

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

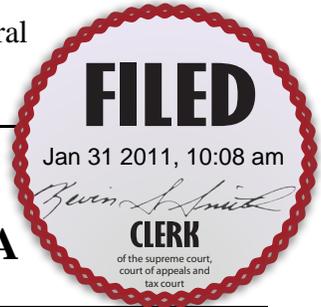
ATTORNEY FOR APPELLANT:

RICHARD D. MARTIN
Martin, Stuard & Douglas
Frankfort, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

MARTY B. BEARD,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 12A02-1001-CR-423

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Justin H. Hunter, Judge
Cause No. 12D01-0710-FB-134

January 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Marty B. Beard (“Beard”) appeals his convictions for Possession of Chemical Reagents or Precursors with Intent to Manufacture a Controlled Substance¹ and Maintaining a Common Nuisance, as Class D felonies.² He also challenges the sentence enhancement imposed due to his habitual substance offender status.³ We affirm in part, reverse in part, and remand with instructions.

Issues

Beard presents the following consolidated and restated issues for review:

- I. Whether there is a lack of sufficient evidence to support his conviction for Maintaining a Common Nuisance because the State failed to establish that he intended to personally manufacture methamphetamine;
- II. Whether there is a fatal variance between the charging information and the evidence presented on Beard’s possession of precursors;
- III. Whether the jury instructions on the elements of Maintaining a Common Nuisance are fundamentally erroneous;
- IV. Whether the trial court abused its discretion by admitting extrinsic bad act evidence;
- V. Whether the prosecutor violated Beard’s due process rights by allowing perjured testimony from State witnesses;
- VI. Whether his multiple convictions violate double jeopardy principles; and
- VII. Whether his conviction for Maintaining a Common Nuisance is a substance offense such that he could properly be sentenced as a habitual substance offender.

Facts and Procedural History

October 12, 2007, Beard’s friend Levis Gross (“Gross”) arrived at Beard’s Clinton

¹ Ind. Code § 35-48-4-14.5(e).

² Ind. Code § 35-48-4-13(b)(2).

³ Ind. Code § 35-50-2-10.

County farm with a backpack containing various items needed to manufacture methamphetamine.⁴ Gross “let [Beard] know that [he] was there” and stated, “I’d like to do this so I can get high” and “I’ll try to give you a little when I go.” (Tr. 147.) According to Gross, Beard “didn’t want” Gross to proceed with his plan but nevertheless told Gross, “go ahead and do it but pick your mess up.” (Tr. 147.)

Gross commenced the manufacturing process. When he opened a container of anhydrous ammonia, he was badly burned on his face. His grandparents took him to a local hospital, prompting a police inquiry into the circumstances surrounding his injuries. Clinton County Sheriff’s Deputy Steve Catron and other officers searched Beard’s farm and residence. Between grain bins and a camper, the officers located several “punched in” starting fluid cans, “stripped out” lithium batteries, mixing bowls, and ground up pills. (Tr. 275-76.) Inside the camper, Deputy Catron located “some stripped out lithium batteries and some other precursors.” (Tr. 281.) Inside the Beard residence, Deputy Catron saw a can of ether.

On October 16, 2007, the State charged Beard with Dealing in Methamphetamine, Possession of Chemical Reagents or Precursors with Intent to Manufacture a Controlled Substance, and Maintaining a Common Nuisance. The State also alleged Beard to be a habitual controlled substance offender. At the conclusion of a jury trial, Beard was acquitted of Dealing in Methamphetamine, but convicted of the remaining charges. He admitted to

⁴ Gross testified that he had in his backpack the following items: anhydrous ammonia in a thermos bottle, ground pills in a Mason jar, batteries, three cans of ether (starting fluid), aquarium tank tubing, sulfuric acid (plumbing cleaner), plastic baggies, coffee filters, and rock salt.

having two prior unrelated substance offense convictions,⁵ and was found to be a habitual substance offender.

Subsequently, Beard entered into a post-conviction, pre-sentencing agreement with the State, whereby the State agreed to recommend concurrent sentences and an aggregate executed sentence not to exceed five years. On December 21, 2009, the trial court sentenced Beard to an aggregate sentence of five years imprisonment (two years for possession and two years for maintaining a common nuisance, enhanced by three years due to habitual substance offender status). This appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence – Maintaining a Common Nuisance

Beard contends that his conviction for Maintaining a Common Nuisance must be reversed because the State did not prove that he intended to personally manufacture methamphetamine, as opposed to allowing Gross to do so.

The standard by which we review alleged insufficiency of the evidence to support a criminal conviction is well-settled:

When reviewing the sufficiency of the evidence to support a conviction, “appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict.” McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005) (emphasis added). It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Wright v. State, 828 N.E.2d 904 (Ind. 2005). To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it “most favorably to the trial court’s ruling.” Id. Appellate courts affirm the conviction unless “no

⁵ These were two convictions for Operating While Intoxicated.

reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000) (emphasis added). It is therefore not necessary that the evidence “overcome every reasonable hypothesis of innocence.” Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995). “[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001).

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007).

In order to convict Beard of Maintaining a Common Nuisance, as charged, the State was required to establish beyond a reasonable doubt that he knowingly maintained a building, structure, vehicle or place used one or more times for manufacturing methamphetamine. See Ind. Code § 35-48-4-13(b)(2)(A); App. 15.

Gross testified that he arrived at Beard’s farm with supplies to cook methamphetamine, advised Beard that he needed to “get high,” and offered Beard a small cut of the product. (Tr. 147.) Beard responded, “go ahead and do it but pick your mess up.” (Tr. 147.) Gross then proceeded to manufacture methamphetamine on the premises.⁶ From this evidence, the jury could conclude that Beard knowingly maintained a place used for manufacturing methamphetamine.

Beard nonetheless contends that the State was required to show that he “must have personally intended to manufacture methamphetamine.” Appellant’s Brief at 25. He rests his argument upon State v. Prater, 922 N.E.2d 746, 750 (Ind. Ct. App. 2010), trans. denied. Prater involved two defendants who stole anhydrous ammonia with the intent to sell it to a

⁶ After the anhydrous ammonia erupted in Gross’s face, Gross used the remaining ammonia to continue with the cooking process. The diminished process did not result in a batch that Gross deemed satisfactory for use; nonetheless, Indiana State Police testing revealed that some methamphetamine had been produced.

third party, presumably for the manufacture of methamphetamine. See id. at 747. Prater was charged with violating Indiana Code Section 35-48-4-14.5(c), which criminalizes possession of anhydrous ammonia with the intent to manufacture methamphetamine. A jury found Prater guilty of the charged offense, but the trial court vacated the conviction for illegal possession of anhydrous ammonia, finding insufficient evidence to establish beyond a reasonable doubt that Prater had intent to manufacture methamphetamine. See id. at 748.

The State appealed. A panel of this Court, in accordance with the words of the relevant statute given their “plain, ordinary, usual” meaning, concluded that the Legislature did not intend to criminalize mere possession of anhydrous ammonia. Id. at 749. Rather, “the plain language of Indiana Code Section 35-48-4-14.5(c) requires that the person who possesses anhydrous ammonia have the intent to use that chemical in the manufacture of methamphetamine to commit a Class D felony.” Id. at 750.

However, the holding in Prater does not afford Beard the relief he seeks, that is, the reversal of his conviction for Maintaining a Common Nuisance. As previously observed, the charged offense here at issue is established by proof beyond a reasonable doubt that Beard “knowingly maintained a structure” that was used one or more times for methamphetamine manufacture. Ind. Code § 35-48-4-13(b)(2). Unlike the statutory provision under which Prater was charged, there is no element of “intent to manufacture.” “[W]e are obliged to suppose that the General Assembly chose the language it did for a reason.” Prater, 922 N.E.2d at 750. We will not engraft a requirement that a person maintaining premises upon which methamphetamine has been manufactured must have possessed the intent to become

personally involved in the production process.

II. Variance – Possession

Beard also claims that there is a lack of sufficient evidence to establish that he possessed precursors with intent to manufacture methamphetamine. More specifically, he argues that the State alleged his possession of “lithium batteries that had been stripped out along with bottles of starting fluid, liquid heat, acid, and salt,” App. 14, but then failed to present evidence “that the stripped battery casings contained lithium metal or that the punched starting fluid cans contained ether.” Appellant’s Brief at 35. Thus, although he frames his argument as one of sufficiency of the evidence, he essentially alleges a fatal variance between the proof at trial and the charging information.⁷

A criminal defendant has the right to be advised of the nature and cause of the accusation against him, and there must be consistency between the allegations charged and the proof adduced. Simmons v. State, 585 N.E.2d 1341, 1344 (Ind. Ct. App. 1992). A failure to prove a material allegation descriptive of the offense is fatal. Mitchem v. State, 685 N.E.2d 671, 676 (Ind. 1997). Allegations which are not essential, those which can be entirely omitted without affecting the sufficiency of the charge, are considered mere surplusage and may be disregarded. Id. Unnecessary descriptive material in a charge is surplusage. Id. It need not be established in the proof and if there is a variance in the evidence from such unnecessary particularity it does not vitiate the proceedings unless it is

⁷ Beard does not argue that he lacked ability to exert control over, or to constructively possess, the materials brought onto his land by Gross.

shown that the defendant has been misled or prejudiced. Id.

Here, to define the offense with which Beard was charged, the State needed to allege that Beard possessed “two or more chemical reagents or precursors with the intent to manufacture a controlled substance.” Ind. Code § 35-48-4-14.5(e). The State specified that Beard possessed [hydrochloric] acid, lithium, and ether, statutorily recognized chemical reagents or precursors. See Ind. Code § 35-48-4-14.5(a)(7),(8), and (10).

Gross testified that he brought “sulphuric acid” (“like plumbing cleaner”) and anhydrous ammonia to Beard’s farm. (Tr. 144-45.) He also testified that the backpack of items he brought included “pills, batteries, [and] three cans of ether (which he also described as “starting fluid” and “Heet starting fluid”). (Tr. 144.) Deputy Catron testified that he found “starting fluid” cans on the grounds of the Beard farm and a can of ether inside the residence. (Tr. 275.) He also testified that he found lithium batteries (stripped out) both in Beard’s camper and outside the camper. Indiana State Police Trooper Nathaniel King testified that his report of recovered items had included “lithium” as well as “battery casings.” (Tr. 258.) Accordingly, there was consistency between the allegations and the proof.

Beard merely asks that we discard all testimony that lithium batteries were found based upon his assumption that the stripping process effectively removed all traces of lithium. We will not engage in such a reweighing process. Drane, 867 N.E.2d at 146. Moreover, despite the specificity of the charging information, the State was not required to establish Beard’s possession of more than two precursors. Beard has shown no fatal

variance.

III. Jury Instruction on Maintaining a Common Nuisance

A. Preliminary Instruction

A person may commit the offense of maintaining a common nuisance in more than one way; for example, by knowingly or intentionally maintaining a place used one or more times to unlawfully use controlled substances, Indiana Code § 35-48-4-13(b)(1), or by knowingly or intentionally maintaining a place used one or more times for unlawfully manufacturing controlled substances, Ind. Code § 35-48-4-13(b)(2)(A) (emphasis added). The charging information alleged that Beard maintained a place where a controlled substance was manufactured, and the jury was given a final instruction to this effect. The jury was also instructed to consider, during its deliberations, preliminary instructions together with final instructions. All parties apparently failed to notice at trial that the jury had been given a preliminary instruction referring to the “use” of controlled substances as opposed to “manufacturing.” Having made no objection at trial, Beard now argues that the inclusion of the preliminary instruction was fundamental error. He claims that the jury may have been misled to believe that he could be convicted of Maintaining a Common Nuisance based upon Gross’s testimony that he had, in times past, used methamphetamine while at work on Beard’s farm.

The fundamental error exception to the waiver rule is an extremely narrow one. Munford v. State, 923 N.E.2d 11, 13 (Ind. Ct. App. 2010). To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a

fair trial impossible. Id. More specifically, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Id. When we are asked to consider a claim of fundamental error with respect to jury instructions, we look to the instructions as a whole to determine if they were adequate. Ringham v. State, 768 N.E.2d 893, 898 (Ind. 2002). An error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. Massey v. State, 803 N.E.2d 1133, 1137 (Ind. Ct. App. 2004).

Here, the preliminary instruction did not accurately state the elements of the crime with which Beard was charged, because it referenced use of a controlled substance as opposed to manufacture of a controlled substance. However, the final instruction in this regard accurately described the conduct charged. Also, the charging information referencing manufacture was read to the jury. The State's evidence focused upon the manufacture of methamphetamine. Finally, the State's closing argument emphasized that the prohibited conduct was maintaining a place where a controlled substance was manufactured. Under these circumstances, we cannot say that the inclusion of the erroneous preliminary instruction misled the jury such that Beard was denied fundamental due process.

B. Inclusion of Phrase "By Persons"

Beard also challenges Final Instruction 8, which provided in relevant part:

To convict the Defendant [of Maintaining a Common Nuisance], the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. Knowingly

3. Maintained a building, structure, vehicle or place
4. That was used one (1) or more times by persons to unlawfully manufacture methamphetamine, which the court instructs you is a controlled substance.

(App. 137.) Not having objected to the instruction at trial, Beard now claims it was fundamental error to instruct the jury including the phrase “by persons.”

Beard complains that the instruction does not precisely mirror the statutory language of Indiana Code Section 35-48-4-13(b), which provides:

(b) A person who knowingly or intentionally maintains a building, structure, vehicle, or other place that is used one (1) or more times:

(1) by persons to unlawfully use controlled substances; or

(2) for unlawfully:

(A) manufacturing;

(B) keeping;

(C) offering for sale;

(D) selling;

(E) delivering; or

(F) financing the delivery of;

controlled substances, or items of drug paraphernalia as described in IC 35-48-4-8.5;

commits maintaining a common nuisance, a Class D felony.

Beard insists that the trial court improperly inserted “by persons” in the instruction when the statute uses “by persons” only to refer to the use of controlled substances (subsection (b)(1), and not to refer to manufacturing of controlled substances (subsequently appearing in subsection (b)(2)(A)). As best we can discern his argument, Beard believes that he was prejudiced because “persons” could be understood by the jury to include Gross, yet the statute was intended only to criminalize, in the manufacturing context, personal conduct on the part of Beard.

We agree with Beard that the phrase “by persons” is not repeated at each successive subsection of the foregoing statute. Nonetheless, we presume the legislature intended logical application of the language used in a statute, so as to avoid unjust or absurd results. Boyd v. State, 889 N.E.2d 321, 324 (Ind. Ct. App. 2008), trans. denied. We also bear in mind the objects and purposes of the law as well as the effect and repercussions of such a construction. Id. It would seem absurd to conclude that the legislature intended to define any offense other than one attributable to persons, even if each act of prohibited conduct is not accompanied by such specification.

The statute at issue criminalizes the maintenance of a place where controlled substances are used, manufactured, stored, sold, or delivered. There is no language suggesting that the proprietor of the property need be personally involved in any of the activities. There is no logical reason for distinguishing between use and manufacture in this regard. Beard’s proposed construction is a reiteration of his personal intent/personal participation argument premised upon Prater. We have previously rejected his argument in this regard. Beard has demonstrated no fundamental error in the instruction of the jury.

IV. Prior Bad Act Evidence

Over Beard’s objection, the State was permitted to elicit the following testimony from Gross:

Prosecutor: Had you ever provided methamphetamine to the defendant before?

[Objection and Ruling]

Gross: Yes, I have.

Prosecutor: Would that have taken place during the summer of Two Thousand and Seven?

Gross: Some times, yes.

(Tr. 177-78.) Beard claims that the admission of evidence that he had used methamphetamine violated Indiana Evidence Rule 404(b), as it was admitted only to show his propensity to engage in illicit drug activity.

The admission of evidence of uncharged misconduct is constrained by Indiana Rule of Evidence 404(b), which provides in relevant part as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Evidence of extrinsic offenses poses the danger that the jury will convict the defendant because he is a person of bad character generally, or has a tendency to commit crimes. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003). The rationale for the prohibition against bad act and character evidence is “predicated upon our fundamental precept that every defendant should only be required to defend against the specific charges filed.” Oldham v. State, 779 N.E.2d 1162, 1173 (Ind. Ct. App. 2002), trans. denied.

To decide whether character evidence is admissible under Evidence Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs or acts is relevant to a matter at issue other than the person’s propensity to engage in a wrongful act;

and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. Bassett, 795 N.E.2d at 1053.

The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission, and the trial court's ruling will be reviewed only for an abuse of discretion. Larry v. State, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999). A decision by the trial court to admit evidence will be reversed only upon a showing of a manifest abuse of discretion that resulted in the denial of a fair trial. Id. at 80.

Here, it is apparent from the trial court's statements that the evidence of methamphetamine use was admitted to show Beard's motive in allowing Gross to manufacture methamphetamine on Beard's property: Beard was a user and hoped to be given a small amount. Evidence of uncharged misconduct that is probative of the defendant's motive and which is inextricably bound up with the charged crime is properly admissible under Evidence Rule 404(b). Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Accordingly, evidence of Beard's methamphetamine use was admissible for a purpose other than to merely show his propensity to engage in wrongful acts. Moreover, while evidence of drug use is no doubt prejudicial, there was other testimony admitted without objection that Beard had previously been a user of methamphetamine. Beard has demonstrated no manifest abuse of the trial court's discretion so as to support reversal on Evidence Rule 404(b) grounds.

V. Allegedly Perjured Testimony

Beard claims that the prosecutor knowingly allowed State witnesses to offer perjured testimony. Patty Meagher (“Meagher”), accompanied by her daughter Angie King (“King”), had driven Gross to Beard’s farm on the day in question and dropped him off in the driveway. According to Meagher’s and King’s testimony, they did not see Gross make contact with Beard. According to Gross, he had let Beard know of his presence and plans.⁸ Gross also testified that when he got into King’s van,⁹ he had in his possession numerous items of paraphernalia and precursors for manufacturing methamphetamine. Meanwhile, Meagher and King claimed to have seen nothing of the sort. Beard contends that the testimony is so contradictory that “someone was lying” and the prosecutor must have known such. Appellant’s Brief at 47.

Although the knowing use of perjured testimony may constitute prosecutorial misconduct, contradictory or inconsistent testimony by a witness does not constitute perjury. Timberlake v. State, 690 N.E.2d 243, 252 (Ind. 1997). In the present case, the prosecutor presented witnesses who gave inconsistent accounts. However, Beard presented no evidence that the prosecutor knew a particular witness’s trial testimony was false. Indeed, the prosecutor in closing argument acknowledged inconsistencies and invited the jury to make credibility determinations. Absent evidence that the prosecutor knew a witness was lying, we cannot say that the prosecutor committed prosecutorial misconduct. See id. at 253.

⁸ Gross testified that, to the best of his recollection, he had sent King to Beard’s door to summon him.

⁹ Meagher was driving her daughter’s van.

VI. Double Jeopardy

Beard contends that the actual evidence used to convict him of Possession of Precursors and Maintaining a Common Nuisance is the same evidence, and thus his multiple convictions violate the double jeopardy prohibition of Article 1, Section 14 of the Indiana Constitution.

Article 1, Section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Richardson v. State, 717 N.E.2d 32 (Ind. 1999) explained that two offenses are the same offense if the statutory elements of the crimes are the same or the actual evidence used to convict is the same. The statutory elements analysis is the Blockburger test.¹⁰ Beard does not contend that the statutory elements of the two crimes at issue are the same. The actual evidence test addresses evidence presented at trial to determine whether separate and distinct facts were presented as to each offense. Id. There must be more than a remote or speculative possibility that the same facts were used. Id.

Here, the only manner in which Beard engaged in a joint endeavor with Gross was by providing the premises. The jury was advised that Beard constructively possessed precursors for methamphetamine manufacture because of his ownership and occupation of the subject premises. Beard’s ownership and occupation of the subject premises was also the evidence used to establish his maintenance of a common nuisance. As each conviction rests upon the same actual evidence, one must be vacated. We remand to the trial court with instructions to vacate the possession conviction and sentence.

¹⁰ Blockburger v. United States, 284 U.S. 299, 304 (1932).

VII. Enhancement

Indiana Code Section 35-50-2-10(b) provides that the State may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging that the person has accumulated two prior unrelated substance offense convictions. Beard concedes that he had two prior unrelated substance offense convictions, but contends that the instant offense of Maintaining a Common Nuisance is not a substance offense because its primary element involves premises maintenance.

Indiana Code Section 35-50-2-10(a)(2) defines a “substance offense” as “a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime.” Indiana Code Section 35-48-4-13(b)(2)(A), pursuant to which Beard was convicted, provides:

(b) A person who knowingly or intentionally maintains a building, structure, vehicle, or other place that is used one (1) or more times:

(2) for unlawfully:

(A) manufacturing; ...

controlled substances, or items of drug paraphernalia as described in IC 35-48-4-8.5;

commits maintaining a common nuisance, a Class D felony.

Multiple elements are involved: (1) maintaining a building, structure, vehicle, or place (2) for unlawful manufacture (3) of a controlled substance. Accordingly, manufacture of drugs was a material element of the crime of which Beard was convicted. His sentence was properly enhanced by reason of his habitual substance offender status.

Conclusion

Beard's convictions are supported by sufficient evidence. He has demonstrated no fundamental error in the jury instructions, nor has he demonstrated an abuse of discretion in the trial court's evidentiary rulings. He has failed to establish prosecutorial misconduct. However, Beard's conviction for Possession of Precursors must be vacated to avoid a double jeopardy violation. His sentence for the remaining conviction, Maintaining a Common Nuisance, was properly enhanced by reason of Beard's status as a habitual substance offender.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and KIRSCH, J., concur.