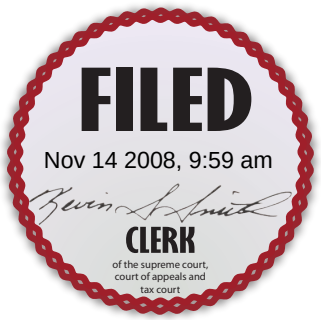

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IN THE COURT OF APPEALS OF INDIANA

PAUL R. FEGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0804-CR-190
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-0711-FA-1008

November 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Fegan was convicted of Possession of Methamphetamine within 1000 Feet of School Property,[1] a class B felony, and two counts of Resisting Law Enforcement,[2] one as a class D felony and one as a class A misdemeanor. On appeal, Fegan challenges only the aggravation of his possession conviction to a class B felony based on being within 1000 feet of school property.

We affirm.

The facts favorable to Fegan's possession conviction follow. On the evening of November 8, 2007, Sergeant Kurt Althoff of the Evansville Vanderburgh Joint Drug Task Force was watching a house at 508 Keck Avenue in Evansville, Indiana. Fegan had an active warrant out for his arrest. Around 7:30 that evening, Fegan was dropped off at the residence. Fegan's long-time friend, Annie Knight, lived at this residence and allowed Fegan to keep clothes and other property there, which included digital scales and drug paraphernalia. That night, Fegan and Knight ate dinner, played darts, and smoked methamphetamine together. Fegan left the residence around 9:50 p.m. and drove away in Knight's car.

Althoff, who had been surveilling the residence, immediately radioed nearby uniformed officers to initiate a traffic stop of Fegan. After a high-speed car chase followed by a foot chase, Fegan was apprehended by police behind Knight's residence just after 10:00 p.m. During a search incident to arrest, officers recovered four small bags of methamphetamine and an empty bag with white residue from Fegan's front right pant pocket.

[1] Ind. Code Ann. § 35-48-4-6.1 (West, PREMISE through 2007 1st Regular Sess.).
[2] Ind. Code Ann. § 35-44-3-3 (West, PREMISE through 2007 1st Regular Sess.).

Subsequent tests revealed a total net weight of 2.55 grams of methamphetamine.

At trial, the State offered evidence that Knight's residence was within 1000 feet of North High School. Gerald Summers, the coordinator for safety and security for the Evansville Vanderburgh School Corporation, testified as to the numerous after-school activities scheduled at the school on the evening in question. While other activities ended at or before 7:30 p.m., the latest activity – girls' middle school basketball – was scheduled from 7:30 to 9:30 p.m.

On appeal, Fegan argues that he should have been convicted of possession as a class D felony, rather than as a class B felony. Specifically, he contends the State presented insufficient evidence to rebut his defense that he possessed the methamphetamine for only a brief period of time and children were not present at North High School at the time of his possession of the drugs.

It is well established that the defendant bears the initial burden of proof by a preponderance of the evidence on any affirmative defense. *Adkins v. State*, 887 N.E.2d 934 (Ind. 2008). If the defendant meets this burden, the State is then required to rebut the defense. *See Shelton v. State*, 679 N.E.2d 499 (Ind. Ct. App. 1997). The standard of review for a challenge to the sufficiency of the evidence to rebut an affirmative defense is the same as the standard for any sufficiency claim. *See Willis v. State*, 888 N.E.2d 177 (Ind. 2008). We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* If there is sufficient evidence of probative value to support the conclusion of the trier of fact, the verdict will not be disturbed. *Id.*

Possession of methamphetamine in an amount less than three grams is generally a

class D felony. *See* I.C. § 35-48-4-6.1(a). The offense may be elevated to a class B felony if it is committed in, on, or within 1000 feet of school property. I.C. § 35-48-4-6.1(b)(2)(B)(i). I.C. § 35-48-4-16(b) (West, PREMISE through 2007 1st Regular Sess.), however, provides a defense to the aggravated charge of possession near a school. This defense applies if:

> (1) a person was briefly in, on, or within one thousand (1,000) feet of school property…; *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…at the time of the offense.

Id. (emphasis supplied).

The record reflects that, at trial, the State presented an aerial photograph and testimony indicating that the area between North High School and Knight's residence is primarily residential. More importantly, the State presented evidence that North High School hosted girls' middle school basketball from 7:30 until 9:30 that evening.[3] From this evidence, a reasonable inference may be drawn that a person under eighteen years of age was in, on, or within one thousand feet of the school at the time Fegan possessed methamphetamine.

Further, we cannot agree that Fegan's possession of the methamphetamine was brief. The evidence reveals that he was inside Knight's home (where he kept some of his belongings) from approximately 7:30 to 9:50 that evening. While there, he and Knight used methamphetamine together. When he was apprehended soon after leaving the residence,

[3] In passing, Fegan asserts that Summers's testimony regarding the after-school activities was improperly admitted hearsay. He presents no authority or cogent argument in support of this bald assertion. Therefore, we find the issue waived. *See Groves v. State*, 823 N.E.2d 1229, 1231 n.2 (Ind. Ct. App. 2005) ("[f]ailure to put forth a cogent argument acts as a waiver of the issue on appeal"). *See also* Ind. Appellate Rule 46(A)(8)(a) (requiring arguments to be supported by cogent reasoning and citations to relevant authorities).

Fegan had four small bags of methamphetamine, as well as an empty bag with residue, in his pocket. Fegan told Sergeant Althoff that scales and a box containing drug paraphernalia found inside Knight's home were his. In fact, Fegan stated that "anything in the house was his." *Transcript* at 174. A reasonable inference from the evidence is that Fegan possessed the methamphetamine while inside the residence.

Therefore, assuming for the sake of argument that Fegan met his burden regarding his affirmative defense, we find that the State presented sufficient evidence to rebut the defense. In light of the evidence presented at trial, the jury could reasonably conclude that Fegan's possession of the methamphetamine was not brief and/or that children under eighteen years of age were in, on, or within one thousand feet of the school at the time of said possession.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur