

Phillip D. Hartsough was convicted of Class B felony dealing in methamphetamine¹ and Class A misdemeanor resisting law enforcement.² On appeal, he argues the trial court abused its discretion when it denied his motion for mistrial, the evidence was insufficient to support his conviction, and his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 9, 2010, police went to a house based on a tip someone was manufacturing methamphetamine there. When the officers knocked on the front door, someone pulled the curtain aside but did not open the door. A few seconds later, the officers heard an explosion at the rear of the house. They saw Hartsough jumping into a river that ran behind the property. Hartsough swam a short distance, then cried in pain and asked the officers to help him out of the water.

On the back deck of the house, the officers discovered a Gatorade bottle with residue in it and burn marks on the house indicative of an explosion. There also was an odor of ether and chemicals, which is typical of methamphetamine manufacture. Inside, the officers found items indicating methamphetamine was being manufactured, including a plastic bag with white powder, a shopping bag containing a cold pack, a cold compress containing ammonium nitrate that had been cut open and emptied, two boxes of decongestants containing pseudoephedrine, a metal mixing bowl, pliers, liquid drain cleaner, aluminum foil, plastic

¹ Ind. Code § 35-48-4-1.1(a)(1)(A).

² Ind. Code § 35-44-3-3(a)(3).

wrap, a plastic bottle, a can, and a bottle of Coleman fuel.

The State charged Hartsough with Class B felony dealing in methamphetamine,³ Class D felony maintaining a common nuisance,⁴ and Class A misdemeanor resisting law enforcement. The State dropped the common nuisance charge, and a jury found Hartsough guilty of the other two charges. The court sentenced him to fifteen years executed and two years on probation for dealing in methamphetamine, and to one year for resisting law enforcement. It ordered the sentences served concurrently.

DISCUSSION AND DECISION

1. Denial of Mistrial

A mistrial is an “extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error.” *Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). “On appeal, the trial judge’s discretion in determining whether to grant a mistrial is afforded great deference because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury.” *McManus v. State*, 814 N.E.2d 253, 260 (Ind. 2004), *reh’g denied*. “When determining whether a mistrial is warranted, we consider whether the defendant was placed in a position of grave peril to which he should not

³ The charging information indicates Hartsough was charged with aiding, inducing, or causing the crime pursuant to Ind. Code § 35-41-2-4.

⁴ Ind. Code § 35-48-4-13(b)(2)(A).

have been subjected; the gravity of the peril is determined by the probable persuasive effect on the jury's decision." *James v. State*, 613 N.E.2d 15, 22 (Ind. 1993).

Hartsough claims he was entitled to a mistrial because Officer Jastrzembski testified about Hartsough's refusal to give a voluntary statement after he was advised of his *Miranda* rights. Hartsough cites *United States v. Doyle*, which held "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." 426 U.S. 610, 619 (1976).

Officer Jastrzembski's comment did not require a mistrial. The prosecutor asked the officer if he read Hartsough his *Miranda* rights off a pre-printed card or from memory, and Officer Jastrzembski replied, "I was going to ask for a witness statement, if he would volunteer to give a statement. So before I asked for the statement, which he refused, I read the *Miranda* off the sheet of paper." (Tr. at 105.) Defense counsel objected, the jury was removed from the room, and defense counsel requested a mistrial. After a lengthy discussion regarding the purpose of the question, the judge denied Hartsough's request for mistrial.

In determining whether a mistrial is warranted, we consider: (1) the use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. *Higgins v. State*, 690 N.E.2d 311, 313 (Ind. Ct. App. 1997), *reh'g denied*. A single reference to a defendant's post-arrest silence does not put a

defendant in grave peril justifying a mistrial. *See Id.* (in which one witness testified Higgins declined to give a statement after he was read his Miranda rights).

Nor was Hartsough placed in grave peril. First, the prosecution did not elicit Officer Jastrzembski's statement – the officer's answer was in response to a question regarding the manner in which he gave Hartsough his *Miranda* rights. The reference to post-arrest silence was fleeting, and the prosecution did not subsequently refer to it. There was sufficient evidence to convict Hartsough without Officer Jastrzembski's statement. As the officer's comment did not place Hartsough in a position of grave peril, the trial court did not abuse its discretion when denying Hartsough's request for mistrial. *See Id.*

2. Sufficiency of the Evidence

When reviewing sufficiency of evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the decision. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, and not ours, "to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Id.* To preserve this structure, when confronted with conflicting evidence, we consider it most favorably to the trial court's ruling. *Id.* We affirm a conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence need not overcome every reasonable hypothesis of innocence; rather, the evidence is sufficient if an inference reasonably may be drawn from it to support the jury's decision. *Id.* at 147.

To convict Hartsough of Class B felony dealing in methamphetamine,⁵ the State had to prove beyond a reasonable doubt that he (1) knowingly or intentionally (2) manufactured (3) methamphetamine. Ind. Code § 35-48-4-1.1(a)(1)(A).

Hartsough argues the State did not prove methamphetamine was being manufactured because “many of the required elements for making methamphetamine were never found at the residence.” (Br. of Appellant at 15.) He claims the absence of ammonium nitrate, fertilizer, and a filter or paper towel made the manufacture of methamphetamine impossible. We first note impossibility does not relieve a defendant of culpability for the commission of a crime. Ind. Code § 35-41-5-1(b). Police found cold compresses containing ammonium nitrate at the scene and an officer testified many of the ingredients and tools necessary for manufacturing methamphetamine using a “one pot” method were present. (*See* Tr. at 206.)

Hartsough also argues the State did not prove he was involved in that manufacturing process. The State presented evidence that ephedrine and pseudoephedrine are key ingredients in the manufacture of methamphetamine and Hartsough bought ephedrine or pseudoephedrine twenty-two times in the months leading up to March 9, 2010. A witness testified she saw Hartsough with a grocery bag that had a red container in it, which police later identified as a bottle of Coleman fuel, which is another ingredient for making methamphetamine. The witness also testified she saw Hartsough with a Gatorade bottle,

⁵ Hartsough does not challenge his conviction of Class A misdemeanor resisting law enforcement.

which is the kind of bottle police found in the backyard after the explosion with residue of almost-completed methamphetamine in it. Finally, she saw Hartsough go into a bedroom, where police later determined the methamphetamine had been manufactured. Hartsough's argument is an invitation for us to reweigh the evidence, which we cannot do. *See Drane*, 867 N.E.2d at 146. There was sufficient evidence to convict Hartsough of Class B felony dealing in methamphetamine.

3. Appropriateness of Sentence

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but any other factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

When considering the appropriateness of a sentence, we first consider the advisory sentence. *Anglemeyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *modified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The advisory sentence for a Class B felony is ten years, with a sentencing range of six to twenty years. Ind. Code § 35-50-2-5. The sentence for a Class A misdemeanor may not exceed one year. Ind. Code § 35-50-3-2. Hartsough received a sentence of fifteen years incarcerated and two years on probation.

When considering the “character of the offender,” one relevant fact is the defendant’s criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The significance of criminal history in assessing a defendant’s character varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.* At thirty years old, Hartsough has an extensive criminal history including three juvenile adjudications, three felony convictions, seven misdemeanor convictions, and two probation violations. The trial court noted “other sanctions have proved ineffective in rehabilitating this Defendant and accordingly, he is in need of rehabilitation for a longer period of time.” (App. at 33.) At the time of sentencing, Hartsough had a child support arrearage of \$3500 and admitted smoking marijuana since age fifteen. All of these factors reflect poorly on his character.

Regarding the nature of his offense, Hartsough argues, “There was not a significant amount of contraband involved. There were no weapons involved in the offense. There were no acts of personal violence nor threats of personal violence involved in this offense. Nothing regarding the manner in which this offense was committed is particularly outrageous or extreme” (Br. of Appellant at 23.) We cannot agree. Hartsough’s actions caused an explosion and released harmful chemicals into the surrounding residential area. While Hartsough may not have committed a violent act against any person in particular, his actions easily could have harmed others.

Based on his extensive criminal history, his failed attempts at rehabilitation, and the dangerous nature of his crime, we cannot say Hartsough's sentence of seventeen years, with two of those years suspended to probation, is inappropriate.

CONCLUSION

Hartsough has not demonstrated the trial court abused its discretion when it denied his request for mistrial. The State presented sufficient evidence to convict Hartsough of Class B felony dealing in methamphetamine, and his sentence is not inappropriate based on his character and the nature of the offense. Therefore, we affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.