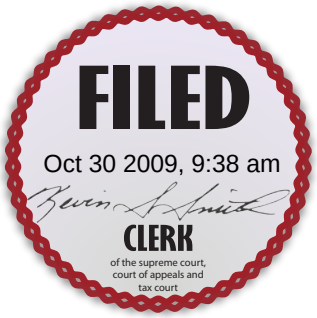

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IN THE
COURT OF APPEALS OF INDIANA

JOSE AGUILAR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0811-CR-678
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0612-FA-96

OCTOBER 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant-Defendant Jose Aguilar appeals his convictions and sentence for dealing cocaine weighing three grams or more, a Class A felony, Ind. Code § 35-48-4-1(a)(1)(C) and (b)(1), and dealing cocaine, a Class B felony, Ind. Code § 35-48-4-1(a)(1)(C).

We affirm.

ISSUES

Aguilar presents two issues for our review which we restate as:

I. Whether the trial court erred by admitting evidence of uncharged acts of Aguilar.

II. Whether Aguilar's sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

On November 9, 2006, an undercover officer of the Elkhart Police Department and a "cooperating source" ("CS") conducted a controlled buy at Concho's Body Shop. When they arrived at Concho's, the undercover officer met with Aguilar. The undercover officer then gave $200 to a man identified as Marcos Mora, and Mora gave the undercover officer a bag of cocaine.

Later that same day, the undercover officer and the CS were conducting another, separate controlled buy when the undercover officer was approached by Aguilar. Aguilar asked the undercover officer to either return the cocaine to him or to give him more money, explaining that he had been "shorted" in their deal. Tr. at 57. The undercover

officer gave Aguilar more money, and Aguilar stated that he wanted the undercover officer to deal directly with him in the future.

A few days later on November 14, 2006, the undercover officer returned to Concho's Body Shop for the purpose of purchasing 3.5 grams (known as an "eight ball") of cocaine. Tr. at 73. At that time, the undercover officer gave Aguilar $175. Mora was present this time, as well, and he gave the undercover officer a bag of cocaine. The officer weighed the cocaine on scales he had taken with him, but the cocaine weighed only 2.8 grams. Aguilar suggested that the undercover officer buy half of an ounce for $500 the next time, and Aguilar would at that time give him extra cocaine to make up for the shortfall on this occasion. On that same day, the undercover officer made arrangements with Aguilar to purchase half of an ounce of cocaine for $500 a few days later.

On November 16, 2006, the undercover officer took $500 to Concho's Body Shop and gave it to Aguilar. Aguilar asked the undercover officer if he "had badges," to which the undercover officer replied in the negative. Tr. at 81. Aguilar then asked if he knew anyone that dealt in marijuana, and the undercover officer replied in the affirmative. Following his cell phone conversation with an unidentified person, Aguilar told the undercover officer that he could not get the cocaine delivered to the shop, so they left the shop in the undercover officer's car. On the way to pick up the cocaine, a police officer stopped the undercover officer's car and made a mock arrest of the undercover officer. Aguilar was not arrested but was given a ride from the scene.

A second undercover officer was introduced into the operation to pose as the partner of the first undercover officer, and, on November 20, 2006, the second undercover officer went to Concho's Body Shop either to retrieve the cocaine that would make up for the previous shortfall or to get money back. The second undercover officer left Concho's that day without receiving anything. However, he returned to Concho's on November 21, 2006, and, at Aguilar's direction, was given a bag containing cocaine.

Based upon the occurrences on November 14 and 21, 2006, the State charged Aguilar with dealing in cocaine, as a Class A felony, and dealing in cocaine, as a Class B felony. Following a jury trial, Aguilar was found guilty of both charges. The trial court sentenced Aguilar to an aggregate sentence of forty-two years. It is from these convictions and this sentence that Aguilar now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE

Aguilar first contends that the trial court erred by denying his motion in limine. Prior to trial, the State filed a Notice of Intent to Offer Inextricably Intertwined Evidence in order to present evidence of Aguilar's uncharged conduct that occurred on November 9, 2006. In response, Aguilar filed a motion in limine to prevent the State from presenting this evidence to the jury. The trial court, following a hearing, denied Aguilar's motion, and this case proceeded to trial. At trial, defense counsel objected to the evidence regarding the transaction on November 9, 2006, and requested a continuing objection. The trial court granted a continuing objection but overruled it.

For clarification, we note that pre-trial rulings on admissibility do not determine the ultimate admissibility of the evidence. *Hightower v. State*, 866 N.E.2d 356, 364 (Ind. Ct. App. 2007), *trans. denied*. Accordingly, a trial court's ruling on a motion in limine does not constitute an appealable issue. *Id*. Only after the evidence is admitted at trial over a specific objection can a party assert an error on appeal. *Id*. Thus, the question on appeal is two-fold: (1) did Aguilar specifically object so as to preserve the issue on appeal, and (2) if so, did the trial court err in admitting certain evidence. *See id*.

As to the first factor, neither party argues that Aguilar did not specifically object to the evidence, and our review of the transcript reveals a specific objection by Aguilar's defense counsel. Therefore, our discussion will focus on the second factor concerning the propriety of the trial court's admission of the evidence. The admissibility of evidence is within the sound discretion of the trial court, and we will not disturb the decision of the trial court absent a showing of abuse of that discretion. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). 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*.

Aguilar maintains that the admission at trial of evidence of his uncharged actions on November 9, 2006 violated Indiana Evidence Rule 404(b). Evid. R. 404(b) provides, in pertinent part: "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 . . ." When faced with a

404(b) question, the court must: (1) decide if the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. *Earlywine v. State*, 847 N.E.2d 1011, 1013 (Ind. Ct. App. 2006). Although Evid. R. 404(b) is designed to exclude evidence introduced to prove the "forbidden inference" of the defendant's propensity to commit the charged crime, the rule does not bar evidence of uncharged criminal acts that are "intrinsic" to the charged offense. *Marshall v. State*, 893 N.E.2d 1170, 1174-75 (Ind. Ct. App. 2008). Other acts are considered "intrinsic" if they occur at the same time and under the same circumstances as the crimes charged. *Wages v. State*, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. "Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted." *Id*.

Here, the State elicited testimony at trial from the undercover officer that on November 9, 2006, he and the CS went to Concho's Body Shop and met with Aguilar. After meeting with Aguilar, the undercover officer, the CS and Marcos Mora went outside where the undercover officer gave Mora the $200, and Mora gave the officer a plastic bag containing cocaine. The undercover officer and the CS then returned to the police station where they prepared to conduct another controlled buy. The undercover

officer testified that the second controlled buy was a separate, unrelated purchase from the earlier purchase involving Aguilar.

At the second controlled buy, the CS entered a house, and the undercover officer remained in the car. While the officer was in the car, Aguilar appeared. Aguilar was upset, and he reached into the car and removed the keys. He informed the undercover officer that he wanted either the return of the cocaine or additional money because "he thought he got shorted." Tr. at 57. The undercover officer gave Aguilar more money. Aguilar asked for the officer's phone number so that the officer could deal directly with Aguilar, and then he left.

Evidence of Aguilar's conduct on November 9, 2006, just a few days before his first charged offense of dealing cocaine, is "intrinsic" to the charged offenses. This evidence is not evidence of an unrelated bad act occurring at another time and another place offered only to create the inference that Aguilar sold drugs to the undercover officers on November 14 and 21. Rather, the evidence shows acts by Aguilar performed within the same time period (just five days prior to his first charged offense) and at the same place (Concho's Body Shop) as the charged offenses.

In applying the balancing test of Evid. R. 403, the trial court has wide latitude, and its determination is reviewed for an abuse of discretion. *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). We first note that all relevant evidence necessarily is prejudicial in a criminal prosecution. *Wages*, 863 N.E.2d at 412. However, under the

Evid. R. 403 balancing test, evidence is excluded when its probative value is substantially outweighed by the danger of *unfair* prejudice. *Id*. (Emphasis added).

In the instant case, the undercover officer's testimony of Aguilar's drug transaction on November 9, 2006 is prejudicial to Aguilar. However, it is evidence of his drug dealing within the same time frame and at the same place as the charged offenses; it is not evidence unrelated to his drug dealing. Consequently, we find that the prejudicial nature of the evidence does not substantially outweigh its probative value. Thus, although the evidence is prejudicial, it does not rise to the level of being *unfairly* prejudicial such that it should have been excluded.

II. SENTENCE

For his second assertion of error, Aguilar claims that his sentence is inappropriate. We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

With regard to the nature of the offense, the advisory sentence is the starting point in our consideration of an appropriate sentence for the crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). Here, Aguilar was convicted of one Class A felony and one Class B felony. The advisory sentence for a Class A felony is thirty

years, and the advisory sentence for a Class B felony is ten (10) years. *See* Ind. Code §§ 35-50-2-4 and -5. Aguilar received a sentence of forty-two (42) years for his conviction of dealing cocaine as a Class A felony, and fifteen (15) years for dealing cocaine, as a Class B felony, to be served concurrently. The result is an aggregate sentence of forty-two (42) years. Further consideration of the nature of this offense reveals that Aguilar has, on at least one occasion, dealt in a large quantity of an illegal drug. Further, it appears that instead of focusing on the legal business of a body shop, Aguilar chooses to use the business as a "front" in order to sell drugs on the premises.

With regard to Aguilar's character we note, as did the trial court, that Aguilar is in this country illegally. He has four misdemeanor convictions, and he was previously charged with possession of cocaine as a D felony. In addition, Aguilar committed the instant offenses while out on bond for other offenses, and he has failed to appear in two previous cases. At the time of sentencing, Aguilar was 35 years old, and he admitted to addiction to marijuana since he was 19 and to cocaine since he was 23.

Aguilar has not carried his burden of persuading this Court that his sentence has met the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494 (declaring that defendant must persuade appellate court that his sentence has met inappropriateness standard of review). In light of the nature of the offense and the character of Aguilar, the sentence is not inappropriate.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court did not err in admitting evidence of Aguilar's uncharged conduct on November 9, 2006, and that Aguilar's sentence is not inappropriate.

Affirmed.

NAJAM, J., and MAY, J., concur.