# MEMORANDUM DECISION



IN THE

# Court of Appeals of Indiana



Daniel L. Creech,
*Appellant-Defendant*

v.

State of Indiana,
*Appellee-Plaintiff*

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June 28, 2024

Court of Appeals Case No.
23A-CR-2675

Appeal from the Dearborn Circuit Court

The Honorable Frank Aaron Negangard, Judge

Trial Court Cause No.
15C01-2206-F2-000004

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**Memorandum Decision by Judge Felix**
Judges Riley and Kenworthy concur.

**Felix, Judge.**

## Statement of the Case

[1] Daniel Creech, along with Karla Homola and inmates Matthew Gabbard, Richard Oldfield, and Dustin Cole, planned to smuggle methamphetamine into the Dearborn County Security Center (the "Security Center"). On two occasions, Creech sold methamphetamine to Homola who then helped Gabbard bring that methamphetamine into the Security Center through a hole he had made in Oldfield's cell window. Shortly after the second delivery, correctional officers discovered some of the meth. Creech was convicted of two counts of dealing in methamphetamine and one count of conspiracy to deal in meth, and he was found to be a habitual offender. The trial court sentenced Creech to a total of 50 years executed at the Indiana Department of Correction. Creech now appeals and presents five issues for our review, which we revise and restate as the following four issues:

1. Whether the State presented sufficient evidence to support Creech's convictions;
2. Whether the jury instruction on direct versus circumstantial evidence resulted in fundamental error;
3. Whether the trial court abused its discretion by denying Creech's motion for separate trials; and
4. Whether Creech's sentence is inappropriate under Indiana Appellate Rule 7(B).

[2] We affirm.

## Facts and Procedural History

[3] In March 2022, Gabbard, Oldfield, and Cole were incarcerated in the Security Center in Lawrenceburg, Indiana. Gabbard shared a cell with Cole, and Oldfield was in a different cell located in the same block. In this cell block, inmates could move freely around the block for significant portions of the day. At some point prior to March 5, 2022, Gabbard and Oldfield created a small hole in the window of Oldfield's cell window. The hole was a little bigger than a quarter, and Gabbard planned to use the hole to smuggle methamphetamine into the Security Center.

[4] On March 5, 2022, Gabbard sent text messages to Homola, his ex-girlfriend asking Homola to buy methamphetamine from Creech and bring it to the Security Center. Gabbard arranged for people to send money to Homola through her "cash app." Tr. Vol. V at 123. Gabbard also contacted Creech, who Gabbard called "Crow Bar," Tr. Vol. IV at 144, asking him to send "Carla thru," Ex. Vol. I at 46. Gabbard first negotiated with Creech to purchase five grams of meth, but Gabbard then increased the amount to seven grams. Homola and Creech discussed the location and amount of money needed to purchase seven grams of meth. Creech confirmed with Gabbard that Homola had contacted him and they were working out the details of the purchase.

[5] Homola received $140 and used that money to buy seven grams of methamphetamine from Creech. Homola told Creech that she was taking the methamphetamine to Gabbard. Creech then messaged Gabbard and told him, "I just seen bat girl gave her a hard 8." Ex. Vol. I at 47. After Homola bought

the meth, Gabbard told her to put the drugs into a condom and take it to the Security Center. Once Homola arrived outside the Security Center, Gabbard shone the light of an e-cigarette from Oldfield's cell to show her where he was located. Homola then found the string that Gabbard had thrown out of the hole in the window and tied the condom onto the string. At the time, Gabbard, Oldfield, and Cole were waiting in Oldfield's cell. Once the condom was tied to the string, Gabbard and Oldfield pulled the string and condom into the cell. The three inmates then took the methamphetamine to Gabbard's cell, used some of it, and split the remaining methamphetamine between Gabbard and Oldfield.

[6] The next day on March 6, Gabbard texted Homola and asked for "[a] repeat of the night before." Tr. Vol. V at 140. Again, Gabbard arranged for Homola to get $140, and Homola bought seven grams of methamphetamine from Creech. Creech later contacted Gabbard and told him, "I took care of ol girl." Ex. Vol. I at 58. Gabbard replied, "Gratitude how many!" *Id.* Creech responded, "7," and confirmed that Homola had paid the same price as the day before. *Id.*

[7] As she did the first time, Homola put the drugs in a condom and tied them to a string outside of the Security Center. Gabbard and Oldfield then pulled the second delivery of methamphetamine through Oldfield's cell window. Just like the previous day, Gabbard, Oldfield, and Cole took the methamphetamine to Gabbard's cell, used some of the methamphetamine, and split the remaining methamphetamine between Gabbard and Oldfield.

[8] On March 8, Gabbard used some of the methamphetamine in his cell and started "acting weird." Tr. Vol. III at 189–90. A correctional officer went to Gabbard's cell to check on him and found Gabbard kneeling on his bed and staring out the window. Gabbard then told the officer that "the aliens in the parking lot were swallowing people as they were walking by, they were swallowing cars, that the aliens had already swallowed up the CSX railroad stuff out there." *Id.* at 192. Correctional officers searched Gabbard's cell and found a clear plastic bag containing 2.19 grams of methamphetamine.

[9] On June 1, 2022, the State charged Creech with two counts of dealing in methamphetamine as Level 3 felonies[1] and one count of conspiracy to deal in methamphetamine as a Level 2 felony[2]. The State also alleged that Creech was a habitual offender[3] and was affiliated with a criminal organization when he committed the alleged offenses[4].

[10] Approximately a week and a half before Creech and Gabbard's joint trial was set to begin, Creech filed a Motion for Separate Trial. After a hearing, the trial court denied Creech's motion. Creech renewed his motion at trial, and the trial court denied it again. The jury found Creech guilty as charged. Creech admitted the habitual offender enhancement, and, in exchange, the State

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[1] Ind. Code § 35-48-4-1.1(a)(1)(A), (d)(2); *id.* §§ 35-48-1-16.5, 35-41-2-4.

[2] *Id.* § 35-48-4-1.1(a)(1)(A), (e)(2); *id.* §§ 35-41-5-2, 35-48-1-16.5.

[3] *Id.* § 35-50-2-8(d).

[4] *Id.* § 35-50-2-15.

dismissed the criminal organization enhancement. The trial court sentenced Creech to a total aggregate sentence of 50 years executed at the Indiana Department of Correction. This appeal ensued.

## Discussion and Decision

### 1. There Was Sufficient Evidence to Sustain Creech's Convictions for Conspiracy to Deal Methamphetamine and Dealing Methamphetamine

[11] Creech argues that the State presented insufficient evidence at trial to support his convictions for dealing methamphetamine and conspiracy to deal methamphetamine. "Sufficiency-of-the-evidence arguments trigger a deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility, instead reserving those matters to the province of the jury.'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018)), *reh'g denied* (Aug. 17, 2023). In our review, "we consider only 'the probative evidence and reasonable inferences supporting the verdict.'" *Id.* (quoting *Matheney v. State*, 583 N.E.2d 1202, 1208 (Ind. 1992)). We will reverse a guilty verdict only when no reasonable trier of fact "could find the elements of the crime proven beyond a reasonable doubt." *Lock v. State*, 971 N.E.2d 71, 74 (Ind. 2012) (quoting *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)).

[12] Creech claims the State did not present sufficient evidence to demonstrate that he conspired to deal methamphetamine and dealt methamphetamine. We address each argument in turn.

### *Conspiracy*

[13] To prove that Creech conspired to deal methamphetamine as a Level 2 felony, the State needed to prove beyond a reasonable doubt that (1) Creech intended to deal methamphetamine in an amount at least five grams but less than ten grams, (2) Creech agreed with another person to deal methamphetamine in an amount at least five grams but less than ten grams, and (3) either Creech or a person he agreed with committed an overt act in furtherance of their agreement. *See* Ind. Code. § 35-41-5-2(a), (b); *id.* § 35-48-4-1.1(a)(1)(A), (e)(2).

[14] Here, the evidence showed that on two separate occasions, Gabbard and Homola contacted Creech about purchasing seven grams of methamphetamine from him, Creech agreed to sell Homola seven grams of meth, and Creech accepted $140 from Homola in exchange for seven grams of meth. The evidence also shows that Creech knew Homola was buying the methamphetamine for Gabbard and intended to take it to him at the Security Center. Thus, the State presented sufficient evidence to support Creech's conviction for conspiracy to deal methamphetamine as a Level 2 felony.

### *Dealing*

[15] To prove that Creech dealt in methamphetamine as a Level 3 felony, the State needed to prove that Creech knowingly or intentionally delivered at least one gram but less than five grams of meth. *See* I.C. § 35-48-4-1.1(a)(1)(A), (d)(2). Creech argues only that the State failed to present sufficient evidence concerning the weight of the methamphetamine he dealt.

[16] Where, as here, the weight of the drug enhances the offense, *see* I.C. § 35-48-4-1.1(a), (d)(2), the weight of the drug is an essential element of that offense, *Halsema v. State*, 823 N.E.2d 668, 673 (Ind. 2005). To prove weight, "the State must either offer evidence of its actual, measured weight or demonstrate that the quantity of the drugs or controlled substances is so large as to permit a reasonable inference that the element of weight has been established." *Id.* at 674. There is more than one way the State can provide direct evidence of the actual measured weight of a drug. *Buelna v. State*, 20 N.E.3d 137, 147 (Ind. 2014). One example is that the State can elicit testimony of a forensic scientist who weighed the drug. Another way to present direct evidence is from "those who regularly use or deal in the substance" to establish the weight of the substance. *Id.* (quoting *Halsema*, 823 N.E.2d at 674). A third way is to present testimony from law enforcement officers who regularly investigate drug crimes. *Id.* The State may also provide circumstantial evidence to corroborate this direct evidence. *See id.* at 148. The jury can "reasonably rely on that testimony alone" to reach its conclusion as to the actual measured weight of a substance. *Id.*

[17] Here, the text messages between Homola and Creech show that both transactions were for seven grams of meth. Both Homola and Cole testified that they had previously used methamphetamine and believed the amount delivered to the jail was seven grams. Cole also testified that Gabbard anticipated receiving seven grams of methamphetamine and was satisfied with the quantity of methamphetamine delivered. Thus, the State presented

sufficient evidence to support Creech's two convictions for dealing in methamphetamine as Level 3 felonies.

## 2. The Trial Court Did Not Commit Fundamental Error by Giving a Jury Instruction About Direct and Circumstantial Evidence

[18] Creech argues the trial court erred by giving the following instruction:

> The parties in this case may prove a fact by one or two types of evidence: direct evidence or circumstantial evidence. Direct evidence is direct proof of a fact. Circumstantial evidence is indirect proof of a fact. For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal's tracks in the snow. It is not necessary that any fact be proved by direct evidence. You may consider both direct evidence and circumstantial evidence as proof.

Tr. Vol. VI at 167. As Creech acknowledges, he did not object to this instruction at trial, so he now claims the trial court committed fundamental error in giving it.

[19] "An error is fundamental if it 'made a fair trial impossible' or if it clearly and blatantly violated basic principles of due process resulting in 'undeniable and substantial potential for harm.'" *Batchelor v. State*, 119 N.E.3d 550, 559 (Ind. 2019) (quoting *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018)). When reviewing a jury instruction for fundamental error, "we need not reverse unless the instructions as a whole—the jury charge—misled the jury on the applicable

law." *Id.* (citing *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 300 (Ind. 2009)).

[20] Creech contends that the instruction was an incorrect statement of law, stating that certain facts cannot be proven by circumstantial evidence. Specifically, Creech claims that the State could not prove the weight enhancement of his charges by circumstantial evidence. Our Supreme Court has stated "only direct evidence, not circumstantial evidence, may sustain a weight enhancement." *Buelna*, 20 N.E.3d at 148. However, Creech has not demonstrated that this error affected his right to a fair trial. Creech claims that the jury incorrectly relied on circumstantial evidence to prove the weight of the methamphetamine, but he has not highlighted any circumstantial evidence in the record which the jury could have relied on. Rather, as we discussed earlier, the State provided sufficient direct evidence of the weight of the methamphetamine, and Creech has not demonstrated that the instructions as a whole made a fair trial impossible. Thus, we conclude that this instruction does not amount to fundamental error.

### 3. The Trial Court Did Not Abuse Its Discretion by Denying Creech's Motion for Separate Trials

[21] Creech also contends that the trial court abused its discretion when it denied his motion requesting to be tried separately from Gabbard. Several defendants may be joined in a single prosecution. I.C. § 35-34-1-9. However, upon a motion by a defendant or the prosecutor, "the court shall order a separate trial of defendants whenever the court determines that a separate trial . . . is

appropriate to promote a fair determination of the guilt or innocence of a defendant." *Id.* § 35-34-1-11(b). We review a trial court's decision to grant or deny a motion for a separate trial for an abuse of discretion. *Fayson v. State*, 726 N.E.2d 292, 295 (Ind. 2000) (citing *Averhart v. State*, 470 N.E.2d 666, 680 (Ind. 1984)). We measure the trial court's decision "by what actually occurred at trial rather than what is alleged in the motion." *Lee v. State*, 684 N.E.2d 1143, 1147 (Ind. 1997) (quoting *Castro v. State*, 580 N.E.2d 232, 234 (Ind. 1991)). The defendant has the burden of showing "that a fair trial could not otherwise be had," which requires more than demonstrating "that severance would enhance the prospects for acquittal." *Lee*, 684 N.E.2d at 1149 (quoting *Blacknell v. State*, 502 N.E.2d 899, 905 (Ind. 1987)).

[22] Creech argues that "there was unnecessary spillover of prejudicial evidence" that he claims was irrelevant and lacked probative value and that would have been excluded had he been tried separately from Gabbard. Appellant's Br. at 22. In particular, Creech claims the following evidence was "highly prejudicial," "irrelevant," and "confusing to the jury": evidence that Gabbard saw aliens, Homola's testimony that she included prescription medications in the condoms, and evidence of Gabbard and Oldfield's creation of a hole in Oldfield's cell window. *Id.* at 22–23 (citing Tr. Vol. III at 186; Tr. Vol. V at 125, 175, 220).

[23] Assuming arguendo that this evidence was irrelevant, had little to no probative value, and would not have been admitted at trial if Creech was tried individually, Creech does not explain how this evidence was confusing to the

jury or otherwise prevented him from receiving a fair trial. *See* Ind. Appellate Rule 46(A)(8)(a); *Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) (quoting *Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 364 (Ind. Ct. App. 2021)); *Lee*, 684 N.E.2d at 1149 (quoting *Blacknell*, 502 N.E.2d at 905). Creech also does not present any evidence that the jury was confused by the presentation of the above-listed evidence. *See Dill v. State*, 727 N.E.2d 22, 24 (Ind. Ct. App. 2000), *aff'd on other grounds by* 741 N.E.2d 1230, 1234 (Ind. 2001) (summarily affirming Court of Appeals decision on severance issue).

[24] In other words, Creech has failed to meet his burden of showing that he was denied a fair trial. *See Lee*, 684 N.E.2d at 1149 (quoting *Blacknell*, 502 N.E.2d at 905). In light of our "strong judicial policy in favor of joint trials where codefendants are charged with the same crime," *id.* (quoting *Castro v. State*, 580 N.E.2d 232, 234, 235 (Ind. 1991)), we conclude the trial court did not abuse its discretion in denying Creech's motion for separate trials.

## 4. Creech's Sentence is Not Inappropriate under Appellate Rule 7(B)

[25] Finally, Creech argues his sentence is inappropriate under Appellate Rule 7(B) and should be revised.[5] The Indiana Constitution authorizes us to independently review and revise a trial court's sentencing decision. *Faith v.*

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[5] In his argument on this issue, Creech claims not only that his sentence was inappropriate under Appellate Rule 7(B), but also that the trial court abused its discretion. Creech only discusses the law relevant to and analyzes his sentence under Appellate Rule 7(B); he does not explain how the trial court abused its discretion in imposing his sentence. Therefore, to the extent Creech is arguing the trial court abused its discretion at sentencing, he has waived that issue for our review by failing to provide cogent argument. *See* App. R. 46(A)(8)(a); *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015).

*State*, 131 N.E.3d 158, 159 (Ind. 2019) (citing Ind. Const. art. 7, §§ 4, 6; *McCain v. State*, 88 N.E.3d 1066, 1067 (Ind. 2018)). That authority is implemented through Appellate Rule 7(B), which permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." *Faith*, 131 N.E.3d at 159 (quoting App. R. 7(B)).

[26] Sentencing is "principally a discretionary function in which the trial court's judgment should receive considerable deference." *Lane v. State*, 232 N.E.3d 119, 122 (Ind. 2024) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008)). To overcome this deference, the defendant must present "compelling evidence portraying in a positive light the nature of the offense and the defendant's character." *Id.* (internal quotation marks omitted) (quoting *Oberhansley v. State*, 208 N.E.3d 1261, 1267 (Ind. 2023)).

> Our role is primarily to "leaven the outliers" and identify "guiding principles" for sentencers, rather than to achieve the "perceived 'correct' result" in each case. *Cardwell*, 895 N.E.2d at 1225. As such, we "focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Id.* Ultimately, we rely on our "collective judgment as to the balance" of all the relevant considerations involved, which include "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Id.* at 1224, 1226.

*Lane*, 232 N.E.3d at 122. In conducting this analysis, "we are not limited to the mitigators and aggravators found by the trial court." *Brown v. State*, 10 N.E.3d 1, 4 (Ind. 2014).

[27] When considering the nature of the offense, we start with the advisory sentence. *Brown*, 10 N.E.3d at 4 (citing *Anglemyer*, 868 N.E.2d at 494). Here, Creech was convicted of one Level 2 felony and two Level 3 felonies, and he was also found to be a habitual offender. "A person who commits a Level 2 felony shall be imprisoned for a fixed term of between ten (10) and thirty (30) years, with *the advisory sentence being seventeen and one-half (17 ½) years*." I.C. § 35-50-2-4.5 (emphasis added). "A person who commits a Level 3 felony . . . shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with *the advisory sentence being nine (9) years*." *Id.* § 35-50-2-5 (emphasis added). A person found to be a habitual offender shall be sentenced "to an additional fixed term that is between . . . eight (8) years and twenty (20) years." *Id.* § 35-50-2-8(i)(1).

[28] The trial court sentenced Creech to 30 years executed at the DOC on his Level 2 felony conviction and 16 years executed at the DOC on both of his Level 3 felony convictions, all of which the trial court ordered Creech to serve concurrently. The trial court enhanced Creech's conspiracy conviction by 20 years executed at the DOC because he is a habitual offender. In total, Creech received an aggregate sentence of 50 years at the DOC.

[29] Where, as here, the trial court deviated from the advisory sentence, one factor we consider is "whether there is anything more or less egregious about the

offense committed by the defendant that makes it different from the 'typical' offense accounted for by the legislature when it set the advisory sentence." *T.A.D.W. v. State*, 51 N.E.3d 1205, 1211 (Ind. Ct. App. 2016) (quoting *Holloway v. State,* 950 N.E.2d 803, 806–07 (Ind. Ct. App. 2011)), *as amended* (May 26, 2023). We also consider whether the offense was "accompanied by restraint, regard, and lack of brutality." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[30] Here, Creech communicated with both Homola and Gabbard to coordinate Homola's purchases of methamphetamine from Creech. Creech sold a total of 14 grams of methamphetamine to Homola on two separate days, and he knew that Homola was working with Gabbard to get that methamphetamine to him in the Security Center. The fact that Creech knew the drugs were intended for inmates at the Security Center is evidence that makes this offense worse than the standard dealing and conspiracy to deal offenses. Many inmates are addicted to drugs, and one of the places where an inmate should be secure in knowing that he will not be able to obtain drugs is in a local jail or correctional center. In short, the introduction of methamphetamine into the Security Center is a fact that makes this offense more egregious than the typical dealing and conspiracy to deal offenses.

[31] In considering the character of the offender, "we engage in a broad consideration of a defendant's qualities," *T.A.D.W.*, 51 N.E.3d at 1211 (citing *Aslinger v. State*, 2 N.E.3d 84, 95 (Ind. Ct. App. 2014), *clarified on other grounds on*

*reh'g*), including whether the defendant has "substantial virtuous traits or persistent examples of good character," *Stephenson*, 29 N.E.3d at 122.

[32] Creech has an extensive criminal history spanning 25 years and three states. When he was a juvenile, Creech had informal adjustments for misdemeanor conversion and misdemeanor criminal mischief. Creech was later detained in a juvenile center for the latter offense after he violated the terms of that informal adjustment and then his probation. As an adult, Creech was convicted of at least 17 felonies and 19 misdemeanors, including but not limited to the following crimes: unlawful possession of a syringe, illegal use or possession of drug paraphernalia, possession of meth, giving an officer a false name or address, multiple instances of tampering with a coin machine, shoplifting, possession of burglary tools, multiple instances of theft and attempted theft, check deception, multiple instances of check fraud, multiple instances of criminal mischief, and multiple instances of obstructing official business. Creech also violated his probation at least 11 times.

[33] In his presentence investigation report, Creech stated that his criminal activity was linked to his substance abuse. Creech—who was 40 years old at the time of sentencing—began smoking marijuana at 14 years old, using crack cocaine at 18 years old, and using methamphetamine when he was approximately 36 or 37 years old. Additionally, Creech is the parent of one minor child; Creech's mother adopted the child and has cared for him since he was three months old. According to Creech's mother, Creech has an off and on relationship with the

child and spends time with the child when he is not incarcerated. At the time of sentencing, Creech had not been employed since 2018.

[34] Based on the serious nature of Creech's offenses and his extensive history of criminal behavior, we cannot say that Creech has produced compelling evidence demonstrating that the nature of his offense or his character renders his sentence inappropriate. *See Hayko v. State*, 211 N.E.3d 483, 487 n.1 (Ind. 2023), *reh'g denied* (Aug. 18, 2023).

## Conclusion

[35] In sum, the State presented sufficient evidence to support Creech's convictions, it was not fundamental error for the trial court to give the jury instruction regarding direct versus circumstantial evidence, the trial court did not abuse its discretion by denying Creech's motion for a separate trial, and Creech's sentence is not inappropriate under Appellate Rule 7(B). We therefore affirm the trial court on all issues raised.

[36] Affirmed.

Riley, J., and Kenworthy, J., concur.

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