

James J. Daher, Jr. appeals his conviction of Conspiracy to Commit Escape With a Deadly Weapon,¹ a class B felony. Daher presents the following issue for review: Did the State establish that Newton County was the county of proper venue by presenting sufficient evidence to prove that a portion of the conspiracy occurred in Newton County?

We affirm.

The facts are that Anthony Fisher was an inmate in the Newton County Jail. He was scheduled for trial on January 26, 2009. Prior to trial, Fisher began contacting people seeking to enlist their aid in helping him escape while walking from the jail to the courthouse. He made contact with Daher and the two exchanged phone calls from September 2008 to January 2009. At the time, Daher resided on West 38th Street in Indianapolis. Eventually, the two agreed on an escape plan, part of which was that Daher would steal a car from an Indianapolis dealership. On the morning of Fisher's trial, Jail Commander David Kessler handcuffed Fisher and placed his cuffs through a belly chain, which was then secured with a lock. Kessler began walking Fisher outside the jail and through an alley toward the courthouse. While they were in the alley, a man approached Kessler. The man carried a white box in one hand and was holding a handgun in the other. The man pointed the gun at Kessler's stomach and ordered him to drop his police radio and return to the jail, which the officer did. When he was away from Fisher and the other man, Officer Kessler turned and saw the men get into a white car and drive off. Officer Kessler eventually identified Daher as the man who pointed a gun at him that day. Later that day, police found a white car parked near some railroad tracks. They determined the car had been stolen from Indy Motors in

¹ Ind. Code Ann. § 35-41-5-2 (West, Westlaw through 2010 2nd Regular Sess.).

Indianapolis one or two days before Fisher's escape.

The next day, January 29, Fisher and Daher were spotted by police officers at a car wash in South Bend, Indiana. When they were confronted, Fisher fled but was apprehended almost immediately. Near the truck they had been washing were items of personal property that Daher admitted belonged to him and Fisher. Those items included, among other things, a police-style radio, a handgun, and ammunition. After ascertaining Fisher's identity as the person who had escaped from custody in Newton County the day before and placing him under arrest, the officers on the scene learned that the other person, Daher, was a suspect in the escape. He too was placed under arrest. Daher was subsequently charged with conspiracy to commit escape with a deadly weapon as a class B felony. He was convicted as charged following a jury trial and sentenced to twenty years in prison.

Daher contends the State failed to show that venue properly lay in Newton County. Daher has a constitutional and statutory right to be tried in the county where the crime was alleged to have been committed. *Baugh v. State*, 801 N.E.2d 629 (Ind. 2004). We note, however, that a defendant waives an alleged error relating to venue when he fails to make an objection before the trial court. *See Floyd v. State*, 503 N.E.2d 390 (Ind. 1987). In this case, Daher moved for change of venue less than one week after criminal charges were filed. He did so, however, on grounds other than improper venue. In fact, Daher concedes upon appeal that he failed to properly preserve this issue below. Therefore, it is waived. *Smith v. State*, 809 N.E.2d 938 (Ind. Ct. App. 2004), *trans. denied*.

Daher seeks to escape the rigors of waiver by contending that the alleged failure to prove venue constituted fundamental error. In order to rise to the level of fundamental error,

an error must be so prejudicial to the rights of the defendant that a fair trial is impossible. *Caron v. State*, 824 N.E.2d 745 (Ind. Ct. App. 2005), *trans. denied*. This doctrine permits reversal only when there has been a blatant violation of basic principles that denies a defendant fundamental due process. *Id.* The defendant bears the burden of proving that such a fundamental error occurred which rendered the trial unfair. *Id.* “In determining whether an alleged error rendered a trial unfair, we must consider whether the resulting harm or potential for harm is substantial. We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome.” *Id.* at 751 (internal citation to authority omitted).

Our Supreme Court has consistently described this doctrine as “extremely narrow”, *see, e.g., Baer v. State*, 866 N.E.2d 752, 763 (Ind. 2007), *cert. denied*, 552 U.S. 1313 (2008), and held that it is available only in “egregious circumstances”. *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003). The fundamental error rule may not be invoked merely on the basis that an error occurred that was prejudicial to the defendant. *See Absher v. State*, 866 N.E.2d 350 (Ind. Ct. App. 2007). Neither is it enough to urge, as Daher does here, that a constitutional right is implicated. *Id.* To qualify as fundamental error, “‘an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible’ and must ‘constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.’” *Id.* at 355 (quoting *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002) (internal quotations and citations omitted)).

Even assuming, without deciding, that there is merit in Daher’s substantive argument

that Newton County was not the county of proper venue in this case, he has not explained how a trial in that locale, as opposed to Marion County, made a fair trial impossible. *See Caron v. State*, 824 N.E.2d 745. In fact, apart from reciting the boilerplate law of fundamental-error law and identifying venue rights as rooted in the Indiana Constitution, Daher offers no particularized rationale to support a claim that the alleged error in this case was of such a magnitude as to implicate Daher's fundamental due process rights. Accordingly, Daher has failed to establish that any error in trying his case in Newton County was fundamental in nature. Therefore, the argument is waived.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.