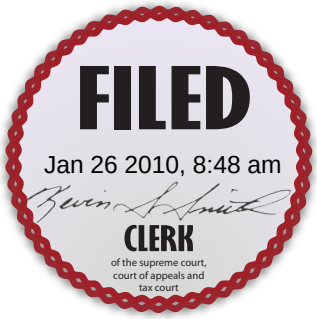

ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANTWAND JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0906-CR-321
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G23-0805-FD-101704

January 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Antwand Johnson appeals his conviction for Possession of Cocaine within 1000 feet of a family housing complex,[1] a class B felony. Specifically, Johnson contends that the trial court abused its discretion in refusing to instruct the jury with regard to the mitigating factors or defenses that are applicable "to the [1000] feet enhancement," which would have reduced the conviction to a class D felony. Appellant's Br. p. 5. Johnson further contends that the evidence was insufficient to support his conviction as a class B felony because the evidence only established that he was at the scene for a brief period and the State failed to show the presence of children on the premises. Concluding that Johnson has waived the issue because he did not tender a proposed final instruction and finding the evidence sufficient to support the conviction, we affirm the judgment of the trial court.

FACTS

On May 2, 2008, at approximately 12:30 a.m., Lawrence Police officers were dispatched to the Canterbury House Apartments (Canterbury House) in Indianapolis after receiving a call about a fight on the premises. The Canterbury House is an apartment complex that has annual leases and houses several families with children.

When Officer Michael McKenna arrived at the scene, he saw Johnson, who was bleeding from the mouth, leaving one of the apartment units. As Johnson walked toward one of the two parked vehicles in the lot that were registered in his name, Officer

[1] Ind. Code § 35-48-4-6.

McKenna told Johnson to stop. Johnson refused, appeared to be disoriented, and continued to walk away.

At some point, Officer Scott Evans saw Johnson drop a baggie next to a vehicle. Officer Evans recovered the bag, noticed a white substance inside, and believed that it contained cocaine. Subsequent laboratory tests revealed that there were .23 grams of cocaine in the bag.

As the officers tried to handcuff Johnson, he pulled away and started to run from the scene. The officers then tased Johnson and took him into custody. The police impounded both of Johnson's vehicles and had them towed from the parking lot.

Following the arrest, Officer McKenna spoke with Andrea Williams at the Canterbury House, who stated that Johnson had struck her in the face. At some point, Williams's cousin intervened and punched Johnson in the mouth.

The State initially charged Johnson with possession of cocaine, a class D felony, battery, and resisting law enforcement. Thereafter, the State amended the possession of cocaine charge and alleged that Johnson possessed the cocaine within 1000 feet of a family housing complex, a class B felony.

At a jury trial that commenced on April 29, 2009, Lydia Allen, a resident of the Canterbury House, testified that Johnson lived on the second floor of the apartment building where she was living. Johnson denied living at the apartments and claimed that he was only visiting the mother of his baby on May 2. Johnson also denied possessing

any cocaine that evening. Following the presentation of the evidence, the trial court gave the final instructions, which included the following:

Final Instruction No.7

> The term "family housing complex" is defined as a building or a series of buildings that is operated as an apartment complex.

Final Instruction No. 8

> The term "apartment complex" is defined as real property consisting of at least five (5) units that are regularly used to rent or otherwise furnish residential accommodations for periods of thirty (30) days or more.

Appellant's App. p. 62-63.

Although Johnson's counsel informed the trial court that he did not have any proposed final instructions to offer, he orally requested the trial court to instruct the jury on the defenses that are applicable to the "one thousand feet enhancement" in drug possession cases in accordance with Indiana Code section 35-48-4-16. Tr. p. 198. Specifically, Johnson's counsel argued that the trial court should instruct the jury that Johnson could be convicted of possession of cocaine only as a class D felony because the evidence established that Johnson was on the premises for only a brief period and the State failed to show the presence of children at the apartments.

The trial court refused counsel's request, and the jury found Johnson guilty of resisting law enforcement and possession of cocaine as a class B felony. Thereafter, the

trial court sentenced Johnson to time served on the resisting count and to ten years of incarceration on the possession of cocaine charge. Johnson now appeals.

DISCUSSION AND DECISION

I. Instructions

Johnson contends that the trial court erred in refusing to instruct the jury regarding the defenses that are available to a defendant who is charged with possessing cocaine within 1000 feet of a family housing complex as a class B felony. Specifically, Johnson argues that he was entitled to such an instruction because the evidence at trial established that he was on the premises only on the day of the incident and no one saw any children at the Canterbury House when the offense was committed. Therefore, Johnson claims that this evidence "mitigated" the possession charge pursuant to the defenses set forth in Indiana Code section 35-48-4-16(b), and he could only have been convicted of possession of cocaine as a class D felony. Appellant's Br. p. 5.

In resolving this issue, we initially observe that the trial court has broad discretion in the manner of instructing the jury and we review the trial court's decision only for an abuse of discretion. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). If the trial court fails to cover some pertinent point in instructing the jury, it is the obligation and duty of the party desiring to have that point covered in the instruction to tender his instruction on the same. Nolan v. State, 863 N.E.2d 398, 404 (Ind. Ct. App. 2007). Moreover, in criminal cases, a party must tender any instructions the party believes are applicable to the case to the trial court in writing. Ind. Crim. Rule 8(A) and (D). Failure

to tender such an instruction waives the right to object to that point not being covered. Nolan, 863 N.E.2d at 404.

Notwithstanding Johnson's contentions that the trial court should have instructed the jury on the possible defenses or mitigators that are applicable to the charged offense, we note that he did not tender an instruction on this issue. Following the presentation of the evidence, the trial court and the parties discussed the proposed final instructions. At some point, the trial court asked Johnson's counsel whether he had any instructions to tender. Tr. p 192. Counsel responded: "We discussed it and don't have one that we want to offer at this time." Id. Thereafter, the following colloquy ensued:

> [DEFENSE COUNSEL]: There are annotations in [Indiana Code section 35-48-4-16] . . . that say a defense is that you're briefly in the area and there are no children present.
>
> THE COURT: Right. That's an actual defense. That's no annotation. There's an actual defense that reads something along the lines of—and I'm not going to give it. A, nobody has asked. And B, it's not supported by the evidence.
>
> [DEFENSE COUNSEL]: We would ask now.
>
> THE COURT: You didn't tender one. I asked if you had any to tender and you said no. Now you want to give the defense. . . .
>
> . . .
>
> THE COURT: Anything else you want to say about the defense instruction which at this time I'm not going [to] give unless you change my mind?
>
> [DEFENSE COUNSEL]: No.

Id. at 198-202 (emphasis added).

Although Johnson's counsel orally requested the trial court to instruct the jury on the defenses applicable to class B felony possession of cocaine, at no point did he tender such an instruction. Even more compelling, Johnson's counsel specifically told the trial court that he did not "have [an instruction] to offer." Tr. p. 192. As a result, Johnson has waived the issue.

II. Sufficiency of the Evidence

Although Johnson does not challenge the fact that he knowingly possessed cocaine, he asserts that the evidence was insufficient to support his conviction as a class B felony because the evidence established that he was at the Canterbury House for only a brief period, and the "State offered no evidence that any actual children were present at the time of the offense either in the apartment units or on the basketball court." Appellant's Br. p. 14. Stated differently, Johnson argues that the conviction must be set aside because the State failed to rebut the mitigating factors or defenses set forth in Indiana Code section 35-48-4-16 "beyond a reasonable doubt."

When reviewing sufficiency of the evidence claims, we must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007). When confronted with conflicting evidence, we consider the evidence most favorable to the trial court's ruling. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

We also note that a conviction may be sustained on circumstantial evidence as long as "inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt." Pratt v. State, 744 N.E.2d 434, 436 (Ind. 2001). Moreover, a conviction may be sustained on the uncorroborated testimony of a single witness or victim. Baltimore v. State, 878 N.E.2d 253, 258 (Ind. Ct. App. 2007).

The applicable statutes in this case include Indiana Code section §35-48-4-6, which provides in pertinent part, that

> (a) A person who . . . knowingly or intentionally possesses cocaine (pure or adulterated) . . . commits possession of cocaine or a narcotic drug, a Class D felony, except as provided in subsection(b).
>
> (b) The offense is:
>
> > (2) a Class B felony if the person in possession of the cocaine . . . possesses less than three (3) grams of . . . cocaine . . .
> >
> > (B) in, on, or within one thousand feet of:
> >
> > . . .
> >
> > (iii) a family housing complex.

Additionally, Indiana Code section 35-41-1-10.5 defines a "family housing complex" as a "building or series of buildings:"

> (1) that contains at least twelve (12) dwelling units:
>
> (A) where children are domiciled or are likely to be domiciled; and
>
> (B) that are owned by a governmental unit or political subdivision;
>
> (2) that is operated as a hotel or motel (as described in IC 22-11-18-1);

(3) that is operated as an apartment complex; or

(4) that contains subsidized housing.

Finally, Indiana Code section 35-48-4-16(b) lists the defenses[2] that can reduce a charge of possession of cocaine as a class B felony within 1000 feet of a family housing complex[3] to a class D felony:

> (b) It is a defense . . . that:
>
> (1) A person was briefly in, on, or within . . . 1000 . . . feet of . . . a family housing complex. . . .; and
>
> (2) No person under . . . 18 years of age at least . . . 3 . . . years junior to the person was in, on, or within . . . 1000 feet of the . . . family housing complex. . . at the time of the offense.
>
> . . .
>
> (d) The defense under this section applies only to the element of the offense that requires proof that the delivery, financing of the delivery, or possession of cocaine . . . occurred in, on, or within one thousand (1,000) feet of . . . a family housing complex. . . .

(Emphases added).

In addressing Johnson's claims, we note that Andra Taylor, the property manager at Canterbury House, testified at trial that approximately 134 children live within the 110-unit apartment complex. Tr. p. 46. Taylor also testified that 66 of the units have at least

[2] Although the statute refers to these provisions as a defense, this court has determined that the actual effect is to operate as mitigation. Harrison v. State, 901 N.E.2d 635, 642 (Ind. Ct. App. 2009), trans. denied.

[3] These defenses are also available to a defendant who is in possession of cocaine within 1000 feet of school property, a public park, or a youth program center at the time of the offense. I.C. § 35-48-4-16(b).

one child living in them. Id. at 47. Although Taylor did not know how many children were actually present in the apartment complex on May 2, it was highly unlikely that all of the children who lived at the Canterbury House would have been absent that night. Thus, the jury could have reasonably inferred that some children were living within and present in the apartment complex on the night that Johnson possessed the cocaine. Put another way, because the Canterbury House was a "family housing complex" within the meaning of Indiana Code section 35-41-1-10.5, the evidence established that some children were presently living within the complex, and Johnson committed the offense there, we reject Johnson's claim that the evidence was insufficient to negate his defense that children were not present at the time of the offense.

We also note that Lydia Allen, who lived on the third floor of the building where the arrest occurred, testified that Johnson had specifically told her that he "lived on the second floor downstairs" from her. Id. at 161, 177. Allen had talked to Johnson at Canterbury House on several occasions and Johnson testified that he was at Canterbury House because the mother of his child also lived there. Id. at 188-89. Allen witnessed the incident and observed the police "impound both of Johnson's cars" that were parked close to the unit. Id. at 87-95, 163, 173. In light of this evidence, we find that the State sufficiently rebutted Johnson's claim that he was at the Canterbury House for only a brief period. Therefore, we conclude that the evidence was sufficient to support Johnson's conviction for possession of cocaine as a class B felony.

The judgment of the trial court is affirmed.

KIRSCH, J., and DARDEN, J., concur.