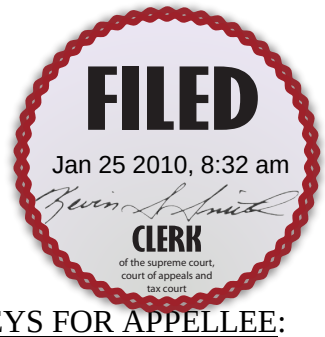

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IN THE
COURT OF APPEALS OF INDIANA

KENNETH R. CRONIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A01-0904-CR-186
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
The Honorable Karen Werner, Magistrate
Cause No. 62C01-0804-FA-390

January 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kenneth R. Cronin appeals his twenty-two convictions for methamphetamine-, marijuana-, and firearm-related offenses. We affirm.

Issues

We restate the issues as follows:

I. Did the trial court abuse its discretion by admitting certain evidence seized in the execution of two search warrants?

II. Did the trial court abuse its discretion by rejecting Cronin's tendered instruction on the theory of his defense?

III. Did the trial court abuse its discretion by denying Cronin's motion for mistrial following its enforcement of federal agents' sovereign immunity testimonial privilege?

Facts and Procedural History

On April 2, 2008, Tell City Police Officer Marty Haughee conducted a probation search at the home of Derrick Stiles. The search produced evidence of drug activity in his basement; specifically, police found paraphernalia used to manufacture methamphetamine ("meth"). In an attempt to better his legal situation and avoid probation revocation, Stiles agreed to provide police with information regarding the manufacture of meth in the area; this included information about Cronin's drug activity. Based on this information, police obtained warrants to search two of Cronin's properties.

On April 18, 2008, state and local law enforcement officers, accompanied by two federal Alcohol, Tobacco, Firearms and Explosives ("ATF") agents, simultaneously executed the warrants upon both of Cronin's properties. Cronin was mowing the lawn of the Aster

Road property when the police arrived to conduct the search there. In the living room, police discovered a metal cylinder containing meth, a glass pipe, marijuana, aluminum foil containing burnt residue, a loaded .380 caliber semi-automatic weapon, a loaded .32 caliber handgun, and additional ammunition. In the kitchen, they found coffee filters containing meth residue. In the bedroom, they found burnt marijuana joints, rolling papers, Cronin's casino rewards card, and mail addressed to Cronin and his wife at the address of his other searched property on Highwater Road. Under the mattress, police found a loaded short-barrel twelve-gauge shotgun. In a closet, they found a digital scale, a plastic bag of cutting agent, two shotguns, two .22 caliber rifles, shotgun shells, and other ammunition. In the garage, they discovered coffee filters, battery strippings, a package of lithium batteries, empty boxes of medications containing ephedrine or pseudoephedrine, an empty bottle of Coleman camp fuel, an empty bottle of Heat, an empty can of starter fluid, a glass bottle containing a chunky white substance, a plastic spoon containing white residue, a plastic soda bottle with a modified lid and tubing attached to create an HCL generator, additional plastic tubing, 8.76 grams of meth, and propane tanks containing anhydrous ammonia. Police arrested Cronin and discovered $9,413.00 on his person.

In their simultaneous search of the Highwater Road property, police found Cronin's truck to contain a metal cylinder housing plastic bags containing 8.96 and 4.27 grams of meth and a plastic bag containing .97 grams of cocaine. They also discovered a box of plastic sandwich bags on the floor board. In the bedroom, police discovered receipts for the purchase of meth precursor items, a butane torch, a water bottle containing a secret

compartment, a glass pipe containing residue, a marijuana "blunt," .10 grams of meth on the dresser, .36 grams of meth in a metal tin, and a bank statement and prescription pill bottle in Cronin's name at that address. Under the bed, they found a loaded .45 caliber handgun and ammunition. The garage contained a plethora of items, including a loaded Glock handgun with two extra magazines, additional ammunition of various calibers, a coffee grinder, a coffee filter containing 13.38 grams of meth, additional coffee filters, radio frequency detectors, two night vision scopes, containers of salt, pills containing pseudoephedrine, liquid fire, propane torches, an air purifying respirator, a prescription pill bottle bearing Cronin's name and containing marijuana, a glass pipe with residue, rolling papers, and a false dictionary with a hidden compartment containing meth, marijuana, a hollow pen, and a check card book containing Cronin's name. In the rafters, police found another plastic bag containing meth.

On April 24, 2008, the State charged Cronin with the following twenty counts: four counts of class A felony dealing methamphetamine, four counts of class C felony methamphetamine possession, two counts of class C felony possession of anhydrous ammonia, two counts of class C felony possession of meth precursors, two counts of class D felony maintaining a common nuisance, two counts of class A misdemeanor marijuana possession, two counts of class A misdemeanor possession of paraphernalia, and two counts of class A misdemeanor illegal storage of anhydrous ammonia. On April 28, 2008, the State amended the information to include two counts of class B felony unlawful possession of a firearm by a serious violent felon.

On August 27, 2008 and January 22, 2009, Cronin filed motions to suppress the evidence produced from the searches on the basis that the search warrants were not supported by probable cause. The trial court denied both motions following hearings. On February 27, 2009, the State filed a motion in limine seeking to limit testimony by federal ATF agents involved in the investigation. In response, Cronin filed a motion for continuing objection to the evidence discovered pursuant to the search warrants, which the court granted on March 3, 2009. A five-day jury trial commenced that same day. On March 4, 2009, Cronin moved for a mistrial based on the trial court's enforcement of the federal ATF agents' testimonial privilege. The trial court denied his motion on March 5, 2009. On March 9, 2009, the jury found Cronin guilty as charged on counts one through twenty. After a bifurcated phase of the trial, the jury found him guilty of two counts of unlawful possession of a firearm by a serious violent felon. On April 7, 2009, the trial court sentenced him to an aggregate term of sixty years. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Admission of Evidence

First, Cronin asserts that the trial court erred in admitting evidence seized in the execution of two search warrants. Decisions regarding the admission of evidence lie within the sound discretion of the trial court. *Davis State*, 907 N.E.2d 1043, 1048 (Ind. Ct. App. 2009). We review such decisions for an abuse of discretion. *Id*. An abuse of discretion occurs where the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id*.

Cronin alleges that the affidavit supporting the search warrants was not based on probable cause. In this vein, he filed two pretrial motions to suppress, which the trial court denied. He then filed a motion for continuing objection to all evidence found in the searches, which the trial court granted. The purpose of continuing objections is "to avoid the futility and waste of time inherent in requiring repetition of the same unsuccessful objection each time evidence of a given character is offered." *Hayworth v. State*, 904 N.E.2d 684, 692 (Ind. Ct. App 2009).

In *Hayworth*, the defendant lodged a continuing objection, but proceeded to state "no objection" to various exhibits when offered at trial. *Id*. at 693. As a result, we found that this amounted to waiver despite the defendant's continuing objection:

> By stating 'No objection,' we find that Hayworth has waived her objection to that evidence. The proper procedure, assuming the trial court granted the continuing objection, would have been for Hayworth to have remained silent when the State introduced those various exhibits. But Hayworth did much more than that. Instead, she affirmatively said, 'No objection.' This was confusing to the trial court, the State, and now us, the reviewing court, leaving us to speculate why she bounced back and forth between continuing objection and no objection. On appeal, Hayworth asserts that 'No objection' really meant 'no objection other than the continuing objection.' However, we will not read 'No objection,' a simple and powerful two-word phrase, to have such meaning. This is especially so when Hayworth alternated between using continuing objection and no objection. This then leaves us with the fact that Hayworth has affirmatively said 'No objection' to the vast majority of the evidence against her. And as for the evidence to which she did lodge a continuing objection, some competing evidence came in. For example, Hayworth objected to photographs of two firearms but then said 'No objection' when the actual firearms were introduced. We thus find that Hayworth has waived her objection to the admission of the evidence seized during the execution of the search warrant.

Id. at 693-94.

Likewise, here, Cronin sought and was granted a continuing objection. At trial, he inexplicably stated "no objection" to many exhibits while stating a "continuing objection" to others. Moreover, he cited his continuing objection to various items offered as exhibits while stating "no objection" to photographs of those same items. Thus, we agree with the State that, to the extent of most of the evidence discovered pursuant to the search warrants, "the evidence for which an objection was preserved is only cumulative of the evidence for which no objection was preserved." Appellee's Br. at 12. *See N.W.W. v. State*, 878 N.E.2d 506, 509 (Ind. Ct. App. 2007) (stating that erroneous admission of evidence that is merely cumulative is not reversible error), *trans. denied* (2008). As a result, Cronin has waived any claim of error regarding the admission of much of the evidence obtained pursuant to the search warrants.[1]

Waiver notwithstanding, and to the extent Cronin has preserved his challenge regarding the admission of the remaining evidence,[2] we conclude that probable cause supported the search warrants. Probable cause exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Eaton v. State*, 889 N.E.2d 297, 299 (Ind. 2008) (citation and internal quotation marks omitted), *cert. denied* (2009).

Here, the probable cause to issue the search warrants was based on Officer Haughee's

[1] We note that Cronin raises a fundamental error argument in his reply brief. *See D.G.B. v. State*, 833 N.E.2d 519, 529 n.5 (Ind. Ct. App. 2005) (noting State's correct assertion that purpose of reply brief is to respond to appellee's arguments, not to raise new issues including fundamental error).

[2] This evidence consists of the non-firearm evidence seized from Cronin's Highwater Road property.

affidavit containing information he obtained from confidential informant ("CI") Stiles. "An affidavit demonstrates probable cause to search premises if it provides a sufficient basis of fact to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime." *Scott v. State*, 883 N.E.2d 147, 153 (Ind. Ct. App. 2008) (citation omitted). A magistrate faced with a request for a search warrant must "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id*. (citation omitted). On review, our duty is "to determine whether the magistrate had a 'substantial basis' for concluding that probable cause existed." *Id*. at 153-54 (citation omitted). Thus, with significant deference to the magistrate's decision, we "focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause." *Id*. at 154. Because search warrants are presumed to be valid, the defendant bears the burden of overcoming the presumption, and doubtful cases are to be resolved in favor of upholding the warrant. *Ramsey v. State*, 853 N.E.2d 491, 503 (Ind. Ct. App. 2006), *trans. denied*.

Cronin claims that CI Stiles was not credible and that, as a result, Officer Haughee was not justified in relying on his statements as a basis for the warrants. Indiana Code Section 35-33-5-2(b) addresses search warrant affidavits and the information required to establish the credibility of hearsay, providing that,

(b) When based on hearsay, the affidavit must either:

> (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there

> is a factual basis for the information furnished; or
> (2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

The trustworthiness of hearsay in proving probable cause for a search warrant may be established by showing that (1) the CI has given accurate information in the past; (2) independent police investigation corroborates the CI's statements; (3) some basis for the CI's knowledge is demonstrated; (4) the CI predicts conduct or activity by the suspect that is not ordinarily easily predicted; *or* (5) the CI made declarations against his penal interest. *State v. Spillers*, 847 N.E.2d 949, 954 (Ind. 2006) (emphasis added).

Here, CI Stiles made statements to Officer Haughee via interview on April 3, 2008. These statements proved credible in multiple ways. First, he provided Officer Haughee with information that had proven to be accurate and fruitful in the police investigation of Mark Northerner who, between the time of the interview and the time of the affidavit, was charged with meth-and marijuana-related offenses. Appellant's App. at 58. Stiles also provided detailed information regarding the existence and location of Cronin's meth-related burn piles along Highwater Road and, in the intervening weeks between the interview and the affidavit, Officer Haughee and two State Police Officers located the burn piles. The piles consisted of partially burnt remnants and meth precursors. *Id*. at 59. Within that same timeframe, Officer Haughee also located the twenty-pound propane tank that Stiles had described as belonging to Cronin. *Id*. at 60. To the extent the actual location of the tank deviated from that described by Stiles, we note that the tank was located near the burn piles and also note that one-hundred-percent accuracy is not required to establish probable cause. *See Dost v. State*,

812 N.E.2d 232, 236-37 (Ind. Ct. App. 2004) (holding inexact description of location not fatal to warrant, stating practical accuracy and common sense prevail over hypertechnicality), *trans. denied* (2005).

Prior to the April 18, 2008 affidavit, Officer Haughee had personal knowledge of Cronin's felon status as well as his unrelated pending charges for unlawful possession of a weapon. Appellant's App. at 59. Also, as previously noted, he had personally seen the burn piles and propane tank. Moreover, he had personally visited Cronin at his Aster Road property during March 2008, and had observed Cronin's responses to informal inquiries by law enforcement. *Id*. at 60. He concluded his affidavit by unequivocally stating that he found the information regarding Cronin's weapons- and drug-related activity to be credible and reliable based not only upon Stiles's statements, but also upon his "own personal observations and first hand [sic] knowledge." *Id*. at 61.

Officer Haughee's affidavit also cites independent corroborating evidence by Perry County Deputy Sheriff Richard Kratzer indicating that he smelled a strong odor of ether emanating from the area of Cronin's Highwater Road residence within the last six months. *Id*. at 58. To the extent Cronin challenges the evidence as stale, we note that it may be considered as part of the totality of circumstances establishing probable cause. *See Cheever-Ortiz v. State*, 825 N.E.2d 867, 872 (Ind. Ct. App. 2005) (stating that while stale evidence, standing alone, cannot support probable cause finding, it can be part of the totality of

circumstances considered).[3]

Finally, CI Stiles made declarations against his penal interest. Declarations are deemed to be against penal interest if, after arrest or confrontation by police, the CI "admitted committing criminal offenses under circumstances in which the crimes otherwise would likely have gone undetected." *Id*. at 956. Here, during the probation search of CI Stiles's property, police found him to be in possession of marijuana, paraphernalia, and meth precursors. At that time, Stiles did not merely get caught "red-handed" and then name a source for the contraband he possessed; instead, he admitted to committing the more serious crime of being a "runner" in Cronin's meth manufacturing business. *See Creekmore v. State*, 800 N.E.2d 230, 234 (Ind. Ct. App. 2003) (finding informant's credibility could be inferred where, in making declarations about defendant, he implicated himself in the *delivery* of drugs rather than mere possession). Stiles also admitted to helping Cronin transport weapons, thus implicating himself in additional crimes involving illegal possession of a handgun. In sum, the totality of circumstances tended to indicate the trustworthiness of Stiles's declarations. Thus, Cronin has failed to overcome the presumption that the search warrants were not supported by probable cause. As such, the trial court acted within its discretion in admitting the evidence seized pursuant to the execution of the warrants.

II. Jury Instruction

[3] We also note that the ongoing nature of Cronin's meth-related criminal activity, as opposed to a one-time-occurrence crime, further undermines his staleness argument. There is no bright-line rule as to the exact moment when information becomes stale; thus, "whether information is tainted by staleness must be determined by the facts and circumstances of each case." *Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008), *trans. denied*.

Cronin also contends that the trial court erred in rejecting his tendered jury instruction. The decision to accept or reject a tendered jury instruction lies within the trial court's sound discretion. *Benefield v. State*, 904 N.E.2d 239, 245 (Ind. Ct. App. 2009), *trans. denied*. We therefore review the trial court's rejection of a jury instruction for an abuse of discretion. *Powell v State*, 769 N.E.2d 1128, 1132 (Ind. 2002). Such an abuse of discretion occurs if (1) the tendered instruction correctly sets out the law, (2) evidence supports the tendered instruction, and (3) the substance of the tendered instruction is not covered by other instructions. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). Even when the trial court errs in refusing to give an instruction, such error is harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. *Williams v. State*, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008).

Cronin alleges that the trial court abused its discretion by rejecting the following instruction:

> Kenneth Cronin has asserted the defense that a third party, Derrick Stiles, committed the crimes of manufacturing and dealing methamphetamine and has acted to conceal his crimes and avoid punishment by placing the blame on Mr. Cronin.
>
> Kenneth claims that to further his plan, Derrick Stiles lied to police about Kenneth's activities, placed incriminating evidence at the Aster Road property Stiles rented and in Kenneth's garage and vehicle at his Highwater Road residence.
>
> If the State of Indiana has not convinced you beyond a reasonable doubt that Kenneth's defense, that is that Derrick Stiles performed these acts, you should find Kenneth Cronin not guilty.

Appellant's App. at 116. First, we conclude that the first two paragraphs of Cronin's instruction constitute a statement of the theory of his defense, rather than a statement of law.

Moreover, even the final paragraph, which does constitute a correct statement of the law, merely reiterates the State's burden of proof, the substance of which was repeatedly and adequately covered by other jury instructions.[4] *See Benefield*, 904 N.E.2d at 245 (stating that jury instructions are to be considered as a whole and in reference to each other). Thus, the trial court acted within its discretion in rejecting Cronin's proffered instruction.

III. Motion for Mistrial

Finally, Cronin contends that the trial court erred in denying his motion for mistrial. A decision to deny a defendant's motion for mistrial lies within the trial court's sound discretion. *Lucio v. State*, 907 N.E.2d 1008, 1010 (Ind. 2009). We review such a decision only for an abuse of discretion. *Id*. In our review, we consider whether the defendant was prejudiced to the extent that he was placed in a position of grave peril. *Id*. Because the mistrial remedy is extreme, "it should be prescribed only when 'no other action can be expected to remedy the situation' at the trial level." *Id*. at 1010-11 (citation omitted). To succeed on appeal from the denial of a motion for mistrial, a defendant must demonstrate that misconduct occurred and that it had a probable persuasive effect on the jury's decision. *Booher v. State*, 773 N.E.2d 814, 820 (Ind. 2002).

Here, Cronin's claim concerns the scope of permissible testimony by federal ATF Agents Robert Bindley and Philip Luecke. As part of the United States Department of Justice, ATF agents are executive branch employees subject to federal regulation. 5 U.S.C. §

[4] *See* Appellant's App. at 124-35, 139 (listing each count in instructions 4-23 and stating for each, "If the State failed to prove any of these elements beyond a reasonable doubt, you must find the Defendant not guilty of …," with instructions 35 and 36 specifically explaining presumption of defendant's innocence and State's burden of proof).

301. Such regulation places limitations on their disclosure of information in legal proceedings. 28 C.F.R. §§ 16.21 *et seq*. In proceedings in which the United States is not a party, Justice Department employees are forbidden from disclosing any material contained in Department files, information relating to that material, or information acquired in the performance of the person's official duties "without prior approval of the proper Department official in accordance with 28 C.F.R. §§ 16.24 and 16.25." 28 C.F.R. § 16.22(a). A litigant who seeks to elicit oral testimony from a Department employee must, by affidavit if feasible, furnish the responsible United States Attorney with a summary of the testimony sought as well as its relevance to the proceedings. 28 C.F.R. § 16.22(c).

After charging Cronin, the State filed its request with the U.S. Attorney for the Southern District of Indiana, asking that Special Agent Bindley be permitted to testify regarding his search for and recovery of evidence from both of Cronin's properties. In an authorization letter dated July 1, 2008, the U.S. Attorney stated in part:

> You [Special Agent Bindley] are hereby authorized, pursuant to the regulations set forth at 28 C.F.R. § 16.21 *et seq*. to testify at deposition and/or at trial as to your knowledge of the facts and circumstances surrounding the searches noted above. Your testimony is not to exceed matters specifically authorized herein. Any attempts to elicit testimony beyond the scope authorized by this letter should be answered by declining to provide an answer, pursuant to 28 C.F.R. § 16.28.

Appellant's App. at 105.

Thereafter, the State sought permission to elicit testimony from Special Agent Bindley and Officer Luecke regarding their investigation of the trace history of the twelve-gauge shotgun recovered pursuant to the search conducted at Cronin's Aster Road property,

including reports generated and interviews conducted concerning the trace history of the shotgun. In an authorization letter dated February 26, 2009, the U.S. Attorney stated in part:

> You [Special Agent Bindley and Officer Luecke] are hereby authorized, pursuant to the regulations set forth at 28 C.F.R. § 16.21 *et seq*. to testify as to your knowledge of the matters authorized by the prior authorization letter dated July 1, 2008, and to the matters referred to above in this letter. Your testimony, or production of documents belonging to the ATF, is not to exceed matters specifically authorized herein. Any attempts to elicit testimony beyond the scope authorized by this letter should be answered by declining to provide an answer, pursuant to 28 C.F.R. § 16.28.

Id. at 107.

Cronin bases his mistrial argument on the claim that the State never informed the defense that the testimony of the agent witnesses would be limited. However, he does not dispute the validity and enforceability of the longstanding federal regulations.[5] The request procedure outlined in 28 C.F.R. § 16.22(c) is equally available to either party: "[A] statement *by the party seeking testimony or by his attorney*, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney." (Emphasis added.)

Cronin could have furnished such a statement to the U.S. Attorney but did not.[6] Instead, at the hearing on his motion for mistrial, he alleged that the trial court's enforcement

[5] *See Touhy v. Ragen*, 340 U.S. 462, 470 (1951) (upholding predecessor regulation establishing limits on disclosure of government information absent compliance with procedural prerequisites for obtaining authorization). Federal cases have enforced compliance with the regulations and have reiterated that state courts lack the authority to compel disclosure of information unless prior authorization has been sought and granted by the proper authorities. *See e.g*., *U.S. v. Williams*, 170 F.3d 431, 433 (4th Cir. 1999), *cert. denied*; *Smith v. Cromer*, 159 F.3d 875, 881 (4th Cir. 1998), *cert. denied* (1999).

[6] We note that under 28 C.F.R. §§ 16.21 *et seq*., Cronin could have pursued an administrative remedy had the U.S. Attorney refused such a request.

of the regulatory limitations on the agents' testimony denied him his Sixth Amendment right to a fair trial, because he intended to use such testimony to establish that *all* of the weapons could be traced to Stiles. While we agree with Cronin that he is guaranteed the right to present a defense and to confront witnesses, *Washington v. Texas*, 388, U.S. 14, 18-19 (1967), we note that he must comply with the procedural rules necessary to secure such testimony. *See U.S. v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981) (noting Justice Department's legitimate interest in regulating access to government information and holding that procedures do not deny Sixth Amendment right to confront witnesses where defendant failed to comply with procedures for requesting testimony/information). To the extent he claims that he saw the agents' names on the State's witness list and was unaware of any limitations on the scope of their testimony, we note that ignorance of the law is no excuse. *Scalpelli v. State*, 827 N.E.2d 1193, 1198 (Ind. Ct. App. 2005), *trans. denied*. Essentially, Cronin sought a mistrial because the trial court refused to expand the federal agents' testimony beyond the limits of the regulations. The trial court merely complied with the federal regulations in enforcing the limits of the agents' testimony. As such, the trial court acted within its discretion in denying Cronin's motion for mistrial. Any alleged error could have been avoided by Cronin himself, had he filed a request with the U.S. Attorney. *See Hape v. State*, 903 N.E.2d 977, 997 (Ind. Ct. App. 2009) (stating error invited by complaining party is not reversible error), *trans. denied*. Accordingly, we affirm.

Affirmed.

RILEY, J., and VAIDIK, J., concur.