

STATEMENT OF THE CASE

Milton Elliot appeals his conviction of and sentence for dealing in methamphetamine, a class B felony.¹

We affirm but remand for additional findings.

ISSUES

1. Whether the trial court abused its discretion in denying Elliot's belated objection to certain testimony.
2. Whether the trial court abused its discretion in ordering Elliot to pay restitution as a condition of probation.

FACTS

Arup Das, Elliot's employer, owned a house in Indianapolis in which he allowed Elliot to live. Das would stop by the house two or three times a month to pick up supplies stored there and to help Elliot take care of the property.

In January of 2010, over a year after Elliot had moved into the house, Das noticed that the heating bill for the house was skyrocketing, and he decided to install additional insulation in the house to cut utility costs. Das arranged to meet Elliot at the house on the morning of January 28, 2010, to talk about installing the insulation.

Das arrived at the house at the appointed time, but Elliot was not there. Das went to lunch with a friend, Patrick Stern, and Das and Stern arrived back at the house later that afternoon. This time, Elliot answered the door, and Das noticed a strong chemical

¹ Ind. Code § 35-48-4-1.1.

odor emanating from the house. Das and Elliot arranged to meet the next day to install the insulation.

Das returned to Stern's vehicle and told him about the chemical odor. On a hunch, the two men took several trash bags from the alley behind the house. The bags reeked of chemical odor and contained coffee filters, empty paint thinner cans, and empty pseudoephedrine boxes. Upon discovering these items, the men contacted the police.

The police inspected the trash bags' contents with Das and saw the coffee filters, empty paint thinner cans, empty pseudoephedrine blister packs, salt containers, and empty lithium battery packs. They also smelled an organic solvent chemical odor. Suspecting the manufacture of methamphetamine, two officers watched the house while another sought a search warrant. The officers saw Elliot open the door for one or two men to enter the house with a large plastic tub.

Upon executing the search warrant later that evening, officers discovered that the house reeked of ammonia and that it was filled with pseudoephedrine pills, lithium batteries, organic solvents, a tank of anhydrous ammonia, aquarium pumps, tubing and vessels, all indicative of a methamphetamine manufacturing operation. Only Danny Grider was in the house at the time of the search.

The State charged Elliot with class B felony dealing in methamphetamine, class D felony possession of a chemical reagent or precursor, and class D felony possession of methamphetamine. At the subsequent trial, Grider testified that he, not Elliott, manufactured and possessed the methamphetamine. Despite Grider's claim, the jury

found Elliott guilty on all counts. However, the trial court entered judgment only on the class B dealing in methamphetamine conviction, finding that the class D convictions merged with dealing conviction. The trial court sentenced Elliot to the advisory term of ten years, with six years executed at the Department of Correction. The trial court also ordered Elliot to serve one year of probation and pay restitution as a condition of probation.

DECISION

1. Admission of Evidence

At trial, Indiana State Police Trooper Chip Ayers explained that in his professional opinion, the house was the site of methamphetamine production. As part of his testimony, Trooper Ayers explained the effects of methamphetamine on the brain and body. Near the end of Trooper Ayers' testimony concerning the mental and physical effects of methamphetamine on a user, Elliot objected to the evidence as irrelevant because Elliot was not charged with methamphetamine use. The trial court overruled the objection on the basis that evidence of use was relevant to the possession charge, as the jury was free, on the basis of Trooper Ayers' testimony, to conclude that Elliot showed some of the characteristics of a user. In its closing argument, the State referred to Trooper Ayers' testimony to rebut Elliott's claims that he did not possess methamphetamine and that he neither knew about nor participated in the manufacture of the substance. The State argued, "Remember what Trooper Ayers talked about, that's the

long-term use . . . There are three people in the last two days that have met that description in this courtroom. I hope you took note of who they were.” (Tr. 318).

Elliot contends that Trooper Ayers’ testimony about the mental and physical effects of methamphetamine upon a user was irrelevant and that the trial court abused its discretion in denying his objection at trial. Elliot also contends that to the extent the evidence was relevant, it was unduly prejudicial and should have been excluded. Elliot argues that any waiver issues are avoided on the basis that trial counsel’s failure to object on various grounds constitutes fundamental error.

The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed “absent a showing of manifest abuse of the trial court’s discretion resulting in the denial of a fair trial.” *Sallee v. State*, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002), *trans. denied*. An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Relevant evidence is that evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ind. Evidence Rule 401. The standard under Evidence Rule 401 is a liberal one, and an appellate court reviews the trial court’s determination as to relevance for an abuse of discretion. *Jackson v. State*, 712 N.E.2d 986, 988 (Ind. 1999). However, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues,

or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Evidence Rule 403.

As described above, Elliot waited almost until the close of Trooper Ayers’ testimony before making his relevancy objection. Indeed, Trooper Ayers’ testimony on the subject of the mental and physical effects of methamphetamine covers almost three pages in the record before the objection is made. The testimony includes Trooper Ayers’ observation that heavy methamphetamine users suffer from teeth and bone deterioration, as well as “crank bugs” or “meth sores,” which are inflamed pores. (Tr. 232). The failure to make a contemporaneous objection at trial waives any claim on appeal that the evidence was improperly admitted. *Delarosa v. State*, 938 N.E.2d 690, 694 (Ind. 2010). Accordingly, the issue is waived.

However, a claim waived by a defendant’s failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that fundamental error occurred. *Id.* The fundamental error exception is ““extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.”” *Id.* (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)). The error claimed must either ““make a fair trial impossible”” or constitute ““clearly blatant violations of basic and elementary principles of due process.”” *Id.* (quoting *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009)). The exception is available only in ““egregious circumstances.”” *Id.* (quoting *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003)).

Elliot argues that Trooper Ayers' testimony was not relevant because there was no connection shown between his appearance at the time of the arrest and his appearance nearly a year later at trial. He argues that the admission of the evidence constitutes fundamental error because Trooper Ayers' testimony is "analogous to the introduction of character evidence" under Evidence Rule 404(b). (Elliot's Br. at 16). He further argues that such character evidence was so inflammatory as to "create[] a substantial harm to his right to a fair [t]rial." *Id.*

To the extent that any error occurred in the admission of Trooper Ayers' testimony, it was not fundamental. According to Elliot's argument, he did not exhibit any of the traits described by Trooper Ayers. Accordingly, it was highly unlikely that Trooper Ayers' testimony about the mental and physical conditions of a user contributed to Elliot's convictions. Instead, the overwhelming evidence that Elliot was living in a house permeated by the distinctive odor of methamphetamine manufacturing and filled with easily observable manufacturing materials convinced the jury that Elliot knew about and abetted or participated in the manufacture of the drugs. There was no egregious error—if any at all—and Elliot was not deprived of his right to a fair trial.²

² Elliot argues that Trooper Ayers' was not qualified under Rule of Evidence 702 to testify about the mental and physical characteristics of methamphetamine users. We observe that Elliot did not object at trial on this basis, and issues raised for the first time on appeal are waived. *See Whitfield v. State*, 699 N.E.2d 666, 669 (Ind. Ct. App. 1998), *trans. denied*.

2. Order to Pay Restitution

The trial court ordered Elliot to pay restitution as a condition of probation. The total amount, \$4,069.79, represents the \$1,467.46 owed to Das for damage to his property and \$2,602.33 to law enforcement for environmental cleanup costs.

Elliott contends that the trial court erred in ordering restitution because it failed to ascertain his ability to pay the fixed amount. Elliot further contends that the trial court failed to fix the manner of performance.

Restitution under Indiana Code section 35-38-2-2.3 serves to compensate a criminal's victim, while vindicating the rights of society as a whole and impressing upon the defendant the "magnitude of the loss the crime has caused." *Pearson v. State*, 883 N.E.2d 770, 772 (Ind. 2008). Indiana Code section 35-38-2-2.3(a)(5) provides that a trial court may require a person to make restitution to the victim for damage caused by the probationer. In addition, Indiana Code section 35-48-4-17(a) provides that the trial court shall order restitution to cover law enforcement costs of environmental cleanup in methamphetamine manufacturing cases. However, when a trial court makes restitution a condition of probation, the court "shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance." I.C. § 35-38-2-2.3(a)(5). An inquiry and finding concerning the probationer's ability to pay prevents indigent probationers from being imprisoned because of a probation violation based on the failure to pay restitution. *Walsman v. State*, 855 N.E.2d 645, 654 (Ind. Ct.

App. 2006). The obligation to make restitution does not end upon the expiration of a probationary period. I.C. § 35-50-5-3(f).

Elliot reported to the probation officer preparing his pre-sentence report that he “pretty much” stopped working after a back injury. (Pre-Sentence Report 7). However, during the sentencing hearing, the following colloquy between Elliot and his counsel indicated that Elliot has the ability to earn money when he is not incarcerated but also has other obligations:

Q. Okay. Are you able, physically able to work and have gainful employment?

A. If I was out.

Q. Yes.

A. Yes.

Q. What can you do?

A. I paint for a living.

Q. Okay. And do you support anyone other than yourself?

A. Yes, I do.

Q. Who do you support?

A. My sixteen-year-old son.

(Tr. 391-92).

The trial very carefully weighed the mitigators and aggravators in imposing the ten-year advisory sentence (four years suspended with one year of probation). However, the trial court did not make a specific finding about Elliot’s ability to pay, although it

appears that the trial court credited Elliot's sentencing testimony in determining that he should pay restitution. The trial court also did not fix the manner of performance, and the State urges us to remand with instructions directing the trial court to do so. We remand with instructions that the trial court make specific findings about Elliot's ability to pay and the manner of performance.

Affirmed and remanded.

FRIEDLANDER, J., and VAIDIK, J., concur.