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IN THE COURT OF APPEALS OF INDIANA

LAWRENCE HALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0704-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
The Honorable Patrick Murphy, Commissioner
Cause No. 49G23-0612-FB-242837

December 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Lawrence Hall appeals his convictions for class D felony possession of chemical reagents or precursors with intent to manufacture methamphetamine ("possession of chemical precursors") and class B felony dealing in methamphetamine. We affirm in part and vacate in part.

Issues

Hall raises two issues, which we reorder and restate as follows:

I. Whether the trial court erred in permitting the State to amend the charging information; and

II. Whether there is sufficient evidence to support his conviction of possession of chemical precursors.

Facts and Procedural History

On December 16, 2006, at approximately 5:30 a.m., State Troopers Richard Van Ness and Jesse Schmidt were nearing the end of their shift, and they pulled into the parking lot of an Indianapolis church to finish some paperwork. They saw a car at the back of the church parking lot by the recycling bins. The driver's side door was open, and "a male [was] bending over outside the door." Tr. at 11. The troopers decided to conduct a welfare check of the individual, who turned out to be Hall. They walked to the car and asked Hall why he was there and requested his identification. While Hall was retrieving his identification, the troopers detected the odor of ammonia coming from his car. One of the troopers asked Hall to exit his car and requested permission to search the car, to which Hall consented.

The troopers found a clear pitcher containing a bubbling liquid, in which decongestant tablets could be seen. *Id*. at 14, 22. The troopers also found six empty boxes of

decongestant/cold medicine, each of which contained forty-eight tablets. Each tablet contained thirty milligrams of ephedrine or pseudoephedrine. *Id*. at 34, 44. Camp fuel, drain cleaner, batteries, coffee filters, valves, a glass jar covered in white residue, pliers, pipe fittings, and a crescent wrench were also recovered. Trooper Schmidt asked Hall where he got the pills. Hall said that he got them from two men he had worked with and that he was to make methamphetamine for them in return for some of the finished product. *Id*. at 26.

On December 20, 2006, the State charged Hall with Count I, class B felony dealing in methamphetamine by possession with intent to deliver,[1] Count II, class D felony possession of a chemical precursor, that is, ephedrine,[2] and Count III, class A misdemeanor improper storage or transportation of ammonia.[3] Appellant's App. at 16-17. The trial court set the omnibus date for January 22, 2007.

On February 8, 2007, the State filed a motion to amend the information by interlineation to add Count IV, class B felony dealing in methamphetamine. *Id*. at 7, 26. Count IV specifically alleged "Lawrence Hall, did knowingly or intentionally possess, with intent to manufacture a Controlled Substance, that is: METHAMPHETAMINE."[4] *Id*. at 27. The chronological case summary ("the CCS") indicates that the trial court sent notice to the parties that a hearing on the State's motion to amend would be held at the next pretrial conference. *Id*. at 7. On February 21, 2007, the State filed a second motion to amend the

[1] Ind. Code § 35-48-4-1.1(a).

[2] Ind. Code § 35-48-4-14.5.

[3] Ind. Code § 22-11-20-6.

[4] Ind. Code § 35-48-4-1.1(a).

information to add Count IV, class B felony dealing in methamphetamine by manufacture. *Id*. at 7, 31.[5] Count IV of the State's second motion to amend alleged, "Lawrence Hall, did knowingly or intentionally manufacture methamphetamine."[6] *Id*. at 32. On February 22, 2007, a pretrial conference was held. *Id*. at 7. The CCS does not indicate that the trial court ruled at that time on either of the State's amendments, and the transcript of the conference is not in the record before us.

On February 27, 2007, a bench trial was held. Hall's counsel asked to be "heard again on the State's amendment filed last week, Thursday." *Id*. at 4. The trial court allowed Hall's counsel to present additional argument in support of Hall's objection to the State's amendment. In discussing whether the amendment was permissible, the trial court referred to the probable cause affidavit, which the trial court said, "describes an allegation including manufacture." *Id*. at 7. Apparently, the trial court and the parties were discussing the State's second motion to amend. The trial court took the amendment under advisement but permitted Count IV to be tried that day. *Id.*

At the close of evidence, Hall moved for judgment on the evidence on Count I, which the trial court granted. *Id*. at 93-96. As to Count IV, the trial court granted the State's amendment to the information and found Hall guilty, stating:

> Regarding Count Four, the question was form or substance, whether a defense is equally available and the evidence equally applicable. I think both are true here … even the statutes denominated the same Counts One and Four. It's just whether [it's] possession or manufacture. I find that the evidence that

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[5] The motion itself is file-stamped February 21, 2007, but the chronological case summary does not show that this motion was ever filed.

[6] Ind. Code § 35-48-4-1.1(a).

this is manufacture of methamphetamine.

Tr. at 104.

The trial court took Counts II and III under advisement until sentencing, at which time it found Hall guilty on both counts. Hall now appeals his convictions on Counts II and IV.

Discussion and Decision

I. Amendment to Charging Information

Hall takes issue with the trial court's decision to grant the State's second motion to amend the charging information. At the time of Hall's trial, the parameters governing amendment to a charging information depended upon whether the amendment (1) corrected an immaterial defect, (2) amended matters of form, or (3) amended matters of substance. *Fajardo v. State*, 859 N.E.2d 1201, 1204-05 (Ind. 2007). Specifically, Indiana Code Section 35-34-1-5(b) permitted amendment as to matters of form at any time so long as it did not prejudice the substantial rights of the defendant. *Id*. at 1205.[7] However, the statute specifically prohibited amendments as to matters of substance "unless made thirty days before the omnibus date for felonies and fifteen days before the omnibus date for misdemeanors."[8] *Fajardo*, 859 N.E.2d at 1207.

[7] Amendments correcting an enumerated immaterial defect may be corrected at any time; an unenumerated immaterial defect may be amended only if it does not prejudice the defendant's substantial rights. Such amendments are not in issue here.

[8] Indiana Code Section 35-34-1-5 has been revised to permit amendment to a charging information any time prior to trial as to either form or substance so long as such amendment does not prejudice the substantial rights of the defendant. P.L. 178-2007 § 1 (effective May 8, 2007).

Here, Hall claims that the State's amendment was one of substance and therefore was impermissible because the omnibus date had passed. In *Fajardo*, our supreme court clarified the distinction between matters of substance and matters of form:

> [A]n amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

Id.

The State, however, does not respond to Hall's argument. Instead, the State argues that Hall has not properly preserved his claim for appeal because Hall failed to move for a continuance after his objection to the amendment was overruled. Indiana Code Section 35-34-1-5(d) provides,

> Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

In support of its argument, the State notes that in *Absher v. State*, 866 N.E.2d 350 (Ind. Ct. App. 2007), we recently applied a waiver analysis to a defendant's challenge to an amendment. There, the State asserted that "because Absher failed to object to its motion to amend the charging information, he has failed to preserve this issue for appeal." *Id*. at 354. Absher *conceded* that he did not contemporaneously object to the amendment at trial and claimed that fundamental error occurred. In fact, Absher asked for, and was granted, a continuance to prepare his defense in light of the new charges. We observed that "failure to

object at trial constitutes waiver of review unless an error is so fundamental that it denied the accused a fair trial." *Id*. at 355. We concluded that Absher failed "to provide even a single cogent argument or citation to authority supporting his legal conclusions that his trial was fundamentally unfair[,]" and therefore his claim of fundamental error failed. *Id*. at 356. Thus, in *Absher* we were not called upon to determine whether both an objection and a request for a continuance were necessary to properly preserve a claim that an amendment to the charging information is untimely. Therefore, *Absher* is inapplicable here.

The State also cites *Haak v. State*, 695 N.E.2d 944 (Ind. 1998), a pre-*Fajardo* case. There, we noted, "the defendant must object to the request to amend and, if the objection is overruled, seek a continuance to prepare his or her defense in light of the change." *Id*. at 951 n.5 (citing *Wright v. State*, 690 N.E.2d 1098, 1104 (Ind. 1997)). Haak had objected to the amendment, but it was unclear whether he had asked for a continuance. The State had not argued that Haak had waived his claim, and we addressed it on the merits. Thus, *Haak* is also not on point.

Another panel of this Court recently examined whether a request for a continuance, after an objection was overruled, was necessary to preserve a claim that an amendment to the charging information was untimely pursuant to the version of Indiana Code Section 35-34-1-5 applicable in the instant case. In *Fuller v. State*, 875 N.E.2d 326 (Ind. Ct. App. 2007), *trans. pending*, the State filed two additional charges against Fuller after the omnibus date had passed. Fuller objected. The trial court declined to dismiss the charges even though it found them to be untimely filed. Fuller did not seek a continuance. He was subsequently found guilty of the additional charges and appealed on the ground that the trial court erred in

allowing the additional charges. The State argued that Fuller had waived his claim because he had failed to move for a continuance after his objection was overruled, relying on *Wright*, 690 N.E.2d 1098.

In addressing the State's argument, we thoroughly examined the implications of *Fajardo*. We noted,

> *Fajardo* made it clear that alleged prejudice to the defendant (or lack thereof) simply is not part of the equation when determining the permissibility of an amendment of substance under the previous version of Indiana Code Section 35-34-1-5. … Although the *Fajardo* opinion did not specifically cite *Wright* [690 N.E.2d 1098], we believe it is precisely the type of case our supreme court intended to overrule, at least as to its analysis if not its result, because it failed to examine whether the amendment at issue was one of form or substance.

Id. at 331. We also observed that the *Fajardo* opinion specifically noted that Fajardo objected to the additional charges but failed to mention whether the defendant moved for a continuance. We summed up our reasoning as follows:

> In light of (1) *Fajardo*'s clarification that the validity of an amendment of substance under the former statute turns solely upon the timing of the amendment, not prejudice to the defendant, (2) its criticism of cases very similar to *Wright*, and (3) its failure to mention whether the defendant in the case had moved for a continuance, we conclude that Fuller was not required to move for a continuance in order to preserve his objection to the State's late amendment of the charging information to include the two stalking charges.

Id. We find the reasoning in *Fuller* persuasive. Accordingly, we conclude that Hall's objection to the State's amendment was sufficient to preserve the issue for appeal.[9]

[9] The State urges us to consider the "clear intent" of the legislature as expressed in the recently amended version of Indiana Code Section 35-34-1-5 and argues that Hall's substantive rights were not violated by the amendment to the charging information. Appellee's Br. at 8. Were we to apply this new standard, we would in effect be overruling the decision of our supreme court in *Fajardo*. We have no authority to do so. *See Dragon v. State*, 774 N.E.2d 103, 107 (Ind. Ct. App. 2002) ("[W]e are bound by the decisions of our supreme court.").

As previously noted, the State did not respond to Hall's argument that the amendment to the charging information was one of substance.

> An appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief. This failure does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required. However, counsel for appellee remains responsible for controverting arguments raised by appellant. For appellant to win reversal on the issue, he must establish only that the lower court committed prima facie error. Prima facie means at first sight, on first appearance, or on the face of it.

Cox v. State, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002) (citations omitted).

The amendment to the charging information alleged that "Lawrence Hall did knowingly or intentionally manufacture methamphetamine." Appellant's App. at 32. The trial court observed that both Count I and Count IV were violations of the same statute and concluded that a defense was equally available and Hall's evidence equally applicable to both counts. Hall argues that although both counts originate in the same statute, the conduct prohibited under each count is significantly different such that a defense under the original information would not be equally available and his evidence would not apply equally to both charges. We agree with Hall.

Count I charged Hall with class B felony dealing in methamphetamine by possession with intent to deliver pursuant to Indiana Code Section 35-48-4-1.1(a). Indiana Code Section 35-48-4-1.1(a) provides,

> A person who:
> (1) knowingly or intentionally:
> (A) manufactures;
> (B) finances the manufacture of;
> (C) delivers; or
> (D) finances the delivery of;

> methamphetamine, pure or adulterated; or
> (2) possesses, with intent to:
> (A) manufacture;
> (B) finance the manufacture of;
> (C) deliver; or
> (D) finance the delivery of;
> methamphetamine, pure or adulterated;
> commits dealing in methamphetamine, a Class B felony, except as provided in subsection (b).

While the charging information did not specify which subdivision served as the basis for the charge, the subsection most applicable is 35-48-4-1.1(a)(2)(C). In response to this charge, Hall argued that he did not possess any methamphetamine. We observe that the State failed to prove that Hall possessed methamphetamine, and therefore the trial court granted Hall's motion for judgment on the evidence as to this count.

Count IV charged Hall with manufacturing methamphetamine, also pursuant to Indiana Code Section 35-48-4-1.1(a). While the charging information failed to specify the subdivision that supports the charge, the subdivision most suitable is 35-48-4-1.1 (a)(1)(A). In contrast to Count I, whether Hall possessed methamphetamine is irrelevant to proving this charge because the manufacturing process does not need to be complete in order to obtain a conviction. *See Bush v. State*, 772 N.E.2d 1020, 1023 (Ind. Ct. App. 2002) (holding that manufacturing process need not be complete nor must there actually be final product to obtain a conviction for manufacturing methamphetamine); *Dawson v. State*, 786 N.E.2d 742, 747 (Ind. Ct. App. 2003) (holding that crushing ephedrine into powder meets definition of manufacturing in order to support conviction for dealing in methamphetamine by knowingly manufacturing it), *trans. denied*.

We note that one may possess methamphetamine intending to deliver it without ever having manufactured methamphetamine and that one may manufacture methamphetamine without intending to deliver it. The conduct comprising each of the charges is distinctly different. Thus, Hall's evidence disputing Count I would not be "equally applicable" to dispute Count IV. Further, the amendment charges the commission of a separate crime and is therefore essential to making a valid charge of the crime. We conclude that the amendment adding Count IV was a matter of substance. *See Fajardo*, 859 N.E.2d at 1208 (finding that amendment adding class A felony child molesting to original charge of class C felony child molesting was a matter of substance where evidence addressed to disputing charge of fondling or touching with intent to arose sexual desire (class C felony child molesting) was not equally applicable to dispute charge of act involving a sex organ of one person and the mouth or anus of another person or the penetration of the sex organ or anus of a person by an object (class A felony child molesting)). Because the amendment adding Count IV was one of substance that was sought after the omnibus date, it was in violation of Indiana Code Section 35-34-1-5(b). Hall's objection should have been sustained. Accordingly, we vacate Hall's conviction on Count IV.

II. Sufficiency of the Evidence

Hall also contends that there is insufficient evidence to sustain his conviction for class D felony possession of precursors. When reviewing a claim of insufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995). Rather, we consider the evidence most favorable to the judgment and the reasonable inferences therefrom. *Id*. We will affirm a conviction if

evidence of probative value exists from which the trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

Possession of chemical precursors as a class D felony is governed by Indiana Code Section 35-48-4-14.5(b), which provides, "A person who possesses more than ten (10) grams of ephedrine, pseudoephedrine, or phenylpropanolamine, *pure or adulterated*, commits a Class D felony." (Emphasis added.) Here, Hall was charged with the possession of ten grams or more of ephedrine. The trial court found that the pitcher retrieved from Hall's car contained ten grams or more of ephedrine in an adulterated state.

Our supreme court has stated, "The total weight of the delivered drug and not its pure component is to be considered in prosecutions." *Tobias v. State*, 479 N.E.2d 508, 511 (Ind. 1985); *see also Woodford v. State*, 752 N.E.2d 1278, 1283 (Ind. 2001) (sufficient evidence to convict defendant of dealing three grams or more of cocaine where nine rocks weighed over three grams and two of the rocks tested positive for cocaine; State did not need to test all nine rocks); *Riley v. State*, 711 N.E.2d 489, 493 (Ind. 1999) (sufficient evidence supported defendant's conviction for dealing three grams or more of cocaine where packages purchased from defendant weighed over sixteen grams; State did not need to establish the relative purity of the samples taken from the packages); *Woodson v. State*, 501 N.E.2d 409, 410 (Ind. 1986) (sufficient evidence supported defendant's conviction of possession of three grams of heroin where bindles weighing over five grams contained only about one percent pure heroin).

Nevertheless, Hall argues that "the clear evidence indicated that, at most, he possessed approximately 8.6 grams" of ephedrine.[10] Appellant's Br. at 8. He attempts to distinguish cases such as *Tobias* by arguing that in those cases the controlled substances were adulterated "so as to dilute its potency or make the amount go further." *Id*. While that may be true, we do not think that the absence of such a purpose in this case is a sufficient reason to depart from the rule set forth in *Tobias*. Further, to the extent that Hall argues that the adulterant must be of the same or similar physical characteristics as that of the controlled substance, we note that the statute does not contain such a requirement. "[I]t is just as important to recognize what a statute does not say as it is to recognize what it does say[,]" and we "may not read into a statute that which is not the expressed intent of the legislature." *Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000), *trans. denied*.

In addition, Hall "contends that under the facts of this case, the court should not have considered the entire weight of the solution that contained ephedrine in determining that he possessed in excess of ten grams of ephedrine for purposes of finding him guilty under [Indiana Code Section 35-48-4-14.5]." *Id*. at 7. He explains,

> This application of the language of the statute, however, allows for potentially absurd and surely unintended results that would criminalize possession of lesser amounts of ephedrine or the other named substances. By way of one example, a person could put one or two pseudoephedrine decongestant tablets into ½ ounce (about 15 grams) of water for the purpose of turning the water pink with the red coating on the pills, or into the same amount of soft drink to make it bubble more, essentially for nothing more than entertainment of curiosity purposes, and that person would thereby fall under the language of this statute.

[10] This amount is based on the total weight of the tablets that had been in the six empty boxes of cold medicine that were found in Hall's car.

Id. "[W]e do not presume that the legislature intended language used in the statute to be applied illogically or to bring about an unjust or absurd result[.]" *Riley*, 711 N.E.2d at 495. The innocent hypothetical situations described by Hall are simply not comparable to his obviously nefarious conduct in this case. As such, his hypotheticals do not persuade us that "under the facts of this case, the trial court should not have considered the entire weight of the solution."[11]

Accordingly, we conclude that there was sufficient evidence to convict Hall of class D felony possession of chemical precursors.

Affirmed in part and vacated in part.

DARDEN, J., and MAY, J., concur.

[11] Moreover, we observe that Indiana Code Section 35-48-4-14.5(d) protects normal, everyday uses of ephedrine from criminal prosecution:

> Subsection (b) does not apply to a:
>
> (1) licensed health care provider, pharmacist, retail distributor, wholesaler, manufacturer, warehouseman, or common carrier or an agent of any of these persons if the possession is in the regular course of lawful business activities; or
>
> (2) person who possesses more than ten (10) grams of a substance described in subsection (b) if the substance is possessed under circumstances consistent with typical medicinal or household use, including:
>
> (A) the location in which the substance is stored;
>
> (B) the possession of the substance in a variety of:
>
> (i) strengths;
>
> (ii) brands; or
>
> (iii) types; or
>
> (C) the possession of the substance:
>
> (i) with different expiration dates; or
>
> (ii) in forms used for different purposes.