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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL REYNOLDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-1012-CR-799
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-1005-FB-55

SEPTEMBER 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Michael Reynolds appeals his conviction of manufacturing methamphetamine, a Class B felony. Ind. Code § 35-48-4-1.1 (2006).

We affirm.

ISSUES

Reynolds presents two issues for our review, which we restate as:

I. Whether there existed a fatal variance between the date of this offense as alleged in the charging information and the date as shown by the evidence at trial.

II. Whether Reynolds was subjected to double jeopardy based upon the trial court's instruction to the jury regarding the State's burden of proof as to the date of the offense as alleged in the charging information.

FACTS AND PROCEDURAL HISTORY

On May 15, 2010, the police were called to Reynolds' trailer due to a report of a domestic disturbance. The police took Reynolds and his girlfriend outside the trailer to separate them and then checked the trailer for any additional people. During this check, the police saw items used in the manufacture of methamphetamine. Reynolds consented to a search of his trailer, and he was later charged based upon this incident and the findings of the search. Following a jury trial, Reynolds was found guilty as charged. The court sentenced him to ten years, and this appeal ensued.

DISCUSSION AND DECISION

I. VARIANCE

Reynolds first contends that he was misled and prejudiced by the variance between the charging information and the evidence presented at trial as to the date this offense occurred. "A variance is an essential difference between proof and pleading." *Reinhardt v. State*, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008). Not all variances are fatal, and the two-part test to determine whether a variance between a charging information and the proof at trial is fatal is as follows: (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby; and (2) will the defendant be protected against double jeopardy in a future criminal proceeding encompassing the same event, facts, and evidence. *Tucker v. State*, 725 N.E.2d 894, 896 (Ind. Ct. App. 2000), *trans. denied*. We also note that when time is not an element of the offense, the State is only required to prove that the offense occurred any time within the statutory period of limitations; thus, the State is not required to prove the offense occurred on the precise date alleged in the information. *Neff v. State*, 915 N.E.2d 1026, 1032 (Ind. Ct. App. 2009), *trans. denied*.

Here, the charging information states: "On or about the 15th day of May, 2010, in St. Joseph County, State of Indiana, MICHAEL ANTHONY REYNOLDS knowingly manufactured methamphetamine (pure or adulterated)." Appellant's App. p. 4. The evidence at trial showed that Reynolds manufactured methamphetamine between May 7,

2010 and May 15, 2010. Reynolds admitted to the police that he does manufacture methamphetamine and that the manufacturing items found in the trailer belonged to him. He also informed the police that he had cooked methamphetamine the week prior to May 15. In addition, Exhibit 25, which was introduced without objection, is a receipt from Walmart found in Reynolds' trailer showing the purchase of pseudoephedrine and dated May 7, 2010.

Time is not an essential element of the offense of manufacturing methamphetamine, *see* Ind. Code § 35-48-4-1.1; therefore, the State did not need to prove that Reynolds manufactured methamphetamine on the precise date alleged in the information (i.e., May 15, 2010). The State's proof in this case that Reynolds manufactured methamphetamine some time between May 7, 2010 and May 15, 2010 did not prejudice or harm Reynolds, and there has been no showing of any prejudice or harm. Furthermore, the evidence was limited to the timeframe of May 7, 2010 to May 15, 2010 such that any additional charges regarding the manufacture of methamphetamine during that time period would be precluded. The variance was not fatal to the State's case.

II. JURY INSTRUCTION

In his second stated issue, Reynolds asserts that he was subjected to double jeopardy by the trial court's instruction to the jury that the State need not prove that this offense occurred on the date alleged in the charging information.

First, Reynolds has failed to set out verbatim, in the argument section of his brief, the jury instruction at issue. "When error is predicated on the giving or refusing of any

instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." Ind. Appellate Rule 46(A)(8)(e). An appellant waives the issue by failing to comply with this appellate rule. *Davis v. State*, 892 N.E.2d 156, 163 (Ind. Ct. App. 2008). Moreover, not only does Reynolds fail to state to which jury instruction he is referring, but also he fails to ever mention a jury instruction in his argument of this issue.

Waiver notwithstanding, we note that Reynolds mentions a jury instruction in his argument of Issue I. There, he refers to a jury instruction found in the Appellant's Appendix. The instruction states: "The State is not required to prove that the crime charged was committed on the particular date alleged in the Information." Appellant's App. p. 10. First we note that this instruction is a correct statement of the law. *See Neff*, 915 N.E.2d at 1032. In addition, we conclude, as we did in Issue I, that double jeopardy would preclude a conviction in a future criminal proceeding encompassing these same facts.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the variance between the charging information and the evidence presented at trial did not mislead or prejudice Reynolds. In addition, double jeopardy would preclude a conviction in a future criminal proceeding regarding the same facts, events, and evidence.

Affirmed.

ROBB, C.J., and DARDEN, J., concur.