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IN THE
COURT OF APPEALS OF INDIANA

DOUGLAS J. BOSTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A05-1010-CR-626
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0910-FB-1282

June 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Douglas Brown was convicted of Dealing in Methamphetamine,[1] a class B felony, and Possession of Chemical Reagents or Precursors with Intent to Manufacture,[2] a class D felony. The trial court sentenced Boston to an aggregate term of eighteen years. On appeal, Boston presents four issues for our review:

1. Did the trial court abuse its discretion when it allowed into evidence photographs of items that the State destroyed or completely consumed prior to trial?

2. Did the trial court abuse its discretion by allowing the State to impeach Boston's testimony with four convictions that were more than ten years old?

3. Is the evidence sufficient to support Boston's convictions?

4. Is the eighteen-year aggregate sentence inappropriate?

We affirm.

The facts most favorable to the convictions follow. On October 5, 2009, Daryl Beam traveled from Pennsylvania to his family farm in rural Bartholomew County, Indiana. When Daryl arrived, he looked around the farm and observed someone kneeling by a nearby creek on the property. Daryl was suspicious of the person because there had been problems at the farm before because no one lived on the property and the farmhouse was boarded up. Daryl returned to his vehicle and called 911 at approximately 5:56 p.m.

Bartholomew County Sheriff's Deputies Kevin Abner and Jim Green responded to the

[1] Ind. Code Ann. § 35-48-4-1.1 (West, Westlaw current through 2011 Pub. Laws approved & effective through 5/10/2011).

[2] I.C. § 35-48-4-14.5 (West, Westlaw current through 2011 Pub. Laws approved & effective through 5/10/2011).

scene. Deputies Abner and Green devised a plan to split up and search the property. Deputy Abner approached a concrete bridge that ran across the creek and observed a lit cigarette and a donut on the ground. Deputy Green smelled anhydrous ammonia and observed a soda bottle with a tube coming out of the top, which he knew to be a device known as a generator in the methamphetamine manufacturing process. Given his observations, Deputy Green called for back-up, and Deputy Lowell Lowman responded to the scene. When he met up with Deputy Green, Deputy Lowman smelled organic solvents, which he associated with the manufacturing of methamphetamine. In the meantime, Deputy Abner discovered coffee filters near the creek, a portable camp stove, and lithium batteries.

As Deputy Lowman was searching through a wooded area, he observed Boston, who was not wearing a shirt, attempting to hide under a log. Deputy Lowman also observed another man he knew as Michael Powers trying to sneak away. The log under which Boston was trying to hide was five feet from several items used in the manufacturing process and approximately fifteen feet from the active methamphetamine lab. Boston did not resist Deputy Lowman, who immediately put Boston in handcuffs.[3] During a search of Boston's person, Deputy Lowell discovered a black pocket scale, a lithium battery, and a cellophane wrapper.

Indiana State Trooper Martin Mead with the methamphetamine suppression unit arrived at the scene to assist with the investigation. Trooper Mead discovered an anhydrous ammonia tank, lithium batteries, pliers, mixing spoons, solvents, a plastic pitcher, lithium strips from batteries, and a reaction vessel that was still "bubbling." *Transcript* at 402.

Trooper Mead took a sample from the reaction vessel, photographed all of the items recovered from the active lab, and later destroyed the items that were considered hazardous. Trooper Mead described the manufacturing process of the instant lab as "somewhere" in the middle but "definitely an active methamphetamine process." *Id*. at 402, 422. Powers testified that Boston brought the reaction vessel with him to the property.

On October 12, 2009, the State charged Boston with dealing in methamphetamine, a class B felony, and possession of precursors, a class D felony. On February 22, 2010, Boston filed a motion to preclude the State from introducing evidence, testimony, photographs, and test results relating to evidence that the State destroyed or completely consumed. The court held a hearing on the motion on July 6, 2010. On July 8, 2010, the trial court denied Boston's motion, concluding that Boston failed to make a prima facie showing that the State failed to properly dispose of the items pursuant to Ind. Code Ann. § 35-33-5-5 (West, Westlaw current through 2011 Pub. Laws approved & effective through 5/10/2011). A jury trial commenced on August 10, 2010 and concluded on August 13 with the jury finding Boston guilty as charged. On September 29, 2010, the trial court sentenced Boston to concurrent terms of eighteen years for class B felony dealing in methamphetamine and two and one-half years for possession of precursors. Boston now appeals.

1.

Boston argues that the trial court abused its discretion in denying his pre-trial motion to preclude evidence. Although titled as a motion to preclude, Boston's motion was a motion to suppress evidence. Because Boston did not seek an interlocutory appeal from the denial of

[3] The deputies also took Powers into custody.

his motion, the issue before us is more appropriately framed as whether the trial court abused its discretion by admitting evidence at trial. *See Kelley v. State*, 825 N.E.2d 420 (Ind. Ct. App. 2005). "[O]nce the matter proceeds to trial, the denial of a motion to suppress is insufficient to preserve an issue for appeal. Rather, the defendant must make a contemporaneous objection to the admission of evidence at trial." *Id*. at 424.

Pursuant to I.C. § 35-33-5-5(e), photographs of items from the illegal manufacture of controlled substances that are destroyed may be used in lieu of the actual items recovered if the law enforcement agency destroys them and the following conditions are met:

> (1) The law enforcement agency collects and preserves a sufficient quantity of the chemicals, controlled substances, or chemically contaminated equipment to demonstrate that the chemicals, controlled substances, or chemically contaminated equipment was associated with the illegal manufacture of drugs or controlled substances.
> (2) The law enforcement agency takes photographs of the illegal drug manufacturing site that accurately depict the presence and quantity of chemicals, controlled substances, and chemically contaminated equipment.
> (3) The law enforcement agency completes a chemical inventory report that describes the type and quantities of chemicals, controlled substances, and chemically contaminated equipment present at the illegal manufacturing site.

The statute further provides that "[t]he law enforcement agency disposing of property in any manner provided in subsection . . . (e) shall maintain certified records . . . . Disposition by destruction of property shall be witnessed by two (2) persons who shall also attest to the destruction." I.C. § 35-33-5-5(g).

In the present case, law enforcement personnel destroyed much of the evidence found at the scene due to its potentially hazardous nature and threat of contamination. In accordance with I.C. § 35-33-5-5, photographs were taken before the items were destroyed and those photographs were submitted at trial as evidence. Along with the photographs, the

State submitted a certified record of disposition that was signed by two attesting officers. At trial, Officer Mead, one of the attesting officers, testified that he was in charge of the disposition of the property and that Officer Stephen Wheeles, the second attesting officer, "was the other clean lab officer there that assisted [him] at the scene" and observed the destruction of the evidence. Although Officer Wheeles attested to witnessing the destruction of the evidence on the certified property record, he did not testify at trial.

Boston objected to the admission of the photographs "for the reasons previously raised prior to the trial . . . ." *Transcript* at 299. Boston requested a continuing objection to all photographs taken of the items that were ultimately destroyed. When the State proffered the property disposition record, Boston objected only on grounds that the document was "marked and highlighted."[4] *Id*. at 454.

On appeal, Boston argues that the photographs were not admissible because only one of the officers who attested to the destruction of the evidence testified at his trial. Boston contends that pursuant to I.C. § 35-33-5-5(g), both officers who attested to the destruction of evidence should have testified at trial. In addition to citing no authority to support his contention, Boston did not make this argument to the trial court as a basis for his objection to the admission of the photographs. Boston's objection was based on his pre-trial arguments that the State did not comply with the dictates of I.C. § 35-33-5-5 in terms of certification of the record or meeting the requirements for destruction of evidence. Indeed, the objection

[4] The State argues that Boston waived his argument because he objected only on grounds that the property disposal record was highlighted and not on grounds that the State failed to comply with the statute as was previously argued. The State overlooks the fact that Boston also challenges the admission of the photographs taken of the items before they were destroyed. Boston preserved his argument by objecting to the admission of the photographs on the grounds he asserted prior to trial.

Boston now raises on appeal could not have been made until trial, when the State did not call both officers attesting to the destruction of evidence to be witnesses. It is well-settled that a defendant may not raise one ground for objection at trial and argue a different ground on appeal. *Howard v. State*, 818 N.E.2d 469 (Ind. Ct. App. 2004), *trans. denied.* The failure to raise an issue at trial waives the issue on appeal. *Id.* Therefore, because Boston did not object on grounds he now asserts, he has waived his objection to the admission of the photographs of the items that were destroyed and to the property disposition report. *See id*.

Waiver notwithstanding, we find Boston's argument unpersuasive. There is nothing in I.C. § 35-33-5-5(g) that requires both individuals who attest to the destruction of items to testify at trial and we decline to read such requirement into the statute. The statute requires only that two individuals witness the destruction of the items and attest thereto. Here, as evidenced on the property disposition report, Officers Mead and Wheeles each attested that they witnessed the destruction of the items. This evidence was corroborated by Officer Mead's testimony. The trial court did not abuse its discretion in admitting the photographs of the items subsequently destroyed or the property disposition report.

2.

Boston argues that the trial court abused its discretion when it permitted the State to impeach his testimony by questioning him about prior convictions that were more than ten years old. Our standard of review for the admissibility of evidence is well settled. The admission or exclusion of evidence lies within the trial court's sound discretion and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an

abuse of discretion. *Id.* An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.*

Indiana Evidence Rule 609 governs impeachment by evidence of conviction of a crime. Evidence Rule 609(b) provides,

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609 creates a rebuttable presumption that convictions greater than ten years old are inadmissible for impeachment purposes. *Giles v. State*, 699 N.E.2d 294 (Ind. Ct. App. 1998). The ten-year limit can be overcome, however, if the trial court determines that the probative value supported by specific facts and circumstances substantially outweighs the prejudicial effect. Evid. R. 609(b). In making its determination, the trial court is to consider the following five factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crimes; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Scalissi v. State*, 759 N.E.2d 618 (Ind. 2001) (citing *United States v. Castor*, 937 F.2d 293 n.8 (7th Cir. 1991)).

Boston elected to testify at trial and completely denied any involvement in the methamphetamine manufacturing process that was ongoing at the scene. Boston's co-defendant testified that Boston was directly involved with the active methamphetamine lab. Prior to cross-examination,[5] the State sought and was granted permission to question Boston, over his objection, about two class D felony theft convictions (1979), a class D felony attempted theft conviction (1984), and a class A misdemeanor check deception conviction (1991) for impeachment purposes.[6]

In ruling that the State would be permitted to question Boston about the challenged convictions, the court carefully considered each of the *Scalissi* factors. The trial court explained that Boston's credibility was the central issue in the case given the contrary testimony of the two co-defendants, who were also the only witnesses. The court further noted that Boston's criminal history consisted of more than an isolated conviction more than ten years prior, but showed a continuing course of conduct that spanned years, with the most recent conviction being less than ten years prior to the instant offense. The court also noted that Boston's prior crimes were crimes of dishonesty and as such, were relevant to an assessment of his credibility. The court also noted that the prior convictions were not of the same nature as the instant offenses and found that such weighed in Boston's favor. The trial

[5] Prior to its cross-examination of Boston, the State informed the court that it had just learned that Boston had two convictions for class C felony robbery from August 1984. The State acknowledged that it had not given notice of its intent to use such convictions for impeachment purposes. Boston objected because of the State's lack of notice. After hearing arguments, the trial court excluded from the State's impeachment evidence these prior convictions that the State had not previously disclosed as possible impeachment evidence.

[6] Boston does not challenge the fact that the State also questioned him about a second class A misdemeanor check deception conviction in 2004 because that conviction was less than ten years prior to the instant offense.

court ultimately concluded, however, that the probative value of the distant convictions outweighed the prejudicial effect. Having reviewed the record, we agree with the trial court's analysis. We therefore conclude that the trial court did not abuse its discretion in permitting the State to introduce through its cross-examination of Boston evidence of Boston's convictions that are greater than ten years old.

Even if the evidence of Boston's prior convictions was erroneously admitted, we will "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Ind. Trial Rule 61. In other words, if, in light of all the evidence in the case, the error has had an insubstantial impact on the jury, the error did not affect the substantial rights of the parties. *Scalissi v. State*, 759 N.E.2d 618. In light of the overwhelming evidence recovered at the scene, Boston's behavior in hiding under a log, and the fact that Boston was found in close proximity to the active reaction vessel and other items used in the manufacturing process, it is unlikely the jury was swayed to a guilty verdict only on the evidence of Boston's prior convictions.

3.

Boston argues that the evidence is insufficient to sustain his convictions. Our standard of review when considering a challenge to the sufficiency of the evidence is well settled.

> 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).

To sustain a conviction for dealing in methamphetamine, the State was required to prove beyond a reasonable doubt that Boston knowingly or intentionally manufactured methamphetamine. The State presented extensive evidence regarding the manufacturing process, generally, and the ongoing nature of the methamphetamine lab found at the scene. To be sure, officers discovered an anhydrous ammonia tank hidden beneath debris, several batteries, casings, pliers, mixing spoons, pitchers, solvent, lithium strips from batteries, and coffee filters. Police also recovered a reaction vessel that tested positive for methamphetamine. Based on the review of items recovered, the officer who dismantled the methamphetamine lab estimated that the production cycle was nearly half-way complete given that the items in the vessel were still reacting. Police found Boston, shirtless and trying to hide under a log, a few feet from lithium batteries, liquid fire, and other items used in the manufacturing process.

In addition to the above evidence, Powers testified that he had tried to "gas off" methamphetamine from several jars he brought to the scene, but was unable to do so. *Transcript* at 532. Powers further testified that Boston arrived not long after with his own reaction vessel and that Boston stripped batteries and placed lithium in the jar that contained a pill-based mixture and then put anhydrous ammonia into the reaction vessel. This evidence is more than sufficient to prove that Boston knowingly or intentionally manufactured methamphetamine. The State's evidence also establishes that Boston possessed precursors with the intent to manufacture methamphetamine.

In challenging the evidence as insufficient, Boston asserts that the only evidence supporting his conviction is the self-serving testimony of Michael Powers, who testified

against Boston in exchange for a sentencing cap of twelve years as a term of his plea agreement. Boston also directs us to testimony from his witnesses, who testified that Boston left the house in order to purchase methamphetamine, not make it. Boston's arguments are simply requests for this court to reweigh the evidence and assess the credibility of the witnesses, which we will not do on appeal. As noted above, the State presented sufficient evidence to support Boston's convictions for class B felony dealing in methamphetamine and class D felony possession of precursors with intent to manufacture.

4.

Boston argues that his aggregate sentence of eighteen years is inappropriate in light of the nature of the offense and the character of the offender. We have the constitutional authority to revise a sentence if, after careful consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Ind. Appellate Rule 7(B); *Anglemyer v. State,* 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218. Even if a trial court follows the appropriate procedure in arriving at its sentence, we maintain the constitutional power to revise a sentence we find inappropriate. *Hope v. State,* 834 N.E.2d 713 (Ind. Ct. App. 2005). Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State,* 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). On appeal, Boston bears the burden of persuading us that his sentence is inappropriate. *Rutherford v. State,* 866 N.E.2d 867.

The trial court sentenced Boston to concurrent terms of eighteen years for class B

felony dealing in methamphetamine and two and one-half years for possession of precursors. Boston asserts that the nature of the offense does not warrant sentences near the maximum for the class B offense.

The sentence for a class B felony ranges from a minimum of six years to a maximum of twenty years, with the advisory sentence being ten years. Ind. Code Ann. § 35-50-2-5 (West, Westlaw current through 2011 Pub. Laws approved & effective through 4/6/2011). Boston requests that we revise his sentence for the class B felony manufacturing conviction to six years and that his two-and-a-half-year sentence for his class D felony possession conviction be served concurrent therewith. In support of his request, Boston maintains that he was present at the scene solely to purchase methamphetamine for his own personal use, that there were no weapons, and that no one was physically threatened or injured. Boston notes that he readily cooperated with police upon his arrest. With regard to his character, Boston does not deny his criminal history, but explains his behavior as stemming from a history of drug and alcohol abuse problems beginning at age thirteen. Boston maintains that he accepts responsibility for his addictions and has self-reported as an alcoholic and marijuana user. Boston states that he currently suffers from serious health issues, including diabetes, heart problems, Rheumatoid arthritis, and a tumor on his liver.

We first consider the nature of the offense. Though not violent, Boston trespassed onto another person's property to manufacture methamphetamine. And, although no one was injured, it is well-known that methamphetamine labs pose a danger to those in the vicinity. Here, when the officers arrived to investigate, they encountered a heavy smell of anhydrous ammonia that kept them from proceeding into certain areas. The methamphetamine lab was

active and had to be dismantled by trained officers so as not to harm anyone. Boston acted in complete disregard of the property rights of others and the environmental and health consequences arising from his clandestine lab.

With regard to the character of the offender, Boston's criminal history is telling. As the trial court noted, Boston's criminal record is "huge." *Transcript* at 973. Boston's first adjudication occurred when he was eleven or twelve years old. Since that time, Boston has accumulated sixty-two different referrals (for which many involved multiple charges). Boston also admitted to participating in other criminal acts, i.e., making methamphetamine, for which he was not arrested. Boston has been convicted of forty-two separate criminal offenses. Boston's criminal history includes convictions for theft, disorderly conduct, battery, resisting law enforcement, attempted robbery, and check deception. He also has a substantial number of substance abuse convictions, including operating while intoxicated, maintaining a common nuisance, public intoxication, and possession of methamphetamine.

Here, the trial court carefully considered Boston's request for a more lenient sentence. In fact, the trial court gave a very extensive and thoughtful sentencing statement addressing each of Boston's proffered considerations and then explaining why it chose the sentence it did. Given our observations above and the trial court's detailed sentencing statement, we affirm Boston's aggregate sentence of eighteen years. Boston has not met his burden of persuading us that his sentence is inappropriate.

Judgment affirmed.

BAILEY, J., concurs.

BROWN, J., concurs in result with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

DOUGLAS J. BOSTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A05-1010-CR-626
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Brown, Judge, concurring in result

I concur in the result reached by the majority but write separately to state my disagreement that it was not an abuse of discretion to allow the State to introduce evidence of Boston's prior convictions, particularly the felonies, which at the time of trial were 26 years to 31 years old. However, given all of the evidence against Boston for the instant offenses, I would find that such error did not affect his substantial rights and was therefore harmless.