty-eight years with twelve years suspended. This appeal ensued.

## DISCUSSION AND DECISION

### Issue One: Admission of Seized Evidence

Gary first argues that the trial court “erred by denying [his] motion to suppress evidence.” Appellant’s Brief at 9 (emphasis removed). Specifically, Gary avers that the affidavit in support of probable cause did not establish the credibility of a confidential informant and that the confidential informant’s purported participation in a controlled buy did not conform with the law. The State responds that Gary has twice waived his arguments. First, the State notes that at the suppression hearing Gary argued only that the affidavit did not establish probable cause because it relied on stale information. And the State also notes that, in any event, Gary did not object at his trial to the admission of the evidence seized under the search warrant. Because we must agree with the State that Gary did not preserve his objections at his trial, we need not consider what happened at the motion to suppress hearing.

Although Gary originally challenged the admission of the evidence through a motion to suppress, he now challenges the admission of that evidence at trial. “Thus, the issue is . . . appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial.” Stafford v. State, 890 N.E.2d 744, 748 (Ind. Ct. App. 2008). ““When the trial court denies a motion to suppress evidence . . . , the moving party must renew his objection to admission of the evidence at trial. If the moving party does not object to the evidence at trial, then any error is waived.”” Id. at 749 (quoting Wright v. State, 593 N.E.2d 1192, 1194 (Ind. 1992), cert. denied, 506 U.S. 1001 (1992), abrogated on other grounds by Fajardo v. State, 859 N.E.2d 1201, 1206-07 (Ind. 2007)).

Here, Gary did not object to the evidence at trial. Accordingly, he cannot claim error on appeal. Id.

### **Issue Two: Admission of Distance Evidence**

Second, Gary argues that “the State failed to sufficiently establish that the daycare was within 1000 feet of the Illinois Street residence. The State did not present any evidence that the distance was actually measured, but rather relied on a computer program whose reliability had not been properly established.” Appellant’s Brief at 16. While styled as a challenge to the sufficiency of the State’s evidence against him, the substance of Gary’s argument on this issue is whether the trial court abused its discretion when it admitted McNamara’s evidence against him. We address the argument accordingly.

Our standard of review of a trial court’s findings as to the admissibility of evidence is an abuse of discretion. Speybroeck v. State, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court’s ruling and any unrefuted evidence in the defendant’s favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

In Charley v. State, 651 N.E.2d 300, 303 (Ind. Ct. App. 1995), this court held that “the State is only required to show that the measuring device was accurate and was operated correctly in order to allow the admission of the distance as evidence.” “A proper foundation is laid for photographs if there is testimony from a reliable source that

the photographs are accurate representations of the things the photographs are intended to portray.” Schnitz v. State, 650 N.E.2d 717, 722 (Ind. Ct. App. 1995), summarily aff’d, 666 N.E.2d 919 (Ind. 1996). In Schnitz, we affirmed the trial court’s admission of an “aerial photomap” after the State presented the testimony of a city engineer. Id. That engineer testified that the map demonstrated that the defendant’s residence was less than 1000 feet from a school. We held that his testimony laid a sufficient foundation for the map’s admissibility even though

[he] did not physically measure the distance nor did he have personal knowledge about the preparation or verification of the map. [He] did testify, however, that he measured the map with his engineer’s scale . . . and that he physically observed the area he measured and believed his physical observations to confirm the . . . measurement he got from the map.

Id.

Here, McNamara testified as follows:

A I am a licensed land surveyor in the State of Indiana[ and a] licensed professional engineer. I have a degree in engineering from Notre Dame. . . .

\* \* \*

Q [by the State] Okay. When a request comes from the prosecutor’s office for you to determine the distance between two points, tell the jury what process you take to make that determination.

A First of all, we take a look at the site and the two sites involved and actually go out there and physically look at it to make sure that nothing is different from what we’ve been told on paper to make sure that the day care or the school or the park is actually where they think it is. And then we put together a map, an aerial photograph at a scale to depict that so that the jury and the prosecutor and the defendant can see it.

Q What’s an overhead or aerial map? What is that?

A It's an aerial photograph[] that was—that's updated every two years in the county. And what we have is a computerized overlay of the surveying system, and we put that right on the photograph so you can see exactly how far the distances are.

Q Do you use these maps often?

A Yes, almost every day.

Q Do you find them to be accurate?

A Yes, they're accurate within two feet. In other words, in a mile they would be often maybe two feet in 5,280 feet [sic]. So they're very accurate. And that's the way we set it up when we first started doing it ten years ago.

Q Okay. Were you asked by my office to make a determination of distance between two points, sir?

A Yes.

Q What two points?

\* \* \*

A The two sites were 423 South Illinois and 436 South Kenmore.

Q . . . you said you went out and looked at these places?

A Yes.

\* \* \*

Q Mr. McNamara, is there some sort of measurement or scale on State's Exhibit 7 [the aerial photomap]?

A Yes.

Q And what is that scale, sir?

A The scale is one inch equals a hundred feet.

\* \* \*

THE COURT: How do you know that?

THE WITNESS: I've checked it out with a scale, and we set it up that way by computer.

\* \* \*

Q Okay. When you say you set it up, this is a computer program that you're talking [about]?

A That's correct

Q You previously testified that the county has a computer that you use on a practically daily basis in your surveying duties?

A Yes.

Q Is that Exhibit 7 a product of that?

A Yes.

Q And there's a red circle [on the Exhibit] which you testified represents a one-thousand foot radius?

A That's correct.

Q Who put the circle on the map, sir?

A Actually the computer did.

Q And was that at your behest or direction?

A That's correct.

Q How do you know the circle is accurate?

A When the drawing is produced, I take an engineering scale which is a three-sided instrument, and I check to make sure that it measures a thousand feet.

Q And that's from the center of the circle outward?

A Yes. Exactly[.] I measure all the way across and divide it by two.

Q Okay. Is it then your testimony that you've prepared State's Exhibit 7?

A Yes.

Q And brought it here today?

A Yes.

Q And that it is accurate?

A Yes.

Transcript at 211-13, 218-20.

On appeal, Gary contends that the aerial photomap with its computer-generated red circle was improperly admitted into evidence for two reasons. First Gary argues that McNamara did not testify that he regularly tested the computer program for accuracy. Second, Gary asserts that McNamara did not take any "manual measurements . . . to verify the accuracy of the computer program." Appellant's Brief at 17. Both of Gary's arguments must fail.

McNamara's testimony established a thorough foundation for the accuracy of both the aerial photomap and the computer-generated circle on that map. As with the city engineer in Schnitz, McNamara testified: that the map here showed, via the red circle, that the Illinois Street residence was within 1000 feet of Lovie's; that McNamara physically observed the area in question; and that McNamara used an engineer's scale to verify the accuracy of the computer-generated circle. Additionally, McNamara testified that he had personal knowledge regarding the preparation and accuracy of the map, factors which were not present in Schnitz. See Schnitz, 650 N.E.2d at 722. Thus, the

State laid a sufficient foundation for the admission of the aerial photomap, and the trial court did not abuse its discretion in admitting that map into evidence.<sup>1</sup>

### **Issue Three: Sufficiency of the Evidence**

Gary next asserts that the State failed to present sufficient evidence that he possessed cocaine within 1000 feet of a daycare. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

In order to prove that Gary committed possession of cocaine, as a Class A felony, the State here had to demonstrate beyond a reasonable doubt that Gary, “without a valid prescription or order of a practitioner acting in the course of the practitioner’s professional practice, knowingly or intentionally possesse[d] cocaine . . . weighing at least three (3) grams . . . within one thousand (1,000) feet of . . . school property.” Ind. Code § 35-48-4-6(b)(3)(B)(i) (West Supp. 2008). “School property,” as used in that section, among other things is defined as “[a] building or structure owned or rented by . . . an entity that is required to be licensed under IC 12-17.2 . . . .” I.C. § 35-41-1-

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<sup>1</sup> Insofar as Gary argues that the map does not constitute sufficient evidence that the Illinois Street residence was within 1000 feet of Lovie’s, that argument is a request for this court to reweigh either the veracity of the map or McNamara’s testimony, which we will not do. See Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003).

24.7(1)(B) (emphasis added). Lovie's was a licensed daycare under Indiana Code Article 12-17.2.

Gary's argument on this issue is that the State presented no evidence that Lovie's "either owned or rented" the property at 436 South Kenmore Street. Appellant's Brief at 15. The State does not dispute that its evidence did not explicitly state that Lovie's either owned or rented the property out of which it operated. But that is no matter. Our standard of review requires us to determine whether the reasonable inferences from the evidence support the conviction; not simply whether the evidence explicitly addresses a particular issue. Here, the State presented evidence—namely, Dean's testimony—that Lovie's had operated at the 436 South Kenmore location for fifteen consecutive years. A reasonable inference from that evidence is that Lovie's either owned or rented the property. See Jones, 783 N.E.2d at 1139. Accordingly, Gary's argument must fail.

#### **Issue Four: Jury Instruction**

Finally, Gary challenges the trial court's refusal to accept a proffered jury instruction. The instruction of the jury is within the discretion of the trial court and it is reviewed only for an abuse of discretion. VanPelt v. State, 760 N.E.2d 218, 224 (Ind. Ct. App. 2003), trans. denied. The test applied to review a trial court's decision to give an instruction is 1) whether the instruction correctly states the law; 2) whether there is evidence in the record to support giving the instruction; and 3) whether the substance of the instruction is covered by other instructions which are given. Id. Jury instructions are to be considered as a whole and in reference to each other. Hancock v. State, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000). Error in a particular instruction will not result in reversal

unless the entire jury charge misleads the jury as to the law in the case. Id. Before a defendant is entitled to a reversal, he must affirmatively show the instructional error prejudiced his substantial rights. Id. “This well-settled standard by which we review challenges to jury instructions affords great deference to the trial court.” Randolph v. State, 802 N.E.2d 1008, 1011 (Ind. Ct. App. 2004), trans. denied.

Here, Gary submitted a proposed jury instruction regarding mitigating factors<sup>2</sup> under Indiana Code Section 35-48-4-16(b). That law provides as follows:

It is a defense for a person charged under this chapter . . . that:

(1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and

(2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.

The State asserts that the trial court did not abuse its discretion in denying Gary’s proposed instruction in light of the evidence presented at Gary’s trial. We must agree with the State.

In Stringer v. State, 853 N.E.2d 543 (Ind. Ct. App. 2006), the defendant sought, as did Gary here, a jury instruction on both of the mitigating factors identified in Indiana Code Section 35-48-4-16(b). The trial court denied the defendant’s request. In affirming that decision, we stated:

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<sup>2</sup> This court recently held that the “defense” provided by this statute is not an affirmative defense but, rather, a mitigating factor. Harrison v. State, 901 N.E.2d 635, 641-42 (Ind. Ct. App. 2009), trans. denied. Further, because Gary’s proposed instruction tracked the language of Indiana Code Section 35-48-4-16(b), the State does not dispute that that instruction was a correct statement of the law.

Although it is arguable that the record supports the giving of such an instruction, ultimately, the record in this case leads us to conclude that the defense's theory did not support giving the instruction. Thus, despite that the record additionally shows that no other instruction covered the substance of the proposed instruction on I.C. § 35-48-4-16, we cannot hold that the trial court abused its discretion by this omission.

Id. at 549-50.

The instant appeal is directly analogous to Stringer. Our review of the record here indicates that the State introduced evidence at trial that Lovie's was within 1000 feet of the Illinois Street residence; Gary was at that residence from midnight until "a little before eight [a.m.]" the day the search warrant was executed, Transcript at 382; and Lovie's normal hours of operation began at 7:00 a.m. See Stringer, 853 N.E.2d at 549. Gary did not present any direct evidence that no one was at Lovie's at the time of the incident; rather, Gary only elicited testimony during cross-examination of one of the State's witnesses, Dean, that it was unknown whether any minors were present at Lovie's at the time Gary was arrested. See id. And while the testimony of Gary's only witness, Johnson, can be used as support for the position that Gary was at the Illinois Street residence for about an hour while Lovie's was open for business, it is clear from the record that Gary's defense theory was not that he was only "briefly" near Lovie's. See I.C. § 35-48-4-16(b)(1). Rather, his theory of defense was that the drugs found at the Illinois Street residence could not have been his because he did not live there and they instead belonged to a third party. See Stringer, 853 N.E.2d at 549-50. Thus, as in Stringer, we cannot hold that the trial court abused its discretion when it refused to tender Gary's proposed instruction.

## **Conclusion**

In sum, we must hold that: (1) Gary did not preserve his objections to the State's evidence obtained pursuant to the search warrant; (2) the trial court did not abuse its discretion when it permitted the State to enter the aerial photomap into evidence; (3) the State presented sufficient evidence that Lovie's owned or rented the property at 436 South Kenmore Street; and (4) the trial court did not abuse its discretion when it denied Gary's proposed jury instruction. Accordingly, we affirm Gary's convictions.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.