

Michael O. Branch appeals his conviction and sentence for Operating a Vehicle as a Habitual Traffic Violator,¹ a class D felony. Branch presents the following restated issues for review:

1. Did the trial court err in denying Branch's motion for mistrial?
2. Was the evidence sufficient to support Branch's conviction?
3. Was Branch's sentence inappropriate?

We affirm.

The facts favorable to the conviction are that on January 20, 2009, Deputy Scott Brown of the Vigo County Sheriff's Department observed a vehicle occupied by two men, neither of whom appeared to be wearing a seat belt. He executed a traffic stop. He approached the driver, Branch, and asked for his license and vehicle registration. Branch produced the vehicle registration only. The deputy again asked for a driver's license and Branch responded that his license was suspended. When asked his name, Branch identified himself as "Tim Thompson." *Transcript* at 11. Deputy Brown asked Branch how old he was and Branch replied that he was forty years old. When the deputy asked his birth date, Branch responded with a date in the year 1961. The deputy asked again how old he was and Branch again responded that he was forty, almost forty-one years old. When he asked Branch to confirm his birth date, Branch gave a different date than the first time, but still claimed it was in 1961. Branch informed the deputy that his middle initial was "O". During their brief conversation, Branch informed Deputy Brown that the car belonged to his son, whom Branch

¹ Ind. Code Ann. § 9-30-10-16 (West, Westlaw through 2011 Pub. Laws approved & effective through 5/10/2011).

claimed had the last name of Branch.

Deputy Brown returned to his squad car and asked for assistance. He attempted to verify the driver's suspended license using the name (i.e., Tim O. Thompson) and birth date supplied, but without success. The deputy then ran the name "Branch" and found a "Michael O. Branch" with a date of birth that was similar to the one the driver had provided. The deputy reviewed a book-in photograph of Michael O. Branch and verified that it depicted the driver of the car who claimed to be Tim Thompson. Deputy Brown checked the status of Branch's license and discovered that he was a habitual traffic offender and had never held a driver's license. Shortly thereafter, Deputy Larry Hopper arrived at the scene to assist Deputy Brown. Deputy Hopper verified that the driver was Michael Branch.

Branch was arrested and charged with operating a vehicle as a habitual traffic violator as a class D felony and false informing as a class B misdemeanor. The State dismissed the latter count shortly before trial. A jury trial was conducted on the remaining count, resulting in a verdict of guilty. Following a sentencing hearing, the trial court entered judgment on the verdict and imposed the maximum three-year sentence. Branch appeals both his conviction and sentence.

1.

During Officer Brown's trial testimony, Branch submitted an oral motion for mistrial based upon a comment made by the deputy. Branch contends the trial court erred in denying his motion for mistrial.

"A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." *Burks v. State*, 838 N.E.2d 510, 519 (Ind. Ct. App. 2005) (quoting

Harris v. State, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005)), *trans. denied*. In order to prevail on appeal from the denial of a motion for mistrial, a defendant must establish that the questioned information or event was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. *Burks v. State*, 838 N.E.2d 510. “The gravity of the peril is determined by the probable and persuasive effect on the jury’s decision.” *Id.* at 519 (quoting *Mote v. State*, 775 N.E.2d 687, 689 (Ind. Ct. App. 2002), *trans. denied*). “Moreover, reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings.” *Warren v. State*, 757 N.E.2d 995, 999 (Ind. 2001). Because it is in the best position to gauge the circumstances and probable impact upon the jury, a trial court’s decision whether to grant a mistrial is afforded great deference. *Burks v. State*, 838 N.E.2d 510.

The testimony that prompted Branch to move for a mistrial came during Officer Brown’s direct examination, as follows:

Q. What was the process [of determining Branch’s true identity] that you came to determine at least[]?

A. [Officer Brown] On our terminals, on our computers we can do, we can do, we can search a lot of different information. One of the things that we can do is local warrant, we can do jail book in formation [sic].

[Defense attorney]: We’ve got a Motion In Limine, certain issues in this case and I just want to make sure that we’re not jumping into this thing.

COURT: UM, OKAY BUT I’M NOT SURE WHAT HE’S, YOU CAN GO AHEAD AND ANSWER THAT.

A. Okay, thank you. Just when I was looking through there, while waiting for you know the other help and just for dispatch to get back and say that was or was no name, um I always if I think somebody’s being

dishonest or untrue you know, I will um, any information they give me I'll try to look that up. Um, one of the things when I was talking to him originally I ask [sic] who the car belonged to, and he said it was his son and, and he gave the name, last name Branch. So, I did look up Branch you know cause [sic] that was one of the names he gave me and we showed a couple warrants for a guy ...

[Defense attorney]: YOUR HONOR, I move to a mistrial [sic]. Object (inaudible) the motion in limine.

COURT: Well ...

State: YOUR HONOR, this is supposed to be affirmative [sic] defense that he (inaudible).

COURT: YEAH, YOU CAN NOT ELABORATE ON WARRANTS. JUST THE PROCESS BY WHICH YOU IDENTIFIED HIM AND, I AM INSTRUCTING THE JURY THAT UH, YOU'RE JUST TO CONSIDER THE PROCESS BY WHICH HE WAS IDENTIFIED. THE FACT THAT THERE MAY OR NOT [sic] A WARRANT AS HE SAID ISSUED, YOU ARE TO COMPLETELY DISREGARD THAT AND IT IS STRICKEN FROM THE RECORD. MOTION FOR MISTRIAL IS DENIED.

Witness: One of the things was his name showed it [sic] Branch and I looked up and there was a, a Michael O. Branch and it had a date of birth that was similar to the month and the day and then uh, and O's an unusual middle initial, I would say and then I can look up an old book in picture and see that the driver was actually this person.

Transcript at 13-15. Later, Deputy Brown testified that two other officers arrived to assist.

The deputy was asked whether he had any further involvement after that point. He responded:

Yes, um went up there um, spoke to the driver again and then you know Deputy Hopper recognized him from working in the jail before so he recognized him and spoke to him briefly and then I spoke to him. We had Mr. Branch get out and explained to him that he was under arrest, so hand cuffed [sic] him.

Id. at 16. Evidently, defense counsel lodged another objection and requested a mistrial for the second time. The trial court denied the motion, as reflected in the following:

COURT: LADIES AND GENTLEMEN OF THE JURY, YOU ARE TO FOCUS ON THE MEANS OF IDENTIFICATION. THE FACT THAT THE WORD JAIL WAS BROUGHT UP IS NOT TO BE CONSIDERED BY YOU IN ANY MANOR [sic], DETERMINING ANYTHING ABOUT THIS. [to the witness] YOU NEED TO STAY AWAY FROM ANY, THAT KIND OF STUFF. JUST SAY IF SOMEONE RECOGNIZED HIM, THEY RECOGNIZED HIM.

Witness: Okay, sorry.

COURT: NOT WHY. SO THAT'S STRICKEN FROM THE RECORD, YOU ARE NOT TO CONSIDER THAT AT ALL. MOTION FOR MISTRIAL IS DENIED.

Id. Branch contends the deputy's "deliberate mention of warrants and jail book-in pictures despite the motion in limine was a subtle way of implying to the jury that Branch was a criminal which bolstered the case against him[.]" *Appellant's Brief* at 16.

As reflected in the above excerpt, the testimony in question was both inadvertent and brief. Moreover, the allusion to Branch's previous criminal activity was vague, at best. In both cases, the deputy's comments were cut off before he could make it clear that Branch had previously been processed through or present at the jail as an arrestee. In each case the trial court issued a prompt and thorough admonishment that was well crafted to not only instruct the jury that it should disregard the improper comment, but to do so without illuminating the direction the deputy's comment was headed and thereby clarifying or underscoring the information that the trial court sought to keep from the jury. In any event, "[a] timely and accurate admonition is presumed to cure any error in the admission of evidence." *Banks v.*

State, 761 N.E.2d 403, 405 (Ind. 2002). Branch has not explained to our satisfaction why the trial court’s admonishments did not suffice in this case. Therefore, we conclude that the admonishment cured any error occasioned by the deputy’s comments and a mistrial was not warranted.

2.

Branch contends the evidence was insufficient to support his conviction in two respects. First, he contends the evidence was not sufficient to prove that he had notice his license had been suspended. Second, he contends the State’s evidence did not establish that he was driving the vehicle when Deputy Brown stopped it.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

Branch contends that the evidence was insufficient to prove that he drove the vehicle on the day in question. According to Branch, “there was no eyewitness testimony sufficient to prove Branch was engaged in an act of driving.” *Appellant’s Brief* at 11. We note that the State wholly failed to address this part of Branch’s sufficiency argument. An appellee’s failure to respond to an issue raised in an appellant’s brief is, with respect to that issue, akin to failing to file a brief. *Cox v. State*, 780 N.E.2d 1150 (Ind. Ct. App. 2002). Such does not relieve us of our obligation to correctly apply the law to the facts in determining whether reversal is required. *Id.* Nevertheless, the State is responsible for controverting Branch’s

arguments. *Id.* As a result of the State’s failure to offer opposing argument, in order for Branch to gain reversal on this issue, he must establish only that the trial court committed prima facie error. *Id.* Prima facie means at first sight, on first appearance, or on the face of it. *Id.*

Deputy Brown testified that while on patrol looking for traffic violators, he pulled behind Branch’s vehicle and observed that neither the driver nor the passenger was wearing a seat belt. He activated his emergency lights and siren and executed a traffic stop. He watched as the vehicle pulled to the side of the road. When asked if he was “able to clearly see both people in the vehicle,” Deputy Brown answered “Yes.” *Transcript* at 9. The deputy was then asked if he could describe the driver of the vehicle and he responded as follows:

Um the driver was, there, they were both males I could tell they were both males when I pulled them over and the passenger was a lot thinner then uh you know, the driver, the driver was, they were both law ... You know large, he was a larger guy, much larger than then [sic] actually the passenger.

Id. at 9-10. Deputy Brown was then asked, “So then the two people the driver and the passenger they both have very distinct features?” *Id.* at 10. He responded, “Oh yes. The passenger was thin and the driver was a larger man.” *Id.* When asked whether Branch was the driver of the vehicle in the day in question, Deputy Branch responded, “Yes, absolutely.” *Id.* at 17.

Branch’s defense at trial consisted of the claim that his passenger, Williams, was driving the car when Deputy Branch stopped the vehicle. According to Branch’s trial testimony, after they were stopped, Williams was concerned about a possible warrant for his arrest and he therefore asked Branch to switch seats with him, which Branch did. As set out

above, Deputy Brown testified that he was directly behind Branch's vehicle when he executed the traffic stop and had the two men under observation the entire time between the time he first observed them driving down the street and the time he walked up to the driver's window after the stop. He also testified that the men's appearances were distinct from one another, and he was unequivocal in his identification of Branch as the driver. It was the jury's duty to decide whom to believe and whether Deputy Brown's identification of Branch as the driver was reliable. We will not invade its province in that regard. Branch has failed to establish prima facie error on this point.

Branch's remaining challenge to the sufficiency of the evidence is that "[t]he State of Indiana offered no evidence sufficient to prove beyond a reasonable doubt that Branch had knowledge that his driving privileges were suspended." *Appellant's Brief* at 8. To the contrary, Deputy Brown testified that when he asked Branch for his driver's license, Branch responded that he did not have one. When the deputy asked for clarification, Branch responded that his license had been suspended. Regardless of the means by which the accused learned of his suspension, a conviction under I.C. § 9-30-10-16 requires only that the accused "knew or should have known of the suspension." *State v. Cooper*, 935 N.E.2d 146 (Ind. 2010). In this case, the State presented evidence that Branch knew his license was suspended at the time he was stopped by Deputy Brown. The evidence was sufficient to support the conviction.

3.

The trial court imposed the maximum three-year sentence upon Branch for his class D felony conviction. Branch contends this sentence was inappropriate in light of his character

and the nature of his offenses. Article 7, section 4 of the Indiana Constitution grants our Supreme Court the power to review and revise criminal sentences. Pursuant to Ind. Appellate Rule 7, the Supreme Court authorized this court to perform the same task. *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008). Per App. R. 7(B), we may revise a sentence “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009), *cert. denied*, 131 S.Ct. 414 (2010). “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d at 1223. Branch bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

We observe initially that there is nothing about the nature of this offense that suggests an enhanced sentence is warranted. The same is not true, however, with respect to Branch’s character. The record reflects that Branch’s criminal history includes twelve felony convictions and fourteen misdemeanor convictions. The felonies include possession of cocaine in 1996, ten class C felony forgery convictions in 2001 and 2002, and a theft conviction in 2009. Of his misdemeanor convictions, seven are for either operating a vehicle having never received a license or operating while suspended. The remaining misdemeanor convictions were received from 2000 to 2008 and include false informing, conversion, and criminal trespass. In addition, at the time he was sentenced, Branch had several charges pending, including battery, domestic battery, possession of marijuana, and theft. In light of Branch’s persistent inability or refusal to live a law-abiding life, and paying particular

attention to his many previous convictions for precisely the same offense of which he was convicted in this case, the maximum three-year sentence imposed by the trial court was not inappropriate.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.