MEMORANDUM DECISION

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IN THE

COURT OF APPEALS OF INDIANA

Derek Cerny,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 11, 2022

Court of Appeals Case No. 21A-CR-2306

Appeal from the Parke Circuit Court

The Hon. Samuel A. Swaim, Judge

Trial Court Cause No. 61C01-2008-CM-396

Bradford, Chief Judge.

Case Summary

[1] In early April of 2020, Darian Lewellen, a Parke County Sheriff's Deputy, underwent back surgery, and was prescribed Norco, a painkiller. While Lewellen was recuperating, Stephanie McCoy, his mother, cared for him and administered his medications. Rockville Police Officer Derek Cerny contacted Lewellen and asked him if he had been prescribed a painkiller after his surgery, identified Norco as the same painkiller for which he had a prescription, and asked if he could come over to visit. At some point during the visit, Cerny asked Lewellen if he could use one of his inhalers, and, when Lewellen agreed, went to the cabinet where the inhaler and Norco tablets were being kept. The next morning, McCoy noticed that the inhaler had not been used but that five Norco tablets were missing.

[2] In August of 2020, the State charged Cerny with Class A misdemeanor theft and Class A misdemeanor possession of a controlled substance. Following a bench trial, the trial court found Cerny guilty as charged and sentenced him to concurrent sentences of 365 days for each conviction, all suspended to probation. As restated, Cerny contends that the State produced insufficient evidence to sustain his convictions, the trial court abused its discretion in denying his motion for judgment on the evidence, the trial court abused its discretion in several respects regarding evidentiary rulings, and his convictions violate prohibitions against double jeopardy. Because we disagree with his first, second, and fourth contentions and conclude that any error the trial court may

have made regarding evidentiary rulings can only be considered harmless, we affirm.

Facts and Procedural History

[3] On the morning of April 2, 2020, Lewellen underwent back surgery in central Indiana, taken to the procedure by McCoy. The duo returned to Rockville that afternoon after stopping to fill Lewellen's prescriptions, which included thirty tablets of the painkiller Norco, or hydrocodone acetaminophen. McCoy intended to stay with Lewellen at his apartment for a few days to care for him, which included administering his medications.

[4] On the evening of April 3, 2020, Cerny contacted Lewellen, "asked what prescription [he] was given[,]" and asked if he could come over; Cerny arrived around midnight. Tr. Vol. II. p. 121. After Cerny arrived, McCoy went to the kitchen cabinet in which she had put the Norco tablets, opened the cabinet, and asked Lewellen if he needed a Norco tablet; he replied that he did not need one. At some point, Cerny asked Lewellen if he could use one of his Albuterol inhalers so that he would not have to retrieve his from his car. Cerny went to the same kitchen cabinet McCoy had opened earlier, ostensibly to get the inhaler.

[5] The next morning, Cerny left after saying he needed to take care of his dog. McCoy went to the kitchen to clean the inhaler Cerny had used and noticed that it had not, in fact, been used. McCoy, who had been keeping a journal of Lewellen's Norco use, counted the remaining tablets and discovered that five were missing. Deputy Lewellen had not taken any Norco tablets other than

those that McCoy had given him, which was a total of two, and had not given Cerny permission to take any. McCoy reported her suspicion that Cerny had taken the Norco tablets to Parke County Sheriff's Deputy Jason Frazier, who immediately referred the case to the Indiana State Police. Later the same day, Indiana State Police Sergeant Detective Sam Stearly interviewed Cerny and learned that although he had a current prescription for Norco through the Veteran's Administration, he had run out.

[6] On August 28, 2020, the State charged Cerny with Class A misdemeanor theft and Class A misdemeanor possession of a controlled substance. On September 22, 2021, Cerny's bench trial was held. After the State rested, Cerny moved for judgment on the evidence on the grounds that the State had failed to prove the essential elements of the crimes charged and that the investigation was incomplete. The trial court denied Cerny's motion for judgment on the evidence and found him guilty as charged. The same day, the trial court sentenced Cerny to concurrent terms of 365 days for each of his convictions, all suspended to probation.

Discussion and Decision

I. Sufficiency of the Evidence

[7] When evaluating a challenge to the sufficiency of the evidence to support a conviction, we do not "reweigh the evidence or judge the credibility of the witnesses," nor do we intrude within the factfinder's "exclusive province to weigh conflicting evidence." *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). Rather, a conviction will be affirmed unless "no reasonable fact-finder could

find the elements of the crime proven beyond a reasonable doubt." *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000). The evidence need not exclude every reasonable hypothesis of innocence, but instead, "the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). When we are confronted with conflicting evidence, we must consider it "most favorably to the [factfinder's] ruling." *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005).

A. Theft

[8] Cerny challenges his theft conviction on the basis that the State failed to prove that he was the one who took Lewellen's Norco tablets or, indeed, that any tablets were taken at all. In order to convict Cerny of Class A misdemeanor theft, the State was required to establish that he "knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use[.]" Ind. Code § 35-43-4-2(a). We have little trouble concluding that the State produced sufficient evidence to establish Cerny's identify as the thief of Lewellen's Norco tablets. The trial court heard evidence that Cerny had verified that Lewellen was in possession of painkillers, had invited himself to Lewellen's apartment, had been present when McCoy went to the cabinet and offered Lewellen a Norco tablet, and had accessed the same cabinet after he asked to use an inhaler that was, in fact, never used. The trial court also heard evidence that McCoy had been keeping close track of Lewellen's Norco use, noting each administration and counting the tablets each time, detecting a shortage of five tablets after Cerny's

visit that did not exist before the visit. Finally, the trial court heard evidence that Cerny had told Detective Stearly that he had a prescription for Norco and would test positive for it despite having run out of his own tablets. This is sufficient evidence from which the trial court could have concluded that Cerny had gone to Lewellen's apartment with the intent to steal Norco tablets—which he then did after discovering where they were being kept.

B. Possession of a Controlled Substance

[9] Cerny challenges his conviction for possession of a controlled substance on the basis that he had a valid prescription for Norco at the time. This challenge requires us to interpret the statute pursuant to which Cerny was convicted. "The interpretation of a statute is a question of law reserved for the courts." *Scott v. Irmeger*, 859 N.E.2d 1238, 1239 (Ind. Ct. App. 2007).

> A statute should be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute. In so doing, the objects and purposes of the statute in question must be considered as well as the effect and consequences of such interpretation. When interpreting the words of a single section of a statute, this court must construe them with due regard for all other sections of the act and with regard for the legislative intent to carry out the spirit and purpose of the act. We presume that the legislature intended its language to be applied in a logical manner consistent with the statute's underlying policy and goals. […] Courts are not bound to adopt a construction that would lead to manifest absurdity in order that the strict letter of the statute may be adhered to. They will rather look to the intention of the legislature, as gathered from the import of the whole act, and will carry out such intention as thus obtained.

Fuller v. State, 752 N.E.2d 235, 237–38 (Ind. Ct. App. 2001) (citations omitted).

[10] Indiana Code section 35-48-4-7(a) provides in relevant part as follows: "A person who, without a valid prescription […], knowingly or intentionally possesses a […] controlled substance or controlled substance analog […] commits possession of a controlled substance[.]" In order for us to accept Cerny's argument on this point, we would have to conclude that the phrase "without a valid prescription" is modifying "person" instead of "possesses." Not only is this an unreasonable interpretation of the statutory language as written, accepting it would lead to an absurd result. Had the General Assembly intended the phrase "without a valid prescription" to modify "person," it would have written "a person without a valid prescription" instead of the language it actually used, which makes it clear that the phrase is intended to modify "possesses." Moreover, allowing a person who is issued a valid prescription for a controlled substance at any point to legally possess any amount of that substance in perpetuity is an absurd result that the General Assembly cannot have intended. So, while Cerny's prescription authorized him to legally possess sixty tablets of Norco, it did not authorize him to legally possess any more than that.

[11] Cerny also challenges several aspects of the State's evidence as failing to satisfy the definition of substantial evidence of probative value and points out the State's case against him was entirely circumstantial. Suffice it to say that Cerny's challenges to the evidence are nothing more than invitations to reweigh it, which we will not do, *see Alkhalidi*, 753 N.E.2d at 627, and it is well-settled that a criminal conviction can be sustained by circumstantial evidence alone.

See, e.g., *Sallee v. State*, 51 N.E.3d 130, 134 (Ind. 2016) ("A conviction for murder may be sustained on circumstantial evidence alone.").

II. Motion for Judgment on the Evidence

[12] Cerny also contends that the trial court erred in denying his motion for judgment on the evidence. Trial courts should only grant a motion for judgment on the evidence "where there is a total absence of evidence upon some essential issue, or where there is no conflict in the evidence and it is susceptible of but one inference, and that inference is in favor of the accused." *State v. Taylor*, 863 N.E.2d 917, 919 (Ind. Ct. App. 2007). Ultimately, "if the evidence is sufficient to support a conviction on appeal, then the trial court's denial of a Motion for a Directed Verdict cannot be in error." *Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). Because we have already concluded that the State produced sufficient evidence to sustain Cerny's convictions, we must also conclude that the trial court did not err in denying his motion for judgment on the evidence.

III. Evidentiary Rulings

[13] Cerny's argument regarding the trial court's denial of his motion for judgment on the evidence actually consists mostly of challenges to various of the trial court's rulings on evidentiary matters, as well as its alleged misuse of some evidence, and we shall address those challenges on that basis. The admission or exclusion of evidence falls within the sound discretion of the trial court, and the trial court's determination regarding the admissibility of evidence is therefore reviewed on appeal only for an abuse of discretion. *Wilson v. State*, 765 N.E.2d

1265, 1272 (Ind. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. In determining the admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the Appellant's favor. *Sallee v. State*, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002), *trans. denied*. The reviewing court will not reverse the trial court's decision to admit or exclude evidence if that decision is sustainable on any ground. *Crawford v. State*, 770 N.E.2d 775, 780 (Ind. 2002).

[14] Specifically, Cerny argues that the trial court improperly (1) excluded a line of questioning regarding an alleged "war" between Cerny's and Lewellen's respective police agencies; (2) admitted McCoy's notebook; (3) admitted and used Cerny's VA records; (4) admitted the inhaler, Norco bottle, and Norco tablets; and (5) excluded an email from the Parke County Prosecutor to the Rockville Police Chief regarding the criminal investigation of Cerny. We need not, however, address the merits of Cannon's evidentiary challenges if we conclude that "[e]rrors in the admission of evidence are to be disregarded as harmless unless they affect the substantial rights of the defendant." *Goudy v. State*, 689 N.E.2d 686, 694 (Ind. 1997). "The erroneous admission of evidence is harmless error where a guilty finding is supported by substantial independent evidence of guilt." *Bates v. State*, 495 N.E.2d 176, 178 (Ind. 1986).

[15] The evidence in this case, without regard to any of the above, amply supports a finding that Cerny was the person who took the Norco tablets from Lewellen's

apartment. Cerny had both the motive and the opportunity to take the tablets; had run out of his own Norco tablets; invited himself to Lewellen's apartment knowing that he, too, had been prescribed Norco; concocted an excuse to access the cabinet where they were kept without arousing suspicion; and did, in fact, access the cabinet, after which it was soon discovered that some of the tablets were missing. Moreover, both McCoy and Lewellen testified that they were not responsible for the missing tablets. Under the circumstances, any error the trial court may have made in its ruling regarding certain evidence can only be considered harmless.

[16] Even though the trial court's rulings—at most—amount to nothing more than harmless error, Cerny has also failed to establish that any of them constituted an abuse of discretion. As an initial matter, Cerny has waived appellate review of rulings (2) through (5) for failure to cite to any case law or Rule of Evidence to support his arguments. *See, e.g.*, *Dunlop v. State*, 724 N.E.2d 592, 596 n.6 (Ind. 2000) (declining to address argument that sentence constitutes cruel and unusual punishment for failure to cite to the Eighth Amendment to the U.S. Constitution).

[17] As for Cerny's claim that the trial court abused its discretion in refusing to allow a line of questioning regarding an alleged "war" between the Parke County Sheriff's Office and the Rockville Police Department, we find the claim to be meritless. When Cerny attempted to ask Deputy Frazier about the war between the agencies, Cerny argued that it was to show potential bias by Deputy Frazier in investigating Cerny. Deputy Frazier, the argument goes, had

a motive to conduct an improper investigation of Cerny because Deputy Frazier was planning to run for Parke County Sheriff against the Chief of the Rockville Police Department, whose political prospects would presumably have been damaged by the criminal conviction of one of his officers.

[18] Cerny argues that the evidence in question was admissible pursuant to Indiana Rule of Evidence 616, which provides that "[e]vidence that a witness has a bias, prejudice, or interest for or against any party may be used to attack the credibility of the witness." Evidence, however, must still also be relevant: "Evidence is relevant if […] it has any tendency to make a fact more or less probable than it would be without the evidence; and […] the fact is of consequence in determining the action." Ind. Evidence Rule 401. To get straight to the point, there is no indication that Deputy Frazier had anything to do with the actual investigation of Cerny, which was conducted by the Indiana State Police. It is undisputed that Deputy Frazier's involvement in the criminal investigation was to speak with McCoy regarding her suspicions of Cerny and then immediately refer the matter to the State Police. We agree with the trial court that Cerny failed to establish the relevance of any "war" between the Parke County Sherriff's Office and the Rockville Police Department on the investigation of Cerny, given that Deputy Frazier had essentially nothing to do with it. The trial court did not abuse its discretion in declining to allow this line of questioning on the basis that it was not relevant.

III. Double Jeopardy

[19] Finally, Cerny contends that his convictions for theft and possession of a controlled substance violate prohibitions against double jeopardy. Whether convictions violate Indiana's prohibition against double jeopardy is a question of law reviewed *de novo*. *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020) (citing *A.M. v. State*, 134 N.E.3d 361, 364 (Ind. 2019)). Recently, the Indiana Supreme Court held that Article 1, section 14, of the Indiana Constitution, applies only to "successive prosecutions for the same offense." *Wadle*, 151 N.E.3d at 245–46. As for claims of substantive double jeopardy, the *Wadle* Court explained that they come in two principal varieties, one of which is when a defendant's single act or transaction violates multiple statutes with common elements and harms one or more victims. *Wadle*, 151 N.E.3d at 247; *Powell*, 151 N.E.3d at 263. The *Wadle* Court "articulate[d] an analytical framework in which to resolve claims of substantive double jeopardy." *Wadle*, 151 N.E.3d at 244, 247. When a single criminal act violates multiple statutes with common elements and one or more victims, courts "first look to the statutory language" for each charge. *Id.* at 248. If the language of either statute "clearly permits" multiple punishments, there is no double-jeopardy violation. *Id.* Here, the language of neither of the relevant statutes clearly permits multiple punishments.

[20] The next step, then, is to determine whether one of the offenses is inherently or factually included in the other. *Id*. Cerny alleges only that his two offenses were factually included in each other. An offense is factually lesser included if the charging information alleges "that the means used to commit the crime

charged include all of the elements of the alleged lesser included offense." *Norris v. State*, 943 N.E.2d 362, 368–69 (Ind. Ct. App. 2011), *trans. denied*. To evaluate such a claim, we must "examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial." *Wadle*, 151 N.E.3d at 249. If neither offense is an included offense of the other, there is no substantive double-jeopardy violation, and the inquiry ends. *Id.* at 248.

[21] The charging information for theft in this case alleged as follows:

> that on or about the 3rd and/or 4th day of April, 2020, in Parke County, Indiana, Derek Cerny, did knowingly or intentionally exert unauthorized control over the property of another person with the intent to deprive the other person of any part of the value or use of said property, to wit: Derek Cerny did knowingly or intentionally exert unauthorized control over Norco pills, a controlled substance, said pills having been prescribed for use only by Darian Lewellen, and the value of said property was less than $750.00.

Appellant's App. Vol. II p. 10.

[22] The charging information for possession of a controlled substance alleged as follows:

> that on or about the 3rd and/or 4th day of April, 2020, in Parke County, Indiana, Derek Cerny, did knowingly or intentionally possess a controlled substance classified in schedule I, II, III, or IV, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, to wit: Derek Cerny did knowingly or intentionally possess Norco pills (Hydrocodone/Acetaminophen, a Schedule II controlled substance), said pills having been prescribed for use only by Darian Lewellen.

Appellant's App. Vol. II p. 11.

[23] Cerny alleges that both of his convictions are based on the same evidence. Based on the charging informations and the evidence adduced at trial, we conclude that this is not the case. The theft charge lists Lewellen as the person over whose property Cerny exerted unauthorized control but does not directly allege that Cerny was not legally entitled to possess them. As for the possession charge, it alleges that Cerny possessed the Norco tablets but not that they were taken from Lewellen without his authorization. While there is some overlap in the allegations contained in the charging informations, they do not amount to multiple punishments for the same offense.

[24] Even more than the charging informations, the evidence adduced at trial clearly established two separate offenses warranting separate punishments. As discussed, the evidence supported a reasonable conclusion that Cerny had exerted unauthorized control over Lewellen's Norco tablets by taking them from the cabinet without Lewellen's permission, which would have been a crime even if Cerny had legally been entitled to possess them. Other evidence adduced at trial established that Cerny possessed the tablets without a valid prescription, which would have been a crime even if he had not stolen them from Lewellen. In short, each one of Cerny's convictions—as charged and proven at trial—required the proof of facts that the other one did not. Cerny has failed to establish that either of his convictions violate prohibitions against double jeopardy.

[25] We affirm the judgment of the trial court.

Najam, J., and Bailey, J., concur.