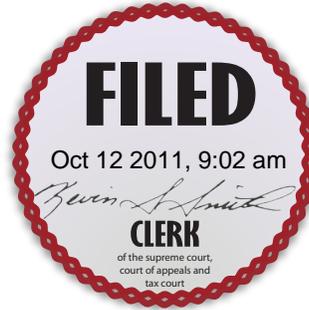


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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STEVEN HOWEY, )

Appellant-Defendant, )

vs. )

No. 34A02-1102-CR-125

STATE OF INDIANA, )

Appellee-Plaintiff. )

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APPEAL FROM THE HOWARD SUPERIOR COURT  
The Honorable William C. Menges, Jr., Judge  
Cause No. 34D01-1002-FA-172

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**October 12, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Steven Howey appeals his convictions for dealing in a schedule III controlled substance as a class A felony, two counts of dealing in a schedule III controlled substance as class B felonies, and maintaining a common nuisance as a class D felony. Howey raises two issues, which we revise and restate as:

- I. Whether the trial court abused its discretion by rejecting Howey's proposed instruction on reasonable doubt; and
- II. Whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error.

We affirm.

The relevant facts follow. In 2009, R.B. began working as a confidential informant with the Kokomo Police Department Drug Task Force. In the summer of 2009, R.B. met Howey through Stephanie Jenkins, R.B.'s ex-girlfriend and a relative of Howey. Prior to working with the Drug Task Force, R.B. and Jenkins purchased Lortabs from Howey.

On December 30, 2009, R.B. called Howey and asked if he could purchase some Lortabs and then called Kokomo Police Officer Shane Melton. Kokomo Police Investigator Brad Reed met with R.B., searched him, gave him forty dollars, and drove R.B. to Howey's apartment. R.B. went into Howey's apartment, gave Howey forty dollars, and Howey gave R.B. ten Lortabs. A decision was made to attempt to make a second purchase from Howey, and R.B. called Howey and told Howey that he wanted to purchase five Lortabs. Howey made a second purchase of Lortabs from Howey at Howey's apartment about an hour later.

On January 6, 2010, R.B. called Howey and told him that he wanted to purchase an ounce of marijuana and five Lortabs. Howey told R.B. that he was at the BMV and later called R.B. and told R.B. that “he could give [R.B.] three, three twenty sacks, twenty dollars worth sacks of marijuana.” Transcript at 254. R.B. then went to the parking lot of the BMV and entered Howey’s vehicle. Howey gave R.B. ten Lortab pills in exchange for money.

On February 24, 2010, the State charged Howey with: Count I, dealing in a schedule III controlled substance as a class A felony; Count II, dealing in a schedule III controlled substance as a class B felony; Count III, maintaining a common nuisance as a class D felony; and Count IV, dealing in a schedule III controlled substance as a class B felony. Count I alleged that Howey “did knowingly deliver Hydrocodone, a controlled substance listed in Schedule III within one thousand (1000) feet of a youth program center, to-wit: Finding Me Now Day Care . . . .” Appellant’s Appendix at 13.

On March 18, 2010, the court held an initial hearing and set the omnibus date for May 21, 2010. The court also entered a discovery order which ordered the State to disclose certain information to Howey “not later than the Omnibus date . . . .” *Id.* at 30. On June 14, 2010, the State filed its Response to Court’s Discovery Order listing the persons the State intended to call as witnesses and the exhibits it intended to introduce.

On January 14, 2011, the State filed an amended information for Count I. The prosecutor argued:

We have some ambiguity in Count I talking about daycare center and youth program center, which are not the same and I believe that a daycare center falls into the definition of school property as opposed to youth program, so I would make a motion to Count Number I to show that that’s, take out

those words youth program center, substitute school property, because that's where the daycare centers fall.

Transcript at 118. Howey's counsel objected on the basis that a part of the defense was that the "proof doesn't match the indictment." Id. at 119. The court stated:

There's a couple of things that I'd note, first, there's separate parts of the statute on youth program center and schools and this could be a material amendment but for the fact that Finding Me Now Daycare is named in the Information and that has been in the Information since this case was filed within, is contained within the Affidavit for Probable Cause. The fact that it may more properly be classified as a school rather than a youth program center is not something that's going to come as a surprise to the defendant.

Id. at 120. The amended charging information alleged that Howey "did knowingly deliver Hydrocodone, a controlled substance listed in Schedule III within one thousand (1000) feet of **school property**, to-wit: Finding Me Now Day Care . . . ." Appellant's Appendix at 124.

That same day, during voir dire, the prosecutor asked the prospective jurors "what do you think about that, somebody has a prescription and they sell it, does that make them a drug dealer?" Transcript at 18. The prosecutor later clarified that he was not talking about "giving your co-worker a pill when they say my back's hurting or give your mother-in-law pill when she says her head hurts . . . ." Id. Howey's counsel objected and stated: "I'm going to object to getting too close to the possible evidence that may be admitted in this trial and if he's going to keep it in more of a hypothetical it's one thing but I'd just like the language to be a little more hypothetical." Id. The trial court overruled the objection, and the prosecutor continued his questioning of the prospective jurors.

Howey tendered a proposed preliminary jury instruction, which stated: “A reasonable doubt may arise from the evidence, or from a lack of evidence, or from a conflict in the evidence on or concerning a given fact or issue.” Appellant’s Appendix at 89. The court rejected this instruction. Howey also proposed an identical instruction as a final instruction, which the court also rejected.

The jury found Howey guilty as charged and the court sentenced him to thirty years for Count I, ten years for Count II, eighteen months for Count III, and ten years for Count IV to be served concurrent with each other for an aggregate sentence of thirty years.

#### I.

The first issue is whether the trial court abused its discretion by rejecting Howey’s proposed instruction on reasonable doubt. Generally, “[t]he 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, 124 S. Ct. 1145 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-1164. When reviewing the refusal to give a proposed instruction, this court considers: (1) whether the proposed instruction correctly states the law; (2) whether the evidence supports giving the instruction; and (3) whether other instructions already given cover the substance of the proposed instruction. Driver v. State, 760 N.E.2d 611, 612 (Ind. 2002). To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as

a whole must misstate the law or otherwise mislead the jury. Benefiel v. State, 716 N.E.2d 906, 914 (Ind. 1999), reh'g denied, cert. denied, 531 U.S. 830, 121 S. Ct. 83 (2000).

Before a defendant is entitled to a reversal, he or she must affirmatively show that the erroneous instruction prejudiced his substantial rights. Gantt v. State, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005). An error is to be disregarded as harmless unless it affects the substantial rights of a party. Oatts v. State, 899 N.E.2d 714, 727 (Ind. Ct. App. 2009); Ind. Trial Rule 61. “Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.” Dill v. State, 741 N.E.2d 1230, 1233 (Ind. 2001).

Howey argues that he “suffered prejudice to his right to a fair trial by the trial court refusing to clarify the instruction on reasonable doubt due to the conflicts in testimony by the confidential informant and Howey.” Appellant’s Brief at 5. Howey argues that one of his defenses was entrapment and that “the State must prove beyond a reasonable doubt that Howey’s conduct was not the product of a law enforcement officer’s agent using persuasion or other means likely to cause Howey’s conduct, or that Howey was predisposed to commit the offence.” Id. Howey further argues that he “testified that he had only ever given pain pills to [R.B.] because he felt compelled to help out his niece,” which “was in conflict with the testimony of [R.B.] who indicated that he had purchased other drugs off of Howey.” Id. at 6. Howey asserts that “[t]his conflict in testimony required the giving of the proffered instruction as clarification of the trial court’s reasonable doubt instruction.” Id. Howey argues that “[t]his matter is unique

in that the conflict does not arise from an element of the crime but from a defense that the State has the burden to prove beyond a reasonable doubt did not exist.” Id. Howey then argues that the “general instruction regarding ‘based on your consideration of the evidence’ is misleading to the jury.” Id. Howey argues that the court’s failure to instruct the jury that a reasonable doubt can occur from a lack of evidence or a conflict of evidence prejudiced his “substantial right to provide a defense, namely the defense of entrapment.” Id.

The State argues that the court’s instructions adequately informed the jury that reasonable doubt could arise from their consideration of the evidence. The State argues that the trial court did not err in rejecting Howey’s instruction because the proposed instruction was adequately covered in other instructions. The State also argues that even if the trial court erred, Howey has failed to demonstrate that his substantial rights were prejudiced such that reversal of his convictions is merited.

The court gave the jury the following instruction:

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State’s proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crimes charged, you should find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty.

Appellant’s Appendix at 106. The court also instructed the jury as follows:

If there are conflicts in the evidence, it is your duty to reconcile the conflicts, if you can, on the theory that each witness has testified to the truth. If you cannot so reconcile the testimony, then it is within your province to determine whom you will believe and whom you will disbelieve.

You should weigh the evidence and give credit to the testimony in light of your own experience and observations in the ordinary affairs of life.

Id. at 141. Lastly, the court also instructed the jury on entrapment as follows:

The defense of entrapment is an issue in this case.

In order to overcome this defense, the State must prove beyond a reasonable doubt:

1. that the prohibited conduct of the Defendant was not the product of a law enforcement officer's agent using persuasion or other means likely to cause the Defendant to engage in the conduct, or
2. that the Defendant was predisposed to commit the offense.

Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Id. at 140. Based upon these instructions, we agree with the State that Howey's proposed instruction was adequately covered and that the trial court did not err in rejecting Howey's instruction.<sup>1</sup>

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<sup>1</sup> Howey cites VanWanzele v. State, 910 N.E.2d 240 (Ind. Ct. App. 2009), reh'g denied, trans. denied, in which the reasonable doubt instruction given by the trial court stated:

A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find her guilty. If on the other hand, you think there is a real possibility that she is not guilty, you must give her

Even assuming that the trial court abused its discretion by refusing to instruct the jury that reasonable doubt can arise from a lack of evidence or a conflict in the evidence, we cannot say that Howey is entitled to reversal. Howey does not point to a lack of evidence and while Howey argues that he “testified that he had only ever given pain pills to [R.B.] because he felt compelled to help out his niece,” which “was in conflict with the testimony of [R.B.] who indicated that he had purchased other drugs off of Howey,” the portion of the record cited by Howey does not support this statement.<sup>2</sup> Id. at 6. We conclude that Howey has failed to demonstrate that his substantial rights were prejudiced.

## II.

The next issue is whether the prosecutor committed prosecutorial misconduct that resulted in fundamental error. Howey argues that the prosecutor committed misconduct: (A) during voir dire; (B) by amending Count I on the first day of trial; and (C) by violating the court’s discovery order.

### A. Voir Dire

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the benefit of the doubt and find her not guilty.

The rule of law which requires proof beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for conviction unless you are convinced beyond a reasonable doubt of the defendant’s guilt. To return any verdict, your verdict must be unanimous.

910 N.E.2d at 246. On appeal, the court held that the trial court abused its discretion by refusing to instruct the jury that reasonable doubt can arise from a lack of evidence. Id. at 247. Unlike in VanWanzeele, the court here also instructed the jury that “[i]f there are conflicts in the evidence, it is your duty to reconcile the conflicts, if you can, on the theory that each witness has testified to the truth. If you cannot so reconcile the testimony, then it is within your province to determine whom you will believe and whom you will disbelieve.” Appellant’s Appendix at 141. Thus, we find VanWanzeele distinguishable.

<sup>2</sup> Specifically, Howey cites page 343 of the transcript for the proposition that he testified that “he had only ever given pain pills to [R.B.] because he felt compelled to help out his niece.” Appellant’s Brief at 6. However, as pointed out by the State, page 343 of the transcript does not support Howey’s claim.

Howey argues that the prosecutor's questions during voir dire were improper. Specifically, Howey argues that the prosecutor "[i]ndoctrinated" the jurors, attempted to try the case during voir dire, and attempted "to plant the seed of guilt that would color the jury's perception of the evidence as it was introduced during the trial." Appellant's Brief at 7-8.

The State argues that there was no misconduct because the prosecutor's questions were intended to discern whether the jurors thought that selling one's own prescription drugs was a crime. The State also argues that Howey cannot show that he was deprived of a fair trial by this isolated question as "[t]he prosecutor's question was posed once amid many other types of inquiry over seven rounds of *voir dire*." Appellee's Brief at 11. The State argues that the prosecutor "did not misstate the law, nor did he suggest prejudicial evidence with his question." Id. at 12.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. Id. If the party is not satisfied with the

admonishment, then he or she should move for mistrial. Id. Failure to request an admonishment or to move for mistrial results in waiver. Id. Here, Howey did not request an admonishment or a mistrial. Thus, Howey has waived the issue. See Robinson v. State, 260 Ind. 517, 522, 297 N.E.2d 409, 412 (1973) (discussing an allegation that the prosecutor made improper statements during voir dire and holding that “[t]o preserve such error, however, Defendant should have moved for a mistrial at the conclusion of the state’s case in chief, because it was within the context of the evidence presented that the propriety of the interrogation and the probability of harm therefrom had to be made”).

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Cooper, 854 N.E.2d at 835. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. It is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.” Id. Howey appears to argue fundamental error.

“The purpose of voir dire is to determine whether a prospective juror can render a fair and impartial verdict in accordance with the law and the evidence.” Joyner v. State, 736 N.E.2d 232, 237 (Ind. 2000). More specifically, such examination of prospective jurors is used to “discover whether a prospective juror has any opinion, belief, or bias which would effect or control her determination of the issues to be tried and thus provide

the basis for exercise of the right of challenge.” Holmes v. State, 671 N.E.2d 841, 854 (Ind. 1996), reh’g denied, cert. denied, 522 U.S. 849, 118 S. Ct. 137 (1997), abrogated on other grounds by Wilkes v. State, 917 N.E.2d 675 (Ind. 2009), reh’g denied, cert. denied, \_\_\_ U.S. \_\_\_, 131 S. Ct. 414 (2010). “Voir dire examination is conducted under the supervision of the trial court and must of necessity be left to its sound discretion.” Id. The Indiana Supreme Court “has condemned the practice of counsel utilizing voir dire as an opportunity to “brainwash” or attempt to condition the jurors to receive the evidence with a jaundiced eye.” Gregory v. State, 885 N.E.2d 697, 706-707 (Ind. Ct. App. 2008) (citing Robinson v. State, 266 Ind. 604, 610, 365 N.E.2d 1218, 1222 (1977), cert. denied, 434 U.S. 973, 98 S. Ct. 527 (1977), reh’g denied), trans. denied. “Questions that examine jurors as to how they would act or decide in certain contingencies or when presented with certain evidence are improper.” Id. at 707.

“However, proper examination may include questions designed to disclose the jurors’ attitudes about the type of offense charged.” Id. “The parties may also attempt to uncover the jurors’ preconceived ideas about a defense the defendant intends to use.” Id. “To reveal the jurors’ attitudes and ideas, the parties may pose hypothetical questions, provided they do not suggest prejudicial evidence not adduced at trial.” Id.

In Robinson, the “prospective jurors were being interrogated by the trial prosecutor, ostensibly to determine their feelings with regard to the death penalty.” 260 Ind. at 519, 297 N.E.2d at 411. The prospective jurors “had previously indicated their acceptance of the same as appropriate under certain circumstances and that they could vote for it if the circumstances warranted.” Id. “[T]he prosecutor stated that he wanted

to determine the circumstances under which they would vote for the death penalty and asked the jurors two additional questions.” Id. “The first assumed a murder by a contract killer following his parole from a life sentence for a previous murder and bore no similarity to the circumstances of [the] case.” Id. “The second question was: ‘If a father killed his twenty year old daughter because she resisted his sexual advances, could you vote for the death penalty then?’” Id. The Court held:

The facts assumed by [the second question], although hypothetically stated bore a striking resemblance to the facts of the case at hand. The victim was the daughter of the accused. She was twenty years old. These questions were propounded to five prospective jurors, two of whom ultimately served upon the jury. Moreover, they were propounded and repeated in the presence of the entire panel. No evidence was presented upon the trial that such was the motive of the defendant, although there was evidence of a long history of dissension between the defendant and his daughter; and various questions (some admitted and some not) and some answers bore the innuendo that the defendant had lust for his daughter. Viewing the evidence in a light most favorable to the state, the most that we can acknowledge is that it supported a suspicion that the friction between the defendant and the victim was incest oriented. There was no evidence presented from which the jury could have drawn such an inference beyond a reasonable doubt. Although not determinative upon the issue of whether or not such question was proper, it is significant that the case had been previously tried and resulted in a hung jury. No such evidence had been presented at the prior trial, and when the motion for discharge was argued, the prosecutor made no claim that he expected to present such evidence. We think such questions were clearly improper, prejudicial and deliberately calculated to prejudice the fair trial guaranties of the defendant, by conditioning the prospective jurors to receive the impending evidence, not with an open mind and resolution to give the defendant the benefit of reasonable doubt but rather with the seeds of suspicion firmly planted and anxiously awaiting germination.

Id. at 519-520, 297 N.E.2d at 411. The Court later concluded that the “interrogation was improper and highly prejudicial.” Id. at 522, 297 N.E.2d at 412.

On a subsequent appeal following a new trial, the Court again addressed the prosecutor's questioning of the jury during voir dire. Robinson v. State, 266 Ind. 604, 605, 365 N.E.2d 1218, 1220 (1977). The Court commented on the second question raised by the prosecutor in the first trial: "If a father killed his twenty year old daughter because she resisted his sexual advances, could you vote for the death penalty then?" Id. at 609, 365 N.E.2d at 1222. The Court held that "[t]he question was objectionable not because it closely resembled the State's case, but because the State did not introduce any evidence of such an attempted assault." Id. at 610, 365 N.E.2d at 1222. The Court held that the question "had been designed to and probably did implant in the minds of the jurors a belief as to a motive for the murder, and evidence of the suggested assault was not forthcoming, although evidence was presented that aroused suspicion of such assaults." Id. The Court concluded:

The hypothetical questions objected to here are distinguishable from those in the earlier trial, since, as defendant himself points out in his brief, the inferences suggested by the questions were well supported by the evidence. Although we condemned the practice generally of permitting counsel to "brainwash" or attempt to condition the jurors to receive the evidence with a jaundiced eye, the standards set by [] White[ v. State, 257 Ind. 64, 272 N.E.2d 312 (1971)] do not appear to compel our interference, in this case, with the trial judge's considered judgment upon this issue. In view of the evidence adduced, we can not say that the hypothetical questions propounded on voir dire examination placed the defendant in a position of grave peril.

Id.

Here, during voir dire, the following exchange occurred:

[Prosecutor]: [Prospective Juror], what do you think about that, somebody has a prescription and they sell it, does that make them a drug dealer?

[Prospective Juror]: Well, yeah, technically, I mean . . .

[Prosecutor]: You say technically.

[Prospective Juror]: I mean like if you're working and somebody like sold one maybe, you know, but if they sold a lot, yes.

[Prosecutor]: Well, I'm talking basically selling, not giving your co-worker a pill when they say my back's hurting or give your mother-in-law pill when she says her head hurts, that's somewhat different. I'm talking were [sic] you actually sell (inaudible).

Transcript at 18-19. We cannot say that the prosecutor's question regarding somebody that sells his prescription was objectionable as the State introduced and the court admitted evidence that Howey obtained Lortabs with a prescription and then sold them to R.B. We cannot say that the prosecutor's other statements indicating that he was not talking about "giving your co-worker a pill when they say my back's hurting or give your mother-in-law pill when she says her head hurts," Id., constituted brainwashing the jury or an attempt to condition the jurors to receive the evidence with a jaundiced eye. Thus, we cannot say that the prosecutor committed misconduct or that fundamental error occurred.

B. Amended Charging Information

As previously mentioned, the original charging information alleged that Howey "did knowingly deliver Hydrocodone, a controlled substance listed in Schedule III within one thousand (1000) feet of a youth program center, to-wit: Finding Me Now Day Care . . . ." Appellant's Appendix at 13. The amended charging information alleged that Howey "did knowingly deliver Hydrocodone, a controlled substance listed in Schedule III within

one thousand (1000) feet of **school property**, to-wit: Finding Me Now Day Care . . . .”  
Id. at 124.

Initially, we observe that Howey concedes that the failure to request a continuance after the trial court grants a motion to amend charges results in waiver of the issue on appeal. Specifically, Howey states: “While acknowledging the lack of a motion to continue waiving the issue of the late amendment, Howey asserts this was the result of prosecutorial misconduct.” Appellant’s Brief at 9. We also observe that Howey did not object to the amendment on the basis of prosecutorial misconduct.

Howey argues that the prosecutor had the information for nearly one year before the trial began in January 2011. Howey argues that “any defendant would take a different approach in defending each enhancement” and that “[w]hether the defendant were to argue that no children were present, that he was there for only a brief period of time or that group was not licensed at the time of the alleged events would depend on which enhancement, ‘youth program center’ or ‘school property,’ the State was asserting.” Id.

The State argues that “the Indiana Code provides that the State may seek to amend the charging information at any time, even during or after trial” and that “[t]he prosecutor cannot have committed misconduct by seeking an amendment at a time provided by statute.” Appellee’s Brief at 12 (citing Ind. Code § 35-34-1-5(c)). The State also argues that Howey has failed to show that he was deprived of a fair trial or subjected to a potential for substantial harm because he was on notice from the information and probable cause affidavit that the Finding Me Now Day Care facility was the enhancing location and “the potential statutory defenses of whether children were present or the

defendant was only briefly within the enhancement zone are equally applicable to a youth program center and a school.” Id. (citing Ind. Code § 35-48-4-16(b)). The State also argues that “Howey was not deprived of a defense based upon the licensing status of the Finding Me Now Day Care because the evidence at trial was that the facility was, in fact, licensed.” Id. at 13.

Howey does not cite authority for the proposition that such conduct constitutes prosecutorial misconduct. See Collins v. State, 509 N.E.2d 827, 832 (Ind. 1987) (addressing the defendant’s argument that the prosecutor’s attempts to amend charges or file additional charges constituted prosecutorial misconduct and observing that the defendant failed to provide supporting authority for his contention that such conduct constitutes prosecutorial misconduct). Further, given that the Finding Me Now Day Care was mentioned in the initial charging information, the amended charging information, and the probable cause affidavit, we cannot say that the amendment placed Howey in a position of grave peril or resulted in fundamental error.

C. Discovery

Howey does not appear to make a separate argument regarding the State’s filing of its Response to Court’s Discovery Order on June 14, 2010. Rather, Howey argues that “[t]he Prosecutor had the information for nearly one year before the trial began in January, 2011,” and “[i]f this were the only incident it may be written off as happenstance; however, taken in conjunction with the attempts to indoctrinate the jury and the failure to provide a response to the trial court’s standard discovery order until

twenty-four (24) days after the omnibus date, indicates an apparent reckless disregard by the State depriving Howey of a fair trial.” Appellant’s Brief at 10.

The State argues that Howey “does not claim that the State withheld any exculpatory evidence from him or submitted a response that incomplete [sic] in some other manner” or “explain how his defense was prejudiced except to assert that his defense was ‘delayed’ in some unspecified manner.” Appellee’s Brief at 13. The State also argues that “[g]iven that Howey’s defense was entrapment and that he received notice of the names of the witnesses and exhibits to be used by the State at trial while the parties were still conducting plea negotiations, he has failed to show that his defense was negatively impacted at all, let alone to the point of fundamental error.” Id.

Initially, we observe that Howey did not object to the State’s filing of its Response to Court’s Discovery Order. Further, while the State filed its Response to Court’s Discovery Order on June 14, 2010, which was after the May 21, 2010, date set in the court’s discovery order, the Response was filed seven months prior to trial and Howey does not develop an argument alleging that he was prejudiced by the late filing. We cannot say that Howey has demonstrated an undeniable and substantial potential for harm by the State’s filing of its Response to Court’s Discovery Order or that the combined allegations constitute fundamental error.

For the foregoing reasons, we affirm Howey’s convictions for dealing in a schedule III controlled substance as a class A felony, two counts of dealing in a schedule III controlled substance as class B felonies, and maintaining a common nuisance as a class D felony.

Affirmed.

BAKER, J., and KIRSCH, J., concur.