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IN THE
COURT OF APPEALS OF INDIANA

Lisa Rose Fedij,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 11, 2022

Court of Appeals Case No.
21A-CR-1481

Appeal from the Hamilton
Superior Court

The Honorable J. Richard
Campbell, Judge

The Honorable Darren Murphy,
Magistrate

Trial Court Cause No.
29D04-2003-CM-1717

Mathias, Judge.

[1] In recent years, our General Assembly has amended our criminal code to permit Hoosiers to possess certain cannabis-based products so long as the percent concentration of THC in those products is below a certain threshold. Here, the State's only evidence that Lisa Rose Fedij possessed a substance with

a THC content above that threshold, rather than a legal substance, was what appears to be manufacturers' declarations of the THC content on the outside of the packaging that the substances found in her possession apparently came in. Fedij objected to the admission of that packaging on hearsay grounds, but the trial court admitted the packaging into evidence, and she was found guilty of Class A misdemeanor possession of marijuana and Class C misdemeanor possession of paraphernalia.

[2] Fedij now appeals and raises the following two issues for our review:

I. Whether the trial court abused its discretion when it admitted the packaging into evidence under the market reports exception to hearsay.

II. Whether the State presented sufficient evidence to support Fedij's convictions.

[3] We hold that the trial court abused its discretion when it admitted the packaging into evidence under the market reports exception to hearsay because nothing about the statements and symbols on the packaging demonstrates the substantial trustworthiness of the products' claims. We also hold, based on the remaining, admissible evidence, that the State failed to prove beyond a reasonable doubt that Fedij in fact possessed marijuana and not a legal substance. We therefore reverse her conviction for Class A misdemeanor possession of marijuana. However, sufficient evidence shows that Fedij committed Class C misdemeanor possession of paraphernalia, and we affirm that conviction.

Facts and Procedural History

[4] On February 27, 2020, Carmel Police Department Officer Shelby Jellison responded to a report of a disturbance at a residential location on Windy Knoll Lane. Upon arriving at the residence, the homeowners let Officer Jellison inside. Fedij had been living alone at the residence but was not one of the homeowners. The door to Fedij's bedroom was to the immediate left of the front door upon entering the residence.

[5] Just inside the front door, Officer Jellison immediately smelled the odor of burnt hemp or marijuana coming from Fedij's bedroom. Officer Jellison knocked on the door to Fedij's bedroom. Fedij exited the room, closed the door behind her, and asked to speak with Officer Jellison down the hallway in the kitchen.

[6] Officer Jellison requested a search warrant for Fedij's bedroom after Fedij denied Officer Jellison permission to search the room. After receiving the search warrant, Officer Jellison and another officer searched Fedij's bedroom. There, they seized the following items:

1. A "pill-shaped bottle" that "contained plant material," Tr. Vol. 2 p. 177;
2. "Two grinders, both containing plant material in them," *id.*;
3. A package—similar to a small package of candy[1]— containing yellow hard candy, with the writing "THC INFUSED HARD DROPS" on the outside of the packaging, Ex. Vol. 4 p. 8;

[1] We used Officer Jellison's body-camera footage, which was admitted into the record as State's Exhibit 2, to approximate the size of this package.

4. Another package—similar to a Capri-Sun package[2]—containing a light brown liquid, with the writing "Exotic Carts," an apparent Twitter handle,[3] and "ONE GRAM" on the outside of the packaging, *id.* at 10;
5. A "green smoking bong with burnt plant material residue on it," Tr. Vol. 2 pp. 174-75;
6. A "clear glass smoking pipe with a rubber band wrapped around it, also containing burnt plant material," *id.* at 176;
7. A "blue powdered glass smoking bowl . . . that also had burnt plant material residue on it," *id.*

Elsewhere in the house, Officer Jellison found a "plastic baggie that contained plant material"; a silver tray "that also contained fine amounts of other plant material"; and "an ashtray in the guest bedroom with a burnt marijuana cigarette and other plant material residue with that." *Id.* at 179.

[7] The State charged Fedij with Class A misdemeanor possession of marijuana, Class B misdemeanor possession of marijuana, and Class C misdemeanor possession of paraphernalia. The court bifurcated Fedij's trial such that the Class B and Class C misdemeanor allegations were first tried to the jury, and, thereafter, the Class A misdemeanor allegation was tried to the court.

[8] During the initial phase of the trial, the State called Officer Jellison, who testified to her observations at the residence and to the evidence seized from the residence. During her testimony, she stated that she smelled the odor of "[b]urnt marijuana" coming from Fedij's bedroom and identified a cigarette

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[2] Again, we used Officer Jellison's body-camera footage to approximate the size of this package.

[3] A Twitter handle is a username for the social media site Twitter, preceded by the "@" symbol.

found elsewhere in the house as a "burnt marijuana cigarette." *Id.* at 161, 179. However, on cross-examination, she acknowledged that "there are two variations of the cannabis plant," "one is legal and one is not legal," and "the difference in the legality is the THC content," which "[i]s why we send it to the lab." *Id.* at 223, 225-26. She further acknowledged that she was "trained only on the smell of burnt marijuana," and she was not trained on the smell of burnt hemp or on any differences that may exist between the smell of burnt hemp and burnt marijuana. *Id.* at 232.

[9] During Officer Jellison's testimony, the State moved to admit photographs of the items that were seized. Those photographs included State's Exhibits 4 and 5, which depicted the "Hard Drops" package, and State's Exhibits 6 and 7, which depicted the "Exotic Carts" package. Ex. Vol. 4 pp. 7-10.[4] Again, the Hard Drops package identified its contents as "THC INFUSED HARD DROPS." *Id.* at 8. The package additionally portrayed a large triangle with a marijuana leaf and an exclamation point inside the triangle as well as the letters "CA" underneath the triangle. *Id.* Officer Jellison stated in her body-camera footage, which had been admitted without objection as State's Exhibit 2, that the triangle symbol "is known" to identify substances "for contaminants containing THC." State's Ex. 2 at 4:24 to 4:32. The package also had the word "WARNING" written in large font on it followed by "THIS IS NOT FOOD"

[4] Although these photographs are included in the record on appeal, they are difficult to read aside from the most conspicuous lettering. Our descriptions of the writing and labels on the packaging therefore is also based on undisputed descriptions provided in the transcript by the trial court, the attorneys, and the witnesses.

next to the warning in slightly smaller font. Ex. Vol. 4 p. 8. Finally, the package stated that its product contained "60 mg THC." Tr. Vol. 3 p. 12.

[10] The Exotic Carts package included pictures of "monsters" in a "euphoric kind of design" and stated that it contained "ONE GRAM" of its product. Tr. Vol. 2 p. 203; Ex. Vol. 4 p. 10. The package also included a THC identifier similar to the triangle on the Hard Drops package. *See* Tr. Vol. 2 p. 212. And the package stated that its product was "100 percent dank[5]" and contained "THC 80 to 85 percent." Tr. Vol. 3 p. 12.

[11] Fedij objected to the State's photographs of the two packages on the ground that the packages' writing and symbols were inadmissible hearsay.[6] The trial court overruled Fedij's objections and admitted the State's photographs of the packages.

[12] The State also had admitted into evidence forensic analyses of the "yellow candy," "light brown liquid," and plant material. Ex. Vol. 4 pp. 50, 59, 61, 63. The Miami Valley Regional Crime Laboratory analyzed the candy and liquid. However, its written analysis could not "differentiat[e those substances] between hemp and marijuana." *Id.* at 50. While the analysis was able to identify

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[5] "Dank" could mean either that the product contained marijuana or more generally that the product was something "of high quality." *Dank*, UrbanDictionary.com (last visited on Mar. 15, 2022).

[6] The physical packages themselves were subsequently admitted into evidence without contemporaneous objections from Fedij, but the State does not suggest on appeal that Fedij's prior hearsay objections did not apply to the physical packages.

the candy and liquid as containing THC, the analysis did not identify a percent concentration of THC in either substance. *Id.*

[13] Carmel Police Department Examiner Karen Sutton conducted the analysis of the plant material.[7] As with the candy and liquid, her analysis of the plant material could not differentiate the material between hemp and marijuana. Tr. Vol. 3 pp. 5-8. Indeed, in her testimony about her analysis, Sutton made clear that the only way to distinguish between hemp and marijuana would be to determine the percent concentration of THC in the tested substance. *Id.* But, while her analysis of the plant material was able to identify the presence of THC in the plant material, she did not determine a percent concentration of THC. *See id.*; Ex. Vol. 4 pp. 59, 61, 63.[8] Instead, in her written analysis, she advised that, "[i]f the percent concentration of [THC] in the plant material needs to be determined, please contact the Indiana State Police Laboratory." Ex. Vol. 4 pp. 59, 61, 63. But the State did not seek further testing of the candy, liquid, or plant material because "the level of crime[s] charged did not justify the expense of the additional testing." Tr. Vol. 3 p. 10.

[14] Following Sutton's testimony, the trial court, outside the presence of the jury, asked the State if it had evidence "that reflects the levels of THC in any of these

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[7] The cumulative weight of the plant material was 4.34 grams. *See* Ex. Vol. 4 pp. 59, 61, 63.

[8] As explained further below, Sutton's written reports of the plant material identify the material as "[m]arijuana." Ex. Vol. 4 pp. 59, 61, 63. However, in her testimony about those reports, she clarified that nothing in her testing of the material would have been able to distinguish legal hemp from illegal marijuana. Tr. Vol. 3 pp. 5-8.

products?" *Id.* The State responded that it was relying on the Hard Drops package, the Exotic Carts package, and "circumstantial" evidence to show the percent concentration of THC in the candy, liquid, and plant material. *Id.* at 10-11. The State also alleged that it could rely on "evidence of the officer's training and experience that could . . . differentiate between marijuana and legal hemp." *Id.* at 11. And, after Fedij renewed her hearsay objections to the Hard Drops package and the Exotic Carts package, the State responded that the writing and symbols on the packages were admissible under Indiana Evidence Rule 803(17), which states that hearsay is admissible when it is in the form of "[m]arket quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations," as well as under our Supreme Court's analysis of that Rule in *Reemer v. State*, 835 N.E.2d 1005 (Ind. 2005). *Id.* at 12-15. After a recess, the court affirmed its admission of the packages over Fedij's hearsay objections and permitted the State to proceed with its case.

[15] The jury found Fedij guilty of Class B misdemeanor possession of marijuana and Class C misdemeanor possession of paraphernalia. Thereafter, the court found her guilty of Class A misdemeanor possession of marijuana and entered judgment of conviction on the Class A and Class C misdemeanors. This appeal ensued.

Discussion and Decision

Issue One: Admission of the Writing and Symbols on the Packages to Prove the Truth of the Matters Asserted Under Evidence Rule 803(17)

[16] Fedij first argues on appeal that the trial court erred when it admitted the Hard Drops package and the Exotic Carts package to prove the truth of the matters asserted on them, namely, that those products contained levels of THC that made them illegal in Indiana. Generally, a trial court has broad discretion in ruling on admissibility of evidence. *Dycus v. State*, 108 N.E.3d 301, 303 (Ind. 2018). We will ordinarily disturb a trial court's admissibility rulings only where it has abused its discretion. *Id.* A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court misapplies the law. *Id.*

[17] There is no dispute in this appeal that the writings and symbols on the Hard Drops package and the Exotic Carts package were hearsay. Our Evidence Rules define hearsay as "a statement that: (1) is not made by the declarant while testifying at the trial . . . ; and (2) is offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). The general rule is that "[h]earsay is not admissible unless these rules or other law provides otherwise." Evid. R. 802.

[18] The State offered the Hard Drops package and the Exotic Carts package for the purpose of proving the truth of the matters asserted on those packages: that the products within those packages contained levels of THC that would be illegal in Indiana. Thus, the State does not dispute that it offered hearsay evidence.

Instead, the State asserts that the hearsay was admissible under Evidence Rule 803(17), the "market reports exception" to the rule against hearsay. That Rule provides that the following statements are admissible hearsay: "Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations." Evid. R. 803(17).

[19] Essential to the State's application of the market reports exception is our Supreme Court's analysis of that exception in *Reemer*. In that case, the defendant purchased multiple boxes of over-the-counter cold medicines containing a salt of pseudoephedrine. The State charged him with Class D felony possession of a precursor in the manufacture of methamphetamine, which required the State to show that the defendant possessed more than ten grams of ephedrine, pseudoephedrine, or a salt of one of those compounds. To prove the identity of the compound in the defendant's possession, the State offered into evidence the labels from the over-the-counter medicine boxes. Those labels demonstrated that the cold medicines contained a salt of pseudoephedrine. The defendant objected to the admission of the labels as hearsay, but the trial court admitted the labels into evidence under the market reports exception.

[20] Our Supreme Court affirmed the trial court's admission of the labels under Rule 803(17). In doing so, the court reasoned:

> The "market reports" description of admissible items as "market quotations, tabulations, lists, directories, or other published compilations" suggests that the exception exists only for

> "compilations." *It has however been held to support admission of other published materials where they are generally relied upon either by the public or by people in a particular occupation*.
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> *In the instant case, labeling of the tablets found in [the defendant's] possession was subject to federal and state law*. A false or misleading label violates federal law. *See* 21 U.S.C. § 352 (1999). The Indiana "Drug, Device, and Cosmetic Act" regulates drugs introduced into commerce in this state. Like its federal counterpart, it also specifically prohibits the introduction into commerce of any drug that is mislabeled. *See* I.C. § 16-42-3-4. The applicable federal and state regulations require that drug labels be accurate and trustworthy. As the Iowa Supreme Court observed, *"the contemporary nature of pharmaceutical practice exemplifies the inherent trustworthiness" of the labels on cold medication*. *[State v.]Heuser*, 661 N.W.2d [157,] 164 [(Iowa 2003)]. Indeed, physicians, patients and the general public routinely rely on regulated manufacturing practices and mandatory labeling to assure that pharmaceuticals are as they are represented to be. We conclude that labels of commercially marketed drugs are properly admitted into evidence under the exception provided by Evidence Rule 803(17) to prove the composition of the drug.

Reemer, 835 N.E.2d at 1008-09 (emphases added; footnotes omitted). In a footnote, the court added:

> At trial, the state claimed that its reason for not offering a lab report which documented the weight and chemical contents of the tablets was because its laboratory had established a policy against running tests on tablets such as the ones found in [the defendant's] possession. The reason for this policy is not stated. We assume it is because labels adequately describe the chemical makeup of commercially marketed products and laboratory resources are scarce.

Id. at 1007 n.3.

[21] Following *Reemer*, we were asked to determine whether the market reports exception applied to the admission of a product label on a can of starter fluid, which warned consumers that the product contained dangerous ingredients. *Forler v. State*, 846 N.E.2d 266 (Ind. Ct. App. 2006). Some of those ingredients were relevant to the manufacture of methamphetamine, with which the State had charged the defendant. We held that our Supreme Court's analysis in *Reemer* demonstrated that the label warning of dangerous ingredients was also admissible:

> It is true, as [the defendant] argues, that *Reemer* was concerned specifically with commercially marketed pharmaceuticals and that it relied upon particular federal and state statutes regulating pharmaceutical labeling . . . . However, we see no indication that our supreme court intended to foreclose any consideration of other types of product labels as possibly falling under Evidence Rule 803(17)'s hearsay exception for "market reports" and "commercial publications."
>
> Instead, we discern the opposite. In two footnotes, the court cited with apparent approval a number of cases that had found various types of compilations or published materials other than drug labels to be admissible hearsay "where they are generally relied upon either by the public or by people in a particular occupation." *Id.* at 1008 and 1008 n.6; *see also id.* at 1009 n.7. Of particular interest in this case is our supreme court's citation to *Ledford v. State*, 239 Ga. App. 237, 520 S.E.2d 225, 229 (1999), for the proposition that the "public can rely on labels to show a product includes a hazardous substance because 'a manufacturer

would have no interest in proclaiming that the product contained such a substance if in fact it did not.'" *Id.* at 1009 n.7.[9]

. . . [T]he passage . . . that our supreme court quoted actually comes from a California case, *In re Michael G.*, 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (1993).

California has a hearsay exception that closely parallels Indiana Evidence Rule 803(17). . . . In *Michael G.*, the court considered whether a label from a paint can, listing toluene as ingredient, was admissible under this hearsay exception. The court concluded:

> While we agree with appellant that a manufacturer might have devious reasons for failing to advise the public of the dangers of its product, the converse is not true. **A label *including* (rather than excluding) a hazardous substance is inherently trustworthy, in that a manufacturer would have no interest in proclaiming that the product contained such a substance if in fact it did not. However, our holding is limited strictly to the *presence* of a hazardous substance, and not to its quantity or quality**. The trial court was thus entitled to take judicial notice that the public relies on the dangers and antidotes listed on a label as a matter of common knowledge, and to conclude that the label was generally used and relied on as accurate in the course of a business within the meaning of the compilation exception to the hearsay rule . . . .

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[9] In *Forler*, we added that "[w]e feel compelled to note that our supreme court's pinpoint citation to and quotation from *Ledford* actually is from a dissenting opinion filed in that case . . . ." 846 N.E.2d at 269 (citing *Ledford*, 520 S.E.2d at 228-29).

Michael G., 24 Cal. Rptr. 2d at 262 (footnote omitted) ([italicized] emphases in original).

In addition to *Michael G.*, we note that in the *Heuser* opinion relied upon by our supreme court in *Reemer*, the Iowa Supreme Court held not only that cold medicine labels were admissible into evidence, but also that battery labels indicating that the batteries contained lithium were admissible under the "market reports" hearsay exception. *Heuser*, 661 N.W.2d at 165. **The court acknowledged that the batteries were not governed by strict labeling requirements, as was the cold medicine, but concluded nonetheless, "There is nothing in the record to suggest the battery labels indicating they contained lithium were untrustworthy or had been altered from their original form**." *Id.*

Here, the starting fluid can's label stated in part, "PRECAUTIONS—DANGER: Contains n-heptane . . . , diethyl ether . . . , carbon dioxide . . . , lubricant oil . . . . Use in well ventilated area. EXTREMELY FLAMMABLE." The Liquid Fire bottle's label stated in part, "CAUTIONS—READ BEFORE USING—Contains concentrated sulfuric acid. May cause eruption of hot acid when poured into drain. Protect eyes, face and other portions of body." We readily conclude, as did the *Michael G.* court, that **manufacturers would have little to no incentive to place such warnings of hazardous contents on their products if such were not true**. On the contrary, the only persons who might actually be directly motivated to buy starting fluid or Liquid Fire **because** they have dangerous ingredients, or who might feel "cheated" if they in fact did not contain ether and sulfuric acid, would be methamphetamine manufacturers. **We believe it is permissible to assume that where a product label warns consumers that it contains dangerous ingredients, the general public reasonably relies upon the accuracy of such warnings**.

Id. at 268-70 (bold emphases added; footnote and record citations omitted).

[22] We conclude that the trial court erred when it relied on *Reemer* and *Forler* to admit the writing and symbols on the Hard Drops and Exotic Carts packages under the market reports exception. First, and most obviously, the writing and symbols on the Hard Drops package and the Exotic Carts package are in stark contrast to the federally regulated drug labels on pharmaceuticals, which were at issue in *Reemer*. Unlike the labels on pharmaceuticals, nothing in the writing or symbols of the Hard Drops and Exotic Carts packages provides a detailed analysis of the products' chemical compositions, their directions for use, or specific warnings from their misuse.

[23] Indeed, there is no Indiana or federally regulated labeling on these products *at all* for a conspicuous reason: they are wholly illegal in both jurisdictions. Thus, unlike in *Reemer*, the general public cannot "routinely rely on regulated manufacturing practices and mandatory labeling to assure" that these products "are as they are represented to be." 835 N.E.2d at 1009. And, unlike "the contemporary nature of pharmaceutical practice," we cannot say that the manufacturing of these federally outlawed products "exemplifies the inherent trustworthiness" of the products' own descriptions. *Id.* (quoting *Heuser*, 661 N.W.2d at 164).

[24] That said, we agree with *Forler* that the reasoning in *Reemer* is not limited to pharmaceutical labels. *See id.* at 268-69. Part of our Supreme Court's reasoning in *Reemer* looked to whether the packaging at issue is "generally relied upon

either by the public or by people in a particular occupation."[10] 835 N.E.2d at 1008. That is not the case here. These are not products that, in Indiana at least, one can buy on a supermarket shelf. *See id.* at 1009 n.7 (approving of foreign precedent that applied the market reports exception where "the consumer public daily accepts as true and relies upon the assertions in labels and brands appearing on packages displayed at the supermarket") (quoting *State v. Rines*, 269 A.2d 9, 14 (Me. 1970)).

[25] Further, nothing in the writing or symbols visible in the record on appeal or as described in the transcript demonstrates anything analogous to the labels consumers might find on food products, such as a "Nutrition Facts" label that describes serving size, servings per container, calories, weights of components, each component's percentage of daily value, and ingredients. Likewise, nothing in the writing or symbols here is comparable to a Surgeon General's warning label that consumers might find on, say, alcohol or a pack of cigarettes. Indeed, the State's insistence that the writing and symbols on the Hard Drops and Exotic Carts packages even be called "labels" is unsupported.

[26] Importantly, while the law in *Forler* is applicable, its facts are very different. Unlike the dangerous product at issue in *Forler*, there is no indication that the products here contain ingredients that could cause immediate and serious injury if the products are misused. To the contrary, and critically, the manufacturers of

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[10] The State does not suggest that there are people in a particular occupation who might rely on the representations made on the Hard Drops or Exotic Carts packages.

the Hard Drops and Exotic Carts products may well be incentivized by their likely consumers to exaggerate their claimed ingredients and potency. We are therefore not persuaded that any market-based incentives for these products are by themselves sufficient to demonstrate the substantial trustworthiness of the products' own claims, as was the case in *Forler*.

[27] Finally, in *Reemer*, the State did not offer a laboratory analysis of the cold medicine tablets because its laboratory had an established policy against running tests on pharmaceutical tablets. Our Supreme Court surmised that the reason for that policy was because the regulated labels "adequately describe the chemical makeup of commercially marketed products and [because] laboratory resources are scarce." 835 N.E.2d at 1007 n.3. There is no such rationale here, where the State did not test for the percent concentration of THC in any of the seized items simply because the State concluded that "the level of crime[s] charged did not justify the expense of the additional testing." Tr. Vol. 3 p. 10.

[28] Nonetheless, on appeal the State asserts that the writing and symbols on the Hard Drops and Exotic Carts packages are consistent with California law. The State's argument is not well taken for a number of reasons. First, the State did not offer any evidence or argument in the trial court regarding how California requires these products to be presented to consumers. Second, and more critically, the State did not offer any evidence that *these* products were manufactured or sold in California and were in fact subjected to California

oversight and regulation.[11] And, third, the State's own citation to California's purported labeling requirements shows requirements that are substantially above and beyond the writing and symbols displayed on the Hard Drops and Exotic Carts packages. *See* Appellee's Br. at 14 n.4.

[29] In essence, the State is claiming that, because some regulation must exist somewhere, the specific products here must have been captured by that regulation as a matter of law, even if the products themselves do not demonstrate that regulation. Neither Evidence Rule 803(17), *Reemer*, nor *Forler* supports such a broad reading of the market reports exception to the general rule against hearsay, and we reject the State's argument accordingly.

[30] In sum, the trial court erred when it relied on *Reemer* and *Forler* to conclude that the Hard Drops and Exotic Carts packages were admissible under the market reports exception to hearsay. There is no basis in this record to conclude under that exception that the packages contained sufficient indicia of reliability for the trustworthiness of their representations. Thus, the writing and symbols on the packages contained inadmissible hearsay, and they should have been excluded.

[31] Having concluded that the trial court erred in admitting the writing and symbols from the Hard Drops and Exotic Carts packages, we also conclude that

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[11] In support of its assertion that the packages here were subject to California regulation, the State cites only the photographs of the packages themselves. As noted above, those photographs are less than clear and do not demonstrate that they were subjected to California regulation. The Hard Drops package has the letters "CA" on it under the triangle, but there is nothing in the record of this appeal to demonstrate that that lettering shows as a matter of fact that the State of California regulated this product.

the erroneous admission of that evidence was not harmless. *See, e.g.*, *Mason v. State*, 689 N.E.2d 1233, 1236-37 (Ind. 1997). Both products are conspicuously cannabis-based products. The Hard Drops package included a picture of a marijuana leaf and the writing "THC INFUSED" on it. Ex. Vol. 4 p. 8. The Exotic Carts package stated that its product was "100 percent dank" and contained "THC 80 to 85 percent." Tr. Vol. 3 p. 12. Indeed, the writing on the Exotic Carts package was the State's only evidence of a purported percent concentration of THC in any of the seized materials, and the witnesses were clear throughout the trial that the percent concentration of THC is essential to determining whether a substance is legal hemp or illegal marijuana. Further, the analysis of the plant material was unable to differentiate it between hemp and marijuana. We therefore cannot say that the erroneous admission of the writing and symbols on the two packages was harmless error.

Issue Two: Sufficiency of the Evidence

[32] We thus turn to the sufficiency of the State's remaining evidence in support of Fedij's convictions. As our Supreme Court has made clear:

> For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Hall v. State, 177 N.E.3d 1183, 1191 (Ind. 2021). Fedij challenges the sufficiency of the State's evidence supporting both of her convictions. We address each argument in turn.

Class A Misdemeanor Possession of Marijuana

[33] We first consider whether the State's properly admitted evidence provided a sufficient basis from which the fact-finder could have found beyond a reasonable doubt that Fedij committed Class A misdemeanor possession of marijuana. To demonstrate that offense, the State had to show the following: that Fedij "knowingly or intentionally possesse[d] (pure or adulterated) marijuana, hash oil, hashish, or salvia"; and, as relevant here, that she had a prior conviction for a drug offense. Ind. Code § 35-48-4-11(b) (2020).

[34] Fedij challenges only whether the State's evidence was sufficient as a matter of law to demonstrate that she possessed "marijuana." "Marijuana" is defined under Indiana law as follows:

> (a) "Marijuana" means any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and hash oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.
>
> (b) *The term does not include*:
>
> (1) the mature stalks of the plant;
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> (2) fiber produced from the stalks;

> (3) oil or cake made from the seeds of the plant;
>
> (4) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom);
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> (5) the sterilized seed of the plant which is incapable of germination;
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> (6) *hemp (as defined by IC 15-15-13-6)*;
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> (7) low THC hemp extract; or
>
> (8) smokable hemp.

I.C. § 35-48-1-19 (2020) (emphases added). And "hemp" is defined under Indiana law as follows:

> As used in this chapter, *"hemp" means the plant Cannabis sativa L. and any part of that plant*, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, *with a delta-9-tetrahydrocannabinol [THC] concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis*, for any part of the Cannabis sativa L. plant.

I.C. § 15-15-13-6 (2020) (emphases added). Thus, as a matter of Indiana law, the difference between legal hemp and illegal marijuana is determined by the percent concentration of THC in a particular substance: to be illegal, the percent concentration of THC must be more than 0.3%.

[35] Fedij correctly asserts on appeal that the State presented no admissible evidence that any of the seized substances had a percent concentration of THC that was more than 0.3%. The forensic analysis of the yellow candy and brown liquid did not determine a percent concentration of THC for either substance. Accordingly, the written analysis for those substances declared that the analysis could not "differentiat[e those substances] between hemp and marijuana." Ex. Vol. 4 p. 50. Likewise, Sutton did not determine a percent concentration of THC for the plant material. Thus, in her testimony, she admitted that the plant material was "consistent with" both marijuana and hemp and that she could not determine whether the plant material was one and not the other. Tr. Vol. 3 pp. 5-8.

[36] Still, the State asserts on appeal that circumstantial evidence proved the substances were marijuana and not hemp. It is true that the State can prove the identity of a drug by circumstantial evidence. *Vasquez v. State*, 741 N.E.2d 1214, 1216 (Ind. 2001) (quoting *Clifton v. State*, 499 N.E.2d 256, 258 (Ind. 1986)). However, the State cannot premise a conviction "upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility." *Id.* (quoting *Shutt v. State*, 233 Ind. 169, 174, 117 N.E.2d 892, 894 (1954)).

[37] In support of its argument on appeal, the State asserts that Officer Jellison's testimony was that she had been trained to recognize the smell of marijuana and she identified the substances to be consistent with her training. The State also asserts that Sutton testified that she was trained in identifying marijuana and also stated that the plant material was consistent with marijuana.

[38] But the State's reading of Officer Jellison's testimony and Sutton's testimony is selective, and it is contrary to our standard of review. While we of course are bound by the facts most favorable to the judgment in our review of the sufficiency of the evidence, our standard of review does not demand that we selectively read the record and ignore "substantial uncontradicted evidence to the contrary[] to decide whether the evidence is sufficient . . . ." *McIlquham v. State*, 10 N.E.3d. 506, 511 (Ind. 2014) (quoting *Holder v. State*, 847 N.E.2d 930, 935 (Ind. 2006)).

[39] In this case, Officer Jellison and Sutton were unequivocal in their testimony that they had no way to distinguish any of the substances between hemp and marijuana absent a test for the percent concentration of THC. Officer Jellison acknowledged in her testimony that "there are two variations of the cannabis plant," "one is legal and one is not legal," and "the difference in the legality is the THC content," which "[i]s why we send it to the lab." Tr. Vol. 2 pp. 223, 225-26. She further acknowledged that she was "trained only on the smell of burnt marijuana," and she was not trained on the smell of burnt hemp or on any differences that may exist between the smell of burnt hemp and burnt marijuana. *Id.* at 232.

[40] Likewise, Sutton made clear in her testimony that her analysis of the plant material could not differentiate the material between hemp and marijuana. Tr. Vol. 3 pp. 5-8. She also made clear that the only way to distinguish between hemp and marijuana would be to determine the percent concentration of THC

in the tested substance, which she did not determine. *Id.*; Ex. Vol. 4 pp. 59, 61, 63. And the State did not seek further testing of any of the seized substances.

[41] Thus, the substantial, uncontradicted evidence was that the only way to determine if any of the seized substances was a legal substance or an illegal one was to test the percent concentration of THC in the substance, which the State did not do. Accordingly, the State had no evidentiary basis from which a reasonable fact-finder could conclude that the seized substances were in fact marijuana and not hemp. Instead, the State has premised Fedij's Class A misdemeanor conviction for possession of marijuana on nothing more than conjecture, which is not permissible. *See Vasquez*, 741 N.E.2d at 1216.

[42] We briefly address two additional assertions made by the State in its brief on this issue. First, the State asserts that it "was not required to present an exact THC amount for each item." Appellee's Br. at 18. We agree with this proposition in its literal terms: the State did not need to prove the exact percent concentration of THC, but the State *did* need to prove the substance possessed was marijuana.

[43] And that brings us to a final point. The State also asserts that "[i]t is not, and never has been, the State's burden to prove what the substance *was not*," i.e., hemp, because "that was Fedij's obligation." *Id.* at 21. The State grossly misunderstands Fedij's position. She has never asserted that the evidence shows that the substances were in fact hemp; her defense has been that the State has not shown that the substances were in fact marijuana. The statute proscribes

possession of a specific substance, and if the State seeks to obtain a conviction under that statute, it is entirely the State's burden to prove that the proscribed substance was in fact in the defendant's possession. Leaving the fact-finder to simply guess whether a substance is legal or illegal from equivocal evidence is not a sufficient basis to sustain a criminal conviction.

[44] Thus, we hold that the State failed to present sufficient evidence to show that Fedij possessed marijuana. We reverse her Class A misdemeanor conviction for possession of marijuana accordingly.

Class C Misdemeanor Possession of Paraphernalia

[45] Finally, Fedij asserts that the State failed to present sufficient evidence to support her conviction for Class C misdemeanor possession of paraphernalia. For this offense, the State had to show that Fedij "knowingly or intentionally possesse[d] an instrument, a device, or another object" that she "intend[ed] to use for: (1) introducing into the person's body a controlled substance . . . ." I.C. § 35-48-4-8.3(b) (2020).

[46] Fedij's argument on this issue is that, because the State did not demonstrate that any of the substances seized from her room were marijuana, the State likewise did not prove that she used any of the instruments found in her room with the intent to introduce marijuana into her body. But Fedij's argument is misplaced. The possession-of-paraphernalia statute does not require the State to prove possession of a controlled substance. It required the State to prove possession of an instrument and the defendant's intent to use that instrument to

introduce a controlled substance into her body. We think it is beyond dispute that the bong, smoking pipe, and smoking bowl met that burden. Accordingly, we affirm Fedij's conviction for Class C misdemeanor possession of paraphernalia.

Conclusion

[47] For all of these reasons, we hold that the trial court abused its discretion when it admitted the writing and symbols from the Hard Drops and Exotic Carts packages into evidence under the market reports exception to hearsay, Evidence Rule 803(17). We further hold that the State failed to present sufficient admissible evidence to support Fedij's conviction for Class A misdemeanor possession of marijuana. However, we affirm Fedij's conviction for Class C misdemeanor possession of paraphernalia. Thus, we affirm in part, reverse in part, and remand with instructions for the trial court to vacate Fedij's conviction and sentence for the Class A misdemeanor conviction.

[48] Affirmed in part, reversed in part, and remanded with instructions.

Bailey, J., and Altice, J., concur.