MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Cornelius Powell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 31, 2023

Court of Appeals Case No. 23A-CR-119

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2105-F5-93

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Cornelius Powell appeals his conviction for Level 5 possession of cocaine following a jury trial. Powell presents two issues for our review:

> 1. Whether the trial court committed fundamental error when it admitted into evidence his custodial statements to police officers.
>
> 2. Whether the trial court committed fundamental error when it instructed the jury.

[2] We affirm.

Facts and Procedural History

[3] On May 26, 2021, officers with the Lafayette Police Department ("LPD") investigated a tip that a man and woman staying in a hotel room in Lafayette had cocaine. Someone at the front desk identified Powell as the person who had rented the room. A K9 unit from the nearby Dayton Police Department conducted a free air sniff outside of the hotel room and alerted to the presence of illegal drugs. LPD Officer Carson Smith "ma[d]e contact" with the occupants, who identified themselves as Powell and Xavier Gee. Tr. p. 140. Powell and Gee refused to let Officer Carson enter the room.

[4] Officer Carson obtained a search warrant for the room. During the officers' search of the hotel room, they found "a small bag of cocaine" underneath the telephone. *Id.* at 141. On a "child's [iP]ad" located on a dresser at the foot of the bed, officers found "more cocaine and a straw." *Id.* Officers found a scale and baking powder in Gee's purse. Officer Carson led Powell out into the hallway. There, he asked Powell whether the cocaine was his, and he

responded that "he was just there basically having fun, or partying, [and] that he had snorted the cocaine." *Id.* at 145-46. Subsequent forensic testing revealed that officers found approximately 1.62 grams of cocaine in the hotel room.

[5] The State charged Powell with Level 5 felony possession of cocaine. The charge was a Level 5 due to Powell's alleged prior conviction for dealing in cocaine. *See* Ind. Code §§ 35-48-1-16.5; 35-48-4-6. A jury found him guilty of possession of cocaine. At the ensuing bench trial on the enhancement, the trial court found that Powell had been previously convicted of dealing in cocaine. Accordingly, the trial court entered judgment on Level 5 felony possession of cocaine and sentenced Powell to four years. This appeal ensued.

Discussion and Decision

Issue One: Admission of Evidence

[6] Powell contends that the trial court committed fundamental error when it admitted into evidence his custodial statements to officers which he alleges he made without having been Mirandized. Powell concedes that he did not object to the evidence at trial. As we explained in *Nix v. State*,

> fundamental error makes "a fair trial impossible." *Durden*[*v. State*], 99 N.E.3d [645,] 652[(Ind. 2018)]. And "fundamental error in the evidentiary decisions of our trial courts is especially rare." *Merritt v. State*, 99 N.E.3d 706, 709-10 (Ind. Ct. App. 2018), *trans. denied*. That is because fundamental error
>
> > is extremely narrow and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation. At the same

> time, if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error.
>
> *Durden*, 99 N.E.3d at 652 (emphasis added; quotation marks and citations omitted).
>
> An attorney's decision not to object to certain evidence or lines of questioning is often a tactical decision, and our trial courts can readily imagine any number of viable reasons why attorneys might not object. *Cf. Merritt*, 99 N.E.3d at 710 ("The risk calculus inherent in a request for an admonishment is an assessment that is nearly always best made by the parties and their attorneys and not sua sponte by our trial courts."). Fundamental error in the erroneous admission of evidence might include a claim that there has been a "fabrication of evidence," "willful malfeasance on the part of the investigating officers," or otherwise that "the evidence is not what it appears to be." *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). But absent an argument along those lines, "the claimed error does not rise to the level of fundamental error." *Id.*

158 N.E.3d 795, 801 (Ind. Ct. App. 2020), *trans. denied*.

[7] Powell does not argue that his statements were not what they appeared to be and, as such, he cannot demonstrate fundamental error on this issue. *See id.* Instead, Powell alleges, without citation to any evidence, that he was not Mirandized before he made his statements to the officers that the cocaine was his. During his trial, defense counsel did not object to testimony regarding those statements. And neither the prosecutor nor defense counsel questioned whether Officer Carson had Mirandized Powell after his arrest and before he made the challenged statements.

[8] On appeal, Powell maintains that "the trial court should have asked if *Miranda* warnings had been given before the statements were introduced into evidence." Appellant's Br. at 12. We disagree. As the State points out, Powell's trial counsel had reviewed the officer's body camera footage prior to trial and did not move to suppress the statements. Given the lack of a motion to suppress, combined with the lack of objection at trial, the trial court reasonably surmised that there was no *Miranda* issue to raise. And the trial court may well have considered the lack of objection a tactical decision by defense counsel. *See id.* Powell has not shown that the trial court committed fundamental error when it admitted into evidence his statements to Officer Carson about his cocaine possession.

Issue Two: Jury Instruction

[9] Powell next contends that the trial court gave an "incomplete" jury instruction on constructive possession of contraband. Appellant's Br. at 14. Again, his trial counsel did not object to the instruction or proffer a different instruction, so Powell contends that the trial court committed fundamental error when it did not properly instruct the jury. But Powell is mistaken.

[10] As our Supreme Court has explained,

> [w]e review jury instructions "as a whole and in reference to each other," and "error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." *Whitney v. State*, 750 N.E.2d 342, 344 (Ind. 2001) (quoting *Edgecomb v. State*, 673 N.E.2d 1185, 1196 (Ind. 1996), *reh'g denied*). And under fundamental error review, [a]

> Defendant must further show the charge was so misleading as to make a fair trial impossible or blatantly violate basic due process. *See Clark*[*v. State*], 915 N.E.2d [126,] 131[(Ind. 2009)].

Knapp v. State, 9 N.E.3d 1274, 1284-85 (Ind. 2014). Further, again, "[t]he fundamental error exception is extremely narrow and 'reaches only errors that are so blatant that the trial judge should have taken action sua sponte.'" *Clemons v. State*, 83 N.E.3d 104, 107 (Ind. Ct. App. 2017) (quoting *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007)), *trans. denied*.

[11] Powell acknowledges that the trial court gave a proper pattern jury instruction on constructive possession "verbatim." Appellant's Br. at 13. But he asserts that, because the alleged possession here was non-exclusive, the trial court should have included in the instruction an explanation that the State was required to present evidence of additional circumstances to show constructive possession, as set out in our case law, such as incriminating statements, attempted flight or furtive gestures, drugs in plain view, etc. *See Holmes v. State*, 785 N.E.2d 658, 661 (Ind. Ct. App. 2003). Powell maintains that the trial court committed fundamental error when it did not sua sponte include this additional language from case law in the jury instruction.

[12] First, because we hold that the trial court did not commit fundamental error when it admitted into evidence Powell's statements that the cocaine was his, there is no question that Powell actually possessed the cocaine, and constructive possession was not in fact an issue for the jury. Second, given that the trial court gave the pattern jury instruction on constructive possession, verbatim, and in

view of the instructions taken as a whole, we cannot say that the trial court committed fundamental error when it did not instruct the jury on the non-exhaustive list of additional circumstances needed to prove constructive possession as set out in our case law. *See, e.g.*, *Batchelor v. State*, 119 N.E.3d 550, 563 (Ind. 2019) (holding that language in appellate opinions is not necessarily proper language for a jury instruction "especially" where the instruction "is rooted in reasoning found in a sufficiency-of-the-evidence case").

[13] For all these reasons, we affirm Powell's conviction for Level 5 felony possession of cocaine.

[14] Affirmed.

Vaidik, J., and Pyle, J., concur.