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IN THE
COURT OF APPEALS OF INDIANA

CHARLES A. LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A05-0902-CR-110
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0608-FA-145

July 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Charles A. Lewis appeals his conviction of Class A felony dealing in cocaine within 1,000 feet of a family housing complex[1] and argues his conviction should be vacated because fundamental error occurred when the jury was instructed as to a statutory definition of "family housing complex" that was not in effect at the time of the commission of his crime. The State acknowledges the jury instruction was erroneous but contends Lewis's dealing in cocaine conviction, which was enhanced to a Class A felony based on the offense occurring within 1,000 feet of a family housing complex, should be reduced to a Class B felony and remanded for resentencing. Concluding the instruction was fundamentally erroneous but that the evidence is sufficient to sustain Lewis's conviction as a Class B felony, we reverse and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

On May 30, 2006, Lewis sold cocaine to a confidential informant at a store parking lot. The controlled buy, which was observed by police, was recorded and admitted into evidence at Lewis's jury trial.

On May 31, 2006, Lewis sold cocaine to the same confidential informant at an apartment complex. This controlled buy was also observed by police, recorded, and admitted into evidence during trial.

The State charged Lewis with Count 1, dealing in cocaine as a Class B felony, and Count 2, dealing in cocaine within 1,000 feet of a family housing complex as a Class A

[1] Ind. Code § 35-48-4-1(b)(3)(B)(iii). Lewis does not challenge his conviction of dealing in cocaine as a Class B felony.

felony. The trial court--in preliminary instruction number 2 and final instruction number 3--instructed the jury that a "family housing complex" was defined by statute as a building or series of buildings that is operated as an apartment complex.[2] (*See* App. at 48, 69.) However, the statute in effect at the time of Lewis's crime did not define "family housing complex" as including an apartment complex.[3] Lewis did not object to the instructions. The jury found Lewis guilty as charged. The trial court sentenced Lewis to concurrent terms of fifteen years for Count 1 and forty years for Count 2.

DISCUSSION AND DECISION

On appeal, Lewis challenges only his conviction on Count 2, dealing in cocaine, which was elevated to a Class A felony for occurring within 1,000 feet of a family housing complex. Lewis contends the trial court erred when it instructed the jury that "family housing complex" meant an apartment complex. Lewis acknowledges that his

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[2] The trial court also instructed the jury, pursuant to Ind. Code § 6-1.1-20.6-1, that an "apartment complex" was defined as "real property consisting of at least five (5) units that are regularly used to rent or otherwise furnish residential accommodations for periods of thirty (30) days or more." (*See* App. at 48, 69.)

[3] At the time of Lewis's crime on May 31, 2006, Ind. Code § 35-41-1-10.5 defined "family housing complex" as "a building or series of buildings: (1) that is owned by a governmental unit or political subdivision; (2) that contains at least twelve (12) dwelling units; and (3) where children are domiciled or are likely to be domiciled." (Format altered).

Effective July 1, 2006, Ind. Code § 35-41-1-10.5 defined "family housing complex" as a building or series of buildings:

(1) that contains at least twelve (12) dwelling units:
    (A) where children are domiciled or are likely to be domiciled; and
    (B) that are owned by a governmental unit or political subdivision;
(2) that is operated as a hotel or motel (as described in IC 22-11-18-1);
(3) *that is operated as an apartment complex* (as defined in IC 6-1.1-20.6-1); or
(4) that contains subsidized housing.

(Emphasis added). *See also* P.L. 26-2006, § 1 (*now amended by* P.L. 146-2008, § 682).

failure to object to the trial court's instructions results in waiver, but in an attempt to avoid such procedural default, he argues the trial court's instructions constituted fundamental error. "The fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006) (internal quotation marks omitted).

Lewis contends the trial court's instructions resulted in fundamental error because his conviction of dealing in cocaine was enhanced to a Class A felony based on the faulty definition contained in the court's instructions. The State "acknowledges that the trial court erred and that such error was not harmless." (Appellee's Br. at 6.) The State, however, asserts that because the portion of the instruction that was erroneous concerned only the location enhancement of dealing in cocaine that elevated the charge to a class A felony, Lewis does not challenge the instruction with regard to the remaining elements, and the evidence presented was sufficient to sustain his conviction of dealing in cocaine, the proper remedy is to reduce Lewis's conviction of dealing in cocaine on Count 2 from a Class A felony to a class B felony and remand for resentencing.

We agree with the State. "The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003), *cert. denied*, 540 U.S. 1150 (2004). The instructions on

the family housing complex location enhancement were not a correct statement of the law in effect at the time of Lewis's offense and permitted Lewis to be convicted of an enhanced class of dealing in cocaine. Because the trial court's instruction on the location enhancement of Count 2 constituted fundamental error but the remainder of the instruction is proper and supported by sufficient evidence, we remand this cause with instructions for the trial court to reduce the judgment of conviction on Count 2 to a Class B felony and resentence on that count.[4]

Reversed and remanded.

BAKER, C.J., and BARNES, J., concur.

[4] As the trial court did in its original sentencing, it would need to order any sentence on Count 2 to be served concurrently to Count 1. *See Beno v. State*, 581 N.E.2d 922, 924 (Ind. 1991) (holding consecutive sentences to be inappropriate for nearly identical State-sponsored buys).