



## STATEMENT OF THE CASE

Appellant Russell W. Maddex appeals his convictions and sentences for burglary as a class C felony,<sup>1</sup> attempted theft as a class D felony,<sup>2</sup> and for being a habitual offender. We affirm.

## ISSUES

Maddex raises five issues for review, which we restate as:

- I. Whether the trial court abused its discretion by denying Maddex's motion to dismiss;
- II. Whether the State suppressed evidence favorable to Maddex, thereby depriving him of due process;
- III. Whether the evidence is sufficient to sustain Maddex's burglary conviction;
- IV. Whether the trial court abused its discretion by instructing the jury on accomplice liability; and
- V. Whether Maddex's sentence is inappropriate in light of the nature of the offense and the character of the offender.

## FACTS

On the night of September 7, 2008, Officer Jonathon Simpson of the Madison Police Department was dispatched to the Dollar General Store ("the Store") in Madison. The police had received a report of an alarm activating in the Store. Officer Simpson

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<sup>1</sup> Ind. Code § 35-43-2-1.

<sup>2</sup> Ind. Code §§ 35-41-5-1 (attempt), 35-43-4-2 (theft).

arrived at the Store, checked the front door, and walked along the north side of the building.

As Officer Simpson walked along the north side of the Store, he heard a humming or drilling sound coming from inside the Store. Officer Simpson tried to open a door on that side of the building, but the door was locked. Furthermore, the humming or drilling sound stopped after Officer Simpson tried to open the door. He walked around to the front of the Store and looked into a window, and when he saw nothing out of the ordinary he returned to where he had heard the humming or drilling sound. At that point, Officer Simpson saw a person on the Store's roof, which is flat and surrounded by a short wall. Officer Simpson climbed onto a dumpster and turned on a flashlight to get a better view, and he saw that the person was Maddex. At that point, Officer Simpson could not see the roof itself due to the short wall, but Maddex appeared to be climbing out of a hole. Maddex ignored Officer Simpson's demands to halt and moved away from him on the roof, heading south. The Store's south wall is contiguous with a neighboring building, known as the United Way Building. The side and the roof of the United Way Building are accessible from the Store's roof.

At that point, Officer Simpson advised dispatch that there was a man on the Store's roof, got down from the dumpster, and moved around the outside of the Store so that he would see if anyone one jumped off of the roof. Other police officers arrived and set up a perimeter around the Store and the United Way Building. Reserve Sheriff's Deputy John Schoenstein was one of the responding officers. He was also a volunteer firefighter and, pursuant to the Sheriff Department's request, arrived at the Store in a fire

truck with a moveable aerial platform. Reserve Deputy Schoenstein extended the aerial platform, looked onto the Store's roof, and saw a person lying on the roof. Officer Simpson joined Reserve Deputy Schoenstein on the platform, and the two men used the platform to get onto the Store's roof. They arrested the person on the roof, who was identified as Steven Perry.

At that point, Officer Simpson saw that a hole had been cut in the Store's roof. A ladder was sticking out of the hole, providing access to the Store, and tools and bags were scattered on the roof around the hole. He also noticed that siding on the United Way Building had been torn off, and there was a hole in the side of that building.

Meanwhile, Captain Dave Stidham of the Madison Police Department had arrived on the scene and was watching the front of the United Way Building. As he looked towards a window, Captain Stidham saw something fall through the ceiling inside the building. Captain Stidham walked up to a window, and when he looked inside he saw a person get up and move away. Captain Stidham tried to watch as the person moved through the building but lost track of the person. Eventually, Captain Stidham and several other officers broke a window and entered the building. The officers moved through the building and came to a janitor's closet, where another hole had been torn in the ceiling. An officer demanded that whoever was in the ceiling come down. Maddex climbed down and was taken into custody.

Back at the Store, after Perry was arrested Officer Simpson and other officers entered the Store. They determined that no one else was in the Store. In the Store's office, an alarm system and a security camera had been damaged and someone had

attempted to cut open a safe. The officers found more tools in the office. Peggy Jester, a manager of the Store, came to the Store to view the damage and to review the surveillance camera's recordings.

The State charged Maddex with burglary as a class C felony, theft as a class D felony, and with being a habitual offender.<sup>3</sup> The State later amended the theft charge to attempted theft as a class D felony. Prior to trial, Maddex filed a motion to dismiss. The trial court held a hearing on the motion on the day before trial and denied Maddex's motion after the hearing.

The case went to trial, and a jury convicted Maddex of burglary and attempted theft. Subsequently, Maddex pleaded guilty to being a habitual offender. The trial court sentenced Maddex to an aggregate sentence of fourteen (14) years.

## DISCUSSION AND DECISION

### I. DENIAL OF MOTION TO DISMISS

We review a trial court's denial of a motion to dismiss for an abuse of discretion. *Johnson v. State*, 774 N.E.2d 1012, 1014 (Ind. Ct. App. 2002). In reviewing a trial court's decision for an abuse of discretion, we reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Maddex contends that the trial court should have granted his motion to dismiss because: (1) the State caused or allowed evidence to be destroyed prior to trial; and (2)

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<sup>3</sup> The State also charged Maddex with two counts of criminal mischief, both as class D felonies, but later dismissed those charges.

the State failed to respond to his pre-trial discovery request to provide a summary of the expected trial testimony of the State's witnesses.<sup>4</sup> We will address each issue in turn.

#### A. FAILURE TO PRESERVE EVIDENCE

Criminal defendants have the right to examine physical evidence in the hands of the State under the Fourteenth Amendment to the United States Constitution and Article One, Section Twelve of the Indiana Constitution.<sup>5</sup> *Terry v. State*, 857 N.E.2d 396, 406 (Ind. Ct. App. 2006), *transfer denied*. The appropriate test to apply when deciding whether a defendant's due process rights have been violated by the State's failure to preserve evidence depends on whether the evidence in question was "potentially useful evidence" or "material exculpatory evidence" as these terms were employed in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988), *reh'g denied*. *Blanchard v. State*, 802 N.E.2d 14, 26 (Ind. Ct. App. 2004).

The United States Supreme Court has defined potentially useful evidence as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Blanchard*, 802 N.E.2d at 26 (quoting *Youngblood*, 109 S.Ct. at 337). As such, the State's failure to preserve the evidence does not constitute a violation of due process rights unless the

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<sup>4</sup> Maddex also argues that he was entitled to dismissal because the State intentionally deprived him of his right to a speedy trial. Specifically, Maddex contends that the State listed a partner of Maddex's first counsel as a trial witness with the intent to force Maddex to obtain new counsel and delay his trial. Maddex devotes one paragraph of his Appellant's Brief to this issue, without citation to the record or legal authority. Therefore, we deem this claim waived. *See Edrington v. State*, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), *transfer denied* (declining to consider a claim when the party did not support a claim with cogent argument or citation to authority).

<sup>5</sup> The analysis under the Indiana Constitution is identical to the federal analysis. *Terry*, 857 N.E.2d at 406 n.8.

defendant shows bad faith on the part of the police. *Blanchard*, 802 N.E.2d at 26-27. On the other hand, to rise to the level of material exculpatory evidence, the “evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* at 27 (quoting *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984)). When the evidence is defined as material exculpatory evidence, the State’s good or bad faith in failing to preserve the evidence is irrelevant. *Blanchard*, 802 N.E.2d at 27. While a defendant is not required to prove conclusively that the destroyed evidence is exculpatory, there must be some indication that the evidence was exculpatory. *Id.*

In this case, the lost evidence consisted of: (1) Maddex’s orange 1987 Chevy Blazer, which the officers found several blocks from the Store; and (2) photographs that Officer Simpson took at the Store on the night of the incident, including several photographs of Perry.

The police impounded the Blazer on the night of the arrest and had it towed to a private towing company’s yard. After the police searched the Blazer, they released their impound hold on the vehicle on September 10, 2008. The towing company sold the Blazer for scrap several months later, and it was subsequently destroyed. Maddex argues that if he had been allowed access to the Blazer, he would have used it at trial to demonstrate that he could not have brought a ladder to the Store on that vehicle. Nevertheless, the State released its hold on the Blazer within three (3) days after impounding it, so the Blazer was no longer in the State’s control when it was sold for

scrap and destroyed months later. In fact, it is undisputed that Maddex could have regained the Blazer from the towing company at any time after the State released its hold if Maddex had paid the storage and towing fees. Thus, the Blazer was not in the State's possession or control when the towing company sold it for scrap and it was subsequently destroyed, so the State did not violate Maddex's right to due process with respect to the Blazer.

Turning to the photographs, Officer Simpson took several photographs on a digital camera at the Store and was subsequently unable to locate the photographs on the camera or on police computers. Maddex argues that the photographs could have proved or disproved the identity of the burglar, but pictures of Perry and of the crime scene do not have exculpatory value that would have been apparent before being lost because they would not exclude Maddex from having been present at the scene and committing the crimes in question. Furthermore, Maddex could have obtained comparable evidence, because other photographs of the crime scene were admitted at trial. In addition, Maddex could have pursued other discovery to determine what Perry was wearing on the evening in question. Thus, we conclude that the photographs were potentially useful evidence rather than material exculpatory evidence, and the key question is whether the State acted in bad faith by failing to preserve the photographs.

Bad faith is defined as being "not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." *Blanchard*, 802 N.E.2d at 27-28 (quoting *Samek v. State*, 688 N.E.2d 1286, 1289 (Ind. Ct. App. 1997), *reh'g denied, trans. denied*). Here, there is no evidence that Officer Simpson

intentionally destroyed the missing photographs. In fact, Maddex concedes that Officer Simpson “negligently destroyed” them. Appellant’s Br. p. 15. Thus, there is no showing of bad faith as to the loss of the photographs, and Maddex was not denied due process of law due to the loss of evidence.

#### B. DISCOVERY NONCOMPLIANCE

The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings and will be granted deference in assessing what constitutes substantial compliance with discovery orders. *Braswell v. State*, 550 N.E.2d 1280, 1283 (Ind. 1990). Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. *Id.* As a general proposition, the proper remedy for a discovery violation is a continuance. *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000). Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court’s discovery order. *See id.*

The exclusion of evidence as a sanction for discovery abuse is not proper unless there is a showing that the prosecution engaged in deliberate or other reprehensible conduct which thwarted the defendant’s right to a fair trial. *Carter v. State*, 512 N.E.2d 158, 171 (Ind. 1987). A defendant bears an even heavier burden when he or she seeks the extreme sanction of dismissal of the charges against him or her, although that is one response available to the trial court. *See id.* An appellant must affirmatively show that

there was error prejudicial to his or her substantial rights before reversal is warranted. *Wells v. State*, 848 N.E.2d 1133, 1143 (Ind. Ct. App. 2006), *corrected on reh'g*, 853 N.E.2d 143 (Ind. Ct. App. 2006), *transfer denied, cert. denied*, 549 U.S. 1322, 127 S.Ct. 1913, 167 L.Ed.2d 567 (2007).

In this case, among other discovery requests Maddex asked the State to provide a “short concise statement regarding the subject of testimony expected” from certain named witnesses and any other people the State expected to testify. Appellant’s App. p. 88. The State never provided the requested statement. Maddex never requested a continuance of the jury trial to obtain the statement, so the matter is waived. Waiver notwithstanding, although we do not condone the State’s failure to comply with Maddex’s discovery request, it does not appear that the State’s conduct was deliberate or reprehensible, so the extreme sanction of dismissal was not appropriate. Furthermore, Maddex has not shown that his substantial rights were prejudiced by the State’s failure to produce a statement of the witnesses’ anticipated testimony. Maddex asserts that because he did not have the statement of the witnesses’ testimony he was surprised by Jester’s testimony about surveillance video, but, as we discuss below, he ultimately chose not to object to her testimony. Consequently, the State’s discovery violation does not merit dismissal.

For these reasons, the trial court did not abuse its discretion by denying Maddex’s Motion to Dismiss.

## II. THE STATE’S WITHHOLDING OF EVIDENCE

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). To establish a *Brady* violation, a defendant must show: “(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial.” *Stephenson v. State*, 864 N.E.2d 1022, 1056-1057 (Ind. 2007), *reh’g denied, cert. denied*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1871, 170 L.Ed.2d 751 (2008) (quoting *Conner v. State*, 711 N.E.2d 1238, 1245-46 (Ind. 1999), *cert. denied*, 531 U.S. 829, 121 S.Ct. 81, 148 L.Ed.2d 43 (2000)).

In this case, in a discovery request Maddex asked the State to provide “copies of all . . . records, tapes, . . . photographs, video tapes and other tangible objects and evidence which were collected or created by the State of Indiana . . . .” Appellant’s App. p. 43. The State did not produce any recordings from the Store’s surveillance cameras. At trial, the State called Jester to testify. When Jester arrived at the Store on the night of the burglary, she noticed that a surveillance camera had been damaged. The camera’s recording was reviewable, and as Jester began to testify as to what she saw on the recording, Maddex’s counsel informed the trial court that he had been told that there was no surveillance video available and objected “to testimony regarding something that I’ve requested in discovery that was never made available to me, and whether it could have been or should have been, I mean, I don’t know, but the testimony itself is a surprise.” Tr. p. 379.

At that point, pursuant to Maddex's counsel's request, the trial court removed the jury from the courtroom and allowed Maddex to ask preliminary questions of Jester and Officer Simpson. Jester testified that her manager had saved the surveillance recording on a CD, and she had given the CD to the police. Officer Simpson testified that he received the CD but could not make the CD function and was unable to review the recording. The CD was not disclosed to Maddex. After the preliminary questioning, Maddex's counsel stated as follows:

Your Honor, I'm not going to request the exclusion of any evidence. I mean, obviously this was a surprise, and I'm . . . I'm at least satisfied with the responses that I've received that there wasn't anything intentional as far as keeping information from me, and I'm not going to request that any of the evidence with respect to the surveillance camera be excluded.

Tr. p. 386. Thus, Maddex withdrew his earlier objection. In the absence of an objection and a request for a continuance or exclusion of evidence related to the surveillance video, Maddex has waived this claim for appellate review. *See Fadell v. State*, 450 N.E.2d 109, 115 (Ind. Ct. App. 1983) (determining that appellant waived a *Brady* claim by failing to object to evidence at trial on that basis and by failing to request a continuance to remedy the State's alleged nondisclosure of evidence).

### III. SUFFICIENCY OF THE EVIDENCE

Our standard of review for sufficiency of the evidence is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. *Whitlow v. State*, 901 N.E.2d 659, 660 (Ind. Ct. App. 2007). Rather, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. *Id.* at 660-661. We affirm the conviction if there is probative evidence from which a reasonable trier of

fact could find the defendant guilty beyond a reasonable doubt. *Id.* at 661. It is not necessary that the evidence “overcome every reasonable hypothesis of innocence.” *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995), *reh ’g denied*).

In this case, in order to convict Maddex of burglary, the State was required to prove: (1) Maddex (2) broke into and entered (3) the Store (4) with intent to commit a felony, in this case attempted theft, in the Store. Ind. Code § 35-43-2-1. During trial, the State requested and received a jury instruction on accomplice liability. Maddex contends that the State failed to provide sufficient evidence to convict him of burglary as either a principal or an accomplice. We disagree. As Officer Simpson investigated a report of an alarm activating at the Store, he saw Maddex appear on the Store’s roof.<sup>6</sup> Maddex appeared to be climbing out of a hole in the roof, and the officers later saw that someone had cut a hole in the Store’s roof in that spot. The officers found a ladder in the hole, saw tools on the roof near the hole and in the Store’s office, and saw that someone had attempted to cut open the Store’s safe. Furthermore, the United Way Building, towards which Maddex had fled after climbing out of the hole in the Store’s roof, had a hole torn in the side that was accessible from the Store’s roof, and Maddex was apprehended in the ceiling space of the United Way Building shortly thereafter. This evidence is sufficient to sustain Maddex’s conviction for burglary of the Store as a principal.

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<sup>6</sup> Maddex contends there is “substantial doubt” as to the validity of Officer Simpson’s identification of Maddex from his vantage point on the dumpster and that Officer Simpson’s testimony on this point was not “credible evidence.” Appellant’s Reply Brief, p. 7. We remind Maddex that we review the facts in the light most favorable to the judgment. Officer Simpson testified that there was “no doubt in his mind” that Maddex was the person he saw on the Store’s roof. Tr. p. 268.

Maddex cites the case of *Blakney v. State*, 819 N.E.2d 542 (Ind. Ct. App. 2004), to support his claim, but that case is factually distinguishable. In that case, we found the evidence insufficient to sustain Blakney's conviction for criminal trespass as a principal because there was no evidence that Blakney was on another person's property after having been denied entry. *Id.* at 545. Furthermore, there was insufficient evidence to convict Blakney of criminal trespass as an accomplice because Blakney's companion did not enter the property in question, so there was no evidence that Blakney aided, induced, or caused her companion to commit criminal trespass. *Id.* at 546. By contrast, in this case there is ample evidence to convict Maddex of burglary as a principal. Thus, *Blakney* does not compel reversal of the jury's verdict.

#### IV. JURY INSTRUCTIONS

We review the issuance of a jury instruction for an abuse of discretion. *Brooks v. State*, 895 N.E.2d 130, 132 (Ind. Ct. App. 2008), *reh'g denied*. To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. *Id.* In reviewing a trial court's decision to give a tendered jury instruction, we consider: "(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given." *Id.* (quoting *Chambers v. State*, 734 N.E.2d 578, 580 (Ind. 2000), *reh'g denied*).

Maddex contends that the trial court erred by giving Final Instructions Number Seven and Eight. Those instructions concern accomplice liability. Final Instruction

Number Seven states, “[y]ou are instructed that when two or more persons combine to commit a crime, each is criminally responsible for the acts of his confederate(s) committed in furtherance of the common design, the act of one being the act of all.” Appellant’s App. p. 178. Final Instruction Number Eight provides: “[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person: 1. has not been prosecuted for the offense; 2. has not been convicted of the offense; or 3. has been acquitted of the offense.” Appellant’s App. p. 179.

Under the theory of accomplice liability, an individual who aids, induces, or causes the commission of a crime is equally as culpable as the person who actually commits the offense. *Brooks*, 895 N.E.2d at 133 (citing Ind. Code § 35-41-2-4 (2004)). The accomplice liability statute does not set forth a separate crime, but merely provides a separate basis of liability for the crime that is charged. *Id.* Therefore, where the circumstances of the case raise a reasonable inference that the defendant acted as an accomplice, it is appropriate to instruct the jury on accomplice liability even where the defendant was charged as a principal. *Id.*

In this case, Officer Simpson saw Maddex on the Store’s roof, apparently climbing out of a hole in the roof and heading south towards the United Way Building. However, Officer Simpson later saw Perry on the Store’s roof, near the hole. Tools were present on the roof and in the Store’s office, and someone had tried to cut open the Store’s safe. This evidence provides a reasonable inference that Maddex acted as Perry’s accomplice by aiding him and supports the trial court’s decision to instruct the jury on accomplice

liability. In addition, as is noted above, the evidence is sufficient to sustain Maddex's burglary conviction as a principal. Thus, the trial court did not abuse its discretion by issuing Final Instructions Seven and Eight to the jury.

#### V. APPROPRIATENESS OF SENTENCE

Although a trial court may have acted within its lawful discretion in determining a sentence, appellate review of the merits of a sentence may be sought on the grounds outlined in Indiana Appellate Rule 7(B). *See Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Rule 7(B) provides: “[t]he Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” We may look to any factors appearing in the record to conduct the examination. *Schumann v. State*, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). The burden is on the defendant to persuade this Court that his or her sentence is inappropriate. *Id.*

The “nature of the offense” portion of the standard articulated in Appellate Rule 7(B) speaks to the statutory presumptive sentence for the class of crimes to which the offense belongs. *Id.* That is, the presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crime committed. *Id.* at 1130-1131. The character of the offender portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. *Id.* at 1131.

In this case, the trial court sentenced Maddex to six (6) years for burglary, which is two (2) years greater than the advisory sentence but two (2) years less than the maximum sentence for a class C felony. *See* Ind. Code § 35-50-2-6. The trial court enhanced the burglary sentence by eight (8) years due to the habitual offender determination. The trial court also sentenced Maddex to two (2) years for the attempted theft conviction, which was six (6) months greater than the advisory sentence but one (1) year less than the maximum sentence. *See* Ind. Code § 35-50-2-7. The trial court directed Maddex to serve the attempted theft sentence concurrently with the enhanced burglary sentence, for an aggregate sentence of fourteen (14) years.

Regarding the nature of the offenses, Maddex's use of a ladder and tools to break into the Store via the roof and his unsuccessful attempts to disable the Store's alarm and surveillance systems demonstrate a degree of planning. Furthermore, breaking into the Store by cutting a hole in the roof, as opposed to forcing entry through a window or door, caused "extensive damage" to that building. Appellant's App. p. 249.

Turning to Maddex's character, he has a lengthy criminal history, including two convictions for receiving stolen property and a conviction for auto theft. It reflects poorly on Maddex that he has continued to commit crimes involving property despite repeated opportunities to reform. Furthermore, at the time Maddex committed the crimes in this case, he was facing a pending charge of operating a vehicle while intoxicated. Thus, Maddex is unwilling or unable to avoid committing crimes even when he has an active criminal case, which indicates serious disrespect for the law.

Maddex has failed to demonstrate that his sentence is appropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

We affirm Maddex's convictions and sentence.

Affirmed.

BAKER, C.J., and ROBB, J., concur.