MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Frederico Allen Conn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 24, 2023

Court of Appeals Case No.
22A-CR-2170

Appeal from the
Fayette Circuit Court

The Honorable
Hubert Branstetter, Jr., Judge

Trial Court Cause No.
21C01-2103-F2-148

Memorandum Decision by Judge Foley
Judges Vaidik and Tavitas concur.

Foley, Judge.

[1] Frederico Allen Conn ("Conn") appeals his conviction for possession of methamphetamine.[1] We consolidate and restate his claim as a challenge to a jury instruction detailing the fact that possession of methamphetamine is a lesser included offense of dealing in methamphetamine. Conn contends that he should have been convicted of a Level 4 felony rather than a Level 3 felony based on the manner in which the crime was charged. Conn, however, failed to object to the instruction at the trial level and fails to persuade us now that the jury instruction resulted in fundamental error. We affirm.

Facts and Procedural History

[2] On February 23, 2021, a Connersville Police officer was on patrol on Country Club Road in Fayette County. The officer saw Conn driving west and recognized him as someone with active arrest warrants. Conn was arrested, and during a subsequent search of Conn's car, police uncovered several bags of methamphetamine weighing approximately 85 grams in total.

[3] The State charged Conn with dealing in methamphetamine, a Level 2 felony; possession of a syringe, a Level 6 felony; operating a vehicle as a habitual traffic violator, a Level 6 felony; and possession of paraphernalia, a Class C misdemeanor.[2] The original charging information referenced the fact that the

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[1] Ind. Code § 35-48-4-6.1(d)(1)

[2] The State eventually dropped the misdemeanor charge.

methamphetamine at issue totaled 85 grams, but the State opted to remove that reference shortly before the trial, which occurred on July 25, 2022.

[4] Prior to closing arguments, the trial court asked the parties if they had any objections to the final jury instructions. Neither party raised any substantive objections. Conn did not object to final instruction five, which provided:

> The crime of possession of Methamphetamine is defined by law as follows and is a lesser included offense of Count I.
>
> A person who knowingly or intentionally possesses methamphetamine (pure or adulterated) commits possession of methamphetamine, a Level 6 felony, except as provided in subsections (b) through (d).
>
> The offense is a Level 3 felony if: the amount of the drug involved is at least twenty-eight (28) grams. I.C. 35-48-4-6-1(a) and (d).

Appellant's App. Vol. II p. 91.

[5] The jury convicted Conn of possession of a syringe and operating a vehicle as a habitual offender but acquitted him of the dealing in methamphetamine charge. Rather, they returned a verdict of possession of methamphetamine as a Level 3 felony. This appeal followed.

Discussion and Decision

[6] Though he frames it differently, Conn raises a single claim of fundamental error pertaining to the jury instructions. In his brief, Conn concedes that he did not

object to the jury instructions. He argues, however, that the requirement that a defendant object to a jury instruction is, in fact, not a requirement at all, as it has its roots in dicta. We cannot agree.

[7] "'Failure to object to a jury instruction results in waiver on appeal, unless giving the instruction was fundamental error.'" *Barthalow v. State*, 119 N.E.3d 204, 210–11 (Ind. Ct. App. 2019) (quoting *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000)). "An error may be fundamental and thus not subject to waiver, if it is a 'substantial blatant violation of basic principles.'" *Id*. (quoting *Moreland v. State*, 701 N.E.2d 288, 294 (Ind. Ct. App. 1998)). "The error must be so prejudicial to the defendant's rights as to make a fair trial impossible." *Id*. "'This exception to the general rule requiring a contemporaneous objection is narrow, providing relief only in 'egregious circumstances' that made a fair trial impossible.'" *Id*. (quoting *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016)).

[8] "In considering a claim of fundamental error with respect to jury instructions, we look to the instructions as a whole to determine if they were adequate." *Id*. (citing *Munford v. State*, 923 N.E.2d 11, 14 (Ind. Ct. App. 2010)). "'When determining whether a defendant suffered a due process violation based on an incorrect jury instruction, we look not to the erroneous instruction in isolation, but in the context of all relevant information given to the jury, including closing argument, and other instructions.'" *Id*. (quoting *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002)). "When all information, as a whole, does not mislead the jury as to the correct understanding of the law, there is no due process violation." *Id*.

[9] While we reject the State's contention that Conn invited any error in the instructions, we also observe that Conn offers no explanation for his assertion that "[t]he Court's observation in *Wright* that '[a] defendant must object to such an instruction in order to preserve the issue for appeal' was not essential to the result" and was therefore dicta. Appellant's Br. p. 19. We note that *Wright* has been cited by this court some ten times for the stated proposition.[3] But even if it was dicta in that particular case, there are plenty of other cases that contain the same proposition as a part of their holding. *See, e.g.*, *Miller v. State*, 753 N.E.2d 1284, 1287–88 (Ind. 2001). There is no doubt that a failure to object to a jury instruction consigns a litigant to the doctrine of fundamental error as a matter of binding law.

[10] The question before us, therefore, is whether final instruction five was so prejudicial to Conn that a fair trial was impossible. The answer is no. Final instruction five was an accurate statement of the law pursuant to Indiana Code Section 35-48-4-6.1. Moreover, possession of methamphetamine *is* an included offense of dealing methamphetamine. An "included offense" is an offense that:

> (1) "is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged,"

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[3] Conn refers to *Wright v. State*, 658 N.E.2d 563 (Ind. 1995), which is not to be confused with *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000) which we cite above. That *Wright* case also stands for the same proposition and has been cited for it eighteen times as of the date of this writing.

> (2) "consists of an attempt to commit the offense charged or an offense otherwise included therein," or
>
> (3) "differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission."

Ind. Code § 35-31.5-2-168. "Dealing of methamphetamine and possession of methamphetamine are included offenses under subsection (1)." *Phillips v. State*, 174 N.E.3d 635, 646 (Ind. Ct. App. 2021). "The material elements of possession of methamphetamine—that is, knowing or intentional possession of the drug—are established through proof of the material elements of dealing in methamphetamine—possession with intent to deliver." *Id*. (citing I.C. § 35-48-4-1.1(a); I.C. § 35-48-4-6.1(d)(1)). A jury instruction which accurately describes the law does not constitute fundamental error. And, because Conn claims that he is not bound by the doctrine of fundamental error, he makes no argument to the contrary.[4]

[11] The real gravamen of Conn's claim appears to be that one could imagine a scenario in which Level 3 possession is not a lesser included offense of Level 2 dealing as a factual matter. Level 3 possession requires proof that the

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[4] To the extent that Conn raises any concerns that he may not have received adequate notice of the crime with which he was charged, we are unpersuaded. All the amendment to the charging information did was remove a specific detail. Not all of the bags of methamphetamine were tested in a laboratory, and so the State could not prove that all 85 grams were actually methamphetamine. That has no impact on the question, however, of whether Conn was on notice that the State was charging him with dealing in methamphetamine.

methamphetamine in question is in excess of twenty-eight grams, whereas the State could prove Level 2 dealing for any amount between ten and twenty-eight grams, thereby creating a window of conduct where one could be guilty of one crime but not the other. It is of no moment. The State proved that Conn was in possession of more than twenty-eight grams of methamphetamine, regardless of the fact that the charging information only alleged that the amount was in excess of ten grams.[5] And twenty-eight grams is a subset of "at least ten grams." I.C. § 35-48-4-1.1(e). The trial court did not err by giving final instruction five.

[12] Affirmed.

Vaidik, J., and Tavitas, J., concur.

[5] At a minimum the evidence at trial established that Conn possessed 42.24 grams of methamphetamine.