

David F. Griffin (“Griffin”) was found guilty in Shelby Circuit Court of Class B felony burglary and Class D felony theft. Griffin was ordered to serve an aggregate nine-year sentence in the Indiana Department of Correction. Griffin appeals and raises two issues:

- I. Whether the trial court abused its discretion when it admitted Griffin’s statement to police; and
- II. Whether the State presented sufficient evidence to sustain Griffin’s burglary and theft convictions.

We raise the following issue sua sponte:

- III. Whether Griffin’s simultaneous convictions for Class B felony burglary and Class D felony theft violate double jeopardy protections.

We affirm in part, reverse in part, and remand for proceedings consistent with this decision.

Facts and Procedural History

On February 4, 2008, deputies from the Shelby County Sheriff’s Department were called to the home of Donald and Betty Richardson following a report from a security company that a window had been broken at the residence. The deputies did not initially see any indication of forced entry and left the residence to respond to another call. The Richardsons were vacationing in Arizona at the time. After learning from the security company that the alarm to their residence had gone off, Donald Richardson contacted Thomas Jenkins (“Jenkins”), who was watching the Richardsons’ house while they were away, and asked him to check out the property.

Upon entering the residence, Jenkins noticed that someone had been inside and subsequently called the police. The deputies returned to the Richardsons' home where they discovered a window had been shot out with a pellet from a BB gun. In the Richardsons' bedroom, a jewelry rack had been torn from the wall, and a jewelry box had two drawers pulled out and one drawer missing. Jewelry was scattered on the bed and the floor. The Deputies also noticed a small amount of mud on a throw rug underneath the broken window and a piece of aluminum foil on the floor¹ in the doorway with a shoe print embedded in it. Outside, the deputies found smudges on a chair near the window and fresh footprints in the mud.

During their investigation of the break-in, the deputies spotted Griffin walking on the Richardsons' property. Griffin, who lived near the Richardsons, claimed he had been out walking since early that morning, heard the alarm and wanted to see what the commotion was about. The deputies patted Griffin down and found a new CO₂ cartridge commonly used in BB guns and two Swiss army knives. Donald Richardson later identified one of the knives as his.

Later that afternoon, Griffin was taken to the Shelby County Sheriff's Department for an interview with Detective Rick Isgrigg ("Detective Isgrigg"). Detective Isgrigg informed Griffin of his rights both verbally and through a written waiver. Griffin refused to sign the waiver but verbally acknowledged that he understood his rights and indicated he wanted to cooperate with the investigation. Near the conclusion of the interview,

¹ The aluminum foil was used to winterize the home from drafts and to deter rodents from crawling under the door while the Richardsons were away for the winter.

Detective Isgrigg requested Griffin's shoes for comparison to the shoe prints found in the Richardsons' home. Griffin eventually agreed and relinquished his shoes to Detective Isgrigg and Detective Isgrigg took Griffin home. Subsequent forensic analysis found that Griffin's shoes had the same tread design and shape as the shoe prints found in and around the Richardsons' home.

On January 12, 2009, Griffin was charged with Class B felony burglary, Class D felony theft, and Class D felony receiving stolen property. Following several requests for continuance by Griffin's counsel, a one-day bench trial was held on April 6, 2010. On April 16, 2010, the trial court acquitted Griffin of Class D felony receiving stolen property and found him guilty of Class B felony burglary and Class D felony theft. On May 16, 2010, the trial court sentenced Griffin to concurrent terms of nine years executed with two years suspended to probation for the Class B felony burglary conviction and one and one-half years executed for the Class D felony theft conviction. Griffin now appeals.

I. Statement to Police

Griffin argues that the trial court abused its discretion in admitting his statement to police because it was not voluntarily given and because the State failed to prove beyond a reasonable doubt that Griffin was advised of and understood his Miranda rights or that he voluntarily waived those rights.

A trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will reverse a trial court's ruling on the admissibility of evidence only when it constitutes an abuse of

discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id.

Miranda prohibits the introduction at trial of any statement “stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” Cliver v. State, 666 N.E.2d 59, 66 (Ind. 1996) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)). The Miranda warning must inform the suspect of his right to remain silent and to the presence of an attorney and warn the suspect that any statement made may be used as evidence against him. Loving v. State, 647 N.E.2d 1123, 1125 (Ind. 1995). “Waiver of the defendant’s Miranda rights occurs when the defendant, after being advised of those rights and acknowledging an understanding of them, proceeds to make a statement without taking advantage of those rights.” Cox v. State, 854 N.E.2d 1187, 1193 (Ind. Ct. App. 2006). Statements made in violation of a defendant’s Miranda rights are generally inadmissible in a criminal trial. Loving, 647 N.E.2d at 1125.

When a defendant challenges the admissibility of his statement, the State must prove beyond a reasonable doubt that the defendant’s statement was voluntary. Jackson v. State, 735 N.E.2d 1146, 1153 (Ind. 2000). In evaluating a claim that a statement was not given voluntarily, the trial court is to consider the totality of the circumstances, including police coercion, the length of the interrogation, its location, its continuity, and the defendant’s maturity, education, physical condition, and mental health. Pruitt v. State, 834 N.E.2d 90, 115 (Ind. 2005). On appeal, we look to the totality of the circumstances surrounding the waiver or statement, and our focus is whether the waiver

or statement was free and voluntary and not induced by any violence, threats, promises, or other improper influences. Jackson, 735 N.E.2d at 1153.

We do not reweigh the evidence, but instead view the evidence most favorable to the State, together with the reasonable inferences that can be drawn therefrom, in order to determine if there is substantial, probative evidence of voluntariness. Pruitt, 834 N.E.2d at 115. We will uphold the trial court's decision to admit the statement if there is substantial evidence of probative value to support it. Id.; Jackson, 735 N.E.2d at 1153-54; Atteberry v. State, 911 N.E.2d 601, 606 (Ind. Ct. App. 2009).

Here, Griffin argues that his statement was not voluntarily obtained because he was at Detective Isgrigg's mercy, as he had no way to get home. Additionally, Griffin claims he asked several times to leave but was ignored.

The record shows that Griffin was advised at the beginning of the interview that he was not under arrest and was free to leave at any time. Griffin asked three times to leave. Following Griffin's first request to leave, Detective Isgrigg acknowledged Griffin's desire to go home. However, Griffin re-initiated the discussion with Detective Isgrigg. Following his second and third requests to leave, Detective Isgrigg asked Griffin to release his boots voluntarily to avoid the additional time it would take Detective Isgrigg to obtain a search warrant for them. Griffin acquiesced and released the shoes to Detective Isgrigg. In total, the interview lasted thirty-seven minutes.

Griffin does not argue, nor does the record suggest, that the length, location, and continuity of the questioning was unreasonable or that he lacked the maturity, education,

or physical health to waive his Miranda rights. However, Griffin does challenge his ability to understand his rights based on his mental health status.

Griffin's counsel notes Griffin's strange responses to Detective Isgrigg's questions,² which, when combined with Griffin's history of depression and post-traumatic stress disorder, Griffin argues, should have led Detective Isgrigg to question Griffin's ability to understand his rights. However, at the beginning of the interview, Griffin acknowledged his understanding of the questions Detective Isgrigg was asking, he denied being under the influence of alcohol or drugs, and acknowledged that he understood his right to leave at any time and to stop answering questions.

Finally, Griffin claims that the State failed to prove beyond a reasonable doubt that he voluntarily waived his rights because he did not sign the waiver nor did Detective Isgrigg read Griffin his rights on tape. However, "an express written or oral waiver is not necessary to establish that the defendant waived his Miranda rights." Horan v. State, 682 N.E.2d 502, 510 (Ind. 1997). The record establishes that Griffin read the waiver and acknowledged that Detective Isgrigg verbally informed Griffin of his rights.

The fact that Griffin asked to leave but voluntarily continued talking with Detective Isgrigg or that the Detective did not read his rights on tape does not render Griffin's statement involuntary when the record shows he had been informed of his rights, indicated that he understood them, was a mature individual of normal intelligence, and was not interrogated for an inordinate amount of time. See Atteberry, 911 N.E.2d at

² For example, when asked if he knew where he was, Griffin responded, "Yeah, I'm in Shelbyville . . . Planet earth." Defendant's Ex. A, p. 5.

608. Looking at the totality of the circumstances, there is no evidence that Griffin's statement was induced by coercion, violence, threats, promises, or other improper influences. Based on these facts and circumstances there is substantial evidence of probative value to conclude that Griffin's statement was voluntary. Therefore, the trial court did not abuse its discretion in admitting into evidence Griffin's statement to police.

Furthermore, even if Griffin's statement was improperly admitted, the error was harmless. Errors in the admission of evidence are to be disregarded as harmless unless they affect the defendant's substantial rights. Stewart v. State, 754 N.E.2d 492, 496 (Ind. 2001); Ind. Trial Rule 61; Ind. Evidence Rule 103(a). For an error to be harmless, the conviction must be supported by substantial independent evidence of guilt that satisfies the court that there is no substantial likelihood that the challenged evidence contributed to the conviction. Rowley v. State, 724 N.E.2d 1087, 1090 (Ind. 2000).

Here, Griffin was found on the Richardsons' property with a pocket knife belonging to Mr. Richardson in his possession; the Richardsons' window was broken with a BB gun pellet, Griffin was found in possession of a CO₂ cartridge, which is used for BB guns; and Griffin's shoes matched shoe prints found in and around the Richardsons' home. There is substantial independent evidence that Griffin committed the offenses rendering Griffin's statement to officers nothing more than cumulative evidence. See Wright v. State, 766 N.E.2d 1223, 1232 (Ind. Ct. App. 2002) (finding the admission of cumulative evidence in the form of defendant's statement to police to be harmless error). In light of these facts and circumstances, we conclude that even if Griffin's statement to police was admitted in error, the error was harmless.

II. Sufficiency of the Evidence

Griffin claims that the State presented insufficient evidence to prove that he was the person responsible for the burglary and theft at the Richardsons' house. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. Atteberry, 911 N.E.2d at 609. Instead, we consider only the evidence supporting the conviction and the reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, then the verdict will not be disturbed. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008).

To establish that Griffin committed Class B felony burglary the State was required to prove that Griffin broke and entered the Richardsons' home with the intent to commit a felony therein. Ind. Code § 35-43-2-1(1)(B) (1999). Also, to establish that Griffin committed Class D felony theft, the State was required to prove that Griffin knowingly or intentionally exerted unauthorized control over the Richardsons' property, with intent to deprive them of any part of its value or use. Ind. Code § 35-43-4-2 (2009).

Here, the Richardsons' window was broken with a BB gun pellet, Griffin was found in possession of a CO₂ cartridge, which is used for BB guns, Griffin's shoes matched shoe prints found in and around the Richardsons' home; and Griffin was found on the Richardsons' property with a pocket knife belonging to Mr. Richardson in his possession. Griffin's argument is simply an invitation to reweigh the evidence and judge the credibility of witnesses, which we will not do. The State presented sufficient

evidence to support Griffin's convictions for Class B felony burglary and Class D felony theft.

III. Double Jeopardy

We next address, *sua sponte*, whether Griffin's simultaneous convictions for Class B felony burglary and Class D felony theft subjected him to double jeopardy. We raise this issue *sua sponte* because a double jeopardy violation, if shown, implicates fundamental rights. Scott v. State, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006). The double jeopardy clause found in Article 1, Section 14 of the Indiana Constitution "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Two or more offenses are the "same criminal transgression" in violation of the Indiana double jeopardy clause if, "with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Id.

The imposition of simultaneous sentences for burglary and theft convictions would not inherently violate double jeopardy protection since burglary and theft contain distinct statutory elements. Payne v. State, 777 N.E.2d 63, 68 (Ind. Ct. App. 2002). However, separate convictions for burglary and theft may violate the Indiana double jeopardy clause if the actual evidence used to convict established the essential elements of both burglary and theft. Under the actual evidence test, the evidence at trial is examined to determine whether proof of each of the challenged offenses was established by separate and distinct evidence. Polk v. State, 783 N.E.2d 1253, 1258 (Ind. Ct. App. 2003), trans.

denied. To establish that two offenses constitute the “same offense” under the actual evidence test, there must be a “reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Richardson, 717 N.E.2d at 53. The defendant must show that the evidentiary facts establishing the elements of one offense also establish all of the elements of a second offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

Here, the fact that Griffin was found in possession of a knife later identified as belonging to Mr. Richardson was used to establish his Class D felony theft conviction. The theft was then used to establish the intent element of the Class B felony burglary conviction. Specifically, the same evidence was used to show: (1) that Griffin broke and entered the Richardsons’ home with the intent to commit a felony (i.e., theft) for purposes of establishing a Class B felony burglary conviction; and (2) that Griffin knowingly or intentionally exerted unauthorized control over Richardson’s property for purposes of establishing a Class D felony theft conviction. Thus, there is a reasonable possibility that the trial court used the same evidentiary facts to convict Griffin of both Class B felony burglary and Class D felony theft, in violation of Indiana’s double jeopardy clause.

The trial court ordered Griffin to serve both sentences concurrently for an aggregate nine years executed in the Indiana Department of Correction. Thus, the length of Griffin’s sentence will not change. However, the imposition of concurrent sentences does not cure a double jeopardy violation. Carroll v. State, 740 N.E.2d 1225, 1233 (Ind.

Ct. App. 2000), trans. denied. Therefore, we vacate the Class D felony theft conviction and remand for the trial court to enter judgment accordingly.

Conclusion

There is substantial evidence of probative value to conclude that Griffin's statement to the police was voluntary. Therefore, the trial court did not abuse its discretion in admitting into evidence Griffin's statement to police. Furthermore, even if Griffin's statement was improperly admitted, the error was harmless. The State presented sufficient evidence to support Griffin's convictions for Class B felony burglary and Class D felony theft. Finally, because Griffin's convictions of both Class B felony burglary and Class D felony theft violate Indiana's prohibition against double jeopardy, we vacate his theft conviction and remand to the trial court to enter judgment accordingly.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this decision.

FRIEDLANDER, J., and MAY, J., concur.