



## STATEMENT OF THE CASE

Appellant-Defendant, Donald L. Helton (Helton), appeals his conviction for Count I, possession of methamphetamine within 1000 feet of a family housing complex, a Class B felony, Ind. Code § 35-48-4-6.1(a), -(b)(2); and Count II, possession of marijuana, a Class D felony, I.C. § 35-48-4-11(1).

We affirm.

## ISSUES

Helton raises two issues on appeal, which we restate as follows:

- (1) Whether the State presented sufficient evidence to establish beyond a reasonable doubt that Helton possessed methamphetamine within 1000 feet of a family housing complex; and
- (2) Whether the trial court erred by not instructing the jury on a necessity defense.

## FACTS AND PROCEDURAL HISTORY

On the afternoon of April 24, 2010, Kokomo Police Officer Chad Van Camp (Officer Van Camp), while on duty, ran the license plate of a white 1992 Chevrolet. The inquiry notified the Officer that the license plate belonged to a red 1971 Ford. Officer Van Camp initiated a traffic stop at the corner of Taylor and Union Streets, in Howard County, Indiana. This intersection is located within 1000 feet of the Civic Towers, which is owned and operated by the Kokomo Housing Authority.

Officer Van Camp spoke with the driver of the Chevrolet and obtained his license and registration; Helton was sitting in the front passenger's seat. Officer Van Camp asked the driver to step out of the vehicle and to walk to his patrol car. After talking to the driver, Officer Van Camp returned to the Chevrolet to speak with Helton. Helton was staring straight ahead and refused to make eye contact. Officer Van Camp noticed that Helton was breathing rapidly and he "could see [Helton's] heart beating." (Transcript p. 19). Officer Doug Rensberger (Officer Rensberger) arrived to assist Officer Van Camp. Officer Van Camp then got his police canine partner, Tara, out of his vehicle to conduct a drug sniff of the exterior portion of the Chevrolet. The canine alerted to the passenger's side and the driver's side door seams.

At that point, Officer Van Camp asked Helton to exit the vehicle. When searching Helton, Officer Van Camp found a clear plastic bag which held marijuana. Helton was also carrying a smoking device and another plastic bag containing methamphetamine. Inside the vehicle, Officer Van Camp found two duffel bags in between the front seats, which contained over 315 grams of marijuana, scales, and three clear plastic baggies with methamphetamine. Officer Van Camp also noticed an overwhelming smell of marijuana in the car.

On April 28, 2010, the State filed an Information charging Helton with Count I, possession of methamphetamine within 1000 feet of a family housing complex, a Class B felony, Ind. Code § 35-48-4-6.1(a), -(b)(2); Count II, possession of marijuana, a Class D felony, I.C. § 35-48-4-11(1); and Count III, possession of a precursor, a Class D felony, I.C. § 35-48-4-14.5(b). On October 21, 2010, the State filed a motion to dismiss Count III, which

was granted by the trial court. Helton elected to proceed *pro se* and the trial court appointed standby counsel. On October 29 through November 1, 2010, a jury trial was held. At the close of the evidence, the jury found Helton guilty as charged. On November 24, 2010, the trial court sentenced Helton to twelve years executed on Count I and one year executed on Count II, with sentences to run concurrently.

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

## DISCUSSION AND DECISION

### *I. Sufficiency of the Evidence*

Helton contends that the State failed to present sufficient evidence to establish beyond a reasonable doubt that Helton possessed methamphetamine within 1000 feet of a family housing complex. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

In order to convict Helton of a Class B felony, the State was required to prove beyond a reasonable doubt that he possessed methamphetamine within 1000 feet of a family housing complex. *See* I.C. § 35-48-4-6.1(a); -(b)(2). Here, Helton only challenges the existence of the family housing complex. A family housing complex is defined by statute 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 [I.C. §] 22-11-18-1);

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

(4) that contains subsidized housing.

I.C. § 35-41-1-10.5. Specifically, Helton claims that the State failed to prove the number of units in the Civic Towers or whether it contained subsidized housing.

The record reflects that Kokomo City Engineer Cary Stranahan (Engineer Stranahan) testified that the Civic Towers is owned and managed by the Kokomo Housing Authority. Without triggering any objection, Engineer Stranahan also stated that the Civic Towers is a family housing complex. Additionally, Officer Van Camp testified that “a lot of elderly” and “a lot of families” live in the Towers. (Tr. p. 58). At the time of the traffic stop a lot of people were out and about and Officer Van Camp noticed “all ages” of children in the area. (Tr. p. 58). Based on these statements, a reasonable trier-of-fact could conclude that the Civic Towers is a family housing complex, as defined by statute. Therefore, we find that the State presented sufficient evidence to convict Helton of possession of methamphetamine within 1000 feet of a family housing complex.

## II. *Necessity Defense*

Next, Helton asserts that the trial court erred when it failed to instruct the jury on a necessity defense. Prior to trial Helton mailed a letter to the trial court which he characterizes as a “notice of intent to raise necessity as a defense” and which asserted factual allegations Helton believed justified his criminal conduct. *See* Appellant’s Br. p. 7. During

the trial, Helton attempted to show the existence of a necessity defense; however, when asked by the trial court if he had any final instructions to tender, Helton declined to offer any and did not object to the trial court's proposed final jury instructions.

We now find Helton's claim to be unavailing. When the asserted error is failure to give an instruction, "a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request." *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002). Failure to tender an instruction results in waiver of that issue for our review. *Id.* See also *Williams v. State*, 771 N.E.2d 70, 72 (Ind. 2002) (a defendant who fails to object to the trial court's final instructions and fails to tender a set of instructions at trial waives a claim of error on appeal.). Because Helton never presented the trial court with a proposed jury instruction on necessity, his claim is now waived for our review.

#### CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to establish beyond a reasonable doubt that Helton possessed methamphetamine within 1000 feet of a family housing complex; and Helton waived his claim concerning the trial court's alleged error on instructing the jury on the necessity defense.

Affirmed.

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