



## **STATEMENT OF THE CASE**

Elysia B. Souders appeals her conviction for theft, as a Class D felony. She presents three issues on appeal:

1. Whether the trial court abused its discretion when it admitted certain hearsay evidence over Souders' objection.
2. Whether the trial court abused its discretion when it refused to instruct the jury on the lesser included offense of criminal trespass, as a Class A misdemeanor.
3. Whether the evidence is sufficient to support Souders' conviction.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

In October 2008, Alexis McCloud lived at 916 West Graham Drive in Bloomington. McCloud and John Collins were long-time friends, and Souders is Collins' niece. Collins told McCloud that Souders was "in a bad way" and needed a place to stay. Transcript at 126. Collins asked McCloud if Souders could move in with her, and McCloud agreed.

On the evening of October 31, Souders' husband called McCloud and said that Souders had taken a ring belonging to McCloud. The ring was a family heirloom that had been passed down for generations, and McCloud had inherited it from her mother. After talking with Souders' husband, McCloud checked a drawer in her bedroom dresser where she normally kept the ring and discovered that it was missing.

McCloud immediately told Collins that her heirloom ring was missing. McCloud and Collins then went to Souders' place of employment to ask her about the missing ring. When McCloud asked Souders about the ring, Souders was "[k]ind of like a deer in the

headlights. Very stuttering and kind of avoiding answering anything.” Transcript at 134. Upon demand, Souders gave the pawn ticket for the ring to McCloud. McCloud then told Souders that she could retrieve her things from the house but could no longer live there.

The pawn ticket had Souders’ name on it but listed an address other than McCloud’s. Souders later stated that she considered the address on the ticket to be her “home” address.<sup>1</sup> Transcript at 229. McCloud waited to see if Souders would give her money to redeem the ring from the pawn shop, but Souders did not contact McCloud again, did not give her any money to redeem the ring from the pawn shop, and did not retrieve her personal belongings from McCloud’s home. In late November, sixteen days before the charge for redeeming the ring was to increase, McCloud reported the incident to the Bloomington Police Department.

The police retrieved the ring from the pawn shop, and the State charged Souders with theft, as a Class D felony. At the jury trial, Souders requested the court to instruct the jury on criminal trespass as a lesser included offense of theft. Instead, the court included an instruction on criminal conversion as a lesser included offense of theft. Following the close of evidence and deliberations, the jury returned a verdict finding Souders guilty of theft, as a Class D felony. Souders now appeals.

## **DISCUSSION AND DECISION**

### **Issue One: Admission of Hearsay**

Souders first contends that the trial court abused its discretion when it admitted hearsay testimony over her objection. Our standard of review of a trial court’s findings

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<sup>1</sup> Souders testified that she had lived “off and on” at the address listed on the pawn ticket, which was for a home owned by her husband’s aunt and uncle. Transcript at 229.

as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is not admissible except as provided by the Rules of Evidence. Evid. R. 802. Souders argues that McCloud's testimony of what Souders' husband said on the phone was inadmissible hearsay. We cannot agree.

During the State's case in chief, McCloud testified as follows:

Q: Okay. At some point you were made aware of the fact that the ring was missing. Did you ultimately, tell me how that happened? What happened?

A: I was sitting at home on my couch, and I got a phone call from [Souders'] husband, um, and he told me . . .

[Defense Counsel]: Objection. Testifying as a hearsay [sic], Judge. Say what he said.

The Court: (indecipherable)

[State]: Well, it's not offered for the truth, just to show substantive [sic] action.

The Court: I'm sorry.

[State]: It is not being offered for the truth of the matter asserted, but ultimately, what he said is the truth which is to show what she did afterwards.

The Court: I'll allow it.

A: He phoned me on the telephone and told me that [Souders] had taken my ring. I went into my room to make sure, in fact the ring was gone, and it was. Um, from that point on, I drove to where

[Souders] worked at the time, which was Kilroy's, and I don't remember if I had spoken with her uncle on the phone beforehand, or not, but he was working at a neighboring business and I went in and talked with him and he went up to Kilroy's with me to talk to [Souders].

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Q: Speaking with Mr. Collins, ultimately you two decided to go up to talk to [Souders] about um, what happened. Is that correct?

A: Yes.

Transcript at 132-33.

The State offered McCloud's testimony about what Souders' husband had said in order to show how McCloud learned that the ring was missing and to show why she asked Souders whether she had taken the ring. Because that testimony was not offered to show that Souders took the ring, it is not hearsay. Therefore, the trial court did not abuse its discretion when it admitted that testimony. In any event, Souders admitted at trial that she had taken the ring. Thus, the error, if any, was harmless. See Camm v. State, 908 N.E.2d 215, 224 (Ind. 2009) ("Harmless error is error that does not affect the substantial rights of a party given the error's likely impact on the jury in light of other evidence presented at trial.") (internal quotations and citation omitted).

Still, Souders argues that the State in fact used that testimony as substantive evidence to prove Souders had exerted unauthorized control over the ring. In support, Souders cites to the State's closing argument. There, when discussing the evidence that satisfied each of the elements of theft, the State said:

Again, how did I show that unauthorized, the control of that ring was unauthorized? Well when she, [McCloud] found out from [sic] [Souders' husband] that the ring was taken, she didn't say well, "I know." She hung

up the phone and she actually went and checked. She went to her bedroom. She opened that drawer. She looked for the spot that [it] is always in and it was gone. She did not know about it. She was shocked when she got this phone call from [Souders' husband]. . . .

Transcript at 270-71. In context, the State's reference to the phone call from Souders' husband explains how McCloud learned that the ring was missing. The State did not refer in the closing argument to the statement by Souders' husband that Souders had taken the ring in order to prove that fact. And, again, Souders admitted at trial that she had taken the ring, so any error was harmless. See Camm, 908 N.E.2d at 224. Souders has not shown that the trial court abused its discretion when it allowed McCloud to testify that Souders' husband said in a telephone call that Souders had taken the ring.

### **Issue Two: Jury Instructions**

Souders next contends that the trial court abused its discretion when it refused to instruct the jury on the lesser included offense of criminal trespass. The manner of instructing a jury is left to the sound discretion of the trial court Patton v. State, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). Its ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Jury instructions must be considered as a whole and in reference to each other. Id.

Trial courts should perform a three-part test when called upon by a party to instruct a jury on a lesser included offense of the crime charged. Fisher v. State, 810 N.E.2d 674, 678 (Ind. 2004) (citing Wright v. State, 658 N.E.2d 563 (Ind. 1995)). First, the trial court must compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine if the alleged lesser included

offense is inherently included in the crime charged. Id. Second, if a trial court determines that an alleged lesser included offense is not inherently included in the crime charged under step one, then it must determine if the alleged lesser included offense is factually included in the crime charged. Id. If the alleged lesser included offense is neither inherently nor factually included in the crime charged, the trial court should not give an instruction on the alleged lesser included offense. Id. Third, if a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties to determine if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater. Id. “[I]t is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense” if there is such an evidentiary dispute. Id.

A person commits theft when she “knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use[.]” Ind. Code § 35-43-4-2(a). A person commits criminal conversion when she “knowingly or intentionally exerts unauthorized control over property of another[.]” Ind. Code § 35-43-4-3. And a person commits criminal trespass, as a Class A misdemeanor, when she knowingly or intentionally interferes with the possession or use of the property of another person without the person’s consent. Ind. Code § 35-43-2-2(a)(4).

Souders' argument centers on the third prong of the jury instruction test, namely, that the trial court should have instructed the jury on criminal trespass as a lesser included offense of theft. In support, she cites Belcher v. State, 453 N.E.2d 214, 218 (Ind. 1983). There, our supreme court held that, on the facts of that case, criminal trespass was a lesser included offense of theft. Id. (emphasis added). But Belcher in turn cites Gregory v. State, 274 Ind. 450, 412 N.E.2d 744 (1980), where the court held that, assuming that criminal trespass is a lesser included offense of the crime of theft, the failure of the trial court to instruct the jury on the crime of criminal trespass was harmless error because the court had instructed the jury on the lesser included offense of criminal conversion. 412 N.E.2d at 747.

Here, we assume for the sake of argument that criminal trespass is a lesser included offense of theft on the facts of this case.<sup>2</sup> But the trial court instructed the jury on both theft, as a Class D felony, and on conversion, as a Class A misdemeanor. Thus, under Gregory, the trial court's error, if any, in failing to instruct the jury on criminal trespass is harmless. See id. This conclusion is supported by the fact that the jury convicted Souders of theft, not criminal conversion. We can infer, then, the jury found beyond a reasonable doubt that Souders had exerted unauthorized of control over McCloud's property with the intent to deprive McCloud of any part of its use or value. That element also distinguishes theft from criminal trespass. Therefore, even if the court had instructed the jury on criminal trespass, the jury still would have found Souders

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<sup>2</sup> Because we conclude that the trial court did not commit reversible error when it instructed on the lesser included offense of criminal conversion instead of the lesser included offense of criminal trespass under Gregory, 412 N.E.2d at 744, we need not consider whether criminal trespass is inherently or factually included in the charge of theft. See Fisher, 810 N.E.2d at 678.

guilty of theft. As such, the trial court's refusal to instruct the jury on criminal trespass as a lesser included offense of theft is harmless error, if any.

### **Issue Three: Sufficiency of Evidence**

Finally, Souders contends that the evidence is insufficient to support her conviction for theft. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Rhoton v. State, 938 N.E.2d 1240, 1246 (Ind. Ct. App. 2010), trans. denied. We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Again, to prove theft, as a Class D felony, the State was required to show beyond a reasonable doubt that Souders knowingly or intentionally exerted unauthorized control over McCloud's property with the intent to deprive McCloud of any part of the use or value of it. See Ind. Code § 35-43-4-2(a). Souders argues that the State did not prove that she had the intent to deprive McCloud of any part of the use or value of the ring because she pawned it but did not sell it. We cannot agree.

Intent may be proven by circumstantial evidence, and it may be inferred from a defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points. Long v. State, 935 N.E.2d 194, 197 (Ind. Ct. App. 2010) (citation omitted), trans. denied. Here, the evidence most favorable to the verdict shows that Souders took the ring from McCloud's bedroom dresser drawer, without permission, and

gave it to a pawn shop as collateral for a loan. Souders signed her own name but used a different address on the pawn ticket. By signing the pawn ticket, she “certif[ied] that [she was] the sole owner of the [ring] and that it is fully paid for . . . .” State’s Exhibit 2. Two weeks passed before McCloud learned that the ring was missing. Upon learning that fact, McCloud and Collins immediately confronted Souders, who did not deny that she had taken the ring. Souders then gave the pawn ticket to McCloud only upon demand. Souders made no contact with McCloud after that, either to retrieve her personal effects from McCloud’s home or to pay the amount McCloud would need to redeem the ring from the pawn shop.

From these facts, the jury could have reasonably inferred that Souders had intended to deprive McCloud of the use or value of the ring. Still, Souders contends that because McCloud had not known that the ring was missing, she had not been deprived of any value or use of the item, but she cites no authority to support that contention. Rather, had McCloud wished to view, use, pawn, or sell the ring herself, it would have been unavailable to her because first Souders and then Ace Pawn Shop had possession of the ring. And Souders controlled possession and disposition of the ring because she held the pawn ticket.

Souders also argues that the evidence does not show that she intended to deprive McCloud of the use or value of the ring because Souders had merely pawned it instead of selling it outright. No reported Indiana cases have made such a distinction, but Souders cites State v. McBride, 504 So. 2d 840 (La. 1987), in support of her contention. But we are not bound by that case, nor do we find it persuasive here. The Louisiana statute on

theft requires permanent deprivation. See La. Rev. Stat. § 14:67. Indiana Code Section 35-43-4-2 does not include the element of permanent deprivation. The legislature deleted the word “permanently” from the statute in 1971. See Bennett v. State, 871 N.E.2d 316, 319 (Ind. Ct. App. 2007), (citation omitted), trans. granted and adopted by, 878 N.E.2d 836, 836 (Ind. 2008). And our supreme court has confirmed that permanent deprivation is not required under Section 35-43-4-2. Bennett, 878 N.E.2d at 836. Thus, McBride is inapposite. Souders’ argument that the evidence is insufficient to support her theft conviction must fail.

Affirmed.

ROBB, C.J., and CRONE, J., concur.