## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

Freddie Demarka Reed III,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

August 25, 2023

Court of Appeals Case No.
22A-CR-1747

Appeal from the
Vanderburgh Superior Court

The Honorable
Robert J. Pigman, Judge

Trial Court Case No.
82D03-2101-F6-375

**Memorandum Decision by Senior Judge Shepard**

Chief Judge Altice and Judge Kenworthy concur.

**Shepard, Senior Judge.**

[1] Freddie Demarka Reed III appeals from his convictions of Level 2 felony dealing in methamphetamine, Level 6 felony resisting law enforcement, and Level 6 felony criminal recklessness. He argues the trial court erred in allowing the State to amend the charging information. Reed also claims the prosecutor committed misconduct during closing arguments amounting to fundamental error. We affirm.

## Facts and Procedural History

[2] On the night of January 19, 2021, Reed led federal and state police officers on a car chase in Evansville. He crashed his car and fled on foot. Several officers, including a K9 handler, followed Reed on foot. The handler released the K9, who caught and held Reed until officers took him into custody. The K9 tore off Reed's sweatpants, and an officer saw a clear plastic baggie fall out of Reed's sweatpants as the handler removed the pants from the dog's mouth. The deputy pointed out the baggie to the other officers. It contained a crystalline substance, and subsequent laboratory testing revealed the substance consisted of 26.36 grams of methamphetamine. An officer later explained such a large quantity of meth is typically associated with dealers rather than mere users.

[3] The officers also gained access to Reed's text messages. A detective reviewed Reed's conversations from the weeks before the arrest and recognized slang and code words common in methamphetamine transactions.

[4] On January 21, 2021, the State filed charges against Reed arising from his flight from the officers by car and on foot. The State also filed an habitual offender sentencing enhancement. None of the charges involved meth.

[5] On July 26, 2021, Reed moved to suppress the methamphetamine and related evidence, noting he had not been charged with any offenses related to controlled substances. He also noted the State had not yet given him any test results related to the methamphetamine. The trial court denied the motion.

[6] On November 7, 2021, the State filed an amended charging information, adding counts of Level 2 felony dealing in methamphetamine and Level 3 felony possession of methamphetamine. Reed objected in writing to the amendment, noting the State had filed it after the omnibus date, though more than thirty days before trial. The court overruled Reed's objection.

[7] Trial began on May 12, 2022, six months after the trial court allowed the State to amend the charging information. The State dismissed several charges, and the jury determined Reed was not guilty of one count related to his flight from law enforcement. The jury also determined Reed was guilty of Level 6 felony resisting law enforcement (fleeing by use of a vehicle), Level 6 felony criminal recklessness, Level 2 felony dealing in methamphetamine, and Level 3 felony possession of methamphetamine. Reed admitted he was an habitual offender.

[8] At sentencing, the trial court vacated the conviction of possession of methamphetamine, determining it merged into the dealing charge. The court imposed a sentence, and this appeal followed.

## Issues

[9] Reed raises two claims, which we restate as:

I. Whether the trial court erred in allowing the State to amend the charging information.

II. Whether the prosecutor engaged in misconduct amounting to fundamental error.

## Discussion and Decision

### I. Amendment of Charging Information

[10] Reed argues the court should not have allowed the State to add the dealing and possession charges, claiming the amendment was untimely and prejudiced his substantial rights. We review the trial court's decision for abuse of discretion. *Johnson v. State*, 194 N.E.3d 98 (Ind. Ct. App. 2022), *trans. denied*. "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law." *Id.*

[11] "A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information." *Fajardo v. State*, 859 N.E.2d 1201, 1203 (Ind. 2007). In the current case, the State does not dispute the amendment was a matter of

substance rather than form. For amendments of substance, the General Assembly has provided:

> The indictment or information may be amended in matters of substance . . . , 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; or
>
> (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
>
> before the omnibus date; or
>
> (2) before the commencement of trial;
>
> if the amendment does not prejudice the substantial rights of the defendant.

Ind. Code § 35-34-1-5(b) (2014). Here, the State presented its amendment after the omnibus date had passed. We thus consider whether the amendment prejudiced Reed's substantial rights.

[12] A defendant's substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge. *Ramon v. State*, 888 N.E.2d 244 (Ind. Ct. App. 2008). If the amendment does not affect any particular defense or change the positions of either party, it does not violate these rights. *Id*. "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." *Erkins v. State*, 13 N.E.3d 400, 405-06 (Ind. 2014) (quoting *Sides v. State,* 693 N.E.2d 1310, 1313 (Ind.1998), *abrogated on other grounds by Fajardo,* 859 N.E.2d. at 1206-07).

[13] Reed had six months to prepare for trial after the court allowed the State to amend the information. But he claims the amendment prejudiced his substantial rights because the new charges: (1) required him to consider new evidence unrelated to his flight from law enforcement, including data extracted from his phone; and (2) heightened the severity of his potential sentence.

[14] The State concedes Reed had to spend extra time preparing for the new charges but argues the six-month period was sufficient, noting Reed was aware of the potential for methamphetamine charges before the amendment. We agree with the State. Reed moved to suppress the methamphetamine over two months before the State sought leave to amend the charging information, which demonstrates Reed was aware of the possibility the State could file methamphetamine-related charges against him.

[15] In addition, Reed had access to the State's evidence surrounding his arrest and the discovery of the meth early in the case. Further, Reed did not dispute the amount of the meth the officers discovered. Instead, during trial, Reed presented the following defenses to the dealing charge: (1) the amount at issue did not meet the statutory requirement to prove dealing; and (2) the State did not present other "indicia of dealing." Tr. Vol. II at 173. As for the possession charge, Reed claimed the State failed to prove the methamphetamine belonged to him. Although Reed's defenses to the methamphetamine charges differ from his defenses to the charges of resisting law enforcement and criminal recklessness, it appears six months was sufficient time to prepare for the meth charges. *See, e.g., Mannix v. State*, 54 N.E.3d 1002 (Ind. Ct. App. 2016) (trial

court did not err in allowing State to add new charge arising from deadly auto accident; defendant had five months from the date of the amendment to prepare a defense to the new charge).

[16] Also, Reed neither identifies other defenses he would have prepared if he had more time nor explains how facing a more severe sentence made trial preparation more difficult. *See Taylor v. State*, 86 N.E.3d 157, 163 (Ind. 2017) (trial court did not err in permitting amendment two days before trial; the defendant did not explain "what he would have done with more time or how this amendment hindered his defense"). Under these circumstances, Reed had a reasonable opportunity to prepare for trial, and the State's amendment did not prejudice his substantial rights.

## II. Prosecutor's Closing Argument

[17] Reed next argues the prosecutor committed misconduct during closing arguments by referring to evidence outside the record. Reed did not object at trial to the prosecutor's statements. As a result, Reed contends the prosecutor's statements amounted to fundamental error.

[18] When reviewing a claim of prosecutorial misconduct, we determine (1) whether misconduct occurred and, if so, (2) whether the misconduct, under the circumstances, placed the defendant in a position of grave peril to which he or she would not have otherwise been subjected. *Ryan v. State*, 9 N.E.3d 663 (Ind. 2014) (quotation omitted). "Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional

Conduct." *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." *Id.*

[19] Where, as here, the defendant has procedurally defaulted a claim of prosecutorial misconduct due to failure to object at trial, the defendant must prove not only the grounds for prosecutorial misconduct but must also prove the misconduct constituted fundamental error. *Ryan*, 9 N.E.3d at 667-68. The fundamental error rule is extremely narrow and applies only when the error is a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Boesch v. State*, 778 N.E.2d 1276 (Ind. 2002). "A finding of fundamental error essentially means that the trial judge erred either by not acting when he or she should have . . . or by acting in a manner that grossly exceeded the role of an impartial judge[.]" *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012), *citations omitted*. In evaluating an allegation of fundamental error, our task is to look at the alleged misconduct in the context of all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions—to determine whether the alleged misconduct's effect on the jury's decision was so undeniable and substantial as to render a fair trial impossible. *Ryan*, 9 N.E.3d at 668 (emphasis omitted).

[20] During Reed's trial, the State presented excerpts from Reed's text messages with several other people from the weeks prior to his arrest. Officers identified language Reed and others used as consistent with dealing in controlled

substances. During closing argument, the prosecutor told the jury: "There's a cell phone from [Reed] that had evidence that [he] was dealing drugs and that's it." Tr. Vol. II, p. 169.

[21] In his closing argument, Reed addressed the text messages in the context of the dealing charge, as follows:

> What other indicia of dealing do we have in this case? Well, they dumped a phone. Nobody knows where this phone came from. Nobody. You saw the video. You saw 'em pat him down. Nobody took a phone out of his pocket. There wasn't a phone laying there. Everybody that took the stand said I never saw a phone. I don't know where the phone came from. Maybe, maybe it came out of the vehicle. The vehicle that was owned by his son, Marco. Heard testimony about that. Is it Marco's phone? Nobody knows where that phone came from. I think it's pretty clear he didn't have it on him. You saw in the video when they patted him down. But when they did dump the phone, they said there were, and again rely on what, uh, Detective Budde said, but he and I had a conversation that there was a huge amount of data on a phone when you dump it, right? Huge amount of phone data. And we kicked around the number of fifteen thousand pages, I think. That box over there holds five thousand pages. Three boxes of material. They had seventeen pages. Did you hear testimony that were [sic] pictures of Mr. Reed on that phone? Did you hear testimony that were [sic] videos of Mr. Reed on that phone? Did you hear testimony that Mr. Reed had purchased the phone? That the phone was in his name? That he paid for the service on the phone? I'm, I'm betting you all have cell phones. When you open your cell phone, doesn't it tell you who owns the phone? Who pays for the service? Was no testimony about that.

Tr. Vol. II, pp. 173-74.

[22] On rebuttal, the prosecutor answered Reed's argument about the phone data as follows:

> But, thankfully in this case there is other evidence. You have a cell phone extractions. (sic) If you look at those, you'll see that it's all within about a month, what happened. We're not trying to go back a year and say oh he was dealin' meth a year ago. I'm not allowed to do that. The rules of evidence prohibit me from introducing certain kinds of evidence. So that's, that's the evidence in the recent past.

*Id.* at 176.

[23] Reed argues the prosecutor's rebuttal argument unfairly implied the phone records the jury did not see suggested he was guilty, and the impact of the argument on the jury placed him in grave peril. The State claims the prosecutor's statement was an appropriate response to Reed's reference to unadmitted phone records.

[24] "Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Cooper v. State*, 854 N.E.2d at 836. Here, Reed opened the door to the prosecutor's rebuttal comment by mentioning the thousands of pages of phone records. The prosecutor's statement about limitations on presenting evidence was not a commentary on possible uncharged misconduct but an explanation for why the State did not present the rest of the records to the jury. Reed has failed to prove prosecutorial misconduct. *See id*. (prosecutor's rebuttal comments on defendant's credibility did not amount to misconduct; defense

had raised the credibility issue earlier in closing arguments, and the prosecutor's comments were based on the evidence presented); *Cf. Johnson v. State*, 453 N.E.2d 365 (Ind. Ct. App. 1983) (reversing on grounds of prosecutorial misconduct during closing argument; prosecutor directed jurors' attention to evidence excluded on defendant's objection, implying the defendant was hiding inculpatory evidence from the jury).

[25] In addition, even if the prosecutor's statement amounted to misconduct, we cannot conclude it amounted to fundamental error in the context of the circumstances presented to the jury during trial. Deputy Wesner saw a baggie fall out of Reed's pants after Reed was arrested. According to an officer, the baggie contained meth in an amount associated with dealing rather than possession. And the prosecutor showed the jury Reed's text messages, in which he and others used terminology consistent with dealing in controlled substances. Turning to the court's jury instructions, the jury was directed to base its verdict "only on the evidence admitted and the Instructions [sic] on the law." Tr. Vol. II, p. 166. The court further told the jury, "It is your duty to determine the facts from the testimony and evidence admitted by the Court and given in your presence. You should disregard any and all information that you may derive from any other source." *Id.* Finally, the court explained attorneys' statements are not evidence.

[26] In the context of the substantial independent evidence of Reed's guilt on the dealing charge and the trial court's instruction to consider only the evidence presented at trial, we cannot conclude any misconduct was so blatant a

deprivation of due process as to require the trial court to take action on its own to address the prosecutor's statement. *See Carter v. State*, 956 N.E.2d 167, 171 (Ind. Ct. App. 2011) (prosecutor's statements during closing argument did not amount to fundamental error; the prosecutor presented "overwhelming independent evidence" of defendant's guilt), *trans. denied*.

## Conclusion

[27] For the reasons stated above, we affirm the judgment of the trial court.

[28] Affirmed.

Altice, C.J., and Kenworthy, J., concur.