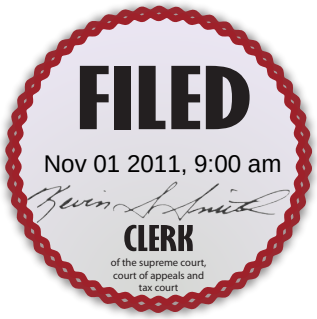

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IN THE COURT OF APPEALS OF INDIANA

ROBERT D. BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-1011-CR-663
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Steven M. Fleece, Judge
Cause No. 10D02-0807-FB-220

November 1, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Robert Brown appeals his convictions for Class B felony attempted dealing in methamphetamine, Class C felony possession of methamphetamine with a firearm, Class D felony possession of methamphetamine, Class D felony maintaining a common nuisance, Class A misdemeanor possession of marijuana, and Class A misdemeanor carrying a handgun without a license. The trial court did not err in allowing the State to amend the charging information three weeks before trial, as we find it did not prejudice his substantial rights. Nor did the trial court err in admitting photographs into evidence of labeled containers that were opened. Further, the evidence is sufficient to support his attempted dealing in methamphetamine conviction, and his sentence is not inappropriate. We do, however, remand for vacation of his possession of methamphetamine conviction because it was merged without being vacated. We affirm in part, reverse in part, and remand with instructions to vacate the lesser Class D felony possession of methamphetamine conviction.

Facts and Procedural History

In June 2008, Indiana State Police Trooper Katrina Smith received information about a residence in Clarksville, Indiana, which belonged to Brown, and was involved in the sale of methamphetamine precursors. On July 1, 2008, Trooper Smith went to the residence and searched the garbage set out for collection. Inside the garbage, Trooper Smith found blue latex gloves with yellow stains, a Walgreen's receipt for pseudoephedrine, and an empty bottle of hydrogen peroxide. Based on her findings, Trooper Smith obtained a search warrant for the house.

Upon executing the search warrant of Brown's house, the officers found many chemicals used in the production of methamphetamine, including red phosphorus, iodine, hydrogen peroxide, and sulfuric acid. Appellant's App. p. 22. Additionally, the officers found chemicals necessary to mix the ingredients and extract the cooked methamphetamine, including hydrochloric acid and sodium hydroxide, along with books about how to manufacture methamphetamine and equipment and tools used in the manufacturing process. *Id.*; Tr. p. 198. The officers searched Brown's car and found more red phosphorous and a partially burnt cigarette containing marijuana. Along with the chemicals, officers found twelve guns inside Brown's home and three guns inside his car.

On July 8, 2008, the State initially charged Brown with five counts: Class B felony dealing in methamphetamine, Class D felony possession of methamphetamine precursors with intent to manufacture, Class D felony maintaining a common nuisance, Class A misdemeanor possession of marijuana, and Class A misdemeanor carrying a handgun without a license. The State amended the charging information in January 2010 to add another charge, Class B felony attempted dealing in methamphetamine. Brown objected to the State's amended information and moved to dismiss the attempted dealing charge. The trial court sustained Brown's objection on April 8, 2010, but allowed the State to re-file and add greater specificity to the Class B felony attempted dealing in methamphetamine charge.

On September 7, 2010, which was three weeks before trial, the State moved to amend the attempted dealing charge and added two more charges, Class C felony

possession of methamphetamine with a firearm and Class D felony possession of methamphetamine. The trial court granted the motion and scheduled an initial hearing on the three added charges. Brown neither objected to the new charges at the initial hearing nor requested a continuance of the trial. On the first morning of the trial, however, Brown renewed his earlier objection to the amended charging information, but he again failed to request a continuance.

Before trial, Brown moved to preclude the State from admitting photographs of various labeled containers of chemicals into evidence on the basis that the labels could not prove the contents of the containers. The trial court denied the motion in limine, and Brown did not object to the the photographs when they were admitted at trial.

Following a jury trial, Brown was found guilty of Class B felony attempted dealing in methamphetamine, Class C felony possession of methamphetamine with a firearm, Class D felony maintaining a common nuisance, Class D felony possession of methamphetamine, Class A misdemeanor possession of marijuana, and Class A misdemeanor carrying a handgun without a license. Brown was found not guilty of Class B felony dealing in methamphetamine and Class D felony possession of methamphetamine precursors with intent to manufacture. The trial court merged—but did not vacate—Brown's lesser Class D felony possession of methamphetamine conviction into his Class C felony possession of methamphetamine with a firearm conviction.

The trial court sentenced Brown to the advisory sentence on each of the six convictions and ordered the sentences to be served consecutively, for an aggregate

sentence of seventeen and one-half years. The court suspended seven and one-half years to probation, resulting in an executed sentence of ten years. In reaching its decision, the trial court noted Brown's lack of criminal history, lack of remorse, admitted illegal drug use, and "high degree of self-delusional righteousness." Tr. p. 550. The trial court also determined that Brown would be a "terrible candidate for probation because the defendant is convinced that he is in the right." *Id.*

Brown now appeals.

Discussion and Decision

Brown raises four issues, which are: (I) whether the trial court erred in allowing the charging information to be amended three weeks before trial, (II) whether the trial court abused its discretion in admitting photographs of various substances and containers into evidence, (III) whether there is sufficient evidence to support his conviction for attempted dealing in methamphetamine, and (IV) whether his sentence is inappropriate.

I. Amended Charging Information

Brown argues that the trial court erred when it allowed the State to amend the charging information to include three additional counts. This amendment was filed on September 7, 2008, three weeks before trial. Brown contends that the amendment was improper because it prejudiced his substantial rights.

Indiana Code section 35-34-1-5(b) provides in relevant part:

> The indictment or information may be amended in matters of substance and the names of material witness may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time:
>
> (1) up to:
>
> (A) thirty (30) days if the defendant is charged with a felony,

> * * * * *
> before the omnibus date; or
> (2) before the commencement of trial;
> if the amendment does not prejudice substantial rights of the defendant.

Brown contends that his substantial rights were prejudiced by the additional charges added by the State in the weeks before trial. Here, it is uncontested that the State's request to amend the charging information was timely under Indiana Code section 35-34-1-5 because the amendment was made before Brown's trial commenced. Thus, the question is whether the amendment prejudiced Brown's substantial rights.

However, "a defendant's failure to request a continuance after a trial court allows a pre-trial substantive amendment to the charging information over the defendant's objection results in waiver." *Wilson v. State*, 931 N.E.2d 914, 918 (Ind. Ct. App. 2010), *trans. denied*. Here, Brown had the opportunity to request a continuance in order to prepare his defense for the newly-added charges, but he chose not to pursue that course. Brown objected to the amended charging information at trial, but he failed to request a continuance. Therefore, he waived the issue for appeal.

Waiver notwithstanding, Brown still would not prevail. Indiana Code section 35-34-1-5(b) allows the State to amend charging information at any time before trial as long as the amendment does not prejudice the defendant's substantial rights. A defendant's substantial rights include "a right to sufficient notice and an opportunity to be heard regarding the charge." *Gaby v. State*, 949 N.E.2d 870, 874 (Ind. Ct. App. 2011). The defendant's substantial rights are not prejudiced if: "(1) a defense under the original information would be equally available after the amendment, and (2) the defendant's

evidence would apply equally to the information in either form." *Id.* Brown argues that his defense preparation and strategy were both prejudiced as a result of the amended charging information. We disagree.

Brown claims that he had an inadequate opportunity to prepare defenses to the Class C felony possession of methamphetamine with a firearm and Class D felony possession of methamphetamine charges. However, the amended charges were just variations of the initial charges, so they should not have been a surprise to Brown and his counsel. Because the new charges were in the same vein as the original charges, the amended information neither deprived Brown of his initial defenses nor required him to present defenses for which he was not prepared. Therefore, the addition of these two charges did not prejudice Brown's substantial rights.

Brown also argues that his defenses were significantly altered by the addition of the Class B felony attempted dealing in methamphetamine charge. Brown had planned to argue that while he may have possessed red phosphorous and iodine, the State had not met its burden of proving that he actually manufactured methamphetamine. By adding the attempted dealing in methamphetamine charge, Brown contends that this defense was foreclosed. However, even under the amended information, Brown could still present this same defense. Solely acknowledging the possession of two chemicals would not prove the State's case that he had taken a substantial step toward dealing in methamphetamine. The amended information therefore did not completely deprive Brown of this defense.

We further note that Brown was aware that the State was going to file the Class B felony attempted dealing in methamphetamine charges in January 2010, eight months before trial. The State was granted leave to re-file the charges with greater specificity, so the addition of this charge was foreseeable to Brown and his counsel. Also, Brown never requested a continuance, which his counsel would have done had he not felt prepared to start the trial.

Thus, even if Brown had properly preserved this issue for appeal, he would not prevail. We therefore affirm the trial court on this issue.

II. Admission of Photographs into Evidence

Brown also argues that the trial court erred in admitting photographs of labeled containers of chemicals into evidence without a proper foundation.

First, we note that Brown's argument is waived for failure to make a timely objection at trial. Although Brown filed a pre-trial motion to suppress, he did not object to the admission of evidence at trial. In order to preserve error for appeal, the appealing party must object to the admission of the evidence at the time it is offered, and the failure to object at trial to the admission of the evidence results in waiver. *Warren v. State*, 757 N.E.2d 995, 998 (Ind. 2001); *see also McCarthy v. State*, 749 N.E.2d 528, 537 (Ind. 2001). Brown did not object at trial, and when the evidence was admitted, Brown's counsel specifically stated he had no objection. Tr. p. 217. Thus, Brown has waived appellate review of any argument regarding the admissibility of the photographs.

Regardless, this was not a fundamental error, nor does Brown try to argue that it was, so the failure to object at trial cannot be overcome. Brown does not dispute the fact

that he possessed red phosphorous and iodine, and laboratory testing confirmed the presence of pseudoephedrine and methamphetamine. Tr. p. 171, 195-96, 348. Even without the photographs of the containers, the State would have been able to show the existence of the chemicals in Brown's house.

Waiver notwithstanding, the trial court properly admitted the photographs into evidence. Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. However, we must also consider the uncontested evidence favorable to the defendant. *Id.* In this sense, the standard of review differs from the typical sufficiency of the evidence case where only evidence favorable to the verdict is considered. *Fair v. State*, 627 N.E.2d 427, 434 (Ind. 1993).

In this case, Brown contends that a proper foundation was not laid for the photographs of the labeled containers found in his home. He argues that the photographs should not have been admitted into evidence because there was no evidence that the contents of the containers were the original contents, as is required by the foundational elements set forth in *Reemer v. State*, 835 N.E.2d 1005 (Ind. 2005). We disagree.

This Court examined the standard set out in *Reemer* in *Robertson v. State*, 877 N.E.2d 507 (Ind. Ct. App. 2007), *reh'g denied*. In *Robertson*, we questioned whether the requirement that there be evidence that the contents of the containers were as the

manufacturer packaged them is applicable when the charge is not one of possession. 877 N.E.2d at 514 n.3. When the question is whether the defendant was manufacturing methamphetamine, ensuring that the containers were unopened and held the original materials is not an essential inquiry. Since the State also charged Brown with manufacturing methamphetamine, the chemicals used in that process would not be untouched and unopened. Therefore, we agree with the State that the *Reemer* foundational requirement is not at issue in this case, as the contents of the containers were circumstantial evidence of the manufacturing of methamphetamine, not substantive evidence of the chemicals inside the containers.

We affirm the trial court on this issue.

III. Sufficiency of the Evidence

Brown also argues that the evidence is insufficient to support his conviction for attempted dealing in methamphetamine.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 923 N.E.2d 773, 781 (Ind. Ct. App. 2010), *reh'g denied, trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences draw therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

Class B felony attempted dealing in methamphetamine occurs when a person "(1) knowingly or intentionally: (A) manufactures; . . . methamphetamine, pure or adulterated; or (2) possesses, with intent to: (A) manufacture; . . . methamphetamine, pure or adulterated." Ind. Code § 35-48-4-1.1. A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime." *Id.* § 35-41-5-1.

Brown argues that his conviction is improper because there is not sufficient evidence that the items found in his house were associated with the manufacturing of methamphetamine or that he engaged in conduct constituting a substantial step toward the commission of that offense. We disagree.

The evidence adduced at trial shows that Brown possessed all of the materials necessary to manufacture methamphetamine in his home, including red phosphorus, iodine, hydrogen peroxide, and sulfuric acid. Appellant's App. p. 22. Additionally, the police executing the search warrant found the chemicals necessary to mix the ingredients and extract the cooked methamphetamine, including hydrochloric acid and sodium hydroxide, along with books about how to manufacture methamphetamine. *Id.*; Tr. p. 198. Possession of all of those materials is sufficient to show that Brown took a substantial step toward dealing in methamphetamine, namely that he had started the process of manufacturing the methamphetamine.

Brown also argues that the chemicals seized were common household items, they were found throughout the house, and that his house was extremely cluttered. However, these arguments are just invitations to reweigh the evidence, which we may not do.

This evidence is sufficient to support Brown's conviction for Class B felony attempted dealing in methamphetamine.[1]

IV. Inappropriate Sentence

Brown contends that his executed sentence of ten years is inappropriate in light of the nature of the offenses and his character. We disagree.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). Also, "[i]n assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge." *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

The trial court sentenced Brown to the advisory sentences for all of his convictions, totaling seventeen and one-half years. The trial court ordered ten years to be

[1] Brown also argues that the inconsistent jury verdicts give rise to a question about the sufficiency of the evidence for his attempted dealing in methamphetamine conviction. We disagree.

executed, the advisory sentence for Class B felony attempted dealing in methamphetamine. The remainder of the sentence was suspended to probation.

Regarding the nature of the offense, there is nothing in the record that indicates that this sentence is inappropriate. Brown possessed a multitude of chemicals and instruments needed to produce methamphetamine in his home, in addition to small amounts of marijuana, methamphetamine, and many firearms and ammunition. He was also a large supplier of red phosphorous and iodine to methamphetamine labs in Southern Indiana. Appellant's App. p. 196. The nature of this offense is serious.

Regarding the character of the offender, Brown does not have a prior criminal record, but his pre-sentence investigation report shows a long history of illicit drug use beginning at the age of nineteen. *Id.* at 195-96. Brown also lied to the trial court and to the probation department, claiming that he had obtained degrees from the University of Wisconsin and that he lost his job due to a faulty drug test. In reality, Brown never obtained those degrees, and he lost his job for distributing methamphetamine and being under the influence of illegal drugs on company property. *Id.* at 193. Additionally, the trial court noted that Brown had a "total lack of remorse and . . . a high degree of self delusional righteousness." Tr. p. 550. A lengthy letter written after trial further indicates that Brown was unwilling to take responsibility for his actions. In this letter, Brown blames his conviction on faulty lab results and rigged jury instructions. Appellant's App. p. 216-19.

After due consideration of the trial court's decision, we cannot say that Brown's executed sentence of ten years is inappropriate in light of the nature of the offenses and his character.

As a final matter, Brown contends that the trial court's merger of his Class C felony possession of methamphetamine with a firearm and Class D felony possession of methamphetamine charges without vacating the lesser charge violates double jeopardy. The State concedes this point. *See* Appellee's Br. p. 3 n.7. Merger for the purpose of sentencing is an insufficient remedy because the entry of a judgment on both counts is a violation of the Indiana Double Jeopardy Clause. *Morrison v. State*, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005), *trans. denied*. Therefore, Brown's conviction for Class D felony possession of methamphetamine must be vacated.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and DARDEN, J., concur.