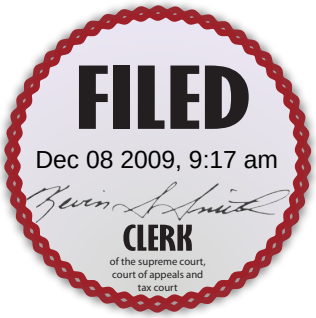

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IN THE
COURT OF APPEALS OF INDIANA

DAVID J. GAFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A03-0904-CR-178
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0812-FB-303

December 8, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David J. Gaff (Gaff), appeals his conviction for dealing in methamphetamine, as a Class B felony, Ind. Code § 35-48-4-1.1.

We affirm.

ISSUES

Gaff presents three issues for our review, which we restate as:

(1) Whether the trial court abused its discretion by admitting certain receipts of purchase without authentication;

(2) Whether the State presented evidence sufficient to prove beyond a reasonable doubt that he was dealing in methamphetamine; and

(3) Whether his sentence is inappropriate when the nature of his offense and character are considered.

FACTS AND PROCEDURAL HISTORY

On November 26, 2008, Deputy James Marshall (Deputy Marshall) of the Kosciusko County Sheriff's Department received a dispatch regarding a suspicious odor emanating from a trailer. As Deputy Marshall approached the scene he could smell a strong odor of ether. To determine exactly where the smell was coming from, Deputy Marshall walked along the tree line behind a "couple of other trailers." (Transcript p. 25). He determined that it was "pretty obvious which location it was coming from." (Tr. p. 25). Deputy Marshall radioed for other officers, and another officer requested the Drug Task Force (DTF).

Officers of the DTF arrived and also observed the smell of ether, as well as odors of ammonia and fuel for cooking stoves, all smells which correspond with the manufacture of methamphetamine. The DTF Officers approached the trailer, knocked, announced their presence, and entered the trailer. Deputy Marshall, who was around the side of the trailer at the time of the knock, heard people running around inside the trailer. He went to the door, which had been opened, entered the trailer and observed DTF Officers in various rooms restraining subjects, including one subject who was trying to climb through a hole that had been cut in the floor of the trailer. Gaff was found in a bedroom. In the closet of the bedroom where Gaff had been, Deputy Marshall discovered a green 2-liter bottle containing a liquid substance that was bubbling and "realized it was an active meth lab." (Tr. p. 28). Officer Matt Rapp (Officer Rapp), of the Kosciusko County DTF, also identified the 2-liter bottle as an "active meth lab." (Tr. p. 40). In addition, the officers found several ingredients used in the "one pot meth lab" manufacturing process of methamphetamine. (Tr. p. 45). Trooper Scott Gilbert (Trooper Gilbert), of the Indiana State Police, took a sample of the substance inside the green 2-liter bottle, which was sent to the Indiana State Police Laboratory. At the laboratory, Nicole Jacobs (Jacobs), a chemist, tested the substance and determined that it contained methamphetamine.

The State filed an Information charging Gaff with dealing in methamphetamine in an amount less than three grams, a Class B felony, I.C. 35-48-4-1.1. On February 24, 2009, the trial court conducted a jury trial. At the trial, multiple police officers and James Charters (Charters), a co-perpetrator with Gaff, testified. Charters explained that on the morning of

November 26, 2008, he and Gaff went around gathering materials to make methamphetamine. They returned to the trailer and Charters went to go do some work. He was in and out of the trailer that day and observed Gaff "putting the bottle together with chemicals." (Tr. p. 68). Charters and Gaff had planned to sell the methamphetamine which Gaff was making so they could afford a deposit for electricity.

At the close of evidence and arguments, the jury deliberated and returned a verdict of guilty of dealing in methamphetamine, less than three grams, a Class B felony. On March 19, 2009, the trial court conducted a sentencing hearing. The trial court determined that Gaff's criminal history and his recent probation violation were aggravating factors, found no mitigating factors, and sentenced Gaff to 15 years in the Department of Correction.

Gaff now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

Gaff contends that the trial court abused its discretion when it admitted two retail store receipts of purchase during the trial. Specifically, Gaff argues that since neither receipt was accompanied by testimony or affidavit from a representative of the respective store, the receipts were not adequately authenticated.

> We review a trial court's decision to admit or exclude evidence for an abuse of discretion. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error if the error is inconsistent with substantial justice or if a substantial right to the party is affected.

Donaldson v. State, 904 N.E.2d 294, 300 (Ind. Ct. App. 2009) (citing *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*).

Records of regularly conducted business are not excluded by the hearsay rule regardless of whether the declarant is available as a witness. Indiana Evidence Rule 803(6). However, those records must be authenticated or certified by a "custodian thereof or another qualified person" stating under oath that it "was made at or near the time of the occurrence of the matters set forth," it "is kept in the course of the regularly conducted activity, and [] was made by the regularly conducted activity as a regular practice." Evid. R. 902(9). Here, the receipts were not accompanied by any certification, nor did any representative of the stores listed on the receipts appear at trial to testify to the authenticity of the receipts.

That being said, the State contends that Gaff did not properly preserve this issue for our review. "The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal." *Brown v. State*, 783 N.E.2d 1121, 1125 (Ind. 2003). "Further, in order to preserve the allegation of error, appellant must object each time the allegedly inadmissible evidence is offered." *Jenkins v. State*, 627 N.E.2d 789, 797 (Ind. 1993). It is undisputed that Gaff properly objected when the receipts were offered as evidence. However, Gaff did not object when Exhibit Number 1 was entered as evidence, which contains two photographs of the receipts in question. In one photograph, one of the two receipts is fully legible, and the other

receipt is partially legible. Therefore, Gaff has waived his argument for at least one of the receipts, if not both.

Nevertheless, we fail to see any harm that Gaff may have incurred due to the admission of the receipts. The receipts which Gaff argues were improperly admitted were receipts for the purchase of products containing ephedrine or pseudoephedrine. The packaging for the products was also found in the trailer and photographs of those packages were also admitted as evidence. Additionally, Charters testified at the hearing and explained that he and Gaff had purchased the products. The receipts merely provide evidence as to when and where the products were purchased, which are facts that provide little material support for Gaff's conviction, if any. Therefore, because photographs of the packaging for the products and Charters' testimony that he and Gaff purchased those products were admitted into evidence, the receipts are cumulative and the admission of them as evidence was harmless error. *See Purvis v. State*, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005) ("Improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before the trier of fact."), *trans. denied*., *cert. denied*, 547 U.S. 1026 (2006).

II. *Sufficiency*

Gaff contends that the evidence was insufficient to prove beyond a reasonable doubt he was dealing in methamphetamine.

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute

> substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 212-13 (Ind. Ct. App. 2007), *trans. denied* (internal citations omitted).

Indiana Code section 35-48-4-1.1 defines "Dealing in methamphetamine," in pertinent part by stating: "A person who [] knowingly or intentionally [] manufactures . . . methamphetamine, pure or adulterated . . . commits dealing in methamphetamine, a Class B felony . . . ." Indiana Code section 35-48-1-18 defines "manufacture" as:

> the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical syntheses, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

The evidence most favorable to the verdict included Charters' testimony that he and Gaff purchased supplies for the manufacture of methamphetamine, and Gaff performed the process of mixing the supplies in a green 2-liter bottle. Deputy Marshall discovered a green 2-liter bottle in the trailer, which he identified based upon his training and experience as "an active meth lab." (Tr. p. 28). Trooper Gilbert described for the jury the process of "cooking" or the chemical reactions that were taking place in the green 2-liter bottle. (Tr. p. 83). Trooper Gilbert took a sample from the green 2-liter plastic bottle which was sent to the Indiana State Police Laboratory where Jacobs tested the sample and determined that it contained methamphetamine. Based on this evidence, we conclude that the State presented

sufficient evidence to prove beyond a reasonable doubt that Gaff manufactured methamphetamine, and, therefore, was dealing in methamphetamine.

III. *Inappropriate Sentence*

Gaff contends that his sentence is "unreasonably excessive" and asks that we revise it. (Appellant's Br. p. 9). Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The defendant carries the burden to persuade us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Gaff was convicted of a Class B felony, for which the advisory sentence is 10 years, and the sentence can range between 6 and 20 years. I.C. § 35-50-2-5. The trial court sentenced him to 15 years relying on Gaff's criminal history and a recent probation violation as described in the Pre-Sentence Investigation Report (PSI). However, Gaff has not provided the PSI on appeal. Nevertheless, we have descriptions of the PSI in the transcript which facilitates our review. Gaff's trial counsel explained: "I was just doing the math here, you've got eighteen different criminal references under his adult criminal history. Out of

those, eleven of them specifically have something to do with substance abuse. Maybe the other seven had some involvement with substance abuse as well." (Tr. p. 130). The State added that the PSI stated Gaff had recently violated probation.

Gaff makes no argument concerning the nature of his offense, likely because there is nothing to state about his offense which would tend to support a conclusion that his sentence is excessive. Gaff was making a highly addictive drug which has caused grave societal problems in many areas of our State. Furthermore, the process used by Gaff in making the drug is extremely dangerous, which is why Trooper Gilbert referred to the 2-liter bottle with chemical reactions taking place inside as being "basically an organic bomb." (Tr. p. 90). All of the officers that entered the trailer were placed in harm's way by Gaff's actions.

As for Gaff's character, his substantial criminal history speaks volumes. Gaff notes that he had only one prior felony conviction, and no prior felony "drug" convictions. (Appellant's Br. p. 9). That being said, Gaff's numerous misdemeanor convictions and his violation of probation demonstrate his disrespect for the law. Altogether we cannot say that Gaff's sentence is inappropriate when the nature of his offense and character are considered.

CONCLUSION

Based on the foregoing, we conclude that even if the trial court abused its discretion by entering the purchase receipts as evidence, that error was harmless because they were cumulative evidence which added nothing but immaterial facts, the State presented evidence sufficient to prove beyond a reasonable doubt that Gaff was dealing in methamphetamine,

and Gaff's sentence is not inappropriate when the nature of his offense and character are considered.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.