## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Jeromy D. Hurd,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

May 24, 2021

Court of Appeals Case No. 20A-CR-1671

Appeal from the DeKalb Superior Court

The Honorable Kevin P. Wallace, Judge

Trial Court Cause No. 17D01-2001-F2-3

**Vaidik, Judge.**

# Case Summary

[1] Jeromy D. Hurd appeals his convictions for dealing in methamphetamine, dealing in marijuana, and theft, arguing the trial court erred in admitting evidence and the evidence is insufficient to support his convictions. We agree and reverse as to the theft conviction but affirm in all other respects.

# Facts and Procedural History

[2] On January 9, 2020, Officer Justin James of the Auburn Police Department received information that Hurd, who had a warrant out for his arrest, was at 318 South Walsh Street in Garrett, DeKalb County, Indiana. The residence includes four apartments. Jodi Parrish resided in a ground-floor apartment, and her apartment was the only unit with access to the building's basement. Parrish's stepdaughter, Kassandra Dailey, regularly stayed at the apartment. Hurd had visited Dailey there a "couple" times. Tr. Vol. III p. 148.

[3] Officer James knocked on Parrish's door and, when she answered, asked for Hurd. Parrish went to Dailey's bedroom, where Dailey and Hurd were sleeping, and told them police were there. Hurd was "frantic" and "tr[ied] to hide" by "go[ing] out the window" and up "into the ceiling rafters." *Id.* at 152, 153. Parrish went back and forth between Dailey's bedroom and the front door several times to communicate with the officers outside. Hurd initially refused to leave the apartment, but after officers threatened to send in a canine unit, he came out. Officers searched him and found a cell phone and $1,360 cash "in

mostly small bills." *Id.* at 88. Officer James applied for a search warrant for the cell phone, which was granted. Officers also searched two vehicles parked at the apartment they were "told [Hurd] was driving" and found inside the cars "several chemical precursors to manufacture" methamphetamine. *Id.* at 99, 134. Parrish and Dailey consented to a search of the apartment. In Dailey's bedroom, officers found a firearm underneath a pillow, as well as a marijuana pipe, a small amount of marijuana, a meth pipe, and "a couple of residue baggies of methamphetamine." *Id.* at 89. In the basement, officers found a backpack containing 76.16 grams of methamphetamine, 587 grams of marijuana, a bag of pills, digital scales, a brass grinder, drug paraphernalia, a magazine loader for a handgun, and plastic baggies. The State charged Hurd with Level 2 felony dealing in methamphetamine, Level 6 felony dealing in marijuana, Level 6 felony possession of precursors, and Level 6 felony theft of a firearm.[1]

[4] The trial was held over three days in July 2020. During Officer James's direct testimony, the State asked him about text messages he found on Hurd's cell phone. The following exchange occurred:

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[1] The State also charged Hurd with Class A misdemeanor possession of a controlled substance based on the pills found in the backpack and with being a habitual offender. The court dismissed the misdemeanor charge after Hurd moved for a directed verdict, stating there was "an absence of any type of evidence." Tr. Vol. III p. 209. The habitual-offender charge was presented to the jury, and it found Hurd guilty. However, prior to sentencing Hurd argued the two offenses the jury found as being his prior convictions—Class C felony escape and Class C felony possession of a handgun without a permit by a convicted felon—were related because the escape felony was the underlying offense for the possession of a handgun charge. To avoid any double-jeopardy issues, the State agreed to dismiss the habitual-offender charge.

> [Prosecutor]: Alright. And at some point did you make any observations of that phone prior to obtaining the search warrant?
>
> [Officer James]: While I was working on the search warrant a message had popped up, someone asking to purchase—
>
> [Defense counsel]: I'm going to object to hearsay your honor. We don't know who this person is.
>
> [The Court]: Your response?
>
> [Prosecutor]: Well your honor again I, the issue is we have an out of court declarant. I'm not using this testimony to prove that the declarant actually in fact wanted to purchase the items. It's more of the drug activity that was going on related to the messages in Mr. Hurd's phone, not the intent of the actual parties sending him the messages and the truth of their intent.

*Id.* at 100-01. The court overruled the objection, and Officer James testified the phone contained messages "related to drug activity." *Id.* at 102.

[5] The State then introduced Exhibit 13, a photograph of text messages from Hurd's phone on the morning of his arrest. The court admitted the photograph over Hurd's "continuing objection." *Id.* at 104. The text messages contained the following exchange:

> [Unidentified Person]: Ok unless you just want to meet somewhere you need more green or what
>
> [Hurd]: I can take more tree yea and u got more go bubba? I can take whatever really…..

[Unidentified Person]: Alil

[Hurd]: And I gotta meet darryl in town but we can meet at 6 and 69 if u want? Thatd be easier.

Ex. 13. Officer James testified "green" and "tree" are both slang terms for marijuana. The State later introduced photographs of Facebook messages received by Hurd's phone on the day of his arrest. The messages contained the following, all from unidentified persons:

Hey bud whatcha doing my man lmfao wants some bad, he said he just wants a few bong rips lmfao

Did I show you what I made

Hey bub

You ok bub

I got you cash bub

I'm at home I need and got your money.

Hey guy, whatcha doing? Got cash for a zip

I mean how much for four whole ones grn

I need a qp bro

Ok so I got that but what about a b

Exs. 14, 16-19.

[6] Again, the court admitted the exhibits over Hurd's objection. Officer James testified these messages indicate "money transaction[s]" and reference needing "drugs." Tr. Vol. III pp. 110, 111. Specifically, he testified "bong rips" refers to "smoking" marijuana or methamphetamine out of a bong and "zip" is slang for "an ounce of drugs." *Id.* at 108, 111. Unlike Exhibit 13, these photographs contain only messages sent to Hurd from unidentified persons; no responses from Hurd are included. Additionally, the State introduced a "photograph of a photograph on [Hurd's] phone" *Id.* at 112. The photograph showed a brass grinder, which Officer James testified "appears to be the same type of grinder" found in the backpack and that he believed the two grinders to be the "same." *Id.* at 205. He also stated he doesn't "commonly find brass grinders." *Id.* at 206.

[7] Later Officer James testified he ran the serial number on the gun found in Dailey's bedroom and it came back as stolen from Travis Bunn in Noble County. During Hurd's cross-examination of Officer James, the following exchange occurred:

> [Defense counsel]: To your knowledge did [Dailey] know that the gun was present in her bedroom?
>
> [Officer James]: She did. She told me about it.
>
> [Defense counsel]: But she wasn't charged with that gun?
>
> [Officer James]: That is correct.

> [Defense counsel]: Items stolen and in her possession?
>
> [Officer James]: I couldn't hear what you said.
>
> [Defense counsel]: She didn't get charged with having a stolen gun in her possession?
>
> [Officer James]: No.

*Id.* at 123. On Officer James's redirect, the State asked, "[Defense counsel] asked you why [Dailey] wasn't charged with possession of that firearm. Is there a reason?" *Id.* at 124. Hurd objected that the answer called for hearsay, but the court allowed Officer James to respond because "[Dailey] will be testifying" so the defense will "have a chance to ask [her] about this." *Id.* at 124. Officer James then testified Dailey was not charged with theft of the gun because when he was interviewing her she was "very open" and said the gun was not hers. *Id.*

[8] Parrish testified that, when speaking with Officer James at the front door, she told him "[Hurd] was in the basement." *Id.* at 155. However, she clarified she was told this information by Dailey, and never actually saw Hurd go into the basement. Later, defense counsel asked Parrish about Hurd's actions right before he left the apartment, and she stated, "When he came upstairs he said, he, yeah, when he was right next to me there at the door he said that he wanted to smoke, he's turning himself in he wanted to smoke a cigarette." *Id.* at 161. Finally, Detective Cory Heffelfinger of the Auburn Police Department testified

the value of the methamphetamine found in the backpack was approximately $7,600, while the value of the marijuana was around $6,000.

[9] The State anticipated Dailey would testify, but during a break in the trial on the second day she left and did not return. Hurd then moved "to strike portions of Jodi Parrish's testimony that referenced comments of [Dailey's] since [Dailey] is not now here to testify. It would be hearsay." *Id.* at 194. The court agreed to "strike from the record . . . anything that Jodi Parrish said Kassandra Dailey told her." *Id.* at 195. Most notably, this included Dailey telling Parrish that Hurd was in the basement.

[10] The jury found Hurd guilty of Level 2 felony dealing in methamphetamine, Level 6 felony dealing in marijuana, and Level 6 felony theft. The jury found Hurd not guilty of Level 6 felony possession of precursors. The court sentenced Hurd to twenty years for the Level 2 felony and two years each for the Level 6 felonies, all to be served concurrently, for an aggregate sentence of twenty years.

[11] Hurd now appeals.

# Discussion and Decision

## I. Admission of Evidence

[12] Hurd challenges the trial court's admission of the messages from his phone and Officer James's testimony regarding the messages. Generally, the admission of evidence is within the sound discretion of the trial court, and we afford that

discretion great deference on appeal. *Hall v. State*, 36 N.E.3d 459, 466 (Ind. 2015). We therefore review a trial court's admission of evidence only for an abuse of discretion. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied.* "An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." *Id.*

[13] Hurd argues the contents of the phone messages were inadmissible hearsay. "Hearsay" is defined as an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is not admissible unless it falls within an exception to the hearsay rule. Ind. Evidence Rule 802.

[14] The first challenged exhibit, Exhibit 13, shows an exchange of text messages between Hurd and an unidentified person. Again, the messages provide, in part:

> [Unidentified Person]: Ok unless you just want to meet somewhere you need more green or what
>
> [Hurd]: I can take more tree yea and u got more go bubba? I can take whatever really…..
>
> [Unidentified Person]: Alil
>
> [Hurd]: And I gotta meet darryl in town but we can meet at 6 and 69 if u want? Thatd be easier.

Ex. 13. Hurd argues these statements are inadmissible hearsay because the statements were used to prove the truth of the matter asserted—"that the declarant[] wanted to purchase drugs." Appellant's Br. p. 13. We disagree.

First, Hurd's statements, as the defendant, are not hearsay because they are statements of a party opponent. *See* Evid. R. 801(d)(2)(A). The statements made by the unidentified person are also not hearsay because their contributions to the conversation were not admitted for the truth of the matter asserted. *See* Evid. R. 801(c). Rather, they were admitted to place Hurd's statements in context. *See Williams v. State*, 930 N.E.2d 602, 609 (Ind. Ct. App. 2010) ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth."), *trans. denied*.

[15] As with Exhibit 13, Hurd argues the other messages—Exhibits 14 and 16-19—constitute inadmissible hearsay because they were used to prove the declarants wanted to buy drugs. The State responds that the messages are admissible under Indiana Rule of Evidence 803(3), which allows "[a] statement of the declarant's then-existing state of mind," such as motive, intent, or plan. We need not resolve this issue because even if these messages were improperly admitted, the error was harmless.

[16] We will not reverse a defendant's conviction if the error was harmless. *Teague v. State,* 978 N.E.2d 1183, 1188-89 (Ind. Ct. App. 2012). An error is harmless if substantial independent evidence of guilt satisfies the reviewing court that no substantial likelihood exists that the challenged evidence contributed to the conviction. *Id.* Generally, errors in the admission of evidence are to be disregarded unless they affect the substantial rights of a party. *Id.* If the erroneously admitted evidence was cumulative of other evidence, the admission is harmless error for which we will not reverse a conviction. *Id.*

[17] Here, the messages sent to Hurd were cumulative of other admitted evidence and therefore harmless. The messages show "drug activity" by either referencing a need for drugs or referencing money transactions. But Exhibit 13, which was properly admitted, shows the same. In fact, it is far more damaging as it includes not only an unidentified person referencing a drug transaction, but also Hurd responding. Furthermore, as detailed more below, the evidence is sufficient to support Hurd's convictions even without these exhibits. Under these facts and circumstances, we conclude any error in the admission of messages received by Hurd's phone was harmless.

# II. Sufficiency of Evidence

[18] Hurd contends the evidence is insufficient to support his convictions. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We will only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

## A. Dealing Convictions

[19] To convict Hurd of Level 2 felony dealing in methamphetamine, the State had to prove he knowingly or intentionally possessed at least ten grams of methamphetamine with the intent to deliver it or finance its delivery. Ind. Code

§ 35-48-4-1.1(e). To convict Hurd of Level 6 felony dealing in marijuana, the State had to prove he knowingly or intentionally possessed over thirty grams, but less than ten pounds, of marijuana with intent to manufacture, finance its manufacture, deliver, or finance its delivery. Ind. Code § 35-48-4-10(c). The only element Jackson challenges, for both convictions, is possession. To satisfy this element, the State may prove he had actual or constructive possession. *Griffin v. State*, 945 N.E.2d 781, 783 (Ind. Ct. App. 2011). Actual possession occurs when a defendant has direct physical control over an item. *Id.* Absent actual possession, constructive possession may support a conviction. *Id*. Here, Hurd did not have direct physical control over the drugs found in the backpack. The question then is whether he had constructive possession. Constructive possession "occurs when a person has the intent and capability to maintain dominion and control over the item." *Id*.

[20] In cases where the defendant has exclusive possession of the premises where the contraband is found, an inference is permitted that he knew of its presence and was capable of controlling it. *Collins v. State*, 822 N.E.2d 214, 222 (Ind. Ct. App. 2005), *trans. denied*. "But when possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it." *Id.* The "additional circumstances" have been shown by various means: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of

the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Erickson v. State*, 68 N.E.3d 597, 601 (Ind. Ct. App. 2017), *trans. denied*. "These circumstances apply to show constructive possession even where the defendant is only a visitor to the premises where the contraband is found." *Collins*, 822 N.E.2d at 222.

[21] Here, although Hurd was only a visitor to the apartment, the evidence sufficiently shows he constructively possessed the drugs found in the backpack. The State presented evidence that a brass grinder—which Officer James stated is not common to find—was in the backpack. Hurd's phone contained a photo of the "same" brass grinder. And the cars officers had been told Hurd drove contained supplies to manufacture methamphetamine. Hurd also sought to avoid apprehension. He not only refused to exit the apartment and surrender to officers until they threatened to send in a canine, but Parrish testified he attempted to flee out of a window and hide in her apartment. Furthermore, although there was conflicting evidence as to whether any witnesses saw Hurd in the basement, Parrish testified at one point that Hurd "came upstairs" to speak to officers, who were on the ground floor. The jury could infer this meant he had been in the basement. And Parrish testified she was often not in the bedroom with Hurd because she was speaking with officers at the door and that her apartment had access to the basement, meaning Hurd had the opportunity to hide the backpack there even without her knowledge. Finally, the State produced text messages from the morning of Hurd's arrest, suggesting Hurd was involved in drug activity. This is sufficient evidence for the jury to convict.

*See Ferguson v. State*, 485 N.E.2d 888, 889 (Ind. 1985) (evidence was sufficient for the jury to find defendant guilty of constructively possessing a bag of drugs found in a hotel basement, even though no one saw him go into the basement, because he was inside the hotel, fleeing police, and appeared to be covered in dirt also found in the basement).

[22] The State produced sufficient evidence Hurd constructively possessed the backpack containing the methamphetamine and marijuana.

## B. Theft Conviction

[23] Finally, Hurd argues there is insufficient evidence to convict him of theft. The offense of theft is governed by Indiana Code section 35-43-4-2, which provides in part, "A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft," and that offense is a Level 6 felony if the property is a firearm. To convict Hurd of theft as a Level 6 felony, the State had to prove he knowingly or intentionally exerted unauthorized control over Travis Bunn's firearm with intent to deprive him of its value or use.

[24] Hurd contends that even if the State proved he possessed the gun, "that fact alone cannot support the inference that [he] knew the firearm was stolen." Appellant's Br. p. 18. We agree. "[T]he mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft." *Fortson v. State*, 919 N.E.2d 1136, 1143 (Ind. 2010). Possession "is to be considered along with the other evidence in a case, such as

how recent or distant in time was the possession from the moment the item was stolen, and what are the circumstances of the possession (say, possessing right next door as opposed to many miles away)." *Id.* Here, the State showed no evidence to support the "knowingly or intentionally" element. Although Officer James testified the gun was stolen from Travis Bunn in Noble County, the record is silent as to any evidence suggesting Hurd knew this. There is no evidence as to when this theft occurred, and although the State presented evidence it was stolen in Noble County and found in DeKalb County, there was no other evidence presented as to the circumstances of possession, such as a connection between Hurd and Bunn, or that Hurd was ever in Noble County. *See Daugherty v. State*, 43 N.E.3d 1288, 1290 (Ind. Ct. App. 2015) (finding sufficient evidence defendant had knowledge the items were stolen because the State showed he possessed the items "close in time to the moment they were stolen" and "in close physical proximity" to where they were stolen).

[25] We agree with Hurd that the State provided insufficient evidence to convict him of theft and reverse as to that conviction.[2]

[26] Affirmed in part, reversed in part, and remanded.

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[2] Hurd also challenges Officer James's testimony that Dailey was not charged with theft of the firearm because she told him it was not hers, arguing this constitutes inadmissible hearsay. We're inclined to agree with the State that the evidence is admissible because Hurd "opened the door" to such testimony by questioning Officer James as to why the State did not charge Dailey with theft of the firearm. *See Wilder v. State,* 91 N.E.3d 1016, 1023 (Ind. Ct. App. 2018) (holding the defendant opened the door to a detective's testimony when he attacked the police investigation and the State was entitled to elicit testimony about why it brought charges without first interviewing certain persons). But because this evidence goes to the theft conviction, which we are reversing, we need not resolve this issue.

Bradford, C.J., and Brown, J., concur.