MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Jeffery Alan Vlietstra,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 3, 2024

Court of Appeals Case No.
23A-CR-1786

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No.
45G01-2302-F5-74

Memorandum Decision by Judge Brown
Judges May and Weissmann concur.

Brown, Judge.

[1] Jeffery Vlietstra appeals his conviction for burglary as a level 5 felony and argues the trial court erred in admitting certain evidence and that the evidence is insufficient to support his conviction. We affirm.[1]

Facts and Procedural History

[2] On February 15, 2022, Schererville Police Sergeant David Hunter responded to an alarm at AAA Supply Corporation in Schererville, Indiana. When he arrived, he observed a "hole that was cut in the fence where the . . . chain drive for that gate is," there was a "pry mark [] where the door was damaged when it was entered," and there was "yellow paint transfer that [did not] belong on that door." Transcript Volume V at 155. He noticed "empty hooks" on the wall where the business usually displayed its equipment. *Id.* at 155-156. Jason Koedyker, an employee of AAA Supply Corporation, reported that nine saws were missing and turned surveillance video footage over to officers which showed a maroon Dodge Ram parked outside a closed gate and a white man in a black ski mask wearing brown boots and gloves entering and leaving the business.

[3] Merrillville Police Detective Derek Diehl was involved in the investigation of the burglary, and he was aware of a GPS tracking device "being placed on a

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[1] On March 12, 2024, we held oral argument at the University of Southern Indiana. We thank counsel for traveling to Evansville and for their well-prepared advocacy. We also thank the faculty, staff, and students for their gracious hospitality.

vehicle that was being utilized by . . . Vlietstra." *Id.* at 208.[2] After the tracker had been placed, Crown Point Police Detective Airren Nylin observed Vlietstra drive vehicles including "a gray Dodge Ram, a maroon Dodge Ram and also a Ford." Transcript Volume VI at 34. On April 8, 2022, Detective Diehl observed Vlietstra in LaCrosse, Indiana, and he observed him in Chicago meeting with Hector Ortega ("Hector"). Detectives met with Hector and his son, Alexander Ortega ("Alexander"), who initially stated they had not purchased items from Vlietstra. Hector called the detectives shortly after they departed and invited them to his storage unit, where they recovered a concrete saw purported to have been stolen from AAA Supply Corporation.

[4] On April 12, 2022, Iroquois County Sheriff's Detective Eric Starkey of Illinois, and others, conducted a search of the residence of Vlietstra's girlfriend Sharon Long, in Joliet, Illinois, pursuant to a search warrant issued by the Twenty-First Judicial Circuit Court of Watseka, Iroquois County, Illinois. Officers discovered items inside her garage including a yellow crowbar; a Stihl adjustment tool; and a workbench on which there was "a Milwaukee lift gate battery," a "[s]nap-on tool step," a lithium battery, a lithium charger, and an insurance card. Transcript Volume V at 176. Officers obtained consent from Long to search a gray Dodge Ram 1500, which she had rented and of which Vlietstra was the primary driver, and they discovered bolt cutters, two pry bars,

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[2] The GPS tracking device was placed on Vlietstra's vehicle pursuant to an Order Authorizing Placement, Maintenance, Removal and Monitoring of Tracking Device, filed April 5, 2022, issued by the Twenty-First Judicial Court of Iroquois County, an Illinois court.

and brown boots in the truck bed. They found white gloves, a black ski mask, and a smaller black and yellow Stanley "wonder bar" inside the truck. *Id.* at 179.

[5] On February 9, 2023, the State charged Vlietstra with burglary as a level 5 felony related to the "structure of Wayne Koedyker d/b/a AAA Supply." Appellant's Appendix Volume II at 17. The State also filed an habitual offender enhancement.

[6] On June 25, 2023, Vlietstra filed a motion to suppress, in which he alleged that the "warrant was not based upon sworn testimony or statements," "the items search[ed] and seized from the residence exceeded the scope of the search warrant," "both warrants violated Article I, Section 11 of the Indiana Constitution and the Fourth Amendment of the Federal Constitution," and "[a]ny evidence directly or indirectly obtained as the result of both warrants is fruit from the poisonous tree and [should] be suppressed." *Id.* at 86-87. In a supplemental motion to suppress, Vlietstra alleged that the search warrant "did not provide authorization for law enforcement officers to enter a Dodge Ram pickup truck," and the search and seizure of the truck was unconstitutional. *Id.* at 88. After discussion on the morning of trial, the court denied the supplemental motion to suppress.

[7] The next day, prior to jury selection, the court discussed, in part, the motion to suppress, and the following exchange occurred:

[Defense Counsel]: . . . . The motion to suppress is just to preserve the record because while we've already had the hearing on the previous cause, I do not believe that – and while there's an entry in this docket in regards to the motion to suppress, I do not believe that a -- that a formal motion to suppress was actually filed under this cause. So I filed the motion to suppress just to ensure that the record is preserved, that those issues -- very well expecting the Court to be the previous order in this Court in regard to the motion to suppress to be applied to that -- to that motion, if that makes sense.

* * * * *

THE COURT: I think it would be proper to preserve the record by referencing the Porter County cause, the Lake County cause of last week's trial. It's largely the same issue from what I could tell that would involve this motion to suppress. Same warrant.

[Defense Counsel]: Yes, sir.

THE COURT: And same discussion that was held before the judge in Porter County that was fully litigated, from what I could tell, briefed and the judge in Porter County denied the motion to suppress without an evidentiary finding. But given the idea of that prior hearing, it would be proper as I see it to once again take judicial notice of the entire proceeding involving that motion to suppress in Porter County, our discussions in the other cause number and incorporate all that into our cause number. The problem is I don't have the cause numbers in front of me. I will take them now if you want to preserve the record. If you want to make the record clear. I just don't have those in front of me, so what I want is the cause number for last week's trial.

[Defense Counsel]: Yes, sir. You ready?

THE COURT: Just announce it.

[Defense Counsel]: 45G01-2201-F5-482.[3]

THE COURT: Okay. And in that case, we did discuss as far as I'm concerned in great detail the Porter County case as well as the idea of preserving the record on the motion to suppress in that 482 cause also. So what is the Porter County cause?

[Defense Counsel]: 64D01-2206-F5-5316.[4]

THE COURT: Okay. So the Court will once again take judicial notice of the proceedings under the G01 cause, 482, as well as 64 cause 2206-F5-5316. Take judicial notice of all those proceedings. Acknowledge it was a fully-litigated motion to suppress regarding a search warrant that occurred in Illinois. That resulted in a search of a home in Illinois which led to further investigation and eventually led to the filing of these cases. Does that sound about right?

[Defense Counsel]: That's correct, Judge.

THE COURT: Okay. Motion to suppress in this cause is therefore denied.

Transcript Volume IV at 77-80.

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[3] According to the Odyssey Case Management System, under cause number 45G01-2201-F5-482, Vlietstra was found not guilty of burglary and theft related to a business in Crown Point, Indiana on June 22, 2023.

[4] According to the briefs of Vlietstra and the State as well as the records of the Odyssey Case Management System, cause number 64D01-2206-F5-5316 is a case from Porter County in which Vlietstra was charged with burglary, theft, and criminal mischief related to a Sunny Daze Tanning in Porter County. In that case, he filed a *pro se* Motion to Quash Search Warrant and Suppress Evidence of the GPS tracking device, and later filed a motion to suppress evidence seized from Long's home. The Porter Superior Court held a hearing on both motions and denied them. The Odyssey Case Management System does not indicate the case has been scheduled for trial although there is an order continuing Vlietstra's trial date until June 5, 2023, Odyssey lists the case's status as pending, and the latest filing was an order from the court stating that all correspondence with the court from Vlietstra should come through his attorney.

[8] At Vlietstra's trial, the State sought to admit State's Exhibits 15-49, during the testimony of Detective Starkey, and the following exchange occurred:

> [Defense Counsel]: Your Honor, consistent with the previous motion to suppress that was filed and your Honor took judicial notice of the Porter County proceeding and Tippecanoe -- took -- strike that. All the evidence and the pleadings that were admitted during that proceeding, we would object to State's Exhibit 15 through -- through 40, inclusive.
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> * * * * *
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> [Defense Counsel]: . . . . The items that were depicted in State's Exhibit 15 through 40 were not subject to the actual search warrant itself. The search warrant was over broad. Was a general warrant. Those were arguments already made in the Porter County matter.
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> THE COURT: Okay.
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> [Defense Counsel]: And then pursuant to the supplemental motion to suppress that was filed and discussed this morning at the start of business, we would object to State's Exhibit 41 through 49.
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> * * * * *
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> THE COURT: Okay. Okay. So certainly I'm going to incorporate by reference the discussions we had this morning with regard to the supplemental warrant and also incorporate by reference motion to suppress hearing out of [45]G01-2210-F5-482 where there was a -- there was a discussion about a search warrant that was the subject of a larger hearing conducted in Porter County. It's a 64 cause number and it's referenced as 2208-F5-5316. I did take judicial notice of the Porter County suppression. I do so again once -- in this instance. And for the reasons previously stated, objection is overruled. Fifteen through

> 40 -- certainly, 15 through 49 are now admitted. Objection noted and I will show that as a continuing objection.

Transcript Volume V at 172-174.

[9] When the State moved to admit State's Exhibits 50 and 51, which were CD-ROMS containing phone records for two separate numbers belonging to Vlietstra, defense counsel asked the court to take judicial notice of "all of the Court's exhibits . . . under [cause number 45G01-2201-F5-482]," and the court "incorporate[d] by reference discussions . . . had in the motion to suppress hearing under 2210 F5-482," and showed a continuing objection to the denial of the motion to suppress. *Id.* at 181.

[10] Hector testified that he recognized the person shown to him in a photograph by detectives as "Guero," but he did not identify Vlietstra as Guero while testifying. Hector testified that Guero was "[t]he guy that brought [him] the concrete saw." Transcript Volume VI at 3. Alexander testified that "Guero was the guy that [his] dad would buy stuff from," he had met Guero, he identified Vlietstra as Guero, he had known Guero for "a little bit over a year," he affirmed that Guero sold him or his father a concrete saw, and he agreed that "[he] allow[ed] detectives to take a concrete saw that [he] bought from Guero from the storage locker." *Id.* at 18, 20.

[11] On the final day of trial, defense counsel objected to the content of jail phone calls as being irrelevant and "significantly unduly prejudicial of any type of an interpretation that the jury may have about [Vlietstra] and Ms. Long's son

[who] is not a witness in this case," and the court stated that the calls were admissible to show Vlietstra's "acts or words that may tend to arguably affect the witness testimony [of Long]" but that the "threats or potential threats . . . to Sharon Long's son [are] highly prejudicial and outweigh[] any probative value of the information" and ordered the calls redacted. *Id.* at 82, 87-88.

[12] Long testified that, in April 2022, she and Vlietstra traveled to Kentucky in the rented gray Dodge Ram to visit her mother's grave, they purchased tools from Tractor Supply to fix her mother's grave including a yellow crowbar and a tool to "tap down the ground," and she later called the store to acquire a copy of the receipt of the purchases. *Id.* at 147. On cross-examination, she testified that she had conversations on the phone with Vlietstra about the receipt for those purchases, and angry statements he made "during those phone calls [were] hurtful." *Id.* at 168-169. She stated that she rented the gray Dodge Ram, and she affirmed that "while both [she] and Mr. Vlietstra had access to the Dodge Ram, . . . it [is] fair [to say] that Mr. Vlietstra was the primary driver of that Dodge Ram." *Id.* at 154. She stated, "I don't think so," when asked if she "ever personally dr[o]ve the Dodge Ram" by herself. *Id.* During cross-examination, Vlietstra renewed his objection to the phone calls and to Karry Speichert's testimony, stating that the probative value was outweighed by the prejudicial impact, the prosecutor argued that the evidence "goes to his mental state," and the court overruled the objection. *Id.* at 178.

[13] Karry Speichert, an employee of ViaPath technologies and site administrator for the Lake County Jail, testified that, on May 13, 2023, Vlietstra made a

phone call from jail to Long, Vlietstra's counsel stated "[s]ame objection," and the court admitted audio of the phone call as State's Exhibit 74A, in which Long and Vlietstra had a heated discussion about her finding a receipt for the purchase of a yellow crowbar made while the couple was in Kentucky. *Id.* at 184.

[14] The State also presented testimony of multiple witnesses including the trustee of the trust which owns AAA Supply Corporation, Wayne Koedyker; an employee of AAA Supply Corporation, Jason Koedyker; Sergeant Hunter; Detectives Eric Starkey, Derek Diehl, Airren Nylin; and Special Agent Nicole Robertson of the Federal Bureau of Investigation.

[15] On June 28, 2023, the jury found Vlietstra guilty of burglary as charged, and Vlietstra admitted to being an habitual offender. The court sentenced Vlietstra to an aggregate term of eight years. On August 3, 2023, Vlietstra filed a notice of appeal. On August 4, 2023, defense counsel appears to have sought to include the transcript from the Porter County proceedings in the record when he filed a motion to supplement the record with the "transcripts and exhibits" from the hearing on the motion to suppress in cause number 64D01-2206-F5-5316 ("Cause No. 5316"), to which the State objected, and the court denied Vlietstra's motion. Appellant's Appendix Volume II at 237.

Discussion

I.

Vlietstra argues the trial court erred in taking judicial notice. He claims that the court "improperly took judicial notice of a suppression hearing and filings related thereto from a proceeding that is still pending in Porter County," and the court's "reliance on judicial notice was an attempt to circumvent the collateral estoppel doctrine." Appellant's Brief at 13. He argues that, as a result of taking judicial notice of the prior case under cause number 45G01-2210-F5-482 ("Cause No. 482"), the court "improperly rel[ied] upon the Porter County court's decision on [his] suppression in [Cause No. 5316]." *Id.*

[16] The State responds that a ruling on a motion to suppress is not a final judgment, Vlietstra "improperly frames this appeal as a challenge to the trial court's denial of his motion to suppress," and "a ruling on a motion to suppress evidence is not a final judgment as to the admissibility of evidence at trial, and direct review of the merits of an order denying a motion to suppress is only proper on interlocutory appeal." Appellee's Brief at 10 (citing *Clark v. State*, 994 N.E.2d 252, 259 (Ind. 2013)). The State further argues that "[a]ny challenges to the manner in which the suppression hearing was conducted are now moot." *Id.*

[17] In reply, Vlietstra argues that his appeal on this claim is not moot because "appellate courts have refused to find mootness under the collateral consequences doctrine," and that reversing the denial of the motion to suppress "has the possibility of granting [him] relief." Appellant's Brief at 6 (citing *M.T.*

v. Cmty. Health Network, 219 N.E.3d 151, 154 (Ind. 2023) and *M.M. v. Ind. Dep't of Child Servs.*, 118 N.E.3d 70, 78 n.3 (Ind. Ct. App. 2019)).[5]

[18] The invited-error doctrine generally precludes a party from obtaining appellate relief for his or her own errors, even if those errors were fundamental. *Miller v. State*, 188 N.E.3d 871, 874-875 (Ind. 2022) (quoting *Brewington v. State*, 7 N.E.3d 946, 974-975 (Ind. 2014), *cert. denied*, 574 U.S. 1077 (2015)). A party invites an error if it was "part of a deliberate, 'well-informed' trial strategy." *Id.* at 875 (quoting *Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019) (quoting *Brewington*, 7 N.E.3d at 954)). This means there must be "evidence of counsel's strategic maneuvering at trial" to establish invited error. *Id.* (quoting *Batchelor*, 119 N.E.3d at 557). "[M]ere 'neglect' or the failure to object, standing alone, is simply not enough." *Id.* (quoting *Batchelor*, 119 N.E.3d at 557-558). And "when there is **no evidence** of counsel's strategic maneuvering, we are reluctant to find invited error." *Id.* (quoting *Batchelor*, 119 N.E.3d at 558) (emphasis added in *Miller*).

[5] To the extent Vlietstra argues his appeal of the merits of the issues raised by his motion to suppress are not moot, he references the collateral consequences doctrine, and he cites an appeal of an expired involuntary civil commitment order and an appeal of a CHINS adjudication, neither of which mention a motion to suppress. In *M.T. v. Cmty. Health Network*, the Court cited *In re Commitment of C.P.*, 219 N.E.3d 142, No. 22A-MH-2960 (Ind. Ct. App. Sept. 14, 2023), which stated that the Indiana Supreme Court has previously held that an appeal was not moot based on certain long-lasting collateral consequences that can accompany CHINS adjudications, and that "[o]ur appellate courts have likewise repeatedly invoked the collateral-consequences doctrine to review the merits of appeals where the order at issue, if invalid and left undisturbed, could contribute to a future adverse finding against the appellant." 219 N.E.3d 151, 154 (Ind. 2023) (citing *C.P.*, 219 N.E.3d at 148-149). We cannot say the collateral consequences doctrine is dispositive here.

[19] The record reveals that Vlietstra's counsel requested that the court take judicial notice of the proceedings in "the Porter County cause, the Lake County cause of last week's trial," stating that "it would be proper to preserve the record," and a motion to suppress was filed "just to ensure that the record is preserved . . . very well expecting the Court to be [sic] the previous order in this Court in regard to the motion to suppress," and the court agreed that "it would be proper to preserve the record by referencing the Porter County cause, the Lake County cause of last week's trial." Transcript Volume IV at 78-79. We conclude that Vlietstra's counsel invited any error. Vlietstra also does not point to the record to suggest, and our review does not reveal, that defense counsel objected prior to or during the trial to the trial court's decision to take judicial notice of certain exhibits or testimony. Accordingly, reversal is not warranted.

II.

[20] Vlietstra argues the "trial court erred in admitting several items of evidence," including evidence acquired from the search of Long's residence, cell phone records admitted as State's Exhibits 50 and 51, evidence from the search of the gray Dodge Ram truck, a phone call between Long and Vlietstra made while he was imprisoned, and Hector's out-of-court identification.

[21] We generally review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Roche v. State*, 690 N.E.2d 1115, 1134 (Ind. 1997), *reh'g denied*. We reverse only when the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386,

390 (Ind. 1997), *reh'g denied*. We may affirm a trial court's decision regarding the admission of evidence if it is sustainable on any basis in the record. *Barker v. State*, 695 N.E.2d 925, 930 (Ind. 1998), *reh'g denied*. We review *de novo* a ruling on the constitutionality of a search or seizure, but we give deference to a trial court's determination of the facts, which will not be overturned unless clearly erroneous. *Campos v. State*, 885 N.E.2d 590, 596 (Ind. 2008); *see also Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014) (holding that the ultimate determination of the constitutionality of a search or seizure is a question of law that we consider *de novo*). Even when the trial court abuses its discretion, this Court will not reverse the court's judgment if the admission amounts to only harmless error. *Richardson v. State*, 189 N.E.3d 629, 635 (Ind. Ct. App. 2022).

> The improper admission is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court there is no substantial likelihood the challenged evidence contributed to the conviction. Moreover, "[a]ny error in the admission of evidence is not prejudicial, and [is] therefore harmless, if the same or similar evidence has been admitted without objection or contradiction."

Id. (quoting *Hoglund v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012)).

[22] In ruling on admissibility following the denial of a motion to suppress, the trial court considers the foundational evidence presented at trial. *Barker v. State*, 96 N.E.3d 638, 646 (Ind. Ct. App. 2018) (citing *Carpenter*, 18 N.E.3d at 1001). If the foundational evidence at trial is not the same as that presented at the suppression hearing, the trial court must make its decision based upon trial

evidence and may consider hearing evidence only if it does not conflict with trial evidence. *Id.* at 646-647 (citing *Guilmette v. State*, 14 N.E.3d 38, 40 n.1 (Ind. 2014)).

[23] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.[6]

[24] Even assuming Vlietstra has standing to challenge the search of Long's residence, we cannot say that reversal is warranted. With respect to his argument that the "[t]rial court erred in admitting evidence from the search of the residence," specifically the photographs admitted as Exhibits 15-40, he alleges that their admission violated "the Fourth Amendment of The United States Constitution," and that he "objected consistent with the prior motion to suppress." Appellant's Brief at 17-18. In his prior motion to suppress, he alleged that the items seized from Long's residence exceeded the scope of the

[6] Although Vlietstra mentions Article 1, Section 11 on appeal, he does not provide an independent analysis of the Indiana Constitution. Failure to make a cogent argument under the Indiana Constitution constitutes waiver of the issue on appeal. *See Abel v. State*, 773 N.E.2d 276, 278 n.1 (Ind. 2002) (holding that because the defendant presented no authority or independent analysis supporting a separate standard under the state constitution, any state constitutional claim is waived).

search warrant, the warrant violated the Federal and Indiana Constitution, and that any evidence obtained was "fruit from the poisonous tree." Appellant's Appendix Volume II at 86. The State argues that "it is not at all clear on what grounds he is alleging that the search of the residence was improper," and claims Vlietstra has waived the issue. Appellee's Brief at 12. Even if Vlietstra has not waived issues raised under both constitutions, we note that the Fourth Amendment of the United States Constitution "prohibits general warrants, which prevents a general, exploratory rummaging in a person's belongings and the seizure of one thing under a warrant describing another." *State v. Figgures*, 839 N.E.2d 772, 776-777 (Ind. Ct. App. 2005) (citations omitted). "While the items to be searched for and seized must be described with some specificity, there is no requirement that there be an exact description." *Id.* at 777.

[25] The record includes a Complaint for Search Warrant, signed by an Illinois trial court judge, in which a detective:

> requests the issue of a search warrant to search 3301 Old Castle Road, Joliet, IL, 60431, a two-story brick and tan sided residence having a two-car attached garage with a white door above which reads "3301" located on the north side of the road for clothing, hand tools (pry bars), electronic devices (cell phones, GPS units), power tools, STHIL Saws identifiable by Serial Number, Cut out Wheels identifiable by serial Number, gas powered equipment and U.S. Currency or things which have been used in the commission of, or which constitute evidence of, the offense of Burglary . . . .

Appellant's Appendix Volume II at 208. The warrant describes the items to be seized with specificity, and we cannot say that the court abused its discretion in admitting Exhibits 15-40, which contain photographs of the gray Dodge Ram, the garage described in the warrant, and the items recovered.

[26] As for whether the trial court properly admitted "cell phone records of phone numbers that were associated with [Vlietstra]," Appellant's Brief at 18, admitted as State's Exhibits 50 and 51, Vlietstra argues "that the records were fruits of the illegal GPS tracking warrant and illegal search warrant for 3301 Old Castle Road."[7] *Id.* We cannot say that Vlietstra has presented a cogent argument on this point. *See Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding the defendant's contention was waived because it was supported neither by cogent argument nor citation to authority). We also conclude that the admitted evidence in State's Exhibits 50 and 51, which merely included call records for two phone numbers associated with Vlietstra, would be harmless error in light of the independent evidence of Vlietstra's guilt.

[27] With respect to whether the "[t]rial court erred in admitting evidence from search of [the] Dodge Ram," Vlietstra asserts that the search warrant for Long's residence did not include the Dodge Ram, Long did not have authority to consent to a search of the Dodge Ram, he was the sole driver of the vehicle, and "the record is devoid of any evidence that the officers' reliance upon her

[7] The State asserts that "Vlietstra does not argue on appeal that the search warrant for the GPS tracking device was illegal" and has waived this argument. Appellee's Brief at 14 n.1.

consent was reasonable." Appellant's Brief at 18, 21. One well-recognized exception to the warrant requirement is a voluntary and knowing consent to search. *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041 (1973); *Stallings v. State*, 508 N.E.2d 550, 552 (Ind. 1987)). "Authority to consent to a search can be either apparent or actual." *Gado v. State*, 882 N.E.2d 827, 832 (Ind. Ct. App. 2008), *trans. denied*. "Actual authority requires a sufficient relationship to or mutual use of the property by persons generally having joint access to or control of the property for most purposes." *Bradley*, 54 N.E.3d at 999-1000 (citing *Halsema v. State*, 823 N.E.2d 668, 677 (Ind. 2005)). "The test for evaluating apparent authority is whether 'the facts available to the officer at the time would cause a person of reasonable caution to believe that the consenting party had authority over the premises.'" *Id.* at 1000 (quoting *Primus v. State*, 813 N.E.2d 370, 374-375 (Ind. Ct. App. 2004) (citing *Krise v. State*, 746 N.E.2d 957, 967 (Ind. 2001); *Trowbridge v. State*, 717 N.E.2d 138, 144 (Ind. 1999), *reh'g denied*)). The State bears the burden of proving that the third-party possessed the authority to consent. *Id.* Long gave written consent to officers searching the gray Dodge Ram. Long testified that she had rented the vehicle, both she and Vlietstra had access to the vehicle, she had previously ridden in the Dodge Ram, and it had been parked outside of her residence when the search warrant

was executed. We cannot say that Long lacked authority to consent to the search of the vehicle.[8]

[28] To the extent Vlietstra asserts that two phone calls made to Long while he was incarcerated were "irrelevant and unduly prejudicial," he cites Ind. Evidence Rules 402 and 403. Appellant's Brief at 21. Ind. Evidence Rule 402 provides that "irrelevant evidence is not admissible." Ind. Evidence Rule 403 provides that the court may "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." "All evidence that is relevant to a criminal prosecution is inherently prejudicial and thus the Evidence Rule 403 inquiry boils down to a balance of the probative value of the proffered evidence against the likely unfair prejudicial value of that evidence." *Hendricks v. State*, 162 N.E.3d 1123, 1134 (Ind. Ct. App. 2021) (quoting *Duvall v. State*, 978 N.E.2d 417, 428 (Ind. Ct. App. 2012), *trans. denied*). The balancing of the probative value against the danger of unfair prejudice must be determined with reference to the issue to be proved by the evidence. *Id.* (citing *Ward v. State*, 138 N.E.3d 268, 273 (Ind. Ct. App. 2019)).

[8] At oral argument, Appellant's counsel claimed that Long's consent was not obtained until the vehicle had been removed from the property. However, the record does not note the timing of Long's consent to search the vehicle.

[29] The court admitted audio of the jail phone calls described above. The prosecutor asserted that the calls showed Vlietstra's mental state, and we find no abuse of discretion in admission of the audio recordings of the phone calls.

[30] As for whether Hector's "out-of-court identification contained a single photograph, making it unduly suggestive," Appellant's Brief at 23, we note that the Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. *Swigeart v. State*, 749 N.E.2d 540, 544 (Ind. 2001). A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. *Id.* A pre-trial identification may occur in a manner so suggestive and conducive to mistaken identification that permitting a witness to identify a defendant at trial would violate the Due Process Clause. *Id.* (citing *Young v. State*, 700 N.E.2d 1143, 1146 (Ind. 1998). Nevertheless, a witness who participates in an improper pretrial identification procedure may still identify a defendant in court if the totality of the circumstances shows clearly and convincingly that the witness has an independent basis for the in-court identification. *Id.* Even if the identification procedure of Vlietstra by Hector were unduly suggestive, Alexander testified subsequently that he had known Guero for a little more than a year, he identified Vlietstra in the courtroom as Guero, and he affirmed that Guero sold his father a concrete saw. We conclude that any error in Hector's identification of Vlietstra would be harmless.

III.

[31] Vlietstra asserts that the State did not present sufficient evidence to convict him of burglary. Vlietstra analogizes this case to *Kidd v. State*, 530 N.E.2d 287, 287 (Ind. 1988), in which the Indiana Supreme Court held that the evidence was insufficient to support a burglary conviction.

[32] When reviewing claims of insufficiency of the evidence, this Court does not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, the Court looks to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* It will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[33] Ind. Code § 35-43-2-1 provides that a person who breaks and enters the building or structure of another person with intent to commit a felony or theft in it commits burglary as a level 5 felony.

[34] In *Kidd v. State*, the sole evidence was that "subsequent to the burglary, [Kidd] was found in possession of stolen rifles two to four days later, and of stolen stereo equipment one to three days later." 530 N.E.2d at 288. This, "combined with [Kidd's] false explanations regarding his possession of the property and desire to sell it," were claimed by the State to be sufficient to support the conviction of burglary. *Id.* The Court determined that "[i]f this were so, evidence sufficient to prove possession of stolen property would necessarily and inevitably support a further conviction for burglary, even absent evidence that

such defendant participated in the burglary itself," and it stated that it could not conclude that a reasonable trier of fact could find Kidd guilty of burglary beyond a reasonable doubt. *Id.*

[35] The record reveals that surveillance video showed a white male wearing a black ski mask, white gloves, and brown boots enter AAA Supply Corporation and steal nine saws. The man left in a maroon Dodge Ram truck. When they arrived on scene, officers discovered that a hole had been cut in the chain-link fence around the business and found yellow paint transferred to the area around a pry mark on one of the doors. Officers learned that Long had rented maroon and gray Dodge Ram trucks, and Long affirmed that she and Vlietstra had access to both Dodge Ram trucks and Vlietstra was the primary driver of the gray Dodge Ram. Officers placed a GPS tracking device on "a vehicle being driven by [Vlietstra]" and at different times observed him drive maroon and gray Dodge Ram trucks, and a Ford. Transcript Volume VI at 34. Detective Nylin affirmed that Vlietstra "owned or had access to a yellow pry bar," and "possessed [] items that were capable of cutting the chain links." *Id.* at 44. After following him to Chicago, officers observed him speak with the Ortegas. Officers interviewed Hector and his son Alexander, and Hector invited them to a storage unit where officers recovered items including a concrete saw stolen from AAA Supply Corporation. Alexander testified that Vlietstra sold the concrete saw seized by officers to his father, Hector. When officers executed a search warrant of Long's residence, they found items including a yellow crowbar that Vlietstra argued had been purchased after the AAA Supply

Corporation incident, and they searched a gray Dodge Ram, in which they found bolt cutters and brown boots in the truck bed, and white gloves, a black ski mask, and a smaller black and yellow Stanley crowbar inside the truck. About the items discovered in the gray Dodge Ram, Detective Nylin stated that State's Exhibit 48, the white gloves, appeared to match the video from AAA Supply Corporation and the description of gloves the burglar had worn. We conclude the State presented evidence of probative value from which a reasonable jury could find Vlietstra guilty beyond a reasonable doubt of burglary.

[36] For the foregoing reasons, we affirm Vlietstra's conviction.

[37] Affirmed.

May, J., and Weissmann, J., concur.

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