MEMORANDUM DECISION

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IN THE

Court of Appeals of Indiana

Kortney D. Bowers,

Appellant-Petitioner

v.

State of Indiana,

Appellee-Respondent

May 9, 2024

Court of Appeals Case No.
23A-PC-1939

Appeal from the Huntington Superior Court

The Honorable Jennifer E. Newton, Judge

Trial Court Cause No.
35D01-2006-PC-8

Memorandum Decision by Judge Mathias
Judges Bailey and Crone concur.

Mathias, Judge.

[1] The Huntington Superior Court denied Kortney Bowers's petition for post-conviction relief. Bowers appeals, arguing that his trial and appellate counsels were ineffective for failing to challenge the jury instruction defining possession with intent to deliver at trial and on direct appeal.

[2] We affirm.

Facts and Procedural History

[3] Following a jury trial, the trial court entered judgment of conviction against Bowers for Level 2 felony dealing in methamphetamine and Level 6 felony possession of a narcotic. Facts relevant to this appeal are reported in our court's resolution of Bowers's direct appeal of his convictions.

> On August 31, 2017, officers with the Huntington Police Department (HPD) obtained a search warrant for a residence on Columbia Street that was the subject of a months-long drug investigation involving several law enforcement agencies including the Allen County Drug Task Force and the Huntington County Sheriff's Department. Law enforcement had been conducting surveillance of the Columbia Street house since June 2017, based on information indicating that an occupant named Clifton Rose was dealing drugs from the house. The search warrant also gave officers permission to search two vehicles, including a white Ford Explorer (the Explorer) driven by James Kuchar. According to information from a confidential informant, Kuchar was known to transport narcotics, and, during the period of surveillance, Kuchar had been seen carrying items in and out of the Columbia Street residence.

On the morning of September 1, HPD Detectives Cory Boxell and Ty Whitacre, in separate vehicles, intended to execute the search warrant on the Explorer, which was last seen the day before at the Columbia Street address, but after looking there and at Kuchar's mother's house, they did not see it. A detective with the sheriff's department advised that he had located the Explorer in the neighboring town of Andrews, Indiana, so Detectives Boxell and Whitacre traveled to Andrews, still in separate vehicles. Detective Boxell located the Explorer parked at Bowers's house. Kuchar was in the driver's seat, and Detective Boxell watched Bowers exit the residence wearing a "very large" black backpack and walk to the Explorer. Bowers put the backpack in the back seat and then got in the front passenger seat, and then the Explorer drove away. The two Detectives, along with other law enforcement personnel from several agencies, followed the Explorer throughout the day, observing as it made various stops. At a residence in Fort Wayne, a third individual, later identified as Adam, got in the back seat of the Explorer. Kuchar, Bowers, and Adam then went to one or more other locations, and at least once Adam got out of the vehicle but returned minutes later. Eventually, Kuchar took Adam back to his residence in Fort Wayne, and the Detectives lost sight of the Explorer while in Huntington City. Detective Boxell contacted Marshal Bullock to advise him that they had lost track of the Explorer but believed it might be returning to Bowers's home in Andrews.

Marshal Bullock spotted and stopped the Explorer, directing Kuchar and Bowers to place their hands in sight, but having them remain in the car until back-up assistance arrived. Within moments, Detectives Boxell and Whitacre arrived at the scene, as well as HPD Captain Shane Jones and Sergeant Andrew Ellet. Kuchar and Bowers were removed from the Explorer and handcuffed. Captain Jones conducted a pat down of Bowers for weapons but found none. Officers seated both men in the grass about fifteen to twenty feet apart.

At one point, while Detective Boxell was kneeling next to Kuchar and was about to read the search warrant to him, Detective Boxell noticed Bowers, who had been helped to a standing position, reach with his cuffed hands into the back of his pants. Concerned for their safety, Detective Boxell yelled to the other officers about Bowers's movements. Detective Whitacre told Bowers to stop what he was doing and get his hands out of his pants, and Captain Jones pulled Bowers's hands out of his pants. Detective Whitacre shook the elastic waistband of Bowers's pants, and a small plastic container fell from the bottom of Bowers's pant leg. Inside the container were two small baggies with red hearts on them and that contained pills, later determined to be hydrocodone. As Captain Jones was picking up the container, Bowers put his hands down the back of his pants again. Detective Whitacre again told Bowers to "stop reaching in his pants," and he shook the waistband of Bowers's pants again and patted his pant legs, and a clear plastic baggie with a crystalline substance, later determined to be methamphetamine, fell to the ground out of Bowers's pant leg. Officers then secured Bowers in the front seat of Captain Jones's vehicle.

Meanwhile, officers searched the Explorer and, among other things, found a black safe, similar in appearance to a laptop, on the floor where Bowers had been seated. Inside the safe were the following items: a digital scale, plastic baggies, some of which had red hearts on them, and two tablets of paper. One tablet contained names and initials and "numerical values" next to those names, which officers believed through their training and experience indicated money owed "for product," and the other tablet also contained ledger-type information, including names or initials, addresses, and "numerical values," such as ".04", which officers believed reflected someone who was "ordering product" in the amount of "four tenths" or "four points." Many of the names, such as Possum, White Boy, Agent P, and Booster, were what police believed to be "street names" for individuals.

After the search of the Explorer, Detective Boxell went to the police vehicle in which Bowers was seated. As he approached, Bowers told Detective Boxell that he wanted to talk and make a deal. Detective Boxell stated that he was not in a position to do so. Thereafter, Bowers was transported to HPD, where Bowers participated in a video-recorded interview with Detective Boxell, which was later admitted at trial.

During the interview, Bowers stated that his involvement was that he knew someone who could get Kuchar the quantity of drugs he wanted. According to Bowers, the plan for the day was that Kuchar would pick up Bowers, they would pick up Bowers's connection, who would then go get the product, namely half an ounce of methamphetamine, and then Kuchar would sell it. Bowers told the detective that, for his participation, he was to get half a gram of methamphetamine for his personal use. Bowers told Detective Boxell that the black safe found in the Explorer was his and it was generally used in the transport of the drugs, but stayed with him, in his backpack, when not being used for transporting.

On September 5, 2017, the State charged Bowers with Level 2 felony dealing in methamphetamine and Level 6 felony possession of a narcotic drug. On December 27, 2017 Bowers filed a motion to suppress the evidence seized on September 1, arguing that police lacked reasonable suspicion that Bowers was committing a crime, his continued detention exceeded the scope of the stop, and the seizure of him was unreasonable, such that police violated his state and federal constitutional rights. The court held a hearing in February 2018. Marshal Bullock, Sergeant Ellet, Captain Jones, and Detectives Whitacre and Boxell each testified at the suppression hearing to being aware on September 1 that Bowers was out on bond for a felony possession of a handgun without a license charge, and Detective Boxell stated that, when he was arrested on that charge, the handgun was in the back of his pants. On May 5, the trial court issued an order

denying the motion to suppress. At the June 2018 jury trial, prior to the presentation of evidence, the trial court agreed with Bowers's request to show a continuing objection at trial as to admission of the contested evidence.

During trial, the State presented evidence that, on the day in question, Bowers had possessed five hydrocodone pills, in two packages, totaling 2.14 grams and also possessed 13.26 grams of methamphetamine. Detective Boxell explained that an ounce is 28 grams, half an ounce is 14 grams, an "8 ball" is one-eighth of an ounce or 3.5 grams, and "a point" is one-tenth of a gram. He said he typically sees methamphetamine sold in the local area in "points or half a gram, maybe up to a gram," but an 8 ball (3.5 grams) was "relatively rare." In Detective Boxell's fifteen-year career, this was only the second time he had seen a quantity as large as Bowers's 13.26 grams.

Detective Boxell acknowledged that officers did not find any weapons on Bowers, but that when he observed Bowers shoving his handcuffed hands in the back of his pants while seated in the grass, he had concern for officer safety and immediately yelled to other officers about it. Detective Boxell testified that after the recorded interview with Bowers ended, Bowers continued to suggest that he could be an informant.

Detective Boxell stated that he telephoned a prosecutor about Bowers's request but that the prosecutor declined, and when Detective Boxell told Bowers this information, Bowers was angry and continued to blame Kuchar, suggesting that Kuchar had thrown the drugs at Bowers's feet.

Bowers rested without presenting any evidence. Bowers's counsel conceded that Bowers was guilty of the Level 6 felony possession charge but argued that he was only a user and addict and that the State had failed to present evidence of Bowers's intent as required

> to convict him of dealing. The State maintained that it had presented evidence to show that Bowers intended to deliver the methamphetamine – to someone, although the recipient did not matter – but that even if the jury did not find that Bowers on his own intended to deliver it, that it had presented sufficient evidence that he "aided someone in their possession with intent to deliver," namely Kuchar. The State's theory was that the evidence showed that Bowers was not merely a user and had the connections with "the big boys" in Allen County and that Kuchar needed "that hookup."

Bowers v. State, 18A-CR-1680, 2019 WL 2440240, at *1-3 (Ind. Ct. App. June 12, 2019) (record citations and footnote omitted).

[4] The trial court tendered preliminary and final instructions to the jury defining the elements of possession with intent to deliver. But the jury was not instructed that the State could not rely solely on the weight of the methamphetamine to prove intent to deliver because the amount was less than twenty-eight grams.[1] *See* Ind. Code §35-48-4-1.1(b). The jury found Bowers guilty as charged. The trial court ordered Bowers to serve an aggregate sentence of twenty-two years executed in the Department of Correction and seven years of probation.

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[1] The General Assembly amended the statute effective July 1, 2014, defining the offense of possession of methamphetamine with intent to deliver and added that a person may be convicted of the offense *only if the weight of the drug involved is at least twenty-eight grams or "there is evidence in addition to the weight of the drug that the person intended to deliver or finance the delivery of the drug[.]"* Ind. Code § 35-48-4-1.1(b) (emphasis added).

We also observe that the pattern jury instructions did not include the emphasized statutory language that was omitted from the instruction in this case. *See* Ex. Vol., pp. 14-16.

[5] Bowers appealed his convictions and raised two issues: 1) whether he was unreasonably detained during the traffic stop, and, therefore, whether the search of his person was unconstitutional; and 2) whether the State presented sufficient evidence of his intent to commit dealing. *Bowers*, 2019 WL 2440240, at *3-7. Because it is relevant to our resolution of Bowers's claims in his petition for post-conviction relief, we observe that, on direct appeal, our court concluded that the evidence was sufficient to prove that Bowers intended to deal methamphetamine. Specifically, we observed:

> Bowers was found in possession of 13.26 grams of crystal methamphetamine, as well as 2.14 grams of hydrocodone pills. According to Detective Boxell, those quantities were consistent with dealing and not merely personal use. Indeed, he stated that in his fifteen years of law enforcement it was only the second time that he had seen such a large quantity of crystal methamphetamine in the Huntington community. Police watched Bowers enter the Explorer with a very large backpack, and officers surveilled the Explorer all day as Kuchar, a suspected drug dealer, drove around making stops in Huntington and Allen counties. Police eventually stopped the Explorer and executed the search warrant of the vehicle and found on the passenger-side floor, where Bowers was seated, a safe. Bowers admitted that the safe belonged to him and that it was used to transport drugs. Inside of the safe, police found a digital scale, baggies some of which had red hearts on them like the baggie that had fallen out of Bowers's pants, and two tablets of notebook paper with ledger-type information consistent with drug sales. Bowers described to Detective Boxell Kuchar's involvement in the drug-dealing operation and that he (Bowers) knew people to provide Kuchar with drugs to sell.

Id. at *7.

[6] After our court affirmed Bowers's convictions, he filed a petition for post-conviction relief arguing ineffective assistance of trial and appellate counsel. Specifically, Bowers claimed that his trial counsel was ineffective because he failed to object to the tendered jury instruction for possession of methamphetamine with intent to deliver. Bowers also argued that the jury was improperly instructed that it should apply the "knowingly" mens rea to every element of the offense. He similarly claimed that his appellate counsel was ineffective for failing to challenge the instruction on direct appeal, albeit under the fundamental error standard.

[7] The post-conviction court held a hearing on Bowers's petition on May 9, 2023. At the hearing, Bowers's trial counsel testified that he believed Bowers's best defense was to argue he had only possessed the methamphetamine and did not intend to deal. PCR Tr. pp. 15, 17. Trial counsel agreed with Bowers that the jury should have been instructed that the State could not rely solely on the weight of the methamphetamine to prove intent to deliver because the amount was less than twenty-eight grams.

[8] Bowers's appellate counsel provided an affidavit and averred that, while he could not specifically recall why he did not challenge the jury instruction on direct appeal, he is generally "reticent to raise fundamental error issues on appeal because that standard is very difficult for a party to meet[.]" Ex. Vol., p. 8. He also stated that "raising fundamental error issues risks detracting from preserved issues and eroding the credibility of the appeal before the appellate court." *Id.* Appellate counsel also averred that, if trial counsel had objected to

the instructions on the definition and elements of possessing methamphetamine with intent to deal, he would have raised the issue on appeal because they "were not adequate to inform the jury on the correct elements of the offense[.]" *Id.* at 9.

[9] On July 24, the post-conviction court issued findings of fact and conclusions of law. The court denied Bowers's petition for post-conviction relief after concluding that he had failed to establish that his trial and appellate counsels engaged in deficient performance or that he had suffered any prejudice because his trial and appellate counsels failed to challenge the jury instructions at issue.

[10] Bowers now appeals.

Standard of Review

[11] Bowers appeals the post-conviction court's order denying him post-conviction relief.

> "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." *Campbell v. State*, 19 N.E.3d 271, 273-74 (Ind. 2014). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id.* at 274. In order to prevail on an appeal from the denial of post-conviction relief, a petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Weatherford v. State*, 619 N.E.2d 915, 917 (Ind. 1993). Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction

> court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (internal quotation omitted).

Humphrey v. State, 73 N.E.3d 677, 681-82 (Ind. 2017).

Ineffective Assistance of Trial Counsel

[12] "The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution." *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id.* The defendant must establish that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment. *Id.* (citations omitted). "There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment, and the burden falls on the defendant to overcome that presumption." *Peaver v. State*, 937 N.E.2d 896, 900 (Ind. Ct. App. 2010), *trans. denied*.

[13] "Second, the defendant must show that the deficient performance prejudiced the defense." *Perez*, 748 N.E.2d at 854. "To establish prejudice, a defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Although the two parts of the *Strickland* test are separate [inquiries], a claim may be disposed of on either prong." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "*Strickland* declared that the 'object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.'" *Id.* (quoting *Strickland*, 466 U.S. at 697).

[14] First, Bowers argues that his trial counsel was deficient for failing to request jury instructions that explained that, because the weight of the methamphetamine was less than twenty-eight grams, the State had to present evidence of intent to deliver in addition to the weight of the drug. *See* Ind. Code § 35-48-4-1.1(b). At the post-conviction hearing, trial counsel agreed with Bowers that he should have requested an instruction containing the statutory language. Although we do not go so far in this case as to hold that requiring the State to present evidence of intent to deliver in addition to the weight of the drug in cases involving less than twenty-eight grams is an element of the offense, given counsel's concession that he should have requested an instruction that tracked with the statutory language, we conclude that counsel's

performance was deficient.[2] Therefore, we proceed to the prejudice prong of the *Strickland* analysis.

[15] Bowers argues that he was prejudiced by the inadequate instruction because his intent to deliver "was squarely at issue." Appellant's Br. at 34. Bowers points to evidence that he was not under investigation, unlike the other persons in the vehicle, on the date of the traffic stop. Bowers notes that, during closing argument, counsel argued that the State had not presented any evidence to establish that "Bowers had bought or sold anything."[3] *Id*. at 35. Finally, Bowers cites the State's numerous statements in its closing argument focusing on the weight of the drug, which the State argued was indicative of dealing. *Id*. at 35-36 (quoting Trial Tr. Vol. 8, pp. 184-85, 192).

[16] In its closing argument, the State discussed both the weight of the methamphetamine, arguing that 13.6 grams was indicative of dealing, and also

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[2] We observe that the pattern jury instructions did not include the statutory language that was omitted from the instruction in this case. *See* Ex. Vol., pp. 14-16. And our appellate courts have not addressed the precise issue whether the language must be included in the jury instructions defining the offense. For this reason, the trial court concluded that trial counsel's performance was not deficient. Appellant's App. p. 135. However, the jury instruction did not track the statutory language, and, therefore, we disagree with the trial court's conclusion concerning counsel's performance.

[3] Bowers also speculates that the jury was only presented with evidence that if he possessed the methamphetamine with intent to deal, the evidence was only sufficient to prove that he did so while he was in Allen County. First, this argument should have been raised on direct appeal. But we also observe that Bowers's claims are not persuasive because the State presented evidence that he possessed the items proving that he had intent to deliver in Huntington County both before and after Bowers traveled to Allen County on the date of the offense.

Moreover, the jury was read the charging information which alleged that the offense occurred in Huntington County. And Bowers does not argue how the omitted language from the instruction, simply requiring additional evidence of intent beyond weight, would have affected the jury's consideration of that evidence concerning the location of Bowers's offense.

highlighted additional evidence to prove that Bowers had the requisite intent to deliver the methamphetamine that Bowers possessed. *See* Trial Tr. Vol. 2, pp. 181, 184, 191, 193-94. The State argued that the safe, which Bowers admitted was his, contained scales, baggies, and ledgers, which evidence proved that he intended to deliver the methamphetamine. *Id*. at 184; *see also id*. at 193 ("Nobody walks around with baggies and scales and drug ledgers unless you're a dealer."). The State's evidence and argument to the jury on applying the evidence complied with the statute's requirement that, to prove possession with intent to deliver, the State had to present additional evidence to prove intent to deliver because the amount of the methamphetamine was less than twenty-eight grams. *See* Ind. Code § 35-48-4-1.1(b).

[17] We are also unpersuaded by Bowers's reliance on caselaw discussing *Spradlin* instructional error. *See, e.g.*, *Ramsey v. State*, 723 N.E.2d 869, 871-73 (Ind. 2000) (citing *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991)) (explaining that in attempted murder prosecutions, the jury instructions must include the mens rea of specific intent to kill and should not include the word "knowingly"). In those cases where the defendant's conviction was reversed, the courts failed to properly instruct the juries that the State had to prove that the accused specifically intended to kill the victim and took a substantial step to do so. *See, e.g.*, *Metcalfe v. State*, 715 N.E.2d 1236, 1273 (Ind. 1999). Here, however, the jury was properly instructed that the State had to prove that Bowers intended to deliver the methamphetamine that he knowingly possessed. Importantly, the parties' arguments at trial made it clear to the jury that Bowers's possession of

the methamphetamine was not enough evidence to prove that he intended to deliver it.

[18] Bowers also claims that trial counsel was ineffective for failing to challenge the trial court's instruction for the jury to apply the "knowingly" mens rea to every material element of the offense. We addressed a similar claim in *McKinley v. State, 45 N.E.3d 25, 28 (Ind. Ct. App. 2015), trans. denied*. In that case, the appellant claimed that "the trial court erred by including the word 'knowingly' as an element of the offense and thereby permitted the jury to convict him on the dealing charge without finding a specific intent to deliver." *Id.* But, like the facts in this case, the parties' closing arguments in *McKinley* "focused almost exclusively on whether the State had established McKinley's intent to deliver." *Id.* at 31. Our court held that, "although defining 'intent to deliver' may have been preferable, terms in common use that can be understood by a person of ordinary intelligence do not always need to be defined." *Id.*

[19] Thus, even if we assume that trial counsel should have challenged the instruction, Bowers has not established prejudice. We agree with the *McKinley* panel that a reasonable juror would have understood what the phrase "intent to deliver" means without any additional instruction. Moreover, Bowers has not established that including "knowingly" in the instructions misled the jury so that they reduced the level of proof required for possession of the methamphetamine with intent to deliver. The State presented evidence that Bowers possessed items commonly possessed by drug dealers, in addition to his possession of 13.6 grams of methamphetamine, which amount was also

indicative of dealing. The State relied on the evidence to argue to the jury that Bowers was a drug dealer, not just a drug user. For all of these reasons, Bowers cannot establish that he was prejudiced by the trial court's instruction that the jury should apply the "knowingly" mens rea to each element of the offense.

[20] In sum, several instructions informed the jury that the State had to prove that Bowers knowingly possessed the methamphetamine with intent to deliver. And the jury was presented with evidence of dealing beyond just the weight of the drug, which the State argued proved that Bowers had the requisite intent to deliver the methamphetamine. For these reasons, Bowers cannot establish that he was prejudiced by the alleged errors in the jury instruction defining possession of methamphetamine with intent to deliver, and we therefore conclude that his trial counsel was not ineffective.

Ineffective Assistance of Appellate Counsel

[21] Bowers also argues that his appellate counsel should have challenged the jury instruction on appeal. Our review of Bowers's ineffective assistance of appellate counsel claim is reviewed under the same two-part *Strickland* test, i.e. whether appellate counsel's performance was deficient and, if so, whether the defendant was prejudiced as a result. *See Isom v. State*, 170 N.E.3d 623, 650 (Ind. 2021).

[22] Further, "ineffective assistance of appellate counsel claims generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well." *Hollowell v. State*, 19 N.E.3d 263, 270 (Ind. Ct. App. 2014). As our Supreme Court has explained:

> To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Ben-Yisrayl*, 738 N.E.2d at 261. To evaluate the performance prong when counsel waived issues upon appeal, we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind. 2001) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). If the analysis under this test demonstrates deficient performance, then we examine whether, "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." *Bieghler[v. State]*, 690 N.E.2d [188,] 194 [(Ind. 1997)] (citation omitted).

Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). "'[I]neffectiveness is very rarely found" in waiver of issues claims "because deciding which issues to raise 'is one of the most important strategic decisions to be made by appellate counsel.'" *Isom*, 170 N.E.3d at 650 (quoting *Bieghler*, 690 N.E.2d at 193).

[23] Here, appellate counsel testified that he is generally reluctant to raise claims of fundamental error on direct appeal given the unlikelihood of success. Ex. Vol., p. 8. Moreover, on direct appeal, appellate counsel argued that the evidence was insufficient to establish that Bowers had intent to deal the methamphetamine he possessed. Bowers's alleged fundamental error issue was not clearly stronger than the issues appellate counsel did raise. Finally, for the same reasons expressed above, Bowers has not established that he was prejudiced by the poor instruction. Therefore, even if appellate counsel had

challenged the instruction on direct appeal, Bowers's conviction likely would not have been reversed. For these reasons, Bowers has not established that his appellate counsel was ineffective.

Conclusion

[24] Bowers has not established that his trial and appellate counsels were ineffective, and we affirm the trial court's order denying his petition for post-conviction relief.

[25] Affirmed.

Bailey, J., and Crone, J., concur.

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