MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph Alford,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff

March 9, 2023

Court of Appeals Case No. 22A-CR-2366

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-1812-F4-91

Memorandum Decision by Judge May
Judges Mathias and Bradford concur.

May, Judge.

[1] Joseph Alford appeals following his convictions of Level 4 felony possession of a firearm by a serious violent felon ("SVF"),[1] Class A misdemeanor resisting law enforcement,[2] and Class B misdemeanor leaving the scene of an accident.[3] Alford presents one issue for our review, which we revise and restate as whether the trial court committed fundamental error when it responded to questions submitted by the jury during its deliberations by directing the jurors to review the jury instructions previously given to them. We affirm.

Facts and Procedural History

[2] At approximately 11:23 p.m. on December 25, 2018, Alford was driving west on Lincoln Way in Mishawaka. Alford drove his vehicle off the roadway and the front passenger side of his vehicle collided with a light post. After hitting the post, Alford's vehicle slid across the roadway and came to a rest facing west in the east bound lane. A nearby homeowner called 911, and Officer Harold Yost of the Mishawaka Police Department responded to the dispatch. Officer Yost noticed the front-right portion of the vehicle was severely damaged, two airbags had deployed, and the windshield was shattered. Officer Yost noticed Alford standing near where the car came to rest. When Officer Yost started to approach Alford, Alford started to back away. He then turned and ran away.

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[1] Ind. Code § 35-47-4-5.

[2] Ind. Code § 33-44.1-3-1.

[3] Ind. Code § 9-26-1-1.1.

Officer Yost yelled, "Stop. Police." (Tr. Vol. II at 114.) Nevertheless, Alford continued to run away. As Alford was running away, he kept putting his hands in and out of his pockets because, as he later told Officer Yost, "he wanted to make sure he didn't have anything illegal on him." (*Id*. at 117.)

[3] Officer Yost pursued Alford on foot, and Officer Daniel Braniff joined the foot pursuit. Officer Yost and Officer Braniff caught Alford a few blocks away from the crash site, and Officer Yost handcuffed him. Officer Braniff then drove Alford to a local hospital for a medical evaluation, and while enroute to the hospital, Alford told Officer Braniff that "the reason that he left the scene of the crash was because his license was suspended." (*Id*. at 144.) After the medical evaluation, Officer Braniff transported Alford to jail.

[4] Officer Yost and Officer Ryan Kuzmicz conducted an inventory search of Alford's vehicle before impounding it. During the inventory search, the officers found a handgun on the driver's side floorboard, near the gas pedal. The Indiana State Police Lab tested the gun and found Alford's DNA on the trigger and the bottom of the magazine.

[5] The State charged Alford on December 27, 2018, with Class A misdemeanor resisting law enforcement, Class B misdemeanor leaving the scene of an accident, and Level 4 felony unlawful possession of a firearm by a SVF. Alford

was alleged to be a SVF because of a Class B felony armed robbery[4] conviction in 2001. The trial court held a two-day jury trial beginning on July 11, 2022.

[6] Sunjoi Bradshaw, the mother of one of Alford's children, testified that she, Alford, and her nephew Cameron Lee drove Alford's vehicle from Indianapolis to Mishawaka on December 25, 2018. At some point during the day, Bradshaw and Lee drove from Mishawaka to South Bend to visit Bradshaw's mother, and Alford remained at his sister's house. Bradshaw testified that, before she and Lee went into her mother's house in South Bend, Lee stashed his handgun underneath the driver's seat of Alford's vehicle. After visiting her mother, Bradshaw and Lee returned to Alford's sister's house. Alford then left in his car to visit a friend, and it was on the way to the friend's house that Alford got into the accident. Both Bradshaw and Lee testified they did not tell Alford about the gun that Lee had placed under the driver's seat of Alford's car while at the home of Bradshaw's mother. Lee also explained that Alford had gone with him when he purchased the handgun about three or four days before Christmas and that Alford handled the gun while Lee contemplated purchasing it.

[7] During its closing argument, the State recounted the evidence, including Lee's testimony, and the deputy prosecutor said: "So my thought to you and my proposition here is the crime occurred not necessarily on the 25th of December. The crime occurred three or four days earlier in Indianapolis." (*Id*. at 210.)

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[4] Ind. Code § 35-42-5-1 (1982).

The trial court called a side bar conference, and asked the State: "Don't you have to prove that he possessed a firearm in St. Joseph County?" (*Id.*) The State responded affirmatively and stated, "I'm working on it." (*Id.*) The State then concluded its closing argument:

> So the question then becomes where did he possess it? Mr. Lee said it was down in Indianapolis. You can believe Mr. Lee or not. You can also believe whether or not he placed the gun in the car here in St. Joseph County. You can also choose to believe whether or not the defendant touched the gun here in St. Joseph County.
>
> I submit, ladies and gentleman, that Mr. Lee and his affinity for guns does not necessarily mean that he placed the gun himself in the car. I think it's an inference that can be made since it's the defendant's car and he's all alone in the car at the time that the defendant touched that gun, placed that gun in the car here in St. Joseph County, and that's what I'm asking you to find today.

(*Id.* at 211.)

[8] After each side finished with its closing argument, the trial court read the final jury instructions, and the jury retired to deliberate. During deliberations, the jury sent three questions to the trial court: "Is the possession charge only related to the time of the accident or evidence presented of possession at any time previously? Does it include the testimony about the purchase in Indianapolis? How to define 'possession'?" (*Id.* at 231-32.) Without objection from either party, the trial court responded: "So the answer to your first two questions can

be found in the instructions. As to the last question, you received all the instructions." (*Id*. at 232.)

[9] The jury returned guilty verdicts on all counts. On September 13, 2022, the trial court sentenced Alford to consecutive terms of six years in the Indiana Department of Correction for his Level 4 possession of a firearm by a SVF conviction, thirty days with respect to his Class A misdemeanor resisting law enforcement conviction, and thirty days with respect to his Class B misdemeanor leaving the scene of an accident conviction, for an aggregate sentence of six years and two months.

Discussion and Decision

[10] Alford contends the trial court abused its discretion when it did not further instruct the jury in response to the three questions the jury posed while it was deliberating. We generally leave instructing the jury to the sound discretion of the trial court, and we review such decisions for an abuse of discretion. *Schermerhorn v. State*, 61 N.E.3d 375, 381 (Ind. Ct. App. 2016), *trans. denied*. "To constitute an abuse of discretion, the instructions given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury." *Murray v. State*, 798 N.E.2d 895, 900 (Ind. Ct. App. 2003). However, a party that fails to object at trial waives the issue for appellate review unless the error was so substantial as to constitute fundamental error. *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013).

[11] Alford acknowledges he did not object to the trial court's proposed response before it was given to the jury, and he therefore argues the response amounted to fundamental error. The fundamental error doctrine "is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and [when the] violation is so prejudicial to the rights of the defendant as to make a fair trial impossible." *Jewell v. State*, 887 N.E.2d 939, 942 (Ind. 2008). "In other words, to establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not *sua sponte* raising the issue[.]" *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014), *reh'g denied*. To assess whether fundamental error occurred, we look at the alleged error in the context of all that happened at trial and all the information given to the jury—including the evidence admitted at trial, closing arguments, and jury instructions—to determine whether the alleged error had "such *an undeniable and substantial effect on the jury's decision* that a fair trial was impossible." *Id*. (emphasis in original).

[12] Indiana Code section 34-36-1-6 provides:

> If, after the jury retires for deliberation:
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> (1) there is a disagreement among the jurors as to any part of the testimony, or
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> (2) the jury desires to be informed as to any point of law arising in the case;

> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

Alford reads that statute to mean the "trial court is obligated by statute to respond to a jury's question(s) that related [sic] to a point of law." (Appellant's Br. at 9.) He asserts that because the trial court chose not to provide the jury with further instructions, "[t]he jury could very well have convicted Alford based upon the testimony that he 'possessed' the gun in Indianapolis when he examined it during the sale to Mr. Lee." (*Id*. at 12.) However, Indiana Code section 34-36-1-6 "does not mandate that the trial court provide information automatically and mechanically every time the jury requests it, or that a failure to answer every question posed by the jury is reversible error per se." *Foster v. State*, 698 N.E.2d 1166, 1170 (Ind. 1998).

[13] In instructing the jury, the trial court has a duty not to invade the province of the jury by inappropriately emphasizing certain facts. *McQuinn v. State*, 197 N.E.3d 348, 351 (Ind. Ct. App. 2022). Indiana Code section 35-37-2-2(6), which governs the order of a criminal trial following empanelment of the jury, provides:

> A charge of the court or any special instructions, when written and given by the court under this subdivision, may not be orally qualified, modified, or in any manner orally explained to the jury by the court. If final instructions are submitted to the jury in written form after having been read by the court, no indication of

> the party or parties tendering any of the instructions may appear on any instruction.

In *Foster*, our Indiana Supreme Court noted its cases interpreting this statute "stand for the proposition that, when the jury indicates that it has a problem in its deliberations concerning an important issue of law on which they were previously instructed, the trial court generally should reread the instructions to the jury without further comment." 698 N.E.2d at 1170. Since *Foster*, the law has evolved to allow trial courts more latitude in assisting the jury. *See Campbell v. State*, 19 N.E.3d 271, 275 (Ind. 2014) ("But for over a decade now trial courts have been given 'greater leeway to facilitate and assist jurors in the deliberative process, in order to avoid mistrials.'") (quoting *Ronco v. State*, 862 N.E.2d 257, 259 (Ind. 2007)). Yet, the trial court's principal purpose in instructing the jury remains "to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Batchelor v. State*, 119 N.E.3d 550, 553 (Ind. 2019) (internal quotation marks omitted).

[14] The first two questions the jury asked were: "Is the possession charge only related to the time of the accident or evidence presented of possession at any time previously? Does it include the testimony about the purchase in Indianapolis?" (Tr. Vol. II at 231-32.) The trial court instructed the jury in both the preliminary and final jury instructions that the crime of possession of a firearm by a SVF was alleged to have occurred "on December 25, 2018, in St. Joseph County[.]" (*Id*. at 96 & 219 ("Count I: On or about December 25, 2018,

in St. Joseph County, State of Indiana, Joseph Pierre Alford, having previously been convicted of a serious violent felony, to wit: Robbery, a Class B felony, in Cause No. 71D04-0012-CF-566.")). Because the previously given instructions already answered those questions, the trial court did not need to further instruct the jury and could simply refer the jury to the instructions already given. Moreover, in its closing argument, the State explained to the jury that, because Alford was the only person in the car when it crashed and Alford owned the vehicle, the jury could infer Alford put the handgun in the vehicle and possessed it in St. Joseph County.

[15] With respect to the jury's third question asking about the meaning of "possession," a "trial court has a duty to give further instructions defining words used in other instructions only if the words are of a technical or legal meaning normally not understood by jurors unversed in the law." *Martin v. State*, 314 N.E.2d 60, 70 (Ind. 1974), *reh'g denied*, *cert. denied*, 95 S. Ct. 833 (1975). For example, in *Inman v. State*, our Indiana Supreme Court held the trial court did not err in responding to a jury question asking for the meaning of "asportation" by providing Black's Law Dictionary's definition of the term.[5] 4 N.E.3d 190, 201 (Ind. 2014). As the State notes, "asportation is not a common word with a common understanding of its definition." (Appellee's Br. at 19.) In contrast, in *Barthalow v. State*, we held the trial court did not commit

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[5] Black's Law Dictionary (11th ed. 2019) defines "asportation" as "[t]he act of carrying away or removing (property or a person)."

fundamental error by not defining the term "bodily injury." 119 N.E.3d 204, 212 (Ind. Ct. App. 2019). We explained "the jury could likely infer from common sense the meaning of bodily injury." *Id*.

[16] Here, as in *Barthalow*, the trial court instructed the jury to rely on their common sense. (Tr. Vol. II at 224-25 ("In weighing the evidence to determine what or whom you will believe, you should use your own knowledge, experience, and common sense gained from day to day living.").) "Possession" is commonly understood to mean "the act of having or taking into control." *Possession*, Merriam-Webster Online Dictionary [https://perma.cc/YK9W-NV2E]. This meaning closely tracks with how we have defined "possession" in caselaw. For example, in *Albrecht v. State*, we explained:

> To prove that a defendant possessed an item, the State may prove either actual possession or constructive possession. Actual possession occurs when a person has direct physical control over an item. Constructive possession is proven when the State shows that the defendant has both the intent and the capability to maintain dominion and control over it.

185 N.E.3d 412, 422 (Ind. Ct. App. 2022) (internal quotation marks and citation omitted), *trans. denied*. "Possession" does not have a legal or technical definition different from how the term is normally understood. Thus, the trial court did not commit fundamental error when it decided not to instruct the jury regarding the definition of "possession" because the legal definition of the term mirrors the term's commonly understood meaning. *See Lohmiller v. State*, 884 N.E.2d 903, 912-13 (Ind. Ct. App. 2008) (holding trial court did not abuse its

discretion in deciding not to further instruct the jury regarding the definition of "material fact").

Conclusion

[17] The trial court did not commit fundamental error when it answered the jury's questions. The jury's first two questions were answered in both the preliminary and final jury instructions, and therefore, the trial court did not err by instructing the jury to consult the instructions it already had. In addition, the trial court did not commit fundamental error in refusing to define "possession" because it is a commonly understood term used in daily life. We accordingly affirm the trial court.

[18] Affirmed.

Mathias, J., and Bradford, J., concur.