Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

T. ANDREW PERKINS
Peterson & Waggoner, LLP
Rochester, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RYAN D. JOHANNINGSMEIER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SHAUN A. HINSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 25A05-0605-CR-265
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable Douglas B. Morton, Judge
Cause No. 25C01-0509-FB-44

November 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Shaun Hinson appeals his conviction for Class D felony possession of methamphetamine. We affirm.

Issues

Hinson raises two issues, which we restate as:

I. whether there is sufficient evidence that he possessed methamphetamine as charged; and

II. whether the police properly entered the motel room after his arrest.

Facts

On September 13, 2005, Hinson obtained a motel room in Rochester. That night and possibly into the next day, Hinson smoked methamphetamine with Cassandra Fleck in the motel room.

On September 21, 2005, the State charged Hinson with Class B felony dealing in methamphetamine, Class D felony possession of methamphetamine, and Class D felony possession of precursors with the intent to manufacture methamphetamine. A jury found Hinson not guilty of the dealing and possession of precursors charges and guilty of the possession of methamphetamine charge. Hinson now appeals.

Analysis

I. Sufficiency of the Evidence

Hinson contends there is insufficient evidence to support his conviction for possession of methamphetamine. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses, and

we respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). Appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Id. Said another way, we must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

At the trial, Fleck testified that after they arrived at the hotel on the night of September 13, 2005, she and Hinson smoked methamphetamine. The prosecutor questioned Fleck:

> [State]: You and Shaun smoked Methamphetamine there that night, did you not?
>
> [Fleck]: Yes.
>
> [State]: So you had Methamphetamine with you?
>
> [Fleck]: Yes.
>
> [State]: You both had it in your possession?
>
> [Fleck]: Yes.
>
> [State]: I assume you'd had to have it in your possession if you're smoking it right?
>
> [Fleck]: Right it was very little.
>
> [State]: He did that to [sic] right, both of you did?
>
> [Fleck]: Yes.
>
> [State]: So on that night maybe the next day early the next morning you two definitely at least possessed Methamphetamine right?

[Fleck]: Yeah.

Tr. pp. 195-96.

Hinson asserts Fleck's statements only clearly indicate that he possessed methamphetamine on September 13, 2005, and not on September 14, 2005, as charged. Even if Fleck's testimony is unclear, Hinson was charged with possessing methamphetamine "[o]n or about September 14, 2005." App. p. 102. To the extent that the difference between the proof and pleading constitutes a variance, not all variances between allegations in the charge and the evidence at the trial are fatal. Childers v. State, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004). A variance is fatal if (1) the defendant was misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his or her defense, and was he or she harmed or prejudiced thereby; and (2) the defendant is not protected against double jeopardy in a future criminal proceeding covering the same event, facts, and evidence. Id.

The failure to make a specific objection at trial waives any material variance issue. Id. There is no indication that Hinson objected to this discrepancy at trial and this issue is waived. See id. Waiver notwithstanding, Hinson does not argue that he was prejudiced by the alleged variance, and we cannot conclude that the charging information alleging that he possessed methamphetamine "[o]n or about September 14, 2005," and the evidence that he possessed methamphetamine on the night of September 13, 2005, and possibly into early September 14, 2005, was misleading or hampered the preparation of

his defense or that the allegation in the information charging was so broad that he could be subject to future criminal proceedings for the same offense. App. p. 102. Based on Fleck's testimony, there is sufficient evidence that Hinson actually possessed methamphetamine "[o]n or about September 14, 2005." Id.

II. Entry into Motel Room

Hinson contends that when the police entered the motel room after he had been arrested immediately outside the room, they violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution. Hinson concedes, however, that he did not object on such grounds at trial and argues that the admission of evidence relating to the search amounts to fundamental error.

Our supreme court has observed, "That the evidence may have been obtained in violation of the defendant's constitutional rights to be protected against unlawful search and seizure does not elevate the issue to the status of fundamental error that may be raised for the first time on appeal." Swinehart v. State, 268 Ind. 460, 466-67, 376 N.E.2d 486, 491 (Ind. 1978). Accordingly, we have declined to review allegations of fundamental error where a defendant alleges that evidence was obtained in violation of his or her constitutional rights. See Covelli v. State, 579 N.E.2d 466, 471 (Ind. Ct. App. Dist. 1991), trans. denied. Although Hinson asks us to reconsider whether such a violation amounts to fundamental error, we are bound by the decisions of our supreme court. Dragon v. State, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002), trans. denied.

Without more, Hinson has not established that the admission of this evidence is reviewable under the doctrine of fundamental error.

Conclusion

There is sufficient evidence that Hinson actually possessed methamphetamine, and any argument regarding the erroneous admission of evidence obtained after Hinson was arrested is waived. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.