MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Megan Shipley
Marion County Public Defender Agency
Appellate Division
Indianapolis, Indiana 46204

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

James Arthur Hodge,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 28, 2022

Court of Appeals Case No. 21A-CR-1722

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

The Honorable Jeffrey L. Marchal, Magistrate

Trial Court Cause No. 49D32-1909-F5-37756

Mathias, Judge.

[1] James Arthur Hodge appeals his conviction for Level 5 felony possession of methamphetamine following a jury trial. Hodge presents a single issue for our review, namely, whether the trial court committed fundamental error when it failed to act upon instances of alleged prosecutorial misconduct during the State's closing argument at trial.

[2] We affirm.

Facts and Procedural History

[3] In August and September 2019, officers with the Indianapolis Metropolitan Police Department ("IMPD") conducted five controlled buys of narcotics from two men at 3036 North Temple Avenue. The first two buys were from Lamont Allen, and the latter three buys were from a man nicknamed "Hollywood." Tr. Vol. 3 p. 47. On September 24, 2019, three days after the last controlled buy, IMPD officers, with the assistance of the SWAT team, executed a no-knock search warrant at the house.

[4] Once inside, officers found Hodge lying on a bed in a bedroom, and he was the only person in the home. Detective Ryan Gootee escorted Hodge to the living room and read him his *Miranda* rights. Hodge stated that he had recently had a roommate, but he "kicked [him] out." Ex. p. 26. Hodge also stated that his former roommate had left some of his personal belongings in the house. And Hodge explained that he had used drugs earlier that day and had fallen asleep in his former roommate's bedroom.

[5] During the search of Hodge's former roommate's bedroom, officers found a semiautomatic rifle, a 30-round magazine, and a plastic baggie containing what was later determined to be .4265 gram of methamphetamine. In the second bedroom, officers found an electric bill with Hodge's name and home address on it. Hodge admitted that the baggie was for "our personal use." *Id.* at 36. Hodge stated that the rifle did not belong to him, but he also stated that it was "in [his] hands[.]" *Id.* at 32.

[6] The State charged Hodge with Level 5 possession of methamphetamine. During his opening argument at the ensuing jury trial, defense counsel stated that the officers had found the methamphetamine in Hodge's former roommate's bedroom and that it did not belong to Hodge. Accordingly, during a sidebar conference, the prosecutor argued that, because Hodge had presented evidence that his former roommate had "left behind" the methamphetamine, Hodge had "opened the door" to evidence regarding the controlled buys and that Hodge was the "primary suspect for the search warrant." Supp. Tr. p. 4. In response, defense counsel stated that he did not "have any problem with [the prosecutor] getting into the controlled buys or the investigation as long as there is no discussion of [Hodge's] criminal history[.]" *Id.* at 5. The trial court then agreed to give a limiting instruction to the jury and asked defense counsel to "write it down." *Id.* at 7. The prosecutor then clarified that he would not go into the controlled buys "to demonstrate that Mr. Hodge is a drug dealer or that narcotics were dealt" but only to show that officers were able to buy narcotics

from both Allen and "Hollywood," which was later explained to be Hodge's nickname. *Id.* at 10. Defense counsel stated, "That's all fine with me." *Id.*

[7] During the State's direct examination of Detective Gootee, the prosecutor asked him whether he had set up five controlled buys at Hodge's house leading up to the search warrant, and Detective Gootee replied, "Yes[.]" Tr. Vol. 3 p. 44. The trial court then, sua sponte, admonished the jury:

> Ladies and gentlemen, sometimes testimony is offered for a limited purpose, and this is one of those times. I am advising you that the information provided regarding the investigation must only be considered regarding who law enforcement believed was in the residence. It cannot be considered for any other purpose.

Id. at 45. Detective Gootee then explained that the most recent three controlled buys, including three days before the search warrant was executed, had been made with Hodge.

[8] The jury found Hodge guilty as charged. The trial court entered judgment of conviction for Level 5 felony possession of methamphetamine and sentenced Hodge to three years with 495 days suspended. This appeal ensued.

Discussion and Decision

[9] Hodge contends that the trial court committed fundamental error during the State's closing argument at trial. The prosecutor stated in relevant part as follows:

> So where's the reasonable doubt? The argument is that Mr. Hodge is living in his home, he had a roommate, the roommate dealt drugs. The roommate for some reason wasn't living there, we don't know why because it didn't come out in testimony. Wasn't living there when the house was raided. His stuff was gone, but he left behind his bag of meth. That's the reasonable doubt and that he left it behind and then he had no idea about it being in there, no idea. He just fell asleep next to it, next to his gun. That's the reasonable doubt that's been presented.
>
> Ask yourself does that make sense? What do I have to overlook to buy into the reasonable doubt? You have to look past that he's the only occupant at 3036 North Temple. That he's been living there since July at least. Was the target of a search warrant in the last three controlled buys made by IMPD. The last one within 72 hours of the execution of the search warrant. That he didn't know it was there as he laid right next to the bag of methamphetamine when SWAT came in. That he referred to it several times in his statement and kept other items in the room belonging to him next to the drugs. You have to look past all that to get to that reasonable doubt. It doesn't make sense. Look at where the gun is in State's Exhibit 7 and look at where the meth is. He didn't know about it?
>
> . . . . So what don't we have to prove? We don't have to prove James Hodge is dealing drugs. A lot of stuff came in about it, but we don't have to prove that. We didn't charge him with dealing drugs, we charged him with possessing methamphetamine that he was lying next to. . . .

Tr. Vol. 3 p. 80–81. And during rebuttal, the State said:

> What the officers in the case did do is they investigated narcotics being dealt out of a residence[,] specifically 3036 North Temple. During the course of their investigation, they were able to conduct multiple controlled buys, five in total. The first two

> demonstrating that someone they identify as Lamont Allan was dealing out of that residence and the final three, they identified an individual as Hollywood, and they were provided with a description from the confidential informant.

Id. at 90.

[10] Hodge maintains that, contrary to the prosecutor's stated intent that he would not use evidence of the controlled buys as evidence that Hodge was a drug dealer, the prosecutor in closing and rebuttal "repeatedly relied on the evidence of the controlled buys as substantive evidence of guilt." Appellant's Br. p. 12. And he asserts that

> [t]hese statements constituted prosecutorial misconduct because they were not supported by admissible evidence. The evidence of the controlled buys was admitted only for the purpose of explaining the identity of the person the police believed was in the residence, and not for the purpose of showing that drug dealing had happened at the house or that Hodge was involved in drug dealing.

Id. at 13.

[11] As our Supreme Court has explained,

> [i]n reviewing a claim of prosecutorial misconduct properly raised in the trial court, we determine (1) whether misconduct occurred, and if so, (2) "whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected" otherwise. A prosecutor has the duty to present a persuasive final argument and thus placing a defendant in grave peril, by itself, is not misconduct. "Whether a prosecutor's argument constitutes

> misconduct is measured by reference to case law and the Rules of Professional Conduct. 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." To preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial.

Ryan v. State, 9 N.E.3d 663, 667 (Ind. 2014) (citations omitted).

[12] Here, Hodge did not object to the prosecutor's statements during closing argument. Thus, to prevail on appeal, Hodge

> must establish not only the grounds for prosecutorial misconduct but must also establish that the prosecutorial misconduct constituted fundamental error. Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to "make a fair trial impossible." 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 because alleged errors (a) "constitute clearly blatant violations of basic and elementary principles of due process" and (b) "present an undeniable and substantial potential for harm." The element of such harm is not established by the fact of ultimate conviction but rather "depends upon whether [the defendant's] right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled."

Id. at 667-68 (citations and footnote omitted). In evaluating the issue of fundamental error, our task is to look at the alleged misconduct in the context

of all that happened and all relevant information given to the jury—including evidence admitted at trial, closing argument, and jury instructions—to determine whether the misconduct had such an undeniable and substantial effect on the jury's decision that a fair trial was impossible. *See id.* at 668.

[13] Further, our Supreme Court has emphasized that "'[a] finding of fundamental error essentially means that the trial judge erred . . . by not acting when he or she should have. . . .'" *Id.* (quoting *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012)). "Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Id.* (citing *Baer v. State*, 942 N.E.2d 80, 99 (Ind. 2011) (noting it is "highly unlikely" to prevail on a claim of fundamental error relating to prosecutorial misconduct)).

[14] On appeal, Hodge contends that "[t]he State's misconduct rises to the level of fundamental error because allegations of dealing are extremely prejudicial and would have a strong impact on any jury." Appellant's Br. p. 14. But Hodge does not allege that the alleged error was so prejudicial that it made a fair trial impossible. *See Ryan*, 9 N.E.3d at 668. Nor does Hodge allege that the trial court erred when it did not sua sponte address the allegedly prejudicial remarks. *See id.* Accordingly, Hodge has not satisfied his burden on appeal to show that the prosecutor's remarks constituted fundamental error.

[15] In any event, even assuming that the prosecutor's remarks during closing argument unfairly referred to the evidence of the controlled buys, considering the remarks in the context of the evidence admitted at trial and the jury instructions, as we are obliged to do, we cannot say that the remarks rose to the level of fundamental error. *See Ryan*, 9 N.E.3d at 668. Indeed, during opening argument, defense counsel referred to prior cocaine dealing "out of the house." Tr. Vol. 2 p. 179. Further, Hodge did not object to Detective Gootee's testimony that three of the recent controlled buys involved Hodge. And, during that testimony, the trial court sua sponte admonished the jury as follows:

> Ladies and gentlemen, sometimes testimony is offered for a limited purpose, and this is one of those times. I am advising you that the information provided regarding the investigation must only be considered regarding who law enforcement believed was in the residence. It cannot be considered for any other purpose.

Tr. Vol. 3 p. 45. Finally, at the conclusion of trial, the trial court instructed the jury that

> [s]ometimes evidence is admitted for a limited purpose. You have heard testimony regarding five investigations occurring prior to the date the search warrant was served. You may consider this testimony only as it relates to the identity of the person law enforcement believed was in the residence.
>
> You may not consider such testimony for any other purpose or draw any inferences from this testimony. You may not consider the evidence as proof of whether the Defendant is guilty or not guilty of the crime charged.

Id. at 93. It is well settled that we presume the jury follows the trial court's admonishments and instructions. *See, e.g.*, *Weisheit v. State*, 26 N.E.3d 3, 20 (Ind. 2015). We hold that the trial court did not commit fundamental error when it did not sua sponte act in response to the prosecutor's remarks during closing argument.

[16] Affirmed.

Brown, J., and Molter, J., concur.