

K. CRIMES

K.1. Culpability

K.1.a. General criminal intent

TITLE: Gebhard v. State

INDEX NO.: K.1.a.

CITE: (1st Dist. 10/23/85) Ind. App., 484 N.E.2d 45

SUBJECT: Criminal intent overt act - crime

HOLDING: Facts alleged in information do not constitute offense. Here, D was charged with disorderly conduct (tumultuous conduct) because he walked into empty hallway with pistol & such conduct "was likely to result in serious bodily injury to any person standing in hallway." Ct. finds D's conduct does not rise to level that persons are immediately likely to be seriously injured, therefore, it is not tumultuous conduct, which Ct. goes on to define. Felonious intent unconnected with unlawful act = no crime. Chandler (1895), 141 Ind. 106. Person cannot be punished for offense he/she may commit in future. 22 C.J.S., Criminal Law, 37(b). Held, reversed with instructions to dismiss information.

TITLE: Newton v. State

INDEX NO.: K.1.a.

CITE: (2d Dist. 11/29/83) Ind. App., 456 N.E.2d 736

SUBJECT: General criminal intent - malum in se

HOLDING: Child molesting statute is not unconstitutional because it is silent re mens rea. Here, D argues fundamental error (D failed to move to dismiss on this ground, precluding appellate review). Omission of words of culpability from statute defining crime does not exclude guilty knowledge as essential element of crime; it is matter of statutory construction. 22 C.J.S. Criminal Law 30; Gregory 291 N.E.2d 67. Where statute is adoptive of common law crimes (which have always included mens rea as element), criminal intent & knowledge are required, even if not specified in statute. Gregory. Child molesting is adoptive of common law offense of sodomy; therefore, offense requires mens rea, even though statute is silent. Held, conviction affirmed.

TITLE: Petruso v. State
INDEX NO.: K.1.a.
CITE: (11/12/82) Ind., 441 N.E.2d 446
SUBJECT: Criminal intent
HOLDING: Criminal intent may be inferred from nature of attack upon victim & circumstances surrounding crime. Roberson 430 N.E.2d 1173. Here, D argues evidence fails to establish D's intent to kill police officer. Evidence showed bullet from gun fired by D grazed D's truck & hit officer in the back. Officer was using D's truck as shield. Held, attempted murder conviction affirmed.

TITLE: State v. Keihn

INDEX NO.: K.1.a.

CITE: (8/10/89), Ind., 542 N.E.2d 963

SUBJECT: Construing statutes that lack mens rea element

HOLDING: Although statute defining driving while suspended is silent as to mens rea, knowledge of suspension is element of offense. Both Model Penal Code & Ind. Criminal Law Study Commission recommended minimum level of culpability where mental state is not otherwise specified, but these provisions were not adopted as part of revised criminal code. [Citations omitted.] Traditional malum in se/malum prohibitum distinction has been criticized as imprecise, unsound, & unreliable. [Citations omitted.] LaFave & Scott have identified 7 factors to consider in determining whether culpable mental state is required for offense where statute does not specify it: (1) legislative history, title, or context of statute; (2) similar or related statutes; (3) severity of punishment; (4) danger prohibited conduct presents to public; (5) D's opportunity to ascertain operative facts & avoid prohibited conduct; (6) prosecutor's difficulty in proving D's mental state; & (7) number of expected prosecutions. Substantive Criminal Law 3.8. Legislative history is inconclusive. Punishment is relatively severe, & may be imposed for reasons unrelated to ability to drive safely (i.e. failure to prove financial responsibility). Other traffic offenses in same chapter with less severe penalties require knowing wrongful conduct, implying that driving while suspended should also require knowledge. Lack of knowledge of suspension makes it difficult for individual to avoid driving while suspended. Finally, state's difficulty in proving knowledge is not unduly great; knowledge may be inferred from proof that notice of suspension was mailed to last known address. Held, offense of driving while suspended requires proof of knowledge of suspension.

K. CRIMES

K.1. Culpability

K.1.a.1. Voluntarily

TITLE: Baird v. State

INDEX NO.: K.1.a.1.

CITE: (12/1/92), Ind., 604 N.E.2d 1170

SUBJECT: Crimes -- culpability; voluntariness

HOLDING: D was convicted of three counts of murder and one count of feticide and sentenced to death. D claimed that State failed to prove he acted voluntarily according to Ind. Code 35-41-2-1(a), which provides that person commits offense only if he voluntarily engages in conduct in violation of statute defining offense. In addition, D contended that evidence presented in his case provided factual basis sufficient to raise issue of voluntariness so as to require State to prove beyond reasonable doubt that he acted voluntarily. Although proof of commission of act itself usually fulfills State's burden of proving voluntariness, State must prove voluntariness beyond reasonable doubt when evidence in record raises issue. Ct. disagreed and stated that D conflated meaning of voluntary act with concept of irresistible impulse which was formerly part of Indiana's insanity statute. Ct. held that evidence presented failed to provide factual basis which would require prosecution to prove beyond reasonable doubt that D acted voluntarily. Held, conviction affirmed.

RELATED CASES: McClain, 678 N.E.2d 104 (evidence of automatism allegedly caused by sleep deprivation was relevant to voluntariness of D's conduct in allegedly striking police officers).

TITLE: O'Connell v. State

INDEX NO.: K.1.a.1.

CITE: (06-05-12), 970 N.E. 2d 168 (Ind. Ct. App 2012)

SUBJECT: Voluntariness - instructions

HOLDING: Tr. Ct. did not abuse its discretion by refusing to give D's proposed element instruction which included the word "voluntary." A person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense. Ind. Code 35-41-2-1(a). Once evidence in the record raises the issue of voluntariness, the State must prove beyond a reasonable doubt that the D acted voluntarily.

Here, D was charged with Class C felony attempted escape, disorderly conduct and public intoxication due to his belligerent behavior with police. D was talking "gibberish," growling, making threats, slurring, cussing, and asserting that he was Jesus. At one point, D became non-responsive and was taken to the hospital. Two officers claimed that D smelled of alcohol, but D testified that he had not drank for twenty years. D's wife testified that D suffers from a seizure disorder and had a seizure earlier that day where he growled and was non-responsive. D proposed multiple instructions on voluntariness. The Tr. Ct. gave the proposed instruction based on the statutory language regarding the requirement of voluntary conduct, but refused to include the word "voluntary" in the elements instructions. Because the pattern jury instruction also includes the word "voluntary," D's proposed elements instruction was a correct statement of the law. However, the instruction on voluntariness the court did give, along with the instructions explaining that statutory elements of the charges and the State's burden of proof, adequately informed the jury that, in order to find D guilty, the State had to prove beyond a reasonable doubt that he voluntarily engaged in the conduct alleged by the State. It is not dispositive that no one instruction directly explained to the jury that the State was required to prove beyond a reasonable doubt that D's criminal conduct was voluntary. While the better practice would be to use the pattern jury instruction, the standard of review does not require it. Held, judgment affirmed; Riley, J., dissenting on basis that the jury instructions, as a whole, did not sufficiently cover the substance of D's proposed instructions, and the testimony at trial presented the issue of whether D's conduct was involuntary due to a seizure disorder.

K. CRIMES

K.1. Culpability

K.1.a.2. Intentionally (Ind. Code 35-41-2-2(a))

TITLE: Burgess v. State

INDEX NO.: K.1.a.2.

CITE: (4/17/84) Ind., 461 N.E.2d 1094

SUBJECT: Intentional murder - sufficiency

HOLDING: Evidence was sufficient to sustain attempted murder conviction where D raised gun to victim's head & gun went off. Here, D argues gun fired accidentally. Witness (and friend of D) testified D had handgun for some time & was familiar with using it. Firearms expert testified particular handgun could be fired only by pulling back on trigger with six pounds of force. Use of weapon in manner likely to cause death/great bodily harm may be sufficient to establish D's intent to commit murder. Scott 413 N.E.2d 902; Zickefoose 388 N.E.2d 507. Depending upon circumstances, intent to murder may occur as instantaneously as successive thoughts. Morris 384 N.E.2d 1022; Rogers 383 N.E.2d 1035. Held, conviction affirmed.

K. CRIMES

K.1. Culpability

K.1.a.3. Knowingly (Ind. Code 35-41-2-2(b))

TITLE: Armour v. State

INDEX NO.: K.1.a.3.

CITE: (07/3/85), Ind., 479 N.E.2d 1294

SUBJECT: "Knowingly" is subjective standard (child neglect statute)

HOLDING: As used in child neglect statute, a person acts "knowingly" if he/she is subjectively aware of high probability that he/she has placed dependent in dangerous situation. Opinion resolves conflict as to meaning of term knowingly in child neglect statutes. See Ware, App., 441 N.E.2d 20 & Smith, App., 408 N.E.2d 614. "Knowingly" is defined in Ind. Code 35-41-2-2. Here, Ct. finds evidence supports jury's conclusion that D knowingly endangered health/life of his 3-month old son by not seeking timely medical care. Doctors determined that baby had subdural hematoma caused by trauma to its head. Its symptoms were such that a person of normal intelligence would have realized the baby was not healthy. Held, conviction for neglect of dependent affirmed.

RELATED CASES: Rinker 565 N.E.2d 344 (D's continual neglect of child after she had received prior counseling & instruction, was sufficient to satisfy "knowingly or intentionally" element of child neglect); Horne 445 N.E.2d 976 (see card at K.3.b.1).

TITLE: Leonard v. State
INDEX NO.: K.1.a.3.
CITE: (5/2/2017), 73 N.E.3d 155 (Ind. 2017)
SUBJECT: "Knowing" mens rea applies to prohibited conduct, not identity of victims
HOLDING: To convict Defendant of knowingly murdering his two neighbors, the State needed to only show that Defendant knowingly committed the prohibited conduct – killing two other human beings – not that he knowingly killed two specific individuals. Thus, the evidence was sufficient to support Defendant's convictions.

Defendant lived with his girlfriend in Richmond Hill, a neighborhood on the southeast side of Indianapolis. To collect on a home insurance policy, they triggered a massive natural gas explosion of their home, which killed their two next door neighbors, the Longworths. Defendant was charged with and convicted of knowingly killing the Longworths.

On appeal, Defendant argued that the State failed to prove the knowing element as to the specific victims. In other words, he contended that the State failed to prove he knew that the victims of the crime would be the Longworths. In support, he cited Ind. Code § 35-41-2-2(d), which provides: "d) . . . if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct."

However, the statute requires the State to prove the knowing mens rea only with respect to every material element of the prohibited conduct, not the identity of the victims. Though the victims' identities were material elements of the offense, their identities were not part of the prohibited conduct. See Owens v. State, 742 N.E.2d 538, 543 (Ind. Ct. App. 2001) ("In Markley v. State, 421 N.E.2d 20, 21 (Ind. Ct. App. 1981)] we noted that 'prohibited conduct' and 'element' within Ind. Code § 35-41-2-2(d) are not synonymous and if the legislature had intended culpability to apply to every material element, the phrase 'of the prohibited conduct' would be superfluous."). Thus, the State presented sufficient evidence to prove beyond a reasonable doubt that Defendant knowingly committed murder. Held, judgment affirmed.

Note: This case may cast doubt on Eberle v. State, 942 N.E.2d 848 (Ind. Ct. App 2011), where the defendant was accused of committing intimidation against a person the defendant did not know was a police officer. The Court held that the State needed to show that the defendant knew the person was a police officer the State needed to show that the defendant knew the person was a police officer.

RELATED CASES: Owens, Ind. App., 742 N.E.2d 538 (State's need to prove D knowingly committed murder applied only to the prohibited conduct, not the identity of the victims); Maldonado-Morales, 985 N.E.2d 25 (Ind. Ct. App 2013) (instruction properly stated that to convict D of domestic battery under transferred intent doctrine, jury needed to find only that he acted knowingly or intentionally with regard to the prohibited conduct - striking another person - but not the facts that elevated the offense to a D felony, striking his ex-wife in the presence of their child); D.H., 932 N.E.2d 236 (Ind. Ct. App 2010) (evidence was sufficient to support Class D felony battery adjudication where D threw a punch, intending to hit another student, and mistakenly struck his teacher instead; culpability requirement applies only to the conduct element of the battery statute, thus State is not required to prove that knowingly or intentionally struck his teacher); Eberle, 942 N.E.2d 848 (Ind. Ct. App 2011) D's intimidation conviction was improperly elevated to a Class D felony where he was not aware that complaining witness (CW) was a law enforcement officer when he committed the instant offenses).

TITLE: U.S. v. X-Citement Video, Inc

INDEX NO.: K.1.a.3.

CITE: 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)

SUBJECT: Obscenity - Scierter Requirement

HOLDING: Federal statute that criminalizes "knowingly" transporting, shipping, receiving, distributing, or reproducing visual depiction of minor engaged in sexually explicit conduct requires knowledge that performer is minor, and thus does not facially violate first amendment. 7-2 majority looks to rule that presumption in favor of scierter requirement should apply to each statutory element which criminalizes otherwise innocent conduct. Because non-obscene, sexually explicit materials involving adults are protected by first amendment, there is presumption in favor of scierter requirement for minority element of statute. Although reading "knowingly" to apply only to transporting, shipping... elements is most natural grammatical reading, but could lead to anomalies and absurdities. For example, druggist who returns unexamined roll of developed film could be prosecuted under statute without scierter requirement as to age of performer. Trafficking in child pornography is similar to types of common-law offenses that presume scierter requirement -- punishment is harsh, and age of performers is crucial element separating legally innocent conduct from culpable conduct. Finally, without scierter requirement as to age of performers, statute would raise serious first amendment problems. Scalia & Thomas, JJ., DISSENT.

K. CRIMES

K.1. Culpability

K.1.a.4. Recklessly (Ind. Code 35-41-2-2(c))

TITLE: Wallace v. State

INDEX NO.: K.1.a.4.

CITE: (1st Dist. 8/20/90), Ind. App., 558 N.E.2d 864

SUBJECT: Criminal recklessness - sufficiency; changing lanes while driving

HOLDING: Evidence that D changed lanes without looking or using turn signals, resulting in car being forced off road, did not support conviction for criminal recklessness. D was driving tanker truck loaded with grain alcohol in convoy with other driver when he changed lanes & forced car off road. Other truck driver radioed this fact to D, & he pulled back over so that car could return to road. Evidence most favorable to verdict was that D did not look for other cars or use turn signals. Ind. Code 35-41-2-2 provides that person acts recklessly "if he engages in the conduct in plain, conscious, & unjustifiable disregard of harm that might result & the disregard involves a substantial deviation from acceptable standards of conduct." To win conviction, state merely need show that individual realized or should have realized strong probability that harm might occur. Miller, App., 449 N.E.2d 1119. In Abney 525 N.E.2d 333, S.Ct. upheld conviction for criminal recklessness where tavern patron attempted to keep fellow patron from intervening in fight with his estranged wife, & inadvertently stabbed him. S.Ct. stated that intent state had to prove was "intent to strike [the intervening patron] with the knowledge that appellant was holding an open knife at the time." Here, D's sole intent was to change lanes, & because he had no knowledge of presence of other car, he could not be reckless with regard to potential harm unknown to him. D's conduct was merely negligent. Held, conviction reversed. Robertson, J., DISSENTS, arguing that evidence created inference that D, professional driver, should have known of risk of potential harm to passing motorist.

RELATED CASES: Watson, App., 776 N.E.2d 914 (although D was unfamiliar with area where accident occurred, he knew or should have known that driving 70 miles per hour at dusk on unfamiliar road with three children in car involved substantial deviation from acceptable standards of conduct).

K. CRIMES

K.1. Culpability

K.1.b. Specific intent

TITLE: Shields v. State

INDEX NO.: K.1.b.

CITE: (1st Dist. 12/7/83) Ind. App., 456 N.E.2d 1033

SUBJECT: Specific intent - instruction; inferences

HOLDING: Tr. Ct. did not err in giving following instruction: "Intent to commit felony, element of burglary, can be inferred from time, force, & manner of entry, if there is no evidence that entry was made with some lawful intent." Ct. holds instruction correct statement of law. State must sustain burden of proof on each element of offense charged, but some elements may be proven by circumstantial evidence. Kondrup 235 N.E.2d 703. Because intent is mental state of actor, trier of fact must resort to reasonable inferences based upon examination of surrounding circumstances to reasonably infer its existence. Lisenko 355 N.E.2d 841; Duncan 409 N.E.2d 597. Held, no error.

TITLE: Smallwood v. State
INDEX NO.: K.1.b.
CITE: 343 Md. 97; 680 A.2d 512 (Md. Ct. App. 1996)
SUBJECT: Intent to Kill -- Can't be Inferred from Rapist's Knowledge re HIV Status
HOLDING: Knowingly exposing persons to risk of HIV infection is not, by itself, a sufficient basis from which to infer intent to kill. D's attempted murder convictions, supported only by evidence that he raped several women knowing he was HIV-positive, are reversed. Evidence showed D intentionally exposed victims to risk of HIV infection. However, state did not prove that death by AIDS was probable result of D's actions, and absent other evidence of intent to kill, Court cannot conclude that death by AIDS was sufficiently probable to support inference of intent to kill. Court distinguishes facts here from those in State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989), where D sprayed his blood on victims and said he would give AIDS to them.

CITE: United States v. Veach

INDEX NO.: K.1.b.

CITE: 455 F.3d 628 (6th Cir. 2006)

SUBJECT: Assault with intent to impede, specific intent

HOLDING: The Sixth Circuit Court of Appeals held that the offense of threatening to assault or murder a federal law enforcement officer with the intent to impede the performance of his or her official duties, in violation of 18 U.S.C. § 115(a)(1)(B), is a specific intent crime, and thus a D is entitled to mount a defense of diminished capacity to such a charge.

The Court had previously held that assaulting a federal officer, in violation of 18 U.S.C. § 111(a)(1), is a general intent crime. U.S. v. Kimes, 246 F.3d 800 (6th Cir. 2001). However, with the statute at issue, the Court noted that “unlike 18 U.S.C. § 111 . . . § 115(a)(1)(B) does contain additional language not found in the former general intent statute.” It specifically provides that the proscribed acts be done “with intent to impede, intimidate, or interfere” with a federal official engaged in performing official duties. This language, coupled with the requirements for conviction, leads to the “inescapable conclusion” that the statute contains a specific intent element that must be proved beyond a reasonable doubt.

K. CRIMES

K.1. Culpability

K.1.c. Transferred intent

TITLE: D.H. v. State

INDEX NO.: K.1.c.

CITE: (08-11-10), 932 N.E.2d 236 (Ind. Ct. App 2010)

SUBJECT: Transferred intent - higher punishment level than crime originally intended to be committed

HOLDING: Evidence was sufficient to support delinquency finding for Class D felony battery where D threw a punch, intending to hit another student, and mistakenly struck his teacher instead. D argued that the doctrine of transferred intent should not apply in this case because doctrine has been applied to crimes that were charged at the same or lower punishment level as the crime originally intended to be committed. Here, in contrast, if D had struck the other student, he would merely have committed the equivalent of a class A or class B misdemeanor battery. But because he struck a teacher instead, D's act was elevated to a class D felony. Court disagreed, noting that culpability requirement applies only to the conduct element of the battery statute, *i.e.*, touching another in a rude, angry, or insolent manner. Thus, the State is not required to prove that D knowingly or intentionally struck his teacher. Instead, State is required to prove beyond a reasonable doubt that D knowingly or intentionally struck someone, and then prove beyond a reasonable doubt that the victim happened to be a teacher in the course of her duties. Held, judgment affirmed.

RELATED CASES: Maldonado-Morales, 985 N.E.2d 25 (Ind. Ct. App 2013) (instruction properly stated that to convict D of domestic battery under transferred intent doctrine, jury needed to find only that he acted knowingly or intentionally with regard to the prohibited conduct - striking another person - but not the facts that elevated the offense to a D felony, striking his ex-wife in the presence of their child).

TITLE: Straub v. State

INDEX NO.: K.1.c.

CITE: (02/27/91), Ind., 567 N.E.2d 87

SUBJECT: Transferred intent - instruction

HOLDING: Instruction on intent to kill one person with deadly weapon being transferred from intended victim to another who is killed through mistake or inadvertence with such weapon, was not erroneous as also allowing transference of intent in lesser-included offense of battery with deadly weapon, despite D's argument that murder is specific intent crime & battery involves general intent. D was charged with 2 counts of attempted murder but convicted of one count of lesser-included offense of battery with deadly weapon. Evidence showed that after getting into confrontation with another patron, D fired several rounds from his gun into air & at tavern. One of rounds or piece of shattered window struck another patron, apparently unknown to D. Ct. noted that "specific intent" has been used in attempt statute to exclude its application to crimes with "reckless" intent, & not as traditionally used in criminal law jurisprudence, *citing to Henderson* 534 N.E.2d 1105. Ct. held that culpability required for both murder & battery is same, & that intent to commit murder could be transferred to battery in this context. Therefore, instruction was not erroneous. Held, conviction for battery affirmed.

RELATED CASES: Matthews, App., 866 N.E.2d 821 (because jury was instructed as to the specific intent of both the accomplice & the principal on the attempted murder charge, the doctrine of transferred intent can be applied to find the accomplice guilty of the murder charge; the accomplice's specific intent to kill in an attempted murder charge can be transferred to another victim).

TITLE: Tucker v. State

INDEX NO.: K.1.c.

CITE: (1/21/83) Ind., 443 N.E.2d 840

SUBJECT: Transferred intent

HOLDING: D's intent to injure/kill X is transferred from X to person actually injured/killed. Napier 298 N.E.2d 427; Matthews 148 N.E.2d 334. Here, D took gun from friend's car, drove to home of intended victim, aimed gun toward lighted window & fired. Bullet hit stepbrother of intended victim. D contends evidence is insufficient to support attempted voluntary manslaughter conviction because evidence fails to show he intended to strike or injure anyone. Held, evidence supports conviction.

RELATED CASES: Williams, 690 N.E.2d 162; White, 638 N.E.2d 785 (if person deliberately attempts to kill one person but in process kills another, intent to kill is transferred & he may be found guilty of murder of person killed).

K. CRIMES

K.1. Culpability

K.1.d. Offenses not requiring criminal intent

TITLE: Elonis v. United States
INDEX NO.: K.1.d.
CITE: (6/1/2015), 135 S.Ct. 2001 (2015)
SUBJECT: Requiring only reasonably foreseeable mental state improper under threat statute
HOLDING: Instruction requiring federal government to show only that D reasonably foresaw that his Facebook postings would be interpreted as threats was legally erroneous. Even though 18 U.S.C. § 875(c) includes no specific mens rea requirement, a proper instruction would have advised the jury that the government needed to prove D transmitted his messages with the purpose of issuing a threat or with knowledge that it would be viewed as a threat.

After his wife and two children left him, D began posting violent, crude, and degrading comments directed at his wife, co-workers, neighboring schools, and local, state, and federal law enforcement. He fashioned the comments as lyrics for rap music, and his postings were interspersed with claims that the lyrics did not depict real people.

D was charged with five counts of violating 18 U. S. C. §875(c), which forbids transmitting in interstate commerce “any communication containing any threat . . . to injure the person of another.” He was convicted on four counts.

Instructing the jury to determine what D could reasonably foresee impermissibly grafted a civil negligence standard into a criminal case. The instruction was inconsistent with the traditional requirement in criminal cases of showing a D’s “awareness of some wrongdoing.” Staples v. United States, 511 U. S. 600, 606-07 (1994). And while the statute does not expressly set forth a mens rea element, “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.” Morrisette v. United States, 342 U. S. 246, 250 (1952). Thus, the Court applied the general rule that a guilty mind is “a necessary element in the indictment and proof of every crime.” United States v. Balint, 258 U.S. 250, 251 (1922). Under this standard, the Tr. Ct.’s instruction was improper.

The Court expressly chose to not address whether an instruction requiring only that a D’s mental state was reckless is sufficient. Also, because the Court decided the issue on statutory grounds, it declined to address the case under the First Amendment. Roberts, C.J., joined by Scalia, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Alito, J., concurring in part and dissenting in part; Thomas, J., dissenting. Held, cert. granted, Third Circuit judgment at 730 F.3d 321 reversed, and remanded for proceedings consistent with the opinion.

TITLE: White v. State
INDEX NO.: K.1.d.
CITE: (11/21/2012), 978 N.E. 2d 475 (Ind. Ct. App 2012)
SUBJECT: Feticide sentence enhancement constitutional despite no mens rea requirement
HOLDING: D failed to meet his heavy burden to show that the feticide enhancement statute, Ind. Code § 35-50-2-16, is unconstitutional for lacking a mens rea requirement.

D and his wife, who were separated, argued about parenting time with their child. The day before a provisional custody hearing, the two argued. D shot his wife twice in the abdomen, killing her and their unborn child. Subsection (e) of the feticide enhancement statute provides that the State need not prove a D “had knowledge or should have had knowledge that the victim was pregnant,” Ind. Code § 35-50-2-16 (e)(1), or that “the D intended to cause the termination of a human pregnancy.” Ind. Code 35-50-2-16 § (e)(2). In his challenge, D “labors under a heavy burden to show that the statute is unconstitutional.” See State v. Moss-Dwyer, 686 N.E.2d 109, 111-12 (Ind. 1997). Absent a clear constitutional infirmity, “our separation of powers doctrine requires we take a highly restrained approach when reviewing legislative prescriptions for punishments.” Id. at 112.

As D concedes, the U.S. Supreme Court has not “delineate[d] a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental state and crimes that do not.” See Morissette v. United States, 342 U.S. 246, 250 (1952).

The principle behind the enhancement statute comes from the aggravator for the “nature and circumstances of the crime,” meaning that the consequences to a victim of a crime are as important as a D’s culpability. Cf. McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001). Further, the statute is not an outlier. Ind. Code § 35-50-2-9 (b)(12) provides that a D who murders a child less than 12 can receive the death penalty, even if he was unaware of the child’s age. Stevens v. State, 691 N.E.2d 412, 432-43 (Ind. 1997).

The feticide enhancement statute reflects the legislature’s desire to increase protection of fetuses and punish more harshly those who, by murdering a pregnant woman, cause the death of a fetus. Held, judgment affirmed.

RELATED CASES: Elonis v. United States, 135 S.Ct. 2001 (2015) (instruction requiring government to show only that D reasonably foresaw that his Facebook postings would be interpreted as threats was erroneous; see full review, this section).

K. CRIMES

K.2. Offenses of general applicability

K.2.a. Aiding/inducing/causing an offense - accomplice liability (Ind. Code 35-41-2-4) (see, also substantive offense)

TITLE: Bethel v. State

INDEX NO.: K.2.a.

CITE: (6-16-00), Ind., 730 N.E.2d 1242

SUBJECT: Aiding attempted murder - required proof

HOLDING: In appeal of D's attempted murder conviction, Ct. addressed issue of what must be proven in order to show that D "knowingly or intentionally" aided commission of crime requiring specific intent. To support conviction for aiding an attempted murder, State must prove: 1) that accomplice, acting with specific intent to kill, took substantial step toward commission of murder, & 2) that D, acting with specific intent that killing occur, knowingly or intentionally aided, induced, or caused accomplice to commit crime of attempted murder. In this case, despite substantial evidence that D was engaged in protracted criminal activity with Co-D, with both men carrying guns, threatening several people, Ct. found evidence insufficient to prove that D had specific intent to kill victim or specific intent that Co-D kill victim. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Rosales, 23 N.E.3d 8 (Ind. 2015) (accomplice liability instruction on attempted murder was fundamentally erroneous because it failed to say State must prove Defendant acted with specific intent to kill when he knowingly or intentionally aided, induced, or caused another person to kill someone else; see full summary, this section); Tiller, App., 896 N.E.2d 537 (failure to instruct that the specific intent requirement for attempted murder, as properly set forth in the attempted murder instruction, also applied to accomplice liability for attempted murder was fundamental error); Means, App., 807 N.E.2d 776 (D failed to establish fundamental error from accomplice liability instruction, because intent to kill was not at issue on charge pertaining to erroneous instruction); Edington, 806 N.E.2d 310 (Bethel did not announce a new rule of criminal procedure but rather explained what State was already required to prove to gain conviction); Cowherd, App., 791 N.E.2d 833 (D failed to demonstrate that he was prejudiced by allegedly deficient performance of trial counsel in failing to object to jury instruction regarding accomplice liability for attempted murder); Kendall, App., 790 N.E.2d 122 (evidence was insufficient to find that D had specific intent to kill victim or specific intent that his accomplices kill victim); Hopkins, 782 N.E.2d 988 (Evidence of D's specific intent that victim be killed was sufficient to conclude that D suffered no prejudice from Tr. Ct.'s failure to instruct jury that it was required to find beyond reasonable doubt that D possessed specific intent to kill victim); Woodson, App., 767 N.E.2d 1022, reh'g granted 778 N.E.2d 475 (attempted murder & accomplice instructions that failed to refer to specific intent to kill constituted fundamental error); Hopkins, 759 N.E.2d 633 (Tr. Ct. committed fundamental error in failing to instruct jury regarding specific intent required of D to establish accomplice liability for attempted murder where D's intent to kill was clearly at issue); Williams, 737 N.E.2d 734 (Tr. Ct. committed fundamental error in not instructing jury that it had to find that D, as non-shooting accomplice, possessed specific intent to kill when he knowingly or intentionally aided, induced, or caused his backseat accomplice to commit crime of attempted murder; see full review at K.2.b).

TITLE: Courchaine v. State

INDEX NO.: K.2.a.

CITE: (8/22/89), Ind., 542 N.E.2d 969

SUBJECT: Inducing or causing offense - sufficiency

HOLDING: Evidence was sufficient to support conviction for inducing or causing burglary. Co-Ds testified that they had committed prior burglaries, & that they met with D at D's home to discuss his future involvement. Plans were made for co-Ds to continue burglaries, & to bring stolen items to D's home for him to dispose of. Co-Ds committed 2 burglaries pursuant to this plan, using D's car & bringing stolen goods to D's home. They were arrested while attempting 3d burglary at home D selected. D argues on appeal that evidence may tend to show that he "aided" co-Ds, but not that he "induced" or "caused" burglary. State's motion to amend information to include aiding was denied by Tr. Ct. In Harden 441 N.E.2d 215, testimony of co-D that D was directly involved in planning robbery, provided gun, gave directions to victim's home, received all stolen money & divided it among participants, keeping 1/4, was sufficient to support conviction for robbery. Ind. S. Ct. in Harden wrote that D commits offense whenever he/she knowingly or intentionally aids, induces, or causes it to be committed, citing Ind. Code 35-41-2-4, under which D here is charged. Harden Ct. also held that concerted action or participation in crime is sufficient for conviction & may be established by uncorroborated testimony of accomplice. Jury was justified in finding D's provision of market for stolen goods was inducement or cause for co-Ds to commit burglaries. Held, D's involvement was sufficient to support conviction for inducing or causing burglary.

TITLE: Faulisi v. State

INDEX NO.: K.2.a.

CITE: (3rd Dist., 11-16-92), Ind. App., 602 N.E.2d 1032

SUBJECT: Accomplice liability

HOLDING: Where evidence indicated that D was at scene of fire when it started; sped away when officer arrived in marked car; was followed for 3 1/2 miles by officer with emergency lights on before he stopped; told officer that his passenger who successfully fled on foot had started fire; & had motive for committing arson, it was sufficient to sustain conviction for arson. Factors to consider in determining accomplice liability are (1) presence at scene of crime; (2) companionship with other engaged in crime; (3) failure to oppose commission of crime; & (4) course of conduct before during & after crime. Johnson, 490 N.E.2d 333. In addition to evidence above, D had been fired & locked out of burned business by owner, had told others he was angry enough to kill owner, & suggested that business should be burned. D also threatened harm to owner & to burn store down before he could cheat him again. Therefore, evidence was sufficient to support conviction. **Note:** Decision also discusses instruction which did not specifically require finding bodily injury beyond reasonable doubt to enhance felony level, & found instructions taken as whole were sufficient to prevent fundamental error.

RELATED CASES: Green, 937 N.E.2d 923 (Ind. 2010) (evidence was sufficient to support aiding in murder where D was with co-D at scene when victim was shot, and during a traffic stop a day later fled from police with the gun that was used to shoot victim).

TITLE: Garland v. State

INDEX NO.: K.2.a.

CITE: (11-19-99), Ind. 719 N.E.2d 1184

SUBJECT: Aiding murder - insufficient evidence

HOLDING: Reasonable trier of fact could not find, beyond reasonable doubt, that D was guilty of knowingly or intentionally aiding, inducing, or causing another person to commit murder. While D's presence during commission of crime or his failure to oppose crime are, by themselves, insufficient to establish accomplice liability, jury may consider them along with other facts & circumstances tending to show participation. Burkes, 445 N.E.2d 983, 987. Here, D's drug counselor, who was also D's mother's alleged boyfriend, shot & killed D's father in front of D. During trial, most favorable evidence to State was videotaped interview of D where D repeatedly told police that mother's alleged boyfriend tried to get D to help kill his father, but D consistently refused to get involved. Although D was aware of his mother's boyfriend's expressed desire to kill D's father, that he did not report it to police or warn his father, that he was present near scene of murder, that he assisted his mother in leaving scene & concealing potential evidence, & that he initially lied to police regarding his knowledge of incident, there was no evidence demonstrating that D took any step to aid, induce, or cause crime. Thus, there was insufficient evidence to support conviction for aiding & abetting murder or conspiracy to commit murder. Held, conviction reversed.

RELATED CASES: Williams, App., 748 N.E.2d 887 (IAC found where defense counsel failed to move for directed verdict on conspiracy to commit murder charge; there was absence of evidence that D entered into agreement with Co-Ds to kill robbery victim).

TITLE: Ivy v. State
INDEX NO.: K.2.a.
CITE: (4/4/2018), 98 N.E.3d 107 (Ind. Ct. App 2018)
SUBJECT: Ineffective assistance of counsel (IAC) - erroneous jury instruction on accomplice liability for attempted murder
HOLDING: D received IAC because trial counsel failed to object to jury instructions given on accomplice liability for attempted murder. D's accomplice stabbed the victim while D held another individual at gunpoint. At trial, D argued he had not acted with the requisite culpability to be found guilty of attempted murder as an accomplice. The jury instruction for attempted murder mentioned specific intent, but it was phrased in terms of D being the principal actor, i.e., the one who stabbed the victim, rather than the accomplice. The accomplice liability instruction was fundamentally erroneous because it failed to say the State must prove D specifically intended that the victim be killed when he knowingly or intentionally aided his accomplice in the commission of attempted murder. As in Specht v. State, 838 N.E.2d 1081 (Ind. Ct. App 2005), Tr. Ct.'s failure to instruct the jury on this essential element of accomplice liability was erroneous. D's intent was a central issue at trial, thus there is a reasonable probability that had trial counsel objected to the instructions given and tendered the appropriate instruction, the result of his trial may have been different. Held, denial of petition for post-conviction relief reversed and remanded for further proceedings. Riley, J., dissenting, believes that when read together, the instructions sufficiently apprised jury of the essential elements necessary to convict D of attempted murder under an accomplice liability theory.

TITLE: Johnson v. State

INDEX NO.: K.2.a.

CITE: (3/27/86), Ind., 490 N.E.2d 333

SUBJECT: Accessory - sufficiency

HOLDING: Evidence was sufficient to prove D was accessory to Smith in robbery of woman. Here, 3 men waited in parking lot to rob someone. They identified one victim (Chandler). D grabbed Chandler & struggle ensued. At same time, co-D shot Zink, grabbed her purse & fled. D argues he is not accessory to robbery of Zink because he did not agree to participate in that robbery. Accomplice is criminally liable for acts of confederates which are probable/natural consequence of common plan, even though acts originally may not have been intended as part of their plan. Lowery 478 N.E.2d 1214; Cary 469 N.E.2d 459. Preconceived plan need not be proved; concerted action/participation in illegal acts is sufficient. Simmons 315 N.E.2d 368. Factors in determining whether aiding/abetting may be inferred include: (1) presence at scene of crime; (2) companionship with another engaged in a crime; (3) failure to oppose commission of crime; (4) course of conduct before/during/after occurrence of crime. Harris 425 N.E.2d 154. Held, conviction affirmed.

RELATED CASES: Manning, 995 N.E.2d 1066 (Ind. Ct. App 2013) (Court rejected D's argument that conviction for resisting by fleeing in vehicle should be vacated because in separate trial, co-D was granted a directed verdict on same charge; under Ind. Code § 35-41-2-4, disposition of co-D's charge is irrelevant); Shane, 716 N.E.2d 391 (convictions supported by sufficient evidence, based on accomplice liability); Casey, App., 689 N.E.2d 465 (it is not necessary for State to show that D was party to preconceived scheme; it must merely demonstrate concerted action or participation in illegal act); Taylor, 578 N.E.2d 664 (accomplice liability. Where D was identified as one of front seat passengers in car from which bullets were fired, it wasn't necessary to his murder conviction to prove which person fired fatal shot); Haynes, 479 N.E.2d 572 (evidence was sufficient to sustain murder conviction where D provided killer with gun & participated in incident); Harden, 441 N.E.2d 215 (robbery & conspiracy to commit robbery convictions affirmed even though D remained in a car while elderly couple was beaten & robbed in their home); Cornes, App., 467 N.E.2d 425 (evidence supports theft conviction where D dropped co-D off behind store & hid in nearby alley with car running to wait for co-D, who stole 2 coats from store); Haskett, App., 467 N.E.2d 32 (evidence supports attempted robbery conviction where D encouraged co-D to rob store, even though co-D left store without attempting to rob it); Loy, App., 443 N.E.2d 111 (state must prove some participation in offense but not necessarily on every element, held, theft conviction affirmed); Tolbert, App., 442 N.E.2d 718 (robbery conviction affirmed where D stood at door while co-D robbed liquor store & fled with him, *citing* Coleman 354 N.E.2d 232).

TITLE: Kadrovach v. State
INDEX NO.: K.2.a.
CITE: (9/30/2016), 61 N.E.3d 1241 (Ind. Ct. App 2016)
SUBJECT: Instructions did not mislead jury regarding mens rea for attempted murder
HOLDING: Jury instructions did not mislead jury about the requisite mens rea for attempted murder, where one of the instructions specifically emphasized the intent to kill requirement from Spradlin v. State, 569 N.E.2d 948 (Ind. 1991). Although there was no clear Spradlin error, the instruction on attempt permitted conviction for only a “knowing” murder mens rea. The standard attempt definition instruction given, while accurate as to attempt to commit other offenses, is no longer accurate where the attempted offense is murder. “As such, we believe that in cases where a conviction for attempted murder is a possible outcome, the best practice would be to either not give [the attempt instruction] or, if necessary because of other possible attempt crimes, to supplement the attempt instruction with a statement that to convict a person of attempted murder, the State must prove that he/she acted with the specific intent to kill the victim.” In this case, instructions as a whole were sufficient to indicate that "intent to kill" was required in order to convict D of attempted murder. Held, judgment affirmed.

TITLE: Peterson v. State
INDEX NO.: K.2.a.
CITE: (5th Dist., 8-31-98), Ind. App., 699 N.E.2d 701
SUBJECT: Erroneous accomplice liability instruction - tracking statute insufficient
HOLDING: Tr. Ct. committed reversible error by refusing to give jury following instructions tendered by D on accomplice liability: Mere presence at the scene of a crime does not establish a person as an accessory; nor is acquiescence in the commission of a crime by another sufficient to render a person guilty as an accomplice.

In order for the State to meet its burden of proving the allegations...the State must have proven beyond a reasonable doubt that [D] aided, induced or caused criminal recklessness...& that when [D] so acted, he was aware of a high probability that his behavior was aiding, inducing or causing criminal recklessness.

D's tendered instructions correctly stated law & were supported by evidence. Additionally, D's tendered instructions were not adequately covered by cursory accomplice liability instruction given by Tr. Ct. Thrust of Tr. Ct.'s instruction, which simply tracked language of Ind. Code 35-41-2-4, focused on law that person could be convicted as accomplice regardless of whether other person had been prosecuted or convicted. Tr. Ct.'s instruction failed to focus on knowledge & conduct of D & wholly failed to instruct that D must have engaged in some affirmative conduct in aiding or inducing offense. D's tendered instructions should have been given to enable jury to understand case in order to arrive at just, fair, & correct verdict. Held, convictions reversed; Riley, J., dissenting.

RELATED CASES: Rosemond, 134 S.Ct. 1240 (U.S.S.Ct. 2014) (aiding and abetting instruction was erroneous because it failed to require jury to find that D knew in advance that one of his accomplice was going to use a gun during a drug deal); Boney, App., 880 N.E.2d 279 (where instructions adequately advised jury of State's burden, Tr. Ct. properly refused to give D's tendered instruction that the State had to prove D knew co-D was going to commit murder when D gave co-D the gun); Specht, App., 838 N.E.2d 1081 (distinguishing Peterson, Ct. was not persuaded by D's contention that accomplice liability instructions misled jury by failing to focus on D's knowledge & conduct. Tr. Ct. did not err in giving separate element & accomplice liability instructions rather than giving hybrid "accomplice liability element instructions" that combine elements of accomplice liability with elements of crimes charged; Bridges, 835 N.E.2d 482 (D's objection to accomplice liability instruction as not being "an accurate statement of law" was insufficient); Hopkins, App., 747 N.E.2d 598 (distinguishing Peterson, Ct. noted that jury was instructed that to be accomplice, D must "knowingly support, help, or assist in the commission of a crime," & must "have knowledge that he is helping in the commission of a crime").

TITLE: Rosales v. State
INDEX NO.: K.2.a.
CITE: (1/15/2015), 23 N.E.3d 8 (Ind. 2015)
SUBJECT: Accomplice liability instruction for attempted murder constituted fundamental error
HOLDING: In an issue of first impression, Supreme Court held that an accomplice liability instruction on attempted murder was fundamentally erroneous because it failed to say State must prove D acted with specific intent to kill when he knowingly or intentionally aided, induced, or caused accomplice to attempt to kill victim, where it is unknown if D was convicted of attempted murder on the basis of accomplice liability or direct liability. See Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001); Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000); and Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). The State compounded this error by its repeated insistence during closing argument that specific intent to kill was not required for accomplice liability with attempted murder. Held, transfer granted, Court of Appeals' opinion at 3 N.E.3d 1014 vacated, reversed and remanded for new trial.

TITLE: Small v. State

INDEX NO.: K.2.a.

CITE: (12/19/88), Ind., 531 N.E.2d 498

SUBJECT: Accomplice liability - erroneous instruction

HOLDING: Tr. Ct. erred in reading misleading instruction on accomplice liability. D was charged with armed robbery resulting in serious bodily injury. Victim testified that D & another man jumped from behind bushes & D hit him in face with brick several times. Victim was robbed, & sometime before he received assistance he was shot, although he did not recall shooting. Tr. Ct. instructed jury that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. It is also the law that a D is responsible for the acts of his co-Ds as well as his own acts. Any act of one is attributable to them all." This was only instruction on accomplice liability. Introductory phrase half-way through creates impression that what follows constitutes separate & distinct source of liability. This is not correct; accomplice liability is included in theory of aiding & abetting. Moredock 514 N.E.2d 1247. More important, second part of instruction does not require jury to find that shooting occurred while D acted in concert in carrying out robbery. It requires only that D & person who shot victim have relationship of co-Ds. This is clearly erroneous. Error was not harmless, since it was unclear from evidence who shot victim or when. Held, reversed & remanded for new trial or, at discretion of prosecutor, for reduction of sentence to Class B felony. Pivarnik & Givan, JJ., DISSENT.

RELATED CASES: Kane, 976 N.E. 2d 1228 (Ind. 2012) (Tr. Ct.'s final instruction on accomplice liability erroneously omitted altogether the key phrase "knowingly or intentionally" and said nothing about mens rea at all); Green, 937 N.E.2d 923 (Ind. 2010) (the final portion of accomplice liability instruction that focused only on D's conduct before and after the offense and not that during the offense was cured by other portions of the accomplice liability instruction); Brooks, App., 895 N.E.2d 130 (distinguishing Small, Ct. noted that instruction recited that D could only be convicted of dealing in narcotic drug as accomplice if State proved beyond a reasonable doubt that he knowingly and intentionally aided, induced, or caused accomplice to commit the offense); Moore, App., 697 N.E.2d 1268 (instruction that person acts in concert with another when he takes action that has been planned, arranged, adjusted or agreed was incorrect statement of law); Grundy, App., 695 N.E.2d 167 (no error where jury instructed that D is responsible for acts of confederates and that presence at scene of crime is insufficient to show participation); Steele, 672 N.E.2d 1348 (although accomplice liability instruction did not explicitly contain phrase "acting in concert," it clearly required much more than merely co-D relationship).

TITLE: Sanquenetti v. State

INDEX NO.: K.2.a.

CITE: (4-14-00), Ind., 727 N.E.2d 437

SUBJECT: Accomplice liability statute does not violate Privileges & Immunities Clause

HOLDING: Indiana's accomplice liability statute, Ind. Code 35-41-2-4, does not violate Privileges & Immunities Clause of Indiana Constitution even though D was convicted of murder for aiding in killing of victim & his accomplice, whom D contended actually killed victim, was convicted of involuntary manslaughter in separate trial. Under accomplice liability statute, any accomplice to crime may be tried & convicted upon sufficient proof, regardless of whether other accomplices were prosecuted, convicted, or acquitted. Johnson v. State, 687 N.E.2d 345 (Ind. 1997). There is no separate crime of being accessory to crime or aiding & abetting perpetrator of crime; rather, D may be convicted as principal upon evidence that he aided or abetted in perpetration of charged crime.

Invoking Article I, § 23 of Indiana Constitution, D argued that his murder conviction violates this provision by allowing actual killer privilege of being convicted of lesser crime than his non-killing accomplice. In rejecting this argument, Ct. noted that accomplice liability statute neither establishes separate classes nor accords disparate treatment to Indiana citizens or classes of citizens. Rather, Ind. Code 35-41-2-4 removes common law distinctions between principals & accessories & renders all participants in perpetration of crime accomplices who are equally responsible for criminal acts. Even if statute as applied in this case accords disparate treatment to two classes, Ct. concluded that reasonable relationship could exist between such disparate treatment & inherent characteristics that distinguish unequally treated classes. In cases tried separately, each D's guilt is determined based on evidence presented at each separate trial. Held, judgment affirmed.

RELATED CASES: Walker, App., 784 N.E.2d 1040 (Tr. Ct.'s refusal to allow D to withdraw his guilty plea to robbery as Class B felony, where Co-D pled to robbery as class C felony, did not result in manifest injustice).

TITLE: Taylor v. State
INDEX NO.: K.2.a.
CITE: (01-17-06), Ind., 840 N.E.2d 324
SUBJECT: D can be guilty as accomplice even if principal does not act "knowingly or intentionally"
HOLDING: While jury unanimity is required as to D's guilt, it is not required as to the theory of D's culpability. Here, there were two different theories upon which jury could have found that D committed one act of murder -- either as principal or accomplice. Thus, trial counsel did not exhibit deficient performance by not objecting to instructions & verdict form because jury did not need to agree unanimously on which theory supported murder conviction.

D also argued that trial counsel provided ineffective assistance by failing to object to a jury instruction that omitted essential element of offense. Jury was not instructed that the person that D was aiding, inducing, or causing to kill victim had to do so with a knowing or intentional mens rea to commit murder. Following other jurisdictions, Court held that an accomplice can be guilty of a greater homicide crime than the principal when the accomplice's mens rea is more culpable. Therefore, instruction that would allow a jury to find D guilty of murder as principal's accomplice, even if it found that principal did not kill victim knowingly or intentionally, was not erroneous. If D knowingly or intentionally aided & abetted principal to kill victim, D can be found guilty of murder so long as: 1) principal killed victim & 2) D knew or intended that victim be killed. Because instruction was not erroneous, victim's claim of ineffective assistance of trial counsel failed. Court noted this holding does not apply to accomplice liability cases dealing with attempted murder. See Bethel v. State, 730 N.E.2d 1242 (Ind. 2000). Held, transfer granted, Ct. App.' opinion at 820 N.E.2d 691 vacated, denial of post-conviction relief except with respect to claim of ineffective assistance of counsel for failing to appeal D's sentence; remanded for new sentencing order.

RELATED CASES: Suggs, App., 883 N.E.2d 1188 (even assuming State argued accomplice liability to jury but no instruction was given, error was not fundamental because evidence was sufficient to convict D as principal).

TITLE: United States v. Gardner

INDEX NO.: K.2.a.

CITE: 488 F.3d 700 (6th Cir. 2007)

SUBJECT: D charged with aiding & abetting possession of firearm by felon must know co-D felon

HOLDING: Sixth Circuit Court of Appeals held that for a D to be convicted of aiding and abetting the possession of a firearm by a felon, the government must prove that the D was aware that the principal was a felon. D in case was caught carrying a gun while a passenger in car driven by felon while on their way to rob undercover officers posing as drug dealers. Among other offenses, D was convicted under 18 U.S.C. ' 2 of aiding and abetting a violation of the felon-in-possession statute, 18 U.S.C. ' 922(g)(1). The mens rea element of Section 2 required the government to prove that D intended to assist in the principal's violation of Section 922(g)(1). Circuits are divided, however, as to whether this element requires proof of D's knowledge that the felon was a principal. Sixth Circuit agreed with Third Circuit in U.S. v. Xavier, 2 F.3d 1281 (3rd Cir. 1993), that the mens rea for this offense must be interpreted in light of 18 U.S.C. ' 922(d), which makes it a federal crime "to sell or otherwise dispose of any firearm to any person knowing or having cause to believe that such a person" is a felon. Court said other courts' indulgence of a presumption that a D was aware that the principal was a felon defeats the congressional intent behind the knowledge element of Section 922(d). "We cannot countenance an interpretation of ' 922(g) that would permit an ordinary gun dealer to be held criminally liable for 'aiding' a third person's possession of a firearm without some knowledge or cause to know of that person's status as a convicted felon, when that very same transaction would not be criminal under ' 922(d) for 'selling' the same gun."

TITLE: Waddington v. Sarausad

INDEX NO.: K.2.a.

CITE: (U.S.) (01/21/09), 129 S.Ct. 823

SUBJECT: Accomplice liability instruction not ambiguous & did not relieve State of burden of proof

HOLDING: Ninth Circuit erred in granting habeas relief to D based on unclear accomplice liability jury instructions because state-court decision denying post-conviction relief did not result in an unreasonable application of clearly established Federal law pursuant to 28 U.S.C. ' 2254(d)(1). A D challenging the constitutionality of a jury instruction that quotes a state statute must show both that the instruction was ambiguous and that there was a reasonable likelihood jury applied the instruction in a way that relieved State of its burden of proving every element of the crime beyond a reasonable doubt. Estelle v. McGuire, 502 U.S. 62, 72 (1991).

Here, D was convicted of second-degree murder for his role as the driver in a gang-related, drive-by shooting. In closing argument, prosecutor stressed D's knowledge of a shooting, noting how he drove at the scene, that he knew that fighting alone would not regain respect for his gang, and that he was "in for a dime, in for a dollar." On appeal, D argued that prosecutor's improper argument may have led jury to convict him as an accomplice to murder based solely on a finding that he had anticipated that an assault would occur. Jury instruction parroted the state statute's language, requiring jury to find D guilty as an accomplice "in the commission of the [murder]" if he acted "with knowledge that [his conduct would] promote or facilitate the commission of the [murder]." Because Washington courts' conclusion that jury instruction was unambiguous was not objectively unreasonable, Ninth Circuit should have ended its ' 2254(d)(1) inquiry there. However, even if the instruction were ambiguous, there was no evidence of ultimate juror confusion and Washington courts reasonably applied precedent when they found no "reasonable likelihood" that the prosecutor's closing argument caused jury to apply instruction in a way that relieved State of its burden to prove every element of crime beyond a reasonable doubt. Prosecutor consistently argued that D was guilty as an accomplice because he acted with knowledge that he was facilitating a drive-by shooting. Held, grant of habeas relief reversed and remanded. Souter, Stevens, and Ginsburg, JJ., DISSENT, arguing that uncertain, ambiguous instruction from trial judge was underscored by prosecutor's "confounding" argument that included a "clearly erroneous statement of law." As a result, jurors did not understand the state of mind prosecution had to prove for accomplice liability.

Note: See Peterson v. State, 699 N.E.2d 701 (Ind. Ct. App 1998) (reversible error for failure to give accused's tendered instructions which went beyond the bare language of Indiana's accomplice liability statute, Ind. Code 35-41-2-4 and Pattern Instruction 2.11).

TITLE: Ward v. State

INDEX NO.: K.2.a.

CITE: (8/18/82) Ind., 438 N.E.2d 966

SUBJECT: Aiding/inducing/causing an offense - instruction

HOLDING: Tr. Ct. did not err in giving instruction on being an accessory where D was charged as a principal. D may be charged as a principal but be convicted as an accessory. If evidence of aiding & abetting exists, then an accessory instruction is proper. Doss 267 N.E.2d 385. Here, 3 men participated in rape-murder. In co-D's appeal there was conflicting evidence as to who fired fatal shot. D objected to giving of instruction on being an accessory. Held, no error.

RELATED CASES: Burdine, 477 N.E.2d 544 (Tr. Ct. did not err in instructing jury that when 2 or more persons combine to commit crime, each is criminally responsible for acts of confederates committed in furtherance of common design; Ct. rejects D's argument that evidence did not support instruction); Voss, App., 469 N.E.2d 789 (Crim L 59(5), 829(20); Tr. Ct. did not err in giving state's instruction (set forth in opinion) concern-ing aiding/inducing; Ct. notes aiding/inducing is basis of liability of underlying offense, rather than a separate offense itself, *citing* Hoskins 441 N.E.2d 419).

TITLE: Weyls v. State

INDEX NO.: K.2.a.

CITE: (5th Dist. 09/01/92), Ind. App., 598 N.E.2d 610

SUBJECT: Instruction on failure to oppose crime - accomplice

HOLDING: Where D was tried as accomplice, it was not error for Tr. Ct. to strike portion of D's instruction on failure to oppose criminal activity which stated: "You may consider the D's failure to oppose the commission of a crime only when the D owes a duty to protect the victim of the crime such as a parent owes to a child." Tr. Ct. gave State's instruction which stated among other things, that jury could infer participation in crime from person's failure to oppose crime. D's instruction that jury must find D intended by own actions to cause or facilitate crime, & that there must be some affirmative conduct from which inference of common design or purpose to effect commission of crime could be drawn, was also given, but without additional language noted above. While agreeing that failure to oppose commission of crime, standing alone, is not sufficient to impose liability unless duty to protect exists, Ct. noted that duty to act is not only time failure to oppose may be considered. It may be considered with other circumstances & conduct of D to determine whether he lent his "countenance & approval" to commission of crime. Therefore, Ct. did not err in striking questioned portion of D's instruction.

TITLE: Zenthofer v. State

INDEX NO.: K.2.a.

CITE: (05-11-93), Ind., 613 N.E.2d 31

SUBJECT: Evidence sufficient to find accomplice liability for felony murder

HOLDING: Evidence that D knew friend was going to rob store & wanted D to come with him; was aware friend was considering committing murder; had been given what ultimately became murder weapon as collateral for loan prior to crime; was present during commission of crime; had cigarettes stolen from store; & helped friend conceal murder weapon, was sufficient to support conviction for felony murder under accomplice liability theory. Although D claimed mere presence at scene of crime was insufficient to support accomplice liability; that possession of gun was merely weak circumstantial evidence of participation; & that acts occurring after crimes were committed could not be sole basis of his conviction, Ct. found that under insufficiency standard of review, evidence as whole was sufficient. But see, Ward, 567 N.E.2d 85 at K.3.b.2, finding evidence insufficient.

RELATED CASES: Hyche, 934 N.E.2d 1176 (Ind. Ct. App 2010) (D's act of agreeing to purchase ecstasy did not make him an accomplice to dealing and thus liable for a death that occurred during the drug transaction under the felony murder statute); Wieland, 736 N.E.2d 1198 (evidence was sufficient to prove D actively participated in crimes); Edgecomb, 673 N.E.2d 1185 (D's actions & untruths after commission of crime supported conclusion that she knowingly aided co-D in felony murder).

K. CRIMES

K.1. Culpability

K.1.d. Offenses not requiring criminal intent

TITLE: Elonis v. United States
INDEX NO.: K.1.d.
CITE: (6/1/2015), 135 S.Ct. 2001 (2015)
SUBJECT: Requiring only reasonably foreseeable mental state improper under threat statute
HOLDING: Instruction requiring federal government to show only that D reasonably foresaw that his Facebook postings would be interpreted as threats was legally erroneous. Even though 18 U.S.C. § 875(c) includes no specific mens rea requirement, a proper instruction would have advised the jury that the government needed to prove D transmitted his messages with the purpose of issuing a threat or with knowledge that it would be viewed as a threat.

After his wife and two children left him, D began posting violent, crude, and degrading comments directed at his wife, co-workers, neighboring schools, and local, state, and federal law enforcement. He fashioned the comments as lyrics for rap music, and his postings were interspersed with claims that the lyrics did not depict real people.

D was charged with five counts of violating 18 U. S. C. §875(c), which forbids transmitting in interstate commerce “any communication containing any threat . . . to injure the person of another.” He was convicted on four counts.

Instructing the jury to determine what D could reasonably foresee impermissibly grafted a civil negligence standard into a criminal case. The instruction was inconsistent with the traditional requirement in criminal cases of showing a D’s “awareness of some wrongdoing.” Staples v. United States, 511 U. S. 600, 606-07 (1994). And while the statute does not expressly set forth a mens rea element, “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.” Morrisette v. United States, 342 U. S. 246, 250 (1952). Thus, the Court applied the general rule that a guilty mind is “a necessary element in the indictment and proof of every crime.” United States v. Balint, 258 U.S. 250, 251 (1922). Under this standard, the Tr. Ct.’s instruction was improper.

The Court expressly chose to not address whether an instruction requiring only that a D’s mental state was reckless is sufficient. Also, because the Court decided the issue on statutory grounds, it declined to address the case under the First Amendment. Roberts, C.J., joined by Scalia, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Alito, J., concurring in part and dissenting in part; Thomas, J., dissenting. Held, cert. granted, Third Circuit judgment at 730 F.3d 321 reversed, and remanded for proceedings consistent with the opinion.

TITLE: White v. State
INDEX NO.: K.1.d.
CITE: (11/21/2012), 978 N.E. 2d 475 (Ind. Ct. App 2012)
SUBJECT: Feticide sentence enhancement constitutional despite no mens rea requirement
HOLDING: D failed to meet his heavy burden to show that the feticide enhancement statute, Ind. Code § 35-50-2-16, is unconstitutional for lacking a mens rea requirement.

D and his wife, who were separated, argued about parenting time with their child. The day before a provisional custody hearing, the two argued. D shot his wife twice in the abdomen, killing her and their unborn child. Subsection (e) of the feticide enhancement statute provides that the State need not prove a D “had knowledge or should have had knowledge that the victim was pregnant,” Ind. Code § 35-50-2-16 (e)(1), or that “the D intended to cause the termination of a human pregnancy.” Ind. Code 35-50-2-16 § (e)(2). In his challenge, D “labors under a heavy burden to show that the statute is unconstitutional.” See State v. Moss-Dwyer, 686 N.E.2d 109, 111-12 (Ind. 1997). Absent a clear constitutional infirmity, “our separation of powers doctrine requires we take a highly restrained approach when reviewing legislative prescriptions for punishments.” Id. at 112.

As D concedes, the U.S. Supreme Court has not “delineate[d] a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental state and crimes that do not.” See Morrisette v. United States, 342 U.S. 246, 250 (1952).

The principle behind the enhancement statute comes from the aggravator for the “nature and circumstances of the crime,” meaning that the consequences to a victim of a crime are as important as a D’s culpability. Cf. McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001). Further, the statute is not an outlier. Ind. Code § 35-50-2-9 (b)(12) provides that a D who murders a child less than 12 can receive the death penalty, even if he was unaware of the child’s age. Stevens v. State, 691 N.E.2d 412, 432-43 (Ind. 1997).

The feticide enhancement statute reflects the legislature’s desire to of increase protection of fetuses and punish more harshly those who, by murdering a pregnant woman, cause the death of a fetus. Held, judgment affirmed.

RELATED CASES: Elonis v. United States, 135 S.Ct. 2001 (2015) (instruction requiring government to show only that D reasonably foresaw that his Facebook postings would be interpreted as threats was erroneous; see full review, this section).

K. CRIMES

K.2. Offenses of general applicability

K.2.a. Aiding/inducing/causing an offense - accomplice liability (Ind. Code 35-41-2-4) (see, also substantive offense)

TITLE: Bethel v. State

INDEX NO.: K.2.a.

CITE: (6-16-00), Ind., 730 N.E.2d 1242

SUBJECT: Aiding attempted murder - required proof

HOLDING: In appeal of D's attempted murder conviction, Ct. addressed issue of what must be proven in order to show that D "knowingly or intentionally" aided commission of crime requiring specific intent. To support conviction for aiding an attempted murder, State must prove: 1) that accomplice, acting with specific intent to kill, took substantial step toward commission of murder, & 2) that D, acting with specific intent that killing occur, knowingly or intentionally aided, induced, or caused accomplice to commit crime of attempted murder. In this case, despite substantial evidence that D was engaged in protracted criminal activity with Co-D, with both men carrying guns, threatening several people, Ct. found evidence insufficient to prove that D had specific intent to kill victim or specific intent that Co-D kill victim. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Rosales, 23 N.E.3d 8 (Ind. 2015) (accomplice liability instruction on attempted murder was fundamentally erroneous because it failed to say State must prove Defendant acted with specific intent to kill when he knowingly or intentionally aided, induced, or caused another person to kill someone else; see full summary, this section); Tiller, App., 896 N.E.2d 537 (failure to instruct that the specific intent requirement for attempted murder, as properly set forth in the attempted murder instruction, also applied to accomplice liability for attempted murder was fundamental error); Means, App., 807 N.E.2d 776 (D failed to establish fundamental error from accomplice liability instruction, because intent to kill was not at issue on charge pertaining to erroneous instruction); Edington, 806 N.E.2d 310 (Bethel did not announce a new rule of criminal procedure but rather explained what State was already required to prove to gain conviction); Cowherd, App., 791 N.E.2d 833 (D failed to demonstrate that he was prejudiced by allegedly deficient performance of trial counsel in failing to object to jury instruction regarding accomplice liability for attempted murder); Kendall, App., 790 N.E.2d 122 (evidence was insufficient to find that D had specific intent to kill victim or specific intent that his accomplices kill victim); Hopkins, 782 N.E.2d 988 (Evidence of D's specific intent that victim be killed was sufficient to conclude that D suffered no prejudice from Tr. Ct.'s failure to instruct jury that it was required to find beyond reasonable doubt that D possessed specific intent to kill victim); Woodson, App., 767 N.E.2d 1022, reh'g granted 778 N.E.2d 475 (attempted murder & accomplice instructions that failed to refer to specific intent to kill constituted fundamental error); Hopkins, 759 N.E.2d 633 (Tr. Ct. committed fundamental error in failing to instruct jury regarding specific intent required of D to establish accomplice liability for attempted murder where D's intent to kill was clearly at issue); Williams, 737 N.E.2d 734 (Tr. Ct. committed fundamental error in not instructing jury that it had to find that D, as non-shooting accomplice, possessed specific intent to kill when he knowingly or intentionally aided, induced, or caused his backseat accomplice to commit crime of attempted murder; see full review at K.2.b).

TITLE: Courchaine v. State

INDEX NO.: K.2.a.

CITE: (8/22/89), Ind., 542 N.E.2d 969

SUBJECT: Inducing or causing offense - sufficiency

HOLDING: Evidence was sufficient to support conviction for inducing or causing burglary. Co-Ds testified that they had committed prior burglaries, & that they met with D at D's home to discuss his future involvement. Plans were made for co-Ds to continue burglaries, & to bring stolen items to D's home for him to dispose of. Co-Ds committed 2 burglaries pursuant to this plan, using D's car & bringing stolen goods to D's home. They were arrested while attempting 3d burglary at home D selected. D argues on appeal that evidence may tend to show that he "aided" co-Ds, but not that he "induced" or "caused" burglary. State's motion to amend information to include aiding was denied by Tr. Ct. In Harden 441 N.E.2d 215, testimony of co-D that D was directly involved in planning robbery, provided gun, gave directions to victim's home, received all stolen money & divided it among participants, keeping 1/4, was sufficient to support conviction for robbery. Ind. S. Ct. in Harden wrote that D commits offense whenever he/she knowingly or intentionally aids, induces, or causes it to be committed, citing Ind. Code 35-41-2-4, under which D here is charged. Harden Ct. also held that concerted action or participation in crime is sufficient for conviction & may be established by uncorroborated testimony of accomplice. Jury was justified in finding D's provision of market for stolen goods was inducement or cause for co-Ds to commit burglaries. Held, D's involvement was sufficient to support conviction for inducing or causing burglary.

TITLE: Faulisi v. State

INDEX NO.: K.2.a.

CITE: (3rd Dist., 11-16-92), Ind. App., 602 N.E.2d 1032

SUBJECT: Accomplice liability

HOLDING: Where evidence indicated that D was at scene of fire when it started; sped away when officer arrived in marked car; was followed for 3 1/2 miles by officer with emergency lights on before he stopped; told officer that his passenger who successfully fled on foot had started fire; & had motive for committing arson, it was sufficient to sustain conviction for arson. Factors to consider in determining accomplice liability are (1) presence at scene of crime; (2) companionship with other engaged in crime; (3) failure to oppose commission of crime; & (4) course of conduct before during & after crime. Johnson, 490 N.E.2d 333. In addition to evidence above, D had been fired & locked out of burned business by owner, had told others he was angry enough to kill owner, & suggested that business should be burned. D also threatened harm to owner & to burn store down before he could cheat him again. Therefore, evidence was sufficient to support conviction. **Note:** Decision also discusses instruction which did not specifically require finding bodily injury beyond reasonable doubt to enhance felony level, & found instructions taken as whole were sufficient to prevent fundamental error.

RELATED CASES: Green, 937 N.E.2d 923 (Ind. 2010) (evidence was sufficient to support aiding in murder where D was with co-D at scene when victim was shot, and during a traffic stop a day later fled from police with the gun that was used to shoot victim).

TITLE: Garland v. State

INDEX NO.: K.2.a.

CITE: (11-19-99), Ind. 719 N.E.2d 1184

SUBJECT: Aiding murder - insufficient evidence

HOLDING: Reasonable trier of fact could not find, beyond reasonable doubt, that D was guilty of knowingly or intentionally aiding, inducing, or causing another person to commit murder. While D's presence during commission of crime or his failure to oppose crime are, by themselves, insufficient to establish accomplice liability, jury may consider them along with other facts & circumstances tending to show participation. Burkes, 445 N.E.2d 983, 987. Here, D's drug counselor, who was also D's mother's alleged boyfriend, shot & killed D's father in front of D. During trial, most favorable evidence to State was videotaped interview of D where D repeatedly told police that mother's alleged boyfriend tried to get D to help kill his father, but D consistently refused to get involved. Although D was aware of his mother's boyfriend's expressed desire to kill D's father, that he did not report it to police or warn his father, that he was present near scene of murder, that he assisted his mother in leaving scene & concealing potential evidence, & that he initially lied to police regarding his knowledge of incident, there was no evidence demonstrating that D took any step to aid, induce, or cause crime. Thus, there was insufficient evidence to support conviction for aiding & abetting murder or conspiracy to commit murder. Held, conviction reversed.

RELATED CASES: Williams, App., 748 N.E.2d 887 (IAC found where defense counsel failed to move for directed verdict on conspiracy to commit murder charge; there was absence of evidence that D entered into agreement with Co-Ds to kill robbery victim).

TITLE: Ivy v. State
INDEX NO.: K.2.a.
CITE: (4/4/2018), 98 N.E.3d 107 (Ind. Ct. App 2018)
SUBJECT: Ineffective assistance of counsel (IAC) - erroneous jury instruction on accomplice liability for attempted murder
HOLDING: D received IAC because trial counsel failed to object to jury instructions given on accomplice liability for attempted murder. D's accomplice stabbed the victim while D held another individual at gunpoint. At trial, D argued he had not acted with the requisite culpability to be found guilty of attempted murder as an accomplice. The jury instruction for attempted murder mentioned specific intent, but it was phrased in terms of D being the principal actor, i.e., the one who stabbed the victim, rather than the accomplice. The accomplice liability instruction was fundamentally erroneous because it failed to say the State must prove D specifically intended that the victim be killed when he knowingly or intentionally aided his accomplice in the commission of attempted murder. As in Specht v. State, 838 N.E.2d 1081 (Ind. Ct. App 2005), Tr. Ct.'s failure to instruct the jury on this essential element of accomplice liability was erroneous. D's intent was a central issue at trial, thus there is a reasonable probability that had trial counsel objected to the instructions given and tendered the appropriate instruction, the result of his trial may have been different. Held, denial of petition for post-conviction relief reversed and remanded for further proceedings. Riley, J., dissenting, believes that when read together, the instructions sufficiently apprised jury of the essential elements necessary to convict D of attempted murder under an accomplice liability theory.

TITLE: Johnson v. State

INDEX NO.: K.2.a.

CITE: (3/27/86), Ind., 490 N.E.2d 333

SUBJECT: Accessory - sufficiency

HOLDING: Evidence was sufficient to prove D was accessory to Smith in robbery of woman. Here, 3 men waited in parking lot to rob someone. They identified one victim (Chandler). D grabbed Chandler & struggle ensued. At same time, co-D shot Zink, grabbed her purse & fled. D argues he is not accessory to robbery of Zink because he did not agree to participate in that robbery. Accomplice is criminally liable for acts of confederates which are probable/natural consequence of common plan, even though acts originally may not have been intended as part of their plan. Lowery 478 N.E.2d 1214; Cary 469 N.E.2d 459. Preconceived plan need not be proved; concerted action/participation in illegal acts is sufficient. Simmons 315 N.E.2d 368. Factors in determining whether aiding/abetting may be inferred include: (1) presence at scene of crime; (2) companionship with another engaged in a crime; (3) failure to oppose commission of crime; (4) course of conduct before/during/after occurrence of crime. Harris 425 N.E.2d 154. Held, conviction affirmed.

RELATED CASES: Manning, 995 N.E.2d 1066 (Ind. Ct. App 2013) (Court rejected D's argument that conviction for resisting by fleeing in vehicle should be vacated because in separate trial, co-D was granted a directed verdict on same charge; under Ind. Code § 35-41-2-4, disposition of co-D's charge is irrelevant); Shane, 716 N.E.2d 391 (convictions supported by sufficient evidence, based on accomplice liability); Casey, App., 689 N.E.2d 465 (it is not necessary for State to show that D was party to preconceived scheme; it must merely demonstrate concerted action or participation in illegal act); Taylor, 578 N.E.2d 664 (accomplice liability. Where D was identified as one of front seat passengers in car from which bullets were fired, it wasn't necessary to his murder conviction to prove which person fired fatal shot); Haynes, 479 N.E.2d 572 (evidence was sufficient to sustain murder conviction where D provided killer with gun & participated in incident); Harden, 441 N.E.2d 215 (robbery & conspiracy to commit robbery convictions affirmed even though D remained in a car while elderly couple was beaten & robbed in their home); Cornes, App., 467 N.E.2d 425 (evidence supports theft conviction where D dropped co-D off behind store & hid in nearby alley with car running to wait for co-D, who stole 2 coats from store); Haskett, App., 467 N.E.2d 32 (evidence supports attempted robbery conviction where D encouraged co-D to rob store, even though co-D left store without attempting to rob it); Loy, App., 443 N.E.2d 111 (state must prove some participation in offense but not necessarily on every element, held, theft conviction affirmed); Tolbert, App., 442 N.E.2d 718 (robbery conviction affirmed where D stood at door while co-D robbed liquor store & fled with him, *citing* Coleman 354 N.E.2d 232).

TITLE: Kadrovach v. State

INDEX NO.: K.2.a.

CITE: (9/30/2016), 61 N.E.3d 1241 (Ind. Ct. App 2016)

SUBJECT: Instructions did not mislead jury regarding mens rea for attempted murder

HOLDING: Jury instructions did not mislead jury about the requisite mens rea for attempted murder, where one of the instructions specifically emphasized the intent to kill requirement from Spradlin v. State, 569 N.E.2d 948 (Ind. 1991). Although there was no clear Spradlin error, the instruction on attempt permitted conviction for only a “knowing” murder mens rea. The standard attempt definition instruction given, while accurate as to attempt to commit other offenses, is no longer accurate where the attempted offense is murder. “As such, we believe that in cases where a conviction for attempted murder is a possible outcome, the best practice would be to either not give [the attempt instruction] or, if necessary because of other possible attempt crimes, to supplement the attempt instruction with a statement that to convict a person of attempted murder, the State must prove that he/she acted with the specific intent to kill the victim.” In this case, instructions as a whole were sufficient to indicate that "intent to kill" was required in order to convict D of attempted murder. Held, judgment affirmed.

TITLE: Peterson v. State
INDEX NO.: K.2.a.
CITE: (5th Dist., 8-31-98), Ind. App., 699 N.E.2d 701
SUBJECT: Erroneous accomplice liability instruction - tracking statute insufficient
HOLDING: Tr. Ct. committed reversible error by refusing to give jury following instructions tendered by D on accomplice liability: Mere presence at the scene of a crime does not establish a person as an accessory; nor is acquiescence in the commission of a crime by another sufficient to render a person guilty as an accomplice.

In order for the State to meet its burden of proving the allegations...the State must have proven beyond a reasonable doubt that [D] aided, induced or caused criminal recklessness...& that when [D] so acted, he was aware of a high probability that his behavior was aiding, inducing or causing criminal recklessness.

D's tendered instructions correctly stated law & were supported by evidence. Additionally, D's tendered instructions were not adequately covered by cursory accomplice liability instruction given by Tr. Ct. Thrust of Tr. Ct.'s instruction, which simply tracked language of Ind. Code 35-41-2-4, focused on law that person could be convicted as accomplice regardless of whether other person had been prosecuted or convicted. Tr. Ct.'s instruction failed to focus on knowledge & conduct of D & wholly failed to instruct that D must have engaged in some affirmative conduct in aiding or inducing offense. D's tendered instructions should have been given to enable jury to understand case in order to arrive at just, fair, & correct verdict. Held, convictions reversed; Riley, J., dissenting.

RELATED CASES: Rosemond, 134 S.Ct. 1240 (U.S.S.Ct. 2014) (aiding and abetting instruction was erroneous because it failed to require jury to find that D knew in advance that one of his accomplice was going to use a gun during a drug deal); Boney, App., 880 N.E.2d 279 (where instructions adequately advised jury of State's burden, Tr. Ct. properly refused to give D's tendered instruction that the State had to prove D knew co-D was going to commit murder when D gave co-D the gun); Specht, App., 838 N.E.2d 1081 (distinguishing Peterson, Ct. was not persuaded by D's contention that accomplice liability instructions misled jury by failing to focus on D's knowledge & conduct. Tr. Ct. did not err in giving separate element & accomplice liability instructions rather than giving hybrid "accomplice liability element instructions" that combine elements of accomplice liability with elements of crimes charged; Bridges, 835 N.E.2d 482 (D's objection to accomplice liability instruction as not being "an accurate statement of law" was insufficient); Hopkins, App., 747 N.E.2d 598 (distinguishing Peterson, Ct. noted that jury was instructed that to be accomplice, D must "knowingly support, help, or assist in the commission of a crime," & must "have knowledge that he is helping in the commission of a crime").

TITLE: Rosales v. State
INDEX NO.: K.2.a.
CITE: (1/15/2015), 23 N.E.3d 8 (Ind. 2015)
SUBJECT: Accomplice liability instruction for attempted murder constituted fundamental error
HOLDING: In an issue of first impression, Supreme Court held that an accomplice liability instruction on attempted murder was fundamentally erroneous because it failed to say State must prove D acted with specific intent to kill when he knowingly or intentionally aided, induced, or caused accomplice to attempt to kill victim, where it is unknown if D was convicted of attempted murder on the basis of accomplice liability or direct liability. See Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001); Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000); and Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). The State compounded this error by its repeated insistence during closing argument that specific intent to kill was not required for accomplice liability with attempted murder. Held, transfer granted, Court of Appeals' opinion at 3 N.E.3d 1014 vacated, reversed and remanded for new trial.

TITLE: Small v. State

INDEX NO.: K.2.a.

CITE: (12/19/88), Ind., 531 N.E.2d 498

SUBJECT: Accomplice liability - erroneous instruction

HOLDING: Tr. Ct. erred in reading misleading instruction on accomplice liability. D was charged with armed robbery resulting in serious bodily injury. Victim testified that D & another man jumped from behind bushes & D hit him in face with brick several times. Victim was robbed, & sometime before he received assistance he was shot, although he did not recall shooting. Tr. Ct. instructed jury that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. It is also the law that a D is responsible for the acts of his co-Ds as well as his own acts. Any act of one is attributable to them all." This was only instruction on accomplice liability. Introductory phrase half-way through creates impression that what follows constitutes separate & distinct source of liability. This is not correct; accomplice liability is included in theory of aiding & abetting. Moredock 514 N.E.2d 1247. More important, second part of instruction does not require jury to find that shooting occurred while D acted in concert in carrying out robbery. It requires only that D & person who shot victim have relationship of co-Ds. This is clearly erroneous. Error was not harmless, since it was unclear from evidence who shot victim or when. Held, reversed & remanded for new trial or, at discretion of prosecutor, for reduction of sentence to Class B felony. Pivarnik & Givan, JJ., DISSENT.

RELATED CASES: Kane, 976 N.E. 2d 1228 (Ind. 2012) (Tr. Ct.'s final instruction on accomplice liability erroneously omitted altogether the key phrase "knowingly or intentionally" and said nothing about mens rea at all); Green, 937 N.E.2d 923 (Ind. 2010) (the final portion of accomplice liability instruction that focused only on D's conduct before and after the offense and not that during the offense was cured by other portions of the accomplice liability instruction); Brooks, App., 895 N.E.2d 130 (distinguishing Small, Ct. noted that instruction recited that D could only be convicted of dealing in narcotic drug as accomplice if State proved beyond a reasonable doubt that he knowingly and intentionally aided, induced, or caused accomplice to commit the offense); Moore, App., 697 N.E.2d 1268 (instruction that person acts in concert with another when he takes action that has been planned, arranged, adjusted or agreed was incorrect statement of law); Grundy, App., 695 N.E.2d 167 (no error where jury instructed that D is responsible for acts of confederates and that presence at scene of crime is insufficient to show participation); Steele, 672 N.E.2d 1348 (although accomplice liability instruction did not explicitly contain phrase "acting in concert," it clearly required much more than merely co-D relationship).

TITLE: Sanquenetti v. State

INDEX NO.: K.2.a.

CITE: (4-14-00), Ind., 727 N.E.2d 437

SUBJECT: Accomplice liability statute does not violate Privileges & Immunities Clause

HOLDING: Indiana's accomplice liability statute, Ind. Code 35-41-2-4, does not violate Privileges & Immunities Clause of Indiana Constitution even though D was convicted of murder for aiding in killing of victim & his accomplice, whom D contended actually killed victim, was convicted of involuntary manslaughter in separate trial. Under accomplice liability statute, any accomplice to crime may be tried & convicted upon sufficient proof, regardless of whether other accomplices were prosecuted, convicted, or acquitted. Johnson v. State, 687 N.E.2d 345 (Ind. 1997). There is no separate crime of being accessory to crime or aiding & abetting perpetrator of crime; rather, D may be convicted as principal upon evidence that he aided or abetted in perpetration of charged crime.

Invoking Article I, § 23 of Indiana Constitution, D argued that his murder conviction violates this provision by allowing actual killer privilege of being convicted of lesser crime than his non-killing accomplice. In rejecting this argument, Ct. noted that accomplice liability statute neither establishes separate classes nor accords disparate treatment to Indiana citizens or classes of citizens. Rather, Ind. Code 35-41-2-4 removes common law distinctions between principals & accessories & renders all participants in perpetration of crime accomplices who are equally responsible for criminal acts. Even if statute as applied in this case accords disparate treatment to two classes, Ct. concluded that reasonable relationship could exist between such disparate treatment & inherent characteristics that distinguish unequally treated classes. In cases tried separately, each D's guilt is determined based on evidence presented at each separate trial. Held, judgment affirmed.

RELATED CASES: Walker, App., 784 N.E.2d 1040 (Tr. Ct.'s refusal to allow D to withdraw his guilty plea to robbery as Class B felony, where Co-D pled to robbery as class C felony, did not result in manifest injustice).

TITLE: Taylor v. State
INDEX NO.: K.2.a.
CITE: (01-17-06), Ind., 840 N.E.2d 324
SUBJECT: D can be guilty as accomplice even if principal does not act "knowingly or intentionally"
HOLDING: While jury unanimity is required as to D's guilt, it is not required as to the theory of D's culpability. Here, there were two different theories upon which jury could have found that D committed one act of murder -- either as principal or accomplice. Thus, trial counsel did not exhibit deficient performance by not objecting to instructions & verdict form because jury did not need to agree unanimously on which theory supported murder conviction.

D also argued that trial counsel provided ineffective assistance by failing to object to a jury instruction that omitted essential element of offense. Jury was not instructed that the person that D was aiding, inducing, or causing to kill victim had to do so with a knowing or intentional mens rea to commit murder. Following other jurisdictions, Court held that an accomplice can be guilty of a greater homicide crime than the principal when the accomplice's mens rea is more culpable. Therefore, instruction that would allow a jury to find D guilty of murder as principal's accomplice, even if it found that principal did not kill victim knowingly or intentionally, was not erroneous. If D knowingly or intentionally aided & abetted principal to kill victim, D can be found guilty of murder so long as: 1) principal killed victim & 2) D knew or intended that victim be killed. Because instruction was not erroneous, victim's claim of ineffective assistance of trial counsel failed. Court noted this holding does not apply to accomplice liability cases dealing with attempted murder. See Bethel v. State, 730 N.E.2d 1242 (Ind. 2000). Held, transfer granted, Ct. App.' opinion at 820 N.E.2d 691 vacated, denial of post-conviction relief except with respect to claim of ineffective assistance of counsel for failing to appeal D's sentence; remanded for new sentencing order.

RELATED CASES: Suggs, App., 883 N.E.2d 1188 (even assuming State argued accomplice liability to jury but no instruction was given, error was not fundamental because evidence was sufficient to convict D as principal).

TITLE: United States v. Gardner

INDEX NO.: K.2.a.

CITE: 488 F.3d 700 (6th Cir. 2007)

SUBJECT: D charged with aiding & abetting possession of firearm by felon must know co-D felon

HOLDING: Sixth Circuit Court of Appeals held that for a D to be convicted of aiding and abetting the possession of a firearm by a felon, the government must prove that the D was aware that the principal was a felon. D in case was caught carrying a gun while a passenger in car driven by felon while on their way to rob undercover officers posing as drug dealers. Among other offenses, D was convicted under 18 U.S.C. ' 2 of aiding and abetting a violation of the felon-in-possession statute, 18 U.S.C. ' 922(g)(1). The mens rea element of Section 2 required the government to prove that D intended to assist in the principal's violation of Section 922(g)(1). Circuits are divided, however, as to whether this element requires proof of D's knowledge that the felon was a principal. Sixth Circuit agreed with Third Circuit in U.S. v. Xavier, 2 F.3d 1281 (3rd Cir. 1993), that the mens rea for this offense must be interpreted in light of 18 U.S.C. ' 922(d), which makes it a federal crime "to sell or otherwise dispose of any firearm to any person knowing or having cause to believe that such a person" is a felon. Court said other courts' indulgence of a presumption that a D was aware that the principal was a felon defeats the congressional intent behind the knowledge element of Section 922(d). "We cannot countenance an interpretation of ' 922(g) that would permit an ordinary gun dealer to be held criminally liable for 'aiding' a third person's possession of a firearm without some knowledge or cause to know of that person's status as a convicted felon, when that very same transaction would not be criminal under ' 922(d) for 'selling' the same gun."

TITLE: Waddington v. Sarausad

INDEX NO.: K.2.a.

CITE: (U.S.) (01/21/09), 129 S.Ct. 823

SUBJECT: Accomplice liability instruction not ambiguous & did not relieve State of burden of proof

HOLDING: Ninth Circuit erred in granting habeas relief to D based on unclear accomplice liability jury instructions because state-court decision denying post-conviction relief did not result in an unreasonable application of clearly established Federal law pursuant to 28 U.S.C. ' 2254(d)(1). A D challenging the constitutionality of a jury instruction that quotes a state statute must show both that the instruction was ambiguous and that there was a reasonable likelihood jury applied the instruction in a way that relieved State of its burden of proving every element of the crime beyond a reasonable doubt. Estelle v. McGuire, 502 U.S. 62, 72 (1991).

Here, D was convicted of second-degree murder for his role as the driver in a gang-related, drive-by shooting. In closing argument, prosecutor stressed D's knowledge of a shooting, noting how he drove at the scene, that he knew that fighting alone would not regain respect for his gang, and that he was "in for a dime, in for a dollar." On appeal, D argued that prosecutor's improper argument may have led jury to convict him as an accomplice to murder based solely on a finding that he had anticipated that an assault would occur. Jury instruction parroted the state statute's language, requiring jury to find D guilty as an accomplice "in the commission of the [murder]" if he acted "with knowledge that [his conduct would] promote or facilitate the commission of the [murder]." Because Washington courts' conclusion that jury instruction was unambiguous was not objectively unreasonable, Ninth Circuit should have ended its ' 2254(d)(1) inquiry there. However, even if the instruction were ambiguous, there was no evidence of ultimate juror confusion and Washington courts reasonably applied precedent when they found no "reasonable likelihood" that the prosecutor's closing argument caused jury to apply instruction in a way that relieved State of its burden to prove every element of crime beyond a reasonable doubt. Prosecutor consistently argued that D was guilty as an accomplice because he acted with knowledge that he was facilitating a drive-by shooting. Held, grant of habeas relief reversed and remanded. Souter, Stevens, and Ginsburg, JJ., DISSENT, arguing that uncertain, ambiguous instruction from trial judge was underscored by prosecutor's "confounding" argument that included a "clearly erroneous statement of law." As a result, jurors did not understand the state of mind prosecution had to prove for accomplice liability.

Note: See Peterson v. State, 699 N.E.2d 701 (Ind. Ct. App 1998) (reversible error for failure to give accused's tendered instructions which went beyond the bare language of Indiana's accomplice liability statute, Ind. Code 35-41-2-4 and Pattern Instruction 2.11).

TITLE: Ward v. State

INDEX NO.: K.2.a.

CITE: (8/18/82) Ind., 438 N.E.2d 966

SUBJECT: Aiding/inducing/causing an offense - instruction

HOLDING: Tr. Ct. did not err in giving instruction on being an accessory where D was charged as a principal. D may be charged as a principal but be convicted as an accessory. If evidence of aiding & abetting exists, then an accessory instruction is proper. Doss 267 N.E.2d 385. Here, 3 men participated in rape-murder. In co-D's appeal there was conflicting evidence as to who fired fatal shot. D objected to giving of instruction on being an accessory. Held, no error.

RELATED CASES: Burdine, 477 N.E.2d 544 (Tr. Ct. did not err in instructing jury that when 2 or more persons combine to commit crime, each is criminally responsible for acts of confederates committed in furtherance of common design; Ct. rejects D's argument that evidence did not support instruction); Voss, App., 469 N.E.2d 789 (Crim L 59(5), 829(20); Tr. Ct. did not err in giving state's instruction (set forth in opinion) concern-ing aiding/inducing; Ct. notes aiding/inducing is basis of liability of underlying offense, rather than a separate offense itself, *citing* Hoskins 441 N.E.2d 419).

TITLE: Weyls v. State

INDEX NO.: K.2.a.

CITE: (5th Dist. 09/01/92), Ind. App., 598 N.E.2d 610

SUBJECT: Instruction on failure to oppose crime - accomplice

HOLDING: Where D was tried as accomplice, it was not error for Tr. Ct. to strike portion of D's instruction on failure to oppose criminal activity which stated: "You may consider the D's failure to oppose the commission of a crime only when the D owes a duty to protect the victim of the crime such as a parent owes to a child." Tr. Ct. gave State's instruction which stated among other things, that jury could infer participation in crime from person's failure to oppose crime. D's instruction that jury must find D intended by own actions to cause or facilitate crime, & that there must be some affirmative conduct from which inference of common design or purpose to effect commission of crime could be drawn, was also given, but without additional language noted above. While agreeing that failure to oppose commission of crime, standing alone, is not sufficient to impose liability unless duty to protect exists, Ct. noted that duty to act is not only time failure to oppose may be considered. It may be considered with other circumstances & conduct of D to determine whether he lent his "countenance & approval" to commission of crime. Therefore, Ct. did not err in striking questioned portion of D's instruction.

TITLE: Zenthofer v. State

INDEX NO.: K.2.a.

CITE: (05-11-93), Ind., 613 N.E.2d 31

SUBJECT: Evidence sufficient to find accomplice liability for felony murder

HOLDING: Evidence that D knew friend was going to rob store & wanted D to come with him; was aware friend was considering committing murder; had been given what ultimately became murder weapon as collateral for loan prior to crime; was present during commission of crime; had cigarettes stolen from store; & helped friend conceal murder weapon, was sufficient to support conviction for felony murder under accomplice liability theory. Although D claimed mere presence at scene of crime was insufficient to support accomplice liability; that possession of gun was merely weak circumstantial evidence of participation; & that acts occurring after crimes were committed could not be sole basis of his conviction, Ct. found that under insufficiency standard of review, evidence as whole was sufficient. But see, Ward, 567 N.E.2d 85 at K.3.b.2, finding evidence insufficient.

RELATED CASES: Hyche, 934 N.E.2d 1176 (Ind. Ct. App 2010) (D's act of agreeing to purchase ecstasy did not make him an accomplice to dealing and thus liable for a death that occurred during the drug transaction under the felony murder statute); Wieland, 736 N.E.2d 1198 (evidence was sufficient to prove D actively participated in crimes); Edgecomb, 673 N.E.2d 1185 (D's actions & untruths after commission of crime supported conclusion that she knowingly aided co-D in felony murder).

K. CRIMES

K.2. Offenses of general applicability

K.2.b. Attempt (Ind. Code 35-41-5-1) (see, also substantive offense)

TITLE: Ballentine v. State

INDEX NO.: K.2.b.

CITE: (3rd Dist., 2-19-96), Ind. App., 662 N.E.2d 190

SUBJECT: Attempted murder instruction - fundamental error

HOLDING: Because Tr. Ct. erred in its jury instruction on attempted murder, D was entitled to post-conviction relief. Requirement for instruction regarding necessity of specific intent to kill to sustain attempted murder conviction is applicable to cases reviewed in post-conviction proceedings. Tacy v. State, 641 N.E.2d 57 (Ind. Ct. App. 1994). Here, Tr. Ct.'s instructions allowed jury to convict D for knowingly or intentionally engaging in conduct which constitutes substantial step toward murder. Requisite "intent to kill" language was not included in instruction on attempted murder. Held, reversed & remanded, Garrard, J., concurring.

RELATED CASES: Yeagley, App., 670 N.E.2d 358 (PCR granted where Tr. Ct. improperly instructed jury re: elements of attempted voluntary manslaughter); Ashley, App., 661 N.E.2d 889 (erroneous attempted murder instruction).

TITLE: Bethel v. State

INDEX NO.: K.2.b.

CITE: (6-16-00), Ind., 730 N.E.2d 1242

SUBJECT: Aiding attempted murder - required proof

HOLDING: In appeal of D's attempted murder conviction, Ct. addressed issue of what must be proven in order to show that D "knowingly or intentionally" aided commission of crime requiring specific intent. To support conviction for aiding an attempted murder, State must prove: 1) that accomplice, acting with specific intent to kill, took substantial step toward commission of murder, & 2) that D, acting with specific intent that killing occur, knowingly or intentionally aided, induced, or caused accomplice to commit crime of attempted murder. In this case, despite substantial evidence that D was engaged in protracted criminal activity with Co-D, with both men carrying guns, threatening several people, Ct. found evidence insufficient to prove that D had specific intent to kill victim or specific intent that Co-D kill victim. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Minor, 36 N.E.3d 1065 (Ind. Ct. App. 2015) (accomplice liability instruction related to attempted murder was erroneous because it failed to tell jury it needed to find D acted with specific intent to kill when he knowingly aided or induced another person; error was harmless because State did not truly argue that accomplice liability was a distinct basis to convict D); Rosales, 23 N.E.3d 8 (Ind. 2015) (accomplice liability instruction on attempted murder was fundamentally erroneous because it failed to say State must prove D acted with specific intent to kill when he knowingly or intentionally aided, induced, or caused another person to kill someone else; see full summary, this section); Means, App., 807 N.E.2d 776 (D failed to establish fundamental error from accomplice liability instruction, because intent to kill was not at issue on charge pertaining to erroneous instruction); Edington, 806 N.E.2d 310 (Bethel did not announce a new rule of criminal procedure but rather explained what State was already required to prove to gain conviction); Cowherd, App., 791 N.E.2d 833 (D failed to demonstrate that he was prejudiced by allegedly deficient performance of trial counsel in failing to object to jury instruction regarding accomplice liability for attempted murder); Kendall, App., 790 N.E.2d 122 (evidence was insufficient to find that D had specific intent to kill victim or specific intent that his accomplices kill victim); Hopkins, 782 N.E.2d 988 (Evidence of D's specific intent that victim be killed was sufficient to conclude that D suffered no prejudice from Tr. Ct.'s failure to instruct jury that it was required to find beyond reasonable doubt that D possessed specific intent to kill victim); Woodson, App., 767 N.E.2d 1022, *reh'g* granted 778 N.E.2d 475 (attempted murder & accomplice instructions that failed to refer to specific intent to kill constituted fundamental error); Hopkins, 759 N.E.2d 633 (Tr. Ct. committed fundamental error in failing to instruct jury regarding specific intent required of D to establish accomplice liability for attempted murder where D's intent to kill was clearly at issue).

TITLE: Blanche v. State
INDEX NO.: K.2.b.
CITE: (1-29-98), Ind., 690 N.E.2d 709
SUBJECT: Erroneous attempted murder instruction - no fundamental error
HOLDING: Tr. Ct.'s erroneous instruction on attempted murder did not constitute fundamental error. Where, as here, primary issue at trial was not D's intent, but identity, Ct. will not find fundamental error. Jackson, 575 N.E.2d 617; Swallows, 674 N.E.2d 1317 (on post-conviction). Defense in this case was one of innocence & mistaken identity. D's cross examination of witnesses at trial clearly demonstrates that this was defense strategy, & this defense was clearly stated at sentencing hearing. Held, convictions affirmed.

RELATED CASES: McCann, App., 854 N.E.2d 905 (Ct. could not conclude that there was reasonable possibility that jury would have acquitted D of attempted murder had trial counsel objected to instructions & tendered a correct one); Hollins, App., 790 N.E.2d 100 (failure to instruct on specific intent was not fundamental error because D maintained he was not inside victim's apartment during attack, thus his intent at time of victim's shooting was not at issue); Grundy, App., 695 N.E.2d 167 (where identity is at issue, intent may also be at issue, requiring reversal or finding of fundamental error).

TITLE: Bray v. State

INDEX NO.: K.2.b.

CITE: (12/29/82) Ind., 443 N.E.2d 310

SUBJECT: Attempt - sufficiency

HOLDING: Attempt conviction requires proof that D, while acting with required culpability, engaged in conduct constituting a substantial step toward commission of the crime. Ind. Code 35-41-5-1; Williams, 433 N.E.2d 769; Zickefoose, 388 N.E.2d 507. Here, D challenged sufficiency of evidence supporting attempted burglary conviction. Ct. finds statements & actions of D, including breaking & entering home, showed he was acting with intent to commit felony therein. Held, evidence sufficient to sustain conviction. Williams; Strosnider, App., 422 N.E.2d 1325; Keirns, App., 403 N.E.2d 361.

RELATED CASES: Hampton, App., 468 N.E.2d 1077 (robbery; card at K.3.d).

TITLE: Clay v. State

INDEX NO.: K.2.b.

CITE: (4-11-02), Ind. App., 766 N.E.2d 33

SUBJECT: Attempted murder instruction - "conscious purpose" is equivalent of "specific intent"

HOLDING: In attempted murder prosecution, Tr. Ct. did not commit fundamental error when it instructed jury that State had to prove that D had conscious purpose of killing another person. In Spradlin v. State, 569 N.E.2d 948 (Ind. 1991), Ct. determined that attempted murder instruction must inform jury that D acted with specific intent to kill victim. However, erroneous instruction will not constitute fundamental error where either: 1) instructions as whole sufficiently informed jury of requirement of intent to kill and/or 2) intent of perpetrator was not central issue. Ramsey v. State, 723 N.E.2d 869 (Ind. 2000). Because "conscious purpose" is equivalent to mens rea of "specific intent," instruction was proper. Fact that instruction required proof that D "knowingly or intentionally stabbed" victim did not constitute fundamental error because instruction as whole adequately informed jury that State was required to prove D had specific intent to kill victim. Held, judgment affirmed.

RELATED CASES: Elliot, App., 786 N.E.2d 799 (almost identical instruction adequately informed jury that State had to prove beyond reasonable doubt that D, with specific intent to kill victim, engaged in conduct which was substantial step toward this killing).

TITLE: Collier v. State

INDEX NO.: K.2.b.

CITE: (4th Dist., 04-27-06), Ind. App., 846 N.E.2d 340

SUBJECT: Attempted murder conviction reversed; conduct not "strongly corroborative" of intent

HOLDING: Evidence was insufficient to sustain attempted murder conviction, where D's conduct was not "strongly corroborative" of intent to commit murder. The evidence showed that a drunken D made threats against his wife who had a protective order against D & had filed for divorce. D communicated threat to a neighbor, saying he was going to "stab her in the effin' heart twice" & "cut her effin' throat . . . tonight" & gathered an ice pick, a box cutter & a pair of binoculars. D left in his pickup & later that evening was found passed out in the parking lot of the hospital where his wife was scheduled to get off work soon. He was parked in a location where he could see where she exited. Ct. considered whether D's actions constituted a substantial step, noting that most Indiana cases defining a substantial step have involved some appreciable, direct physical contact or attempted contact. Ct. noted that the seriousness of the crime of murder weighs in favor of affirming conviction. Ward v. State, 528 N.E.2d 52 (Ind.1988). Ct. analyzed substantial step requirement in relation to Ind. Code 35-41-5-1(a), Model Penal Code 5.01(1)(c) & Zickefoose v. State, Ind., 388 N.E.2d 507 (1979), which specifically required that D's conduct be "strongly corroborative" of D's criminal purpose. Conduct is more indicative of intent than statements, & "equivocal acts may reflect an equivocal purpose." Ct. also looked to MPC 5.01(2) & its illustrative list of conduct "strongly corroborative of the actor's criminal purpose," which in this case included D's lying in wait, reconnoitering, & possessing materials to be employed in the crime at or near where it was contemplated. Despite these supporting factors, majority could not find D's conduct "strongly" corroborative of his stated intent primarily due to fact that he was passed out or asleep when apprehended & his choice of weapons. The corroborative significance of a D's possession of weapons must be evaluated in light of the types of weapons he possesses & the danger they present. Given the distance between D & his wife at the time of arrest, the ice pick & box cutter were virtually useless in terms of attempted murder. Ct. distinguished the situation from one where a parked truck was full of explosives or a D possessed a handgun a few hundred feet from an intended victim. Ct. also distinguished situation from Hampton v. State, 468 N.E.2d 1077 (Ind. Ct. App1984), where D was convicted of attempted robbery after being apprehended outside a restaurant hiding behind bushes & wearing a ski mask while armed. S.Ct. has noted facts in Hampton are "much flimsier" than other attempted robbery cases. State v. Van Cleave, 674 N.E.2d 1293 (Ind. 1996). Further, Hampton was awake when apprehended, gave a detective a post-arrest statement of his intent, & left his vehicle with a gun in furtherance of his plan. Ct. noted that, as defense conceded, D could have been convicted of invasion of privacy or stalking on these facts but was not so charged. Held, judgment reversed; Barnes, J., dissenting, noted that this is a "close case" but believes the most important principle in this case is what constitutes a "substantial step is left to the province of the jury." He noted the list cited by the majority from MPC 5.01(2) provides sufficient evidence as a matter of law for what constitutes a substantial step. He further points to the pre-arrest statements made by the D to a neighbor to support the conviction & fact that D was passed out when police arrived is of no consequence, questioning whether a different result would occur if police stopped D as he entered the parking lot.

RELATED CASES: B.T.E., 108 N.E.3d 322 (Ind. 2018) (to the extent that Collier and Calvert (below) would have foreclosed finding a "substantial step" under these facts, Ct. disapproved of these cases. Lack of proximity is not dispositive; See full review, this section); Calvert, 930 N.E.2d 633 (Ind. Ct. App 2010)

(fact that D circled liquor store and parked across the street in a car in which ski masks, bb gun, sawed-off shot gun and sunglasses were found constituted only preparation for robbery and not a substantial step; attempted robbery conviction reversed); Henley, 881 N.E.2d 639 (where there was no evidence that D in back of van even knew police officers were outside of van when he was shooting a German Shepard police dog that tracked him into the van, there was insufficient evidence of intent to kill officer).

TITLE: Goodwin v. State

INDEX NO.: K.2.b.

CITE: (9/7/82) Ind., 439 N.E.2d 595

SUBJECT: Attempt - general intent crimes

HOLDING: Attempt statute, Ind. Code 35-41-5-1, does not apply to class of general intent crimes to which criminal recklessness, Ind. Code 35-42-2-2, belongs. Humes 426 N.E.2d 379. Here, D's conviction of criminal recklessness reversed where Tr. Ct., in instructing jury upon battery & lesser included offenses, incorporated the word "attempts" which is neither part of the criminal recklessness statute nor applicable to general intent crimes. Held, conviction reversed.

RELATED CASES: Henderson 534 N.E.2d 1105 (because battery requires culpability of knowingly or intentionally, attempted battery is cognizable offense); Tunstall 451 N.E.2d 1077 (Homic 310(2); Ct. uses same reasoning to find criminal recklessness is not lesser included offense of attempted murder).

TITLE: Hill v. State

INDEX NO.: K.2.b.

CITE: (06-09-93), Ind., 615 N.E.2d 97

SUBJECT: Attempted murder instruction erroneous

HOLDING: Ind. S.Ct. granted transfer & reversed memorandum decision, finding instruction on attempted murder was erroneous. Instruction (set forth in opinion) did not inform jury that State must prove D, at time he shot victim, intended to kill, & allowed jury to convict on erroneous lesser intent of "knowingly." Ct. once again stated that Tr. Ct's. should apply requirements set forth in Spradlin (1991), 569 N.E.2d 948 (also set forth in opinion), when instructing on attempted murder. Ct. additionally noted that D had tendered instruction regarding specific intent, & while finding instruction was "in artful," Ct. determined it properly set forth specific intent for attempted murder. Ct. also determined that evidence supported giving instruction & it was reversible error for Tr. Ct. to have refused it. Held, conviction reversed, Givan, J., dissenting. **Note:** In footnote Ct. discussed D's tendered instruction & showed how to correct it in approved manner. This could be used as guide for instruction to tender on specific intent in attempted murder.

RELATED CASES: Martin, App., 657 N.E.2d 430 (inclusion of "specific intent to commit murder" language immediately following elements of attempted murder in same jury instruction cured any error in not including specific intent within list of elements itself); Tacy, App., 641 N.E.2d 57 (erroneous instruction constituted fundamental error).

TITLE: Ivy v. State
INDEX NO.: K.2.b.
CITE: (4/4/2018), 98 N.E.3d 107 (Ind. Ct. App. 2018)
SUBJECT: Ineffective assistance of counsel (IAC) - erroneous jury instruction on accomplice liability for attempted murder
HOLDING: D received IAC because trial counsel failed to object to jury instructions given on accomplice liability for attempted murder. D's accomplice stabbed the victim while D held another individual at gunpoint. At trial, D argued he had not acted with the requisite culpability to be found guilty of attempted murder as an accomplice. The jury instruction for attempted murder mentioned specific intent, but it was phrased in terms of D being the principal actor, i.e., the one who stabbed the victim, rather than the accomplice. The accomplice liability instruction was fundamentally erroneous because it failed to say the State must prove D specifically intended that the victim be killed when he knowingly or intentionally aided his accomplice in the commission of attempted murder. As in Specht v. State, 838 N.E.2d 1081 (Ind. Ct. App 2005), Tr. Ct.'s failure to instruct the jury on this essential element of accomplice liability was erroneous. D's intent was a central issue at trial, thus there is a reasonable probability that had trial counsel objected to the instructions given and tendered the appropriate instruction, the result of his trial may have been different. Held, denial of petition for post-conviction relief reversed and remanded for further proceedings. Riley, J., dissenting, believes that when read together, the instructions sufficiently apprised jury of the essential elements necessary to convict D of attempted murder under an accomplice liability theory.

TITLE: King v. State

INDEX NO.: K.2.b.

CITE: (4th Dis. 10/31/84) Ind. App., 469 N.E.2d 1201

SUBJECT: Attempt - impossibility; buying stolen goods not stolen

HOLDING: Evidence was sufficient to support D's conviction for attempting to receive stolen property (RSP) where undercover officer told D items were "a little hot," despite fact that items were not stolen. See State v. Gillespie, App., 428 N.E.2d 1338. Here, D contends verdict was contrary to law because items received as "stolen property" were not stolen. Ct. notes Ind. Code 35-43-4-2(b) (attempt statute) rejects defense of impossibility. Fact that items were not actually stolen is unimportant as long as jury found D believed them to be stolen. D's purchase of items constituted substantial step toward commission of crime RSP. Ct. rejects dissent's argument that decision constitutes "a long step down road to thought control." Attempt statute requires proof of both intent & conduct which constitutes substantial step toward commission of crime. Person's intent & conduct are more reliable indication of culpability than hazy distinction between factual & legal impossibility, as legislature recognized by rejecting impossibility defense in Ind. Code 35-41-5-1(b). Held, conviction affirmed. Conover DISSENTS. It was legally impossible for D to commit crime. Legislature intended to exclude only factual impossibility.

TITLE: Miller v. State

INDEX NO.: K.2.b.

CITE: (7/12/2017), 77 N.E.3d 1196 (Ind. 2017)

SUBJECT: Remand to apply correct mens rea standard

HOLDING: On transfer, the Indiana Supreme Court agreed with the Court of Appeals that the judge presiding over the bench trial applied the wrong mens rea standard in adjudging D guilty of attempted murder, as it found D guilty because he “knowingly or intentionally” attempted to commit murder. (Emphasis added) However, while agreeing that the Tr. Ct. applied the wrong standard, the Supreme Court remanded not for a new trial, as the Court of Appeals had, but simply to the same judge to reconsider the case under the correct mens rea standard, which required the State to prove D had specific intent to kill Jeremy Kohn. See Zickefoose v. State, 338 N.E.2d 507, 510 (1979); Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). The underlying facts showed that D, who has a long history of severe mental illness, cut Kohn’s throat because he thought Kohn and Kohn’s girlfriend were laughing at him. D had never met Kohn before. The knife D used was a pocket knife with a three-to-four inch blade. The cut to Kohn’s throat was not deep enough to damage his jugular vein, carotid artery, or trachea. D was calm during the entire incident; he didn’t speak and his face was expressionless. When he did speak, D said he had no preference for whether Kohn lived or died. The State charged D with attempted murder, specifically alleging that D “knowingly or intentionally attempted to commit the crime of murder” (emphasis added), and the Tr. Ct. *cited* the same standard when it found D guilty. Held, transfer granted, Court of Appeals’ opinion vacated with respect to mens rea issue but affirmed in all other respects. Justice Slaughter dissented regarding the majority’s remedy, writing, “I fear a mere remand to the same trial judge instructing him to apply the correct standard will be insufficient to redress the underlying harm from using the wrong standard. In my view, [D] should receive a new trial. The erroneous mens rea standard should not be dismissed as a slip of the tongue (or pen) in the court’s written findings because it first appeared in the State’s charging information and thus tainted the entire proceeding.” Transfer granted, yet summarily affirmed on all issues except the nature of the remedy. See Supreme Court opinion, this section.

RELATED CASES: Miller (on appeal from remand, Court of Appeals found sufficient evidence of specific intent for attempted murder). Miller, (for a severely mentally ill defendant, criminal justice system should make an assessment as soon as possible after charges are filed to determine if the defendant could have formed requisite mens rea for crime at issue).

TITLE: Pierce v. State

INDEX NO.: K.2.b.

CITE: (2d Dist. 10/16/91), Ind. App., 579 N.E.2d 1317

SUBJECT: Attempted murder instruction, intent to kill

HOLDING: (on rehearing) Where intent was at issue because of voluntary intoxication defense & Ct. only instructed jury on elements of murder & attempt & didn't use "by attempting to kill" language in instruction, reversible error occurred. Ct. of Appeals distinguished this case from Jackson, 575 N.E.2d 617 & Allen, 575 N.E.2d 615, where error in failing to instruct jury as to "intent to kill" element of attempted murder was found not fundamental, by noting that D had put intent at issue & instructions as whole did not convey the necessary intent to be proven. Ct. refused to consider Jackson & Allen as overruling Spradlin, 569 N.E.2d 948, & its precursors. Ct. instead found that Jackson & Allen held only that error in instruction might not be fundamental reversible error under some circumstances, & that those circumstances didn't exist here. Held, conviction reversed in original memorandum decision & upheld because of denial of rehearing.

RELATED CASES: Parks, App., 646 N.E.2d 985 (although charging information contains "knowingly or intentionally...attempting to kill," D's intent was principal issue at trial & no specific intent instruction was given); Clark, App., 597 N.E.2d 4 (fundamental error for Tr. Ct. to fail to adequately instruct jury on need to find specific intent to kill in order to convict of attempted murder. Ct. found these instructions constituted fundamental error because they clearly provided that required intent was to engage in conduct, rather than to accomplish result of killing another human, & they suffered from same infirmity as instructions found fundamentally erroneous in Brown, App., 587 N.E.2d 693). But see, Wilson, 611 N.E.2d 160 (although attempted murder instructions were erroneous on "intent to kill" element, & trial counsel was deficient in failing to object to them, instructions informed jury of specific intent to kill element adequately enough so as not to constitute reversible error, & D did not show requisite prejudice); Wilson, App., 635 N.E.2d 1109, & Lingler, App., 635 N.E.2d 1102.

TITLE: Pittman v. State

INDEX NO.: K.2.b.

CITE: (11/5/2015), 45 N.E.3d 805 (Ind. Ct. App. 2015)

SUBJECT: Stalking can be prosecuted as "attempt" crime

HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion to dismiss attempted stalking charge. Although Ind. Code § 35-45-10-1 clearly requires that, for the commission of the completed offense, the D's conduct actually causes the victim to feel terrorized, frightened, intimidated, or threatened, this fact does not manifest a legislative intent to foreclose application of the general attempt statute to prosecute unsuccessful attempts to commit stalking.

Court also held that Indiana's general attempt statute is not void for vagueness as applied to D's case. On these facts, which include that, following multiple phone calls where he threatened to kill his girlfriend, D traveled to the doctor's office where she was located while armed with a handgun for the specific purpose "to scare his girlfriend," the statute for attempted stalking is not void for vagueness. State presented sufficient evidence to prove D committed attempted stalking beyond a reasonable doubt.

Finally, Court rejected D's proportionality challenge to his six-year sentence. Such a sentencing range and the sentence imposed for attempted stalking do not "shock public sentiment" or "violate the judgment of a reasonable people." Thus, D's sentence does not violate Art. 1, Sec. 16 of the Ind. Constitution. Held, judgment affirmed.

TITLE: Prewitt v. State

INDEX NO.: K.2.b.

CITE: (5th Dist., 1-14-02), Ind. App., 761 N.E.2d 862

SUBJECT: Enhancement for attempted possession of cocaine in family housing complex

HOLDING: D was properly charged with attempted possession of cocaine as Class B felony for being within 1,000 feet of family housing complex when offense occurred. Ind. Code 35-41-5-1 provides that a person attempts to commit crime when, acting with culpability required for commission of crime, he engages in conduct that constitutes a substantial step toward commission of crime. Attempt statute applies only to specific intent crimes. Goolsby v. State, 517 N.E.2d 54 (Ind. 1987). D argued it was improper to enhance attempt based upon location alone, noting that enhancement provisions of possession of cocaine statute punish only act & disregard intent completely. However, D was not charged with & convicted of innocent conduct, i.e., attempting to be within 1,000 feet of family housing project. Rather, he was charged with attempting to knowingly or intentionally possess cocaine, in violation of Ind. Code 35-48-4-6, which requires specific intent to possess cocaine. That the attempt occurred within legislatively- declared "drug-free zone" is fact which only serves to elevate seriousness of crime & penalty. Assuming State otherwise proves required culpability for substantive crime, conviction can be sustained for attempt to commit enhanced crime. Held, judgment affirmed.

TITLE: Rhinehardt v. State

INDEX NO.: K.2.b.

CITE: (4/30/85) Ind., 477 N.E.2d 89, *overruled* on other grounds, 528 N.E.2d 476

SUBJECT: Attempt statute not unconstitutionally vague

HOLDING: D's failure to challenge statute prior to trial in timely/proper motion to dismiss waives claim. Even assuming D had preserved claim, Ct. finds statute conveys sufficiently definite warning re proscribed conduct. Stotts, 271 N.E.2d 722. Here, D pointed loaded gun in direction of another person & fired weapon. Person of ordinary intelligence could understand that criminal attempt statute was intended to proscribe such conduct. Held, no error.

RELATED CASES: Conrad, 747 N.E.2d 575 (Ind. Ct. App. 2001) (Legislature has determined that attempts or conspiracies to commit another crime should carry the same penalty as the choate crime, thus indicating that attempts and conspiracies are generally considered to be equally detrimental to society as successful completions of the choate crimes; therefore, the inclusion of attempts and conspiracies in the definition of "serious violent felony" does not lead to irrationally imposed disparate treatment under the privileges and immunities clause of Ind. Const., art 1, § 23).

TITLE: Rosales v. State
INDEX NO.: K.2.b.
CITE: (1/15/2015), 23 N.E.3d 8 (Ind. 2015)
SUBJECT: Accomplice liability instruction for attempted murder constituted fundamental error
HOLDING: In an issue of first impression, Supreme Court held that an accomplice liability instruction on attempted murder was fundamentally erroneous because it failed to say State must prove D acted with specific intent to kill when he knowingly or intentionally aided, induced, or caused accomplice to attempt to kill victim, where it is unknown if D was convicted of attempted murder on the basis of accomplice liability or direct liability. See Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001); Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000); and Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). The State compounded this error by its repeated insistence during closing argument that specific intent to kill was not required for accomplice liability with attempted murder. Held, transfer granted, Court of Appeals' opinion at 3 N.E.3d 1014 vacated, reversed and remanded for new trial.

TITLE: Spradlin v. State
INDEX NO.: K.2.b.
CITE: (04/15/91), Ind., 569 N.E.2d 948
SUBJECT: Attempted murder instruction
HOLDING: It is reversible error to fail to instruct jury that in order to convict for attempted murder, State must prove that D intended to kill human being at time of act, & took substantial step to do so. Tr. Ct. read statutory definitions of attempt, Ind. Code 35-41-5-1, & of murder, Ind. Code 35-42-1-1(1), & gave instruction reading in part: "[t]o convict the Ds, the State must have proved each of the following elements: The Ds 1) knowingly or intentionally 2) strike, stab & cut the body of Robert Grubbs 3. that the conduct was a substantial step toward to commission of the crime of murder...." S.Ct. disagreed with prior memorandum decision which found these instructions, taken together, sufficient to inform jury of necessity of finding intent to kill, citing to Smith 459 N.E.2d 355, for proposition that although one may be guilty of murder without entertaining specific intent to kill, one cannot be guilty of attempted murder without such intent to kill. Instruction that purports to set forth elements of attempted murder, must inform jury that State must prove beyond a reasonable doubt that D, with intent to kill the victim, engaged in conduct constituting substantial step toward such killing. Held, decision of Ct. App. vacated, convictions of Ds reversed & remanded for new trial, J. Givan dissenting, C.J. Shepard concurring in result.

RELATED CASES: Jones, App., 868 N.E.2d 1205 (fundamental error found where Tr. Ct. failed to properly inform jury of the law regarding specific intent in the context of attempted murder, where intent question was central issue at trial); Sanders, App., 764 N.E.2d 705, habeas relief granted on other grounds, 398 F.3d 572 (attempted murder instruction that failed to require finding of specific intent to kill did not constitute fundamental error, because D's intent to kill was not central issue at trial & intent to kill was addressed in another instruction regarding transferred intent, which was given to jury); Booker, App., 741 N.E.2d 748 (despite repeated references to "knowing" mens rea, attempted murder instruction did not constitute fundamental error, because Tr. Ct. listed "specific intent to kill" among elements required to be proven by State, & instruction did not equate "specific intent" with "knowingly"); Foster, App, 733 N.E.2d 534 (fundamental error where jury instructions on attempted murder as whole did not sufficiently inform jury of State's burden of proving that D specifically intended to kill victim); Ramsey, 723 N.E.2d 869 (although attempted murder instruction in this case suggested that "knowing" mens rea is sufficient to establish guilt of attempted murder, language was not objected to & Ct. "narrowly" concluded that error was not fundamental); Lawrence, App., 665 N.E.2d 589 (error was harmless beyond reasonable doubt because D's intent was not critical issue at trial); Hill, 617 N.E.2d 97; Taylor, 616 N.E.2d 748 (Ct. granted transfer and reversed Ct. App. decision, again reaffirming Spradlin concerning need to have intent to kill in instruction on attempted murder. Ct. essentially reiterated holding in Hill, but added that if jury is properly instructed, it may infer D's intent to kill from way he acted. Instruction must be correct, however, because inference of intent must be focused on D's mens rea at time he committed act against victim, Givan, J., dissenting); Jackson 575 N.E.2d 617 (erroneous instruction lacking "intent to kill" element did not constitute fundamental error requiring reversal for 2 reasons: (1) instruction did require proof that D was "attempting to kill" victim, & there can be no attempt to perform act unless there is simultaneous intent to accomplish act; & (2) issue central to trial was identity of D, not whether he intended to kill victim. See also Allen, 575 N.E.2d 615. Greenlee, 655 N.E.2d 488 (instructions taken together adequately informed jury that it needed to

conclude D must have acted with intent to kill before it could convict him). But see Woodcox, 591 N.E.2d 1019, finding fundamental error in instruction.

TITLE: State v. Haines

INDEX NO.: K.2.b.

CITE: (2d Dist. 10/31/89), Ind. App., 545 N.E.2d 834

SUBJECT: Attempted murder - substantial step; ARC patient throwing blood

HOLDING: Tr. Ct. erred in setting aside jury verdict of guilt on attempted murder charges. Three counts of attempted murder were based on D's scratching & biting police officer, & throwing blood & spitting at officer & paramedics who responded to his suicide attempt. Evidence showed that D, who had AIDS Related Complex (ARC), told victims he had AIDS & they should leave him alone, & he threatened to infect them. Jury found D guilty, but Tr. Ct. set aside verdict & entered convictions for battery, ruling that evidence did not support finding that D took substantial step toward committing murder. Specifically, Tr. Ct. found that state did not establish that D's conduct was capable of causing death. However, Tr. Ct. erroneously failed to consider evidence offered by D. Evidence showed that D carried AIDS virus, was aware of infection & believed it to be fatal, & that he intended to infect others by spitting, biting, scratching, & throwing blood. Ind. Code 35-41-5-1 provides that impossibility is no defense to attempt charge. In Zickefoose, 388 N.E.2d 507, Ind. S. Ct. observed, that one commits attempt when he/she has done all that he/she believes necessary to cause particular result, regardless of what is actually possible. Here, D's statements, & statements of doctors to him regarding his conduct, sufficiently establish that. D suggests that Indiana should follow other states in recognizing that where offense is inherently impossible or unlikely, public is not endangered & culpability should be limited. [Citations omitted.] However, evidence here showed more than mere "chance" that D could transmit disease through his conduct. Held, reversed & remanded to reinstate jury verdict & resentence D.

TITLE: Swallows v. State

INDEX NO.: K.2.b.

CITE: (12-31-96), Ind., 674 N.E.2d 1317

SUBJECT: Erroneous attempted murder instruction - post-conviction cases

HOLDING: In post-conviction case, where D's intent was not disputed at attempted murder trial, failure to instruct jury on specific intent to kill does not constitute fundamental error. Here, D's strategy at trial was to put identity at issue, & D did not raise instruction error on direct appeal. Held, denial of post-conviction relief affirmed; Sullivan, J., concurring in result.

RELATED CASES: Mitchell, App., 821 N.E.2d 390, sum. *Aff'd* 844 N.E.2d 88 (as in Swallows, theory of D's case was that he wasn't there, not lack of intent to kill); Majors, App., 735 N.E.2d 334 (primary theory of D's defense was that he was not shooter; however, record showed that D's intent was also at issue; fundamental error found because jury was not instructed on specific intent element of attempted murder).

TITLE: Ward v. State

INDEX NO.: K.2.b.

CITE: (9/12/88) Ind., 528 N.E.2d 52

SUBJECT: Attempted child molesting - solicitation sufficient

HOLDING: Evidence of solicitation of child may be sufficient to support conviction for attempted child molesting. Evidence showed D followed 11-year-old victim & offered 3 times to perform fellatio on him. Police later sent 15-year-old boy to approach D. D offered to perform fellatio & when that offer was refused, D vaguely suggested that 15-year-old visit him sometime. Generally, to be guilty of attempt D must have acted with specific intent to commit offense & must have engaged in overt act constituting substantial step toward commission of crime. Zickefoose 388 N.E.2d 507. Ind. S. Ct. adopts 2 separate tests to determine when solicitation may be substantial step. First test has 3 parts: (1) solicitation takes form of urging; (2) solicitation urges immediate commission of crime; & (3) cooperation or submission of person solicited is essential feature of substantive crime. Perkins, Criminal Attempt & Related Problems, 2 UCLA. L. Rev. 319 (1955). Second test focuses on nature of crime: the more serious the offense, the farther back criminal law will reach in sanctioning behavior as attempt. Sayre, Criminal Attempts, 41 Harv. L. Rev. (1988). Both tests warrant sanctioning solicitation of child as attempted child molesting, generally. Here, solicitation of 11-year-old constituted substantial step; solicitation of 15-year-old, being less urgent & referring, at least in part, to future opportunity, did not. Held, conviction affirmed re 11-year-old, reversed re 15-year-old. DeBruler, J., DISSENTS, arguing that solicitation of child under 12 is separately sanctioned offense.

NOTE: See related cases at K.3.e.3.

RELATED CASES: Laughner, App., 769 N.E.2d 1147 (crime of attempted child solicitation is established in case of one who engages in overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out solicited person is an adult).

TITLE: Williams v. State

INDEX NO.: K.2.b.

CITE: (11-2-00), Ind., 737 N.E.2d 734

SUBJECT: Aiding attempted murder - erroneous jury instruction

HOLDING: Tr. Ct. committed fundamental error in not instructing jury that it had to find that D, as non-shooting accomplice, possessed specific intent to kill when he knowingly or intentionally aided, induced, or caused his backseat accomplice to commit crime of attempted murder. Instead, jury was instructed that to find D guilty of aiding attempted murder, it need only determine that he knowingly or intentionally aided, induced, or caused another person to commit crime of attempted murder. While this was correct statement of law as it generally pertained to accomplice liability, it fell significantly short of adequately instructing jury in this case given that Tr. Ct. had already failed to instruct on basic elements of attempted murder. Ct. noted that in typical attempted murder prosecution involving armed robbery or some other criminal enterprise gone awry, accomplice is criminally responsible for acts done by accomplice's confederates which were probable & natural consequence of their common plan, & intent to kill is properly inferred from knife-wielding or shooting principal. Bonds, 721 N.E.2d 1238 (Ind. 1999). Here, however, chance encounter led to spontaneous firing of two shots from back seat of D's automobile, & instructions as whole never informed jury that either backseat principal or D had to possess specific intent to kill victim. It is difficult if not impossible to see how D received fair trial when jury could have convicted him of knowingly (rather than intentionally) aiding principal in knowingly (rather than intentionally) attempting to kill victim. Held, transfer granted, Ct. App. § opinion at 715 N.E.2d 882 vacated, Tr. Ct. reversed & remanded for new trial.

RELATED CASES: Specht, App., 838 N.E.2d 1081 (D received IAC because trial counsel failed to object to jury instructions given on accomplice liability for attempted murder); Cowherd, App., 791 N.E.2d 833 (D waived review of his fundamental error claim regarding attempted murder accomplice liability instruction).

K. CRIMES

K.2. Offenses of general applicability

K.2.c. Conspiracy (Ind. Code 35-41-5-2) (see, also substantive offense)

TITLE: Beal v. State

INDEX NO.: K.2.c.

CITE: (9/14/83) Ind., 453 N.E.2d 190

SUBJECT: Conspiracy - corpus delicti

HOLDING: Tr. Ct. did not err in allowing state to introduce evidence tending to show an arson occurred before proving D had conspired to commit that arson. Here, Ct. rejects D's contention that state must first prove perpetrators conspired to commit a crime before it can show that the crime was actually committed. Proof of corpus delicti is proof which shows crime has been committed. Generally, corpus delicti must first be proved before statements or any involvement of D can be introduced. Order of evidence is discretionary with trial judge; admitting evidence out of order is not reversible error provided D's involvement is ultimately forthcoming. Vacendak 431 N.E.2d 100. In present case, judge admitted photos showing arson occurred conditioned on later proof of D's involvement. Judge refused prosecutor's request to pass exhibits to jury until close of state's evidence. Held, no prejudice shown; conviction affirmed.

RELATED CASES: Altman 466 N.E.2d 716 (Crim L 363; time frame established by pleadings does not limit state to presentation of evidence of events occurring within time period, *citing* Gadacz 426 N.E.2d 376 (circumstances/statements substantially contemporaneous with crime charged); held, telephone conversation arranging cocaine sale made within week prior to time of alleged conspiracy admissible).

TITLE: Grant v. State

INDEX NO.: K.2.c.

CITE: (2nd Dist., 11-16-93), Ind. App., 623 N.E.2d 1090

SUBJECT: Instruction on inference of conspiracy

HOLDING: While finding following instruction was not erroneous under facts of case, Ct. cautioned that such instruction might not be proper in all cases: Proof of the existence of a conspiracy does not need to rest solely on words giving rise to an express agreement, but may be inferred from acts & conduct of the person accused, done in pursuance of an apparent criminal or unlawful purpose. Portion of instruction regarding inference from acts & conduct might tend to mislead jury in situations where evidence of participation in sale of drugs, i.e., D's acts & conduct, in & of itself, actually constitutes conspiratorial act complained of. "Blurring the 'sale' with the 'agreement,' absent evidence of a prior or contemporaneous agreement beyond the sale in question, could result in the impermissible multiple punishment for but one criminal act." Ct. cautioned Tr.Cts. to carefully evaluate facts of case before giving such instruction.

TITLE: Kemper v. State

INDEX NO.: K.2.c.

CITE: (6/17/2015), 35 N.E.3d 306 (Ind. Ct. App 2015)

SUBJECT: Insufficient evidence D conspired to commit armed robbery

HOLDING: Court reversed D's conspiracy to commit armed robbery conviction, where State presented no evidence of an agreement to commit robbery. Accomplice's uncontradicted testimony at trial was that he was not aware that D planned on robbing the gas station until D pulled a gun out of his pocket and exited the car. Text messages between D and accomplice on night of robbery indicate nothing more than that the two planned to meet. D's calls to accomplice after the robbery in an attempt to help him escape likewise do not indicate the existence of a prior agreement. Finally, accomplice's guilty plea to conspiracy cannot be considered as substantive evidence of D's guilt. See Berridge v. State, 168 Ind. App. 22, 340 N.E.2d 816, 822-23 (1976).

Court also rejected D's appropriateness challenge to his 40-year maximum sentence for robbery resulting in bodily injury and possession of firearm by SVF. Held, judgment affirmed in part, reversed and remanded on other grounds.

TITLE: Miller v. State
INDEX NO.: K.2.b.
CITE: (3/17/2017), 72/502 (Ind. Ct. App 2017)
SUBJECT: Trial court applied wrong attempted murder mens rea
HOLDING: In finding Defendant guilty of attempted murder after a bench trial, the trial court applied the incorrect mens rea for attempted murder.

Defendant, who has a long history of severe mental illness, cut the throat of a man he thought was laughing at him. Defendant had never met the man before. The knife Defendant used was a pocket knife with a three-to-four inch blade. The cut to victim's throat was not deep enough to damage his jugular vein, carotid artery, or trachea. Defendant was calm during the entire incident; he did not speak and his face was expressionless. When he did speak, Defendant said he had no preference for whether the victim lived or died. The State charged Defendant with attempted murder, specifically alleging that Defendant "knowingly or intentionally attempted to commit the crime of murder." (Emphasis added). Once the bench trial concluded, the trial court issued findings, which found Defendant guilty but mentally ill of attempted murder, stating that Defendant did "knowingly or intentionally" attempt to commit murder. (Emphasis added).

To meet its burden in an attempted murder case, the State must show that the perpetrator "entertained a specific intent to kill the victim." Zickefoose v. State, 388 N.E.2d 507, 510 (1979). Juries must be so instructed. Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). A judge presiding over a bench trial is presumed to both know the law and to follow the law. The facts here, however, rebut that presumption because the trial court's findings rely on the same erroneous standard found in the charging information, which allowed a finding of guilt on a mere showing of a "knowing" mens rea. Thus, the trial court applied the wrong standard, which is of great consequence here because the only contested issue was Defendant's intent, or lack thereof. Therefore, the conviction is reversed, and the matter is remanded for a new trial, with a new judge and a correctly worded charging information. Held, judgment reversed.

TITLE: Perkins v. State

INDEX NO.: K.2.c.

CITE: (10/25/85) Ind., 483 N.E.2d 1379

SUBJECT: Conspiracy - double jeopardy (DJ)

HOLDING: Separate conspiracy convictions based upon same agreement violates DJ. Here, Ds were charged with, convicted of & sentenced for conspiracy to deal in marijuana & conspiracy to traffic with an inmate. When separate conspiracies are charged, relevant inquiry is whether more than one agreement to perform some illegal act(s) existed [citations omitted], not whether crimes of dealing & trafficking have different elements. Both, conspiracy counts center on same act, delivery of controlled substance to Ds at Pendleton. Participants in both counts were identical. Held, remanded with instructions to vacate one of Ds' conspiracy convictions.

RELATED CASES: Drakulich, App., 877 N.E.2d 525 (although evidence could support inference that there was a single agreement, Ct. could not say that no reasonable fact-finder could find that there were multiple agreements to sell unregistered securities); Hammers 502 N.E.2d 1339 (Ct. rejects D's contention that case fits into exception providing that acquittal on substantive charge precludes conviction on conspiracy count where necessary proof on substantive charge is identical with that required for conviction on conspiracy count; exception applies only when counts are tried separately; see Weekley, App., 415 N.E.2d 152; held, acquittal of murder does not bar conviction for conspiracy to commit murder); Smith 465 N.E.2d 1105 (DJ does not bar trial, conviction & sentence upon both murder & conspiracy to commit murder); Huff, App., 443 N.E.2d 1234 (commission of offense & conspiracy to commit same offense are separate offenses, thus acquittal of one is not bar to other [citations omitted]).

TITLE: Porter v. State

INDEX NO.: K.2.c.

CITE: (9-8-99), Ind., 715 N.E.2d 868

SUBJECT: Evidence insufficient for robbery & conspiracy convictions

HOLDING: Evidence was insufficient to support D's convictions for conspiracy & accessory robbery.

D walked onto basketball Ct., shot & killed victim, & took gold chain from victim's neck. At approximately same time, at opposite end of Ct., another man robbed two other victims at gunpoint. D was convicted of murder, robbery, & carrying handgun without license for killing victim & taking his necklace. D was also convicted of conspiracy to commit robbery & two counts of robbery as accomplice in robberies of two other victims. Ct. concluded that there was no evidence, either direct or circumstantial, to establish that at time of robberies, D was acting in concert with other man. In addition, there were no facts presented from which jury could infer agreement establishing conspiracy to commit robbery. Held, convictions & sentences for accomplice robbery & conspiracy to commit robbery vacated.

RELATED CASES: Emerson, App., 812 N.E.2d 1090 (Porter's Co-D's appellate counsel was not ineffective in failing to argue that State presented insufficient evidence to prove that D acted in concert or by agreement with D).

TITLE: Sharp v. State

INDEX NO.: K.2.c.

CITE: (2d Dist. 03/26/91), Ind. App., 569 N.E.2d 962

SUBJECT: Conspiracy to sell drugs - sufficiency for multiple convictions

HOLDING: Ds' 3 convictions for conspiracy to sell certain drugs were erroneous, because evidence was insufficient to prove 3 separate agreements to sell drugs. Ds, husband & wife, sold percodan, vicodin, demerol & possibly other drugs, to multiple persons at various times over period of 2 years. Evidence showed people would call Ds to see if they had drugs they wanted, & would purchase if they did. Ct. held that while jury could reasonably infer that Ds had agreement with another couple to deal narcotic drugs, evidence was insufficient to prove they had 3 separate agreements to sell each type of drug. Determination as to whether there exists one agreement or multiple agreements depends on several factors, including: nature of criminal scheme; overlapping participants; proximity in time; & frequency, quality & duration of co-conspirators' involvement in each crime. Although evidence confirmed multiple sales over period of time, it did not show separate arrangements to supply particular drug for distinct purpose. Ds sold whatever drug was available, & there was no evidence as to when one transaction was completed & another began. Ct. found evidence supported only one conviction of conspiracy to deal narcotic drugs for each of Ds, because it revealed not discrete transactions, but single, open-ended agreement to sell several kinds of illegal drugs. Held, judgment affirmed in part & reversed for vacation of 2 conspiracy convictions for each D.

TITLE: Simmons v. State

INDEX NO.: K.2.c.

CITE: (2nd Dist., 6-3-05), Ind. App., 828 N.E.2d 449

SUBJECT: Weight of separate cocaine sales can enhance conspiracy conviction

HOLDING: Ct. held that two separate sales of cocaine to the same individual could be aggregated to enhance a conspiracy to deal in cocaine from a Class B to a Class A felony. Although criminal statutes are to be strictly construed against the State, Ct. need not interpret statute because it was only asked to review the sufficiency of the evidence. Further, Ct. found sufficient evidence of an agreement to deal in cocaine to support the convictions against both Ds. Ct. distinguished Washington v. State, 807 N.E.2d 793 (Ind. Ct. App2004), where State only proved that D was involved in one of five buys. The evidence here demonstrates an intelligent & deliberate agreement to deal in three or more grams of cocaine. These buys occurred very close in time in one location. This is not a situation where the State attempted to link several independent buys to justify the enhancement. Ct. also found no problem with inconsistent verdicts as one D was acquitted of dealing in cocaine but convicted of conspiracy to deal. The second D was only charged with conspiracy & “there must be two verdicts before any question of fatally inconsistent verdicts exists.” Green v. State, 808 N.E.2d 137 (Ind. Ct. App2004). Ct. distinguished Owsley v. State, 769 N.E.2d 181 (Ind. Ct. App2002), where Ct. reversed D's possession conviction by asking if he “did not possess cocaine on that date, how could he have provided cocaine to [the seller]?” Here, State was not required to establish that the D who had a viable claim of inconsistent verdicts actually sold the cocaine. The jury was free to believe some portions of the evidence as it related to conspiracy but disagree as to others that would establish dealing. Held, judgment affirmed.

TITLE: Smith v. United States
INDEX NO.: K.2.c.
CITE: (1/12/2013), 133 S.Ct. 714 (U.S. Supreme Court 2013)
SUBJECT: D bears burden to prove withdrawal from conspiracy; statute of limitation implications
HOLDING: Court unanimously held that a D charged with conspiracy carries the burden to prove he withdrew from a conspiracy. Failure to place burden on State to prove beyond a reasonable doubt the absence of a withdrawal, which Congress could do, does not violate Due Process Clause.

A D bears this burden as he does with any other affirmative defense unless the affirmative defense negates an element of the crime. Withdrawal does not vitiate a D's prior participation in a conspiracy; indeed, withdrawal presupposes that the D participated in the conspiracy.

A D carries this burden whether the withdrawal occurs within the applicable statute of limitations, which would terminate liability for post-withdrawal acts of his confederates, or if outside the statute of limitations period, which would relieve a D of liability for all acts committed to further a conspiracy.

TITLE: Suding v. State

INDEX NO.: K.2.c.

CITE: (03-22-11), 945 N.E.2d 731 (Ind. Ct. App 2011)

SUBJECT: Conspiracy to commit murder - sufficient evidence

HOLDING: Evidence was sufficient to convict D of three counts of conspiracy to commit murder.

Ind. Code 35-41-5-2 states, "[a] person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony." The statute requires a unilateral, rather than a bilateral, agreement to commit the crime. Garcia v. State, 394 N.E.2d 106 (Ind. 1979). Under the unilateral approach, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned. Despite holding in Garcia, D claimed that Williams v. State, 748 N.E.2d 887 (Ind. Ct. App 2001), requires Court hold his co-conspirator's lack of intent is fatal to his conviction. However, decision in Williams was not based on a co-conspirator's feigning intent to commit a crime. Rather, Court overturned Williams' conviction of conspiracy to commit murder because there was insufficient evidence that Williams or his co-conspirators intended to murder anyone when they conspired to commit only robbery. Here, D's wife's testimony provided sufficient evidence that he intended to kill his ex-wife, her lawyer, and the judge who presided over protective order hearing. Held, conviction affirmed.

TITLE: Taylor v. State

INDEX NO.: K.2.c.

CITE: (06-29-10), 929 N.E.2d 243 (Ind. Ct. App 2010)

SUBJECT: Class A felony conspiracy to deal cocaine reduced to B felony

HOLDING: Tr. Ct. erred in submitting conspiracy to deal cocaine charge to jury as class A felony instead of class B felony. At trial, State agreed that the dealing charge should be reduced to a B felony because D was within 1000 feet of elementary school only briefly and no children were present when he delivered cocaine. See Ind. Code 35-48-4-16(b). However, State argued and Tr. Ct. agreed that conspiracy charge should still be submitted to jury as a class A felony. Because a “conspiracy to commit felony is a felony of the same class as the underlying felony,” (Ind. Code 35-41-5-2), Tr. Ct. should have submitted conspiracy charge as a B felony. D did not contend evidence was insufficient for class B felony conspiracy to deal. Held, judgment affirmed in part, reversed in part, and remanded with instructions to enter D’s conspiracy conviction as a class B felony and to re-sentence him.

TITLE: Weida v. State
INDEX NO.: K.2.c.
CITE: (11-21-02), Ind. App., 778 N.E.2d 843
SUBJECT: Withdrawal of conspiracy - improper not to give jury instruction; same as abandonment defense

HOLDING: Tr. Ct. abused its discretion when it refused to give D's tendered instruction regarding defense of withdrawal of conspiracy. D's instruction stated to withdraw from conspiracy, D must cease his activity in the conspiracy & take affirmative act to defeat or disavow conspiracy's purposes either by making full confession to authorities or by communicating his withdrawal in a manner reasonably calculated to inform co- conspirators, & his withdrawal must be both complete & in good faith.

Withdrawal from conspiracy is affirmative defense under federal law, of which D's instruction adequately set forth elements of defense but is not recognized under Indiana law. However, D argued that instruction is correct statement of abandonment defense, which was not covered by any other instructions. State argued that pursuant to Ind. Code 35-41-3-10, abandonment is defense that person who engaged in prohibited conduct voluntarily abandoned effort to commit underlying crime & voluntarily prevented its commission. Comparing defenses of withdrawal & abandonment, it is clear that both consist of same concepts because they require D to forsake the conspiracy. State further argued that tendered instruction would have reduced D's burden in establishing affirmative defense. Ct. disagreed, noting that defense of withdrawal requires D to affirmatively act to defeat conspiracy, whereas abandonment requires only that D voluntarily abandon effort to commit crime. Good analogy is that abandonment is lesser-included defense of withdrawal. While withdrawal has never been recognized as defense in Indiana & D bears additional burden of demonstrating that he took affirmative act to defeat goals of conspiracy to establish withdrawal defense, withdrawal & abandonment are essentially same defense. Further, instruction was not covered by other instructions & there was evidence in record that would support giving it, therefore Tr. Ct. abused its discretion by refusing instruction. Held, conspiracy to commit murder conviction reversed & remanded.

TITLE: Wilhoite v. State

INDEX NO.: K.2.c.

CITE: (4/23/2014), 7 N.E.3d 350 (Ind. Ct. App 2014)

SUBJECT: Charge of "conspiring to attempt to commit robbery" - no fundamental error

HOLDING: Ind. Code § 35-41-5-3(a) provides that "a person may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime." Here, although the State charged D with the non-existent crime of "conspiracy to commit attempted armed robbery," the record shows he was actually convicted of conspiring to commit armed robbery and jury was instructed on elements of conspiracy. Thus, Court rejected D's claim he was convicted of a crime that does not exist. At trial, D never challenged the charging information so the issue was reviewed under the fundamental error standard on appeal. Although Court agreed people should not be charged with conspiring to attempt a crime (see Ind. Code 35-41-5-3(a)), it nonetheless held D had not demonstrated fundamental error because errors in the charging information are only fatal if they mislead the D or fail to give him notice of the charges filed against him. Held, judgment affirmed.

K. CRIMES

K.2. Offenses of general applicability

K.2.c.1. Elements of

TITLE: Conn v. State

INDEX NO.: K.2.c.1.

CITE: (05-12-11), 948 N.E.2d 849 (Ind. Ct. App 2011)

SUBJECT: Conspiracy to commit murder - sufficient evidence

HOLDING: State presented sufficient evidence of overt acts to prove conspiracy to commit murder, including : 1) D's sister performing surveillance of alleged victim's (AV's) home and reporting back as to what she observed; 2) D, at his father's direction, surveilling AV's mobile trailer park; and 3) D testing a homemade silencing device on a shotgun. Unlike attempts to commit felonies, there is no requirement that in order to prove a crime of conspiracy State must prove that the overt act went beyond preparatory steps. Owens v. State, 929 N.E.2d 754 (Ind. 2010). D challenged his surveillance of mobile home park because "they were watching the wrong trailer" and thus the surveillance "did not further the plan to kill [AV]." Court could not say that information gleaned from surveillance was entirely useless. Moreover, State is not required to show that the act actually advanced the objective, per se, but rather that the act was done for the purpose of advancing, or "in furtherance of," the agreement. Archbold v. State, 397 N.E.2d 1071 (Ind. Ct. App 1979) (noting that conspiracy to commit a felony can be committed despite the fact that the goal of the conspiracy is factually impossible to achieve). Any one of the three overt acts presented by State was enough to prove that a conspiracy to murder AV existed. Held, judgment affirmed.

TITLE: Erkins v. State

INDEX NO: K.2.c.1.

CITE: (7/22/2014), 13 N.E.3d 400 (Ind. 2014)

SUBJECT: Conspiracy - intent to commit SBI is sufficient to prove enhancement

HOLDING: There is sufficient evidence to support D's conviction for Conspiracy to Commit Robbery Resulting in Serious Bodily Injury (SBI), as a Class A felony, despite the fact that the victim was never injured. A persons conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same class as the underlying felony. Ind. Code 35-41-5-2. Further, a person who knowingly or intentionally takes property from another person or from the presence of another person by using or threatening the use of force on any person or by putting any person in fear commits robbery, a Class C felony. However, the offense is a Class A felony if it results in SBI to any person other than the D. Ind. Code 35-42-5-1.

Here, the State eavesdropped on D's conversations with another regarding robbing the victim who was winning money at a casino. D's co-conspirator followed and surveyed the targeted victim. During their conversations, D and co-conspirator discussed using violence, if necessary, against the targeted victim. The police arrested D and co-conspirator before any robbery occurred. This was sufficient evidence of conspiracy to commit class A felony robbery. The State did not have to show actual SBI. Intending and agreeing to commit SBI was sufficient. Held, judgment affirmed; Rucker and Dickson, JJ., dissenting on basis that SBI is not an element of the crime but rather an enhancement, that this Court has required actual SBI in order to enhance conspiracy in the past, and that the majority's decision provides a greater penalty for conspiracy to commit a crime than the actual crime.

TITLE: Ocasio v. U.S.
INDEX NO.: K.2.c.1.
CITE: (5/2/2016), 136 S. Ct. 1423 (U.S. S. Ct 2016)
SUBJECT: Scope of conspiracy to extort under federal Hobbs Act
HOLDING: D could be convicted under The Hobbs Act of conspiring to commit extortion, even though D accepted money from his co-conspirators, not from someone outside the conspiracy.

D, a Baltimore police officer, participated in a kickback scheme with the owners of a local auto repair shop called "Majestic Auto Repair Shop ("Majestic"). Under the scheme, when D and other officers reported to the scene of an accident, they would persuade the owners of the damaged cars to have their cars towed to Majestic. In turn, the owners of Majestic paid kickbacks to the officers ranging between \$150 and \$300 per referral. At one point these referrals constituted 90% of Majestic's business.

The Hobbs Act makes it a crime to affect commerce by extortion. 18 U. S. C. §1951(a). "Extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." §1951(b)(2) (emphasis added). In Evans v. U.S., 504 U. S. 255, 260 (1992), the Court broadened the meaning of extortion to include acts that were roughly equivalent to bribery. Id., at 260.

Here, it was not necessary for the Government to prove that payment came from someone who was not part of the conspiracy. It needed only to prove an agreement that one of the conspirators committed each element of the substantive offense, which it did by proving the agreement between D and the owners of Majestic.

In dissent, Justice Sotomayor said the majority departed from the normal understanding of extorting "another person." The majority did not base its ruling in an analysis of "another person" but in, as the majority put it, "age-old principles of conspiracy law." However, these principles were most commonly applied in cases arising from an entirely different statute, The Mann Act. Held, cert. granted, Fourth Circuit decision at 750 F.3d 399 affirmed, and judgment affirmed. Alito, J., joined by Kennedy, Ginsburg, Breyer, and Kagan, JJ; Breyer, J., concurring; Thomas, J., dissenting; Sotomayor, J., dissenting, joined by Roberts, C.J.

TITLE: Perkins v. State
INDEX NO: K.2.c.1.
CITE: (10/25/85) Ind., 483 N.E.2d 1379
SUBJECT: Conspiracy (C) - elements; sufficiency
HOLDING: Evidence was sufficient to sustain Ds' convictions for C to traffic in controlled substance with an inmate. Elements of C are: (1) intent to commit felony; (2) agreement with another person to commit felony; & (3) overt act in furtherance of agreement. Williams 409 N.E.2d 571. Intent may be inferred from acts committed & from surrounding circumstances. Reese 452 N.E.2d 936; Williams. Prosecution need not present direct evidence of formal express agreement. Survance 465 N.E.2d 1076. Here, testimony of co-Cs & direct evidence of trafficking established intent, agreement & overt act. Held, convictions affirmed.

RELATED CASES: CIRCUMSTANTIAL EVIDENCE OF EXISTENCE OF C: Haynes, 479 N.E.2d 572 (facts show D aided friend in quest for vengeance); Smith, 465 N.E.2d 1105 (2 men aware that police officer is entering building suddenly & without warning open coordinated gunfire). FEIGNED CONSPIRACY: McBride, App., 440 N.E.2d 1135 (C may be committed even though 1 party is feigning criminal activity, as with sting operations, citing Garcia, 394 N.E.2d 106); SUFFICIENCY: Hammers, 502 N.E.2d 1339 (evidence sufficient to sustain conviction for conspiracy to commit murder); Isom, 501 N.E.2d 1074 (where D & co-D armed themselves & intended to "get back" at victim, conducted methodical search for victim & immediately attacked, shot, & killed him, evidence was sufficient to support conviction for conspiracy to commit murder); Lewis, App., 493 N.E.2d 822 (sale of stolen cars to police held insufficient to prove conspiracy; DISSENT finds evidence sufficient as to 1 co-D based on his telephone conversation with officer); Fadell, App., 450 N.E.2d 109 (conviction for C to commit perjury in affidavit affirmed); McBride (D's conviction for C to commit theft reversed; D agreed to sell stolen car to police in sting operation, but evidence shows no contemporaneous agreement amounting to C, citing US v. Prieskorn (CA8 1981), 658 F.2d 631).

K. CRIMES

K.3. Offenses against the person

K.3.a. Battery/related offenses

TITLE: Bailey v. State

INDEX NO.: K.3.a.

CITE: (11/5/2012), 979 N.E.2d 133 (Ind. S. Ct. 2012)

SUBJECT: Battery - bodily injury; sufficient evidence of pain

HOLDING: The State presented sufficient evidence that D's wife suffered bodily injury as a result of his poking and shoving her. In order for a D to be guilty of domestic battery, the State must prove the battery resulted in bodily injury. Bodily injury is defined as "any impairment of physical condition, including physical pain." Ind. Code 35-31.5-2-29. Here, D's wife testified that she was shoved and repeatedly poked in the forehead by D and that each of these acts caused her pain. Although D denied touching his wife, the Tr. Ct. believed the wife over D and this credibility determination will not be disturbed. Despite prior Indiana cases all including higher levels of injury to the victims than the instant case, the courts have never said that a particular level of pain is required in order to rise to the level of impairment of physical condition and thus satisfy the definition of bodily injury. Rather, the proper reading of the prior caselaw and the statute is that physical pain is an impairment of physical condition. Because any physical pain is sufficient to prove bodily injury, D's wife's testimony that the poking and shoving hurt was sufficient to prove the bodily injury element of domestic battery. Held, Court of Appeals Memorandum Opinion vacated and the judgment of the Tr. Ct. affirmed.

TITLE: Cupello v. State

INDEX NO.: K.3.a.

CITE: (3/11/2015), 27 N.E.3d 1122 (Ind. Ct. App 2015)

SUBJECT: Right to use reasonable force to prevent public servant's unlawful home entry

HOLDING: In prosecution for battery on law enforcement officer D exercised reasonable force under Ind. Code § 35-41-3-2(i)(2) to prevent or terminate an unlawful entry by a public servant into his home. Statute was amended in response to Barnes v. State, 953 N.E.2d 473 (Ind. 2011), which held that the Castle Doctrine is not a defense to battery or another violent act on a police officer. Here, D slammed his apartment front door on the foot of an off-duty constable (Webb) who was employed by the apartment complex as a part-time courtesy officer. The complex told Webb that D had been verbally intimidating to apartment staff, so Webb went to his apartment to investigate “reports of intimidation.” Webb stuck his foot just inside D’s apartment once he opened the door to prevent him from slamming the door closed. When D became upset, he tried closing the door several times, striking Webb’s foot. This caused Webb to call for backup and arrest D for battery.

Court found that the State proved that Webb was engaged in the performance of his official duties under the resisting law enforcement statute, even though during that incident, Webb was not in uniform nor did he identify himself as a constable to D. But the two had encountered each other on a prior occasion. When Webb went to the apartment, D told him he wanted to press charges against an apartment complex employee for harassment, which could lead one to infer D knew Webb as both a law enforcement officer and acting in his official capacity.

But based on the revised statute, D had the right to exclude Webb from his home and used reasonable force to do so. The placement of Webb’s foot inside the threshold of the apartment door was unlawful entry by a public servant. D used reasonable force to prevent or terminate Webb's unlawful entry by closing his door, so the facts do not support his conviction. Held, judgment reversed; Mathias, J., concurring with separate opinion in which he encourages the Legislature to clarify what easily visible and audible indicia are required to place citizens on notice that they are dealing with an off-duty law enforcement officer who is acting in his official capacity. Legislature should also consider the clearly intended and confusing appearance of private security personnel dressed in uniforms of the same color, and with identification patches that are nearly the same as those worn by sworn officers, as it has done with its strict limitation of blue and red emergency lighting on private vehicles. See Ind. Code § 9-21-7-10.

TITLE: Johnson v. State

INDEX NO.: K.3.a.

CITE: (2nd Dist., 3-4-04), Ind. App., 804 N.E.2d 255

SUBJECT: Battery on child with injury - sufficiency; claim of legal authority to discipline

HOLDING: Evidence was sufficient to support D's conviction for battery on a child with injury as a Class D felony. After learning that her thirteen-year-old daughter had sex with a teenage boy, D jumped on daughter, knocked her down, dragged her down three concrete steps, & repeatedly hit her, resulting in bloodied lip & bruise on her head. State witness's uncorroborated testimony alone was sufficient to prove element of bodily injury. Toney v. State, 715 N.E.2d 367 (Ind. 1999). Evidence was also sufficient to overcome D's legal authority or parental right to discipline her daughter. Although legal authority statute, Ind. Code 35-41-3-1, has been interpreted to permit a parent to engage in reasonable discipline of her child, parental discipline must not be cruel or excessive. Smith v. State, 489 N.E.2d 140 (Ind. Ct. App 1986). Evidence was sufficient for Tr. Ct. to have found that D's treatment of her daughter was excessive & did not constitute reasonable parental discipline. Held, judgment affirmed.

RELATED CASES: Cooper, App., 831 N.E.2d 1247 (State prove beyond reasonable doubt that D knowingly or intentionally touched her child in angry manner causing injury); Mitchell, App., 813 N.E.2d 422 (rejecting D's legal authority argument, Ct. found that actions by D of holding a 4-year-old over a dropped bottle while yelling at him to pick up the f***in bottle," listing the child by his shirt abruptly & then allowing the child to drop to the floor (accidently or purposefully) before kicking his leg at him, while repeatedly calling the child a "f***in spoiled brat" along with testimony of bodily injury was sufficient to sustain conviction).

TITLE: Smith v. State

INDEX NO.: K.3.a.

CITE: (3rd Dist., 03-07-08), Ind. App., 881 N.E.2d 1040

SUBJECT: Aggravated battery - tooth is a "bodily member or organ"

HOLDING: A person commits aggravated battery by knowingly or intentionally inflicting injury on a person that causes protracted loss or impairment of the function of a bodily member or organ. Ind. Code 35-42-2-1.5. Addressing a matter of first impression, Court held that a tooth is a "bodily member or organ" within the definition of this statute. Here, D damaged the victim's tooth during an assault, and the tooth later had to be surgically removed and artificially replaced. "Protracted" means "to draw out or lengthen in time or prolong." "Impairment" means "the fact or state of being damaged, weakened, or diminished." Because victim permanently lost the function of her tooth, the evidence was sufficient to sustain D's aggravated battery conviction. Held, judgment affirmed in part and reversed in part.

TITLE: State v. Fettig

INDEX NO.: K.3.a.

CITE: (2nd Dist., 04-15-08), Ind. App. 884 N.E.2d 341

SUBJECT: Dismissal of battery charge affirmed - corporal punishment in schools

HOLDING: Tr. Ct. did not abuse its discretion by dismissing battery charge against teacher. Ind.

Code 35-34-1-4(5) provides that an information may be dismissed when facts stated do not constitute an offense. A Tr. Ct. considering a motion to dismiss need not rely on text of charging information but can hear and consider evidence in determining whether or not a D can be charged with crime alleged. Zitlaw v. State, 880 N.E.2d 724 (Ind. Ct. App 2008). Here, Tr. Ct. found that gym teacher used a measure of touching during a classroom disturbance to restore order and redirect focus of class. No weapon was used, no closed fists, no repeated blows or verbal abuse; just an open-handed touching to the face of a fifteen-year-old student which caused her face to sting. Ind. Code 20-33-8-8(b) provides that teachers have the right to take disciplinary action as necessary to conduct orderly and effective education. Moreover, the judiciary has the ability to determine whether a teacher has acted within the bounds of her authority to discipline when striking a student. Considering these facts, in context of right of teachers to be free from criminal prosecution for physical punishment that is neither cruel nor excessive, Tr. Ct. did not abuse its discretion in dismissing battery charge against D. Held, judgment affirmed; Kirsch, J., dissenting, believes that "State should have its day in court."

RELATED CASES: Ceasar, 964 N.E.2d 911 (Ind. Ct. App 2012) (agreeing with dissent in Fettig, Ct. held that whether an individual has a statutory defense to charges in an information goes beyond the issues that may be decided by a motion to dismiss and instead is a matter to be decided at trial); Littleton, 954 N.E.2d 1070 (Ind. Ct. App 2011) (given the inability to control autistic child's self-injurious behavior, efforts to gradually try new measures to bring child's conduct under control, and an apparent lack of training or established school rules for measures to control the child's behavior, teacher's condoning of confining the child for a limited duration was neither unreasonable use of force nor based upon an unreasonable belief that such action was necessary to protect the child and others in the classroom; teacher was immune from prosecution for battery, neglect of dependent and confinement); Barocas, 949 N.E.2d 1256 (Ind. Ct. App 2011) (Ct. reversed battery conviction against teacher who "flicked" a special education student's tongue with her finger to control student's behavior of sticking out her tongue; D's force against student was not cruel or excessive, nor did it rise to the level of unreasonable force).

TITLE: Willis v. State
INDEX NO.: K.3.a.
CITE: (06-10-08), 888 N.E.2d 177
SUBJECT: Legal authority - State failed to negate parental discipline privilege
HOLDING: In battery prosecution, State failed to negate D's defense of parental discipline privilege.

To sustain a conviction for battery where a claim of parental privilege has been asserted, State must prove that either: (1) the force that parent used was unreasonable; or (2) the parent's belief that such force was necessary to control her child and prevent misconduct was unreasonable. In determining whether the force is reasonable for the control, training or education of a child, the following factors may be considered: (1) whether the actor is a parent; (2) the age, sex, and physical and mental condition of the child; (3) the nature of his offense and his apparent motive; (4) the influence of his example upon other children of the same family or group; (5) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command; and (6) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm. This list is not exhaustive.

Here, D's twelve-year-old son had ongoing disciplinary problems when he stole his mother's clothing and gave it to another boy at school. When confronted by his mother about the clothing, her son lied. D warned her son that if he did not tell the truth he would be punished. Again, the child lied. D instructed her son to remove his pants and she struck him five to seven times with a belt or an extension cord, leaving bruises on his arm and thigh. Most parents would consider as serious their child's behavior in being untruthful and taking property of others. Moreover, D had tried progressive forms of discipline, like grounding, that failed to work. Lastly, the child testified that the swats hurt "for a minute" but did not hurt the next day when he returned to school. Considering the totality of the circumstances, State failed to disprove the defense of parental discipline privilege beyond a reasonable doubt. Held, transfer granted, Court of Appeals' opinion at 866 N.E.2d 374 vacated, judgment reversed; Sullivan, J., dissenting on basis that the majority's opinion changes the policy on child abuse and that a policy change should be left to the legislative and executive branches, not the judiciary.

RELATED CASES: Pava, (142 N.E.3d 1071 (Ind Ct. App. 2020) (battery on child statute was not unconstitutionally vague as applied to D, because it sets forth a scienter requirement and because the Indiana Supreme Court in Willis implemented a reasonableness standard to assess the parental discipline privilege which provides sufficient notice of what conduct crosses the line from mere discipline of a child to battery); Fernanders, 112 N.E.3d 222 (Ind. Ct. App 2018) (State presented sufficient evidence to refute parental privilege defense where D spanked his six-year-old daughter on her bare buttocks with a belt, multiple times, with sufficient force to leave large bruises and to cause her to limp afterward; D used an unreasonable amount of force when disciplining his child for repeatedly speaking out of turn in her first-grade class at school); Carter, 67 N.E.3d 1041 (Ind. Ct. App 2016) (sufficient evidence for D's conviction for battery resulting in bodily injury, despite parental discipline privilege, where D beat 14-year-old daughter 4 times with belt, injuring her back, buttocks, and arm); Smith, 34 N.E.3d 252 (Ind. Ct. App 2015) (Mother's use of corporal punishment on 13-year-old daughter was unreasonable; she whipped daughter 10-20 times with a belt, leaving welts, scratches and bruises on daughter's face, shoulder, arms, and legs); Hunter, 950 N.E.2d 317 (Ind. Ct. App 2011) (fact that child's step-mother and half-brothers were at home makes the near-naked conversation and punishment unnecessarily embarrassing and degrading; further, nothing suggests the discipline was

used as an example to influence the half-brothers' behavior; finally, D hit child with belt with enough force that a scab on her thigh and her swollen middle fingers still hurt more than three months later); Matthew, App., 892 N.E.2d 695 (under these circumstances, sufficient evidence exists to support the Tr. Ct.'s finding that D's hitting her daughter, J.M., repeatedly with a closed fist and a belt – both in the bathroom and then, after J.M. escaped, in the bedroom – was not unreasonable; Baker, C.J., dissenting on basis that although agreeing in principle with the majority, the Indiana Supreme Court's holding in Willis requires reversal).

K. CRIMES

K.3. Offenses against the person

K.3.a.1. Battery/sexual battery (Ind. Code 35-42-2-1)

TITLE: Adetokundo v. State
INDEX NO.: K.3.a.1.
CITE: (4/27/2015), 29 N.E.3d 1277 (Ind. Ct. App 2015)
SUBJECT: Battery conviction reversed due to material variance re: victim's identity
HOLDING: Proof of battery against a person other than the victim named in the charging information is not an immaterial variance. The State's charging information must include the name of the victim or any person whose identity is essential to a proper description of the offense. See, e.g., Robinson v. State, 232 Ind. 396, 112 N.E.2d 861 (1953).

Here, Court reversed battery conviction where charging information alleged D touched a DCS security guard in a rude, insolent, and angry manner but at trial, the State failed to present any evidence she made any contact with the security guard. At trial, there was testimony that D pushed a police officer who arrived at the scene to assist. But any variance resulting from evidence that D committed a different battery against another victim is a material, fatal variance, "and the State's argument to the contrary is unconvincing." Court distinguished fleeing law enforcement cases where naming the wrong officer in the charging information was found to be an immaterial variance. Held, disorderly conduct and resisting law enforcement convictiond affirmed, battery conviction reversed.

TITLE: Anderson v. State

INDEX NO.: K.3.a.1.

CITE: (3rd Dist., 12-31-96), Ind. App., 674 N.E.2d 184

SUBJECT: Retroactive application of aggravated battery statute - fundamental error

HOLDING: Conviction for aggravated battery, which was added to Indiana Code after commission of offense, violated constitutional proscriptions against ex post facto laws & was fundamental error. Ct. rejected State's argument that D invited error by seeking instruction on aggravated battery as lesser included offense in attempted murder trial. Invited error doctrine may not apply to convict person of non-existent crime. Vandeventer v. State, 459 N.E.2d 1221 (Ind. Ct. App 1984). Double jeopardy precluded D from being retried for attempted murder charge. Although jury did not expressly acquit D of attempted murder, jury's conviction of what was thought to be lesser included offense implies acquittal & precludes further prosecution for attempted murder. New trial was not necessary, because charging information alleged elements necessary for battery with deadly weapon, & jury was instructed on that charge. There was no question that had Tr. Ct. refused D's request to offer lesser included offense of aggravated battery, jury would have found D guilty of battery with deadly weapon. Held, conviction reversed & remanded with instructions to enter judgment & sentence on offense of battery with deadly weapon, as class C felony.

TITLE: Bowling v. State

INDEX NO.: K.3.a.1.

CITE: (10/2/2013), 995 N.E.2d 715 (Ind. Ct. App 2013)

SUBJECT: Person may be convicted of domestic battery even if they batter someone other than spouse

HOLDING: A person may be convicted of Domestic Battery (IC 35-42-2-1.3) even if the person batters someone other than their spouse, if the person they batter was living as if a spouse to the batterer. Here, D was married but was involved in a romantic relationship with C.C. They lived together off and on, once as long as five months. One day in May of 2012, D and C.C. fought in their residence. C.C. had visible injuries, and the State charged D with Domestic Battery.

D is wrong that including extramarital affair participants impermissibly broadens the scope of the Domestic Battery statute, as long as such a relationship falls within the is-or-was-living-as-if-a-spouse requirement of subsection (a)(2). In other words, "the fact that the D is legally married does not shield D from the domestic battery statute if he or she batters another person with whom he or she has shared a domestic relationship." Held, judgment affirmed.

TITLE: Bowman v. State
INDEX NO.: K.3.a.1.
CITE: (3/29/2017), 73 N.E.3d 731 (Ind. Ct. App 2017)
SUBJECT: Removal of prosthetic eye in front of jury permissible to show "protracted" injury"
HOLDING: In an issue of first impression, the Court of Appeals ruled that the Tr. Ct. did not abuse its discretion in allowing the victim to remove her prosthetic eye in the presence of the jury to demonstrate her "protracted injury."

Defendant's mother asked Defendant why she had been smoking marijuana in her (the mother's) home. Defendant responded, "I don't give a fuck." The mother took offense, confronted Defendant, and a fight ensued. Others separated the two, but Defendant retreated to her car, retrieved some sort of object, and struck her mother in the eye with the object, damaging hereye so severely that doctors had to remove it. Defendant's mother was later fitted with a prosthetic eye. Defendant was convicted of Aggravated Battery, a level 3 felony, and Battery Resulting in Serious Bodily Harm, a level 5 felony.

Defendant argued she was prejudiced when the Tr. Ct. permitted her mother to remove her prosthetic eye in the presence of the jury to demonstrate the severity of her injury. The State had already admitted, without objection, photographs of the eye injury. Defendant argued the relevancy of a live demonstration was substantially outweighed by the prejudicial effect of the gruesome injury and inflamed the passions of the jury, in violation of Evidence Rule 403. The Court acknowledged that a "conventional alternative," a picture of the mother's severely damaged eye, was already in front of the jury - see Crain v. State, 736 N.E.2d 1223, 1234 (Ind. 2000) - yet the State carried the burden to prove more, that the mother suffered a "protracted injury." Therefore, "the prosthetic eye was relevant and probative given the State's burden to prove a protracted injury." See Ind. Code § 35-42-2-1.5(2). Held, judgment affirmed.

RELATED CASES: Crain, Ind., 736 N.E.2d 1223 (trial court did not abuse discretion in allowing victim to remove her prosthetic eye in presence of the jury to demonstrate her "protracted injury"; see full review, this section).

TITLE: Brown v. State
INDEX NO.: K.3.a.1.
CITE: (10/31/2016), 62 N.E.3d 1232 (Ind. Ct. App 2016)
SUBJECT: Battery - reasonable intrusion into D's home
HOLDING: State presented sufficient evidence to support D's conviction for battering a public safety officer, where officers lawfully entered his home because they suspected him of being armed and dangerous. Police knocked on D's front door in response to his threat to use unreasonable deadly force against his neighbors in defense of his property. When D opened the door, the officers could not see his right hand. D told them he had laid his gun on the counter and did not have it in his right hand, but when one of the officers asked him to put his hands up, he refused. The officers were eventually able to get into the home, and when one of the officers tried to reach out and handcuff D, he struck him in the face and pushed the other officer into the wall.

Applying three factors for reasonableness set forth in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), Court held that the officers' limited intrusion into D's privacy was justified by the immediate, urgent need to protect themselves and members of the public from a man whom the officers reasonably believed to be armed and dangerous. It would be "entirely unreasonable" to require the officers to turn their backs on D because they believed he was armed and noncompliant and because he had made serious threats to his neighbors. Requiring officers to turn their backs on D would not have promoted a feeling of safety in the community. Thus, under the totality of the circumstances, officers acted lawfully in taking steps to end the emergency and there was no need to reach the question of whether D acted with reasonable force in self-defense. Held, judgment affirmed.

TITLE: Burgh v. State

INDEX NO.: K.3.a.1.

CITE: (6/23/2017), 79 N.E.3d 955 (Ind. Ct. App 2017)

SUBJECT: Pavement can be a "deadly weapon"

HOLDING: In an issue of first impression, the Court of Appeals held that the State's evidence that Defendant slammed the victim's head six times into a paved parking was sufficient to show that Defendant battered the victim with a deadly weapon. Among other things, "deadly weapon" refers to any "material that in the manner it: (A) is used; (B) could ordinarily be used; or (C) is intended to be used; is readily capable of causing serious bodily injury." I.C. § 35-31.5-2-86(a)(2). Whether an object is a deadly weapon is determined from the nature of the object, the manner of its use, and the circumstances of the case. E.g., Gleason v. State, 965 N.E.2d 702, 708 (Ind. Ct. App. 2012). "While we commonly think of a weapon as a moveable object, as this case illustrates a stationary object can also be used as a weapon. A paved surface is 'other material' that is 'readily capable of causing serious bodily injury' depending on the manner in which the surface is actually used. I.C. § 35-31.5-2-86(a)(2). We also reject [Defendant's] argument that a paved surface was not within our General Assembly's contemplation when it defined 'deadly weapon'; on this point, the broad and fact-sensitive language of Indiana Code Section 35-31.5-2-86(a)(2) speaks for itself. Accordingly, we affirm [Defendant's] conviction for battery, as a Level 5 felony." Held, judgment affirmed.

TITLE: Carmouche v. State

INDEX NO.: K.3.a.1.

CITE: (05/17/2022), Ind. Ct. App., 188 N.E.3d 482

SUBJECT: Battery conviction reversed; Defendant never advised of his jury rights and insufficient evidence of battery

HOLDING: After a bench trial, Defendant was convicted of battery as a class A misdemeanor stemming from a jailhouse incident wherein, he was alleged to have kicked a door against the knee of the jail's mail clerk. The Court of Appeals reversed his conviction after finding his jury trial waiver was invalid because he was never advised of his jury trial right or how to assert it. The Court went on to find insufficient evidence of the battery in light of the video footage that clearly shows the door did not touch the clerk's knee, indisputably contradicting the State's case. In light of this finding, the Court held Defendant cannot be retried. Held, reversed, and discharged.

TITLE: Casey v. State

INDEX NO.: K.3.a.1.

CITE: (4th Dist., 12-16-97), Ind. App., 689 N.E.2d 465

SUBJECT: Aggravated battery - sufficiency

HOLDING: Where State proved that D participated in illegal act, State presented sufficient evidence to support D's conviction of aggravated battery. It is not necessary for State to show that D was party to preconceived scheme; it must merely demonstrate concerted action or participation in illegal act. Tynes, 650 N.E.2d 685. Here, after D threw ceramic plate at victim's vehicle, victim exited vehicle & D punched victim. D, along with others, began kicking & stomping on victim until victim was in coma. Although State failed to prove which attacker caused life-threatening injuries & that attackers acted in conspiracy, State did prove that D committed battery on D, D suffered life-threatening injuries & joint actions of D & others caused these injuries. Thus, D participated in aggravated battery of victim. Held, conviction affirmed.

TITLE: Coleman v. State

INDEX NO.: K.3.a.1.

CITE: (06/30/2020), 149 N.E.3d 313 (Ind. Ct. App. 2020)

SUBJECT: Battery by bodily fluid statute not unconstitutionally vague and saliva is considered a bodily fluid under the statute

HOLDING: Defendant, an inmate at Wabash Valley correctional facility, spit on a corrections officer. He was charged with battery by bodily fluid against a public safety official and convicted by a jury. On appeal Defendant argued "bodily fluid" is not defined in the statute and therefore the statute was unconstitutionally vague as applied to him. Court of Appeals looked to the dictionary definition to find that a person of ordinary intelligence would know that the term bodily fluid would include saliva. Conviction affirmed.

TITLE: Cornelious v. State

INDEX NO.: K.3.a.1.

CITE: (4/9/2013), 988 N.E.2d 280 (Ind. Ct. App 2013)

SUBJECT: Aggravated battery - injuries from stabbing resulted in serious permanent disfigurement

HOLDING: For purposes of serious permanent injury required to prove aggravated battery (Ind. Code 35-42-2-1.5), Court has defined "permanent" as "continuing or enduring without fundamental or marked change" and "disfigure" as: "to make less complete, perfect or beautiful in appearance or character: deface, deform, mar." James v. State, 755 N.E.2d 226 (Ind. Ct. App 2001). Here, sufficient evidence demonstrated victim of stabbing suffered serious permanent disfigurement. The cut to victim's face was approximately twelve inches long and almost one inch deep. Victim testified he wore a beard to hide the scar, and it "mess[ed] with him mentally" when he looked in the mirror.

TITLE: Cushenberry v. State

INDEX NO.: K.3.a.1.

CITE: (4th Dist., 7-30-03), Ind. App., 792 N.E.2d 571

SUBJECT: Habitual offender & aggravated battery - no double enhancement

HOLDING: Indiana's aggravated battery statute, Ind. Code 35-42-2-1.5, does not constitute a habitual offender statute, nor is it part of a sentencing scheme that progressively elevates classifications of an offense based upon identified criteria with features similar to habitual offender statute, as was the case in Ross v. State, 729 N.E.2d 113 (Ind. 2000). Unlike habitual traffic offender scheme & handgun statute, the aggravated battery statute is a discrete & separate statute defining a single offense. Aggravated battery is, by definition, a class B felony. Thus, D's conviction of aggravated battery does not represent an elevation of a lesser classification of aggravated battery. As a result, imposition of a habitual offender enhancement did not represent a second enhancement of the aggravated battery offense. Held, denial of motion to correct erroneous sentence affirmed.

TITLE: Davis v. State

INDEX NO.: K.3.a.1.

CITE: (5th Dist., 10-3-03), Ind. App., 796 N.E.2d 798

SUBJECT: Domestic battery - "living as if a spouse"

HOLDING: In appeal of D's domestic battery conviction, Ct. concluded sua sponte that D, although not married to victim, could be considered a person who "is or was living as a spouse of the other person" under Ind. Code 35-42-2-1.3(2). Ct. specifically addressed this issue because statute was found unconstitutionally vague as applied to the D in Vaughn v. State, 782 N.E.2d 417 (Ind. Ct. App 2003). Here, Ct. relied on facts that D lived with victim several months, cared for her children, implied that he was a better caregiver than victim & stayed with her because he loved her to show that spouse-like commitment existed unlike situation in Vaughn. Thus, the "living as if a spouse of the other person" language was susceptible of meaning so as to place D on notice that his conduct violated domestic battery statute. Held, judgment affirmed; Baker, J. concurring, disagrees with Vaughn, believes that Ind. Code 35-42-2-1.3(2) is constitutional & that difference between Vaughn & this case is simply a question of factual proof regarding "living as if a spouse." Sullivan, J. concurring, disagrees with interpretation of Vaughn as to opinions in this case. He believes lead opinion wrongly correlates D's statements of a love relationship existing as to determination that a spouse-like commitment exists. In answer to Judge Baker's concurrence, Judge Sullivan states that prior to Vaughn, State benefitted from an extremely deferential burden of proof as to showing that a person was "living as a spouse" & this broad interpretation led to the unconstitutional vagueness problems of the statute.

All opinions note that as a likely response to Vaughn, the legislature amended Ind. Code 35-42-2-1.3. The amended statute now directs factfinders to consider "(1) the duration of the relationship; (2) the frequency of contact; (3) the financial independence; (4) whether the two individuals are raising children together; (5) whether the two individuals are raising children together; & (6) other factors the Ct. considers relevant" to determine if a person "was living as a spouse of the other person." See Ind. Code 35-42-2-1.3(b).

RELATED CASES: Jackson, 165 N.E.3d 641 (Ind. Ct. App. 2021) ("dated or has dated" language in statutory definition of "family or household member" is not unconstitutionally vague and as applied to facts of this case is sufficiently clear to have informed D of the conduct that is prohibited); Croy, 953 N.E.2d 660 (Ind. Ct. App 2011) (although CW ended romantic relationship two weeks before crimes, D testified that he and CW still lived and remained in the same household and considered it to be his residence; they also shared a bedroom and D kept personal property at CW's home; held, evidence sufficient to demonstrate that D and CW had a spousal relationship at time he confined and attacked her); Williams, App., 924 N.E.2d 121 (statutory definition of "family or household member" is not void for vagueness; the phrase "is or was engaged in a sexual relationship with the other person" is sufficiently definite to inform ordinary person of prohibited conduct and to avoid arbitrary and discriminatory enforcement of statute); Williams, App., 798 N.E.2d 457 (legislature did not intend factors listed in Ind. Code 35-42-2-1.3(b) to serve as litmus test to determine whether batterer was "living as if a spouse").

TITLE: Delahanty v. State

INDEX NO.: K.3.a.1.

CITE: (5th Dist., 12-14-95), Ind. App., 658 N.E.2d 600

SUBJECT: Battery & sexual battery - double jeopardy

HOLDING: D's convictions for both battery causing bodily injury & sexual battery did not violate double jeopardy, because offenses as charged were not same, & battery causing bodily injury is not necessarily or inherently included offense of sexual battery. Class D felony battery requires that bodily injury result. Ind. Code 35-42-2-1(a)(2). Sexual battery requires proof of touching by force or imminent threat of force with intent to arouse or satisfy sexual desires. Ind. Code 35-42-4-8. Because each statutory provision requires element that other does not, offenses are not same for double jeopardy purposes. Charging information contained date of offenses, name of victim, & general statutory language; neither charge contained specific allegations of harm or injury to victim. D argued that charging information alleged no separate injurious conduct on which to predicate battery charge, as only conduct involved in charging information was forced sexual intercourse. However, during attack, victim sustained multiple scratches & bruises. Although battery & sexual battery convictions arose from same operative circumstances, Ct. noted that separate factual basis for each charge was discernible from record. Held, convictions affirmed, Sullivan, J., dissenting.

TITLE: Gibbs v. State

INDEX NO.: K.3.a.1.

CITE: (11-02-20), Ind. Ct. App., 157 N.E.3d 562

SUBJECT: Insufficient evidence to support domestic battery enhancement-- no evidence CW was in care of Defendant

HOLDING: Defendant was convicted of domestic battery, elevated to a Level 5 felony because it resulted in bodily injury to a family or household member who has a mental or physical disability and who is in the care of the defendant. The complaining witness (C.W.) was obese, had bad knees, struggled to stand, and used an electric scooter. The Court of Appeals found insufficient evidence to support a conclusion Defendant voluntarily assumed care of C.W. First, there was no evidence C.W. was in anyone's care or that she needed or wanted care. Second, even if she did need some level of care because of her disability, there is no authority to support the proposition that anybody who enters a romantic relationship with such a person necessarily assumes the care of that person. The Court of Appeals remanded the case to the trial court for the entry of a conviction for a Class A misdemeanor.

TITLE: Gilbert v. State

INDEX NO.: K.3.a.1.

CITE: (2nd Dist., 10-16-07), Ind. App., 874 N.E.2d 1015

SUBJECT: Aggravated battery - using dog as weapon

HOLDING: Evidence was sufficient to support aggravated battery conviction, where D inflicted injuries by inciting her pit bull to attack the victim. Although dogs are living creatures, they can be weapons--even deadly weapons--when used as such by a human. See, e.g., State v. Bowers, 721 P.2d 268 (Kan. 1986). "If a D incites & encourages a dog to attack the victim, it is logical & just to hold the D, who knowingly or intentionally pulled the metaphorical trigger, responsible for the injuries caused by the weapons she wielded." Here, jury found that dog did not act of its own accord & was instead used by D as a weapon to attack victim. Held, conviction affirmed.

TITLE: Henderson v. State

INDEX NO.: K.3.a.1.

CITE: (3/9/89), Ind., 534 N.E.2d 1105

SUBJECT: Attempted battery - cognizable offense in Indiana

HOLDING: Because battery requires culpability of at least "knowingly" or "intentionally," attempted battery is cognizable offense in Indiana. D argues that attempt statute, Ind. Code 35-41-5-1, applies only to "specific intent" offenses, *citing Humes* 426 N.E.2d 379. D argues that Ind. S. Ct. has said in several decisions that battery is not a specific intent offense. Ind. S. Ct. acknowledges confusion, noting that use of term "specific intent" has not been universal or consistent. [citations omitted]. With regard to attempt statute, specific intent means that D must have level of culpability of at least knowingly or intentionally. [Citations omitted.] Because offense of battery, Ind. Code 35-42-2-1, requires proof that D knowingly or intentionally touched another person in rude, insolent, or angry manner, attempted battery is cognizable offense in Indiana. Held, conviction affirmed.

RELATED CASES: *Richeson*, 704 N.E.2d 1008 (in attempted battery prosecution, Tr. Ct. did not err in instructing jury that it could convict D if it found that he knowingly or intentionally attempted to touch victims)

TITLE: Holeton v. State

INDEX NO.: K.3.a.1.

CITE: (2nd Dist.; 09-06-06), Ind. App., 853 N.E.2d 539

SUBJECT: Domestic battery- prior conviction must be from Indiana

HOLDING: Domestic battery occurring prior to July 1, 2006, can be enhanced to a Class D felony on basis of prior conviction only if prior conviction was from Indiana under Ind. Code 35-42-2-1.3. In 1999, the legislature passed Ind. Code 35-42-2-1.3(a), creating the crime of domestic battery & enhancing domestic battery to a class D felony if the D has a "prior unrelated conviction under this section." Thus, a domestic battery conviction entered after 1999 could be enhanced to a class D felony only if the prior conviction had been entered in Indiana. Here, although there was sufficient evidence that a domestic battery occurred in Indiana on September 6, 2005, D's prior conviction for domestic battery occurred in Illinois. The prior Illinois conviction cannot be used to support the Class D felony enhancement. Held, judgment affirmed in part & reversed in part with instructions to enter judgment of conviction as a class A misdemeanor & re-sentence D accordingly.

NOTE: Effective July 1, 2006, legislature changed domestic battery statute to include, in addition to convictions under the domestic battery statute, domestic battery convictions that are entered in other jurisdictions. Ind. Code 35-42-2-1.3.

TITLE: Jaske v. State

INDEX NO.: K.3.a.1.

CITE: (6/1/89), Ind., 539 N.E.2d 14

SUBJECT: Battery - consent no defense

HOLDING: Victim's consent is no defense to battery charge. D offered victim chance to join "syndicate," with opportunities for jobs, cash, & early release from prison. Victim agreed to undergo initiation into syndicate, which involved having hands & feet bound while D beat initiate unconscious. This beating resulted in victim's death, & D's conviction for battery. On appeal, D argues that evidence was insufficient to support battery conviction because victim's consent constituted complete defense. Consent is not statutory element of battery. Ind. Code 35-42-2-1. Further, Ind. Code 35-38-1-7(c)(3) recognizes victim's inducement or facilitation of offense as mitigating circumstance in sentencing. From this, it is clear that legislature did not intend victim's consent to operate as bar to conviction. D cites *Vanvactor* in support of his argument. *Vanvactor* was teacher discipline case, which rested not on student/victim's consent but on teacher's right to use corporal punishment. Ind. S. Ct. finds *State v. Fransua* (N.M. Ct. App. 1973), 85 N.M. 1734, 510 P.2d 106, persuasive. In *Fransua*, D & victim were drinking in bar when argument developed. Victim retrieved gun from his car, laid it on bar, & told D to shoot him if he wanted to, which D did. New Mexico Ct. App. ruled that criminal statutes were intended not only to protect individual citizens from violent crime, but to prevent breach of public peace. While Ct. had little sympathy for victim's absurd actions, it rejected D's consent defense. Here, Ind. S. Ct. similarly rejects victim's consent as defense to battery. Held, consent no defense, but battery conviction & sentence vacated because double jeopardy bars D's conviction for both battery & involuntary manslaughter.

RELATED CASES: *Govan*, 913 N.E.2d 237 (Ind. Ct. App 2009) (although case involved sexual overtones, victim's consent was not a defense because D's actions involved a deadly weapon; jury could have reasonably concluded that victim did not consent to be branded with heated knife or beaten with extension cord)

TITLE: Lemon v. State
INDEX NO.: K.3.a.1.
CITE: (2nd Dist., 07-06-07), Ind. App., 868 N.E.2d 1190
SUBJECT: Battery - insufficient evidence; use of reasonable force to resist private security guard's unreasonable use of force

HOLDING: Ind. Code 35-41-3-2(a) & (c), providing justification for use of reasonable force to protect property, & citizen's arrest statute (Ind. Code 35-33-1-4) did not allow private security guard to arrest D without actual violence or the imminent threat of actual violence toward person or property. Here, evidence presented was insufficient to support D's battery conviction, because any injury sustained by security guard was a result of his unreasonable & unlawful use of force while attempting to arrest D. Security guard confronted D in parking lot while she knelt next to her ex-boyfriend's vehicle. Guard issued a verbal challenge to D, & D became argumentative & backed away from vehicle. Guard did not give D a reasonable period of time to leave parking lot before he grabbed her. Nothing in record indicates that D had engaged in or threatened any acts of violence until security guard initiated physical contact with her, & her actions prior to citizen's arrest by guard did not constitute a "breach of the peace" for purposes of Ind. Code 35-33-1-4. Mere threat to vandalize personal property, without more, does not constitute a breach of the peace.

The simple act of trespass (for which D was neither arrested nor charged), without threat of imminent violence or destruction of property on part of trespasser, does not sanction use of unreasonable force by a landowner or his agent to terminate the trespass. Furthermore, an alleged trespasser does not give up her common law & statutory right to resist the use of unreasonable force by a landowner or her/his agent. Here, D's identity was well known & a simple 911 call or subsequent complaint filed with prosecutor would have been appropriate & lawful response to D's conduct. Held, judgment reversed.

TITLE: Leonard v. State
INDEX NO.: K.3.a.1.
CITE: (5/2/2017), 73 N.E.3d 155 (Ind. 2017)
SUBJECT: "Knowing" mens rea applies to prohibited conduct, not identity of victims
HOLDING: To convict Defendant of knowingly murdering his two neighbors, the State needed to only show that Defendant knowingly committed the prohibited conduct – killing two other human beings – not that he knowingly killed two specific individuals. Thus, the evidence was sufficient to support Defendant’s convictions.

Defendant lived with his girlfriend in Richmond Hill, a neighborhood on the southeast side of Indianapolis. To collect on a home insurance policy, they triggered a massive natural gas explosion of their home, which killed their two next door neighbors, the Longworths. Defendant was charged with and convicted of knowingly killing the Longworths.

On appeal, Defendant argued that the State failed to prove the knowing element as to the specific victims. In other words, he contended that the State failed to prove he knew that the victims of the crime would be the Longworths. In support, he cited Ind. Code § 35-41-2-2(d), which provides: “d) . . . if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.”

However, the statute requires the State to prove the knowing mens rea only with respect to every material element of the prohibited conduct, not the identity of the victims. Though the victims’ identities were material elements of the offense, their identities were not part of the prohibited conduct. See Owens v. State, 742 N.E.2d 538, 543 (Ind. Ct. App. 2001) (“In Markley [v. State], 421 N.E.2d 20, 21 (Ind. Ct. App. 1981)] we noted that ‘prohibited conduct’ and ‘element’ within Ind. Code § 35-41-2-2(d) are not synonymous and if the legislature had intended culpability to apply to every material element, the phrase ‘of the prohibited conduct’ would be superfluous.”). Thus, the State presented sufficient evidence to prove beyond a reasonable doubt that Defendant knowingly committed murder. Held, judgment affirmed.

Note: This case may cast doubt on Eberle v. State, 942 N.E.2d 848 (Ind. Ct. App 2011), where the defendant was accused of committing intimidation against a person the defendant did not know was a police officer. The Court held that the State needed to show that the defendant knew the person was a police officer.

TITLE: Manuel v. State

INDEX NO.: K.3.a.1.

CITE: (08-07-12), 971 N.E.2d 1262 (Ind. Ct. App 2012)

SUBJECT: Domestic Battery - evidence sufficient

HOLDING: State presented sufficient evidence to prove beyond a reasonable doubt that D committed domestic battery in the physical presence of children under Ind. Code. 35-42-2-1.3(b)(2). "Presence" for purposes of this statute does not require that a child actually sense the battery; it is sufficient that the child *might* see or hear the battery. Boyd v. State, 889 N.E.2d 321 (Ind. Ct. App 2008). In True v. State, 954 N.E.2d 1105 (Ind. Ct. App 2011), Court further clarified that "presence" for purposes of statute is defined as knowingly being within either the possible sight or hearing of a child. From this precedent, Court concluded that the critical question in determining whether a child is "present" for purposes of the statute is whether a reasonable person would conclude that the child might see or hear the offense; not whether a child is in the same room as where the offense is taking place.

Here, even though the two children were not in the same room at the time of the incident and were supposedly asleep, they were present in their bedrooms and one child testified she could hear D and complaining witness arguing in hallway outside her room and it made her sad. Further, D was aware that the children might hear him. Held, judgment affirmed.

TITLE: Masotto v. State

INDEX NO.: K.3.a.1.

CITE: (3rd Dist., 06-19-09), 907 N.E.2d 1083 (Ind. Ct. App 2009)

SUBJECT: Battery on law enforcement officer - sufficiency; "official duty"

HOLDING: Evidence was sufficient to support D's conviction for battery on a law enforcement officer. Three officers were called to D's apartment to investigate loud noise complaint. D cursed at officers, told them to get out of her apartment, and pushed one of the officers in the back as he walked out of front door. The officer then felt door hit him on the heel. Battery statute explicitly requires only that officers be engaged in their official duty, not in lawful execution of their duty. Ind. Code 35-42-2-1(a)(1)(B).

D argued that police officer ceases acting in his official duty if he enters a residence without a warrant or a justifiable excuse from the warrant requirement. Even accepting D's argument that officers acted unlawfully when they entered her apartment, this does not excuse her actions. Officers did not attempt a forceful entry; they were invited in by D's boyfriend. In addition, D was not resisting the officers' entry or her arrest; her actions in pushing one of the officers in the back on his way out "falls squarely within the boundaries of the conduct the battery on a law enforcement officer statute seeks to prevent." Thus, D battered officer while he was engaged in his official duty. Held, judgment affirmed.

TITLE: Matthews v. State

INDEX NO.: K.3.a.1.

CITE: (4/26/85) Ind., 476 N.E.2d 847

SUBJECT: Battery - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for attempted battery with deadly weapon (ABWDW) where fleeing D fired 3 shots over his shoulder at undercover cop. D contends his intent at time he fired shots was to escape danger (presented by 2 unidentified sleazy characters who were following him) rather than to specifically batter officer. Battery is not specific intent crime. Norris 419 N.E.2d 129. Intent required in ABWDW is intent to touch another person in rude, insolent or angry manner. Washington 441 N.E.2d 1355. Battery occurs when person is unlawfully touched by D or by substance put in motion by D. Reed 263 N.E.2d 719. Intent to commit battery can be inferred from deliberate use of deadly weapon in manner calculated to strike another person. Washington; Norris. Intent to escape is not valid defense to ABWDW. Green, App., 304 N.E.2d 845.

RELATED CASES: K.D., App., 754 N.E.2d 36 (touching officer's gun belt was sufficient to support conviction; touching was insolent because it showed lack of respect for school police officer); Impson, App., 712 N.E.2d 1275 (sufficient evidence of touching where D knocked victim's glasses to ground although D did not punch victim); Parks 513 N.E.2d 170 (police officer received cuts & scrapes during struggle with D, but did not know how; evidence sufficient to sustain conviction for battery of police officer); Nieto, App., 499 N.E.2d 280 (evidence was sufficient to sustain conviction for BATTERY ON A POLICE OFFICER where off-duty police officer was acting to preserve peace & prevent offenses by intervening in domestic violence & D knew man was an officer when he hit him); Smith, App., 489 N.E.2d 140 (A & B 91; D's beating of daughter exceeded bounds of parental discipline; see card at L.3.f).

TITLE: McNeill v. State
INDEX NO.: K.3.a.1.
CITE: (11-12-10), 936 N.E.2d 358 (Ind. Ct. App 2010)
SUBJECT: Aggravated battery - sufficient evidence even though no evidence D was responsible for injury
HOLDING: Although no medical, forensic, or ballistic evidence was presented to establish the source of victim's gunshot wound, evidence was sufficient to support D's aggravated battery conviction. A person is liable as an accomplice if he knowingly or intentionally aided, induced, or caused another person to commit a crime. Ind. Code 35-41-4-2.

The day before victim was shot, D threatened him by stating, "you [sic] lucky your momma [sic] here, or you would be dead." The next day shortly before the shoot-out involving several individuals, D said "I don't fight [with fists], I shoot." Witnesses saw D fire a gun several times in the direction of victim. This evidence demonstrates D was at the crime scene and participated in the crime by firing his weapon. Just before the shoot-out, D summoned several armed individuals from a nearby apartment to assist him in the shoot-out; his companionship with those individuals would allow him to be convicted regardless of whose bullet struck victim. See, e.g., Garland v. State, 788 N.E.2d 425 (Ind. 2003). Held, judgment affirmed.

TITLE: Mitchell v. State

INDEX NO.: K.3.a.1.

CITE: (8/2/90), Ind., 557 N.E.2d 660

SUBJECT: Battery - sufficiency

HOLDING: Evidence supporting inference that D held child in bathtub filled with 140 degree water for 1 - 5 seconds necessary for child to receive full-thickness burns was sufficient to support convictions for battery & confinement. On appeal, D argues that evidence was not sufficient to prove that she committed offenses, or if so that she did so knowingly or intentionally. Evidence showed that D took daughter to emergency room for treatment & explained that she had found her on her back in bathtub after filling tub & leaving bathroom with child on toilet. D gave false name & address to admitting desk & to social worker & left hospital shortly thereafter. Child suffered extensive full-thickness burns from waist to toes & on hands, but no burns to back, shoulders, neck or head. Four physicians testified that injuries were not consistent with accidental burns generally, & with D's explanation in particular. These physicians also testified that it would take only 1 - 5 seconds for child to receive full-thickness burns in 140-degree water. S.Ct. finds this evidence sufficient to support finding that D inflicted injuries on child. Circumstantial evidence further supports inference that D did so knowingly & intentionally. D provided false name & address to hospital & law enforcement officers, & displayed lack of concern about child's injuries, leaving hospital shortly after arriving there. DeBruler, J., DISSENTS, arguing that while evidence supports inference that D held child in tub filled with scalding water for 1 - 5 seconds, it did not support finding that D did so with specific intent required for confinement or battery.

TITLE: Mitchell v. State

INDEX NO.: K.3.a.1.

CITE: (05/31/2022), Ind. Ct. App., 188 N.E.3d 69

SUBJECT: Use of a gun to strike victim in the head supported deadly weapon enhancement for battery despite gun not being admitted into evidence

HOLDING: Defendant was convicted at a bench trial of battery by means of a deadly weapon for having repeatedly hit victim in the head with a gun. On direct appeal, Defendant argued the gun was used as a cudgel and because the State merely submitted photos of the gun and no evidence about its size, weight or caliber, the evidence was insufficient to find that the gun was a deadly weapon. Court of Appeals finds that the statute requires that the weapon be readily capable of causing serious bodily injury and that the photo of the gun combined with the victim's testimony was sufficient to establish the gun used by Defendant to strike the victim was both a firearm and a weapon that was readily capable of causing serious bodily injury in a manner in which was used, could be used, or was intended to be used. Thus, State presented sufficient evidence to support the conviction.

TITLE: Nash v. State

INDEX NO.: K.3.a.1.

CITE: (1st Dist., 03-07-08), Ind. App., 881 N.E.2d 1060

SUBJECT: Battery by body waste - "correction officer" includes nurse working at DOC

HOLDING: State presented sufficient evidence to convict D of battery by body waste infected with HIV, a Class C felony, even though victim was not employed by department of correction. D, an HIV-positive inmate at New Castle Correctional Facility, threw a cup of his urine and feces at a nurse which landed on her shoes, and on a box she was carrying. To convict D, as charged, State had to prove that he knowingly or intentionally in a rude, insolent, or angry manner placed body fluid or waste on a corrections officer and that D knew or recklessly failed to know that the body fluid or waste was infected with HIV. Ind. Code 35-42-2-6(e). Subsection (a) defines "corrections officer" to include persons employed by 1) department of correction; 2) a law enforcement agency; 3) a probation department; 4) a county jail; 5) a circuit, superior, county, probate, city, or town court. Although nurse was employed by a staffing agency and not the DOC, Court nevertheless upheld the conviction based on "the objective and purpose of the law." Court could not ignore "the absurd result" of D's interpretation, which would "distinguish between the personnel at the Department of Correction based on their employment status rather than the services they provide to the prisoners." Evidence is sufficient that nurse was within the class of personnel intended to be protected by the legislature in her employment status with the DOC. Held, judgment affirmed.

But See: Smith v. State, 867 N.E.2d 1286 (Ind. 2007) (bus driver working as an independent contractor for a school was not a "child-care worker" under child seduction statute).

TITLE: Neville v. State

INDEX NO: K.3.a.1.

CITE: (5th Dist., 1-30-04), Ind. App., 802 N.E.2d 516

SUBJECT: Aggravated battery - evidence insufficient

HOLDING: Evidence was insufficient to support D's aggravated battery conviction, where State presented no evidence that victim suffered loss or impairment of function of his leg for longer than three days. Evidence showed that D pushed victim, pulled out a handgun, & shot victim twice in right leg, causing a lateral condyle fracture to his knee joint. State alleged that D committed aggravated battery by knowingly inflicting an injury on victim that caused protracted loss or impairment of the function of a bodily member, *i.e.*, his leg. Ind. Code 35-42-2-1.5. At trial, State established that victim was hospitalized for three days, experienced pain, & was discharged on crutches with his leg in a brace. State offered victim's medical records into evidence, but his physicians did not document severity of his injury or note whether he would experience protracted loss or impairment of the function of his leg. Victim did not testify at trial, so jury heard no evidence from victim as to how long he used crutches, wore his brace, experienced pain, or otherwise suffered loss or impairment of function of his leg. Because charging instrument in this case also included all elements of battery as a Class C felony, Ct. remanded with instructions to enter judgment & re-sentence accordingly. Held, aggravated battery conviction reversed, remanded to enter judgment for battery as Class C felony.

RELATED CASES: Alexander, 13 N.E.3d 917 (Ind. Ct. App 2014) (State presented insufficient evidence to prove that victim's injury, *i.e.*, a graze wound to his back for which he received no medical treatment, created a substantial risk of death); Mann, App., 895 N.E.2d 119 (victim's diminished hearing loss suffered for about three months after battery was sufficient evidence of SBI).

TITLE: Owens v. State

INDEX NO.: K.3.a.1.

CITE: (2-16-01), Ind. App., 742 N.E.2d 538

SUBJECT: Battery of law enforcement officer - D unaware of law enforcement officer's status

HOLDING: Evidence was sufficient to convict D for battery of law enforcement officer, despite fact that D was unaware that officer was law enforcement officer when he struck him. Conduct prohibited in battery is rude, insolent, or angry touching, & this is conduct that must be done knowingly or intentionally by D. Ind. Code 35-42-2-1(a)(2); Markley v. State, 421 N.E.2d 20 (Ind. Ct. App 1981). Moreover, bodily injury to law enforcement officer is element of battery offense that must be proven beyond reasonable doubt before there can be battery conviction resulting in injury to law enforcement officer. Id.

Ind. Code 35-41-2-2(d) provides that "if a kind of culpability is required for commission of an offense, it is required with respect to every material element of proscribed conduct." Element of bodily injury to law enforcement officer is aggravating circumstance, which, if proven beyond reasonable doubt, increases penalty for offense committed without proof of any culpability separate from culpability required for conduct elements of offense. Therefore, legislature determined that aggravating circumstance of battery resulting in bodily injury to law enforcement officer was sufficient to increase gravity of battery offense because of increased threat of injury to law enforcement officers. This reasoning, coupled with fact that "results in bodily injury to a law enforcement officer" is a result, rather than prohibited conduct, leads to conclusion that Ind. Code 35-41-2-2(d) does not apply to "results in bodily injury to law enforcement officer" element of Class D felony battery. Thus, State was not required to prove that D knew that officer was police officer when he struck him in order to convict him for battery of law enforcement officer. Held, affirmed in part, reversed in part on other grounds & remanded for corrected sentencing order.

RELATED CASES: Leonard, 73 N.E.3d 155 (but cf. Leonard v. State - State's need to prove D knowingly committed murder applied only to the prohibited conduct, not the identity of the victims.), Eberle, 942 N.E.2d 848 (Ind. Ct. App 2011) (felony intimidation conviction insufficient where D was unaware C.W. was law enforcement officer. See full review at K.7.e); Maldonado-Morales, 985 N.E.2d 25 (Ind. Ct. App 2013) (instruction properly stated that to convict D of domestic battery under transferred intent doctrine, jury needed to find only that he acted knowingly or intentionally with regard to the prohibited conduct - striking another person - but not the facts that elevated the offense to a D felony, striking his ex-wife in the presence of their child); D.H., 932 N.E.2d 236 (Ind. Ct. App 2010) (evidence was sufficient to support Class D felony battery adjudication where D threw a punch, intending to hit another student, and mistakenly struck his teacher instead; culpability requirement applies only to the conduct element of the battery statute, thus State is not required to prove that knowingly or intentionally struck his teacher).

TITLE: Perry v. State

INDEX NO.: K.3.a.1.

CITE: (5/11/2017), (Ind. Ct. App 2017)

SUBJECT: Battery - insufficient evidence based on speculation

HOLDING: Court reversed four out of five of Defendant's felony domestic violence-related convictions in a case that "highlights the limits of circumstantial evidence in proving a criminal defendant's guilt beyond a reasonable doubt." Court concluded that the jury speculated that Defendant had caused injuries his wife (C.W.) sustained several days before police found her with a bloody lip after a fight with Defendant (on December 6). Defendant was arrested after C.W. told police he hit and choked her in the hotel where they were staying, as well as days earlier, but she later recanted. C.W. changed her story and said her earlier injuries were the result of a car crash. Her statements to police that Defendant had committed those crimes were not admitted as substantive evidence. The jurors saw the photographs of C.W.'s injuries and heard conflicting stories about how and by whom they were caused. "The jurors were entitled to disbelieve those stories, but they were not entitled to infer that [Defendant] caused [C.W.'s] injuries based solely on the couple's lack of credibility. This would amount to speculation, which is insufficient to sustain a conviction." See Mediate v. State, 498 N.E.2d 391 (Ind. 1986). The Court also held the State lacked evidence to prove proper venue for four of the five counts against Defendant. "Any inference that the offenses were committed in Allen County because [C.W.] sought treatment at a hospital in that county would be purely speculative. Thus, Court reversed Defendant's convictions on counts 1 through 4 (which were alleged to have occurred on December 2 or 3) and affirmed felony domestic battery conviction on count 5 (based on direct and circumstantial evidence supporting December 6 allegations). Court also reversed Defendant's habitual offender finding because his conviction on Count 5 was enhanced to a felony based on a prior unrelated conviction. See Ind. Code § 35-50-2-8(e). Defendant's two-and-a half-year executed sentence for his level 6 felony domestic battery conviction was not inappropriate in light of the nature of the offense and his character. Held, judgment affirmed in part and reversed in part.

RELATED CASES: Perry, Ind. App., 454 N.E.2d 450 (State failed to prove proper venue for 4 of 5 domestic violence-related counts against D; see full review at K.3.a.1).

TITLE: Robinson v. State

INDEX NO.: K.3.a.1.

CITE: (3rd Dist., 9-10-04), Ind. App., 814 N.E.2d 704

SUBJECT: Battery on police officer - right to resist unlawful entry

HOLDING: Commission of a battery against a police officer is not the use of reasonable force to resist an unlawful entry. A person has the right to reasonably resist the unlawful entry of a police officer into a person's home. Alspach v. State, 755 N.E.2d 209 (Ind. Ct. App 2001). There can be a fine line between reasonable resistance & battery, but that is for the jury to resolve. Here, officers were investigating a possible domestic dispute at D's residence. D pushed one of the officers away from entryway when he attempted to enter home. State failed to prove existence of any exigent circumstances to justify officer's warrantless entry, thus when officer attempted to enter he was not acting lawfully, & D had right to reasonably resist entry. Id. However, D's act of pushing officer away from entryway was not reasonable resistance. The right to reasonably resist an unlawful entry does not include right to commit a battery upon a police officer. Shoultz v. State, 735 N.E.2d 818 (Ind. Ct. App 2000). Ct. also held that D's conviction for battery on police officer was not inconsistent with his acquittal for resisting law enforcement. Held, judgment affirmed.

TITLE: Salone v. State

INDEX NO.: K.3.a.1.

CITE: (2nd Dist., 7-11-95), Ind. App., 652 N.E.2d 552

SUBJECT: Aggravated battery - sufficiency

HOLDING: Evidence was insufficient to support one of two aggravated battery convictions. Charges were based upon injuries to victims' hands as result of being forced to grasp hot knife. D argued that Tr. Ct. erred in refusing lesser-included offense instructions & that evidence was insufficient to support convictions. Ct. found that as to first victim, Tr. Ct. properly refused lesser included offense of battery instruction, because there was substantial evidence of probative value that victim suffered permanent disfigurement or protracted loss or impairment of function of her hand as result of D's actions.

However, as to second victim, Ct. found "fatal deficiency" in State's proof of injury element of aggravated battery. Emergency room physician's testimony concerning severity of victim's burns was abstract & equivocal. Aggravated battery requires proof of injury that creates "substantial risk of death or causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." Here, physician's testimony did not discuss either disfigurement or functional impairment which burns would cause. Held, conviction as to first victim affirmed, & conviction as to second victim reversed.

Note: Ct. also rejected federal & state equal protection challenge to aggravated battery statute, Ind. Code 35-42-2-1.5.

RELATED CASES: James, App., 755 N.E.2d 226 (evidence sufficient; permanent disfigurement" has not been defined by legislature, but legislature intended to protect against continuing or enduring injuries that mar or deface appearance or physical characteristics of a person); Meriweather, App., 659 N.E.2d 133 (Tr. Ct. could properly infer that D did not fire 5 shots randomly, but rather intended to shoot at & cause victim harm contemplated by statute); Spann, App., 632 N.E.2d 741; Tingle, 632 N.E.2d 345; Brown, App., 618 N.E.2d 1348.

TITLE: Smith v. State

INDEX NO.: K.3.a.1.

CITE: (04/30/21), 167 N.E.3d 378 (Ind. Ct. App 2021)

SUBJECT: Sufficient evidence to support moderate bodily injury

HOLDING: In prosecution for Level 6 felony domestic battery resulting in moderate bodily injury, State presented sufficient evidence of probative value from which a reasonable jury could find beyond a reasonable doubt that the complaining witness (C.W.) suffered an impairment of physical condition that included substantial pain amounting to moderate bodily injury. When C.W. informed Defendant she wanted a divorce, Defendant used her "as a battering ram" and repeatedly kicked her and hit her head against a door frame. C.W. declined to go to the hospital but said she suffered from "massive migraines" and other related pain and illness after the attacks. She suffered various injuries including lumps, scratches and redness on her head as well as scratches and bruises on other parts of her body. In the week following her attack, C.W. could not move her neck quickly without pain or vomiting and continued to see stars. Also, the doorframe was dented from the attack and a piece of siding had come loose after Defendant hit C.W.'s head against it. "While there may be no bright line to differentiate levels of pain, the State's evidence demonstrated that C.W.'s pain was above the threshold to show bodily injury and enough to show that the result of Defendant's attack on C.W. was "an impairment of physical condition that include[d] substantial pain." Ind. Code § 35-31.5-2-204.5.

TITLE: Staples v. State

INDEX NO.: K.3.a.1.

CITE: (12-22-11), 959 N.E.2d 323 (Ind. Ct. App 2011)

SUBJECT: Domestic battery conviction is not prerequisite for firearm prohibition

HOLDING: After D pled guilty to battery and pointing a firearm, Tr. Ct. did not abuse its discretion by concluding that D had committed a crime of domestic violence, thus rendering it illegal for him to possess a firearm. At sentencing, Tr. Ct. "shall determine whether a person has committed a crime of domestic violence" based upon a factual basis provided as part of a plea. Ind. Code. 35-38-1-7.7. A crime of domestic violence is defined as "an offense or the attempt to commit an offense that has as an element" the use of physical force or threatened use of a deadly weapon, committed against a person who was cohabiting with or had cohabited with the D as a spouse, parent, or guardian. Ind. Code. 35-41-1-6.3. A conviction for domestic battery is not a prerequisite for a determination that D committed a crime of domestic violence. Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App 2005). Here, circumstantial evidence established that D and complaining witness (CW) were members of the same household and were, or had been, in a dating relationship.

Court also held that a separate hearing with notice prior to disqualifying D from future possession or ownership of firearms is not required under IND. CODE. 35-38-1-7.7, as the factual basis of a guilty plea provides Tr. Ct. with evidence from which to make that determination. Held, judgment affirmed.

TITLE: State v. Mercer

INDEX NO.: K.3.a.1.

CITE: (4th Dist. 12/11/86) Ind. App., 500 N.E.2d 1278

SUBJECT: Battery - lesser included offenses

HOLDING: Tr. Ct. did not err in dismissing battery count after D was found guilty by jury of criminal recklessness & jury hung on battery count. Here, state contends criminal recklessness is not LIO of battery. Ct. finds while state may have had to prove additional facts to establish battery, it had to prove no fact unnecessary to prove battery in order to prove criminal recklessness. See Johnson, App., 426 N.E.2d 91 (under facts in charging instrument, every essential element of criminal recklessness would have been committed during course of battery). Held, dismissal of battery count affirmed.

TITLE: Suggs v. State
INDEX NO.: K.3.a.1.
CITE: (4/28/2016), 51 N.E.3d 1190 (Ind. Ct. App 2016)
SUBJECT: Domestic battery - failure to show D was related by marriage to victim
HOLDING: A sister of a brother who was once married to D's aunt is not a "family or household member" within the meaning of Ind. Code § 35-31.5-2-128(a)(5), which elevates misdemeanor battery to a level 6 felony.

Reviewing a question of statutory construction *de novo*, Court was not persuaded that "by use of the term 'related by marriage' the legislature intended to include an infinite variety of relationships whose only connection is a marriage or series of marriages identified somewhere on the remote branches of a family tree." Instead, the legislature intended to employ the term in its commonly understood meaning, namely, related by "affinity" (i.e., the connection existing in marriage between each of the married persons and the kindred of the other). There is no affinity between the blood relatives of one spouse and the blood relatives of the other. Because the evidence was not sufficient to establish D was related to the victim by marriage as used in Ind. Code §35-31.5-2-128, he was not a family or household member within the meaning of the statute. Held, transfer granted, Court of Appeals' opinion at 31 N.E.3d 998 vacated, Level 6 battery conviction reversed and remanded with instructions to enter judgment as a Class A misdemeanor and to resentence accordingly.

TITLE: Thomas v. State
INDEX NO.: K.3.a.1.
CITE: (2nd Dist., 10-12-95), Ind. App., 656 N.E.2d 819
SUBJECT: Sufficient mens *rea* for aggravated battery
HOLDING: Evidence was sufficient to permit reasonable inference that D possessed requisite intent for aggravated battery at time of offense. Quarrel between D and his wife escalated to point that D struck and bit her in face, eye and arms. Fact that D bit victim multiple times, coupled with obvious severity of injuries to victim's left eye, belie D's claim that he did not intend to inflict serious injury during attack. Held, conviction affirmed.

RELATED CASES: Lowden, 51 N.E.3d 1220 (Ind. Ct. App 2016) (in order to prove Aggravated Battery, the State was required to prove only that D knowingly or intentionally inflicted injury and not that D knew he would cause serious bodily injury); Corbin, App., 840 N.E.2d 424 (D's statement, actions and struggle with two citizens who tried to subdue him created a substantial risk of death or serious injury); Wilson, App., 835 N.E.2d 1044 (reasonable jury could have found beyond a reasonable doubt that D was aware of a high probability that her conduct would lead to serious bodily injury, including protracted loss or impairment of police officer's arm or shoulder).

TITLE: Thompson v. State

INDEX NO.: K.3.a.1.

CITE: (9/8/2017), 82 N.E.3d 376 (Ind. Ct. App 2017)

SUBJECT: Double jeopardy - only one battery conviction for single push resulting in injuries to two victims

HOLDING: Elevated battery convictions based on bodily or serious bodily injury "to any other person" or "to another person" do not require the person who is battered to be the same person who is injured as a result of the battery. Thus, D was properly charged with Level 5 felony battery when he pushed his ex-wife and as a result his ex-wife knocked her boyfriend's elderly grandmother to the ground, causing serious bodily injury. However, D's convictions for both Level 6 felony domestic battery and Level 5 felony battery based on grandmother's injuries violated double jeopardy and the "actual evidence test" because they relied on the same, single act of touching by D, who shoved his ex-wife only once. See McGaughey v. State, 419 N.E.2d 184 (Ind. Ct. App 1981). Held, Level 6 felony conviction vacated and remanded for resentencing on only the Level 5 felony conviction.

TITLE: Timm v. State
INDEX NO: K.3.a.1.
CITE: (12-28-94), Ind., 644 N.E.2d 1235
SUBJECT: Battery - deadly weapon & serious bodily injury
HOLDING: In prosecution for Battery as Class C felony, evidence was sufficient to support finding that long-handled plastic flashlight was deadly weapon. In determining whether something constitutes deadly weapon, Ct. considers manner in which instrument was used and capacity of object to inflict serious bodily injury under facts of each case, Cummings v. State, Ind., 384 N.E.2d 605, Majors v. State, Ind., 410 N.E.2d 1196.

Here, D struck victim in face with flashlight, and victim testified that force of blow broke her glasses and that flashlight shattered upon impact. Jury could reasonably have concluded that flashlight was capable of causing serious bodily injury, which is sufficient for conviction under Ind. Code § 35-42-2-1(3). Held, conviction affirmed.

RELATED CASES: Ward, 15 N.E.3d 114 (Ind. Ct. App 2014) sum. aff'd 50 N.E.3d 752 (Ind. 2016) ; (belt qualified as a deadly weapon, given the severe pain and serious nature of victim's injuries); McClellan, 13 N.E.3d 546 (Ind. Ct. App 2014) (operational stun gun used on victim was a deadly weapon; State need only prove that item is readily capable of causing serious bodily injury, not that it did cause such injury); Phelps, App., 669 N.E.2d 1062 (trier of fact could reasonably have concluded that brass knuckles were capable of inflicting serious bodily injury, thus meeting definition of "deadly weapon" under Ind. Code § 35-41-1-8(2)).

TITLE: Tobias v. State

INDEX NO.: K.3.a.1.

CITE: (5-24-96), Ind., 666 N.E.2d 68

SUBJECT: Rape & sexual battery - victim's perception of force

HOLDING: Construing element of forceful compulsion in rape & sexual battery statutes, Ct. held that presence or absence of forceful compulsion is to be determined from victim's perspective, not assailants. This is subjective test that looks to victim's perception of circumstances surrounding incident in question. Here, evidence was sufficient for jury to find element of compulsion by force to have been proven beyond reasonable doubt. After representing & asserting enforcement authority of campground, D took 16-year-old girl to secluded, remote places & subjected her to his sexual acts. Held, convictions affirmed; DeBruler, J., concurring on other grounds.

RELATED CASES: Newbill, App., 884 N.E.2d 383 (Ct. discouraged use of jury instruction based on Tobias; see full review, this section).

TITLE: Vaughn v. State

INDEX NO.: K.3.a.1.

CITE: (1-28-03), Ind. App., 782 N.E.2d 417

SUBJECT: Domestic battery statute - "living as if a spouse" unconstitutionally vague

HOLDING: Ind. Code 35-42-2-1.3(2), defining domestic battery as "a person who knowingly or intentionally touches a person who...is or was living as a spouse of the other person in a rude, insolent, or angry manner that results in bodily injury" is unconstitutionally vague. Statute fails to define what constitutes "living as if a spouse" of another & therefore, no one can know with any reasonable degree of confidence whether they are, or were in the past, living with another as a spouse for purposes of domestic battery statute. Here, D was attending a party at ex-girlfriend's house when alleged crime occurred. Ex-girlfriend testified that she & D had once lived together & had once had intimate sexual relationship. While there is no authority that State would be required to show such things as joint tax returns, joint utility bills, joint bank accounts, or even how long they lived together, there can be little doubt that something more than living together & having sexual relationship is required. Otherwise, many individuals who have no intent to "live as a spouse" of another would be subject to punishments of domestic battery statute by virtue of fact that they live under same roof as domestic partner. Held, conviction reversed & remanded to enter conviction on lesser offense of battery.

Note: Ind. Code 35-42-2-1.3(c), which provides factors for the court to consider when determining if a D is "living as if a spouse," was amended in response to Vaughn.

RELATED CASES: Boyd, App., 889 N.E.2d 321 (statute's requirement that touching occur in the physical presence of child, that D know that child was present, and that child might be able to see or hear the offense is not unconstitutionally vague); Williams, App., 798 N.E.2d 457 (majority disagreed with Vaughn, to extent it holds that cohabiting & a sexual relationship may never satisfy the statutory requirements of Ind. Code 35-42-2-1.3).

TITLE: Vest v. State

INDEX NO.: K.3.a.1.

CITE: (10-12-93), Ind., 621 N.E.2d 1094

SUBJECT: Insufficient evidence of battery

HOLDING: Evidence supporting conviction for battery did not have sufficient probative value & quality to conclude beyond reasonable doubt that D was guilty; reversing memorandum decision. Three-year old child was found to have two cigarette burns on top of her foot. At trial child did not testify, but emergency room nurse testified over hearsay objection that child had said D burned her with cigarette. Jury was instructed that statements given to medical attendant to secure diagnosis & treatment could not be used as proof of facts contained in statement, nor to establish truth of statements made, & that such statements were relevant to basis of medical attendant's opinion only. When police interviewed D concerning situation, he first denied burning child, & then said he might have accidentally burned her when he tried to discard his cigarette by flicking it off porch. Ct. found evidence was insufficient to prove it was D who intentionally burned child. Statement to nurse was not proof of identity because its use for that purpose was foreclosed by jury instruction. Inference of identity was supported by proof D was smoker, child was often in his company, child walked by his house two days before injury was reported, & he altered his initial story to police. This evidence was insufficient to support verdict, & double jeopardy precluded retrial. **Note:** In discussing admissibility of statement by nurse & jury instruction, Ct. noted that these issues would soon be governed by IRE, particularly Rule 803(4) concerning statements made for purpose of medical diagnosis or treatment, finding new rule did not appear to alter previous case law precluding use of statement for substantive purpose of proving identity.

RELATED CASES: Herron, 10 N.E.3d 552 (Ind. Ct. App. 2014) (where D objected to the improperly admitted hearsay, that hearsay could be used in a sufficiency analysis on appeal despite the jury being told it could not be used for substantive evidence).

TITLE: Wilcher v. State

INDEX NO.: K.3.a.1.

CITE: (7-17-02), Ind. App., 771 N.E.2d 113

SUBJECT: Aggravated battery - sufficient evidence to show substantial risk of death

HOLDING: Evidence was sufficient to show that D's battery of victim created substantial risk of death. D attempted to break up fight between several people by stabbing one of them. No expert medical testimony is required to prove that there was substantial risk of death. Here, victim had been stabbed in upper-left side of chest near heart, was bleeding, had difficulty breathing, drifted in & out of consciousness, underwent surgery, & remained in hospital for five days connected to lung machine. In light of evidence presented with regard to nature & location of injury, jury could have reasonably inferred that D exposed victim to substantial risk of death. Held, judgment affirmed. Sullivan, J., dissenting & relying on Tingle v. State, 632 N.E.2d 345 (Ind. 1994), would require State to offer medical evidence that victim was in fact subjected to substantial risk of death, not merely that it was possible considering nature & location of injury. Judge Sullivan would reduce aggravated battery conviction to battery as Class C felony.

RELATED CASES: Fleming, App., 833 N.E.2d 84 (based upon evidence presented at trial, jurors could have reasonably inferred that D committed battery upon victim that caused him "protracted loss or impairment of the function of a bodily member or organ," under Ind. Code 35-42-2-1.5, despite absence of expert witness testimony).

K. CRIMES

K.3. Offenses against the person

K.3.a.2. Criminal recklessness/ hazing (Ind. Code 35-42-2-2)

TITLE: Al-Saud v. State

INDEX NO.: K.3.a.2.

CITE: (12-20-95), Ind., 658 N.E.2d 907

SUBJECT: Criminal recklessness - unloaded firearm & risk of bodily injury

HOLDING: Firearm need not be loaded to create substantial risk of bodily injury under Indiana's criminal recklessness statute, Ind. Code 35-42-2-2. Deadly weapon is defined by Ind. Code 35-41-1-8 to include either loaded or unloaded firearm. Whether loaded or unloaded gun creates substantial risk of bodily injury to another person is question of fact. Held, transfer granted, Ct. App. decision at 638 N.E.2d 822 vacated, & Tr. Ct. affirmed; DeBruler, J., dissenting. **Note:** In resolving conflict in Ct. App., Ct. disapproved of Reynolds v. State (1991), Ind. App., 573 N.E.2d 430 & Warren v. State (1993), Ind. App., 615 N.E.2d 500, & affirmed In re D.B. (1995), Ind. App., 648 N.E.2d 1230.

RELATED CASES: Ferrell, App., 656 N.E.2d 839 (evidence insufficient to show that D performed act that created substantial risk of bodily injury); D.B., App., 648 N.E.2d 1230 (fact finder had discretion to draw reasonable inference that gun pointed at victim was loaded, thereby creating substantial risk of bodily injury; State not required to prove loaded weapon in every prosecution of criminal recklessness involving firearm).

TITLE: Clancy v. State

INDEX NO.: K.3.a.2.

CITE: (5th Dist., 06-15-05), Ind. App., 829 N.E.2d 203

SUBJECT: Criminal recklessness - evidence insufficient; falling asleep while driving

HOLDING: Mere fact that D fell asleep behind wheel & caused accident was insufficient to support his two criminal recklessness convictions. There must be some proof that driver consciously ignored, for a period of time, substantial warnings that he or she might fall asleep, & continued to drive despite the warnings, before actually falling asleep & causing an accident. State presented no such evidence in this case. It has been stated in civil context that "wanton or willful" misconduct requires driver to: 1) be conscious of her misconduct, 2) be motivated by reckless indifference for safety of others, & 3) know that her conduct subjects her guest to a probability of injury. Duncan v. Duncan, 764 N.E.2d 763 (Ind. Ct. App 2002). Negligent driving generally is not a basis for imposing criminal liability in Indiana, no matter how tragic the result. Given similarities between definitions of willful & wanton misconduct & recklessness, Ct. could not discern a valid reason for adopting a lesser standard of proof for imposing liability on a sleeping driver in criminal context than is required in civil context. Held, convictions reversed, false informing conviction affirmed.

RELATED CASES: Boadi, App., 905 N.E.2d 1069 (failure to stop at a red light at an intersection due to inadvertence or an error in judgment cannot, without more, constitute criminally reckless conduct).

TITLE: Davis v. State

INDEX NO.: K.3.a.2.

CITE: (8-26-04), 813 N.E.2d 1176 (Ind. 2004)

SUBJECT: Criminal recklessness - insufficient evidence of serious bodily injury

HOLDING: Evidence was insufficient to sustain finding of criminal recklessness involving serious bodily injury, a Class D felony. "Serious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes 1) serious permanent disfigurement; 2) unconsciousness; 3) extreme pain; 4) permanent or protracted loss or impairment of the function of a bodily member or organ; or 5) loss of a fetus." Ind. Code 35-41-1-25. Here, prosecutor contended in final argument at trial that fractured finger was itself enough to constitute serious bodily injury. On appeal, State argued that impact on victim's knee when she was pushed down & the blow that lacerated her lip & broke her finger were events from which "extreme pain" can be inferred. However, victim said little at trial in describing her level of pain, & hospital did not write her up for any prescription pain medication. Although it is difficult to describe a bright line between what is "bodily injury" & "serious bodily injury," Ct. concluded that even taken altogether, a lacerated lip, abrasion to knee, & a broken pinky fall below the line. Held, transfer granted, reversed & remanded for entry of judgment for crime of recklessness as a Class B misdemeanor.

RELATED CASES: Whitlow, 901 N.E.2d 659 (Ind. Ct. App. 2009) (despite fact that 7-year-old CW did not take pain medication or seek medical attention for large bruises on her arms, thighs, back and buttocks, there was sufficient evidence to support finding that she suffered serious bodily injury); Hand, App., 863 N.E.2d 386 (evidence of 2 black eyes & bruising on face, shoulders & hands were insufficient to prove serious bodily injury).

TITLE: DeWhitt v. State

INDEX NO.: K.3.a.2.

CITE: (2nd Dist., 6-29-05), Ind. App., 829 N.E.2d 1055

SUBJECT: Criminal recklessness - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for criminal recklessness while armed with a deadly weapon, a Class D felony under Ind. Code 35-42-2-2(c)(2). After D's vehicle was towed, he went to the towing facility & attempted to drive out of the yard without paying the fines as facility personnel attempted to stop him. An employee attempted to shut the gate to the towing yard & D drove through the gate before it could be shut, hitting the gate & striking the employee on the leg with the bumper of his truck. Ct. disagreed with D's argument that the employee created the substantial risk of bodily injury by closing the gate. Ct. was not persuaded by D's reliance on Micinski v. State, 487 N.E.2d 150 (Ind.1986) & Abney v. State, 766 N.E.2d 1175 (Ind.2002), that the State must prove that the D's conduct was a proximate cause & not a contributing cause to an accident. Micinski noted a hypothetical where a drunk driver could ask under its holding for a jury instruction on causation where a child "runs out from between two parked cars". Here, the employee was not the "darting child" who, through no fault of the driver, darts from between two parked cars. The employee here was simply reacting to D's actions in not paying the towing fee. Further, Micinski & Abney involved statutes requiring the D's conduct either "result" in serious bodily injury to another or "cause" death. The criminal recklessness statute does not require a D to "cause" any injury, but rather "create" a substantial risk of injury.

Ct. also disagreed that D could not be convicted of the Class D felony because the criminal recklessness statute includes a more specific charge for when a vehicle is used as a Class A misdemeanor. Ind. Code 35-42-2-2(c)(1). An automobile may be considered a "deadly weapon" given appropriate circumstances. Johnson, 455 N.E.2d 93. Ct. does not view the statute as containing two mutually exclusive subsections. Ct. also did not find trial counsel ineffective for not seeking an instruction on the lesser included offense as trial counsel may have thought the State could not prove the vehicle was used as a deadly weapon & decided to go for an "all or nothing" strategy. Held, judgment affirmed but remanded to modify sentence.

TITLE: Elliott v. State

INDEX NO.: K.3.a.2.

CITE: (1st Dist. 10/18/90), Ind. App., 560 N.E.2d 1266

SUBJECT: Criminal recklessness - sufficiency

HOLDING: Evidence that D fired pistol into air in direction of uninhabited fields & woods was insufficient to support conviction for criminal recklessness. Evidence showed that D & his employees were relaxing outdoors on his used car lot, D walked to edge of lot & fired 5 shots into air. None of his employees was in line of fire, no one was in fields, & no evidence was introduced indicating presence of anyone in woods, although hunters were known to use them on occasion. D was convicted of criminal recklessness & challenges sufficiency of evidence on appeal. Statutes define criminal recklessness as knowing & intentional performance of act which creates substantial risk of bodily injury to another person. Ind. Code 35-42-2-2. Conduct is reckless if person engages in it "in plain, conscious, & unjustifiable disregard of harm that might result & the disregard involves a substantial deviation from acceptable standards of conduct." Ind. Code 35-41-2-2(c). Here, while D's conduct was "reckless at best & deplorable at worst, it did not create a substantial risk of bodily injury to another person because there were no people in or near his line of fire." Statutes do not define "substantial," but Webster's Dictionary defines it as having "substance or actual existence." Since evidence failed to show any person put in harm's way by D's conduct, there was no substance to risk. Held, conviction reversed.

RELATED CASES: Smith, App., 688 N.E.2d 1289 (based upon evidence, jury could reasonably infer that there were individuals in or near D's line of fire, & that D's conduct created actual & substantial risk of bodily injury to another person); Boushehry, App., 648 N.E.2d 1174 (D induced accomplice to fire gun in direction of road; State failed to show substantial risk of bodily injury).

TITLE: Garcia v. State

INDEX NO.: K.3.a.2.

CITE: (10/9/2012), 979 N.E.2d 156 (Ind. Ct. App 2012)

SUBJECT: Criminal Recklessness - "place where people are likely to gather"

HOLDING: In an issue of first impression, Tr. Ct. did not err in denying D's motion for directed verdict on Class C felony criminal recklessness because by presenting evidence that D shot his firearm at two people in another vehicle, the State did, in fact, present evidence that D shot "a firearm into . . . a place where people are likely to gather." See Ind. Code § 35-42-2-2(c)(3)(A) (emphasis added). Even though the statute does not define a "place where people are likely to gather," the word "place" is broadly defined to include a "space in which one person, such as a passenger, can sit or stand." American Heritage College Dictionary 1043 (3rd ed. 2000). Held, judgment affirmed.

RELATED CASES: Wilson, 182 N.E.3d 257 (Ind. Ct. App. 2022) (Ct. declined to make a distinction between specific parts of a vehicle, affirming finding that shooting at gas tank or bed of pickup truck and not the internal passenger compartment constitutes a place where people are likely to gather).

TITLE: Grannan v. State
INDEX NO.: K.3.a.2.
CITE: (8-31-21), 174 N.E.3d 232 (Ind. Ct. App 2021)
SUBJECT: Sufficient evidence to support criminal recklessness conviction - shooting at neighbor's house

HOLDING: To obtain a conviction of Level 5 felony criminal recklessness, the State is required to prove beyond a reasonable doubt that Defendant: (1) recklessly, knowingly, or intentionally (2) created a substantial risk of bodily injury (3) to another (4) by shooting a firearm into an inhabited dwelling or other building where people are likely to gather. See Ind. Code § 35-42-2-2. Here, State presented sufficient evidence to establish that Defendant's act of shooting several bullets into the side of her ex-friend's home in the middle of the night posed a substantial risk of bodily injury, and thus constituted criminal recklessness. In so holding, Court disagreed with Defendant's claim that her conduct did not fall within the purview of the offense of criminal recklessness because her ex-friend's home was not inhabited when she fired the shot. The plain language of the statute also applies to a building "where people are likely to gather," and ex-friend's home fits this definition. Defendant later admitted that she knew her ex-friend had returned home at the time she shot at her house

TITLE: Hobson v. State

INDEX NO.: K.3.a.2.

CITE: (12-01-11), 957 N.E.2d 1031 (Ind. Ct. App 2011)

SUBJECT: Criminal recklessness - evidence sufficient

HOLDING: State presented sufficient evidence to support D's criminal recklessness conviction where D admitted approaching a Chevy Blazer parked in the lot of a burned out business and firing shots in the air as it drove away, and a witness testified that he was parked in that location in a Chevy Blazer which was struck by bullets as he pulled away. Distinguishing Ferrell v. State, 656 N.E.2d 839 (Ind. Ct. App 1995), Court held that one may reasonably infer from the evidence that D was the person who recklessly shot at or near the Blazer, creating a substantial risk of bodily injury to the occupants. Held, judgment affirmed.

TITLE: Irwin v. State
INDEX NO.: K.3.a.2.
CITE: (4th Dist., 3-19-01), Ind. App., 744 N.E.2d 565
SUBJECT: Criminal recklessness - serving alcoholic beverages
HOLDING: Evidence was sufficient to support D's conviction for criminal recklessness. D, a bartender, served customer ten double drinks over period of 130 minutes, & then allowed customer to leave. As result, customer & two others were killed in automobile accident. Jury watched videotape which various witnesses testified showed D pouring ten double-plus drinks of rum. State's expert testified about process of intoxication, how its effects could be observed, & evidence as to customer's actual intoxication. Another witness testified that D had been taught about effects of alcohol & that he told her he felt responsible for accident because he had served so many drinks to customer. From this evidence, jury could reasonably find beyond reasonable doubt that D had unjustifiably disregarded harm that might result, thereby performing act that created substantial risk of bodily injury to general public, in violation of Ind. Code 35-42-2-2(b). Held, conviction affirmed.

TITLE: Joseph v. State

INDEX NO.: K.3.a.2.

CITE: 126 N.E.3d 810 (Ind. Ct. App. 2019) 05/02/2019

SUBJECT: Criminal recklessness - improperly unloading, clearing and disassembling firearm

HOLDING: State presented sufficient evidence to support Defendant's criminal recklessness conviction based on his improper cleaning of handgun in proximity to a child and other residents of apartment complex, resulting in discharge and injury. Defendant knew the handgun was defective in that it did not reasonably eject shells after firing. There was testimony that a proper sequence for firearm handling would have involved engaging the safety, pointing in a safe direction, removing the magazine, racking the slide at least once, locking the slide back, and visually or physically inspecting the chamber. However, Defendant elected not to engage the thumb safety mechanism of his handgun or ascertain that it was unloaded prior to pointing the weapon and moving the slide back in an attempt to dislodge a bushing at the tip of the barrel. This was sufficient evidence from which factfinder could conclude that Defendant engaged in conduct in plain, conscious, and unjustifiable disregard of harm that might result, and the disregard involved a substantial deviation from acceptable standards of conduct. Held, judgment affirmed; Pyle, J., dissenting, believes that although Defendant may have disregarded proper procedures for unloading, clearing and disassembling a firearm, "the remedy in this case is found in our civil law."

TITLE: Kilmon v. State

INDEX NO.: K.3.a.2.

CITE: 905 A.2d 306 (Md.Ct. App. 2006)

SUBJECT: Pregnant woman's ingestion of drugs not reckless endangerment

HOLDING: The Maryland Court of Appeals held that the state's reckless endangerment statute does not apply to a pregnant woman's ingestion of a substance that poses a risk to her fetus. The statute makes it a misdemeanor for a person recklessly to "engage in conduct that creates a substantial risk of death or serious physical injury to another." The State argued it could prosecute women whose newborns tested positive for cocaine, attempting to avoid the issue of according a fetus the status of a person by arguing that the law would apply only to those women whose fetuses were born alive.

The Court rejected the State's arguments and held that the legislature did not intend for the statute to apply to the intentional ingestion of cocaine by a pregnant woman. The Court noted that the legislature has repeatedly considered and rejected legislation that would impose criminal liability on pregnant women who endanger their fetuses. The legislature has chosen to address the problem of drug abuse by pregnant women through addiction treatment, the termination of parental rights, and other noncriminal means. Additionally, the Court noted policy issues that are not present with respect to acts committed by third parties. It added that application of the statute to pregnant women could lead to prosecutions based on "a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature." The Court noted that nearly all other states that have considered the issue have rejected the application of similar statutes to pregnant women who ingest drugs, with only South Carolina taking a contrary position.

TITLE: Kimball v. State

INDEX NO.: K.3.a.2.

CITE: (2/28/85) Ind. App., 474 N.E.2d 982

SUBJECT: Criminal recklessness - constitutionality

HOLDING: Criminal recklessness statute, Ind. Code 35-41-2-2(a) & (c), requires general intent; therefore, statute is not lacking mens rea element as required by due process & is constitutional. Humes 426 N.E.2d 379. Crime of recklessness requires proof of reckless behavior; it does not require intent to accomplish a result which would be a crime. Recklessness is shown by a disregard for harm that might result. Humes. Held, conviction affirmed.

RELATED CASES: Miller, App., 449 N.E.2d 1119 (statute is not vague on its face or as applied, *citing Beckman* 37 N.E.2d 531).

TITLE: Meek v. State

INDEX NO.: K.3.a.2.

CITE: (3rd Dist., 03-02-94), Ind. App., 629 N.E.2d 932

SUBJECT: Criminal recklessness instruction - no error in refusing

HOLDING: Tr. Ct. did not err in refusing D's tendered instruction concerning definition of criminal recklessness, because instruction given was correct statement of law. When officer came to D's house, D was on back porch with shotgun. D pointed gun at officer & threatened to kill him unless he left. Eventually, officer got D to put gun down, after which he went inside & returned without gun. When officer recovered shotgun, it was unloaded. D's tendered instruction included language that placing barrel of unloaded firearm against body of another didn't necessarily constitute criminal recklessness because it did not necessarily create substantial risk of bodily harm. Tr. Ct. gave instruction without that language, & refused D's instruction. Ct. acknowledged that Warren, App., 615 N.E.2d 500; Reynold, App., 573 N.E.2d 430; & Mahone, App., 429 N.E.2d 261, contained language that unloaded gun in some circumstances might not create substantial risk of bodily harm, but none of them concerned instructions. Merely because statement is contained in appellate decision, does not necessarily mean it is appropriate for instruction, Hare, 467 N.E.2d 7. Tr. Ct.'s instruction correctly stated law & was applicable to evidence, & Ct. noted that instruction is not erroneous just because it is not fullest statement of law, Lopez, 527 N.E.2d 1119. Instruction given required proof D's acts created substantial risk of bodily injury to officer, & D was free to argue that merely pointing unloaded gun at officer did not create such risk, Staton, J., dissenting with good argument concerning duty to instruct jury fully in all matters of law necessary to decision.

TITLE: Morse v. State

INDEX NO.: K.3.a.2.

CITE: (2d Dist., 1-30-95), Ind. App., 646 N.E.2d 332

SUBJECT: Criminal recklessness - voluntary intoxication -

HOLDING: Evidence of D's deliberate & controlled actions was sufficient to support conviction for criminal recklessness. D claimed that, due to either his voluntary intoxication or blackout, he lacked requisite culpability to commit offense. Intoxication or mental incapacity is defense to any crime to extent it negates mens rea, in this case "recklessly, knowingly, or intentionally" shooting complaining witness (CW), Terry v. State, Ind., 465 N.E.2d 1085; Butrum v. State, Ind., 469 N.E.2d 1174. Here, evidence of extent of D's culpability conflicted, as CW testified that D was able to enter & exit car, engage in lucid conversation over extended period of time, arm himself, seek, find, & shoot at CW. This was substantial evidence of probative value to support conviction. Held, conviction affirmed.

TITLE: Ponciano v. State
INDEX NO.: K.3.a.2.
CITE: (2nd Dist., 07-13-06), Ind. App., 851 N.E.2d 305
SUBJECT: Criminal recklessness - shooting firearm from vehicle; proportionality claim
HOLDING: Ct. rejected claim that Ind. Code 35-42-2-2(c)(3) violates Proportionality Clause of Indiana Constitution because it more severely punishes the criminally reckless act of shooting from a vehicle than the criminally reckless discharge of a gun by a person who does not occupy a vehicle. Proportionality Clause, Article 1, Section 16 states that "[a]ll penalties shall be proportioned to the nature of the offense." A legislatively determined penalty will be deemed unconstitutional by reason of its length only if it is so severe & entirely out of proportion to the gravity of the offense committed as to shock public sentiment & violate the judgment of reasonable people. Teer v. State, 738 N.E.2d 283 (Ind. Ct. App 2003).

If a person commits criminal recklessness while armed with a deadly weapon, the offense is elevated to a class D felony. Ind. Code 35-42-2-2(c)(2). If a person commits the offense by shooting a firearm from a vehicle into an inhabited dwelling, building, or other place where people are likely to gather, the offense is elevated to a Class C felony. Ind. Code 35-42-2-2(c)(3). Ct. noted that Legislature could have reasonably determined that a person who shoots a firearm from a vehicle into a place where people are likely to gather commits a more dangerous & serious crime because the vehicle makes it: 1) less likely that the person will be identified or apprehended; 2) more likely that the offense will be committed because the person avoids identification, apprehension, & a face-to-face encounter with his intended victim; & 3) more likely that bystanders & unintended victims will suffer serious bodily injury or death because of the difficulty of aiming & discharging firearm from a moving vehicle. Statute does not shock public sentiment or violate judgment of reasonable people.

In rejecting D's vagueness challenge to "place where people are likely to gather" language of statute, Ct. concluded that there is no constitutional requirement that the legislature provide an exact list of places where people are likely to gather. & Ct. could not conclude that phrase "a place where people would likely gather" refers to all places where people could conceivably gather. Held, conviction affirmed.

TITLE: Springer v. State

INDEX NO.: K.3.a.2.

CITE: (11-6-03), Ind., 798 N.E.2d 431

SUBJECT: Criminal recklessness - failure to give jury instruction regarding negligence; no error

HOLDING: In criminal recklessness prosecution, Tr. Ct. did not abuse its discretion in refusing to give D's tendered jury instructions regarding distinction between negligence & recklessness. D went to residence where his son had been beaten up the night before, carrying a loaded, unlicensed firearm with him. In a state of anger, D banged on door & when he gained entry, he demanded to know whereabouts of person whom he believed had beaten his son. In the midst of this activity, D's gun fired & injured an occupant in another room. Charging information alleged that criminal recklessness occurred when D "discharged a .45 caliber handgun causing the bullet/projectile to enter the chest of [the victim]." It did not charge that D was reckless by entering a dwelling full of people with a loaded, cocked handgun. At trial, D argued that gun discharged as a result of an accident, or at the most negligence, & that his conduct did not rise to level of recklessness. However, Tr. Ct. refused to instruct jury on negligence, which D argued was necessary to explain his theory of defense.

Noting that D was free to & did argue that he did no more than fail to exercise reasonable or ordinary care, Ct. held that no additional instruction to jury on this point was required. Moreover, no reasonable interpretation of facts suggests that D's conduct was merely negligent; thus, there was no legal question of negligence at stake. From very beginning, D engaged in conduct in which he had no right to engage & which, when viewed in its best light, indicated an intent to intimidate. In reaching its conclusion, Ct. distinguished Chicos v. State, 243 Ind. 187, 184 N.E.2d 1 (1962), & Sipp v. State, 514 N.E.2d 330 (Ind. Ct. App 1987), which involved driving a motor vehicle-- conduct that can be undertaken with due care. Held, transfer granted, Ct. App.' opinion on this issue at 779 N.E.2d 555 vacated & summarily affirmed on other issues, conviction affirmed. Dickson & Rucker, JJ., dissenting, believed that D's tendered instructions were correct statements of law, were based upon evidence, were not adequately covered by other instructions, & were necessary to enable jury fairly to consider D's theory of defense.

RELATED CASES: New, 135 N.E.3d 619 (Ind. Ct. App. 2019) ((D was entitled to jury instruction on negligence defense in criminal recklessness case).

TITLE: State v. Keith
INDEX NO.: K.3.a.2.
CITE: (2d Dist. 9/11/85) Ind. App., 482 N.E.2d 751
SUBJECT: Criminal recklessness - lesser included offenses
HOLDING: Tr.Ct did not err in granting D's motion to dismiss felony charge of criminal recklessness. Here, D was charged with misdemeanor criminal recklessness. State moved to dismiss misdemeanor charges & Tr. Ct. erroneously overruled motion. [Ind. Code 35-34-1-13 requires Tr. Ct. to dismiss charges.] Tr. Ct. accepted D's guilty plea to misdemeanor charge. State charged D with felony criminal recklessness. Tr. Ct. granted state's second motion to dismiss misdemeanor proceeding. Tr. Ct. granted D's motion to dismiss felony proceeding. Ct. finds felony offense as charged satisfies each element of misdemeanor offense; therefore, misdemeanor offense is lesser included of felony offense & 2 are same for double jeopardy purposes. Tawney 439 N.E.2d 582; State v. Redmon 425 N.E.2d 634. Held, dismissal of felony charge affirmed. Sullivan CONCURS IN RESULT without opinion. On rehearing, State v. Keith, App., 507 N.E.2d 245 (dismissal affirmed).

TITLE: Tipton v. State

INDEX NO.: K.3.a.2.

CITE: (12/21/2012), 981 N.E. 2d 103 (Ind. Ct. App 2012)

SUBJECT: Criminal recklessness - shooting gun when resident of house is absent

HOLDING: For criminal recklessness purposes, shooting a gun at a residence may create a substantial risk of bodily injury to another person even if the resident is away from home at the moment of the shooting. Here, D shot at police who arrived at his home to arrest him on suspicion of domestic battery. Some of the shots hit the neighbors' house, but they were not home at the time. Charging information for Class C felony criminal recklessness stated D performed "an act that created a substantial risk of bodily injury to another person by shooting a firearm into an inhabited dwelling." It did not allege the police officers were at risk. D argued the neighbors' house was not the "inhabited dwelling" Ind. Code 35-42-2-2 requires because nobody was home when he shot at it.

Court declined to hold that a dwelling is necessarily "uninhabited" for criminal recklessness purposes when its residents are briefly away. In so holding, Court adopted reasoning of other courts that have held the fact the occupants of a house were not physically present does not lessen the risk of danger to others or the recklessness of D's behavior and that shooting at a structure currently used as a dwelling poses a great risk or "high probability" of death. Thus a residence may be "inhabited" for criminal recklessness purposes if someone is likely to be inside.

RELATED CASES: Grannan, 174 N.E.3d 232 (Ind. Ct. App. 2021) (State presented sufficient evidence to establish that D's act of shooting several bullets into the side of her ex-friend's home in the middle of the night posed a substantial risk of bodily injury, and thus constituted criminal recklessness. In so holding, Ct. disagreed with D's claim that her conduct did not fall within the purview of the offense of criminal recklessness because her ex-friend's home was not inhabited when she fired the shot. The plain language of the statute also applies to a building "where people are likely to gather," and ex-friend's home fits this definition. D later admitted that she knew her ex-friend had returned home at the time she shot at her house).

TITLE: Upp v. State

INDEX NO.: K.3.a.2.

CITE: (3d Dist. 2/6/85), Ind. App., 473 N.E.2d 1030

SUBJECT: Criminal recklessness - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for criminal recklessness. Here, D contends evidence did not establish substantial risk of bodily injury because he was not trying to hit victim, just frighten him away by firing shots near his feet. Ct. finds substantial risk that victim could have been hit had D missed aim or bullet ricocheted. Held, evidence sufficient; Tr. Ct.'s grant of new trial (right to counsel) affirmed. **Note:** D sought appellate review of sufficiency determination to bar retrial.

RELATED CASES: Green, App., 808 N.E.2d 137 (evidence sufficient where after argument, when D was upstairs packing his bag, a gun discharged & the bullet lodged in a wall behind the wife & her brother, which D maintained was an accident. Police found a gun that had been discharged in the bag without any indication the gun went off while in the bag. Ct. held that sufficient circumstantial evidence existed to show that D shot the bullet that struck behind the wife & her brother & that this was enough to prove criminal recklessness); Rowold, App., 629 N.E.2d 1285 (State does not have to show D knew of potential harm, only that he should have known of potential danger); Kimball, 474 N.E.2d 982 (see card at K.3.a.2); Brinker, App., 491 N.E.2d 223 (Autos 342, 356; where D & friend were racing & latter's car struck another, resulting in injury & death, evidence was sufficient to sustain D's conviction for criminal recklessness).

TITLE: Wallace v. State

INDEX NO.: K.3.a.2.

CITE: (1st Dist. 8/20/90), Ind. App., 558 N.E.2d 864

SUBJECT: Criminal recklessness - sufficiency; changing lanes while driving

HOLDING: Evidence that D changed lanes without looking or using turn signals, resulting in car being forced off road, did not support conviction for criminal recklessness. D was driving tanker truck loaded with grain alcohol in convoy with other drivers when he changed lanes & forced car off road. Other truck driver radioed this fact to D, & he pulled back over so that car could return to road. Evidence most favorable to verdict was that D did not look for other cars or use turn signals. Ind. Code 35-41-2-2 provides that person acts recklessly "if he engages in the conduct in plain, conscious, & unjustifiable disregard of harm that might result & the disregard involves a substantial deviation from acceptable standards of conduct." To win conviction, state merely need show that individual realized or should have realized strong probability that harm might occur. Miller, App., 449 N.E.2d 1119. In Abney 525 N.E.2d 333, S.Ct. upheld conviction for criminal recklessness where tavern patron attempted to keep fellow patron from intervening in fight with his estranged wife, & inadvertently stabbed him. S.Ct. stated that intent state had to prove was "intent to strike [the intervening patron] with the knowledge that appellant was holding an open knife at the time." Here, D's sole intent was to change lanes, & because he had no knowledge of presence of other car, he could not be reckless with regard to potential harm unknown to him. D's conduct was merely negligent. Held, conviction reversed. Robertson, J., DISSENTS, arguing that evidence created inference that D, professional driver, should have known of risk of potential harm to passing motorist.

RELATED CASES: Watson, App., 776 N.E.2d 914 (although D was unfamiliar with area where accident occurred, he knew or should have known that driving 70 miles per hour at dusk on unfamiliar road with three children in car involved substantial deviation from acceptable standards of conduct).

TITLE: Williams v. State

INDEX NO.: K.3.a.2

CITE: (11/17/2016), 64 N.E.3d 226 (Ind. Ct. App 2016)

SUBJECT: Evidence sufficient that bullet was fired "into" a dwelling for criminal recklessness conviction

HOLDING: Evidence was sufficient that D fired a bullet “into” a dwelling, and was thus sufficient to support his conviction for level 5 felony criminal recklessness, where D fired a handgun at a raccoon sitting on a trash can, and where the bullet pierced the vinyl siding of one house, exited the corner of that house, ricocheted, and then lodged in the vinyl siding of another home across the street, where a ten-year-old girl was sleeping just beyond the siding that the bullet pierced. See Ind. Code § 35-42-2-2(b)(2)(A). The siding of a home marks the boundary of a dwelling, and even a bullet that has only partly penetrated the exterior of a dwelling has entered “into” the dwelling. The plain language of the statute supports this interpretation, as does the policy of reducing risk of injury to those inside a home. Held, judgment affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.a.3. Provocation

TITLE: Evans v. State

INDEX NO.: K.3.a.3.

CITE: (5/12/82), Ind. App., 434 N.E.2d 940

SUBJECT: Provocation -- sufficiency of evidence

HOLDING: Crime of provocation is committed by instigating another to commit battery against any person. D need not actually know her conduct would cause another to commit battery, but it is enough that D should know that it would. Crime encompasses numerous situations, but most commonly will punish someone who provokes fight. Language "likely to provoke reasonable man to commit battery" in provocation statute implies condition that victim of verbal harassment must have present capacity to commit battery. Here, D was convicted of provocation of police officer and she appealed. Ct. held that evidence was insufficient to show that police officer had physical capacity to commit battery because, although he was in close proximity to D when she made statement, he was driving his vehicle in opposite direction with passenger window rolled up, he only partially heard her and had to stop his car, back his vehicle to where he found her, stop, part vehicle, and then get out of vehicle and confront D. Ct. did not find support in evidence for finding that well-trained police officer would commit battery in this situation. Held, conviction reversed and remanded.

K. CRIMES

K.3. Offenses against the person

K.3.b. Homicide

TITLE: Reaves v. State

INDEX NO.: K.3.b.

CITE: (02/17/92), Ind., 586 N.E.2d 847

SUBJECT: Felony Murder - Causation

HOLDING: Immediate cause of victim's death was not so extraordinary that D should not have been held responsible for death. In process of burglary & robbery, victim's niece was thrown on top of victim, who was bedfast. Niece was unable to move off victim during night & next morning the 2 were taken to hospital. Victim was examined, treated & released & remained bedfast until he died 3 weeks later of pulmonary embolism. Coroner testified that having niece thrown on legs caused blood clot which broke off & traveled to pulmonary artery, eventually causing death. D argued that niece's weight was primarily on other leg, that most of medical personnel did not report any bruising on victim's leg, that victim was immediately released from hospital, that examination of autopsy pathologist revealed no sign of trauma, that victim remained bedfast following incident & that he had suffered from bad circulation for some time. Ct. found that although 2 of pathology experts testified victim died of natural causes, all 3 pathologists agreed that death could have been either natural or due to crime, & therefore one pathologist's testimony on causation was sufficient to support verdict. Even if victim's death were due to his immobilization after robbery, D would still be responsible because "proof beyond a reasonable doubt does not require proof to a moral certainty..." & if physical debility causing death was produced by D's acts, it is sufficient for liability, Thomas 436 N.E.2d 1109, 1112. Held, conviction affirmed.

TITLE: Yearly v. State
INDEX NO.: K.3.b.
CITE: (04/04/2022) Ind. Ct. App., 186 N.E.3d 662
SUBJECT: Drug-Induced Homicide statute constitutional but reversible error found in jury instructions
HOLDING: The Court of Appeals held Indiana's Drug Induced Homicide (DIH) statute (Ind. Code § 35-42-1-1.5) does not eliminate the State's burden of proving proximate causation and is therefore constitutional. The plain language of I.C. 35-42-1-1.5(a) requires the State to prove a causal connection between the controlled substance delivered by the defendant and the victim's death. The plain language of subsection (d)(1) only precludes a defendant from raising as a "complete defense" that the person who died made the voluntary choice to use, inject, inhale, absorb, or ingest the drug manufactured or delivered by the defendant. See, e.g., Willis v. State, 888 N.E.2ds 177, 182-84 (defenses of parental privilege and self-defense are "complete defense[s]" eliminating culpability for an otherwise criminal act). As applied here, the defense exclusion in subsection (d)(1) merely prevented Defendant from seeking acquittal solely because the victim voluntarily chose to ingest the drug that Defendant sold him. Subsection (d)(1) does not prohibit Defendant from ever arguing the user's voluntary actions broke the chain of causation. Instead, it effectively prohibits the defendant from only arguing that one particular voluntary decision by a user – to ingest the substance – breaks the chain of causation.

As with subsection (d)(1), subsection (d)(2) does not alter the State's constitutional burden of proving causation. The State still must prove that the death resulted from the drug distributed by the defendant. Where multiple drugs are in the defendant's system, such proof may consist of evidence that the drug distributed by the defendant was enough, by itself, to cause the death. It also may consist of evidence that the distributed drug, while not enough to cause the death by itself, foreseeably combined with other substances to cause the death.

The trial court committed reversible error in refusing to give Defendant's tendered jury instructions, which further defined the element of causation. Simply saying that ingestion of a controlled substance "resulted in the death of a human being who used the controlled substance" does not convey the concept of proximate causation to a lay juror. Likewise, saying, "cause of death" is that event which initiates a chain of events, however short or protracted, that results in the death of an individual" does not convey to a lay person that some event may break the chain of causation. A lay person could reasonably, but erroneously, interpret these instructions to mean the State was only required to prove the victim's death followed the drug sale because "result" and "follow" are synonyms. Due to the ambiguity regarding precisely what drugs and in what quantities the victim took over the time period leading up to his death, the jury's verdict likely turned on its understanding of the legally required causal connection between the drugs Defendant sold the victim and the victim's death. Therefore, the trial court's instructional error cannot be called harmless.

Because the evidence could permit a reasonable trier of fact to determine the drugs Defendant sold to the victim were the actual and proximate causes of the victim's death, the State may choose to retry Defendant. But improperly excluded evidence of the text messages the victims sent and received in the days immediately preceding the victim's death should be admissible in the event of retrial. The text messages point to potential alternate sources of the fentanyl the victim ingested, and therefore, they affect the probability of whether the drugs Defendant sold him proximately caused his death.

Consequently, at least portions were relevant to the issue of causation and should have been admitted. Held, judgment reversed and remanded.

RELATED CASES: Veach, 204 N.E.3d 331 (Ind. Ct. App. 2023) (dealing causing death conviction affirmed even though deceased's autopsy revealed additional substances than those D alleged to have sold and delivered to deceased; *citing* Yeary, Ct. also found no abuse of discretion in instructing jury that it is not a defense that the deceased died by voluntarily using a controlled substance in combination with any other substance; instruction did not restrict D from arguing the decedent's voluntary conduct of combining other drugs was an intervening cause of his death).

K. CRIMES

K.3. Offenses against the person

K.3.b.1. Murder (Ind. Code 35-42-1-1(1))

TITLE: Askew v. State

INDEX NO.: K.3.b.1.

CITE: (10/4/82) Ind., 439 N.E.2d 1350

SUBJECT: Murder - human being

HOLDING: Murder statute, Ind. Code 35-42-1-1, applies only to the killing of human beings. An indictment for murder that names victim need not further state victim is a human being. Roberts 375 N.E.2d 215; Merrick, (1878) 63 Ind. 327. D argued that indictment/information must state crime in words of statute or words that convey similar meaning. Thus, D argued that Tr. Ct. erred in overruling his motion for discharge. D contended discharge was proper because information on which charge was based failed to state that victim was a human being. Ct. finds no merit to argument. Held, murder conviction affirmed.

TITLE: Askew v. State

INDEX NO.: K.3.b.1.

CITE: (10/4/82) Ind., 439 N.E.2d 1350

SUBJECT: Murder - intent; sufficiency; use of deadly weapon

HOLDING: Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm. Fryback 400 N.E.2d 1128; Chambers 392 N.E.2d 1156. See also Vasseur 430 N.E.2d 1157; Armstrong 429 N.E.2d 647; Jackson 426 N.E.2d 685. Here, D fired a sawed-off shotgun at close range into decedent's chest. Evidence held sufficient to support Tr. Ct. finding regarding element of intent. Held, murder conviction affirmed.

RELATED CASES: Lee 498 N.E.2d 972 (Homic 230; Ct. rejects D's contention that because he shot victim in arm & then fired more shots into ground around her, he did not intend to murder her; held, attempted murder conviction affirmed).

TITLE: Bryan v. State

INDEX NO.: K.3.b.1.

CITE: (6/28/83) Ind., 450 N.E.2d 53

SUBJECT: Murder - sufficiency; self-defense

HOLDING: Evidence was sufficient to prove D knowingly killed victim where D strangled her with wire after allegedly wrestling baseball bat from her. Here, D contends ex-wife's statement that she planned to remove children from state so he would never see them again caused him to kill her in sudden heat. Ct. holds such a statement is not sufficient provocation to reduce homicide to manslaughter. Provocation must be adequate to arouse emotions of an ordinary person so as to obscure reasoning powers. See Hooks 409 N.E.2d 618; Dickens 295 N.E.2d 613; 15 I.L.E. Homicide 32; 40 Am.Jr.2d Homicide 61; 40 C.J.S. Homicide 46. Evidence also shows D attacked victim with deadly force after any danger to him had passed. Right of self-defense passes when danger passes. Schlegel 150 N.E.2d 563. Held, conviction affirmed.

TITLE: Bunch v. State

INDEX NO.: K.3.b.1.

CITE: (6-9-98), Ind., 697 N.E.2d 1255

SUBJECT: Evidence sufficient to support felony murder conviction

HOLDING: Evidence was sufficient to support conviction of felony murder. Culpability for felony murder is established once jury concludes that D set fire & victim died in fire. Sheckles, 501 N.E.2d 1053. Arson is almost always subject to proof only by circumstantial evidence. Barton, 490 N.E.2d 317. Here, D was convicted of setting fire to her home in which her son died. However, D claimed that State failed to prove her guilt because State did not show that D bought accelerant, poured it, ignited it or otherwise started fire. Yet, D admitted presence in home when fire started, there was lack of any claim of forced entry, & there were strong indications inside home of deliberate scheme to commit arson & trap D's son in bedroom. These facts pointed to D, & excluded all others, as cause of fire. Thus, felony murder conviction was supported by sufficient evidence. Held, conviction affirmed.

TITLE: Cash v. State
INDEX NO.: K.3.b.1.
CITE: (03-04-93), Ind., 610 N.E.2d 228
SUBJECT: Circumstantial evidence sufficient to support murder conviction
HOLDING: Evidence showing D had considerable amount of blood on his clothing shortly after victim's death, told different stories of incident, although largely circumstantial, was sufficient to support murder conviction. When victim's body was found, he had severe head & facial injuries, apparently inflicted by nearby concrete block, and deep cuts on hands, indicating defensive wounds. Tennis shoes and watch owned by victim were missing and he had been in company of D shortly before his death. When D was found he was wearing victim's tennis shoes and watch, and he told police he and victim had been camping out and were attacked by gang who beat both of them. When first questioned, D said watch was his, but he later said he had taken victim's shoes and watch before leaving scene. He never reported incident to police prior to apprehension.

Ct. found evidence showed more than mere suspicion or possibility that D committed murder. He had considerable blood on his clothing, which was more than would be expected from small cut over his eye. He first told police he went to vacant apartment building, where he cleaned up and slept after attack. Witness testified, however, that D came to his house covered with blood, and he allowed D to clean up there. Considered as whole, although largely circumstantial, evidence was sufficient to support guilty verdict. Held, conviction upheld, Dickson & DeBruler, JJ., dissenting, finding that evidence was insufficient to show D "knowingly" killed another person.

RELATED CASES: Miles, 51 N.E.3d 305 (Ind. Ct. App 2016) (abundant evidence supported inference D knowingly killed victim; although D told police the victim accidentally shot herself, D's several different explanations were inconsistent with the physical evidence, and D was seen fighting with victim a few minutes before the shooting); Lawrence, 959 N.E.2d 385 (Ind. Ct. App 2012) (D's presence at crime scene coupled with other circumstantial evidence was sufficient to support reasonable inferences enabling the jury to find him guilty of murder beyond a reasonable doubt; any challenge to the use of State witness's inconsistent out-of-court statements as substantive evidence was waived); Kriner, 699 N.E.2d 659 (circumstantial evidence viewed as whole and most favorably to judgment supported guilty verdict); Walton, 637 N.E.2d 808 (sufficient evidence to show D was perpetrator of murder, even though chief witness was blind, because witness knew D's voice, etc., and other witness, although child, was very credible).

TITLE: Davenport v. State

INDEX NO.: K.3.b.1.

CITE: (7/6/84) Ind., 464 N.E.2d 1302

SUBJECT: Attempted murder - sufficiency; premeditation not element

HOLDING: D is incorrect in contending evidence is insufficient to sustain conviction for attempted murder. Here, jury returned verdict of guilty of attempted murder. Jury verdict included request for leniency (because crime "unpremeditated"). D argues verdict negated finding of necessary intent. Words added to verdict are considered surplusage unless inconsistent with jury's determination. Hogan 409 N.E.2d 588; Rush 292 N.E.2d 599. Premeditation is no longer element of murder. Ind. Code 35-42-1-1 requires only knowing or intentional action. Intent to kill can be inferred from intentional use of deadly weapon in manner reasonably calculated to produce death/great bodily harm; purpose to kill may be inferred from act of killing. Vasseur 430 N.E.2d 1157; Jackson 426 N.E.2d 685. Ct. finds jury's statement that D's act was "unpremeditated" not inconsistent with verdict. Held, conviction affirmed. Prentice, CONCURRING IN RESULT, contends crime of attempt encompasses premeditation, *citing* Smith 459 N.E.2d 355.

RELATED CASES: Castellanos 477 N.E.2d 279 (discussion of premeditation under prior murder statute; held, conviction affirmed); Rhinehardt 477 N.E.2d 89 (Homic 230, 256; Ct. rejects D's contention that his intent was to frighten rather than kill pursuer when he fired wide shot; D presented evidence of proficiency with firearms, but police testified D's gun was not particularly accurate & was loaded with dangerous hollow-point cartridges; held, conviction affirmed).

TITLE: Davidson v. State

INDEX NO.: K.3.b.1.

CITE: (06-28-06), Ind., 849 N.E.2d 591

SUBJECT: Murder - evidence of involuntary intoxication does not require instruction including voluntariness as element of crime

HOLDING: Tr. Ct. did not err by refusing to read D's tendered instruction adding "& voluntarily" as an additional element of murder. If evidence raised voluntariness as an issue, State must prove the D acted voluntarily beyond a reasonable doubt. Baird v. State, 604/1170 (Ind. 1992). In fact, Indiana Pattern Jury Instructions insert the phrase "& voluntarily" into elements of crime when evidence raises voluntariness issue. Ind. Pattern Jury Inst. 9.01 (3rd. ed. 2005). Here, D presented expert testimony that combination of Ambien & Zoloft, which D took night of murder, could adversely affect person's control over impulsive behavior, causing one to become uninhibited. Experts also testified that D was unaware of these potential adverse effects, & D was in a disassociative state rendering his conduct involuntary. This testimony supports an involuntary intoxication defense. If the Ct. were to hold that evidence of intoxication raised question of voluntary conduct, result would be that all intoxication, & not just involuntary intoxication, would be a defense. Further, because D has burden to prove defense of involuntary intoxication, D could switch burden back to State by framing intoxication as evidence of voluntariness. Thus, evidence of intoxication does not raise issue of voluntariness, & does not require Ct. to add the phrase "& voluntarily" into the element instruction of the charged crime. Held, judgment affirmed.

TITLE: Drane v. State

INDEX NO.: K.3.b.1.

CITE: 867 N.E.2d 144 (Ind. 2007)

SUBJECT: Murder- sufficiency of the evidence

HOLDING: There was sufficient evidence to support D's convictions for murder and rape. Appellate courts affirm the conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. The task for the appellate tribunal is to decide whether the facts favorable to the verdict represent substantial evidence probative of the elements of the offense. Here, the victim talked with D multiple times on the night of the murders making arrangements to meet him. The victim was last seen around 10:00 p.m. D admitted meeting the victim and having consensual sex with her. D claimed she left him around midnight. The victim's body was found around 9:00 the next morning in a park. Although D denied being in the park, at around 11:00 p.m. to 11:30 p.m. and then again about two to three hours later on the night of the murder, D's car was seen in the park near where the body was found. The victim's body was bruised, she was strangled, and her skirt was pulled up so her genitalia were visible. DNA samples found on vaginal cervical swabs and external genital swabs from the victim's body could not exclude D as a contributing source. There was evidence of a probative value from which a jury could find D committed the crimes beyond a reasonable doubt. Held, transfer granted, Court of Appeal's memorandum opinion vacated, judgment affirmed.

TITLE: Elliot v. State

INDEX NO.: K.3.b.1.

CITE: (2nd Dist., 4-21-03), Ind. App., 786 N.E.2d 799

SUBJECT: Attempted murder - sufficiency

HOLDING: Evidence was sufficient to prove D committed attempted murder. State must prove that D acted with specific intent to kill & that he engaged in conduct that constituted substantial step toward killing of victim, his wife. Here, evidence showed that D drove to wife's workplace with twelve-gauge shotgun loaded with four deer slugs & waited in bean field for her to arrive. When she did, D fired two slugs in her direction. Although neither one hit her, slugs landed in chicken house & grain bin behind her, about one & a half feet above her head. D claimed he shot gun to scare wife into coming back to him. However, evidence contradicted that claim. Twenty years prior to this incident, D had pointed gun at wife's head & threatened to kill her if she ever left. Not long before current incident, D told wife that he would hunt her down & kill her & told neighbor that he would blow himself or someone else away, that he had guns, & that if he couldn't have wife, then no one could. Further, letter found in D's possession & notebook found in car both revealed similar statements. Held, judgment affirmed.

TITLE: Elliott v. State

INDEX NO.: K.3.b.1.

CITE: (03-08-94), Ind., 630 N.E.2d 202

SUBJECT: Murder conviction upheld - various issues

HOLDING: Decision upheld D's murder conviction & found sufficient evidence of intent to kill. Ct. additionally found no error in allowing decedent's mother to testify concerning her son's background & relationship with D's estranged wife, because information concerning individuals involved was relevant. Furthermore, prior threats & statements of D made to estranged wife & decedent were admissible under FRE 404(b) to show motive, plan & absence of accident. It also found no error in admitting photos of decedent's heart (removed from body), even though there was no dispute D fired shot that killed decedent or that bullet struck heart. Pictures demonstrated path of bullet & tended to negate defense of accident. Ct. additionally found no error in allowing testimony of therapist at hospital where D committed himself due to mental health problems. Ct. rejected argument that therapist worked under psychiatrist at hospital, making information privileged under doctor-patient privilege, finding instead that she was independent therapist & not covered by privilege.

RELATED CASES: Simmons, 999 N.E.2d 1005 (Ind. Ct. App 2013) (D knew there were a number of officers in the direction he was shooting, even if they were not visible to him behind the drywall).

TITLE: Fouts v. State

INDEX NO.: K.3.b.1.

CITE: (4-24-23), Ind. Ct. App., 207 N.E.3d 1257

SUBJECT: Corpus delicti rule satisfied by establishing an inference the charged crimes occurred; evidence of conspiracy to commit murder sufficient without conclusive medical evidence of the specific cause of death.

HOLDING: A jury convicted Defendant of conspiracy to commit murder and failure to report human remains in the death of her husband, whose body was found in a ditch under circumstances that led investigators to conclude that he did not die in that location. Her husband's stomach contents included poisonous mushrooms but tests for associated toxins were negative. The forensic pathologist testified that he could not "rule out between poisoning and asphyxia" as the cause of death but concluded he died of "homicide by unspecified means."

Responding to the argument that the evidence in the case was insufficient to prove there was a homicide at all, the Court of Appeals found that the requisite intent to commit murder was proven, noting medical testimony is not an absolute requirement to establishing the cause of death in a murder case and that the cause of death is not an element of the offense. In holding that sufficient evidence supported the conspiracy conviction, the Court summarily rejected Defendant's argument that the circumstantial evidence regarding the agreement to commit the offense of murder was insufficient, stating the argument is "essentially a request to reweigh the evidence, which we will not do." The Court also found sufficient evidence of failure to report human remains.

In response to a detective telling Defendant the police believed she killed her husband, she stated, "I know." In Indiana, before a confession may be admitted into evidence, the corpus delicti of the crime must be established by independent evidence of both the occurrence of the specific kind of injury and someone's criminal act as the cause of the injury. Williams v. State, 837 N.E.2d 615, 617 (Ind. Ct. App. 2005), trans. denied. The Court affirmed the admission of that statement and found the corpus delicti rule was satisfied, noting that the State need only present sufficient evidence to create an inference that the crime charged was committed and is not required to prove all the elements of the crime prior to the introduction of a confession.

Finally, the Court held that the prosecutor's closing argument, stating that Defendant's statement, "I know," was a confession and direct evidence of the crime, was not prosecutorial misconduct constituting fundamental error. The Court found that the statement had been admitted into evidence, the prosecutor's characterization of it as an "admission" was not unfair, and the jury had been instructed that arguments of counsel are not evidence. Held, affirmed.

TITLE: Gentry v. State

INDEX NO.: K.3.b.1.

CITE: (1st Dist., 12-16-93), Ind. App., 625 N.E.2d 1268

SUBJECT: Murder compared to assisting & causing suicide

HOLDING: D's actions constituted murder, not merely assisting or causing suicide, because he took independent steps of own volition to cause mother's death. D's mother suffered from multiple sclerosis & benign brain tumor, & when D arrived home she was apparently asleep on couch. D's confession related various times he checked on her, and his conclusion she was attempting suicide with pills he assumed she'd taken. Autopsy revealed non-lethal, but above therapeutic level, amount of Mellaril in her system. At times mother was incoherent & late in evening D put blanket over her head & went to bed. In early morning, D found she was unable to open her eyes, incoherent, & breathing shallowly. He covered her head & face with pillows & returned to bedroom. Later he found her still alive & decided to end her life by pressing pillows down on her face until she stopped breathing. He then called emergency personnel, who found her brain dead on couch. Coroner found she suffered facial trauma before being suffocated to death by pillows & concluded that although she suffered from several medical problems, she did not have any immediate life-threatening illnesses. D was convicted of murder, & Ct. rejected arguments that he had only assisted her suicide (not then a crime). D's acts were separate & distinct cause of mother's death, not merely attempt to aid her in her own suicide. If she was attempting to commit suicide through drug overdose, this was not cause of her death. Death resulted from D's knowing & intentional act of suffocation, & he was properly charged & convicted for murder. Ct. also rejected D's argument, based on *In re Lawrance*, 579 N.E.2d 32, that D was only helping her achieve final rest. D did not merely remove artificial medical treatment to allow mother to die naturally, he took positive, deliberate action to force her death. Held, murder conviction affirmed.

TITLE: Hobson v. State

INDEX NO.: K.3.b.1.

CITE: (12-31-96), Ind., 675 N.E.2d 1090

SUBJECT: Defective Murder conviction - erroneous instructions

HOLDING: D was charged with rape, criminal deviate conduct, & knowing/intentional murder. Ct. held that murder conviction was defective because Tr. Ct. gave general Murder verdict form to jury after instructing jury on both intentional or knowing murder & felony murder, with rape & criminal deviate conduct listed as alternative felonies to support felony murder. General verdict left it impossible to ascertain whether D was convicted on intentional murder or felony-murder theory. Under these circumstances, it was possible that jury concluded that State had only proved felony murder, while Tr. Ct. sentenced D for intentional murder along with underlying felonies. Secondly, it was impossible to know whether one or both felonies should have been merged into felony murder charge, thus there was possibility that D's double jeopardy rights were violated. Held, murder conviction reversed, remanded for new trial; Sullivan, J., would affirm murder conviction & vacate rape & criminal deviate conduct convictions.

RELATED CASES: Mathews, App., 824 N.E.2d 713 rev'd on other grounds, 849 N.E.2d 578 (Ind. Ct. App 2006) (there was no discrepancy between charging information and murder instruction; unlike in Hobson, murder instruction did not allow jury to convict D on a theory not contained in information; State presented two theories of murder, intentional murder & felony murder).

TITLE: Horne v. State

INDEX NO.: K.3.b.1.

CITE: (3/7/83) Ind., 445 N.E.2d 976

SUBJECT: Knowing/intentional murder - sufficiency

HOLDING: Evidence was sufficient to sustain murder conviction of D who caused injuries to 13-month-old stepson resulting in child's death. Here, D argues there was no evidence that he acted "knowingly" or with a specific intent to kill child. Direct evidence showed child was severely beaten about his head, face & shoulders. Ct. finds jury could conclude from child's injuries that D intended to kill the child. Corbin 234 N.E.2d 261. See also Hulen 413 N.E.2d 907 ("knowingly" is synonymous with "purposely.") An act is done "knowingly" or "purposely" if it is willed, is product of conscious design, intent or plan that it be done, & is done with awareness of probable consequences. Held, evidence sufficient to sustain conviction.

RELATED CASES: Blanchard, App., 802 N.E.2d 14 (State presented sufficient evidence to prove that D was aware of high probability of killing his infant by placing a washcloth over his mouth); Smith 486 N.E.2d 465 (Homic 9; prosecution need not prove D desired to bring about actual death of 4-year-old daughter by forcibly pouring large amounts of pepper into her mouth (Case 458 N.E.2d 233), only that such action created high probability of death, *citing* Burkhalter 397 N.E.2d 596); Peters 470 N.E.2d 708 (Homic 161, 230; duration, brutality, & relative strengths of D & victim are factors jury may consider as indications of D's intent to kill, *citing* Burkhalter & Shackleford 349 N.E.2d 150; held, jury could infer intent to kill from multiple injuries inflicted by D upon his stepson).

TITLE: Johnson v. State

INDEX NO.: K.3.b.1.

CITE: (12/22/82) Ind., 442 N.E.2d 1065

SUBJECT: Murder - cause of death not stated in information

HOLDING: An information or indictment charging murder is proper despite fact cause of victim's death is not specifically known. Roberts 375 N.E.2d 215; Carrier 134 N.E.2d 688. Here, D was originally charged with murder by striking victim on head with blunt instrument while committing a robbery against him. Information was amended to seek death penalty. Charge as amended did not specify means causing death. Court finds state could have & should have amended the amended charge to correct this defect. Nonetheless, court finds pleadings sufficiently informed D of charges & in fact D was well aware of charges & able to defend himself without prejudice. Carson 391 N.E.2d 600, on remand 403 N.E.2d 330. Held, no error.

TITLE: Kiefer v. State

INDEX NO.: K.3.b.1.

CITE: (1-4-02), Ind., 761 N.E.2d 802

SUBJECT: Attempted murder - evidence insufficient

HOLDING: Evidence was insufficient to convict D of attempted murder, because there was no evidence D acted with requisite intent to kill when he fired gun. As fourteen-year-old Chris Meringa was passing D's house, he heard explosion, turned & looked quickly in direction of house. Meringa saw lots of black smoke & sprinted home. Record revealed no motive or reason for D to kill Meringa, & D did not even know identity of person walking down road in front of his house. Second, D's conduct at scene was inconsistent with that of a man who intended to kill. D was standing in a well-lit area near his garage in presence of four witnesses. D had four rounds remaining in his gun that he could have fired had he wanted to kill Meringa. Finally, D's actions after shooting did not support conclusion that he intended to kill Meringa. After shooting, D said "that kid must be scared now," lending credence to argument that he intended only to scare Meringa. In addition, D walked casually back into his home & did not seem agitated or violent immediately after shooting. Held, conviction reversed.

TITLE: Ledesma v. State
INDEX NO.: K.3.b.1.
CITE: (1-30-02), Ind. App., 761 N.E.2d 896
SUBJECT: Attempted murder is lesser-included offense (LIO) of murder
HOLDING: Attempted murder is LIO of murder. When D is convicted of LIO which was not separately charged by State, Ct. examines whether accused was placed upon fair notice as to crime against which he must defend. McGowan v. State, 671 N.E.2d 1210 (Ind. Ct. App. 1996). Ind. Code 35-41-1-16(2) defines LIO as one that consists of attempt to commit offense charged or offense otherwise included. Thus, by statutory definition, attempted murder is inherently LIO of murder. Here, victim was shot several times by three different shooters. D was accused of shooting victim twice in chest where injuries would not have been fatal. Based on evidence, jury could have concluded that either D killed victim or one of other shooters killed victim. Because attempted murder is LIO of murder & serious evidentiary dispute existed, Tr. Ct. did not err by instructing jury on attempted murder. Held, judgment affirmed.

TITLE: Leonard v. State
INDEX NO.: K.3.b.1.
CITE: (5/2/2017), 73 N.E.3d 155 (Ind. 2017)
SUBJECT: "Knowing" mens rea applies to prohibited conduct, not identity of victims
HOLDING: To convict Defendant of knowingly murdering his two neighbors, the State needed to only show that Defendant knowingly committed the prohibited conduct – killing two other human beings – not that he knowingly killed two specific individuals. Thus, the evidence was sufficient to support Defendant's convictions.

Defendant lived with his girlfriend in Richmond Hill, a neighborhood on the southeast side of Indianapolis. To collect on a home insurance policy, they triggered a massive natural gas explosion of their home, which killed their two next door neighbors, the Longworths. Defendant was charged with and convicted of knowingly killing the Longworths.

On appeal, Defendant argued that the State failed to prove the knowing element as to the specific victims. In other words, he contended that the State failed to prove he knew that the victims of the crime would be the Longworths. In support, he cited Ind. Code § 35-41-2-2(d), which provides: "d) . . . if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct."

However, the statute requires the State to prove the knowing mens rea only with respect to every material element of the prohibited conduct, not the identity of the victims. Though the victims' identities were material elements of the offense, their identities were not part of the prohibited conduct. See Owens v. State, 742 N.E.2d 538, 543 (Ind. Ct. App. 2001) ("In Markley v. State, 421 N.E.2d 20, 21 (Ind. Ct. App. 1981)] we noted that 'prohibited conduct' and 'element' within Ind. Code § 35-41-2-2(d) are not synonymous and if the legislature had intended culpability to apply to every material element, the phrase 'of the prohibited conduct' would be superfluous."). Thus, the State presented sufficient evidence to prove beyond a reasonable doubt that Defendant knowingly committed murder. Held, judgment affirmed.

Note: This case may cast doubt on Eberle v. State, 942 N.E.2d 848 (Ind. Ct. App 2011), where the defendant was accused of committing intimidation against a person the defendant did not know was a police officer. The Court held that the State needed to show that the defendant knew the person was a police officer.

RELATED CASES: Owens, Ind. App., 742 N.E.2d 538 (State's need to prove D knowingly committed murder applied only to the prohibited conduct, not the identity of the victims); Maldonado-Morales, 985 N.E.2d 25 (Ind. Ct. App 2013) (instruction properly stated that to convict D of domestic battery under transferred intent doctrine, jury needed to find only that he acted knowingly or intentionally with regard to the prohibited conduct - striking another person - but not the facts that elevated the offense to a D felony, striking his ex-wife in the presence of their child); D.H., 932 N.E.2d 236 (Ind. Ct. App 2010) (evidence was sufficient to support Class D felony battery adjudication where D threw a punch, intending to hit another student, and mistakenly struck his teacher instead; culpability requirement applies only to the conduct element of the battery statute, thus State is not required to prove that knowingly or intentionally struck his teacher); Eberle, 942 N.E.2d 848 (Ind. Ct. App 2011) D's intimidation conviction was improperly elevated to a Class D felony where he was not aware that complaining witness (CW) was a law enforcement officer when he committed the instant offenses).

TITLE: Leonard v. State

INDEX NO.: K.3.b.1.

CITE: (8/10/2017), 80 N.E.3d 878 (Ind. 2017)

SUBJECT: Sufficient evidence for "knowing" murder

HOLDING: The State presented sufficient evidence that D knowingly killed two next door neighbors by exploding his brother's girlfriend's home as the evidence showed he was aware with a high probability that the explosion would kill someone outside the girlfriend's home. D's brother, Mark Leonard, lived with his girlfriend, Monserrate Shirley, in Richmond Hill, a neighborhood on the southeast side of Indianapolis. To collect on the home insurance policy, they planned to trigger a massive natural gas explosion of their home. A person knowingly kills when they are "aware of a high probability" that their actions may kill. Ind. Code § 35-41-2-2(b). "Because knowledge is the mental state of the actor, the trier of fact must resort to reasonable inferences of its existence." Young v. State, 761 N.E.2d 387, 389 (Ind. 2002). Here, as D and his accomplices' initial attempts failed, they intensified their efforts to create a larger explosion. They did this by, inter alia, removing a fireplace valve to let gas leak into the home, sealing the home so gas could not escape, and pouring gasoline on the floors. These efforts were done with the awareness that once a home is filled with gas, it would "pop or blow up," as one of D's friends, a gas company employee, told him. When the house exploded, it killed two next door neighbors, Dion and Jennifer Longworth, whose home was only ten feet from Shirley's home. Thus, the jury could reasonably infer that D was aware with a high probability that the explosion would kill someone and thus find sufficient evidence to find D guilty of two counts of murder. See Mark Leonard v. State, 73 N.E.3d 155, 161-62 (Ind. 2017). Held, judgment affirmed.

TITLE: Lowry v. State

INDEX NO.: K.3.b.1.

CITE: (10/27/82), Ind., 440 N.E.2d 1123

SUBJECT: Murder - sufficiency; corroboration

HOLDING: Murder conviction may be based solely on testimony of co-Ds involved in murder who did not come forward with stories until after D implicated them & whose testimony was rewarded with favorable plea bargains (charge dismissed; 3-year sentence), even though D had been acquitted of an unrelated murder in which prosecutor relied on co-Ds' trial testimony & even though prosecutor demanded death penalty for D. In Bentley 414 N.E.2d 573, D was identified as triggerman solely by testimony of co-D as part of a plea bargain. Here, co-Ds testified D shot & killed 2 men over money due on a drug deal. There were no other witnesses. Co-Ds' testimony was only evidence identifying D as triggerman. Held, evidence sufficient to sustain convictions.

RELATED CASES: Thompson, 671 N.E.2d 1165 (conviction upheld where accomplice was exclusive source of essentially all evidence against D); Green 587 N.E.2d 1314 (evidence against D, although circumstantial, was sufficient to support conviction for murder. Conviction for murder can be sustained on circumstantial evidence alone, Moore 557 N.E.2d 665, & if reasonable inference supporting conviction can be drawn from circumstantial evidence presented, verdict will not be disturbed. Biggerstaff 432 N.E.2d 43. Evidence tending to show that D may have caused unauthorized overdrafts on victim's account supported reasonable inference that he had motive to kill victim, & evidence that neighbor saw D at victim's home at time of death permitted reasonable inference that he had opportunity to commit murder); Dorsey 489 N.E.2d 513 (evidence supported inference that D was present at & knowingly participated with co-D in murder; here, Ds were allegedly hired to kill woman's husband).

TITLE: McCorker v. State
INDEX NO.: K.3.b.1.
CITE: (10-16-03), Ind., 797 N.E.2d 257
SUBJECT: Jury instruction - accomplice liability; permissible mandatory presumption
HOLDING: Although inartfully worded, following instruction did not relieve State of its burden of proof by creating impermissible mandatory presumption, & was correct statement of law: "it is fundamental principle of law that each person is criminally responsible for actions of each other person which were probable & natural consequence of their common plan even though not intended as part of original plan."

In so holding, Ct. disapproved of decision in Walker v. State, 779 N.E.2d 1158 (Ind. Ct. App 2002), which granted post-conviction relief due to almost identical instruction. Ct. App. decision in this case, as in Walker, hinged on Sandstrom v. Montana, 442 U.S. 510 (1979), which held that jury instruction that shifts burden to D violates due process under 14th Amendment. There was no Sandstrom violation here, despite "fundamental principle of law" language which unnecessarily highlighted this instruction over others. Ideally, instruction would also note that it is State's burden to prove beyond a reasonable doubt that D knowingly & intentionally aided, induced, or caused the Co-D to commit unlawful acts. However, Ct. concluded that a general instruction on State's burden & other instructions given in this case lessened this problem.

Ct. expressed concern that instruction used many of the same words that were used in unconstitutional instruction disapproved in Sandstrom. However, Sandstrom did not outlaw "mandatory presumptions," but outlawed mandatory presumptions that advise a jury that the State has met its burden of proof on an element of the charged offense. Here, instruction did not instruct jury to presume or otherwise find intent from the consequences of D's acts. Rather, it instructed jury that it could impose liability or guilt if it found that D "knowingly aided, supported, helped or assisted" the co-D in the charged crimes. While S.Ct. directed Tr. Cts. to no longer use this instruction, the Ct. found it a correct statement of the law & noted it had beneficial language to D to effect that mere presence at scene of crime & knowledge that it was being committed were not enough to establish his participation. Held, transfer granted, Ct. App.' memorandum decision reversed & judgment of Tr. Ct. affirmed.

RELATED CASES: Specht, App., 838 N.E.2d 1081 (while not all four of instructions relating to accomplice liability mentioned the required *mens rea*, when read as a whole, instructions put jury on sufficient notice that it was required to find that D knowingly or intentionally aided accomplice in commission of crimes in order to find him guilty of crimes as an accomplice); Pinkins, App., 799 N.E.2d 1079 (Tr. Ct. did not commit fundamental error in giving accomplice liability instruction disapproved in McCorker).

TITLE: Miller v. State

INDEX NO.: K.3.b.1.

CITE: (7/12/2017), 77 N.E.3d 1196 (Ind. 2017)

SUBJECT: Remand to apply correct mens rea standard

HOLDING: On transfer, the Indiana Supreme Court agreed with the Court of Appeals that the judge presiding over the bench trial applied the wrong mens rea standard in adjudging D guilty of attempted murder, as it found D guilty because he “knowingly or intentionally” attempted to commit murder. (Emphasis added) However, while agreeing that the Tr. Ct. applied the wrong standard, the Supreme Court remanded not for a new trial, as the Court of Appeals had, but simply to the same judge to reconsider the case under the correct mens rea standard, which required the State to prove D had specific intent to kill Jeremy Kohn. See Zickefoose v. State, 338 N.E.2d 507, 510 (1979); Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991). The underlying facts showed that D, who has a long history of severe mental illness, cut Kohn’s throat because he thought Kohn and Kohn’s girlfriend were laughing at him. D had never met Kohn before. The knife D used was a pocket knife with a three-to-four inch blade. The cut to Kohn’s throat was not deep enough to damage his jugular vein, carotid artery, or trachea. D was calm during the entire incident; he didn’t speak and his face was expressionless. When he did speak, D said he had no preference for whether Kohn lived or died. The State charged D with attempted murder, specifically alleging that D “knowingly or intentionally attempted to commit the crime of murder” (emphasis added), and the Tr. Ct. cited the same standard when it found D guilty. Held, transfer granted, Court of Appeals’ opinion vacated with respect to mens rea issue but affirmed in all other respects. Justice Slaughter dissented regarding the majority’s remedy, writing, “I fear a mere remand to the same trial judge instructing him to apply the correct standard will be insufficient to redress the underlying harm from using the wrong standard. In my view, [D] should receive a new trial. The erroneous mens rea standard should not be dismissed as a slip of the tongue (or pen) in the court’s written findings because it first appeared in the State’s charging information and thus tainted the entire proceeding.” Transfer granted, yet summarily affirmed on all issues except the nature of the remedy. See Supreme Court opinion, this section.

RELATED CASES: Miller, (on appeal from remand, Court of Appeals found sufficient evidence of specific intent for attempted murder). Miller, (for a severely mentally ill defendant, criminal justice system should make an assessment as soon as possible after charges are filed to determine if the defendant could have formed requisite mens rea for crime at issue).

TITLE: Miller v. State
INDEX NO.: K.3.b.1.
CITE: (7/12/2017), 77 N.E.3d 1196 (Indiana Supreme Court 2017)
SUBJECT: Remand to apply correct mens rea standard
HOLDING: On transfer, the Indiana Supreme Court agreed with the Court of Appeals that the judge presiding over the bench trial applied the wrong mens rea standard in adjudging Defendant guilty of attempted murder, as it found Defendant guilty because he “knowingly or intentionally” attempted to commit murder. (Emphasis added) However, while agreeing that the trial court applied the wrong standard, the Supreme Court remanded not for a new trial, as the Court of Appeals had, but simply to the same judge to reconsider the case under the correct mens rea standard, which required the State to prove Defendant had specific intent to kill Jeremy Kohn. See Zickefoose v. State, 338 N.E.2d 507, 510 (1979); Spradlin v. State, 569 N.E.2d 948, 950 (Ind. 1991).

The underlying facts showed that Defendant, who has a long history of severe mental illness, cut Kohn’s throat because he thought Kohn and Kohn’s girlfriend were laughing at him. Defendant had never met Kohn before. The knife Defendant used was a pocket knife with a three-to-four inch blade. The cut to Kohn’s throat was not deep enough to damage his jugular vein, carotid artery, or trachea. Defendant was calm during the entire incident; he didn’t speak and his face was expressionless. When he did speak, Defendant said he had no preference for whether Kohn lived or died. The State charged Defendant with attempted murder, specifically alleging that Defendant “knowingly or intentionally attempted to commit the crime of murder” (emphasis added), and the trial court cited the same standard when it found Defendant guilty. Held, transfer granted, Court of Appeals’ opinion vacated with respect to mens rea issue but affirmed in all other respects. Justice Slaughter dissented regarding the majority’s remedy, writing, “I fear a mere remand to the same trial judge instructing him to apply the correct standard will be insufficient to redress the underlying harm from using the wrong standard. In my view, [Defendant] should receive a new trial. The erroneous mens rea standard should not be dismissed as a slip of the tongue (or pen) in the court’s written findings because it first appeared in the State’s charging information and thus tainted the entire proceeding.” transfer granted, yet summarily affirmed on all issues except the nature of the remedy. See Supreme Court opinion, this section.”

TITLE: Moriarity v. State

INDEX NO.: K.3.b.1.

CITE: (09-22-93), Ind., 620 N.E.2d 696

SUBJECT: Murder - Insufficient evidence

HOLDING: Where one could only guess that D may have injured baby, evidence was insufficient to support guilt of murder beyond reasonable doubt. Baby was born prematurely with health complications. On night baby died, D got home around 8:00 p.m., & around 8:30 baby's mother left with friends. At 9:34 p.m., police received 911 call that baby was not breathing & that D was administering CPR. When police first arrived, D said baby was on floor with bottle when he went into other room to make phone call & that when he returned, baby was not breathing. Subsequently, D said baby was on couch with bottle, that he heard him fall from couch, rearranged him on floor with bottle, & discovered baby was not breathing when he came back into living room. Later, after being told baby had sustained blow to head, D said he thought baby had struck wall when D carried him from living room to bedroom to make 911 call, & even later, D said he thought it was some other part of baby's body that struck wall, not his head. Baby suffered from apnea that caused him to stop breathing periodically, & had monitor to alert parents, who also received training in CPR. Mother testified that attacks had stopped sometime prior to baby's death, & that when she left home, baby was on floor taking bottle. D testified that when he went in to make first phone call, baby was on couch. Baby died of venous hemorrhage, that would require anywhere from 20 minutes to 6 hours to cause cessation of breathing. Baby also suffered single blow to side of head by coming into contact with flat padded surface, & doctors testified it was unlikely injury would have occurred in fall from couch to floor, but stated it was not impossible. Evidence showed D was alone with baby for approximately 1 hour, 5 minutes, & during that time baby quit breathing & eventually died from massive Moriarity v. State.

TITLE: Nunn v. State

INDEX NO.: K.3.b.1.

CITE: (10-23-92), Ind., 601/334

SUBJECT: Murder - insufficient evidence

HOLDING: Where evidence revealed that D & victim did not exchange words, that D struck victim once with his hand in back of neck & walked away, & that victim died from unusual injury by severance of cerebral artery, it was insufficient to support conviction for murder because necessary intent to kill was lacking.

D & victim were both at park after incident involving victim's daughter & another girl. Victim swore & yelled at girl, & D left to talk to another child. D then approached victim from behind, & as he left, struck victim hard one time from behind. She died of severed cerebral artery short time later.

Information charged D with "knowingly" killing another human being. Although intent can be inferred from use of deadly weapon; nature of attack & circumstances surrounding crime; duration, brutality, & relative strengths of parties; & magnitude of repeated blows; Ct. found evidence in this case was sufficient to sustain only conviction for involuntary manslaughter. Ct. exercised authority to order modification of conviction to lesser included offense because of insufficiency of evidence on intent element of crime, Givan, J., dissenting.

Note: Decision has considerable emphasis on intent, which may be useful in arguing for instructions in murder cases. But, see, Pilarski, App., 635/166 finding no error in refusing instruction that specified that to convict D of murder (as opposed to attempted murder) State had to show specific intent to kill, because intent to commit murder may be inferred from nature of attack & circumstances surrounding crime.

RELATED CASES: Whatley, 908 N.E.2d 275 (Ind. Ct. App 2009) (in contrast to Nunn, State presented evidence that D struck victim with a hammer or two times with his fist; also, injuries suffered by victim--a skull fracture & impact brain contusions--were not uncommon for kind of force used by D).

TITLE: Pearson v. State

INDEX NO.: K.3.b.1.

CITE: (6/1/88) Ind., 523 N.E.2d 747

SUBJECT: Attempted murder - sufficiency; intent to kill

HOLDING: Evidence was insufficient to support attempted murder conviction. Prosecution for attempted murder requires same showing of specific intent to kill as is required for murder. Tata 486 N.E.2d 1025. Intent to kill may be inferred from use of deadly weapon in manner likely to cause death or great bodily harm. Armstrong 429 N.E.2d 647; Whitt 499 N.E.2d 750. Here, however, evidence failed to support even inference of intent to kill. D & victim, who were friends, testified they were talking just before the shooting. D testified that as he turned to leave, his gun dropped from his pocket. When he grabbed it, it went off, injuring victim. Victim testified he did not see D point gun at him. State's case was based on testimony of police officer who was parked across street from scene of shooting. Officer testified he heard shot, then looked up & saw D holding gun. State offered evidence that gun had heavy trigger pull & was not likely to go off accidentally. However, state's expert testified trigger pull may have grown heavier since shooting because gun was not cleaned. State referred to D's failure to offer medical assistance, but facts reveal that police officer immediately ran across street firing shots & ordered D to drop gun & lie on ground. No evidence was offered re path of bullet in victim. Also lacking was evidence re how often D carried gun. Finally, evidence presented shows D's conduct at scene was not consistent with intent to kill. D stood still, stunned, & made no attempt to flee. Held, conviction reversed & D discharged.

RELATED CASES: Bethel, 730 N.E.2d 1242 (because record was devoid of any evidence that D was pointing his firearm at victim when he fired weapon, co-D's intent to kill was not established beyond reasonable doubt; there was sufficient evidence of D's intent to kill second victim, but evidence was insufficient to support co-D's conviction; see full review at K.2.a).

TITLE: Romine v. State

INDEX NO.: K.3.b.1.

CITE: (11/17/83) Ind., 455 N.E.2d 911

SUBJECT: Murder - prior threats by D

HOLDING: Tr. Ct. did not err in allowing witness to testify re prior threat by D to victim made 3 years earlier. Here, witness testified D threatened victim 3 years earlier with knife to her throat & said, "You are going with me or else." D contends testimony was irrelevant because of remoteness. In homicide cases, law permits state to introduce prior threats & assaults upon victim by D to prove state of mind. Moore 414 N.E.2d 558. Ct. finds discrete similarities between murder (of wife with knife) & former event make prior threat relevant to state of mind. Held, no error.

TITLE: Smith v. State

INDEX NO.: K.3.b.1.

CITE: (12-30-96), Ind., 675 N.E.2d 693

SUBJECT: Murder - conflicting statutes regarding presumptive sentence

HOLDING: Tr. Ct. erred in using 50-year presumptive sentence for murder, where Legislature expressed two different sentencing intentions by enacting two conflicting versions of same statute. Ind. Code 35-50-2-3, which instructs Ct. on how to sentence D convicted of murder, was amended twice in 1994 legislative session. First Amend. changed presumptive sentence from 40 to 50 years & reduced possible enhancement time from 20 to 10 years. Subsequent amendment excluded mentally retarded individuals from sentence of death or life imprisonment but did not incorporate changes of first amendment. After some confusion as to proper version to apply, Tr. Ct. applied first version, sentencing D to 50 years executed & 10 on probation. Where two inconsistent sentencing statutes are passed in same legislative session & cannot be harmonized, Tr. Ct. should apply later version. Milk Control Board v. Pursifull, 219 Ind. 49, 36 N.E.2d 850 (1941). Ambiguous penal statute must be strictly construed against State. Spangler v. State, 607 N.E.2d 720 (Ind. 1993). Ct. found that Tr. Ct. improperly sentenced D under first version of statute because second version was enacted subsequently & use of 40-year presumptive sentence was more favorable to D. Held, conviction affirmed, case remanded for new sentencing statement.

RELATED CASES: Mauricio, 941 N.E. 2d 497 (Ind. 2011) (appellate counsel was ineffective for not arguing that D was sentenced under incorrect version of Ind. Code 35-50-2-3).

TITLE: State v. Haines

INDEX NO.: K.3.b.1.

CITE: (2d Dist. 10/31/89), Ind. App., 545 N.E.2d 834

SUBJECT: Attempted murder - substantial step; ARC patient throwing blood

HOLDING: Tr. Ct. erred in setting aside jury verdict of guilt on attempted murder charges. Three counts of attempted murder were based on D's scratching & biting police officer & throwing blood & spitting at officer & paramedics who responded to his suicide attempt. Evidence showed that D, who had AIDS Related Complex (ARC), told victims he had AIDS & they should leave him alone, & he threatened to infect them. Jury found D guilty, but Tr. Ct. set aside verdict & entered convictions for battery, ruling that evidence did not support finding that D took substantial step toward committing murder. Specifically, Tr. Ct. found that state did not establish that D's conduct was capable of causing death. However, Tr. Ct. erroneously failed to consider evidence offered by D. Evidence showed that D carried AIDS virus, was aware of infection & believed it to be fatal, & that he intended to infect others by spitting, biting, scratching, & throwing blood. Ind. Code 35-41-5-1 provides that impossibility is no defense to attempt charge. In Zickefoose 388 N.E.2d 507, Ind. S. Ct. observed that one commits attempt when he/she has done all that he/she believes necessary to cause particular result, regardless of what is actually possible. Here, D's statements, & statements of doctors to him regarding his conduct, sufficiently establish that. D suggests that Indiana should follow other states in recognizing that where offense is inherently impossible or unlikely, public is not endangered & culpability should be limited. [Citations omitted.] However, evidence here showed more than mere "chance" that D could transmit disease through his conduct. Held, reversed & remanded to reinstate jury verdict & resentence D.

TITLE: Thomas v. State
INDEX NO.: K.3.b.1.
CITE: (9/28/2016), 61 N.E.3d 1198 (Ind. Ct. App 2016)
SUBJECT: Voluntary intoxication not a defense to attempted murder
HOLDING: The Tr. Ct. did not err, let alone commit fundamental error, by instructing the jury that voluntary intoxication is not a defense to attempted murder. See Ind. Code § 35-41-2-5; Sanchez v. State, 749 N.E.2d 509 (Ind. 2001).

D fired his shotgun multiple times toward four individuals, grazing one person while striking another in the face. He was charged with, inter alia, four counts of attempted murder. The Tr. Ct. instructed the jury that voluntary intoxication is not a defense.

It is true that Indiana law treats attempted murder differently from other intent crimes, in that it requires proof of specific intent to kill. This, however, does not affect the constitutionality of the voluntary intoxication statute as to attempted murder. “Given that the Indiana legislature has not expressly identified attempted murder as an exception to the law negating voluntary intoxication as a defense, and our Supreme Court has not . . . indicate[ed] that any such exception exists, we decline [D’s] invitation to create one.” Held, judgment affirmed.

TITLE: Watson v. State

INDEX NO.: K.3.b.1.

CITE: (12/19/2013), 999 N.E.2d 968 (Ind. Ct. App 2013)

SUBJECT: Accomplice's murder conviction upheld

HOLDING: State presented sufficient evidence that D committed murder under a theory of accomplice liability. An accomplice can be found guilty of murder if she knew or intended that the victim would be killed by a principal. See Taylor v. State, 840 N.E.2d 324 (Ind. 2006). In determining accomplice liability, the fact-finder can consider factors including: 1) presence at the scene of the crime; 2) companionship with another engaged in a crime; 3) failure to oppose the commission of the crime; and 4) the course of conduct before, during, and after the occurrence of the crime.

Here, after D got into a physical fight with victim and his girlfriend, witnesses heard D make threats that “somebody is going to die” and that she would have her brothers come back and kill victim. D told a friend that the brothers were on their way and were bringing guns with them. D did not oppose the plan to kill victim and actually spoke up to stop her accomplice from shooting the wrong person. She ultimately remained inside a car while her accomplice shot the victim. This was probative evidence supporting D's conviction. Held, judgment affirmed.

TITLE: Wilber v. State
INDEX NO.: K.3.b.1.
CITE: (3/5/84) Ind., 460 N.E.2d 142
SUBJECT: Murder - sufficiency; cause of death
HOLDING: Evidence was sufficient to sustain D's murder conviction where D beat & robbed victim 3 days earlier & then returned to beat & rob victim a second time. Here, D contends evidence is insufficient to show injuries inflicted by him contributed to victim's cause of death. Victim died of pneumonia developed while in coma following operation for blood clot on his brain. Ct. finds evidence sufficient. D knew victim had been injured; D was "full participant" in second robbery as wheelman. Head injuries from second robbery "were serious & were a cause of death." Fact that injuries received during previous robbery also may have contributed to cause of death does not relieve D of criminal responsibility. Thomas 436 N.E.2d 1109. Held, conviction affirmed.

RELATED CASES: Thomas, 965 N.E.2d 70 (Ind. Ct. App 2012) (taking victim off of life support is not an intervening cause that breaks the causal connection between a gun shot and the victim's death); Williams, App., 782 N.E.2d 1039 (because D caused victim's injuries, which necessitated insertion of trach tube that became plugged, plugging of trach tube was not extraordinary & did not constitute intervening cause); Ewing, 719 N.E.2d 1221 (where life support is removed because victim had suffered irreversible cessation of all functions of his entire brain, removal of life support is not intervening cause that relieves killer from inexorable consequences of his or her actions); Wooley, 716 N.E.2d 919 (no showing of overwhelming evidence of extraordinary intervening cause sufficient to break chain of criminal responsibility); Reed, 479 N.E.2d 1248 (Ct. rejects D's contention that state did not discount intervening improper medical attention as cause of death rather than D's act of shooting victim in chest with shotgun; when one inflicts injury upon another, one is deemed in law to be guilty of homicide if injury contributes mediately or immediately to death of another person, *citing* Manna 440 N.E.2d 473 & Swafford 421 N.E.2d 596); Sims 466 N.E.2d 24.

TITLE: Young v. State
INDEX NO.: K.3.b.1.
CITE: (12/13/2023) Ind., 198 N.E.3d 1172
SUBJECT: Probative circumstantial evidence supported murder and attempted murder convictions
HOLDING: In murder and attempted murder prosecution, State presented sufficient evidence to identify Defendant as the shooter. Defendant — wearing a white shirt and shoes and dark coat, pants and cap — was seen on video smoking inside a gas station store before getting into his car and driving away, passing another car with the victims inside. About two minutes after Defendant drove away, surveillance footage captured a similarly dressed person near an alleyway across the street from the gas station. The person in the video tossed a lit object onto the ground, crossed the street, ran into the gas station lot and fired multiple shots before disappearing from view. Defendant did not dispute he was at the gas station minutes before the shooting but argued that the State failed to prove beyond a reasonable doubt that he returned to the station and committed the crime. Although there was no direct evidence identifying Defendant as the shooter, Court found the evidence “fit together into a coherent whole that incriminates the defendant,” thus supporting a reasonable inference of guilt. Defendant's DNA was on a cigarette found in the alley two days after the shooting in the same general area where the person in the alley footage discarded the lit object, Defendant searched the internet a week or two after the shooting about how to clean and disassemble a weapon that could have been used in the shooting and deactivated his Google location data the day of and day after the shooting.

Still, Defendant maintained the evidence left room for reasonable doubt. He pointed to three alleged failures of proof: 1) uncertainty as to whether the cigarette collected from the alley was the same one seen in the video; 2) differences in his appearance and the appearance of the person seen on the video; and 3) an apparent inconsistency in the two videos placing him both at the gas station and in the alley at the same time. Although the jury might have derived a reasonable doubt from this evidence, the Court ultimately deferred to the jury to weigh evidence and resolve conflicts either for or against the defense. Held, transfer granted, Court of Appeals’ opinion at 187 N.E.3d 969 vacated, judgment affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.b.2. Felony murder (Ind. Code 35-42-1-1(2))

TITLE: Brown v. State
INDEX NO.: K.3.b.2.
CITE: (4/27/83) Ind., 448 N.E.2d 10
SUBJECT: Felony-murder (F-M) - constitutionality
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss information where motion contended F-M statute was unconstitutional because it does not require proof of a specific intent to kill. Here, D was charged with 2 counts of F-M (arson). She contended she meant only to burn a hole in the rug to let her mother know of her displeasure. She did not intend to burn the house or kill her brothers. Ct. holds intent to kill is not element of F-M (Pawloski 380 N.E.2d 1230; Cade 348 N.E.2d 394), intent required is that to commit underlying felony (Pruett 234 N.E.2d 501). Other states have upheld similar F-M statutes against constitutional attacks. In People v. Aaron, (Mich. 1980) 299 N.W.2d 304, MI Ct. rejected F-M rule, but not on constitutional grounds. Held, no error.

TITLE: Head v. State

INDEX NO.: K.3.b.2.

CITE: (12/14/82) Ind., 443 N.E.2d 44

SUBJECT: Felony murder - attempt

HOLDING: Attempted felony-murder conviction reversed because there is no such crime in IN.

Here, D was charged with attempted felony-murder & robbery. Information included all elements necessary to charge attempted murder. Jury was instructed on attempted felony-murder & attempted murder, but returned verdict of guilty - attempted felony murder. Held, attempted felony murder conviction reversed. Robbery conviction affirmed. DISSENT by Pivarnik, joined by Givan, argues that attempted felony-murder is a crime in IN.

TITLE: Layman v. State

INDEX NO.: K.3.b.2.

CITE: (9/18/2015), 42 N.E.3d 972 (Ind. 2015)

SUBJECT: Felony murder inapplicable where death of co-D was not reasonably foreseeable

HOLDING: Indiana's felony murder statute was not properly applied to Ds, where one of their co-perpetrators was shot and killed by a homeowner during commission of burglary of a house they thought was unoccupied, and none in the group had a weapon when the burglary occurred. The language in the felony-murder statute about killing another person while committing an underlying felony is not restricted to situations where the person committing the felony kills another person. Palmer v. State, 704 N.E.2d 124, 126 (Ind. 1999). The language applies equally to a felon who "contributes to the death of any person," even if the person doing the killing is a police officer or victim and the person killed is a co-conspirator. *Citing* the doctrines of stare decisis and legislative acquiescence, Court declined to revisit and overrule Palmer. However, Court reversed Ds' felony murder convictions, noting that neither they nor their cohorts engaged in any "dangerously violent and threatening conduct" as in Palmer and other felony murder cases affirmed on appeal. Facts in those cases are "significantly different" from the facts in this case. There was simply nothing about Ds' conduct or the conduct of their cohorts that was "clearly the mediate or immediate cause" of their friend's death. Thus, while evidence is sufficient to sustain a conviction for the underlying burglary, it is not sufficient to sustain a conviction for felony murder in the perpetration of a burglary. Held, transfer granted, Court of Appeals' opinion at 17 N.E.3d 957 vacated, remanded with instructions to enter class B felony burglary convictions.

See also: Sharp v. State, 42 N.E.3d 512 (Ind. 2015) (because D was identically situated to Layman and Sparks, Court likewise vacated his felony murder conviction and remanded for sentencing on conviction of burglary as a Class B felony).

RELATED CASES: Dalton, 56 N.E.3d 644 (Ind. Ct. App 2016) (sufficient evidence for felony murder where accomplice's death was reasonably foreseeable; D and 2 accomplices, all armed, violently entered a home they knew was occupied to steal items, where violent melee ensued and accomplice died).

TITLE: Manna v. State

INDEX NO.: K.3.b.2.

CITE: (10/7/82) Ind., 440 N.E.2d 473

SUBJECT: Felony-murder - cause of death

HOLDING: An individual who inflicts injury upon another is guilty if injury directly contributes mediately or immediately to death. Miller 335 N.E.2d 206, Thomas 436 N.E.2d 1109, Bivens 258 N.E.2d 644. Here, D beat & robbed victim in alley & then fled. A car entering the alley was unable to stop & ran over victim. Pathologist testified victim died from a combination of injuries, i.e., beating, being run over. Held, state satisfied burden of proving that D caused or contributed to victim's death.

RELATED CASES: Pittman 528 N.E.2d 67 (Homic 236(1); evidence was sufficient to support felony murder conviction where 1-inch stab wound inflicted by D made exploratory surgery necessary; victim died 2 weeks later from complications resulting in part from extreme obesity).

TITLE: Miller v. State

INDEX NO.: K.3.b.2.

CITE: (5/6/83) Ind., 448 N.E.2d 293

SUBJECT: Felony-murder (child molesting) - sufficiency

HOLDING: Evidence was sufficient to support D's conviction for felony murder (child molesting) where there was medical testimony that the 2 1/2 year old female victim was bitten on the buttocks. The act of biting is a kind of "fondling or touching," Ind. Code 35-42-4-3(b), & supports jury conclusion that act was committed with requisite intent to gratify sexual desires. Best, 418 N.E.2d 316 (intent to gratify may be inferred from circumstantial evidence). Here, D contends there was insufficient evidence of penetration (medical testimony was equivocal). D also contends state failed to match pattern of bite marks to his mouth (no expert testimony introduced), as was done in Niehaus, 359 N.E.2d 513. In reviewing sufficiency cases, Ct. examines evidence produced by state, not what it failed to produce. Held, evidence sufficient to sustain conviction.

TITLE: Nelson v. State

INDEX NO.: K.3.b.2.

CITE: (9/21/88), Ind., 528 N.E.2d 453

SUBJECT: Felony murder (robbery) - sufficiency

HOLDING: Evidence was sufficient to support D's conviction for felony murder. Eyewitness testified that on night of shooting, victim was following her in separate car. Both cars stopped at intersection, & 3d car pulled around them & stopped. Witness went back to victim's car to see if he needed directions & was grabbed by D, who had gotten out of 3d car. As D dragged witness away, she saw victim being pushed back into his car. She heard gunshot but did not see gun. Witness came to in her own car, with D leaning over her. D told her to shut up & not look & she would be all right. Witness grabbed her purse & threw it at D, who rummaged through it. At that time, 3d car started & 2 other men told D to hurry up. D dropped purse & jumped in 3d car. D argues on appeal that evidence does not support underlying felony, robbery, & thus does not support felony murder conviction. Evidence showed D dragged victim to car & forced her to remain. Victim testified she was frightened when she threw purse at D, thus supporting finding that D took possession of purse & contents by violence & by putting witness in fear. D argues evidence did not show asportation or taking away, essential element of robbery. Evidence need show only that item was moved slight distance. Hunter, 492 N.E.2d 1067; Neal, 14 N.E.2d 590. Evidence established elements of robbery. As for felony murder, evidence need not establish that D fired shot. Evidence supported finding that D dragged witness away to facilitate shooting. When persons act in concert to commit criminal act, each is criminally liable for acts committed by others. Keeby, 511 N.E.2d 1005; Slone 496 N.E.2d 401. Held, conviction affirmed.

TITLE: Palmer v. State

INDEX NO: K.3.b.2.

CITE: (1-7-99), Ind., 704 N.E.2d 124

SUBJECT: Application of felony murder statute proper where accomplice of felon killed

HOLDING: Language of Ind. Code 35-42-1-2(2), which provides that person who "kills another human being while committing" designated list of felonies, does not restrict felony murder provision only to instances in which felon is killer, but may also apply equally when, in committing any of designated felonies, felon contributes to death of any person. Sheckles, App., 684 N.E.2d 201. In deciding whether person may be convicted of felony murder for allegedly indirect or remote death, Indiana Ct.s have applied felony murder statute when designated felony was mediate or immediate cause of death. In this case, felony murder statute was properly applied to kidnapper whose accomplice was shot & killed by law enforcement officer. D pointed loaded & cocked handgun at head of officer & thereafter fired it, injuring officer. Such conduct clearly raised foreseeable possibility that intended victim might resist or that law enforcement would respond, & thereby created risk of death to persons present. D's felonious conduct was clearly mediate or immediate cause of accomplice's death. Held, convictions affirmed; Sullivan, J, & Shepard, C.J., concurring in part & dissenting in part.

RELATED CASES: Layman, 42 N.E.3d 972 (Ind. 2015) (felony murder statute was not properly applied to unarmed Ds, where one of their co-perpetrators was killed by a homeowner during commission of burglary of a house they thought was unoccupied).

TITLE: Seeley v. State

INDEX NO.: K.3.b.2.

CITE: (10/4/89), Ind., 544 N.E.2d 153

SUBJECT: Felony murder - completion of felony

HOLDING: Evidence that co-D killed victim after robbery & kidnapping were completed & D & co-Ds had attempted to leave scene was sufficient to support D's conviction for felony murder. Evidence showed that victim had picked up D & co-Ds King & Morrison while they were hitchhiking. They stopped at friend's home, where D & King went inside & King asked for gun to rob victim. Meanwhile, victim made sexual advances toward Morrison, who robbed him at knife-point & tied his hands. Victim was forced back into car & all 4 drove into country with King behind wheel. After forcing victim from car, the 3 women attempted to drive toward Indianapolis, but discovered they were going in the wrong direction. As they drove back toward victim, King said she was going to kill victim & did in fact hit & kill him with car. On appeal, D argues that killing was independent act of King committed after felonies were completed & she & co-Ds had attempted to flee scene. Consequently, D argues, killing was not done while committing felony, as required by felony murder statute. In Eddy, 496 N.E.2d 24, Ind. S. Ct. wrote that killing need not occur before completion of each element of felony. Leaving scene is part of res gestae of felony such that killing at that time is, for felony murder purposes, committed in perpetration of felony. Averhart, 370 N.E.2d 666. Fact that D & co-Ds here had initially driven in wrong direction does not set killing apart from attempt to leave scene. Held, conviction affirmed.

TITLE: Sharp v. State
INDEX NO.: K.3.b.2.
CITE: (9/12/2014), 16 N.E.3d 470 (Ind. Ct. App 2014)
SUBJECT: Felony murder conviction affirmed where D unarmed and co-perpetrator killed
HOLDING: Indiana's felony murder statute was properly applied to D, where one of his co-perpetrators was shot and killed by homeowner during commission of burglary of house they thought was unoccupied, and none in the group had a weapon when the burglary occurred. As in Exum v. State, 812 N.E.2d 204 (Ind. Ct. App 2004), evidence was sufficient to show that co-defendant should have reasonably foreseen that the victim's act of self-defense or defense of his dwelling could occur, even though D was not armed and may have left prior to the shooting. Court has upheld felony murder convictions where perpetrators were unarmed, but stress of crimes committed resulted in someone's death. See Booker v. State, 270 Ind. 498, 386 N.E.2d 1198 (1979). Held, judgment affirmed in part, reversed in part on other grounds.

TITLE: Sheckles v. State

INDEX NO.: K.3.b.2.

CITE: (1st Dist., 4-23-97), Ind. App., 684 N.E.2d 201

SUBJECT: Felony murder - mediate contribution to victim's death

HOLDING: Ind. case law comports with view that person who commits or attempts to commit one of offenses designated in felony-murder statute is criminally responsible for homicide which results from act of one who was not participant in original criminal activity. State need not prove that D's acts were sole cause of death, only that acts contributed, whether mediately or immediately, to victim's death. Watson, 658 N.E.2d 579. Where accused reasonably should have foreseen that commission of or attempt to commit contemplated felony would likely create situation which would expose another to danger of death at hands of nonparticipant in felony, & where death in fact occurs as was foreseeable, creation of such dangerous situation is intermediary, secondary, or medium in effecting or bringing about death of victim. There, situation is mediate contribution to victim's killing.

In this case, D created dangerous situation during attempted robbery in which intervention by nonparticipant was reasonably foreseeable. Therefore, D was criminally responsible for death of victim, who was killed in exchange of gunfire between himself & bartender, regardless of who fired fatal shot. Even if D could establish that trial counsel's failure to request ballistics expert constituted deficient performance, he did not demonstrate that he was deprived of fair trial. Because no genuine issue of material fact existed on whether alleged deficiencies of trial counsel prejudiced defense, post-conviction Ct. did not err in summarily denying D's petition for post-conviction relief without evidentiary hearing. Held, judgment affirmed.

RELATED CASE: Sage, 114 N.E.3d 923 (Ind. Ct. App 2018) (D's act of dealing methamphetamine provided a direct and immediate connection to the ensuing confrontation in which the killings occurred; D was armed and "violence was contemplated as part and parcel of the methamphetamine deal").

TITLE: Smith v. State

INDEX NO.: K.3.b.2.

CITE: (5/28/87) Ind., 508 N.E.2d 14

SUBJECT: Felony murder has no lesser included offenses

HOLDING: Tr. Ct did not err in denying D's tendered instruction stating that involuntary manslaughter is lesser included offense of murder. Involuntary manslaughter is not a lesser included offense of felony murder, as there are no lesser included homicides of felony murder. Fleener, 412 N.E.2d 778; Rodriguez, 388 N.E.2d 493. Held, no error.

RELATED CASES: Nelson 479 N.E.2d 48 (Const L 265; Indict 191(4); Ct. finds D's conviction for voluntary manslaughter constituted fundamental error; here, D was charged with felony murder, Tr. Ct. instructed jury re intentional homicides, & D did not object or raise issue on appeal; held, conviction set aside & case remanded for further proceedings).

TITLE: Stevens v. State

INDEX NO.: K.3.b.2.

CITE: (1/5/89) Ind., 531 N.E.2d 1175

SUBJECT: Felony-murder - sufficiency

HOLDING: D's assistance to boyfriend, in form of recovering victim's car keys while he was beating the victim & closing & locking door of house as they escaped supports her conviction for felony murder. D claimed she was ignorant of Wallis' intent prior to his attack on victim, & only aided his escape out of fear of him. Ct. finds circumstantial evidence supports conclusion that theft of automobile was planned ahead of time, & that D's willing & active collusion is shown by her pounding on car door to gain entry as boyfriend was making his escape in order to flee with him. Affirmed. Dickson DISSENTS without opinion.

RELATED CASES: Edgecomb, 673 N.E.2d 1185 (considering D's actions before, during, & after commission of crime, reasonable jury could conclude that D was "behind the scenes" planner & participant in felony murder).

TITLE: Thomas v. State

INDEX NO.: K.3.b.2.

CITE: (05-31-05), Ind., 827 N.E.2d 1131

SUBJECT: Felony murder instructions - harmless error

HOLDING: In Thomas v. State, 803 N.E.2d 1218 (Ind. Ct. App 2004), Ct. App. held that D received ineffective assistance of trial counsel when counsel failed to object to a jury instruction on felony murder, which did not delineate the elements of the underlying felony of dealing in cocaine. On transfer, Indiana S.Ct. held that D was not harmed by this omission because he was properly charged with, & the jury properly instructed on, the charge of knowing or intentional murder. While charging information alleged that D was guilty of felony murder, it set forth all of elements necessary to convict a person of knowing or intentional murder, in addition to including a felony that would support conviction for felony murder. Neither jury's verdict nor Tr. Ct.'s judgment of conviction or sentencing order distinguished between knowing or intentional murder & felony murder. State met its burden of proof on charge of knowing or intentional murder, thus it simply did not matter how completely the jury was instructed on offense of dealing in cocaine. Ct. noted that it would have been a different case entirely if D had been charged with only elements of felony murder; in that circumstance, it would have been necessary to provide jury with specific elements of underlying felony.

Trial counsel was not ineffective for failing to challenge form of verdict for failing to specify whether jury had found D guilty of knowing/intentional murder or of felony murder. Jury was instructed in such a way that it could not have returned a verdict of guilty without finding that State had met its burden of proof on all elements of knowing or intentional murder. Held, transfer granted, Ct. App.' opinion vacated, denial of post-conviction relief affirmed.

RELATED CASES: Taylor, 922 N.E.2d 710 (Ind. Ct. App 2010) (D received IAC where counsel failed to object to lack of robbery instruction where robbery was underlying felony for felony murder; see full review at D.9.g.2.d).

TITLE: Thompson v. State

INDEX NO.: K.3.b.2.

CITE: (10/28/82) Ind., 441 N.E.2d 192

SUBJECT: Felony murder - sequence

HOLDING: Asportation of property must occur before robbery is complete. Stroud, 395 N.E.2d 770.

Here, shooting of cab driver occurred before D & accomplice carried away victim's possessions. Held, robbery & shooting were so closely connected in point of time, place & continuity of action as to be one continuous transaction. Stroud. Held, felony murder conviction affirmed.

RELATED CASES: Inman, 4 N.E.3d 190 (Ind. 2014) (in instructing jury how murder and robbery were part of one continuous transaction, Tr. Ct. erred by reading the last sentence of the otherwise proper instruction but the error was harmless; the erroneous part of the instruction said that the spirit of the law would not be fostered by ruling that D could not be convicted of robbing the victim after killing him; this sentence advocated the State's position); Seabrooks, App., 803 N.E.2d 1190 (there was sufficient evidence that the murders were tied with the burglary; dispositive issue is whether a connection exists between an intent to burglarize & the murder & not the time sequence for the intent to burglarize & the murder); Kelly, 719 N.E.2d 391 (upholding Tr. Ct.'s judgment on evidence notwithstanding jury verdict finding D guilty of murder where sole evidence established that killing was spontaneous after D had left scene); Mauricio, 476 N.E.2d 88 (after D rode away on snowmobile, D's brother shot its owner; who later died; held, D's conviction for aiding felony murder affirmed).

TITLE: Trimnell v. State

INDEX NO.: K.3.b.2.

CITE: (12/21/2018), 119 N.E.3d 92 (Ind. Ct. App. 2018)

SUBJECT: Erroneous denial of motion to dismiss felony murder charge - delivery of narcotic drug to another person who administered it to decedent

HOLDING: On interlocutory appeal, Court held that a felony murder charge should have been dismissed because D, who delivered what he believed to be heroin to a man who subsequently injected his companion, was not the "mediate or immediate cause" of her death. D could not have anticipated or reasonably foreseen that the decedent would become acutely intoxicated prior to injection or how much of the drug would be injected or that her companion would not seek medical attention for her.

RELATED CASES: Walmsley, 131 N.E.3d 768 (Ind. Ct. App. 2019) (because D's act of injecting his wife drugs that they jointly purchased and possessed did not constitute "delivery" as defined in I.C. 35-48-1-11, he could not be charged with felony murder).

TITLE: Walmsley v. State

INDEX NO.: K.3.b.2.

CITE: (08/29/19) Ind. Ct. App., 131 N.E.3d 768

SUBJECT: Felony-murder charge of delivering narcotic drug resulting in death does not apply when two or more people jointly acquired and possessed the drug

HOLDING: Because Defendant's act of injecting his wife drugs that they jointly purchased and possessed did not constitute "delivery," he could not be charged with felony murder, thus trial court erred in denying his motion to dismiss. Defendant's wife overdosed and died after Defendant injected a drug into her arm. The undisputed evidence showed that Defendant and his wife agreed to purchase heroin from a dealer, they used wife's tip money to purchase it, and the dealer handed the drug to Defendant in wife's presence and with her knowledge. The State argued that wife's involvement in the purchase of the drug was not relevant. "Delivery" is defined as "an actual or constructive transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship." Ind. Code § 35-48-1-11. Court concluded that "when two or more people jointly acquire possession of a drug for their own use, intending only to share it together, they do not 'deliver' the drug when they inject or hand the drug to the other person, since they acquired possession from the outset and did not intend to distribute the drug to a third person." In so holding, Court distinguished Duncan v. State, 857 N.E.2d 955 (Ind. 2006), noting that Defendant's wife was an adult who chose to use drugs and consented to the injection, not a "two-year-old who did not voluntarily choose to ingest methadone."

TITLE: Ward v. State

INDEX NO: K.3.b.2.

CITE: (02/15/91), Ind., 567 N.E.2d 85

SUBJECT: Felony murder, sufficiency of evidence

HOLDING: Evidence was insufficient to sustain conviction for felony murder, even on accomplice theory. S.Ct. found that there was no evidence D participated in or was present during planning of robbery, that he received any of the proceeds, that he remained at the site & acted as a lookout, or that he aided the perpetrators in their escape. Facts tending to support verdict showed that food store was robbed by number of males, & owner was fatally shot. One of perpetrators supplied only testimony linking D to crime. He testified that on evening of crime he asked D to come to section of city & when they arrived, he asked D to come in house. One of 6 men present then took D to back room out of sight & hearing of others, who then discussed robbery plan. D returned from back room & was asked what kind of area was around a certain street, & he answered. D then drove 3 men to area of store where he dropped them off at parking lot & drove away. During trip, no one gave D directions as to where to go. After D had left, other perpetrators arrived by separate car containing weapons & ski masks & committed robbery. Ct. found that reasonable inferences from this evidence fell short of establishing guilt, even on accomplice theory. Held, Tr. Ct. reversed & appellant ordered discharged, Givan dissenting. **NOTE:** This issue was raised in Motion to Correct Errors filed in case but was not raised on appeal until reply brief. Ct. noted that reply brief cannot present new theories on appeal, & therefore they can be waived. Nonetheless, Ct. noted that it had on occasion addressed insufficiency even absent proper presentation on appeal & did so here because its review of issue was not impeded by improper presentation.

RELATED CASES: Layman, 42 N.E.3d 972 (Ind. 2015) (felony murder statute was not properly applied to unarmed Ds, where one of their co-perpetrators was killed by a homeowner during commission of burglary of a house they thought was unoccupied).

K. CRIMES

K.3. Offenses against the person

K.3.b.3. Causing suicide

TITLE: Gentry v. State

INDEX NO.: K.3.b.3.

CITE: (12/16/93), Ind. App., 625 N.E.2d 1268

SUBJECT: Causing suicide -- force, duress or deception

HOLDING: In prosecution for causing suicide, D need only cause, by force, duress, or deception, another human being to perform act by which another person commits suicide. Here, D was convicted of murder for suffocating his mother while mother was affected by drug overdose in attempted suicide. Ct. held that because D placed pillows over his mother's head and face while applying pressure to prevent her from being able to breathe and held pillows in place until she had suffocated, D was guilty of murder, even if mother had been affected by earlier attempt to commit suicide through drug overdose. Held, conviction affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.b.4. Voluntary manslaughter (Ind. Code 35-42-1-3)

TITLE: Bane v. State

INDEX NO.: K.3.b.4.

CITE: (02/25/92), Ind., 587 N.E.2d 97

SUBJECT: Voluntary manslaughter (VM) instruction - harmless error

HOLDING: Instruction on VM which erroneously suggested that state bore burden to prove presence of sudden heat beyond reasonable doubt, did not constitute fundamental error & there fore did not mandate reversal. D was charged with both murder & VM, & jury was instructed on both. VM instruction stated that existence of sudden heat was mitigating factor reducing murder to VM, but then went on to tell jury that to find D guilty of VM they must find state had proven the following elements beyond reasonable doubt: "(1) The D, Clayton Bane; (2) knowingly; (3) killed while acting under sudden heat;..."

Ct. agreed that instruction was erroneous, because sudden heat is not element of crime of VM & once issue has been raised, burden is on state to negate its existence, not prove it. D did not object to instruction at trial, however, & Ct. found that although instruction was unartfully drafted & technically erroneous, it didn't deprive D of his due process rights & therefore was not fundamental error. Ct. noted that instruction given was virtual reproduction of instruction in Pattern Instructions, & that those instructions were not endorsed by S.Ct. Held, conviction affirmed, DeBruler, J., & Dickson, J., dissenting on other issue.

RELATED CASES: Boesch, 778 N.E.2d 1276 (erroneous VM instruction did not constitute fundamental error); Spradlin, App., 764 N.E.2d 705 (jury instruction that incorrectly includes sudden heat as element of voluntary manslaughter is not fundamental error when instruction also explains that sudden heat is mitigating factor that reduces murder to voluntary manslaughter); Clark, 668 N.E.2d 1206 (VM instruction which failed to specify burden of proof re: sudden heat did not deprive D of due process rights); Wilcoxon, App., 705 N.E.2d 198; Isom, 651 N.E.2d 1151 (despite erroneous VM instruction, instructions read in totality clearly explained sudden heat is mitigator that reduces what would otherwise constitute murder to VM); Moore, App., 649 N.E.2d 686 (although VM instruction did not indicate that State had burden of proof to rebut presence of sudden heat beyond reasonable doubt, error was harmless); Morrison, 588 N.E.2d 527 (although instruction, which included proof of killing under sudden heat as element of VM was erroneous, & failure to object to instruction was IAC, error was harmless because evidence did not show D was prejudiced by instruction & IAC).

TITLE: Bradley v. State
INDEX NO.: K.3.b.4.
CITE: (2nd Dist., 6-19-02), Ind. App., 770 N.E.2d 382
SUBJECT: Erroneous enhancement of voluntary manslaughter conviction based on use of firearm
HOLDING: It was improper to enhance D's Class A felony voluntary manslaughter conviction by five years because D had intentionally used handgun. State had not filed written request for enhancement which is required by Ind. Code 35-50-2-11. Further, voluntary manslaughter is defined as Class B felony, but becomes Class A felony if committed by means of deadly weapon. Fact which constitutes material element of crime may not be used as aggravating factor to support an enhanced sentence. Borton v. State, 759 N.E.2d 641 (Ind. Ct. App. 2001). Held, five-year enhancement reversed.

TITLE: Brantley v. State
INDEX NO.: K.3.b.4.
CITE: (2/16/2018), 91 N.E.3d 566 (Ind. 2018)
SUBJECT: Sudden heat is mitigating factor to freestanding voluntary manslaughter charge
HOLDING: Voluntary manslaughter may be brought as a standalone charge, and as with murder cases, sudden heat is a mitigating factor rather than an element, even when the State charges voluntary manslaughter as a standalone. However, even though it is not an element, there must be some evidence of sudden heat before a jury can consider voluntary manslaughter and the State cannot just stipulate to the existence of sudden heat. Watts v. State, 885 N.E.2d 1228 (Ind. 2008). Sudden heat requires evidence of "anger, rage, sudden resentment, or terror that is sufficient to obscure the reason" of an ordinary person. Isom v. State, 31 N.E.3d 469, 486 (Ind. 2015). Under appropriate circumstances, evidence supporting sudden heat as a mitigating factor may also support a defense of self-defense, and the jury may consider both theories in delivering its verdict.

In this case, D lived with his sister, her husband Bruce and the couple's minor son. Bruce had a history of chronic physical and mental health problems. He and his wife often verbally fought with each other and he was once arrested for domestic battery for choking his wife. One day after returning from a job interview, D heard the couple fighting. The two were seated while arguing. D repeatedly asked Bruce to calm down, but Bruce said he was going to "get rid of all of his problems right now," as he angrily lunged from his chair, clenching something shiny in his fist. Fearing the object was a knife because Bruce was known for keeping sharp objects, D fatally shot Bruce one time. Bruce was later discovered to have been clutching his glasses.

At D's trial for voluntary manslaughter, both D and his sister testified that he was acting in self-defense. The jury was instructed on self-defense, voluntary manslaughter and on the definition of sudden heat, with the instructions noting the State had conceded sudden heat in choosing to charge D with voluntary manslaughter instead of murder. Court held that the State's concession of sudden heat did not nullify D's claim of self-defense. "[T]he jury...was faced with two stories: one where [D] acted irrationally out of sudden heat, the other where [he] acted rationally in self-defense. These explanations for [D's] actions are not conflicting since the nature of each defense is different, and it was within the province of the jury to weigh the evidence and assess witness credibility in arriving at its verdict." Common to both defenses is terror. Although "scant," there was sufficient evidence of sudden heat to support jury's verdict, i.e., that D experienced terror and had the sudden impetus to kill. Held, transfer granted, Court of Appeals' opinion at 71 N.E.3d 397 vacated, conviction affirmed.

TITLE: Eichelberger v. State
INDEX NO.: K.3.b.4.
CITE: (2nd Dist., 08-17-06), Ind. App., 852 N.E.2d 631
SUBJECT: Erroneous voluntary manslaughter/murder instructions - sudden heat; misstating burden of proof
HOLDING: Trial counsel was ineffective for tendering a flawed instruction on voluntary manslaughter, which improperly included sudden heat as an element of the offense rather than stating that the State bears burden of disproving its existence beyond a reasonable doubt. Moreover, counsel was ineffective for failing to ensure that jury was properly instructed that absence of sudden heat is an element of murder on which the State bears the burden of proving beyond a reasonable doubt. An instruction assigning the burden of affirmatively proving sudden heat to the State is erroneous as a matter of law. Bane v. State, 587 N.E.2d 97 (Ind. 1992). In addition, Tr. Ct.'s failure to give a jury instruction explaining that State must negate presence of sudden heat beyond a reasonable doubt, when requested, necessitates the granting of a new trial. Harrington v. State, 516 N.E.2d 65 (Ind. 1987). Here, as in Sanders v. Cotton, 398 F.3d 572 (7th Cir. 2005), trial counsel was ineffective for failing to ensure that jury was properly instructed as to burden of proof for both murder & voluntary manslaughter. This is a due process violation that requires a new trial. Held, denial of post-conviction relief reversed & remanded.

RELATED CASES: McDowell, (05/30/2018), (Ind. Ct. App. 2018) (unlike instruction in Eichelberger, instruction did not misinform the jury that the State had to prove the existence of sudden heat, but merely explained that the defendant can be convicted of voluntary manslaughter only if jury finds the existence of sudden heat; moreover, separate instruction explicitly informed jury that the State had to prove that defendant did not act under sudden heat); Roberson, 982 N.E.2d 452 (Ind. Ct. App. 2013) (trial counsel was ineffective for failing to ensure that jury was properly instructed regarding elements of murder, voluntary manslaughter, and State's burden of proof regarding sudden heat; moreover, Tr. Ct. incorrectly informed jury that it could only consider convicting D of voluntary manslaughter instead of murder if it first found him not guilty of murder); Massey, 955 N.E. 2d 247 (Ind. Ct. App. 2011) (even though jury was improperly instructed regarding elements of voluntary manslaughter, D was not entitled to the voluntary manslaughter instruction because his girlfriend's words ending their relationship did not constitute sufficient provocation to induce sudden heat).

TITLE: Fowler v. State

INDEX NO.: K.3.b.4.

CITE: (03/07/2022), Ind. Ct. App., 184 N.E.3d 1221

SUBJECT: No error in denying oral motion at sentencing to enter judgment on voluntary manslaughter as lesser included offense of murder

HOLDING: Defendant was charged with battery of two pregnant women and murder of the boyfriend of one of the women after the expectant father died of a gunshot wound. At a bench trial, Defendant was found guilty of murder and level 5 felony battery resulting in bodily injury to a pregnant woman and Class A misdemeanor battery after finding insufficient evidence to support the second Level 5 felony count. At sentencing, Defendant orally moved for the trial court to reconsider its guilty verdict for murder and instead enter judgment of conviction on the lesser-included offense of voluntary manslaughter. But the trial court refused and sentenced him to an aggregate of 45 years for murder. At trial, Defendant argued self-defense. The trial court considered the evidence and found it did not support self-defense. The trial court was not asked to consider voluntary manslaughter and because the defense never hinted at the existence of sudden heat, it deprived the State the opportunity to submit evidence Defendant did not act in sudden heat. The Court of Appeals affirmed the murder conviction, noting that waiting until sentencing to inject sudden heat as a mitigating factor of the killing not only prejudiced the State but also deprived the trial court of the opportunity to consider sudden heat as a factor. Court of Appeals noted that self-defense and voluntary manslaughter are not mutually exclusive, although trial counsel may have made a strategic decision for an all or nothing self-defense argument so as to deprive the State of the opportunity to negate sudden heat. Held, conviction affirmed.

TITLE: Gibson, et al. v. Indiana Department of Correction
INDEX NO.: K.3.b.4.
CITE: (4th Dist., 12-29-08), Ind. App., 899 N.E.2d 40
SUBJECT: Sex and violent offender registry - murder/voluntary manslaughter
HOLDING: Effective July 1, 2007, persons convicted of murder, voluntary manslaughter, attempted murder, or attempted voluntary manslaughter must register as a sex or violent offender pursuant to Ind. Code 11-8-8 et. seq. Court held that imposition of Registry's requirements on "violent" offenders (above) does not violate Article 1, Sections 23 and 12 of Indiana Constitution. Because murder and voluntary manslaughter, along with attempts and conspiracies to commit these crimes, involve voluntary and intentional acts by persons either designed to take the life of another person or very intentional and voluntary acts to commit certain serious felonies where commission of crimes might reasonably cause death of another person, Legislature was within its authority consistent with Article 1, Section 23 of Indiana Constitution to determine that persons who have committed murder and voluntary manslaughter represent a greater, continuing threat to society than persons who committed other crimes resulting in death, so that their inclusion on Registry was warranted.

Considering Court's deference to legislative policies, fact that there is some (albeit slight) recidivism among violent offenders at least for some time after release, and that community notification about violent offenders provides an opportunity for enhancing public safety, requirement that violent offenders register for at least some amount of time meets low threshold of rational relation, thus there is no violation of Article 1, Section 12.

Court also clarified that a violent offender is required to register for ten years rather than for life, unless he or she is a sexually violent predator, was convicted of an offense while over age of eighteen against a victim less than twelve, or has been convicted of two or more unrelated offenses under Ind. Code 11-8-8-5(a). See Ind. Code 11-8-8-19(b)(c) and (e). Held, denial of preliminary injunction with respect to ten-year registration requirement for violent offenders affirmed, grant of preliminary injunction against lifetime registration for all violent offenders reversed, judgment affirmed in all other respects.

TITLE: Goodwin v. State
INDEX NO.: K.3.b.4.
CITE: (9/7/82) Ind., 439 N.E.2d 595
SUBJECT: Attempted voluntary manslaughter
HOLDING: The elements of attempted manslaughter are (1) knowing or intentional state of mind (2) conduct constituting a substantial step toward (3) the killing of (4) a human being. Palmer, 425 N.E.2d 640; Smith, 422 N.E.2d 1179; Anthony, 409 N.E.2d 632. Here, there was sufficient evidence to sustain conviction (D thrust knife repeatedly into unarmed man saying he would kill him). Inconsistency between versions of various witnesses is for jury to resolve. Held, conviction affirmed.

TITLE: Griffin v. State

INDEX NO.: K.3.b.4.

CITE: (12-16-94), Ind., 644 N.E.2d 561

SUBJECT: Lesser included offense instruction - voluntary manslaughter

HOLDING: In murder prosecution, evidence in record supported voluntary manslaughter & sudden heat instructions. Voluntary manslaughter instruction should be given if there is any appreciable evidence of sudden heat, which requires "sufficient provocation to engender passion," Johnson v. State, Ind., 518 N.E.2d 1073. Here, D & victim had been experiencing marital discord, & on date of shooting, victim pointed loaded gun at D & informed him to remove his belongings from marital residence. D had bruises & scratches on his arms consistent with struggle & victim was shot with gun that she brought to residence. Jury could have found sudden heat under these circumstances & Tr. Ct. committed reversible error by refusing to give D's tendered instructions as required. When question to instruct on lesser included offense is close, Tr. Ct. should give instruction & avoid risk of expense & delay involved in retrial. Held, conviction reversed & remanded, Givan, J., dissenting.

RELATED CASES: Watts, 885 N.E.2d 1228 (overruling Griffin to extent inconsistent with holding that it is reversible error for Tr. Ct. to instruct jury on voluntary manslaughter in absence of evidence of sudden heat; see full review, this section); Sarwacinski, App., 564 N.E.2d 950 (issues of necessity of lesser included instruction on voluntary manslaughter, of effectiveness of counsel, & of sufficiency of evidence to rebut self-defense claim decided contrary to D).

TITLE: Harris v. State
INDEX NO.: K.3.b.4.
CITE: (1st Dist., 04-16-08), Ind. App. 884 N.E.2d 399
SUBJECT: Attempted voluntary manslaughter- instruction on specific intent to kill required
HOLDING: In attempted voluntary manslaughter prosecution, Tr. Ct. erred in failing to instruct jury that the State was required to prove that D acted with specific intent to kill. In Richeson v. State, 704 N.E.2d 1008 (Ind. 1998), Court held that specific intent instructions are not warranted for lesser offenses. Here, however, attempted voluntary manslaughter is not a lesser offense of attempted murder. The special precautions that distinguish attempted murder from other attempt crimes are also present in attempted voluntary manslaughter prosecutions. This offense includes the same ambiguity that is involved in proving attempted murder because it is often unclear whether D intended to murder or batter, whether he knew of a high probability of death or a touching, or whether he simply recklessly disregarded either. Additionally, the higher sentencing range for attempted murder is also present for attempted voluntary manslaughter. Held, conviction reversed and remanded for retrial.

TITLE: Howell v. State

INDEX NO.: K.3.b.4.

CITE: (3/13/2018), 97 N.E.3d 253 (Ind. Ct. App. 2018)

SUBJECT: Incorrect jury instruction did not constitute fundamental error

HOLDING: In murder prosecution, jury instruction on voluntary manslaughter did not constitute fundamental error. Court agreed that the instruction incorrectly stated that if the State did not prove all the elements of murder, the jury should then decide whether D committed voluntary manslaughter. But distinguishing Roberson v. State, 982 N.E.2d 452 (Ind. Ct. App 2013), Court rejected D's contention that the erroneous instruction made a fair trial impossible because instructions taken as a whole did not mislead the jury. Another instruction correctly informed jury of the definitions of murder and voluntary manslaughter, that sudden heat is a mitigating factor that reduces murder to voluntary manslaughter, and that the State had burden of proving that D was not acting under sudden heat. Held, judgment affirmed.

TITLE: Jackson v. State

INDEX NO.: K.3.b.4.

CITE: (5-2-99), Ind., 709 N.E.2d 326

SUBJECT: Voluntary manslaughter - sudden heat; burden of proof

HOLDING: In appeal of voluntary manslaughter conviction, Ct. clarified that State has burden of negating presence of sudden heat beyond reasonable doubt. In so doing, Ct. overruled Storey, 552 N.E.2d 477, 480; McCann, 466 N.E.2d 421, 424; & Matheney, 583 N.E.2d 1202, 1205, to extent that they improperly place burden of showing or proving sudden heat on D. Sudden heat requires sufficient provocation to engender passion which is demonstrated by anger, rage, sudden resentment, or terror that is sufficient to obscure reason of ordinary person, prevent deliberation & premeditation, & render D incapable of cool reflection. Here, victim initially approached D who had been drinking & was arguing with another. When victim joined in argument, D displayed knife & gun & threatened victim. After victim disarmed D, D went to his apartment, loaded another gun, walked back downstairs, shot victim, & announced that he had fulfilled his earlier promise to shoot victim. Based on above evidence, jury reasonably concluded that victim did nothing to provoke D. Thus, State sufficiently negated presumption of sudden heat. Held, conviction affirmed.

RELATED CASES: Earl, 715 N.E.2d 1265; Gregory, 540 N.E.2d 585 (State may meet its burden of negating presence of sudden heat by rebutting D's evidence or affirmatively showing in its case-in-chief that D was not acting in sudden heat when killing occurred).

TITLE: LaBine v. State

INDEX NO.: K.3.b.4.

CITE: (4/22/83) Ind., 447 N.E.2d 592

SUBJECT: Voluntary manslaughter (VM) - sufficiency

HOLDING: Where evidence is sufficient to sustain murder conviction, conviction for VM will be upheld. Begley, 416 N.E.2d 824; Hardin, 404 N.E.2d 1354. Here, D was charged with murder & arson & found guilty of VM & arson. D contends evidence was insufficient because it was wholly circumstantial. Ct. notes there is a distinction between law governing Tr. Cts. & appellate Cts. when circumstantial evidence is involved. Spears, 401 N.E.2d 331; Ruetz, 373 N.E.2d 152. Ct. finds record reveals sufficient evidence from which to draw reasonable inference to support jury's finding on arson. Furthermore, a person was killed as a result of arson. There was substantial evidence to support finding of murder, thus jury's verdict of guilty of VM as a lesser included offense was proper. Held, convictions affirmed.

RELATED CASES: Herron, App., 808 N.E.2d 172 (Ct. affirmed aiding voluntary manslaughter against a D who had no legs, no right arm & only a part of his left hand, where Co-D testified that he beat the victim with a cane while D exhorted him on & that D later hit the victim with a hook attached to a prosthetic arm, helped the co-D load the body in a car trunk & advised him in discarding the body); Anderson, 466 N.E.2d 27 (intent to kill inferred from repeated severe blows to child, see Horne, 445 N.E.2d 976, card at K.3.b.1).

TITLE: McWhorter v. State
INDEX NO.: K.3.b.4.
CITE: (07-12-12), 970 N.E.2d 770 (Ind. Ct. App. 2012), *sum. Aff'd* 993 N.E.2d 1141
SUBJECT: Ineffective assistance of counsel – erroneous instruction on voluntary manslaughter
HOLDING: In murder prosecution, trial counsel was ineffective for failing to object to voluntary manslaughter instruction that was not warranted by the evidence and invited a compromise or unreliable verdict. The theory of defense was that an accidental shooting occurred. Voluntary manslaughter instruction lacked evidentiary support because it was based on anger alone and a verbal admission by the victim that she had been with another man at some time in the past. Words alone do not constitute sufficient provocation to warrant instruction, particularly where, as here, the words at issue are not intentionally designed to provoke the D. Suprenant v. State, 925 N.E.2d 1280 (Ind. Ct. App. 2010).

Moreover, the inartfully drafted instruction directed the jury to proceed, upon failure of proof of one or more of the elements of murder, to consider the lesser charge of voluntary manslaughter. However, the only element in dispute was intent. The jury was led by the sequential error of the instruction to, as a practical matter, find that D did not knowingly or intentionally kill victim, but that he did knowingly or intentionally kill victim while acting in sudden heat. This error invited inconsistency and renders the result of the trial unreliable. D was prejudiced in that he ultimately stood convicted of voluntary manslaughter, an offense not initially charged by the State and one upon which D did not proffer evidence or request instruction. Held, denial of post-conviction relief reversed and remanded for retrial.

RELATED CASES: McDowell, (05/30/2018), (Ind. Ct. App. 2018) (although instruction misstated the law when it told the jury to consider the elements of voluntary manslaughter only if the State failed to prove the elements of murder, the jury instructions as a whole properly informed the jury of its duty; McWhorter, 993 N.E.2d 1141 (Ind. 2013) (after grant of post-conviction relief on voluntary manslaughter conviction due to flawed jury instruction, on remand there is no prohibition for retrial on either voluntary manslaughter or reckless homicide).

TITLE: Perigo v. State

INDEX NO.: K.3.b.4.

CITE: (8/4/89), Ind., 541 N.E.2d 936

SUBJECT: Voluntary manslaughter - provocation; sexual taunting

HOLDING: Tr. Ct. did not err in overruling D's objection to state's closing argument that words alone were not sufficient provocation to warrant voluntary manslaughter verdict. D was charged with murder for killing of his girlfriend. D & victim had had tumultuous relationship for several years. On day of killing, D phoned victim at 5 a.m., & victim told him she had been on date with another man. D went to victim's apartment & confronted her about relationship. Victim told D their relationship was finished. They discussed victim's pregnancy, & D accused victim of having sex with man she had dated. After several denials, victim finally responded, "Yes, I did just [have intercourse with] him & his cum is still inside me." She added that she did not know by whom she was pregnant. D beat victim on head & abdomen with baseball bat, killing her & terminating fetus. Prosecutor argued in closing that words alone are not sufficient provocation to reduce offense from murder to manslaughter, *quoting Vasseur*, 430 N.E.2d 1157. D objected, & Tr. Ct. overruled. On appeal, D argues that words may indeed provide sufficient provocation to reduce offense to voluntary manslaughter. It is recognized that words alone do not provide sufficient provocation. *Vasseur*. [Other citations omitted.] Held, conviction affirmed. Dickson, J., DISSENTS, arguing that cases cited by majority involve "fighting words," & citing caselaw for proposition that discovery of sexual infidelity may provide sufficient provocation & that such discovery may be made through words of another.

RELATED CASES: *Evans*, 727 N.E.2d 1072 (Ind. 2000) (Ct. recognized that discovery of alleged infidelity can "introduce the element of sudden heat").

TITLE: Robinson v. State

INDEX NO.: K.3.b.4.

CITE: (9/23/83) Ind., 453 N.E.2d 280

SUBJECT: Provocation - voluntary manslaughter

HOLDING: There was sufficient evidence to sustain D's murder conviction where D repeatedly hit 3-year-old child in head with chair. Here, D contends injuries inflicted upon child were in "sudden heat" because child failed to explain why she wet the bed. Voluntary manslaughter is knowing/intentional killing of another human being while acting under sudden heat. Ind. Code 35-42-1-3. Sufficient provocation must exist to engender such heat (passion). Hedrick, 430 N.E.2d 1151; Love, 369 N.E.2d 1073; Dickens, 295 N.E.2d 613. Such emotions as anger, rage, sudden resentment, or terror must be sufficient to obscure reason of ordinary person, prevent deliberation & premeditation & render D incapable of cool reflection. Dickens. Ct. finds although D & her husband (who also struck child) may have been angered that child wet bed & was unresponsive to questioning, this was not sufficient provocation to obscure their reason or understanding of consequences of their actions. To sustain murder conviction, there must be evidence D had conscious objective to kill victim or was aware of high probability conduct would result in death of victim. Burkhalter, 397 N.E.2d 596. Held, conviction affirmed.

RELATED CASES: Carmack, 200 N.E.3d 452 (Ind. 2022) (In LWOP case, State disproved D's assertion that she killed child in sudden heat); Powers, 696 N.E.2d 865 (five year-old victim's crying did not constitute provocation necessary to qualify D's actions as sudden heat; no error in refusing lesser included offense instruction on voluntary manslaughter); Fox, 506 N.E.2d 1090 (evidence was sufficient to support jury's finding that D was not acting under sudden heat; evidence showed D stabbed & killed victim (ex-wife with whom he lived) because she was threatening to leave him; jury was entitled to find provocation was inadequate to obscure D's reason); Sears, 494 N.E.2d 1286 (evidence was sufficient to sustain murder conviction; Ct. rejects D's contention that she acted in sudden heat); Utley, 491 N.E.2d 200 (murder of ex-wife shortly before she & daughter were to leave on vacation with another man was not done in sudden heat); Fowler, 483 N.E.2d 739 (no error in refusal to give instruction implying words alone would be sufficient provocation); Harlan, 479 N.E.2d 569 (Ct. rejects D's contention that sudden heat extended over long period of time).

TITLE: Ronk v. State
INDEX NO.: K.3.b.4.
CITE: (11/29/84) Ind., 470 N.E.2d 1337
SUBJECT: Voluntary manslaughter (VM) - sudden heat; burden of proof
HOLDING: Jury could have concluded from evidence that playful grabbing of \$20 bill from D's hand was insufficient provocation to justify shooting friend (both intoxicated) at point blank range. Shackleford, 349 N.E.2d 150. Evidence sustains murder conviction. Here, D contends he presented evidence of mitigating factor of sudden heat which state failed to rebut. State carries burden of negating presence of sudden heat beyond a reasonable doubt once introduced into case. State may meet burden by rebutting D's evidence or by affirmatively showing in case-in-chief that D was not acting in sudden heat when killing occurred. Palmer, 425 N.E.2d 640. Sudden heat is question for jury to resolve. Estes, 451 N.E.2d 313. Held, conviction affirmed.

RELATED CASES: Jackson, 709 N.E.2d 326 (state successfully negated presumption of sudden heat; state has burden of negating presence of sudden heat, overruling Storey, 552 N.E.2d 477, McCann, 466 N.E.2d 421, and Matheney, 583 N.E.2d 1202). Wheeler, 482 N.E.2d 1141 (D argued over money with son all day); Wright, 474 N.E.2d 89 (evidence of sudden heat held sufficient; no error in giving AVM instruction); Van Orden, 469 N.E.2d 1153 (Tr. Ct. did not err in giving state's instruction on elements of voluntary manslaughter (set forth in opinion); instruction similar to ones approved in Tinsley, 358 N.E.2d 743 & New 259 N.E.2d 696); Bean, 460 N.E.2d 936 (sudden heat is not an element of offense; circumstantial evidence that D caused subdural hematoma was sufficient to sustain VM conviction).

TITLE: Ross v. State

INDEX NO.: K.3.b.4.

CITE: (4th Dist., 12-11-07), Ind. App., 877 N.E.2d 829

SUBJECT: Failure to object to voluntary manslaughter instruction

HOLDING: In murder prosecution, trial counsel was not ineffective for failing to object to jury being given an instruction on Class A felony voluntary manslaughter. Although voluntary manslaughter as a Class B felony is inherently included as a lesser offense of murder, Class A felony voluntary manslaughter is not because it contains an element that murder does not, i.e., that the killing is "committed by means of a deadly weapon." Ind. Code 35-42-1-3(a)(2). Thus, because charging information did not specify that D committed murder by means of deadly weapon, he argued that only proper voluntary manslaughter instruction that could have been given in this case was for Class B felony voluntary manslaughter.

Court agreed that without an allegation in charging information that D had used a deadly weapon to kill the victim, he only could have been convicted of Class B felony, not Class A felony, voluntary manslaughter. However, multiple Indiana cases state that voluntary manslaughter is an inherently included lesser included offense of murder & do not distinguish between Class A & B felony versions of voluntary manslaughter. Court "cannot deem trial counsel ineffective for failing to note an incorrect or overbroad statement of the law that apparently has escaped the notice of our courts for twenty years." Held, denial of post-conviction relief affirmed; Robb, J., concurring in result with opinion.

TITLE: Sanders v. Cotton

INDEX NO.: K.3.b.4.

CITE: 398 F.3d 572 (7th Cir. 2005)

SUBJECT: Erroneous voluntary manslaughter instruction - absence of sudden heat; misstating burden of proof

HOLDING: Federal habeas relief was granted in a case where jury instructions failed to properly identify prosecution's burden of proving absence of sudden heat in order to convict D of murder & attempted murder. The only difference between murder & voluntary manslaughter is the presence of sudden heat, which is defined as "anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation & premeditation, excludes malice, & renders a person incapable of cool reflection." McBroom v. State, 530 N.E.2d 725 (Ind. 1988). If a D charged with murder produces "any appreciable evidence" that he or she committed the crime under sudden heat, Tr. Ct. must give a voluntary manslaughter instruction, & the burden shifts to the prosecution to prove the absence of sudden heat beyond a reasonable doubt in order to obtain a conviction for murder. Id.

Here, Tr. Ct. refused to give an instruction requested by defense counsel that established State's burden of proving absence of sudden heat to prove murder. Instead, burden to prove existence, not the absence, of sudden heat was allocated to the State. On direct appeal, D did not challenge failure to properly instruct jury or give his proposed instruction. In Sanders v. State, 764 N.E.2d 705 (Ind. Ct. App. 2002), Ct. agreed that voluntary manslaughter instructions were erroneous, but found error harmless because instructions also informed jury that sudden heat is a mitigating factor. Seventh Circuit found that Indiana Ct.'s analysis was "incomplete...because it did not address [D's] argument that without proposed instruction...the jury would have no reason to know that the absence of sudden heat was an element of murder & attempted murder that the State was required to prove beyond a reasonable doubt."

In his application for habeas relief, D claimed that his due process rights were violated by failure to properly instruct jury & that his Sixth Amendment rights were violated by ineffective assistance of appellate counsel. The Seventh Circuit Ct. App. found no waiver of D's claim & that he fairly presented his federal claims. On merits, Ct. found reversible error because instructions not only failed to properly state burden of proof but affirmatively misstated it when they included element of proving existence of sudden heat. Instructions given by Tr. Ct. did not inform jury that sudden heat was something that the State had to disprove, rather they were left "ignorant of which side bore the burden of proof." Harrington v. State, 516 N.E.2d 65, 66 (Ind. 1987). Ct. also found that appellate counsel was ineffective because there was a reasonable probability that Indiana appellate Ct. would have ordered a new trial if counsel had raised issue, thus counsel's performance was both deficient & prejudicial. Held, denial of D's habeas corpus petition reversed & remanded with directions to grant writ unless State elects to retry D.

TITLE: Santana v. State

INDEX NO.: K.3.b.4.

CITE: (5th Dist., 12-9-97), Ind. App., 688 N.E.2d 1275

SUBJECT: Voluntary manslaughter - sudden heat required

HOLDING: Counsel was not ineffective for failing to tender voluntary manslaughter instruction which was not supported by evidence. Voluntary manslaughter instruction is warranted if there is any appreciable evidence of sudden heat, which is anger, rage, resentment or terror sufficient to obscure reason of ordinary man, & prevents deliberation & premeditation, excludes malice & renders person incapable of cool reflection. Baird, 604 N.E.2d 1170. Here, after D went to estranged wife's house & found her with her new boyfriend, D drove home, got his gun, drove back to wife's house & shot wife's boyfriend through window. Although sudden heat can survive a while beyond act of provocation, D's sudden heat could not have survived span of thirty minutes which separated D's seeing wife with boyfriend & his shooting of boyfriend. Thus, evidence did not support instruction of voluntary manslaughter. Held, conviction affirmed.

RELATED CASES: Wilson, 697 N.E.2d 466 (otherwise normally stressful encounter does not suddenly inflame sudden heat, simply because person suffers from psychological disorder which gives him "hair trigger").

TITLE: Watts v. State
INDEX NO.: K.3.b.4.
CITE: (05-13-08), Ind., 885 N.E.2d 1228
SUBJECT: Voluntary manslaughter instruction where no evidence of sudden heat - reversible error
HOLDING: In murder and criminal recklessness prosecution, it was reversible error for Tr. Ct. to give voluntary manslaughter instruction over defense counsel's objection because there was no evidence of sudden heat. In Wright v. State, 658 N.E.2d 563 (Ind. 1995), Court adopted a three-part test to determine whether it is appropriate to instruct jury regarding lesser-included offenses (LIOs), and held it is reversible error for Tr. Ct. to refuse to instruct jury on a LIO in presence of a serious evidentiary dispute about element or elements distinguishing greater from lesser offense. Court now holds it is also reversible error to give an instruction on a LIO in the absence of a serious evidentiary dispute. Specifically, if there is no serious evidentiary dispute over sudden heat, it is reversible error for Tr. Ct. to instruct a jury on voluntary manslaughter in addition to murder. Court noted that an unsupported voluntary manslaughter instruction, as was given in this case, deprives D of the opportunity to pursue a legitimate "all-or-nothing" trial strategy.

Here, D objected to instruction on grounds that "sudden heat has to be interjected by the D and I don't think that's happened." While defense counsel was incorrect that only the defense may introduce evidence of sudden heat, counsel was correct that evidence of sudden heat had not been introduced during trial. Thus, D adequately preserved this issue for appeal. Besides isolated moment when victim "got in the face" of D before D fired four to five shots as victim walked away, there was no possible evidence of sudden heat before jury. Insults and taunts alone are not sufficiently provocative to merit conviction of voluntary manslaughter instead of murder. See Jackson v. State, 709 N.E.2d 326 (Ind. 1999). Held, transfer granted, Court of Appeals' memorandum opinion vacated, voluntary manslaughter conviction reversed. Shepard, C.J., dissents without opinion; Boehm, J., dissenting, believes D did not properly preserve this issue for appeal, as he did not focus on the lack of evidence of sudden heat.

RELATED CASES: Collins, 966 N.E.2d 96 (Ind. Ct. App. 2012) (because there was evidence of sudden heat, i.e., D snapped from years of domestic abuse, when she shot her husband, Tr. Ct. court did not abuse its discretion by granting State's request to give a voluntary manslaughter instruction).

TITLE: Yeagley v. State

INDEX NO.: K.3.b.4.

CITE: (1st Dist., 8-12-96), Ind. App., 670 N.E.2d 358

SUBJECT: Attempted voluntary manslaughter instruction - fundamental error

HOLDING: D was entitled to post-conviction relief, where Tr. Ct. improperly instructed jury regarding elements of crime of attempted voluntary manslaughter. D's intent was at issue in trial. However, instructions failed to advise jury that in order to convict D of attempted voluntary manslaughter, State had to prove that he acted with specific intent to kill. Because elements of attempted murder & attempted voluntary manslaughter are identical, Ct. found decisions requiring attempted murder instructions to contain "intent to kill" language applicable to cases involving attempted voluntary manslaughter. Held, post-conviction Ct. reversed & remanded for new trial.

K. CRIMES

K.3. Offenses against the person

K.3.b.5. Involuntary manslaughter (Ind. Code 35-42-1-4)

TITLE: Baker v. State

INDEX NO.: K.3.b.5.

CITE: (1st Dist. 04/02/91), Ind. App., 569 N.E.2d 369

SUBJECT: Involuntary manslaughter instruction - when required

HOLDING: Tr. Ct. erred in refusing D's involuntary manslaughter instruction because charging instrument included all elements of involuntary manslaughter & there was serious evidentiary dispute on intent, the element distinguishing murder from involuntary manslaughter. D was convicted of murder of his 3 month old son, & evidence revealed that D shook child violently 3 times when he became upset because child would not stop crying. Child later died from brain hemorrhage cause by violent shaking. Ct. noted that first part of lesser included offense instruction test was satisfied because involuntary manslaughter is generally lesser included offense of murder, & charging instrument alleged necessary elements for the lesser offense. Ct. then noted that element distinguishing involuntary manslaughter from murder is intent to batter versus intent to kill. D testified that he committed act of shaking but did not know it could kill baby. Ct. found that evidence was subject to interpretation that D intentionally battered child causing death, but that he did not knowingly or intentionally kill him. Because this interpretation existed, it was error to refuse instruction on involuntary manslaughter. Held, conviction for murder reversed & remanded for new trial.

RELATED CASES: Stidham, Ind., 637 N.E.2d 140 (No error in refusing D's instruction on voluntary manslaughter, because evidence did not support it. Although when fight first erupted, there was sudden heat involved, beating of victim continued after this time, and was later stabbed numerous times).

TITLE: Fought v. State

INDEX NO.: K.3.b.5.

CITE: (3d Dist. 9/13/84) Ind. App., 468 N.E.2d 247

SUBJECT: Involuntary manslaughter - DWI; sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for involuntary manslaughter where D's drunk driving (Class A misdemeanor) inherently imposed risk of serious bodily injury. Ind. Code 35-42-1-4; Ind. Code 9-4-1-54; Pollard 439 N.E.2d 177. Here, D struck & killed bicyclist. D's blood alcohol content was .12%. Ct. rejects D's argument that evidence was insufficient because no evidence was presented re cause of death & because his intoxicated condition might not have been proximate cause of collision. Conviction for involuntary manslaughter requires proof that underlying felony N.E.2d misdemeanor was proximate cause of victim's death. Howell, (1928) 200 Ind. 345; Kimmel, (1926) 198 Ind. 444. Victim was thrown 170 feet & died immediately after collision. Bicycle was well lighted, visible from 435 feet. D's car struck bicycle close to berm; D took no evasive measures to avoid accident; & D fled from scene. Held, evidence sustains conviction.

TITLE: Fought v. State

INDEX NO.: K.3.b.5.

CITE: (3d Dist. 9/13/84) Ind. App., 468 N.E.2d 247

SUBJECT: Involuntary manslaughter - instruction

HOLDING: Tr. Ct. did not err in giving final instruction providing: "I instruct you that if you find that the collision which resulted in the death of Wilbur Helmuth was the sole result of inadvertence, thoughtless negligence, lack of attention, or failure to observe the bicycle by Kermit Fought, then you must find the D not guilty for the reason that proof of negligence is not sufficient to support a conviction for involuntary manslaughter." Cichos 184 N.E.2d 1 (nearly identical instruction). Further, D's failure to timely object waives any error. Bonds 436 N.E.2d 295. Held, affirmed.

TITLE: Phelps v. State
INDEX NO.: K.3.b.5.
CITE: (1st Dist. 9/13/83) Ind. App., 453 N.E.2d 350
SUBJECT: Involuntary manslaughter - sufficiency
HOLDING: Evidence was sufficient to support D's involuntary manslaughter conviction where D's stories were inconsistent & his explanation of 14-month-old victim's bruises was highly improbable & inadequate as to cause of death. State v. Green, (WA App. 1970) 466 P.2d 193. Here, D lived with victim's mother. Child was alive when mother went to work at 11 p.m. D was alone for at least one hour with child who was found dead the next morning. An autopsy disclosed multiple bruises all over child's body. Cerebral edema (general swelling of brain) caused by blunt force to the head resulted in death. Circumstantial evidence is sufficient to sustain involuntary manslaughter conviction. See Hutchinson 255 N.E.2d 828; Mobley 85 N.E.2d 489. Means & manner of death may be inferred from proven circumstances. People v. Kinzell, (IL App. 1969) 245 N.E.2d 319. Opportunity to commit crime or presence at scene when coupled with other circumstances may be sufficient to support finding of guilt. Manna 440 N.E.2d 473; State v. Pennewell, (WA App. 1979) 598 P.2d 748 (similar facts). Held, conviction affirmed.

TITLE: R.S. v. State

INDEX NO.: K.3.b.5.

CITE: (5th Dist., 9-26-03), Ind. App., 796 N.E.2d 360

SUBJECT: Involuntary manslaughter - evidence insufficient

HOLDING: There was insufficient evidence to support juvenile Ct.'s determination that Ds committed an offense that would be involuntary manslaughter if committed by adult. Juveniles inflicted four superficial wounds during fight with man, who suffered heart attack & died shortly after. Forensic pathologist testified that victim's heart attack began two days before with signs of other, recent heart problems that made his death "imminent" even without the fight. Ct. distinguished decisions from other jurisdictions where stress related to battery induced the fatal heart attack. In those cases, unlike instant case, person beaten was not already in midst of heart attack. Ds' conduct was not direct & proximate cause of victims' death. Held, battery adjudication affirmed, determination that Ds committed act that would be involuntary manslaughter if committed by adult vacated.

TITLE: Vega v. State

INDEX NO.: K.3.b.5.

CITE: (4th Dist., 10-17-95), Ind. App., 656 N.E.2d 497

SUBJECT: Involuntary manslaughter - evidence sufficient

HOLDING: State presented sufficient evidence to support involuntary manslaughter conviction, where various acts of cruelty & neglect perpetrated upon 3-year-old victim by her mother proximately caused victim's death. Victim's sister testified that D beat victim until she bled, immersed her in cold water for long period of time, & refused to feed her or keep her warm. D also admitted that she did not seek medical assistance when she observed victim's injuries. Under these circumstances, jury was entitled to infer that victim died as result of D's neglect & cruelty. Hall v. State (1980), Ind., 405 N.E.2d 530; Hutchinson v. State (1967), 225 N.E.2d 828. Ct. also rejected D's claim that she was denied due process & fair trial by misconduct of prosecutor during final argument. When read as whole, prosecutor's comments properly informed jury that State's burden was to prove that D's acts of cruelty & neglect were proximate cause of victim's death. Held, conviction affirmed.

RELATED CASES: Wahl, 148 N.E.3d 1071 (Ind. Ct. App. 2020) (conviction affirmed for Ds who jointly owned and operated daycare and recklessly supervised toddler who died as a result thereof); Wessling, App., 798 N.E.2d 929 (State proved beyond reasonable doubt the cause of death as alleged in charging information, & that victim died from injuries caused by D).

K. CRIMES

K.3. Offenses against the person

K.3.b.6. Reckless homicide (Ind. Code 35-42-1-5)

TITLE: Dawson v. State

INDEX NO.: K.3.b.6.

CITE: (1st Dist., 04-20-93), Ind. App., 612 N.E.2d 580

SUBJECT: Reckless Homicide & Operating While Intoxicated Resulting in Death (OWI death) convictions are precluded

HOLDING: Because D's convictions for reckless homicide & OWI death arose from death of one person following single mishap, & Tr. Cts. & attorneys have relied on Carter (1981), App., 424 N.E.2d 1047, & Drossos (1982), App., 442 N.E.2d 1, holding Ds cannot be punished for both OWI death & reckless homicide, interest in maintaining stability & precedent in law required that D's multiple convictions not stand. After drinking at party, D got on his motorcycle, rode down street, made U-turn, revved engine, accelerated to between 40-60 mph, & did wheelie. While D was zipping back up street on one wheel he struck & killed friend who walked or ran across in front of him. He was convicted & sentenced for both OWI death & reckless homicide. Ct. noted that if OWI death & reckless homicide are "same offense," double jeopardy (DJ) provisions of U.S. & Ind. Constitutions prevent punishment for both. In Carter, Ind. rejected 'one set of operative circumstances' approach to DJ & held OWI death & reckless homicide were "same" for DJ purposes. In concurrence in Carter, however, Judge Staton noted that "person may engage in reckless conduct without being intoxicated, & may be intoxicated without engaging in reckless conduct...", & that if State attempted to prove recklessness by showing intoxication, elements of OWI death would be completely contained in reckless homicide, but if not they could be separate offenses. Decision in Drossos relied on Carter. Ct. here concluded D's offenses were not same & DJ was not offended by punishing D for each, because reckless homicide was based on wheelie, & not on intoxication, & offense of OWI death was based on intoxication, & not on wheelie. Nevertheless, Ct. chose to favor result reached in Carter & Drossos that "one may not be punished for both OWI death & reckless homicide arising from a single death." Although DJ didn't forbid punishment for both OWI death & reckless homicide under facts presented, Ct. held Ind. law did impose such prohibition. Because D's case did not raise DJ concerns, however, Ct. found vacation of conviction was not required & that law required only that D not be punished for both OWI death & reckless homicide arising from same accidental death. Therefore, substituting OWI conviction for OWI death conviction was satisfactory outcome. Because OWI was lesser-included offense of OWI death, it was plain D was guilty of OWI or was on notice that he could be punished for it. Ct. then exercised authority under App. R. 15(N), & remanded case with instruction to vacate OWI death conviction & enter OWI conviction & sentence.

RELATED CASES: Scott, 986 N.E.2d 292 (Ind. Ct. App 2013) (trial counsel's failure to inform D of the correct maximum sentence of 23 rather than 30 years for operating a vehicle with a BAC of at least .18 causing death and resisting law enforcement causing death rendered his guilty plea unintelligent; see full review at Y.4.b.2).

TITLE: Drossos v. State

INDEX NO.: K.3.b.6.

CITE: (4th Dist. 11/16/82) Ind. App., 442 N.E.2d 1

SUBJECT: Reckless homicide/DWI causing death - one death, one conviction

HOLDING: D may not be convicted of both reckless homicide (Ind. Code 35-42-1-5) & operating a vehicle while intoxicated resulting in death of another person (Ind. Code 9-4-1-54) for the death of the same person. Carter, App., 424 N.E.2d 1047. Here, D was convicted on 3 counts of reckless homicide & 3 counts of DWI resulting in death. Three persons were killed. Held, 3 counts under Ind. Code 9-4-1-54 affirmed, but case remanded to Tr. Ct. to vacate conviction on 3 counts of reckless homicide.

TITLE: Dylak v. State

INDEX NO.: K.3.b.6.

CITE: (4th Dist., 06-06-06), Ind. App., 850 N.E.2d 401

SUBJECT: Reckless homicide -- violation of rules pertaining to truck drivers

HOLDING: Evidence was sufficient to support D's conviction for reckless homicide as a class C felony. D, a truck driver, violated the rule that during a period of eight days a driver may not exceed seventy hours of on duty time. During the eight days preceding the collision, D had been driving for 71.5 hours at time of collision. On 5-6 days before collision, D also violated rule that a driver may only drive ten hours & then must not work for eight hours. The purpose of the seventy-hour rule & the ten hour rule is to prevent fatigued drivers from driving on roadways. D entered well-lit intersection, failed to use his horn & had enough distance to stop. Collision occurred 11.4 seconds after traffic signal turned yellow. D admitted that he was one hundred yards away from intersection when traffic signal turned yellow & that traffic signal was red when he entered intersection. After collision, D told officers that he was tired & that he was going to rest. Under circumstances, jury could have found that D was substantially deviating from acceptable driving standards & recklessly killed victim. Held, judgment affirmed.

Note: Compare Clancy v. State, 829 N.E.2d 203 (Ind. Ct. App 2005), where Ct. held that mere fact D fell asleep behind wheel & caused accident was insufficient to support his two criminal recklessness convictions, in absence of some proof that driver consciously ignored, for a period of time, substantial warnings that he or she might fall asleep, & continued to drive despite the warnings.

TITLE: Gibbs v. State

INDEX NO.: K.3.b.6.

CITE: (2nd Dist., 3-21-97), Ind. App., 677 N.E.2d 1106

SUBJECT: Reckless homicide - evidence sufficient

HOLDING: Evidence was sufficient to sustain reckless homicide conviction, where D caused fatal car crash by continuing to operate his vehicle in dark after alternator failure left him without operating headlights & with only parking lights. Conviction of reckless homicide requires evidence of probative value supporting each of three elements: causation, that act resulting in homicide was voluntary, & that D's conduct was reckless & not merely negligent. Taylor v. State, 457 N.E.2d 594 (Ind. Ct. App 1983). When D voluntarily continued to operate his vehicle on very dark highway without headlights, he acted with plain, conscious, & unjustifiable disregard of harm that might result. Ct. rejected argument that D's conduct was not direct & proximate cause of victim's death, & that driving without headlights under Indiana statutes does not constitute criminal recklessness. Held, conviction affirmed; Sullivan, J., dissenting.

RELATED CASES: Barber, App., 863 N.E.2d 1199 (D's weaving in his own lane towards teenager's car that was about to pass & speeding on wet roads was reckless; although teenager's following too closely was listed as cause of accident by State Police investigator, D's actions also contributed to the accident, & thus, were a proximate cause); Whitaker, App., 778 N.E.2d 423 (relatively slight deviations from traffic code, even if technically rising to level of reckless driving, do not necessarily support reckless homicide conviction if someone is subsequently killed; see full review, this section).

TITLE: Hughes v. State

INDEX NO.: K.3.b.6.

CITE: (3d Dist. 7/27/87) Ind. App., 510 N.E.2d 741

SUBJECT: Reckless homicide - sufficiency

HOLDING: D's speed, coupled with other evidence, sufficiently sustained jury's verdict as to reckless homicide. Taylor, App., 457 N.E.2d 594. Here, evidence indicates D accelerated as he approached intersection controlled by traffic signal, disregarded red light, & struck another car. D was traveling approximately 60 miles per hour in a 25 to 35 mile per hour zone. "Recklessly" is defined as conduct in which person engages "in plain, conscious, & unjustifiable disregard of harm that might result; disregard involves substantial deviation from acceptable standards of conduct." Evidence shows D neither stopped nor attempted to brake for red signal. Ct. rejects D's contention that acts amount to negligence rather than recklessness. Mere negligence or inadvertence cannot support conviction for reckless homicide. Cichos 184 N.E.2d 1. Jury was instructed on negligence & that negligent conduct would not constitute recklessness. It is jury's purpose to determine into which legal category D's conduct falls. Held, conviction affirmed.

RELATED CASES: Guy, App., 678 N.E.2d 1130 (jury could have reasonably inferred from evidence that D acted recklessly & that his consumption of alcohol impaired his ability to control his car & caused accident); DeVaney, 288 N.E.2d 732 (State failed to establish reckless homicide based solely on D's intoxication at time of accident & fact that he crossed center line of road).

TITLE: Marshall v. State

INDEX NO.: K.3.b.6.

CITE: (2d Dist. 12/20/90), Ind. App., 563 N.E.2d 1341

SUBJECT: Reckless homicide - multiple deaths from single accident

HOLDING: Tr. Ct. did not err in entering judgment & sentence against D for 6 counts of reckless homicide, based on single accident. D pled guilty to 6 counts of driving with .10 BAC resulting in death (BAC death) & 6 counts of reckless homicide, as result of single accident in which his 6 passengers were killed. D later petitioned for modification of sentence, asserting double jeopardy (DJ) bar. Tr. Ct. vacated 5 convictions for BAC death. Ct. App. finds that Tr. Ct. erred in failing to vacate either remaining BAC death conviction or one reck-less homicide conviction based on death of same victim. See Drossos, App., 442 N.E.2d 1; Carter, App., 424 N.E.2d 1047. D also argues that Tr. Ct. erred in affirming 6 reckless homicide convictions resulting from single incident. Focus of DJ inquiry is whether legislature intended to define separate offenses which might result from same conduct. Kelly, App., 527 N.E.2d 1148. Kelly court examined DUI resulting in death statute & determined that essence of that offense is operating vehicle while intoxicated; resulting death is merely factor enhancing offense. Thus, Kelly court concluded that legislature intended only one DUI resulting in death offense regardless of number of deaths. Same logic applies to BAC death offense. However, legislature has defined reckless homicide as reckless killing of another human being, Ind. Code 35-42-1-5, so that death is essence of offense. Accordingly, where multiple deaths occur in course of single incident, statute has been violated multiple times. Held, 5 reckless homicide convictions affirmed; remanded with instructions to vacate either remaining BAC death conviction or reckless homicide conviction.

TITLE: Shepherd v. State

INDEX NO.: K.3.b.6.

CITE: 155 N.E.3d 1227 (Ind. Ct. App 2020) (09/14/2020)

SUBJECT: No evidence to support defendant's proposed reckless homicide instruction

HOLDING: In reckless homicide and criminal recklessness with deadly weapon prosecution, trial court did not abuse its discretion when it rejected Defendant's proposed instruction that read: "[p]roof that an accident arose out of the inadvertence, lack of attention, forgetfulness or thoughtfulness of the driver of a vehicle or from an error in judgment on his part, will not support a charge of reckless homicide." Charges resulted from the deaths of three young children and serious injury of another struck by pickup truck Defendant was driving that failed to stop for a school bus stopped to pick up the children for school. Defendant's theory at trial was that she experienced an error of judgment which caused the collision. Nonetheless, Court of Appeals found there was no evidence at trial to support giving the instruction because Defendant did not point to evidence supporting portions of her proffered instruction regarding "inadvertence, lack of attention, forgetfulness or thoughtfulness." Even if there were evidence to support defense theory that the collision resulted from an error of judgment, Defendant did not offer a separate instruction limited just to that wording. The Court of Appeals found sufficient evidence Defendant acted recklessly rather than negligently, thus sustaining her convictions for reckless homicide and criminal recklessness. The jury reasonably concluded that Defendant recognized that the vehicle before her in the road was a stopped school bus or that she was aware of conditions that would have disclosed that fact to any reasonable person. However, the Court vacated Defendant's misdemeanor reckless driving conviction on double jeopardy grounds, finding that the reckless driving and criminal recklessness convictions were both established by the same evidence and same act of recklessly driving past the stopped school bus. Thus, the Court remanded the case with instructions to issue a new sentencing order expressly indicating the two ordered license suspensions are to be served concurrently.

TITLE: State v. Sturman

INDEX NO.: K.3.b.6.

CITE: (7/14/2016), 56 N.E.3d 1187 (Ind. Ct. App 2016)

SUBJECT: Reckless homicide SOL runs on date of death, not date of act

HOLDING: In an issue of first impression, the Tr. Ct. abused its discretion in dismissing D's reckless homicide charge on statute-of-limitation grounds because it erroneously determined the statute began to run on the date D committed the act that led to the person's death, not the date the person died.

D prescribed massive amounts of pain killers to D.E.H., who died from "pharmacologic intoxication." D wrote the final prescription on July 29, 2010; D.E.H. died on August 6, 2010. The State charged D with reckless homicide on August 5, 2015. Finding that the five-year statute of limitations began to run the date D wrote the final prescription – July 29, 2010 – the Tr. Ct. found that the August 5, 2015 charge did not fall within the limitations period and thus dismissed the charge.

A statute of limitation begins to run only when the crime is complete, and in the case of reckless homicide, the crime is not complete until the victim dies. See Illinois v. Mudd, 507 N.E.2d 869, 871 (Ill.Ct. App. 1987) (reckless homicide case). Thus, the State could not charge D with reckless homicide until the date D.E.H died, August 6, 2010. Cf. Alderson v. State, 145 N.E. 572, 573 (1924) ("A homicide consists of not only striking the fatal blow . . . but is not complete until the victim has [actually] died"). Therefore, the August 5, 2015, filing of the reckless homicide charge fell within the five-year limitations period. Held, dismissal of count reversed.

TITLE: Taylor v. State

INDEX NO.: K.3.b.6.

CITE: (4th Dist. 12/19/83) Ind. App., 457 N.E.2d 594

SUBJECT: Reckless homicide - sufficiency; speeding; drinking

HOLDING: Evidence is sufficient to support D's conviction for reckless homicide where testimony of eyewitness revealed D was exceeding speed limit by 20-40 mph (exacerbated by wet pavement & D's unfamiliarity with area); excessive speed or fact D has been drinking tend to show recklessness. Hall, App., 367 N.E.2d 1103. See generally 61A C.J.S. Motor Vehicles Sections 609, 610, 657(b) (1970). Here, D was acquitted of DWI. D's admission that he had 2 beers on day of accident is irrelevant to reckless homicide conviction in light of that acquittal. General intent necessary to support conviction for reckless homicide: choice of action, with knowledge of either serious danger to others or facts which would disclose danger to reasonable person. Salrin App., 419 N.E.2d 1351. See also Shorter 122 N.E.2d 847; Beeman 115 N.E.2d 919. Failure to adhere to speed limit does not necessarily constitute recklessness, as in cases of inadvertence or slight deviation. Ct. looks to reckless driving statute (Ind. Code 9-4-1-56.1) for guidance on excessive speed issue. Ct. notes in certain circumstances, driving at "unreasonably high rate of speed" may be sufficient to support reckless driving conviction. Ct. finds driving 40 mph over speed limit is unreasonable & reckless. Held, conviction reversed & remanded on other grounds.

RELATED CASES: Green, App., 650 N.E.2d 307 (evidence sufficient to support RH conviction; jury could reasonably find that speed of 100 mph was unreasonable).

TITLE: Vandeventer v. State

INDEX NO.: K.3.b.6.

CITE: (1st Dist. 2/22/84) Ind. App., 459 N.E.2d 1221

SUBJECT: Attempted reckless homicide - nonexistent offense

HOLDING: Conviction for non-existent crime is fundamental error. Moon 366 N.E.2d 1168; Young 231 N.E.2d 797; Hargis 44 N.E.2d 307. Here, D charged with attempted voluntary manslaughter was convicted of attempted reckless homicide as lesser included offense, pursuant to D's tendered instruction. State contends D invited error/cannot now complain. Stamper 294 N.E.2d 609; Moore, App., 445 N.E.2d 576. Rule has been applied to instructions stating offense is lesser included when it is not (Loza 325 N.E.2d 173; Moore; Sund, App., 320 N.E.2d 790), but cases involved statutorily defined offenses. Rule does not apply to non-existent offenses. Held, reversed.

RELATED CASES: Yeagley 467 N.E.2d 730.

TITLE: Whitaker v. State

INDEX NO.: K.3.b.6.

CITE: (11-13-02), Ind. App., 778 N.E.2d 423

SUBJECT: Reckless homicide - insufficient evidence

HOLDING: There was insufficient evidence to convict D of reckless homicide. D had been following victim by several car lengths at about 5 mph over speed limit, when D rear-ended victim, propelling her car into oncoming traffic where it was run over by a dumptruck. Victim died instantly. Upon reviewing multitude of cases, Ct. concluded that relatively slight deviations from traffic code, even if technically rising to level of reckless driving, do not necessarily support reckless homicide conviction if someone is subsequently killed. Some gross deviations from traffic code may under certain circumstances be such substantial departure from acceptable standards of conduct that they will support reckless homicide conviction, such as ignoring traffic signals at high rate of speed, driving on dark road at night without headlights, or intentionally crossing center line without legitimate reason for doing so. Speed may support reckless homicide conviction, but only greatly excessive speeds, such as twenty or more mph over speed limit, or where inclement weather & poor road conditions render higher speeds greatly unreasonable. Here, D was only going 5 mph over speed limit & was traveling at same rate of speed as other motorists. D may have been following too closely behind victim, but that is subjective determination & State failed to introduce any evidence as to what reasonable following distance would have been, let alone actual distance between D's & victim's vehicles. Although D admitted that he failed to notice that victim was stopped until it was too late for him to stop or avoid her car, this is evidence of negligence but does not rise to level of recklessness despite tragedy. Held, conviction reversed.

RELATED CASES: Boadi, App., 905 N.E.2d 1069 (failure to stop at a red light at an intersection due to inadvertence or an error in judgment cannot, without more, constitute criminally reckless conduct).

K. CRIMES

K.3. Offenses against the person

K.3.b.7. Feticide

TITLE: Baird v. State

INDEX NO.: K.3.b.7.

CITE: (12/1/92), Ind., 604 N.E.2d 1170

SUBJECT: Feticide -- intent

HOLDING: D was convicted of three counts of murder and one count of feticide and sentenced to death. D claimed that his conviction for feticide was contrary to law. He maintained that feticide statute, Ind. Code 35-42-16, was enacted to punish those who perform illegal abortions and cannot reasonably be applied to crime in which sole act was killing of pregnant woman and in which there was no evidence that D intended to harm fetus. He also claimed that feticide is factually included lesser offense of murder in this case. Ct. held that proper construction of feticide statute requires that it be viewed not as illegal abortion statute, but as extension of laws of homicide to cover situation in which victim is not human being as defined by Ind. Code 35-41-1-14 (individual who has been born and is alive), but is fetus.

D also argued that language "with an intention other than to produce a live birth or to remove a dead fetus" must be understood to require that termination of pregnancy be accomplished with specific intent to kill fetus. Ct. held that questioned language does not require that accused have specific intent to kill fetus but merely exempts two obvious, noncriminal intentions. Held, conviction affirmed.

TITLE: Patel v. State

INDEX NO.: K.3.b.7.

CITE: (7/22/2016), 60 N.E.3d 1041 (Ind. Ct. App 2015)

SUBJECT: Feticide statute does not apply to illegal or self-induced abortions

HOLDING: Legislature did not intend for Indiana's feticide statute (Ind. Code § 35-42-1-6) to apply to illegal abortions or to be used to prosecute women for their own abortions. In this case, D purchased abortion-inducing drugs online and used the drugs to terminate her pregnancy at home. Illegal abortions are governed by provisions regulating abortion in Title 16, and not the feticide statute. Baird v. State, 604 N.E.2d 1170 (Ind. 1992). Since the legislature enacted the feticide statute in 1979, it has been used to prosecute third parties who knowingly terminate pregnancies by using violence against the expectant mother without her consent. In an "abrupt departure" from earlier cases, Court noted this is the first case in which the State has used the feticide statute to prosecute a pregnant woman (or anyone else) for performing an illegal abortion. Based on the language used in Ind. Code § 16-34-2, the Legislature intended for any criminal liability to be imposed on medical personnel, not on women who perform their own abortions. Held, conviction reversed.

K. CRIMES

K.3. Offenses against the person

K.3.c. Kidnapping/confinement

K.3.c.1. Kidnapping (Ind. Code 35-42-3-2)

TITLE: Clayton v. State
INDEX NO.: K.3.c.1.
CITE: (4th Dist., 9-7-95), Ind. App., 658 N.E.2d 82
SUBJECT: Kidnapping - insufficient evidence
HOLDING: Evidence was insufficient to support D's conviction for kidnapping. Ind. Code 35-42-3-2(b)(2) provides that "[a] person who knowingly or intentionally removes another person . . . by force, or threat of force, from one place to another: ...[w]hile hijacking a vehicle . . . commits kidnapping." "Hijacking a vehicle" element of Ind. Code 35-42-3-2(b)(2) is defined as exercising unlawful/unauthorized control of vehicle by force/threat of force upon vehicle's inhabitants. Wilson v. State (1984), Ind., 468 N.E.2d 1375. Here, D allowed complaining witness (CW) to take her children into house instead of exposing them to special danger which results when one is seized & confined or transported in commandeered vehicle. Kidnapping is malum in se crime & requires that element of intent be proved beyond reasonable doubt. Smith v. State (1979), Ind., 386 N.E.2d 1193. Following Smith, Ct. found insufficient evidence of intent in this case to support conviction. CW voluntarily took one child into house when she went with D to look for her purse. Subsequently, before driving away, D ordered CW to remove her other child from car. There was no evidence that D threatened CW's children or used any force to keep children in car against their will. Held, kidnapping conviction reversed, burglary, robbery, & confinement convictions affirmed.

TITLE: Freed v. State
INDEX NO.: K.3.c.1.
CITE: (7/30/85) Ind., 480 N.E.2d 929
SUBJECT: Kidnapping - sufficiency
HOLDING: Evidence was sufficient to sustain D's conviction for kidnapping where D pointed sawed-off shotgun at victim (police officer in patrol car) & said "I don't want to hurt you, lady, but I want Richard Joseph out of jail." Victim got out of car & led D into jail where D held victim & dispatcher at gunpoint until latter released Joseph. D contends it was not her conscious objective to remove victim from one place to another by force/threat of force. Ct. finds only reasonable inference was D intended victim to go at gunpoint from parking lot into county jail. See Gilmore 415 N.E.2d 70. Held, conviction affirmed.

TITLE: Ingle v. State

INDEX NO.: K.3.c.1.

CITE: (5-8-01), Ind., 746 N.E.2d 927

SUBJECT: Kidnapping - evidence insufficient; "hostage" element

HOLDING: Term "hostage" in Indiana kidnapping statute, Ind. Code 35-42-3-2, refers to person who is held as security for performance or forbearance of some act by third party. To extent such person is held solely to secure demands upon that person alone, perpetrator may be guilty of criminal confinement, Ind. Code 35-42-3-3, but not kidnapping. Here, there was insufficient evidence to find that D committed attempted kidnapping because there was no evidence he intended to take his estranged wife hostage. Evidence was undisputed that D was trying to secure something from his wife only -- her promise to return to him -- & not from third party. Reasonable jury could infer from evidence that D intended to confine wife & demand her return, but there is no evidence that he intended to make any demands on third party. Because D never intended to take wife hostage, he could not have been attempting to kidnap her. Held, murder & attempted murder convictions affirmed, attempted kidnapping conviction reversed; remanded for resentencing.

TITLE: State v. Froland (Kindt)

INDEX NO.: K.3.c.1.

CITE: 193 N.J. 186, 936 A.2d 947 (N.J. 2007), modified by 949 A.2d 844

SUBJECT: Kidnaping reversed based on statutory definition of parent

HOLDING: New Jersey Supreme Court held a woman who removed her stepchildren from the state with their father's consent, but without the consent of their mother, should not have been convicted of kidnaping. State argued that the stepmother's reliance on the common meaning of "parent" in the statute was too simplistic because it failed to take into account the effect of judicial custody orders affecting parental status. Court disagreed, pointing out that the legislature "could have qualified the word 'parent' in the consent prong of the kidnapping statute based upon judicially decreed custodial status [but it] did not do so." Without such legislative direction, "courts are not free to superimpose on the ordinary word 'parent' the state's catalogue of distinctions."

TITLE: Wilson v. State

INDEX NO.: K.3.c.1.

CITE: (10/19/84) Ind., 468 N.E.2d 1375

SUBJECT: Kidnapping - sufficiency; "hijacking" defined

HOLDING: Evidence was sufficient to prove "hijacking a vehicle" element of Ind. Code 35-42-3-2(b)(2) where state proved D & accomplice took control of victim's car by threatening victim with shotgun & driving victim away in his own car with intent to force him to withdraw funds with his bank card. Hijacking is commonly understood to mean exercising of unlawful/unauthorized control of vehicle by force/threat of force upon vehicle's inhabitants. Here, Ct. rejects D's contention that proof of goods in transit is required. D relied on definition in Blacks Law Dictionary, 656 (5th Ed. 1979). Ct. notes drafters of statute should have used word with less broad/slang meaning; however, "poor language does not necessarily result in unconstitutionality. Legislature intended to prevent persons from being exposed to special danger resulting when one is seized/confined/transported in commandeered vehicle. Held, conviction affirmed.

RELATED CASES: Daughtry 498 N.E.2d 1217 (case of Wilson's co-D; same holding); Coleman 339 N.E.2d 51 (Kidn 1; reasonable fear of use of force/violence, when combined with asportation is sufficient to sustain kidnapping conviction).

TITLE: Miller v. State

INDEX NO.: K.3.c.1.

CITE: (3d Dist. 05/11/92), Ind. App., 591 N.E.2d 146

SUBJECT: Attempted kidnapping properly charged

HOLDING: Ind. Code 35-42-3-2(a)(2), which includes kidnapping as knowingly or intentionally confining another while hijacking vehicle, does require intentional or knowing conduct, & therefore provides specific intent necessary to attempt. Ct. rejected D's argument that portion of statute under which he was charged did not support crime of attempted kidnapping because it did not require specific intent. Ct. also found evidence that D threatened victim with gun, while insisting that she drive him to another town, supported finding that he intended to kidnap her. Held, convictions for attempted kidnapping & confinement affirmed, conviction for attempted confinement reversed on merger grounds.

K. CRIMES

K.3. Offenses against the person

K.3.c.2. Criminal confinement (Ind. Code 35-42-3-3)

TITLE: Boyd v. State

INDEX NO.: K.3.c.2.

CITE: (3-7-02), Ind. App., 766 N.E.2d 396

SUBJECT: Two convictions for one continuous criminal confinement prohibited by double jeopardy; continuing crime doctrine

HOLDING: D's convictions for criminal confinement & attempted criminal confinement violated Indiana Constitution's prohibition against double jeopardy. D's conduct resulted in one continuous period of confinement. Violation of criminal confinement statute, Ind. Code 35-42-3-3, during one continuous confinement may result in only one confinement conviction. Idle v. State, 587 N.E.2d 712 (Ind. Ct. App. 1992). Determinative factor is whether confinement may be divided into two separate parts. Id. Confinement ends when victim both feels & is free from detention, & separate confinement begins if & when detention of victim is re-established. Bartlett v. State, 711 N.E.2d 497 (Ind. 1999). Ct. rejected State's argument that both Bartlett & Idle have been superceded by Richardson v. State, 717 N.E.2d 32 (Ind. 1999), & that "continuing crime doctrine" is obsolete. Statutory elements & actual evidence tests are designed to assist Cts. in determining whether two separate chargeable crimes amount to same offense. Continuous crime doctrine does not seek to reconcile double jeopardy implications of two distinct chargeable crimes; rather, it defines those instances where D's conduct amounts only to single chargeable crime. Despite fact that D was charged with violating separate sections of Ind. Code 35-42-3-3, victim was never free, & therefore, everything that occurred was under one continuous confinement. Held, conviction for attempted criminal confinement reversed.

RELATED CASES: Leggs, 966 N.E.2d 204 (Ind. Ct. App 2012) (D's two confinement convictions violated continuing crime doctrine where victim testified she never felt free to leave); Taylor, App., 879 N.E.2d 1198 (where D confined children by removing them and continued to confine them by hijacking, confinement merged into kidnapping by hijacking); Penrod, 810 N.E.2d 345 (Ct. vacated two confinement convictions & affirmed D's kidnapping conviction, where evidence established only one continuous confinement).

TITLE: Bridges v. State

INDEX NO.: K.3.c.2.

CITE: (1st Dist. 2/18/85) Ind. App., 474 N.E.2d 529

SUBJECT: Confinement - consent; child of tender years

HOLDING: Evidence was sufficient to sustain Tr. Ct.'s finding of delinquency. Here, D removed 10 month-old child (her child, whose legal guardian was D's step-sister) from home where he had been left in D's mother's care. Tr. Ct. found D had confined child without his consent (Ind. Code 35-42-3-3(a)(1)) & was therefore a delinquent child under Ind. Code 31-6-4-1. D contends no evidence was introduced to show she acted without child's consent. Ct. finds child of tender years is ordinarily regarded as incapable of consenting to its seizure & abduction & thus, when taken from its rightful guardian, it is deemed taken without its consent as matter of law. 1 Am. Jur.2d Section 16 (1962); other citations omitted. Held, judgment affirmed.

RELATED CASES: Richards, App., 816 N.E.2d 72 (evidence was sufficient to support D's criminal confinement conviction, where D grabbed his child & kept her traveling with him for four months after an argument with child's mother, who had custody & a domestic restraining order from another state which D knew of, although the parties had lived together off & on since that time).

TITLE: Brown v. State

INDEX NO.: K.3.c.2.

CITE: (06-22-07), Ind., 868 N.E.2d 464

SUBJECT: Criminal confinement statute vague.

HOLDING: Indiana's criminal confinement statute, Ind. Code 35-42-3-3, as to the inclusion of the words "fraud" & "enticement" is void for vagueness & cannot be a basis for D's convictions, but is not invalidated as a whole. There must be something in a criminal statute to indicate where the line is to be drawn between trivial & substantial things so that erratic arrests & convictions for trivial acts & omissions will not occur. It cannot be left to juries, judges, & prosecutors to draw such lines. State v. Downey, 476 N.E.2d 121 (Ind. 1985). Here, criminal confinement is defined as removing another person by fraud, enticement, force, or threat of force, from one place to another. Ind. Code 35-42-3-3. But, removing a person by enticement or fraud would include a vast assortment of very acceptable & even salutary conduct that is clearly not criminal in nature, such as asserting an untruth to persuade an Alzheimer's patient to enter the location of a caregiver. Such obvious possibilities of intuitively improper applications of the criminal confinement statute is persuasive evidence that, with respect to removal by fraud or enticement, the statute fails to indicate where the line is to be drawn between trivial & substantial things. Thus, the statute, as applied to fraud & enticement, is vague. Held, transfer granted, Ct. App.' opinion at 848 N.E.2d 699, *aff'd on reh.*, 856 N.E.2d 739 vacated, judgment reversed & remanded.

TITLE: Burdine v. State
INDEX NO.: K.3.c.2.
CITE: (3d Dist., 2-14-95), Ind. App., 646 N.E.2d 696
SUBJECT: Attempted criminal confinement - evidence sufficient
HOLDING: Evidence was sufficient to sustain attempted criminal confinement conviction. Where D grabbed & held 10 year-old victim's shirt, chased after her, & then watched her, jury was entitled to determine that this constituted a substantial step toward act of criminal confinement. Jury could also properly infer from circumstances that victim's escape from D was through her efforts, not because D failed to take steps to confine her. Moore v. State, 569 N.E.2d 701. Held, conviction affirmed.

TITLE: Cook v. State

INDEX NO.: K.3.c.2.

CITE: (4th Dist. 12/28/89), Ind. App., 547 N.E.2d 1118

SUBJECT: Criminal confinement - violation of custody order; order must be specific

HOLDING: Evidence was insufficient to support conviction for criminal confinement based on removal of children from state where custody order did not specifically prohibit such removal. D was convicted of confinement pursuant to Ind. Code 35-42-3-3, which prohibits removal of person under 18 to place outside Indiana when removal violates child custody order. Evidence showed that D sold all of her possessions & took her children to Florida with her. She wrote to her ex-husband telling him that if he tried to find children she would move again to hide them. At time D took children to Florida, their father had custody & D had visitation rights. Custody order provided that D should have such visitation rights "so long as she conducts herself properly & provides a proper environment for such visitations." On appeal, D argues that because her custody order said nothing about removing children from Indiana, confinement statute does not apply. State argues that statute may be violated when removal from state occurs in connection with attempt to interfere with custody order, even where order does not expressly prohibit removal. Penal statutes must be strictly construed against state. [Citations omitted.] Custody order here is silent & therefore ambiguous as to whether children may be removed from state. See Clark v. Clark, App., 404 N.E.2d 23 (custody decree which lacks express command or prohibition may not be enforced through contempt proceedings). Such ambiguity must be resolved in favor of D. While D may have violated spirit of law, she did not violate letter, & criminal penalties are not appropriate. Held, conviction reversed.

TITLE: Cunningham v. State
INDEX NO.: K.3.c.2.
CITE: (2nd Dist., 07-25-07), Ind. App., 870 N.E.2d 552
SUBJECT: Confinement - insufficient evidence that D restrained CW's liberty
HOLDING: To convict D of confinement as a B felony, State was required to prove that D knowingly confined victim without her consent by preventing her from escaping by constant physical assault that resulted in serious bodily injury. Ind. Code 35-42-3-3. Offense of confinement requires proof of a substantial interference with a person's liberty without the person's consent. Lyles v. State, 576 N.E.2d 1344 (Ind. Ct. App 1991), *abrogated on other grounds*. In order to prove confinement beyond the main crime charged, there must be something more than the act necessary to effectuate the crime, albeit rape, theft, escape or battery. McDonald v. State, 511 N.E.2d 1066 (Ind. 1987).

Here, Tr. Ct. noted no direct evidence of confinement but concluded that because of the injuries D inflicted on victim, there was an inference that supported a finding that D had confined victim. However, victim did not testify that she felt confined. An inference of confinement does not arise from evidence of injury to the victim. If so, every battery as a Class C felony would also constitute confinement as a Class B felony. The inference on which Tr. Ct. relied cannot be drawn beyond a reasonable doubt. Held, confinement conviction reversed & remanded to re-sentence D on battery conviction alone.

RELATED CASES: McFadden, 25 N.E.3d 1271 (Ind. Ct. App 2015) (because there was no independent evidence to establish confinement beyond the evidence used to establish that D committed battery, evidence was insufficient to support D's criminal confinement conviction); Kelley, 2 N.E.3d 777 (Ind. Ct. App 2014) (insufficient evidence to support confinement conviction where victim was moving around and dodging D during attack, but D did not hold victim or block her); Schmidt, 952 N.E.2d 249 (Ind. Ct. App 2011) (Cunningham inapposite where D was not a resident of victim's home, he entered illegally and restrained victim by binding her wrist).

TITLE: Dewald v. State
INDEX NO.: K.3.c.2.
CITE: 898 N.E.2d 488 (Ind. Ct. App. 2008)
SUBJECT: Confinement - bail bondsmen may not stop and detain third parties
HOLDING: Evidence was sufficient to support criminal confinement convictions where D, a bail bondsman, stopped and trapped a minivan in which two third parties who were not his bail customers were riding. D detained and questioned the minivan's occupants for five to ten minutes and argued that confining them was not illegal, but necessary "in order to effectively perform his job." In affirming convictions, Court declined D's invitation to expand law pertaining to authority of bail bondsmen to permit bondsmen to conduct investigatory stops of third parties. Rights associated with "special position" of bail bondsmen are limited to the apprehension of the D. Mishler v. State, 660 N.E.2d 343 (Ind. Ct. App 1996). Evidence was sufficient to prove that D confined the minivan's occupants "knowingly," notwithstanding his belief that he acted within his authority. Held, judgment affirmed.

TITLE: Edwards v. State

INDEX NO.: K.3.c.2.

CITE: (6/28/85), Ind., 479 N.E.2d 541

SUBJECT: Confinement - double jeopardy

HOLDING: Conviction for both confinement & attempted rape did not violate double jeopardy.

Here, D argues he had to confine victim in order to rape her, thus neither crime requires proof of additional fact. Proper double jeopardy analysis focuses on whether offenses to be prosecuted/punished are same, not whether offenses spring from same act/operative circumstances. Confinement is defined as substantial interference with another person's liberty. Ind. Code 35-42-3-1; Ind. Code 35-42-3-3(a)(1). Attempted rape requires proof of substantial step toward having forced sexual intercourse with member of opposite sex. Ind. Code 35-41-5-1; Ind. Code 35-42-4-1. Each offense has statutory elements which other does not; hence, they are separate offenses. While evidence produced at trial to prove offenses may have overlapped, there was evidence specifically addressed to each offense. Ct. finds evidence sufficient to support both convictions. Sammons, App., 397 N.E.2d 289. Held, no error. **NOTE:** Cf. Wethington 560 N.E.2d 496 (card at K.3.c.2).

RELATED CASES: Idle, 587 N.E.2d 712 (multiple convictions for confinement of same person in same incident precluded even if D is separately charged under both provisions of statute, see card at J.10.f); Haggard, 445 N.E.2d 969 (Crim L 161, 195(1); D convicted of confinement in one county may not be convicted of confinement in another county when one continuing & uninterrupted act of confinement is at issue; held conviction constitutes double jeopardy & is reversed).

TITLE: Gibson v. State

INDEX NO.: K.3.c.2.

CITE: (9/1/2015), 42 N.E.3d 81 (Ind. 2015)

SUBJECT: Insufficient evidence D confined victim during battery

HOLDING: *Per Curiam*. Evidence was insufficient to support D's conviction for confinement by removal under Ind. Code § 35-42-3-3(a)(2). D was charged with aggravated battery and confinement following a physical altercation with another man. The charging information mirrored the language of the statute and alleged that D "knowingly remove[d] [the victim] by force or threat of force by pulling [the victim] to the ground and battering him." Held, transfer granted, Court of Appeals' memorandum opinion summarily affirmed on all other issues, judgment affirmed in part, criminal confinement conviction and concurrent two and one-half year sentence reversed.

TITLE: Kelly v. State

INDEX NO.: K.3.c.2.

CITE: (3/17/89), Ind., 535 N.E.2d 140

SUBJECT: Criminal confinement - 2 distinct offenses

HOLDING: Tr. Ct. erred in giving final instruction allowing jury to convict D of offense not charged.

D was charged with knowingly confining another individual against his consent while armed with deadly weapon. Tr. Ct. gave final instructions, over D's objection, defining confinement as confining or removing another individual by fraud, enticement, force, or threat of force. D argues that these instructions enabled jury to convict him of offense of confinement by removal, Ind. Code 35-42-3-3(a)(2), even though he had been charged only with non-consensual confinement under Ind. Code 35-42-3-3(a)(1). Statutory sections define 2 separate offenses. See Addis, App., 404 N.E.2d 59. Evidence, although conflicting, could have permitted jury to infer following: D, who walked with limp, approached larger, younger man with knife & ordered him to accompany D to party to ascertain his identity. D then forced young man to drive to another house, at gunpoint. Tr. Ct.'s contested instructions make case analogous to Shelton v. State (1936), 199 N.E. 148. Shelton was charged with committing manslaughter by driving under influence & at excessive speed. At trial, evidence sharply conflicted as to intoxication & driving speed, but clearly indicated recklessness. Tr. Ct. instructed jury that it could find Shelton guilty if it found either intoxication, excessive speed, or recklessness. Ind. S. Ct. reversed, ruling that Shelton was entitled to know character of charge against him. D here was likewise entitled, & Tr. Ct.'s instruction prejudiced this right, allowing possible verdict of guilty upon uncharged offense. Held, reversed & remanded. Pivarnik, J., DISSENTS.

RELATED CASES: Lewis, App., 759 N.E.2d 1077 (unlike Kelly, Tr. Ct. instructed jury on charges against D & then instructed jury regarding each of elements of confinement relevant to charges); Griesinger, App., 699 N.E.2d 279 (there are two separate confinement offenses: non-consensual restraint & confinement by removal; no error to refuse D's tendered instruction which referenced concept of consent, which is not element of confinement by removal).

TITLE: Lobbley v. State

INDEX NO.: K.3.c.2.

CITE: (11/19/84) Ind., 470 N.E.2d 341

SUBJECT: Confinement - sufficiency

HOLDING: Evidence was sufficient to sustain D's confinement conviction where D blocked victim's car with his own, threatened her with gun, forced her into passenger seat, shot at her when she tried to escape, dragged her by feet across parking lot & choked or grabbed her each time she tried to escape. Here, D contends victim's testimony is inherently unbelievable because she did not attempt to escape when she could have & she slapped him & demanded her pants back (aggressive behavior inconsistent with being held against one's will, argues D). Ct. sees no logic in argument. Victim's fear is not necessarily element of confinement. Held, conviction affirmed.

RELATED CASES: Brown

TITLE: Mickens v. State
INDEX NO.: K.3.c.2.
CITE: (12/10/2018), 115 N.E.3d 520 (Ind. Ct. App 2018)
SUBJECT: Criminal confinement - proof of enhancement for serious bodily injury
HOLDING: State presented sufficient evidence to support D's conviction for criminal confinement resulting in serious bodily injury. *Citing* McFadden v. State, 25 N.E.3d 1271 (Ind. Ct. App 2015), D argued that evidence of complaining witness's (C.W.'s) injuries did not give rise to an inference of confinement. Court disagreed, noting that the criminal confinement statute has been amended to remove the "removal" subsection, and D was charged with confining C.W. without her consent, not removing her from one place to another. Further, there was evidence other than repeatedly stomping on C.W.'s already-broken leg that D confined C.W., including grabbing the victim by the hair and dragging her outside, and then dragging her back to the front door. Also, there was a "temporal link" between the injury and the confinement so that the injury occurred during the incident of confinement. Therefore, the evidence was sufficient to support the conviction for Level 3 felony confinement resulting in serious bodily injury. Held, judgment affirmed.

TITLE: Moore v. State

INDEX NO.: K.3.c.2.

CITE: (12/12/19), 137 N.E.3d 1034 (Ind. Ct. App 2019)

SUBJECT: Criminal confinement - pellet gun was a "deadly weapon"

HOLDING: Evidence was sufficient to support Defendant's convictions for Level 3 felony criminal confinement (for committing the offenses while armed with a deadly weapon) and Level 6 felony Intimidation (for drawing or using a deadly weapon). Defendant pushed his mother up against a deep freezer so that her back was against it and his body was blocking the door. He had a pellet gun (which she believed to be an actual gun) in his hand at the time, put it against her temple and threatened to shoot her. The gun was actually a pellet gun that was not loaded and was not tested to determine if it was operable. Following Whitfield v. State, 699 N.E.2d 666 (Ind. Ct. App. 1998), the Court of Appeals held that a disabled pellet gun was a deadly weapon because pellet guns are virtually indistinguishable from the real guns they are modeled after and the victim was significantly frightened.

TITLE: State v. Greene

INDEX NO: K.3.c.2.

CITE: (9/17/2014), 16 N.E.3d 416 (Ind. 2014)

SUBJECT: Criminal confinement - enhancement for serious bodily injury to victim

HOLDING: Post-conviction court erred in finding that D's trial and appellate counsel were ineffective for failing to adequately challenge sufficiency of evidence underlying his class B felony criminal confinement conviction by failing to *cite* Long v. State, 743 N.E.2d. 253 (Ind. 2001). Long did not hold that elevation of criminal confinement to a Class B felony can only be sustained by injuries inflicted during the removal of the victim from one place to another. Instead, the case actually holds that serious bodily injury to the victim must be sustained during the charged offense of criminal confinement: a knowing or intentional forcible removal of the victim from one place to another. Thus, the victim must suffer serious bodily injury as the result of the act of forcible removal, whether or not the act of force occurs simultaneously with the act of removal.

Here, confinement victim testified that D strangled her unconscious while in their bedroom, and that she regained consciousness in their living room. Unlike in Long, jury could have reasonably inferred that D's act of force (strangulation) both facilitated his removal of victim from bedroom to living room and resulted in serious bodily injury to her. By failing to present an incorrect interpretation of case law, counsels' conduct did not fall below an objective standard of reasonableness and they did not render ineffective assistance. Held, transfer granted, Court of Appeals' opinion vacated, grant of post-conviction relief reversed

RELATED CASES: Mickens, 115 N.E.3d 520 (Ind. Ct. App 2018) (evidence was sufficient to show a temporal link between D's confinement of C.W. and her resulting serious bodily injury; see full review, in this section).

TITLE: Mallard v. State

INDEX NO.: K.3.c.2.

CITE: (5th Dist., 10-6-04), Ind. App., 816 N.E.2d 53

SUBJECT: Criminal confinement - evidence sufficient

HOLDING: Evidence was sufficient to convict D of criminal confinement while armed with a deadly weapon, even though he never displayed weapon to victim. D stopped the victim's vehicle by following her, turning a spotlight on her vehicle & flashing his headlights on & off at her. D flashed a badge at victim & retained her driver's license & registration when an actual police officer arrived, eventually determining that D had a handgun in his front pocket & was not with law enforcement. No evidence showed that D ever displayed a weapon to the victim.

Ct. found that D's actions in pulling the victim's car over, flashing a badge & keeping her documents gave the impression that he was a police officer & a jury could conclude that she did not feel free to leave. Ct. also found sufficient evidence to enhance the crime to a Class B felony for confining the victim "while armed with a deadly weapon." Ct. relied on Gresinger v. State, 699 N.E.2d 279 (Ind. Ct. App 1998) where Tr. Ct. denied a lesser-included offense instruction where evidence indicated D never held the knife he possessed on the victim, but evidence presented at trial supported an inference that the knife could have been used as a deadly weapon. Ct. also noted that plain language of statute uses the term "while armed" without reference to the deadly weapon being used during the commission of the offense. Held, judgment affirmed.

TITLE: Miller v. State
INDEX NO.: K.3.c.2.
CITE: (4th Dist., 06-28-93), Ind. App., 616 N.E.2d 750
SUBJECT: Variance in proof leads to insufficiency of class B Confinement
HOLDING: Because D was charged with class B Confinement by confining victim while "while armed with a deadly weapon, namely, a handgun," evidence that weapon was pellet gun was insufficient to support conviction as class B felony. Ct. first noted that weapon does not have to be firearm to be deadly weapon, & pellet or BB guns have been considered deadly weapons, Glover (1982), 441 N.E.2d 1360, Williams (1983), App., 451 N.E.2d 1026. Ct. then noted, however, that Information specifically charged D with confinement with handgun, & there was no evidence State attempted to broaden charge by deleting term "handgun" & charging simply possession of deadly weapon. "Handgun" is defined in Ind. Code 35-47-1-6 as "firearm," & firearm is defined as weapon capable of expelling projectile by means of explosion or gunpowder. State clearly established that D's pellet gun was not handgun, & therefore there was variance between Information, instructions given, & proof at trial. To warrant reversal, variance must be substantial, such as might mislead defense, Madison (1955), 130 N.E.2d 35. In instant case, defense counsel relied on Information as charged, arguing for directed verdict at close of State's case on ground it had been clearly shown that pellet gun used by D was not firearm. Because of variance in charge & proof that was obviously relied on as part of defense, variance required reversal of B felony conviction. Held, reversed & remanded for sentencing of D on conviction of confinement as D felony, Rucker, J., dissenting on this issue.

TITLE: Mitchell v. State

INDEX NO.: K.3.c.2.

CITE: (8/2/90), Ind., 557 N.E.2d 660

SUBJECT: Confinement - sufficiency

HOLDING: Evidence supporting inference that D held child in bathtub filled with 140 degree water for 1 - 5 seconds necessary for child to receive full-thickness burns was sufficient to support convictions for battery & confinement. On appeal, D argues that evidence was not sufficient to prove that she committed offenses, or if so that she did so knowingly or intentionally. Evidence showed that D took daughter to emergency room for treatment & explained that she had found her on her back in bathtub after filling tub & leaving bathroom with child on toilet. D gave false name & address to admitting desk & to social worker & left hospital shortly thereafter. Child suffered extensive full-thickness burns from waist to toes & on hands, but no burns to back, shoulders, neck or head. Four physicians testified that injuries were not consistent with accidental burns generally, & with D's explanation in particular. These physicians also testified that it would take only 1 - 5 seconds for child to receive full-thickness burns in 140-degree water. S.Ct. finds this evidence sufficient to support finding that D inflicted injuries on child. Circumstantial evidence further supports inference that D did so knowingly & intentionally. D provided false name & address to hospital & law enforcement officers, & displayed lack of concern about child's injuries, leaving hospital shortly after arriving there. DeBruler, J., DISSENTS, arguing that while evidence supports inference that D held child in tub filled with scalding water for 1 - 5 seconds, it did not support finding that D did so with specific intent required for confinement or battery.

TITLE: Perrey v. State

INDEX NO.: K.3.c.2.

CITE: (3rd Dist., 03-16-05), Ind. App., 824 N.E.2d 372

SUBJECT: Criminal confinement - child in stolen vehicle

HOLDING: Evidence was sufficient to support Class C felony criminal confinement conviction where D stole vehicle with one-year-old child in car seat in back. D relied on Addis v. State, 404 N.E.2d 59 (Ind. Ct. App. 1980), which held that evidence a father took off with children on false premise of custody visitation "was directed almost exclusively to proving confinement by fraudulently removing the children from Indiana" under Ind. Code 35-42-3-3(a)(2), but lent no support to a conviction for non-consensual confinement under Ind. Code 35-42-3-3(a)(1). However, Ct. noted that a child is incapable of consenting to criminal confinement when taken from a legal guardian & is therefore unable to consent as a matter of law. Matter of Bridges, 474 N.E.2d 529 (Ind. Ct. App. 1985); Richards v. State, 816 N.E.2d 72 (Ind. Ct. App. 2004). This case is distinguishable from Addis, because child was taken without her mother's consent rather than child being taken with consent for visitation but then failing to return the child. Held, judgment affirmed; Sullivan, J., concurring, does not believe discussion of whether mother consented is necessary for result.

TITLE: Wethington v. State

INDEX NO.: K.3.c.2.

CITE: 560 N.E.2d 496 (10/4/90), Ind.

SUBJECT: Confinement - double jeopardy

HOLDING: Because acts alleged as force element of robbery are same as acts alleged constitute confinement, Tr. Ct. erred in entering conviction & sentence on confinement. D was charged with robbery, & charging information alleged as force element that D bound & gagged victims, forced them to lie on floor, covered them with blanket, & poured gasoline around them. These same facts were alleged in confinement information. D was convicted & sentenced on both counts, & on appeal he argues that this violated double jeopardy. Two offenses are same for purposes of double jeopardy when same act constitutes violation of 2 distinct statutory provisions which do not require proof of additional fact. Blockburger v. US (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306. However, double jeopardy does not end with comparison of statutory provisions. Rather, factual bases alleged by state in charging instruments must also be examined. Hall, 493 N.E.2d 433. Language of charging instruments here makes it evident that factual basis underlying criminal confinement charge was same conduct alleged by state to establish force element of robbery. It is possible that single criminal transaction may properly result in convictions for both confinement & another offense, even where that offense necessarily entails some sort of restraint on victim's liberty. [Citations omitted.] However, where, as here, language of charging instrument makes no distinction between factual basis for confinement charge & facts necessary to prove element of other crime, confinement conviction cannot stand. Held, remanded with instructions to vacate confinement conviction & sentence.

RELATED CASES: Taylor, (5/4/2018), (Ind. Ct. App 2018) (criminal confinement convictions violated double jeopardy protections because the confinement of victims was no more extensive than necessary to carry out the robbery; there was no evidence of any separate or significant length of confinement after the robbery was completed and incident was not protracted); Merriweather, 778 N.E.2d 449 (App.) (no DJ violation where confinement was not factually or inherently lesser-included offense of robbery).

TITLE: Whitley v. State

INDEX NO.: K.3.c.2.

CITE: (1st Dist. 9/15/82) Ind. App., 439 N.E.2d 715

SUBJECT: Confinement - duration

HOLDING: If interference with liberty of another person is proven, D may be convicted of confinement, regardless of relative brevity of confinement. Sammons, App., 397 N.E.2d 289. Here, D, charged with attempted rape & confinement, forced his way into victim's car & fondled her. She screamed he ran. Held, confinement conviction affirmed.

RELATED CASES: Hatton, 439 N.E.2d 565 (nature of interference rather than length of confinement is determinative; D forced way into victim's car, took her keys & threatened her with crowbar when she tried to escape; bystanders pulled D from car; held, confinement conviction affirmed).

TITLE: Wise v. State

INDEX NO.: K.3.c.2.

CITE: (5th Dist., 06-15-94), Ind. App., 635 N.E.2d 221

SUBJECT: Confinement by enticement

HOLDING: Evidence of enticement was sufficient to sustain D's conviction for criminal confinement. D was charged with removing his step-daughter from their car to motel room by force, fraud, enticement or threat of force. Enticement includes "inviting, persuading or attempting to persuade a child to enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the person of said child." Black's Law Dictionary Bowen, 334 N.E.2d 691. Record showed that after buying mother's Christmas present, step-daughter was ready to go home, but D said there was something they had to do first. D then took step-daughter to motel room, & there was evidence she & brother had previously been taken to motel room to wrap mother's gifts. Step-daughter questioned D about why she was going to room & was not given answer, but she carried gifts up to room. Once inside room, she prepared to wrap gifts before D tried to rape her. Ct. found jury could have inferred that D persuaded her to leave car & enter room by relying on past experience where gifts had been wrapped, & therefore there was sufficient evidence of enticement to support conviction. Held, Tr. Ct. affirmed.

TITLE: Zimmerman v. State

INDEX NO.: K.3.c.2.

CITE: (2nd Dist., 4-4-03), Ind. App., 785 N.E.2d 1158

SUBJECT: Criminal confinement - no showing of threat or force

HOLDING: In kidnapping prosecution, evidence was insufficient to show that D confined complaining witness (CW) or exercised any control of CW's vehicle by force, threat, fraud or enticement. After stealing a video camera from Wal-Mart, D approached a friend of his, CW, who was stopped at red light. CW let D in car after he told her that the Wal-Mart security officer chasing him was trying to kill him. CW continued to drive D around until eventually being stopped by police. Despite fact that CW felt scared & was not given an answer by D when asked what had occurred, there was no evidence that D accosted CW or made any threats to her in event that she refused to continue driving him around town. Moreover, D never demanded that CW remain in car or prevented her from leaving. Because there was no evidence that D controlled vehicle by force or threat of force, there was no hijacking & D's conviction for kidnapping cannot stand. Held, conviction reversed. Mathias, J., dissenting, believed that evidence was sufficient for fact finder to reasonably conclude that CW's fear of D's potential use of force caused her to navigate vehicle in manner she did & prevented her from exiting vehicle.

RELATED CASES: Taylor, App., 879 N.E.2d 1198 (when victims in car are children, less force is required, thus fact that the children could not safely escape car was sufficient evidence of force).

K. CRIMES

K.3. Offenses against the person

K.3.c.3. Carjacking (IC 35-42-5-2)

TITLE: Allen v. State

INDEX NO.: K.3.c.3.

CITE: (4th Dist., 11-09-07), Ind. App., 875 N.E.2d 783

SUBJECT: Carjacking - actual movement of car not required

HOLDING: One need not physically move motor vehicle away from the victim in order to commit carjacking. Forcing the victim away from the vehicle is sufficient. Ind. Code 35-42-5-2 provides that a "person who knowingly or intentionally takes a motor vehicle from another person or from the presence of another person...by using or threatening the use of force on any person; or...by putting any person in fear...commits carjacking, a Class B felony." Here, brandishing a handgun, D asked victim if she wanted to die & then told her to get out of her vehicle so that he could drive, thereby removing her from the presence of her property. A jury was free to infer from this evidence that victim left her vehicle due to a threat of the use of force, thereby establishing carjacking. Held, conviction affirmed.

TITLE: Armstead v. State

INDEX NO.: K.3.c.3.

CITE: (4th Dist., 4-27-04), Ind. App., 806 N.E.2d 872

SUBJECT: Carjacking - motor scooter

HOLDING: A moped or motor scooter is a "motor vehicle" for purposes of Indiana's carjacking statute, Ind. Code 35-42-5-2. To obtain a conviction for carjacking, State must prove that D knowingly or intentionally took a motor vehicle from another person or from presence of another person by using or threatening use of force on any person or by putting someone in fear. Relying on State v. Drubert, 686 N.E.2d 918 (Ind. Ct. App 1997), which held that a moped was not a motor vehicle for purposes of habitual traffic violator laws, D argued that victim's motor scooter in this case was not a motor vehicle so that he could not be guilty of carjacking for taking it. However, the term "motor vehicle" is defined differently for purposes of traffic & criminal penal statutes. For purposes of traffic laws, definition of "motor vehicle" excludes motorized bicycles, two-or three-wheeled vehicles that are propelled by internal combustion engine or an electric motor, & which operate at not more than twenty-five miles per hour on a flat surface. By contrast, definition of "motor vehicle" applicable to criminal code does not exclude motorized bicycles & includes vehicle that is self-propelled, except for farm tractor, implement of husbandry, or electric personal assistive mobility device. Ind. Code 35-41-1-18.5. Because victim's motor scooter was self-propelled, it was motor vehicle within statutory definition & evidence was sufficient to support D's carjacking conviction. Held, judgment affirmed.

TITLE: Sanders v. State

INDEX NO.: K.3.c.3.

CITE: (5th Dist.; 7-13-99), Ind. App., 713 N.E.2d 918

SUBJECT: Carjacking - sufficiency

HOLDING: Evidence was sufficient to support D's conviction for carjacking. Person commits carjacking when he knowingly or intentionally takes motor vehicle from another person or from presence of another person: (1) by using or threatening use of force on any person; or (2) by putting any person in fear. Ind. Code 35-42-5-2. Here, victim left son in car while she went into store. While boy was waiting for his mother, D got in car & pointed gun at boy. When boy jumped out of car & ran into store, D took off with car. D claims that because he did not take car until boy ran into store, & woman who owned car was not present when he took car, evidence was insufficient to prove that he took car from "presence" of another person. However, because carjacking is inherently lesser included offense of robbery & presence has been defined in robbery context in manner that rejected immediacy requirement, taking of motor vehicle from person's presence does not require that such presence be immediate in order to sustain conviction for carjacking. Thus, there was sufficient evidence that D committed carjacking even though victims were inside store at time he took car. Held, conviction affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.c.4. Interference with custody

TITLE: Melo v. State

INDEX NO.: K.3.c.4.

CITE: (3rd Dist., 3-21-01), Ind. App., 744 N.E.2d 1035

SUBJECT: Interference with custody - facts in information did not constitute offense

HOLDING: Tr. Ct. erred in denying D's motion to dismiss two counts of interference with custody filed against her. To support conviction under Ind. Code 35-42-3-4(a)(2), D must: 1) knowingly or intentionally remove minor child from Indiana; & 2) after minor has been removed to place outside Indiana, D must then knowingly or intentionally, in violation of Ct. order, fail to return person to Indiana. Here, D did not knowingly "remove" her children on or between dates in charging information to place outside Indiana, because children were in Florida pursuant to valid 1998 Ct. order giving D custody. Thus, facts alleged in information against D did not constitute offenses charged. Held, denial of motion to dismiss reversed.

TITLE: Vanness v. State

INDEX NO.: K.3.c.4.

CITE: (2nd Dist., 12-31-92), Ind. App., 605 N.E.2d 777

SUBJECT: Interference with Custody - Ind. Code 35-42-3-4

HOLDING: D's conviction for interference with custody was affirmed, & among issues discussed in opinion were: 1) Writ of Attachment for D who was believed to have left State with child was properly admitted to show D left State in violation of custody order; 2) Testimony of D's divorce attorney offered to interpret language of decree was properly excluded because decree was unambiguous & expert testimony was therefore unneeded; 3) D was properly ordered to pay restitution, including attorney's fees to ex-wife, because she was victim, not party to action, & Ind. Code 35-42-3-4 allows for recovery of costs incurred as result of unlawful taking of child; & 4) Evidence was sufficient to support conviction, because while decree did not contain express prohibition against removing child from State, it limited visitation to visits of specific length in summer, & in county of child's residence. Decision contains considerable discussion on last two issues, which may be of particular interest to those with similar cases.

K. CRIMES

K.3. Offenses against the person

K.3.d. Robbery (Ind. Code 35-42-5-1)

TITLE: Benavides v. State

INDEX NO.: K.3.d.

CITE: (2nd Dist., 5-19-04), Ind. App., 808 N.E.2d 708

SUBJECT: Robbery - insufficient evidence of possession or control of property

HOLDING: Ind. Code 35-42-5-1 provides that a person who knowingly or intentionally takes property from another person or from the presence of another person, 1) by using or threatening the use of force on any person or 2) by putting any person in fear, commits robbery. To satisfy the requirement that property be taken from another person or the presence of another person, the person must possess the property, or the property must be under personal protection of the person. Highbaugh v. State, 773 N.E.2d 247 (Ind. 2002). Here, Ct. reversed one of two of D's convictions for robbery, because complaining witness did not have possession or control of money in his girlfriend's purse at the time of the robbery. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Smith, App., 881 N.E.2d 1040 (although keys D took belonged to county jail, he committed robbery because victim-officer had possession, authority, & protection over keys taken).

TITLE: Birch v. State

INDEX NO.: K.3.d.

CITE: (3d Dist. 04/15/91), Ind. App., 569 N.E.2d 709

SUBJECT: Robbery as Class A felony - insufficient evidence for enhancement

HOLDING: Where evidence showed that injury to victim was inflicted during attempted rape subsequent to robbery, & not during robbery itself, elevation of robbery to Class A felony was improper. Evidence revealed D forced victim into alley, pulled knife & put it to her throat, victim obtained knife in struggle, & D regained knife & put it in his pocket. D then demanded all of victim's money, which she gave him. Subsequently, D demanded sex from victim & attacked her. During attack, victim was cut by knife several times. Victim testified that D was not violent toward her when he asked for money, only when she fought off his sexual attack. Ct. App. found that victim's serious bodily injury was result of attempted rape, not robbery, *citing* to Minnefield 539 N.E.2d 464, for apparent proposition that for enhancement due to serious bodily injury, there must be "but for" relation, *i.e.*, but for the robbery, injury would not have been sustained. Held, conviction for robbery as Class A felony reversed with instruction to sentence D on Class C Battery conviction which had been previously merged with robbery for sentencing; conviction for attempted rape affirmed, J. Staton dissenting.1991-2.

TITLE: Coleman v. State

INDEX NO.: K.3.d.

CITE: (7-21-95), Ind., 653 N.E.2d 481

SUBJECT: Robbery - taking & use of force elements

HOLDING: Evidence was sufficient to support conviction for robbery, where D's use of force was necessary to accomplish theft. D left store after pocketing several rolls of film. As D exited store, salesperson alerted manager, who followed D outside store. Seeing film in pockets, manager asked D if he had forgotten to pay for anything. D then pulled knife & threatened manager, who retreated into store.

"Taking" element of robbery is not fully effectuated if person in lawful possession of property resists before thief has removed property from premises or from person's presence. Eckleberry v. State (1986), Ind., 497 N.E.2d 233. Here, D could not have perfected robbery without eluding manager. Manager confronted D before he left premises & thus presented obstacle to taking itself. D was only successful in removing film from store & from manager's presence by threatening him with knife. Thus theft was not completed before D threatened manager. Held, transfer granted, Ct. App. decision at 640 N.E.2d 727 reversed, & conviction affirmed; DeBruler & Selby, JJ., dissenting.

RELATED CASES: Nunley, 995 N.E.2d 718 (Ind. Ct. App 2013) (sufficient evidence for C felony robbery where D did not threaten store manager until after he possessed stolen DVDs because threat was integral to D's attempt to complete the taking and not a separate incident); Young, 725 N.E.2d 78; Cooper, App., 656 N.E.2d 888 (evidence was sufficient to support finding that D took property by use of force & that taking resulted in bodily injury to victim).

TITLE: Erkins v. State

INDEX NO: K.3.d.

CITE: (7/22/2014), 13 N.E.3d 400 (Ind. 2014)

SUBJECT: Conspiracy - intent to commit SBI is sufficient to prove enhancement

HOLDING: There is sufficient evidence to support D's conviction for Conspiracy to Commit Robbery Resulting in Serious Bodily Injury (SBI), as a Class A felony, despite the fact that the victim was never injured. A persons conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same class as the underlying felony. Ind. Code 35-41-5-2. Further, a person who knowingly or intentionally takes property from another person or from the presence of another person by using or threatening the use of force on any person or by putting any person in fear commits robbery, a Class C felony. However, the offense is a Class A felony if it results in SBI to any person other than the D. Ind. Code 35-42-5-1.

Here, the State eavesdropped on D's conversations with another regarding robbing the victim who was winning money at a casino. D's co-conspirator followed and surveyed the targeted victim. During their conversations, D and co-conspirator discussed using violence, if necessary, against the targeted victim. The police arrested D and co-conspirator before any robbery occurred. This was sufficient evidence of conspiracy to commit class A felony robbery. The State did not have to show actual SBI. Intending and agreeing to commit SBI was sufficient. Held, judgment affirmed; Rucker and Dickson, JJ., dissenting on basis that SBI is not an element of the crime but rather an enhancement, that this Court has required actual SBI in order to enhance conspiracy in the past, and that the majority's decision provides a greater penalty for conspiracy to commit a crime than the actual crime.

TITLE: Flores v. State

INDEX NO.: K.3.d.

CITE: (12/5/85) Ind., 485 N.E.2d 890

SUBJECT: Robbery - specificity re property taken

HOLDING: Information amended on day of trial, deleting references to "wallet" & "jewelry box" & replacing words with "property," fails to comport with constitutional requirements that D be advised of charges against him. Ind.Const. Art. 1, Sections 12, 13. D must be informed of what property is alleged to have been taken from victim. [Ct. *cites* IN cases dealing with larceny]. 52A C.J.S. Larceny Sections 76, 77(1) (1968). See Clark 467 N.E.2d 691 [see RC below]. Ct. rejects state's contention that amendments did not prejudice D's alibi defense. State argued that if D was not there, it wouldn't matter what was alleged taken. Held, robbery convictions reversed.

RELATED CASES: Clark, 467 N.E.2d 691 (Larc 40(6); Rob 26; robbery conviction upheld when information alleged taking of money, but evidence revealed D took victim's pants which contained money).

TITLE: Gray v. State

INDEX NO.: K.3.d.

CITE: 903 N.E.2d 940 (Ind. 2009)

SUBJECT: Robbery while armed with a deadly weapon - sufficiency

HOLDING: There is insufficient evidence that D used a deadly weapon while committing robbery and confinement at Long John Silver's, but sufficient evidence that he used a deadly weapon while committing robbery and confinement at Arby's. A conviction for armed robbery may be sustained even if the deadly weapon was not revealed during the robbery. Nor is it necessary that the weapon be admitted into evidence. However, there must be evidence to support finding that D in fact was armed with a deadly weapon. Here, D was convicted of two counts of robbery and three counts of confinement based on his acts at an Arby's and Long John Silver's on different days. All the convictions were enhanced due to the use of a deadly weapon. In both instances, the witnesses to and victims of the crimes thought D had a gun, although they never saw a gun. In one instance, a witness saw a black handle in D's pocket. Moreover, D communicated that he had a gun. For instance, D kept his hand in his pocket and stated that "no one would get hurt." Without more, D's statements and conduct at both stores would be sufficient to permit the jury to find that he was in fact armed at the time of both offenses. However, the chain of events following D's flight from Long John Silver's demonstrates otherwise as to that robbery. D was arrested almost immediately after leaving the Long John Silver's, and the police found no firearm on D's person, in his car, or at the scene of the crime. The police did find an electric shaver in D's pocket. Thus, all of the evidence and all of the reasonable inferences therefrom lead to just one conclusion, namely that D used an electric shaver, not a gun, to rob the Long John Silver's. However, D's statements and conduct at Arby's were sufficient from which to infer beyond a reasonable doubt that he possessed a gun. Held, transfer granted, judgment affirmed in part, reversed in part and remanded with instructions to reduce D's convictions on the Long John Silver's crimes to Class C felony robbery and Class D felony criminal confinement; Court of Appeals' memorandum opinion is summarily affirmed in all other respects.

TITLE: Henderson v. State
INDEX NO.: K.3.d.
CITE: (2nd Dist., 04-26-05), Ind. App., 825 N.E.2d 983
SUBJECT: Attempted robbery - failure to object to jury instruction lacking specific intent
HOLDING: Trial counsel was not ineffective for failing to object to jury instruction which did not include mens rea of specific intent to commit attempted robbery. In Spradlin v. State, 569 N.E.2d 948 (Ind.1991), Ct. held that a jury instruction for attempted murder must inform the jury that the State must prove a D acted with specific intent to kill. However, similar challenges to attempted battery & attempted rape jury instructions have been rejected. See Richeson v. State, 704 N.E.2d 1008 (Ind.1998); McCann v. State, 742 N.E.2d 998 (Ind. Ct. App2001), *summarily aff'd in relevant part & vacated on other grounds*, 749 N.E.2d 1116 (Ind.2001). Attempted murder is a special case deserving special treatment due to the higher sentencing range in combination with the ambiguity involved in the proof of the crime. State was not required to prove D intended to commit robbery, & thus his counsel could not be ineffective for failing to object on that ground. Ct. rejected State's argument that D waived his IAC claim because he acted *pro se* at trial, noting that standby counsel actively participated in his defense. Held, denial of post-conviction relief affirmed.

TITLE: Henning v. State
INDEX NO.: K.3.d.
CITE: (5/17/85) Ind., 477 N.E.2d 547
SUBJECT: Attempted robbery - lesser included offenses (LIO)
HOLDING: Tr. Ct. did not err in refusing to give instructions on Class C & D felony robbery or Class A misdemeanor battery as LIOs of Class A felony robbery. Here, because evidence conclusively demonstrated that victim was injured during attack, Tr. Ct. would have erred in giving instruction on any robbery offense other than Class A felony. Cf. McNary 428 N.E.2d 1248. Because evidence also conclusively demonstrated that victim was robbed, & only question was whether D participated, instruction on battery would have invited compromise verdict. Held, no error.

RELATED CASES: Dunn 506 N.E.2d 822 (Crim L 984(8); allegation of facts to support attempted robbery was the battery, therefore, it was error to convict D for both; held, battery conviction reversed); Jones 491 N.E.2d 980 (Tr. Ct. properly refused D's tendered instruction re criminal confinement where evidence was undisputed that D placed victim in fear); Maynard 490 N.E.2d 762 (A & B 80; Indict 191; old code commission of felony while armed with deadly weapon is LIO of robbery causing physical injury); Craig 484 N.E.2d 566 (where D moved for dismissal of Class C battery charge as LIO of robbery, D cannot challenge conviction for Class C battery (serious bodily injury) as LIO of Class A robbery (bodily injury); D invited error); Horn, App., 503 N.E.2d 1235 (Indict 191(9); assisting a criminal is neither inherently included nor possibly included in [aiding] robbery as charged); Landers, App., 464 N.E.2d 912 (Crim L 814(20); Indict 191(9); both theft & criminal conversion are LIOs of robbery (Rogers 396 N.E.2d 348), but evidence did not support criminal conversion LIO instruction; theft instruction was given).

TITLE: Hampton v. State

INDEX NO.: K.3.d.

CITE: (4th Dist. 10/4/84) Ind. App., 468 N.E.2d 1077

SUBJECT: Attempted robbery - sufficiency

HOLDING: Evidence of attempted robbery was sufficient where D parked his car near Pizza Hut next to busy highway (easy escape route), hid between bushes & building in attempt to avoid light from passing cars, was armed & had on a ski mask when apprehended &, as former employee, knew assistant manager would leave restaurant carrying large amount of cash. Here, waitress from restaurant across street observed D's odd behavior & called police who found D lying in bushes outside Pizza Hut. Ct. cites 2 IL cases involving similar circumstances. Facts demonstrate D took substantial step toward commission of robbery. Jury could infer intent. Held, conviction affirmed.

RELATED CASES: Sheckles, 501 N.E.2d 1053 (Rob 3; D, charged with felony murder, argues state failed to prove he was engaged in attempted robbery; Ct. rejects D's contention that he was trying to collect \$10 debt; creditor is not justified in taking money by threatening to use force or placing debtor in fear, citing Cobbs, 417 N.E.2d 310); Hunt, 500 N.E.2d 1207 (Ct. rejects D's contention that he abandoned his attempt to rob; Ct. finds facts reveal that D left to avoid detection after his attempt was foiled when everyone ran away, leaving him standing alone).

TITLE: Higgins v. State
INDEX NO.: K.3.d.
CITE: (5th Dist., 12-22-97), Ind. App., 690 N.E.2d 311
SUBJECT: Attempted robbery - enhancement does not require intent to inflict bodily injury
HOLDING: Charge of attempted robbery as Class B felony does not require allegation & proof that D intended to inflict bodily injury on victim. Proscribed conduct in this case is substantial steps taken to knowingly & intentionally take property from another person by putting that person in fear. Bodily injury is result, not conduct, & State need not prove bodily injury was intended result to elevate offense to Class B felony. Ind. Code 35-42-5-1; Wethington, App., 655 N.E.2d 91; Stark, 489 N.E.2d 43. Here, charging information tracked language of attempt & robbery statutes, & Tr. Ct.'s instruction defining offense of attempted robbery was properly given. Held, judgment affirmed.

TITLE: Howard v. State

INDEX NO.: K.3.d.

CITE: (2/8/84), Ind., 459 N.E.2d 29

SUBJECT: Robbery - one transaction; 2 robberies

HOLDING: Evidence was sufficient to sustain conviction upon 2 counts of robbery where D forced his way into car & took purses & jewelry from each of 2 women. Where property is owned & possessed by each of 2 individuals from whom it is taken, 2 separate robberies have occurred even though they are part of the same transaction/series of events. Richardson, 429 N.E.2d 229; Young, 409 N.E.2d 579; Ferguson, 405 N.E.2d 902.

RELATED CASES: Curtis, 42 N.E.3d 529 (Ind. Ct. App 2015) (robbery of a drugs from pharmacist and of car keys from pharmacy technician seconds later constituted two separate and distinct robberies; see full review at J.10.f); Johnson, 581 N.E.2d 9971 (because in bank robbery, D took different things from different people by the use of force on each person, 2 separate & distinct robberies occurred, & multiple convictions were proper); Lash, 433 N.E.2d 764 (upholding conviction for robbery of store & each of 2 employees from whom personal property was taken).

TITLE: Kimbrough v. State

INDEX NO.: K.3.d.

CITE: (2nd Dist., 10-25-93), Ind. App., 622 N.E.2d 230

SUBJECT: Evidence to support robbery conviction insufficient

HOLDING: Where there was no evidence of taking of any property from victim, it was insufficient to support conviction for robbery. Victim testified that D asked if he wanted to fight one-on-one, & that victim fought with him to avoid being jumped. D then hit victim & two fought, with D's friends also striking blows. When fight began, victim allegedly had two cans of soda, potato chips, snack cakes, & ten dollars in button-down pocket of his jacket. During fight victim tried to wiggle out of coat, & at end of fight it was hanging around his knees, buttons on outer pockets were up, & pockets were empty. Victim stated that he could not feel anyone going in his pockets & taking items out, & could not say how items disappeared, only that they were gone after he ran home. Ct. found evidence insufficient to support reasonable inference that D or friends took property from victim by force or threat of force. Held, robbery conviction vacated, battery conviction affirmed.

RELATED CASES: Grace, 731 N.E.2d 442 (no evidence that D actually took property from victim).

TITLE: Nelson v. State

INDEX NO.: K.3.d.

CITE: (9/21/88), Ind., 528 N.E.2d 453

SUBJECT: Robbery - sufficiency

HOLDING: Evidence was sufficient to support D's conviction for felony murder. Eyewitness testified that on night of shooting, victim was following her in separate car. Both cars stopped at intersection, & 3d car pulled around them & stopped. Witness went back to victim's car to see if he needed directions & was grabbed by D, who had gotten out of 3d car. As D dragged witness away, she saw victim being pushed back into his car. She heard gunshot but did not see gun. Witness came to in her own car, with D leaning over her. D told her to shut up & not look & she would be all right. Witness grabbed her purse & threw it at D, who rummaged through it. At that time, 3d car started & 2 other men told D to hurry up. D dropped purse & jumped in 3d car. D argues on appeal that evidence does not support underlying felony, robbery, & thus does not support felony murder conviction. Evidence showed D dragged victim to car & forced her to remain. Victim testified she was frightened when she threw purse at D, thus supporting finding that D took possession of purse & contents by violence & by putting witness in fear. D argues evidence did not show asportation or taking away, essential element of robbery. Evidence need show only that item was moved slight distance. Hunter 492 N.E.2d 1067; Neal 14 N.E.2d 590. Evidence established elements of robbery. As for felony murder, evidence need not establish that D fired shot. Evidence supported finding that D dragged witness away to facilitate shooting. When persons act in concert to commit criminal act, each is criminally liable for acts committed by others. Keeby 511 N.E.2d 1005; Slone 496 N.E.2d 401. Held, conviction affirmed.

RELATED CASES: Daniels, 957 N.E.2d 1025 (Ind. Ct. App 2011) (victim need not testify she was in fear to support conviction for class B felony robbery as long as evidence was sufficient for jury to infer that victim was in fact put in fear).

TITLE: Owensby v. State

INDEX NO.: K.3.d.

CITE: (9/4/84) Ind., 467 N.E.2d 702

SUBJECT: Robbery - sufficiency

HOLDING: Evidence was sufficient to sustain conviction where victims testified that property was taken from them. Here, D contends property allegedly taken was never recovered & testimony was inherently unreliable because victims were marijuana dealers. Recovery of stolen property & its production at trial are not essential to proof of robbery. Mitchell, App., 360 N.E.2d 221. Held, conviction affirmed.

RELATED CASES: Nunley, 995 N.E.2d 718 (Ind. Ct. App 2013 (recovery of stolen property is not required to prove sufficient evidence for C felony robbery); EVIDENCE SUFFICIENT: Pack, 486 N.E.2d 994 (although D did not hold gun to victim during robbery, her threats to victim were sufficient evidence to support armed robbery conviction); Lott, 485 N.E.2d 886 (uncorroborated testimony of victim is sufficient to sustain robbery conviction); Henning, 477 N.E.2d 547 (evidence sufficient where D & co-D acted in concert to rob taxi driver, despite fact victim did not unequivocally state D attacked him); Cole, 475 N.E.2d 306 (evidence sufficient to sustain robbery conviction where D threatened to shoot store security guard & then took guard's gun from him); Warner, 455 N.E.2d 355 (evidence was sufficient to sustain D's conviction where cashier (who hid behind counter) heard cash register open & register was found empty when police arrived, *citing* Hilligoss 255 N.E.2d 101); Horn, App., 503 N.E.2d 1235 (evidence was sufficient to sustain conviction for [aiding] robbery where D told actual robber he knew gas station where friend worked could be easily robbed, called station to see if friend was working, accompanied actual robber, & received share of loot, despite fact D stood in field near station while robbery was in progress); Tolbert, App., 442 N.E.2d 718 (presence plus flight with principal actor may be considered circumstantial evidence of guilt, *citing* Coleman 354 N.E.2d 232). EVIDENCE INSUFFICIENT: Porter, 715 N.E.2d 868 (there was no evidence, either direct or circumstantial, to establish that at time of robberies, D was acting in concert with other man; no facts presented from which jury could infer agreement establishing conspiracy to commit robbery); Kemper, 35 N.E.3d 306 (Ind. Ct. App 2015).

TITLE: Raines v. State

INDEX NO.: K.3.d.

CITE: (2/7/89), Ind., 533 N.E.2d 592

SUBJECT: Robbery - sufficiency

HOLDING: Evidence was sufficient to support D's conviction for robbery. Victim & friend were sitting in victim's kitchen drinking beer when D, who knew both of them, walked in. D walked up to victim & punched him in face, knocking him to floor & causing a nosebleed & black eye. D then left. Victim immediately discovered wallet with \$91 missing. Victim called police, but before they arrived, other friend left. Victim identified assailant by D's middle name, & next day picked D from photo array. D was convicted & argues on appeal that evidence was insufficient. Specifically, D attacks victim's ability to identify him, due to alcohol consumption at time of attack. This is matter for jury to determine. Russell 487 N.E.2d 136. D also argues that mere fact that he struck victim does not prove that he took wallet, since it could be inferred from other friend's leaving before police arrived that he had taken wallet. While that may be, evidence also supports inference that D took wallet, & it was for jury to make determination. DeBruler, J., DISSENTS, arguing that evidence does not support inference that wallet was taken during D's assault, let alone that D took it.

RELATED CASES: Vennard, App., 803 N.E.2d 678 (evidence was sufficient to convict D of robbery as well as two counts of murder, where no money was found in victim's wallet & a few dollar bills found on D were bloody; victim's pockets had been turned inside out; & although D's mother testified she had given D \$150 the day before the murders, D was seen in possession of bloody dollar bills); Johnson, 653 N.E.2d 478 (although independent evidence did not conclusively establish cause of victim's fatal injuries, corpus delicti for robbery was not precluded, since reasonable person could conclude that victim's injuries were caused by force).

TITLE: Rigsby v. State

INDEX NO.: K.3.d.

CITE: (5th Dist. 12/19/91), Ind. App., 582 N.E.2d 910

SUBJECT: Robbery - instruction on "putting in fear"

HOLDING: In prosecution for robbery, it was error to refuse D's tendered instruction that "[f]ear means fear of bodily injury." Instruction was correct statement of law, because section of robbery statute with which D was charged, Ind. Code 35-42-5-1(2), specified that one basis of liability for robbery is taking property from another "by putting any person in fear." At trial, only testimony concerning this element was that victim was afraid of going to jail. D had initially approached victims & inquired about acquiring drugs, indicating that he was police officer. After victims left lounge where first encounter occurred, D approached them again with his badge & walkie-talkie, announced drug bust, & that they were under arrest. D & accomplices continued to act like police officers. Eventually victim turned over money from his father's business, & D & accomplices fled. While "putting in fear" is not statutorily defined, case law establishes that fear of bodily injury or personal harm is necessary for robbery conviction based on "putting in fear." Koby, 209 Ind. 91, 198 N.E. 88; Perkins, 65 Ind. 317; Shinn, 64 Ind. 13. Instruction was, therefore, correct statement of law, & record also contained evidence to support giving of instruction, because if victim was persuaded to turn over money simply because of fear of going to jail, all necessary elements were not proven. Concept of fear meaning fear of bodily injury was not contained in any other instruction, & therefore error in refusing instruction was not harmless. Held, reversed & remanded for new trial.

TITLE: Robinson v. State
INDEX NO.: K.3.d.
CITE: (4-3-98), Ind., 693 N.E.2d 548
SUBJECT: Robbery - sufficient evidence of "person"
HOLDING: There was sufficient evidence that taking of victim's property was effectuated by use of force against him while he was still alive. Robbery is committed when person knowingly or intentionally takes property from another person by using or threatening use of force on any person. Ind. Code ' 35-42-5-1. Ind. Code defines person, by reference to human being, as individual who has been born & is alive. Ind. Code ' 35-41-1-22. Ct. must affirm if considering only probative evidence & reasonable inferences supporting verdict, without weighing evidence or assessing witness credibility, reasonable trier of fact could conclude that D was guilty beyond reasonable doubt. Paul, 612 N.E.2d 1060. Here, D shot victim & dragged his body into cornfield before taking victim's money & drugs. Although one cannot rob dead person, fact that D waited until after victim's death to actually take money was irrelevant. Held, conviction affirmed.

RELATED CASES: Stephenson, 29 N.E.3d 111 (Ind. Ct. App 2015) (State not required to prove that force use to murder victim was same force used to rob victim because there was no evidence D murdered victim and only thereafter decided to rob her); Buggs, App., 844 N.E.2d 195 (distinguishing Robinson, Ct. noted it is simply not possible for a D to commit all the elements of attempted robbery on a person who is already dead); Proffit, App., 817 N.E.2d 675 (as in Robinson, the taking was effectuated by the use of force against victim while he was alive; by stabbing & killing victim, D prevented victim from retaining control over his property).

TITLE: Romero v. State

INDEX NO.: K.3.d.

CITE: (05/31/19) Ind. Ct. App., 124 N.E.3d 1287

SUBJECT: Robbery - sufficient evidence D took property from the presence of another person

HOLDING: On appeal of her robbery conviction, Defendant argued that trial court erred in denying her motion for judgment on the evidence because State failed to prove that she took property from the victim, who was in very close proximity to her money throughout the incident. The victim thought she was buying an iPhone for \$180 through an online seller. When she arrived, it turned out to be a robbery. She put the money on the hood of her car, the accomplice took the money, and then Defendant pulled out a gun and pretended to rob the accomplice. The State originally charged Defendant with taking money from victim. Evidence at trial showed that Defendant took the money from Defendant's accomplice rather than victim. After Defendant moved for a directed verdict, the State was allowed to amend the charging information to allege that Defendant took currency "from another person or the presence of another person, to wit: [victim]." Because robbery may be proven with evidence establishing that a defendant took property from another person or from the presence of another person, by using or the threatening the use of force or by putting any person in fear, evidence was sufficient to support conviction.

TITLE: Simmons v. State
INDEX NO.: K.3.d.
CITE: (4th Dist. 11/14/83) Ind. App., 455 N.E.2d 1143
SUBJECT: Robbery - putting in fear
HOLDING: Where D's words, bulge under his shirt & his gestures toward bulge created inference he possessed a gun, there was sufficient evidence to indicate he was threatening use of force on store manager. Here, Ct. relies upon decisions under earlier robbery statute (Ind. Code 35-13-4-6, "by violence or by putting in fear"). Under this statute, mere appearance, that D possessed weapon was sufficient to establish "violence or by putting in fear" element of robbery. Jackson 275 N.E.2d 538; Lewis 250 N.E.2d 358; Cross 137 N.E.2d 32. See also Annot., 61 A.L.R.2d 996 (1958). Held, evidence sufficient to sustain conviction.

RELATED CASES: Rickert, App., 876 N.E.2d 1139 (to establish the element of fear, it is not necessary for victim to testify that he or she was actually put in fear; here, victim who was robbed at gunpoint processed incident & became afraid within seconds after robbery was completed, which was sufficient to support conviction); Jones, App., 859 N.E.2d 1219 (although bank teller's fear subsided after D never mentioned or displayed a weapon, teller testified that when D handed her note, she felt nervous, scared, uncomfortable, & a little fearful because she felt D might do something to her; statute does not require that victim must remain in fear); Eckelberry 497 N.E.2d 233 (D struck & critically injured woman as he was stealing car from her husband; Ct. rejects D's contention that force was used to accomplish D's escape rather than taking of property; see Smith's Case (1830), 1 Lewin, C.C. 301, 168 Eng. Reprint. 1048, holding that force must be employed before property is stolen); Maul 467 N.E.2d 1197 (evidence sufficient to support finding of use of force & putting in fear); Rowe, App., 496 N.E.2d 585 (Rob 24.5; evidence that D & victim tussled reasonably supports fact-finder's conclusion that victim was put in fear; here, D approached victim from behind & took sack of money from him; victim said he was never in fear, never saw a gun, & did not physically wrestle with robber; citing Baker 402 N.E.2d 951 & Maul, Ct. finds evidence is sufficient to support conviction; DISSENT by Sullivan argues evidence is insufficient to show victim was put in fear).

TITLE: Stokes v. State
INDEX NO.: K.3.d.
CITE: (4th Dist.; 01-27-10), 919 N.E.2d 1240 (Ind. Ct. App. 2010)
SUBJECT: Attempted robbery - sufficiency
HOLDING: Evidence was insufficient to support three of D' six convictions as an accomplice for attempted robbery, specifically the convictions for attempting to rob Greg Arnold, Fred Winfield, and Shantell Williams. The evidence did not show that D's conduct was directed toward each of these alleged victims.

Here, Arnold was working at a recording studio with Winfield, Williams, and Andrew Steele. Other persons were spread throughout the building in separate rooms. Antonio and Antwane Walker arrived at the studio, looked around for a minute and left. A few minutes later, Antonio and Antwane returned with D and three others. Antonio and Antwane entered a room where they found Arnold, Winfield, Williams, and Steele. Antonio greeted Steele and asked Steele to exit the room with him. Steele followed Antonio outside the room where Antwane was waiting. Antonio drew a gun and placed it forcefully against Steele's face and said, "Get down. You know what this is."

Meanwhile, in another area of the studio, two other co-Ds robbed Edriese Phillips at gunpoint, and grabbed Collin Moore and demanded his money at gunpoint. One or more of the perpetrators ordered Moore to "get down" when gunfire erupted. Moore was shot in the leg, but he was not robbed. After six to twelve shots were fired, the Walkers and the other perpetrators fled the scene.

D's claim that the single larceny rule dictates that only one of his six attempted robbery convictions can stand lacked merit. This rule provides that when several articles of property are taken at the same time, from the same place and belonging to the same person, there is only one larceny. Here, however, D and his coDs completed the robbery of one person and attempted to rob the other victims.

However, the State failed to present sufficient evidence for D's convictions as an accomplice for the attempted robberies of Arnold, Winfield, and Williams. The command for Steele to "[g]et down," without more, is too ambiguous to support a reasonable inference that D and his coDs intended to rob each of the alleged attempted robbery victims. Arnold, Winfield, and Williams remained in the room that Steele had been in before the Walkers directed Steele outside the room and commanded him to "get down." The Walkers could have issued the same command to the other people in the same room, but instead asked only Steele to exit the room. Only then did the Walkers attempt rob Steele at gunpoint. The proximity of Arnold, Winfield, and Williams to the Walkers as they tried to rob Steele does not establish that D and his coDs intended to rob Arnold, Winfield, and Williams. The evidence was sufficient to support D' convictions as an accomplice for the robbery of Phillips and the attempted robberies of Steele and Moore. Held, judgment affirmed in part and reversed in part.

RELATED CASES: Stokes, 922 N.E.2d 758 (Ind. Ct. App 2010) (disagreeing with Stokes, Ct. also found evidence insufficient to support conviction for class A felony attempted robbery of Collin Moore; there was no evidence from which a reasonable inference could be drawn that Moore was singled out or directly targeted by perpetrators to be robbed; rather it appears that Moore was simply in the wrong place at the wrong time and got caught in the crossfire).

ITLE: Whitfield v. State

INDEX NO.: K.3.d.

CITE: (5th Dist., 7-28-98), Ind. App., 699 N.E.2d 666

SUBJECT: Robbery with deadly weapon - evidence sufficient; disabled pellet gun

HOLDING: State presented sufficient evidence to support D's conviction of robbery with deadly weapon, where D wielded pellet gun with barrel drilled out. "Deadly weapon" is defined as loaded or unloaded firearm, or "weapon... that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury." Ind. Code § 35-41-1-8(1)(2). Whether sufficient evidence exists to establish weapon is deadly is determined by looking to whether weapon had actual ability to inflict serious injury under fact situation & whether D had apparent ability to injure victim seriously through use of object during crime. Frey, App., 580 N.E.2d 362. Indiana courts have decided that pellet gun is deadly weapon & that disabled firearm is deadly weapon. Williams, App., 451 N.E.2d 687; Barber, App., 418 N.E.2d 563. Further, even if disabled weapon is not used in such manner to cause serious bodily injury, "deadly weapon" element can be satisfied if weapon was used in threatening manner & caused victims to fear for their lives. Rogers, 537 N.E.2d 481. Here, one of victims testified at trial that D came into store, stuck gun in his face & demanded money. Victim was so frightened that he could hardly speak. Investigator testified that pellet guns are virtually indistinguishable from real caliber guns that they are modeled after. Under specific facts of this case, disabled pellet gun was used in threatening manner & placed victims in fear & thus was "deadly weapon" within meaning of robbery statute, Ind. Code § 35-42-5-1 & Ind. Code ' 35-41-1-8. Held, conviction affirmed.

RELATED CASES: Davis, App., 835 N.E.2d 1102 (BB/CO₂ gun used by D was readily capable of causing serious bodily injury & was used in a threatening manner causing victims to experience substantial fear); Merriweather, App., 778 N.E.2d 449 (even if inoperable pellet gun was not deadly weapon, D's companions were armed with operable BB guns which were capable of inflicting serious bodily injury).

TITLE: Wilhoite v. State
INDEX NO.: K.3.d.
CITE: (4/23/2014), 7 N.E.3d 350 (Ind. Ct. App 2014)
SUBJECT: Charge of "conspiring to attempt to commit robbery" - no fundamental error
HOLDING: Ind. Code § 35-41-5-3(a) provides that "a person may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime." Here, although the State charged D with the non-existent crime of "conspiracy to commit attempted armed robbery," the record shows he was actually convicted of conspiring to commit armed robbery and jury was instructed on elements of conspiracy. Thus, Court rejected D's claim he was convicted of a crime that does not exist. At trial, D never challenged the charging information so the issue was reviewed under the fundamental error standard on appeal. Although Court agreed people should not be charged with conspiring to attempt a crime (see Ind. Code 35-41-5-3(a)), it nonetheless held D had not demonstrated fundamental error because errors in the charging information are only fatal if they mislead the D or fail to give him notice of the charges filed against him. Held, judgment affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.e. Sex offenses

TITLE: Forrester v. State

INDEX NO.: K.3.e.

CITE: (10/7/82) Ind., 440 N.E.2d 475

SUBJECT: Sex offenses - weapon used

HOLDING: It need not be shown that a weapon was held on the victim of the sex crime at all times during attack in order to sustain Class A felony conviction. Dean 398 N.E.2d 1270. Here, D pointed a gun at victim & ordered her to go to his car where he forced her to commit fellatio on him. When she resisted his attempt to rape her, he threatened to kill her. She testified on cross that she did not see gun during attack. Ct. finds evidence sufficient to allow jury to find D was armed. Taylor 438 N.E.2d 294; Deel 357 N.E.2d 240; Critchlow 346 N.E.2d 591. Held, Class A felony convictions for rape & deviate conduct affirmed.

RELATED CASES: Kuchel 501 N.E.2d 1032 (Crim L 404(4); where D threatened to use knife to fight with victim's husband if husband found D engaging in deviate conduct with victim, Ct. finds knife was admissible at Tr. Ct.'s discretion (despite fact it was in car & criminal act occurred in house); knife was relevant to show D threatened victim & her family, *citing* State v. Hall 432 N.E.2d 639); Russell 480 N.E.2d 921 (Sodomy 1, 6; evidence sufficient to sustain conviction where D threatened victim with knife at vacant house, but removed her to another location for fear of discovery & then sodomized her; jury could infer D still had control of knife at second location).

TITLE: Matter of G.W.

INDEX NO.: K.3.e.

CITE: (10/10/2012), 977 N.E.2d 381 (Ind. Ct. App 2012)

SUBJECT: Child molest - order to parents to make child available to DCS

HOLDING: Tr. Ct. may order a parent to make his or her child available for an interview requested by the DCS to assess that child's "condition," where the child's sibling has made and then recanted allegations of sexual abuse against a family member who lives in the children's home. DCS's "assessment [into a report of child abuse], to the extent reasonably possible, must include the following: . . . (3) The names and conditions of other children in the home." Ind. Code 31-33-8-7(a). If a custodial parent of a child refuses to allow DCS to interview the child after the caseworker has attempted to obtain the consent of the custodial parent to interview the child, DCS may petition a court to order the custodial parent to make the child available to be interviewed by the caseworker. Ind. Code 31-33-8-7(d).

Here, twelve-year-old M.F. made an allegation that her step-father had sexually abused her. Later, during a DCS interview with M.F., she recanted and claimed that she lied because she was angry at her mother for failing to spend as much time with her. Despite the recantations, DCS requested an interview with M.F.'s nine-year-old sister, G.W., and the mother refused the request. Over Mother's objection, Tr. Ct. ordered her to take G.W. to Susie's Place for a forensic interview in which the Mother could not be present and law enforcement would be watching. Ind. Code 31-33-8-7 requires DCS to investigate the condition of the other children in the home, and specifically contemplates that DCS may interview those other children to determine their conditions if necessary to facilitate such interviews. In the context of child abuse investigation, common sense dictates that DCS must assess the overall conditions of other children in the home, including their physical, psychological and emotional status. Thus, Tr. Ct. did not abuse its discretion by ordering the interview. Held, judgment affirmed; Riley, J., dissenting on basis that simply because the DCS is to assess the names and conditions of other children in the home does not equate to subjecting the other children to an invasive forensic interview, and the statutes refer to the child who is the subject of the abuse and not the non-subject child.

TITLE: Z.H. v. State

INDEX NO.: K.3.e.

CITE: (1st Dist.; 07-18-06), Ind. App., 850 N.E.2d 933

SUBJECT: Sex offender registry- failure to prove likely to repeat sex offense; Rules of Evidence apply

HOLDING: Tr. Ct. erred in concluding that there was clear & convincing evidence that Z.H. is likely to repeat an act that would be sex offense if committed by an adult. In order to place a juvenile on the sex offender registry, State must prove by clear & convincing evidence that the juvenile is likely to repeat an act that would be a specified sex offense if committed by an adult. The focus of this inquiry is whether the juvenile has been rehabilitated as result of treatment received in the facility from which he has been discharged. If the juvenile has been rehabilitated, there cannot be clear & convincing evidence that the juvenile is likely to re-offend & the juvenile cannot be placed on the sex offender registry. B.J.B. v. State, 805 N.E.2d 870, 874 (Ind. Ct. App 2004).

Here, Z.H. was placed on probation for an act that would be a sex offense if committed by an adult & ordered to complete treatment at Resolute. After a few months at Resolute, Z.H. was transferred to Success Group Home & eventually to his grandmother's home. There is no evidence that the record releasing Z.H. from Resolute was not considered a successful discharge. Although there were multiple status reports during his treatment at Success from Dr. Ofstein that show significant difficulties complying with rules, internalizing his therapy & high risk of recidivism, the report recommending discharge from Success states that Z.H. "completed the treatment goals" & there had been "no further acting out behavior since last review." Further, Dr. Kenny, the State's only testifying expert, disagreed with some aspects of Dr. Ofstein's report that Z.H. had a high risk of recidivism.

Given the lapse of time in progress reports, the juvenile ct.'s concluding that Z.H. had met his treatment goals, & the lack of testimonial evidence supporting its position, Ct. concluded that the State did not meet its burden of proving with clear & convincing evidence that Z.H. is likely to repeat an act that would be a sex offense if committed by an adult.

Further, in footnote 2, the ct. holds that the Indiana Rules of Evidence apply to a hearing on a State petition to place a juvenile on the sex offender registry. Held, judgment reversed.

K. CRIMES

K.3. Offenses against the person

K.3.e.1. Rape (Ind. Code 35-42-4-1)

TITLE: Atteberry v. State

INDEX NO.: K.3.e.1.

CITE: (2nd Dist., 07-07-09), 911 N.E.2d 601 (Ind. Ct. App 2009)

SUBJECT: Rape - insufficient evidence of penetration

HOLDING: Evidence of trauma to victim's anus, plus presence of semen stains in her underwear, are insufficient to prove essential element of penetration of victim's sex organ with D's sex organ, which is necessary to support a rape conviction. Tracking language of Ind. Code 35-42-4-1(a), State alleged that D "did, while armed with a deadly weapon...knowingly have sexual intercourse with [L.L.]...when [L.L.] was compelled by force or imminent threat of force." "Sexual intercourse" is defined by Ind. Code 35-41-1-26 as "an act that includes any penetration of the female sex organ by the male sex organ." Penetration may be inferred from circumstantial evidence such as the physical condition of the victim soon after the incident. Pasco v. State, 563 N.E.2d 587 (Ind. 1990).

Here, there was evidence of trauma to victim's anus, but no sign of trauma to her vagina. Instead, semen stains were found on the front, left portion of victim's underwear. This evidence clearly demonstrates that D sexually assaulted victim anally. But crime of rape does not include such conduct, which is instead defined by statute as criminal deviate conduct, a crime for which D was not charged. Held, rape conviction reversed, murder conviction affirmed.

TITLE: Birari v. State

INDEX NO.: K.3.e.1.

CITE: (06-08-12), 968 N.E.2d 827 (Ind. Ct. App 2012)

SUBJECT: Attempted rape - sufficient evidence of D's intent and C.W.'s unawareness

HOLDING: State presented evidence of probative value from which a reasonable jury could have found D guilty of attempted rape, where D's conduct demonstrated intent to rape complaining witness (C.W.) when she was unaware such conduct was occurring. C.W. repeatedly told D that she did not want to take their relationship "to the next level," but merely wanted to remain friends. While C.W. was asleep, D removed his clothes and her sweatpants and woke up when D was on top of her and placing his erect penis near her vagina. After C.W. and her roommate were able to remove D from their apartment, he yelled, "Please, don't call the police. Just kill me." Any variance between State's allegation that D rubbed his erect penis on C.W.'s vagina as a substantial step in an attempted rape and proof that D's penis touched the inner labia majora of C.W.'s genitalia was not material. Held, judgment affirmed.

TITLE: Bozarth v. State

INDEX NO.: K.3.e.1.

CITE: (2d Dist. 3/24/88) Ind. App., 520 N.E.2d 460

SUBJECT: Rape - sufficiency; mental deficiency

HOLDING: Evidence was sufficient to show that rape victim was too mentally disabled or deficient to consent to intercourse, & that D was aware of this. Victim was 21-years-old but had mental age of 10 & I.Q. of 50-70. Her understanding of sex was about that of 6-7 year-old. While counselors had discussed sex with victim twice, she did not have normal understanding of sexual matters. When asked about sexual matters, victim responded in terms of dating, going to dinner, going on vacation, & asking permission of parents. Social worker testified victim was unable to interpret physiological aspects of sex in order to make informed choice. D argues evidence was insufficient to show that he knew of victim's inability to consent. Statute includes "knowing" element, meaning D must have been aware of high probability that he is engaging in proscribing conduct. Ind. Code 35-41-2-2(b). D was deaf & was participating in Goodwill Vocational training program. Goodwill counselors described him as quick learner & noted that he helped other students with training. D was familiar with people of various mental capabilities because of contact with these other students. D's awareness of victim's disability is further demonstrated by his making fun of her & by his parting remark to another dorm resident that he had "busted her cherry." Held, conviction affirmed.

RELATED CASES: Gale, App., 882 N.E.2d 808 ((despite alleged error in instruction, no fundamental error because there was substantial evidence presented at trial that CW was unaware that sexual intercourse was occurring & that D was aware of her condition)).

TITLE: Bryant v. State

INDEX NO.: K.3.e.1.

CITE: (12-16-94), Ind., 644 N.E.2d 859

SUBJECT: Rape - sufficient evidence

HOLDING: Evidence was sufficient to support rape conviction, granting transfer & vacating memorandum decision of Ct. App. While intoxicated victim was vomiting in bathroom, D came in, removed victim's pants & underwear, fondled her, & had sexual intercourse with her. There was no evidence of explicit consent or objection to sex. Medical examination revealed abrasions on victim's kneecaps, thighs, & face, & internal abrasions to vagina. After incident, victim became angry & hysterical. Numerous physical facts in evidence supported conclusion that D used actual force to compel victim's submission. Because evidence showed that victim was extremely upset afterwards, reasonable trier of fact could have concluded that victim did not consent to D's use of force. Held, transfer granted, conviction affirmed, DeBruler & Dickson, J.J., dissenting.

RELATED CASES: D.B., App., 842 N.E.2d 399 (fact finder could have concluded from CW's testimony that CW perceived D was compelling her compliance by force or imminent threat of force); Ruth, App., 706 N.E.2d 257 (evidence sufficient; it is victim's perspective, not assailant's, from which presence or absence of forceful compulsion is to be determined).

TITLE: Carroll v. State
INDEX NO.: K.3.e.1.
CITE: (8/16/82) Ind., 438 N.E.2d 745
SUBJECT: Rape - testimony of victim sufficient
HOLDING: Testimony of victim, by itself, may be sufficient to support a conviction of rape. Bledsoe 410 N.E.2d 1310. See also Tillman 408 N.E.2d 1250; Dobrzykowski 382 N.E.2d 170. Here, victim identified D as assailant from photographic display as well as during trial. Held, conviction affirmed.

TITLE: Carter v. State

INDEX NO.: K.3.e.1.

CITE: (9/17/2015), 44 N.E.3d 47(Ind. Ct. App 2015)

SUBJECT: Rape victim's involvement in prostitution does not render her testimony incredibly dubious

HOLDING: In affirming D's rape convictions, Court rejected D's argument that complaining witness's (C.W.'s) testimony was uncorroborated and so inherently improbable and equivocal that the incredible dubiousity rule should be applied. D pointed to C.W.'s inconsistent statements regarding how many sexual partners she had in the 96 hours preceding the rape, the time she smoked marijuana that day, time at which she was able to escape and call for help and fact that she did not disclose to police or forensic nurse examiner she had been engaging in prostitution. But fact that C.W. did not tell law enforcement she worked as a prostitute did not make her incredible and did not constitute an inconsistency, because she was afraid she would get in trouble.

In a footnote, Court addressed D's argument to equate his actions with theft of service since he claimed he did nothing more with C.W. than what she was attempting to do for money. Court characterized D's contention as a reflection of societal prejudice against rape victims who engage in prostitution. "To the extent that [D] relies on these archaic cultural attitudes, such arguments have no place in our analysis." Further, contrary to D's assertion, C.W.'s testimony was corroborated by circumstantial evidence. Held, judgment affirmed.

TITLE: Chew v. State

INDEX NO.: K.3.e.1.

CITE: (12/19/85) Ind., 486 N.E.2d 516

SUBJECT: Rape - sufficiency

HOLDING: Evidence was insufficient to support rape conviction where witness stated she could not describe D's act of forced intercourse. Here, witness testified D "made love to me from the back." Ct. finds such testimony insufficient to prove penetration of vagina by penis. Ct. distinguishes cases where vague testimony of victims was supported by substantial expert medical testimony. Testimony did not disclose presence of semen itself (only chemical found in semen) & at most demonstrated victim had engaged in vaginal intercourse within 30 hours of examination. Held, rape conviction reversed; criminal deviate conduct conviction affirmed. Pivarnik, joined by Shepard, DISSENTS, finding term "made love to her" is common term understood to mean act of vaginal intercourse.

RELATED CASES: RAPE SHIELD LAW, see O.4.c.2; RAPE EVIDENCE KITS, see O.13; Dabny 498 N.E.2d 1225 (Rape 51(1); presence of sperm in vagina is totally unnecessary for rape conviction, *citing* Baker 449 N.E.2d 1085).

TITLE: Delatorre v. State

INDEX NO.: K.3.e.1.

CITE: (10/20/89), Ind., 544 N.E.2d 1379

SUBJECT: Rape - proof of use/threat of deadly force

HOLDING: Evidence was sufficient to establish threat of deadly force, despite fact that weapon was never displayed. D was convicted of Class A rape based upon threat of deadly force. Evidence shows that D told victim that he had a knife, & if she didn't do what he told her he would kill her. However, D argues that because knife was not displayed or used to menace victim, threat of deadly force was not established. Ind. Code 35-42-4-1 provides for elevation to Class A based on threat of deadly force. Class A convictions have been upheld where weapon was not actually displayed. See, e.g., Lambert 516 N.E.2d 16 (rev'd on other grounds); Zollatz 274 N.E.2d 550; Stowers 363 N.E.2d 978. Here, evidence that D told victim he had knife & threatened to kill her was sufficient to establish threat of deadly force. Held, conviction affirmed. DeBruler, J., CONCURS only because there was physical element to threat; he would find words alone insufficient.

RELATED CASES: Gray, 903 N.E.2d 940 (although D's communication that he had a gun and victim's belief the D had gun is generally sufficient evidence of deadly weapon, fact that D was stopped within seconds of leaving robbery and no gun was found made it impossible to find beyond a reasonable doubt that D committed the robbery with deadly weapon).

TITLE: Dillon v. State
INDEX NO.: K.3.e.1.
CITE: (5/6/83) Ind., 448 N.E.2d 21
SUBJECT: Attempted rape (AR) - sufficiency
HOLDING: Evidence is sufficient to support conviction for AR where D broke into M.S.'s apartment, threw her down on cot, jerked her underpants off & unzipped his pants. A conviction for AR will be upheld upon finding attacker intended to accomplish some penetration by use of force/imminent threat of force or took substantial step toward accomplishment of that result. Smith 439 N.E.2d 634; Neice 421 N.E.2d 1109 (D neither exposed penis nor removed underclothing of intended victims; conviction upheld); Himes 403 N.E.2d 1377. Held, evidence supports conviction.

RELATED CASES: Palmer, 679 N.E.2d 887 ("although perhaps not picture of anatomical clarity," victim's testimony was sufficient for jury to find AR); Ott, 648 N.E.2d 671 (evidence constituted substantial step toward rape); Hughes 600 N.E.2d 130 (attack on victim without any sexual touching, positioning, or attempt to remove clothing, was substantial step toward rape & sufficient to support attempted rape conviction. D asked to perform number sexual acts with victim & when she refused, D threatened to "take it", & grabbed her); Tatum 485 N.E.2d 138 (where D restrained victim, silenced her protests & "assumed a position consistent with plan to accomplish penetration" by placing himself on top of her, evidence was sufficient to support conviction for AR); Ritchie 468 N.E.2d 1369 (evidence of AR sufficient where D broke into R.W.'s apartment, exposed himself, masturbated, told R.W. she should "let me come over & sit by you & I'll get this over with & I'll leave," but did not remove her clothing; DISSENT by Prentice contends D's conduct does not necessarily "logically & reasonably" point to rape).

TITLE: Glover v. State

INDEX NO.: K.3.e.1.

CITE: (1-9-02), Ind. App., 760 N.E.2d 1120

SUBJECT: Rape - victim unaware that act was occurring

HOLDING: Ind. Code 35-42-4-1(a)(2) provides that a person who knowingly or intentionally has sexual intercourse with member of opposite sex when other person is unaware that sexual intercourse is occurring...commits rape. In context of criminal deviate conduct statute, the term "unaware" has been defined as "not aware: lacking knowledge or acquaintance; being unconscious or asleep." Becker v. State, 703 N.E.2d 696 (Ind. Ct. App. 1998). Ct. adopted foregoing definition of term "unaware" in context of rape statute which, like criminal deviate conduct statute, requires that victim is "unaware" that sexual act is occurring. Language of rape statute may be fairly construed as adequate to inform individual of ordinary intelligence that sexual intercourse with individual who has lost consciousness due to inebriation is proscribed & thus constitutional. Here, there was plenty of evidence to find that victim was unconscious & that she was unaware that intercourse was occurring. Several people testified that victim collapsed & was passed out. Doctor testified that she had BAC of .377 & that her pupils were fixed & dilated. Held, judgment affirmed.

RELATED CASES: Filice, App., 886 N.E.2d 24 (because the statute requires that the victim be "unaware" that the sexual act is occurring and Rohypnol can, and did in this case, result in a victim's outwardly-apparent state of unawareness, the language of the statute is adequate to inform an individual of ordinary intelligence that sexual intercourse with an individual in a Rohypnol-induced state of unawareness is proscribed); Gale, App., 882 N.E.2d 808 (evidence was sufficient to prove that D had sexual intercourse with CW when she was unaware that sexual intercourse was occurring).

TITLE: Jones v. State

INDEX NO.: K.3.e.1.

CITE: (04/07/92), Ind., 589 N.E.2d 241

SUBJECT: Insufficient evidence of force to support rape conviction

HOLDING: Where there was no evidence of use of force or threats to encourage intercourse, evidence was insufficient to support conviction for rape. Complaining witness (CW) lived with D, his wife & child, & one night after drinking, D entered her room & asked her to have sex. She refused, & when D asked again, she refused again, saying it would be unfair to his wife & child. CW testified that when D asked third time, she "just let him have it, you know." She also testified that he told her not to tell anyone, & that she did not give him permission to have intercourse. D did not have weapon & CW did not think to hit him. She also said she did not cry out for help or yell because she was afraid & revealed on cross-examination that she was afraid of D, his wife, & her own foster mother. There was some evidence that CW was mentally deficient, but D was not charged under Ind. Code 35-42-4-1(3), which prohibits intercourse when victim is so mentally disabled or deficient that she cannot consent. Ind. S.Ct. found evidence was insufficient to show CW was compelled to have intercourse "by force or imminent threat of force," as charged. Although such force need not be physical, & may be implied from circumstances, in this case circumstances could not lead to inference of constructive or implied force. Although CW said she was afraid to yell for help, there was no evidence that her fear was from D forcing her to do anything or threatening her. Ct. noted that there are reasons why person might be afraid to attract attention, other than fear of forced activity. Held, transfer granted, & conviction reversed.

TITLE: Lambert v. State

INDEX NO.: K.3.e.1.

CITE: (12/15/87) Ind., 516 N.E.2d 16

SUBJECT: Rape - sufficiency of evidence of penetration

HOLDING: Uncorroborated testimony of victim was insufficient to support rape conviction where victim had ample knowledge of male/female sex organs, yet testified with equivocation & uncertainty regarding vaginal penetration. Penetration is a necessary element of the offense of rape. Tillman 408 N.E.2d 1250. In Chew 486 N.E.2d 516, testimony of victim was insufficient to establish penetration where victim had ample knowledge of sex organs yet testified only that D "made love to me from the back." Here, victim testified that D "had sex" with her. Asked by prosecutor if D ejaculated, victim responded, "I believe so," & further questioning brought responses that victim thought so, but really wasn't sure. Finally, victim stated, "well, I know he did it in my mouth & I'm almost positive he did down below too," to which prosecutor responded, "On your legs & inside you?" & victim replied, "Yes." No medical evidence of presence of semen in victim's vagina was offered, although victim testified she did not douche after alleged rape. While penetration, not ejaculation, is essential element, such evidence would have had probative value. Standing alone, victim's equivocal, uncertain testimony regarding vaginal penetration did not establish its occurrence. Held, rape conviction vacated.

TITLE: Lee v. State

INDEX NO.: K.3.e.1.

CITE: (9-10-97), Ind., 684 N.E.2d 1143

SUBJECT: Rape while armed with deadly weapon - evidence sufficient

HOLDING: To support conviction for rape while armed with deadly weapon, it is not necessary for weapon to be held on victim at all times, & weapon need not be displayed to establish threat of deadly force. Lamb, 462 N.E.2d 1025; Kelly, 452 N.E.2d 907. Here, although victim never stated that D was armed during rape, she testified that she saw D hold particular gun "all through the night." Co-D testified that each D held his own gun when women victims were told to disrobe. Victim's duress was well founded. Since weapon was at least constructively under D's control, there was sufficient evidence for finding that he committed rape while armed with deadly weapon. Held, conviction affirmed.

TITLE: McCann v. State

INDEX NO.: K.3.e.1.

CITE: (5th Dist., 1-26-01), Ind. App., 742 N.E.2d 998, summarily affirmed 749 N.E.2d 1116

SUBJECT: Attempted rape instruction - intent to rape not required

HOLDING: In attempted rape prosecution, jury need not be instructed that D must have intent to accomplish crime of rape. Here, over D's objection, jury was instructed as follows:

A person attempts to commit a crime when he knowingly engages in conduct that constitutes a substantial step toward commission of the crime....

A person who knowingly has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force commits rape....

The elements of this offense are that the D must... [k]nowingly...[h]ave sexual intercourse...[w]ith a member of the opposite sex...[b]y compelling the other person with force or the imminent threat of force...[w]hile armed with a deadly weapon....

Following analysis in Richeson v. State, 704 N.E.2d 1008 (Ind. 1998), Ct. held that because culpability required for rape is "knowingly or intentionally," Ind. Code 35-42-4-1, instruction in attempted rape prosecution providing that State must prove intent to achieve a knowing or intentional rape is not required. Rather, Indiana's attempt statute permits instruction that jury may convict upon proof that D took substantial step toward knowing rape. Accordingly, instruction given in this case neither misstated law nor misled jury. Held, judgment affirmed in part, reversed & remanded in part on other grounds; Sullivan, J., dissenting, argued that Richeson requires that jury be informed that D must have intended to achieve knowing or intentional rape.

TITLE: McGill v. State

INDEX NO.: K.3.e.1.

CITE: (4th Dist. 6/28/84) Ind. App., 465 N.E.2d 211

SUBJECT: Attempted rape - lesser included offenses (LIO); deviate conduct

HOLDING: D was erroneously convicted of criminal deviate conduct (CDC) as LIO of charge of attempted rape. Here, D gained entrance into former sister-in-law's home, forcefully removed her clothing & placed his fingers in her vagina. D did not object to Tr. Ct.'s instruction that battery & CDC were LIOs of attempted rape. Ct. finds CDC is neither "necessarily" nor "factually" LIO of charge made against D. It is fundamental error to convict D of crime not charged. Forcible penetration of victim's vagina by D's fingers neither inherently nor by elements divulged in information constitutes a substantial step toward forcible sexual intercourse. See commentary to West's Ind. Code 35-42-4-2 (unlikely that rape is LIO of CDC). Information did not mention penetration of victim's vagina. Failure to mention this vital element of CDC is fatal to argument that CDC was factually LIO of charge of attempted rape. Probable cause affidavit cannot be incorporated into charging instrument, as state suggests. Ct. refuses to modify verdict by finding D guilty of battery as LIO of attempted rape. See n.2. Held, reversed.

RELATED CASES: Thompson, App., 761 N.E.2d 467 (sexual battery is not LIO of rape); Forrester 440 N.E.2d 475 (rape & CDC - fellatio - do not include each other); Riley 432 N.E.2d 15 (rape & CDC - Ind. Code 35-42-4-2(a) - are separate & distinct offenses).

TITLE: Newbill v. State
INDEX NO.: K.3.e.1.
CITE: (2nd Dist., 04-16-08), Ind. App. 884 N.E.2d 383
SUBJECT: Erroneous jury instruction - victim's perspective of force in rape case
HOLDING: In opinion affirming D's rape conviction, Court discouraged use of jury instruction based on Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996), that focuses on victim's perspective on forced intercourse. Language from Tobias was used in the course of appellate review of a challenge to sufficiency of evidence and should not be used in a rape instruction for a jury. Ludy v. State, 784 N.E.2d 459 (Ind. 2003). Rather, a jury should be instructed that evidence of force should be viewed from either the objective or reasonable perspective of the victim. Nevertheless, the instructions taken as a whole properly informed jury that it must find beyond a reasonable doubt that D knowingly or intentionally exerted force that compelled victim to submit to sexual intercourse. Held, judgment affirmed.

TITLE: Potter v. State
INDEX NO.: K.3.e.1.
CITE: (8-25-97), Ind., 684 N.E.2d 1127
SUBJECT: Rape - evidence sufficient to show deadly weapon element
HOLDING: Evidence was sufficient to support D's conviction of rape as Class A felony, which required proof that D was armed with deadly weapon. In proving deadly weapon element, it is not necessary for State to show that deadly weapon was held on victim at all times. Taylor v. State, 438 N.E.2d 294 (Ind. 1982). Rather, Ct. considers whether there was initial show of deadly force with weapon, whether intent was to intimidate victim with weapon & whether weapon was at least constructively under D's control at all times. Id.; Davis v. State, 520 N.E.2d 1271 (Ind. 1988). Here, prior to rape, D blocked front door by sitting in chair holding knife & talking about killing victim & her kids. During rape, D placed knife in kitchen. However, kitchen was separate area connected to living room where rape occurred. Thus, D had constructive control over weapon at all times. Held, transfer granted, Ct. App.' decision at 666 N.E.2d 93 vacated on other grounds, conviction affirmed.

TITLE: Simmons v. State

INDEX NO.: K.3.e.1.

CITE: (3/2/87) Ind., 504 N.E.2d 575

SUBJECT: Rape Trauma Syndrome - admissibility

HOLDING: Tr. Ct. did not err in allowing state's witnesses to testify re rape trauma syndrome. Here, first witness (Kempner) testified as certified social worker, specializing in studies concerning sexual assaults. Second witness (Turnbloom) testified as to credentials in counseling & psychology & to 2 years training at I.U.'s school of social work, specializing for 3 years in cases of rape, domestic violence & child sexual abuse. Kempner testified victim's failure to remember being at particular location was not unusual for rape victim & was consistent with rape trauma syndrome. Turnbloom testified concerning 3 types of rapists, stating that based on events described by victim to police, individual who raped victim was "power rapist." This testimony was used to show that victim could have felt under threat/power of D (who told her he would not kill her if she told police fabricated story which he made up) even after night of rape, thus explaining her original statement to police (D's fabrication). Ct. rejects D's contention that witnesses vouched for victim's credibility. It is proper for expert witness to give opinion in order to aid jury/trier of fact. Witnesses were properly qualified. Witnesses described victim's behavior as consistent with behavior pattern often seen, much as police officer in Blackmon 455 N.E.2d 586 testified re behavior of burglars under certain circumstances. In related issue, Ct. finds no abuse of discretion in allowing victim's father & sister to testify that after rape, victim became afraid to go outside by herself, stayed home more often & even feared for other family members who went out alone. Evidence re victim's behavior & fears were relevant/probative of fact she had been raped. Held, no errors.

TITLE: Tam v. State
INDEX NO.: K.3.e.1.
CITE: (3d Dist. 5/20/87) Ind. App., 507 N.E.2d 993
SUBJECT: Rape Trauma Syndrome - not required as corroboration
HOLDING: Ct. rejects D's contention that evidence concerning rape victim's behavior & appearance after attack did not indicate she was suffering from traumatic effects of rape. Although expert testimony concerning rape trauma syndrome is admissible, Simmons 504 N.E.2d 575, Ct. rules such evidence is not required to corroborate victim's testimony. Research has shown that not all rape victims react in same way. One study showed half expressed emotions by crying, smiling, & acting restless or tense, while other half responded in controlled manner, hiding their feelings behind calm exterior. [Citations omitted.] Ct. refuses to establish code of behavior to which rape complainants must adhere so that their testimony will not be held incredible as a matter of law. Ct. finds victim's behavior & appearance did not render her testimony inherently improbable & defers to jury's assessment of her credibility. Held, convictions affirmed. Neal CONCURS IN RESULT without opinion.

K. CRIMES

K.3. Offenses against the person

K.3.e.2. Criminal deviate conduct (Ind. Code 35-42-4-2)

TITLE: Becker v. State

INDEX NO.: K.3.e.2.

CITE: (3rd Dist., 12-28-98), Ind. App., 703 N.E.2d 696

SUBJECT: Criminal deviate conduct - victim unaware that act was occurring

HOLDING: Evidence was sufficient to show that victim was unaware that act of deviate sexual conduct was occurring as required to sustain conviction under Ind. Code 35-42-4-2(a)(2). D admitted to police that he had placed his finger in victim's vagina while she was asleep. Victim testified that on several occasions, she awoke to find that D was molesting her. On appeal, D argued that victim's testimony was insufficient to sustain conviction because victim was aware that molestations were occurring once she awoke. In holding that evidence was sufficient to support conviction, Ct. noted that crime had been completed by time victim awoke. Jury could reasonably infer that victim was unaware that act of deviate sexual conduct was occurring while she was asleep. Held, conviction affirmed.

RELATED CASES: Nolan, App., 863 N.E.2d 398 (facts supported jury's finding that CW was unaware of D's act of deviate sexual conduct on her even though she was not fully asleep; evidence showed that CW gave no verbal or other consent to D at any point, indicating a lack of awareness on her part as to the situation)

TITLE: Douglas v. State
INDEX NO.: K.3.e.2.
CITE: (4th Dist. 10/29/85) Ind. App., 484 N.E.2d 610
SUBJECT: Criminal deviate conduct (CDC) - "mentally disabled or deficient"/4-year-old
HOLDING: Evidence was insufficient to support CDC conviction. Here, D was charged with CDC upon a 4-year old boy. Information alleged child was so mentally deficient he could not consent. Ct. finds words "mentally disabled or deficient" do not apply to children of normal intelligence. Ct. also notes state made "innovative attempt to circumvent constitutional prohibition of double jeopardy" by charging D twice for same offense - CDC & child molesting (fondling). DJ problem is solved by finding of insufficiency. Ct. reverses child molesting conviction on other grounds. Held, reversed.

TITLE: Galmore v. State

INDEX NO.: K.3.e.2.

CITE: (8/24/84) Ind., 467 N.E.2d 1173

SUBJECT: Criminal deviate conduct - sufficiency

HOLDING: Conviction for CDC may be sustained solely upon uncorroborated testimony of victim.

Catenacci 436 N.E.2d 1134; Calbert 418 N.E.2d 1158. Here, victim was male jail detainee severely beaten by D & other inmates & offered protection by D in exchange for sexual favors. Ct. finds no inherent improbability or lack of credibility in victim's testimony. In fact, victim's testimony was corroborated to some extent. Held, conviction affirmed.

RELATED CASES: Smith, 636 N.E.2d 124 (Where D, impersonating police officer, drove victim to woods, held his arm behind his back, asked whether he had ever had sex with boy, threatened him with handgun, & commanded him to disrobe, evidence was sufficient to support conviction for attempted criminal deviate conduct, despite fact he didn't disrobe or verbalize desire to engage in intercourse).

TITLE: Hampton v. State

INDEX NO.: K.3.e.2.

CITE: (5th Dist., 09-20-07), Ind. App., 873 N.E.2d 1074

SUBJECT: Criminal deviate conduct - victim deceased when offense committed

HOLDING: Evidence was sufficient to support D's criminal deviate conduct conviction, despite expert testimony that object was inserted in victim's vagina following her death. To convict D of criminal deviate conduct, State was required to prove that D caused person to submit to deviate sexual conduct by force or imminent threat of force. Ind. Code 35-42-4-2. Under Ind. Code 35-41-1-14 & -22 a "person" means a "human being," & "human being means an individual who has been born alive." D argued that victim was no longer a "person" when the incident occurred, because pathologist who performed autopsy testified that he believed object was placed in victim's vagina after her death. Ct. held that jury was free to reject this testimony & infer that victim was alive when offense was committed, given the short period of time that elapsed between commission of offenses & suffocation & strangulation of victim. Record supported inference that D committed the act of sexual deviate conduct by engaging in the force against victim while she was still living. That D may have waited until after victim's death to place the object in her vagina "is of no moment." Robinson v. State, 693 N.E.2d 548 (Ind. 1998). Held, judgment affirmed.

TITLE: Riffe v. State

INDEX NO.: K.3.e.2.

CITE: (6/22/84) Ind., 464 N.E.2d 333

SUBJECT: Criminal deviate conduct (CDC) - foreign object; sufficiency

HOLDING: Evidence was sufficient to support D's conviction for CDC where testimony included victim, nursing assistant at hospital & examining physician. Here, D & victim met & drank together at bar, bought beer & drove to secluded spot where beat victim, burned her breast with cigarette, forced tire iron into her vagina, forced his penis into her vagina & anus, stole money from her & left her nude & beaten in cornfield. Victim testified D demanded she tell him where her tire iron was, looked in car trunk, said here is the tire iron & put tire iron in her vagina. He beat her, then forced his penis in her anus. She saw blood on his underwear. Nursing assistant testified to large amounts of blood inside thighs & matted in pubic hair. Examining physician found inch long laceration in wall of vagina & small tears in tissue around anal region & testified such injuries were consistent with victim's version of attack. Held, affirmed.

RELATED CASES: Catenacci 436 N.E.2d 1134 (jail detainee sodomized; held, evidence sustained CDC conviction).

TITLE: Shackelford v. State

INDEX NO.: K.3.e.2.

CITE: (5th Dist., 11-22-93), Ind. App., 622 N.E.2d 1340

SUBJECT: Deviate Sexual Conduct - insufficient evidence

HOLDING: Where complaining witness (CW) stated D touched one of her private parts with his penis & kissed her private parts, but included her breasts in definition of private parts, there was insufficient evidence to support conviction for deviate sexual conduct because she did not indicate which private part he touched. Conviction requires proof of act involving sex organ of one & mouth or anus of another, or penetration of sex organ or anus of person by object. While evidence would have been sufficient to support conviction for child molesting by fondling or touching, Ind. Code 35-42-4-3(b); D was charged with molesting & incest by engaging in deviate sexual conduct, Ind. Code 35-42-4-3(a) & 35-46-1-3(a). Although CW also testified, she kissed D's private parts, she did not identify any of them specifically as his sex organ. Because there was lack of evidence to infer beyond reasonable doubt that D engaged in conduct involving his mouth & CW's genitalia, his penis & CW's mouth or anus, or CW's mouth & his penis, conviction could not stand. Held, conviction reversed for insufficiency. Note: CW's testimony is reproduced verbatim in opinion.

RELATED CASES: Krebs, App., 816 N.E.2d 469 (while an inappropriate touching clearly took place, the evidence, specifically the alleged victim's testimony, was insufficient to permit a jury to infer beyond a reasonable doubt that D inserted an object into the sex organ of the alleged victim as charged); Smith, App., 779 N.E.2d 111 (Ct. found sufficient evidence of penetration despite CW's inconsistent statements & complete lack of physical evidence); Bear, App., 772 N.E.2d 413 (evidence sufficient where CW testified that D licked her "pooty" – a term she used to refer to her vaginal area); Stewart, 768 N.E.2d 433 (from evidence presented at trial, jury easily could have reached conclusion that both adults knew that "private area " or "private part" referred to "penis"); Winters, App., 727 N.E.2d 758 (CW's definition of intercourse "when the male penis touches the vagina" was sufficient evidence of penetration); Thompson, 674 N.E.2d 1307 (record did not include sufficient evidence of penetration necessary to support conviction for criminal deviate conduct).

TITLE: Stewart v. State

INDEX NO.: K.3.e.2.

CITE: (6/5/90), Ind., 555 N.E.2d 121

SUBJECT: Criminal deviate conduct - penetration by object (finger)

HOLDING: D's insertion of his finger into victim's anus constituted penetration by object & supported conviction for criminal deviate conduct. Criminal deviate conduct statute prohibits sex acts involving sex organ of one person & mouth or anus of another & sex acts in which sex organ or anus of person is penetrated by object where one participant does not consent. Ind. Code 35-42-4-2; 35-41-1-9. D argues that an object must be inanimate, & that finger therefore cannot be an object. Where statutory terms are open to interpretation & alternate meanings are available, meaning of term which is compatible with letter & intent of law should be applied. Further, it is not to be presumed that legislature intended an absurdity. [Citations omitted.] Harm to be prevented by criminalizing penetration of sex organ or anus by object, in addition to any physical injury which may result, is subjection to personal indignity & degradation & affront to physiological integrity associated with violation. It is unlikely that legislature would criminalize sexual assaults committed by means of sex organ, mouth, or inanimate object, yet condone such assaults if committed by means of finger or hand. Nonconsensual intrusion by whatever instrumentality chosen by perpetrator, whether animate or inanimate, is prohibited by statute. Held, evidence here was sufficient to support conviction.

K. CRIMES

K.3. Offenses against the person

K.3.e.3. Child molesting (Ind. Code 35-42-4-3)

TITLE: Acuna v. State

INDEX NO.: K.3.e.3.

CITE: (5th Dist. 11/25/91), Ind. App., 581 N.E.2d 961

SUBJECT: Merger - child molest & incest

HOLDING: Where single act of intercourse underlay D's convictions for both child molesting/sexual intercourse & incest, double jeopardy considerations prohibit multiple convictions. Additionally, D's multiple convictions for child molest/fondling & child molest/sexual intercourse are precluded by double jeopardy because act of fondling was incidental & preparatory to subsequent acts of vaginal & anal intercourse. D was convicted of 2 counts of child molest Class B, for sexual intercourse & criminal deviate conduct, one count of fondling child molest & one count of incest. Acts supporting convictions for molest/sexual intercourse & molest/deviate sexual conduct were committed on single occasion within short period of time, but did not have "same injurious consequences," Ellis, Ind., 528 N.E.2d 60, nor were they preparatory & incidental to one another, Starks, App., 565 N.E.2d 1142. Therefore, those multiple convictions were not prohibited. Ct. found double jeopardy prevented incest conviction, however, because it was same act & reflected same injurious consequences as child molest/sexual intercourse conviction. Additionally, child molest/ fondling conviction was only incidental & preparatory to acts of intercourse in child molest/intercourse conviction & was also precluded by double jeopardy. Held, convictions for child molest/fondling & incest vacated. **Note:** In footnote, Ct. noted that Ellis appeared to impliedly overrule Snider, 274 Ind. 401, 412 N.E.2d 230.

RELATED CASES: Williams, 997 N.E.2d 1154 (Ind. Ct. App. 2013) (convictions for child molesting and incest don't violate actual evidence test where evidence showed D had intercourse with child many times over 2-year period).

TITLE: Adcock v. State

INDEX NO.: K.3.e.3.

CITE: (12/8/2014), 22 N.E.3d 720 (Ind. Ct. App 2014)

SUBJECT: Ineffective assistance of appellate counsel - failure to challenge sufficiency of evidence to support child molesting and sexual misconduct with minor convictions

HOLDING: Appellate counsel was ineffective for failing to challenge D's two Class A felony child molesting convictions and two Class B felony sexual misconduct with minor convictions. Complaining witness (C.W.) was 20 when she testified at trial regarding incidents that took place when she was under 14 years of age in junior high. The sexual misconduct charges relate to when she was in high school. C.W. (D's stepdaughter) could not recall whether she was 13 or 14 when D digitally penetrated her vagina, thus State could have only charged and convicted D with Class B felony sexual misconduct with a minor, not Class A felony child molesting. Barger v. State, 587 N.E.2d 1304 (Ind. 1992). Moreover, the evidence did not establish that these acts occurred within five years before the filing of the charging information, as required by the statute of limitations. The Court would have been compelled to reverse the Class B felony sexual misconduct with a minor convictions as time-barred if the issue had been raised on direct appeal. See King v. State, 560 N.E.2d 491 (Ind. 1990).

Because C.W. clearly testified that the first time D touched her vagina with his penis was when she was in high school and above the maximum age to support the other child molesting charge, evidence was insufficient to support that count. With regard to the last count, evidence that D touched C.W.'s genitals with his own was insufficient to establish "penetration" under Spurlock v. State, 675 N.E.2d 312 (Ind. 1996), and total absence of evidence on this count was plain and obvious on the face of the record. Held, judgment reversed and remanded for granting of D's PCR petition and vacating of convictions.

Note: Throughout the opinion, Court repeatedly criticizes the State for "blur[ring] the line" between statutory crimes, giving a "misleading and over-generalized" statement of the facts and "incorrect" summary of testimony, and for failing to acknowledge controlling precedent.

TITLE: Amphonephong v. State

INDEX NO.: K.3.e.3.

CITE: (5/27/2015), 32 N.E.3d 825 (Ind. Ct. App 2015)

SUBJECT: Child molesting - sufficient evidence of intent to arouse sexual desires

HOLDING: State presented sufficient evidence to support D's Class C felony child molesting conviction. D argued that he was asleep when he touched complaining witness (C.W.) in bed, so he could not have knowingly had the intent to arouse or satisfy his or C.W.'s sexual desires. C.W. told the child advocate that D was sleeping, and testified at trial that she could not see D's eyes. C.W. also testified that she removed D's hands from her underwear several times and he kept putting his hands back in. As such, there was sufficient evidence to support the jury's determination that he knowingly touched C.W. and did so with the intent to arouse or satisfy his sexual desires. Held, judgment affirmed.

TITLE: Austin v. State

INDEX NO.: K.3.e.3.

CITE: (12/28/22), Ind. Ct. App., 201 N.E.3d 1184

SUBJECT: Level 1 felony child molesting conviction reversed with insufficient evidence of penetration

HOLDING: To convict Defendant of Level 1 felony child molesting, the State had to prove beyond a reasonable doubt that he engaged in “other sexual conduct” with the victim, a child under fourteen. I.C. § 35-42-4-3(a)(1). As relevant here, “other sexual conduct” is defined as “an act involving . . . the penetration of the sex organ or anus of a person by an object.” I.C. § 35-31.5-2-221.5(2). The only evidence the State pointed to in support of the convictions is the complaining witness's (C.W.'s) testimony that Defendant used his “whole hand” to rub “up and down” on the “outside” of her “private part” and that it made her feel “tingly.” While “the slightest penetration of the sex organ, including penetration of the external genitalia, is sufficient” to prove “other sexual conduct,” Boggs v. State, 104 N.E.3d 1287, 1289 (Ind. 2018), the Court of Appeals concluded that the evidence here doesn't establish even “slight” penetration. The Court distinguished this case from Hale v. State, 128 N.E.3d 456 (Ind. Ct. App. 2019), where it affirmed Level 1 felony child-molesting convictions where the victim said Defendant touched her vagina not just with his hand but with individual fingers, that it was like he was “trying to find something,” that he was “pressing down really hard,” and that it “hurt.” There is no such evidence in this case. Held: judgment reversed and remanded for entry of the convictions as Level 4 felonies (“fondling or touching”) and resentencing accordingly. In a footnote, the Court said, “At trial, the court granted the State's request to instruct the jury on the included offense of attempted child molesting, which would also be a Level 1 felony. On appeal, the State doesn't argue that the Level 1 felony child-molesting convictions should be or could be replaced with Level 1 felony attempted child-molesting convictions. In any event, for the same reason the evidence doesn't establish penetration, it doesn't establish attempted penetration.”

TITLE: Barger v. State

INDEX NO.: K.3.e.3.

CITE: (03/06/92), Ind., 587 N.E.2d 1304

SUBJECT: Child molest with victim over 12 years old sufficiency of evidence

HOLDING: When it is difficult to prove whether child molest victim was 11 or 12 years old at time of offense, it is sufficient to charge & convict D of lesser, Class D felony, because child is clearly under 16 years old, as required for lesser felony conviction, reversing Barger, App., 576 N.E.2d 621. D was charged & convicted of Class D felony child molesting, which prohibits fondling or touching with child 12 or older, but less than 16. Evidence did not clearly establish whether child was 11 or 12 at time of incident. Ct. App. had found evidence insufficient, because crime charged was not lesser-included offense of fondling or touching child under 12, Ind. Code 35-42-4-3(b). While acknowledging that statutes are to be strictly construed against State, S.Ct. noted that they are not to be overly narrowed, so as to exclude cases they fairly cover. Ct. also noted that for most of century, legislature has shown consistent policy to punish offenders more harshly when they commit crimes against younger children. Additionally, time is not of essence in child molest statutes, & Ct. found prosecutor had already narrowly construed statute by charging D with lesser offense because of question of victim's age. Ct. distinguished Mahla (1986), Ind., 496 N.E.2d 568, where sexual intercourse/deviate conduct as C felony was held not to be lesser-included offense of same conduct as B felony. Ct. found evidence was sufficient to sustain conviction as D felony, despite confusion as to age.

RELATED CASES: Adcock, 22 N.E.3d 720 (Ind. Ct. App 2014) (where, as here, it is impossible to tell whether molestation victim was above or below dividing line at time of offense, State may charge and convict D of lesser felony; see full review, this section).

TITLE: Boggs v. State

INDEX NO.: K.3.e.3.

CITE: (8/23/2018), 104 N.E.3d 1287 (Ind. 2018)

SUBJECT: Meaning of "penetration" for purposes of "other sexual misconduct"

HOLDING: Per Curiam. D was found guilty of child molestation for engaging in other sexual conduct with a child under age fourteen. "Other sexual conduct" includes "an act involving...the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-31.5-2-221.5. Complaining witness (C.W.) testified that D put his finger "in the folds of her vagina" and touched her clitoris. Proof of the "slightest penetration" of the female sex organ, including penetration of the external genitalia, is sufficient to sustain a conviction for child molestation based on sexual intercourse. Spurlock v. State, 675 N.E.2d 312 (Ind. 1995). But D argued that "other sexual conduct" requires proof of more intrusive acts, comparing the statute defining sexual intercourse as "any" penetration of the female sex organ (Ind. Code § 35-31.5-2-302) to the statute defining other sexual conduct as "the" penetration of the sex organ. D argued this differing language indicates the legislature intended "penetration" to have different meanings for purposes of the two statutes. Court disagreed, holding that proof of the slightest penetration of the sex organ, including penetration of external genitalia, is sufficient to demonstrate a person performed other sexual misconduct with a child. Held, conviction affirmed, Court of Appeals' memorandum opinion summarily affirmed in all other respects.

RELATED CASES: Hale, 128 N.E.3d 456 (Ind. Ct. App. 2019) (State presented sufficient evidence to prove penetration, as it would have been physically impossible for D to touch any part of C.W.'s vagina without having first penetrated her vulva or external genitalia).

TITLE: Boling v. State
INDEX NO.: K.3.e.3.
CITE: (1/24/2013), 982 N.E.2d 1055 (Ind. Ct. App 2013)
SUBJECT: Attempted child molesting - evidence sufficient
HOLDING: State presented evidence from which jury could conclude that D knowingly attempted to commit Class A felony child molesting and engaged in an overt act constituting a substantial step toward commission of the crime. Mens rea can be established by circumstantial evidence and inferred from the D's conduct and the natural and usual sequence to which such conduct reasonably points.

Here, complaining witness (C.W.) testified that D touched her "front private" first over her underwear and then under her underwear, directly on her skin. The natural and usual sequence to which such conduct reasonably points is that D had taken a substantial step toward penetrating C.W.'s sex organ with his finger. A reasonable jury could find based upon this testimony is that D had attempted to commit deviate sexual conduct. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Bond v. State

INDEX NO.: K.3.e.3.

CITE: (2d Dist. 4/21/87) Ind. App., 506 N.E.2d 491

SUBJECT: Attempted child molesting - sufficiency (child is not touched)

HOLDING: Evidence is sufficient to sustain D's conviction for attempted child molesting. He stood in door of his residence & attracted 12-year-old girl's attention by saying "Psst! Psst!" D was not wearing any pants & was "playing with himself." [Sic] Later, D followed child, but ran away when child sought help & another person intervened. Ct. finds statutory definition of child molesting does not require that fondling or touching occur between perpetrator & victim. D touched himself with intent to arouse his own sexual desires in child's presence. Held, conviction affirmed. Miller CONCURS IN RESULT without opinion.

RELATED CASES: Bass, 947 N.E.2d 456 (Ind. Ct. App 2011) (sufficient evidence of attempted child molest where D, wearing only boxers, knelt next to child as she slept on the couch and pushed her blanket up past her waist and positioned her shorts such that her crotch was visible while having one hand on his crotch; D went beyond sexual gratification because D did more than touch himself; he pushed the blanket up, looked at her crotch, and would have touched her had her mother not appeared).

TITLE: Brown v. State
INDEX NO.: K.3.e.3.
CITE: (07-02-20), Ind. Ct. App., 149 N.E.3d 322
SUBJECT: Circumstantial testimonial evidence sufficient to prove age
HOLDING: In trial for child molesting, the State failed to present direct evidence that Defendant was at least twenty-one years old when he committed the offense. However, testimony established that Defendant was "bald in the middle at the top and hair in the back with a white beard," he owned three cars, worked as a handyman, had a house, and cared for six to ten children at a time. The court held the jury could use its common sense to determine from the evidence that Defendant was at least twenty-one years old when he committed the offense.

TITLE: Buzzard v. State

INDEX NO.: K.3.e.3.

CITE: (3rd Dist., 6-17-99), Ind. App., 712 N.E.2d 547

SUBJECT: Child molesting - sufficient evidence: testimony not incredibly dubious

HOLDING: Testimony of child eyewitness was sufficient evidence to convict D of child molesting.

Incredible dubiousity rule provides Ct. with opportunity to impinge upon jury's duty to judge credibility of witnesses when testimony is inherently improbable or coerced, equivocal or result of coercion. Rule applies to situations involving testimony of sole witness whose inherently contradictory testimony is equivocal or result of coercion. Tillman v. State, 642 N.E.2d 221 (Ind. 1994). Here, only evidence supporting child molesting charge was testimony of victim's eleven-year-old sister who was sleeping in same room. Witness testified that she saw D place his penis in victim's mouth, which was open while victim was sleeping. Although there was no other evidence of act, witness never wavered in her testimony. Thus, incredible dubiousity rule did not apply. Held, conviction affirmed.

RELATED CASES: C.S., 71 N.E.3d 848 (Ind. Ct. App 2017) (evidence supporting juvenile finding of child molesting was not incredibly dubious even though four-year old victim's testimony at admissibility hearing was at times vague and inconsistent because in her prior statement to Children Advocacy Center, she never wavered in her allegation; see full review, this section); Hampton 921 N.E.2d 27 (although mother told 7-year-old CW what to say, she also told her to tell the truth; testimony of CW was not incredibly dubious and provided sufficient evidence to support conviction); Haun, App., 792 N.E.2d 69; Reyburn, App., 737 N.E.2d 1169 (evidence sufficient; Ct. rejected D's argument that victim's testimony was incredibly dubious).

TITLE: C.D.H. v. State

INDEX NO.: K.3.e.3.

CITE: (4th Dist., 01-24-07), Ind. App., 860 N.E.2d 608

SUBJECT: Child molest- D must be older than victim

HOLDING: A child cannot "molest" a child of the same age or who is older. "A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony." Ind. Code 35-42-4-3(b). The ordinary, plain language of the statute requires that the act of the child molesting involve two people: (1) a child under the age of fourteen; & (2) a person older than the child. Although in 1994 the legislature dispensed of the requirement the offender be of a particular age, the legislature retained the requirement that the offender be older than the victim.

Here, the alleged victim's father testified that he "believed" C.D.H. to be eleven-years-old, & the alleged victim, who had the mental capacity of a five or six-year-old, testified that C.D.H. was eleven-years-old. However, trial Ct. referred to C.D.H. as ten-years-old in announcing its decision, & the probation officer at sentencing claimed C.D.H. "is ten years old." Further, the parties & the trial Ct. were unaware that age was an element. The victim's mental age is irrelevant in proving child molesting. Thus, there was insufficient evidence to conclude D was older than the victim. Held, judgment reversed; Barnes, J., dissenting on basis that there was sufficient evidence that D was older than the victim.

TITLE: Chastain v. State
INDEX NO.: K.3.e.3.
CITE: (03-11-20), 144 N.E.3d 732 (Ind. Ct. App 2020)
SUBJECT: Enhancement of offense based on Defendant's age reversed due to improper admission of hearsay evidence.
HOLDING: Hearsay evidence that Defendant was at least twenty-one years old was insufficient to elevate his child molest offense from a Class B to Class A felony. The only evidence presented to establish the essential element of Defendant's age was testimony from a detective who testified over hearsay objection that BMV records which were not admitted into evidence established Defendant's date of birth. Because this impermissible hearsay was used to elevate the offense, Court of Appeals remanded for entry of judgment of conviction and re-sentencing for a Class B felony.

TITLE: Cline v. State

INDEX NO.: K.3.e.3.

CITE: (07-26-12), 971 N.E.2d 1240 (Ind. Ct. App 2012)

SUBJECT: Sex offender registry - courts lack authority to remove offender's information

HOLDING: Tr. Ct. does not have authority to remove D's name and information from the sex offender registry despite the fact D cannot be required to continue to register due to the prohibition against ex post facto laws. The sex offender registry as applied to a person who committed his crime before he was required to register is an ex post facto law. Wallace v. State, 905 N.E.2d 371 (Ind. 2009). In Wallace, the Supreme Court invited the Legislature to provide a "mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure." Id. at 384. The Legislature responded with Ind. Code 11-8-8-22, a mechanism for relief from registration obligation. Under Ind. Code 11-8-8-22, a person may petition the court to remove the person's designation as an offender or require the person to register under less restrictive conditions.

Here, upon release from prison, D registered as a sex offender as he was instructed. Subsequently, he petitioned for removal from the sex offender registry due to ex post facto concerns. Tr. Ct. held that D could no longer be required to register as a sex offender due to ex post facto concerns, but that the court lacked the authority to expunge D's existing information from the registry. Tr. Ct. did not misapply the law. Notably, the Wallace Court did not address expungement; nor did the legislative response specifically do so. Although D will have to endure the stigma associated with registration even if he does not register in the future, the fact that D committed sex crimes is a matter of public record. The DOC handles complaints about mistaken sex offender registration. D is not precluded from pursuing the DOC administrative procedures, although this court expresses no opinion on the breadth of relief to be afforded, if any. Thus, D has not demonstrated his entitlement to expungement as a judicial remedy. Held, judgment affirmed; Robb, C.J., dissenting on basis that a logical reading of Ind. Code 11-8-8-22 provides the Tr. Ct. with the authority to remove D's information from the registry, D is not asking for expungement and Tr. Ct.s, not the DOC, are to consider the constitutionality of a statute.

TITLE: Cowart v. State

INDEX NO.: K.3.e.3.

CITE: (2nd Dist., 10-18-01), Ind. App., 756 N.E.2d 581

SUBJECT: Child molesting - constitutionality of age classification of offenders

HOLDING: Indiana's child molesting statute, Ind. Code 35-42-4-3, does not violate Privileges & Immunities Clause of Art. I, Sec. 23 of Indiana Constitution. D argued that two age classifications in statute are arbitrary & render it unconstitutional because statute provides for harsher punishment for those who commit crime of child molesting & who are at least twenty- one years old. Ct. disagreed & held that increased punishment for child molesters who are at least twenty-one years old is reasonably related to inherent characteristics which distinguish two age groups at issue. Individuals who have attained age of twenty-one are likely to have greater maturity level & understanding for consequences of their actions. The age twenty-one classification dividing line also accommodates, to some extent, high school & college age dating relationships. As statute applies equally to all persons who are at least twenty-one years old, there is no unconstitutionally disparate treatment among those who fall within classification. Collins v. Day, 644 N.E.2d 72 (Ind. 1994). Ct. also held that statute does not violate Equal Protection Clause of Fourteenth Amendment to United States Constitution, because age classification is rationally related to one of highest & most legitimate state interests: the protection of children. Held, judgment affirmed.

TITLE: C.S. v. State

INDEX NO.: K.3.e.3.

CITE: (2/24/2017), 71 N.E.3d 848 (Ind. Ct. App 2017)

SUBJECT: Evidence for delinquency finding was not incredibly dubious

HOLDING: The evidence supporting the juvenile's true finding for Child Molesting was not incredibly dubious, even though the testimony of the victim, A.G., was at times at times vague and inconsistent. A.G lived with her mother, but sometimes stayed with David Gray, her father, and Gray's girlfriend, Bretina Craft. The juvenile is Craft's son. One night when A.G. was three, she was staying with her father and Craft when the juvenile, then nine, entered A.G.'s room, removed her clothes, and put his penis in her vagina. Later, A.G. later made a videotaped statement to the Child Advocacy Center ("CAC") about what happened. Pursuant to Protected Person Statute, the trial court held a hearing to determine if A.G.s statement would be admissible. A.G. testified and was cross examined at the hearing. Her testimony was videotaped. Both videotaped statements were admitted at the delinquency hearing.

While A.G.'s testimony at the admissibility hearing was sometimes vague and contradictory, her statement to CAC had no such defects. Crucially, she never wavered on her claim that the juvenile touched her where he was not supposed to. Despite A.G.'s inconsistencies at the admissibility hearing, such inconsistencies do not require reversal if there is any basis on which a reasonable trier of fact could choose between conflicting accounts or reconcile inconsistencies. See Edwards v. State, 753 N.E.2d 618, 623 (Ind. 2001). The bar for finding such a basis is low. See Smith v. State, 34 N.E.3d 1211, 1222 (Ind. 2015). Thus, it cannot be said that no reasonable fact-finder could have believed A.G.'s allegations against the juvenile. Accordingly, the evidence supporting the juvenile's true finding was not incredibly dubious. See Moore v. State, 27 N.E.3d 749, 754 (Ind. 2015). Held, judgment affirmed.

TITLE: D.P. v. State

INDEX NO.: K.3.e.3.

CITE: (7/14/2017), 80 N.E.3d 913 (Ind. Ct. App 2017)

SUBJECT: Evidence insufficient to support true finding for child molesting

HOLDING: Based on "sparse" evidence presented at fact-finding hearing, a reasonable factfinder could not have found beyond a reasonable doubt that ten-year-old D.P. touched or fondled 4-year-old complaining witness (C.W.) with the intent to arouse or satisfy sexual desires. It is unreasonable to infer intent to satisfy or arouse sexual desire solely from the fact that [a] child intentionally touched another child's genitals given that children may experiment by looking at or touching another child's genitals. T.G. v. State, 3 N.E.3d 19, 24 (Ind. Ct. App 2014). Other circumstances must be present that indicate such intent. Here, there was a six-year age difference between D.P. and C.W. But at fact-finding hearing, C.W. testified to only one incident of touching that involved D.P. touching her "hooha" and her "butt" with his "hand" while her clothes were on. Although C.W. identified her "hooha" as her genital area on an anatomical drawing of a little girl by drawing a circle, there was no evidence of exactly where D.P. touched C.W., how he touched her or how long he touched her. Moreover, C.W. did not feel the touching and there was no evidence of any kissing or D.P. asking her to touch him. Held, true finding for Level 4 felony child molesting reversed.

TITLE: Dillon v. State

INDEX NO.: K.3.e.3.

CITE: (4/14/83) Ind., 447 N.E.2d 581

SUBJECT: Child molesting - sufficiency (child is touched)

HOLDING: Testimony of 9 ½-year-old female victim was sufficient to sustain conviction for child molesting where child's answers were responsive & logical, were stated in understandable terms consistent with her age & experience & did not include digressions into fantasy. Here, D points to inconsistencies in child's testimony (M.H. could not recall time or date of sexual contact or clothing she or D were wearing; she did not tell anyone about the incident). D contends Thomas 154 N.E.2d 503 (conviction for public indecency reversed because evidence inherently improbable) requires reversal. Ct. holds neither Thomas nor Ritchie 189 N.E.2d 575 (uncorroborated testimony of 9-year-old on issue of penetration held uncertain & unsubstantial) are dispositive. M.H. demonstrated neither a vivid & uncontrollable imagination nor a lack of verbal skills to communicate past experiences. Held, evidence sufficient to sustain conviction.

RELATED CASES: Hill, App., 646 N.E.2d 374 (although testimony of 7 year-old victim was inconsistent with deposition & police statement, evidence was sufficient to support conviction for child molesting); Becraft 491 N.E.2d 535 (child's testimony sufficient to sustain conviction despite previous statement that stepfather rather than step-grandfather was abuser); Miller 448 N.E.2d 293 (evidence sufficient to sustain D's conviction for felony murder-child molesting where victim was bitten on buttocks; biting is kind of fondling or touching & supports jury's conclusion that act was committed with reckless intent to gratify sexual desires); Best 418 N.E.2d 316 (intent to gratify may be inferred from circumstantial evidence); Douglas, App., 484 N.E.2d 610 (use of hands is not essential element of touching or fondling; oral/genital contact held sufficient); James, App., 481 N.E.2d 417 (conviction reversed; see card at O.9.b.3).

TITLE: D'Paffo v. State

INDEX NO.: K.3.e.3.

CITE: (11-12-02), Ind., 778 N.E.2d 798

SUBJECT: Child molesting - deviate sexual conduct; State need not prove intent to arouse or satisfy sexual desires

HOLDING: State is not required to prove intent to arouse or satisfy sexual desires in order to obtain conviction of child molesting by deviate sexual conduct. Ind. Code 35-42-4-3(a) provides that a person who, with child under fourteen years of age, performs or submits to sexual intercourse or deviate sexual conduct, commits child molesting. In contrast to Ind. Code 35-42-4-3(b) (child molesting by fondling or touching), subsection (a) does not contain language to effect that D perform or submit to proscribed conduct with intent to arouse or satisfy sexual desires of D or child.

However, Ct. App. erroneously found "intent to arouse or satisfy" element implicit in subsection (a) & found reversible error by failing to instruct jury that in order to find D guilty, it was required to find that State had proven beyond reasonable doubt that D committed charged conduct with "intent to arouse or gratify the sexual desires of [himself] or the child." *Citing Canaan v. State*, 541 N.E.2d 894 (Ind. 1989), S.Ct. disagreed with Ct. App.' opinion & held that elements of child molesting under Ind. Code 35-42-4-3(a) do not include intent to arouse or satisfy sexual desires. Structure of Ind. Code 35-42-4-3 & of other crimes in sex crimes chapter of criminal code are best understood to include "intent to arouse or satisfy sexual desires" element only where it is expressly set forth. Ct. noted that where evidence warrants inference that alleged penetration of sex organ or anus of person by object was in furtherance of bona fide medical or personal hygiene-related examination or procedure, D would be entitled to appropriate instruction as to criminal intent. Held, transfer granted, Ct. App.' opinion at 749 N.E.2d 1235 vacated & other opinions on this issue disapproved, conviction affirmed.

RELATED CASES: *Jaco*, 778 N.E.2d 803 (Tr. Ct. was correct in not instructing jury that State was required to prove that D acted with intent to arouse or satisfy sexual desires; Ct. disapproved Ct. App.' view that intent to arouse is implicit in use of terms "sexual intercourse" & "deviate sexual conduct").

TITLE: Downey v. State

INDEX NO.: K.3.e.3.

CITE: (2nd Dist.; 3-31-00), Ind. App., 726 N.E.2d 794

SUBJECT: Child molesting - insufficient evidence of deviate sexual conduct

HOLDING: There was insufficient evidence to support D's conviction for child molesting by deviate sexual conduct, & appellate Ct. will not enter conviction of child molesting by touching or fondling. Deviate sexual conduct is act involving: (1) sex organ of one person & mouth or anus of another person; or (2) penetration of mouth or anus of person by object. Ind. Code 35-41-1-9. Here, only evidence presented was that D rubbed his penis against or between victim's buttocks. State never offered evidence of or argued that D's penis made contact with victim's anus. Despite their proximity, buttocks & anus are not same, & inference that contact with buttocks necessarily includes contact with anus cannot be made beyond reasonable doubt in this case.

In addition, appellate Ct. cannot enter judgment of child molesting by fondling or touching because child molesting by fondling or touching is neither inherently nor factually included in child molesting by deviate sexual conduct. Where information charges offense of child molesting by sexual deviate conduct but does not allege intent to arouse or satisfy sexual desires, it fails to provide notice of offense of child molesting by fondling or touching so as to provide D with opportunity to prepare his defense & be protected from double jeopardy. Phillips, App., 518 N.E.2d 1129. Here, State charged only child molesting by deviate sexual conduct. Thus, even if jury could infer intent based on D's conduct, this Ct. cannot make that inference in its place when D was not on notice of intent as element to be defended against & jury was never so instructed. Held, conviction reversed; Bailey, J., dissenting on basis of Spurlock v. State, 675 N.E.2d 312 (Ind. 1996).

RELATED CASES: Lewis, 34 N.E.3d 240 (Ind. Ct. App 2015) (distinguishing Downey and holding that DNA found on victim's anus along with direct evidence of non-consensual sex was sufficient to support criminal deviate conduct conviction); Riehle, App., 823 N.E.2d 287 (evidence sufficient to support conviction where D's penis contacted CW's anus); Wisneskey, App., 736 N.E.2d 763 (distinguishing Downey, Ct. held that evidence in this case leads to reasonable inference that D inserted his penis in CW's anus causing him pain).

TITLE: Hawk v. State

INDEX NO.: K.3.e.3.

CITE: (2d Dist. 4/15/87) Ind. App., 506 N.E.2d 71

SUBJECT: Child molesting (intercourse) - lesser included offenses

HOLDING: Touching or fondling with intent to arouse or satisfy is not lesser included offense of sexual intercourse of child less than 12. Here, D was charged with latter, but convicted of former, offense. Ct. relies upon Buck 453 N.E.2d 993 to hold that child molesting statute embraces 3 distinct types of child molesting: sexual intercourse, deviate sexual conduct, & fondling or touching with intent to arouse sexual desires. Held, conviction reversed. Shields CONCURS agreeing that Buck necessitates reversal of conviction. Buchanan DISSENTS finding that D was charged with child molesting - sexual intercourse in Count 1 & child molesting - fondling in Count 2. Tr. Ct.'s acquittal on 1 & conviction on "lesser included" of another was simply "a minor imperfection" caused by Tr. Ct.'s confusion of the number of the 2 counts when announcing the verdict.

RELATED CASES: Downey, App., 726 N.E.2d 794 (child molesting by fondling & touching is not lesser included of molesting by deviate sexual conduct).

TITLE: In re Z.C.
INDEX NO.: K.3.e.3.
CITE: 2007 UT 54, 165 P.3d 1206 (Utah 2007)
SUBJECT: Prosecuting two minors for consensual sex "absurd"
HOLDING: Utah Supreme Court held that a state statute that forbids "a person" from touching someone under 14 years old in a sexual manner may not be applied to consensual activity between two people under the age of 14. The issue came before Court in delinquency proceedings against a 13-year-old girl who was found to have engaged in sexual touching with a 12-year-old boy. The boy was prosecuted in a separate juvenile proceeding. Court acknowledged that the plain language of the statute, if interpreted literally, would support prosecutions of children who engage in a sexual act with each other. "Because we conclude that the legislature could not possibly have intended to punish both children under the child sex abuse statute for the same act of consensual heavy petting, we hold that applying the plain language of the statute in this case produces an absurd result." Although the state's adultery and fornication statutes reveal a clear intent by the legislature to punish both participants in victimless consensual sexual activity, the child sex abuse statute is more like sexual assault laws that envision a perpetrator and a victim, Court noted.

But see: State v. J.D., 701 N.E.2d 908 (Ind. Ct. App 1998) (minors under age 14 can be adjudged to be juvenile delinquents pursuant to Indiana child molesting statute); C.D.H. v. State, 860 N.E.2d 608 (Ind. Ct. App 2007) (D must be older than victim to be guilty of child molest based on fondling).

TITLE: Jewell v. State

INDEX NO.: K.3.e.3.

CITE: (5th Dist., 12-13-07), Ind. App., 877 N.E.2d 864, *sum. aff'd.*, 887 N.E.2d 939 (Ind.2008)

SUBJECT: Child molesting - insufficient evidence

HOLDING: Evidence was insufficient to support one of two counts of Class A felony child molesting, because complaining witness (CW) did not live in Howard County in 1999 & even if CW was in Howard County in 1999, there is no evidence that a molestation occurred then. State alleged that D committed the offense in Howard County in 1999. CW testified that in 1998, he & his family moved to Clarksville, Indiana. Although CW generally testified that D molested him several times a week over the course of a two-year period, he did not specifically testify that D molested him during his 1999 visit to Kokomo. CW described only one incident of child molesting--a 1997 incident in which D performed oral sex on CW at D's house. As for CW's 1999 visit to Kokomo, CW did not testify that he was molested during this visit; rather, he testified that he "ran away" because he "was sick of what was happening. [He] felt like [he] was being violated & [he] couldn't tell anybody about it." There is no evidence that these "violations" were, in fact, "molestations" or that they met elements of Class A felony child molesting. Prosecutor "dropped the ball" during second trial, after jury was unable to reach a decision on this very count in the first trial. A conviction cannot be based on speculation. Watson v. State, 839 N.E.2d 1291 (Ind. Ct. App 2005). To say that the evidence presented at trial proves that D performed or submitted to sexual intercourse or deviate sexual conduct with CW in Howard County in 1999 is to engage in speculation. Held, judgment reversed in part, affirmed in part.

TITLE: Kemp v. State

INDEX NO.: K.3.e.3.

CITE: (1st Dist., 7-24-01), Ind. App., 753 N.E.2d 47

SUBJECT: Attempted child molesting & child solicitation superceded by statute - failure to state offense; police posing as child victims on Internet

HOLDING: Tr. Ct. properly granted D's motion to dismiss two counts of attempted child molesting & one count of child solicitation that had been filed against D, because facts set forth in charging informations failed to establish criminal offense. Charges were filed as result of police officers posing as 14-year-old girl on Internet, agreeing to meet with D in parking lot near motel. D drove to parking lot, brought condoms with him, & was arrested. Ct. held that facts alleged in information did not reach level of overt act leading to commission of child molesting. At most, such allegations only reach level of preparing or planning to commit offense. As to child solicitation charge, which requires urging immediate commission of crime & cooperation or submission of person solicited, Ct. noted that any "urging" in this case was contemplated by police officer posing as 14-year-old girl -- not D. Moreover, although D asked number of sexually explicit questions & made number of explicit comments, it was officer posing as 14-year-old girl who sought out D. Charging information did not sufficiently allege that D urge fictitious child victim to do anything. Moreover, there was nothing to demonstrate that offense was to be "immediately committed" as required by child solicitation statute, Ind. Code 35-42-4-6. Held, judgment affirmed.

RELATED CASES: LaRose, App., 820 N.E.2d 727 (child solicitation statute is constitutional; see full review at K.3.e.7); Laughner, App., 769 N.E.2d 1147 (crime of attempted child solicitation is established in case of one who engages in overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out solicited person is an adult).

TITLE: Koons v. State

INDEX NO.: K.3.e.3.

CITE: (4th Dist., 7-17-02), Ind. App., 771 N.E.2d 685

SUBJECT: Child molesting - sufficient evidence of deadly force to support Class A felony enhancement

HOLDING: State presented sufficient evidence to support conclusion that D threatened use of deadly force to facilitate crime of child molesting. Deadly force is "force that creates a substantial risk of serious bodily injury." Ind. Code 35-41-1-7. Here, complaining witness (CW) testified that when he refused to pull his pants down, D waved his belt around & threatened to hit CW with belt if he did not comply. D then proceeded to perform oral sex on CW & when CW attempted to get up, D struck him with belt. Striking a nine-year-old with belt has potential of causing serious permanent disfigurement, unconsciousness, or at very least, extreme pain. Further, it is not necessary to exert deadly force, rather it is sufficient if threat of deadly force is imminent enough to cause victim to submit to aggressor. Pennington v. State, 523 N.E.2d 414 (Ind. 1988). Jury could have reasonably concluded that D's waving of belt & threatening to strike CW was imminent enough to cause CW to submit to D. Such conduct presented risk of serious bodily injury sufficient to constitute deadly force. Ct. also concluded that D's threats to take CW somewhere where he would never see his parents or anybody again were used to facilitate offense rather than its coverup. Held, denial of post-conviction relief affirmed.

TITLE: Lechner v. State

INDEX NO.: K.3.e.3.

CITE: (2nd Dist., 9-20-99), Ind. App., 715 N.E.2d 1285

SUBJECT: Child molesting -- erroneous refusal of mistake of fact instruction

HOLDING: In child molesting prosecution, Tr. Ct. improperly declined to give instruction D tendered concerning defense of mistake of fact. Jury had before it evidence that victim told 17- year-old D she was at least 14 years old; that D's sister represented to D that victim was at least 14 years old; & that D was aware that victim's friends were 13 & 14 years old. In 1994, legislature amended Ind. Code 35-42-4-3 by criminalizing sexual activity by persons of any age involving persons under 14 years of age. In amending statute, legislature failed to amend subsection establishing as defense the actor's reasonable belief that victim was 16 years of age or older.

Ct. concluded that legislature's failure to modify age at which "reasonable belief" defense becomes available to a D was oversight or scrivener's error & could not be reflective of legislative intent to permit defense only when actor believes victim is 16 years or older, when statute itself does not prohibit activity with a child aged 14 to 16. Thus, availability of statutory mistake of fact defense is not limited to those Ds whose reasonable belief was that victim was at least 16 years old. Defense is available to any D who reasonably believes victim to be of such age that activity engaged in was not criminally proscribed. Held, conviction reversed.

RELATED CASES: T.M., App., 804 N.E.2d 773 (in child molesting prosecution, Tr. Ct. abused its discretion by denying D's mistake of fact defense).

TITLE: Lechner v. State

INDEX NO.: K.3.e.3.

CITE: (2d Dist. 9/27/82) Ind. App., 439 N.E.2d 1203

SUBJECT: Attempted child molesting - lesser included offenses (LIO)

HOLDING: Fondling (Ind. Code 35-42-4-3(d)) is not a LIO of attempted child molesting (Ind. Code 35-42-4-3(c)). Here, D was charged with attempted child molesting. Tr. Ct. ruled that state had failed to prove attempted child molesting but proceeded with bench trial on theory state presented prima facie case of child molesting under (d), fondling. Ct. finds subsection (d) is not LIO under either Ind. Code 35-41-1-2(a) [matching of elements test] or Ind. Code 35-41-1-2(d) [less harm, risk of harm or lesser kind of culpability]. Ct. rejects argument offense is "possibly" included. Here, charge did not allege facts to put D on notice that he should prepare to defend fondling charge. Held, conviction reversed. State may properly charge D with & seek conviction for fondling.

RELATED CASES: Brackens 480 N.E.2d 536 (Crim L 795(2); Tr. Ct. did not err in refusing to instruct jury that battery is LIO of child molesting where evidence was inconsistent with instruction).

TITLE: Louallen v. State

INDEX NO.: K.3.e.3.

CITE: (11-12-02), Ind., 778 N.E.2d 794

SUBJECT: Elements instruction - *mens rea* for child molesting

HOLDING: In child molesting prosecution, it is sufficient that jury find that D "knowingly" performed alleged fondling or touching in order to convict. Thus, Tr. Ct. did not err when it instructed jury that D could be convicted under Ind. Code § 35-42-4-3(b) for "knowingly or intentionally" fondling or touching child with intent to arouse or gratify himself or child. D argued that language in Ind. Code § 35-42-4-3(b) requiring fondling or touching to be performed "with the intent to arouse or satisfy...sexual desires" has effect of requiring that fondling or touching element of offense be performed intentionally. D & Ct. App. relied on Ind. Code § 35-41-2-2(d), which provides that same level of mental culpability is required for all elements of offense unless statute specifically provides otherwise. However, Indiana S.Ct. held that language of Ind. Code § 35-41-2-2(d) simply does not support this construction. An "intentional" mental state is not required by child molesting statute for commission of offense, only for a single element of offense. There is nothing in Ind. Code § 35-41-2-2(d) to suggest that Legislature intended that if a kind of culpability is required for one (but only one) material element of prohibited conduct, it is required for commission of offense & every material element of it. Held, transfer granted, Ct. App.' opinion on this issue at 755 N.E.2d 672 vacated, judgment affirmed.

RELATED CASES: Medina, App., 828 N.E.2d 427, aff'd on rehearing 832 N.E.2d 1142 (although Tr. Ct. erred in giving a child molest instruction that did not include a *mens rea* element, Ct. found error harmless as D would not challenge his *mens rea* on remand but would again deny the commission of the acts).

TITLE: McIver v. State

INDEX NO.: K.3.e.3.

CITE: (4th Dist., 7-31-95), Ind. App., 654 N.E.2d 308

SUBJECT: Child molesting - claim of tainted testimony

HOLDING: In decision affirming conviction for child molesting, Ct. rejected D's argument that 6 year-old complaining witness's testimony was tainted by numerous counseling sessions & memory enhancement. At no time during trial did CW claim anyone other than D molested her. Furthermore, there was no evidence that CW received repeated rehearsals & coaching. CW expressly denied that anyone told her what to say at trial, & D cross-examined CW at length concerning her contact with prosecutor, counselor, mother, & foster mothers. Jury was entitled to disbelieve D's explanation for CW's testimony. Held, conviction affirmed. **Note:** Because there was no evidence of memory enhancement in this case, Ct. declined D's invitation to provide guidelines for "preserving the pathology of the initial child memory."

TITLE: Nelson v. State

INDEX NO.: K.3.e.3.

CITE: (7/5/88), Ind., 525 N.E.2d 296

SUBJECT: Child molesting - sufficiency/inconsistent verdicts

HOLDING: Although jury rejected victim's testimony re sexual intercourse, her testimony re fondling & deviate sexual conduct was sufficient to support conviction of those offenses. D was charged with child molest (sexual intercourse), child molest (fondling), & child molest (deviate sexual conduct). Victim testified in detail re each offense. Examining physician, however, testified that there was no indication that she had ever had sexual intercourse. D was acquitted on that charge, but convicted on other 2. D argues on appeal that since victim testified in similar detail re all 3 offenses, & since jury rejected her testimony re sexual intercourse, her testimony was inherently incredible & cannot support convictions. Trier of fact may believe one part of witness' testimony & reject another part. Thomas 451 N.E.2d 651. If there is substantial probative evidence from which trier of fact can infer guilt beyond reasonable doubt, conviction must stand. Gleman 490 N.E.2d 711. Conviction may stand solely on uncorroborated testimony of minor witness, Pearson 486 N.E.2d 540, but may not stand solely on basis of inherently unbelievable testimony. Hill 497 N.E.2d 1061. In case at bar, jury undoubtedly chose to reject victim's testimony re sexual intercourse in light of examining physician's testimony. However, it was jury's prerogative to weigh other aspects of testimony & to infer from them guilt on other charges. Victim's testimony re those offenses was not inherently incredible, & was sufficient to support convictions. Held, convictions affirmed.

TITLE: Nuerge v. State

INDEX NO.: K.3.e.3.

CITE: (5th Dist., 3-13-97), App., 677 N.E.2d 1043

SUBJECT: Child molesting - Evidence sufficient to support element of intent

HOLDING: Touching alone is not sufficient to constitute crime of child molesting absent proof beyond reasonable doubt that act was accompanied by specific intent to arouse or satisfy sexual desires of victim or perpetrator. Ind. Code 35-42-4-3; J.H., App., 655 N.E.2d 624. Intent may be established by circumstantial evidence & may be inferred from actor's conduct and natural and usual sequence to which such conduct usually points. Pedrick, App., 593 N.E.2d 1213, reh'g denied. Here, facts most favorable to judgment show that D kissed child's inner thigh & placed his hand inside bottom of her shorts. When she asked him to stop, D stated, "You don't want to do this?" Ct. found that factfinder could have reasonably inferred from Ds conduct that he intended to arouse his or child's sexual desire, & evidence was sufficient to support requisite intent. Held, conviction affirmed in part, reversed in part on other grounds.

RELATED CASES: Bass, 947 N.E.2d 456 (Ind. Ct. App 2011) (sufficient evidence that D touched child with the intent to arouse his sexual desires where he touched her sides, rubbed her back, asked her to look at his rash on his inner thigh and threatened to drop his pants; fact D did not touch child's breast or genitalia did not matter); Rodriguez, App., 868 N.E.2d 551 (evidence sufficient where D touched CW's privates several times, pulled CW's pants down & on one occasion offered CW \$3 to take off her clothes); Spann, App., 850 N.E.2d 411 (evidence D touched boy's genitals, along with statements made to cellmate, was sufficient evidence of intent); Altes, App., 822 N.E.2d 1116 (second CW testified that after D laid his arm around her, he started rubbing her upper body, initially over her clothes, but then moved his hand underneath her shirt, touching her skin from her shoulders down to her waist. Trier of fact could reasonably infer from CW's testimony that D's conduct was intended to arouse or satisfy his or CW's sexual desires); Kanady, App., 810 N.E.2d 1068 (two instances of inappropriate touching along with circumstantial evidence of D's intent, based on his statements to child, were sufficient to support conviction).

TITLE: Nuerge v. State

INDEX NO.: K.3.e.3.

CITE: (5th Dist., 3-13-97), App., 677 N.E.2d 1043

SUBJECT: Child molesting - conviction under statute not in effect at time of alleged act

HOLDING: Tr. Ct. committed fundamental error in convicting D under version of child molesting statute which was not in effect at time of acts alleged. Constitutional provisions against ex post facto criminal sanctions require that criminal proceedings be governed by statutory provision in effect at time of crime. U.S. Const. Art. 1, §10; Ind. Const. Art. 1, §24. Underlying rationale against ex post facto laws is that D must be given fair notice at time of act that his/her conduct is deemed criminal. Mudd, App., 483 N.E.2d 782; Bryant, App., 446 N.E.2d 364. Here, D was convicted of Class C child molesting of twelve-year old girl. Version of Ind. Code 35-42-4-3 in effect at time of alleged act would only have authorized charging D with Class D felony. Amended version of statute became effective thereafter, & reduced threshold age of victim from fourteen to twelve for purposes of charging suspect with Class C felony. Ct. found that application of amended statute to conduct which occurred prior to effective date of amendment violated proscription against ex post facto laws and constituted fundamental error. However, Ct. determined that jury was presented with sufficient evidence to support guilty verdict irrespective of victim's age, and conviction could be modified without new trial. Held, Class C child molesting conviction reversed, case remanded with instructions to enter judgment & sentence for child molesting as Class D felony.

RELATED CASES: Clark, App., 695 N.E.2d 999 (insufficient evidence of intent to arouse where D undressed child except for her shirt, hung her upside down on nail, and tickled her under the arms).

TITLE: Pedrick v. State

INDEX NO.: K.3.e.3.

CITE: (5th Dist. 06/16/92), App., 593 N.E.2d 1213

SUBJECT: Battery as Lesser-Included Offense (LIO) of Child Molesting

HOLDING: Tr. Ct. erroneously denied instruction on battery as LIO of child molesting where Information did not preclude battery conviction, & there was serious evidentiary dispute as to element distinguishing 2 offenses. All actions alleged against D involved touching outside of clothing, & D contended that touches were in context of encouraging children. To be entitled to LIO instruction, all elements of LIO must be included in greater offense, & there must be serious evidentiary dispute about element which distinguishes offenses. Although battery is not inherently LIO of child molesting, because charging information alleged performed or submitted to touching or fondling, it did contain elements of battery as LIO. Element which distinguishes child molesting from battery is whether there was intent to arouse or satisfy sexual desires & Ct. found serious dispute on distinguishing element did exist.

TITLE: Rupert v. State

INDEX NO.: K.3.e.3.

CITE: (4th Dist., 8-24-99), Ind. App., 717 N.E.2d 1209

SUBJECT: Child molesting - scrotum is "sex organ" under statute

HOLDING: Term "sex organ," as defined by Ind.'s criminal deviate conduct statute, includes not only penis but scrotum. D nibbled & sucked on scrotum of his girlfriend's one-year-old child, which was sufficient to support child molesting under Ind. Code 35-42-4-3(a). D argued that legislature intended to limit definition of male sex organ to penis, noting that "sexual intercourse" is defined by Ind. Code 35-41-1-26 as "an act that includes any penetration of the female sex organ by the male sex organ." Ct. rejected this narrow interpretation of sex organ, noting that it would lead to absurd result that would abrogate purpose of statute. Held, conviction affirmed.

RELATED CASES: Scott, App., 771 N.E.2d 718 (any reference to part of female anatomy which is used to urinate also refers to external genitalia, & consequently to "sex organ").

TITLE: Schroeder v. State
INDEX NO.: K.3.e.3.
CITE: (11/12/2013), 998 N.E.2d 279 (Ind. Ct. App. 2013)
SUBJECT: Sufficient evidence for class A felony child molesting convictions
HOLDING: State presented sufficient that twenty-four-year-old D committed five counts of class A felony child molesting, which requires that the person committing the act be at least twenty one years old (Ind. Code 35-42-4-3(a)(1)), even though the person who committed the actual criminal acts at D's behest, D's girlfriend, was only nineteen years old. Because of her age, she was charged only with class B felony child molesting.

There is no separate crime of being an accessory to a crime; rather, a D may be convicted as a principal upon evidence he aided or abetted perpetration of the crime. Sanquenetti v. State, 727 N.E.2d 437, 441 (Ind. 2000). A person who would be considered an accessory under common law now vicariously commits the actual offense. Id.; see also Johnson v. State, 687 N.E.2d 345, 349 (Ind. 1997). Accordingly, D was appropriately charged and convicted of class A felony child molesting. Held, judgment affirmed.

TITLE: Smith v. State

INDEX NO.: K.3.e.3.

CITE: (02/11/21) Ind. Ct. App., 163 N.E.3d 925

SUBJECT: Sufficient evidence for child molesting -- child witness's testimony not incredibly dubious

HOLDING: On appeal from his Level 4 felony child molesting conviction, Defendant challenged the sufficiency of the evidence under the incredible dubiousity rule, which allows the reviewing court to judge the credibility of witnesses when certain conditions are met. The rule is applied in limited circumstances, namely where there is: “[1])a sole testifying witness; [(2)]testimony that is inherently contradictory, equivocal, or the result of coercion; and [(3)]a complete absence of circumstantial evidence.” Moore v. State, 27 N.E.3d 749, 756 (Ind. 2015). The complaining witness (CW), her mother, and a detective all testified, but the CW was the sole testifying witness who could establish the elements of the offense. However, her testimony was not inherently contradictory and equivocal and her testimony on the important facts regarding the molestation was consistent. Also, the fact there was no physical evidence to corroborate her testimony does not render it incredibly dubious. Held, conviction affirmed.

TITLE: Snider v. State

INDEX NO.: K.3.e.3.

CITE: (10/10/84) Ind., 468 N.E.2d 1037

SUBJECT: Child molesting - instruction

HOLDING: Ct. rejects D's contention that instruction re child molesting was fundamental error for its failure to include criminal intent as element of offense. Here, D appeals denial of PCR on this issue. D failed to object to instruction at trial & did not raise issue in MCE or on direct appeal. Ct. finds instruction (set forth in opinion) did not eliminate/prohibit consideration of intent to molest or injure. It did not preclude D from proving/arguing touching of child was innocent. Instruction "would have been clearer if it had sorted out criminal intent & separately referred to it," but does not constitute fundamental error. Held, denial of PCR affirmed.

RELATED CASES: Medina, App., 828 N.E.2d 427 (although Tr. Ct. erred in giving a child molest instruction that did not include a *mens rea* element, Ct. found error harmless as D would not challenge his *mens rea* on remand but would again deny the commission of the acts); Jaco, 778 N.E.2d 803 (Tr. Ct. was correct in not instructing jury that State was required to prove that D acted with intent to arouse or satisfy sexual desires; Ct. disapproved Ct. App.' view that intent to arouse is implicit in use of terms "sexual intercourse" & "deviate sexual conduct").

TITLE: Spurlock v. State

INDEX NO.: K.3.e.3.

CITE: (12-18-96), Ind., 675 N.E.2d 312

SUBJECT: Child molesting - insufficient evidence to support Class A felony enhancement

HOLDING: Evidence was insufficient to support D's conviction on three counts of Class A felony child molesting based upon jury finding that molestation was committed by means of sexual intercourse, use of deadly weapon, or both. Count I was based upon Ind. Code 35-42-4-3(a), which elevates molestation of child under fourteen years old to Class A felony where molestation involves sexual intercourse & use of, or threatened use of, deadly force, while armed with deadly weapon or resulting in serious bodily injury. Sexual intercourse is defined as act that includes any penetration of female sex organ by male sex organ. Ind. Code 35-41-1-26. Slightest penetration is sufficient to sustain conviction for child molestation & incest. Dinger, 540 N.E.2d 39. Here, twelve-year-old victim testified that she did not know whether penetration took place but stated repeatedly that D "tried" to have intercourse with her. Relying on Pasco, 563 N.E.2d 587, State argued that penetration can be inferred from circumstantial evidence. However, in Pasco & other cases cited by State, there was physical evidence of penetration. Here, because victim was of age to understand & respond to questions, did not state that penetration occurred & there was no medical or physical evidence of penetration, evidence was insufficient to support enhancement of charge against D to Class A felony.

Counts II & III involved child molestation charges enhanced from Class C to Class A felonies because alleged molestation was committed by threatening to use deadly force. Threat to use deadly force to compel compliance may be sufficient to elevate child molestation to Class A felony without presence of weapon. Bazile v. State, 540 N.E.2d 49. However, for threat to elevate molestation to Class A felony, threat must be used to coerce or otherwise facilitate offense, not aid in maintaining victim's silence afterwards. Here, victim testified that D threatened to kill her & hurt her family if she told anyone about molestation incident. Ct. found D's alleged threats insufficient to warrant enhancement of charge against D to Class A felony. Held, child molestation Counts remanded with instructions to vacate D's conviction as to Count I, reduce convictions on Counts II & III to Class C felony & impose amended sentence of sixty-nine years; judgment affirmed in all other respects; Sullivan & Selby, JJ., dissenting, found sufficient evidence to support conviction on Count I.

RELATED CASES: Cutshall, 166 N.E.3d 373 (Ind. Ct. App. 2021) (circumstantial evidence was sufficient to show penetration even without testimony from child complaining witness who was too young to speak in full sentences); (Ind. Ct. App. 2015) Mastin, 966 N.E.2d 197 (Ind. Ct. App. 2012) (medical testimony that child had scars from genital herpes on her labia majora and bilateral redness on labia minora, along with D's admission to rubbing his penis on her vagina constitutes sufficient evidence of penetration even if D denied penetrating child's vagina); Smith, App., 779 N.E.2d 111 (Ct. found sufficient evidence of penetration despite CW's inconsistent statements & complete lack of physical evidence); Davies, App., 730 N.E.2d 726 (evidence was insufficient to support conviction of child molesting by sexual intercourse, where neither pathologist's testimony nor D's statement established that object that caused obliteration of CW's hymen was penis).

TITLE: Starks v. State

INDEX NO.: K.3.e.3.

CITE: (2d Dist. 01/30/91), Ind. App., 565 N.E.2d 1142

SUBJECT: Child molesting - multiple acts

HOLDING: Double jeopardy (DJ) does not preclude D's conviction on 2 separate counts of Class B Child Molesting where, even though acts occurred in relatively short time span on one occasion, each was separate & distinct act that was source of distinct & separate harm to victim, & none were preparatory & incidental to others. D was charged with 3 counts of Class B child molesting, 1 count as Class C felony, & 1 count of confinement as Class D felony. Through plea bargain, D was sentenced to 2 concurrent 20-year terms for 2 counts of child molesting & 1 concurrent 4-year term on confinement. D filed petition for PCR based on grounds that plea was not knowing & voluntary because he had been advised that maximum sentence possible was 72 years; & that because DJ permitted only conviction on 1 count of child molesting & 1 count of confinement, maximum sentence could be only 24 years. His petition was denied. Evidence showed that D forced victim to commit fellatio, victim unsuccessfully tried to get help, D then had anal & vaginal intercourse with victim, forced her to engage in act of fellatio, "lick his butt," & again engage in coitus. Ct. of Appeals considered Ellis 528 N.E.2d 60, & Lane, App., 539 N.E.2d 488, & found that act of coitus & 2 acts of deviate sexual conduct were separate & distinct, even though occurring in short time span, & that each act was source of distinct harm to victim & not preparatory & incidental to each other. Ct. also found that fondling count could have been supported by either second act of fellatio, second act of coitus, or forcing victim to lick D's posterior. Because of separate & distinct nature of acts, D was facing maximum sentence of 72 years, advice was correct, plea was knowing & voluntary, & denial of PCR was proper. Holding, judgment of PCR Ct. affirmed.

RELATED CASES: Sharp, 951 N.E.2d 282 (Ind. Ct. App 2011) (no DJ violation where State established that D committed two separate offenses, Class A and Class C felony child molesting, based on distinct facts); Ward, App., 736 N.E.2d 265 (convictions for attempted child molesting & child molesting did not violate state & federal prohibitions against DJ, where fondling of child was separate offense from attempted penetration of child's anus).

TITLE: State v. J.D.

INDEX NO.: K.3.e.3.

CITE: (3rd Dist., 11-17-98), Ind. App., 701 N.E.2d 908

SUBJECT: Child molest statute - no exemption of perpetrators on basis of age

HOLDING: Minors under-age of fourteen can be adjudged to be juvenile delinquents pursuant to child molesting statute, Ind. Code 35-42-4-3. Legislature intended that statute would apply to offenders regardless of their age & would apply to offenders who fall within protected age group set forth in statute. There is nothing in statute to indicate legislative intent to exclude offending persons under fourteen years of age, or to set minimum age for perpetrator of offense. In this case, Tr. Ct. erred in interpreting child molesting statute to exempt perpetrators who are younger than fourteen years of age at time they commit molestation. Ct. noted that in situations where there clearly is no criminal intent, such as where very young children engage in innocent sexual play, allegation of juvenile delinquency based upon such play would be inappropriate. Held, judgment reversed & remanded.

RELATED CASES: C.D.H., App., 860 N.E.2d 608 (D must be older than victim to be guilty of child molest based on fondling); W.C.B., App., 855 N.E.2d 1057 (child molest statute, as applied to juveniles, is not unconstitutionally vague, contradictory and does not violate Art. I, ' 23 of the Ind. Const.).

TITLE: Stetler v. State

INDEX NO.: K.3.e.3.

CITE: (08-14-12), 972 N.E.2d 404 (Ind. Ct. App 2012)

SUBJECT: Child molesting - sufficient evidence of penetration

HOLDING: In Class A felony child molesting prosecution, evidence supported jury's finding that D penetrated complaining witness's (C.W.'s) female sex organ with his finger. C.W. testified during trial that D "didn't put his finger inside my private." However, nurse who conducted sexual assault examination testified that C.W. clearly indicated that D touched her clitoral hood, which nurse explained is an internal feature of the female sex organ. Nurse testified that based on her experience, a child tends to have a distorted perception of the meaning of words. In this case, C.W. knew where D touched her, but because of her youth and limited understanding, she was unable to recognize or verbalize the clitoral hood as an interior part of the female sex organ. Held, conviction affirmed.

TITLE: T.G. v. State

INDEX NO.: K.3.e.3.

CITE: (1/31/2014), 3 N.E.3d 19 (2014)

SUBJECT: Juvenile's vagueness challenge to child molest statute rejected - evidence sufficient

HOLDING: Evidence was sufficient to establish that 11 year-old T.G.'s touching or fondling on 6 year-old complaining witness (C.W.) was committed with the intent to arouse or satisfy T.G.'s sexual desires. D argued that because children may experiment by looking at and touching another child's genitals, it is unreasonable to infer intent to satisfy or arouse sexual desire solely from the fact that the child intentionally touched another child's genitals. However, because T.G. was significantly older than C.W., they "cannot be considered peers." Moreover, circumstances in T.G.'s case included repeated incidents of fondling that could lead a reasonable fact-finder to find beyond a reasonable doubt that T.G. met the statutory requirements of committing the acts to arouse or satisfy sexual desires. Court "stress[ed] that in other cases, different or additional factors may be present that shed light on the accused child's intent."

Court also rejected T.G.'s argument that Indiana's child molesting statute is unconstitutionally void for vagueness and fails to provide notice of conduct prohibited for children who might not know that prohibited touching is of a sexual nature. Court disagreed, noting that "if a child does not know that an act would result in sexual arousal or desire, then that child could not have the required intent to have committed child molesting. If a child knows that an act would result in sexual arousal or desire, then the Child Molesting Statute provides sufficient notice to the child that such an act is prohibited." Held, judgment affirmed.

TITLE: Ward v. State

INDEX NO.: K.3.e.3.

CITE: (9/12/88) Ind., 528 N.E.2d 52

SUBJECT: Attempted child molesting - solicitation sufficient

HOLDING: Evidence of solicitation of child may be sufficient to support conviction for attempted child molesting. Evidence showed D followed 11-year-old victim & offered 3 times to perform fellatio on him. Police later sent 15-year-old boy to approach D. D offered to perform fellatio &, when that offer was refused, vaguely suggested that 15-year-old visit him sometime. Generally, to be guilty of attempt D must have acted with specific intent to commit offense & must have engaged in overt act constituting substantial step toward commission of crime. Zickefoose 388 N.E.2d 507. Ind. S. Ct. adopts 2 separate tests to determine when solicitation may be substantial step. First test has 3 parts: (1) solicitation takes form of urging; (2) solicitation urges immediate commission of crime; & (3) cooperation or submission of person solicited is essential feature of substantive crime. Perkins, Criminal Attempt & Related Problems, 2 UCLA.L.Rev. 319 (1955). Second test focuses on nature of crime; the more serious, the farther back the law will reach in sanctioning behavior as attempt. Sayre, Criminal Attempts, 41 Harv.L.Rev. (1988). Both tests warrant sanctioning solicitation of child as attempted child molesting, generally. Here, solicitation of 11-year-old constituted substantial step; solicitation of 15-year-old, being less urgent, did not. Held, conviction affirmed re 11-year-old, reversed re 15-year-old. DeBruler, J., DISSENTS, arguing that solicitation of child under 12 is separately sanctioned offense.

RELATED CASES: Laughner, App., 769 N.E.2d 1147 (crime of attempted child solicitation is established in case of one who engages in overt act that constitutes a substantial step toward soliciting someone believed to be a child under 14 to engage in sexual activity, even if it turns out solicited person is an adult); Shahan, App., 669 N.E.2d 1012 (evidence sufficient where D repeatedly asked his daughter to immediately fondle him); Johnston, 541 N.E.2d 514 (evidence sufficient where D requested parent's permission to molest their children, then brought vibrator & lubricants to their home).

TITLE: Watkins v. State

INDEX NO.: K.3.e.3.

CITE: (07/24/91), Ind., 575 N.E.2d 624

SUBJECT: Multiple convictions - child molesting

HOLDING: D's conviction for child molesting as Class C felony could not stand because act involved was committed within moments of act supporting conviction for attempted child molesting as Class B felony & was part of same incident. Ind. S. Ct. granted transfer & reversed part of 1st District Ct. App.' opinion in Watkins, App., 571 N.E.2d 1262, wherein one of D's convictions for child molesting had been upheld against double jeopardy challenge, because it caused separate & distinct harm to victim. In so doing, Ct. relied on & reaffirmed its prior decision in Bowling 560 N.E.2d 658. Held, conviction for child molesting on Count I reversed, Ct. App. decision otherwise affirmed.

RELATED CASES: Kocielko, 943 N.E.2d 1282 (Ind. Ct. App 2010) (unless instructed to the contrary, Ct. should consider episodic nature of multiple violent crimes when committed against a single victim in a single confrontation; here, imposition of concurrent sentences, as opposed to consecutive sentences, fairly reflects the episodic nature of the crimes committed by D); Ward, App., 736 N.E.2d 265 (convictions for attempted child molesting & child molesting did not violate state & federal prohibitions against DJ, where fondling of child was separate offense from attempted penetration of child's anus).

K. CRIMES

K.3. Offenses against the person

K.3.e.4. Incest (Ind. Code 35-46-1-3)

TITLE: Bohall v. State

INDEX NO.: K.3.e.4.

CITE: (12/5/89), Ind., 546 N.E.2d 1214

SUBJECT: Incest - adoption does not defeat consanguinity

HOLDING: Despite fact that D's natural daughter had been adopted, D was properly convicted of incest based on evidence that he had sexual intercourse with her. Evidence showed that after victim's adoptive father died, she ultimately went to live with D, her natural father, & his wife. During this time, she testified that D had sexual intercourse with her several times against her will, threatening to kill her if she told anyone. She became pregnant, & blood tests established D as father of victim's child. D was convicted, but Ct. App. reversed conviction on ground that adoption of victim severed D's parental relationship to her, so that he could not be prosecuted under incest statute. In doing so, Ct. App. relied on State v. Fischer, App., 493 N.E.2d 1265. While it is true that adoption statute provides that adoption severs relationship between child & natural parents, this provision is intended to benefit child & adoptive parents by preventing natural parents from interfering with them. It is not intended, nor is it possible, that this legislative declaration nullify link of consanguinity. Throughout history, incest has been defined as sexual intercourse between persons of certain degrees of consanguinity. [Citations omitted.] 1987 amendment adding words "related to the person biologically" to incest statute, Ind. Code 35-46-1-3, was not intended to change law but to correct erroneous interpretation rendered in Fischer. This subsequent amendment is indicative of legislative intent at time of initial enactment. See US Fidelity & Guar. v. DeFluiter, App., 456 N.E.2d 429. Held, conviction affirmed & Fischer expressly overruled. Dickson, J., CONCURS IN RESULT, & Shepard & DeBruler, JJ., DISSENT.

TITLE: Jackson v. State

INDEX NO.: K.3.e.4.

CITE: (2nd Dist., 7-8-97), Ind. App., 682 N.E.2d 564

SUBJECT: Incest - biological relationship; evidence sufficient

HOLDING: To support conviction for incest, State must prove that D & complaining witness (CW) are biologically related. Ind. Code 35-46-1-3(a). Here, D argued that because State did not question CW or any other witness regarding exact nature of her relationship to D, it failed to prove that he was biologically related to CW. Although State did not directly ask CW whether she was biologically related to D, Ct. held that other evidence in record sufficiently established that D was her biological father. Specifically, State established that: 1) CW's biological mother & D were divorced, & CW had D's last name; 2) D paid child support for CW after divorce, & CW testified that she had routinely visited & received financial support from D; 3) medical report prepared by hospital personnel described CW's relationship with D as biological; & 4) CW referred to D throughout trial as her "father," but referred to one of her siblings as her "stepsister." This testimony demonstrates that CW was aware of distinction between natural parent & step parent. Taken together, this evidence is sufficient to support D's conviction for incest. Held, conviction affirmed; Kirsch, J., dissenting.

TITLE: Mettler v. State

INDEX NO.: K.3.e.4.

CITE: (5th Dist., 7-29-98), Ind. App., 697 N.E.2d 502

SUBJECT: Attempted incest - evidence insufficient

HOLDING: D's solicitation of sexual favors from his 18-year-old daughter did not constitute sufficient evidence to support his conviction for attempted incest. D left letter, five dollar bill & half of hundred dollar bill in envelope on his daughter's bed. Letter solicited daughter to submit to fondling & cunnilingus, promising her other half of hundred dollar bill if she complied. Whether acts of solicitation rise to level of attempt to commit crime involves consideration of two separate tests. First, solicitation may be substantial step only when: 1) solicitation takes form of urging; 2) solicitation urges commission of crime at some immediate time & not in future; & 3) cooperation or submission of person being solicited is essential feature of substantive crime. Ward, 528 N.E.2d 52. findings are made, Ct. must consider specific crime, & wrongful human conduct that legislature sought to sanction. Id. Ct. held that D's one-time-only letter, in & of itself, did not constitute sufficient step towards commission of incest because it did not constitute "urging." Even if it were urging, invitation to daughter was to submit to acts "some night." This cannot be classified as seeking immediate action. D's request was nothing more than one for submission to his sexual desires at some undefined future time. Held, conviction reversed; Mattingly, J., dissenting.

TITLE: Pavan v. State

INDEX NO.: K.3.e.4.

CITE: (11/17/2016), 64 N.E.3d 231 (Ind. Ct. App 2016)

SUBJECT: Statute of limitations' tolling provision not intended to decriminalize consensual incestuous sex for family members over age 31

HOLDING: Trial counsel was not ineffective for failing to pursue a statute-of-limitations defense to an incest charge involving D's 34-year-old biological aunt. Charges were filed within the general five-year statute of limitations applicable to class C felonies, but Ind. Code § 35-41-4-2(e) provides that prosecution for incest is barred "unless commenced before the date the alleged victim reaches thirty-one years of age."

The purpose of Ind. Code § 35-41-4-2(e) is to extend the statute of limitations to allow victims of certain sex crimes to report their abuse upon reaching adulthood, not to shorten the applicable statute for any crime or wholly decriminalize an otherwise illegal sex act based on the age of the other party. The statute criminalizing incest, Ind. Code § 35-46-1-3, does not support D's assertion that it is not illegal to engage in consensual incestuous sex when the other person involved is over age thirty-one. Court rejected D's "absurd and illogical" interpretation of the statutes, concluding trial counsel cannot be deemed ineffective for failing to pursue a meritless defense. Held, denial of petition for post-conviction relief affirmed.

TITLE: Pearman v. State
INDEX NO.: K.3.e.4.
CITE: (1st Dist. 11/3/86) Ind. App., 499 N.E.2d 277
SUBJECT: Incest - proof of marriage to parent of victim
HOLDING: Evidence was sufficient to sustain finding that D was married to victim's mother. Here, D contends only proper/admissible evidence of marriage is marriage certificate. Facts in criminal prosecutions can be proved by circumstantial evidence as well as by direct evidence. Brunes, App., 475 N.E.2d 356. Admissions of D are competent to prove marriage. 52 Am.Jur.2d, Marriage, Section 153 (1975). Ct. finds D's statements to police officers that he was married to victim's mother were competent proof of their marriage. D also argues Tr. Ct. erred in admitting deed & mortgage as evidence of marriage. Ct. finds question is one of first impression in IN & points to other jurisdictions upholding use of deeds reciting grantors to be husband & wife as proof of marriage. [Citations omitted.] Held, no error; incest conviction affirmed.

TITLE: State v. Anderson
INDEX NO.: K.3.e.4.
CITE: (3d Dist. 11/7/85) Ind. App., 484 N.E.2d 640
SUBJECT: Incest - related by blood or marriage
HOLDING: Tr. Ct. did not err in dismissing information charging D with incest. Here, D allegedly had sexual intercourse with his niece by marriage. Tr. Ct. found Ind. Code 35-46-1-3 prohibits such conduct between uncles & nieces related by consanguinity (blood), but not by affinity (marriage). Although statute does not contain language requiring consanguinity, Ind. S. Ct. in State v. Tucker (1910), 174 Ind. 715 held criminal statutes must be strictly construed & proscribed only sexual relations between uncles & nieces related by consanguinity. Present incest statute is not significantly different than statute construed in Tucker. Held, dismissal affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.e.5. Child exploitation

TITLE: Ashcroft v. Free Speech Coalition

INDEX NO.: K.3.e.5.

CITE: 535 U.S. 234 (2002)

SUBJECT: First Amendment, free speech, child pornography, obscenity, overbroad, vagueness

HOLDING: The First Amendment generally protects speech from content-based restrictions except for a few narrowly defined categories. The government may prohibit the distribution of pornography which is obscene under Miller v. California, 413 U.S. 15 (1973), and may prohibit distribution, manufacture, and possession of child pornography under New York v. Ferber, 458 U.S. 747 (1982), and Osborne v. Ohio, 495 U.S. 103 (1990).

The Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 et seq., prohibits "any visual depiction" that "is, or appears to be of a minor engaging in sexually explicit conduct," whether or not it meets the Miller definition of obscenity, and whether or not it was produced using actual children as in Ferber. It also defines child pornography to include images that have been "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that they depict minors engaging in sexually explicit behavior. Held, the CPPA's prohibition sweeps in a large amount of material which is in neither category nor is therefore protected by the First Amendment. Ferber permitted the regulation of child pornography because of the actual harm to children involved in its manufacture and does not permit regulation of non-obscene "virtual child pornography" when no real children are depicted or involved in its production. The challenged sections of the CPPA are overbroad and unconstitutional under the First Amendment.

TITLE: Babin v. State

INDEX NO.: K.3.e.5.

CITE: (2/22/93), Ind. App., 609 N.E.2d 3

SUBJECT: Child exploitation -- photographing sexual conduct is sexual conduct

HOLDING: D was convicted of conspiracy to commit murder and child exploitation. On appeal, D claimed that evidence was insufficient to sustain child exploitation conviction. Ind. Code 35-42-4-4(b) states, among other things, that sexual conduct includes photographing any performance or incident that includes sexual conduct by child under sixteen years of age. D claims specifically that State failed to prove that photographs he took were taken with intent to satisfy or arouse his or victim's sexual desires. Ct. held that evidence was sufficient because photos showed victim in various states of undress including several completely nude poses, some photos showed victim touching her genitals, in other photos honey was being poured on her breast, and victim testified that D fondled her during some photography sessions. Held, conviction affirmed; Miller, J., concurring.

TITLE: Browning v. State
INDEX NO.: K.3.e.5.
CITE: (07-17-12), 971 N.E.2d 696 (Ind. Ct. App 2012)
SUBJECT: Child exploitation - sufficient evidence D disseminated child pornography; file sharing program
HOLDING: In child exploitation prosecution, State presented sufficient evidence that D knowingly disseminated child pornography where he kept the pornography in a file on his computer that was linked to LimeWire, an internet file sharing program. Conviction for child exploitation requires State to prove beyond a reasonable doubt that D knowingly or intentionally disseminated or exhibited to another person matter that depicts or describes sexual conduct by a child under eighteen years of age. Ind. Code 35-42-4-4(b). To disseminate for purposes of the statute means "to transfer possession for free or for a consideration." Ind. Code 35-42-4-4(a)(1).

Here, D's statement to police officers reveals he knew his files on LimeWire were capable of being downloaded by others using the program. Even if D did not open and view the files once they were downloaded, their filenames included several references indicating their contents were child pornography. Because D kept the files in a folder to share with others, he should have known there was a high probability others would download the files. Held, judgment affirmed.

TITLE: Cutshall v. State
INDEX NO.: K.3.e.5.
CITE: (12-23-20), 160 N.E.3d 247 (Ind. Ct. App 2020)
SUBJECT: Sufficiency and vagueness challenges to possession of child pornography conviction rejected
HOLDING: State presented circumstantial evidence to prove that Defendant knowingly possessed two digital images of child pornography on his wife's cellphone, even though the forensic analysis of the LG phone did not reveal who had downloaded the images. Court rejected Defendant's suggestion that there was insufficient evidence that the girls in the digital images appeared to be less than eighteen years old. The detective who conducted the forensic analysis testified that the girls in the images were "prepubescent" females. Additionally, "an assessment as to the girl's age is not only a matter of common sense but also the trier of fact may take into account her overall appearance, including the developmental stage of the girl based upon her breasts, body hair, and other anatomical features." Bone v. State, 771 N.E.2d 710, 717 (Ind. Ct. App. 2002).

Defendant also waived his argument that the child pornography statute was unconstitutionally vague because he did not raise the claim before the trial court. Waiver notwithstanding, the Court held that Indiana's child pornography statute is not unconstitutionally vague. Given the precise circumstances of this case, a person of ordinary intelligence would, from the phrase "appears to be less than eighteen years of age" as used in Indiana's possession of child pornography statute, know that having digital images of prepubescent females engaged in sexual intercourse and oral sex was included in the proscribed conduct of possessing a digital image that depicts sexual conduct by a child who appears to be less than eighteen (18) years of age. Accordingly, Defendant failed to meet his burden of showing that Ind. Code § 35-42-4-4(d) is unconstitutionally vague. Held, judgment affirmed.

TITLE: Delagrange v. State

INDEX NO.: K.3.e.5.

CITE: (3/18/2014), 5 N.E.3d 354 (Ind. 2014)

SUBJECT: Attempted child exploitation - sufficiency; using camera attached to shoe

HOLDING: Evidence was sufficient to support D's convictions for attempted child exploitation, where he used a camera attached to his shoe to record digital images of areas under minors' skirts and dresses. D argued that child exploitation statute, Ind. Code § 35-42-4-4, requires the child's genitals be uncovered with the intent to satisfy sexual desires, and because none of the images he captured depict uncovered genitals, State failed to prove an element of the charged offense (i.e., "sexual conduct"). But State charged D with attempted child exploitation, which requires a showing that he took a "substantial step" toward capturing images of uncovered genitals. It was reasonable for jury to infer that D intended to capture not just images of undergarments as he testified, but also - or instead - images of uncovered genitals. Held, transfer granted, Court of Appeals' opinion at 981 N.E.2d 1227 vacated, judgment affirmed.

TITLE: Eckrich v. State
INDEX NO.: K.3.e.5.
CITE: (4/5/2017), 73 N.E.3d 744 (Ind. Ct. App 2017)
SUBJECT: Pulling up child porn on computer constitutes possession of child pornography
HOLDING: Intentionally accessing and viewing websites that contain child pornography constitutes "possession" under Ind. Code § 35-42-4-4(c), even where there was no attempt to download or save the images on computer. Defendant argued that there was no evidence that he knew of the computer caching process that automatically stored images from websites he visited, or that he controlled any of the images stored through that process. However, no such evidence was necessary in this case because Defendant intentionally pointed a web browser to certain websites containing images of child pornography, and intentionally viewed the pornographic images therein. In doing so, Defendant controlled when images of child pornography would appear on the computer screen, and for how long. These actions constitute sufficient control over the pornographic images such that Defendant possessed them under Indiana law. Held, judgment affirmed and remanded on other grounds.

TITLE: Keith v. State

INDEX NO.: K.3.e.5.

CITE: (7/24/2018), 105 N.E.3d 1147 (Ind. Ct. App 2018)

SUBJECT: Sufficient evidence for possession of child pornography for images sent via Snapchat

HOLDING: The State presented sufficient evidence that D committed Level 6 felony possession of child pornography (Ind. Code § 35-42-4-4(c)), even though no sexual images were found on his cell phone or computer because the images were sent to him via Snapchat, which automatically deletes images if the recipient does not save them immediately. H.T. lived in a Knightstown campground, where her father worked. D also worked there, and he befriended H.T. Several years later, when H.T. was 14, D asked her to fondle his penis and send him pictures of her breasts and genitalia. H.T. sent the requested images via Snapchat at least ten times. Unless a recipient of a Snapchat image immediately saves the image, it is automatically deleted within 10 seconds. If a recipient does save an image, the person who sent the image receives notification that the image was saved. At trial, H.T. testified that she received at least one such notice regarding an image she sent D. Also introduced at trial was D's text message to H.T. that "[f]or some reason the photos you sent last night got on my computer through iCloud." Thus, even though none of these images were found on D's cell phone or computer, this evidence was sufficient to show that D possessed the images of H.T.'s breasts and genitalia. Held, judgment affirmed.

TITLE: Logan v. State

INDEX NO.: K.3.e.5.

CITE: (10-31-05), Ind. App., 836 N.E.2d 467

SUBJECT: Child pornography statute not overbroad

HOLDING: On interlocutory appeal, Ct. found Ind.'s child pornography & exploitation statute, Ind. Code 35-42-4-4, was constitutional in relation to specific facts of case. The statute as written is overbroad in similar ways to the federal statute in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), but not substantially so. Subsection 4(b) applies to not only visual child pornography, but also written descriptions of child pornography. Similarly, subsection 4(c) applies to written descriptions, virtual child pornography, & pornography showing youthful-looking adults. "Whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." New York v. Ferber, 458 U.S. 747 (1982). D did not allege the child pornography found on his work computer is outside constitutional permissible reach of Ind. Code 35-42-4-4 & Ct. left "for another day" questions concerning constitutionally questionable sections of the statute. Ct. also rejected D's claim that statute was unduly vague in that the terms "sexual conduct" & "possesses" do not adequately inform as to what conduct is prohibited. D contended that "exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person" in defining "sexual conduct" is vague, but Ct. noted this is essentially the definition of "lewd" conduct discussed in Ferber. Ct. did not find "possess" to be vague in this instance where images were deleted & required a forensic computer program to locate them on D's computer. Discovery of these images on a computer harddrive is circumstantial evidence that one possessed the images & so is not unduly vague. Ct. also found the statute did not violate Art. I, Sec. 9 of the Ind. Const. as the regulation of child pornography does not involve political expression & does not involve a "core" value under the Ind. Const. Held, judgment affirmed.

TITLE: Pope v. State

INDEX NO.: K.3.e.5.

CITE: (5th Dist., 12-28-00), Ind. App., 740 N.E.2d 1247

SUBJECT: Child exploitation - evidence sufficient

HOLDING: Evidence was sufficient to support D's convictions for child exploitation & possession of child pornography. Conviction for child exploitation requires State to prove beyond reasonable doubt that D: 1) knowingly or intentionally; 2) disseminated or exhibited to another person photographs of sexual conduct by child under eighteen years of age; 3) by using computer network. Ind. Code 35-42-4-4(b)(2). Here, D admitted that he possessed & transmitted over internet photographs depicting girls & boys under sixteen years of age engaging in sexual acts. Detective testified that D sent him photographs during their internet conversation. As result of those communications, detective determined D's age, email address & physical description. Circumstances established by forensic examination of D's computer demonstrated that D was aware that pornographic photographs had been saved to his computer's memory & that he knowingly possessed them. Thus, even without D's admissions, State presented sufficient evidence demonstrating that D sent photographs via internet & that he was person who possessed pictures. Held, convictions affirmed.

TITLE: Saavedra v. State

INDEX NO.: K.3.e.5.

CITE: 186 N.E.3d 134 (2022) Ind. Ct. App.

SUBJECT: Child exploitation - evidence sufficient

HOLDING: To obtain a conviction for child exploitation, the State must prove beyond a reasonable doubt that Defendant knowingly or intentionally created a digitized image of any performance or incident that included the uncovered genitals of a child less than 18 years of age. Ind. Code § 35-42-4-4(b)(4). Here, Defendant began asking his granddaughter (C.W.), who lived in Guatemala and was then 15 years old, to send him "sexy videos" in exchange for money sent to her family. C.W. complied, sending her grandfather explicit photographs of herself and the requested videos. On appeal of his convictions, Court rejected Defendant's argument that the State failed to establish that he "created" any of the images at issue. Bringing into existence the images of C.W. found on Defendant's cell phone involved more than taking them; Defendant told C.W. to use her telephone to capture the explicit images, explained what he wanted to see, and paid her to take them. Defendant's course of action clearly brought the photographs into being, even if he was not the one actually taking them. Regarding the age element, given their close familial relationship and frequent communication, State presented sufficient evidence from which a reasonable jury could conclude that Defendant was aware of a high degree of probability that C.W. was under age 18. Court also affirmed Defendant's vicarious sexual gratification conviction, finding sufficient evidence to establish that C.W. was under the age of 16 when Defendant first solicited the videos from her. Held, attempted rape, child exploitation and vicarious sexual gratification convictions affirmed, remanded for clarification that no judgment of conviction for sexual battery was entered and regarding Defendant's sentence.

TITLE: State v. Zidel

INDEX NO.: K.3.e.5.

CITE: 940 A.2d 255 (2008)

SUBJECT: Morphed pornography involving real children's heads protected by First Amendment

HOLDING: New Hampshire Supreme Court held a New Hampshire statute that prohibits possession of child pornography is unconstitutional as applied to a D's possession of images that were created by combining photographs of the heads and shoulders of children with photographs of the bodies of adults engaged in sexual activity. Court rejected the idea that the involvement of real children takes this type of pornographic image outside the First Amendment's protection of free speech. Court discussed New York v. Ferber, 458 U.S. 747 (1982) and Osborne v. Ohio, 495 U.S. 103 (1990), cases upholding the government's authority to regulate sexually explicit works depicting actual minors, and Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), which struck down federal statutory provisions authorizing a conviction for possessing pornographic material that "appeared" to portray a minor engaged in sexual activity and included virtual pornography as prosecuted. In present case, D, a photographer at a summer camp, possessed photos of the heads and shoulders of minor campers superimposed over photographs of adults engaged in sexual activity. Majority, based on language from Free Speech Coalition, found that when "a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image." Majority conceded that such harm to the children depicted if the images were ever distributed. As in Free Speech Coalition, Court rejected State's argument that the conviction should stand because it prevents harm to children caused by pedophiles whose appetites for child abuse are whetted by viewing virtual child pornography. Court held that the harm to the campers from dissemination of the morphed images is, like the harm discussed in Free Speech Coalition, "contingent upon the occurrence of another arguably unlawful act" to be committed at some indefinite future time: distribution of the images. Furthermore, Free Speech Coalition emphasized that the holding in Osborne is "anchored" in a concern for the participants in the production of the child pornography.

K. CRIMES

K.3. Offenses against the person

K.3.e.7 Child Solicitation

TITLE: Kemp v. State

INDEX NO.: K.3.e.7.

CITE: (1st Dist., 7-24-01), Ind. App., 753 N.E.2d 47

SUBJECT: Attempted child molesting & child solicitation superceded by statute - failure to state offense; police posing as child victims on Internet

HOLDING: Tr. Ct. properly granted D's motion to dismiss two counts of attempted child molesting & one count of child solicitation that had been filed against D, because facts set forth in charging informations failed to establish criminal offense. Charges were filed as result of police officers posing as 14-year-old girl on Internet, agreeing to meet with D in parking lot near motel. D drove to parking lot, brought condoms with him, & was arrested. Ct. held that facts alleged in information did not reach level of overt act leading to commission of child molesting. At most, such allegations only reach level of preparing or planning to commit offense. As to child solicitation charge, which requires urging immediate commission of crime & cooperation or submission of person solicited, Ct. noted that any "urging" in this case was contemplated by police officer posing as 14-year-old girl -- not D. Moreover, although D asked number of sexually explicit questions & made number of explicit comments, it was officer posing as 14-year-old girl who sought out D. Charging information did not sufficiently allege that D urge fictitious child victim to do anything. Moreover, there was nothing to demonstrate that offense was to be "immediately committed" as required by child solicitation statute, Ind. Code 35-42-4-6. Held, judgment affirmed.

RELATED CASES: LaRose, App., 820 N.E.2d 727 (child solicitation statute is constitutional; see full review at K.3.e.7); Laughner, App., 769 N.E.2d 1147 (crime of attempted child solicitation is established in case of one who engages in overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out solicited person is an adult).

TITLE: Kuypers v. State

INDEX NO.: K.3.e.7.

CITE: (2nd Dist., 01-09-08), Ind. App., 878 N.E.2d 896

SUBJECT: Child solicitation - evidence sufficient; online chat with no details/plans to meet

HOLDING: Evidence that D engaged in an online chat with a believed-to-be fifteen-year-old girl, in which he neither specifically asked her to do anything nor made specific arrangements to meet in person, was sufficient to support D's conviction for child solicitation. In course of online conversation, D elicited information regarding girl's age, height, weight, and breast size. He asked what she likes to do for a "good time," she replied, "name it," and he replied: "bent over your table with my d*ck in your p*ssy, while I smack your [a]ss..." He asked her if she likes "doggie," and then asked her if she had "meet [sic] off line." After she responded "yes," D asked, "so when can I take you out[?]"

Court held that an inference may reasonably be drawn from this evidence that D was, at least, expressing a wish or desire that fifteen-year-old girl meet him in person and engage in sexual intercourse. Fact that girl responded she was grounded and they made no specific plans to meet does not change fact that D made the request, that he recommended a course of action, or that he implicitly gave her permission--authority--to meet him in person and engage in sexual activity. There is no requirement that a solicitor actually complete the act of meeting with his or her victim to commit the crime of child solicitation. LaRose v. State, 820 N.E.2d 727 (Ind. Ct. App 2005). Furthermore, the statute specifically states there is no immediacy requirement and does not require that the solicitor inject details into the conversation such as the time and place of the act. Neither a meeting nor an immediate request is necessary to complete the crime because it is the mere exposure of children to such solicitations that the statute seeks to avoid. Id. Therefore, to commit child solicitation, a person must merely "command, authorize, urge, incite, request, or advise" a child to commit the act. Ind. Code 35-42-4-6. Held, judgment affirmed.

TITLE: LaRose v. State

INDEX NO.: K.3.e.7.

CITE: (2nd Dist., 1-14-05), Ind. App., 820 N.E.2d 727

SUBJECT: Child solicitation - constitutionality

HOLDING: Ind. Code 35-42-4-6, which prohibits solicitation of "an individual the person believes to be a child under fourteen (14) years of age," is constitutional, thus Tr. Ct. did not err in denying D's motion to dismiss. Statute is a content-based restriction of speech, but serves two compelling state interests which pass strict scrutiny under the Constitution: 1) the legislature's determination that an adult urging a child to have sex is an inherent evil *in & of itself* causing harm to a child *regardless of whether the solicited act is consummated*. (Court's emphasis). 2) statute allows the interdiction of child predators before they can solicit an actual child -- taking a proactive rather than retroactive approach to seeking predators. Court found statute meets the necessary prong of strict scrutiny as only the "absurd" alternative of using actual children would provide an alternative to frustrating & apprehending child predators. Distinguishing Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), which struck down a statute prohibiting the production of sexual images of children created by a computer, Court noted that Indiana's statute is narrowly drawn, & Ashcroft concerned "computer-generated, child pornography rather than active predators searching for child-victims." Court noted that Ashcroft does not protect speech due to a "mistake of fact," which if so would be akin to protecting a person who solicited an undercover officer as a hit man.

Court also rejected D's challenge to the uncertainty of the additional *mens rea* that allows a conviction if an individual "believes [a person] to be a child under fourteen," as this was a permissible broadening of the statute by the legislature to remove any doubt as to a "mistake of fact" defense in response to State v. Kemp, 753 N.E.2d 47 (Ind. Ct. App2001). Court also rejected D's void for vagueness challenge & his claim that no evidence existed that he solicited anyone to engage in an act "at some immediate time." The crime of child solicitation is completed at the time of utterance. In Kemp, Court gave no constitutional significance to its definition of "solicitation" so legislature was free to amend the statute as it saw fit on this question which it did by specifically stating no immediacy requirement was required. Court also distinguished Indiana v. Hess, 414 U.S. 105 (1973), where the D urged an illegal act at a later time, because here the solicitation itself was the criminal act. Held, judgment affirmed.

TITLE: Laughner v. State
INDEX NO.: K.3.e.7.
CITE: (1st Dist., 6-12-02), Ind. App., 769 N.E.2d 1147
SUBJECT: Attempted child solicitation - constitutionality; police posing as child victims on Internet
HOLDING: Ct. rejected D's claim that criminalizing attempted solicitation of adult pretending to be a child on Internet violates Due Process & Indiana's Due Course of Law provisions by criminalizing his belief that police officer was a child. D was not prosecuted for believing officer was under fourteen but for having intentionally solicited a person whom he believed to be a child under age fourteen to engage in sexual activity.

Ct. next concluded that, as applied, Indiana's child solicitation statute does not violate federal & state constitutional protections of speech by seeking to criminalize communications over Internet. Finally, statute does not violate Proportionality Clause of Indiana Constitution even though it punishes attempted solicitation of child on Internet, a class C felony, more severely than face-to-face solicitation of actual child, a class D felony. Although differing penalty is somewhat troubling, Ct. is not free to set aside legislative determination as to appropriate penalty merely because it seems too severe. State v. Moss-Dwyer, 686 N.E.2d 109 (Ind. 1997). Legislature may have deemed that use of Internet may expose Indiana children to dangers that require greater vigilance by society, or that use of Internet lessens inhibitions. Hence, statutory scheme may reflect legislative determination that Internet crime was indeed a more serious crime. Held, conviction affirmed.

TITLE: Pavlovich v. State

INDEX NO.: K.3.e.7.

CITE: (3/28/2014), 6 N.E.3d 969 (Ind. Ct. App 2014)

SUBJECT: Child solicitation - can be through indirect means

HOLDING: Because D communicated with a person he believed to be S.Y., who he believed was passing such communications on to her nine-year-old-sister P.Y., the Tr. Ct. did not err when it denied D's motion for a directed verdict and the State presented evidence of a probative nature from which the jury could find that D committed child solicitation as a class D felony. A person eighteen years or older who knowingly or intentionally solicits a child under fourteen years of age or an individual the person believes to be a child under fourteen to engage in sexual intercourse, deviate sexual conduct, or any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person commits child solicitation. Solicitation can occur by means specifically designated in the statute or "by any other means." Ind. Code 35-42-4-6(b). Here, D texted and emailed twenty-one-year-old S.Y. and a police officer posing as S.Y. about his desire to be with S.Y. and her nine-year-old sister. Although S.Y. told D that she communicated D's wishes to her sister, she did not. However, the crime is completed at the point of solicitation and D believed that his desires would be communicated. Thus, there was sufficient evidence to sustain D's convictions. Held, judgment affirmed; Barnes, J., dissenting in part on the basis that no illicit communication ever reached a child under fourteen years old or a person pretending to be a child; further, the State never charged or argued attempt.

K. CRIMES

K.3. Offenses against the person

K.3.e.8. Child seduction (Ind. Code 35-42-4-7)

TITLE: Corbin v. State

INDEX NO.: K.3.e.8.

CITE: (10/1/2014), 17 N.E.3d 270 (Ind. 2014)

SUBJECT: Attempted child seduction - teacher's Facebook messages to student

HOLDING: Per Curiam. Tr. Ct. did not err in denying D's motion to dismiss attempted child seduction charge against him. At issue was whether high school teacher took a "substantial step" toward committing the crime when he urged a 16 year-old student to sexually satisfy him, sneak out of her house and send him explicit photographs. Applying two-part test in Ward v. State, 528 N.E.2d 52 (Ind. 1988), D argued that his explicit messages he sent to student's Facebook account were simply an invitation to the student and did not constitute an attempt because he was not in a position to immediately commit the crime.

What constitutes an "attempt" offense can, on occasion, be determined as a matter of law, but often the question involves subtle distinctions in behavior and the nuance of the context in which the behavior occurs. One difference between D's and most other cases, including Ward, is those cases involved review of a conviction after all of the evidence had been presented. D's case, by contrast, is in the charging stage, when other evidence, if there is any, is not yet known. And for the most part, the charges against D reflect the language of the seduction statute. At this point, Court could not say that dismissal is required. Held, transfer granted, Court of Appeals' opinion at 999 N.E.2d 70 vacated, judgment affirmed.

TITLE: State v. D.M.Z.

INDEX NO.: K.3.e.8.

CITE: (1st Dist., 12-16-96), Ind. App., 674 N.E.2d 585

SUBJECT: Child seduction - "custodian"

HOLDING: For purposes of Indiana's Child Seduction Statute, Ind. Code 35-42-4-7, a custodian must be someone who exercises more than limited or occasional supervision over a child. "Custodian" includes any person responsible for child's welfare who is employed by public or private residential school or foster care facility. Ind. Code 35-42-4-7(c). To be "custodian," one must have personal accountability or ability to act without guidance or superior authority. Here, child-care employee at youth shelter who was subject to direction & control of counselor was not responsible for child's welfare, & therefore could not be charged under Ind. Code 35-42-4-7 for conduct involving children at shelter. Held, grant of D's motion to dismiss sustained.

RELATED CASES: Gellenbeck, App, 918 N.E.2d 706 (although CW's father still retained some authority over her, record contains ample evidence to allow jury to conclude that D, CW's uncle, was a "custodian" under statute); Smith, 867 N.E.2d 1286 (D, a school bus driver working for an independent contractor under contract with school corporation, did not fall within definition of "child care worker" under child seduction statute); Stratton, App., 791 N.E.2d 220 (Tr. Ct. properly denied D's motion to dismiss child seduction charges, where D was "child care worker" who provided care & supervision of students within meaning of child seduction statute)

K. CRIMES

K.3. Offenses against the person

K.3.e.9 Sexual Battery (Ind. Code 35-42-4-8)

TITLE: Bailey v. State

INDEX NO.: K.3.e.9.

CITE: (3-11-02), Ind. App., 764 N.E.2d 728

SUBJECT: Sexual battery - prior encounters with D sufficient to show complaining witness (CW) was compelled to submit to touching

HOLDING: Evidence was sufficient to support sexual battery conviction where CW perceived she was compelled to submit to D's touch by force or imminent threat of force. D grabbed CW's buttocks in park after two previous encounters where D approached CW & asked her to pull her pants down & another where CW saw D masturbating in park. Relying on Scott-Gordon v. State, 579 N.E.2d 602 (Ind. 1991), D argued that State did not prove that CW was compelled to submit to touching by force or threat of force as required by Ind. Code 35-42-48. Distinguishing Scott-Gordon, Ct. noted that CW in this case had two unsolicited encounters with D prior to incident in question. CW had responded to D in those situations by telling him to leave her alone & hurrying home. Thus, prior to incident in question, CW had already told D to leave her alone. Further, because of prior encounters, CW had reason to fear D. In determining whether CW was compelled to submit to D's touching, subjective test is used, which looks to CW's perception of circumstances surrounding incident in question. Accordingly, taking all factors into account, there was sufficient evidence to support conclusion that D compelled CW to submit to touching. Held, judgment affirmed; Darden, J., dissenting.

TITLE: Ball v. State
INDEX NO.: K.3.e.9.
CITE: (04-20-11), 945 N.E.2d 252 (Ind. Ct. App 2011)
SUBJECT: Sexual battery - kissing a sleeping person insufficient
HOLDING: Being asleep is not equivalent to a mental disability or deficiency for purposes of sexual battery statute, Ind. Code 35-42-4-8(a)(2). Not all touchings intended to arouse or satisfy sexual desires constitute sexual battery. Scott-Gordon v. State, 579 N.E.2d 602 (Ind. 1991). Here, D was convicted of Class D felony sexual battery for kissing and licking complaining witness's (CW's) face while she was asleep. Once she awoke, she asked D to stop and he left her apartment. CW uses a wheelchair and takes pain medication that can affect her memory, but State never argued this made her "mentally disabled or deficient" under Ind. Code 35-42-4-8(a)(2).

Both rape and criminal deviate conduct statutes include identical language--the force or threat of force and mental disability or deficiency prongs--that are found in the sexual battery statute. However, those crimes also include a third prong not found in the sexual battery statute, *i.e.*, that the victim is unaware that the conduct is occurring. Under rape and criminal deviate conduct statutes, being asleep only has supported a conviction charged under the "unawareness" prong, not the "mentally disabled or deficient" prong. Becker v. State, 703 N.E.2d 696 (Ind. Ct. App 1998).

The plain meaning of "mentally disabled or deficient," as well as the facts of cases in which a victim has been found to be mentally disabled or deficient, would exclude a temporary, natural state such as sleep from inclusion in that phrase. Moreover, given legislature's exclusion of the "unawareness" prong from the sexual battery statute, "it would be disharmonious to construe 'mentally disabled or deficient' to include sleep for purposes of the sexual battery statute when the same phrase does not include sleep for purposes of the other sexual offense statutes." Held, conviction reversed and remanded with instructions to enter judgment for battery as a Class B misdemeanor.

RELATED CASES: Perry, 962 N.E.2d 154 (Ind. Ct. App 2012)

TITLE: Chatham v. State

INDEX NO.: K.3.e.9.

CITE: (1st Dist., 04-11-06), Ind. App., 845 N.E.2d 203

SUBJECT: Sexual battery - insufficient evidence of force

HOLDING: In sexual battery prosecution, State presented insufficient evidence that complaining witness (CW) was compelled to submit to a touching by force or the imminent threat of force. State charged D based on his act of coming up behind a woman & grabbing her between the crotch & buttocks. Ct. rejected D's claim that insufficient evidence existed that D acted with intent to arouse or satisfy his or CW's sexual desires, relying on J.J.M. v. State, 779 N.E.2d 602 (Ind. Ct. App 2002). D's intent may be inferred from his conduct & the natural consequences thereof. However, evidence that a victim did not voluntarily consent to a touching does not in itself, support the conclusion that D compelled the victim to submit to the touching by force or threat of force. Bailey v. State, 764 N.E.2d 728 (Ind. Ct. App2002). Ct. concluded that CW's situation was comparable to that in Scott-Garden v. State, 579 N.E.2d 602 (Ind.1991) & Smith v. State, 678 N.E.2d 1152 (Ind. Ct. App1997). In both cases, no compulsion existed to submit to the touching by force or threat of force. State attempted to distinguish from testimony that CW feared D & that she did not have an opportunity to consent to D touching her as she was caught off guard. However, the fear experienced by CW must precede the touching; & while Ct. agreed the witness did not have an opportunity to grant or deny consent, Ct. was constrained to follow Indiana S.Ct. precedent in Scott-Gordon, which involved similar facts. Held, judgment reversed & remanded to enter new sentence & judgment for lesser included offense of battery as a Class B misdemeanor.

RELATED CASES: E.S., 198 N.E.3d 701 (Ind. Ct. App. 2022) (when D put his hand in the holes in C.W.'s pants and put his hand on her breast, he did not restrain her in any way, and she was free to get up and walk away. When D put his arm around C.W. and pulled her close on another occasion, the State did not present evidence that he did so to arouse or satisfy his sexual desires. As a result, the State did not prove beyond a reasonable doubt that D committed sexual battery); McCarter, 961 N.E.2d 43 (Ind. Ct. App 2012) (although CW did not voluntarily submit to D's groping of her buttocks and touching may have occurred with some force, State failed to prove that CW perceived that she was compelled to submit to it by force or threat of force; a single advance is not sufficient to support a sexual battery conviction).

TITLE: Childs v. State

INDEX NO: K.3.e.9.

CITE: (2nd Dist., 05-15-08), Ind. App., 886 N.E.2d 75

SUBJECT: Erroneous judgment of conviction for sexual battery - not lesser/included offense of child molesting

HOLDING: After bench trial, Tr. Ct. erred by entering judgement of conviction for sexual battery, which it described as a lesser "included offense" of child molesting as a Class B felony. Sexual battery requires a finding that victim was: 1) compelled to submit to touching by force or imminent threat of force; or 2) so mentally disabled or deficient that consent to touching cannot be given. Ind. Code 35-42-4-8(a). Neither statutory language nor charging informations for child molesting as a Class B or C felony include this element, thus sexual battery is not a lesser included offense of child molesting. Court could not remand with instructions to enter judgment of conviction for child molesting as a class C felony, because D was originally charged with and impliedly acquitted of that offense. Due to double jeopardy, D cannot be retried on child molesting as class B or C felony. Held, conviction reversed.

RELATED CASES: Walker, 988 N.E.2d 341 (Ind. Ct. App 2013) (because class D felony sexual battery is neither inherently nor factually included in class C felony child molesting as charged, Tr. Ct. did not err in failing to instruct jury on class D felony sexual battery).

TITLE: Gliva v. State

INDEX NO.: K.3.e.9.

CITE: (10-7-21), Ind. Ct. App. 2021, 178 N.E.3d 321

SUBJECT: Sexual battery statute requires that victim be "unaware" of touching as it occurs and not before it occurs

HOLDING: The State alleged that Defendant touched victim's buttocks three times while she was shopping at a large retail store. The State's charges alleged the unaware prong of Indiana's sexual battery statute. The unaware prong of the sexual battery statute applies when the victim lacks knowledge or acquaintance of the touching or is unconscious of the touching as the touching is occurring. Unawareness that the touching is going to occur alone does not satisfy the provision. Under the Court of Appeals' construction of the statute, which requires unawareness contemporaneous with the touching, the Court could not say with confidence that the State met its burden of proving sexual battery beyond a reasonable doubt. Evidence indicated victim was aware of the touching.

TITLE: Hutton v. State

INDEX NO.: K.3.e.9.

CITE: (06/15/2022), Ind. Ct. App., 190 N.E.3d 413

SUBJECT: Grabbing victim and pulling her towards him and touching her pubic area while she was pinned against sink sufficient to support element of force/threat of force for sexual battery

HOLDING: Defendant was convicted of sexual battery based on evidence he came up behind a woman in a restroom, pulled her towards him, pinned her against a sink and touched her pubic area. On appeal, he argued there was no force or threat of use of force for the touching because there were two separate acts, the pinning against the sink and the touching. Court of Appeals found the evidence sufficient to support the element of force when the woman was pinned against the sink when the touching occurred. The Court of Appeals did not find the complaining witness's testimony to be incredibly dubious.

TITLE: Smith v. State

INDEX NO.: K.3.e.9.

CITE: (2nd Dist., 4-22-97), Ind. App., 678 N.E.2d 1152

SUBJECT: Sexual battery - evidence of force insufficient

HOLDING: There was insufficient evidence of force or imminent threat of force to sustain D's convictions for sexual battery. State was required to prove that D touched another person with intent to arouse or satisfy his own sexual desires or sexual desires of another person when that person was compelled to submit to touching by force or imminent threat of force. Ind. Code 35-42-4-8(1). Evidence revealed that while returning from trip, D unbuttoned complaining witness's (CW's) pants & fondled his penis. CW testified that he had no reason to be afraid of D before incident & did not say anything to D during incident because he did not know what to do. Although it was clear that CW did not consent to touching, evidence that CW did not voluntarily consent to touching does not in itself, support conclusion that D compelled CW to submit to touching by force or threat of force. Scott-Gordon v. State, 579 N.E.2d 602 (Ind. 1991). Only touchings in which CW is compelled to submit by force or imminent threat of force violate Ind. Code 35-42-4-8. There was similar lack of sufficient evidence on element of force to support conviction on second count of sexual battery. Held, convictions reversed.

RELATED CASES: Perry, 962 N.E.2d 154 (Ind. Ct. App 2012) (while "reprehensible," D's actions in inserting his fingers into CW's vagina and rubbing his penis on her buttocks while she was sleeping do not qualify for sexual battery; although CW did not consent to the touching, there was no evidence of force or imminent threat of force); McCarter, 961 N.E.2d 43 (Ind. Ct. App 2012) (although CW did not voluntarily submit to D's groping of her buttocks and touching may have occurred with some force, State failed to prove that CW perceived that she was compelled to submit to it by force or threat of force; a single advance is not sufficient to support a sexual battery conviction).

TITLE: Thompson v. State
INDEX NO.: K.3.e.9.
CITE: (1-16-02), Ind. App., 761 N.E.2d 467
SUBJECT: Sexual battery - not lesser-included offense (LIO) of rape
HOLDING: Sexual battery is not LIO of rape. In order for sexual battery to be LIO of rape, according to Ind. Code 35-41-1-16, it must be established by proof of same material elements or less than all material elements required to establish commission of crime charged. Sexual battery requires touching with intent to arouse or satisfy one's own sexual desires or those of victim, which is not required for rape. Ind. Code 35-42-4-8; Ind. Code 35-42-4-1. Furthermore, in Scrougham v. State, 564 N.E.2d 542 (Ind. Ct. App 1990), Ct. held that sexual battery was not LIO of rape, & this case has not been explicitly overruled. Since D was not given notice of elements of crime for which he was ultimately convicted, he was unable to adequately prepare defense. Held, conviction reversed.

K. CRIMES

K.3. Offenses against the person

K.3.e.10 Sexual Misconduct with Inmates (see K.5.h)

(no cases)

K. CRIMES

K.3. Offenses against the person

K.3.e.11 Sexual misconduct with minor (Ind. Code 35-42-4-9)

TITLE: Adcock v. State

INDEX NO.: K.3.e.11.

CITE: (12/8/2014), 22 N.E.3d 720 (Ind. Ct. App 2014)

SUBJECT: Ineffective assistance of appellate counsel - failure to challenge sufficiency of evidence to support child molesting and sexual misconduct with minor convictions

HOLDING: Appellate counsel was ineffective for failing to challenge D's two Class A felony child molesting convictions and two Class B felony sexual misconduct with minor convictions. Complaining witness (C.W.) was 20 when she testified at trial regarding incidents that took place when she was under 14 years of age in junior high. The sexual misconduct charges relate to when she was in high school. C.W. (D's stepdaughter) could not recall whether she was 13 or 14 when D digitally penetrated her vagina, thus State could have only charged and convicted D with Class B felony sexual misconduct with a minor, not Class A felony child molesting. Barger v. State, 587 N.E.2d 1304 (Ind. 1992). Moreover, the evidence did not establish that these acts occurred within five years before the filing of the charging information, as required by the statute of limitations. The Court would have been compelled to reverse the Class B felony sexual misconduct with a minor convictions as time-barred if the issue had been raised on direct appeal. See King v. State, 560 N.E.2d 491 (Ind. 1990).

Because C.W. clearly testified that the first time D touched her vagina with his penis was when she was in high school and above the maximum age to support the other child molesting charge, evidence was insufficient to support that count. With regard to the last count, evidence that D touched C.W.'s genitals with his own was insufficient to establish "penetration" under Spurlock v. State, 675 N.E.2d 312 (Ind. 1996), and total absence of evidence on this count was plain and obvious on the face of the record. Held, judgment reversed and remanded for granting of D's PCR petition and vacating of convictions.

Note: Throughout the opinion, Court repeatedly criticizes the State for "blur[ring] the line" between statutory crimes, giving a "misleading and over-generalized" statement of the facts and "incorrect" summary of testimony, and for failing to acknowledge controlling precedent.

TITLE: Beedy v. State
INDEX NO.: K.3.e.11.
CITE: (8/22/2016), 58 N.E.3d 987 (Ind. Ct. App 2015)
SUBJECT: Previous sex offense against same victim does not preclude "Romeo and Juliet" defense
HOLDING: Indiana's "Romeo and Juliet" statute, Ind. Code § 35-42-4-9(e), generally allows an

affirmative defense to a sexual misconduct with a minor charge for someone who is less than four years older than the victim and who is in an ongoing or dating relationship with the victim. The person asserting the defense must not have "committed a sex offense...including a delinquent act that would be a sex offense if committed by an adult...against any other person." Ind. Code § 35-42-4-9(e)(4).

Here, D was 17 when he began dating, and subsequently having sex with, 13 year-old A.W. As a result of their conduct, D was adjudicated a delinquent for committing acts against A.W. of child molesting and child exploitation, criminal offenses if committed by an adult. D and A.W. subsequently had sexual intercourse and conceived a child. State charged D with sexual misconduct with a minor and successfully precluded D from raising the Romeo and Juliet defense by alleging he was disqualified due to his prior juvenile adjudications for sex offenses.

Addressing an issue of first impression, Court held that D was erroneously precluded from asserting the affirmative defense. "To us, it is clear that when read in context, the plain language of Ind. Code 35-42-4-9(e)(4) means that a proper sex offense against the same victim does not render the defense inapplicable." Held, conviction reversed; Bradford, J., dissenting, believes "any other person" should be interpreted to mean any person other than the D.

TITLE: Hmurovic v. State
INDEX NO.: K.3.e.11.
CITE: (10/27/2015), 43 N.E.3d 685 (Ind. Ct. App 2015)
SUBJECT: Sexual misconduct with a minor - insufficient evidence to support age element
HOLDING: Court reversed D's conviction for Class B felony sexual misconduct with a minor, where State presented insufficient evidence that complaining witness (C.W.) was under the age of sixteen when he first had sexual intercourse or deviate sexual conduct with her. C.W. testified she did not remember having sex with D prior to her sixteenth birthday, and D's videotaped interrogation does not establish that the activity with C.W. began when she was fourteen or fifteen years of age. Although C.W. acknowledged that she had previously told an investigator that the sex acts started around the age of thirteen, the jury acquitted D of class A felony child molesting charge, which alleged sexual conduct when she was under the age of fourteen. C.W.'s prior inconsistent statement to social worker at hospital could not be used by jury as substantive evidence to establish her age. Lawrence v. State, 959 N.E.2d 385 (Ind. Ct. App 2012). Held, judgment affirmed.

TITLE: King v. State
INDEX NO.: K.3.e.11.
CITE: (03-02-10), 921 N.E.2d 1288 (Ind. 2010)
SUBJECT: Attempted dissemination of matter harmful to minor- officer may pose as minor
HOLDING: Overruling Gibbs v. State, 898 N.E.2d 1240 (Ind. Ct. App 2008) and Aplin v. State, 889 N.E.2d 882 (Ind. Ct. App 2008), Court held that the offense of Attempted Dissemination of Matter Harmful to Minors can be committed when a D attempts to transmit proscribed matter by the Internet to an adult police detective posing as a minor. It is no defense to a crime of attempt that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted. Ind. Code 35-41-5-1. It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. Zickefoose v. State, 388 N.E.2d 507 (Ind. 1979).

Here, acting with the culpability required for the commission of the crime of Dissemination of Matter Harmful to Minors, D took the substantial step of transmitting by the internet such proscribed matter to a person he believed was a fifteen-year-old girl. It matters not that his intended recipient was an adult; the Attempt statute makes clear that such "a misapprehension of the circumstances" is no defense. Although to be guilty of Dissemination of Matter Harmful to Minors, the recipient must be eighteen years of age, such requirement does not evidence legislative intent to foreclose application of the general Attempt statute to prosecute unsuccessful attempts to commit such Dissemination. Thus, there was sufficient evidence to support D's conviction for Attempted Dissemination, although the recipient was an adult police officer posing as a fifteen-year-old girl. Held, transfer granted, Court of Appeals' opinion summarily affirmed in all other respects and judgment of Tr. Ct. affirmed.

TITLE: Moon v. State

INDEX NO.: K.3.e.11.

CITE: (2nd Dist., 3-9-05), Ind. App., 823 N.E.2d 710

SUBJECT: Sexual misconduct with minor - D's burden to show "reasonable belief"

HOLDING: In sexual misconduct with a minor prosecution, jury instructions properly placed burden on D to prove by preponderance of the evidence that he had a reasonable belief that complaining witness was over 16 years old. Tr. Ct.'s instruction was a correct statement of the law because the mistaken belief defense in Ind. Code 35-42-4-9 does not negate an element of the crime since if believed the defense only reduces D's culpability for acts he admits that he committed. If a defense specifically negates an element of the crime, State has the burden to prove beyond a reasonable doubt the absence of the defense. A *mens rea* of "knowingly" applies to the crime although not specifically mentioned in Ind. Code 34-42-4-9(a), but the D's *knowledge of* the victim's age is not an element of the crime. (Ct.'s *emphasis*). When a defense only addresses the D's culpability, the D may be assigned the burden to prove the defense by a preponderance of the evidence. Newson v. State, 785 N.E.2d 1155 (Ind. Ct. App. 2003); see also Fenix v. State, 438 N.E.2d 1005 (Ind. Ct. App 1982) (dealing with reasonable belief defense in child molesting prosecutions).

D's analogy to the mistake of fact defense is misplaced, as two cases cited by D dealt with assertion of the defense to disprove an element of the offense & in the other the reviewing Ct. found the evidence did not support a mistake of fact defense but only served to support self-defense. Self-defense & entrapment are defenses of justification which statutorily established burden shifting to the State. This allocation of burden is permissible but not constitutionally required. Held, judgment affirmed.

RELATED CASES: Wilson, 4 N.E.3d 670 (Ind. Ct. App 2014) (reasonable belief defense does not negate a material element of the crime, but instead is an affirmative defense that must be raised by D and for which D must bear the initial burden of proof); Wilson, 997 N.E.2d 38 (Ind. Ct. App 2013) (because age-based exception to sexual misconduct with minor is not in section of statute defining the offense but in subsequent section, the exception is an affirmative defense, not a material element of crime, so Tr. Ct. properly instructed jury that D carried burden to prove he reasonably believed child was at least 16).

TITLE: Smith v. State
INDEX NO.: K.3.e.11.
CITE: (4th Dist., 11-03-09), (Ind. App. 2009) 915 N.E.2d 1037
SUBJECT: Sexual misconduct with minor - repeated touchings & viewing of pornographic images
HOLDING: Evidence was sufficient to support D's conviction for sexual misconduct with a minor, which requires State to prove that he was at least 21 and, with a child at least 14 years of age but less than 16, performed or submitted to any fondling or touching with intent to arouse or to satisfy the sexual desires of either the child or the older person. Ind. Code 35-42-4-9(b)(1). Complaining witness (CW) testified that D touched her inner thigh twice and played with her bathing suit strap while closing pornographic images on computer and touched her stomach inside elastic waist band of her pajama pants. This was sufficient evidence from which jury could infer that D was touching CW with intent to arouse his sexual desires. Even if D did not intend for pornographic images to pop up, he did not dispute that he viewed them and touched CW. Held, judgment affirmed; Kirsch, J., dissenting, argues that the evidence of touching in this case gives rise to only speculation as to what D's intention was, which cannot constitute proof beyond a reasonable doubt.

TITLE: Staton v. State

INDEX NO.: K.3.e.11.

CITE: (09-06-06), Ind., 853 N.E.2d 470

SUBJECT: Sexual misconduct with a minor- D's age is element; sufficient evidence of age

HOLDING: Overruling McGowan v. State, 267 Ind. 16, 366 N.E.2d 1164 (1977), S.Ct. held that when the age of D is an element of a crime, the D does not waive the sufficiency issue by failing to file a motion to dismiss on the ground that he is not of the required age. It is a core constitutional principle that in a criminal prosecution the State must prove every element of an offense. The reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." In re Winship, 397 U.S. 358, 363 (1970). Among other things, "it is a prime instrument for reducing the risk of convicts resting on factual error." Id. Here, the Indiana General Assembly has chosen to include the age of the D as an element of the crime of sexual misconduct with a minor. Thus, the State had the burden to prove beyond a reasonable doubt that the D was at least eighteen years old at the time of the alleged offense.

Here, victim's testimony that she had known the D almost her whole life & that she "imagined" & "understood" D, who was a freshman in college, to be at least 18 was sufficient evidence that D was 18 years-old. Because the victim's testimony remained an unchallenged affirmation that the D was 18, the weight & credibility of the affirmation was for the jury to assess. Held, transfer granted, Ct. App.' opinion at 843 N.E.2d 75 vacated, judgment affirmed; Sullivan & Rucker, JJ., dissenting from majority's conclusion that victim's testimony constituted substantial evidence of probative value that, beyond a reasonable doubt, the D was over the age of 18, & that D's failure to challenge what little proof the State did offer should affect the sufficiency assessment.

RELATED CASES: Hudson, App., 2009 Ind. App. LEXIS 363 (State failed to present sufficient evidence that D was twenty-one at the time he committed molestation (2000-2006) from evidence that D began dating his ex-wife around 2000 when he met her on an internet website); C.D.H., App., 860 N.E.2d 608 (testimony of victim's father that he "believed" D to be 11 years old was insufficient to prove age where trial judge stated, when pronouncing verdict, that D was 10 years old); Haas, 849 N.E.2d 550 (victim's testimony concerning her age is not proof beyond reasonable doubt of age for purposes of requiring a Blakely hearing).

TITLE: Warren v. State
INDEX NO.: K.3.e.11.
CITE: (1st Dist., 11-17-98), Ind. App., 701 N.E.2d 902
SUBJECT: Sexual misconduct with minor - failing to instruct on intent element; no error
HOLDING: Although language of Indiana's sexual misconduct with minor statute, Ind. Code 35-42-4-9(a), contains no mens rea element, criminal intent is contained in crime. D argued that Tr. Ct. committed fundamental error by tracking language of statute & failing to include mens rea element in final instructions. Language of sexual misconduct with minor statute closely parallels that of child molesting, which contains no mention of any criminal intent. Ct. noted that there is no fundamental error where instructions on child molestation fail to sort out & separately refer to criminal intent element so long as that element is not eliminated or consideration of it prohibited by tendered instructions. Mullins, App., 486 N.E.2d 623. Here, instructions which tracked language of sexual misconduct with minor statute did not preclude consideration of intent element of crime. D was not prohibited from arguing that any touching of complaining witness was innocent. Instructions given to jury contained words which in their plain meaning could be understood by jury as including criminal intent & did not mislead jury as to law of case. Held, conviction affirmed.

K. CRIMES

K.3. Offenses against the person

K.3.e.12 Sex offender registry and related offenses (IC 11-8-8; IC 35-42-4-11)

TITLE: A.O. v. State
INDEX NO.: K.3.e.12.
CITE: (4th Dist., 11-17-05), Ind. App., 837 N.E.2d 219
SUBJECT: Juvenile improperly placed on sex offender registry
HOLDING: Tr. Ct. erred in finding that clear & convincing evidence demonstrated that juvenile was likely to repeat a sex offense & thus was required to register as a sex offender. See Ind. Code 5-2-12-4(3). State only presented argument from deputy prosecutor that registration should be required & probation officer recommending registry based on prosecutor's statements. No expert testimony or other evidence was presented to justify the registry requirement. Further, State argued this at disposition hearing prior to juvenile's release & majority noted Ind. Code 5-2-12-4(b)(2) requires a determination as to registry after the juvenile's release so as to assess rehabilitation efforts. See B.J.B. v. State, 805 N.E.2d 870 (Ind. Ct. App.2004); In re G.B., 709 N.E.2d 352 (Ind. Ct. App.1999). Held, judgment reversed; Baker, J., concurring in result, disagreed that Ind. Code 5-2-12-4(3) requires a registry determination only after a juvenile's release. Baker read the statute to hold that a juvenile may not be labeled an offender for purposes of the registry until all three conditions in the statute occur including a juvenile's release, but the statute does not require the conditions to occur in order. However, he acknowledged that several cases in Indiana support the majority's position.

TITLE: A.R. v. State
INDEX NO.: K.3.e.12.
CITE: (10/5/2022), 196 N.E.3d 289 (Ind. Ct. App. 2022)
SUBJECT: Juvenile court had jurisdiction to order sex offender registration
HOLDING: Court of Appeals affirmed A.R.'s placement on the sex offender registry that resulted from his adjudication of a sex offense committed when he was thirteen (13) years old. After A.R.'s 11-year-old sister disclosed that he had put his penis in her anus, A.R. was charged with Level 3 felony child molesting in July 2017 and eventually admitted to sexual battery. A.R. was held in various residential treatment facilities, where he disclosed more acts with his sister, and had conduct violations, including those of a sexual nature. A.R. was eventually committed to the DOC, where his conduct violations continued until his release and placement in a group home in August, 2021.

After his release, the State petitioned the court to reinstate jurisdiction and order A.R. to register as a sex offender. The juvenile court reinstated, had A.R. evaluated for risk of reoffending, and after a hearing found clear and convincing evidence that he was likely to repeat an offense under I.C. 11-8-8-5(a), requiring A.R. to register as a sex or violent offender.

On appeal, A.R. and Amicus argued that the juvenile court did not have jurisdiction; A.R. could not be made to register because he was no longer a child and his offense was committed before reaching the age of fourteen (14); the evidence to support his registration requirement was insufficient; and his registration requirement was a form of cruel and unusual punishment, prohibited by both the Eighth Amendment of the U.S. Constitution and Article 1, Sec. 16 of the Indiana Constitution.

The Court held that the juvenile court had authority to reinstate jurisdiction pursuant to I.C. 31-30-3-2, and this authority was not impacted because the motion to reinstate jurisdiction was filed by the prosecutor, who is not identified by statute as a potential movant for the resumption of jurisdiction.

Despite the procedure and authority for sex offender registry being in Title 11 of the Indiana Code, the majority applied the definition of a child in Title 31 (which extends until the age of 21) to find that A.R. was still a child and could be made to register under I.C. 11-8-8-4.5(b). Further, the majority held that A.R. could be made to register, despite his offense occurring before the age of fourteen (14), because I.C. 11-8-8-4.5(b) requires that the child be at least 14 at the time of registry, not at the time of the offense.

The Court held that sufficient evidence supported the decision to require A.R. to register, primarily due to the State's evidence of continued behavioral problems during treatment and his prison commitment, and due to his diagnoses and scoring results from multiple risk assessments. Finally, the Court held that A.R.'s arguments that the registry requirement was cruel and unusual punishment were waived by not being raised below. Riley, J., dissenting, believes that prosecutors hold no statutory authority to request reinstatement of juvenile court jurisdiction, A.R. is not a "child" for purposes of Title 11, and more specifically SORA itself ("child" is undefined in those statutes, so she would apply the dictionary definition of being less than eighteen years old and unemancipated). Judge Riley would not have reached the issue of whether the evidence was sufficient but found it "deeply troubling" that the expert gave no opinion as to whether A.R. was likely to reoffend and used no empirically validated instruments to estimate an adolescent's risk of sexual re-offense because none exist.

TITLE: Bleeke v. Lemmon
INDEX NO.: K.3.e.12.
CITE: (4/16/2014), 6 N.E.3d 907 (Ind. 2014)
SUBJECT: Offender against children cannot apply to offenses committed before July 1, 2005
HOLDING: “Offender against children” (OAC) label cannot be applied to anyone who committed their underlying sex offense prior to July 1, 2006. For all persons charged with either a residential restriction offense (Ind. Code 35-42-4-11) or an “unlawful employment offense” (Ind. Code 35-42-4-10), and the sex offense that triggered the restriction occurred before July 1, 2006, the OAC statutes do not apply to those persons. Here, parolee should not be considered an OAC based on his 2005 attempted criminal deviate conduct conviction. Held, transfer granted, Court of Appeals’ opinion at 982 N.E.2d 1040 vacated, judgment affirmed in part and reversed in part.

TITLE: Bridges v. State
INDEX NO.: K.3.e.12.
CITE: (8/22/2018), 109 N.E.3d 453(Ind. Ct. App. 2018)
SUBJECT: Tolling of sex offender registration requirement for 2002 conviction did not subject D to *ex post facto* violation

HOLDING: D was not subjected to an *ex post facto* violation where his registration requirement for his 2002 child molesting conviction was extended, because after 2008 he was convicted of several offenses that resulted in his incarceration, which tolled his registration requirement under the 2008 amendment to Ind. Code § 11-8-8-19. In 2002, D was convicted of two counts of child molesting. He was required to register as a sex offender for ten years. In May of 2006 he was released from prison, and his ten-year registration requirement began, which would terminate on May 16, 2016. In 2008, the General Assembly amended Ind. Code § 11-8-8-19 to toll the registration requirement for offenders who commit additional offenses that result in incarceration. After 2008, D was convicted of felonies in 2010, 2011, and 2013. When he was released from prison on January 29, 2017, the State told him he was required to register as a sex offender because the 2008 amendments tolled the registration requirement, meaning he was required to register until January 4, 2020. D did not register and was charged with Level 5 felony failure to register. He filed a motion to dismiss, arguing that applying the 2008 tolling provision to his 2002 initial offense violates Indiana's prohibition on *ex post facto* laws. The trial court denied the motion, and D brought this interlocutory appeal.

D was not subjected to an *ex post facto* violation. He committed his subsequent offenses in 2010, 2011, and 2013, several years after the 2008 amendment went into effect. Thus, no retroactive application occurred, so there was no *ex post facto* violation. And because D committed his subsequent offenses years after the 2008 amendments became effective, he had fair notice and warning that he would be subjected to the tolling provision if he became incarcerated after 2008. Held, judgment affirmed.

TITLE: Brogan v. State

INDEX NO.: K.3.e.12.

CITE: (05-6-10), Ind. Ct. App, 925 N.E.2d 1285

SUBJECT: Denial of motion to remove from sex offender registry affirmed - jurisdiction

HOLDING: Noble Superior Court did not err by denying D's motion to remove name from sex offender registry on jurisdictional grounds, because even though court was court of conviction, jurisdiction lies in county of residence. See Ind. Code 11-8-8-22 ("A petition under this section shall be filed in the circuit or superior court of the county in which the offender resides."). Here, in October of 1994, D pleaded guilty in Noble County to two counts child molesting, both class C felonies. He has served his time for the convictions but was serving time in Henry County DOC facility for Huntington County conviction for failure to register as a sex offender. If incarcerated, D should file motion in county of incarceration, Henry County, and if not, in county of residence. Even if multiple counties have registries bearing D's name, he need not file petition to remove name in each county. Held, Tr. Ct.'s denial of D's motion on jurisdictional grounds affirmed without prejudice to his right to pursue relief under Ind. Code 11-8-8-22 in county of residence.

RELATED CASES: In re Gambler, 939 N.E. 2d 1128 (Ind. Ct. App. 2011) (where pro se offender's letter requesting removal from registry on ex post facto grounds did not meet the requirements of Ind. Code 11-8-8-22(k) and Tr. Ct. did not provide notice to the proper parties under Ind. Code 11-8-8-22(e) before ordering the offender removed, the order removing D should have been dismissed without prejudice); Clampitt, 932 N.E.2d 1256 (Ind. Ct. App. 2010) (amended version of Ind. Code 11-8-8-22(e) confers jurisdiction over motions to remove status as SVP); Clampitt, 928 N.E.2d 210 (Ind. Ct. App. 2010) (amended version of Ind. Code 11-8-8-22 provides specific guidance about how to petition to remove status of sexually violent predator, including provisions about jurisdiction, notice, contents of a petition, and findings necessary to determine a person should not be deemed a sex offender).

TITLE: Burton v. State

INDEX NO.: K.3.e.12.

CITE: (11/8/2012), 977 N.E.2d 1004 (Ind. Ct. App 2012)

SUBJECT: Sex offender registry - ex post facto violation; out-of-state sex offense

HOLDING: It is a violation of the ex post facto provision of the Indiana Constitution to require D to register under the Indiana Sex Offender Registration Act (SORA) as one who is required to register in another state, Illinois, when the statutes requiring him to register in Illinois and in Indiana were enacted after he had been convicted of the qualifying offense in Illinois. Mandatory sex offender registration is punitive and that application of Indiana's SORA to an offender who had committed his offense prior to the enactment of our SORA violated the ex post facto prohibition of the Indiana Constitution. Wallace v. State, 905 N.E.2d 371 (Ind. 2009). Here, in 1987, D was convicted of aggravated criminal sexual assault in Illinois. In 1996, Illinois amended its SORA to require D to register for a period of ten years. In 2003 and 2007, D was convicted of failing to register in Illinois. In 2006, Indiana amended its SORA to require any person who is required to register in any jurisdiction to register in Indiana. D subsequently moved to Indiana and was charged with failing to register. Because at the time D committed his sex offense in Illinois he was not required to register in either Illinois or Indiana, punishing him for failing to register with Indiana's SORA violates Indiana's ex post facto provision. D has the protection of our constitution as to the application of our SORA, without regard to the fact that he was convicted of the qualifying sex offense in Illinois. It is for this court, not Illinois, to determine who is required to register under our SORA. It makes no difference that D's requirement to register in Illinois was extended after 2006 due to his 2007 conviction for failing to register in Illinois. Further, the Full Faith and Credit law is not implicated here. Illinois determined that D was required to register in Illinois, not anywhere else. Although some individuals may consider Indiana a "haven," such is small group who committed their crimes before the passage of the registration requirements in both Indiana and their home state and that group will continue to get smaller with time. Thus, the Tr. Ct. abused its discretion by denying D's motion to dismiss the charge of failure to register as a sex offender. Held, judgment reversed.

RELATED CASES: Nichols, 136 S. Ct. 1113 (U.S. 2016) (D, a federal registered sex offender, should not have been convicted for failing to update his residence as required by 18 U.S.C. § 2250(a), because once he left Kansas to reside in the Philippines, the jurisdiction "where he resides" is a jurisdiction not covered by Sex Offender Registration and Notification Act ("SORNA")); Zerbe, 32 N.E.3d 834 (Ind. Ct. App. 2015) (criticizing Burton analysis); Hough, 978 N.E.2d 505 (Ind. Ct. App. 2012) (Tr. Ct. properly granted D's petition to remove his name from INSORA where he was convicted of rape in Pennsylvania in 1993 and moved to IND. in 1998); Andrews, 978 N.E. 2d 494 (Ind. Ct. App. 2012) (even if D has a federal duty to register under USSORNA because he engages in interstate travel, only his duty to register under INSORNA is at issue; Indiana state courts do not have the authority to consider whether federal statutory penalties attach to D's conduct; D's petition for removal of his name from Indiana's sex offender registry should have been granted because the offense he committed in another state was committed before he was required to register under Indiana).

TITLE: Carr v. United States

INDEX NO.: K.3.e.12.

CITE: (06-01-10), U.S., 130 S.Ct. 2229

SUBJECT: Application of SORNA to Pre-Enactment Travel

HOLDING: The Sex Offender Registration and Notification Act ("SORNA"), a 2007 law that requires sex offenders to register, does not apply to sex offenders whose interstate travel occurred before the Act went into effect. 42 U.S.C. § 16913(a) imposes criminal penalties of up to ten years of imprisonment on anyone who "is required to register...travels in interstate or foreign commerce...and knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General retroactively applied SORNA's registration requirements to persons who were convicted before July 27, 2006. See 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The two questions presented to the Court were: (1) Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the D's underlying offense and travel in interstate commerce both predated SORNA's enactment. (2) Whether the *Ex Post Facto* Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment. Sidestepping the *Ex Post Facto* question, the Court ruled as a matter of statutory construction that section 2250 does not apply to sex offenders whose interstate travel occurred before SORNA's effective date. Writing for the majority, Justice Sotomayor found that the statute's words are written in the present tense, not the past or present perfect tense. Held, Seventh Circuit Court of Appeals' opinion at 551 F.3d 578 reversed and remanded. Alito, joined by Thomas and Ginsburg, JJ., DISSENTING.

TITLE: Dobeski v. State
INDEX NO.: K.3.e.12.
CITE: (12/12/2016), 64 N.E.3d 1257 (Ind. Ct. App. 2016)
SUBJECT: Seven days to register as sex offender is measured by calendar days, not 168 hours
HOLDING: The seven-day period for a person to register as a sex offender upon release from incarceration is computed the way time is computed under Trial Rule 6(A), that is, the first day of the period is excluded, and days are counted through the last day of the period unless the last day is a Saturday, Sunday, or legal holiday. See Ind. Code § 11-8-8-7(g) (obligation to register within seven days). Therefore, the State is incorrect that a day is to be computed as a 24-hour period commencing the precise moment D was released from incarceration. Thus, the State failed to present sufficient evidence that D failed to register within seven days of his release.

In 2008, D was convicted of child molesting and possession of child pornography. He was released from incarceration on July 16, 2015, at approximately 11:15 a.m. In midafternoon of July, 23, 2015, D was arrested for failing to register within seven days because D failed to register within 168 hours of release, the number of hours in seven days as measured precisely from the moment of release.

The rules of trial procedure apply in criminal cases if they do not conflict with any specific rule of criminal procedure. Ind. Criminal Rule 21; Ward v. Ind. Parole Bd., 805 N.E. 2d 893 (Ind. Ct App. 2004). Trial Rule 6(A) governs the computation of “any time period prescribed or allowed by these rules, by order of the court, or by any applicable statute. (Emphasis added). Thus, Trial Rule 6(A) governed the computation of time for D to have registered, and under application of the rule, he had until the end of July 23, 2016 to register. D was arrested prematurely, and the State failed to present sufficient that he failed to timely register. Held, judgment reversed.

TITLE: Doe 1 v. Boone County Prosecutor & Sheriff
INDEX NO.: K.3.e.12.
CITE: (10/24/2017), 85 N.E.3d 902 (Ind. Ct. App. 2017)
SUBJECT: Church is not "school property"; State enjoined from arresting plaintiffs for attending church
HOLDING: Even though the plaintiffs' churches conduct Sunday school classes and offer child care services, the churches are not "school property," so Boone County authorities are permanently enjoined from arresting and/or prosecuting the plaintiffs for entering their churches. See Ind. Code § 35-42-4-14(b).

In July of 2015, the Boone County Sheriff sent a letter to the county's registered sex offenders, including the three plaintiffs, advising them that the law prohibits serious sex offenders from entering "school property" and that churches are "school property," if the church conducts Sunday school or has child care for children who are at least three years of age and not yet enrolled in kindergarten. Under this interpretation, the plaintiffs' churches are school property. The plaintiffs sought declaratory and injunctive relief, claiming their churches are not school property. The trial court denied relief, except one ground not at issue in the appeal.

The churches are not school property under Ind. Code § 35-31.5-2-285(1)(D). This statute defines school property as a "federal, state, local, or nonprofit program or service operated to serve, assist, or otherwise benefit children who are at least three (3) years of age and not yet enrolled in kindergarten" This broad wording might include churches, but this section also contains a list of examples that qualify as "school property," including: 1) a Head Start program, 2) a special education preschool program, and 3) a developmental child care program for preschool children. Ind. Code § 35-31.5-2-285(1)(D)(i)-(iii). These examples focus on places or entities traditionally thought of and known as "schools." Churches and religious instruction are not schools, nor do they become so by use of the popular and common name of "Sunday school." "Moreover, we note what the statute 'does not say.' See Day v. State, 57 N.E.3d 809, 812 (Ind. 2016). The statute does not say churches, Sunday school, or anything related to religious instruction for children is 'school property.'" If the legislature intended for churches offering Sunday school or other religious instruction to children to qualify as "school property," it would have said so. Therefore, the plaintiffs are entitled to a permanent injunction that bars Boone County authorities from arresting and/or charging the plaintiffs under Ind. Code § 35-42-4-14(b) for attending church. Held, judgment reversed.

TITLE: Dye v. State

INDEX NO.: K.3.e.12.

CITE: (02-28-11), 943 N.E. 2d 928 (Ind. Ct. App. 2011)

SUBJECT: Failure to register as sex offender - insufficient evidence

HOLDING: State presented insufficient evidence beyond a reasonable doubt to show that D knowingly made a material misstatement or omission while registering as a sex offender. If a sex or violent offender does not have a permanent residence, then he shall report to local law enforcement authority in the county where he resides at least once every seven days to report address in which he will stay during time he lacks a principal address or temporary residence. Ind. Code 11-8-8-12(c). D, who had been homeless for four weeks prior to his arrest, reported to the Registry Office in person every seven days as required by statute. He wrote down his address as "2955 NCALL," which someone in Registry Office crossed out and changed to "2955 N. Gale" upon being notified by detective that the street did not exist. D testified that he did not make this change. Essentially, someone in the Registry Office materially changed D's registration form, and D simply copied this information on subsequent registration forms. It is clear that there were a number of errors on D's registration forms including his address due to the fact that he is illiterate and does not understand the forms. Because he is illiterate, D completes his registration forms by copying answers from other papers that he has. Given fact that D is illiterate, was not assisted when registering, and complied with Ind. Code 11-8-8-12(c) by appearing in person every seven days, evidence was insufficient to convict him of failing to register. Held, judgment reversed.

TITLE: Gibson, et al. v. Indiana Department of Correction
INDEX NO.: K.3.e.12.
CITE: (4th Dist., 12-29-08), Ind. App., 899 N.E.2d 40
SUBJECT: Sex and violent offender registry - murder/voluntary manslaughter
HOLDING: Effective July 1, 2007, persons convicted of murder, voluntary manslaughter, attempted murder, or attempted voluntary manslaughter must register as a sex or violent offender pursuant to Ind. Code 11-8-8 et. seq. Court held that imposition of Registry's requirements on "violent" offenders (above) does not violate Article 1, Sections 23 and 12 of Indiana Constitution. Because murder and voluntary manslaughter, along with attempts and conspiracies to commit these crimes, involve voluntary and intentional acts by persons either designed to take the life of another person or very intentional and voluntary acts to commit certain serious felonies where commission of crimes might reasonably cause death of another person, Legislature was within its authority consistent with Article 1, Section 23 of Indiana Constitution to determine that persons who have committed murder and voluntary manslaughter represent a greater, continuing threat to society than persons who committed other crimes resulting in death, so that their inclusion on Registry was warranted.

Considering Court's deference to legislative policies, fact that there is some (albeit slight) recidivism among violent offenders at least for some time after release, and that community notification about violent offenders provides an opportunity for enhancing public safety, requirement that violent offenders register for at least some amount of time meets low threshold of rational relation, thus there is no violation of Article 1, Section 12.

Court also *clarified* that a violent offender is required to register for ten years rather than for life, unless he or she is a sexually violent predator, was convicted of an offense while over age of eighteen against a victim less than twelve, or has been convicted of two or more unrelated offenses under Ind. Code 11-8-8-5(a). See Ind. Code 11-8-8-19(b)(c) and (e). Held, denial of preliminary injunction with respect to ten-year registration requirement for violent offenders affirmed, grant of preliminary injunction against lifetime registration for all violent offenders reversed, judgment affirmed in all other respects.

TITLE: Greer and Maggi v. Buss

INDEX NO.: K.3.e.12.

CITE: (2nd Dist., 12-17-09), (Ind. App. 2009) 918 N.E.2d 607

SUBJECT: Sex offenses - registration period does not start anew based on new offense

HOLDING: Tr. Ct. erred by finding that a pre-2008 statute required the ten-year sex offender registration period to start anew if the sex offender was convicted of a new offense. Before 2008, Ind. Code 11-8-8-19(a) required a sex or violent offender to register until the expiration of ten years after the date the sex or violent offender: is released from a penal facility or a secure juvenile detention facility; is placed in a community transition program; is placed in a community corrections program; is placed on parole or is placed on probation whichever occurs last. In 2008, the legislature added the following language to Ind. Code 11-8-8-19(a): the registration period does not restart if the offender is convicted of a subsequent offense; however, if the subsequent offense is a sex or violent offense, a new registration period may be imposed in according with this chapter.

Here, the DOC is interpreting the pre-2008 statute to require second registration upon a subsequent conviction for any offense whatsoever. The DOC's interpretation of the statute is inconsistent with the rule of lenity requiring all penal statutes to be construed in favor of the D. The pre-2008 statute contained no language suggesting that the required registration would be triggered for a second ten-year registration period upon a subsequent conviction. Moreover, the DOC's interpretation of the pre-2008 statute violated ex post facto as applied to Greer and Maggi. Greer was convicted of child molesting in 1991 before the registry ever existed, and Maggi was convicted of possession of child pornography in 1998 before it was a registerable offense. But, because they both were convicted of OWIs later, the DOC required them to register. This violated the Indiana constitutional protection against ex post facto laws. Similarly, the application of the residency restriction to Greer violated the ex post facto clause regardless of whether Greer owned property within 1000 feet of a school, park, etc. Thus, Tr. Ct. erred by granting summary judgment in favor of the DOC. Held, judgment reversed in part and affirmed in part.

TITLE: Gundy v. United States

INDEX NO.: K.3.e.12.

CITE: (06/20/2019), 139 S. Ct. 2116 (U.S. 2019)

SUBJECT: Attorney general may specify the applicability of SORNA's registration requirements to pre-Act offenders

HOLDING: Congress did not violate the non-delegation doctrine when it allowed the attorney general to decide if the Sex Offender Registration and Notification Act's (SORNA's) registration requirements should apply to those convicted of sex crimes before the law's passage. The doctrine bars Congress from transferring its legislative power to another branch of government. Gorsuch, joined by Roberts, C.J., and Thomas, J., DISSENTING, noted that "[i]f the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."

TITLE: Healey v. Carter

INDEX NO.: K.3.e.12.

CITE: (8/21/2018), 109 N.E.3d 1043 (Ind. Ct. App. 2018)

SUBJECT: Criminal confinement conviction required sex offender registration even though plea agreement did not mention that victim was a minor

HOLDING: Where D was charged with two counts of criminal confinement but pled only to the count that did not require him to acknowledge that the victim was a minor, he was still required to register as a sex offender. D assaulted Z.M., who was less than 12 years old. The State charged D with one count of battery and two counts of criminal confinement, one as a C felony and the other as a D felony. D pled guilty to D felony criminal confinement, which does not include an element based on the victim's age. Once D served his executed time, DOC required him to register as a sex offender for life because the victim was under 12. Ind. Code § 11-8-8-19(c) (2007). D registered, but in 2017, he sought declaratory relief, asking to be relieved of his duty to register because he never pleaded to the age of the victim. The trial court denied relief. The trial court's ruling was proper. Even though D did not plead to the victim's age, placement on the Registry was mandatory. The Sex Offender Registry Act ("the Act") "affords neither the trial court nor the DOC any discretion in the matter of the registration requirement. . . . Plea agreements have no effect on operation of the Act..." Nichols v. State, 947 N.E.2d 1011, 1017 (Ind. Ct. App. 2011). Moreover, because sex offender registration is not part of a sentence but instead a collateral consequence of a conviction, there was no constitutional requirement that D plead guilty to every fact justifying the registration requirement. Compare Bethea v. State, 983 N.E.2d 1134, 1145 (Ind. 2013) (because a plea bargain does not foreclose "the possibility of the trial court using enhancements from the underlying charges that were dismissed, or from the original charges from which a lesser included plea is taken[,] . . . it is not necessary for a trial court to turn a blind eye to the facts of the incident that brought the D before them."). Thus, while Ds are free to bargain about the length of the sentence, they are not free to bargain away registration requirements. D's registration requirement was a mandatory consequence of the Act itself. Nichols, 947 N.E.2d at 1017. Held, judgment affirmed.

TITLE: Healey v. State

INDEX NO.: K.3.e.12.

CITE: (4/17/2013), 986 N.E.2d 825 (Ind. Ct. App 2013)

SUBJECT: Rehearing granted, reversing judgment denying request for removal from sex offender registry

HOLDING: As applied to D, the 1995 amendment to the Sex Offender Registration Act ("SORA"), which increased D's obligation to register to ten years, is punitive in effect and violates Indiana's prohibition on ex post facto laws. The Court's original opinion relied on Jensen v. State, 905 N.E.2d 384, 396-97 (Ind. 2009), to find that the effect of the 1995 amendment was not punitive. A few months later, however, the Indiana Supreme Court held that a similar extension in the time required to register was punitive and violated the ex post facto prohibition because there was no statutory right to seek review of the extension of the reporting period. See Gonzalez v. State, 980 N.E.2d 312 (Ind. 2013). The same circumstances exist here; D has no statutory right to challenge the extension of his reporting period - now ten years under the 1995 amendment to SORA - so the effect of the extension is punitive. Held, reversed and remanded.

RELATED CASES: Seales, 4 N.E.3d 821 (Ind. Ct. App. 2014) (because D is considered a sexually violent predator, he is able to petition for removal from the registry after ten years; thus, the 7th factor of the intent-effects test weighs in favor of the lifetime registration being non-punitive; as such, the lifetime registration requirement as applied to D is not an ex post facto law).

TITLE: Hevner v. State

INDEX NO.: K.3.e.12.

CITE: (12-9-09), 919 N.E.2d 109 (Ind. 2009)

SUBJECT: Sex offender registry and 1000 feet - ex post facto

HOLDING: As applied to Hevner, amendment to Ind. Code 11-8-8-4.5 requiring person with only one conviction for possession of child pornography to register as a sex offender violates state constitution's prohibition on ex post facto laws (Ind. Const. art. I, § 24) because when Hevner committed the offense, legislature had not yet amended the statute and first-time offenders such as Hevner were not deemed sex offenders and were not required to register as such. Registration requirement added punishment beyond what statute allowed when Hevner committed the offense. However, ordering Hevner to not live within 1000 feet of a school was not erroneous because court may impose any term of probation related to rehabilitation (See Ind. Code 35-38-2-2.3(a)(14)) and protection of public. Carswell v. State, 721 N.E.2d 1255, 1259 (Ind. Ct. App. 1999); Hale v. State, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008), *trans. denied*. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment reversed in part.

RELATED CASES: Bleeke, 6 N.E.3d 907 (Ind. 2014) (Hevner does not stand for the blanket proposition that residency restriction is always appropriate condition of parole regardless of whether a residential restriction offense (Ind. Code 35-42-4-11) applies to a given offender; restriction must be reasonably related to parolee's successful reintegration into the community and is not unduly restrictive of a fundamental right); Whitener, 982 N.E.2d 439 (Ind. Ct. App. 2013) (although D's rape conviction was vacated because it was based on the same evidence that supported his burglary conviction and thus violated double jeopardy, requiring D to register as a sex offender as a probation condition was proper and reasonably related to his rehabilitation); Gaither, 971 N.E.2d 690 (Ind. Ct. App. 2012) (probation condition prohibiting D from residing within 1000 feet of school did not violate prohibition on ex post facto laws; only limitation on Tr. Ct.'s discretion in fashioning terms of probation is that conditions reasonably relate to D's treatment and public safety).

TITLE: Hyle v. Porter

INDEX NO.: K.3.e.12.

CITE: 117 Ohio St. 2d 165, 882 N.E.2d 899 (Ohio 2008)

SUBJECT: No retroactive effect for sex offender residency requirement

HOLDING: Ohio Supreme Court held that the state legislature did not intend for that state's statute in relation to a sex offender living within 1,000 feet of a school, etc. . . to be applied to an offender who owned his home and committed his offense before the statute's effective date. Statute uses contrasting verb tenses, past and present, providing that the residency restriction applies to one "who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to" certain sex offenses. The law also establishes that no such person "shall establish a residence or occupy residential premises within one thousand feet of any school premises." Court noted that the first rule of statutory construction is that "a statute is presumed to be prospective in its operation unless expressly made retrospective." The residency restriction law is ambiguous in that regard. By contrast, Court pointed out that a different statute that it has found retroactive expressly applies to one who "was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after" that date. Given the absence of legislative intent to make the residency statute retroactive, Court did not reach the constitutional issue. A dissent was entered in the case.

See also: R.L. v. Missouri Department of Corrections, 245 S.W.3d 236 (Mo. 2008) (holding law violates state constitution and noting that "the constitutional bar on retrospective civil laws has been a part of Missouri law since this State adopted its first constitution in 1820.").

TITLE: J.B. v. State

INDEX NO.: K.3.e.12.

CITE: (5th Dist., 12-15-04), Ind. App., 819 N.E.2d 137

SUBJECT: Placement of juvenile D on sex offender registry - no error

HOLDING: Tr. Ct. did not err in ordering juvenile to register as a sex offender even though the Department of Correction (DOC) would not accept him following a probation violation because he had passed his 18th birthday. After probation violation hearing, Tr. Ct. held a dispositional hearing to determine whether juvenile should register as a sex offender and the court found that he was likely to re-offend so registration was appropriate. On appeal, D argued he did not have to register because he was not considered an "offender" under Ind. Code 5-2-12-4(b) in that he was neither on probation or parole, nor had he been discharged from the DOC. Court found that DOC's lack of acceptance of the individual acted as a discharge for purposes of the statute. Further, the individual was placed for transport in a county juvenile detention center pending transport to the DOC and release from such a facility would also give a Tr. Ct. authority to order a child to register as a sex offender. Held, judgment affirmed.

TITLE: J.C.C. v. State
INDEX NO.: K.3.e.12.
CITE: 897 N.E.2d 931 (Ind. 2008)
SUBJECT: Juvenile registry - requires evaluation of rehabilitation during detention
HOLDING: State failed to prove by clear and convincing evidence that J.C.C. was likely to be a repeat sex offender. A juvenile must register as a sex offender if the child: (1) is at least 14-years-old; (2) is on probation, parole, or is discharged from a facility by the DOC, is discharged from a "secure private facility," or is discharged from a juvenile detention facility as a result of an adjudication as a delinquent child for an act that would be a sex offense if committed by an adult; and (3) is found by a court by clear and convincing evidence to be likely to repeat an act that would be a sex offense if committed by an adult. Ind. Code 5-2-12-4(b).

Here, in its attempt to prove J.C.C. was likely to repeat a sex offense, State relied exclusively on an expert, who in essence testified that J.C.C.'s offenses were so serious in and of themselves that nothing else- not the fact of his incarceration, nor his successful completion of the treatment program, nor his behavior in the community following release - could lower his risk of committing another sex offense. The expert reached this conclusion based on a risk assessment criteria called the Estimate of Risk of Adolescent Sexual Offense Recidivism (ERASOR), and did not interview J.C.C. or consider any information about his detention, successful completion of the DOC sex offender treatment program or his behavior following release. Given the overreaching rehabilitative thrust of Indiana's juvenile justice system and the statute's specific requirements that any finding of a juvenile's likelihood to repeat must await discharge from secure detention and must be based on clear and convincing evidence, an evaluation of whether a juvenile has been rehabilitated while in detention is a prerequisite to finding clear and convincing evidence that the juvenile is likely to repeat. Because the expert based his opinion solely on the pre-dispositional acts of J.C.C. and did not analyze whether J.C.C. had been rehabilitated subsequent to disposition, there was no clear and convincing evidence that he was likely to commit another sex offense. Held, transfer granted, judgment reversed, and Court of Appeals' memorandum opinion is vacated except for the portion addressing the T.R. 60(b) claim, which is summarily affirmed.

RELATED CASES: J.D.M., 68 N.E.3d 1073 (Ind. Ct. App 2017) (Juvenile court erred in ordering J.D.M. to register as a sex or violent offender because he wasn't eligible for registration until discharge from residential treatment and placement on probation).

TITLE: J.D.M. v. State

INDEX NO.: K.3.e.12.

CITE: (2/15/2017), 68 N.E.3d 1073 (Ind. 2017)

SUBJECT: SOR premature; juvenile not yet discharged from residential treatment or placed on probation

HOLDING: Juvenile court erred in ordering J.D.M. to register as a sex or violent offender because J.D.M. was not eligible for registration until he was discharged from residential treatment and was placed on probation. See Ind. Code § 11-8-8-5(b)(2); J.C.C. v. State, 897 N.E.2d 931, 934 (Ind. 2008). J.D.M. was adjudicated a delinquent for acts which, if committed by an adult, would be Class C felony child molesting. At the dispositional hearing, the probation officer recommended J.D.M. continue treatment at a residential treatment center; the court agreed and continued placement at the treatment center. J.D.M. remained there for the next two-and-a-half years and made some progress. After J.D.M. turned eighteen, the court held a sex offender registry hearing and found the State had provided clear and convincing evidence that J.D.M. was likely to reoffend. The court ordered J.D.M. to register, although he continued to reside at the treatment center and was not placed on probation. The requirements of Ind. Code § 11-8-8-5(b)(2) should be strictly construed to accomplish the goal of rehabilitation. N.L. v. State, 989 N.E.2d 773, 778 (Ind. 2013). Until J.D.M. is actually released and placed on probation, the possibility of continued rehabilitation exists and should be continued. Thus, the trial court's registration order was premature. Held, transfer granted, Court of Appeals' opinion at 56 N.E.3d 729 vacated, and judgment reversed.

TITLE: Jeandell v. State

INDEX NO.: K.3.e.12.

CITE: 910 A.2d 1141 (2006)

SUBJECT: Homeless offenders wrongly convicted for failure to register as sex offenders

HOLDING: Maryland Court of Appeals held that the provision of Maryland's sex offender registry law that requires registrants to notify authorities when they change their "residence" did not authorize convictions for two homeless sex offenders with less than semi-permanent living situations. Court framed the issue as whether the statutory scheme allows convictions of homeless offenders for failing to notify authorities of a change in residence. Courts in Minnesota and Washington have concluded that their states' sex offender registration schemes did not authorize convictions for homeless offenders whose living situations prevented them from being able to send and receive mail. These courts reached this conclusion after noting that statutes appeared to use the terms "residence" and "address" interchangeably. Maryland's high court found that the same was true of its state's registration scheme. Relying on the ordinary meanings of the terms "residence" and "address," Court decided that homeless registrant has a new residence, for purpose of the sex offender law, "only if that person has a fixed location at which the registrant is living, or one to which the registrant intended to return upon leaving it." Court clarified that, once a D comes forward with evidence supporting a homelessness defense, State has the obligation to present evidence beyond a reasonable doubt that the D was staying at a location that qualified as a "residence" as defined above. Court held evidence insufficient on these grounds and ordered reversal. (see also Twine v. State, 910 A.2d 1132 (Md. 2006)).

TITLE: Johnson v. State

INDEX NO.: K.3.e.12.

CITE: (04-29-10), 925 N.E.2d 793 (Ind. Ct. App. 2010)

SUBJECT: Failure to register as sex offender - requirements when moving out of state

HOLDING: There was insufficient evidence to support D's conviction for failure to register by failing to update his registration every ninety days. The following persons must register: a sex offender who resides in Indiana; a sex offender who works or carries on vacation in Indiana; and a sex offender enrolled or intends to be enrolled in any educational institution in Indiana. Here, D was convicted of Class B felony rape and required to register as a sexually violent predator, which requires D to register and get his picture taken every ninety days. In October 2008, D registered at a new address in Indianapolis. In November, D moved to North Carolina and in January to Tennessee. D did not notify the local law enforcement of his move. Because the State did not present evidence showing that Johnson resided, worked or attended school in Indiana ninety days after October 2008, he was not required to register at that time.

However, there was sufficient evidence to support D's conviction for failure to register by failing to notify law enforcement of his change of address within seventy-two hours of moving. When a sex offender changes his principal residence address, he shall report in person to the local law enforcement authority having jurisdiction over his current principal address not more than seventy-two hours after the address change. Ind. Code § 11-8-8-11(a). If a sex offender moves his residence to a new state, the local law enforcement authority shall inform the state police in the new state of the sex offender's new place of residence. Ind. Code § 11-8-8-11(e). Here, D argued that he was only required to report in person, but not notify the police of his new residence. Although Ind. Code § 11-8-8-11 does not expressly state that a sex offender is required to notify law enforcement regarding a change in address when he moves out of state, the statute requires local law enforcement to inform the state police in the new state of the sex offender's new place of residence. The only way to read the statutes as a whole and avoid an absurd result is to read it to require that the sex offender notify the local law enforcement authority having jurisdiction over the sex offender at this current principal address of his move out of state and his new address. Thus, D was required to notify the local authority of his out-of-state move, which he admits he failed to do. Held, judgment reversed and remanded with instructions to vacate conviction on Count I, to reinstate the vacated conviction on Count II, and to sentence D accordingly, with credit to be given for time served on the vacated conviction.

RELATED CASES: Moore, 45 N.E.3d 832 (Ind. Ct. App. 2015) (fact that D moved and no longer resided in Indiana did not remove his duty to comply with sex offender registry statutes).

TITLE: Kirby v. State

INDEX NO.: K.3.e.12.

CITE: (8/31/2017), 83 N.E.3d 1237 (Ind. Ct. App. 2017)

SUBJECT: Unlawful entry statute - ex post facto as applied to D

HOLDING: Pursuant to Ind. Code § 35-42-4-14(b) (effective July 1, 2015), a person who is required to register as a sex offender and convicted of, among other crimes, child solicitation, commits Level 6 felony unlawful entry by a serious sex offender, when he "knowingly or intentionally enters school property." In November 2010, D pled guilty to one count of Class D felony child solicitation. Under the terms of D's 18-month probation, which he successfully completed, he was granted explicit permission to enter school property for the purposes of observing his son's school activities. D was also required to register as a sex offender for 10 years. It is undisputed the statute applies to D. Weighing the seven factors outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963), Court concluded that the 2015 statute is unconstitutional as applied to D because it amounts to a retroactive punishment in violation of the Ex Post Facto Clause of the Indiana Constitution. "Importantly, the record is devoid of any suggestion that [D] behaved inappropriately at any time while on school property.... To suddenly deny [D] of the opportunity to attend his son's activities for no reason other than his prior conviction is excessive." Held, judgment of post-conviction court reversed only as to enforcement of unlawful entry statute.

TITLE: Lucas v. McDonald

INDEX NO.: K.3.e.12.

CITE: 09-15-11), 954 N.E.2d 996 (Ind. Ct. App. 2011)

SUBJECT: Sex offender registry - broad discretion to deny relief from lifetime registration

HOLDING: Tr. Ct. did not abuse its discretion in denying D's petition for relief from his lifetime sex offender registration requirement. A court may grant a petition for relief from sex offender registration requirements if, following a hearing, the court finds: (1) the law requiring the petitioner to register as an offender has changed since the date on which the petitioner was initially required to register; (2) if the petitioner who was required to register as an offender before the change in law engaged in the same conduct after the change in law occurred, the petitioner would (: (A) not be required to register as an offender; or (B) be required to register as an offender, but under least restrictive conditions; (3) If the petitioner seeks relief under this section because a change in law makes a previously unavailable defense available to the petitioner, that the petitioner has proved the defense. The court has the discretion to deny a petition under this section, even if the court makes the findings under this subsection. Ind. Code 11-8-8-22.

Here, when D was initially required to register, he was only required to register for life. Now, after amendments to the registration law, D is required to register for only ten years. D moved for relief from the lifetime registration and met all of the requirements of Ind. Code 11-8-8-22. Moreover, D had not been arrested for any sex offenses, had not failed to register subsequent to his sex offense, had no other criminal record, and was well over seventy years old. However, at the hearing on his petition for relief, the victim testified that she agreed to D's original plea agreement because she believed he would be monitored as a sex offender for life. She also believed that continued registration is necessary to protect others from him. Tr. Ct.'s refusal to grant D's petition for relief despite the fact he met the statutory requirements was not against the logic and effect of all the facts and circumstances. Held, judgment affirmed.

TITLE: Mann v. Georgia Dept. of Corrections

INDEX NO.: K.3.e.12.

CITE: 653 S.E.2d 740 (2007)

SUBJECT: Statute requiring sex offenders to move found unconstitutional

HOLDING: Georgia Supreme Court held a state law that requires sexual predators to move out of their homes if a school, day care center, or other protected facility moves into their neighborhood is unconstitutional. Court decided that the law authorizes unconstitutional takings of property without fair compensation. The statute makes it a felony for a person required to register as a sex offender to reside within 1,000 feet of places where children congregate. Unlike similar statutes in some other states, the Georgia law does not contain an exception allowing sex offenders to remain in neighborhoods when they were there before protected facilities were established. The offender in this case had raised a similar takings challenge in a previous case after he was required to move out of his parents' home due to its proximity to a day care center. In that case, Mann v. State, 603 S.E.2d 283 (Ga. 2004), the Court decided that the offender's loss of rent-free living arrangements with his parents did not have a sufficiently significant economic impact to render it violative of the Fifth Amendment's taking clause or its state counterpart. Court *cited* to Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), noting "regulations that fall short of eliminating property's beneficial economic use may still effect a taking, depending upon the regulation's economic impact on the landowner, the extent to which it interferes with reasonable investment-backed expectations, and the interests promoted by the government action." The Lingle court explained that this ad hoc inquiry "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."

In the present case, the statute's effect is to require the offender's immediate physical removal from his residence, and this effect is "'functionally equivalent to the classic taking in which government directly . . . ousts the owner from his domain,'" *quoting* Lingle. Court rejected State's argument that the offender's ability to rent or sell his house eliminates or minimizes the economic impact of the statute's requirement that he move out. Court noted that, even assuming that a new residence outside any protected zones can be located, the offender is faced with the financial burden of maintaining both residences until he and his wife can sell or rent his current residence. Although neither the offender nor his wife are "real-estate speculators," the statute would force them to become lessors, "an unwelcomed and unanticipated role for which they are ill-equipped." Further, Court noted that the sex offender registration law gives notice of the residences of sex offenders to any third parties desirous of establishing a new protected facility, which could lead to third parties intentionally establishing protected facilities near sex offenders' residences in order to drive them out of the community.

TITLE: Matter of G.B.

INDEX NO.: K.3.e.12.

CITE: (2nd Dist., 4-20-99), Ind. App., 709 N.E.2d 352

SUBJECT: Premature placement of juvenile D on Sex Offender Registry (SOR); effect of plea agreement

HOLDING: Tr. Ct. not authorized to place juvenile D on SOR because juvenile had not yet been discharged from DOC. For purposes of Sex Offender Registration Act, Ind. Code 5-2-12-4(3) provides that child is "offender" if he: 1) is at least 14 years of age; 2) is on probation, parole, or is discharged from facility by DOC as result of adjudication as delinquent child for act that would be sex offense if committed by adult; & 3) is found by Ct. by clear & convincing evidence to be likely to repeat act that would be sex offense if committed by adult. Tr. Ct. may not order juvenile to be placed on Registry until after his release from detention. On release, Tr. Ct. must hold evidentiary hearing to determine whether juvenile is likely to be repeat sex offender. This statutory scheme helps assure that juveniles who have been rehabilitated by virtue of their detention are not required to register as sex offender.

Although Tr. Ct. acted prematurely in ordering D to register as sex offender, Ct. did not violate terms of D's plea agreement when it ordered him to be placed on Registry. Notwithstanding fact that plea agreement made no reference to Sex Offender Registry, if at time of juvenile's release Tr. Ct. finds that juvenile is likely to be repeat offender, then juvenile must be placed on Registry. Ind. Code 5-2-12-4(3). State may not enter into nor may Tr. Ct. accept plea agreement that purports to alter or nullify operation of Sex Offender Registration Act, either implicitly or by its express terms. Act is mandatory, not punitive in nature, & Tr. Ct. must comply with Act regardless of terms of D's plea agreement. Held, affirmed in part, reversed in part & remanded with instructions.

RELATED CASES: Lockhart, 38 N.E.3d 215, (Ind. Ct. App. 2015) (petition to remove from SOR on ex post facto grounds premature because D was not on registry and could not be put on registry until released from DOC at least six years hence); C.E.K., 928 N.E.2d 258 (Ind. Ct. App. 2010) (D must register as a sex offender even if plea was silent as to the registry); K.J.P., App., 724 N.E.2d 612 (determination that 14 year-old D was required to register as sex offender was not premature, nor was it in conflict with rehabilitative goals of juvenile code, even though D had not completed Ct.-ordered counseling program at time of hearing & determination).

TITLE: McClain v. State

INDEX NO.: K.3.e.12.

CITE: 898 N.E.2d 409 (Ind. Ct. App. 2008)

SUBJECT: Stipulation to sex offender status precludes admission of registration form

HOLDING: In trial for failure to register as sex offender, Tr. Ct. abused its discretion when it admitted sex offender registration form into evidence over D's objection and despite his offer to stipulate to his sex offender status. Registration form contained prejudicial details of D's prior sexual battery conviction. In light of D's offer to stipulate, the probative value of the registration form was outweighed by the danger of unfair prejudice. Although prosecution is entitled to prove its case by evidence of its own choice, and criminal D may not stipulate his way out of full evidentiary force of case against him, this general rule does not apply where point at issue is D's legal status that is independent of criminal behavior later charged against him. Old Chief v. United States, 117 S.Ct. 644 (1997); Sams v. State, 688 N.E.2d 1323 (Ind. Ct. App. 1997).

Court found that reasoning in Old Chief applies and held that D's offer to stipulate that he is a sex offender precludes admission of registration form at trial. Court could not say beyond reasonable doubt that probable impact of prejudicial evidence upon jury was sufficiently minor so as not to affect D's substantial rights. Held, conviction reversed and remanded for new trial.

TITLE: McClernon v. State
INDEX NO.: K.3.e.12.
CITE: (12-30-19), 139 N.E.3d 1104 (Ind. Ct. App.)
SUBJECT: Sex offender registry requirement for any vehicle an offender "operates on a regular basis" not void for vagueness
HOLDING: Ind. Code § 11-8-8(a)(1) requires a sex offender register a vehicle the offender "operates on a regular basis." In an interlocutory appeal from the denial of a motion to dismiss Defendant argued the language "operates on a regular basis" was void for vagueness. Court of Appeals disagrees and applies a reasonable person standard to hold the statute constitutional. J. Baker, dissenting, finds the statute vague enough to violate Defendant's due process rights.

TITLE: McClernon v. Wedding

INDEX NO.: K.3.e.12.

CITE: (03/09/2022), S.D. Ind., 2022 U.S. Dist. LEXIS 41557 (1:20-cv-02322-JPH-DML 2022)

SUBJECT: Sex offender registry requirement for any vehicle an offender "operates on a regular basis" void for vagueness as applied to Defendant

HOLDING: Ind. Code § 11-8-8-8(a)(1), which requires a sex offender to provide information related to "any vehicle the sex or violent offender operates on a regular basis," was unconstitutionally vague as applied to Defendant. The Indiana Court of Appeals' decision was based on an unreasonable determination of the facts, specifically, that Defendant used the truck for five consecutive days. The Court of Appeals relied on those facts in determining whether "a reasonable person would have considered McClernon's failure to register the information for the vehicle he operated to have put him at risk under the statute." In granting habeas relief, federal district court concluded the statute does not provide an objective standard by which to determine whether one's use of a vehicle is "regular." It therefore fails to place a person of ordinary intelligence on notice of the conduct proscribed and opens the door for arbitrary enforcement.

TITLE: McCown v. State

INDEX NO.: K.3.e.12.

CITE: (5th Dist., 07-22-08), Ind. App., 890 N.E.2d 752

SUBJECT: Failure to register as sex offender - duty to register began 7/1/01

HOLDING: When Indiana's sex offender registry law was enacted in 1994, it initially required registration only for those convicted of sex offenses after June 30, 1994. 2001 amendments to the statute required registration by any person previously convicted of child molesting. As a result, for a number of Indiana residents, including D-- who was convicted in 1987-- the 2001 amendments created an entirely new obligation to register as sex offenders. According to plain language of 2001 amendments to sex offender registry statutes, which took effect on July 1, 2001, D was required to register as a sex offender within seven days of his release from incarceration and/or placement on probation, and upon his arrival at his intended place of residence. D failed to do so after his release on November 10, 2001, and was therefore properly charged with failure to register as a sex offender. Thus, Tr. Ct. did not err in denying D's motion to dismiss State's charging informations alleging that he failed to register as a sex offender. Held, judgment affirmed and remanded for proper enhancement of habitual offender charge.

TITLE: McPhearson v. State
INDEX NO.: K.3.e.12.
CITE: (4/9/2020), 145 N.E.3d 880 (Ind. Ct. App 2020)
SUBJECT: Petition for removal from sex offender registry denied -- out-of- state conviction substantially similar to Indiana offense and no ex post facto violation
HOLDING: In 1998, Defendant pleaded guilty in Maine to gross sexual assault and admitted his crime consisted of "touching the victim's vagina with [his] hand and with [his] penis." As a result, he was required to register as a sex offender in Maine for life and, after statutory changes in Indiana law in 2006, was also a lifetime registrant in Indiana. In 2015, the Maine appellate courts found that their state's statutory sex offender registry requirements were unconstitutional as applied to individuals like Defendant because they violated ex post facto principles. Defendant filed a petition for removal from Indiana's sex offender registry in 2018 and served it solely on the county prosecutor's office. The trial court held a hearing, granted his petition, and notified the DOC for the first time. Thereafter, the Deputy Attorney General appeared on behalf of the DOC and filed motions to intervene in the proceedings and to correct error. The trial court granted both motions and vacated its original order removing Defendant before setting the matter for another hearing at which it denied Defendant's petition for removal from the registry.

The Court of Appeals held that Ind. Code 11-8-8-22(e) requires the trial court to give notice to four different government officers before conducting a hearing on a petition for removal. The Court also held that Defendant is required to register in Indiana not based on his previous obligation to register in Maine, but instead because he was convicted of a crime in Maine that is substantially similar to the Indiana offense of sexual battery, pursuant to Ind. Code 11-8-8-4.5(a)(22)-4.5(b)(1). The Court relied on Tyson v. State, 51 N.E.3d 88 (Ind. 2016), to conclude that there was no ex post facto violation in lengthening Defendant's Indiana registration obligation from ten years to life since he was already on notice of his registration requirements by the time he moved to Indiana and was also aware of the amendment.

TITLE: McVey v. State

INDEX NO.: K.3.e.12.

CITE: (7/1/2016), 56 N.E.3d 674 (Ind. Ct. App 2015)

SUBJECT: Application of unlawful entry statute -- no ex post facto violation

HOLDING: Pursuant to Ind. Code § 35-42-4-14(b) (effective July 1, 2015), a person who is required to register as a sex offender and who is either found to be a sexually violent predator or convicted of, among other crimes, child molesting commits unlawful entry by a serious sex offender, a Level 6 felony, when he "knowingly or intentionally enters school property." Applying the unlawful-entry statute to D, who committed child molesting well before the statute went into effect, did not violate Indiana's Ex Post Facto Clause. Weighing the seven factors outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554 (1963), Court concluded that the effects of the unlawful entry statute are minor and not punitive as applied to D, who wants to enter school property to take a CDL class. Notably, D does not allege that this is the only place he can take the class, and he started the CDL process after the unlawful-entry statute went into effect.

Court also held that applying the lifetime sex offender registration requirement to D, who committed his offense before July 1, 2001, would be an ex post facto law violation. Held, denial of petition asking to be exempt from unlawful-entry statute affirmed, reversed in part to vacate lifetime registration requirement.

RELATED CASES: Kirby, 120 N.E.3d 574 (Ind. Ct. App. 2019) (enforcement of unlawful entry statute not unconstitutional as applied to D; see full review, this section); Kirby, 95 N.E.3d 518 (Ind. 2018) (post-conviction rules do not let D bring his ex post facto claim in a post-conviction proceeding because D is challenging a collateral consequence instead of his conviction or sentence; issue should be raised in declaratory-judgment action).

TITLE: Milliner v. State

INDEX NO.: K.3.e.12.

CITE: (1st Dist., 07-29-08), Ind. App., 890 N.E.2d 789

SUBJECT: Homeless D properly convicted of failure to register as sex offender

HOLDING: State presented sufficient evidence to support D's conviction for failure to register as a sex offender. Under Ind. Code 5-2-12-8 (repealed, see now Ind. Code 11-8-8-11) D was required to complete and submit a new registration form to local law enforcement authority within seven days of a change in his home address. D moved from home he shared with his wife and admitted he did not re-register as a sex offender within seven days. Describing himself as "homeless," D noted that he lived with various other relatives during the relevant period, claiming he did not "change" his home address, as required by statute but, rather, he "lost" it.

Majority of Court concluded that evidence showed D made his home with others, not that he was homeless. Court does not read statute as having triggered duty to re-register only after an offender lived seven consecutive days in a new location. If that were the case, an offender could evade supervision by moving every six days. Rather, statute provides a seven-day grace period during which a registrant could avoid prosecution by reporting a change of address, whether permanent or temporary, to proper authorities. State's use of word "residence" in charging information did not heighten its burden to prove a level of permanency in D's move. Held, judgment affirmed; Kirsch, J., dissenting.

Note: In current statutory scheme, Ind. Code 11-8-8-12 defines "temporary residence" and prescribes how an offender without a principal or temporary residence must proceed.

RELATED CASES : Branch, App., 917 N.E.2d 1283 (D who left homeless shelter to stay at different places not more than four consecutive days at a time had to report his address change within seventy-two hours; sufficient evidence of failure to register).

TITLE: Nichols v. State

INDEX NO.: K.3.e.12.

CITE: (04-29-11), 947 N.E.2d 1011 (Ind. Ct. App. 2011)

SUBJECT: Sex offender registry - lifetime registration for "unrelated" offenses

HOLDING: When a sex offender has been "convicted of at least two (2) unrelated offenses," IND.

CODE 11-8-8-19(a) provides that the offender must register for life rather than ten years. "Unrelated" is not defined in the statute, but D argued that lifetime registration is only required where a second offense was committed after a D was sentenced for a first offense, as in the habitual offender context. Court rejected this interpretation, noting that the absence of "prior" and "felony convictions" in IND. CODE 11-8-8-19(a) makes it clear that the legislature meant for the statute to apply broadly, i.e., to multiple sex offenses without regard to their sequence or status of adjudication. Plain and ordinary understanding of "unrelated offenses" applies to offenses independent of one another--not a conviction-and-reoffense sequence. Here, in consolidated proceedings, D pled guilty to and was convicted of three charged sex offenses against two different victims in two different counties. The Hamilton County offenses were committed upon a different victim and in a different period of time from the Tipton County offense. Thus, Tr. Ct. did not err when it determined that D's offenses were "unrelated," and therefore that D must register for life.

TITLE: N.L. v. State
INDEX NO.: K.3.e.12.
CITE: (7/1/2013), 989 N.E.2d 773 (Ind. 2013)
SUBJECT: Placement of juvenile on sex offender registry - evidentiary hearing and findings
HOLDING: Juvenile may not be ordered to register as sex offender unless Tr. Ct. expressly finds, by clear and convincing evidence, that the juvenile is likely to commit another sex offense. Ind. Code 11-8-8-5(b)(2). It is well within a Tr. Ct.'s discretion to hold more than one hearing to determine whether a juvenile's risk of reoffending warrants placing them on the sex offender registry. But when it does so, every hearing held for that purpose must be an "evidentiary hearing" as defined by J.C.C. v. State, 897 N.E.2d 931 (Ind. 2008). That is, juveniles must have the opportunity to challenge the State's evidence and present evidence on their own; and if an "evidentiary hearing" is continued, they must have continued representation by counsel at the subsequent hearings as well. Here, Tr. Ct.'s order requiring N.L. to register as a sex offender was neither issued in connection with an evidentiary hearing nor accompanied by findings. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment reversed and remanded with instructions to conduct a new evidentiary hearing and express findings as J.C.C. requires.

TITLE: Peele v. State

INDEX NO.: K.3.e.12.

CITE: (01-24-20), Ind. Ct. App., 141 N.E.3d 838

SUBJECT: Trial court had subject matter jurisdiction to consider petition for removal from sex offender registry

HOLDING: Trial court erred in dismissing Defendant's verified petition for removal from Indiana's Sex Offender Registry. Ind. Code 11-8-8-22(d) clearly confers subject matter jurisdiction upon the circuit or superior court in the county in which the offender resides to accept the filing of, set a hearing on, and consider, grant, or deny an offender's petition for removal from the Registry. An individual may either file a petition for removal from the sex offender registry in a separate, civil cause or within a criminal cause under a qualifying court. Here, Defendant filed his petition in the superior court in county where he resided at the time, under the cause number associated with his conviction. He alleged that the registration requirement, as applied to him, violated Indiana's prohibition on ex post facto laws. However, the trial court dismissed the petition for lack of jurisdiction. Court of Appeals held that Defendant properly brought his petition for removal within a criminal cause in a qualifying court pursuant to statute. Thus, Court reversed and remanded with instructions to consider the merits of Defendant's petition.

TITLE: R.E.I. v. State

INDEX NO.: K.3.e.12.

CITE: (5th Dist., 05-07-08), Ind. App., 855 N.E.2d 93

SUBJECT: Juvenile court's jurisdiction to order 21 year-old D to register as sex offender

HOLDING: Juvenile court had jurisdiction to order 21 year-old D to register as sex offender, because: 1) he could not be ordered to register until juvenile court held required evidentiary hearing after his release from DOC, In re G.B., 709 N.E.2d 352 (Ind. Ct. App. 1999); and 2) he intentionally delayed proceedings past his twenty-first birthday. Juvenile court was not required to file a motion to reinstate jurisdiction pursuant to Ind. Code 31-30-2-3, because D was on probation for his delinquency adjudication for child molesting, and State filed petitions to register him as sex offender while he was on probation.

Court retained jurisdiction to conduct evidentiary hearing and order D to register after he reached age of twenty-one, because by his own conduct, he failed to appear for previous evidentiary hearings and intentionally delayed the proceedings past his twenty-first birthday. D's attempt to game the system by failing to appear for scheduled hearings in an effort to challenge juvenile court's jurisdiction is a clear "gotcha" technique that Court will not reward. Held, judgment affirmed.

TITLE: R.G. v. State

INDEX NO.: K.3.e.12.

CITE: (2nd Dist., 8-13-03), Ind. App., 793 N.E.2d 238

SUBJECT: Placement of juvenile on sex offender registry - likelihood of committing future sex offense

HOLDING: There was clear & convincing evidence to support Tr. Ct.'s decision to require juvenile D to register as sex offender. Evidence presented at sex registry hearing indicated that D is likely to commit a future sex offense, which is required by Ind. Code 5-2-12-4. Clinician who prepared discharge report from treatment center where D had been placed testified that D remained a high risk for re-offending. Discharge report also suggested that toward end of D's treatment, he became less open about his problems in order to create impression that he is cured. Although two therapists who met with D after his release from treatment center testified that they observed nothing in D's behavior to suggest that he was a high risk to re-offend, they did not have benefit of observing D in residential setting & D did not have opportunity to exhibit bad behavior while under their supervision. Moreover, psychologist who worked with D at treatment center testified that he believed D remained a high risk for re-offending. Held, judgment affirmed.

RELATED CASES: B.W., 909 N.E.2d 471 (Ind. Ct. App. 2009) (Tr. Ct. weighed evidence & did not err in finding clear & convincing evidence D is likely to reoffend, despite fact D completed a 2-year treatment program which resulted in some progress); J.B., App., 819 N.E.2d 137 (Tr. Ct. did not err in ordering juvenile to register as a sex offender even though the DOC would not accept him following a probation violation because he had passed his 18th birthday); M.L.H., App., 799 N.E.2d 1 (Ct. found that "clear & convincing" evidence existed that juvenile was likely to repeat a sex offense; dissenting opinion clarifies the proper scope of appellate review of challenges to the sufficiency of evidence for juvenile sex registry claims & implicitly criticizes the existing law on the subject).

TITLE: Smith v. State

INDEX NO.: K.3.e.12.

CITE: (08/23/2022), Ind. Ct. App., 194 N.E.3d 118

SUBJECT: Defendant's obligation to register as a sex offender for life was not unconstitutional

HOLDING: This is an interlocutory appeal from the denial of the defendant's motion to dismiss the charges. In 2004, Smith committed Class D felony sexual battery against an adult victim. At the time of the offenses, the Indiana Code imposed a lifetime registration requirement. In 2007, the General Assembly amended the Indiana Code to require offenders convicted of sexual battery to register for only ten years. In 2018, the Johnson County Sheriff's Office composed a memorandum informing Smith that his registration obligation was only ten years and notifying him of a change in his registration status. In 2019, the division of the DOC responsible for maintaining the sex and violent offender registry reclassified Smith as a lifetime registrant. In September 2020, the State charged Smith with two counts of Level 5 felony failure to register as a sex or violent offender and two counts of Level 6 felony failure to register as a sex or violent offender. Smith later filed a motion to dismiss, arguing it was unlawful for the State to continue to require him to register for life when the legislature passed a law after Smith's conviction reducing the registration period for his crime to ten years. He attached as an exhibit an email received on September 29, 2020, from a DOC registration coordinator, which stated: "Mr. Smith is required to register as a sex offender for life, with the use of force [in committing the 2005 sexual battery] being the lifetime qualifier (Indiana Code 11-8-8-19)." The trial court summarily denied the motion to dismiss without a hearing. Before addressing the merits, the Court of Appeals first rejected the State's argument that Smith's motion to dismiss was untimely because it was not filed 20 days before the omnibus date. The Court agreed that the primary basis for Smith's motion involved a question of law, and therefore, his motion to dismiss was not untimely because it was made before trial under IC 35-34-1-4(a)(11). On the merits, the Court determined that the lifetime registration requirement was not unconstitutional. The law at the time Smith committed the offense of sexual battery put the public on notice that those convicted of sexual battery were required to register as sex offenders for life if the offense included the use of force. The Court concluded that retroactive application of the 2007 amendment to IC 11-8-8-19 would lead to "absurd and unreasonable results" when looking at the amendment in context with other statutes dealing with the same subject matter. In 2007, the General Assembly enacted another statute that provided a mechanism for offenders like Smith to seek removal or modification of their registration obligation—even though Smith chose not to avail himself of this procedure. The Court held that the General Assembly intended its 2007 act exempting those convicted of Class D felony sexual battery from a lifetime registration obligation to be given prospective application only. The Court disagreed with Smith's argument that the lifetime registration requirement violated the equal privileges and immunities clause in Article 1, Section 23 of the Indiana Constitution, finding that "to the extent Smith is being treated differently from other sex offenders, it is the direct result of his own choices." The Court also found no "due course of law" violation under Article 1, Section 12 because Smith was afforded due process before the registration obligation was imposed on him. Further, the memorandum notifying Smith his registration obligation ended on June 25, 2018, did not effectively remove Smith from the Indiana sex offender registry because a sex offender's registration obligation is determined by statute. And "as a matter of public policy, if we were to accept Smith's position that a letter from a deputy sheriff saying a sex offender is no longer required to register removes the offender's legal obligation to register, then the State's interest in protecting the public from sex offenders could be stymied by an incompetent bureaucrat's

misunderstanding of the law." The Court acknowledged that if the DOC failed to notify Smith of his reclassification as a lifetime registrant in 2018, the present charges would violate due process, but found that was a factual matter not properly adjudicated via motion to dismiss. Held: affirmed and remanded.

TITLE: State v. Casada

INDEX NO.: K.3.e.12.

CITE: (2nd Dist., 04-22-05), Ind. App., 825 N.E.2d 936

SUBJECT: Erroneous grant of judgment on evidence - failure to register as sex offender; retrial barred

HOLDING: After D was found guilty by a jury of failing to register as a sex offender, Tr. Ct. on its own motion granted judgment on the evidence pursuant to Ind. Trial Rule 50(A)(6). Tr. Ct. issued its order because the State failed to allege that D knowingly & intentionally failed to register, noting that Ind. Code 35-34-1-2 requires charging information to allege the elements of an offense & Ind. Code 35-34-1-6 provides for dismissal for a defective information. Tr. Ct. erred in ordering acquittal as D did not object to the erroneous charging information. Despite the erroneous charging information, jury was properly instructed on the elements to prove the offense at trial & the State presented sufficient evidence to prove D knowingly & intentionally failed to register as a sex offender. A Tr. Ct. should not grant a motion for judgment on the evidence unless there is a total absence of evidence on some essential issue or if the evidence is without conflict & is susceptible to only one inference that is favorable to D. State v. Gradison, 758 N.E.2d 1008 (Ind. Ct. App. 2001).

However, despite the erroneous judgment on the evidence, D cannot be retried because an erroneous entry of acquittal acts as an acquittal for double jeopardy purposes. Ct. declined to accept the State's contention, without support from authority, that double jeopardy only extends to acquittals based on insufficient evidence. The Ct. also rejected the State's reliance on the *dictum* of Arizona v. Rumsey, 467 U.S. 203 (1984) that a jury's guilty verdict can be reinstated when no new fact finding is necessary. Held, judgment reversed but double jeopardy prohibits further prosecution.

RELATED CASES: Todd, App., 900 N.E.2d 776 (where evidence showed D worked at wife's tanning salon for 14 consecutive days while wife was ill, he had a duty to register in the county of the salon; sufficient evidence of failure to register).

TITLE: State v. Johnston

INDEX NO.: K.3.e.12.

CITE: (12/13/2016), 65 N.E.3d 1061 (Ind. Ct. App. 2016)

SUBJECT: Inadequate petition to remove from SOR

HOLDING: The Tr. Ct. erred by ruling that D's duty to register as a sex offender would terminate ten years after his most recent conviction because the petition did not comply with Ind. Code § 11-8-8-22. Although the petition listed D's 2006 conviction for child molesting, it did not list a 1997 conviction for the same offense. It also was not verified; it did not indicate service on the attorney general or the Department of Correction; it did not allege an ex post facto punishment violation. The Court ordered the matter dismissed without prejudice to D's right to file an adequate petition. Held, judgment reversed.

TITLE: State v. K.H.

INDEX NO.: K.3.e.12.

CITE: (5th Dist., 02-08-07), Ind. App., 860 N.E.2d 1284

SUBJECT: Removal of juvenile from sex offender registry affirmed, despite agreement

HOLDING: Trial Ct. appropriately ordered juvenile D removed from sex offender registry, even though juvenile agreed to be placed on registry during his delinquency proceedings. Juvenile agreed to be placed on the registry without ever being informed of the requirements of an evidentiary hearing & finding by clear & convincing evidence that he was likely to commit another sex offense before he could be placed on the registry. See Ind. Code 11-8-8-5(b). Trial Ct.'s acceptance of juvenile's agreement to be placed on registry without following requirements of Ind. Code 11-8-8-5 is not consistent with the juvenile code's stated goal of rehabilitation rather than punishment. D.S. v. State, 829 N.E.2d 1081 (Ind. Ct. App. 2005). Moreover, after juvenile's successful completion of sexual abuse family treatment intervention program, neither trial Ct. nor juvenile's probation officer believed that he should be placed on the sex offender registry. Held, judgment affirmed.

TITLE: State v. Kirby
INDEX NO.: K.3.e.12.
CITE: (3/4/2019), 120 N.E.3d 574 (Ind. Ct. App. 2019)
SUBJECT: Ex post facto challenge to unlawful school entry statute rejected
HOLDING: Kirby pled guilty in 2010 to one count of Class D felony child solicitation, leading to a 10-year sex-offender registration and 18-months probation, which he successfully concluded. The probation conditions made schools off-limits, but Kirby was granted explicit permission to enter school property so he could attend his son's school activities. But in 2015, Ind. Code § 35-42-4-14(b) made it a Level 6 felony for a "serious sex offender" like D to knowingly or intentionally enter school property. activities. So Kirby sought and received a declaratory judgment declaring the school-entry statute unconstitutional as applied to him.

Weighing the seven factors outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963), Court reversed, concluding that the 2015 regulatory statute is not unconstitutional as applied to Kirby because it does not amount to retroactive punishment in violation of the Ex Post Facto Clause of the Indiana Constitution. It is not excessive to prohibit Kirby from attending his son's school events because of his prior criminal conviction. Held, judgment reversed and remanded; Baker, J., dissenting with separate opinion.

TITLE: State v. Summers

INDEX NO.: K.3.e.12.

CITE: (10/19/2016), 62 N.E.3d 451 (Ind. Ct. App. 2016)

SUBJECT: No ex post facto violation from sex offender registry tolling requirement

HOLDING: Where D was required to register as a sex offender in Illinois in 2005 and later moved to Indiana, there was no ex post facto violation in applying the Indiana Sex Offender Registry (SOR) tolling requirement to D, even though Indiana did not add the tolling requirement until 2008, because D was subject to a tolling requirement in Illinois when he registered there. Thus, maintaining that requirement across state lines imposed no punitive burden on D. Cf. Tyson v. State, 51 N.E.3d 88, 92 (Ind. 2016) (though D's crime putting him on the Texas SOR did not make D a sex offender in Indiana at the time, requiring him to register in Indiana under a new statute that expanded the definition of sex offenders did not create an ex post facto violation). Held, judgment reversed.

TITLE: State v. Zerbe
INDEX NO.: K.3.e.12.
CITE: (2/25/2016), 50 N.E.3d 368 (Ind. 2016)
SUBJECT: Sex offender registry - out-of-state offense; no *ex post facto* violation
HOLDING: Because D was already required to register as a sex offender in Michigan, maintaining that requirement in Indiana does not retroactively punish him; thus there is no violation of the Indiana Constitution's *Ex Post Facto* Clause. D was convicted in Michigan of criminal sexual conduct with a minor in 1992, two years before Indiana and Michigan required registry of sex offenders. When D was released from prison in 1999, he was required to register as a sex offender in Michigan for 25 years. In 2006, Indiana amended its registry to include "a person who is required to register as a sex offender in any jurisdiction." See Ind. Code § 11-8-8-7(a),-19(f). D moved to Indiana in 2012. He successfully petitioned to be removed from the sex offender registry, arguing that the requirement is an *ex post facto* violation as applied to him because at the time he committed the underlying offense in 1992, neither Michigan nor Indiana had a registry.

Court disagreed, holding that it was not D's underlying crime that triggered his obligation to register as a sex offender; instead, it was Michigan's requirement that he register that triggered his obligation to register in Indiana. Court will not "second-guess the legitimacy of Michigan's registry requirement as it applies albeit retroactively to [Defendant]." For the same reasons explained in Tyson v. State, 51 N.E.3d 88 (Ind. Feb. 25, 2016), Court found that the 2006 amendment to the law was regulatory and non-punitive as applied to D. Held, grant of petition to remove designation as sex offender reversed.

RELATED CASES: Crowley, 188 N.E.3d 54 (Ind. Ct. App. 2022) (Requiring out of state offender to register in Indiana did not violate *ex post facto* even though crime committed prior to enactment Indiana's registry); Ammons, 50 N.E.3d 143 (Ind. 2016) (no *ex post facto* violation requiring D to register as sex offender upon his return from Iowa; even though D was not initially required to register here for his 1988 CM conviction, Iowa law required him to register on its registry when he moved there, and 2012 amendments to Indiana Code require a person who must register in another state must register here when they come to Indiana); Andrews, 978 N.E. 2d 494 (Ind. Ct. App. 2012) (even if D has a federal duty to register under USSORNA because he engages in interstate travel, only his duty to register under INSORNA is at issue; Indiana state courts do not have the authority to consider whether federal statutory penalties attach to D's conduct; D's petition for removal of his name from Indiana's sex offender registry should have been granted because the offense he committed in another state was committed before he was required to register under Indiana).

TITLE: Straw v. State

INDEX NO.: K.3.e.12.

CITE: (09/30/2019), 133 N.E.3d 765 (Ind. Ct. App. 2019)

SUBJECT: Person convicted of voyeurism does not have to register as a sex offender because legislature did not include that offense in its list of crimes requiring registration

HOLDING: The Court reversed and remanded the trial court's order requiring Defendant to register as a sex offender, as part of his condition for probation, when he was convicted of Level 6 felony voyeurism. This offense is not an offense listed under Ind. Code § 11-8-8-4.5, the statute that requires sex offender registration. Defendant had been charged with an offense that would have required him to register as a sex offender, but because he was acquitted of that charge and voyeurism is not specifically listed under the statute requiring registration, the trial court could not order him to register. [But see Healey v. Carter, 109 N.E.3d 1043 (Ind. Ct. App. 2018), where Defendant pleaded guilty to a charge that did not have the victim's age as an element but upon release from DOC he was still required to register as a sex offender because the victim was in fact under 12 years old. The difference between the two cases is that in Straw, Defendant went to trial and was acquitted of the charge for which he would have been required to register. The take away from Healey is that a guilty plea to an offense that does not specifically list the victim's age as an element will most likely not avoid the requirement for sex offender registration.]

TITLE: T.W. v. State

INDEX NO.: K.3.e.12.

CITE: (08-15-11), 953 N.E.2d 1120 (Ind. Ct. App. 2011)

SUBJECT: Juvenile court had jurisdiction to order juvenile to register as sex offender

HOLDING: In 2009, Tr. Ct. found T.W. to be delinquent for engaging in two counts of class C felony child molesting if committed by an adult. In September 2010, shortly after the DOC released T.W., the State petitioned to have the juvenile register as a sex offender and also to be evaluated to determine his risk of re-offending.

Tr. Ct. had subject matter jurisdiction to consider the State's petition. Ind. Code 11-8-8-4.5(b)(2) allows "a court" to find that a juvenile should be placed on the sex offender registry. Although the sex offender registry statutes are not part of the juvenile code, it is logical to assume that the General Assembly intended courts with juvenile jurisdiction to also have subject matter jurisdiction to make a sex offender registry finding. T.W. did not argue that requiring him to register as a sex offender violates either the United States or Indiana Constitutions. In the absence of any constitutional constraints, it was entirely with the General Assembly's prerogative to grant Indiana court the subject matter jurisdiction to enter orders requiring certain juveniles to register as sex offenders.

Further, while it is true that one of the stated purposes of the juvenile code is to "ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation," Court has previously held that requiring a juvenile to register as a sex offender does "not constitute an additional penalty." K.J.P. v. State, 724 N.E.2d 612, 615 (Ind. Ct. App. 2000) (citing In re G.B., 709 N.E.2d 352, 355 (Ind. Ct. App. 1999)). Also, the Juvenile Code does not absolutely prohibit a juvenile court . . . from imposing what might be called "punishment" upon a juvenile, including commitment to the Department of Correction. Held, judgment affirmed.

TITLE: Taylor v. State

INDEX NO: K.3.e.12.

CITE: (09-21-12), 975 N.E.2d 392 (Ind. Ct. App. 2012)

SUBJECT: Failure to register - D on home detention

HOLDING: D properly registered as a sex offender after release from incarceration in 2009 and properly updated his address with the registry two weeks later. On both occasions, D received notice and signed a form, which displayed in bold letters, "FAILURE TO COMPLY IS A CLASS D FELONY." Approximately two years later, D was arrested and convicted of confinement. He was released to home detention, to be served at an address not listed on the registry and failed to update the registry with the home detention address. D did not dispute he did not update his registry when he was placed on house arrest, but he claimed he did not knowingly or intentionally fail to register because he was not aware he was required to submit himself to double monitoring. Court disagreed, noting D's signature on form acknowledged he understood he had to register as a sex offender for ten years. Any argument D offers to the contrary is a request to reweigh the evidence, which Court cannot do. Held, judgment affirmed.

TITLE: Twine v. State

INDEX NO.: K.3.e.12.

CITE: 910 A.2d 1132 (Md. 2006)

SUBJECT: Homeless offenders wrongly convicted for failure to register as sex offenders

HOLDING: Maryland Court of Appeals held that the provision of Maryland's sex offender registry law that requires registrants to notify authorities when they change their "residence" did not authorize convictions for two homeless sex offenders with less than semi-permanent living situations. Court framed the issue as whether the statutory scheme allows convictions of homeless offenders for failing to notify authorities of a change in residence. Courts in Minnesota and Washington have concluded that their states' sex offender registration schemes did not authorize convictions for homeless offenders whose living situations prevented them from being able to send and receive mail. These courts reached this conclusion after noting that statutes appeared to use the terms "residence" and "address" interchangeably. Maryland's high court found that the same was true of its state's registration scheme. Relying on the ordinary meanings of the terms "residence" and "address," Court decided that homeless registrant has a new residence, for purpose of the sex offender law, "only if that person has a fixed location at which the registrant is living, or one to which the registrant intended to return upon leaving it." Court clarified that, once a D comes forward with evidence supporting a homelessness defense, State has the obligation to present evidence beyond a reasonable doubt that the D was staying at a location that qualified as a "residence" as defined above. Court held evidence insufficient on these grounds and ordered reversal (see also Jeandell v. State, 910 A.2d 1141 (2006)).

TITLE: Tyson v. State
INDEX NO.: K.3.e.12.
CITE: (2/25/2016), 51 N.E.3d 88 (Ind. 2016)
SUBJECT: Requiring sex offenders who move to Indiana to register does not violate *Ex Post Facto* Clause
HOLDING: A sex offender required to register in any other state must also register in Indiana if he or she relocates to Indiana, regardless of when the initial sex crime was committed. It is not an unconstitutional retroactive punishment for the State to require sex offenders with registration obligations elsewhere to also register in Indiana.

Here, when D was 13 years-old and living in Texas in 2002, he was adjudicated a delinquent for an offense that required him to register as a sex offender until 2014. At the time of his offense, he would not have been required to register in Indiana if he moved here. But in 2006, Indiana amended its registry to include "a person who is required to register as a sex offender in any jurisdiction." See Ind. Code § 11-8-8-7(a), - 19(f). D moved to Indiana in 2009 and was charged in 2014 with failure to register as a sex offender. He moved to dismiss the charge, arguing that the registry requirement was an *ex post facto* law because his offense occurred before the change in the law in 2006.

Court held that Indiana's registry laws did not violate the Indiana Constitution's prohibition against *ex post facto* laws. The Court examined a number of factors to decide whether the registry law was punitive in intent or effect. See Wallace v. State, 905 N.E.2d 371 (Ind. 2009). As applied to D, who "merely maintained his sex offender status across state lines," the amended sex offender registry law was regulatory and non-punitive. Held, transfer granted, Court of Appeals' memorandum opinion vacated, denial of motion to dismiss affirmed.

Note: Court also rejected D's argument that he did not fit the definition of "sex or violent offender" under Ind. Code § 11-8-8-5. Reading the two subsections together "as one list of requirements would lead to an absurd result."

RELATED CASES: Crowley, 188 N.E.3d 54 (Ind. Ct. App. 2021) (Requiring out of state offender to register in Indiana did not violate *ex post facto* even though crime committed prior to enactment Indiana's registry); Summers, 62 N.E.3d 451 (Ind. Ct. App. 2016) (Where D was required to register as a sex offender in Illinois and later moved to Indiana, there was no *ex post facto* violation in applying Indiana SOR tolling requirement to D because he was subject to a tolling requirement in Illinois).

TITLE: United States v. Kebodeaux

INDEX NO.: K.3.e.12.

CITE: (6/24/2013), 133 S. Ct. 2496 (U.S. Supreme Court 2013)

SUBJECT: SONRA's registration requirements as applied to D fall within scope of Necessary & Proper Clause

HOLDING: Congress had the power under the Necessary and Proper Clause to enact Sex Offender Registration and Notification Act's (SONRA's) registration requirements and apply them to an offender who had already completed his sentence when SONRA was enacted. Court's opinion turned in significant part on fact that offender in this case was still subject to registration requirements under the federal Wetterling Act when he was released. As a result, the registration requirements of SONRA merely modified existing legal requirements. "Congress could reasonably conclude that registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns." Held, 5th Circuit Court of Appeals' opinion at 687 F.3d 232 reversed and remanded; Roberts, C.J., CONCURRING to emphasize that the majority's holding is not based on a "federal police power," but is instead based on Congress's power to make rules for the regulation of the Armed Forces; Scalia, J., DISSENTING; Thomas, J., DISSENTING.

TITLE: Wallace v. State

INDEX NO.: K.3.e.12.

CITE: (04-30-09), 905 N.E.2d 371 (Ind. 2009)

SUBJECT: Sex offender registry - ex post facto violation

HOLDING: Indiana's Sex Offender Registration Act ("Act") constitutes retroactive punishment forbidden by the Ex Post Facto Clause contained in the Indiana Constitution when applied to a person whose crime occurred before the statute was enacted. The ex post facto clauses of the U.S. Constitution and the Indiana Constitution are similarly worded. When Court interprets language in the state constitution substantially identical to its federal counterpart, Court may part company with the interpretation of the U.S. Supreme Court based on the text, history, and decisional law elaborating the Indiana constitutional right. Although applying the federal intent-effects test in analyzing the ex post facto claim under the Indiana Constitution, Court reaches a different conclusion than the U.S. Supreme Court did in Smith v. Doe, 538 U.S. 84, 105-06 (2003) (registration requirement could be applied retroactively without violating the Ex Post Facto Clause of the U.S. Constitution). Under the intent-effects test, Court must first determine whether the legislature meant the statute to impose punishment. If so, then punishment results and retroactive application violates the Ex Post Facto Clause. If not, Court must further examine whether the statutory scheme is so punitive in effect as to negate the intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty. In making this determination, Court considers: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether it comes into play only on a finding of *scienter*, (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.

Assuming without deciding that the Legislature intended the Act to be non-punitive, its effects are nonetheless punitive as to D. Six of the seven factors illustrate a punitive effect. Although the Act is a legitimate way to protect the public from sex offenders, Indiana's registration system is excessive in relation to the purpose of safety. The Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk. Moreover, there is no mechanism by which a registered sex offender can petition for relief even on the clearest proof of rehabilitation.

Here, D was charged, convicted and served the sentence for his crime before the Act was enacted. Thus, as applied to D, the Act violates the prohibition on ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed. Held, transfer granted, judgment reversed and Court of Appeals' opinion at 878 N.E.2d 1268 summarily affirmed in all other respects.

RELATED CASES: Gonzalez, 980 N.E.2d 312 (Ind. 2013) (denial of D's petition to be removed from sex offender registry on basis of 2006 amendment to I.C. 5-2-12-15 (1996), which increased time for D to stay in registry from 10 years to life, was ex post facto violation because D was placed on the registry 7 years before the 2006 amendment went into effect, barring D from ever petitioning to be removed from list); Sewell, 973 N.E.2d 96 (Ind. Ct. App. 2012) (conviction for committing sex offender residency offense for residing within 1000 feet of youth program center did not violate Indiana Constitution's ex post facto prohibition, even though D's status as "offender against children" under Ind. Code § 35-42-4-

11 was based on his child molesting conviction entered 5 years before that statute went into effect, because D established his residence in a prohibited zone after Ind. Code §35-42-4-11 was in effect; case distinguishable from State v. Pollard, 908 N.E.2d 1145, 1154 (Ind. 2009) because Pollard resided in property which only later fell within 1000 feet of a school or youth program center); York, N.E.2d 844 (Ind. Ct. App. 2011) (ex post facto claim re: residency restriction did not apply to this appeal because the alleged violation happened within D's original ten-year period rather than the lifetime requirement that became effective after his conviction); Blakemore, 925 N.E.2d 759 (Ind. Ct. App. 2010) (fact that D agreed to "comply with the statutory requirements of registering with local law enforcement as a sex offender" in 1998 did not waive his future ex post facto argument under Wallace); Greer, App., 918 N.E.2d 607 (the residency restriction that a sex offender cannot live within 1000 feet of a school, etc. violates ex post facto clause if applied to an offender who committed his crime before the statute applying the residency restriction to his crime was passed, regardless of whether D owned his home); Pollard, 908 N.E.2d 1145 (Ind. 2009) (retroactive application of the residency restriction statute, prohibiting certain sex offenders from living within 1,000 feet of school property, youth program center or a park, violates Ex Post Facto Clause of the Indiana Constitution); Dowdell, 907 N.E.2d 559 (Ind. Ct. App 2009) (ordinance barring convicted sex offenders from public parks violated Indiana Constitution prohibition against ex post facto laws as applied to D, who was convicted, served his sentence and completed his registration requirements before ordinance was enacted); Ridner, App., 892 N.E.2d 151 (registry requirement as sex offender was not punitive and thus not an ex post facto law when retroactively applied); Douglas, App., 878 N.E.2d 873 (incarceration for failing to register is not ex post facto when applied to a D who was only required to register years after his crime when his offense was added to the registry); Spencer, App., 707 N.E.2d 1039 (as the registry existed in 1999, it was not punitive).

K. CRIMES

K.3. Offenses against the person

K.3.e.13 Sexually violent predator and related offenses (IC 35-38-1-7.5; IC 35-42-4-10)

TITLE: Bleeke v. Lemmon
INDEX NO.: K.3.e.13.
CITE: (4/16/2014), 6 N.E.3d 907 (Ind. 2014)
SUBJECT: Offender against children cannot apply to offenses committed before July 1, 2005
HOLDING: “Offender against children” (OAC) label cannot be applied to anyone who committed their underlying sex offense prior to July 1, 2006. For all persons charged with either a residential restriction offense (Ind. Code 35-42-4-11) or an “unlawful employment offense” (Ind. Code 35-42-4-10), and the sex offense that triggered the restriction occurred before July 1, 2006, the OAC statutes do not apply to those persons. Here, parolee should not be considered an OAC based on his 2005 attempted criminal deviate conduct conviction. Held, transfer granted, Court of Appeals’ opinion at 982 N.E.2d 1040 vacated, judgment affirmed in part and reversed in part.

TITLE: Hollen v. State

INDEX NO.: K.3.e.13.

CITE: (6/25/2013), 994 N.E.2d 1166 (Ind. Ct. App 2013)

SUBJECT: Lifetime sexually violent predator registry - no ex post facto violation as applied to D

HOLDING: D argued that the requirement that he register as a sexually violent predator constitutes an ex post facto law because he committed the offenses prior to the effective date of the Sex Offender Registration Act. To the extent that D argues that the Act constitutes an ex post facto law because he committed the offense prior to the effective date of July 1, 1994, Court did not find his argument persuasive because his offenses were alleged to have been committed after that date. The legislature's intent was civil and regulatory and not punitive in relation to D's claim that application of the Act violates the Ex Post Facto Clause.

Weighing the seven factors outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963), Court also concluded that although the Act was less restrictive in 1994 when he committed the offenses, the effects of applying the regulatory scheme to D were not punitive. Held, denial of petition to remove registration act SVP status and GPS affirmed.

TITLE: Jensen v. State

INDEX NO.: K.3.e.13.

CITE: (04-30-09), 905 N.E.2d 384 (Ind. 2009)

SUBJECT: Lifetime sexually violent predator registry - no ex post facto violation

HOLDING: Application of 2006 amendment to Indiana Sex Offender Registration Act requiring lifetime registration to D who completed his executed sentence prior to amendment did not violate prohibition against ex post facto laws. D pled guilty to vicarious sexual gratification and child molesting and was required to register as a sex offender for ten years. D began registering in 2004 upon his release from prison, but in 2006, he was notified that he had to continue registering for life due to the 2006 amendment expanding the definition of "sexually violent predator." Applying the federal intent-effects test in analyzing the ex post facto claim under the Indiana Constitution, Court first concluded that legislature's intent was civil and regulatory, and not criminal or punitive in relation to claim that Act is an ex post facto violation.

In examining whether the Act is so punitive in effect as to negate the intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty, Court considers: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether it comes into play only on a finding of *scienter*, (4) whether its operation will promote the traditional aims of punishment--retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Here, only three of the seven Mendoza-Martinez factors, *i.e.*, (1)-(3) illustrate a punitive effect when applied to D in this case. Factors (4)-(7) point in the other direction. Thus, D has not carried his burden of demonstrating that as applied to him the Act violates the Indiana constitutional prohibition against ex post facto laws. Whether D would have entered plea agreement had he known he would later be required to register for life as a sexually violent predator "requires a factual inquiry that is best resolved through post-conviction proceedings." Held, transfer granted, Court of Appeals' opinion at 878 N.E.2d 400 vacated, judgment affirmed. Sullivan, J., concurring, notes that D can petition court for a determination that he should no longer be considered a sexually violent predator 10 years after date of his release from incarceration, thus his ex post facto claim is not ripe for resolution. Boehm and Dickson, JJ., dissenting, believe that enhanced registration requirements constitute an additional punishment that incapacitates offenders and violates Ex Post Facto Clause as applied to D, whose crimes were committed in 1998.

RELATED CASES: Healey, 986 N.E.2d 825 (Ind. Ct. App 2013) (where sex offender has no statutory right to challenge increase in number of years he must register, the increase constitutes punishment and violates Indiana's prohibition on ex post facto laws); Gonzales, 855 N.E.2d 648 (Ind. Ct. App. 2012) (lack of statutory mechanism for D to petition for reassessment of lifetime registration requirement made 2006 version of the Sex Offender Registration Act, as applied to D, an impermissible ex post facto law); Flanders, 955 N.E.2d 732 (Ind. Ct. App 2011) (although the change in the sex offender registry statutes making D a SVP by operation of law did not violate the Ex Post Facto Clause, the change making D ineligible to petition for relief from lifetime registration does violate Ex Post Facto Clause; thus, SVPs who committed offenses before change in statute removing ability to petition for relief must be allowed to petition for a change in status once a year after he has registered for ten years); Lemon, 949 N.E.2d 803 (Ind. 2011) (retroactive application of 2007 amendment to Ind. Code 35-38-1-7.5(b), which made D a sexually violent predator by operation of law, did not violate Indiana's prohibition on ex post facto

laws because D failed to cite any evidence that the intent of the amendment was punitive and because at least four of the seven factors considered to decide whether the effects of a regulatory scheme are punitive or non-punitive weigh in favor of finding the 2007 amendment to Ind. Code 35-38-1-7.5(b) as non-punitive); Vickery, 929 N.E.2d 907 (Ind. Ct. App 2010) (rejecting argument that lifetime registration statute is punitive because it "imposes an additional punishment of shaming"); Gardner, 923 N.E.2d 959 (Ind. Ct. App 2010) (claim that violent registration requirement violates ex post facto is not ripe for appellate review because Gardner has not yet been ordered to register); Herron, App., 918 N.E.2d 682 (D who was required by Arizona to register as a sex offender for life when he committed his offense in 1983, is a "sex offender" who is required to register for life under Indiana's Sex Offender Registration Act).

TITLE: Lemon v. Harris

INDEX NO.: K.3.e.13.

CITE: (06-28-11), 949 N.E.2d 803 (Ind. 2011)

SUBJECT: Retroactive application of sexually violent predator statute - no ex post facto violation

HOLDING: Even though D committed his crimes before the Legislature created the status of “sexually violent predator” (“SVP”), the 2007 amendment to Ind. Code § 35-38-1-7.5(b) makes him an SVP by operation of law, and the change in status does not violate Indiana’s prohibition on ex post facto laws or the doctrine of separation of powers.

The 2007 amendment of Ind. Code § 35-38-1-7.5 makes a person an SVP “by operation of law” if they committed a qualifying offense and if the person was released from incarceration for the offense after June 30, 1994.

A law is ex post facto if, among other things, it “substantially disadvantage[s] a D because it increase[s] his punishment.” Stroud v. State, 809 N.E.2d 274, 288 (Ind. 2004). Under the “intent-effects” test adopted in Wallace v. State, 905 N.E.2d 371, 378 (Ind. 2009), retroactive application of a statute violates the ex post facto prohibition if a statute intends to impose punishment or, if the Legislature intended a non-punitive regulatory scheme, if a statute’s effects are so punitive as to transform the regulatory scheme into a criminal penalty. Id. Determining whether a statute’s effects transform a regulatory scheme into a punitive law requires consideration of seven factors, including whether: a) the sanction involves an affirmative disability or restraint, b) whether an alternative purpose is assignable to it, and c) whether it appears excessive in relation to the alternative purpose assigned. Id. at 379.

Here, in 1999, D pleaded guilty to B felony child molesting. He was required to register as a sex offender for ten years following his release from incarceration. Around the time D was released, the department of correction (“DOC”) notified D that he was an SVP under Ind. Code § 35-38-1-7.5 and that he must register as a sex offender for life. D agreed that he had to register but disputed that he was required to register for life.

The plain language of Ind. Code § 35-38-1-7.5(b) (2007) calls for retroactive application of the statute. D committed a qualifying offense and, as required by the statute, he was released from incarceration after June 30, 1994.

Retroactive application of the 2007 amendment does not violate the ex post facto prohibition. Because of the lack of legislative history or statement purpose and because D failed to cite any evidence of punitive intent in the 2007 amendment to Ind. Code § 35-38-1-7.5(b), Court presumed that the Legislature’s intent was civil and regulatory. Further, at least four of the seven factors considered to whether the effects of the Act are punitive or non-punitive weigh in favor of treating the amendment as non-punitive. The amendment advances the Act’s legitimate purpose of public safety; only those who present a future threat are required to register for their lifetimes. Further, the fact that the 2007 amendment allows an individualized determination based on likeliness to re-offend after his original ten-year registration requirement expires makes the amendment less punitive. “[A]pplication of the lifetime-registration requirement is not punitive as applied to Harris, especially since he may only be required to register for life if, as determined by a court with the assistance of two experts, he is likely to re-offend - a requirement that most assuredly advances the Act’s legitimate regulatory purpose.” Held, transfer granted, Court of Appeals’ opinion at 926 N.E.2d 1110 vacated, judgment affirmed.

Justice Dickson dissented. “In accord with the dissent in Jensen v. State, 905 N.E.2d 384 396-98 (Ind. 2009) (Boehm, J., dissenting), I believe that the D’s reclassification and the resulting enhanced

requirements of the 2007 amendment constitute additional punishments that violate the Ex Post Facto Clause of the Indiana Constitution when applied to this D, who was sentenced in 1999.”

RELATED CASES: Harlan, 971 N.E.2d 163 (Ind. Ct. App 2012) (D committed one of his child molestation offenses during the period when the sex offender registry requirements were in effect, thus the requirement he register as a SVP is not an ex post facto violation under Lemon v. Harris); Flanders, 955 N.E.2d 732 (Ind. Ct. App 2011) (although the change in the sex offender registry statutes making D a SVP by operation of law did not violate the Ex Post Facto Clause, the change making D ineligible to petition for relief from lifetime registration does violate Ex Post Facto Clause; thus, SVPs who committed offenses before change in statute removing ability to petition for relief must be allowed to petition for a change in status once a year after he has registered for ten years).

TITLE: Mehringer v. State

INDEX NO.: K.3.e.13.

CITE: (08-24-2020), 152 N.E.3d 667 (Ind. Ct. App. 2020)

SUBJECT: Sexual Violent Predator (SVP) finding does not violate separation of powers or due process

HOLDING: Under Ind. Code § 35-38-1-7.5(2014) ("SVP Statute"), a person is an SVP by operation of law if he, being at least eighteen years of age, commits one of several enumerated offenses. An SVP is subject to additional restrictions beyond those imposed on non-SVP sex offenders. Here, Defendant received a sentence of nine years with seven years executed in the Department of Correction for his Level 3 felony child molesting conviction. Defendant's conviction is one of the enumerated offenses that automatically renders a person an SVP. Defendant argued the SVP Statute is unconstitutional because it violates the principle of separation of powers and that his due process rights were violated because he was deemed an SVP by operation of law and could not rebut the statutory presumption that he is likely to reoffend. He framed his argument as a challenge to the SVP statute on vagueness grounds. The Court of Appeals rejected Defendant's arguments and affirmed his SVP status. Court also found no abuse of discretion in trial court's omission of mitigating factors in its sentencing statement, and Defendant's sentence was not inappropriate considering the nature of his offense and his character.

TITLE: Phelps v. State

INDEX NO.: K.3.e.13.

CITE: (2nd Dist., 10-05-09), 914 N.E.2d 283 (Ind. Ct. App 2009)

SUBJECT: Insufficient evidence to support sexually violent predator finding

HOLDING: Evidence was insufficient to support Tr. Ct.'s determination that D is a sexually violent predator. A sexually violent predator is a person who suffers from a mental abnormality or personality disorder that makes the person likely to repeatedly commit a sex offense. Ind. Code 35-38-1-7.5(a). A court can find that a person is a sexually violent predator after considering the testimony of two psychologists or psychiatrists with expertise in criminal behavioral disorders. Ind. Code 35-38-1-7.5(e). Court reviewed D's sufficiency challenge by asking whether there was substantial evidence of probative value to support Tr. Ct.'s finding that D suffers from a mental abnormality or personality disorder that makes him likely to repeatedly commit the enumerated sex offenses.

Here, the son of D's friend asked if he and his cousins could come to D's house to play video games and shoot pool. D let the boys, ages 13 and 14, come over. One boy asked D if they could watch a pornographic movie; D agreed. The boy asked if he could masturbate; D told the boy, "Go for it." The boy asked D if he was going to join in; D accepted the invitation and began to masturbate. The other two boys came into the room and also began masturbating. The State filed a thirteen-count indictment but later agreed to drop ten charges if D would plead guilty to Sexual Misconduct with a Minor, Sexual Gratification, and Dissemination of Material Harmful to a Minor. Phelps took the deal. The parties agreed that D's sentence would not exceed eight years. Tr. Ct. appointed two experts to determine if D was a sexually violent predator. Both experts found that D is *not* a sexually violent predator. Tr. Ct. accepted the plea, determined that D is a sexually violent predator, sentenced him to consecutive terms of two years for Sexual Misconduct with a Minor, four years for Sexual Gratification, and two years for Dissemination of Material Harmful to a Minor.

The fact that neither expert concluded that D is a sexually violent predator did not preclude a determination that he is a sexually violent predator because the statute requires only that the court consult experts. Also, the standard of review dictates that D could not use the experts' conclusions to refute any positive evidence that he is a sexually violent predator. Nonetheless, Court held that the expert opinions highlighted the dearth of evidence showing that D is a sexually violent predator and thus vacated the finding. Held, judgment affirmed in part, reversed in part and remanded with instructions.

TITLE: Scott v. State

INDEX NO.: K.3.e.13.

CITE: (4th Dist.; 10-28-08), Ind. App., 895 N.E.2d 369

SUBJECT: Sexually violent predator -burden of proof

HOLDING: Tr. Ct.'s serious violent predator (SVP) determination was supported by sufficient evidence. ASVP is "an individual who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly" commit certain enumerated sex or violent offenses. Ind. Code 5-2-12-4.5 (2004). Court held that a person is "likely" to reoffend if, because of a mental abnormality or personality disorder, the person presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit the statutorily-enumerated sex or violent crimes in the future. Court declined to read a "more likely than not" or precise mathematical standard into the word "likely" in Indiana's SVP statute. Court applied the standard of review used to review sufficiency of evidence to support a conviction to review the SVP determination.

Here, Dr. Cerling, a psychologist, concluded that D presented only "a moderate risk for future sexual offenses." Dr. Liffick, the other court-appointed psychologist, concluded that D "is significantly more likely than the average individual to engage in the offenses listed." Also, Dr. Liffick noted D's lack of remorse. Moreover, D had a 1993 conviction for attempted child molesting. Dr. Liffick's report, D's multiple sex-related convictions, along with his lack of remorse, support Tr. Ct.'s finding that D is a sexually violent predator. Held, judgment affirmed.

NOTE: Court also held that the doctors are not required to testify and be cross-examined under the statute in effect in 2006. However, in 2007, Ind. Code 35-38-1-7.5 was amended to require a hearing at which the doctors testify.

RELATED CASES: Edwards, 952 N.E.2d 862 (Ind. Ct. App 2011) (based on doctors' reports and testimony, as well as D's overtly sexual crime of possession of child pornography, and his lack of remorse, there was substantial evidence of probative value to support Tr. Ct.'s finding that D is a SVP; doctors were not required to connect his diagnosis or mental abnormality to his current crime); Baugh, 933 N.E.2d 1277 (Ind. 2010) (invited error doctrine precluded consideration of D's appellate claims based on the absence of the doctors' live testimony at the hearing and the alleged insufficient expertise in criminal behavioral disorders, where counsel affirmatively invited Tr. Ct. to make its SVP determination based on the convictions and the doctors' reports); Williams, App., 895 N.E.2d 377 (rejecting D's claim that burden of proof is clear and convincing evidence, which is the standard applied in juvenile SVP determinations; there was sufficient evidence to support SVP determination despite on psychologist's opinion that D was not a SVP in presented a low risk of re-offending).

TITLE: Spencer v. State
INDEX NO.: K.3.e.13.
CITE: (8-3-20), Ind. Ct. App., 153 N.E.3d 289
SUBJECT: Sexually violent predator registry requirement -- exhaustion of administrative remedies and improper use of out-of-state convictions

HOLDING: When Defendant moved to Indiana from Florida in 2016, he had a criminal history of two separate convictions from 1996 and 1997 which occurred when he was eighteen years old and required him to register in Florida for life as a sex offender. In 2016, as required by Indiana law, Defendant registered as a sex offender in Indiana. In 2018, the Sheriff's office telephoned Defendant and informed him that he was being designated as a sexually violent predator (SVP) but never gave him written notice of the change of his designation. Defendant filed a petition in the trial court to remove his designation as an SVP which was denied after a hearing. On appeal, the State argued Defendant failed to exhaust the administrative remedies that were available to him, specifically the "DOC Appeal Procedure". The DOC Appeal Procedure sets forth the manner in which a local law enforcement authority may implement a proposed change to information regarding a local registrant in the Indiana Sex and Violent Offender Registry. It also sets forth the administrative procedure by which the registrant can protest any proposed change and, if necessary, appeal the decision to the DOC. However, the DOC Appeal Procedure states that the right of protest arises only when the local law enforcement authority notifies a registrant of a proposed change in writing.

Here, because the Sheriff's office never gave Defendant written notice that he would be designated as an SVP, Defendant did not fail to exhaust his administrative remedies. The Court also found that Defendant's Florida convictions were not substantially equivalent to the crimes of Class A or Class B felony child molesting as defined in Indiana to require that he register as a SVP in Indiana. And the law in effect in 2016 when Defendant moved to Indiana provided that, to be an SVP, he must have committed a crime substantially equivalent to child molesting as a Level 4 felony "for crimes committed after June 30, 2014." Defendant's crimes occurred in 1995 and he is therefore not required to register as an SVP under the statute that existed at the time Defendant moved to Indiana. Held, registration as an SVP reversed.

TITLE: Stockert v. State
INDEX NO.: K.3.e.13.
CITE: (9/22/2014), 44 N.E.3d 78 (Ind. Ct. App 2015)
SUBJECT: Sex offender registration period determined by law, not by DOC or Tr. Ct.
HOLDING: Tr. Ct. properly denied D's motion for a declaratory judgment seeking to overturn a Department of Correction designation that he is a sexually violent predator (SVP) and offender against children. After pleading guilty to Class B felony criminal deviate conduct, D was informed at sentencing that he would be required to report to the Sex Offender Registry for 10 years, but the DOC later informed him he would be placed on the registry for life. But by virtue of his Class B felony criminal deviate conduct conviction, D is an SVP by operation of law under Ind. Code § 35-38-1-7.5(b) and is required to register for life. The length of D's required reporting period is determined by the applicable statutes and not by the Tr. Ct. or the DOC. See Nichols v. State, 947 N.E.2d 1011 (Ind. Ct. App 2011). Held, judgment affirmed.

K. CRIMES

K.4. Offenses against property

K.4.a. Arson (Ind. Code 35-43-1-1)

TITLE: Alexander v. State

INDEX NO.: K.4.a.

CITE: (3rd Dist., 10-01-92), Ind. App., 600 N.E.2d 549

SUBJECT: Enhancement of arson due to injury to another includes injury to firefighters

HOLDING: D was properly charged & convicted of Arson as Class A felony under Ind. Code 35-43-1-1(a)(2) based on injury to firefighter. Statute provides that arson is elevated to Class A felony if it results in either bodily injury or serious bodily injury to any person other than D. Firefighter sustained injury while fighting fire & was only one injured. Ct. rejected D's argument that if firefighters are included in endangerment provision of Ind. Code 35-43-1-1(a)(2), sections c & d, providing for C & D felony convictions, would be rendered meaningless because firefighters respond to virtually every fire, thereby endangering their lives, & elevating arson to Class B felony. Ct. instead looked to plain & ordinary meaning of words & found that D's argument would require finding that firefighters do not fall in common definition of "persons" or "humans." Ct. refused to do this, & affirmed D's conviction for Class A felony arson.

RELATED CASES: Faulisi, App., 602 N.E.2d 1032

TITLE: Lahrman v. State

INDEX NO.: K.4.a.

CITE: (4th Dist. 7/17/84) Ind. App., 465 N.E.2d 1162

SUBJECT: Class A arson - Class B arson inherently included

HOLDING: Tr. Ct. did not err in entering judgment for D on Class A felony arson at conclusion of state's case-in-chief & allowing trial to proceed on charge of Class B felony arson. Here, Ct. finds Class B arson is "inherently" included in Class A arson. Offense is inherently included if, by definition, it is impossible to commit greater offense without also committing lesser. Jones 438 N.E.2d 972. Charging information included Class B arson. Ct. also finds evidence supported conviction for Class B arson - circumstances endangered human life (explosion scattered debris over large area onto highway & L.P. gas tanks inside posed substantial danger of further explosions). Held, no error.

RELATED CASES: McGowan, App., 671 N.E.2d 1210 (D charged with class A felony arson was properly convicted of class B felony arson, despite fact that no final instructions or verdict forms had been provided to jury for class B arson; D received fair notice of charges against her & was not misled in her defense).

TITLE: Martin v. State
INDEX NO.: K.4.a.
CITE: (3d Dist. 2/13/86) Ind. App., 488 N.E.2d 1160
SUBJECT: Arson - charging multiple counts
HOLDING: D was erroneously charged with 2 counts of arson. Here, only one dwelling was involved. D was charged with damaging property of Mr. & Mrs. Martin & of Mr. Martin & the mortgage holder. Ct. cites robbery cases discussing single or multiple takings in support of holding that evidence supports only one count of arson. Held, reversed & remanded for new trial on other grounds (erroneous joinder of escape charge to arson charge).

TITLE: McDonald v. State

INDEX NO.: K.4.a.

CITE: (9/2/82) Ind., 439 N.E.2d 588

SUBJECT: Arson - sufficiency of evidence

HOLDING: Where expert testified fire occurred because someone saturated floor with flammable liquid & ignited it, D had threatened to burn house down, witnesses at scene testified D set fire, D made several separate & unrelated admissions following the fire, evidence supported verdict. Ct. rejects D's reliance on McAllister, App., 317 N.E.2d 200, 203 (no evidence placing D at scene of fire) & Griffin, App., 413 N.E.2d 293 (record showed only presence at scene & opportunity to set fire). Held, conviction affirmed.

RELATED CASES: Galbraith, App., 468 N.E.2d 575.

TITLE: Neuhausel v. State

INDEX NO.: K.4.a.

CITE: (2d Dist. 11/7/88), Ind. App., 530 N.E.2d 121

SUBJECT: Arson - dwelling

HOLDING: Evidence was insufficient to support D's conviction for arson of dwelling of another without consent where party named in information had no possessory interest in burned building. D was charged with arson of dwelling of Dorothy Lewis without her consent. Statutory definition of "dwelling" is building, etc., "that is a person's home or place of lodging." Ind. Code 35-41-1-10. Undisputed evidence showed that possessory interest in burned house was in 3d party. Thus, house was not Dorothy Lewis' dwelling. State failed to meet burden of proof on essential element of offense as charged. See Brooks 526 N.E.2d 1171. Sullivan, J., CONCURS.

RELATED CASES: White, App., 846 N.E.2d 1026 (while it is uncertain when arson/burglary victim's family were to take up permanent residency in house, they clearly intended to do so in near future; thus, State proved beyond reasonable doubt that house was a "dwelling").

TITLE: Pedigo v. State

INDEX NO.: K.4.a.

CITE: (1st Dist. 12/28/82) Ind. App., 443 N.E.2d 347

SUBJECT: Arson - sufficiency; human life endangered

HOLDING: Human life is endangered if it is exposed to harm. Here, Ds contend evidence does not show human life was endangered. A bomb exploded in a van parked in front of owner's home. Pieces of metal, glass, shrapnel & debris struck house; one piece penetrated the siding. The Ct. finds persons near window of house or pedestrians could have been fatally injured. Van's gas tank could have exploded causing a major fire. Evidence shows human life was endangered which is sufficient to sustain Class B arson conviction. Held, conviction affirmed.

RELATED CASES: Galbraith, App., 468 N.E.2d 575 (D contends danger to firefighters is not contemplated in Ind. Code 35-43-1-1(a)(2); Ct. finds D should have raised issue in motion to dismiss (failure to state offense), rather than in attack on sufficiency; held, evidence sustains finding of endangerment to persons other than firefighters); Lahrman, App., 465 N.E.2d 1162 (card at K.4.a).

TITLE: State v. Burroff

INDEX NO.: K.4.a.

CITE: (5th Dist. 09/09/92), Ind. App., 598 N.E.2d 1081

SUBJECT: Arson with intent to defraud insurance company - impossibility

HOLDING: Fact that D's property was not insured at time of fire did not preclude conviction for arson by knowingly damaging property with intent to defraud, & Tr. Ct. erred in granting D's motion for judgment on evidence. Ct. App. noted that while older version of arson statute required that property actually be insured for crime to occur, present version in Ind. Code 35-43-1-1(c) states only that "[a] person who, by means of fire or explosive, knowingly or intentionally damages property of any person with intent to defraud commits arson." While insurance policy had been terminated two days before fire, Indiana generally does not recognize impossibility as defense in criminal cases. Zickefoose 388 N.E.2d 507. Intent to defraud is gravamen of offense, & relevant question is whether accused believed he was covered, not whether he was actually covered. D informed fire department that he had insurance, reported loss to insurance company, & indicated to adjustor that he thought he was covered. Because there was question of fact as to whether he believed he was covered, & therefore whether his intent was to defraud, it was error to grant motion for judgment on evidence.

TITLE: Survanco v. State

INDEX NO.: K.4.a.

CITE: (7/6/84) Ind., 465 N.E.2d 1076

SUBJECT: Arson - conspiracy; sufficiency

HOLDING: On transfer. Second district erred in holding evidence insufficient to sustain D's conviction for conspiracy to commit arson. Here, 2d Dist. (443 N.E.2d 1234) held state failed to present evidence from which reasonable trier of fact could infer agreement between parties to destroy home by fire. D simply agreed to pay Nave \$500 to destroy dwelling. Ind. S.Ct. finds D wanted dwelling destroyed for insurance purposes. Only insurable "destruction" Nave could effect was fire. Conspiracy entails intelligent deliberate agreement between parties. Woods 413 N.E.2d 572. Evidence of formal express agreement is not necessary. Williams 409 N.E.2d 571. Agreement/requisite guilty knowledge & intent may be inferred from circumstantial evidence alone, including overt acts of parties in pursuance of criminal act. US v. Holt, (CA7 1939) 108 F.2d 365; Beal 453 N.E.2d 190; Woods; Williams; Patterson 386 N.E.2d 936; Johnson, App., 328 N.E.2d 456. Viewing all evidence, Ind. S.Ct. finds it "clearly supports" inference D possessed requisite guilty knowledge & intent. Although evidence is circumstantial, verdict upon which reasonable people may differ will not be set aside. McAfee 291 N.E.2d 554. Held, 2d Dist. opinion vacated; Tr. Ct. affirmed.

RELATED CASES: Smith 465 N.E.2d 1105 (circumstantial evidence of existence of conspiracy: 2 men aware that police officer is entering building suddenly & without warning open coordinated gunfire on officer).

TITLE: Williams v. State
INDEX NO.: K.4.a.
CITE: (4th Dist., 11-28-04), Ind. App., 837 N.E.2d 615
SUBJECT: Sufficient evidence of corpus delicti for arson shown
HOLDING: In murder & arson prosecution, State established corpus delicti of arson, thus Tr. Ct. did not err in admitting D's confession into evidence. To support introduction of a D's confession into evidence, the corpus delicti of crime must be established by independent evidence of both (1) the occurrence of specific kind of injury & (2) someone's criminal act as the cause of injury. Sweeney v. State, 704 N.E.2d 86 (Ind. 1998). Independent evidence need only provide an inference, which may be established through circumstantial evidence, that a crime was committed. Id. Corpus delicti of arson consists of burning of property in question & a criminal agency as a cause of that burning. Fox v. State, 384 N.E.2d 1159 (Ind. Ct. App 1979).

Relying on Pawloski v. State, 380 N.E.2d 1230 (Ind. 1978), D argued that there was insufficient evidence to establish that fire was incendiary in nature. In so arguing, D cited Ind. Code 35-47.5-2-9, which defines "incendiary" as "a flammable liquid or compound with a flash point not greater than one hundred fifty (150) degrees Fahrenheit, as determined by Tagliabue or an equivalent closed cup device, including gasoline, kerosene, fuel oil, or a derivative of these substances." Ct. did not agree that Pawloski requires there be proof of an "incendiary" fire as defined in statute because: 1) definition of "incendiary" does not apply outside Ind. Code 35-47.5, which deals with "controlled explosives," & 2) Article 47.5 was not adopted until 2002, thus when referring to "incendiary," the Pawloski Ct. could not have meant the definition found in Ind. Code 35-47.5-2-9. Webster defines "incendiary" as an adjective as "of, relating to, or involving a deliberate burning of property...." State's expert witness in this case testified that by incendiary she meant a fire started by someone who "had knowledge of what they are doing & they...conduct some aCt..that would intentionally cause a fire...." State established that fire was "incendiary" sufficient to prove corpus delicti of arson. Held, judgment affirmed.

TITLE: Williams v. State

INDEX NO.: K.4.a.

CITE: (3rd Dist., 10-15-92), Ind. App., 600 N.E.2d 962

SUBJECT: Arson - smoke & soot are sufficient "damages"

HOLDING: Smoke & soot damage to wall of basement was sufficient to constitute "damages" within meaning of Ind. Code 35-43-1-1(a), & therefore evidence was sufficient to support conviction for arson. Ind. Code 35-43-1-1(a) states in part that "person who, by means of fire or explosive, knowingly or intentionally damages: (1) a dwelling of another person without his consent ..." commits arson. "Damages" is not defined in statute, but common law rigidly required actual burning. Ct. found, however, that "damages" in present statute is not tied to common law definition, & that given plain & ordinary meaning of damages (injury or harm to person, property, or reputation), smoke & soot damage was clearly some harm done. Ct. also relied on decisions from Georgia & New York, which held likewise. Held, conviction affirmed.

RELATED CASES: Capes, App., 615 N.E.2d 450 (It was not error to admit evidence of amount of insurance settlement paid to homeowner to prove whether fire set by D caused at least \$5,000 in damages. Settlement reflected opinion of insurer as to amount of monetary damage suffered by homeowner & therefore was relevant. It was also not error to admit repair estimate for damage from fire, even though estimate was almost two times amount spent upon property. Such discrepancy went to weight, not admissibility of evidence.)

K. CRIMES

K.4. Offenses against property

K.4.b. Auto theft (Ind. Code 35-43-4-25(b))

TITLE: Brown v. State

INDEX NO.: K.4.b.

CITE: (5th Dist., 05-13-05), Ind. App., 827 N.E.2d 149

SUBJECT: Details of VIN changes determine theft, alteration charges

HOLDING: Sufficient evidence supported two convictions for auto theft & one for removal or alteration of a vehicle identification number (VIN). However, State did not present sufficient evidence as to another alteration of a VIN conviction & owning a vehicle with an improper VIN. The convictions related to three vehicles which had altered or removed VINs which were either in D's possession or had been sold by him. Ct. found sufficient evidence existed to show that D altered a VIN number of a car in his possession that had the VIN of a car he received from another individual, finding it reasonable to infer that D took the VIN from one car & placed it in the other. However, Ct. reversed conviction as to another vehicle D had sold to another individual that had a different VIN on it. State presented no evidence linking D to the stolen vehicle that the different VIN came from, so no evidence existed to infer that D placed the new VIN in the car he sold. Sufficient evidence existed to convict D of auto theft, as to both of these vehicles. In so holding, Ct. distinguished Kidd v. State, 530 N.E.2d 287 (Ind.1988), which held that a Ct. cannot infer theft from mere possession when the theft occurred more than 24 hours before discovery of the possession. Here, State presented additional evidence of theft, showing that D placed a license plate registered to him on one vehicle & titled the car in his name using a VIN from another vehicle. As to the vehicle he sold, D provided the buyer with a title connected to a vehicle associated with the different VIN found on the car. Further, the trier of fact was free to ignore D's explanation that he purchased it from an unidentified person. Ct. also reversed D's conviction as to another vehicle for owning a vehicle in violation of Ind. Code 9-18-8-2. Statute requires an owner of a vehicle built after 1954 that does not have a VIN or has a VIN that has been defaced or altered to apply to the BMV for a special identification number within 20 days of coming into possession of the vehicle. The charge related to a grounded vehicle discovered in D's backyard that had no VIN. D titled the vehicle a few months prior to its being discovered by police. No evidence exists that it was missing when purchased by D & one could infer that D removed the VIN but not when he removed it. As no evidence exists the vehicle had an altered VIN when purchased, Ind. Code 9-18-8-2 is not applicable to this situation. Held, judgment affirmed in part, reversed in part & remanded for new sentencing.

TITLE: Chapman v. State

INDEX NO.: K.4.b.

CITE: (3rd Dist., 5-31-95), Ind. App., 650 N.E.2d 764

SUBJECT: Theft of moped - sufficient under Auto Theft Statute

HOLDING: Theft of moped is actionable under Ind.'s Auto Theft Statute, Ind. Code 35-43-4-2.5. In so holding, Ct. noted that because moped is motorized & self-propelled, it can be construed as motor vehicle under Auto Theft Statute & as defined by Ind. Code 9-13-2-105(a). D unsuccessfully argued that moped is motorized bicycle, which is excluded from definition of motor vehicle, & that State failed to prove that moped was self-propelled as required by statute. Statutory exclusion of motorized bicycles applies only for purposes of Ind. Code 9-21, which deals with traffic regulations. Held, conviction affirmed.

TITLE: Girdler v. State

INDEX NO.: K.4.b.

CITE: (1st Dist., 08-26-10), 932 N.E.2d 769 (Ind. Ct. App 2010)

SUBJECT: Auto theft - sufficiency

HOLDING Evidence was sufficient to support D's conviction for auto theft, despite fact that there was no evidence that he was involved in the original theft of the van. Disagreeing with Buntin v. State, 838 N.E.2d 1187 (Ind. Ct. App 2005) and Trotter v. State, 838 N.E.2d 553 (Ind. Ct. App 2005), Court held that one may be convicted of auto theft even if he was not the original thief, so long as the elements of auto theft are met--the knowing or intentional exercise of control over another's vehicle, with intent to deprive the owner of the vehicle's value or use.

Moreover, the rule recognized by Muse v. State, 419 N.E.2d 1302 (Ind. 1981), did not require State to prove that D was in exclusive possession of the van for the entire thirteen-day period after it was stolen. The Muse rule regarding exclusive possession of stolen property since the time of the original theft only applies where direct evidence of a D's knowledge of the property's stolen character is lacking and such knowledge must be proven circumstantially. Reliance on circumstantial evidence to prove knowledge is not necessary here, as D admitted to police that he knew the van was stolen. In addition to D's admission, he permitted van to remain on his property for five to seven days and failed to take any action to notify police of its presence there. Some tools belonging to D also were found in the van, and D could not explain how they came to be there. This is evidence from which fact-finder reasonably could have concluded that D exerted control over the van with intent to deprive victim of the van's value or use. Held, judgment affirmed.

TITLE: Gonzalez v. State

INDEX NO.: K.4.b.

CITE: (3rd Dist., 06-25-09), 908 N.E.2d 338 (Ind. Ct. App. 2009)

SUBJECT: Auto theft - evidence sufficient; 30-day delay between theft & arrest

HOLDING: Evidence was sufficient to establish that D knowingly and intentionally exerted unauthorized control over a Chevrolet with the intent to deprive the owner of component parts of the vehicle. D argued that evidence was insufficient because State had no evidence linking him to the car during the 28 days it was missing. However, D was not charged with initial theft of entire vehicle, but with intent to deprive owner of a component part of the vehicle under Ind. Code 35-43-4-2.5(b). State is required to establish a nexus in time or possession between D and theft of the vehicle's component parts. Here, although there was a month-long delay between the initial theft of the Chevrolet and date on which D was arrested, on the day of his arrest, he drove pickup truck to garage where neighbor heard sound of a saw cutting metal. There were several pieces of the vehicle sitting in the truck when police arrived. An officer asked D, who displayed a very nervous demeanor, and another man if that was their Chevrolet; they looked at each other and did not respond. D must have known that vehicle had been stolen and was being taken apart so that parts could be sold. Held, judgement affirmed; May, J., concurs with opinion.

TITLE: Grott v. State
INDEX NO.: K.4.b.
CITE: (5/7/2015), 30 N.E.3d 777 (Ind. Ct. App 2015)
SUBJECT: Auto theft - failure to return rental car by agreed-upon return date
HOLDING: Evidence was sufficient to sustain D's conviction for auto theft from Enterprise Rent-A-Car, where he possessed Enterprise's Cadillac that he rented past the agreed-upon return date.

Although Ds who are engaged in good faith contract disputes lack the requisite intent to deprive necessary to commit theft, Court held that the particular dispute in this case was not conducted in good faith. Despite the somewhat open-ended nature of D's contract with Enterprise, jury had evidence that D agreed to a specified return date on which D failed to return the Cadillac. It was not until Enterprise, with assistance from police, repossessed the vehicle from D's driveway five days later that the vehicle was returned. Moreover, although D was disputing the \$4997 charges for his original 53-day contract, the jury had evidence to infer that he was not confused as to terms of the rental agreement, but knew that charges from this period did not entitle him to any extra days of rental after the date he signed a new written contract on 4/1/13. And he knew his current rental period had expired on 4/26/13, the date he agreed to return the Cadillac.

State also presented sufficient evidence that D exercised unauthorized control over the Cadillac. That Enterprise had the authority to come to D's house to repossess the vehicle does not mean that D was not in possession of it. Held, judgment affirmed.

TITLE: Jones v. State

INDEX NO.: K.4.b.

CITE: (4th Dist., 07-24-08), Ind. App., 890 N.E.2d 758

SUBJECT: Auto theft - abandoned vehicle; lienholder as "owner"

HOLDING: To support a conviction for auto theft, State must prove that D knowingly or intentionally exerted unauthorized control over the motor vehicle of another person, with intent to deprive the owner of the vehicle's value or use. Ind. Code 35-43-4-2.5. D argued that evidence was insufficient to support his conviction because owner of van had abandoned the vehicle and the alleged victim was merely a lienholder. The term "owner" is defined as "a person who holds something as his or her own; a possessor or proprietor; a person who has the rightful claim or title to a thing." Oxford English Dictionary Online (2008). Because the lienholder had the legal right to repossess the van, Court concluded that lienholder was the "owner" for purposes of the auto theft statute. Held, judgment affirmed.

TITLE: Thacker v. State

INDEX NO.: K.4.b.

CITE: (11/4/2016), 62 N.E.3d 1250 (Ind. Ct. App 2016)

SUBJECT: Auto theft - evidence sufficient

HOLDING: Although D's possession of car six days after it was stolen is not enough to prove auto theft, State presented additional evidence to support an inference that D had knowledge that the car had been stolen. See Gibson v. State, 533 N.E.2d 187 (Ind. Ct. App 1989). D's being in the driver's seat of the stolen car permits a reasonable inference he was in possession it. The damage to the vehicle (pry marks around seal of front passenger window, "busted out" passenger window and "ripped off" gas cap), along with fact that D and his companion attempted to flee when police encountered them permitted the factfinder to infer D knew he was exerting unauthorized control over someone else's vehicle. Held, Level 6 felony auto theft and Class A misdemeanor resisting law enforcement convictions affirmed.

TITLE: V.R. v. State

INDEX NO.: K.4.b.

CITE: (10/28/2022), Ind. Ct. App., 198 N.E.3d 399

SUBJECT: Juvenile's possession of stolen vehicle did not support reasonable inference of auto theft

HOLDING: In reversing adjudication for auto theft, the Court of Appeals held that the State only proved beyond a reasonable doubt that juvenile possessed a car that had been stolen, which is not enough. The State argued that two circumstantial facts established the elements of auto theft: that juvenile possessed the car at a time when he admitted to being stranded in another city without a way to get home and juvenile could not provide identifying information for the person who allegedly let him borrow the car. The Court of Appeals disagreed that the juvenile's need to return home led to a reasonable inference he intended to deprive anyone of the vehicle's value or use. Moreover, failure to provide information about the person who allegedly gave permission to drive the stolen car is insufficient by itself to sustain a conviction. In so holding, the Court distinguished Donovan v. State, 937 N.E.2d 1223, 1227 (Ind. Ct. App. 2010), in which the conviction was sustained. In Donovan, besides failing to provide identifying information, the VIN number had been scratched off and the car was hotwired. Here, the State chose to call the arresting officer as its sole witness, and all he could say was that the car had been reported stolen. But for whatever reason, it did not call anyone to testify about how the juvenile's possession of the car deprived them of its value or use. The trial court was free to question the credibility of the juvenile's testimony, but its conclusion that he had intentionally deprived someone of its value or use was not based upon any fact that was proven beyond a reasonable doubt. The trial court's conclusion was based instead on speculation, conjecture, or another inference. Held: judgment reversed. Bradford, J. dissented, believing circumstantial evidence was sufficient and that juvenile's argument was an invitation to reweigh the evidence.

TITLE: Williams v. State

INDEX NO.: K.4.b.

CITE: (5th Dist., 1-31-97), Ind. App., 676 N.E.2d 1074

SUBJECT: Habitual offender & auto theft enhancement

HOLDING: Enhanced sentence for auto theft as class C felony may also be enhanced under general HO statute. Here, D's auto theft sentence was enhanced to class C felony for his prior auto theft conviction & enhanced again for his HO status based in part on same prior auto theft conviction. Relying on Freeman, 658 N.E.2d 68, D argued that Tr. Ct. improperly used his prior auto theft conviction to support both enhancements, & that HO enhancement should be reversed because specific enhancement for auto theft under Ind. Code 35-43-4-2.5 should control. Ct. agreed with State's contention that auto theft enhancement serves as "gap-filler" between D's first auto theft conviction, which is not enhanced, & his third conviction, which would be enhanced by general HO statute. Ct. also concluded that auto theft enhancement statute & HO statute complement each other. Without HO statute, each additional auto theft conviction would only subject D to maximum penalty for class C felony. When read together, statutes provide for progressive scheme of punishment. Because statutes can be harmonized, both enhancement provisions may apply simultaneously. Held, judgment affirmed.

RELATED CASES: Goodman, App., 863 N.E.2d 898 (D's sentence was impermissibly doubly enhanced when Tr. Ct. erroneously based his Class C felony auto theft & habitual offender finding on same prior felony conviction; see full review at E.8.d.7).

K. CRIMES

K.4. Offenses against property

K.4.c. Burglary (Ind. Code 35-43-2-1)

TITLE: Baker v. State

INDEX NO.: K.4.c.

CITE: (06-12-12), 968 N.E.2d 227 (Ind. 2012)

SUBJECT: Burglary - independent evidence of intent to commit felony required

HOLDING: To establish the "intent to commit a felony" element of a burglary charge, State must prove beyond a reasonable doubt the D's intent to commit a felony specified in the charge. Freshwater v. State, 853 N.E.2d 941 (Ind. 2006). The evidentiary inference pointing to the D's intent must be separate from the inference of the D's breaking and entering. Justice v. State, 530 N.E.2d 295 (Ind. 1988). The inference of intent must not derive from or be supported by the inference of breaking and entering. In other words, the evidence must support each inference--felonious intent and breaking and entering--independently, and neither inference would rely on the other for support. This is not to say, however, that the same piece of evidence cannot support both inferences.

Here, D entered a church through a window, went to the kitchen, and opened cupboards and drawers. This is enough to support a reasonable inference that D was "looking for something to steal" and thus standing alone was sufficient to support an inference of his felonious intent at the time of entry. Neither Freshwater nor Justice should be understood to suggest that sufficient evidence of intent necessarily requires evidence that D was near or approaching valuable property. The absence of such evidence will not preclude conviction because the statutory definition of the crime of theft places no minimum threshold on the value of property necessary to constitute a felony. Held, transfer granted, Court of Appeals' memorandum opinion vacated, Class B felony burglary conviction affirmed.

RELATED CASES: Oster, 992 N.E.2d 871 (Ind. Ct. App. 2013) (D's possession of burglary tools is independent evidence that supports inference of intent to commit theft, as is fact that D broke into retail business after-hours).

TITLE: Barthalow v. State
INDEX NO.: K.4.c.
CITE: (2/20/2019), 119 N.E.3d 204 (Ind. Ct. App. 2019)
SUBJECT: Burglary - sufficient evidence of intent to commit felony battery
HOLDING: In Level 2 burglary prosecution, which resulted in conviction for lesser offense of Level 3 felony burglary, State presented sufficient evidence to prove that D intended to commit felony battery when he entered house and beat up victim. The State was required to prove that D intended that his actions result in moderate or serious bodily injury to victim, not that his actions actually resulted in moderate or serious bodily injury. All that was required was that the victim experienced physical pain, not that the pain he experienced be of a certain magnitude or duration.

D also claimed the Tr. Ct.'s failure to instruct the jury on "the several gradients of bodily injury resulted in manifest prejudicial injustice rising to the level of fundamental error." Although the definition of "bodily injury" was not included in the jury instructions, it was provided in the State's closing argument and displayed on a screen at that time. Moreover, the jury instructions included the definitions of serious bodily injury and moderate bodily injury. Based on the provided definitions, the jury could likely infer from common sense the meaning of bodily injury. Held, judgment affirmed.

TITLE: Brink v. State

INDEX NO.: K.4.c.

CITE: (1st Dist., 11-15-05), Ind. App., 837 N.E.2d 192

SUBJECT: Burglary, theft convictions affirmed

HOLDING: Evidence was sufficient to support D's convictions for burglary & theft. The evidence consisted of a witness seeing an individual wearing dark clothing force open a storage building at a mill & exit the building. The witness also testified he saw a white box truck, that he & another witness saw in the area earlier, pull onto the highway near the bank. The bank was separated from the mill by a wheat field & a road. A path where the wheat field was tramped down led from the mill to the bank. Police stopped a white box truck driven by D soon thereafter. The officer noticed that D's overalls were wet (investigators inferred this was due to the heavy dew from the wheat field) & found that he had \$142 & two work-issued credit cards in his wallet but had \$35 in cash in his chest pocket. (The petty cash box of the mill was missing between \$20 to \$50). The officer found two long-handled screwdrivers in the vehicle with one having about a 2 inch blade. Investigators claimed the mill door had been pried open with a 2 inch blade. Flat-soled shoe prints were found in a mill building & D was wearing flat-soled cowboy boots. In affirming convictions, Ct. distinguished Janigon v. State, 429 N.E.2d 959 (Ind.1982) & Cantrell v. State, 673 N.E.2d 816 (Ind. Ct. App.1996), where mere presence & suspicious activity were found insufficient to allow convictions to stand.

Here, Ct. noted independent evidence of pry marks, the shoe prints, the trail through the wheat field, & the wet pants tied D to the crime. D noted contradictory facts including that witness could not say the white box truck was the same as one he had seen earlier in the evening & although the witness said the man was wearing dark clothing during break-in, D wore overalls & white t-shirt. Also, paint samples from the mill's doors did not match a white substance on D's screwdriver & a sticky substance known as corn gluten was inside the mill's buildings but despite testing none was found on D's clothing. The evidence is subject to conflicting inferences. "The question, however, is whether the inferences supporting the judgment were reasonable, not whether there was other 'more reasonable' inferences that could have been made." Thompson v. State, 804 N.E.2d 1146 (Ind. 2004). Held, judgment affirmed.

Ed. **Note:** The language quoted from Thompson is the standard for appellate review of sufficiency & should not be argued at trial or submitted as an instruction. At trial, if the evidence is susceptible of two interpretations, each of which appears to be reasonable, & one of which points to the guilt of the Accused, & the other to his/her innocence, submit a jury instruction setting forth the jury's duty under the law to adopt that interpretation which is consistent with the Accused's innocence, & reject that which points to his/her guilt. See Robey v. State, 454 N.E.2d 1221 (Ind. 1983).

RELATED CASES: Klaff, App., 884 N.E.2d 272 (videotape showing D walk to rear of home, where there was an open window, with object resembling a copper pipe that was later determined missing was sufficient evidence of theft and burglary).

TITLE: Brown v. State

INDEX NO.: K.4.c.

CITE: (11/22/2016), 64 N.E.3d 1219 (Ind. Ct. App 2016)

SUBJECT: House-squatter's burglary conviction affirmed

HOLDING: In burglary prosecution, State presented sufficient evidence to prove that D, who occupied a house that was being prepared for sale after foreclosure, intended to commit a felony after he broke into and entered the property. Unlike the defendant in Easton v. State, 228 N.E.2d 6 (Ind. 1967), who left the premises without disturbing anything inside an apartment, evidence established that D broke into the house with the intent to use the house as his personal residence, thereby depriving the property's rightful owners of its value or use. As D failed to satisfy the elements of adverse possession for a continuous ten-year period, he has no claim to the title to the property.

Court also held that D's creation of a fictitious deed and tendering the deed to police officers in an attempt to deceive them constituted forgery. Malcomson v. State, 391 N.E.2d 633 (Ind. Ct. App. 1979). Held, judgment affirmed.

TITLE: Burke v. State
INDEX NO.: K.4.c.
CITE: (02-21-11), 943 N.E. 2d 870 (Ind. Ct. App. 2011)
SUBJECT: Burglary - religious worship enhancement does not violate Establishment Clause or Indiana Constitution
HOLDING: In issue of first impression, Court held that Ind. Code § 35-43-2-1(1)(B)(ii), which enhances burglary from a C felony to a B felony if the structure broken into is used for religious worship, does not violate the Establishment Clause of the First Amendment of the United States Constitution. Here, D and his two companions broke into the True Gospel Assembly Church in Indianapolis. D took an amplifier, and the companions vandalized the property. Court noted that the purpose of the enhancement is not to give more protection to buildings used for worship but to ensure the appropriate sentence for an offender. "It reflects a legislative recognition that: (1) structures used for religious worship have a 'traditional absence of security measures and are thus easy targets of crime, Carter II, 26 F.3d [697,] 699 [7th Cir. 1994], (2) crimes against structures used for religious worship are ' more repugnant to the community, Carter I, 592 N.E.2d [491,] 497 [Ill. App. Ct. 1992], and (3) it takes more time to reform and rehabilitate those offenders who commit acts society deems more repulsive." Also, the primary effect of the enhancement is on the offender, and whatever benefits the provision may have on structures used for religious worship are only incidental and indirect. Carter II, 26 F.3d at 699. Finally, the statute does not unduly entangle the government with religion.

Court also held that the religious worship enhancement does not violate Article I, § 4 of the Indiana Constitution, because the statute does not favor a particular religion or religion in general. The proper question is whether Ind. Code § 35-43-2-1(1)(B)(ii) "materially burdens the right to be free from government preference for a particular religion or religion in general." A statute places a material burden on a core constitutional value "[i]f the right, as impaired, would no longer serve the purpose for which it was designed." Price v. State, 622 N.E.2d 954, 960 n.7 [Ind. 1993]. By classifying burglary of a structure used for religious worship as a B felony, Ind. Code § 35-43-2-1(1)(B)(ii) does not favor a particular religion or religion in general. "To the extent that the provision may benefit structures used for religious worship in the form of added protection, such benefit is too slight to frustrate Article 1, § 4's core constitutional value. That is, such benefit does not amount to an impairment of such magnitude that the right to be free from government preference for a particular religion or religion in general is unconstitutionally burdened." Held, judgment affirmed.

TITLE: Burkes v. State

INDEX NO.: K.4.c.

CITE: (3/8/83) Ind., 445 N.E.2d 983

SUBJECT: Burglary - sufficiency; presence plus

HOLDING: D's presence at scene of burglary, his association with the perpetrators, his activities in carrying stolen goods from scene & subsequently selling some of the stolen merchandise is sufficient to sustain burglary conviction. Mere presence at scene of crime is insufficient to sustain conviction, but presence plus other facts/circumstances tending to show participation in the crime is sufficient to sustain conviction. Here, D's sufficiency argument is rejected, based upon his participation in the crime. Held, conviction affirmed.

RELATED CASES: Voss, App., 469 N.E.2d 789.

TITLE: Calhoon v. State

INDEX NO.: K.4.c.

CITE: (2nd Dist., 02-15-06), Ind. App., 842 N.E.2d 432

SUBJECT: Burglary - evidence insufficient; three-sided fence surrounding business

HOLDING: Where undisputed evidence showed that D gained entry to property "without even the slightest use of force," evidence was insufficient to support his conviction for burglary. State bore burden of proving that D broke & entered complaining witness's (CW's) property with intent to commit theft. Fence on CW's property surrounded only three sides of its business, leaving forth completely open. Even accepting State's argument that a three-sided fence is a "structure" for purposes of Ind. Code 35-43-2-1, evidence did not support a conclusion that D "broke" into the premises. D testified that he & co-D merely walked onto property from side that was not fenced in. D testified that he observed a hole in fence as they approached it in truck, & State offered no evidence showing that he was responsible for creating hole in fence. Fact that D & Co-D dropped scrap metal through hole in fence was irrelevant, inasmuch as they did not "break & enter" in the first place. What matters for purpose of burglary statute is how the D entered the property, not how he exited the property. Held, conviction reversed.

TITLE: Carson v. State

INDEX NO.: K.4.c.

CITE: (03-20-12), 963 N.E.2d 670 (Ind. Ct. App. 2012)

SUBJECT: Burglary - effect of delusion on mens rea

HOLDING: There was sufficient evidence to support D's Class B felony burglary conviction despite the fact that his intent to commit a felony was based on a delusion. The burglary statute only requires that the D intended to commit a felony inside of the dwelling he broke into. Here, without permission, D entered the unlocked door of a trailer home, holding a Bible and some papers and speaking in English, which the homeowner did not understand. About thirty to forty-five minutes later, D returned and the homeowner opened the door and tried to talk with D. D came toward the homeowner and cut her right hand with a knife. The homeowner and her friend were able to shut the door on D. D's subsequent statement to the police illustrated he was suffering from a delusion wherein he was picked and made to kill a baby in the trailer. Contrary to the delusion, the homeowner did not have a baby. Regardless of whether D was deluded as to the actual existence of a baby, he entered the trailer with the subjective intent to commit murder, a felony. The fact that D repeatedly stated he was going to "cut" a baby but could not do it shows that he was able to appreciate the wrongfulness of the intent to commit murder. Although there may be circumstances under which insane delusions negate the culpability of a D's crime, such is not the case here. Held, judgment affirmed.

TITLE: Davidson v. State

INDEX NO.: K.4.c.

CITE: (2nd Dist., 06-15-09), 907 N.E.2d 612 (Ind. Ct. App. 2009)

SUBJECT: Residential entry - unlawful entry of separate structure or enclosed space within dwelling

HOLDING: Evidence was sufficient to sustain D's conviction for residential entry, where he had permission to be in his ex-girlfriend's attached garage, but not her residence, and kicked in locked kitchen door to call her cell phone. D argued that because he was already permissively in the "dwelling" of his victim at time he was in the garage, he cannot be convicted of residential entry for kicking in door and entering kitchen because the kitchen was part of the dwelling. Although Indiana cases recognize entry into an attached garage as entry into a "dwelling" for purposes of the burglary statute, this does not necessarily exclude the possibility that unlawful entry into another area of the dwelling will constitute the offense of residential entry. Where there is an evident boundary, for example a door that locks and was locked at the time of the incident, the area is not only a part of the whole dwelling, but also a separate structure or enclosed space. Thus, locked kitchen constituted a separate structure or enclosed space for purposes of Ind. Code 35-41-1-10 (defining "dwelling"), and Ds' unlawful entry into the kitchen constituted offense of residential entry. Held, judgment affirmed.

TITLE: Dew v. State

INDEX NO.: K.4.c.

CITE: (9/14/82) Ind., 439 N.E.2d 624

SUBJECT: Burglary - breaking

HOLDING: When access is accomplished by threatening victim with force to unlock door & allow entry, a breaking has occurred. Moore, 369 N.E.2d 628. Here, D's car collided with Evans'. D forced Evans back into her car & ordered her to empty purse; D then forced Evans' daughter into D's car. Both cars were driven to Evans' residence. D forced Evans to unlock door to her house. Evans, husband & daughter were tied up & D & companion took car, T.V., stereo, etc. Ct. rejects D's argument that D did not cause a crime to occur, as act of opening one's own door is not a crime. Held, robbery, confinement, burglary convictions affirmed.

RELATED CASES: Jenkins, 34 N.E.3d 258 (Ind. Ct. App. 2015) (D's forcing aside person who opened door sufficient to prove "breaking" element of burglary).

TITLE: Fix v. State

INDEX NO.: K.4.c.

CITE: (9/27/21) Ind. Ct. App., 177 N.E.3d 837

SUBJECT: Insufficient evidence of burglary while armed with a deadly weapon

HOLDING: State presented insufficient evidence that Defendant committed Level 2 felony burglary while armed with a deadly weapon based on evidence that he broke and entered the victim's home unarmed but subsequently obtained and used a handgun against the victim. Defendant entered into the home of victim, who was confined to bed and required substantial care. The victim pulled a handgun after Defendant had entered the house, taken victim's debit card, and threatened to kill him. Defendant wrestled the firearm away from victim and hit him across the side of the head with the weapon. Defendant was eventually convicted by a jury of Level 2 felony burglary while armed with a deadly weapon, Level 3 felony robbery resulting in bodily injury, Level 3 felony armed robbery, and Level 6 felony theft. In reversing the Level 2 felony burglary conviction, Court rejected State's argument that under IC 35-43-2-1(3)(A), a person commits burglary with a deadly weapon even if that individual enters the premise unarmed but later picks up a deadly weapon while inside. "Indiana's burglary statute does not specifically provide that a person will be liable for acts committed after the breaking and entering...[H]ad the Indiana General Assembly wished to extend the liability this far, it could have easily drafted the burglary statute to encompass conduct that takes place after the breaking and entering." The burglary offense addresses the home intrusion itself and is elevated to a Level 2 felony if it 'is committed while armed with a deadly weapon. "'Committed while' contemplates the time when the breaking and entering occurs. Just because our legislature elevated the offense of burglary where the proscribed conduct results in serious bodily injury, it does not follow that our legislature modified the time at which a burglary is deemed complete. Our Indiana Supreme Court has consistently interpreted the burglary statute to mean that the burglary offense itself is complete upon entry." Held, conviction reversed and remanded to enter a conviction of a lesser-included form of burglary.

TITLE: Fix v. State

INDEX NO.: K.4.c.

CITE: (05/16/2022) Ind., 186 N.E.3d 1134

SUBJECT: Sufficient evidence of burglary while armed with a deadly weapon acquired after breaking and entering home

HOLDING: After breaking and entering into the victim's home, Defendant acquired a gun and used it to assault the victim. The Indiana Supreme Court held that acquiring a weapon while inside the home, after the breaking and entering, is sufficient to elevate burglary to a level 2 felony for being armed with a deadly weapon. The Court reasoned that burglary is an ongoing crime that continues until the intrusion has ended. The Court also found that Defendant's sentences for burglary, robbery and theft exceeded the statutory cap for a single episode of criminal conduct under the sentencing cap statute and remanded for resentencing.

TITLE: Freeman v. State

INDEX NO.: K.4.c.

CITE: (4th Dist. 1/19/84) Ind. App., 458 N.E.2d 694

SUBJECT: Burglary - evidence insufficient

HOLDING: Evidence was insufficient to sustain conviction for burglary where evidence most favorable to state showed only that D walked with 2 men after they jumped from retaining wall at edge of victim's property. Ct. cites other cases reversed on sufficiency grounds: Manlove, 232 N.E.2d 874 (second-degree murder); Robinson, App., 454 N.E.2d 873 (possession of controlled substance; card at K.8.b); Cain, App., 451 N.E.2d 672 (deception; card at K.4.e). "A verdict based merely upon suspicion, opportunity, probability, conjecture, speculation, & unreasonable inferences of guilt gleaned from the vague circumstances in the record of evidence before us cannot be upheld & must be reversed." Manlove at 673. D's presence near victim's property near time of burglary may be suspicious circumstance but does not constitute substantial evidence he participated in burglary. Held, reversed.

RELATED CASES: Marrow, App., 699 N.E.2d 675 (presence of D's keys at crime scene failed to establish beyond reasonable doubt that D had possession of keys at time of burglary & theft & that he was person who committed crimes); Richards, 681 N.E.2d 208 (evidence insufficient; tended to prove abduction aimed at sexual attack elsewhere); Cantrell, App., 673 N.E.2d 816 (D's suspicious behavior & presence at scene of crime five hours before burglary was discovered was insufficient to support burglary conviction; Although evidence in this case lends itself to conclusion that D was in house & committed crime, evidence did not support jury determination that D was guilty beyond reasonable doubt); Malott, 485 N.E.2d 879 (evidence neither indicates when business' money pouch was taken nor sufficiently establishes a breaking & entry; held, conviction reversed).

TITLE: Freshwater v. State

INDEX NO.: K.4.c.

CITE: (09-12-06), Ind., 853 N.E.2d 941

SUBJECT: Burglary - insufficient evidence of intent to commit felony

HOLDING: To establish the "intent to commit a felony" element of a burglary charge, State must prove beyond a reasonable doubt the D's intent to commit a felony specified in the charge. Justice v. State, 530 N.E.2d 295 (Ind. 1988). Here, State did not present sufficient evidence to support a finding that D intended to commit theft after breaking into a car wash. State argued that although nothing appeared to have been taken from car wash, it may be reasonably inferred from circumstances that D intended to commit theft because: 1) D broke in at night after car wash was closed; 2) he attempted to enter building at several points; & 3) he fled immediately following the sounding of the alarm. *Citing Justice & Gebhart v. State*, 531 N.E.2d 211 (Ind. 1988), Court held that this was not specific, sufficient evidence for a jury to reasonably infer D had the specific intent to commit theft. In so holding, Court disapproved of language in several Ct. App.' opinions to the effect that a lesser quantum of evidence than that demanded by Justice & Gebhart will satisfy the intent to commit a felony element in a burglary case. *E.g., Gray v. State*, 797 N.E.2d 333 (Ind. Ct. App. 2003); Gentry v. State, 835 N.E.2d 569 (Ind. Ct. App. 2005). There was no evidence that D was near or approaching anything valuable in the car wash. D was discovered by police outside the building. Furthermore, the owner of the car wash testified that nothing was missing from the building or the cash register & that the office appeared to have been undisturbed. Held, transfer granted, memorandum opinion of the Ct. App. vacated, judgment reversed.

RELATED CASES: Baker, 968 N.E.2d 227 (Ind. 2012) (Freshwater should not be understood to suggest that sufficient evidence of intent necessarily requires evidence that D was near or approaching valuable property; see full review, this section).

TITLE: Gibson v. State

INDEX NO.: K.4.c.

CITE: (2d Dist. 1/31/89), Ind. App, 533 N.E.2d 187

SUBJECT: Sufficiency - burglary; possession of goods "recently" stolen

HOLDING: While unexplained possession of stolen goods more than 24 hours after burglary will not by itself support burglary conviction, additional evidence may provide such support. Here, D was discovered with stolen vehicle 2 days after burglary. Unexplained, exclusive possession of recently stolen property alone will support conviction of burglary & theft, Steele, 475 N.E.2d 1149, but only where such possession is shown to have occurred less than 24 hours from time of burglary. See Kidd, 530 N.E.2d 287. However, additional evidence here, in form of D's possession of screwdriver with which to operate "busted" ignition of car, & his refusal to identify himself, & statement that he had not been in car (contrary to officer's observations), is sufficient to remove this case from Kidd rule. Affirmed.

RELATED CASES: Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r); Allen, App., 743 N.E.2d 1222 (evidence sufficient where D was in possession of many of stolen items within 24 hours of burglaries; 24 hours may not be outer limitation for each & every case).

TITLE: Griesinger v. State
INDEX NO.: K.4.c.
CITE: (3rd Dist., 7-28-98), Ind. App., 699 N.E.2d 279
SUBJECT: Residential entry instruction - lack of consent is not element of offense
HOLDING: Tr. Ct. did not err in refusing to instruct jury that they must find D not guilty of residential entry if they found he had consent to enter house. Consent is defense to residential entry, but lack of consent is not element of crime. McKinney, App., 653 N.E.2d 115. Had legislature intended to require State to prove lack of consent in residential entry cases, words "without person's consent" could easily have been inserted in definition of crime. Absence of those words in statute indicates that consent must be raised as defense, & that once defense is raised State has burden of disproving defense beyond reasonable doubt. Instructions given by Tr. Ct. in this case adequately informed jury of consent defense. Held, no error.

TITLE: Hack v. State

INDEX NO.: K.4.c.

CITE: (1st Dist. 7/14/82) Ind. App., 437 N.E.2d 486

SUBJECT: Burglary - lesser included offenses (LIO)

HOLDING: Tr. Ct. did not err in refusing D's tendered instruction that criminal trespass was LIO of burglary. Ct. uses 2-step methodology enunciated in Roddy, App., 394 N.E.2d 1098 & applied in Goodpaster, 402 N.E.2d 1239 for determining what constitutes LIO. (1) An offense is inherently included if elements of LIO are necessarily committed during commission of charged offense. (2) An offense is possibly included if elements of LIO are alleged in charging instrument (facts alleged correlate with elements of LIO). After comparing Ind. Code 35-43-2-1 (burglary) with Ind. Code 35-43-2-2 (criminal trespass), Ct. holds latter is not "inherently" LIO of former. After examining factual allegations of charging instrument, Ct. holds it is clear state intended to prosecute burglary to exclusion of any LIO, as shown by exclusion of elements of criminal trespass, thus, latter is not "possibly" LIO of former. See also Jones, 438 N.E.2d 972; Lawrence, 375 N.E.2d 208. Held, no error.

RELATED CASES: Higgins, App., 783 N.E.2d 1180 (information alleging that D broke & entered dwelling may make criminal trespass a factually included lesser offense of burglary or residential entry); Vincent, App., 639 N.E.2d 315 (residential entry is inherently LIO of residential burglary); Deamus, 479 N.E.2d 1319 (Crim L 200(3); theft is not LIO of burglary, as charged in information).

TITLE: Hayden v. State

INDEX NO.: K.4.c.

CITE: (11/12/2014), 19 N.E.3d 831 (Ind. Ct. App. 2014)

SUBJECT: Instruction defining "dwelling" not supported by evidence

HOLDING: Tr. Ct. did not err in refusing D's instruction regarding the definition of "dwelling," which said that "a house, although furnished as a dwelling house, loses its character as such for the purpose of burglary if the occupant leaves it without intention to return." The evidence did not support the proposed instruction. Treadway v. State, 924 N.E.2d 621, 636 (Ind. 2010). Although the victim had not lived in the home for one year because he was hospitalized, and although he was considering moving into a nursing home after he was released from the hospital, he had not ruled out the possibility of returning home once released from the hospital. Held, judgment affirmed.

TITLE: Henley v. State

INDEX NO.: K.4.c.

CITE: (12/13/89), Ind., 547 N.E.2d 260

SUBJECT: Burglary - resulting in bodily injury; anal abrasions sufficient

HOLDING: Anal abrasions & bloody discharge resulting from D's anal penetration of victim were sufficient bodily injury to elevate burglary to Class A felony. Evidence showed that D broke into victim's home & forced her to engage in anal intercourse with him. Physician who examined victim afterward testified that she had anal abrasions & bloody mucous discharge. On cross-examination, victim was asked if D struck or otherwise injured her, & she replied that he did not. However, Ind. S. Ct. determines that physician's testimony regarding anal abrasions was sufficient to support D's conviction for Class A burglary. Held, conviction affirmed.

TITLE: Hillard v. State

INDEX NO.: K.4.c.

CITE: (3d Dist. 7/7/87) Ind. App., 509 N.E.2d 1124

SUBJECT: Burglary - lesser included offenses

HOLDING: Tr. Ct. erred in instructing jury over D's objection that D, charged with burglary, could be convicted of theft. Theft is a different offense from burglary. Theft is not a necessarily included offense of burglary. Smith, 477 N.E.2d 857 (attempted theft not necessarily included offense of burglary); Quire, 449 N.E.2d 1083 (felonies of rape & robbery were not included offenses of burglary). Ct. looks to charging information to determine if theft was charged. Due process requires that D be accused of offense(s) D is charged with having committed. Blackburn, 291 N.E.2d 686. Information charged D broke & entered building or structure with specific intent to commit theft. Although information explains that theft was intended, it does not allege that theft in fact was committed. Information is, therefore, insufficient to allege that D actually committed theft. Information contains no allegation specifying what property had been stolen. Such information is necessary to state valid charge of theft. Randall, (1892), 132 Ind. 539; see also Flores, 485 N.E.2d 890 (applying rule to robbery charges). Held, conviction reversed.

TITLE: Holman v. State

INDEX NO.: K.4.c.

CITE: (5th Dist., 10-14-04), Ind. App., 816 N.E.2d 78

SUBJECT: Residential entry - minor's authority to give consent to enter

HOLDING: In residential entry prosecution, seventeen-year-old minor did not have authority to give consent to her boyfriend to enter house in which she lived with her parents, & D's belief that his minor girlfriend had authority to give consent was not reasonable. State presented evidence that daughter knew her parents disapproved of her relationship with D & did not want him to come over to their house. In recent past, daughter had given consent for D to enter her bedroom through her bedroom window if her parents were home. On night of incident, D called girlfriend, & she gave him permission to enter her bedroom for limited purpose of retrieving some of his clothes.

On appeal, D argued that evidence was insufficient to support his conviction because he had consent from his minor girlfriend to enter residence. Once defense of consent to enter is raised, State has burden of disproving the defense beyond a reasonable doubt. Griesinger v. State, 699 N.E.2d 279 (Ind. Ct. App. 1998). A D's belief that he has permission to enter must be reasonable in order for him to avail himself of the defense of consent. McKinney v. State, 653 N.E.2d 115 (Ind. Ct. App. 1995). Ct. held that age alone is not an automatic barrier to authority to consent. Instead, Ct's. should look to the totality of circumstances to determine whether minors have authority to give consent to another person to enter house in which they live, such as age, intelligence, & maturity of minor, the scope of consent to enter, & whether minor had right to invite person to house. Under totality of circumstances in this case, Ct. concluded that D's minor girlfriend did not have authority to give consent to D to enter residence. Moreover, because D knew that he was not welcome at residence, his belief that his girlfriend had authority to give him consent was not reasonable. Held, conviction affirmed; Crone, J., dissenting, believes it is reasonable to assume that a 17-year-old has authority to consent to entry, for an otherwise legitimate purpose, to an area of her residence over which she maintains privacy & control.

TITLE: Holloway v. State

INDEX NO.: K.4.c.

CITE: (2/27/2013), 983 N.E.2d 1175 (Ind. Ct. App. 2013)

SUBJECT: Burglary, theft convictions affirmed - unexplained possession and sale of neighbor's stolen property

HOLDING: Unexplained possession of recently stolen items standing alone does not automatically support a conviction for theft. Donovan v. State, 937 N.E.2d 1223 (Ind. Ct. App. 2010). However, here, there was other circumstantial evidence from which Tr. Ct. could make a reasonable inference that D committed burglary and theft. D lived in a townhome next door to victim, and he often saw her leave for work and return home. He also knew when victim's daughter returned home from school. Victim testified that she saw D frequently and had seen him at about 1:00 p.m. on day of burglary. Victim locked up her house and left for work around 2:00 p.m. and her daughter returned home from schools at 4:30 p.m. to discover the home had been broken into and several items were missing. In addition, the evidence revealed that D possessed and pawned the property taken from victim's home a very short time after the burglary. A reasonable inference from evidence is that D was the person who entered victim's home and took the property. Held, judgment affirmed.

TITLE: Howell v. State

INDEX NO.: K.4.c.

CITE: (4/28/2016), 53 N.E.3d 546 (Ind. Ct. App. 2016)

SUBJECT: Burglary - dwelling enhancement based on sole occupant's recent death

HOLDING: Although there are no Indiana cases addressing whether a building or structure is a dwelling when the sole occupant is dead, Court found that it is reasonable to construe "dwelling" for purposes of elevating burglary charge to include buildings and structures that have been occupied in the immediate past by a recently deceased resident. To hold otherwise would reduce the criminality of burglars who target houses where the sole occupant has recently died even though there is still a good chance that people will be there.

Here, D pleaded guilty to entering a home and taking several items hours after police conducted a death investigation there. He knew that sole occupant of house had been found dead earlier that day. The fact that the house was ordered vacated by county health department just hours before D broke in because it was "unfit for human habitation" does not impact whether it was a "dwelling" for purposes of burglary statute. Accordingly, D's guilty plea to Class B felony burglary charge was knowing, voluntary and intelligent. Held, denial of post-conviction relief affirmed.

TITLE: Jacobs v. State

INDEX NO.: K.4.c.

CITE: (2d Dist. 10/17/83) Ind. App., 454 N.E.2d 894

SUBJECT: Burglary - breaking; unlocked or open door

HOLDING: Evidence of breaking was sufficient where victim stated that she did not know Ds or give them permission to enter her home (victim found Ds in her kitchen holding her T.V. set), & that front door was locked & back door was ajar only 3 inches to allow access to her pet. Breaking & entering include illegal/unauthorized entry, whether by opening an unlocked door or window (Willard, 400 N.E.2d 151; Harris, App., 416 N.E.2d 902) or by pushing door which was slightly ajar. Such illegal entry may be proven by circumstantial evidence. See Willard. Held, evidence supports conviction.

RELATED CASES: Hooker, 120 N.E.3d 639 (Ind. Ct. App. 2019)(although walking through an open door would not satisfy the “breaking” element of a burglary conviction, “squeezing” through the door would count as breaking); Jackson, 84 N.E.3d 706 (Ind. Ct. App. 2017) (sufficient evidence for breaking and entering where D and companions entered through doorway that had no door but that was simply covered by a hanging sheet), Anderson, 37 N.E.3d 972 (Ind. Ct. App. 2015) (evidence of breaking was sufficient where D rushed through open door at apartment residence); Payne, App., 777 N.E.2d 63 (although evidence supported inference that D possessed stolen property from his parents' house, it was insufficient to establish that he broke & entered house); Wadsworth, 750 N.E.2d 774 (evidence of "breaking" sufficient even though there were no signs of forced entry; evidence presented allowed reasonable inference that D's entry was unauthorized); Davis, 743 N.E.2d 751 (evidence allowed reasonable inference that D's entry was unauthorized); Thompson, App., 692 N.E.2d 474 (although D claimed he had consent to enter window, there was sufficient evidence of breaking because D used force to remove screen and open window); Trice, 490 N.E.2d 757 (evidence of breaking was sufficient where D testified he opened unlocked door of hotel & then entered store through hole in wall of hotel storage room); Yeagley, 467 N.E.2d 730 (breaking instruction, set forth in opinion, not error; held, evidence of breaking sufficient).

TITLE: Johnson v. State

INDEX NO.: K.4.c.

CITE: (1st Dist., 1-19-99), Ind. App., 704 N.E.2d 159

SUBJECT: Burglary - inner door leading to office in store; separate structure

HOLDING: Evidence was sufficient to support burglary conviction where D forced open locked door to office inside hardware store during business hours. D argued that since store was open to public, inner door leading to office did not make office itself separate structure, as required by burglary statute. Ind. Code 35-43-2-1. Ct. disagreed & held that inner door to office made office itself a "structure" for purposes of burglary statute. Therefore, office door presented structural impediment & State presented sufficient evidence from which jury could infer that D's act of forcing open locked door constituted a breaking. Held, conviction affirmed.

TITLE: Johnson v. State

INDEX NO.: K.4.c.

CITE: (1st Dist., 12-22-92), Ind. App., 605 N.E.2d 762

SUBJECT: Burglary - intent to commit misdemeanor or felony

HOLDING: Way in which burglary was charged did not impermissibly relieve State of burden of proving D's accomplices intended to commit felonies. After victim attempted to rape D, she sought help to make sure he "got the message". Several men went with D to victim's room & two broke down door. Victim was "cut" while two were in room, & eventually died. D was charged as accessory to burglary, as breaking & entering residence of victim with intention to commit alternatively, murder, battery with deadly weapon, battery causing serious bodily injury, intimidation with threat of forcible felony, or intimidation with deadly weapon, all while armed with deadly weapon. D argued that because State did not have to prove culpability with respect to circumstances that elevated substantive offenses from misdemeanors to felonies; result of charging intent to commit what might be called "aggravated misdemeanors", was to require proof of intent to commit unintended result. It appears Ct. found, however, that when underlying burglary offense is one which could be misdemeanor, absent certain conditions or results, State is not relieved of need to show intent to commit felony, but must show D intended to commit not just act, but act which resulted in circumstances making it felony. Although intent to cause result is not part of substantive crime, & result affects only classification & punishment, such intent is both necessary & possible to prove where burglary is alleged. Ct. found felonious result which Ds were alleged to have desired at time of breaking, was battery or intimidation which results in serious bodily injury, not merely misdemeanor versions of these offenses. Therefore, charging instrument alleging felony forms of underlying battery & intimidation was proper & jury was adequately informed of State's burden.

RELATED CASES: Chappell, 966 N.E.2d 124 (Ind. Ct. App. 2012) (despite fact that neither D nor his accomplice testified, there was sufficient circumstantial evidence from which jury could reasonably infer that D knew that his accomplice intended to attack victim with a knife when they broke and entered the home where victim was staying); Vaillancourt, App., 695 N.E.2d 606 (sufficient evidence that D, who planned on spraying victim with mace, entered home with intent to commit battery resulting in serious bodily injury).

TITLE: Joy v. State

INDEX NO.: K.4.c.

CITE: (1st Dist. 3/8/84) Ind. App., 460 N.E.2d 551

SUBJECT: Burglary - movement of structural impediment required; fence considered structure

HOLDING: Evidence was sufficient to support burglary conviction where co-Ds entered lumberyard by hopping over or cutting through fence; such entry constitutes a breaking under Ind. Code 35-43-2-1. Stanley v. State, (Okla. Crim. App. 1973), 512 P.2d 829; State v. Roadhs, (Wash. 1967), 430 P.2d 586. Here, lumberyard was surrounded on 3 sides by "farm fence" in "poor repair" & on one side by chain link fence with sole access gate. Co-Ds loaded lumber on trucks & drove through farm fence to field where lumber was transferred to waiting semitrailer. Ct. ignores language in Stanley that some evidence of forced entry is required. Held, conviction affirmed.

RELATED CASES: Gray, App., 797 N.E.2d 333 (fence enclosing a car lot was a "structure" within meaning of statute & there was evidence of breaking & intent to commit theft); McCovens, 539 N.E.2d 26 (DeBruler DISSENTS to finding that fence is structure, disagreeing with Joy); Strode, App., 486 N.E.2d 642 (burglary conviction reversed where Ds entered open bay of 24-hour car wash & broke into coin boxes; Ds did not physically move structural impediment).

TITLE: Justice v. State

INDEX NO.: K.4.c.

CITE: (11/23/88), Ind., 530 N.E.2d 295

SUBJECT: Burglary - sufficiency; intent to commit theft

HOLDING: Evidence was not sufficient to establish intent to commit theft. Evidence showed that victim heard crashing noise & shortly thereafter saw D in hallway outside her bedroom, wearing black socks over his hands. D fled after victim, who was on telephone, called his name out loud. Police discovered screen pried off window & left on ground outside. D argues on appeal that evidence was insufficient to establish intent to commit theft. Intent to commit felony may be inferred from circumstances, but some fact in evidence points to intent to commit specific felony. Gilliam, 508 N.E.2d 1270. State argues that intent to commit theft can be inferred from fact that D entered premises illegally, fled when victim recognized him, & covered his hands. Neither breaking & entering nor flight alone can support inference of intent to commit felony absent evidence strongly corroborative. Jury may reasonably infer that covering hands with socks was for purpose of avoiding detection in commission of some felony inside structure. Long, App., 335 N.E.2d 631. However, it is not possible to infer from wearing of socks on hands which felony D intended to commit. Slaton, 510 N.E.2d 1343. Held, conviction reversed. Pivarnik, J., DISSENTS WITHOUT OPINION.

RELATED CASES: Hahn, App., 533 N.E.2d 618 (instructions that intent to commit felony could be inferred from time, manner, & force of entry, & from flight constituted reversible error, where no strongly corroborative evidence of intent was offered); Hoffman 520 N.E.2d 436 (D's arrest in apartment complex, 6 days after charged break-in, with prybar & extra license plate in car, held sufficient).

TITLE: Keith v. State

INDEX NO.: K.4.c.

CITE: (6/20/2019), 127 N.E.3d 1221 (Ind. Ct. App. 2019)

SUBJECT: Mental injuries do not qualify as "bodily injury"

HOLDING: State failed to prove beyond a reasonable doubt that burglary resulted in serious bodily injury sufficient to elevate Defendant's offense to a Level 1 felony. During trial, the victim's sons testified that after the offense, their father's Alzheimer's dementia had taken a downward spiral and he was ultimately taken to a psychiatric hospital and transferred to an assisted living facility. The victim was not expected to return home or live independently again. Additionally, the victim's neurologist opined that his changes in behavior were likely caused by the offense because victim had experienced a rapid, acute decline immediately after the events. The State thus alleged that Defendant had caused serious bodily injury in the form of "permanent or protracted loss or impairment of the function of [the victim's] mind."

Court of Appeals reversed, noting that a serious bodily injury must be a bodily injury, which is defined as "any impairment of physical condition." Ind. Code § 35-31.5-2-292. "Although the mind has a physical location in the brain, its functioning is primarily mental, not physical. Thus, any impairment to its functioning is not primarily the impairment of a physical condition. To hold otherwise would be to eviscerate the meaning of the term 'physical condition' and would conceivably allow the State to charge a defendant with an offense resulting in serious bodily injury whenever it negatively impacted the victim's mental state." Held, Level 1 felony burglary conviction reversed and remanded for resentencing as a Level 3 felony.

TITLE: Keller v. State

INDEX NO.: K.4.c.

CITE: (1/25/2016), 47 N.E.3d1205 (Ind. 2016)

SUBJECT: Burglary - improper instruction defining dwelling

HOLDING: The trial court abused its discretion by giving, over objection, an instruction that expanded the statutory definition of a "dwelling" for purposes of Class B felony Burglary, included misleading language and invaded the province of the jury. An instruction that invades the province of the jury by inappropriately emphasizing certain facts is erroneous and misleads the jury.

Here, D was charged with Class B felony burglary of a dwelling. However, the parties disputed whether the burglarized vacant farmhouse was a "dwelling" for purposes of the Class B felony. A "dwelling" is defined by statute as "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." Over objection, the trial court instructed the jury not only on the statutory definition, but also that "any such place where a person keeps personal items with the intent to reside in the near future is considered a dwelling." By the adding this language, the challenged final instruction amplified the statutory definition of a dwelling by telling the jury that the definition would be satisfied by a specific set of facts not identified by the statute. Held, transfer granted, Court of Appeals' opinion at 25 N.E.3d 807, summarily affirmed in all aspects except the sufficiency of the evidence issue and judgment of the two convictions for Burglary as Class B felonies reversed and remanded for the entry of two replacement convictions for burglary as Class C felonies and for resentencing of the D accordingly. Massa and Rush, J.J., dissenting on basis that the instruction language did not constitute reversible error.

TITLE: K.F. v. State
INDEX NO.: K.4.c.
CITE: (01-20-12), 961 N.E.2d 501 (Ind. Ct. App 2012)
SUBJECT: Burglary; theft - juvenile can burglarize and steal from parents
HOLDING: There was sufficient evidence that K.F. committed acts that would be burglary of her mother's home and theft of her mother's property if she were an adult. A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary. For purposes of the burglary statute, the "of another person" element is satisfied "if the evidence demonstrates the entry was unauthorized, even if the accused may have had a right to possession of the house co-equal with another at the time of the breaking. Fuller v. State, 875 N.E.2d 326, 332 (Ind. Ct. App. 2007).

Here, thirteen-year-old K.F. ran away from Mother's home and did not keep in contact with Mother. Thereafter, Mother changed the lock to the door, changed the code to the keypad entry on the garage, and packed up K.F.'s clothes and put them in a bag in the garage. Several weeks later, Mother and the family came home to find the door to the house forced open and items, including televisions, video game systems, computers, Christmas gifts, guns, ammunition, and a bag of K.F.'s clothing missing. Also, the family's home phone showed two incoming calls from K.F.'s friend and an outgoing call to the friend. K.F.'s clothes were found at the friend's home. This evidence is sufficient to show that K.F.'s entry into Mother's home was unauthorized, despite the fact that Mother never told K.F. she was no longer welcome. She indirectly conveyed the message by changing the lock and keypad code. Moreover, K.F. admitted to Mother that she had been in the house to get her clothes, but claimed that the door was already opened and nothing was stolen. Despite K.F.'s denial of taking the family's property, there was sufficient evidence that K.F. committed theft of the stolen items. The fact that the stolen items were never found is circumstantial evidence that K.F. intended to deprive the family of these items. Held, judgement affirmed in part and reversed in part on other grounds.

TITLE: Kidd v. State

INDEX NO.: K.4.c.

CITE: (11/17/88), Ind., 530 N.E.2d 287

SUBJECT: Burglary - sufficiency; possession of stolen goods

HOLDING: Evidence that D possessed stolen goods from 1 to 4 days after alleged burglary was not sufficient to support burglary conviction. Evidence showed that victim's home was broken into between June 5 & 7. Four rifles & 5 pieces of stereo equipment were taken. Receipt dated June 8 indicated that D had sold stereo equipment to state's witness, who testified that D told him he was selling it for his girlfriend's brother. Another state's witness testified D offered to sell him some rifles on June 9, claiming that they belonged to girlfriend's mother. Victim identified stereo equipment & rifles as those taken from his home. D argues that proof that he was in possession of stolen goods does not prove beyond reasonable doubt that he broke & entered victim's home to take them. Ind. S. Ct. has previously held that unexplained possession of recently stolen items provides support for inference of guilt of burglary & theft of that property. Steele, 475 N.E.2d 1149; Ward, 439 N.E.2d 156; Turpin, 435 N.E.2d 1. Here, however, evidence showed only that D was in possession of stolen property from 1 to 4 days after burglary. Given this passage in time, evidence cannot support conviction for burglary, even when combined with D's false explanation for his possession. Held, conviction reversed. Givan & Pivarnik, J.J., DISSENT.

TITLE: McKinney v. State

INDEX NO.: K.4.c.

CITE: (5th Dist., 6-30-95), Ind. App., 653 N.E.2d 115

SUBJECT: Residential entry - sufficiency

HOLDING: Evidence was sufficient to sustain conviction for residential entry. D's wife took her three children to her sister's residence to spend night because she "was having problems at home." On next day, after D's wife sought legal assistance to file for divorce, she returned to sister's residence with D. Wife entered residence and, knowing that D was outside, wife's sister attempted to close door before D could enter residence. D pushed door open, angrily stomped through doorway & entered residence, threatening to kill anyone who attempted to stop him from taking children. Tr. Ct. could reasonably have inferred from this evidence that D used force to gain entry into residence, that he did not have reasonable belief that wife's sister consented to his entry, & that entry was therefore unauthorized. Held, conviction affirmed.

RELATED CASES : Mitchell, App., 712 N.E.2d 1050 (evidence was sufficient where girlfriend testified that she wrote boyfriend note & told him to get out of her house & boyfriend kept coming back to house).

TITLE: McMahon v. State

INDEX NO.: K.4.c.

CITE: (4th Dist., 03-09-93), Ind. App., 609 N.E.2d 1175

SUBJECT: Insufficient evidence for burglary & theft

HOLDING: Where evidence showed only that D had "opportunity" to commit burglary & theft, it was insufficient to sustain conviction because it did not show guilt beyond reasonable doubt. D & friends had been in bar at various times on night in question. When bar closed, bartender noticed D & two friends sitting on ledge at front of bar. Approximately hour later, officer saw three or four people cross highway & proceed through bushes near D's home. Officer could not identify people or how many there were, but said they were carrying object about size of case of beer. Later officer returned to area & noticed security light above door of bar was out. Officer also found door had been forced open & upon investigation, it was determined that 4 cases of beer & 2 1/2 pints of whiskey were missing. At about same time officer first saw people crossing road, witness saw D & friends approaching D's house, & car of another friend driving away, but could not identify driver or occupants of car. She saw one of friends carrying case of beer, & another carrying two cans of beer & two bottles of whiskey, but stated that D was not carrying anything. No evidence was presented that beer & whiskey stolen from bar were ever found, or that they were in possession of D's friends. Ct. found circumstantial evidence showed only that D had "opportunity" to commit crime, as in Janigon, 429 N.E.2d 959, Bond, 272 N.E.2d 460, & Freeman, App., 458 N.E.2d 694, & therefore was insufficient to support conviction. There was no evidence that he "kept watch" or rendered assistance while bar was broken into; that he was aware of illegal activities or assented to them; or that he took or had in his possession any stolen property. Held, convictions reversed, Chezem, J., dissenting.

TITLE: Meehan v. State

INDEX NO.: K.4.c.

CITE: (4/29/2014), 7 N.E.3d 255 (Ind. 2014)

SUBJECT: Sufficiency - DNA on glove, alone, sufficient to support conviction

HOLDING: A glove with D's DNA found at the scene of a burglary constituted sufficient evidence to support his conviction for that burglary. When reviewing a claim of insufficient evidence, the court considers only the probative evidence and reasonable inferences supporting the verdict. Here, O.J.S. Building Services, a mechanical contracting business, was burglarized. The police found a glove near the point of entry which had DNA from D on it. About six months later, when D was arrested, he had tools on him that could be used to commit a burglary. He was convicted of the burglary at trial. Although the glove containing his DNA was the only evidence recovered that directly tied D to the burglary, the circumstances under which the glove was discovered, the glove itself, and D's possession of tools potentially used to commit burglary were probative evidence from which an inference reasonably tending to support the guilty verdict could have been drawn. The glove was found near the point of entry, and D had no legitimate access to O.J.S. The possibility that D's DNA was innocently transferred to the glove or he was framed does not make the evidence presented insufficient. Held, Court of Appeals' Opinion at 986 N.E.2d 371 vacated, judgment affirmed.

TITLE: Mickens v. State

INDEX NO.: K.4.c.

CITE: (9/3/82) Ind., 439 N.E.2d 591

SUBJECT: Burglary - circumstantial evidence; sufficiency

HOLDING: On appeal of verdicts based on circumstantial evidence, reviewing Ct. must determine "whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence." Bruce, 375 N.E.2d 1042. Here, evidence showed door to burglary victim's home was broken, house entered & ransacked, & items from house deposited in pillowcase (later found in garage). Victim frightened D before he could return to garage. D spoke with victim before driving away. Victim wrote down license plate. Police later stopped D in car bearing plate number taken down by victim. Held, evidence sufficient to sustain burglary conviction.

RELATED CASES: Stiles, App., 686 N.E.2d 886 (inconsistencies in eyewitness's testimony did not rise to level of making either victim's or eyewitness's testimony inherently improbable or incredibly dubious); Gray, 593 N.E.2d 1188 (it was not error to give instruction that jury could infer burglary element of specific intent from time, force, & manner of entry, because considered in context of other instructions, it was apparent that jury had to find D entered premises with intent to commit murder. Evidence showed D had previously indicated intent to "get" victim, that he entered house in wee hours of morning by prying door with tire iron, & that he carried tire iron into victim's bedroom); Baker, 491 N.E.2d 524 (Ct. finds evidence was sufficient, but DeBruler DISSENTS).

TITLE: Minneman v. State

INDEX NO.: K.4.c.

CITE: (8/7/84) Ind., 466 N.E.2d 438

SUBJECT: Burglary of dwelling - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for burglary of dwelling where D broke glass in service door of attached garage & then entered general store that separated garage from house (one unit). D took cash register, food & other items. D did not attempt to enter living area. Ct. discusses attached garage (Gaunt, 457 N.E.2d 211; Abbott, 371 N.E.2d 721) & basement with no living area access door (Burgett, App., 314 N.E.2d 799) cases, which held structures were dwellings. When D entered garage, he entered dwelling & remained in dwelling as long as he was within structure. It is immaterial that D did not enter/attempt to enter living area. Gaunt. Held, conviction affirmed.

RELATED CASES: Sullivan, 77 N.E.3d 187 (Ind. Ct. App. 2017) (common dining area of a nursing home constituted a "dwelling" to support elevated Level 4 felony burglary), Shepard, App., 839 N.E.2d 1268 (evidence sufficient to prove D broke into dwelling when he broke into victim's attached garage, even though there is no door between garage & living quarters).

TITLE: Rhoton v. State

INDEX NO.: K.4.c.

CITE: (12-22-10), Ind. Ct. App., 938 N.E.2d 1240

SUBJECT: Burglary - elements of enhancement

HOLDING: Tr. Ct. did not abuse its discretion by instructing jury on the elements of Class A felony burglary. A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. However, the offense is: (1) a Class B felony if: (A) it is committed while armed with a deadly weapon; or (B) the building or structure is a: (I) dwelling; or (ii) structure used for religious worship; and (2) a Class A felony if it results in: (A) bodily injury; or (B) serious bodily injury; to any person other than a D. Ind. Code 35-43-2-1.

Here, D was accused of burglarizing a bar during which he killed the victim. D argued that the use of the conjunction "and" between subsections (1), defining Class B felony, and (2) defining the Class A felony, show that the State must prove all the elements of the Class B felony before it can prove D was guilty of the Class A felony. Thus, the jury should have been instructed that the State had to prove beyond a reasonable doubt that D committed the burglary while armed with a deadly weapon and the burglary resulted in serious bodily injury because the building was not a dwelling. A plain reading of the statute does not support D's contention that the elements of the two felonies are cumulative. Thus, the final instruction that only required the State to prove the burglary resulted in serious bodily injury in order to enhance the Class C felony to a Class A felony burglary correctly stated the law. Held, judgment affirmed.

TITLE: Robinson v. State

INDEX NO.: K.4.c.

CITE: (7/26/89), Ind., 541 N.E.2d 531

SUBJECT: Attempted burglary - sufficiency; intent to commit theft

HOLDING: Evidence was not sufficient to prove that D broke & entered premises "with intent to commit theft." D was charged with 3 counts of attempted breaking & entering "with the intent to commit the felony of Theft." Evidence at trial established that D was observed in 3 unsuccessful attempts to break into dwellings. When police investigated, D explained that he was looking for jobs. D was convicted of attempted burglary, & on appeal he argues that evidence was insufficient to prove intent element. Recent cases have focused on this issue. In Gebhart, 531 N.E.2d 211, Ind. S. Ct. reversed attempted burglary conviction where evidence simply showed that D had pried open back door of house with tire iron, holding that evidence was insufficient to prove intent to commit theft. In Justice, 530 N.E.2d 295 (card at K.4.c), burglary conviction was reversed on same grounds. Intent to commit theft may be inferred from circumstantial evidence, & on appellate review Ct. need not determine whether circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence. Myers, 532 N.E.2d 1158; Kidd, 530 N.E.2d 287. However, facts here are indistinguishable from facts in Gebhart & Justice. While evidence may well support inference that D intended some mischief inside dwellings, it does not support inference that he intended to commit theft. Held, reversed. Givan & Pivarnik, JJ., DISSENT.

RELATED CASES: Desloover, App., 734 N.E.2d 633 (although there was evidence of breaking & entering & flight, there was absolutely no evidence that D touched, disturbed or even approached valuable property; evidence insufficient); Patterson, App., 729 N.E.2d 1035 (evidence insufficient to support attempted burglary, where D took no active indicative of his intent in breaking window of home); Sumner, App., 540 N.E.2d 1253.

TITLE: Say v. State
INDEX NO.: K.4.c.
CITE: (2nd Dist., 11-01-93), Ind. App., 623 N.E.2d 427
SUBJECT: Burglary Intent to Steal Marijuana
HOLDING: Evidence showing D entered home to steal marijuana was sufficient to support burglary conviction. Ct. rejected D's argument that because possession of marijuana is illegal, it is not personal property or property of another, & therefore there could be no theft. Ct. found "property" under Ind. Code 35-41-1-23 is "anything of value," & that while possession of marijuana may be illegal, it is bought & sold daily. Therefore it has value & is property, & its taking deprives others of its value or use.

TITLE: Sisson v. State

INDEX NO.: K.4.c.

CITE: (4th Dist.; 5-10-99), Ind. App., 710 N.E.2d 203

SUBJECT: Burglary - insufficient evidence; sole witness inherently unbelievable

HOLDING: Testimony of accomplice who kept changing his story was insufficient to support D's conviction for burglary. Where sole witness presents inherently contradictory testimony which is equivocal or result of coercion & there is complete lack of circumstantial evidence of D's guilt, Ct. may find that no reasonable person could believe testimony & reverse Tr. Ct.'s decision. Davenport v. State, 689 N.E.2d 1226 (Ind. 1997), reh'g granted on other grounds. Here, alleged accomplice initially implicated D in burglaries of three houses. At trial, accomplice testified inconsistently with his former statement by stating that D was only involved in burglary of one home. When confronted on cross-examination with inconsistencies, accomplice admitted that he lied in attempt to get D in trouble. State contended that even if accomplice's testimony was contradictory, fact that expert testified that shoe print found at burglary of one house "could have" been made by D's shoe was sufficient to support burglary conviction. However, evidence of shoe print was inconclusive at best because expert also testified that D's shoes could not be identified or eliminated as having made impression at burglarized home. Lastly, jury found D guilty of participating in burglary of only one house, but accomplice testified that D did not burglarize that house. Thus, even if jury believed accomplice, there was insufficient evidence to support D's conviction of burglary. Held, conviction reversed.

TITLE: State v. McHenry

INDEX NO.: K.4.c.

CITE: (4/12/2017), 74 N.E.3d 577 (Ind. Ct. App. 2017)

SUBJECT: Defendant who obtains handgun as loot during burglary is not “armed” for purpose of Level 2 felony enhancement

HOLDING: Handgun obtained in the course of a burglary cannot be used to elevate a defendant's charge to Level 2 felony burglary while armed with a deadly weapon. Ind. Code § 35-43-2-1(3)(A), “committed while armed with a deadly weapon,” does not include the situation where a burglar enters unarmed and then becomes armed. Unlike in other states, Indiana legislature has not defined “armed” for purposes of burglary statute, and case law is sparse. The plain and ordinary meaning of “armed” is “furnished with weapons” or “using or involving a weapon.” So a person is not armed when he merely possesses a weapon there must be something more indicating the use or involvement of the weapon in the crime.

Evidence in this case does not indicate that Defendant handled the gun in a manner indicative of using it or involving it in the crime in any way. Under the plain language of statute, the degree of burglary does not change based on the nature of the items stolen. Defendant who obtains handgun as loot during burglary has not “armed” himself under 35-43-2-1(3)(A). Held, dismissal of Level 2 felony burglary charge affirmed.

TITLE: Sullivan v. State
INDEX NO.: K.4.c.
CITE: (5/25/2017), 77 N.E.3d187 (Ind. Ct. App. 2017)
SUBJECT: Evidence sufficient to establish burglary and theft convictions
HOLDING: State presented sufficient evidence establishing that the common dining area of a nursing home that is a part of the residents' daily lives was a "dwelling" under Ind. Code § 35-31-5.2-107 to support an elevated Level 4 felony burglary conviction.

Court also affirmed Defendant's Level 6 felony theft conviction based on 642 pills stolen from the nursing facility. State presented sufficient evidence to establish the value of the stolen pills at \$5 each, or roughly \$3,200, and there was no reason to question that evidence simply because it was based on the pills' black market value rather than the commercial "pharmacy" value. Held, judgment affirmed.

TITLE: Vincent v. State

INDEX NO.: K.4.c.

CITE: (1st Dist., 08-23-94), Ind. App., 639 N.E.2d 315

SUBJECT: Residential entry - lesser included offense (LIO) of residential burglary

HOLDING: D, who was charged with residential burglary, was properly convicted of residential entry (RE), because RE is inherently LIO of residential burglary. Ct. rejected D's argument that intent required for two offenses was different, & that because he was charged only with residential burglary, he was not adequately informed of the charges against him. Ct. found elements of Class B burglary, Ind. Code 35-43-2-1, to be 1) breaking & entering, 2) dwelling of another, 3) with intent to commit felony therein; & that elements of RE were 1) knowingly or intentionally, 2) breaking & entering, 3) dwelling of another, Ind. Code 35-43-2-1.5. RE allows conviction for housebreak without need to prove intent to commit target crime, & if target crime is shown, crime becomes burglary. Although D argued that for residential burglary, State need prove intent to commit felony inside dwelling, while for RE State need only prove knowing or intentional entry of dwelling, Ct. found proof of intent to break is necessary element of burglary. Ct. determined only difference between RE & residential burglary is element of intent to commit felony therein, & that because RE contains all elements of residential burglary but one, RE is LIO of residential burglary. Ct. also found RE was inherently LIO of residential burglary, because residential burglary cannot be committed without also committing RE. Therefore, Ct. found information charging D with residential burglary was sufficient to inform him of need to defend against RE, & that his conviction for RE was proper. Held, conviction affirmed. **Note:** Although decision was negative for D, it can be used to argue for necessity of instruction on RE as LIO of residential burglary, due to being inherently included, Aschliman v. State, Ind., 589 N.E.2d 1160.

RELATED CASES: Hayden, 19 N.E.3d 831 (Ind. Ct. App. 2014) (Court sua sponte vacated lesser included conviction of residential entry where same evidence supported residential entry and burglary convictions); Taylor, 943 N.E. 2d 414 (Ind. Ct. App. 2011) (no abuse of discretion in refusing to instruct on LIO of residential entry; Ct. agreed with Tr. Ct.'s determination that there was no serious evidentiary dispute as to D's intent to commit a felony when he knowingly or intentionally entered victim's residence).

TITLE: Watt v. State

INDEX NO.: K.4.c.

CITE: (2d Dist. 03/28/83) Ind. App., 446 N.E.2d 644

SUBJECT: Burglary of dwelling - sufficiency; temporary absence of owner

HOLDING: Invasion of a house from which owner was temporarily absent but which was being cared for by relative is sufficient to sustain conviction for burglary of a dwelling. See Middleton, App., 391 N.E.2d 657 (5-month vacation was temporary absence from home; because owner intended to return, temporary absence during burglary did not vitiate character of premises). Here, owner had been away from home since 7/81. During that time, owner lived with relatives or was in nursing home. Daughter worked 6 days a week to redecorate/renovate home during owner's absence. Burglary occurred 10/81. Ct. distinguishes Smart, 190 N.E.2d 650 & Carrier, 89 N.E.2d 74 (seasonally inhabited retreats). Owner, aged 88, had lived in home for 55 years. Evidence indicates owner intended to return to her home. Held, evidence sustains Class B burglary conviction.

RELATED CASES: Hayden, 19 N.E.3d 831 (Ind. Ct. App. 2014) (evidence didn't support D's instruction regarding "dwelling" because even though victim was ill and had not lived at home for one year, there was evidence he might return to his home once released from hospital; see this section for full review); White, App., 846 N.E.2d 1026 (while it is uncertain when arson/burglary victim's family were to take up permanent residency in house, they clearly intended to do so in near future; thus, State proved beyond reasonable doubt that house was a "dwelling"); Redmon, App., 734 N.E.2d 1088 (D *cited* no authority for proposition that dependent child cannot be found guilty of burglarizing custodial parent's home, regardless of whether child actually lives with that parent); Ellyson, App., 603 N.E.2d 1369 (where D & wife were in midst of divorce, even though D may have had right to possession of house co-equal with wife, conviction for burglary by breaking into property "of another person" could be sustained if evidence demonstrated entry was unauthorized. When husband moved out, wife alone controlled access to home, & had obtained restraining order against D); Ferrell, 565 N.E.2d 1070 (D's conviction for burglary of a dwelling, Class B felony, was proper where, although owner was living elsewhere at the time & was trying to sell the house; mail was still delivered there, owner still took phone calls there, & owner stopped by nearly every day).

TITLE: Wallace v. State

INDEX NO.: K.4.c.

CITE: (2nd Dist., 12-05-08), Ind. App., 896 N.E.2d 1249

SUBJECT: Burglary/Theft - proof of rightful possession or ownership sufficient

HOLDING: In burglary, theft and criminal mischief prosecution, State was not required to prove ownership of house. Rather, it was sufficient to show rightful possession or ownership. To obtain conviction for burglary, State must prove in part that house was a building or structure of another person, and for theft it must prove in part that D exerted unauthorized control over property of another person. Here, Tr. Ct. concluded that there was a question of fact as to the ownership of the house and erroneously acquitted D of burglary. It was error as a matter of law for Tr. Ct. to require proof of ownership of house. The phrase "building or structure of another person" in Ind. Code 35-43-2-1 is not exclusive equivalent of ownership. Burglary is a crime against possessory interest or rightful possession of the premises. Jay v. State, 246 Ind. 534, 206 N.E.2d 128 (1965).

Although issue was moot because State is barred from retrying D on burglary charge, Court held that evidence was sufficient to support criminal mischief and theft convictions. The house had been subject to foreclosure action, but sale was not final until approximately three months after break-in. Circumstantial evidence was sufficient to prove that State witness had keys to enter house and was rightful possessor of house, furnace, and water heater to exclusion of D. Moreover, other evidence supports conclusion that D was not the owner or rightful possessor of house. Held, judgment affirmed.

TITLE: Wilburn v. State

INDEX NO.: K.4.c.

CITE: (Ind. Ct. App., 09-20-21), 177 N.E.3d 805

SUBJECT: Entering an unlocked door of an open business was insufficient evidence of breaking and entering to support burglary conviction

HOLDING: A conviction for burglary cannot be sustained if an alleged perpetrator enters a business open to the public during business hours, with intent to commit a felony or theft in it, due to a lack of evidence as to breaking. Here, Court found insufficient evidence to sustain Defendant's burglary conviction, because Defendant entered through an unlocked front door of an establishment open for business (two minutes prior to closing), therefore there was not a "breaking" as required by statute.

TITLE: Williams v. State

INDEX NO.: K.4.c.

CITE: (5th Dist., 09-11-07), Ind. App., 873 N.E.2d 144

SUBJECT: Residential entry - evidence sufficient; partial entry into residence

HOLDING: An individual's "partial entry" into a residence will support a conviction for residential entry. Here, only the upper portion of D's body was through victim's window after he broke it. On appeal, D argued that plain meaning of word "enter" should be adopted for purposes of residential entry statute, *i.e.*, "to go or come into," & that statute should require a complete entry into structure because unlike burglary statute, intent to commit a felony requirement is lacking under Ind. Code 35-43-2-1.5. Ct. noted that D's proposed rule of complete entry is untenable, leading to absurd result that an individual could avoid prosecution for residential entry by simply ensuring that a foot or hand remained outside the threshold of the residence. A partial entry into a home creates the same situation that the crime of residential entry is designed to deter in the same manner as a complete entry. Thus, State presented sufficient evidence to sustain D's conviction. Held, judgment affirmed.

K. CRIMES

K.4. Offenses against property

K.4.d Check fraud (IC 35-43-5-12)

TITLE: Childers v. State

INDEX NO.: K.4.d.

CITE: (4th Dist., 8-17-04), Ind. App., 813 N.E.2d 432

SUBJECT: Check fraud & attempted theft - evidence sufficient

HOLDING: Evidence was sufficient to support D's convictions for check fraud & attempted theft. D argued that State failed to show that he attempted to defraud a bank where he knew funds he withdrew would be dishonored & reimbursed from a joint checking account he shared with his parents. D presented falsified "comchecks" -- a third-party check which can be activated with a valid authorization number -- with an invalid authorization number & received cash from the bank for them. Essentially, he argued that his parents & not the bank were being defrauded as he expected the joint account would reimburse the bank. By providing the false authorization number, the Ct. found that "even if the Bank had been only temporarily deprived of its funds, the deprivation was accomplished by deception." Ct. also found that State sufficiently established that the bank met the definition of a "financial institution" pursuant to the check deception statute. Ind. Code 35-43-5-12(a). D argued that State failed to properly establish a foundation for what the particular bank did, but the Ct. found that while witnesses did not testify in "precise" terms as to the nature of the bank or its charter, sufficient evidence existed for the jury to determine the bank was engaged in the business of banking & was a financial institution under the statutory definition. Finally, while the "comchecks" could better be described as drafts than checks, D waived the issue as to a variance in the charging information & evidence presented at trial &, in any case, failed to show how he was prejudiced by this variance. Held, judgment affirmed.

K. CRIMES

K.4. Offenses against property

K.4.e. Check deception (Ind. Code 35-43-5-5)

TITLE: Kimberling v. State

INDEX NO.: K.4.e.

CITE: (3/25/88) Ind., 520 N.E.2d 442

SUBJECT: Check deception - notice of non-payment

HOLDING: Mailed notice of non-payment set out at Ind. Code 35-43-5-5(3) is not exclusive method of notification. D issued bad check & was notified by letter, in person, & through his bank statement, payee's payment schedule, & threat of legal action. Ct. App. reversed D's conviction, finding that notice was element of offense of check deception, & that only mailed notice described in Ind. Code 35-43-5-5(e) is sufficient. Kimberling, App., 516 N.E.2d 1070. Ind. S. Ct. vacates Ct. App. opinion, ruling that no specific type of notice is required. Further, restitution following notice of non-payment was intended as defense; notice is not element of offense. It is a defense if D makes restitution within 10 days of receiving reasonable & positive notice of non-payment. Held, conviction affirmed, Ct. App. opinion vacated.

RELATED CASES: Henderson, App., 647 N.E.2d 7 (although CW never mailed written notice to D stating that checks had not been paid, there was sufficient evidence to prove that CW gave D adequate notice of nonpayment of checks. CW tried unsuccessfully to contact D several times at his office or at home to apprise him of nonpayments. It was reasonable for CW to give notice of default to D's wife & company accountant & assume that they would in turn notify D).

TITLE: Neese v. State

INDEX NO.: K.4.e.

CITE: (9/20/2013), 994 N.E.2d 336 (Ind. Ct. App 2013)

SUBJECT: Check deception - evidence payee knew D had insufficient funds did not prove affirmative defense

HOLDING: In check deception prosecution, evidence that D wrote a check and gave it to her friend, and that when the friend tried to cash it later, D's checking account was closed, was sufficient to prove the elements of check deception under Ind. Code 35-43-5-5.

When D gave friend a check for \$2,500 in exchange for cash, she told friend that she would not have the funds in her checking account to cover the check for another four months. Friend attempted to cash the check before the four months had ended, but was told by D's bank that her account was closed. Fact that friend knew that D had insufficient funds in her account to pay the check when it was written did not prove the statutory affirmative defense under Ind. Code 35-43-5-5(f) by a preponderance of the evidence, because D did not tell friend the check would not be honored because her account had been closed. Court held the reasonable inference from those facts is that D knowingly issued the check on a closed account. She failed to show she shared that knowledge with friend so he was not misled, deceived or defrauded by her. In order for affirmative defense in subsection (f) of check deception statute to apply, the knowledge shared by the payor with the payee, i.e., insufficient funds to ensure payment, must match the reason that the check is not honored by the bank upon presentment, hence excusing culpability of the payor because the payor shared that particular knowledge with the payee. Held, conviction affirmed.

TITLE: Reust v. State

INDEX NO.: K.4.e.

CITE: (12-17-19) Ind. Ct. App., 139 N.E.3d 1056

SUBJECT: The home improvement fraud statute requires the consumer to live in the dwelling at the time of the home improvement and landscaping at a new home construction site is excluded under the terms of the statute.

HOLDING: Defendant subcontracted to provide landscaping around a new home that was under construction. He accepted advance money but did not complete the work or offer to return the money. The Court of Appeals concluded that Defendant's conduct did not fall under the Home Improvement Fraud Statute because it was a landscaping project at a new home construction site and new home construction is excluded under the terms of the statute because it is not residential property. His conviction for home improvement fraud was reversed. His conviction for level 6 felony theft was affirmed but was remanded to the trial court for resentencing and to hold a restitution hearing for an accurate determination of the homeowner's losses.

TITLE: Suits v. State

INDEX NO.: K.4.e.

CITE: (2d Dist. 7/28/83) Ind. App., 451 N.E.2d 375

SUBJECT: Check deception - sufficiency

HOLDING: Appellate Ct. orders acquittals entered on 3 of 4 convictions for check deception (reversed on other grounds) where state failed to provide sufficient evidence to identify D as maker or deliverer of checks in 2 counts & failed to prove written notice of non-payment was made to D concerning check involved in 3rd count. Here, Ct. reverses convictions based upon denial of continuance to obtain counsel & entertains D's sufficiency claims. Ind. Code 35-43-5-5(d) (prima facie evidence of identity of maker) does not relieve state of burden of proving beyond a reasonable doubt that D is issuer/deliverer of check. Burden requires more than identifying D & noting D's name is same as name on check(s). Martin, App., 422 N.E.2d 433; Caudle, App., 404 N.E.2d 57. Under Ind. Code 35-43-5-5(e), written notice of non-payment is an element of check deception. Vargo, App., 429 N.E.2d 291. Notice is not to be construed solely as a defense because holder/payee could totally deprive D of defense of payment by intentionally not mailing notice of nonpayment, thereby nullifying legislature's intent. Held, acquittals ordered entered on 3 counts; conviction on 4th count reversed.

TITLE: Walker v. State
INDEX NO.: K.4.e.
CITE: (3d Dist. 8/29/84) Ind. App., 467 N.E.2d 1248
SUBJECT: Check deception
HOLDING: Person who signs check in representative capacity can be held liable under Ind. Code 35-43-5-5. Cooper, App., 391 N.E.2d 841. Statutory presumption in Ind. Code 35-43-5-5 that one who writes subsequently dishonored check knew it would be dishonored does not shift burden of proof to D. Presumptions are valid in criminal cases if fact presumed is more likely than not to flow from fact on which presumption is based. US v. Kelly (CA7 1974), 500 F.2d 72. Ct. finds statute properly shifts burden of production to D to show no requisite knowledge. Kelly; Cooper. Held, conviction affirmed.

K. CRIMES

K.4. Offenses against property

K.4.g. Computer Trespass (IC 35-43-2-3)

TITLE: West v. State

INDEX NO.: K.4.g.

CITE: (09/30/2021) Ind. Ct. App. 2021, 177 N.E.3d 856

SUBJECT: No abuse of discretion to deny motion to dismiss computer trespass charge

HOLDING: Defendant was charged with Class A misdemeanor computer trespass based on allegations she obtained intimate photographs of another woman from her former boyfriend's phone, using a password she retrieved from his laptop, and posted them to social media. After the trial court denied her motion to dismiss, she pursued an interlocutory appeal, arguing that a single computer cannot constitute a "computer system" to satisfy the elements of the computer trespass statute. The Court of Appeals applied the principles of statutory construction to conclude the legislature intended a single computer to fall within the definition of "computer system" under Ind. Code 35-43-2-3. Further, the trial court did not err in finding that it is for the trier of fact to determine whether Defendant's use of the laptop meets the definition of a "computer system" under the computer trespass statute. Held, judgment affirmed.

K. CRIMES

K.4. Offenses against property

K.4.h. Conversion (Ind. Code 35-43-4-3)

TITLE: Buzzell v. State

INDEX NO.: K.4.h.

CITE: (2nd Dist., 06-20-94), Ind. App., 636 N.E.2d 158

SUBJECT: Conversion - Removing political signs

HOLDING: Tr. Ct. did not err in refusing to allow D to argue that political signs on highway right-of-ways are abandoned property or litter, & therefore that D could not be convicted of conversion for taking them. Ct. discussed Ind. Code 9-21-4-6, that declares private signs on highway right-of-ways are public nuisances, & found that even so, private persons are not authorized to remove them. Ct. found D's rationale would allow each member of public to decide, based on uncertain standards, what is public nuisance.

TITLE: Irvin v. State

INDEX NO.: K.4.h.

CITE: (2d Dist. 12/31/86) Ind. App., 501 N.E.2d 1139

SUBJECT: Criminal conversion - sufficiency

HOLDING: Evidence was insufficient to sustain D's conviction for criminal conversion where she was merely passenger in stolen vehicle her boyfriend was driving. Here, police officers realized car was stolen & pursued it. Boyfriend parked car & he & D exited it, at which time police told them to return to car. D was charged with theft but convicted of criminal conversion as lesser included offense. D contends there was no evidence she exerted control over vehicle. Ct. looks to other jurisdictions to determine mere presence as passenger is insufficient to sustain finding that D exerted control over property. Held, conviction reversed.

TITLE: Morris v. State

INDEX NO.: K.4.h.

CITE: (3rd Dist., 02-09-10), 921 N.E.2d 40 (Ind. Ct. App 2010)

SUBJECT: Failure to instruct on lesser included offense (LIO) of conversion - reversible error

HOLDING: In theft prosecution, Tr. Ct. erred in failing to instruct jury on LIO of class A misdemeanor criminal conversion, because there was a serious evidentiary dispute about whether D intended to deprive a J.C. Penney store of the use of its merchandise. Criminal conversion is an inherently LIO of theft because conversion may be established by proof of less than all material elements of theft. Shouse v. State, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006). It is reversible error for a court to not instruct the jury on an inherently lesser included offense where there is a serious evidentiary dispute about the elements distinguishing the greater offense from the lesser offense. Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995). The only element distinguishing theft from conversion is whether the D acted with intent to deprive a person of the value or use of that property. Cf. Ind. Code ' 35-43-4-2 and Ind. Code ' 35-43-4-3. However, there may be no practical difference between conversion and theft because it seems nearly impossible for a person to knowingly exert unauthorized control of property of another without intending to deprive the person of the value or use of the property. Irvin v. State, 501 N.E.2d 1139, 1142 n.3 (Ind. Ct. App. 1986).

Here, store's loss prevention supervisor Kimberly Blair saw D, who was homeless, stuffing clothes into a large plastic bag while standing in front of a conspicuous security camera. D dropped the bag in the children's department and left the store. Blair, and another security officer subdued D, searched him and found only a toothbrush and small pocketknife. Fourteen months earlier, Blair apprehended D at the same store for stuffing jeans in a trash bag and leaving the store. Soon after, D frequented the same store, making him familiar as a shoplifter to most employees.

The evidence created a serious evidentiary dispute about whether D intended to deprive J.C. Penney of the use and value of the clothing because evidence created the reasonable inference that D acted as he did so he would be caught and jailed, if only for a short time, to receive food and shelter on a cold winter night. D's reckless actions seemed designed to draw attention to himself. Even if there is no articulable difference between conversion and theft, the rule of lenity and the proportionality clause of the Indiana Constitution (Art. I, ' 16) support giving the LIO instruction. The legislature has defined conversion and theft as two separate crimes with two different penalty ranges. Such an ambiguity must be resolved in favor of the accused.

Further, if theft and conversion are one and the same, they violate the proportionality clause of the Indiana Constitution. If the two offenses can be proven with identical evidence yet carry different sentencing ranges, prosecutors would likely pursue the D felony theft charge to obtain a longer sentence, and in this case, to add a habitual offender charge. D was entitled to the LIO instruction for conversion. Held, judgment reversed and remanded for new trial.

RELATED CASES: Lane, 953 N.E.2d 625 (Ind. Ct. App 2011); Poling, 938 N.E.2d 1212 (Ind. Ct. App 2010) (distinguishing Morris factually, court held that there was no serious evidentiary dispute as to D's intent to deprive and thus, D had no right to an instruction on conversion in her theft trial; moreover, court disagreed with Morris to the extent it held that the rule of lenity and the Proportionality Clause of the Indiana Constitution requires such a lesser included offense instruction).

TITLE: Swanson v. State

INDEX NO.: K.4.h.

CITE: (5th Dist., 4-27-95), Ind. App., 650 N.E.2d 43

SUBJECT: Criminal conversion - sufficient evidence of intent

HOLDING: Evidence was sufficient to support conviction of criminal conversion. Record showed that D insisted on reward in exchange for return of missing dog, although he knew that no reward had been offered. D also threatened to enter dog in dog fight if reward was not forthcoming. This was sufficient evidence from which Tr. Ct. could infer that D intended to exert unauthorized control over dog until such time as he would be paid reward. Held, conviction affirmed.

K. CRIMES

K.4. Offenses against property

K.4.i. Deception (Ind. Code 35-43-5-3)

TITLE: Brown v. State

INDEX NO.: K.4.i.

CITE: (06-22-07), Ind., 868 N.E.2d 464

SUBJECT: Identity deception B evidence insufficient

HOLDING: There is insufficient evidence that D used the identifying information of another person, which is required to support a conviction for identity deception. Ind. Code 35-43-5-1(a). Identifying information is defined as "information that identifies an individual, including an individual's . . . name, address, date of birth, place of employment, employer identification number, mother's maiden name, Social Security number, or any identification number issued by a governmental entity . . ." Ind. Code 35-43-5-1(h). Applying the phrase "identifying information" as defined by the statute, State was required to prove that D used an individual's names, address, etc. While D used information identifying a radio station without its consent, he did not use the name, address, date of birth, or other identifiers of any existing human being in perpetrating his hoax, only a fictional person. Thus, State failed to meet its burden. Held, transfer granted, Ct. App.' opinion at 848 N.E.2d 699, aff'd on reh., 856 N.E.2d 739 vacated, judgment reversed & remanded.

RELATED CASES: Duncan, 23 N.E.3d 805 (Ind. Ct. App 2014) (the legislature's amended to the identity deception statute after Brown, supra, changing "individual" to "person" does not change the court's interpretation of the statute that a D must use the person whose identification is being stolen must be a real person).

TITLE: Cain v. State
INDEX NO.: K.4.i.
CITE: (3d Dist. 7/19/83) Ind. App., 451 N.E.2d 672
SUBJECT: Deception - sufficiency
HOLDING: Evidence was insufficient to support conviction for deception (Ind. Code 35-43-5-3(a)(6) - cable T.V. service) where evidence showed only that D lived in apartment, sometimes watched T.V. & knew of existence of illegal hook-up. No reasonable person could infer D's guilt beyond a reasonable doubt. Zinn, App., 424 N.E.2d 1058. Held, conviction reversed.

TITLE: Duncan v. State

INDEX NO.: K.4.i.

CITE: (12/19/2014), 23 N.E.3d 805 (Ind. Ct. App 2014)

SUBJECT: Identity Deception - requires real person

HOLDING: State presented insufficient evidence to sustain D's conviction for identity deception. In order to convict D of identity deception as charged, State was required to prove that D "knowingly or intentionally obtain[ed] . . . or use[d] the identifying information of another person, including the identifying information of a person who is deceased: (1) without the person's consent; and (2) with intent to . . . (c) profess to be another person[.]" Ind. Code 35-43-5-3.5. The identifying information used must be that of a real human being. Brown v. State, 868 N.E.2d 464, 470 (Ind. 2007).

Here, when being arrested, D repeatedly told the police he was George Frederick Walker, George Walker, Jr. and/or George F. Walker, with a birth date of April 6, 1967. However, State presented no evidence that this was the identifying information of a real person. As such, D's conviction for identity deception cannot stand. Held, judgment reversed in part and affirmed on other grounds in part, and remanded with instructions to vacate the identity deception conviction and the sentence imposed thereon.

TITLE: Lacy v. State

INDEX NO.: K.4.i.

CITE: (8/16/2016), 58 N.E.3d 944 (Ind. Ct. App 2015)

SUBJECT: Lawful purpose exception to identity theft is an affirmative defense; instruction properly rejected

HOLDING: In an issue of first impression, the “lawful purpose” exception to identity deception is an affirmative defense, not an element of the crime. Thus, Tr. Ct. properly refused D’s instruction, which claimed the exception was a statutory element.

D’s wife was incarcerated. To get private, unsupervised access to her, D tried to pass himself off as her attorney, resulting in his arrest for identity deception. At trial, the court refused D’s tendered instruction, which said the lawful purpose language was a statutory element, requiring the State to prove D used his attorney’s identify for an unlawful purpose.

To decide whether a statutory exception is an element or an affirmative defense, courts consider the location of the exception compared to the location of the definition of the crime. Lyles v. State, 970 N.E.2d 140, 143 n.3 (Ind. 2012). If the exception is closely connected to the clause creating the offense, it is a material element the State must prove. Id. However, if the exception is located in a subsequent clause, it is an affirmative defense that must be raised by a D. Id.

Identity deception is defined in subsection (a) of the controlling statute, Ind. Code § 35-43-5-3.5(a), while the “lawful purpose” exception appears in subsection (c). See Ind. Code § 35-43-5-3.5(c)(3). This indicates the legislature intended the lawful purpose exception to be an affirmative defense, not a material element. Therefore, D’s tendered instruction incorrectly stated the law, and Tr. Ct. properly rejected it. See Nichols v. State, 542 N.E.2d 572, 575 (Ind. Ct. App. 1989). Held, judgment affirmed.

K. CRIMES

K.4. Offenses against property

K.4.j. Forgery (Ind. Code 35-43-5-2)

TITLE: Anthony v. State

INDEX NO.: K.4.j.

CITE: (7/1/2016), 56 N.E.3d 670 (Ind. Ct. App 2015)

SUBJECT: Forgery - use of victim's debit card to withdraw money from ATM

HOLDING: Using a victim's ATM card qualifies as "uttering" a written instrument for purposes of forgery statute, Ind. Code § 35-43-5-2. D argued that the victims' debit cards were not forged and so he did not use a forged instrument. However, it is not an essential element of forgery that the instrument used necessarily be forged or inauthentic. Rather, impersonating another so as to use an authentic written instrument belonging to them without authorization is sufficient to prove forgery. Borjas v. State, 946 N.E.2d 1230 (Ind. Ct. App 2011).

Using a debit card to withdraw money from an ATM is essentially the same as writing oneself a check to cash at the bank. If a person steals a victim's checkbook, forges the victim's signature, and attempts to cash a check, then the individual is clearly guilty of forgery. The same logic applies to an ATM transaction. Like a signature, a personal identification number (PIN) is a means by which the bank can attempt to verify a person's identity and assure that they are authorized to access the account. By using the victim's PINs, D was attempting to defraud the bank by purporting to be the victims. Held, convictions affirmed.

TITLE: Benefield v. State

INDEX NO.: K.4.j.

CITE: (1st Dist., 02-25-09), 904 N.E.2d 239 (Ind. Ct. App. 2009)

SUBJECT: Erroneous jury instruction

HOLDING: In forgery prosecution, Tr. Ct. erred in instructing jury that "Defraud means to make a misrepresentation of an existing material fact, knowing it to be false, or making it recklessly without regard to whether it is true or false." Instruction impermissibly instructed the jury that it could convict upon merely a "reckless" state of mind, when the forgery statute requires that the making, uttering, or possession of the written instrument in question be done with the "intent to defraud." Ind. Code 35-43-5-2(b). In other words, mere reckless disregard for the truth or falsity of the instrument is not enough; knowledge that the information in the instrument is false is required. To the extent instruction suggests that a person making a representation with a reckless disregard for its truth may have the intent to deceive, it is not a proper statement of law. Court concluded that even though jury was misinformed once regarding the proper mens rea for forgery, error was not fundamental because it was properly informed four times, including three times by Tr. Ct.. Jury was also instructed that it was "to consider all the instructions as a whole" and not to "single out any certain sentence, or any individual point or instruction and ignore the others." Finally, while jury was instructed on legal meaning of term "intentionally," it was not given the legal meaning of "recklessly." The lack of any elaboration on concept of recklessness made it even less likely that jury was focused on it. Held, judgment affirmed. May, J., concurring on basis that she disagreed with majority's conclusion that instruction required State to prove an element beyond that required by the forgery statute.

TITLE: Bocanegra v. State
INDEX NO.: K.4.j.
CITE: (06-22-12), 969 N.E.2d 1026 (Ind. Ct. App 2012)
SUBJECT: Forgery - potential injury sufficient to prove intent to defraud
HOLDING: Proof of "intent to defraud" element of forgery requires a showing the D demonstrated "intent to deceive and thereby work a reliance and injury." Wendling v. State, 465 N.E.2d 169 (Ind. 1984). Notwithstanding 2005 amendment to IND. CODE 35-43-5-2, which added lesser offense of counterfeiting (which does not require intent to defraud), potential injury remains a sufficient basis for a finding of criminal intent in a forgery prosecution. Here, D did not have the documents he needed to work legally in the United States and used someone else's documents. Jury could have reasonably inferred D's misrepresentations subjected his employer to potential penalties for hiring a person who was not legally permitted to work. Thus, there was sufficient evidence, in the form of potential injury to his employer, of D's intent to defraud. Held, judgment affirmed and remanded for vacation of identity deception conviction; Sullivan, Sr.J, dissenting, notes that even though employer relied upon information provided by D, it could not discern any injury sustained by employer, as it received the labor from D for which it bargained.

TITLE: Dumes v. State

INDEX NO.: K.4.j.

CITE: (12/19/2014), 23 N.E.3d 798 (Ind. Ct. App 2014)

SUBJECT: Evidence sufficient to support forgery and unauthorized practice of law convictions

HOLDING: State presented sufficient evidence to support D's convictions for forgery and unauthorized practice of law where she forged a name and attorney number on a divorce filing because she did not want the litigant she was helping to have to watch a video about filing pro se. Teresa Rogers paid D to file her dissolution petition wherein she listed Michelle Smith, a former Marion County Small Claims judge, but included George Plews' attorney number. At the start of her trial, a stipulation was entered that said Smith's signature was on the appearance form with Plews' number, but neither attorney gave D permission to use their information. D did not object to this stipulation, and there is evidence that D told Rogers that she "had to put" Smith's name on the divorce petition or else she wouldn't be able to file it without watching the video. Evidence also showed D accepted a fee to prepare and/or file the dissolution and she is not admitted to the Indiana Bar. Court noted that almost two years had passed since the filing of the petition and D's criminal trial, and Rogers could not proceed with her divorce pro se because Smith was still listed as her attorney. Held, judgment affirmed.

TITLE: Green v. State

INDEX NO.: K.4.j.

CITE: (03-23-11), 945 N.E.2d 205 (Ind. Ct. App 2011)

SUBJECT: Forgery - electronic & written signatures have same force & effect

HOLDING: State presented sufficient evidence to support D's two Class C felony forgery convictions where it showed that D, without permission, used another person's credit card to buy cigarettes at a gas station. Ind. Code § 35-43-5-2(b) required the State to prove that D - with intent to defraud - *made*, uttered or possessed "a *written instrument* in such a manner that it purports to have been made: 1) by another person; 2) at another time; 3) with different provisions; or 4) by authority of one who did not have authority[.]" (emphasis added).

After D swiped the credit card, it was approved, and he signed the other person's name inside the electronic box located on the sale terminal. D received a credit card receipt with the other person=s purported signature. The fact that D electronically signed the credit card sales receipt does not relieve him of criminal liability under the forgery statute. Electronic signatures have the same force and effect as written signatures. See Ind. Code § 26-2-8-106. D "made" a "written instrument" when he signed the other person=s name on the electronic point of sale terminal. To permit D to avoid a forgery conviction because technological advances have allowed for electronic signatures on retail credit card transactions would violate the express intent of the General Assembly. Held, judgment affirmed.

RELATED CASES: Tatusko, 990 N.E.2d 986 (Ind. Ct. App 2013) (evidence sufficient for C felony forgery where D, a waitress, entered into restaurant's computer a tip \$2.00 more than authorized by the customer); Borjas, 946 N.E.2d 1230 (Ind. Ct. App 2011) (D uttered a forged written instrument under Ind. Code 35-41-1-27 by signing an electronic signature box at point of sale terminal, even though constitutes "uttering" a "written instrument" under Ind. Code 35-43-5-2(b)).

TITLE: Jacobs v. State

INDEX NO: K.4.j.

CITE: (3rd Dist., 06-09-94), Ind. App., 640 N.E.2d 61

SUBJECT: Forgery - Selling fake logo T-shirts

HOLDING: D was properly convicted of forgery for selling T-shirts displaying fake federally registered trademarks. T-shirts were sold to private investigators for \$5.00 each. One investigator asked if shirts were originals or copies, & D readily admitted they were copies, but other investigator did not ask, & there was no other indication shirts were copies. Ct. first found Tr. Ct. did not err in denying D's motion to dismiss on ground companies could not prosecute under Ind. penal laws because they were not registered in Ind. Ind. Code 24-2-1-14(a) & (b) allow non-registered companies to have such right. Ct. also found trademark symbol was "written instrument" under forgery statute, Ind. Code 35-43-5-2. Ind. Code 35-43-5-1 defines "written instrument" as "paper, document, or other instrument containing written matter & includes money, coins, tokens, stamps, seals, credit cards, badges, trademarks, medals, or other object of symbols of value, right or identification." Under previous code, selling of counterfeit items was specifically covered under Ind. Code 35-1-124-7. That statute, however, was repealed, & commentary on new forgery statute, Ind. Code 35-43-5-1, made definition broader & included items subject to counterfeiting & identification symbols. Ct. concluded that sale of T-shirts imprinted with legal trademarks of others could be prosecuted under Ind. Code 35-43-5-2, & that D had necessary intent to defraud because he knew shirts were fakes, but there was no indication on booth or shirts that they were not genuine. While he did not lie when directly asked about shirts, jury could have found he did intend customers to believe they were real. Decision also discusses instructions for this offense.

RELATED CASES: An-Hung Yao, 975 N.E.2d 1273 (Ind. 2012) (the trademarked design of a rifle can be considered a "written instrument" and thus can be counterfeited); Diallo, 928 N.E.2d 250 (Ind. Ct. App 2010) (State presented sufficient evidence that D wanted his customers to believe his "knock-off" Nike, Ralph Lauren, and Coogi merchandise was genuine and, thus, intended to defraud them).

TITLE: Jordan v. State

INDEX NO.: K.4.j.

CITE: (1/22/87) Ind., 502 N.E.2d 910

SUBJECT: Forgery - nature of crime; sufficiency

HOLDING: Ct. App. erred in reversing denial of D's PCR. Here, D ordered printing supplies, representing himself to the employee of James & Associates, & signed sales receipt under assumed name. Ct. App. held factual basis was not established for crime charged because invoice itself contained no suggestion that D was agent, employee, or otherwise authorized to bind company. Ct. finds express language of current forgery statute (Ind. Code 35-43-5-2) indicates legislative intent to extend common law offense of forgery to include crimes never before deemed to be within scope of offense. Focus has been shifted from "false making" of things that may be forged to means whereby forgery may be accomplished. Forgery includes every act to fraudulently make an instrument appear to be what it is not. Bowman, App., 398 N.E.2d 1306. Ct. recites definition of "utter" (Ind. Code 35-41-1-2), "make" (Ind. Code 35-43-5-1) & "written instrument" (Ind. Code 35-43-5-1). Ct. also rejects D's contention that conflict between title of information & its text denied him due process (card at A.3.a). Held, denial of PCR affirmed.

RELATED CASES: Hightower, App., 866 N.E.2d 356 (failing to notify FSSA of documents falsified by employee after signing certifying documents' accuracy constituted conspiracy to commit forgery); Stroup, App., 810 N.E.2d 355 (State failed to meet its burden of establishing proper venue in which to charge D with forgery); Jacobs, App., 640 N.E.2d 61 (forgery conviction upheld for selling T-shirts displaying fake federally-registered trademarks); Thornton, App., 636 N.E.2d 140 (Signing false name on fingerprint card at booking is forgery); Richardson 486 N.E.2d 1058 (card at O.12.g); Wendling 465 N.E.2d 169 (Forg 44(1); evidence was sufficient to support D's forgery conviction where D cashed check made payable to him for services; D's possession of checks within 4-day period following theft & his attempt to cash them shortly thereafter, support inference of intent to defraud); West, 235 N.E.2d 53 (execution of rental contract using false name constituted forgery).

TITLE: Lewis v. State

INDEX NO.: K.4.j.

CITE: (8-28-02), Ind. App., 774 N.E.2d 99

SUBJECT: Forgery - sufficiency; intent to defraud; maker of check

HOLDING: Where D does not have authority from bank to utter check purported to be drawn upon account with bank, there is sufficient evidence to support forgery conviction. D argued that he did not need authority from bank to make check pursuant to Ind. Code 26-1-3.1-103, which defines maker as person who signs or is identified in note as person undertaking to pay. D claimed he was maker of check, not bank. However, Ind. Code 26-1-31.-103 limits its applicability to that chapter of Uniform Commercial Code which covers negotiable instruments. Under Ind. Code 35-43-5-1(1), "make" means to draw, prepare, complete, counterfeit, copy or otherwise reproduce, or alter any written instrument in whole or in part. Further, State did not allege that either bank or D was maker of check. Instead, it alleged that check was uttered by D, with intent to defraud, in such manner that it purported to have been made by authority of bank. Lastly, D argued that at most, he committed crime of check deception. While it might have been possible for State to charge D with check deception, he was charged with forgery, & evidence was sufficient to support such conviction. Held, judgment affirmed.

TITLE: Lohmiller v. State

INDEX NO.: K.4.j.

CITE: (2nd Dist., 04-22-08), Ind. App., 884 N.E.2d 903

SUBJECT: Forgery - evidence sufficient

HOLDING: Evidence was sufficient to sustain D's convictions for forgery, based on her elaborate scheme to pass herself off as a nurse registered in Indiana. After knowingly accepting a job that required employee to be a nurse registered in Indiana, D lied about her qualifications for four years. While in that public health nurse position, she signed at least twenty-seven documents in which she held herself out to be an Indiana-licensed nurse. D was not authorized to practice nursing in Indiana or to use the abbreviation of "R.N." pursuant to Ind. Code 25-23-1-11. D admitted that she has never been licensed to practice nursing in Indiana. This evidence was sufficient to show that D knowingly or intentionally made or uttered a written instrument in such a manner that it purports to have been made by authority of one who did not give authority. Ind. Code 35-43-5-2. Court also rejected D's argument that her convictions for forgery and practicing nursing without a license violated double jeopardy clause of Indiana Constitution. Held, judgment affirmed in part, reversed and remanded in part on other grounds.

TITLE: Logan v. State

INDEX NO.: K.4.j.

CITE: (3rd Dist., 4-14-98), Ind.App, 693 N.E.2d 1331

SUBJECT: Forgery - sufficient evidence of aiding

HOLDING: There was sufficient evidence that D was guilty of forgery by aiding, inducing or otherwise causing women to cash checks & thus depriving stores of specified amount of currency.

Richards, 481 N.E.2d 1093. Although there were inconsistencies in testimony of two women accomplices, no one saw D write or sign any of checks or even possess one, & D's fingerprints were not found on any of checks, women's testimony that D set up business account using name of incarcerated inmate, prepared fraudulent payroll checks which he gave to women, took women to stores where they endorsed & cashed checks, waited outside for women to return & allowed women to retain some of money & took remainder was sufficient to support convictions. Jury must reconcile any inconsistencies in arriving at verdict. Parker, App., 530 N.E.2d 128. Held, judgment affirmed.

TITLE: McHenry v. State

INDEX NO.: K.4.j.

CITE: (1-6-05), Ind., 820 N.E.2d 124

SUBJECT: Forgery & theft - evidence sufficient

HOLDING: State presented sufficient evidence to support D's convictions for forgery & theft. D, a bank teller, withdrew \$6500 from the account of Charles Landes. D testified that someone had come to her wanting to make this withdraw, that she had filled in the withdrawal slip, & that she had customer sign it & gave him the money. Upon receiving his bank statement & discovering the withdrawal from his account, Landes immediately reported error to bank & signed affidavit of forgery stating that signature on withdrawal slip was not his & that he did not receive any of proceeds. Bank's videotape showed no one at D's teller window at time withdrawal slip was time-stamped. Bank records also disclosed that D had accessed & viewed Landes' account records twice during two weeks before the withdrawal.

D argued that State failed to present evidence that she intended to defraud customer or bank or that she took the money. In reversing convictions, Ct. App. improperly reweighed evidence & substituted its own judgment for that of the jury. Intent to defraud can be proven by circumstantial evidence. Wendling v. State, 465 N.E.2d 169 (Ind. 1984. Probative evidence & reasonable inferences drawn from evidence could have allowed a reasonable trier of fact to find D guilty beyond reasonable doubt of forgery & theft. Held, transfer granted, Ct. App. opinion at 797 N.E.2d 852 vacated, convictions affirmed.

TITLE: Miller v. State

INDEX NO.: K.4.j.

CITE: (2nd Dist., 3-31-98), Ind. App., 693 N.E.2d 602

SUBJECT: Evidence sufficient to support forgery & theft convictions

HOLDING: Forgery conviction requires showing that D: (1) made or uttered written instrument, (2) with intent to defraud, & (3) in such manner that it purported to have been made by another person. Ind. Code 35-43-5-2. Here, D opened checking account using name, social security number, birth date, & address which were not his. D made written instrument when he wrote check, signing fictitious name to it, & uttered written instrument when he gave cellular phone dealer check as deposit for three phones. Further, D's use of assumed name when passing check & lack of funds in checking account supported jury's inference that D intended to defraud phone dealer. Finally, check D issued purported to have been made by person other than himself. Ct. held that State presented sufficient evidence to support forgery conviction.

TITLE: State v. White

INDEX NO.: K.4.j.

CITE: (4th Dist. 2/14/89), Ind. App., 533 N.E.2d 1273

SUBJECT: Forgery - sufficiency; intent to defraud

HOLDING: Tr. Ct. did not err in granting judgment on evidence in favor of D in trial on 2 counts of forgery. D worked for livestock market (ELM), & conducted cattle auction. General manager adopted fictitious name, "John Long," to market cattle owned by ELM, purportedly because individually-owned cattle bring higher prices. Another employee made out 2 ELM checks to John Long, & when D asked manager whether Long would pick checks up, he was told for first time of false identity. D endorsed checks by signing "John Long," & deposited checks in ELM account. Judgment on evidence is proper only where there is total absence of evidence on essential issue, or where evidence is without conflict & susceptible of only one inference, in favor of moving party State v. Lewis 429 N.E.2d 1110. Here, there is no conflict. Forgery requires intent to defraud, & there is no evidence from which such intent can be inferred. No innocent person was defrauded. Three parties had interest in checks: 1) drawer - ELM; 2) payee - "John Long"; & 3) payee bank. None of these parties was defrauded. Bank simply debited 1 ELM account & credited another. Public may have been misled as to ownership of cattle, but this misrepresentation took place before checks were drawn. Held, conviction reversed.

TITLE: Trainor v. State

INDEX NO.: K.4.j.

CITE: (06-09-11), 950 N.E.2d 352 (Ind. Ct. App 2011)

SUBJECT: Counterfeiting - evidence sufficient

HOLDING: State presented sufficient evidence to support D's Class D felony counterfeiting convictions. D forged order forms for various collectibles to be sent to a police officer=s home in retaliation for the officer giving him a traffic citation. The evidence was sufficient to show that D committed counterfeiting because the order forms constituted papers, documents, or other written instruments containing written matter, and thus fall within the statutory definition of written instrument. See Ind. Code 35-43-5-1(t). Further, the order forms could have been reasonably believed to be objects or symbols of value because they caused the police officer corresponding debt obligations in his name. Id. From this evidence, there was substantial evidence of probative value from which the trier of fact could have drawn the conclusion that the D was guilty beyond a reasonable doubt, and therefore, the evidence was not insufficient. Held, judgment affirmed.

TITLE: Williams v. State

INDEX NO.: K.4.j.

CITE: (2nd Dist., 08-27-08), Ind. App., 892 N.E.2d 666

SUBJECT: Forgery - intent to defraud; presenting forged check to bank teller

HOLDING: In forgery and attempted theft prosecution, Tr. Ct. did not err in denying D's Trial Rule 41(B) motion for involuntary dismissal. Appellate review of the denial of TR 41(B) motion is limited to State's evidence presented during its case-in-chief. Here, State presented testimony that D had recently opened a checking account with bank and that she had presented three-month old, forged check to bank for deposit into her new account. D proceeded with the attempted deposit despite being told by bank's teller that a hold would be placed on it. The mere act of presenting a forged check is sufficient to show that D intended to deprive another of the value of that check. Ringley v. State, 182 Ind. App. 424, 395 N.E.2d 339 (1979); England v. State, 249 Ind. 446, 233 N.E.2d 168 (1968). Thus, evidence presented by State created a rebuttable inference that D acted with intent to defraud. Held, judgment affirmed.

TITLE: Wininger v. State

INDEX NO.: K.4.j.

CITE: (1st Dist. 8/18/88) Ind. App., 526 N.E.2d 1216

SUBJECT: Forgery - handwriting standards; authentication

HOLDING: Tr. Ct. erred in admitting handwriting standards into evidence for purpose of comparison by State's expert with allegedly forged documents. D was convicted of forgery. On appeal, D argues that standards were erroneously admitted because their own genuineness was not properly established. Admitted or proved handwriting may be used as basis for comparison with questioned handwriting. Ind. Code 34-3-6-1. Before comparison may be made, however, genuineness of standard must be established. Wells 261 N.E.2d 865. State here sought to establish genuineness through testimony of witness in whose presence standards had been signed. However, 91-year-old witness had no recollection of signing, & had to refer to transcript from prior trial in which he had given similar testimony. State argues witness' testimony was admissible as present recollection refreshed. However, even after referring to his prior testimony, witness indicated his memory was not refreshed. Alternatively, State argues transcript of prior testimony was admissible as past recollection recorded. However, transcript was made some 9 to 10 years after signing of documents, & thus was not contemporaneous record of signing. Gee 389 N.E.2d 303. Finally, State argues transcript was admissible under former testimony exception to hearsay rule. However, State failed to produce certified transcript or testimony of Ct. stenographer. Testimony & transcript were not admissible under any of these theories. State's erroneous admission was not harmless, since expert based opinion that documents were forged on comparison with inadmissible standards.

K. CRIMES

K.4. Offenses against property

K.4.k. Fraud

TITLE: Osburn v. State

INDEX NO.: K.4.k.

CITE: (01-21-11), 940 N.E.2d 853 (Ind. Ct. App 2011)

SUBJECT: Theft, obstruction of justice & insurance fraud - sufficiency

HOLDING: Evidence was sufficient to support D's convictions for theft, obstruction of justice, and insurance fraud. A criminal D's wife wrote a check to D, a bail bondsman, to post her husband's bond. The check was written on insufficient funds, and D told the wife that he would make arrangements to revoke the bond. He went to the courthouse and asked the bailiff for the bond paperwork, which stated that the bond "should remain a permanent part of court records." Bailiff handed the paperwork to D, who told the bailiff that he needed the bond back because the check had bounced and walked out the door. The bailiff thought that the bondsman would obtain a good check and return with the bond, but he did not. Instead, he allowed his business partner to write "VOID" on the bond, which was in fact valid, and returned it to the insurance company without paying the \$350 premium. The judge presiding over the criminal D's case did not learn about the missing bond paperwork until the following month, when the D requested a bond reduction hearing because he had not been released from jail. State presented sufficient evidence to support D's convictions. Given that D wrote bonds for a living, it was reasonable for the jury to conclude that he knew that his exertion of control over the bond paperwork was unauthorized, notwithstanding bailiff's acquiescence. By submitting the bond marked "VOID" to insurance company's agent, D concealed the fact that the bond was actually a valid bond for which he owed company a \$350 premium that was never paid. Thus, evidence was sufficient to support conviction for insurance fraud.

However, D's double jeopardy rights were violated because there is a reasonable probability that the jury used the same facts to establish the essential elements of both theft and obstruction of justice. Held, theft and insurance fraud convictions affirmed, obstruction of justice conviction vacated.

TITLE: Robinson v. State

INDEX NO.: K.4.k.

CITE: (12-30-02), Ind. App., 780 N.E.2d 849

SUBJECT: Fraud - evidence sufficient; credit card numbers

HOLDING: Evidence was sufficient to convict D of fraud where D used credit card numbers, but did not have actual possession of credit cards, for unauthorized purchases. Ind. Code 35-43-5-4 states that person who with intent to defraud, obtains property by using, without consent, a credit card that was issued to another person commits fraud. D argued that evidence was insufficient to support conviction because he only had credit card numbers, & actual credit card holders had possession of cards. Common sense dictates that credit card number is, in essence, the credit card. Physical credit card is embodiment of credit card number & serves simply as means of presentation of credit card account number. Further, physical credit card is worthless without a valid credit card number. Credit card number & credit card are one & same for purposes of statute defining crime of fraud. Held, judgment affirmed.

TITLE: United States v. Thompson

INDEX NO.: K.4.k.

CITE: 484 F.3d 877 (7th Cir. 2007)

SUBJECT: State official's political award of contract not equal to mail fraud or bribery

HOLDING: Seventh Circuit Court of Appeals held that a state procurement official who got a raise after she steered a state contract toward a political favorite was not guilty of the sort of conduct prohibited by federal fraud and bribery statutes. Court stated the convictions were based on overly broad interpretations of what qualifies as "honest services" fraud and the misapplication of the assets of federally funded programs. D was a Wisconsin procurement official who was convicted under the federal mail fraud and bribery statutes, 18 U.S.C. ' 1341 and 18 U.S.C. ' 666. Evidence showed that D delayed a decision on a multimillion dollar state travel contract and otherwise manipulated the process to ensure that the contract was awarded to a travel agency that was favored by her politically appointed boss, rather than an out-of-state competitor rated by her colleagues as providing better service. Section 666 makes it a crime if individual "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies" property valued at \$5,000 or more. The term "misapplies" is not defined in the statute and the prosecution's theory was that D misapplied more than \$5,000 by diverting the travel contract away from the bidder whom the contract would have been awarded in the absence of her efforts. Court characterized the government's position as advocating an interpretation of statute under which "any public employee's knowing deviation from state procurement rules is a federal felony, no matter why the employee chose to bend the rules, as long as the employee gains in the process. Court noted that it has previously read "misapplies" narrowly. It interpreted "misapplies" as requiring proof that the official was "on the take" when he or she violated or manipulated regulations; otherwise, the official's error is civil, rather than criminal. Court noted such an interpretation was supported by the rule of lenity, which requires ambiguities in criminal statutes to be resolved in favor of the accused. Court also reversed conviction under Section 1341, which prohibits use of the mails in furtherance of a "scheme or artifice to defraud." Court noted that "treating an incorrect application of state procurement law as a 'misuse of office' and a raise as a 'private gain' would land us back in the soup - once again, simple violations of administrative rules would become crimes. . . . The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous.

TITLE: Valle v. State

INDEX NO.: K.4.k.

CITE: (6/25/2013), 989 N.E.2d 1268 (Ind. Ct. App 2013)

SUBJECT: Inmate fraud - future interest in bail money & release from jail constitute "property"

HOLDING: Ind. Code 35-43-5-20 provides that an inmate who, with intent of obtaining money or other property from a person who is not an inmate, knowingly or intentionally makes a misrepresentation to a person who is not an inmate and obtains or attempts to obtain money or other property from the person who is not an inmate, commits inmate fraud, a Class C felony. Here, D made misrepresentations to victim about his prospective employment and ability to repay the victim the bail money once he was released from jail. On appeal, he argued that he did not obtain money or property from these misrepresentations because the money remained with the County Clerk throughout the trial and was returned to victim at sentencing. Court disagreed, holding that D's future interest in the bail money and his release from jail constitutes "property" for purposes of inmate fraud. See Ind. Code 35-31.5-2-253(a)(defining "property" as "anything of value," including "a gain or advantage" and "intangibles"). Held, judgment and 16-year aggregate sentence affirmed; Riley, J., concurs in part and dissents in part without opinion.

K. CRIMES

K.4. Offenses against property

K.4.I. Fraud on financial institutions (Ind. Code 35-43-4-8(a))

TITLE: Asghar v. State

INDEX NO.: K.4.I.

CITE: (4th Dist., 9-3-98), Ind. App., 698 N.E.2d 879

SUBJECT: Fraud on financial institution - evidence sufficient

HOLDING: State presented sufficient evidence from which jury could infer that D took substantial steps toward commission of fraud on financial institution, by engaging in check- kiting scheme. D opened voice mail & post-office boxes using false name. When confronted by detective regarding his identification, D used false name & provided counterfeit social security card & passport. Additionally, D helped his accomplices set up several bank accounts using false addresses & telephone numbers. Held, conviction affirmed.

TITLE: Skinner v. State

INDEX NO.: K.4.l.

CITE: (10-20-00), Ind., 736 N.E.2d 1222

SUBJECT: Defrauding financial institution - State not required to charge lesser, more specific crime

HOLDING: State properly charged Ds with defrauding financial institution instead of check fraud.

Pursuant to Ind. Code 35-43-5-12, defrauding financial institution is Class C felony while under Ind. Code 35-43-5-8, check fraud in amount under \$25,000 is Class D felony. Relying on State v. Wynne, App., 699 N.E.2d 717, Ds argued that State may charge them only with check fraud because check fraud statute is both more specific & more recently adopted. Ct. disapproved of Wynne & held that when two criminal statutes overlap such that either, may cover a given set of facts, prosecutor has discretion to charge under either statute. Held, transfer granted, Ct. App.' opinion at 732 N.E.2d 235 summarily affirmed.

K. CRIMES

K.4. Offenses against property

K.4.m. Home improvement fraud (Ind. Code 35-43-6)

TITLE: Golladay v. State

INDEX NO.: K.4.m.

CITE: (2nd Dist., 10-25-07), Ind. App., 875 N.E.2d 389

SUBJECT: Home improvement fraud - insufficient evidence; variance in proof

HOLDING: Tr. Ct. violated due process by finding D guilty of home improvement fraud under Ind. Code 35-42-6-12(a)(4) when D was charged under Ind. Code 35-42-6-12(a)(3). In order for a D to be convicted of an uncharged crime, the uncharged crime must be a lesser included offense of the charged crime. An offense is factually included if the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense. Here, D was charged under Ind. Code 35-42-6-12(a)(3), with entering into a home improvement contract & knowingly promising performance, to-wit: to roof the home & barn & side the house: that he did not intend to perform or knows will not be performed. However, Tr. Ct. found D guilty under Ind. Code 35-42-6-12(a)(4), using or employing any deception, false pretense or false promise to cause a consumer to enter into a home improvement contract. Because subsection (a)(4) includes an element, inducing the customer to enter into the contract with the false pretense, it is not a lesser included offense. Thus, the conviction violated due process.

Further, in order to be guilty under Ind. Code 35-42-6-12(a)(4), the home owner must be deceived by the false pretenses & promises, & the false promise must have, at least in part, induced the homeowner to enter into a home improvement contract. To hold otherwise would be inconsistent with the statute's goal of protecting homeowners. Thus, Tr. Ct.'s belief that a deceptive contract entered knowingly into by the home owner & D in order to defraud the insurance company is sufficient evidence of guilt under subsection (a)(4) requires reversal. Held, judgment reversed & remanded with instructions to enter judgment of acquittal.

TITLE: Tucker v. State

INDEX NO.: K.4.m.

CITE: (5th Dist., 2-13-95), Ind. App., 646 N.E.2d 972

SUBJECT: Home improvement fraud

HOLDING: In prosecution for home improvement fraud, evidence supported finding that D caused victim to enter into home improvement fraud contract by misrepresenting that her home was infested with termites & then offering to spray house for exorbitant price. "Home improvement" is defined under Ind. Code 35-43-6-3 as "any alteration, repair, or other modification of residential property." Ct. held that spraying for termites is a home improvement under the home improvement fraud statute. Offense was properly enhanced to class C felony because victim was over 60 years old & "two or more home improvement contracts exceeding \$1000 had been entered into in furtherance of common fraudulent scheme, design, or intention," pursuant to Ind. Code 35-43-6-13(c)(2). Ct. rejected D's argument that there was only one contract covering victim's home & her rental residential property. Ind. Code 35-43-6-4 says that multiple "contracts" arising from same transaction are considered a "home improvement contract." Here, evidence supports enhancement because two transactions occurred on separate days, covered different residences, & met definition of home improvement contract. Held, conviction reversed & remanded on other grounds.

K. CRIMES

K.4. Offenses against property

K.4.n. Mischief (Ind. Code 35-43-1-2)

TITLE: Gaerte v. State

INDEX NO.: K.4.n.

CITE: (1st Dist., 5-17-04), Ind. App., 808 N.E.2d 164

SUBJECT: Conviction & sentence for criminal mischief affirmed

HOLDING: After D & another inmate at jail argued, D was put in an isolation cell. D either head-butted window in cell or slammed door with sufficient force to break the window. D wrote to sheriff acknowledging he had broken window & offering to pay for the damage. In affirming criminal mischief conviction, Ct. rejected D's argument that he broke window without criminal intent. Regardless of how window was broken, D was angry when it was broken. His means of expressing his anger was a substantial deviation from an acceptable standard of conduct. In light of D's conduct & natural consequences of what might be expected from that conduct, Ct. could not characterize as unreasonable the Tr. Ct.'s inference that D was reckless. Further, despite D's clear, immediate remorse & offer to make restitution, Ct. held that maximum 180-day sentence was appropriate in light of D's lengthy criminal history. Held, judgment affirmed; Sullivan, J., concurring in part & dissenting as to sentence.

TITLE: Pepper v. State

INDEX NO.: K.4.n.

CITE: (1st Dist. 8/27/90), Ind. App., 558 N.E.2d 899

SUBJECT: Criminal mischief - sufficiency

HOLDING: Where state offered no evidence of dollar amount of damage, conviction for criminal mischief, Class A misdemeanor cannot stand. D was charged with criminal mischief, Class A misdemeanor. Offense becomes class A misdemeanor if pecuniary loss is at least \$250. Evidence showed that D threw brick through neighbor's window. No evidence was offered to show amount of damage. Held, reversed & remanded with instructions to vacate conviction for Class A misdemeanor & enter conviction for lesser included Class B misdemeanor, which has no minimum damage requirement.

RELATED CASES: Haverstick, App., 648 N.E.2d 399 (throwing toilet paper into trees detracts from the perfection or wholeness of external appearance of trees so as to constitute crime of criminal mischief); Evans, App., 460 N.E.2d 1232 (where state did not prove dollar amount of damage or presence of tools or other means of inflicting extensive damage, evidence of criminal mischief inside building was not sufficient to prove intent to commit felony for purpose of sustaining burglary conviction).

TITLE: R.L.H. v. State

INDEX NO.: K.4.n.

CITE: (2nd Dist., 11-15-00), Ind. App., 738 N.E.2d 312

SUBJECT: Criminal mischief - insufficient evidence

HOLDING: State failed to present sufficient evidence to prove beyond reasonable doubt that D committed criminal mischief. State's sole proof that D caused damage to house was State witness's testimony that D told him that either D or another juvenile had thrown brick through window. Although circumstantial evidence, standing alone, may sufficiently support conviction, evidence must prove more than mere possibility that D could have committed charged offense. Freeman, App., 458 N.E.2d 694. Because witness couldn't remember which juvenile was said to have thrown rock, State only proved that there was possibility that D was person who broke window & thus State failed to meet its burden of proof. While circumstantial evidence presented showed that D had visited location in question during relevant time period & further throws degree of suspicion upon D, evidence was not enough to support reasonable inference that D committed charged offense beyond reasonable doubt. However, evidence was sufficient to support finding that D committed second charged act of criminal mischief. Held, judgment affirmed in part & reversed in part.

TITLE: T.H. v. State

INDEX NO.: K.4.n.

CITE: (3/9/2018), 92 N.E.3d 624 (Ind.2018)

SUBJECT: Evidence insufficient for true finding of elevated criminal mischief adjudication

HOLDING: Per Curiam. State failed to present sufficient evidence for T.H.'s adjudication for what would be class A misdemeanor criminal mischief if committed by an adult. T.H., a juvenile, threw a brick through the window of Maria Castro's vehicle. At fact-finding hearing, Castro testified there was damage to her vehicle's window and dashboard and that she took her vehicle to a Toyota dealership where she received a written estimate for repair. The estimate was admitted as State's Exhibit 1. A divided panel of Court of Appeals affirmed T.H.'s delinquency adjudication but held the State failed to present sufficient evidence to prove beyond a reasonable doubt that his actions resulted in at least \$750 in loss. Convictions should be affirmed unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Moore v. State, 27 N.E.3d 749, 754 (Ind. 2015).

Here, the adequacy of State's proof of amount of loss depends on State's Exhibit 1. Considering the exhibit's multiple unexplained anomalies, Court agreed with T.H. that no reasonable fact-finder could find the element of loss of at least \$750 proven beyond a reasonable doubt. Held, transfer granted, delinquency adjudication affirmed but remanded with instructions to modify Tr. Ct.'s records to show T.H. committed an act that would be criminal mischief as a Class B misdemeanor.

TITLE: Womack v. State

INDEX NO.: K.4.n.

CITE: (3rd Dist.; 11-16-00), Ind. App., 738 N.E.2d 320

SUBJECT: Criminal mischief - ownership

HOLDING: Although D possessed certificate of title to trailer which he damaged, there was sufficient evidence that victim owned trailer. Possession of title certificate is not in itself conclusive proof of ownership or legal title of vehicle. Pekin Ins. Co. v. Charlie Rowe Chevorlet, Inc., App., 556 N.E.2d 1367, 1370. Rather, three primary indicia of ownership of personal property such as trailer are title, possession & control. Here, D was charged with damaging victim's trailer. Prior to damage, victim signed certificate of title to D, but claimed she did so because D threatened to divulge information about her that would adversely affect custody dispute between victim & her parents over victim's daughter. Moreover, victim testified that she never sold trailer to D, D never paid for any part of trailer, D did not have key & he had no right to enter trailer without victim's permission. After damage occurred, D disavowed any interest in trailer so he & victim could buy second trailer together. Thus, although D may have had title, jury could have inferred that victim owned trailer. Held, judgment affirmed in part & reversed in part.

K. CRIMES

K.4. Offenses against property

K.4.o Possession of a VIN/License plate

TITLE: Brown v. State

INDEX NO.: K.4.o.

CITE: (5th Dist., 05-13-05), Ind. App., 827 N.E.2d 149

SUBJECT: Details of VIN changes determine theft, alteration charges

HOLDING: Sufficient evidence supported two convictions for auto theft & one for removal or alteration of a vehicle identification number (VIN). However, State did not present sufficient evidence as to another alteration of a VIN conviction & owning a vehicle with an improper VIN. The convictions related to three vehicles which had altered or removed VINs which were either in D's possession or had been sold by him. Ct. found sufficient evidence existed to show that D altered a VIN number of a car in his possession that had the VIN of a car he received from another individual, finding it reasonable to infer that D took the VIN from one car & placed it in the other. However, Ct. reversed conviction as to another vehicle D had sold to another individual that had a different VIN on it. State presented no evidence linking D to the stolen vehicle that the different VIN came from, so no evidence existed to infer that D placed the new VIN in the car he sold. Sufficient evidence existed to convict D of auto theft, as to both of these vehicles. In so holding, Ct. distinguished Kidd v. State, 530 N.E.2d 287 (Ind.1988), which held that a Ct. cannot infer theft from mere possession when the theft occurred more than 24 hours before discovery of the possession. Here, State presented additional evidence of theft, showing that D placed a license plate registered to him on one vehicle & titled the car in his name using a VIN from another vehicle. As to the vehicle he sold, D provided the buyer with a title connected to a vehicle associated with the different VIN found on the car. Further, the trier of fact was free to ignore D's explanation that he purchased it from an unidentified person.

Ct. also reversed D's conviction as to another vehicle for owning a vehicle in violation of Ind. Code 9-18-8-2. Statute requires an owner of a vehicle built after 1954 that does not have a VIN or has a VIN that has been defaced or altered to apply to the BMV for a special identification number within 20 days of coming into possession of the vehicle. The charge related to a grounded vehicle discovered in D's backyard that had no VIN. D titled the vehicle a few months prior to its being discovered by police. No evidence exists that it was missing when purchased by D & one could infer that D removed the VIN but not when he removed it. As no evidence exists the vehicle had an altered VIN when purchased, Ind. Code 9-18-8-2 is not applicable to this situation. Held, judgment affirmed in part, reversed in part & remanded for new sentencing.

K. CRIMES

K.4. Offenses against property

K.4.p. Receiving stolen auto parts

TITLE: Armstead v. State

INDEX NO.: K.4.p.

CITE: (5/31/89), Ind., 538 N.E.2d 943

SUBJECT: Receiving stolen auto parts -- sufficiency of evidence

HOLDING: D was convicted of receiving stolen auto parts. On appeal, he claimed that evidence was insufficient to support his conviction because charge of receiving motor vehicle that has been subject of theft was not sustained by proof that D himself stole motor vehicle from its owner. In addition, D claimed that it is legally impossible to be convicted of receiving stolen property if property is not stolen. Ct. held that at trial, jury could logically have inferred that while moped was stolen, it was not stolen by D. Apparent reason for filing receiving charge was that while police officers positively identified D in possession of moped at time it was abandoned, victim was unable to identify D, his brother, or anyone else as person who took moped from him. Only D's own admissions at trial, along with his brother's, identified him as person who deprived victim of possession of moped. Jury thus could have deduced moped was stolen by D's brother or by some other person. Such inference, combined with proof that D himself was in possession of moped shortly before it was abandoned, was sufficient to support his conviction of receiving stolen auto parts. Held, affirmed in part; remanded in part.

TITLE: Vlietstra v. State

INDEX NO.: K.4.p.

CITE: (4th Dist., 12-30-03), Ind. App., 800 N.E.2d 972

SUBJECT: Receiving stolen property - evidence insufficient; hearsay NCIC reports

HOLDING: Evidence was insufficient to support D's convictions on four counts of receiving stolen property, where police testimony that tractors & other items were identified as stolen through the National Crime Information Center ("NCIC") was inadmissible hearsay. Decision provides an extensive overview of other jurisdictions' analysis of NCIC reports, with all cited finding such reports hearsay, & only some finding reports fit within an exception to the hearsay rule. Without this evidence, Ct. found that State failed to show that tractors were stolen. Evidence cited by State that D sold the property for less than retail value in cash transaction without paperwork; that the tractors were delivered on separate occasions; that different implements were delivered than originally agreed to; that the tractors appeared relatively new & came with keys & operating manuals; that the police confiscated the property & returned it to the original owners; & that D later advised police of another tractor that purchaser failed to disclose did not provide sufficient evidence for conviction. Ct. found much of this evidence "irrelevant" to question of whether property was stolen & whether D knew that it was stolen.

Ct. found suspicion in fact that tractors were relatively new & were sold for less than retail value & also found some relevance in D's confession to the police. Most probative evidence was police officer's testimony that property was returned to the rightful owners, but knowledge of the rightful owners also came from the inadmissible NCIC reports. All Ct. found was suspicion of stolen property & "speculation is insufficient to support convictions[.]" Cockrell, 743 N.E.2d 799. Held, judgment reversed & remanded with instructions to vacate convictions; Friedlander, J., dissenting, would find sufficient evidence to support convictions aside from question of whether NCIC report inadmissible. Most convictions for receiving stolen property will be based on circumstantial evidence. Majority apparently looked at each fact in isolation, while Friedlander viewed facts in their totality, presenting a "mosaic of guilty knowledge[.]"

K. CRIMES

K.4. Offenses against property

K.4.q. Receiving stolen property (Ind. Code 35-43-4-2(b))

TITLE: Gibson v. State

INDEX NO.: K.4.q.

CITE: (11-28-94), Ind., 643 N.E.2d 885

SUBJECT: Receiving stolen property does not require third party

HOLDING: State is not required to prove presence of third-party thief to convict D of receiving stolen property (RSP). Ct. reviewed evolution & language of Ind. Code 35-43-4-2 & concluded that there is no principled distinction between proscribed conduct of Theft & RSP. In prosecutions involving stolen property, legislature intended to authorize State to charge Theft or RSP, depending on which of those crimes is most likely committed by D. Assuming State meets burden of proof, it is of no consequence whether accused was person who actually took stolen property from authorized possessor. Both subsections of statute proscribe knowingly or intentionally exercising unlawful control over property of another with purpose to deprive.

Here, evidence was sufficient to show D's knowledge property was stolen. Evidence showed property was stolen & D was present in area at about time of theft. D also attempted to evade police, attempted to conceal various items after arrest, & resisted efforts to determine what he was hiding. D was subject to conviction for RSP regardless of whether he was actual thief. Held, transfer granted, convictions affirmed, DeBruler, J., dissenting.

RELATED CASES: Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r); Shelby, App., 875 N.E.2d 381 (recognizing conflict between Gibson & other cases, Ct. held that mere possession of car 15 days after it was stolen was insufficient evidence of theft); J.B., 748 N.E.2d 914 (until otherwise instructed by S.Ct., if State charges D with theft, Ct. will continue to apply rule that mere unexplained possession of recently-stolen property may be sufficient to support such conviction, but if State alleges receiving stolen property, unexplained possession of recently stolen property must be accompanied by additional circumstances which support inference that D knew property was stolen); Driver, App., 725 N.E.2d 465 (evidence was sufficient where D was in possession of stolen license plate & was evasive about where he obtained license plate).

TITLE: Johnson v. State

INDEX NO.: K.4.q.

CITE: (4th Dist. 11/24/82) Ind. App., 441 N.E.2d 1015

SUBJECT: Receiving stolen property (RSP)-sufficiency

HOLDING: Guilty knowledge is gravamen of offense of RSP, Mattingly, App., 421 N.E.2d 18.

Knowledge property is stolen may be established by circumstantial evidence but knowledge of stolen character of property may not be inferred solely from unexplained possession of recently stolen property. Guilty knowledge must be proved/inferred from all circumstances surrounding D's possession & use of property in question; evidence merely raising suspicion D knew property was stolen is insufficient. Anderson, app., 406 N.E.2d 351. Here, D contends there is no evidence she had any intent to deprive rightful owner of property or that she knowingly received, retained or disposed of property. Thieves asked D & her husband (brother of thief) to store property under pretense of having been evicted. Husband later learned of nature of property but did not tell wife/D (who aided police in investigation). Held, conviction reversed - insufficient evidence.

RELATED CASES: S.G., 956 N.E.2d 668 (Ind. Ct. App 2011) (juvenile's admission that he disposed of a cell phone that was given to him once he found out the cell phone was stolen was sufficient to support receiving stolen property conviction); Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r); Barnett, App., 834 N.E.2d 169 (evidence sufficient; Ct. noted it would be highly unusual for a person to be approached at a fast-food restaurant & be offered a game system & a dozen games for \$40 when trade-in value at a nearby store was more than three times that amount); Byrd, App., 605 N.E.2d 231 (conviction vacated because unexplained possession of recently stolen property alone, will not support conviction); Earls 489 N.E.2d 516 (evidence was sufficient where D had exclusive possession of stolen property shortly after theft); Marshall, App., 505 N.E.2d 853 (evidence was sufficient where D operated semi-trailer with false license plates, had attempted to sell refrigeration unit at fraction of value, had no title or registration, & had purchases trailer at price far below value); King, App., 469 N.E.2d 1201 (Rcvg Stol Gds 5; Ct. upholds D's conviction for attempting to RSP despite fact undercover police sold D items that were not stolen).

TITLE: Saucerman v. State

INDEX NO.: K.4.q.

CITE: (1st Dist. 7/2/90), Ind. App., 555 N.E.2d 1351

SUBJECT: Receiving stolen property - multiple sources; double jeopardy

HOLDING: Tr. Ct. erred in entering multiple convictions & sentences against D where evidence showed that on 1 occasion he received property which had been stolen from multiple sources. D pled guilty to 3 counts of receiving stolen property, but on PCR he argues that factual basis was established for only 1 offense, since he received all stolen property at same time & place. State argues that D may receive multiple punishments because he had reason to know that items were stolen from distinct sources. Elements of receiving stolen property are knowing control over stolen property, knowing property to have been stolen by another with intent to deprive owner of use & benefit of such property. Nevertheless, gravamen of offense is possession of stolen property with guilty knowledge, & particular ownership of goods is not element of offense, nor is character of act affected by fact that property may have belonged to more than 1 owner. See People v. Loret (1988), 526 N.Y.S.2d 872. [Other citations omitted.] Although D here pled guilty to 3 counts of receiving stolen property, he testified that he received all stolen items at same time & place, & this was not contradicted by other evidence. Factual basis did not support 3 separate convictions. Held, denial of PCR reversed, remanded to vacate 2 convictions.

TITLE: Stone v. State

INDEX NO.: K.4.q.

CITE: (6/19/90), Ind., 555 N.E.2d 475

SUBJECT: Receiving stolen property - knowledge; sufficiency

HOLDING: Evidence was sufficient to show that D knew items on his premises had been stolen, so as to support his conviction for receiving stolen property. Evidence showed that when police served search warrant on D's home & surrounding property, D verbally abused them & physically interfered with their efforts to look under tarp on his front lawn. Notwithstanding this interference, property was found under tarp which was identified at trial as having been stolen. D was convicted at trial, but Ct. App. reversed in unpublished decision, finding evidence insufficient. To support conviction, state must show that D knew that property was stolen. [Citations omitted.] Such knowledge may be inferred from circumstances, & attempts to conceal evidence may be considered by jury as revealing consciousness of guilt. See Marshall, App., 505 N.E.2d 853; Gambill 479 N.E.2d 523. Evidence here was sufficient. Held, conviction affirmed.

K. CRIMES

K.4. Offenses against property

K.4.r. Theft (Ind. Code 35-43-4-2(a))

TITLE: An-Hung Yao v. State

INDEX NO: K.4.r.

CITE: (09-13-12), 975 N.E.2d 1273 (Ind. 2012)

SUBJECT: Theft - unauthorized control of trademarked design

HOLDING: Tr. Ct. did not abuse its discretion by denying D's motion to dismiss theft and corrupt business influence charges based on the theft charges. Property is defined as "anything of value, including "intangible." Ind. Code 31-41-1-23. Exert control over property means "to obtain, take carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property." Ind. Code 35-43-4-1(a). Here, Ds were charged with exerting unauthorized control over property belonging to H & K, Inc., with the intent to deprive the owner of any part of its value or use, namely: trademarks and /or marking or symbols or identification. The State alleged that D sold airsoft toy rifles that looked like actual rifles made and trademarked by H & K, Inc. Because the definition of property as "anything of value," including "intangibles," there is no reason it could not encompass the charged "trademarks and/or markings or symbols of identification." However, this does not mean that the trademarks or markings at issue in this case actually have any value. Rather, this is an evidentiary matter that is subject to proof at trial. Disagreeing with an unpublished federal district court opinion, Court held that copying of the distinct look of a weapon or the use of the trademark itself can constitute exerting control over the property. The Indiana theft statute comprehends a broad field of conduct. Thus, the charging information did state a crime. Held, transfer granted, judgment of Tr. Ct. affirmed in part and reversed in part on other grounds, and Court of Appeals' opinion at 953 N.E.2d 1236 vacated.

NOTE: Court also held that a design of a rifle can be considered a written instrument and serve as the basis for a counterfeiting charge.

TITLE: Belcher v. State

INDEX NO.: K.4.r.

CITE: (9/15/83) Ind., 453 N.E.2d 214

SUBJECT: Theft - lesser included offenses (LIO)

HOLDING: Under facts of this case, criminal trespass is a LIO of theft; Tr. Ct. erred in sentencing D on both theft & criminal trespass convictions. See generally Gregory, 412 N.E.2d 744; Elmore, 382 N.E.2d 893. Here, original charges (burglary & theft) described identical property. D submitted criminal trespass as lesser included of burglary & criminal conversion as lesser included of theft. Jury found D not guilty of burglary & criminal conversion, but guilty of criminal trespass & theft. Held, conviction & sentence for criminal trespass reversed.

RELATED CASES: Wojtowicz, App., 510 N.E.2d 187 (Tr. Ct. erred in refusing D's tendered instruction that conversion is a lesser included offense of theft; held, conviction reversed); Cornes, App., 467 N.E.2d 425 (Crim L 200 (3); Tr. Ct. committed fundamental error in sentencing D for both theft & contributing to delinquency of minor; for purposes of double jeopardy, 2 offenses are essentially the same; held, cause remanded with instructions to vacate "contributing" conviction).

TITLE: Bennett v. State

INDEX NO.: K.4.r.

CITE: (01-09-08), Ind., 878 N.E.2d 836

SUBJECT: Theft - intent to deprive owner permanently of value or use of property not required

HOLDING: Ind. Code 35-43-4-2 (theft) and -2.5 (auto theft) do not require the State to prove that the D intended to deprive the owner of his property permanently. In Coff v. State, 483 N.E.2d 39 (Ind. 1985), Court rejected the notion that Indiana's theft statute contains the common law larceny element requiring intent to permanently deprive. This aspect of Coff is still good law. Held, transfer granted, Court of Appeals' opinion at 871 N.E.2d 316 adopted, judgment affirmed.

TITLE: Brant v. State

INDEX NO.: K.4.r.

CITE: (3d Dist. 3/20/89), Ind. App., 535 N.E.2d 189

SUBJECT: Theft - intent to deprive; sufficiency

HOLDING: Evidence was sufficient to support D's conviction for theft. D was employed at used car lot. D's employer had purchased car for D, with D to pay for car by performing mechanical repairs & earning sales commissions. D took possession of car, while employer retained title. Dispute arose between D & employer over D's work habits. After heated argument, D removed title from employer's desk, saying to co-worker who saw him that he would settle with employer later. D did not reappear at lot or make any attempt to contact employer. Instead, D tried to trade car, but was unsuccessful because he had altered title & used false affidavit. D was convicted of theft & argues on appeal that there was insufficient evidence that he intended to deprive his employer of the title's value or use. Intent is mental state which may be determined from conduct & its natural consequences. See State v. McGraw, 480 N.E.2d 552. Evidence showed that D failed to perform work in exchange for title, as agreed. D took title after argument with employer & tried to trade it with false affidavit. He failed to settle with employer, as he told co-worker he would. Held, conviction affirmed. Staton, J., DISSENTS, arguing that fact that D failed to settle with employer as he said he would is not relevant to his mens rea at time of taking.

RELATED CASES: Miller, App., 693 N.E.2d 602 (although phone dealer voluntarily relinquished phones to D, it did so only, based upon belief that D was in fact person D represented himself to be. Jury could have reasonably inferred that D's use of false name in order to obtain phones resulted in his control over them being unauthorized).

TITLE: Burton v. State

INDEX NO.: K.4.r.

CITE: (4/24/84) Ind., 462 N.E.2d 207

SUBJECT: Theft - auto; confidential VIN number

HOLDING: Evidence was insufficient to convict D where state refused to give up confidentiality of vehicle identification number (VIN). Here, police recovered stolen truck nearly 2 years after theft. Visible VIN obviously had been altered. Police checked confidential VIN (placed in secret place by manufacturer) & determined it was VIN of stolen vehicle. Photo of confidential VIN introduced at trial was illegible. Police refused to let D inspect confidential VIN. Owner did not inspect truck & was only shown pictures that "looked like my truck." Ind. S. Ct. relies on 2 NY decisions re confidential VINs & a U.S. S.Ct. confidential informant case to find violation of D's fundamental right of cross-examination. Only convicting evidence was officer's testimony that confidential VINs were identical. Held, D ordered discharged.

RELATED CASES: Reed, 491 N.E.2d 182 (Witn 271(1); Tr. Ct. did not err in refusing to allow D to cross-exam witness re location of VIN; precise location was not relevant).

TITLE: Burwell v. State

INDEX NO.: K.4.r.

CITE: (2d Dist. 6/30/88) Ind. App., 524 N.E.2d 817

SUBJECT: Theft - exertion of control

HOLDING: D, who had requested stock-boy to push unpurchased microwave to his car, was exerting unauthorized control over microwave within meaning of theft statute. Control means "power or authority to manage, superintend, restrict, regulate, direct, govern, administer, or oversee." Williams, 253 N.E.2d 242. New statute defines exertion of control as "to obtain, take, carry, drive, lead away...or possess property..." Ind. Code 35-43-4-1(a). Control may still be exerted by overseeing or causing acts which will enable D to take actual control. Here, D asked cashier to find someone to assist him in taking microwave to his car to see if it fit in trunk. Cashier obtained stock-boy & directed him to comply with D's request. D caused cashier's actions & oversaw those of stock-boy, giving rise to inference that D exerted control over microwave. Held, theft conviction affirmed.

TITLE: Busam v. State

INDEX NO.: K.4.r.

CITE: (1st Dist. 2/16/83) Ind. App., 445 N.E.2d 118, *overruled on other grounds*, 554 N.E.2d 1127 (Ind. 1990)

SUBJECT: Theft - value; sufficiency

HOLDING: Value of stolen goods need not be proven; it is necessary to prove only that stolen property had some value. Any evidence from which some value, however slight, can be inferred is sufficient. Here, D & accomplice stole copper wire from mining site. Police apprehended them at salvage yard before they were able to sell it. D contends Tr. Ct. erred in convicting him of theft because value of stolen copper wire was not established. Ct. holds proof of value not required under present statute, as neither grade of offense nor severity of punishment is based upon amount stolen, as under prior statutes. State proved Ds took 60-65 pounds of copper wire from electric motors at mining site & took it to salvage yard to sell. Previously, Ds had stolen copper wire from same site & had sold it to same salvage yard. Held, theft conviction sustained.

TITLE: Childers v. State

INDEX NO.: K.4.r.

CITE: (4th Dist., 8-17-04), Ind. App., 813 N.E.2d 432

SUBJECT: Check fraud & attempted theft - evidence sufficient

HOLDING: Evidence was sufficient to support D's convictions for check fraud & attempted theft. D argued that State failed to show that he attempted to defraud a bank where he knew funds he withdrew would be dishonored & reimbursed from a joint checking account he shared with his parents. D presented falsified "comchecks" -- a third-party check which can be activated with a valid authorization number -- with an invalid authorization number & received cash from the bank for them. Essentially, he argued that his parents & not the bank were being defrauded as he expected the joint account would reimburse the bank. By providing the false authorization number, the Ct. found that "even if the Bank had been only temporarily deprived of its funds, the deprivation was accomplished by deception." Ct. also found that State sufficiently established that the bank met the definition of a "financial institution" pursuant to the check deception statute. Ind. Code 35-43-5-12(a). D argued that State failed to properly establish a foundation for what the particular bank did, but the Ct. found that while witnesses did not testify in "precise" terms as to the nature of the bank or its charter, sufficient evidence existed for the jury to determine the bank was engaged in the business of banking & was a financial institution under the statutory definition. Finally, while the "comchecks" could better be described as drafts than checks, D waived the issue as to a variance in the charging information & evidence presented at trial &, in any case, failed to show how he was prejudiced by this variance. Held, judgment affirmed.

TITLE: Costello v. State

INDEX NO.: K.4.r.

CITE: (3rd Dist., 12-6-94), Ind. App., 643 N.E.2d 421

SUBJECT: Theft - exertion of control by creating false impression

HOLDING: Theft conviction was supported by sufficient evidence that D exerted unauthorized control over complaining witness's (CW's) money. D met with CW several times during which D used her alleged special powers to purportedly cure illness of CW's husband. Prior to each meeting, D persuaded CW to turn over large sums of money as part of ritual to cure husband. CW testified that D informed her that all money would be returned "when devil was off [it]," & that after final meeting, D ignored her repeated requests for return of money. State presented sufficient evidence from which jury could reasonably conclude that D exerted unauthorized control over money as set forth in Ind. Code 35-43-1(b)(6), when she acquired CW's money with promise that it would be returned but had no intention of.

TITLE: Doyle v. State

INDEX NO.: K.4.r.

CITE: (4th Dist. 9/11/84) Ind. App., 468 N.E.2d 528

SUBJECT: Theft by failure to make required disposition

HOLDING: Evidence was sufficient to sustain D's conviction for theft where D, as sole director of school corporation (ISHCO), was legally obligated to apply excess funds in accordance with Ind. Code 21-5-11-2, but instead contracted with his own accounting firm to provide services not incidental to ISHCO's corporate existence. Ct. finds evidence supports jury finding D dealt with ISHCO's funds as his own, in violation of his statutory duty to use all excess funds to redeem corporation's bonds. This was sufficient to support theft conviction under Ind. Code 35-17-5-4. Held, affirmed on this issue. Conover CONCURS IN RESULT. Evidence sustains conviction as participating corporate officer in his professional corporation's illegal activities.

RELATED CASES: Duren, App., 720 N.E.2d 1198 (D who told victims he would buy & replace windows & doors in victims' home but failed to do so or return money after repeated requests by victims exerted unauthorized control over victims' money).

TITLE: Doyle v. State

INDEX NO.: K.4.r.

CITE: (4th Dist. 9/11/84) Ind. App., 468 N.E.2d 528

SUBJECT: Theft - unauthorized control; sufficiency

HOLDING: D's conviction on counts 1-5 is not supported by sufficient evidence. Here, D convinced shareholders (SH) of holding corporation to transfer interests to him. D then became sole SH & president. Corporation paid D's accounting firm \$58,900 for services rendered. D was convicted on 15 counts under 3 subsections of theft statute (Ind. Code 35-17-5-3). Ct. looks to present statute (Ind. Code 35-43-4-1) for definition of "unauthorized," & finds D clearly did not exert unauthorized control over corporation's property. Held, reversed in part.

RELATED CASES: Atkins, App., 499 N.E.2d 1180 (Consp. 47(11); evidence failed to show D took, drove away, possessed, sold, conveyed, or transferred 3 of 4 cars to police, evidence was insufficient to sustain convictions for theft; here, D was arrested before he could sell autos to police; D's conviction for conspiracy to commit theft is also reversed; Conover DISSENTS & would uphold convictions based upon circumstantial evidence).

TITLE: Evans v. State

INDEX NO.: K.4.r.

CITE: (3/5/84) Ind., 460 N.E.2d 500

SUBJECT: Theft - sufficiency; taking

HOLDING: On transfer. Fourth District Ct. App. erred in reversing D's conviction for theft.

Circumstantial evidence was sufficient to sustain conviction. Here, Ds were charged with taking fuel oil from tank owned by Peabody Coal Co. Employees saw Ds in van parked next to tank; hose fell to ground as van drove away. Police saw Ds pouring contents of 55 gallon drum into hose leading to house. Ds tried to conceal themselves & volunteered false statements to police. Ct. finds evidence is sufficient, relying on Sansom, 366 N.E.2d 1171; Wilkins, App., 426 N.E.2d 61. Held, Ct. App. decision (455 N.E.2d 1157) vacated; conviction affirmed.

TITLE: Fortson v. State

INDEX NO.: K.4.r.

CITE: (01-21-10), 919 N.E.2d 1136 (Ind. 2010)

SUBJECT: Theft - unexplained possession insufficient evidence

HOLDING: Mere unexplained possession of stolen property is no longer sufficient for conviction of theft, overruling forty-year rule allowing theft conviction under such circumstances. See Bolton v. State, 254 Ind. 648, 261 N.E.2d 841 (1970). Possession is to be considered along with other evidence, such as how recent or distant in time possession was from moment item was stolen and circumstances of possession, such as whether possession was next door or miles away from place item was stolen.

In so holding, Court approved of following theft instruction rejecting mere possession rule:

You are permitted . . . to infer from the possession of the property of another that the D is guilty of theft *only if* in your judgment such an inference is warranted by the evidence as a whole. . . . The possession of property by the D does not shift the burden of proof, which is always on the State every essential element of the offense

Common law rule that shifted burden of proof to D if prosecutor established D had exclusive and unexplained possession of stolen property is no longer acceptable.

Here, Court held that mere unexplained possession of a pick-up truck stolen from a parking lot was insufficient to support D=s conviction for receiving stolen property under Ind. Code 35-43-4-2(b), because mere possession of the truck did not show that D knew it was stolen. Held, transfer granted, Court of Appeals' memorandum opinion vacated, conviction reversed.

RELATED CASES: Holloway, 983 N.E.2d 1175 (Ind. Ct. App. 2013) (in addition to D's unexplained possession and sale of neighbor's stolen property, there was other circumstantial evidence from which Tr. Ct. could make a reasonable inference that D committed burglary and theft).

TITLE: Galbraith v. State

INDEX NO.: K.4.r.

CITE: (2d Dist. 9/24/84) Ind. App., 468 N.E.2d 575

SUBJECT: Attempted theft - sufficiency; arson to defraud

HOLDING: Evidence was sufficient to uphold D's conviction for attempted theft. Conviction is sustained by arson evidence coupled with proof that (1) D filed insurance claim far in excess of coverage; (2) claim included large amounts of purchases shortly before fire despite fact D's only income was workman's compensation benefits; (3) neighbor saw D drive flatbed trailer away from scene on day of fire; (4) insurance claim was denied; & (5) unusually small amount of residue of personal belongings was found by fire investigators in mobile home shell. Held, affirmed. Sullivan CONCURS IN RESULT.

TITLE: Gamblin v. State

INDEX NO.: K.4.r.

CITE: (1st Dist. 03/26/91), Ind. App., 568 N.E.2d 1040

SUBJECT: Theft instruction - erroneous inclusion of uncharged basis of liability

HOLDING: Instruction allowing for theft conviction if either of 2 alternative bases of liability were found, was prejudicial error because D was charged with only one of alternatives & there was evidence presented which could have supported jury finding D guilty on uncharged alternative. D was charged with committing theft by exerting unauthorized control over currency of another by taking & possessing it in manner victim did not consent to. Instruction defined "unauthorized" both in this manner & "by promising performance that the person knows will not be performed." Ct. noted that instructions must not be broader than charging information & that jury may not find D guilty of offense defined by statute, but not charged. Therefore, instruction was erroneous. Ct. also noted that if there was no evidence to support basis of liability underlying erroneous instruction, error would be harmless because there was no danger of jury convicting D on uncharged basis. In this case jury returned verdict of "guilty of theft 'as charged'," & there was evidence to support uncharged basis of liability, making instruction harmful error. Held, convictions for theft on counts relating to instruction reversed & remanded for retrial, convictions on some other counts affirmed & on still others reversed for violation of C.R. 4.

TITLE: Gorman v. State

INDEX NO.: K.4.r.

CITE: (3/21/84) Ind., 460 N.E.2d 968

SUBJECT: Theft - sufficiency; time between burglary & sale of stolen property

HOLDING: Evidence was sufficient to support D's conviction for theft where only 3 hours expired between time homeowner left for work & time D sold stolen items to secondhand store. The shorter the lapse of time between taking & sole possession of accused, the more likely it is that he/she is aware that it is contraband. Underhill, 216 N.E.2d 344. Here, Ct. finds 3 hours is a short period of time, in that burglar had to approach house, select means of entrance, break out window, search for & select valuable items (ring, watch, T.V.) stored in nooks & crannies of house, stealthily remove them from house & transport them to secondhand store. Held, evidence sufficient to support conviction.

RELATED CASES: Williams, App., 714 N.E.2d 671 (25-day period between burglary & sale of stolen property was insufficient to prove theft).

TITLE: Harwei v. State

INDEX NO.: K.4.r.

CITE: (2d Dist. 1/23/84), Ind. App., 459 N.E.2d 52

SUBJECT: Theft - "create false impression" element

HOLDING: Evidence was insufficient to prove "create false impression" element of theft; Ct.

remands theft conviction for modification to attempted theft. Here, charges arose from Transcam, an investigation of transmission repair shops in Marion County. Two customers, whose car transmissions were in good working order (inspected by Purdue engineering professor), brought their cars to Ds, who recommended that the transmissions be replaced. Customers knew transmissions were in good working condition. D cannot create false impression in one who knows D's representation is false. Where no false impression was or could have been created, Ds cannot be convicted of completed theft. Ct. analogizes offense to former law of obtaining money/property under false pretenses. It is not necessary to show that intended victim actually was defrauded in order to sustain charge of attempting to obtain property/money by false pretenses. (Citations omitted.) Ct. finds evidence establishes attempted theft. Citing 2 cases, Ct. orders modification of conviction on remand. Ritchie, 189 N.E.2d 575 (D convicted of rape; insufficient proof of penetration; Ind. S. Ct. remanded to modify conviction to assault & battery with intent); Lane, 372 N.E.2d 1223 (D convicted of theft of property over \$100; no proof of value; Ct. App. remanded to correct judgment to guilty of theft of property under \$100). Held, remanded.

RELATED CASES: Dunnuck, App., 644 N.E.2d 1275 (aiding in theft conviction reversed where State failed to establish necessary elements that county attorney created false impressions to Commissioners, failed to correct them & that Commissioners relied on those impressions in awarding contract); Doyle, App., 468 N.E.2d 528; Coburn, App., 461 N.E.2d 1154 (misrepresentation must be of present or past facts; held 4 counts of theft reversed for insufficient evidence).

TITLE: Hayworth v. State

INDEX NO.: K.4.r.

CITE: (4th Dist., 11-13-03), Ind. App., 798 N.E.2d 503

SUBJECT: Theft - sufficient evidence; unauthorized control

HOLDING: Sufficient evidence existed showing that D exerted unauthorized control over department store merchandise with intent to deprive the store of its merchandise. Evidence showed that D, a store clerk, twice took credit card sales for more than \$400 each within a week. D failed to follow store policy in both transactions by failing to verify the identification of the person using the credit card with the name on the card. The same stolen credit card was used in both instances, but D manually entered a credit card account number of another individual who did not authorize its use. Ind. Code 35-43-4-1(b)(2) defines unauthorized control as that done "in a manner or to an extent other than that to which the other person has consented." By disregarding company policy as to card verification, D exerted control over the store's merchandise in a manner inconsistent with the store's policy. Ct. rejected D's argument that she acted negligently & lacked criminal intent to deprive store of its merchandise. D had knowledge of company policy & continued to process sales using another individual's card number although card never left that individual's possession. Held, convictions affirmed; Sullivan, J., concurring, noted that D committed theft by assisting two bogus customers to commit theft.

TITLE: J.B. v. State

INDEX NO.: K.4.r.

CITE: (4th Dist., 5-3-01), Ind. App., 748 N.E.2d 914

SUBJECT: Theft - unexplained possession of recently stolen property sufficient

HOLDING: Although D was not charged with actually taking property, his mere unexplained possession of recently-stolen property was sufficient to support Tr. Ct.'s finding that he committed theft. State was not required to present additional circumstances surrounding D's possession of property supporting inference that D knew property was stolen. State may charge someone who receives stolen property from actual thief, knowing property was stolen, with either theft or receiving stolen property. Gibson v. State, 643 N.E.2d 885 (Ind. 1994). If charging instrument alleges that D "took" property of another, proof of merely receiving stolen property might not support theft conviction. Id. Until otherwise instructed by S.Ct., if State charges D with theft, Ct. will continue to apply rule that mere unexplained possession of recently-stolen property may be sufficient to support such conviction, but if State alleges receiving stolen property, unexplained possession of recently stolen property must be accompanied by additional circumstances which support inference that D knew property was stolen. Here, even though information did not allege that D took motor scooter, it charged D with auto theft, & D's unexplained possession of scooter on morning after it was stolen was sufficient to support finding that D was exerting unauthorized control over another's property with intent to deprive that person of its value or use. Held, judgment affirmed.

RELATED CASES: Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r); Purifoy, App., 821 N.E.2d 409 (evidence was sufficient to prove that D was aware the camera was stolen when he pawned it, despite evidence of D's learning disabilities & general lack of education).

TITLE: Long v. State

INDEX NO.: K.4.r.

CITE: (09-30-10), 935 N.E.2d 194 (Ind. Ct. App. 2010)

SUBJECT: Theft - difference between breach of contract and theft

HOLDING: Even though legislature did not intend to criminalize bona fide contract disputes, Jamrosz v. Resource Benefits, Inc., 839 N.E.2d 746, 759 (Ind. Ct. App. 2005), State presented sufficient evidence for Class D felony theft where circumstantial evidence proved beyond a reasonable doubt that D exerted “unauthorized control” over items in furnished condo “by promising performance that the [D] kn[ew] [would] not be performed.” Ind. Code 35-43-4-1(a)(6).

A conviction may be based on circumstantial evidence alone if there are reasonable inferences enabling the factfinder to find a D guilty beyond a reasonable doubt. Brink v. State, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005). The key to the offense of theft by promising performance the person knows will not be performed is the intent of the person when she secures control of property. Kollar v. State, 556 N.E.2d 936, 939 (Ind. Ct. App 1990). Intent may be proven by circumstantial evidence and it may be inferred from a D’s conduct.

Here, D told Seller that he had no money, but that “he was having some money transferred in from somewhere out of state.” Seller let D move into condo without down payment, and D lived there for approximately ten weeks before first payment came due. D had “very cordial” relationship with Seller, maintaining “almost daily” contact. When first payment came due, D did not pay, and when Seller asked him about it, D threatened legal action for no apparent reason and cut off all communication. D moved out, taking everything, including appliances, without warning or explanation.

Court said, “This is a close case, and we have the same concern as that expressed by the Tr. Ct. about the propriety of a criminal prosecution in what is primarily a contractual dispute between the parties. But we cannot say that the Tr. Ct. got it wrong in this instance.” Court acknowledged plausibility of other inferences drawn by dissent but said it was bound to consider only the probative evidence and reasonable inferences supporting the verdict. Held, judgment affirmed; Kirsch, J., dissenting on basis that some of majority’s inferences are speculative. He acknowledged evidence supported some of majority’s inferences but evidence equally supported inferences that D did not act with requisite intent for theft. “In baseball, ties go to the runner; in criminal procedure, they go to the D.”

TITLE: McMiller v. State

INDEX NO.: K.4.r.

CITE: (12/18/2017), 90 N.E.3d 672 (Ind. Ct. App. 2017)

SUBJECT: Theft - insufficient evidence of D's intent to deprive for failing to pay restaurant bill

HOLDING: State failed to present sufficient evidence to prove D committed theft, because it did not prove he had the intent to deprive restaurant of the value of the food and drink he consumed, for which he thereafter could not pay. D testified he went to the restaurant at a friend's invitation and she told him she would pay with the credit card they had been using successfully all day. After her credit card was declined, D attempted to use his SSI debit card to pay for the meal, but it was also declined. D did not leave or even attempt to leave the restaurant; instead, he tried to obtain money to pay the bill. D was not refusing to pay restaurant, but rather he did not have the ability to pay and he wrongfully believed he had made other arrangements for payments when he had not. Thus, State did not prove D had the intent to deprive the restaurant of the value when he consumed the food and drink.

After finding out he was going to be arrested for theft, D made "unreasonable noise," disturbing other restaurant patrons and continued to do so after being asked to stop. Thus, Court affirmed D's Class B misdemeanor disorderly conduct conviction under Ind. Code § 35-45-1-3(a)(2). Held, theft conviction reversed, disorderly conduct conviction affirmed.

TITLE: Mefford v. State
INDEX NO.: K.4.r.
CITE: (2/16/2016), 51 N.E.3d 327 (Ind. Ct. App. 2016)
SUBJECT: *Mens rea* for theft proven by "conscious avoidance" doctrine
HOLDING: The State presented sufficient evidence to convict D of three counts of theft because it proved D knew he deprived his victims of their full share of the gross proceeds from timber sales.

Several Jennings County landowners hired D to cut their timber, sell it to local lumber yards, and divide the gross sale proceeds 50-50. In all but one situation, the lumber companies cut checks to Tina Rowlett, one of D's employees. Rowlett first paid D's employees and then gave the remaining proceeds to D, who gave 50% shares to the landowners. D later claimed he did not know the sale proceeds Rowlett gave him were just net proceeds, not gross proceeds. D was convicted of three counts of class D felony theft. Ind Code § 35-43-4-2 (2009).

The evidence showed D had actual knowledge that he exerted unauthorized control over the gross proceeds. When Rowlett paid the employees before giving the proceeds to D, she acted not on her own but at D's instruction. Further, contrary to D's argument, the State was not required to show that D physically possessed the gross proceeds; it needed to show only that D directed how the gross proceeds would be used. See Williams v. State, 253 N.E.2d 242, 246 (Ind. 1969).

Even if D lacked actual knowledge that he exercised unauthorized control over the gross proceeds, the evidence easily established he had good reason to believe that the gross proceeds exceeded what Rowlett gave him, but that he purposefully declined to further investigate. Under the "conscious avoidance" doctrine, the knowledge element of a crime "may in some circumstances be inferred from strong suspicion of wrongdoing coupled with active indifference to the truth." United States v. Draves, 103 F.3d 1328, 1333 (7th Cir. 1997). The doctrine applies "when the D claims he has no guilty knowledge of the illegal activity yet the evidence supports an inference that D had a strong suspicion of wrongdoing, yet made a deliberate effort to avoid guilty knowledge by "burying his head in the sand." Id. Here, D said he had no records of the transactions and admitted he asked Rowlett for sale records only once. He explained his failure to ask the lumber companies for their sale records by claiming he did not know which lumber companies to contact, even though he had been in the lumber business for ten years. He also said he was the person who cut or supervised the cutting of the timber, so he should have known approximately how much timber was cut and its approximate value.

"It was reasonable for the trial court to infer from this evidence that [Defendant] 'subjectively believed that there was a high probability' that the timber sold for more than the amount Rowlett had paid to him, but he deliberately avoided learning of that fact. Global-Tech, 131 S. Ct. at 2068-71. Thus, even if D did not know the precise amount of the timber sales, he was willfully ignorant of the amount. Under the conscious avoidance doctrine, his willful ignorance was sufficient to satisfy the knowledge element of theft. Id. at 1333." Held, judgment affirmed.

TITLE: Middleton v. State

INDEX NO.: K.4.r.

CITE: (4/10/2015), 29 N.E.3d 1275 (Ind. Ct. App 2015)

SUBJECT: Insufficient evidence to support theft conviction

HOLDING: State presented insufficient evidence to support D's theft conviction. Employees became suspicious of D and two companions who were in a Rural King, and a department manager began following D. She saw him attempt to cut the security device from a product but could not identify that product. Store employees followed D out of store and confronted him in parking lot where he had nothing from store in his possession. Employees waved down a police officer, D ran, and police caught and arrested him. Taking out hearsay testimony (for which admonishment was given), the evidence presented against D amounts to manager's statements that she followed him, she saw him use a knife on a security device, and he left the store. No evidence was presented to prove charge that D took a range-finder, which was discovered under some animal feed. Employees who allegedly saw D with a range-finder did not testify. Thus, there was not sufficient evidence from which a reasonable jury could infer D knowingly or intentionally exerted unauthorized control over the range finder. Held, conviction reversed.

TITLE: Mitchell v. State

INDEX NO.: K.4.r.

CITE: (10/16/2012), 976 N.E.2d 771 (Ind. Ct. App. 2012)

SUBJECT: Theft- evidence sufficient

HOLDING: State presented sufficient evidence to support D's theft conviction, despite claim that D did not know he couldn't take the water heater from an apartment complex to scrap. D and two men were attempting to break up and take a water heater that was in the grass on the property when an apartment complex employee and assistant manager told them to stop. The men told the assistant manager that a "big Hispanic supervisor" told them they could take it, but no such employee worked for the complex. The men tried to drive away, but the assistant manager jumped in front of their truck and ordered an employee to call the police. The men pulled over and stopped. On appeal of his theft conviction, D argued that he was relying on information given to him by one of the men who claimed they were allowed to take the water heater, and he did not know the men couldn't take it. However, any belief D had that he could take the water heater became unreasonable when assistant manager unequivocally told them that no one with the apartment complex had given permission to take the water heater and to take it out of the truck. Held, judgment affirmed.

TITLE: Morris v. State

INDEX NO.: K.4.r.

CITE: (3rd Dist., 02-09-10), 20 N.E.2d 808 (Ind. Ct. App 2010)

SUBJECT: Failure to instruct on lesser included offense (LIO) of conversion - reversible error

HOLDING: In theft prosecution, Tr. Ct. erred in failing to instruct jury on LIO of class A misdemeanor criminal conversion, because there was a serious evidentiary dispute about whether D intended to deprive a J.C. Penney store of the use of its merchandise. Criminal conversion is an inherently LIO of theft because conversion may be established by proof of less than all material elements of theft. Shouse v. State, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006). It is reversible error for a court to not instruct the jury on an inherently lesser included offense where there is a serious evidentiary dispute about the elements distinguishing the greater offense from the lesser offense. Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995). The only element distinguishing theft from conversion is whether the D acted with intent to deprive a person of the value or use of that property. Cf. Ind. Code § 35-43-4-2 and Ind. Code § 35-43-4-3. However, there may be no practical difference between conversion and theft because it seems nearly impossible for a person to knowingly exert unauthorized control of property of another without intending to deprive the person of the value or use of the property. Irvin v. State, 501 N.E.2d 1139, 1142 n.3 (Ind. Ct. App. 1986).

Here, store's loss prevention supervisor Kimberly Blair saw D, who was homeless, stuffing clothes into a large plastic bag while standing in front of a conspicuous security camera. D dropped the bag in the children's department and left the store. Blair, and another security officer subdued D, searched him and found only a toothbrush and small pocketknife. Fourteen months earlier, Blair apprehended D at the same store for stuffing jeans in a trash bag and leaving the store. Soon after, D frequented the same store, making him familiar as a shoplifter to most employees.

The evidence created a serious evidentiary dispute about whether D intended to deprive J.C. Penney of the use and value of the clothing because evidence created the reasonable inference that D acted as he did so he would be caught and jailed, if only for a short time, to receive food and shelter on a cold winter night. D's reckless actions seemed designed to draw attention to himself. Even if there is no articulable difference between conversion and theft, the rule of lenity and the proportionality clause of the Indiana Constitution (Art. I, § 16) support giving the LIO instruction. The legislature has defined conversion and theft as two separate crimes with two different penalty ranges. Such an ambiguity must be resolved in favor of the accused.

Further, if theft and conversion are one and the same, they violate the proportionality clause of the Indiana Constitution. If the two offenses can be proven with identical evidence yet carry different sentencing ranges, prosecutors would likely pursue the D felony theft charge to obtain a longer sentence, and in this case, to add a habitual offender charge. D was entitled to the LIO instruction for conversion. Held, judgment reversed and remanded for new trial.

RELATED CASES: Lane, 953 N.E.2d 625 (Ind. Ct. App. 2011).

TITLE: Matthews & Williams v. State

INDEX NO.: K.4.r.

CITE: (11/14/91), Ind., 580 N.E.2d 961

SUBJECT: Insufficiency of evidence - theft

HOLDING: Where there was no evidence permitting reasonable trier of fact to find beyond reasonable doubt that D was connected to stolen property, evidence was insufficient to support conviction for theft. Co-D's conviction was reversed by Ct. App. due to improper search of car trunk that revealed stolen property, but D's conviction had been upheld because of lack of standing to challenge search. S.Ct. finds there was no evidence to connect D to seized property. D's uncontradicted testimony was that he did not take property & did not have access to, or see inside, trunk, & was unaware of contents. Therefore, evidence was insufficient to support conviction. Held, transfer granted & conviction reversed.

TITLE: McBride v. State

INDEX NO.: K.4.r.

CITE: (4th Dist. 10/14/82) Ind. App., 440 N.E.2d 1135

SUBJECT: Theft - receiving stolen property; charge

HOLDING: Information charging theft in violation of Ind. Code 35-43-4-2(a) [exerts unauthorized control] is sufficient to include Ind. Code 35-43-4-2(b) [receives, retains, disposes]. Nash, App., 433 N.E.2d 807. Here, D contends evidence is insufficient to support conspiracy to commit theft conviction because D had already stolen car before attempting to sell it to undercover officer, thus parties could not have agreed to steal it. Ct. rejects argument. Held, conviction reversed on other grounds.

RELATED CASES: Hewell, App., 507 N.E.2d 241 (Disorderly C 1; attempting to receive & retain stolen property is substantial step toward commission of theft; held, RICO conviction affirmed).

TITLE: McHenry v. State

INDEX NO.: K.4.r.

CITE: (1-6-05), Ind., 820 N.E.2d 124

SUBJECT: Forgery & theft - evidence sufficient

HOLDING: State presented sufficient evidence to support D's convictions for forgery & theft. D, a bank teller, withdrew \$6500 from the account of Charles Landes. D testified that someone had come to her wanting to make this withdraw, that she had filled in the withdrawal slip, & that she had customer sign it & gave him the money. Upon receiving his bank statement & discovering the withdrawal from his account, Landes immediately reported error to bank & signed affidavit of forgery stating that signature on withdrawal slip was not his & that he did not receive any of proceeds. Bank's videotape showed no one at D's teller window at time withdrawal slip was time-stamped. Bank records also disclosed that D had accessed & viewed Landes' account records twice during two weeks before the withdrawal.

D argued that State failed to present evidence that she intended to defraud customer or bank or that she took the money. In reversing convictions, Ct. App. improperly reweighed evidence & substituted its own judgment for that of the jury. Intent to defraud can be proven by circumstantial evidence. Wendling v. State, 465 N.E.2d 169 (Ind. 1984. Probative evidence & reasonable inferences drawn from evidence could have allowed a reasonable trier of fact to find D guilty beyond reasonable doubt of forgery & theft. Held, transfer granted, Ct. App. opinion at 797 N.E.2d 852 vacated, convictions affirmed.

TITLE: McMiller v. State

INDEX NO.: K.4.r.

CITE: (12/18/2017), 90 N.E.3d 672 (Ind. Ct. App. 2017)

SUBJECT: Theft - insufficient evidence of D's intent to deprive for failing to pay restaurant bill

HOLDING: State failed to present sufficient evidence to prove D committed theft, because it did not prove he had the intent to deprive restaurant of the value of the food and drink he consumed, for which he thereafter could not pay. D testified he went to the restaurant at a friend's invitation and she told him she would pay with the credit card they had been using successfully all day. After her credit card was declined, D attempted to use his SSI debit card to pay for the meal, but it was also declined. D did not leave or even attempt to leave the restaurant; instead, he tried to obtain money to pay the bill. D was not refusing to pay restaurant, but rather he did not have the ability to pay and he wrongfully believed he had made other arrangements for payments when he had not. Thus, State did not prove D had the intent to deprive the restaurant of the value when he consumed the food and drink.

After finding out he was going to be arrested for theft, D made "unreasonable noise," disturbing other restaurant patrons and continued to do so after being asked to stop. Thus, Court affirmed D's Class B misdemeanor disorderly conduct conviction under Ind. Code § 35-45-1-3(a)(2). Held, theft conviction reversed, disorderly conduct conviction affirmed.

TITLE: Middleton v. State

INDEX NO.: K.4.r.

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SUBJECT: Insufficient evidence to support theft conviction

HOLDING: State presented insufficient evidence to support D's theft conviction. Employees became suspicious of D and two companions who were in a Rural King, and a department manager began following D. She saw him attempt to cut the security device from a product but could not identify that product. Store employees followed D out of store and confronted him in parking lot where he had nothing from store in his possession. Employees waved down a police officer, D ran, and police caught and arrested him. Taking out hearsay testimony (for which admonishment was given), the evidence presented against D amounts to manager's statements that she followed him, she saw him use a knife on a security device, and he left the store. No evidence was presented to prove charge that D took a range-finder, which was discovered under some animal feed. Employees who allegedly saw D with a range-finder did not testify. Thus, there was not sufficient evidence from which a reasonable jury could infer D knowingly or intentionally exerted unauthorized control over the range finder. Held, conviction reversed.

TITLE: Murphy v. State

INDEX NO.: K.4.r.

CITE: (9/16/83) Ind., 453 N.E.2d 219

SUBJECT: Theft - variance in proof; custody/ownership

HOLDING: Evidence introduced at trial to prove theft did not fatally vary from allegation of theft in information. Here, information alleged D exerted unauthorized control over property in "custody of The Post, Inc." Owner of property was actually Southwest Communications. Ct. finds D incorrectly equates custody with ownership. Rights of possessor against taker are significant in theft cases; relative rights of possessor & third parties are irrelevant. Thomas, 263 N.E.2d 158. D was not misled or otherwise prejudiced by alleged variance. Montes, 332 N.E.2d 786. Held, no error.

RELATED CASES: Bridges 457 N.E.2d 207.

TITLE: Pennington v. State

INDEX NO.: K.4.r.

CITE: (2/16/84) Ind., 459 N.E.2d 764

SUBJECT: Theft - intent to deprive; sufficiency

HOLDING: Evidence is insufficient to support D's conviction for theft where D was merely present in store when brother took stereo, did not aid brother in his getaway & later drove off alone in van in which brother had placed stolen stereo. Here, Ct. notes state brief contains no citation of authority on sufficiency issue, other than statute (Ind. Code 35-43-4-2) & standard (Loyd, 398 N.E.2d 1260), thus state's position is waived on appeal. Ct. finds D's brief states prima facie case for reversal, thus Ct. must reverse. Clerk & store manager followed brother, saw him put stereo in van (owned by D's husband). Clerk remained near van while manager called police. D testified clerk did not tell her stolen property was in van when she returned & drove away. Clerk's testimony does not dispute D's testimony. Uncontradicted statements of fact in D's favor are taken as true. Morgan, 400 N.E.2d 111; Whitt, 361 N.E.2d 913; Winn, 111 N.E.2d 653. Ct. finds state failed to prove D's knowing/intentional exertion of unauthorized control or retention of possession. Held, conviction reversed.

RELATED CASES: EVIDENCE SUFFICIENT: Correll 486 N.E.2d 497 (forcing victim to drive D 100 miles in her car constitutes theft); McGraw, App., 504 N.E.2d 345, vacated on other grounds by 514 N.E.2d 621 (where D picked up officer's gun, dropped in struggle, & walked away with it, evidence sustains theft conviction); Scruggs, App., 475 N.E.2d 1194 (evidence was sufficient to sustain conviction where D was charged \$38 for \$700 worth of merchandise by cashier who was in collusion with D's son). EVIDENCE INSUFFICIENT: Snell, App., 472 N.E.2d 215, *overruled on other grounds*, Wright v. State, 658 N.E.2d 563 (Ind. 1995) (evidence insufficient to prove intent to deprive store owner of use or value of property).

TITLE: Prentice v. State

INDEX NO.: K.4.r.

CITE: (2/18/85) Ind., 474 N.E.2d 496

SUBJECT: Theft - sufficiency; unexplained possession

HOLDING: Evidence that D was driving stolen car within a few days of theft, did not have registration for car nor permission to drive car & attempted flight from police is sufficient to sustain a theft conviction. Unexplained possession of recently stolen property is fact from which jury may infer guilt. Short, 443 N.E.2d 298; Muse, 419 N.E.2d 1302. Lapse of considerable time between theft & arrest requires showing of exclusive possession during interim period, Muse (18-day lapse between theft of van & arrest; theft conviction affirmed), but is only one fact to be weighed with others in drawing inference of guilt from circumstantial evidence, Ward, 294 N.E.2d 796 & Morgan, App., 427 N.E.2d 1131. Here, other evidence pointed to D's guilt--testimony of D's sister & police officer that D was driving same car during interim period. Held, conviction affirmed. Prentice CONCURS IN RESULT without opinion.

RELATED CASES: Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r); Trotter, App., 838 N.E.2d 553 (evidence was insufficient to support D's conviction for auto theft, where D was not found with stolen car until five days after it had been stolen); White 495 N.E.2d 725 (D's possession of bracelet bearing name Kerry & Kerry's social security card (which Kerry reported stolen) supported D's conviction for theft; Ct. distinguishes Burton 462 N.E.2d 207, in which mere possession of stolen goods did not support theft conviction); Rhoton 483 N.E.2d 51 (see card at D.9.g.2.h); Hughes, App., 446 N.E.2d 1017 (no error in denial of D's tendered instruction re unexplained exclusive possession excerpted in part from instruction approved in Gann 269 N.E.2d 381).

TITLE: Schmitt v. State

INDEX NO.: K.4.r.

CITE: 3rd Dist., 05-11-94, Ind. App., 634 N.E.2d 71

SUBJECT: Theft: evidence insufficient

HOLDING: D's conviction for theft by issuing check that was returned because account was closed was not supported by sufficient evidence, because if D was issuer of check, there was still no evidence she knew or had reason to know check would be dishonored when she issued it. Unauthorized control can be shown if D promises performance he or she knows will not be performed, & D's information alleged she obtained merchandise by delivering check, knowing it would not be paid. Although Ind. Code 35-43-4-4(e) permits knowledge & intent to be inferred when person who has insufficient funds or no account, issues check, here State failed to present any evidence of when account was closed. Ct. found it would be pure conjecture to conclude account was closed when check was presented by D.

TITLE: Shelby v. State

INDEX NO.: K.4.r.

CITE: (5th Dist., 10-24-07), Ind. App., 875 N.E.2d 381

SUBJECT: Theft - possession of car stolen fifteen days earlier insufficient

HOLDING: The D's driving of a car fifteen days after it was stolen was insufficient to prove theft.

State argued that mere control over the car demonstrated D knew the car to be stolen & thus was adequate to sustain a conviction under the theft/receiving stolen property statute. Although there is case law supporting State's argument & the argument is logical, the argument & case law conflicts with long-standing rule that where any considerable length of time has elapsed from the time of the theft to the time of arrest, there must be some showing that D has had exclusive possession of the property during that period of time. Muse v. State, 419 N.E.2d 1302 (Ind. 1981).

Here, D admitted driving the car which was stolen fifteen days earlier. The car's steering column was broken & there was a butter knife on the floor. However, the officer said he saw the same car sitting in the same position in a parking lot for two days before D drove the car. Thus, State presented insufficient evidence that D had exclusive control over the car in the fifteen days between the car being stolen & D driving the car. Held, judgment reversed.

RELATED CASES: Donovan, 937 N.E. 2d 1223 (Ind. Ct. App. 2010) (disagreeing with Shelby that State must always prove exclusive control and finding sufficient evidence of theft where D was found driving semi-truck seven to ten days after it was stolen with the VIN and DOT number scraped off and the ignition was hot-wired; D did not have ignition key, registration, or a license plate for the truck. Nor could D verify where he obtained truck); Girdler, 932 N.E.2d 769 (Ind. Ct. App. 2010) (rule recognized by Shelby does not require State to prove that D was in exclusive possession of the van for the entire 13-day period after it was stolen); Gonzalez, 908 N.E.2d 338 (Ind. Ct. App. 2009) (where D is charged with intent to deprive owner of a component part of vehicle, State is required to establish a nexus in time or possession between D & theft of the vehicle's component parts).

TITLE: Smith v. State

INDEX NO.: K.4.r.

CITE: (4th Dist., 4-22-96), Ind. App., 664 N.E.2d 758

SUBJECT: Estate is "person" within meaning of theft statute

HOLDING: Although estate is not specifically included within definition of "person" as defined under Ind. Code 35-41-1-22, Ct. held that decedent's estate is person for purposes of theft statute. Accordingly, there was no reversible error in allowing State to amend charging information or in charging D with theft of over \$100,000 from estate. Like corporation, limited liability company, partnership, unincorporated association, or government entity, estate is fictitious legal entity which may possess property & be subject of crime against that property. Held, conviction affirmed.

RELATED CASES: Patterson, 908 N.E.2d 1058 (Ind. Ct. App. 2009) (although a victim is dead, he is still a human being capable of being stolen from under the theft statute); Pagan, App., 809 N.E.2d 915 (sole proprietorship may qualify as a "person" that can be victim of crime).

TITLE: Smith v. State

INDEX NO.: K.4.r.

CITE: (12/20/88), Ind., 531 N.E.2d 1162

SUBJECT: Theft - sufficiency; return for refund

HOLDING: Evidence was insufficient to support D's conviction for attempted theft. Evidence showed that D attempted to return electric razor for refund at 2 different Hook's stores, & was denied refund because he had no receipt. Razor box had Hook's price tag attached. On same day, D attempted to return electric razor for refund at Danner's discount store. Razor box had print missing where price tag was removed. D was charged with exerting unauthorized control over Danner's profit margin by creating false impression that razor had been purchased at Danner's. Ind. S. Ct. does not determine whether profit margin may be property under theft statute, because it finds evidence insufficient to show that D attempted to exert unauthorized control over it. In order to show that D attempted to exert unauthorized control over profit margin, state must demonstrate that D attempted to create false impression. In turn, to show attempt to create false impression, state must show that D did not previously purchase razor at Danner's. State may show this by having Hook's employee identify razor, or by presenting testimony that marred area on box presented at Danner's corresponded to removal of Hook's price tag. No employee identified razor, & only employee who testified re price tag offered contradictory testimony & finally stated that she did not know what kind of mark would be left. Because state did not prove that razor was not bought at Danner's, evidence does not support reasonable inference that D attempted to create false impression. Held, conviction reversed.

TITLE: Smith v. State

INDEX NO.: K.4.r.

CITE: (2/11/2019), 118 N.E.3d 92 (Ind. Ct. App. 2019)

SUBJECT: Theft - value of stolen used tires stockpiled for disposal

HOLDING: On appeal of her theft conviction, D argued that although she exerted unauthorized control over an auto dealership customer's old tires, the tires were not "property" within the meaning of the theft statute because the State failed to establish that the tires were of any value to the dealership. Court disagreed, noting that the threat of unauthorized sale of used tires is a liability to the dealership, which stored the tires in an enclosure that was typically locked, labeled with a warning sign, monitored by video surveillance and overseen by the dealership's personnel.

TITLE: Stout v. State

INDEX NO.: K.4.r.

CITE: (7/1/85) Ind., 479 N.E.2d 563

SUBJECT: Theft - multiple taking; one offense

HOLDING: Tr. Ct. erred in entering judgment & sentence upon 2 counts of theft where D broke into victim's house & stole TV, chainsaw & guns (count II) & car out of garage (count III). Elmore, 382 N.E.2d 893; Holt, App., 383 N.E.2d 467. Garage is part of one's home. Gaunt, 457 N.E.2d 211. Held, remanded with instructions to vacate judgment & sentence on count III.

RELATED CASES: Hill, 25 N.E.3d 1280 (Ind. Ct. App 2015) (2 theft convictions constituted a single larceny because they occurred at the same cash register only 8 minutes apart); Keller, 987 N.E.2d 1099, *aff'd on reh'g*, 989 N.E.2d 1283 (Ind. Ct. App. 2013) (single larceny rule required Ct. to vacate one of D's two convictions of theft for taking from victim a social security check and several separate checks); Benberry, App., 742 N.E.2d 532 (where D purchased stolen credit cards at same time & from same place, there was only one theft offense).

TITLE: Sullivan v. State
INDEX NO.: K.4.r.
CITE: (5/25/2017), 77 N.E.3d187 (Ind. Ct. App. 2017)
SUBJECT: Evidence sufficient to establish burglary and theft convictions
HOLDING: State presented sufficient evidence establishing that the common dining area of a nursing home that is a part of the residents' daily lives was a "dwelling" under Ind. Code § 35-31-5.2-107 to support an elevated Level 4 felony burglary conviction.

Court also affirmed Defendant's Level 6 felony theft conviction based on 642 pills stolen from the nursing facility. State presented sufficient evidence to establish the value of the stolen pills at \$5 each, or roughly \$3,200, and there was no reason to question that evidence simply because it was based on the pills' black market value rather than the commercial "pharmacy" value. Held, judgment affirmed.

TITLE: Teising v. State

INDEX NO.: K.4.r.

CITE: (12/15/2022), 201 N.E.3d0- 212 (Ind. Ct. App. 2022)

SUBJECT: Elected official's convictions on 21 counts of Level 6 felony theft reversed for insufficient evidence

HOLDING: In June 2020, the Defendant, who was the elected Wabash Township Trustee, sold her home and moved furniture and personal possessions into another home in Wabash Township. She then purchased a camper and traveled while working remotely. Throughout this time, her office manager, with whom Defendant regularly communicated, kept the office open, though physically closed to the public. Defendant began camping in Florida at the end of October 2020, when questions surfaced regarding her residency. In December, she refused demands for her to resign as Trustee and ignored local media coverage regarding her residency. The Tippecanoe County Prosecutor, with the assistance of the Indiana State Police, began investigating the matter, and Defendant was eventually indicted by a grand jury on 21 counts of Level 6 felony theft for taking her salary as Trustee while not residing in the township. She was convicted on all counts after a bench trial. The Court of Appeals reversed all of her convictions for insufficient evidence because the State's evidence failed to establish that Defendant ceased being a resident of Wabash Township. Under the statutory presumptions regarding residency of an elected official, Defendant could not have lost her residency in Wabash Township until she established a new residency elsewhere. Defendant's lack of physical presence in Wabash Township must be considered in the context of her travels. There was no indication Defendant intended the travels to be permanent. In sum, the State failed to present sufficient evidence that Defendant intended to abandon her Wabash Township domicile and establish a new residence elsewhere and that she in fact established said new residence. Accordingly, the trial court erred in finding her guilty of the 21 counts of theft. Held: judgment reversed.

TITLE: Wallace v. State

INDEX NO.: K.4.r.

CITE: (2nd Dist., 12-05-08), Ind. App., 896 N.E.2d 1249

SUBJECT: Burglary/Theft - proof of rightful possession or ownership sufficient

HOLDING: In burglary, theft and criminal mischief prosecution, State was not required to prove ownership of house. Rather, it was sufficient to show rightful possession or ownership. To obtain conviction for burglary, State must prove in part that house was a building or structure of another person, and for theft it must prove in part that D exerted unauthorized control over property of another person. Here, Tr. Ct. concluded that there was a question of fact as to the ownership of the house and erroneously acquitted D of burglary. It was error as a matter of law for Tr. Ct. to require proof of ownership of house. The phrase "building or structure of another person" in Ind. Code 35-43-2-1 is not exclusive equivalent of ownership. Burglary is a crime against possessory interest or rightful possession of the premises. Jay v. State, 246 Ind. 534, 206 N.E.2d 128 (1965).

Although issue was moot because State is barred from retrying D on burglary charge, Court held that evidence was sufficient to support criminal mischief and theft convictions. The house had been subject to foreclosure action but sale was not final until approximately three months after break-in. Circumstantial evidence was sufficient to prove that State witness had keys to enter house and was rightful possessor of house, furnace and water heater to exclusion of D. Moreover, other evidence supports conclusion that D was not the owner or rightful possessor of house. Held, judgment affirmed.

TITLE: Williams v. State

INDEX NO.: K.4.r.

CITE: (3d Dist. 7/25/83) Ind. App., 451 N.E.2d 700

SUBJECT: Theft - sufficiency; proof of ownership

HOLDING: Circumstantial proof of ownership of car was sufficient to sustain conviction for theft.

Thomas, App., 423 N.E.2d 682. Here, Wegila saw Ds driving brown Buick & reported license number to police. Officer ran license check & called car owner (Weiner) who had reported car stolen 2 days ago. Ct. finds this evidence gives rise to inference that car belonged to Weiner. Proof of license number or registration is not essential to establishing identity of stolen car. Thomas. Held, conviction affirmed.

RELATED CASES: Pryor, App., 889 N.E.2d 369 (officer's testimony that victim who reported the stolen car came to the scene of the traffic stop and identified D as the male who took her car and identified the car as the one she had reported stolen, and that the stopped vehicle's description and license number matched that of a reported stolen vehicle only established that D stole a black Suburban from a victim who had reported it stolen, but does not establish that the victim was Martin as alleged in information; reversed on insufficient evidence); Markland, App., 865 N.E.2d 639 (it can be reasonably inferred from nature of victim's death, stipulation executed by parties, & survival of victim's mother, sister & half-sister, that those relatives were victim's heirs & owners of D's property at time of death).

TITLE: Wright v. State

INDEX NO.: K.4.r.

CITE: (1-24-03), Ind., 781/1139

SUBJECT: Theft - unauthorized control - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for theft. D entered Wal-Mart store, gathered merchandise from throughout store & presented those goods, along with another shopping cart full of items he brought in from his car to store return desk. Loss-prevention officers expressly authorized cashier to give D a full money refund despite fact that they knew D "returned" items he had not bought. Crime of theft is defined as "knowingly or intentionally exerting 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).

D argued that prosecution failed to prove that refund he obtained was "unauthorized" as required by definition of theft. Ind. Code 35-43-4-1(b) defines "unauthorized control" as control exerted: 1) without other's consent, or 2) by creating a false impression in other person. By instructing manager to approve a refund should D request one, Wal-Mart was not authorizing D to exert control over refunded money, but was rather permitting scope of D's plans to be tested intending all the while to reassert rightful control of money once criminal act was complete. This is evidenced by fact that loss prevention personnel apprehended D once he exited store in possession of money. Although D did not create false impression in Wal-Mart, he did exert unauthorized control over property of Wal-Mart by taking refund money without Wal-Mart's consent, thus satisfying statutory requirements for theft. Held, transfer granted, Ct. App.' opinion at 754 N.E.2d 550 vacated, conviction affirmed.

TITLE: Z.A. v. State

INDEX NO: K.4.r.

CITE: (7/7/2014), 13 N.E.3d 438 (Ind. Ct. App. 2014)

SUBJECT: Theft - co-owned property

HOLDING: Juvenile D was convicted of theft for taking TV from his mother's home without her consent. On appeal, D challenged the sufficiency of the evidence due to the fact that he had contributed \$15 toward the \$200 purchase price of the TV. Theft requires proof that the D "knowingly or intentionally exerted unauthorized control over the property of another person with intent to deprive the other person of any part of its value or use. See Ind. Code 35-43-4-2. Ind. Code 35-31.5-2-253(b)(provides that "property is that 'of another person' if the other person has a possessory or proprietary interest in it, even if the accused person also has an interest in the property." The application of these statutes to a prosecution for theft of shared property is a question of first impression. The state argues that the D's mother had a controlling interest in the TV because she paid 93% of the purchase price. However, the state did not present any evidence that the D and his mother had an understanding that she had a controlling interest in the TV and that it had to remain at her house at all times. The state's reading of the statutes applies equally to both the D and his mother, so that his mother could be convicted of theft for keeping the TV at her house. The legislature did not intend to criminalize bona fide contract disputes. Here, where jointly owned tangible personal property is indivisible and there is no agreement between the co-owners as to the right to use the property, the state has not proved the unauthorized control element of theft beyond a reasonable doubt.

K. CRIMES

K.4. Offenses against property

K.4.s. Trespass (Ind. Code 35-43-2-2)

TITLE: Alves v. State

INDEX NO.: K.4.s.

CITE: (2nd Dist., 10-12-04), Ind. App., 816 N.E.2d 64

SUBJECT: Criminal trespass - notice of denial of entry & airspace above property

HOLDING: Evidence was sufficient to support D's criminal trespass conviction, where property owner had posted a "No Trespassing" sign which denied D entry onto owner's property pursuant to Ind. Code 35-43-2-2(b)(2). D argued that evidence was insufficient to show that he entered the property, because he had climbed on a gate surrounding the property, & "No Trespassing" notice was posted at main entrance of the property. Ct. concluded that such posting is deemed reasonable notice under Ind. Code 35-43-2-2(b)(2). Ct. declined to reweigh the evidence supporting the jury's determination absent evidence there was another "main entrance" to that section of the property. Noting that no Indiana case addresses the point where a "No Trespassing" sign takes effect, the jury could have reasonably inferred that at least part of D's body entered the airspace above the property. Trespass is not confined to an invasion of the surface, as land has an indefinite extent upward & downward. See 75 Am. Jur. *Trespass* ' 31 (1991). Held, judgment affirmed.

RELATED CASES: Willis, 983 N.E.2d 670 (Ind. Ct. App.2013) (while State proved D was on the no-trespassing list for apartment complex, it did not prove that he was denied entry onto the property); Blakney, App., 819 N.E.2d 542 (the denial of entry becomes effective at point where notice is actually posted; see full review, this section).

TITLE: Apollos v. State

INDEX NO.: K.4.s.

CITE: (8/19/2016), 59 N.E.3d 266 (Ind. Ct. App 2015)

SUBJECT: Criminal trespass - insufficient evidence D lacked contractual interest in property

HOLDING: In criminal trespass prosecution, State failed to prove beyond a reasonable doubt that D did not have a contractual interest in property on the day she allegedly trespassed on that property. A "contractual interest" is the right to be present on another's property, arising from an agreement between two parties that creates an obligation to do or not do a particular thing. Semenick v. State, 977 N.E.2d 7 (Ind. Ct. App 2012).

Here, both D and homeowner understood that a lease agreement existed, pursuant to which D would live at homeowner's residence in exchange for rent and/or childcare services for homeowner's daughter. The precise terms may not have been agreed upon, but both parties understood that an agreement existed on the day they got into an argument and homeowner repeatedly asked her to leave. Even if D had breached that agreement by failing to make a rent payment, the lease--and D's contractual interest in the property--did not automatically terminate. See Ind. Code § 32-31-1-8(5) (providing that a lease does not terminate automatically for failure to pay rent); Ind. Code § 32-31-1-6 (tenant entitled to ten days' notice before landlord can terminate lease for failure to pay rent). Because it was undisputed that D and homeowner both understood that they had agreed that D would live in residence in exchange for money and/or childcare services, the State failed to disprove contractual interests reasonably apparent from the circumstances under which the trespass allegedly occurred. Held, conviction reversed.

TITLE: Blakney v. State

INDEX NO.: K.4.s.

CITE: (4th Dist., 12-23-04), Ind. App., 819 N.E.2d 542

SUBJECT: Criminal trespass - evidence insufficient

HOLDING: Evidence was insufficient to support criminal trespass conviction where D did not cross posted "no trespassing" sign. An individual can be convicted of trespassing once "denied entry" by the "posting or exhibiting [of] a notice at the main entrance" in a manner prescribed by law or likely to come to the attention of the public. See Ind. Code § 35-43-2-2(b)(2). Here, D was inside her parked car off a county road adjacent to property which had a "No Trespass" sign posted on a gate. Her passenger was found straddling the gate & his conviction for trespassing was sustained in Alves v. State, 816 N.E.2d 64 (Ind. Ct. App.2004). Ct. here specifically answered question noted but left unanswered in Alves concerning whether entry into the area between a roadway & a "No Trespassing" sign can sustain a conviction. To eliminate confusion, Ct. held that the denial of entry becomes effective at point where notice is actually posted. Finally, Ct. determined conviction could not stand, based on accomplice liability theory as the evidence was insufficient to prove D knew her passenger would enter the airspace above the property by climbing the gate. Held, judgment reversed.

RELATED CASES: Powell, 45 N.E.3d 480 (Ind. Ct. App. 2015) (class A misdemeanor criminal trespass conviction reversed because State failed to prove D was on the bar's property when police asked him to leave).

TITLE: Curtis v. State
INDEX NO.: K.4.s.
CITE: (8/22/2016), 58 N.E.3d 992 (Ind. Ct. App 2015)
SUBJECT: Insufficient evidence for criminal trespass
HOLDING: The evidence for D's Class A misdemeanor criminal trespass was insufficient because the State failed to show he trespassed knowingly.

D lived with his father in an apartment complex reserved for persons at least fifty-five years old. Even though D did not meet the age requirement, he was allowed to stay under a "Live-In Attendant" agreement, which needed to be renewed each year. It was not renewed, but D was allowed to stay until the property manager, Cathy Neff, learned D had stolen books from the complex. She hand-delivered a "No Trespass Notice" to D, stating she would give him forty eight hours to leave. A few minutes later, other tenants approached Neff, telling her D was removing electronic equipment from the community room. Neff decided she wanted D to leave immediately but did not tell D. Instead, she called the police. D was arrested and later convicted of criminal trespass as a Class A misdemeanor. See Ind. Code § 35-43-2-2(b)(1).

Neff's request that D leave the premises impliedly gave him a reasonable time to leave of his volition. See Lemon v. State, 868 N.E.2d 1190, 1196-97 (Ind. Ct. App. 2007). If a person is not given a reasonable time to comply, there is no trespass. Id. Further, criminal trespass requires a mens rea of knowingly. Thus, if a person has a fair and reasonable foundation for believing that he or she has a right to be on the property, there is no criminal trespass. Olsen v. State, 663 N.E.2d 1194, 1196 (Ind. Ct. App. 1996). D had such a reasonable belief. Neff told him he had 48 hours to leave the premises. Also, Neff did not tell him that she had changed her mind and wanted him to leave immediately. Thus, D did not knowingly trespass. Held, judgment reversed.

TITLE: Fleck v. State

INDEX NO.: K.4.s.

CITE: (6/3/87) Ind., 508 N.E.2d 539

SUBJECT: Criminal trespass - sufficiency

HOLDING: On transfer. Evidence was sufficient to support D's conviction for criminal trespass.

Here, D was charged with theft & criminal trespass. Finding of insufficiency of evidence re theft is uncontested. Security guard saw D remove car radio from "blister pack," conceal it in his trousers & attempt to leave store. D was apprehended in parking lot. Evidence showed D had committed or attempted to commit theft in this particular store on numerous occasions. Head of store's security department had ordered D not to return to store & not to come onto premises & that if he did return, he would be prosecuted for shoplifting. D contends evidence was insufficient to show he lacked contractual interest in property, a material element of criminal trespass. Goodpaster 402 N.E.2d 1239. To sustain its burden, state need not disprove every conceivable contractual interest D might have had in property. D acknowledged he understood he was not to come on property again. State proved D was not employee. Held, Ct. App. opinion re criminal trespass ordered vacated. DeBruler DISSENTS without opinion.

RELATED CASES: Berry, 4 N.E.3d 204 (Ind. Ct. App 2014) (sufficient evidence of lack of contractual interest where D lied to officers about identity and later admitted to trespassing).

TITLE: Glispie v. State

INDEX NO.: K.4.s.

CITE: (10-12-11), 955 N.E.2d 819 (Ind. Ct. App 2011)

SUBJECT: Criminal trespass - insufficient evidence of agency relationship

HOLDING: A police officer, if neither an owner nor an agent of the owner, cannot create a trespass violation by denying a person entry to private property and later discovering that person again on the property. Pourghoraishi v Flying J, Inc., 449 F.3d 751 (7th Cir. 2006), corrected by, 2006 U.S. App. LEXIS 13604 (7th Cir. 2006). Where a criminal trespass charge is based on communication by the property owner's agent, State must prove all of the elements necessary to show an agency relationship.

Here, police officer had given oral and written warnings to D not to enter owner's property before he found D again on the property and arrested him. Officer testified that he "could act as an agent of the property," but without any corroboration of owner, his testimony was insufficient to establish an agency relationship. United Artists Theatre Circuit, Inc. v. Ind. Dep't of State Revenue, 459 754 (Ind. Ct. App 1984). To establish an agency relationship, State was required to show a manifestation of consent by the principal, acceptance of authority by the agent, and control exerted by the principal over the agent. Demming v. Underwood, 943 N.E.2d 878 (Ind. Ct. App 2011). There was no evidence in record regarding owner's manifestation of consent or owner's control over police officer as its agent. Nor was there any evidence that owner ever communicated directly with officer to manifest its consent to that agency relationship. Thus, evidence did not show existence of an actual or apparent agency relationship. As such, State failed to prove an essential element of criminal trespass, i.e., that the owner or its agent had denied D entry onto the owner's property. Ind. Code. 35-43-2-2(a)(1). Held, conviction reversed.

RELATED CASES: Berry, 4 N.E.3d 204 (Ind. Ct. App 2014) (evidence showed security officers were agents of State; testimony established that apartment complex hired both security guards to enforce rules, such as rules against trespassing and loitering).

TITLE: Kifer v. State
INDEX NO.: K.4.s.
CITE: (12-04-2019), 137 N.E.3d 990 (Ind. Ct. App. 2019)
SUBJECT: Criminal trespass statute may not be used to permanently and perpetually ban a citizen from a public building
HOLDING: Addressing an issue of first impression, Court of Appeals finds that an agent cannot ban a person permanently and forever from a public building. Decision does not reach the issue of whether an individual can be permanently banned if accommodations such as advance notice or a request of an escort are made. Here, building authority manager sent Defendant a letter stating he was banned from the local Civil Center Complex, which houses various government agencies. Defendant later went to the complex to make a police report and was arrested for trespass. The building manager stated he was notified by judicial, law enforcement, and elected officials to ban Defendant from the premises. However, the manager was not an agent of these officials and therefore could not derive his authority from them absent a court order. The Court of Appeals reversed Defendant's criminal trespass conviction, finding that the State failed to prove that the building manager had the authority to trespass Defendant. Manager's mere statement that he had the authority was insufficient.

TITLE: Lyles v. State

INDEX NO.: K.4.s.

CITE: (06-29-12), 970 N.E.2d 140 (Ind. 2012)

SUBJECT: Criminal trespass - D had no contractual interest in bank

HOLDING: In criminal trespass prosecution, State presented sufficient evidence to support inference that D lacked a contractual interest in the property upon which he is accused of trespassing. To support conviction for trespass, State is required to prove that D knowingly or intentionally refused to leave the real property of another person after having been asked to leave by the person or the person's agent when D lacked a contractual interest in the real property. See Ind. Code § 35-43-2-2(a)(2).

Here, D went to a Chase Bank branch to request a printout of his account. When a Chase employee told D that there would be a \$6.00 charge, he became upset and disruptive, and refused to leave the premises when asked. At trial, there was evidence that D was neither an owner nor an employee of the bank as well as evidence that the bank manager had authority to ask customers to leave the premises. This evidence, taken together, refuted each of the most reasonably apparent sources from which a person in D's position might have derived a contractual interest in the bank's real property: as an owner, as an employee, and as an account holder.

Thus, there was sufficient evidence from which a reasonable jury could infer that D did not have a contractual interest in the bank's real property. Were the State required to negate every conceivable contractual interest, it would face a potentially impossible burden to identify and refute every possible contractual interest a D might have in the property. Held, transfer granted, Court of Appeals' opinion at 956 N.E.2d 180 *vacated*, conviction affirmed. Rucker, J., dissenting, noted that State conceded that D had a contractual right to be inside bank as he was an account holder, and there was no evidence that D's contractual interest had been terminated at the time of his arrest.

RELATED CASES: Frink, 52 N.E.3d 842 (Ind. Ct. App. 2016) (former school corporation employee did not have contractual interest in elementary school just because she wanted to enroll her children there).

TITLE: McBride v. State

INDEX NO.: K.4.s.

CITE: (2/13/2018), 94 N.E.3d 703 (Ind. Ct. App 2018)

SUBJECT: Trespass conviction did not violate right to free speech

HOLDING: D's conviction for class A misdemeanor criminal trespass did not violate his right to speech under Article 1, § 9 of the Indiana Constitution because his statements were not solely political and because it was reasonable for the State to conclude D was abusing his right to speech.

D went to the prosecutor's office to demand dismissal of his old traffic tickets. Several times, Chief Deputy Prosecutor Emily Clarke told D he would need to file something in court. D repeatedly rejected this advice and insisted again and again that the prosecutor dismiss the tickets. Clarke told D to leave because he was disrupting the office; he refused. Several officers eventually escorted D out of the office. Four days later, he returned to drop off some papers. D "went off," again insisting that the prosecutor dismiss the tickets. Clarke gave a trespass warning to D. She asked him to leave at least 15 times; he refused, stating that the office was a public office, so he had a right to be there. Once D refused an officer's request to leave, he was arrested.

First, the conviction did not restrict D's expressive activity because D's statements were, at least in part, concerning his own behavior and thus were not solely political. See Anderson v. State, 881 N.E.2d 86, 90 (Ind. Ct. App 2008); Blackman v. State, 868 N.E.2d 579, 586 (Ind. Ct. App 2007) (D's comments were of a "dual nature" and were thus ambiguous because one comment focused on her right to not leave the scene), trans. denied. Second, the State could have reasonably assumed D's speech was an abuse of his rights under Article 1, § 9 because they disrupted office operations, and thus were a "threat to peace, safety, and well-being." See Whittington v. State, 669 N.E.2d 1363, 1371 (Ind. 1996). Held, judgment affirmed.

TITLE: Minneman v. State

INDEX NO.: K.4.c.

CITE: (8/7/84) Ind., 466 N.E.2d 438

SUBJECT: Burglary of dwelling - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for burglary of dwelling where D broke glass in service door of attached garage & then entered general store that separated garage from house (one unit). D took cash register, food & other items. D did not attempt to enter living area. Ct. discusses attached garage (Gaunt 457 N.E.2d 211; Abbott 371 N.E.2d 721) & basement with no living area access door (Burgett, App., 314 N.E.2d 799) cases, which held structures were dwellings. When D entered garage, he entered dwelling & remained in dwelling as long as he was within structure. It is immaterial that D did not enter/attempt to enter living area. Gaunt. Held, conviction affirmed.

RELATED CASES: Sullivan, 77 N.E.3d 187 (Ind. Ct. App 2017) (common dining area of a nursing home constituted a "dwelling" to support elevated Level 4 felony burglary), Shepard, App., 839 N.E.2d 1268 (evidence sufficient to prove D broke into dwelling when he broke into victim's attached garage, even though there is no door between garage & living quarters).

TITLE: Olsen v. State

INDEX NO.: K.4.s.

CITE: (5th Dist., 4-17-96), Ind. App., 663 N.E.2d 1194

SUBJECT: Criminal trespass - sufficiency

HOLDING: Evidence was sufficient to support conviction for criminal trespass. After renting room in hotel, D became angry & confronted hotel clerk after being advised that he owed money for his phone bill. D later returned to lobby & began to accost hotel clerk, yell complaints, bang on doors, & harass guests. Hotel staff asked D to leave lobby over 20 times, but D responded by running around lobby & threatening to sue hotel. D also refused request by police to leave lobby. Conviction for criminal trespass under Ind. Code 35-43-2-2(a) requires D, who does not have contractual interest in property, to knowingly or intentionally refuse to leave property of another person after having been asked to leave by other person or that person's agent.

D argued that because he rented room in hotel, there was insufficient evidence to prove that he did not have contractual interest in property & that he lacked required criminal intent. Ct. disagreed, finding that there was no fair & reasonable basis for D's belief that he had right to remain in lobby. When D disrupted business operations of hotel & when he became threat to other patrons, hotel had right to ask him to leave. Requisite intent for criminal trespass was shown by evidence that D knowingly or intentionally refused to leave lobby after being asked repeatedly to do so. Held, conviction affirmed.

RELATED CASES: A.E.B., App., 756 N.E.2d 536 (evidence was sufficient to support D's conviction for criminal trespass on school property, despite D's claim that as a student at school, she had contractual interest in the property based on education clause of Indiana Constitution & Indiana's compulsory school attendance law).

TITLE: Rust v. State

INDEX NO.: K.4.s.

CITE: (4th Dist., 3-8-00), Ind. App., 726 N.E.2d 337

SUBJECT: Criminal trespass - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for criminal trespass, which requires knowing or intentional interference with possession or use of property of another without that person's consent. Ind. Code 35-43-2-2(a)(4). While D was protesting in front of Affiliated Women's Services building, a car stopped in building driveway. After woman inside car motioned D to car, D put his protest sign on driveway, came to car, & stood in driveway to speak to woman. Upon seeing D on driveway, president of Affiliated Women's Services came outside & asked D to go back to street. As president turned to pick up D's sign from driveway, she & D collided. From this evidence, Tr. Ct. could reasonably infer that D's sign was impeding access to driveway, & that D himself blocked driveway while speaking with woman in car. D's presence & placing of sign on driveway interfered with use of property by preventing others from coming onto or leaving property by using driveway. Held, conviction affirmed.

TITLE: Semenick v. State

INDEX NO.: K.4.s.

CITE: (10/9/2012), 977 N.E.2d 7 (Ind. Ct. App 2012)

SUBJECT: Trespass - church member had right to remain at service

HOLDING: The State failed to present sufficient evidence that D committed criminal trespass at his church. One commits criminal trespass when he not having a contractual interest in the property, knowingly or intentionally refuses to leave the real property of another person after having been asked to leave by the other person or that person's agent. The State satisfies its burden when it disproves those contractual interests that are reasonably apparent from the context and circumstances under which the trespass is alleged to have occurred. Lyles v. State, 970 N.E.2d 140 (Ind. 2012).

Here, D, while attending a church service, got into an argument with the greeter about how loud the greeter was talking to others. An off-duty officer who was hired to patrol the parking lot asked D to leave the service. D initially refused and referred to the officer as a "rent-a-cop." The officer arrested D for disorderly conduct and trespass. The jury acquitted D of disorderly conduct but convicted him of trespass. The evidence was uncontroverted that D was a church member. D testified that he had been attending service at the church for over twenty years and had sent his children to the church elementary school. The State did not call any church leaders to contradict this evidence. Thus, D had a contractual interest to attend service. Although D's words and conduct were arguably unfriendly, it did not rise to the level of disorderly conduct that would terminate his contractual interest. Unpleasant demeanor does not always equate to criminality. Moreover, the State failed to show that the security officer was given the authority to remove someone from the church sanctuary. Without testimony from a church official disavowing D's contractual interest and otherwise clearly delineating the limits of a member's contractual interests and the breadth of an occasional part-time contract employee's authority, the State failed in its burden to prove material elements of criminal trespass. Held, judgment reversed; Mathias, dissenting on basis that the evidence favorable to the verdict, and the reasonable inferences to be drawn therefrom, would allow a reasonable trier of fact to conclude that D knowingly refused to leave the church premises after being asked to leave by an agent of the church and that D lacked a contractual interest in the property.

TITLE: Taylor v. State

INDEX NO.: K.4.s.

CITE: (11-10-05), Ind. App., 836 N.E.2d 1024

SUBJECT: Trespass upheld for student on school property

HOLDING: Sufficient evidence existed to convict D of criminal trespass on school property. D had classes from 8:15 to 10:15 a.m. Nearly two hours after his classes, school police saw D standing in a hallway by the front entry & asked him what he was doing. D replied he was waiting for the city bus & the officer told D to stay in the front hallway by the entry. Officer testified he twice saw D in the building & the officer advised D to leave the building "five times in quick succession." Majority rejected D's argument that he had a contractual interest to be on the property under the criminal trespass statute, Ind. Code 35-43-2-2. Although D supported his argument with A.E.B. v. State, 756 N.E.2d 536 (Ind. Ct. App2001), Ct. found this case to hold that even if a student has a contractual interest in school property, the interest is not unlimited & can be violated by the student's conduct. A student's contractual interest in school property is limited temporally to when taking classes or engaged in other school activities & limited spatially to areas necessary to attendance. Held, judgment affirmed.

May, J. dissenting, distinguished majority's reading of A.E.B. by noting D here was not engaged in disorderly conduct or other criminal activity as in that case. The officer's request that D leave also does not extinguish his contractual interest in the school property. Woods v. State, 703 N.E.2d 1115 (Ind. Ct. App1998) (D requested to leave health club based on apparent error as to her membership status; majority here distinguished this case because D had unlimited access to the facilities under her membership agreement). In footnote May contended that majority's opinion & reading of Woods impermissibly shifts burden from the State to D as to what contractual interest he had in the school property. While State need not disprove every conceivable contractual interest, it should have burden to disprove the most obvious interest here - a student's contractual interest in being at school. State provided no evidence as to school policies detailing where students may be & when; & May noted her concern as to why the first course of action here was arrest & prosecution rather than a trip to the principal's office.

RELATED CASES: Pogue, 937 N.E.2d 1253 (Ind. Ct. App 2010), (State failed to present sufficient evidence to prove that D's limited contractual interest in school premises was terminated prior to his arrest).

TITLE: Travis v. State

INDEX NO.: K.4.s.

CITE: (5th Dist., 7-28-04), Ind. App., 812 N.E.2d 826

SUBJECT: Criminal trespass - evidence insufficient

HOLDING: Evidence was insufficient to support D's criminal trespass conviction, because police officer did not have authority to place D on a trespass list that would exclude him from a public park indefinitely. After finding D playing dice and gambling in city park, officer ordered him to leave when D started "to run his mouth." Officer told D he was on trespass and not to return to the park. When D returned to park and sat on park bench two days later, another officer arrested him for criminal trespass. Ct. found that pursuant to Ind. Code 36-8-3-6(c)(3), a police officer must enforce municipal ordinances, which include provisions against gambling and allowing removal from parks for not following the city rules. However, Ct. found that such removal could not be permanent and "tantamount to a permanent injunction." Pursuant to Ind. Code 35-43-2-2(b)(1), an oral communication not to return to a property would likely result in a trespassing conviction if a private property owner communicated the order, but police officers are limited by statute and the State offered no statute which allowed an officer to enjoin a citizen from visiting a public park. If D had not left when asked to when playing dice, the officer could have arrested him for criminal trespass for knowingly and intentionally refusing to leave the property of another after being asked to leave by the person's agent, see Ind. Code 35-43-2-2(a)(2). In this case, however, D was not involved in any illegal act when actually arrested, thus police had no legal grounds to arrest him. Held, conviction reversed.

TITLE: Walls v. State

INDEX NO.: K.4.s.

CITE: (8/22/2013), 993 N.E.2d 262 (Ind. Ct. App 2013)

SUBJECT: Tenants' authority to exclude trespasser from immediate adjacent areas to their apartment

HOLDING: State presented sufficient evidence beyond a reasonable doubt to sustain D's conviction for criminal trespass. Intoxicated D was in the common areas of apartment complex at 5:15 a.m., kicking and tapping on complaining witness's (C.W.'s) door with his feet. He refused to leave when requested to do so, and instead knocked on the door, requested to come in, and when refused entry, began banging on the door and yelling. After being refused entry into another apartment, D attempted to come in and put his foot through the threshold of the apartment. In Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc., 820 N.E.2d 158 (Ind. Ct. App 2010), Court held that only a landlord or its agent can exclude a trespasser from common areas. However, under circumstances of this case, tenants had a sufficient possessory interest in, at a minimum, their apartment doors, the threshold of their apartments, and the immediate adjacent areas by which they accessed their leased apartment units, to request that a person leave that specific area and stop persistently banging on their doors. A rigid rule, applied without exception, that a tenant does not have a sufficient possessory interest in such property would defy logic and lead to an absurd result. Held, judgment affirmed; Riley, J., dissenting, would follow Aberdeen and cases which have strictly interpreted the criminal trespass statute, Ind. Code 35-43-2-2(a)(1), which requires that entry on property be denied by either the owner or its agent.

RELATED CASES: Johnson, 38 N.E.3d 686 (Ind. Ct. App 2015) (a person of ordinary intelligence would have no difficulty finding D's behavior, i.e., standing in threshold of apartment, preventing C.W. from closing the door, violated the trespassing statute, thus it was not unconstitutionally vague as applied to him).

TITLE: Willis v. State

INDEX NO.: K.4.s.

CITE: (3/24/2015), 27 N.E.3d 1065 (Ind. 2015)

SUBJECT: Insufficient evidence for criminal trespass

HOLDING: Conviction for Class A misdemeanor criminal trespass reversed for insufficient evidence.

After a security alarm at Watkins Family Recreation Center was activated, officers responded and saw D running in a field west of the building. No one saw D in the building or leaving the building. While a conviction may rest solely on circumstantial evidence, see Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995), there is no circumstantial evidence here. Mere presence at the scene is insufficient to establish guilt. At most, the evidence showed D was spotted running in a field about one hundred yards away from the store. Flight, standing alone, does not establish guilt. Dill v. State, 741 N.E.2d 1230, 1232-33 (Ind. 2001). The evidence merely shows D's behavior was suspicious and he may have had the opportunity to commit the crime, but "a reasonable inference of guilt must be more than a mere suspicion, conjecture, conclusion, guess, opportunity, or scintilla." Mediate v. State, 498 N.E.2d 391, 392 (Ind. 1986). Held, transfer granted, Court of Appeals' opinion at 13 N.E.3d 460 vacated, and judgment reversed.

TITLE: Woods v. State

INDEX NO.: K.4.s.

CITE: (5th Dist., 12-31-98), Ind. App., 703 N.E.2d 1115

SUBJECT: Criminal trespass - insufficient evidence; contractual interest in property

HOLDING: Lack of contractual interest in property is material element State must prove to convict person of criminal trespass. Fleck, 508 N.E.2d 539. Criminal trespass statute's purpose is to punish those who willfully or without bona fide claim of right commit acts of trespass on land of another. Myers, 190 Ind. 269, 130 N.E. 116 (1921). In this case, D's membership contract with health club granted her full access to facilities on unlimited days & unlimited hours. On day of her arrest, D went to health club & was told that her membership had expired. Apparently, D's payment to renew her membership had not yet appeared on database available to club's receptionist. However, club's records later indicated that her payment had been made & club's manager conceded at trial that D was member of club on day of her arrest. Thus, there was undisputed factual basis for D's belief that she had contractual right to be on premises. Her belief & bona fide claim of right defeat mens rea requirement of Ind. Code 35-43-2-2(a)(2). Club's inaccurate computer records did not alter D's membership status or her contractual right to use facilities. Because State failed to prove that D did not have contractual interest in club's property, there was insufficient evidence as matter of law to sustain D's conviction. Held, conviction reversed.

RELATED CASES: Pogue, 937 N.E.2d 1253 (Ind. Ct. App 2010), (State failed to present sufficient evidence to prove that D's limited contractual interest in school premises was terminated prior to his arrest).

K. CRIMES

K.4. Offenses against property

K.4.t. Welfare fraud (Ind. Code 35-43-5-7)

TITLE: Hatton v. State

INDEX NO.: K.4.t.

CITE: (4th Dist. 10/8/86) Ind. App., 498 N.E.2d 398

SUBJECT: Welfare fraud - sufficiency

HOLDING: Evidence was sufficient to sustain conviction for welfare fraud where D received income from house cleaning employment, but failed to report this income to Monroe County Welfare Department. Evidence supported jury's conclusion that D knowingly or intentionally concealed information for purpose of receiving public relief/assistance to which she was not entitled. Held, welfare fraud conviction affirmed; conversion conviction reversed (state failed to lay proper foundation for admitting evidence).

TITLE: Healthscript, Inc. v. State

INDEX NO.: K.4.t.

CITE: (6-28-02), Ind., 770 N.E.2d 810

SUBJECT: Medicaid fraud charge too vague to meet requirements of due process

HOLDING: Tr. Ct. erred in denying D's motion to dismiss because Medicaid Fraud statutes do not encompass situation where provider, such as D, charges Medicaid in amount more than its usual & customary charge. Ind. Code 35-43-5-7.1(a)(1) provides that a person who knowingly or intentionally...files a Medicaid claim...in violation of Ind. Code 12-15, commits Medicaid Fraud. While Ind. Code 12-15 governs operations of Medicaid program in Indiana generally, it does not contain any statute which makes it unlawful to submit claims exceeding a provider's usual & customary charge. There is administrative rule in place limiting providers of covered legend drugs to their usual & customary charges. 405 IAC 1-6-21.1(g) [currently 405 IAC 5-24-4]. Applying void for vagueness doctrine, rule of lenity & fair notice requirement, Ct. concluded that link between Ind. Code 12-15 & conduct prohibited by "ordinary & customary charge" regulation is too attenuated to permit this prosecution to proceed. To understand what conduct Medicaid Fraud statute prohibits requires following cross-reference to Ind. Code 12-15, then through 50 pages & 280 sections of that article, & then to language of agency regulation in Indiana Administrative Code. This lacks sufficient definiteness that due process requires of penal statutes. Kolander v. Lawson, 461 U.S. 352 (1983). Held, transfer granted, remanded with directions to dismiss charging information without prejudice; Boehm, J., concurring with separate opinion in which Dickson & Rucker, JJ., concur, noted that Ds violated Ind. Code 35-43-5-7.1(a)(2) by making false statement to receive payment, but charging information did not charge a violation of that subsection with sufficient clarity.

TITLE: Moundzouris v. State

INDEX NO.: K.4.t.

CITE: (1st Dist., 8-8-03), Ind. App., 792 N.E.2d 952

SUBJECT: Welfare fraud - sufficiency

HOLDING: Evidence was insufficient to support one of D's two convictions for welfare fraud. State was required to prove that D knowingly obtained public relief or assistance by means of false or misleading oral or written statements of an amount greater than \$2,500. Ind. Code 35-43-5-7. As to conviction regarding social security benefits, State presented undisputed evidence that D, in her application for SSI, represented to Social Security Administration that she had custody of her child when in fact she did not. However, as to second conviction, State failed to prove that D knowingly made misrepresentations in her food stamp application. In that application, D represented that both of her children lived with her. However, unlike SSI application, food stamp application was silent concerning whether children must live with applicant full time to be eligible for benefits & did not include any questions regarding custody of children. There was no evidence showing that custody is required to obtain food stamps. An applicant could reasonably interpret question regarding how many people live in household to mean that part-time residence is sufficient. It was undisputed that D considered herself to be children's primary caregiver regardless of dissolution Ct.'s custody order, & evidence supported that understanding. Held, judgment affirmed in part & reversed in part.

K. CRIMES

K.4. Offenses against property

K.4.u Money laundering (IC 35-45-15-5)

TITLE: Parsley v. State

INDEX NO.: K.4.u.

CITE: (1/25/2019), 119 N.E.3d 131 (Ind. Ct. App. 2019)

SUBJECT: Sufficient evidence supported convictions for theft, money laundering and passing lottery ticket with intent to defraud

HOLDING: State presented sufficient "mostly circumstantial" evidence to support D's convictions for theft, money laundering, and false passing of a lottery ticket, a Level 5 felony. D, who managed a family liquor store, chose to conceal a pack of lottery tickets rather than return it to the Lottery and worked with two other accomplices to improperly claim a \$2 million prize ticket he knew he could not have claimed himself. There was also sufficient evidence of D's intent to commit money laundering and theft, as an accomplice. Held, judgment affirmed.

TITLE: Scott v. State

INDEX NO.: K.4.u.

CITE: (5th Dist., 06-07-07), Ind. App., 867 N.E.2d 690

SUBJECT: Money laundering - evidence sufficient

HOLDING: State presented sufficient evidence to support D's conviction for money laundering.

Under Indiana law, offering or agreeing to receive proceeds from a criminal activity is money laundering. Ind. Code 35-45-15-5(a)(3). Here, D knew he was agreeing to facilitate illegal activity of an individual with whom he was corresponding via the Internet when he agreed to accept & deposit checks from entity for which individual was allegedly employed. D lied to police about his prior involvement with a fraudulent financial scam, & D had conducted email correspondence with individuals involved in similar fraudulent financial schemes. State presented evidence that even a rudimentary Internet search of the words "Nigerian bank" or "Maureen Lau" immediately alerts a searcher that these terms are associated with illegal money scams. A reasonable inference from evidence supporting a verdict is enough for Ct. to find evidence to be sufficient. Herron v. State, 808 N.E.2d 172 (Ind. Ct. App. 2004). Addressing a matter of first impression, Ct. also held that D's convictions for money laundering & forgery did not violate double jeopardy under Indiana Constitution. Held, judgment affirmed.

K. CRIMES

K.5. Offenses against public administration

K.5.a. Bribery (Ind. Code 35-44-1-1)

TITLE: Moritz v. State

INDEX NO.: K.5.a.

CITE: (1st Dist. 6/26/84) Ind. App., 465 N.E.2d 748

SUBJECT: Bribery - single act

HOLDING: Tr. Ct. must vacate 3 of 4 counts of bribery where one transaction occurred between chemical salesman & D, resulting in numerous sales orders, & D (Mayor of Seymour) was paid in single lump sum in exchange for orders. Here, Ct. finds single intent & design, relying on Williams 395 N.E.2d 239 (taking money from 4 tellers at same time is one robbery) & Isaac, App., 439 N.E.2d 1193 (exhibiting obscene film to number of people at one time is one offense). Held, Count 1 affirmed; Tr. Ct. directed to vacate sentences for counts 2, 3 & 4.

RELATED CASES: Winn, App., 722 N.E.2d 345 (Tr. Ct. must vacate 6 out of 7 bribery convictions where D was attempting to induce prosecutor not to prosecute him for single offense, even though D sent money or letter to prosecutor seven times); Willner, App., 588 N.E.2d 581 (discussing tolling of statute of limitations in bribery cases, see card at L.7.b).

TITLE: Stevens v. State

INDEX NO.: K.5.a.

CITE: (4th Dist., 09-10-09), 913 N.E.2d 270 (Ind. Ct. App. 2009)

SUBJECT: Bribery - offer does not need to be received

HOLDING: There was sufficient evidence of bribery even when the alleged recipient of the bribe did not receive the letter including the bribe. To convict D of bribery, the State had to prove that D did confer, offer, or agree to confer any property on a witness with the intent that the witness withhold any testimony, information, document or thing. Ind. Code 35-44-1-1. The term "offer" is defined as to present for acceptance or rejection.

Here, D sent a letter addressed to his co-D to the co-D's grandmother's home. The letter was received by the co-D's father and ultimately ended up in the hands of the co-D's mother. In the meantime, D sent the co-D a second letter which the co-D found confusing because she never received the first letter. The co-D's mother explained the first letter included a bribe to the co-D, who then contacted the police. Although there is no Indiana cases that address whether an offer of a bribe must be received, the plain meaning of the word "offer" leads to the conclusion that D only had to present the bribe. D presented his offer for acceptance or rejection when he addressed the letter to the co-D and sent it through channels reasonably calculated to reach her. The co-D actually received the second letter through the same channels, i.e., her grandmother, the first letter was sent. Held, judgment affirmed.

TITLE: United States v. Thompson

INDEX NO.: K.5.a.

CITE: 484 F.3d 877 (7th Cir. 2007)

SUBJECT: State official's political award of contract not equal to mail fraud or bribery

HOLDING: Seventh Circuit Court of Appeals held that a state procurement official who got a raise after she steered a state contract toward a political favorite was not guilty of the sort of conduct prohibited by federal fraud and bribery statutes. Court stated the convictions were based on overly broad interpretations of what qualifies as "honest services" fraud and the misapplication of the assets of federally funded programs. D was a Wisconsin procurement official who was convicted under the federal mail fraud and bribery statutes, 18 U.S.C. ' 1341 and 18 U.S.C. ' 666. Evidence showed that D delayed a decision on a multimillion dollar state travel contract and otherwise manipulated the process to ensure that the contract was awarded to a travel agency that was favored by her politically appointed boss, rather than an out-of-state competitor rated by her colleagues as providing better service. Section 666 makes it a crime if individual "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies" property valued at \$5,000 or more. The term "misapplies" is not defined in the statute and the prosecution's theory was that D misapplied more than \$5,000 by diverting the travel contract away from the bidder whom the contract would have been awarded in the absence of her efforts. Court characterized the government's position as advocating an interpretation of statute under which "any public employee's knowing deviation from state procurement rules is a federal felony, no matter why the employee chose to bend the rules, as long as the employee gains in the process. Court noted that it has previously read "misapplies" narrowly. It interpreted "misapplies" as requiring proof that the official was "on the take" when he or she violated or manipulated regulations; otherwise, the official's error is civil, rather than criminal. Court noted such an interpretation was supported by the rule of lenity, which requires ambiguities in criminal statutes to be resolved in favor of the accused. Court also reversed conviction under Section 1341, which prohibits use of the mails in furtherance of a "scheme or artifice to defraud." Court noted that "treating an incorrect application of state procurement law as a 'misuse of office' and a raise as a 'private gain' would land us back in the soup - once again, simple violations of administrative rules would become crimes. . . . The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous.

TITLE: Wurster v. State

INDEX NO.: K.5.a.

CITE: (2nd Dist., 3-29-99), Ind. App., 708 N.E.2d 587, aff'd 715 N.E.2d 341

SUBJECT: Bribery indictment - specificity lacking; specific & explicit quid pro quo allegation required

HOLDING: Tr. Ct. erred in denying Ds' motions to dismiss indictment charging bribery, because indictment failed to allege essential elements of offense, failed to sufficiently apprise them of offense they were required to defend against, & failed to disclose sufficient facts so as to protect Ds from future prosecutions arising from same facts. Indiana's bribery statute contemplates "intent to control the performance of an act related to the employment...of a public service." Ind. Code 35-44-1-1(a)(1). Whether specific & explicit quid pro quo is essential element of proof under statute has never been directly addressed in Ind.

Because indictment in this case was based on "generalized bribe" theory & was silent as to particular *act* for which Co-Ds allegedly bribed D, indictment could not stand. D, who was part-time citizen legislator, was authorized by Ind. Code 35-44-1-1(a)(1) to accept compensation from Co-Ds for part-time employment as independent marketing consultant. Indictment against D charged simply that D received money from Co-Ds "with the intent that such money would control the performance of acts related to" D's employment. Without specific description of how D would "act" or what "act" he was alleged to have engaged in that resulted in, or was designed to result in, economic gain to Co-Ds, D & Co-Ds were left to speculate, at their peril, as to particular activity they may or may not have engaged in. Ds have right to require that charging allegations state crimes charged with sufficient certainty to enable them to marshal evidence in their defense. Moran, App., 477 N.E.2d 100. In addition, offense charged must be described with sufficient particularity to permit defense of double jeopardy in event of subsequent prosecution. Wine, App., 637 N.E.2d 1369. Indictments in this case did not enable Ds to anticipate proof of State's case & did not protect Ds from future prosecutions under same or similar facts. Held, judgment reversed.

RELATED CASES: Hightower, App., 866 N.E.2d 356 (relationship between D's company & company of Co-D, who worked for FSSA, along with fact D received no-bid contract from FSSA & co-D received \$15,000-\$20,000 from D's company was sufficient evidence of bribery).

K. CRIMES

K.5. Offenses against public administration

K.5.c. False reporting or informing (Ind. Code 35-44-2-2)

TITLE: Cannon v. State

INDEX NO.: K.5.c.

CITE: (12/20/2018), 116 N.E.3d 543 (Ind. Ct. App. 2018)

SUBJECT: Failing to provide information to police is not false informing

HOLDING: A town marshal investigating an alleged attack by a pit bull went to a house to look for the dog and talked to D. Although the pit bull was in a garage at that location, D did not inform the town marshal of this. The State charged him with false informing, which prohibits "giv[ing] false information in the official investigation of the commission of a crime," knowing the information to be false. Ind. Code § 35-44.1-2-3(d). But D never told the town marshal anything about the location of the dog. Therefore, he did not give any information, let alone false information. Thus, D's conviction for false informing cannot stand and double jeopardy principles bar State from retrying him. Held, judgment reversed.

TITLE: Clancy v. State

INDEX NO.: K.5.c.

CITE: (5th Dist., 06-15-05), Ind. App., 829 N.E.2d 203

SUBJECT: False informing - evidence sufficient

HOLDING: A person is guilty of false informing if he or she gives false information in the official investigation of the commission of a crime, knowing the information to be false. Ind. Code 35-44-2-2(d)(1). Here, police responded to an accident scene involving serious bodily injury & a vehicle that had traveled in wrong lane for a considerable distance before striking a motorcycle. D gave false information to police about who was driving his truck. Distinguishing Jones v. State, 774 N.E.2d 957 (Ind. Ct. App 2002), Ct. held that given the severity of accident & evidence that a traffic code violation (crossing center line) had caused it, police officers had a reasonable belief that a crime might have been committed & D was required to answer their questions truthfully regarding who was driving truck. It is immaterial to false informing charge that there ultimately was insufficient evidence to convict D of criminal recklessness with respect to accident. Ct. emphasized its belief that not every police investigation into an automobile collision may be characterized an "official investigation of the commission of a crime" for purposes of false informing statute. Held, conviction affirmed, criminal recklessness convictions reversed (see above); Darden, J., dissenting.

TITLE: Gootee v. State

INDEX NO.: K.5.c.

CITE: (3d Dist. 03/25/92), Ind. App., 588 N.E.2d 584

SUBJECT: Insufficiency of evidence - false reporting

HOLDING: Evidence was insufficient to sustain conviction for false reporting. D worked as emergency medical technician (EMT) at hospital, & was charged with reporting false bomb threat at hospital. No one saw D make phone call. One nurse thought she saw EMT on phone just prior to threat, but did not know if it was D. D was absent from dispatch room when threat was called in. D had previously been convicted of arson & his statements about previous conviction indicated starting 4 fires, one to get additional fireman training, one he thought would go out, one he did not intend to start, & the 4th unexplained. Ct. App. found that similarity of prior incident to present fell short of uniqueness & "signature mark" necessary to render prior incident admissible on issue of identity, Penley (1987), Ind., 506 N.E.2d 806, but that error in admission of evidence was waived by D's failure to object at trial. Ct. found, however, that only evidence to support conviction aside from the statements connected to previous arson conviction, was that he was on duty & not in EMT area on night of report, that nurse had seen EMT who she could not positively identify using hallway telephone, & that prior to incident D had jokingly discussed how neat it would be to have bomb threat with evacuation of patients & paging of people in hospital. This other evidence fell short of proof beyond reasonable doubt, & evidence surrounding prior conviction was also insufficient because it was not sufficiently similar to present situation to identify D as perpetrator.

TITLE: Smith v. State

INDEX NO.: K.5.c.

CITE: (4th Dist., 1-18-96), Ind. App., 660 N.E.2d 357

SUBJECT: False informing - evidence sufficient

HOLDING: Evidence was sufficient to support conviction for false informing. During investigation of alleged underage consumption of alcohol at residence, officer noticed D lying in bed in adjacent room, & recognized him as someone he had encountered before. Because officer believed there were outstanding warrants for D, he awakened D & asked him his name, birth date, & social security number. Officer's examination of D's wallet revealed that D had provided false forename & date of birth. Offense of false reporting is established when evidence shows that person "gives false information in the official investigation of the commission of a crime, knowing the report or information to be false. Ind. Code 35-44-2-2(c)(1). Here, when officer confronted D, he was engaged in official investigation of violation of judicial orders for which outstanding warrants were issued. Whether officer had ended investigation of underage consumption of alcohol was irrelevant. Evidence was sufficient to establish that false answers were intentional & material because D knew that he had outstanding warrants against him when questioned by officer. Finally, although no documentary evidence was introduced to establish D's forename & birth date, officer testified that D's I.D. card indicated that D had given him incorrect forename & birth date. Furthermore, D admitted giving officer his brother's birth date. Held, conviction affirmed.

RELATED CASES: Howell, App., 684 N.E.2d 576 (statute does not require that "official investigation of commission of crime" be regarding crime for which D himself is charged).

TITLE: Wilke v. State
INDEX NO.: K.5.c.
CITE: (1st Dist. 8/26/86) Ind. App., 496 N.E.2d 1310
SUBJECT: False informing - inapplicable to promised future conduct
HOLDING: Evidence presented does not disclose violation of false informing statute, Ind. Code 35-44-2-2(b)(1); conviction reversed. Here, in seeking lenient treatment on a pending perjury charge, D offered to assist police in drug investigations. She informed officer that Ross was a drug dealer & arranged to accompany an undercover police officer to Ross' home to purchase drugs. However, no drug transaction took place because D previously had informed Ross that she would be bringing an undercover police officer to Ross' home. Prosecutor then filed false informing charge against D. Ct. finds situation analogous to false pretenses cases & holds conviction for false reporting can be predicated only upon false statement of a past or existing fact, rather than upon promised future conduct. D's conduct merely was promissory of future intended acts upon her part. Held, conviction reversed; remanded with directions to enter acquittal.

K. CRIMES

K.5. Offenses against public administration

K.5.h Sexual Misconduct with Inmates

K.5.d. Ghost employment (Ind. Code 35-44-2-4)

TITLE: Fadell v. State

INDEX NO.: K.5.d.

CITE: (4th Dist. 6/21/83) Ind. App., 450 N.E.2d 109

SUBJECT: Ghost employment - instruction

HOLDING: Tr. Ct. did not err in refusing D's tendered instructions to the effect that a township assessor has discretionary authority to give employees any amount of time off & to have these employees do unrelated work for him during such time off where record does not indicate D expressly gave employees time off & instructions misstate law. Ind. Code 35-22-8-1 through 5 limits any discretion a public employer might have in giving time off. Held, no error.

TITLE: Fadell v. State

INDEX NO.: K.5.d.

CITE: (4th Dist. 6/21/83) Ind. App., 450 N.E.2d 109

SUBJECT: Ghost employment - sufficiency

HOLDING: Evidence of ghost employment was sufficient where one employee testified he did no assessor's work while on payroll but was assigned extensive duties managing assessor's private companies & second employee testified he was assigned duties in assessor's private business & did no assessing work. Jury was entitled to conclude that D knowingly assigned public employees private duties for which they were compensated with public funds. Held, evidence sufficient to sustain conviction.

K. CRIMES

K.5. Offenses against public administration

K.5.e. Impersonation of a public servant (Ind. Code 35-44-2-3)

TITLE: Poole v. State

INDEX NO.: K.5.e.

CITE: (2d Dist. 9/25/90), Ind. App., 559 N.E.2d 1214

SUBJECT: Impersonating police officer - sufficiency; intent

HOLDING: Evidence that D told hospital personnel that he was police officer & requested work release form was sufficient to support conviction for impersonating police officer. Evidence showed that D went to hospital emergency room seeking treatment for injuries. During processing, D requested work release form, which informs employer of employee's treatment at hospital & necessary time off from work, if any. When asked where he worked, D told nurse that he was police officer, & supplied ID numbers for badge, unit, supervisor, vehicle, & district. Nurse suspected information was false, & hospital contacted Sheriff's Department, which sent 2 officers to hospital. D told officers he was Secret Service officer, then told them he was police officer. As result of these representations, D was charged with impersonating police officer, & was convicted at bench trial. On appeal, D argues this evidence was insufficient to support conviction. Impersonating public official is defined at Ind. Code 35-44-2-3, which sets out 2 elements: (1) false representation that declarant is public servant, made with (2) intent to mislead & induce another to submit to false authority or otherwise to act to his/her detriment. Here, it is clear that D made false representation. It is not necessary that hospital staff was actually misled; it is only necessary that D intended to mislead & induce hospital staff to submit to his authority. Intent may be inferred from circumstances surrounding incident. [Citations omitted.] D requested nurse to provide work release form, & supplied false information for completion of form. This evidence supports inference that D intended for hospital staff to rely on his representation & to provide him special medical treatment & work release form. Held, conviction affirmed.

TITLE: Rogers v. State

INDEX NO.: K.5.e.

CITE: (4th Dist., 12-28-00), Ind. App., 741 N.E.2d 393

SUBJECT: Impersonating public servant - evidence sufficient

HOLDING: In prosecution for impersonating public servant, State presented sufficient evidence to show that D falsely represented himself to be police officer - a public servant, in violation of Ind. Code 35-44-2-3. Police officer identified D in Ct. not as fellow law enforcement officer but as security officer whom he had dealt with before. State's witness testified that D borrowed her cell phone instead of notifying other police via official police radio. Witness testified that D performed strip search & body cavity search on her in closed bathroom without gloves or witnesses & without probable cause. Ordinary juror could reasonably infer that no official police search would be conducted in such manner & that therefore D was not law enforcement officer. D's status as security guard did not confer upon him authority to perform acts he did. Although it is possible for private security guard to also have law enforcement powers, merely working as private security guard does not vest that person with auspices of being public servant & law enforcement officer. Held, conviction affirmed.

K. CRIMES

K.5. Offenses against public administration

K.5.f. Official misconduct (Ind. Code 35-44-1-2)

TITLE: Daugherty v. State

INDEX NO.: K.5.f.

CITE: (1st Dist. 7/18/84) Ind. App., 466 N.E.2d 46

SUBJECT: Official misconduct - underlying offense

HOLDING: Ind. Code 35-44-1-2 is not limited to those acts which only public officials are forbidden to commit. Thus, indictment (charging battery as underlying offense) stated offense under Ind. Code 35-44-1-2. Jury's failure to return verdict on battery charge was not inconsistent with its guilty verdict on official misconduct. One element of official misconduct charge was proof that battery was committed. Ct. finds as charged, battery (Class B misdemeanor) was lesser offense of official misconduct (Class A misdemeanor) & "is analogous to a lesser included offense," *citing* Ind. Code 35-41-1-16, & Roddy, App., 394 N.E.2d 1098. Held, no error. Ratliff CONCURS, noting focus must be on whether act was done by public official in course of official duties. Citations omitted.

TITLE: Flick v. State

INDEX NO.: K.5.f.

CITE: (11/3/83) Ind., 455/339

SUBJECT: Official misconduct - sufficiency

HOLDING: Evidence was sufficient to sustain conviction for official misconduct where D, tried as an accessory, paid money to an assistant manager at a license branch in return for 2 learner's permits (one of which he later sold). IC 35-44-1-2 may only be committed by a public servant, which is defined in IC 35-41-1-24. A person is a public servant if authorized to perform an official function on behalf of a governmental entity & is paid by that entity. Evidence was sufficient to establish both requirements. Held, conviction affirmed.

RELATED CASES: Kinnon, 908 N.E.2d 666 (Ind. Ct. App 2009) (evidence sufficient where D admitted that she requested reimbursement for mileage for trips she did not take & that it was not a mistake); Robey, App., 481 N.E.2d 138 (Sheriffs 86, 153; evidence was sufficient to sustain D's conviction for official misconduct where D, special deputy employed as store security guard, offered to forego shoplifter's arrest in exchange for \$50; D was appointed public servant (IC 35-41-1-24) & as special deputy had same duties as county police officer, including mandatory duty to arrest persons committing offenses within deputy's sight; affirmed on rehearing, 484 N.E.2d 628).

TITLE: Heinzman v. State

INDEX NO.: K.5.f.

CITE: (4th Dist., 10-31-08), Ind. App., 895 N.E.2d 716

SUBJECT: Official misconduct - no connection between crimes and official duties

HOLDING: Evidence was insufficient to support D's official misconduct convictions, because offenses were not committed in the course of his official duties as required by Ind. Code 35-44-1-2.

There must be a connection between the charge and the duties of the public office. State v. Dugan, 793 N.E.2d 1034 (Ind. 2003). If the misconduct bears no relation to the official duties, there is no official misconduct. Id. Here, D was employed as a child protective services caseworker and committed various sexual offenses involving minors. State failed to provide cogent argument supported by legal authority explaining why D's actions after he no longer had an open case file on complaining witness (CW) and was no longer acting in any official capacity towards CW amounted to criminal behavior related to the performance of official duties. None of offenses involving CW occurred while D was acting as CW's case manager. D was involved with CW's family in his official capacity for "not longer than a week" and devoted "about 10 to 15 hours" to the family in his official capacity. D established prima facie error in his convictions of official misconduct, as there was no evidence D was performing any "official duties" when the offenses against CW were committed. Held, judgment affirmed in part, reversed in part, and remanded; Vaidik, J., dissenting, noted that D continued working with CW's family in a manner related to his CPS employment throughout the duration of his interactions with CW.

TITLE: Moran v. State

INDEX NO.: K.5.f.

CITE: (1st Dist. 4/18/85) Ind. App., 477 N.E.2d 100

SUBJECT: Official misconduct - sufficiency of indictment

HOLDING: Interlocutory appeal. Allegation that D failed to comply with mandatory statutory duties was sufficient to charge criminal conduct. Ct. distinguishes this case (improper sale/exchange of 3 pieces of city's personal property & improper award of public works contract, all in contravention of statutory procedures) from Pickett, App., 423 N.E.2d 717 (not official misconduct for mayor to suspend enforcement of parking meter ordinance because statute allowed discretion), based upon contrasting statutory duties. Because statutes re sale/exchange of property & award of contracts stated precise procedure for carrying out official duty, D's failure to comply with provision may be prosecuted under official misconduct statute. However, Ct. finds indictment lacks specificity (*citing Gebhard*, App., 459 N.E.2d 58; card at B.10.d) for its failure to specify which of several statutory mandates were not followed & remands for dismissal of all 4 counts. Held, reversed & remanded.

TITLE: State v. Dugan

INDEX NO.: K.5.f.

CITE: (8-22-03), Ind., 793 N.E.2d 1034

SUBJECT: D properly charged with official misconduct

HOLDING: Tr. Ct. erred in dismissing State's official misconduct charges against D. A public servant who knowingly or intentionally performs an act that he is forbidden by law to perform, commits official misconduct under Ind. Code 35-44-1-2. D was a State Excise Police Officer for Indiana State Alcoholic Beverage Commission (ABC). In its indictment for official misconduct, State alleged that D violated Ind. Code 7.1-5-5-2, which states that it is unlawful for an employee of ABC to receive a gratuity, commission, or profit of any kind from a person "applying for or receiving a permit" under Title 7.1. D argued that Ind. Code 7.1-5-5-2 does not prohibit ABC officials from receiving gratuities from persons who already hold permits. Considering goals & policy underlying statute's enactment, Ct. declined to give word "receiving" its plain & ordinary meaning, ie., "coming into possession of." Instead, Ct. interpreted word "receiving" to mean someone receiving the benefits of a permit, which would include a permit holder. Fact that legislature used "applying for or receiving" suggests it intended to include more than just applicants of permits. Moreover, liberal interpretation of statute better effectuates purposes of statute, namely regulating activities concerning alcoholic beverages. Considering public policy & value of ABC permits, Ct. found it hard to believe that legislature purposely excluded prohibition against accepting gratuities from permit holders.

Ct. also disagreed with Ct. App.' conclusion that a person who violates Ind. Code 7.1-5-5-2 may not be charged with official misconduct. Where, as here, multiple statutes are applicable under given circumstances, State has discretion of prosecuting under any or all of applicable statutes. Hendrix v. State, 759 N.E.2d 1045 (Ind. 2001). Held, transfer granted, Ct. App.' opinion at 769 N.E.2d 235 vacated, judgment of Tr. Ct. reversed & remanded with instructions to reinstate official misconduct charges. Dickson & Rucker, JJ., dissenting, believed that majority's expansion of word "receiving" to encompass holder of permit is violation of due process principles -- variously framed as "void for vagueness doctrine," "rule of lenity" & "fair notice requirement."

TITLE: State v. Hardy
INDEX NO.: K.5.f.
CITE: (4/29/2014), 7 N.E.3d 396 (Ind. Ct. App 2014)
SUBJECT: Official misconduct - underlying offense must be criminal
HOLDING: Tr. Ct. properly dismissed charges against D for four counts of official misconduct. A charge for misconduct must rest upon criminal behavior that is related to the performance of official duties. State v. Dugan, 793 N.E.2d 1034 (Ind. 2003) (interpreting "forbidden by law" language of Ind. Code 35-44-1-2 (2010)). Here, four charges were based on ethical and administrative, but not criminal, violations that D allegedly committed between 2008 and 2010, while he was former chairman of the Indiana Utility Regulatory Commission. Held, judgment affirmed.

K. CRIMES

K.5. Offenses against public administration

K.5.g. Perjury (Ind. Code 35-44-2-1)

TITLE: Barker v. State

INDEX NO.: K.5.g.

CITE: (3rd Dist., 6-6-97), Ind. App., 681 N.E.2d 727

SUBJECT: Perjury - evidence insufficient

HOLDING: Because "engine" does not constitute "motor vehicle" under Indiana's statutory definition, evidence could not support conviction for perjury. D pled guilty to federal crime of possessing, with intent to sell, engine with obliterated vehicle identification number. When D subsequently applied to Bureau of Motor Vehicles for renewal of his business license as automobile dealer, renewal application asked whether he had criminal conviction for violation of laws concerning sale, distribution, financing, or insuring of motor vehicles. D answered "no" in response to this question. "Motor vehicle" is defined as "vehicle that is self-propelled," Ind. Code 9-13-2-105(a), while "engine" is specifically defined as "motor vehicle part" under Ind. Code 9-18-8-1. Ct. rejected State's argument that BMV's question asked whether D had committed any criminal act implicating law which also contained provisions relating to motor vehicles. Ct. held that State's argument contravenes principle that perjury must be clear & direct, & not implied or suggested. Griepenstroh, App., 629 N.E.2d 887. Perjury alleged here is not type of unambiguous & direct statement of fact necessary to sustain perjury conviction. Rather, perjury allegation was based on novel interpretation of syntax. Inconsistency with possible auras & penumbras that can be interpreted as emanating from question is not sufficient to sustain conviction for perjury. Held, conviction reversed.

TITLE: Blackburn v. State

INDEX NO.: K.5.g.

CITE: (4th Dist. 7/31/86) Ind. App., 495 N.E.2d 806

SUBJECT: Perjury must be statement of fact rather than conclusion/opinion/deduction

HOLDING: Statements made by D during hearing on guilty plea were legal conclusions; thus when he later recanted them, they could not provide basis for perjury conviction. Alleged false statement which gives rise to perjury charge must be a statement of fact & not a conclusion, opinion, or deduction from given facts. People v. White, 322 N.E.2d 1 (Ill. 1974); 70 CJS Perjury 5. Here, Ct. finds D's representations are legal conclusions re his guilt of crime of confinement rather than factual statements. D made no affirmative representation as to any specific fact. Ct. states it is "troubled by fact that, although our system allows D to withdraw guilty plea, it can then proceed without warning to charge D with perjury for doing so." Ct. believes better practice is that of Fed.R.Crim.P. 11 which requires that D must be advised that Ct. intends to question D under oath, on record, in presence of counsel re offense & that D's answers may later be used against D in prosecution for perjury or false statement. Ct. also concludes Ind. Code 35-44-2-1(a)(2) no longer requires that false statements be made under oath. Omission of oath requirement, in conjunction with absence of warning requirement, places IN D who wishes to withdraw guilty plea in "precarious position." Ct. concludes omission of oath requirement amplifies need for warning requirement. Held, perjury conviction reversed.

TITLE: Fadell v. State

INDEX NO.: K.5.g.

CITE: (4th Dist. 6/21/83) Ind. App., 450 N.E.2d 109

SUBJECT: Perjury - sufficiency

HOLDING: Evidence was sufficient to sustain conviction for conspiracy to commit perjury in an affidavit even though signer was not sworn before signing affidavit. To prove conspiracy, state had to show: (1) D united or combined with signer; (2) for purpose of committing underlying felony. State need not prove underlying felony was accomplished, only that conspirator's purpose was to commit it. Walker, App., 414 N.E.2d 326. Here, D prepared document bearing title "affidavit," a title generally indicating a sworn statement. This affidavit began: "Comes now Dan Gligor & being duly sworn upon this oath deposes & says...." Affidavit concludes with line for notary's signature, stating "subscribed & sworn to before me. ..." Gligor read & signed document. Jury could have concluded that D's & Gligor's intended purpose at time of their agreement was to have latter make a false affidavit under oath. Although Gligor's failure to take oath before signing might indicate contrary intent, Ct. will not reweigh evidence. Held, conviction affirmed.

RELATED CASES: Daniels, App., 658 N.E.2d 121 (State presented sufficient evidence to prove that D made false material statements during rape trial in effort to undermine credibility of witnesses & to persuade jury that his car was not used to commit crimes); Dunnuck, App., 644 N.E.2d 1275 (evidence insufficient); Evans 489 N.E.2d 942 (Crim L 706(2); contradictory/inconsistent testimony by witness does not equal perjury, *citing* Wallace 474 N.E.2d 1006); Cunningham, App., 469 N.E.2d 1 (Perj 10, 33(1); evidence sustained perjury convictions where Ds signed food stamp application that included "certification" section stating all sources of income had been disclosed).

TITLE: Griepenstroh v. State

INDEX NO.: K.5.g.

CITE: (1st Dist., 02-28-94), 629 N.E.2d 887

SUBJECT: Perjury requires knowingly signing false statement

HOLDING: Because State failed to show D knowingly signed false statement, evidence was insufficient to support conviction for perjury. In context of contracts for work with county, Ct. held that one of statements leading to perjury charge had available interpretation that did not make it false, & therefore it could not support perjury conviction. "[C]onviction for perjury may not lie when a person truthfully answers a question subject to more than one reasonable interpretation or signs an ambiguous statement." Other statement was false, but because document was changed after D had gone over it, & D signed it without reading it again, he did not knowingly sign false statement. It is not perjury when D carelessly swears to fact that he would have learned was false, had he been more cautious, Gardner, 97 N.E.2d 921, & negligence or carelessness in reaching conclusion without taking pains to learn truth of facts to which person swears, doesn't corrupt his oath, *Id.* Held, conviction reversed.

TITLE: Lawson v. State
INDEX NO.: K.5.g.
CITE: (12/07/2022), 199 N.E.3d 829
SUBJECT: Perjury and false informing -- police officer's false statements in probable cause affidavit
HOLDING: State presented sufficient evidence to support Defendant police officer's convictions for perjury and false informing. In a probable cause affidavit he prepared for a delinquency case involving resisting and disorderly conduct, Defendant claimed another officer stated she saw the juvenile throw a punch. Inclusion of this false statement in the probable cause affidavit was material. A reasonable juror could determine that Defendant knew that a punch was not thrown and “knowingly” included a false statement in his probable cause affidavit. Further, Defendant’s argument that he did not include a false statement “knowingly” is essentially a request to reweigh the evidence and judge his credibility, neither of which the Court of Appeals may do. Court also found no abuse of discretion in the trial court's refusal to give four of Defendant's proposed jury instructions because they were sufficiently covered by other instructions.

TITLE: State v. Fields

INDEX NO.: K.5.g.

CITE: (1st Dist. 8/24/88) Ind. App., 527 N.E.2d 218

SUBJECT: Perjury - elements; materiality

HOLDING: Tr. Ct. did not err in dismissing perjury count against D based upon false statement that was not material to grand jury investigation. Materiality is element of perjury. [Citations omitted.] Material statements are those which are reasonably calculated to mislead investigation, or have natural tendency to impede, influence, or dissuade grand jury from pursuing investigation. Wilke 496 N.E.2d 616. Question must relate to subject matter of investigation. State v. Kellis 141 N.E.2d 332. Here, grand jury was investigating receipt of stolen goods by fire fighters. False statement for which D is charged concerned smoking marijuana at fire station. This statement is not related to subject matter of investigation. Ct. App. notes that scope of grand jury investigation is not limited by rule of materiality to actions on particular purpose for which it was called. However, State must indicate on record that it is pursuing additional lines of inquiry. Ind. Code 3534-2-5 requires that subpoenas contain statement of general nature of inquiry & set forth advisements to target witnesses. Here, state did not indicate that marijuana use would be investigated. Held, dismissal affirmed.

RELATED CASES: Gaudin, 515 U.S. 506 (issue of materiality is a mixed question of law & fact).

TITLE: State v. Wolff

INDEX NO.: K.5.g.

CITE: (1st Dist. 10/25/89), Ind. App., 545 N.E.2d 39

SUBJECT: D's statements at guilty plea hearing - unrelated to charge; may form basis for perjury prosecution

HOLDING: Tr. Ct. erred in dismissing perjury charge against D based on statements made at guilty plea hearing on separate charge. At guilty plea hearing, D misrepresented his criminal record, as result of which state charged D with perjury. Tr. Ct. granted D's motion to dismiss, & state appeals. Generally, evidence relating to guilty plea or plea negotiations is inadmissible in subsequent proceedings, [Citations omitted], due to public interest in promoting free negotiations. Legislature has passed 2 statutes prohibiting admission of statements from plea negotiations (Ind. Code 35-35-3-4) or hearing (Ind. Code 35-35-1-4(d)) at subsequent proceedings. Interpreting Ind. Code 35-35-1-4(d), Ct. App. held that statements which establish factual basis for offense charged are not admissible in subsequent proceedings. Tyree, App., 518 N.E.2d 814. Here, however, state is not seeking to use statements forming factual basis for, or even related to, charge to which D pled guilty. D argues that if Indiana allows use of his statements, it should adopt Fed.R.Crim.P. 11(e)(6), which allows use of statements made under oath, on record, & in presence of counsel, & following advisement that statements may be used in perjury prosecution. Ct. App. here declines to adopt federal rule, in part because it would allow perjury prosecution even in connection with statements relating to charged offense. Further, those who take oath are already put on notice that they may be subject to perjury prosecution. To admit statements made during plea or sentencing hearing at subsequent perjury prosecution, state must demonstrate that D's statements were: (1) unrelated to offense previously charged; (2) made under oath, & (3) on record. Held, dismissal reversed.

TITLE: Wilke v. State

INDEX NO.: K.5.g.

CITE: (1st Dist. 9/20/86) Ind. App., 496 N.E.2d 616

SUBJECT: "Exculpatory no" defense to perjury rejected on facts

HOLDING: Ct. rejects D's argument, raised first time on appeal, that her simple denial (that burglary occurred during drug transaction) falls under "exculpatory no" exception. Federal Cts. have almost unanimously accepted "exculpatory no" doctrine as defense to 18 U.S.C. 1001. Thrust of theory is that if person answers with simple denial in response to investigator's question, which would otherwise yield incriminating answer if answered truthfully, person cannot be convicted under 1001. Prevailing rationale is that application of 1001 to simple denial would violate individual's right against selfincrimination. [Citations omitted.] Ct. observes "exculpatory no" doctrine is not without limitation. Situation must involve incriminating questions & if questioning is part of administrative function, defense fails. Ct. declines to adopt "exculpatory no" doctrine as defense to perjury statute (Ind. Code 35-44-2-1) for 2 reasons: (1) federal Cts. have not adequately explained absence of "exculpatory no" defense to convictions under 18 U.S.C. 1621, the federal perjury statute; (2) case under consideration presents an appropriate factual posture inasmuch as D, not police, initiated investigation. Held, perjury conviction affirmed.

K. CRIMES

K.5. Offenses against public administration

K.5.h Sexual Misconduct with Inmates

TITLE: Hubbard v. State

INDEX NO.: K.5.h.

CITE: (3rd Dist; 06-29-06), Ind. App., 849 N.E.2d 1165

SUBJECT: Sexual misconduct with inmates includes while inmates are on leave from facility

HOLDING: There was sufficient evidence that D committed sexual misconduct. A service provider who knowingly or intentionally engages in sexual intercourse or deviate sexual conduct with a person who is subject to lawful detention commits sexual misconduct. A "service provider" is defined as "a public servant or other persons employed by a governmental entity or another person who provides goods or services to a person who is subject to lawful detention." Ind. Code 35-44-1-5. The Legislature did not include an exception for part-time, temporary or off-duty employees. Here, the D concedes that she was an employee of the Goshen Work Release Center & that she knew Ross was a detainee when she had sexual intercourse with him. The fact that the intercourse occurred while Ross was on leave from the facility does not matter.

Further, the criminalization of consensual sex between a service provider & a detainee does not violate the D's right to privacy because the restriction of the right to privacy is based on a legitimate governmental interest, i.e., avoiding favoritism toward certain detainees or unfounded retaliation against them that could undermine the integrity of the correctional facility. Held, judgment affirmed.

K. CRIMES

K.5. Offenses against public administration

K.5.i Failure to deposit public funds (IC 5-13-14-3)

TITLE: Cole v. State

INDEX NO.: K.5.i.

CITE: (4th Dist., 7-2-03), App., 790 N.E.2d 1049

SUBJECT: Knowing failure to deposit public funds - proportionality

HOLDING: I.C. 5-13-14-3 provides that a “public official who knowingly fails to deposit public funds, or knowingly deposits or draws any check or negotiable order of withdrawal against funds except in manner prescribed in this article, commits a class B felony.” D challenged proportionality of this statute, arguing it violates Article I, Section 16 of Indiana Constitution because: 1) other class B felonies are more serious crimes than knowing failure to deposit public funds; 2) crime only requires “knowing” mens rea, whereas crime of theft, a class C felony, requires proof of a “knowing or intentional” mens rea, & 3) penalty remains class B felony irrespective of whether small or large amounts of money are involved.

A sentence may be unconstitutional by reason of its length, if it is so severe & entirely out of proportion to gravity of offense committed as to shock public sentiment & violate judgment of a reasonable people. Teer v. State, 738 N.E.2d 283 (Ind. Ct. App 2000). Ct. held that classifying a knowing failure to deposit public funds as a class B felony does not shock public sentiment or violate judgment of reasonable people. First, a public official owes an undivided duty to public whom he serves. Instant offense harms all members of public served by public officials, not just an individual property owner. Second, because crime is more difficult to detect, it may justify a stricter penalty for sake of deterrence. It does not shock public conscience to penalize more harshly those harms that may be more pervasive yet difficult to detect. Thus, Ind. Code 5-13-14-3 does not violate Article I, Section 16 of Indiana Constitution. Held, judgment affirmed.

RELATED CASES: Foreman, App., 865 N.E.2d 652 (classifying disclosure of confidential information relating to lottery as class A felony is not disproportional under Art. I, ' 16 of Ind. Constitution).

TITLE: Taylor v. State
INDEX NO.: K.5.i.
CITE: (1st Dist., 3-25-96), Ind. App., 663 N.E.2d 213
SUBJECT: Failure to deposit public funds - evidence sufficient
HOLDING: Evidence was sufficient to support convictions under Ind. Code 5-13-14-3 for failure to deposit public funds. Evidence showed that D, who was appointed director of community center, was "public officer" as defined by Ind. Code 5-13-4-21, Ct. also held that community center was "political subdivision" & "municipal corporation" as defined by statutes, where center was established by law to function as part of government of political subdivision under Ind. Code 5-13-4-21. Held, conviction affirmed.

K. CRIMES

K.6. Interference with governmental operations

K.6.a. Assisting a criminal (Ind. Code 35-44-3-2)

TITLE: Clements v. State

INDEX NO.: K.6.a.

CITE: (4th Dist., 5-18-04), Ind. App., 808 N.E.2d 198

SUBJECT: Assisting a criminal - evidence insufficient; failure to follow police officer's commands to get wife & leave

HOLDING: State presented insufficient evidence to convict D for Assisting a Criminal. Charge arose after state trooper pulled over another individual suspected of drug dealing, who had previously had his truck parked in front of D's inn. While trooper was questioning suspect, D & his wife pulled up & D's wife left the vehicle to ask trooper what the problem was. D then "hollered [the trooper] over to his vehicle" & complained that the trooper was harassing him & his customers. The D had made similar complaints to the state trooper's post in the past. While discussion took place, suspect attempted to get rid of suspected drugs which were not tested because only a small amount existed. The suspect was arrested for resisting law enforcement & D was arrested & later convicted for assisting a criminal by "distracting & hindering" police. The trooper testified at trial that D "didn't attempt to interfere but he didn't follow my commands to get his wife & leave." Ct. noted that men have not been legally responsible for the actions of their wives since the nineteenth century. Although not relying on state constitution for decision, Ct. noted D's speech may have been "squarely within the public pale," but ultimately decided case based on State's failure to show that D harbored, concealed or assisted a criminal as necessary to support conviction. Overton v. State, 317 N.E.2d 467 (Ind. Ct. App 1971). Held, judgment reversed.

TITLE: Frost v. State

INDEX NO.: K.6.a.

CITE: (4th Dist. 8/30/88) Ind. App., 527 N.E.2d 228

SUBJECT: Assisting a criminal - not applicable to delinquent child; fugitive from justice must flee from one state to another

HOLDING: Where evidence showed only that D concealed delinquent child, it was insufficient to support conviction for assisting a criminal or fugitive from justice. Person assisted must have committed crime or be fugitive from justice. Ind. Code 35-44-3-2. Proceedings in juvenile Ct. are civil rather than criminal. State ex rel. Atkins v. Juvenile Ct. of Marion County, 247 N.E.2d 53. Act of juvenile delinquency is not crime. Bible 254 N.E.2d 319. Here, state presented no evidence juvenile committed crime. In particular, there was no evidence that he was waived from juvenile to adult Ct. Thus, he could not have committed crime, as required by Ind. Code 35-44-3-2. Further, because D was charged with felony, state had burden of proving that person assisted had committed felony. There is also no evidence that person assisted was fugitive from justice. Fugitive from justice is person who is charged with crime in one state & flees to another. [Citations omitted.] Held, reversed & remanded with instructions to dismiss. Miller, J., CONCURS WITH OPINION.

RELATED CASES: Lafferty, App., 899 N.E.2d 683 (where State failed to prove D fled from one state to another, state presented insufficient evidence that D harbored a fugitive from justice).

TITLE: Gulbranson v. State

INDEX NO.: K.6.a.

CITE: (08-17-11), 953 N.E.2d 533 (Ind. Ct. App 2011)

SUBJECT: Assisting a criminal - evidence sufficient

HOLDING: On appeal of her conviction for Class C felony Assisting a Criminal, D argued that the evidence was insufficient to sustain her conviction because State failed to prove that the persons she assisted had been convicted of committing a Class A felony. See, e.g., McKnight v. State, 658 N.E.2d 559 (1995). D's claim, however, is misplaced because current version of Ind. Code 35-44-3-2, which was in effect at time D assisted co-Ds, no longer requires State to prove that the assisted person has been prosecuted for and convicted of a Class A felony. See Ind. Code 35-44-3-2(b). As such, D's reliance on authority interpreting prior versions of Ind. Code 35-44-3-2 is misplaced. Held, judgment affirmed.

TITLE: Jacobs v. State

INDEX NO.: K.6.a.

CITE: (7-7-20), Ind. App., 148 N.E.3d 1175

SUBJECT: Assisting a criminal -- lying to provide false alibi was sufficient evidence of intent to hinder punishment

HOLDING: In contrast to Class A misdemeanor false informing, the offense of assisting a criminal requires the State to prove Defendant's action of lying to police assisted a criminal and was done with intent to hinder the suspect's apprehension or punishment See Ind. Code § 35-44.1-2-5. Here, Court found sufficient evidence that Defendant lied to police by providing a false alibi for a murder suspect with the intention of hindering the suspect's punishment and was therefore sufficient to support her conviction for assisting a criminal as a Level 5 felony rather than false informing.

TITLE: Jaunese v. State

INDEX NO.: K.6.a.

CITE: (2nd Dist., 11-30-98), Ind. App., 701 N.E.2d 1282

SUBJECT: Assisting criminal - evidence insufficient

HOLDING: Evidence was insufficient to support conviction for assisting criminal. Ind. Code 35-44-3-2 requires State to prove that D was not parent, child or spouse of another person who has committed crime or is fugitive from justice. State relied on following evidence to show that D & criminal she allegedly assisted (Golden) did not stand in one of relationships enumerated in statute: 1) Golden's references to Lori, his fiancée at time of crime; 2) letter written by Golden referring to both D & Golden's mother; & 3) testimony from which jury could estimate D's age. State argued that because Golden testified to having girlfriend when D allegedly assisted him, jury could infer Golden was not married to D. Ct. first noted it is curious that State relied on circumstantial evidence to prove element which is easily proven through direct evidence. Second, it is unreasonable to conclude that person is not married for sole reason that he or she has significant other. Without any other evidence to contrary, existence of significant other is too remote to prove person is not married. Held, conviction reversed.

RELATED CASES: Davis, App., 892 N.E.2d 156 (evidence sufficient where D's marriage was entered into in Kentucky under false pretenses to purposely evade Indiana law).

TITLE: Jones v. State

INDEX NO.: K.6.a.

CITE: (12/30/2014), 22 N.E.3d 877 (Ind. Ct. App 2014)

SUBJECT: Assisting A Criminal - Sufficiency

HOLDING: To prove a charge of assisting a criminal, the state need not show that the D knew the nature and level of offense the principal was committing. Ind. Code required, at the time of D's offense, only that the D acted "with intent to hinder the apprehension or punishment of the other person." In order to prove this intent, the state need prove only that the D had reason to believe that the other party was subject to apprehension or punishment, or in other words, that the other person had committed a crime. Knowledge of the nature and level of the offense is not required. Held, conviction affirmed.

TITLE: Joseph v. State

INDEX NO.: K.6.a.

CITE: (2nd Dist., 1-5-96), Ind. App., 659 N.E.2d 676

SUBJECT: Assisting a criminal – evidence insufficient

HOLDING: Separate conviction for assisting a criminal could not be supported where D's actions, taken after crime of theft was committed, merely represented D's continuing scheme or plan to aid her accomplices in theft. To facilitate theft of her father's safe, D provided accomplices with keys to her truck & house. Ct. concluded that these acts of aiding theft made D an active participant in crime, despite fact she did not go to house & physically steal safe. Following Smith v. State (1982), Ind., 429 N.E.2d 96, & Harris v. State (1993), Ind., 617 N.E.2d 912, Ct. held that facts here were insufficient to show that D committed separate & distinct offense of assisting criminal after commission of theft itself. Fact that D assisted accomplices in evading police after they took safe merely reveal D's attempt to hide her involvement in crime. Held, reversed & remanded, Chezem, J., dissenting.

RELATED CASES: Woods, 963 N.E.2d 632 (Ind. Ct. App 2012) (as in Joseph, D's actions after accomplice stole purse merely represented her continuing scheme or plan to aid accomplice in the robbery; allegedly inconsistent guilty verdicts of robbery and assisting a criminal do not necessitate a new trial or reversal of the robbery conviction; Tr. Ct. properly entered judgment of conviction and sentenced D for robbery only); Newgent, App., 897 N.E.2d 520 (where D was convicted of being an accomplice, her conviction for assisting a criminal could not stand even if both convictions were based on different evidence).

TITLE: McKnight v. State

INDEX NO.: K.6.a.

CITE: (11-16-95), Ind., 658 N.E.2d 559

SUBJECT: Mandated consistency of verdicts – assisting criminal

HOLDING: After alleged principal is acquitted in separate trial, accessory after fact cannot be found guilty under Indiana's Assisting a Criminal statute, Ind. Code 35-44-3-2. Unlike Aiding, Inducing, or Causing statute, which explicitly changes common law rule that principal must be tried before accessory, Assisting Criminal statute is silent on issue. Although Ind. Code 35-44-3-2 does not make person found guilty of assisting criminal guilty of same crime as principal, classification of crime is still dependent on level of guilt of person assisted. Here, D was acquitted of murder but convicted of Assisting a Criminal. Principal in alleged crime had already been acquitted in separate trial. Ct. mandated consistency between two verdicts, noting that one cannot be convicted of Assisting a Criminal if there is no criminal to assist. Held, conviction reversed, remanded with instructions to discharge D.

RELATED CASES: Myers, App., 765 N.E.2d 663 (although there was insufficient evidence to support Class D felony conviction because person assisted was not convicted, there was sufficient evidence to convict D for assisting criminal as Class A misdemeanor). **Note:** Ind. Code 35-44-3-2 (amended effective July 1, 1999) no longer requires State to prove that the assisted person has been prosecuted for and convicted of a Class A felony).

TITLE: Moore v. State

INDEX NO.: K.6.a.

CITE: (4th Dist. 2/22/83) Ind. App., 445 N.E.2d 576

SUBJECT: Assisting a criminal – sufficiency

HOLDING: Driving car for person who follows & murders or attempts to murder occupants of another car, waiting for person while shots are fired & following victims' car after incident is sufficient evidence to sustain conviction for assisting a criminal. Ind. Code 35-44-3-2. See also Smith 429 N.E.2d 956. Here, D drove car which twice signaled victims' car to stop. Shotgun was observed on front seat of D's car. D waited while Wilson shot victims & drove away after Wilson returned to D's car. Later D pulled into inn where victims went for help; Wilson was still in D's car. Held, evidence supports conviction.

TITLE: Taylor v. State

INDEX NO.: K.6.a.

CITE: (2d Dist. 2/24/83) Ind. App., 445 N.E.2d 1025

SUBJECT: Assisting a criminal – sufficiency

HOLDING: Evidence of D's possessory interest in house & her presence with co-occupant when police entered to serve arrest warrant on individual found hiding in storage trunk in living room was insufficient to sustain conviction of assisting a criminal. Here, co-occupant opened door to police. Both co-occupant & D asserted that they knew neither arrestee nor his whereabouts. D's statement to police was affirmative act constituting assistance only if it could reasonably be inferred that D knew of arrestee's presence in jointly occupied house at the time she denied knowledge of his whereabouts. Held, conviction reversed. (D's criminal conversion conviction was affirmed).

K. CRIMES

K.6. Interference with governmental operations

K.6.b. Escape (Ind. Code 35-44-3-5)

TITLE: Anglin v. State

INDEX NO.: K.6.b.

CITE: (3rd Dist., 5-13-03), Ind. App., 787 N.E.2d 1012

SUBJECT: Escape – evidence sufficient; “detention for law enforcement purposes”

HOLDING: A Tr. Ct.’s order that a D wait for police to arrive & transport him so that he may serve his sentence serves as a valid lawful detention for purposes of escape statute, Ind. Code 35-44-3- 5. A person who intentionally flees from lawful detention commits escape. “Lawful detention,” as defined in Ind. Code 35-41-1-18(a), includes “any other detention for law enforcement purposes.” Ct. noted that statute does not explicitly limit its application to situations in which a law enforcement officer has control of an individual. What is critical in determining meaning of “any other detention for law enforcement purposes” is that an individual is being detained so that he is subject to legitimate law enforcement purposes.

Here, at end of sentencing hearing, Tr. Ct. ordered D to wait in hall for transport officer from sheriff’s department to come & pick him up. The Tr. Ct.’s Order indicated that sentence was to begin immediately, that actual incarceration would take place momentarily, & that D was being turned over to sheriff’s department as soon as hearing was over. Instead of waiting in hall as ordered, D walked out of Ct. house & was apprehended approximately two weeks later in another county. Law enforcement purpose for which D was ordered to wait in hallway was for transportation to jail & incarceration to serve sentence which he had just been ordered to serve. While initial detention itself was not performed by law enforcement officer, that is not fatal to conviction for escape as charged by State. D was “detained” by Tr. Ct. in that he was not free to leave building as soon as he was informed that sheriff’s department would pick him up at designated location in Ct. house. That D was not in physical custody of transport officer at time that he fled does not exclude conclusion that he was in “detention for law enforcement purposes.” Held, conviction affirmed.

RELATED CASES: Rowe, App., 813 N.E.2d 1232 (Tr. Ct.’s order that D report to jail on a specified date to begin serving his sentence constituted a valid “lawful detention” for purposes of failure to return to lawful detention statute, Ind. Code 35-44-3-5(c)).

TITLE: Brown v. State

INDEX NO.: K.6.b.

CITE: (2nd Dist., 10-16-08), Ind. App., 894 N.E.2d 598

SUBJECT: Escape - failure to instruct on unauthorized absence from home detention

HOLDING: In escape prosecution, Tr. Ct. did not commit fundamental error in failing to instruct jury about offense of unauthorized absence from home detention. A person who knowingly or intentionally violates a home detention order or intentionally removes an electronic monitoring device commits escape, a Class D felony. Ind. Code 35-44-3-5(b). However, leaving one's home without permission while on home detention can be charged as "unauthorized absence from home detention," a Class A misdemeanor under Ind. Code 35-38-2.5-13. Ind. Code 35-38-2.5, which is referenced in defining the offense of unauthorized absence from home detention, provides for home detention as a condition of probation. Thus, Court concluded that the misdemeanor offense of unauthorized absence from home detention applies only when the D is on home detention as a condition of probation. Here, D was on home detention as an executed sentence, so the offense could not apply to him. Held, judgment affirmed; Baker, C.J., concurring, criticized majority's "overly technical" interpretation of statutes and believes that different offenses are part of a legislative scheme that provides "flexibility to prosecutors in charging [crimes] and to juries in crafting a verdict."

RELATED CASES: Kilgore, 922 N.E.2d 114 (Ind. Ct. App 2010) (no error in refusing to instruct jury as to unauthorized absence because it was neither an inherently nor factually included offense in this case).

TITLE: Carpenter v. State

INDEX NO.: K.6.b.

CITE: (12/5/78), Ind. App., 382 N.E.2d 1026

SUBJECT: Escape -- defects in arrest do not justify escape

HOLDING: D was incarcerated in DeKalb County Jail after being arrested for theft. D escaped, was apprehended same day, & then escaped again while awaiting trial. He was caught five months later & convicted of both jail breaking offenses by jury. D appealed & claimed that he was unlawfully confined when he escaped from jail. D argued that he had been unlawfully confined because of his original arrest for theft. He claimed that there had been illegal search of his car, unlawful interrogation of him after his arrest; deprivation of counsel, & lack of probable cause. Ct. held that it was unnecessary to discuss alleged defects since instant case was controlled by Johnson, 282 N.E.2d 802, in which Indiana S.Ct. held that D was lawfully confined where commitment order was valid on its face. Here, warrant issued for D's arrest was valid on its face & D did not contest that fact on appeal. Since D had been confined in jail by virtue of arrest warrant valid on its face, he was lawfully confined. Therefore, even if D had established such defects surrounding his original arrest for theft as to require his release on appeal or through habeas corpus proceedings, that nevertheless would not provide justification for escaping from DeKalb County Jail on either occasion. Held, conviction affirmed; DeBruler, C.J., concurring.

TITLE: Evans v. State

INDEX NO.: K.6.b.

CITE: (7/20/2017), 81 N.E.3d 634 (Ind. Ct. App 2017)

SUBJECT: Escape - erroneous mens rea instruction did not constitute fundamental error

HOLDING: Although improper "knowingly" mens rea language in escape instruction was problematic, instructional error did not deprive D of a fair trial. Indiana Code § 35-44.1-3-4(a) states that a person who "intentionally flees" commits the crime of escape, but the jury instructions indicated the crime was defined by "knowingly or intentionally" fleeing. *Citing Ramsey v. State*, 723 N.E.2d 869 (Ind. 2000), Court concluded the instructions "sufficiently informed the jury of the proper mens rea which the State was required to prove beyond a reasonable doubt." The correct "intent to flee" mens rea was listed during the State's closing argument, final instructions and charging information. In the context of all the information given to the jury, the escape instructions informed the jury that the State was required to prove beyond a reasonable doubt that D intentionally fled from lawful custody. Following *Newman v. State*, 690 N.E.2d 735 (Ind. Ct. App 1998), Court also held that D's crimes of unlawful possession of a syringe and escape were part of two distinct criminal episodes because a full account of the individual crimes can be given without reference to the other. Thus, Tr. Ct. did not abuse its discretion when it ordered the sentences for each offense to be served consecutive to one another. Held, judgment affirmed.

TITLE: Giden v. State

INDEX NO.: K.6.b.

CITE: (06/24/2020), Ind. Ct. App., 150 N.E.3d 654

SUBJECT: Felony escape conviction relating to pretrial home detention upheld but Court of Appeals encourages legislature to reconsider penalties

HOLDING: Defendant was placed on pretrial home detention after being charged with Level 5 and Level 6 felonies. He was subsequently charged and convicted of two counts of Level 6 felony escape. Evidence to support the escape charges was that GPS showed he left his residence. On appeal, Defendant argued the escape statute under which he was convicted, I.C. 35-44.1-3-4(b), violates the Proportionality Clause of Article 1, Section 16 of the Indiana Constitution. That statute, which makes the violation of a home detention order a Level 6 felony, runs afoul of the Proportionality Clause because the unauthorized absence statute, I.C. 35-38-2.5-13, provides that the unauthorized absence from home detention is a Class A misdemeanor. Defendant argued “common sense and sound logic dictate that (the unauthorized absence statute) should apply equally to a person placed on home detention as a condition of pre-trial release” in order to comply with Indiana’s Proportionality Clause. He pointed out a “presumptively innocent defendant” placed on home detention as a condition of pretrial release “can receive a harsher penalty” than an already-convicted offender. The Court of Appeals found the unauthorized absence statute “applies only to cases where the offender has been placed on home detention as a condition of probation.” Since Defendant was on home detention as a condition of pretrial release and not because he was on probation, the unauthorized absence statute is not applicable. In a footnote, the Court of Appeals expressed concern that Defendant now had two felony convictions for relatively minor violations and encouraged the legislature to amend the escape statute to include staggered penalties based upon type of violation. Defendant also argued as fundamental error that he should have received an instruction as to the unanimity of the verdict but Court of Appeals determined the jury was not improperly instructed and evidence was sufficient to support conviction. Held, convictions affirmed.

TITLE: Grabarczyk v. State

INDEX NO.: K.6.b.

CITE: (7-10-02), Ind. App., 772 N.E.2d 428

SUBJECT: Escape - evidence sufficient; community corrections program as condition of bond

HOLDING: D argued he could not be convicted of escape because he was not subject to a lawful detention. D had been placed on home detention with work release as condition of bond. D was convicted of escape under Ind. Code 35-44-3-5(b), which does not require lawful detention. Statute only requires violation of home detention order or removal of electronic monitoring device. Moreover, even if lawful detention was required element of offense, it was satisfied. Tr. Ct. had statutory authority under Ind. Code 11-12-1-2.5 to place D in community corrections program on pretrial home detention. D's argument that community corrections programs cannot be utilized in pretrial home detentions under Ind. Code 35-38-2.6-1 was misplaced because article 38 of Indiana Code only applies to criminal proceedings following dismissal, verdict, or finding. D was required to submit to pretrial home detention as condition of bond. Held, judgment affirmed.

TITLE: Gordon v. State

INDEX NO.: K.6.b.

CITE: (1/24/2013), 981 N.E.2d 1215 (Ind. Ct. App 2013)

SUBJECT: Escape - home detention violation can be misdemeanor or Class D felony

HOLDING: The rule of lenity does not require a D who violates home detention as a condition of probation to be charged with a class A misdemeanor rather than a class D felony. The rule of lenity requires that penal statutes be construed strictly against the State and any ambiguities resolved in favor of the accused. However, the rule of lenity does not apply when the court is faced with two specific statutes, which are not ambiguous. Here, D was serving an executed sentence on home detention when he left his house without authorization. D was convicted of class D felony escape, which required the State to prove that he knowingly or intentionally violated a home detention order or intentionally removed his electronic monitoring device or GPS tracking device. Ind. Code 35-44.1-3-4. However, Ind. Code 35-38-2.5-13 states that an offender who leaves his home in violation of the statute requiring him to remain confined in his home without documented permission from the supervising entity commits unauthorized absence from home detention, a Class A misdemeanor. First, Ind. Code 35-38-2.5-13 only applies when the D is serving his home detention as a condition of probation, and here, D was on home detention as an executed sentence. Regardless, the two statutes are unambiguous. Both statutes put the offender on notice of the conduct that will result in a Class D felony escape conviction or a Class A misdemeanor unauthorized absence from home detention conviction. It was within the prosecutor's discretion to determine which charge was warranted by D's conduct. Held, judgment affirmed. NOTE: These statutes may violate the Proportionality Clause. Poling v. State, 853 N.E.2d 1270 (Ind. Ct. App 2006) (where the same act constituted two different level of offenses, the Proportionality Clause of the Indiana Constitution was violated).

TITLE: Huffman v. State

INDEX NO.: K.6.b.

CITE: (1st Dist., 12-21-95), Ind. App., 659 N.E.2d 214

SUBJECT: Escape - evidence sufficient

HOLDING: Indiana's Escape statute, Ind. Code 35-4-3-5(a), does not require that prisoner escape from grounds of prison or detention facility. Statute defines crime of Escape as "intentionally flee[ing] from lawful detention." Here, D fled from cottage on grounds of Boys' School where he had been lawfully detained, but never left Boys' School property. D admitted that he had intended to leave Boys' School property. Evidence was sufficient to support completed crime of Escape. Held, judgment affirmed.

RELATED CASES: Fisher, 294 N.E.2d 632 (circumstantial or direct evidence supporting each element of attempted escape is sufficient to convict D).

TITLE: Keith v. State

INDEX NO.: K.6.b.

CITE: (1/11/2018), 91 N.E.3d 1029 (Ind. Ct. App 2018)

SUBJECT: For person on home detention, home is place of "lawful detention" under escape statute

HOLDING: Sufficient evidence supported D's Level 6 felony escape conviction because her home qualified as a place of "lawful detention." See Ind. Code § 35-44.1-3-4(c) (escape statute). D was convicted of an undisclosed crime and was ordered to serve 180 days on home detention. She was allowed to leave home only to attend probation appointments and have her anklet monitoring device maintained. When she met with her probation officer, she was fitted with the monitoring device, and her probation officer told her "to go directly home." D visited various locations before going home. After she went home, she later left home for unauthorized reasons. For purposes of home detention, D's home was the place of lawful detention, and she escaped from it first by not going there immediately from the home detention office and second by leaving again later in the day. See, e.g., Grabarczyk v. State, 772 N.E.2d 428, 432 (Ind. Ct. App. 2002). Further, contrary to D's argument, the monitoring device was not the detention from which D had to flee to be guilty of escape. Instead, her escape was effectuated by not going directly home and later leaving her home. Held, judgment affirmed.

TITLE: Leshore v. State

INDEX NO.: K.6.b.

CITE: (3rd Dist. 9-13-01), Ind., 755 N.E.2d 164

SUBJECT: Escape - "lawful detention" found despite invalid writ of attachment

HOLDING: Where police officer places a person in handcuffs pursuant to writ of body attachment, person is "lawfully detained" within meaning of escape statute even though writ later proves to be defective. Here, sheriff went to D's home to execute writ of body attachment. Although not facially invalid, the writ was defective as matter of law because it did not include amount for bail or escrow. While being detained based upon provision of writ, D slipped his hands from handcuffs & fled residence. Offense of escape occurs when person "intentionally flees from lawful detention." Ind. Code 35-44-3-5. Ind. Code 35-41-1-18 defines "lawful detention" as "(1) arrest;...[or] (10) any other detention for law enforcement purposes." Notwithstanding fact that writ was invalid, since police officer was engaged in law enforcement activity at time of arrest, D was lawfully detained. Person seized through issuance of defective writ of body attachment may have civil rights claim or cause of action in tort against those responsible for its issuance. However, fact that writ is defective does not control whether officer is engaged in law enforcement activity at time writ is served. Just as citizen may not resist arrest by police officer even if arrest later proves to be unlawful, a citizen may not escape from police officer's detention even if grounds upon which detention is based are later determined to be defective. Held, transfer granted, Ct. App.' decision at 739 N.E.2d 1075 vacated, conviction affirmed.

TITLE: McGraw v. State
INDEX NO.: K.6.b.
CITE: (4th Dist. 3/2/87), Ind. App., 504 N.E.2d 345, *aff'd*, 514 N.E.2d 621 (Ind. 1987)
SUBJECT: Escape - sufficiency
HOLDING: Evidence was sufficient to sustain conviction for escape where D was told he was under arrest, struggled with officer & ran away. Here, D contends that because officer was only able to place one handcuff on his wrist before struggle ensued, he was never under "lawful detention" pursuant to escape statute. See Ind. Code 35-44-3-5(a). Arrest occurs when officer interrupts freedom of accused & restricts accused's liberty of movement. Phillips 492 N.E.2d 10; Armstrong 429 N.E.2d 647. Ct. finds officer interrupted D's freedom & liberty of movement. Held, conviction affirmed.

RELATED CASES: Hart, App., 671 N.E.2d 420 (evidence sufficient); Isom, App., 479 N.E.2d 61 (D successfully escaped from squad car & later injured officer who attempted to capture him; Ct. finds D was still in process of fleeing officer, thus, evidence was sufficient to justify denial of D's motion for directed verdict; Ct. rejects D's reliance on Utley 281 N.E.2d 888, which held one cannot escape from constructive custody; Utley failed to return after temporary release to look for a job).

TITLE: Mesarosh v. State

INDEX NO.: K.6.b.

CITE: (1st Dist., 1-12-04), Ind. App., 801 N.E.2d 200

SUBJECT: Escape - evidence insufficient

HOLDING: Evidence was insufficient to support D's conviction for escape as a Class C felony. Town marshal stopped D's truck, advised that a body attachment had been issued for him & informed him that he was under arrest. However, D convinced the marshal to allow him to drop off his passenger & take his truck back home while the marshal followed him. After parking his truck, D fled on foot & was not apprehended until several months later.

Ind. Code 35-44-3-5(a) provides that a person who intentionally flees from lawful detention commits escape. Ct. found that although D's freedom of movement was initially restricted to constitute detention, that detention ended when marshal allowed D to leave the scene of the detention driving his truck. D was neither under arrest when he fled nor surrendered, & thus could not escape. Ct. distinguished Anglin v. State, 787 N.E.2d 1012 (Ind. Ct. App.2003), which upheld escape conviction where an individual fled from a Ct. house after being sentenced & informed that his sentence began immediately. Ct. noted in that case analysis focused on who was performing the detention rather than whether detention actually existed. Because evidence clearly supported a conviction of lesser included offense of failing to return to lawful detention as Class D felony, Ct. remanded with instructions to enter a judgment for that offense. Held, judgment reversed & remanded with instructions.

TITLE: Russell v. State

INDEX NO.: K.6.b.

CITE: (6/20/2022), Ind. Ct. App., 189 N.E.3d 1160

SUBJECT: Invalid home detention order could not be basis for escape charge

HOLDING: Trial courts have two options for imposing home detention following a conviction: 1) home detention as a condition of probation under Ind. Code § 35-38-2.5; and 2) home detention as a direct commitment to Community Corrections under Ind. Code § 35-38-2.6. A trial court must enter a home detention order when a defendant is sentenced to home detention as a condition of probation. Here, after pleading guilty to misdemeanor theft, Defendant was sentenced to one year in the Department of Correction but was permitted to serve her sentence on home detention through community corrections. Defendant was later charged with level 6 felony escape for allowing the battery on her ankle bracelet to die in violation of her home detention order. The Court of Appeals reversed the trial court's denial of motion to dismiss the felony escape charge, finding Defendant as a misdemeanant was ineligible for direct placement on home detention and she was not placed on home detention as a condition of probation. Thus, Defendant could not be charged with escape for violating a non-existent home detention order.

TITLE: T.D. v. State

INDEX NO.: K.6.b.

CITE: (2nd Dist., 11-13-08), Ind. App., 896 N.E.2d 547

SUBJECT: Escape - insufficient evidence of lawful detention; non-secure juvenile facility

HOLDING: State presented insufficient evidence to support D's delinquency adjudication for escape, because it failed to show that she intentionally fled from lawful detention when she refused to return to Lagota Academy. Definition of "lawful detention" in Ind. Code 35-44-3-5(a) includes "detention in a facility for custody of persons alleged or found to be delinquent children." In order to prove that D fled from lawful detention, State was required to show that she fled from commitment to the DOC, a juvenile detention facility, a shelter care facility, or a secure private facility. See Ind. Code 31-37-19-6(b) (describing facilities in which a court may order delinquent children to be detained).

Here, evidence did not show that D was in lawful detention when she fled from Lagota Academy personnel following her court hearing in another case. Record showed that D's placement in Academy is not a suspended commitment to the Department of Correction. In its closing argument at denial hearing, State admitted that the Academy is a "non-secure" facility and did not show that the Academy is a secure private facility or shelter care facility licensed by the State. Held, D's petition for rehearing granted, delinquency adjudication reversed.

TITLE: Triplett v. State

INDEX NO.: K.6.b.

CITE: (2nd Dist., 7-25-96), Ind. App., 669 N.E.2d 993

SUBJECT: Escape - element of lawful detention

HOLDING: Ind. statute defining "lawful detention" explicitly provides that person is under lawful detention while in custody during transportation to or from penal facility for purpose of obtaining medical treatment or diagnosis. Ind. Code 35-41-1-18. Here, while being held on unspecified charges, D had been taken to hospital ward that was under control of sheriff's department. Employee of police department who had responsibility of transporting D from hospital ward back to jail had taken custody of D from sheriff's department personnel at ward. D broke free from officer's grasp & fled while climbing into police paddy wagon. D argued that officer's testimony that D was being held on other charges was inadequate to prove that detention was lawful. Ct. held that precise reasons underlying detainment are not necessarily required if lawful detention element can otherwise be inferred from evidence before trier of fact. Evidence was sufficient to prove that D was lawfully detained when he fled from officer. Held, conviction affirmed.

TITLE: Williams-Bey v. State

INDEX NO.: K.6.b.

CITE: (3/28/2016), 51 N.E.3d 1261 (Ind. Ct. App 2016)

SUBJECT: D's protestation of innocence as to Class B-level enhancement for escape

HOLDING: Post-conviction court clearly erred when it found that D's statements denying culpability for Class B-level enhancement for escape with which he was charged failed to amount to a protestation of innocence. In being examined as to the accuracy of the factual basis during change-of-plea hearing, D stated he was aware that an officer was harmed in the process of arresting him after he fled from custody, but acknowledged that it occurred only in the process of the arrest, suggesting that it was not intended. Whether it is required that a D had the intent to cause the injury in order to support the "inflicting injury" enhancement remains unsettled. Cf. Moore v. State, ___ N.E.3d ___ (Ind. Ct. App 2016) and Smith v. State, 21 N.E.3d 121 (Ind. Ct. App 2014) with Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App 2006).

Regardless, D's statements during the change-of-plea hearing were intended to deny culpability for the enhancement, not merely to clarify his legal position. Therefore, the Tr. Ct.'s order denying post-conviction relief was reversed. Held, denial of post-conviction relief reversed and remanded to vacate guilty plea in its entirety.

K. CRIMES

K.6. Interference with governmental operations

K.6.c. Failure to appear (Ind. Code 35-44-3-6)

TITLE: Abdul-Musawwir v. State

INDEX NO.: K.6.c.

CITE: (3d Dist. 9/30/85) Ind. App., 483 N.E.2d 464

SUBJECT: Failure to appear - sufficiency

HOLDING: Evidence was sufficient to sustain conviction where D was advised in open Ct. of trial date & D's absence was due to being in Chicago, intoxicated & generally confused about Ct. dates. Ct. distinguishes case from Pennington 426 N.E.2d 408 (D not advised by Tr. Ct. of duty to appear at specified time/place; state stipulated during plea negotiations that cause for which D failed to appear would be dismissed). Case is akin to Haskett, App., 386 N.E.2d 1012 (D knew he was to appear on certain date, called sheriff to say he'd appear the next day but failed to show up). Here, D called attorney from Chicago at 8:30, learned he was to appear in South Bend at 9:30 & asked attorney to request continuance because "I had been present at all other proceedings." Held, conviction affirmed.

K. CRIMES

K.6. Interference with governmental operations

K.6.f. Obstructing a firefighter (Ind. Code 35-44.1-4-9)

TITLE: Love v. State
INDEX NO.: K.6.f.
CITE: (9/8/2016), 61 N.E.3d 290 (Ind. Ct. App. 2015)
SUBJECT: Insufficient evidence - video undisputedly contradicts officer testimony
HOLDING: The State failed to present sufficient evidence to convict D of resisting law enforcement and mistreatment of a law enforcement animal, both class A misdemeanors - even though officers testified that D did resist - because video evidence undisputedly and unambiguously contradicted the officers' testimony.

Police officers stopped D for running a stop light and disregarding a stop sign. A police video showed D exited his vehicle and within five seconds raised his hands, placed himself on all fours and within another ten seconds laid face down on the ground. The video also showed that soon after, the officers and D scuffled as the officers tased D and deployed a police dog against him. At trial, several officers testified they took these actions because D was "completely uncooperative." D agreed the scuffle occurred but claimed the violence was "gratuitously initiated by the police" after he already surrendered and that he was merely protecting himself from the officers and the dog. The act of reviewing video evidence does not constitute impermissible appellate reweighing; such evidence is a necessary part of the record, just like any other type of evidence. Cf. Robinson v. State, 5 N.E.3d 362, 366 (Ind. 2014). However, where a fact-finder determines that an officer's observations are superior to that of a video camera, it may give more weight to the officer's testimony. Id. at 367 (case involving reasonable suspicion to stop vehicle). But where, as here, video evidence unambiguously and undisputedly contradicts the officers' testimony that D was uncooperative, total deference to the fact finder is not required. See State v. Houghton, 384 S.W.3d 441, 446 (Tex. App. 2012). Further, the scuffle that occurred is not a basis for either conviction as the police-initiated violence was not objectively reasonable. See Graham v. Connor, 109 S. Ct. 1865, 1872 (1989). Held, judgment reversed; Pyle, J., dissenting, believes that the majority reweighed the evidence.

Cf.: Robinson v. State, 5 N.E.3d 362, 367 (Ind. 2014) (where a fact-finder reviewing reasonable suspicion to stop determines officers' observations are superior to that of a video camera, it may give more weight to officers' testimony)

K. CRIMES

K.6. Interference with governmental operations

K.6.h. Obstruction of justice (Ind. Code 35-44-3-4)

TITLE: Brewington v. State

INDEX NO.: K.6.h.

CITE: (5/1/2014), 7 N.E.3d 946 (Ind. 2014)

SUBJECT: Blogger's threats constituted intimidation, not protected speech

HOLDING: Evidence was sufficient to support D's convictions for intimidating judge who presided over his divorce case and obstruction of justice against custody evaluator. D posted numerous Internet blogs taking aim at Dearborn Circuit Judge Humphrey, Humphrey's wife, and a psychologist who served as a custody evaluator in D's case. Although many of D's blog posts about judge may have been protected free speech (e.g., calling him a "child abuser"), others constituted credible threats to the judge's safety when put in their full context, which included D's references to himself as an "accomplished pyromaniac" and his online posting of the judge's address.

Court of Appeals failed to distinguish between fear of one's reputation (which cannot be used to support convictions) and fear for one's safety, but Supreme Court concluded D's actions toward judge and custody evaluator during his years-long vendetta against them, and his behavior in and out of courtroom placed targets of his contempt in credible fear for their safety.

Although jury instructions and general verdict erroneously failed to distinguish between protected speech and unprotected speech, D affirmatively invited those errors as part of a perfectly reasonable "all or nothing" trial strategy, thus Court found neither fundamental error nor ineffective assistance of trial counsel. Held, transfer granted, Court of Appeals' opinion at 981 N.E.2d 585 summarily affirmed in part and vacated in part, intimidation and obstruction of justice convictions affirmed.

TITLE: Cook v. State
INDEX NO.: K.6.h.
CITE: (1/31/20), Ind. Ct. App., 143 N.E.3d 1018
SUBJECT: Conviction for attempted obstruction of justice affirmed
HOLDING: Statements to a witness in a pending action to “bow out” to not “lose anything in the end” is sufficient to sustain a conviction for attempted obstruction of justice.

Defendant was involved in a legal dispute and her neighbor was subpoenaed to provide a deposition for trial. Defendant approached neighbor while he was mowing his property and made statements including, he "needed to consider what was going on and take this opportunity to bow out of the proceedings so that...he wouldn't lose anything in the end" and that he "could stand to lose everything; that [he] would wind up with nothing" and that he "needed to make the right decision." The Court of Appeals held that the State presented sufficient evidence to prove beyond a reasonable doubt that Defendant committed attempted obstruction of justice, finding sufficient evidence of coercion to sustain the conviction. Judge Baker dissented, arguing that the neighbor's testimony did not establish an attempted threat or coercion from Defendant, which is a required showing under the obstruction of justice statute.

TITLE: Goonen v. State

INDEX NO.: K.6.h.

CITE: (2nd Dist., 1-29-99), Ind. App., 705 N.E.2d 209

SUBJECT: Obstruction of justice -- refusal to testify

HOLDING: Tr. Ct. properly found that D violated his probation by committing obstruction of justice. D's plea agreement to conspiracy to commit robbery charge required him to give sworn, recorded clean-up statement detailing charged offenses & all other non-violent offenses he had committed. D also agreed to "testify truthfully at any hearing or trial upon request." In consideration for D's guilty plea, State agreed to drop two other pending charges & not to prosecute D for any non-forcible offenses that he admitted in his recorded statement. When D was called as witness for State in unrelated armed robbery trial, he cited safety concerns & attempted to assert his Fifth Amendment privilege against self incrimination. After D refused to testify, trial judge found him in direct criminal contempt & sentenced him to six months without good time credit.

In affirming probation revocation based on D's obstruction of justice from refusal to testify, Ct. found substantial evidence of probative value to support finding that D violated probation condition against committing another crime. D testified that he was not involved with robbery offenses & that if he testified, he would simply relate to Ct. what he saw or was told by others after fact. At most, State could have charged D with assisting a criminal, which is non-forcible offense. Because State granted D immunity for non-forcible offenses, D could not seek refuge by invoking his privilege against self-incrimination. *In re Schultz*, App., 428 N.E.2d 1284. Further, after reviewing record, Ct. was unpersuaded by D's attempted assertion of his Fifth Amendment right for reasons of his personal safety. State showed by preponderance of evidence that, contrary to judge's order, D knowingly or intentionally withheld testimony in robbery trial, & that he could not utilize Fifth Amendment's protections. Held, probation revocation affirmed.

TITLE: Gomillia v. State

INDEX NO.: K.6.h.

CITE: (3/19/2015), 27 N.E.3d 1175 (Ind. Ct. App 2015)

SUBJECT: Attempted obstruction of justice - State failed to prove D knew statements were false when he made them

HOLDING: The State presented insufficient evidence to support D's conviction for attempted obstruction of justice. The State alleged that D attempted to commit obstruction of justice by inducing a witness in a domestic violence case to withhold testimony "by threat, coercion or false statement" by calling the witness and telling her not to come to court in the case involving an inmate incarcerated in the same block of Marion County Jail as D, "so that charges would be blocked." Obstruction of justice statute, Ind. Code § 35-44.1-2-2(a)(1)(A), required the State to prove that D knew the statements were false when he communicated them to witness, not just that they were in fact false.

Here, there is no evidence that D knew the statements were false. In fact, detective testified it is a commonly held belief that the absence of a witness means the dismissal of a case. Without any evidence suggesting D knew the statements were false, there is insufficient evidence to establish that he knowingly or intentionally attempted to induce witness not to testify by false statement. Held, conviction reversed.

TITLE: Herron v. State
INDEX NO.: K.6.h.
CITE: (9/30/2016), 61 N.E.3d 1246 (Ind. Ct. App 2016)
SUBJECT: Charging D under wrong part of obstruction of justice statute warranted directed verdict
HOLDING: Tr. Ct. erred in denying D's motion for directed verdict, where State charged him under the wrong part of the obstruction of justice statute. D was issued no-contact orders against his alleged victim, but he called her from jail and begged her not to testify against him. He also called others and urged them to persuade the victim not to testify or appear at his trial. The State charged D with attempted obstruction of justice under Ind. Code § 35-44.1-2-2(a)(2)(C), which refers to a defendant's personal act of being absent from a proceeding rather than subpart (a)(1)(C), which criminalizes attempts to induce a witness to be absent from a proceeding.

These are two distinct crimes. Because the State chose to charge D pursuant to subpart (a)(2)(C), and because there is no evidence that D attempted to absent himself from his criminal proceeding, the record is devoid of evidence on one or more elements of the charged offense. Court noted that even had the State charged D under subsection (a)(1)(C), directed verdict was still warranted because there was no evidence he attempted to induce absence by "threat, coercion or false statement." Held, conviction reversed.

TITLE: Howell v. State

INDEX NO.: K.6.h.

CITE: (4th Dist., 12-09-09), (Ind. App. 2009) 921 N.E.2d 503

SUBJECT: Obstruction of justice - sufficient evidence

HOLDING: Evidence was sufficient to support D's conviction for obstruction of justice even though the email messages that constituted "false records" for the basis of the charge did not contain false or inaccurate information. Ind. Code 35-44-3-4(a)(4) defines obstruction of justice as "mak[ing], present[ing], or us[ing] a false record, document, or thing with the intent that the record, document, or thing, material to the point in question, appear in evidence in an official proceeding or investigation to mislead a public servant."

Here, detective posed as a female minor in a Yahoo! chat room using the name "indydiamondgirl08." D, using the screen name "john_doe8238" contacted detective's undercover account and was eventually charged with child solicitation. A few days after D was released on bond, detective received more emails at indydiamondgirl08 from johndoe_8238 from an account registered to a woman in Great Falls, Montana. D had given the woman's daughter, C.C., his screen name and password, asked her to send messages to indydiamondgirl08 and to change his password. C.C. also said she logged on as john_doe8238 only when D specified. D explained to C. C. that if she did this, it would help his pending criminal case by showing that someone else was using his screen name.

Although the emails contained no false information in that they were mere inquiries into indydiamondgirl08's well being or requests to engage in further conversation, Court found the emails false because C.C., not D, sent the messages. This made the emails "false records."

Court also rejected D's argument that the evidence was insufficient because: 1) the most recent emails were not introduced as evidence at D's child solicitation trial and 2) emails were sent not to mislead detective, but to create a defense to the child solicitation charge by showing someone else could have sent the messages. Ind. Code 35-44-3-4(a)(4) says obstruction of justice also occurs when a false record appears in an *investigation*. Because detective was required to investigate the emails sent after D was arrested for child solicitation, the fact that the emails were not introduced as evidence at the child solicitation trial was inconsequential. D's argument regarding insufficient intent to mislead was an impermissible request to reweigh the evidence. Held, judgment affirmed.

TITLE: Kingston v. State

INDEX NO.: K.6.h.

CITE: (1st Dist. 7/9/85) Ind. App., 479 N.E.2d 1356

SUBJECT: Obstruction of justice - lesser included offenses (LIO)

HOLDING: Offense of false reporting is neither inherently nor possibly LIO of crime of obstruction of justice, as charged in informations. Here, 2 Vanderburgh County deputy sheriffs lost control of their unmarked car, ran red light, struck traffic signal pole & then hit 2 parked cars as they fled the area. However, deputies told Evansville police that they inadvertently hit parked cars while pursuing vehicle that had struck pole. Later, both admitted making false statements. Deputies were charged with obstruction of justice but convicted of false reporting. Ct. finds it is possible to commit obstruction of justice without first committing false reporting (not inherent LIO). Elements of false reporting were not charged in information (not possibly LIO). Held, convictions reversed.

RELATED CASES: Long, App., 492 N.E.2d 700 (intimidation convictions merged into convictions for attempted obstruction of justice).

TITLE: McElfresh v. State

INDEX NO.: K.6.h.

CITE: (3/3/2016), 51 N.E.3d 103 (Ind. 2016)

SUBJECT: True statements can be threatening or coercive under obstruction of justice statute

HOLDING: State presented sufficient evidence to support D's conviction for attempted obstruction of justice under Ind. Code § 35-44.1-2-2(a)(1)(A), which requires knowingly or intentionally inducing, by threat or coercion, a person to withhold or unreasonably delay in producing any testimony. While in jail awaiting his guilty plea hearing, D mailed an intimidating and coercive letter to mother (A.W.) regarding her daughter T.W., a witness in the pending criminal proceeding against him. In D's letter, he accused T.W. of lying, contended that she was coached, and that she conspired with another girl to give false testimony. He also told T.W.'s mother that if T.W. intended to lie under oath, she would face legal consequences for the dishonesty. Court held a reasonable trier of fact could have concluded that D's intent in sending the letter was an attempt to influence T.W. into changing her prior allegations against him before trial court accepted his guilty plea. It is possible for a true statement to be threatening or coercive under the obstruction of justice statute. And D did not need to explicitly state that the mother needed to get T.W. to change her statement so he could get out of his plea agreement because "[t]he content of the letter, and the circumstance surrounding its drafting support a reasonable inference that [Defendant] did intend for that to occur." Held, transfer granted, Court of Appeals' opinion at 40 N.E.3d 1259 vacated, judgment affirmed but remanded with instructions to resentence D on attempted invasion of privacy conviction.

RELATED CASES: Scott, 139 N.E.3d 1148 (Ind. Ct. App 2020) (D's statement that if she failed to comply with his request to withhold her testimony then he would not get out of jail and she would have to continue working tirelessly to care for two children without his help were sufficient to demonstrate a consequence and demonstrated coercion).

TITLE: Moore v. State

INDEX NO.: K.6.h.

CITE: (4th Dist., 04-12-06), Ind. App., 845 N.E.2d 225

SUBJECT: Obstruction of justice charge brought outside statute of limitations

HOLDING: Prosecution for obstruction of justice was brought outside statute of limitations, & even if charges had been brought in a timely fashion, evidence was insufficient to support conviction.

Obstruction charge was brought based on Office of Family & Children's (OFC) employee preparing an Adoption Summary on November 11, 1998, that indicated the potential adoptive parents of twins had no criminal history & no contact with the OFC office. The parents, in fact, had a felony theft & a misdemeanor battery, but neither felony theft nor misdemeanors are included on an OFC list prohibiting an individual from being a foster parent. The parents also had past contact with the OFC. On February 24, 1999, the potential parents filed for adoption & the Adoption Summary was filed in conjunction with this. In 2002, the twins were taken to a hospital where one died. The parents were later convicted of child neglect. On February 19, 2004, a grand jury returned an indictment charging D. A motion to dismiss was filed on statute of limitations' grounds but was denied. Ind. Code 35-41-4-2 states that a prosecution for a class D felony is barred unless it is commenced within five years after the commission of the offense. With an obstruction of justice charge, State is not required to prove actual impairment of an investigation, & the mere potential influence with a line of inquiry is sufficient to establish materiality. Vandiver v. State, 822 N.E.2d 1047 (Ind. Ct. App 2005). Therefore, it is of no moment that the Adoption Summary was not placed before a Ct. until February 24, 1999, the date the adoption petition was filed. The acts that the State alleged to be an obstruction of justice occurred on November 11, 1998, the date the adoption summary was filed.

Ct. also found that insufficient evidence existed to support the conviction, as no evidence existed that D possessed the requisite intent to mislead a public servant. Ct. noted that as a low-level IFSSA employee it was not D's place to disregard IFSSA policies, & she followed policy in determining what constitutes criminal history in making the Adoptive Home Study. Further, the State introduced no evidence that D knew of the adoptive family's previous contact with OFC. Ct. rejected State's argument that knowledge could be inferred from the ease with which this information could be obtained. "[T]hat is simply not enough to prove that she knew of the contact yet falsely reported that there was none." It is possible that D never requested this information. This is negligent conduct & may be grossly negligent, but negligence in Indiana is not a criminal act. See Whitaker v. State, 778 N.E.2d 423 (Ind. Ct. App 2003). Held, judgment reversed.

TITLE: Mullins v. State

INDEX NO.: K.6.h.

CITE: (2nd Dist.; 10-14-99), Ind. App., 717 N.E.2d 902

SUBJECT: Obstruction of justice - swallowing drugs

HOLDING: There was sufficient evidence to support D's conviction for obstruction of justice. Person who alters, damages, or removes any record, document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation commits obstruction of justice. Ind. Code 35-44-3-4(a)(3). Here, D was sitting in his car in front of known drug house. As officer approached car, D placed crack cocaine in his mouth, & when officer ordered D to spit it out, D refused & pushed officer away. D eventually swallowed cocaine. Although D was not under arrest at time he swallowed crack cocaine & argued that he did not know officer was approaching car in order to begin investigation, reasonable fact finder could infer that D was aware of officer's investigation & intent to seize crack cocaine. Held, conviction affirmed.

TITLE: Sheppard v. State

INDEX NO.: K.6.h.

CITE: (4th Dist. 11/5/85) Ind. App., 484 N.E.2d 984

SUBJECT: Attempted obstruction of justice (AOJ) - sufficiency

HOLDING: Evidence was insufficient to support D's conviction for AOJ. Here, D made phone call to robbery witness (who was acquaintance of 2 years & employee of business robbed) on 7/26, asking her not to pick him out of lineup. On 7/16, D wrote witness letter asking her not to identify him. D made at least one other phone call to witness, who then contacted police in an effort to stop D from harassing her. Phone call on 7/26 was basis of AOJ charge. Ct. extensively discusses meaning of word "coercion," citing dictionary & case law definitions. Ct. finds D did not exert pressure on will of witness; therefore, D did not "coerce" witness, as word is used in OJ statute. Absent any indication to witness of consequences of her failure to obey D's instructions, his statement to her amounts to nothing more than a request. Held, conviction reversed. Conover DISSENTS, finding coercion.

RELATED CASES: Robinson, App., 126 N.E.3d 807 (in domestic battery prosecution, none of D's statements to C.W. attempting to induce her to withhold testimony explicitly or implicitly indicated any consequence to C.W. if she failed to comply; D's statements amounted to only requests that are not sufficient to constitute "coercion" pursuant to the statute); Brown, App., 859 N.E.2d 1269 (telling fiancée there would be "no third time" and he would "lick that ***** every night" if she would not testify against him was insufficient to prove threat or coercion to constitute obstruction of justice); Long, App., 492 N.E.2d 700 (evidence was sufficient to sustain conviction for AOJ where victim testified D threatened her with confinement & criminal deviate conduct if she signed anything against her brother, who was charged with homicide).

TITLE: Vandivier v. State

INDEX NO.: K.6.h.

CITE: (5th Dist., 2-24-05), Ind. App., 822 N.E.2d 1047

SUBJECT: Obstruction of justice - analyzing materiality

HOLDING: Materiality is an essential element of offense of obstruction of justice that the State must prove beyond a reasonable doubt. In light of United States v. Gaudin, 515 U.S. 506 (1995), Court concluded that a framework similar to one used to determine voluntariness of confessions should be applied when making determinations of materiality in obstruction of justice cases. Tr. Ct. must first make a preliminary determination of materiality when assessing the admissibility of the evidence. If it finds the evidence is admissible, it must then submit the issue to jury for jury to weigh evidence & determine whether State proved materiality beyond a reasonable doubt. If, on the other hand, Tr. Ct. finds that evidence is immaterial &, thus, inadmissible, obstruction of justice charge must be dismissed. Richardson v. State, 255 Ind. 655, 266 N.E.2d 51 (1971). Here, Tr. Ct. did not err in ruling that a false witness statement made by D's friend was material & admissible as relevant evidence at D's trial. D induced friend to make statement, which was fabricated exculpatory evidence relating to D's pending burglary charge. Statement also had capacity to mislead trial judge regarding custody decision in dissolution case. State presented sufficient evidence to support D's conviction for obstruction of justice as accomplice. Held, judgment affirmed.

K. CRIMES

K.6. Interference with governmental operations

K.6.i. Refusal to aid an officer

TITLE: Low v. State

INDEX NO.: K.6.i.

CITE: (11/14/91), Ind. App., 580 N.E.2d 737

SUBJECT: Refusal to aid officer -- one may refuse by actions or words

HOLDING: D, who was suspected to be involved in prostitution activity, was convicted of refusal to assist officer during prostitution investigation. D claimed evidence was insufficient to support her conviction for refusal to assist officer. Ct. held that while there is no statutory definition for word "refuse," Indiana Supreme Ct. has held that "ordinary signification of the word 'refuse' is to deny a request or demand." One may refuse by her actions as well as her words. Escort service used code words in certain circumstances over phone to indicate to their escort service whether they are safe. Here, after being ordered by police officers not to tip off caller from her escort service, D spoke with her escort service over phone, and driver never returned. Therefore, trier of fact could reasonably infer that D tipped off service. Held, conviction affirmed.

K. CRIMES

K.6. Interference with governmental operations

K.6.j. Resisting law enforcement (Ind. Code 35-44-3-3)

TITLE: Adkisson v. State

INDEX NO.: K.6.j.

CITE: (5th Dist.; 5-18-00), Ind. App., 728 N.E.2d 175

SUBJECT: Resisting law enforcement - insufficient evidence; arrest warrant needed to enter home

HOLDING: Where officer unlawfully entered home without arrest warrant, there was insufficient evidence to support D's conviction for resisting law enforcement. Although U.S. Supreme Ct. in U.S. v. Santana, 427 U.S. 38, 96 S. Ct. 2406 (1976) held suspect may not defeat arrest which has been set in motion in public place by expedient of escaping to private place, police may not cause suspect to come into public view, i.e., threshold of home, & then invoke Santana to enter home without warrant. There is greater privilege to resist unlawful entry into private premises than to resist unlawful arrest. Casselman, App., 472 N.E.2d 1310. Here, officer knocked on D's door to question her about alleged battery. Although D refused to allow officer to enter home, she stood at threshold of home & answered questions. Eventually, D attempted to close door, but officer placed his foot in door & told her that she was under arrest for battery. D retreated into her home. When officer followed her into home, she pushed officer down & ran out of home. Because officer caused D to come into public view by knocking on door to ask her questions & because no exigent circumstances existed, officer acted unlawfully when he forcibly entered D's residence to arrest her. Thus, officer was not lawfully engaged in execution of his duties as law enforcement officer. Because officer's means of effectuating arrest were unlawful, D had right to resist arrest. Held, conviction reversed.

NOTE: This case can be used to support argument that D has right to resist arrest when police use excessive force in effectuating arrest.

NOTE: Ind. Code 35-41-3-2(i)(2) was amended in response to Barnes to restore a citizen's right to use reasonable force to protect themselves against unlawful police entry.

RELATED CASES: Jean-Baptiste, 71 N.E.3d 406 (Ind. Ct. App. 2017) *sum aff'd* 82 N.E.3d 878 (Ind. 2017) (a law enforcement officer who attempts to effect a civil arrest warrant is not "lawfully engaged in the execution of [his] duties" where, as here, he reaches across the threshold of a D's residence without permission or other legal justification and grabs D; see full review, this section.); Cupello, 27 N.E.3d 1122 (Ind. Ct. App. 2015) (D exercised reasonable force under amendment to Ind. Code § 35-41-3-2(i)(2) in response to Barnes, below, to prevent or terminate an unlawful entry by a public servant into his home; see full review, this section); Alspach, App., 755 N.E.2d 209 (exigent circumstances existed that justified officer's warrantless entry into D's residence; officer reasonably concluded that delay in entering residence might result in further injury or deterioration in condition of someone inside who was apparently bleeding; therefore, because officer was lawfully engaged in execution of official duties, evidence was sufficient to support D's conviction); Johnson, App., 747 N.E.2d 623 (distinguishing Adkisson, Ct. concluded that officer was lawfully engaged in execution of his duties when he arrested D who was standing in doorway of his home & interfering with officer's attempt to issue & explain citation); S.E., App., 744 N.E.2d 536 (evidence was insufficient to sustain Tr. Ct.'s finding of delinquency based on resisting law enforcement charge, because police officers who forcibly entered D's home were not lawfully engaged in execution of their duties).

TITLE: Ajabu v. State
INDEX NO.: K.6.j.
CITE: (5th Dist., 12-10-98), Ind. App., 704 N.E.2d 494
SUBJECT: Resisting law enforcement (RLE) - insufficient evidence of force
HOLDING: Under RLE statute, any action to resist must be done by force. Spangler, 607 N.E.2d 720. D "forcibly resists" law enforcement when "strong, powerful, violent means" are utilized to evade officer's lawful exercise of his duties. Id. Here, during protest at Monument Circle in Indianapolis, D continued to direct fellow demonstrator to ignite American flag after officer ordered them not to light it. Officer proceeded to grab D & flag. D reacted by holding onto his flag & twisting & turning "a little bit," even after being maced, & only let go after officer dragged him eight to ten feet. There was no evidence that D made threatening or violent actions toward police.

State argued that D forcibly resisted officer by refusing to release flag. While Ct. agreed that this evidence established some resistance by D, record failed to disclose any evidence from which reasonable trier of fact could conclude beyond reasonable doubt that D acted forcibly, as defined by Spangler. Evidence merely showed that D resisted officer by claiming ownership & holding onto flag. Thus, facts presented at trial were insufficient to establish D's guilt beyond reasonable doubt. Held, conviction reversed.

RELATED CASES: Pogue, 937 N.E.2d 1253 (Ind. Ct. App. 2010), (D's failure to drop a box cutter following a demand to do so by police amounts to forcible obstruction of officer's lawful execution of his duties); Guthrie, App., 720 N.E.2d 7 (Ct. found sufficient evidence that D acted with requisite force in resisting officer).

TITLE: Armstead v. State

INDEX NO.: K.6.j.

CITE: (1st Dist. 2/7/90), Ind. App., 549 N.E.2d 400

SUBJECT: Resisting law enforcement; single encounter with multiple officers

HOLDING: Single affray with multiple officers supports only one conviction for resisting law enforcement. Resisting law enforcement is offense against public administration, not against individual. See Ind. Code § 35-44-3-3. Resisting law enforcement harms peace and dignity of state and its law enforcement authority, & harm caused by one incident is same regardless of number of officers resisted. Offense is akin in this way to bank robbery. Robbery of bank property harms only bank as single entity, regardless of how many bank employees are forced to relinquish bank property. Williams, 395 N.E.2d 239. Similarly, in context of resisting law enforcement, where only one incident occurs, there can be only one charge. See Brumbaugh, 491 N.E.2d 983; Roberson, 430 N.E.2d 1173; Shepler, 412 N.E.2d 62. Cf. Pettit, App., 439 N.E.2d 1175; Parks, 513 N.E.2d 170 (multiple incidents support multiple charges). Here, although three officers were involved in incident, only one conviction can stand. D argues that lesser offense against officer who actually put him under arrest should stand, with others set aside. However, Ct. App. Reasons that D should be answerable for greatest harm resulting from incident. Held, felony conviction affirmed; misdemeanor convictions reversed.

RELATED CASES: Lewis, 43 N.E.3d 689 (Ind. Ct. App. 2015); Arthur, App., 824 N.E.2d 383 (Ct. vacated second resisting law enforcement conviction resulting from one continuous episode; Ct. could not say resisting law enforcement by fleeing in a vehicle is a different “species” than fleeing on foot); Williams, App., 755 N.E.2d 1183 (D can be convicted of multiple counts of resisting law enforcement arising out of same incident where he has committed more than one of acts enumerated under Ind. Code § 35-44-3-3, fleeing & resisting).

TITLE: Barnes v. State
INDEX NO.: K.6.j.
CITE: (05-12-11), 946 N.E.2d 572 (Ind. 2011)
SUBJECT: Court abrogates residents' right to reasonably resist illegal police entry into residence
HOLDING: Indiana no longer recognizes a D's right to reasonably resist unlawful entry of police officers into a person's home because "public policy disfavors any such right." Thus, Tr. Ct. did not err in failing to advise the jury about D's purported right to reasonably resist the unlawful entry of officers into his apartment.

Here, D's wife called 911 because D was throwing things in their apartment. When officers arrived, D was outside, stating that he was moving out and that the officers should go. Wife came outside to give D a duffle bag and told him to get the rest of his things. D followed wife into the apartment, and the officers followed him. As one officer tried to enter the apartment, D shoved him against a wall. They struggled, and the officers subdued D with a choke hold and a taser.

"The English common-law right to resist unlawful police action existed for over three hundred years, and some scholars trace its origin to the Magna Carta in 1215." The right was viewed as necessary to prevent illegally arrested persons from being subject to abuses common in that era, such as indefinite detention, lack of bail, disease-infested prisons, and torture. But the "right to resist an unlawful police entry into a home is against public policy." Today, an aggrieved arrestee has "means unavailable at common law for redress against unlawful police action . . . (1) bail, (2) prompt arraignment and determination of probable cause, (3) the exclusionary rule, (4) police department internal review and disciplinary procedure, and (5) civil remedies." Further, resistance "unnecessarily escalates the level of violence and . . . risk of injuries." Thus, it is not wise to let a homeowner "adjudge the legality of police conduct in the heat of the moment. As we decline to recognize a right to resist unlawful police entry into a home, we decline to recognize a right to batter a police officer as a part of that resistance." Held, transfer granted, Court of Appeals' opinion at 925 N.E.2d 420 vacated, judgment affirmed.

Dickson, J. dissenting, admits that modern arrestees have means to minimize or prevent abuses like indefinite detention but argued Court should not have abrogated the right of resistance because "the consistent existence of and adherence to [those means] unfortunately remains less than ideal." Further, Court's "wholesale abrogation of the historic right to resist unlawful police entry is . . . unnecessarily broad." The majority could have resolved the case on narrower grounds by "deeming *unreasonable* a person's resistance to police entry in the course of investigating reports of domestic violence."

RELATED CASES: Cupello, 27 N.E.3d 1122 (Ind. Ct. App 2015) (D exercised reasonable force under amendment to Ind. Code § 35-41-3-2(i)(2) in response to Barnes, below, to prevent or terminate an unlawful entry by a public servant into his home; see full review, this section); Garrett, 956 N.E.2d 199 (Ind. Ct. App. 2011) (evidence was sufficient to support D's conviction for resisting law enforcement; there is no right to reasonably resist an officer who has illegally entered a residence; even if such a right existed, there was no illegal entry and D's resistance was not reasonable); Barnes, 953 N.E.2d 473 (Ind. 2011) (On rehearing, Ct. held that Castle Doctrine is not a defense to the crime of battery or other violent acts on a police officer).

TITLE: Batchelor v. State
INDEX NO.: K.6.j.
CITE: (03/18/2019), 119 N.E.3d 550 (Ind. 2019)
SUBJECT: Instruction on "fleeing" was not fundamental error
HOLDING: At Defendant's trial for Level 6 felony resisting law enforcement, trial court's instruction on "fleeing" was erroneous because it instructed the jury it could convict Defendant by finding he was merely negligent in not immediately pulling over after an officer activated his lights and siren. The instruction misstated the mens rea and potentially misled the jury as an incorrect statement of law. However, the error was not fundamental because jury charged, as a whole, cured the instructional defect and evidence clearly sustained Defendant's conviction. Defendant failed to object to the instruction, but he did not invite the alleged error because he made no "active" or "affirmative" request for it.

Because of its potential to mislead the jury, Court expressly disapproved of the fleeing instruction taken from Cowans v. State, 53 N.E.3d 540 (Ind. Ct. App 2016). Held, transfer granted, Court of Appeals' opinion at 97 N.E.3d 297 vacated, judgment affirmed.

RELATED CASES: Spencer, 129 N.E.3d 209 (Ind. Ct. App 2019) (following Batchelor and finding no abuse of discretion in denying D's proposed jury instruction that defined "forcibly" resisting law enforcement and included examples from cases where appellate courts concluded the element of "force" was not satisfied).

TITLE: Bonner v. State

INDEX NO.: K.6.j.

CITE: (3rd Dist., 4-16-03), Ind. App., 789 N.E.2d 491

SUBJECT: Resisting law enforcement - sufficiency of evidence; defective information

HOLDING: State did not present sufficient evidence to support conviction for resisting law enforcement where information alleged that D did not immediately comply with certain officer's instruction. Several officers were in pursuit of D after he pulled away from traffic stop, disobeying officer's orders. Another officer engaged in foot pursuit of D & upon catching up with him ordered him to get on ground, which D did. Charging information for Class A misdemeanor resisting stated that D did not comply with last officer's command to get on ground. State argued its references to last officer amounted to surplusage. However, names of particular officers from whom D fled were essential to proper description of State's two separate resisting charges. Given number of officers involved in chase & number of ways D was alleged to have fled from different officers, separate resisting charges would not have provided D with sufficient information to anticipate proof that would be adduced against him with regard to each charge if officers pertinent to each separate offense had not been particularly identified. Because there was no evidence that D did not comply with last officer, which State acknowledged, conviction of Class A misdemeanor resisting was not supported by evidence. Held, judgment reversed.

RELATED CASES: Vest, 930 N.E.2d 1221 (Ind. Ct. App 2010) (charging information was not duplicitous for naming all three officers from whom D fled, & Tr. Ct. did not err when it did not issue a more specific unanimity instruction to jury because jurors were not required to agree on which particular officer D fled); Parhams, 908 N.E.2d 689 (Ind. Ct. App 2009) (where D was charged with one act of resisting law enforcement, State's failure to identify the correct officer in the charging information against whom D allegedly resisted did not mislead him in the preparation of his defense; see full review at A.6); Whaley, App., 843 N.E.2d 1 (given number of officers involved in arresting D & number of ways D was alleged to have fled, correct names of officers involved were essential to a proper description of offenses charged).

TITLE: Briggs v. State

INDEX NO.: K.6.j.

CITE: (1st Dist., 09-11-07), Ind. App., 873 N.E.2d 129

SUBJECT: Resisting law enforcement - police not lawfully engaged in execution of their duties

HOLDING: In resisting law enforcement prosecution, State failed to prove beyond a reasonable doubt that police officers were lawfully engaged in execution of their duties when they asked D to stop walking toward back bedroom of his apartment & grabbed his arms. Officers were providing stand-by assistance to retrieve ex-roommate's belongings from D's apartment. Assuming, without deciding, that officers lawfully entered D's apartment without a warrant, they had no authority to restrict D's movement in any way because their encounter with D was consensual. Since the Fourth Amendment was not implicated, D remained free to disregard the officers, walk away, or even order them to leave his home. However, officers detained D solely on a hunch that he could have a weapon in his bedroom. This amounted to an unreasonable seizure in violation of the Fourth Amendment. State v. Atkins, 834 N.E.2d 1028 (Ind. Ct. App. 2005). Held, conviction reversed. Friedlander, J., dissenting, believes that this level of police investigation was not a consensual encounter, but "something of a hybrid," & since D consented to police entry, he submitted to such authority as was reasonably required to accomplish their purpose.

TITLE: Brooks v. State

INDEX NO.: K.6.j.

CITE: (10/31/2018), 113 N.E.3d 782 (Ind. Ct. App. 2018)

SUBJECT: Insufficient evidence D forcibly resisted arrest

HOLDING: D not presenting her arms to officers to be cuffed was insufficient evidence of forcible resist, which requires resisting by strong, powerful or violent means. Held, conviction reversed due to insufficient evidence.

TITLE: Casselman v. State

INDEX NO.: K.6.j.

CITE: (3d Dist. 1/17/85) Ind. App., 472 N.E.2d 1310

SUBJECT: Resisting law enforcement - sufficiency

HOLDING: Evidence was not sufficient to sustain D's conviction for resisting law enforcement where sheriff used excessive force in executing civil writ of attachment of the body pursuant to Ind. Code 34-4-91-2.1. Here, D had filed bankruptcy. D's attorney advised him he did not have to attend scheduled hearing on motion for proceeding supplemental arising from previous judgment entered against him. Tr. Ct. was not notified & upon D's second failure to appear issued writ. D opened door of his home to sheriff who identified himself & advised D of writ. D told sheriff to see his attorney & started to close door. Sheriff put foot in door & D pushed him away. Sheriff entered D's home, drew his gun & arrested D. Ct. finds D had right to close door. Common law right to offer reasonable resistance to unlawful entry has not been abrogated. Scuffle ensued only after sheriff unlawfully entered D's doorway to prevent D from closing door. Ct. distinguishes Fields, App., 382 N.E.2d 972 & Williams, App., 311 N.E.2d 619 (arrests occurred in public places & were for criminal offenses; unlawfulness of arrest arose from insufficient grounds for arrests, not from means used to effect arrests). Ct. examines term "authorized" in resisting arrest statute (Ind. Code 35-44-3-3(a)(2)) & finds sheriff unlawful entry exceeded authority granted by writ. Held, reversed & remanded for vacation of conviction & entry of acquittal. Hoffman DISSENTS, arguing sheriff's entry was lawful.

NOTE: Ind. Code 35-41-3-2(i)(2) was amended in response to Barnes to restore a citizen's right to use reasonable force to protect themselves against unlawful police entry.

RELATED CASES: Jean-Baptiste, 71 N.E.3d 406 (Ind. Ct. App. 2017) *sum aff'd*, 82 N.E.3d 878 (Ind. 2017) (a law enforcement officer who attempts to effect a civil arrest warrant is not "lawfully engaged in the execution of [his] duties" where, as here, he reaches across the threshold of a D's residence without permission or other legal justification and grabs D; see full review, this section.); Cupello, 27 N.E.3d 1122 (Ind. Ct. App. 2015) (D exercised reasonable force under amendment to Ind. Code § 35-41-3-2(i)(2) in response to Barnes, below, to prevent or terminate an unlawful entry by a public servant into his home; see full review, this section); Braster, App., 596 N.E.2d 278 (Where evidence showed that when police ordered D to floor, he just stared at them, but did not show that he forcibly resisted, obstructed, or interfered with officers, it was insufficient to support conviction for resisting arrest. Ind. Code 35-44-3-3(a)(1) requires use of force as essential element of resisting law enforcement. While D's failure to obey officer's command was definite resistance, obstruction, & interference with law enforcement, it lacked necessary force involved for conviction); Nieto, App., 499 N.E.2d 280 (sufficient evidence; off-duty/plain-clothes cop was executing official duty); Cole, 475 N.E.2d 306 (sufficient evidence of visual command to stop by officer who pursued D & pulled up behind D's car when it stopped); Pettit, App., 439 N.E.2d 1175 (Obstr Just 16; held, conviction upheld where officers visually ordered (red lights & siren) fleeing D to stop).

TITLE: Cole v. State
INDEX NO.: K.6.j.
CITE: (2/8/2017), 69 N.E.3d 552 (Ind. Ct. App. 2017)
SUBJECT: Evidence sufficient to support felony enhancement for resisting law enforcement
HOLDING: State presented sufficient evidence to support Level 3 felony resisting law enforcement, where Defendant "operat[ed] a vehicle in a manner that cause[d] the death of another person[.]" Defendant led police on a high-speed chase that ended when he crashed into a residential backyard. Two officers approached the car with guns drawn and yelled at Defendant and his passenger, Dyer, to exit the car with their hands up. Dyer rummaged around on the floor of the car and made a movement consistent with cocking a firearm. At the same time, Defendant put the car in reverse and accelerated toward the officers. In response to the oncoming car and his belief that Dyer was preparing to open fire, one of the officers shot and fatally wounded Dyer.

On appeal of his conviction, Defendant argued his operation of the vehicle was not the proximate cause of Dyer's death. Instead, he argued Dyer's death was caused by the officer who shot Dyer in response to Dyer's own actions of making furtive movements and refusing to show his hands. Court held that Defendant's operation of the car was the proximate cause of Dyer's death because the shooting was foreseeable. Defendant and Dyer were acting in concert to evade the police by any means necessary, and so it was foreseeable that Dyer would make furtive movements and the police would respond by shooting him. Held, judgment affirmed.

TITLE: Coleman v. State

INDEX NO.: K.6.j.

CITE: (9/29/2022), 196 N.E.3d 274 (Ind. Ct. App 2022)

SUBJECT: Police had reasonable suspicion to stop Defendant who drove away on motorcycle after being ordered to stop

HOLDING: Police responded to a dispatch regarding a male subject, named J.K., with active arrest warrants breaking out windows, causing damage to property, and threatening to commit "suicide by cop" at "75 South in the Hardinsburg area." The officers parked their cars on the street, blocking the road, and listened to see if they could hear the disturbance since there were several different buildings on the property. At the same time, Defendant turned out of an adjacent driveway and onto the street, driving toward the officers at a slow speed. An officer asked the others, "is this our guy?" but nobody knew if it was J.K. When Defendant was within a few feet of the officers, one officer put his hands up and yelled at Defendant to stop. Defendant did not stop and drove between the police vehicles parked in the street. Somebody asked again if Defendant was "our guy" but nobody knew. One of the officers turned on his emergency lights and tried to conduct a traffic stop. The officer testified the lights mounted on his vehicle were the "brightest lights he had ever had on a police car." Defendant did not stop but drove to the next county road and accelerated quickly. The officer pursued Defendant and saw him "fidgeting around" and placing his hands in his pockets while driving the motorcycle. When Defendant turned onto his mother's driveway, located a mile away from the scene, he stopped the motorcycle and put his hands in his pockets. The officer drew his gun and told him to get his hands out of his pockets and down on the ground. Defendant complied, but as he did so, a small package of four Gabapentin pills fell out of his hands. Defendant was charged with resisting law enforcement as a Level 6 felony for using a vehicle in the offense and with possession of a legend drug. The trial court denied Defendant's motion to suppress, and he was found guilty of both counts at a jury trial. On appeal, Defendant argued the officers gave no lawful order to stop under Gaddie v. State, 10 N.E.3d 1249 (Ind. 2014), and that he had not failed to stop. The Court of Appeals found Gaddie distinguishable because there the report involved a "mere disturbance" but here the report involved a person with arrest warrants who was damaging property and threatening suicide by cop. The Court concluded that under the circumstances "we cannot say that Sergeant Dick's order to stop was unlawful or that Coleman's Fourth Amendment rights were violated." Held: judgment affirmed.

TITLE: Conley v. State

INDEX NO.: K.6.j.

CITE: (7/22/2016), 57 N.E.3d 836 (Ind. Ct. App 2015)

SUBJECT: Resisting law enforcement - officer's hand gesture was sufficient visual command to stop

HOLDING: State presented sufficient evidence to support D's resisting law enforcement conviction. Uniformed police officer testified that, as D ran out of store after having committed theft, he passed directly in front of another officer's marked police car, made eye contact with him as officer was holding up his hand in a gesture attempting to get D to stop while D was approximately ten feet away. D dropped his backpack immediately behind officer's police car as he ran past it. This evidence demonstrates that officer did, by visible means, order D to stop fleeing. Distinguishing Czobakowskey v. State, 566 N.E.2d 87 (Ind. Ct. App. 1991), Court held that under these facts and circumstances, a reasonable person would have interpreted officer's hand gesture as a visual command to stop. And officer's testimony supports a reasonable inference that D saw that gesture but proceeded to run from him. Held, judgment affirmed.

TITLE: Cowans v. State
INDEX NO.: K.6.j.
CITE: (4/27/2016), 53 N.E.3d 540 (Ind. Ct. App. 2016)
SUBJECT: Instruction properly rejected as mistake of law; guidance on "fleeing" element
HOLDING: In D's trial for Level 6 felony resisting law enforcement (Ind. Code. § 35-44.1-3-1), Tr. Ct. did not abuse its discretion in refusing D's tendered instruction on mistake of fact because D's mistaken belief that he could continue driving to find a safe place to pull over was a mistake of law, not a mistake of fact. Even so, while Indiana has not adopted D's view, it is not surprising that he and many others justifiably understand that the law allows this. Multiple news stories quote local sheriffs or prosecutors who recommend drivers find a safe place to pull over. "Internet commentary is almost unanimous in expressing a belief that citizens have this right." Also, under some circumstances common sense dictates that motorists should be allowed this latitude. For instance, a motorist on a ten-lane highway would not be required to "stop in her tracks" to avoid committing a felony by continuing to drive to a safe place. "It would be an intolerable state of affairs if basic common sense, not to mention the explicit advice of many police departments, turned ordinary citizens into felons." Finally, focusing on the "knowing" element of the crime of resisting does not allay these concerns. The better approach is to focus on the definition of "flee." Ind. Code § 35-44.1-3-1(a)(3). A person who continues to drive only briefly to find a safer location is not fleeing. Thus, while "we reiterate that a driver does not have full discretion to choose to stop anywhere, [we observe that] it would be equally absurd to hold that drivers have zero discretion to choose the location of a stop." Here, D bypassed several opportunities to pull over into a safe area. Held, judgment affirmed.

RELATED CASES: Batchelor, 119 N.E.3d 550 (Ind. 2019) (Ct. expressly disapproved of fleeing instruction suggested in Cowans because of its potential to mislead the jury; see full review, this section); West, 85 N.E.3d 608 (Ind. Ct. App. 2017) (State failed to present sufficient evidence of resisting by fleeing where police did not order D to stop as she walked toward her 2-year-old grandson's bedroom as a police SWAT served a no-knock warrant on D's son; see full review).

TITLE: Cupello v. State

INDEX NO.: K.6.j.

CITE: (3/11/2015), 27 N.E.3d 1122 (Ind. Ct. App 2015)

SUBJECT: Right to use reasonable force to prevent public servant's unlawful home entry

HOLDING: In prosecution for battery on law enforcement officer D exercised reasonable force under Ind. Code § 35-41-3-2(i)(2) to prevent or terminate an unlawful entry by a public servant into his home. Statute was amended in response to Barnes v. State, 953 N.E.2d 473 (Ind. 2011), which held that the Castle Doctrine is not a defense to battery or another violent act on a police officer. Here, D slammed his apartment front door on the foot of an off-duty constable (Webb) who was employed by the apartment complex as a part-time courtesy officer. The complex told Webb that D had been verbally intimidating to apartment staff, so Webb went to his apartment to investigate "reports of intimidation." Webb stuck his foot just inside D's apartment once he opened the door to prevent him from slamming the door closed. When D became upset, he tried closing the door several times, striking Webb's foot. This caused Webb to call for backup and arrest D for battery.

Court found that the State proved that Webb was engaged in the performance of his official duties under the resisting law enforcement statute, even though during that incident, Webb was not in uniform nor did he identify himself as a constable to D. But the two had encountered each other on a prior occasion. When Webb went to the apartment, D told him he wanted to press charges against an apartment complex employee for harassment, which could lead one to infer D knew Webb as both a law enforcement officer and acting in his official capacity.

But based on the revised statute, D had the right to exclude Webb from his home and used reasonable force to do so. The placement of Webb's foot inside the threshold of the apartment door was unlawful entry by a public servant. D used reasonable force to prevent or terminate Webb's unlawful entry by closing his door, so the facts do not support his conviction. Held, judgment reversed; Mathias, J., concurring with separate opinion in which he encourages the Legislature to clarify what easily visible and audible indicia are required to place citizens on notice that they are dealing with an off-duty law enforcement officer who is acting in his official capacity. Legislature should also consider the clearly intended and confusing appearance of private security personnel dressed in uniforms of the same color, and with identification patches that are nearly the same as those worn by sworn officers, as it has done with its strict limitation of blue and red emergency lighting on private vehicles. See Ind. Code § 9-21-7-10.

RELATED CASES: Jean-Baptiste, 71 N.E.3d 406(Ind. Ct. App 2017) *sum. aff'd* 82 N.E. 3d 878 (Ind. 2017) (a law enforcement officer who attempts to effect a civil arrest warrant is not "lawfully engaged in the execution of [his] duties" where, as here, he reaches across the threshold of a D's residence without permission or other legal justification and grabs D; see full review, this section).

TITLE: Edmonds v. State

INDEX NO.: K.6.j.

CITE: (6/29/2018), 100 N.E.3d 258 (Ind. 2018)

SUBJECT: Only one conviction for single act of resisting causing death and serious bodily injury

HOLDING: Ind. Code § 35-44.1-3-1 allows only one conviction for each act of resisting law enforcement, regardless of how many people are harmed. During a high-speed police chase, D ran a red light and crashed into one vehicle, killing the driver and seriously injuring two passengers. He was convicted of three counts of resisting law enforcement, one resulting in death and two resulting in serious bodily injury. Relying on principles of statutory interpretation, Court concluded that each discrete incident of resisting outlined in Ind. Code § 35-44.1-3-1(a) constitutes a separate offense of resisting law enforcement. Subsection (b) of the statute does not create a new or independent offense, it merely enhances the degree of the offense outlined in subsection (a). Thus, when a single act of resisting law enforcement while using a vehicle causes multiple deaths and/or serious bodily injury, the offense continues to be a single harm to the peace and dignity of the State and a D can only be convicted of one felony under the statute. Held, transfer granted, Court of Appeals opinion at 86 N.E.3d 414 vacated, Level 3 felony resisting law enforcement resulting in death conviction affirmed and two lesser Level 5 felony resisting convictions vacated and remanded for resentencing.

NOTE: "In the spirit of exercising judicial restraint," Court declined to address the constitutionality of D's multiple convictions for leaving the scene of an accident with death/injury that were likewise based on one incident.

TITLE: Evans v. State

INDEX NO.: K.6.j.

CITE: (05-01-23), Ind., 201 N.E.3d 617

SUBJECT: Dissent from denial of transfer; slamming door was not forcible resistance to law enforcement

HOLDING: Chief Justice Rush, joined by Justice Slaughter, dissented from the denial of Defendant's petition to transfer, in which she argued that evidence was insufficient to prove she forcibly resisted law enforcement. A majority of a Court of Appeals' panel affirmed her conviction, concluding she acted forcibly when she "slammed" shut her slightly open apartment door—making no contact with law enforcement—after an officer expressed intent to arrest her. Chief Justice Rush wrote that "the bar for forcible conduct is not this low, and we should clarify as much. See Ind. Appellate Rule 57(H)(6). Moreover, this case presents an opportunity to decide when, if ever, an occupant can validly consent to law enforcement's warrantless entry of a residence when another occupant unequivocally objects. This important question of law, not reached by the majority, is one of recurring significance—particularly when officers respond to domestic disputes—and we should decide it. See App. R. 57(H)(4). For these reasons, I respectfully dissent from the Court's decision to deny transfer." The dissent would adopt Judge Weissman's dissent in the Court of Appeals because nothing in this record suggests any strength, power, or violence in Evans's act of slamming her slightly open apartment door or otherwise proves beyond a reasonable doubt that she acted forcibly prior to law enforcement entering her home. "The majority's contrary conclusion represents a significant departure from accepted law." Further, the dissent found Evans's Article 1, Section 11 claim implicates an issue of first impression: whether, and to what extent, it is reasonable for an officer to enter a home without a warrant when a physically present occupant consents to entry while another such occupant expressly objects. "We should resolve that issue and, in doing so, provide needed guidance to the bench and the bar." Held: transfer denied with two justices dissenting.

TITLE: Fowler v. State

INDEX NO.: K.6.j.

CITE: (5th Dist., 01-03-08), Ind. App., 878 N.E.2d 889

SUBJECT: Erroneous grant of judgment on evidence (JOE) - resisting law enforcement

HOLDING: After jury returned verdict of guilty of resisting law enforcement, Tr. Ct. erred by granting D's motion for JOE. Tr. Ct. stated that it was granting motion on basis that no evidence had been presented to show that police officers had ordered D to stop. Motion should be granted when there is a total absence of evidence on an issue or evidence susceptible of only one inference which is in favor of D. Here, State was required to prove beyond a reasonable doubt that D was ordered to stop. Ind. Code 35-44-3-3. Distinguishing State v. Czobakowsky, 566 N.E.2d 87 (Ind. Ct. App 1991), Court noted that officers were at D's house for specific purpose, which was conveyed to D, to serve an arrest warrant. Evidence showed that they were readily and easily identifiable as law enforcement officers. After D had fled into bedroom, several of officers ordered him to come back and D then attempted to flee out bedroom window. These factors would have been more than sufficient to indicate to a reasonable person that D had been ordered to stop. Although word "stop" was not expressly stated, D had been visibly and audibly ordered not to flee. To hold otherwise would make the "visible or audible...means" language of Ind. Code 35-44-3-3 meaningless. Held, jury's conviction for class D felony resisting law enforcement reinstated.

RELATED CASES: Bockler, 908 N.E.2d 342 (Ind. 2009) (D's act of diving into pond and swimming away as officer tied up D's boat during what was akin to a typical traffic stop on suspicion of OWI was resisting).

TITLE: Gaddie v. State
INDEX NO: K.6.j.
CITE: 10 N.E.3d 1249 (Ind. 2014) (6/27/2014)
SUBJECT: Resisting law enforcement - order to stop must be based on reasonable suspicion or probable cause of criminal activity
HOLDING: A person cannot be prosecuted for resisting law enforcement by fleeing unless the officer has, at a minimum, the reasonable suspicion necessary to conduct a Terry stop. Here, a police officer responded to a “disturbance” at a residence and upon arriving attempted to “corral” everyone to the front yard in order to keep an eye on them until backup arrived. D ignored the officer’s order and walked away from the residence and the officer. The officer radioed for help, and eventually another officer intercepted D, who was arrested and charged with resisting law enforcement by fleeing.

A statute that makes it a criminal offense to walk away from an officer who, without reasonable suspicion or probable cause, has ordered the person to stop, would violate longstanding Fourth Amendment principles and "the right to walk away." The language of the Resisting Law Enforcement statute does not require that a police officer’s order to stop be lawful, but the Court prefers to construe the statute in a manner that does not violate the Constitution. As such, it held the statutory element “after the officer has . . . ordered the person to stop” must be understood to require that such order to stop rests on probable cause or reasonable suspicion that criminal activity is afoot.

In this case, because the officers lacked the reasonable suspicion necessary to conduct an investigatory stop of D, the evidence was insufficient to convict him of resisting law enforcement by flight. Held, transfer granted, Court of Appeals' opinion at 991 N.E.2d 117 vacated, conviction reversed.

RELATED CASES: Jones, (4/20/2018), (Ind. Ct. App 2018) (in case for RLE by fleeing officer's order to stop, trial court did not commit fundamental error by failing to instruct jury that order to stop must be supported by reasonable suspicion; see full review, this section); Miller, 51 N.E.3d 313 (Ind. Ct. App 2016) (search incident to arrest violated D's right to walk away as recognized in Gaddie, where police had no basis to order her to stop. See full review at Z.3.a); Jones, (Ind. Ct. App 2015); M.J., 19 N.E.3d 796 (Ind. Ct. App 2014) (reversing delinquency adjudication because police officers did not have reasonable suspicion to believe that criminal activity had occurred or was afoot when they ordered M.J. to stop); Murdock, 10 N.E.3d 1265 (Ind. 2014) (under the statutory interpretation announced in Gaddie, evidence was sufficient to establish reasonable suspicion for officer to order D to stop; probation revocation for committing resisting law enforcement affirmed).

TITLE: Garner v. State

INDEX NO.: K.6.j.

CITE: (4th Dist., 2-2-95), Ind. App., 646 N.E.2d 349

SUBJECT: Resisting law enforcement - sufficient evidence

HOLDING: Evidence was sufficient to sustain D's conviction for resisting law enforcement as class D felony. At trial, police officers testified that during chase, D ran seven separate red lights followed by marked police car with lights & sirens activated. Collisions were barely avoided & several cars had to pull off to head on lane to avoid D. Offense as defined by Ind. Code 35-44-3-3 requires "knowingly or intentionally" fleeing "from law enforcement officer after officer has, by visible or audible means, identified himself & ordered the person to stop" and, while so doing, the individual "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." Here, circumstances of D's high rate of speed & his failure to observe traffic signals sustain inference that D's operation of vehicle posed substantial risk of bodily injury to others. Held, conviction affirmed.

RELATED CASES: Smith, App., 809 N.E.2d 938 (acts of D's accomplices in fleeing from police were properly imputed to him); Vickers, App., 653 N.E.2d 110 (despite D's gross intoxication, he was still capable of forming requisite intent to knowingly or intentionally flee from police officers).injury to others. Held, conviction affirmed.

TITLE: Gracia v. State

INDEX NO: K.6.j

CITE: (09-05-12), 976 N.E.2d 85 (Ind. Ct. App 2012)

SUBJECT: Jury instruction on use of excessive force by police properly rejected

HOLDING: In disarming of law enforcement officer prosecution, Tr. Ct. did not err in refusing D's jury instruction on excessive use of force by police. Court agreed with Tr. Ct.'s conclusion that it did not believe the tendered instruction was a "good statement of law" in light of Supreme Court's decision in Barnes v. State, 946 N.E.2d 572 (Ind. 2011), *clarified on reh'g*, 953 N.E.2d 473 (Ind. 2011). In Barnes, Court held there is no right to reasonably resist unlawful entry by police officers. Instruction tendered by D provided a defense to charges against him by converting police officers to trespassers or unlawful enterers in his home by arguing that they used unnecessary force. In this way, D argued that he was permitted to use reasonable force against police officers in his garage. This was not permitted at the time under Barnes (and before IND. CODE 35-41-3-2(i)(2) was amended to restore a citizen's right to use reasonable force to protect themselves against unlawful police entry). Held, judgment affirmed.

TITLE: Harper v. State
INDEX NO.: K.6.j.
CITE: (2/26/2014), 3 N.E.3d 1080 (2014)
SUBJECT: Insufficient evidence of resisting law enforcement - "ruse" to enter home to arrest D
HOLDING: Court reversed D's resisting law enforcement conviction where, without any exigent circumstances and after being denied consensual entry, police officer lied to gain entry into home and was thus not "lawfully engaged in the execution of the officer's duties" under Ind. Code 35-44.1-3-1. When officers went to D's residence to arrest her for domestic battery, she refused to open her screen door and allow them inside. She also refused to step outside, so officers lied to D, telling her she needed to sign a protective order. When D opened the screen door, the officers stepped inside to arrest her, and she was charged with misdemeanor resisting arrest when she pulled away from officer as he tried to remove her wedding ring after she was handcuffed.

Although officer's purpose for entering D's home was to arrest her, he was still required to obtain an arrest warrant before entering her private residence. Instead, he chose to use fraud to enter the residence to arrest her. This was not a situation of hot pursuit or a crime committed in the presence of the officer. Distinguishing United States v. Santana, 427 U.S. 38 (1976), Court noted that D never crossed the threshold of her residence onto her stoop or porch. Given the officers' unlawful entry into residence, they were not engaged in the lawful execution of their duties at the time they arrested D. Thus, evidence was insufficient to support her conviction. Held, judgment reversed.

TITLE: Hopson v. State

INDEX NO.: K.6.j.

CITE: (2/28/2018), 2018 Ind. App. LEXIS 75 (Ind. Ct. App 2018)

SUBJECT: Felony resisting - sufficient evidence D's actions were proximate cause of police officer's injuries during flight

HOLDING: Tr. Ct. may, on its own motion, set aside a guilty plea if the D asserts his innocence after the plea has been accepted but before sentencing. Beech v. State, 702 N.E.2d 1132 (Ind. Ct. App 1998). In this case, Tr. Ct. did not err in revoking its acceptance of of plea agreement and forcing D to go to trial for Level 1 felony neglect of a dependent. Record reflects that Tr. Ct. believed that D did not admit that he was subjectively aware of a high probability that his conduct would result in his three-month-old son's health or life being at risk or in danger. Based on D's letters to Tr. Ct. and his statements at a subsequent hearing, Tr. Ct. found that D asserted his innocence to State's allegation that he knowingly or intentionally deprived his son of necessary food and/or medical care, which resulted in son's death. Although State argued in favor of the plea agreement at the trial level, this does not relieve Tr. Ct. of its obligation to ensure that D's guilty plea was an unqualified admission of his guilt. Held, judgment affirmed.

TITLE: Jean-Baptiste v. State
INDEX NO.: K.6.j.
CITE: (2/24/2017), 71 N.E.3d 406 (Ind. Ct. App 2017), *sum. aff'd* 82 N.E. 3d 878
SUBJECT: Resisting law enforcement - right to reasonably resist officer's unlawful crossing of home's threshold
HOLDING: A law enforcement officer who attempts to effect a civil arrest warrant is not "lawfully engaged in the execution of [his] duties" where, as here, he reaches across the threshold of a defendant's residence without permission or other legal justification and grabs the defendant. Casselman v. State, 472 N.E.2d 1310 (Ind. Ct. App 1985). Legislature recently reaffirmed its commitment to the Castle Doctrine as the policy in Indiana. See Ind. Code § 35-41-3-2(a) and 35-41-3-2(i) (permitting a person to exercise reasonable force to prevent or terminate an unlawful entry by a public servant into his home).

Here, officer attempting to serve a civil arrest warrant on Defendant was outside the residence while Defendant was inside the residence when officer, without permission or other legal justification, reached across the threshold and grabbed Defendant. Defendant pulled away, so officer entered the home and placed him in custody. As the officer was not lawfully engaged in the exercise of his duties, as a matter of law Defendant had the right to reasonably resist him, and State failed to present sufficient evidence to support Defendant's resisting law enforcement conviction. Held, judgment reversed.

TITLE: Johnson v. State
INDEX NO.: K.6.j.
CITE: (2nd Dist., 08-31-05), Ind. App., 833 N.E.2d 516
SUBJECT: Resisting law enforcement - violent means not required to "forcibly resist"
HOLDING: Under Indiana's resisting law enforcement statute, Ind. Code 35-44-3-3(a)(1), any action to resist police officer must be done by force. Spangler v. State, 607 N.E.2d 720 (Ind. 1993). In Spangler, Indiana S.Ct. held that a D "forcibly resists" law enforcement when "strong, powerful, violent means" are utilized to evade an officer's lawful exercise of his duties. Here, D did more than passively resist, he used physical means to resist officers by turning away & pushing away with his shoulders as they attempted to search him. More importantly, after refusing to get into transport vehicle, D stiffened up, requiring that officers exert force to place him inside transport vehicle. Although D did not threaten officers, lunge at them, or act "violently" toward them, Ct. concluded that D forcibly resisted officers & affirmed his conviction.

Given Spangler's definition of "forcibly resist," it is unclear whether an individual can be guilty of resisting law enforcement without the State having to prove that the individual's actions are violent. Ct. recognized that it may have moderated definition of "forcibly resist" as it was written in Spangler, but it refused to apply "an overly strict" definition of "force" to include strong, powerful, & violent means. See also Guthrie v. State, 720 N.E.2d 7 (Ind. Ct. App 1999). Held, conviction affirmed.

RELATED CASES: Shepard, 2058 N.E.3d 1051 (Ind. Ct. App. 2023) (sufficient evidence D forcibly resisted law enforcement by lodging arm under his body); Jordan, 37 N.E.3d 525 (Ind. Ct. App 2015) (sufficient evidence of forcible resistance where D yanked her shoulder away as officer attempted to grab it, she twisted and turned, and started "firing her arms and pulling her body away from [officer] so that [he] could not get control of her;" she also tried to "jerk away" from officer as he tried to handcuff her and kept trying to slip her wrists out of his hands); Glenn, 999 N.E.2d 859 (Ind. Ct. App 2013) (D's feet-dragging and multiple attempts to pull away from officer constituted forcible resistance); Lopez, 926 N.E.2d 1090 (Ind. Ct. App 2010) (as in Johnson, evidence was sufficient to prove that D acted with the requisite force in resisting the officers in the execution of their duties); J.S., App., 843 N.E.2d 1013 (D's actions of pulling & jerking away from officer met definition of "forcibly resist").

TITLE: Jones v. State
INDEX NO.: K.6.j.
CITE: (4/20/2018), ___ N.E.2d ___ (Ind. Ct. App 2018)
SUBJECT: Resisting law enforcement by fleeing officer's order - need not instruct jury on reasonable suspicion
HOLDING: Addressing a sufficiency claim for resisting law enforcement (by ignoring an officer's order to stop), Court found no fundamental error from Tr. Ct.'s failure to instruct jury that the order to stop must be supported by reasonable suspicion.

Several police officers were trying to find Tyrone Esters, who had outstanding warrants for burglary and battery on law enforcement. Because Esters dated D and lived with her, the officers surveilled D's residence. Esters often drove a gold Chevy Malibu, and D did the same. One of the officers watched D drive away from her residence in a gold Malibu; she soon returned with a passenger who loosely matched Esters' description. Another officer pulled his car behind the gold Malibu and activated his lights. D sped away but eventually stopped. The officers soon realized the passenger was not Esters, but they arrested D for resisting law enforcing by fleeing and driving with a suspended license.

D filed a motion to suppress, arguing the officers lacked reasonable suspicion to stop the Malibu; the Tr. Ct. denied the motion. At trial's end, the Tr. Ct. instructed the jury but did not instruct it that a resisting by fleeing conviction requires a finding that the decision to stop was supported by reasonable suspicion.

To convict a person of resisting by fleeing, the State must show, inter alia, that an officer has "ordered a person to stop." Ind. Code § 35-44.1-3-1(a)(3). This element requires a finding that reasonable suspicion supported the stop. See Gaddie v. State, 10 N.E.3d 1249, 1255 (Ind. 2014). Here, when the Tr. Ct. denied D's pretrial motion to suppress, it made the requisite finding of reasonable suspicion. Accordingly, there was no reason to submit this issue to the jury. Thus, the Tr. Ct. did not err, let alone commit fundamental error, in failing to instruct the jury about reasonable suspicion. Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: K.6.j.
CITE: (06-17-10), Ind. Ct. App, 928 N.E.2d 285
SUBJECT: Resisting law enforcement - Gaming Commission agents have full police power
HOLDING: Tr. Ct. did not err in concluding that a Gaming Commission agent is a "law enforcement officer" for purposes of resisting law enforcement. Even though Ind. Code 35-44-3-3(a),(c) and Ind. Code 35-41-1-17(a) define A law enforcement officer@ for purposes of criminal law, Title 4 statutes control resolution of issue because they specifically address what constitutes a "law enforcement officer" for purposes of gaming laws.

Indiana Code 4-33-2-11.6(1), (5) provides that Gaming Commission agents and Gaming Commission control officers constitute a law enforcement agency. Under Indiana Code 4-33-4.5-1(a), gaming agents are "vested with full police power to enforce gambling laws," and section (d) of the same statute allows gaming agents to "act as an officer for the arrest of offenders who violate the laws of Indiana." These statutes demonstrate Legislature's intent that gaming agents exercise full police power, including the power to arrest suspected offenders. "It would be absurd to expect gaming agents to do so without the deterrence provided by the resisting law enforcement statute." Thus, when D scuffled with Gaming Commission agent at Indiana Live Casino in Shelbyville, he resisted a law enforcement officer. Held, conviction affirmed.

TITLE: K.W. v. State
INDEX NO.: K.6.j.
CITE: (2/22/2013), 984 N.E.2d 610 (Ind. Ct. App 2013)
SUBJECT: Resisting law enforcement - insufficient evidence of force
HOLDING: State presented insufficient evidence of forcible resistance to support a true finding for committing resisting law enforcement. K.W. and another student faced off with raised fists, indicating they were about to fight. A teacher intervened, as did a school liaison officer who attempted to handcuff K.W. "for his own safety." K.W. "turned and pulled away" without any evidence of "strength, power or violence" in K.W.'s movement. Court of appeals reversed, holding that there was insufficient evidence that the school liaison officer was lawfully engaged in the execution of his duties as required by I.C. 35-44-3-3.

On transfer, Supreme Court reversed trial court, albeit for different reasons than the court of appeals, holding that neither the officer's testimony nor surveillance video of the incident established "force" beyond a reasonable doubt. Court also invited the legislature to further clarify the roles of school resource officers, as current statutes apply only to their engagement in law enforcement duties. Held, transfer granted, Court of Appeals' opinion at 976 N.E.2d 61 vacated, delinquency adjudication reversed.

TITLE: Murdock v. State

INDEX NO.: K.6.j.

CITE: (6/27/2014), 10 N.E.3d 1265 (Ind. 2014)

SUBJECT: Reasonable suspicion to stop D - probation revocation for resisting law enforcement affirmed

HOLDING: Under the statutory interpretation announced in Gaddie (above), evidence was sufficient to establish reasonable suspicion for a police officer to order Defendant to stop. The officer responded to a report of a suspect running away from another officer at nighttime. The officer then helped establish a perimeter around a largely unoccupied apartment complex in a high-crime area. While inspecting a vacant apartment, the officer saw Defendant, who matched the description of the fleeing suspect, run out of the back of the apartment. When the officer caught up with Defendant, he resisted arrest and injured the officer. Trial court's decision to revoke Defendant's probation was affirmed. Held, transfer granted, Court of Appeals' opinion at 5 N.E.3d 792 vacated, judgment affirmed.

TITLE: Paquette v. State
INDEX NO.: K.6.j.
CITE: (6/29/2018), 101 N.E.3d 234 (Ind. 2018)
SUBJECT: Only one conviction for single act of resisting law enforcement causing multiple deaths
HOLDING: Where a single discrete act of resisting law enforcement while using a vehicle causes multiple deaths, Ind. Code § 35-44.1-3-1, as written, was intended to permit only one Level 3 felony resisting law enforcement conviction. The structure of the statute supports the legislature's intent to only increase the gravity of the offense, not to create an entirely new offense for each individual injured or killed. Court compared the structure and language of the statute to similar statutes to support its conclusion. Subsection (b) of the statute only enhances the underlying offenses in subsection (a) and only one conviction is permissible when a single act of resisting causes multiple deaths. "Our legislature is aware that multiple convictions for multiple harms caused by a single violation require explicit authorization and we trust that they would have done so if that was their intent." Held, transfer granted, Court of Appeals' opinion at 79 N.E.3d 932 vacated, judgment reversed and remanded with instructions to vacate two of three convictions.

RELATED CASES: Paquette, 131 N.E.3d 166 (Ind. 2019) (the proper sentence to avoid double jeopardy violation, where D caused three deaths while operating a vehicle under the influence of drugs and fleeing police, was guilt for one count of Level 3 felony resisting law enforcement causing death; two counts of Level 4 felony operating causing death; and one count of Level 6 felony operating causing serious bodily injury).

TITLE: Robinson v. State
INDEX NO.: K.6.j.
CITE: (5/30/89), Ind., 538 N.E.2d 932
SUBJECT: Resisting arrest - civil body attachment
HOLDING: Tr. Ct. did not err in permitting officers to testify concerning their entry into D's home to serve civil body attachment. D had appeared in municipal Ct. several times in conjunction with complaints filed against him for health & environmental code violations. When he failed to respond to another summons, civil body attachment issued. Officers arrived at D's home, knocked & announced that they were police officers. When they received no reply, they were instructed to enter D's home & serve attachment. While doing so, 2 officers were wounded by D's gunfire, & D was charged with resisting arrest. D argues that officers had no authority to forcefully enter his home to execute civil attachment, *citing Casselman*, App., 472 N.E.2d 1310. In *Casselman*, Ct. App. correctly noted that civil attachment statute, Ind. Code 34-4-9-2.1, did not specifically authorize breaking & entering, as does criminal arrest warrant statute at Ind. Code 35-33-2-3(b). However, civil statute authorizes officer to serve writ & take subject into custody, & Ind. S. Ct. finds that legislature intended to empower officer to carry out these duties. Held, conviction affirmed. Shepard, J., CONCURS IN RESULT; DeBruler, J., DISSENTS.

TITLE: Runnells v. State

INDEX NO.: K.6.j.

CITE: (04-21-22), Ind. Ct. App., 186 N.E.3d 1181

SUBJECT: Insufficient evidence that defendant "forcibly" resisted law enforcement

HOLDING: Defendant was convicted of criminal trespass and resisting law enforcement after he wandered onto a stranger's porch, refused to leave, and then pulled away from a police officer's grasp while being escorted off the property. On appeal, he challenged the sufficiency of evidence for his resisting law enforcement conviction. The arresting officer had testified, "As soon as I attempted to place handcuffs on Mr. Runnells, he began to pull away or step away from me. I was able to grab his arm, and he began to pull away again from me. At that point, I grabbed him in a bear hug type manner, guided him to the ground, and was able to get him placed in handcuffs" The Court of Appeals determined that nothing in this testimony suggests any "strength, power, or violence" in Runnells' actions or otherwise proves beyond a reasonable doubt that Runnells acted forcibly. The State argued that Graham v. State, 903 N.E.2d 963 (Ind. 2009), in which our Supreme Court opined that "even stiffening of one's arms when an officer grabs hold to position them for cuffing would suffice" as forcible resistance, was controlling. The Court rejected the argument, observing that the "stiffening" statement in Graham: (1) was not necessary to the Court's decision; (2) is difficult to square with the Court's subsequent holding in K.W.; and (3) appears at odds with other statements made by the Court over the years. The Court further rejected the State's argument--that the resistance was forcible because Defendant possessed a sawed-off shotgun--because there was no evidence he actually possessed at the time of the offense, distinguishing Pogue v. State, 937 N.E.2d 1253 (Ind. Ct. App. 2010). Reversed and remanded.

TITLE: Shoultz v. State

INDEX NO.: K.6.j.

CITE: (1st Dist.; 9-22-00), Ind. App., 735 N.E.2d 818

SUBJECT: Resisting law enforcement - right to resist excessive force

HOLDING: D had right to resist excessive force used by officer. Rule that citizen may not resist peaceful, though illegal, arrest was not intended as blanket prohibition so as to criminalize any conduct evincing resistance where *means used* to effect arrest are unlawful. Casselman, App., 472 N.E.2d 1310. When determining whether officer used reasonable force when making arrest, Ct. considers facts & circumstance of each particular case, including severity of crime, whether suspect poses immediate threat to safety of officers or others, & whether he is actively resisting arrest or attempting to evade arrest by flight. Graham v. Connor, 490 U.S. 386, 106 S.Ct. 1865 (1989). Here, because officer observed motorcyclist making what he believed was unsafe start, officer followed motorcyclist to motorcycle club & entered front yard to investigate. At that time, D, who was fellow motorcyclist, started yelling at officer about being on property. During incident, officer ordered D to stop yelling, to go back in house & to put his hands up on wall, to which D passively refused. D continued yelling as officer tried to arrest him. Officer then sprayed him with mace & hit him twice, once in back of his leg & once on head, with his fifteen to eighteen-inch flashlight. As D was being restrained, he thrashed about on ground & kicked officer twice in shin. Excessive force was used against D who never verbally or physically threatened officer with harm, who was not forcibly resisting law enforcement or attempting to escape, & who was being arrested (though this was not verbalized by officer) for interfering with investigation of class C infraction. Thus, D had right to respond as he did to officer's excessive force. Held, conviction reversed.

NOTE: Ind. Code 35-41-3-2(i)(2) was amended in response to Barnes to restore a citizen's right to use reasonable force to protect themselves against unlawful police entry.

RELATED CASES: Cupello, 27 N.E.3d 1122 (Ind. Ct. App 2015) (D exercised reasonable force under amendment to Ind. Code § 35-41-3-2(i)(2) in response to Barnes, below, to prevent or terminate an unlawful entry by a public servant into his home; see full review, this section); Wilson, App., 842 N.E.2d 443 (Tr. Ct. committed reversible error when it declined to give a proposed instruction that informed jury about a D's right to protect himself when arresting officers use excessive force; see full review at D.9.g.2.g); Robinson, App., 814 N.E.2d 704 (commission of a battery against a police officer is not the use of reasonable force to resist an unlawful entry); Howell, App., 782 N.E.2d 1066 (regardless of whether initial stop of D was justified there was ample probable cause that D committed resisting law enforcement; person may not flee from or use force against police officer that orders a person to stop regardless of lawfulness of officer's order).

TITLE: Smith v. State
INDEX NO.: K.6.j.
CITE: (11/21/2014), 21 N.E.3d 121 (Ind. Ct. App 2014)
SUBJECT: Felony enhancement for resisting law enforcement- insufficient evidence D "inflicted" or "caused" officer's injuries

HOLDING: Enhancement of D's resisting law enforcement conviction to Class D felony was improper because State failed to prove that D "inflicted" or caused" injury to police officer who scraped his knuckle and fingertip while forcing D to the ground. Officer was injured when he fell to the ground while forcing D to the ground. D did not "inflict" the injury on the officer and the "cause" of the injury was the officer's action, not hers. In so holding, Court declined to follow Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App 2006), which reached opposite result. Held, judgment reversed and remanded to enter conviction of resisting law enforcement as a Class A misdemeanor.

RELATED CASES: Trash, 88 N.E.3d 198 (Ind. Ct. App 2017) (distinguishing Smith and Moore (below), D created a scenario which directly produced officer's back injury), Williams-Bey, 51 N.E.3d 1261 (although the question of whether it is required that D had the intent to cause the injury in order to support the "inflicting injury" enhancement remains unsettled, D's statements at guilty plea hearing were intended to protest his innocence rather than clarify his legal position; see full review at K.6.b); Moore, 49 N.E.3d 1095 (Ind. Ct. App 2016) (insufficient evidence D's fleeing caused injury to the police officer chasing him; while it may be possible for a D fleeing from an officer to be a proximate, as well as contributing, cause of that officer's resulting injuries, evidence did not support finding of proximate cause here; D did not put officer in a position where his only option was to suffer injury).

TITLE: Spangler v. State

INDEX NO: K.6.j.

CITE: (01-22-93), Ind., 607 N.E.2d 720

SUBJECT: Resisting Law Enforcement (RLE) requires force

HOLDING: S.Ct. granted transfer of Ct. App. memorandum decision to clarify meaning of statute on RLE. D was arrested for DOC when he refused to accept service of Temporary Protective Order & Order to Appear from county sheriff's department. He was later also charged with RLE. After repeated attempts to contact D, deputy sheriff went to his office & again tried to serve him with Ct. orders. Several very brief conversations between deputy & D followed, in which D refused to accept orders & told deputy not to try to serve him at work. He was placed under arrest for DOC when he walked away after being told he'd be arrested if he didn't come back & settle down.

D argued that his actions were not "forcible," & therefore were not in violation of RLE statute, Ind. Code 35-44-3-3. Tr. Ct. found because his actions in resisting were active, & not passive, they were forceful & unlawful. Ct. App. agreed, finding that while physical force was not used, Spangler still acted to resist. S.Ct. first noted that Ind. Code 35-44-3-3 states in part: "Sec. 3(a) A person who knowingly or intentionally: (2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a Ct. commits resisting law enforcement, a Class A misdemeanor." Ct. then noted conflict in interpretation involved whether "forcibly" modified required element of crime of RLE.

Both 3rd & 1st District Cts.App. have found use of force is essential element of offense., White, App., 545 N.E.2d 1124, & O'Connor, App., 590 N.E.2d 145. S.Ct. noted that "forcibly" appears directly before word "resists" in statute & concluded that "forcibly" is required element of crime, & that mere action to resist, absent showing of force, does not fall within prohibitions of statute. Ct. also considered whether "forcibly" modifies all of following verbs in statute, i.e., "resists, obstructs or interferes," or whether it modifies only word "resists," & concluded that it modifies & applies to entire string of verbs. Ct. next concluded that common denominators of all definitions of "forcibly" are use of strength, power, or violence, applied by someone to accomplish desired end. Additionally, Ind. Code 35-41-1-11 consistently defines forcible felony as one which "involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being." Ct. concluded that: "[w]e believe that one 'forcibly resists' law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties."

Ct. found here that D's resistance was active, but found it was not "forcible" as mandated by statute. Evidence most favorable to verdict showed that D abruptly ended his phone conversation with officer, refused to accept Ct. documents from him, & demanded that he not bother him at work. He also continued to express dissatisfaction with sheriff's department & turned & walked away from officer three times, to avoid service & resume work. Ct. found there was no strength, power or violence directed toward officer, & that therefore there was insufficient evidence of "forcible" actions to resist, Givan, dissenting.

RELATED CASES: Woods, 13 N.E.3d 558 (Ind. Ct. App 2014) (no evidence D forcibly resisted where she pulled on her wrist after arresting officer initially grabbed it and she started to turn toward the officer); Macy, 9 N.E.3d 249 (Ind. Ct. App 2014) (D/arrestee did not forcibly resist by getting out of police car because she was not "physically interacting" with arresting officer; when officer forced her back into police car, D did not forcibly resist by keeping her feet outside the car as passive resistance does not constitute forcible resistance); Aguirre, 953 N.E.2d 593 (Ind. Ct. App 2011) (evidence that D pulled her

arm away from police officer as she was trying to answer her cell phone was insufficient to sustain her conviction for resisting law enforcement); A.C., 929 N.E.2d 907 (Ind. Ct. App 2010) (juvenile's simple failure to stand, without more, amounts to passive inaction and seems analogous to failure to present one's arms for handcuffing, which does not constitute forcible resistance); Colvin, 916 N.E.2d 306 (Ind. Ct. App 2009) (evidence insufficient where D was not complying with officers' commands, did not stiffen his arms & kept his hands in his pockets during the struggle; officers had to use force or "made threatening or violent actions" to contribute to the struggle with the officers); Berberena, 914 N.E.2d 780 (Ind. Ct. App 2009) (because there was no evidence that D's opposition to officer putting handcuffs on him was forceful rather than merely difficult, evidence was insufficient to support conviction); Graham, 903 N.E.2d 963 (Ind. 2009) (while even "stiffening" of one's arms when an officer grabs hold to position them for cuffing would suffice, there is no fair inference here that such occurred; D's mere refusal to present his hands for cuffing was not forcible resistance); Atkinson, App., 810 N.E.2d 1190 (no evidence existed that D "forcibly resisted" law enforcement to support resisting conviction, where D fled from police twice & later hid in trunk of car to escape capture).

TITLE: Stack v. State

INDEX NO.: K.6.j.

CITE: (3d Dist. 2/20/89), Ind. App., 534 N.E.2d 253

SUBJECT: Resisting law enforcement - sufficiency

HOLDING: Evidence was insufficient to support conviction for resisting law enforcement where officer was not identifiable as such & did not tell D that he was under arrest. Incident here occurred while D watched police apprehend escaped prisoner, whose head was bleeding. D suggested that police should elevate prisoner's head. As D walked away, he passed individual getting out of white car, wearing blue jeans & sweater. D remarked that he thought police were mishandling situation, & after listening to response, told individual he was an "asshole." Individual responded that D should be careful, or he might be arrested "for interfering." As D turned to walk away, individual touched him on shoulder & D turned back around & punched him & fight ensued. Individual was in fact undercover narcotics officer, who testified that he had touched D on shoulder in attempt to place him under arrest. D was charged with forcibly resisting law enforcement officer lawfully engaged in execution of his/her duties, pursuant to Ind. Code 35-44-3-3. To be convicted under this statute, D must know or have reason to know that person resisted is law enforcement officer. Sayles, App., 513 N.E.2d 183. Here, evidence showed that officer was not identifiable as such by his attire. His remark that D might be arrested could have been made by one civilian to another & does not constitute substantial evidence of probative value that D should have known he was law enforcement officer. It is undisputed that officer never identified himself as such or told D that he was under arrest. Held, conviction reversed.

RELATED CASES: Battle, App., 818 N.E.2d 56 (distinguishing Stack, Ct. held that evidence was sufficient to prove that D knew woman in civilian dress was police officer); McCombs 536 N.E.2d 277.

TITLE: Stansberry v. State

INDEX NO.: K.6.j.

CITE: (09-19-11), 954 N.E.2d 507 (Ind. Ct. App 2011)

SUBJECT: D cannot be convicted of "attempted resisting law enforcement"

HOLDING: Where Tr. Ct. found that D acted with force but did not resist, obstruct, or interfere with officer's execution of his duties, D could not be convicted of "attempted resisting law enforcement." Because "forcibly" only modifies the type of resistance, obstruction, or interference actionable under the criminal code, it cannot even serve as a separate element that would, without more, support an included offense of attempt. Moreover, the very nature of offense of resisting law enforcement is almost necessarily one of attempt to elude the exercise of law enforcement duties. Short of escape, almost any action one takes towards thwarting law enforcement is necessarily one of attempt. It is actionable when it is coupled with force.

In this case, police officer ordered D to come to back of truck and place his hands on vehicle. D replied, "not today," and started taking his clothes off. He pulled his shirt over top of his head and charged at officer from ten feet away. Officer drew his pepper spray and announced that he would spray D if he continued moving closer. D nevertheless disobeyed and kept charging and removing his clothes, so officer sprayed him in face from six feet away. D continued charging and officer moved back and sprayed him again. This time, the pepper spray blinded D, and after ten seconds of staggering around he told officer, "I'm done" and submitted to handcuffs. By finding that D did not resist, obstruct, or interfere, Tr. Ct. essentially concluded that D's actions fell short of modest level of resistance necessary to sustain a conviction. Held, conviction and probation revocation reversed and remanded with instructions.

TITLE: State v. Moriarity

INDEX NO.: K.6.j.

CITE: (2nd Dist., 08-10-05), Ind. App., 832 N.E.2d 555

SUBJECT: No right to use force to resist unlawful seizure

HOLDING: Tr. Ct. erred in granting D's motion to suppress evidence & testimony relating to events that occurred after police officer told D he was going to seize his car. Police officer showed up at D's used car lot & showed D a prejudgment order of possession of car. This prejudgment order of possession was later determined to be invalid. When D told officer that he had vehicle's title in his possession, officer explained that he was required to follow Ct.'s order by seizing vehicle & that D would have to avail himself of legal system to reclaim the vehicle. Believing that his property was being unlawfully seized, D fled from officer & initiated a dangerous high-speed chase that could have resulted in injuries or death to himself, officer, and/or innocent bystanders. A private citizen may not use force in resisting a peaceful arrest by an individual whom he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful. Robinson v. State, 814 N.E.2d 704 (Ind. Ct. App 2004). Held, grant of motion to suppress reversed & remanded for further proceedings.

TITLE: Touchstone v. State

INDEX NO.: K.6.j.

CITE: (3rd Dist., 08-04-93), Ind. App., 618 N.E.2d 48

SUBJECT: Multiple Resisting Law Enforcement (RLE) convictions precluded

HOLDING: Where three officers were involved in subduing & transporting D who resisted arrest, only one conviction for RLE could be sustained because RLE is offense against lawful authority, not person, Armstead (1990) App., 549 N.E.2d 400. Ct. rejected State's argument that separate incidents of resisting occurred when D was placed under arrest & when they arrived at station. Ct. found facts supported only single incident even though D apparently stopped resisting during drive to station. Because Tr. Ct. only sentenced D on one count, however, cause was not remanded.

RELATED CASES: Sanders 914 N.E.2d 792 (Ind. Ct. App 2009) (2 convictions upheld because there were two distinct pursuits separated by both time and distance, i.e., two minutes and eight blocks); Whaley, App., 843 N.E.2d 1 (conviction on two counts upheld where each conviction involved separate victims); Johnson, App., 774 N.E.2d 1012 (Tr. Ct. properly found that D's actions in resisting officers one & two were sufficiently separated in time & distance as to constitute two distinct, separate offenses); Deshazier, App., 877 N.E.2d 200; Williams, App., 755 N.E.2d 1183 (D can be convicted of multiple counts of resisting law enforcement arising out of same incident where he has committed more than one of acts enumerated under Ind. Code 35-44-3-3, fleeing & resisting); Miller, App., 726 N.E.2d 349 (although D fled from police after leaving bank & then in ensuing chase, D could only be convicted of one count of resisting because there was single incident).

TITLE: Tyson v. State

INDEX NO.: K.6.j.

CITE: (1-30-20), Ind. Ct. App., 140 N.E.3d 374

SUBJECT: Refusal to remove hands from pockets when instructed by a law enforcement officer satisfies the “forcibly resist” element of resisting law enforcement.

HOLDING: In affirming Defendant's conviction for resisting law enforcement, Court of Appeals found sufficient evidence Defendant forcibly resisted, obstructed, or interfered with a police officer. The officer stopped Defendant after becoming suspicious he was trying to avoid her when he saw her marked patrol car. After initiating contact, the officer claimed she could smell an odor of alcohol and marijuana and that Defendant was uncooperative because he refused to stop or take his hands out of his pockets. Defendant also said he had done nothing wrong and that he did not have to stop. After calling for backup, the officer warned Defendant that if he did not keep his hands where she could see them, he would be tased. The officer also testified she could "see that there were items in his pockets." Defendant walked away, keeping his hands out of sight and the officer tazed him, causing him to fall down some steps. After the taser's current stopped, Defendant was "belligerent and uncooperative" and did not put his hands behind his back. The officer "administered her taser a second time and was able to handcuff" him. Court held that Defendant's refusal to take his hands out of his pockets, which clearly contained items, amounted to a threatening gesture presenting an imminent danger of bodily injury to the officer.

NOTE: See Rush, C.J, joined by Slaughter, J., dissenting from denial of transfer at 149 N.E.3d 1186, to reinforce that, when a resisting-law-enforcement conviction is based on the threat of force, the evidence must establish that (1) the threat was directed at the officer; and (2) the defendant's actions, viewed objectively, were threatening. The two justices would reverse Defendant's conviction because neither requirement is present here.

TITLE: Walker v. State

INDEX NO.: K.6.j.

CITE: (5th Dist., 7-20-04), Ind. App., 813 N.E.2d 339

SUBJECT: Resisting law enforcement - insufficient evidence; park ranger

HOLDING: Evidence was insufficient to support D's resisting law enforcement conviction because State failed to prove that a park ranger was a law enforcement officer. Ind. Code 9-13-2-92, 35-41-1-17, & 14-9-8-1, all set forth definitions of a law enforcement officer & none include park ranger. Thus, these statutes' failure to include park ranger indicates that a park ranger is not a law enforcement officer as a matter of law. In future trials, State may present evidence indicating a park ranger is considered an adjunct of a law enforcement agency but no such evidence was presented here. Held, judgment affirmed in part & reversed in part & remanded.

RELATED CASES: Harris, App., 831 N.E.2d 848 (distinguishing Walker, Ct. held that State presented sufficient evidence that officer who was employed by police department as park ranger was "law enforcement officer" within meaning of resisting law enforcement statute).

TITLE: Walker v. State

INDEX NO.: K.6.j.

CITE: (12/12/2013), 998 N.E.2d 724 (Ind. 2013)

SUBJECT: Sufficient evidence of forcible resistance - threat of violence

HOLDING: Under Indiana's resisting law enforcement statute, Ind. Code § 35-44.1-3-1, any action to resist a police officer must be done by force. Spangler v. State, 607 N.E.2d 720 (Ind. 1993). A person "forcibly" resists, obstructs, or interferes with a police officer when he or she uses strong, powerful, violent means to impede an officer in the lawful exercise of his or her duties. This should not be understood as requiring an overwhelming or extreme level of force. Even a modest level of resistance may suffice. Graham v. State, 903 N.E.2d 963 (Ind. 2009). Moreover, the statute does not require commission of a battery on the officer or actual physical contact--whether initiated by the officer or the D. It also contemplates punishment for the active threat of such strength, power, or violence when that threat impedes the officer's ability to lawfully execute his or her duties. Court declined to adopt a strict bright-line test for whether a D acts "forcibly," as that finding is best left for triers of fact.

Here, after officer told D and another man that he would use his tazer if they failed to comply with his order to drop to the ground, D disobeyed. Instead, D turned towards the officer, stared at him, clinched his fists in an aggressive manner, and started walking towards him. Officer continued to demand D drop to the ground, and when D was near striking distance, the officer deployed his tazer. Given totality of D's conduct, Court concluded it was sufficient to show an active threat of strength, violence, or power directed at officer to satisfy the charge of forcibly resisting law enforcement. Held, transfer granted, Court of Appeals' opinion at 984 N.E.2d 642 vacated, judgment affirmed.

TITLE: Wellman v. State

INDEX NO.: K.6.j.

CITE: (3rd Dist., 12-2-98), Ind. App., 703 N.E.2d 1061

SUBJECT: Resisting law enforcement - sufficient evidence of "fleeing"

HOLDING: Ind. Code 35-44-3-3(a)(3) provides that person commits resisting law enforcement if he flees from law enforcement officer after officer has, by visible or audible means, identified himself & ordered person to stop. "Flight" in this context should be understood to mean a knowing attempt to escape law enforcement when D is aware that law enforcement officer has ordered him to stop or remain in place once there. Statute does not require inquiry into speed, mode, & manner of retreat from law enforcement officer after officer has given command to stop. Here, officer who was conducting lawful investigation arrived at D's house in marked police car, dressed in full uniform. Officer ordered D to remain outside after D refused to cooperate with investigation. D disobeyed officer's command & went back inside house & locked door behind him. It was irrelevant that D did not run quickly into house or attempt to hide once there. Evidence was sufficient to support resisting law enforcement conviction based upon charge of fleeing. Held, judgment affirmed.

RELATED CASES: Macy, 9 N.E.3d 249 (Ind. Ct. App 2014) (when officer forced her back into police car, D did not forcibly resist by keeping her feet outside the car; passive resistance does not constitute forcible resistance); Manning, 995 N.E.2d 1066 (Ind. Ct. App 2013) (evidence for resisting by fleeing in a vehicle was sufficient even though driver and D/accomplice drove car only a few feet after ignoring officer's command to exit vehicle); Vanzyll, 978 N.E. 2d 511 (Ind. Ct. App 2012) (distinguishing Wellman, Ct. noted D had no obligation to open the door when police knocked and there was no evidence officers ordered him to stop before he ran back in the residence).

TITLE: West v. State
INDEX NO.: K.6.j.
CITE: (9/28/2017), 85 N.E.3d 608 (Ind. Ct. App 2017)
SUBJECT: Insufficient evidence - resisting law enforcement by fleeing
HOLDING: Defendant's conviction for Class A misdemeanor resisting law enforcement by fleeing was not supported by sufficient evidence. Ind. Code § 35-44.1-3-1(a)(3).

Defendant's son sold synthetic drugs to an informant. Police obtained a search warrant for Defendant's house and served it at 6:10 A.M. while some of the children were getting ready for school. Police forced open the door and broke a window to gain entry, and shouted commands for everyone to come out. Defendant saw the officers and turned toward the kitchen, heading toward the bedroom where her two-year-old grandson was sleeping. An officer shot her with a "foam baton," knocking her to the ground.

Flight in the context of the resisting statute "should be understood to mean a knowing attempt to escape law enforcement when the defendant is aware that a law enforcement officer has ordered him to stop or remain in place once there." Cowans v. State, 53 N.E.3d 540, 545 (Ind. Ct. App. 2016).

There is no evidence from which a reasonable factfinder could conclude Defendant intended to flee, escape, or even unnecessarily prolong her exit from the home. Further, in the twenty seconds of chaos during which Defendant allegedly fled from police by walking toward her grandson's bedroom, there is no evidence she was ordered to stop. Held, judgment reversed.

TITLE: White v. State

INDEX NO.: K.6.j.

CITE: (3rd Dist. 11/6/89), Ind. App., 545 N.E.2d 1124

SUBJECT: Resisting law enforcement - force required

HOLDING: Where evidence merely showed that D had stood in driveway to prevent police from towing his vehicle, it was insufficient to support conviction for resisting law enforcement. Ind. Code 35-44-3-3(a) provides that "person who knowingly or intentionally: (1) forcibly resists, obstructs, or interferes with" law enforcement officer or person assisting officer in execution of duties commits resisting law enforcement. Ind. has not previously considered whether "forcibly" modifies each verb which follows it. However, federal Cts. have construed similar federal statute to require that force is essential element of offense. Ct. App. here concludes same. D's position in driveway & his declaration that tow truck could not drive onto parking lot did not amount to forcible interference. Held, evidence insufficient; conviction reversed.

RELATED CASES: Wellman, App., 703 N.E.2d 1061 (evidence sufficient where D resisted leaving house by placing his hands against door frame & refusing to get up & walk once outside, forcing officer to lift D onto his feet); McCaffrey, App., 605 N.E.2d 241 (where D refused to get up & walk after being told he was under arrest, continued to refuse to leave squad car or put feet under him to stand when arriving at jail, & pulled legs up so officers were forced to carry him from car to effectuate arrest, it was sufficient to show forcible resistance, obstruction or interference with arrest. Although there needs to be some force in D's actions, it can be implied from circumstances).

TITLE: Yowler v. State

INDEX NO.: K.6.j.

CITE: (4th Dist., 10-08-08), Ind. App., 894 N.E.2d 1000

SUBJECT: No "outrageous conduct" defense to resisting law enforcement

HOLDING: An individual may not flee from a police officer who has ordered the person to stop, regardless of the apparent or ultimate lawfulness of the officer's order. Cole v. State, 878 N.E.2d 882 (Ind. Ct. App 2007). Further, Indiana's resisting law enforcement statute does not condition the offense upon a lawful order. Id. Therefore, under the Cole reasoning, an "outrageous conduct" defense is incompatible with the crime of resisting law enforcement.

In any event, officer's conduct in this case was not outrageous. At request of school principal, officer served D with a letter banning D from school property. After D became confrontational and failed to follow orders, officer slapped D. Evidence indicates that officer was acting to protect herself and to effect a lawful arrest. Held, judgment affirmed.

TITLE: Young v. State

INDEX NO.: K.6.j.

CITE: (3rd Dist., 12-16-93), Ind. App., 626 N.E.2d 474

SUBJECT: Resisting Law Enforcement (RLE) - sufficient evidence

HOLDING: Officers were called to D's apartment on report he was walking in & out of building with shotgun. After D came outside & denied possessing gun, he returned to apartment & shut & locked door on officer who followed him in to verify claim. After officers were in apartment, D said gun was in another apartment, but before officers reached other apartment, D pulled shotgun from behind TV & placed barrel under his chin. Officers left & took cover, ordering D to remove gun. D, who had made previous suicide attempts, said he wanted to die & that police should have killed him before. D then got in his car, with shotgun still aimed at his chin, & after starting car & police fire, shotgun was pointed at police. When D's parents arrived, father tried to get gun away, & D reacted violently, fired shot into air, ran back into apartment, & another shot was fired when he dove through screen. D was finally arrested after consulting with counselor & pastor, & giving up gun. Incident took approximately 3 hours & involved 30 officers. Ct. looked to Spangler, 607 N.E.2d 720, & found D's actions were sufficient to meet required element of force for RLE. Ct. also found officers were lawfully engaged in their duties because D's actions were dangerous & potentially harmful, & they were entitled to maintain peace & order for benefit of public. Held, conviction affirmed.

K. CRIMES

K.6. Interference with governmental operations

K.6.k. Trafficking with an inmate (Ind. Code 35-44-3-9)

TITLE: Norvell v. State

INDEX NO.: K.6.k.

CITE: (12-06-11), 960 N.E.2d 165 (Ind. Ct. App 2012)

SUBJECT: Trafficking with an inmate - accomplice liability

HOLDING: D, an inmate at Delaware County Jail, was properly convicted for trafficking with an inmate under theory of accomplice liability. D arranged for his girlfriend to obtain money, purchase and activate a cell phone, and then deliver to jail where he was incarcerated. D also helped his cell mate break a hole in their cell window, through which the phone was carried into the jail by cell mate. Further, cell mate delivered phone to D and D was the sole user of the phone. D's actions clearly aided the criminal enterprise. That he expected to benefit, and in fact did, from a criminal act in which he aided does not preclude his conviction for the offense. Hopper v. State, 539 N.E.2d 944 (Ind. 1989). Held, judgment affirmed.

TITLE: Sureporn Roll v. State
INDEX NO.: K.6.k.
CITE: (1st Dist. 1/24/85) Ind. App., 473 N.E.2d 161
SUBJECT: Trafficking with inmates
HOLDING: Evidence sustains D's conviction for trafficking with inmate. Here, D contends Second Chance Halfway House is not a "penal facility." Ct. finds definition of penal facility (Ind. Code 35-41-1-21) includes such a facility. Held, conviction affirmed.

K. CRIMES

K.6. Interference with governmental operations

K.6.I. Unlawful use of a police radio

TITLE: Wallman v. State
INDEX NO.: K.6.I.
CITE: (5/12/81), Ind. App., 419 N.E.2d 1346
SUBJECT: Unlawful use of police radio -- statute does not prohibit radar detection device
HOLDING: D was convicted of possession of portable police radio. D claimed that Tr. Ct. erred in overruling his motion to dismiss information because statute under which he was charged, Ind. Code 35-44-3-12, is unconstitutionally vague. Portable police radio that D was alleged to have knowingly and intentionally possessed was described as "radio device capable of receiving an assigned police frequency and commonly referred to as a radar detection device." Ct. held that because Ind. Code 35-44-3-12 does not prohibit possession of such device, D's motion to dismiss information was erroneously overruled. Held, conviction reversed.

K. CRIMES

K.6. Interference with governmental operations

K.6.m. Refusal to identify self

TITLE: Bringle v. State

INDEX NO.: K.6.m.

CITE: (4th Dist., 3-6-01), Ind. App., 745 N.E.2d 821

SUBJECT: Refusal to identify self - evidence sufficient

HOLDING: Evidence was sufficient for jury to convict D of refusal to identify self. To support conviction, State was required to prove beyond reasonable doubt that D: 1) knowingly or intentionally; 2) refused to provide law enforcement officer who had stopped him for infraction or ordinance violation; 3) with either name, address, & date of birth or his driver's license, if in his possession. Ind. Code 34-28-5-3.5. Here, after police officer stopped D for speeding, he held his driver's license up to window of his vehicle for officer to see. D argued that his action of holding up his license to window fulfilled his obligation under Ind. Code 34-28-5-3.5. Given common & ordinary meaning of word "provide," Ct. held that statute requires that person either supply police officer with name, address, & date of birth, or physically hand over his license, if it is in his possession. Displaying license through window did not comply with mandate of statute. Held, conviction affirmed.

RELATED CASES: Johnson, 933 N.E.2d 544 (Ind. Ct. App 2010) (D's act of instructing officer where he can find D's license after being asked at least four times for the license is not providing the officer with the licenses; thus, there was sufficient evidence of D's refusal to identify self; moreover, court rejected D's claim that fear for his safety prevented him from complying).

TITLE: Starr v. State

INDEX NO.: K.6.m.

CITE: (06-22-10), 928 N.E.2d 876 (Ind. Ct. App 2010)

SUBJECT: Passenger did not fall within purview of refusal to identify statute

HOLDING: A vehicular passenger is not subject to the same criminal penalties by refusing to identify himself when, unlike the driver of the vehicle, there was no reasonable suspicion that he had committed an infraction or violated an ordinance. Although police officers may request a passenger's verbal or documentary identification during a traffic stop, as a general proposition, "[c]itizens are not required to interact with police officers." Greeno v. State, 861 N.E.2d 1232 (Ind. Ct. App 2007).

Here, D was "stopped" when the vehicle in which his girlfriend was driving was stopped for an illegal turn. D refused to provide verbal or documentary identification during the traffic stop and was convicted of refusal to identify self. D was merely a passenger, thus, he lacked personal culpability for a violation related to the operation of the vehicle. In the context of a traffic stop for a vehicular violation, the Good Faith Belief statute provides for detention of a person who, in the "good faith belief of the officer, " has committed an infraction or ordinance violation." Ind. Code ' 34-28-5-3. The Refusal to Identify Self statute then criminalizes the refusal to comply with an officer's lawful request under the statute authorizing detention. Although D was stopped when vehicle in which he was a passenger was stopped, there was no showing that D was stopped as a consequence of any conduct on his part. There was no reasonable suspicion that he had committed an infraction or ordinance violation, giving rise to an obligation to identify himself upon threat of criminal prosecution. Thus, D did not fall within the purview of the Refusal to Identify Self statute. Held, conviction reversed.

TITLE: Weaver v. State
INDEX NO.: K.6.m.
CITE: (8/4/2016), 56 N.E.3d 25 (Ind. 2015)
SUBJECT: Sufficient evidence for refusal to identify
HOLDING: Sufficient evidence supported D's Class C misdemeanor conviction for refusal to provide information or driver's license (Ind. Code § 35-28-5-3.5).

An officer stopped D for driving without an operable license plate light. When D could not produce his license, the officer asked for his address and name. D refused to provide his address, and evaded questions about his name, eventually disclosing his last name, "Weaver," but otherwise saying, "I don't have a particular name." After finally admitting his mother calls him "Corey," D repeatedly refused to provide his date of birth, even after being handcuffed and detained for refusing to identify himself. After about sixteen minutes of questioning, D finally provided his date of birth. The officer then was able to determine that D's license was suspended. Held, transfer granted, Court of Appeals' opinion vacated, judgment affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.a. Disorderly conduct (Ind. Code 35-45-1-3)

TITLE: Blackman v. State

INDEX NO.: K.7.a.

CITE: (2nd Dist., 06-26-07), Ind. App., 868 N.E.2d 579

SUBJECT: Disorderly conduct - unreasonable noise; no violation of right to speak

HOLDING: Ind.Const. art. I, § 9 provides: "No law shall be passed, restraining the free interchange of thought & opinion, or restricting the right to speak, write, or print freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." When reviewing whether State has violated Article 1, Section 9, Ct. must determine whether state action has restricted a claimant's expressive activity, & if it has, Ct. must decide whether the restricted activity constituted an abuse of the right to speak. Whittington v. State, 669 N.E.2d 1363 (Ind. 1996). Here, D was arrested for disorderly conduct after she shouted & swore at police officers, thus State restricted her expressive activity. Some of D's outbursts were political speech, but others constituted expression focused on the conduct of a private party, *i.e.*, D herself. This dual nature of D's outbursts, coupled with her unreasonable noise levels, her refusal to comply with officers' instructions, & resulting disruption of police investigation, led Ct. to conclude that although D's expressive activity began as political speech, it did not end as such. State could have rationally concluded that where D obstructed & interfered with officers' attempts to function as law enforcement officer, her conduct constituted an abuse of the right to speak & fell within State's police power. Thus, D's arrest for disorderly conduct did not violate art. I, § 9 of Indiana Constitution. In so holding, Ct. relied on J.D. v. State, 859 N.E.2d 341 (Ind. 2007) & distinguished Price v. State, 622 N.E.2d 957 (Ind. 1993). Held, judgment affirmed. Kirsch, J., concurring, believes that Indiana's independent constitutional jurisprudence re: freedom of expression set forth in Price v. State, 622 N.E.2d 957 (Ind. 1993) was tacitly overruled by J.D. v. State, 859 N.E.2d 341 (Ind. 2007).

RELATED CASES: McBride, 94 N.E.3d 703 (Ind. Ct. App 2018) (D's conviction for class A misdemeanor criminal trespassing did not violate right to speech under Article 1, § 9 of the Indiana Constitution because statements were not solely political and because it was reasonable the State to conclude D was abusing his right to speech); Martin, 908 N.E.2d 285 (Ind. Ct. App 2009) (even if D's yelling, making loud noises & banging on walls in holding cell of work release center constituted "political" speech, there was abundant evidence that tirade constituted an abuse of D's right of free speech); Yowler, App., 894 N.E.2d 1000 (conviction upheld where D flailed his arms, yelled, used profanity & directed vulgar names at officer after being asked to stop, which caused D's neighbors to come out of their homes).

TITLE: Borchert v. State

INDEX NO.: K.7.a.

CITE: (3rd Dist., 10-18-93), Ind. App., 621 N.E.2d 657

SUBJECT: Disorderly conduct (DOC) - unreasonable noise

HOLDING: Where D's shouts could be heard inside building, & he failed to heed warnings to quiet down, his noise was unreasonable under circumstances, & DOC conviction did not violate constitutional right to free speech. D & 25 others were protesting outside abortion clinic, in public alley approximately 150 feet from building. As patient escorts, carrying portable radios, led patients from cars to clinic, protestors yelled at patients. Security officer received complaints from those inside clinic that D could specifically be heard, & that he was disturbing both staff & patients, shouting things like "Mommy don't kill me." Officer approached D, informed him his voice could be heard inside building, & warned him to quiet down. Later, same problem arose, & after arrest & trial D was convicted of DOC. Ct. found conviction did not violate D's right to engage in constitutionally protected speech. While spoken words generally fall within constitutional protections, several categories fall outside, including speech in circumstances where its time, place or manner of delivery unduly interferes with privacy of home or similar competing interest, i.e., nuisance speech. Ct. looked to decision in Price, App., 600 N.E.2d 103, upholding constitutionality of DOC statute, & finding prosecution of unreasonable noise constituting public nuisance did not violate free speech rights. Ct. found evidence of loudness, standing alone, does not constitute unreasonable noise, because unreasonableness of loudness is determined in context of surrounding circumstances. Ct. concluded here that D did use unnecessarily loud speech that was unreasonable under circumstances, & therefore prosecution for DOC did not violate his right of free speech. **Note:** Price decision was overturned on transfer, 622 N.E.2d 954, on Nov. 1, 1993.

TITLE: Cavazos v. State

INDEX NO.: K.7.a.

CITE: (2d Dist. 10/31/83) Ind. App., 455 N.E.2d 618

SUBJECT: Disorderly conduct (DOC) - unreasonable noise

HOLDING: There was insufficient evidence to support D's conviction for DOC where her words did not constitute fighting words, were not obscene, did not invade substantial privacy interests, were not unreasonably loud & did not incite immediate lawless action. Here, officer arrested D's brother in tavern for DOC. D told officer he had grudge against her brother & had no right to arrest him, called officer an asshole & continued to debate her brother's arrest after officer told her to be quiet. Application of DOC statute (Ind. Code 35-45-1-3(2)) to speech must be limited to unprotected classes of speech, e.g., obscenity, fighting words, public nuisance speech & incitement to imminent lawlessness. Hess v. IN, (1973) 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303. Ct. assumes but does not decide "unreasonable noise" criminalizes foregoing categories of constitutionally unprotected speech. To be obscene, speech must be erotic/appeal to prurient interest in sex. Cohen v. CA, (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284; Roth v. US, (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Fighting words are personally abusive epithets which are inherently likely to provoke violent action. Cohen; Chaplinsky v. NH, (1942) 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; Stults, App., 336 N.E.2d 669. Public nuisance speech invades substantial privacy interests in an essentially intolerable manner. Cohen. In order to incite immediate lawless action, speech must be directed to that goal. Hess ("we'll take the fucking street later"); Brandenburg v. OH, (1969) 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed. 2d 430; State v. New 421 N.E.2d 626. Held, conviction reversed. DISSENT by Buchanan agrees with state - speech constituted fighting words.

TITLE: Day v. State

INDEX NO.: K.7.a.

CITE: (8/29/2016), 57 N.E.3d 809 (Ind. 2016)

SUBJECT: "Fighting" subsection of disorderly conduct statute requires physical altercation, but not public disturbance

HOLDING: The "fighting" subsection of Indiana's disorderly conduct statute (Ind. Code § 35-41-1-3(a)(1)), does not contain a public disturbance element, but does require a physical altercation. Statute simply reads "[a] person who recklessly, knowingly, or intentionally...engages in fighting or in tumultuous conduct...commits disorderly conduct." Because the statute unambiguously applies to both public and private disturbances, D is not immune from prosecution simply because he confined his "fighting" to his house. Court agreed with D that statute is ambiguous in that the term "fighting" could include both physical and verbal altercations or it may just include physical altercations. Applying the rule of lenity, Court interpreted the term narrowly, meaning it covers only physical altercations. Moreover, under *noscitur a sociis*, if a statute contains a list, each word in that list should be understood in the same general sense. And because "tumultuous conduct" is defined as "serious bodily injury to a person or substantial damage to property" pursuant to Ind. Code § 35-45-1-1, "fighting" should be understood to entail physical violence as well.

Even under Court's narrow interpretation of the term "fighting," D's intentional spitting on his wife constituted sufficient evidence of a physical altercation to support his conviction. Held, transfer granted, Court of Appeals' opinion at 48 N.E.3d 921 vacated, judgment affirmed.

TITLE: D.R. v. State
INDEX NO.: K.7.a.
CITE: (2nd Dist., 6-7-00), Ind. App., 729 N.E.2d 597
SUBJECT: Disorderly conduct - insufficient evidence; no "lawful assembly of persons"
HOLDING: Ind. Code 35-45-1-3 provides that a person who recklessly, knowingly, or intentionally disrupts a lawful assembly of persons commits disorderly conduct. In this case, evidence was insufficient to support finding that juvenile D's behavior disturbed "lawful assembly of persons" because he muttered curse word in presence of one teacher & not in presence of group of people. Based upon definition of "assembly," it appears that legislature intended to punish behavior that disrupts group of people meeting for specific purpose. D & teacher were not part of group of people & consequently, evidence was insufficient to support Tr. Ct.'s finding that D committed offense of disorderly conduct by disrupting lawful assembly of persons. Held, judgment reversed.

TITLE: Davis v. State

INDEX NO.: K.7.a.

CITE: (2nd Dist., 11-13-96), Ind. App., 672 N.E.2d 1365

SUBJECT: Disorderly conduct - insufficient evidence of tumultuous conduct

HOLDING: D's refusal to obey police officer's order to clear street did not rise to level of tumultuous conduct, which is defined by IC 35-45-1-1 as "conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property." Thus, evidence was insufficient to support disorderly conduct conviction. Police officer was part of mobile field force deployed for purpose of riot control. Rioting activity in area where D was arrested included looting of businesses, property damage, & personal injury. D & other men did not respond to officer's repeated requests to leave area, & D continued to stand by vehicle with his hand inside window. In reversing D's conviction, Ct. noted that term "likely," as used to define tumultuous conduct, includes temporal requirement of immediacy. Gebhard v. State, 484 N.E.2d 45 (Ind. Ct. App 1985). Here, there was no evidence in record that any people nearby could have been immediately injured when D ignored officer's request, or that there was any property in danger of immediate damage. Fact that personal injury & property damage had been occurring in area over three-day period does not establish that D's conduct was in any way connected with such injury & damage. Held, conviction reversed.

RELATED CASES: Glenn, 999 N.E.2d 859 (Ind. Ct. App. 2013) (reasonable fact-finder could conclude D swung handcuff at officer and serious bodily injury could have resulted therefrom); Martin, 908 N.E.2d 285 (Ind. Ct. App. 2009) (even if D's yelling, making loud noises & banging on walls in holding cell of work release center constituted "political" speech, there was abundant evidence that tirade constituted an abuse of D's right of free speech); Bailey, 907 N.E.2d 1003 (Ind. 2009) (disorderly conduct may occur when the aggressor appears well on his way to inflicting serious bodily injury but relents in the face of superior force or creative resistance; it was reasonable for the trier of fact to conclude that, but for the officer's arrival, D's conduct of getting in Dean's face, cussing and clinching fists would have escalated).

TITLE: Gebhard v. State

INDEX NO.: K.7.a.

CITE: (1st Dist. 1/23/84) Ind. App., 459 N.E.2d 58

SUBJECT: Disorderly conduct - tumultuous conduct

HOLDING: Tr. Ct. erred in overruling D's motion to dismiss amended information (Count III - "tumultuous conduct") for failure to state facts/circumstances with sufficient precision so as to apprise D of charge against him. Here, information read: "On or about 11/2/82, in Vanderburgh County, IN, the D, Michael Gebhard, did knowingly engage in tumultuous conduct, all in violation of Ind. Code 35-45-1-3(1)." Information must be specific enough to enable D to prepare defense & assure he/she will not be put in jeopardy twice for same crime. Blackburn 291 N.E.2d 686. Usually information is sufficient if it tracks language of statute defining offense. However, if statute defines crime in general terms, then information must specify facts/circumstances to inform D of particular offense. Hamling v. U.S., (1974) 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). See Griffin 439 N.E.2d 160 (information charging receiving stolen property was inadequate; it neither described property nor named owners). Information in this case does not specify whether D's conduct endangered person/property. It does not indicate which of his activities on 11/2 fell within range of prohibited conduct. "Tumultuous conduct" is precisely type of charge requiring additional facts/circumstances in order to fully apprise D of nature of offense charged. State v. Bridgewater, (1908) 171 Ind. 1. Where inadequate information poses risk of double jeopardy, prejudice & inability to prepare defense are demonstrated. (Citations omitted.) Held, reversed, remanded (set aside conviction, dismiss charge).

RELATED CASES: Gebhard, App., 484 N.E.2d 45 (see card at K.1.a).

TITLE: Gilles v. State

INDEX NO.: K.7.a.

CITE: (4th Dist. 12/6/88), Ind. App., 531 N.E.2d 220

SUBJECT: Disorderly conduct - fighting words

HOLDING: D's conviction for disorderly conduct was supported by evidence & did not violate his constitutional right to free speech. D was arrested while "preaching" to crowd at public festival where band was playing & alcohol was served. D stood on public sidewalk outside entrance could be heard by 200 to 300 of approximately 1,000 people present. D addressed crowd as "fuckers," "sinners," "whores," "queers," "drunkards," "AIDS people," & "scum of the earth." D argues that his "noise" was not unreasonable under circumstances, & that it was constitutionally protected speech. There are 4 types of speech which are not constitutionally protected: (1) obscenity; (2) nuisance speech which interferes with privacy of home or similar competing interest; (3) speech advocating immediate violence or similar lawless action which is likely to follow; & (4) fighting words, personally abusive language likely to provoke violent reaction toward speaker. Mesarosh, App., 459 N.E.2d 426. (card at K.7.a). Thrust of fighting words exception is whether, under objective standard, words were stated as personal insult to hearer in language inherently likely to provoke violent reaction. In terms generally offensive in our culture, D placed listeners in categories defined by sexual activity, sexual orientation, & sexually transmitted disease. This constituted fighting words. Because they were unprotected, they were unreasonable, & D does not deny that he acted intentionally & refused to stop when asked twice to do so. Held, affirmed. Miller, J., DISSENTS.

TITLE: Hooks v. State

INDEX NO.: K.7.a.

CITE: (4th Dist., 1-31-96), Ind. App., 660 N.E.2d 1076

SUBJECT: Disorderly conduct - unreasonable noise

HOLDING: Conviction for disorderly conduct did not constitute unconstitutional punishment of protected speech. As police officer prepared to have D's vehicle towed from street in front of D's mother's house, D & his brother came out of house & began to scream obscenities at officer. D continued to shout obscenities at officer, so loudly that he could be heard across street. Prohibition against unreasonable noise in Ind.'s disorderly conduct statute is aimed at intrusiveness & loudness of expression, not whether content of language is obscene or provocative. Price v. State (1993), Ind., 622 N.E.2d 954. Here, State produced evidence that D's screams were overheard by his neighbors. From that evidence, jury could reasonably conclude that D's shouting infringed upon peace & tranquility enjoyed by others, & was not merely a "fleeting annoyance." Held, conviction affirmed, Robertson, J., dissenting.

TITLE: Johnson v. State

INDEX NO.: K.7.a.

CITE: (2nd Dist., 11-17-99), Ind. App., 719 N.E.2d 445

SUBJECT: Disorderly conduct - unreasonable noise; no violation of right to speak

HOLDING: Evidence was sufficient to support D's adjudication as delinquent child based upon commission of disorderly conduct. Police officers were called to residence by D's mother because he had been arguing with her. Officer testified that D argued in voice louder than voices of others in room. D's volume prevented police officers from asking additional questions in effort to resolve situation, both before & after officer asked D to be quiet. Because D's manner of loud speaking disrupted police investigation, Tr. Ct.'s conclusion that D made unreasonable noise was supported by evidence. Whittington, 669 N.E.2d 1363.

Ct. also rejected D's argument that his right to speak under Article 1, ' 19 of Indiana Constitution was violated by application of disorderly conduct statute to facts of this case. While arguing with officers & his mother, D stated that he was not going to attend "classes he was supposed to be going to." Although it was not implausible that D was criticizing State for imposing unfair probation conditions, it was equally plausible that D was simply commenting on his own conduct & intentions. It is reasonably conceivable that D's loud manner of speaking interfered with police investigation into reasons why D's mother called them to her home. Therefore, State could have rationally concluded that D's conduct constituted abuse of right to speak, & thus fell within State's police power. Held, conviction affirmed; Rucker, J., dissenting, concluded that evidence was insufficient to show that D's speech amounted to unreasonable noise.

RELATED CASES: McBride, 94 N.E.3d 703 (Ind. Ct. App 2018) (D's conviction for class A misdemeanor criminal trespassing did not violate right to speech under Article 1, § 9 of the Indiana Constitution because statements were not solely political and because it was reasonable the State to conclude D was abusing his right to speech); Anderson, App., 881 N.E.2d 86 (D's speech directed at tanning salon's decision to remove him from premises and his right to remain on premises was not political because it was not directed at police); Wells, App., 848 N.E.2d 1133 (D's loud, angry diatribe posed a threat to peace, safety, & well-being, & did not violate Art. 1, ' 9 of Ind. Constitution); Madden, App., 786 N.E.2d 1152 (evidence was sufficient to convict D of disorderly conduct where D's political expression created harm, & restriction of expression was not material burden).

TITLE: Jordan v. State

INDEX NO.: K.7.a.

CITE: (6/25/2015), 37 N.E.3d 525 (Ind. Ct. App 2015)

SUBJECT: Disorderly conduct - unreasonable noise; violation of right to speak

HOLDING: Evidence was insufficient to sustain D's conviction for disorderly conduct, where her comments to police constituted free speech under the Indiana Constitution and did not inflict "particularized harm" on any private interests. During a traffic stop, D was belligerent toward police officer and yelled at him after he asked if she had any weapons in the car. She questioned if she was being pulled over because she was black. Another officer responded to the scene and the car was towed. D refused to leave the scene, and after continuing to yell at the officers, they decided to arrest her.

Court held that D's overall complaint and statements to police were critical of them, and thus her speech was political. The State failed to prove that the statements and D's shouting – which caused people in the area to pay attention to the situation – rose to the level of anything beyond a fleeting annoyance. The State likewise failed to demonstrate that the speech amounted to a public nuisance such that it inflicted particularized harm analogous to tortious injury on readily identifiable private interests. Held, disorderly conduct conviction reversed, resisting law enforcement conviction affirmed.

TITLE: J.S. v. State

INDEX NO.: K.7.a.

CITE: (2nd Dist., 03-21-06), Ind. App., 843 N.E.2d 1013

SUBJECT: No disorderly conduct where "hostile" fight not present

HOLDING: Ct. reversed juvenile adjudication for disorderly conduct where D was arrested in school after officer witnessed her grab boy's hair & hit him in the face. Testimony from two witnesses & D established that D did acts after boy slapped her on the butt & that acts were just play fighting, which D told officer as he was trying to arrest her. D was charged with recklessly, knowingly, or intentionally engaging in fighting pursuant to Ind. Code 35-45-1-3. A "fight," which is not statutorily defined, is described as a "hostile encounter; either physical or verbal in nature" by Black's Law Dictionary. Juvenile Ct. appeared to find that the mere act of hitting constitutes "fighting" per se, negating the requisite of hostility necessary for the finding of "fighting." There was scant evidence in the record that D's acts were done in hostility outside the officer's assumption that it "could have been a fight," which Ct. found insufficient, without more, to establish D's motivations beyond a reasonable doubt. Held, judgment affirmed in part & reversed in part.

TITLE: McCoy v. State

INDEX NO.: K.7.a.

CITE: 157 N.E.3d 28

SUBJECT: Disorderly conduct -- yelling at police as they intervened in domestic disturbance
constituted political speech

HOLDING: Absent evidence that comments rose to the level of unreasonable noise, loud criticism of government action does not constitute disorderly conduct. Here, police arrived at a domestic disturbance and Defendant, a neighbor, was arrested and convicted of disorderly conduct after yelling at police officers. The Court of Appeals found evidence insufficient to support a conviction that would be consistent with article 1, section 9 of the Indiana Constitution, because Defendant demonstrated both that the State restricted her political expression and that she had not abuse the right to speak. Defendant's extremely brief interaction with police where she clearly expressed her political speech did not infringe upon the peace and tranquility of her neighbors and evidence was insufficient to support her disorderly conduct conviction.

TITLE: Mesarosh v. State

INDEX NO.: K.7.a.

CITE: (4th Dist. 2/9/84) Ind. App., 459 N.E.2d 426

SUBJECT: Disorderly conduct - unreasonable noise

HOLDING: D's obscene language directed to police officers was not protected speech & constituted "fighting words." Here, after D's friend was arrested, D shouted a string of verbal abuse at police, which included "shit," "mother fuckers," "son-of-a-bitches," "fuck you pigs" & "we're going to get your ass." A crowd gathered but did not interfere with either arrest. After reviewing the four types of unprotected speech, Ct. holds D's words were fighting words. Test for fighting words is whether, under an objective standard, words were intended as personal insult to hearer in language inherently likely to provoke a violent reaction. Ct. examines recent IN fighting words cases: Miller 279 N.E.2d 222 (reversed); Whitted 269 N.E.2d 149 (affirmed); Cavazos, App., 455 N.E.2d 618 (reversed); Stults, App., 336 N.E.2d 669 (affirmed). Ct. applies Judge Buchanan's rationale in Cavazos (dissenting opinion) but emphasizes the decision does not question Cavazos. Facts differentiate results in cases re fighting words. Held, conviction affirmed. Young CONCURS, noting noise was unreasonable, content of noise is irrelevant. "A person could violate the statute by reading the scriptures in an unreasonably loud manner."

RELATED CASES: Martin, App., 499 N.E.2d 273 (Disorderly C 1, 9; evidence of unreasonable noise held sufficient).

TITLE: Mitchell v. State

INDEX NO.: K.7.a.

CITE: (2nd Dist., 8-16-04), Ind. App., 813 N.E.2d 422

SUBJECT: Disorderly conduct - evidence sufficient; unreasonable noise

HOLDING: In a question of first impression regarding disorderly conduct, Ct. held that conviction could stand despite fact that a law enforcement officer never requested D to stop making unreasonable noise. While several other jurisdictions have required that officer make such a request, either statutorily or even when a statute is silent on the issue (as is the case in Indiana), the Ct. found otherwise, holding only that an "official" warning need be given which was satisfied by a hospital security guard in this case. Ct. found guidance for its holding from Whittington v. State 669 N.E.2d 1363 (Ind.1996), which, although involving a police officer, stated "a conviction for disorderly conduct requires proof of 'unreasonable noise' both before & after an official warning." The Ct. left for another day whether requests by others than police officers or security officers would be found "official." Ct. also rejected that D's conviction violated his constitutional right to freedom of expression under Art. I, § 9 of the Ind. Constitution as the security officers were acting as private citizens. [Ed. note: Such analysis appears incorrect as D's arrest for disorderly conduct would implicate State action & free expression can be implicated in expression directed at private individuals within "the broad category of speech 'on any subject whatever' that is protected by Article I, Section 9." See Mishler v. MAC Sys., 771 N.E.2d 92 (Ind. Ct. App.2002) where injunction by Ct. ordering Appellant to take a sign out of yard complaining of Appellee resulted in State action limiting expression among private parties; see also Local Union No. 135 v. Merchandise Warehouse, 127 Ind. App. 57 (1956) where picketing of private company implicated freedom of speech].

Ct. also noted in a footnote that D's outburst exceeded protected speech & was not an "abuse," but Ct.'s holding relied on the idea that freedom of expression was not implicated due to private parties being involved. Decision also noted that "hospital setting" here played role in determining whether speech "infringed on the right to peace & tranquility enjoyed by others." Held, judgment affirmed.

TITLE: Oliver v. State

INDEX NO.: K.7.a.

CITE: (5th Dist., 6-12-03), Ind. App., 789 N.E.2d 1003

SUBJECT: Disorderly conduct - obstructing pedestrian traffic separate offense

HOLDING: Evidence was insufficient to support D's conviction for disorderly conduct. D, in protest of other religious group, carried 2X3 foot sign around RCA Dome before football game was about to begin. There was large amount of vehicular & pedestrian traffic. D was arrested because he was standing in middle of sidewalk with sign & people were forced to walk in street to get around him. D argued that although most of pedestrians were probably walking to RCA Dome where they would become lawful assembly of persons attending football game, they had not yet become lawful assembly of persons pursuant to Ind. Code 35-45-2-1(3) while they were walking. "Assembly" refers to group of people already assembled, not one that is in process of assembling. D.R. v. State, 729 N.E.2d 597 (Ind. Ct. App. 2000). Further, D argued that in light of definition of "assembly," facts of case do not fit elements of crime charged. D was told he was arrested for obstructing pedestrian traffic, which is specific charge apart from disorderly conduct. Person cannot be properly charged with & convicted of disorderly conduct for obstructing pedestrian traffic. Legislature was mindful of disorderly conduct statute when it created obstruction of traffic statute in 1998. It was obvious intent of legislature to make obstruction of traffic separate crime from disorderly conduct. Because evidence demonstrated that D was arrested because he was obstructing pedestrian traffic, conviction for disorderly conduct is not supported. Held, judgment reversed. Sharpnack, J., dissenting, concluded that majority construed term "assembly" too narrowly & evidence was sufficient to sustain conviction.

TITLE: Price v. State

INDEX NO.: K.7.a.

CITE: (11-01-93), Ind., 622 N.E.2d 954

SUBJECT: Disorderly conduct (DOC) - unreasonable noise

HOLDING: Unreasonable noise provision of DOC statute is not overbroad or vague, but must be narrowly construed to be constitutional under Ind. Const. Under that construction, evidence was insufficient to support conviction, reversing decision at 600 N.E.2d 103 on this issue. Art. I, § 9 of Ind. Const. states: "No law shall be passed, restraining the free interchange of thought & opinion, or restricting the right to speak, write or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." D was convicted under Ind. Code 35-45-1-3(2) making it illegal to make unreasonable noise & continue to do so after being asked to stop. D was arrested in early morning hours of New Year's Day, during noisy altercation between police & multiple "partiers," when she "screamed" profanities at officer while objecting to another's arrest & then her own. After several verbal exchanges, officer told D to desist or he would arrest her for DOC, & she responded, "'F--- you. I haven't done anything.'" S.Ct. examined what constituted "abuse" of right of free speech; concluding that "[t]o the extent that Ind. Code Ann § 35-45-1-3(2) permits the State to impose a material burden upon the free exercise of political speech, it cannot stand." Although violation of rational statute generally would constitute "abuse" of rights extended in Art. I, § 9, State cannot punish expression, if to do so would impose "material burden upon a core constitutional value." Ct. concluded that political speech did constitute "core constitutional value," & determined that when political speech that doesn't harm any particular individual is treated & punished as abuse, there is material burden placed on core constitutional value. To determine when such speech could be properly considered abusive, Ct. looked to tort law, & held that "political expression becomes 'unreasonably noisy' for purposes of Ind. Code Ann. § 35-45-1-3(2) when & only when it inflicts upon determinant parties harm analogous to that which would sustain tort liability against the speaker." In D's case, Ct. first found her actions constituted political speech, primarily because it was protest concerning legality & appropriateness of police conduct. Ct. concluded that while behavior would support finding D created public nuisance, & her "victims" were identified with sufficient specificity, harm suffered did not rise above fleeting annoyance. Therefore, punishment under Ind. Code 35-45-1-3(2) was impermissible under Ind. Const. Ct. also examined conviction under First & Fourteenth Amendments to U. S. Constitution & concluded that code section at issue was not overbroad or vague in violation of those provisions. Because there was insufficient evidence to support conviction under constitutionally permissible interpretation of Ind. Code 35-45-1-3(2), however, transfer was granted, & case remanded for entry of acquittal on DOC charge, Dickson & Givan, JJ., dissenting.

RELATED CASES: McBride, 94 N.E.3d 703 (Ind. Ct. App 2018) (D's conviction for class A misdemeanor criminal trespassing did not violate right to speech under Article 1, § 9 of the Indiana Constitution because statements were not solely political and because it was reasonable the State to conclude D was abusing his right to speech); Whittington, 669 N.E.2d 1363 (see full review, this section).

TITLE: Radford v. State

INDEX NO.: K.7.a.

CITE: (2nd Dist., 09-20-94), Ind. App., 640 N.E.2d 90

SUBJECT: Disorderly Conduct (DC) - evidence sufficient

HOLDING: On rehearing, Ct. reversed previous decision at 627 N.E.2d 1331, which found insufficient evidence to convict D of DC. Previous decision had found D's speech was protesting legality & appropriateness of police conduct, & therefore was protected political speech. Relying on decision in Price v. State, Ind., 622 N.E.2d 954, Ct. had found evidence of altercation with officer in hospital after D had been fired, did not rise to level giving rise to tort liability, & therefore was insufficient to support conviction. On rehearing, Ct. largely adopted dissent to previous decision, finding D's purpose in arguing with officer was not to make expression concerning political process, but was to continue underlying dispute over property. Because no "purely political" speech was involved in D's case, & State established that she made unreasonable noise & continued to do so after being asked to stop, conviction for DC was supported by sufficient evidence. Held, conviction affirmed, Friedlander, J., dissenting.

TITLE: Robinson v. State
INDEX NO.: K.7.a.
CITE: (2d Dist. 03/17/92), Ind. App., 588 N.E.2d 533
SUBJECT: Disorderly conduct (DO) - fighting words
HOLDING: Where D called officer "lying mother-fucker," told him to "get the fuck away," & screamed that investigation was "bullshit," evidence was sufficient to support conviction for DO, because such words were "fighting words," & unprotected speech. D was charged with DO by making unreasonable noise & continuing to do so after being asked to stop. Situation arose when police approached D in his car & asked him to get out, after they had been sent to store parking lot on citizen complaint that someone was selling merchandise from car. D accused police of harassment & made statements during their confrontation. Because conviction was based on speech, question was whether it was constitutionally protected speech. Ct. looked at definitions of insulting or "fighting words," & found them to be "those which by their very utterance inflict injury or tend to incite an immediate breach of peace," quoting Chaplinsky v. New Hampshire (1942), 315 U.S. 568, 571, as cited in Brittain (1990), Ind. App., 565 N.E.2d 757. Ct. noted that there was no Ind. S.Ct. authority on issue, but cited to Brittain, Mesarosh, App., 459 N.E.2d 426, & Cavazos (1983), Ind. App., 455 N.E.2d 618, for support. Ct. found that language used did not technically constitute "obscene" language but found it did constitute fighting words. Held, conviction affirmed, Shield, J., dissenting. **Note:** Justice Shields' dissent is lengthy & may provide support for opposite views.

TITLE: Shoultz v. State

INDEX NO.: K.7.a.

CITE: (1st Dist.; 9-22-00), Ind. App., 735 N.E.2d 818

SUBJECT: Disorderly conduct - insufficient evidence; political expression

HOLDING: Noise alleged by State to be unreasonably loud was political speech by D & did not adversely affect private interests as required by Indiana Constitution. If D's speech giving rise to disorderly conduct conviction is political, State must demonstrate that it has not materially burdened D's opportunity to engage in political expression. Such expression is not materially burdened if State produces evidence that speech inflicted particularized harm analogous to tortious injury on readily identifiable private interests. Evidence of annoyance or inconvenience is insufficient. Price, 622 N.E.2d 954. Here, noise State claims was unreasonable was D's profanity-laced tirade directed at officer after he entered motorcycle club property to investigate other motorcyclist's alleged unsafe start. Because D did not comment on validity of his own conduct until after police attempted to arrest him, but rather D protested legality & appropriateness of police conduct toward third party, D's speech was political expression. In addition, officer's testimony, which made no statements at all as to noise's effect on residents of area surrounding motorcycle club, was only evidence State offered to prove tortious injury on private interests. Thus, there was insufficient evidence to support conviction for disorderly conduct that would be consistent with Article I, § 9 of Indiana Constitution. Held, conviction reversed.

RELATED CASES: Burton, 978 N.E.2d 520 (Ind. Ct. App 2012) (although officers testified to different versions of what occurred, DVD provided a strong evidentiary foundation to warrant the giving of tendered instruction on right to defend against perceived excessive force; error in refusing instructions was not harmless); Johnson, App., 747 N.E.2d 623 (D engaged in protected political speech & State failed to produce evidence that D's speech inflicted particularized harm analogous to tortious injury on readily identifiable private interests).

TITLE: Snell v. State

INDEX NO.: K.7.a.

CITE: (4th Dist., 05-18-07), Ind. App., 866 N.E.2d 392

SUBJECT: Disorderly conduct- right to protected speech instruction

HOLDING: Tr. Ct. erred by refusing D's request to instruct the jury on protected speech. As a general rule, a D in a criminal case is entitled to have the jury instructed on any theory of defense which has some foundation in the evidence. Here, D yelled profanities at police officers when they started arresting her friend. Despite the officers' requests for D to stay back & calm down, she continued yelling, stood on the couch & approached the officers. One of the officers testified he was concerned about the safety of the situation. D's speech may have been found to be political speech. Had an instruction on the right to speak been given, the jury would have been properly informed of a D's right to engage in expressive activity, & of the jury's burden to determine whether the state action has restricted the expressive activity & if the restricted activity constituted an abuse of the right to speak. Thus, Tr. Ct.'s refusal to give the instruction was not harmless.

A local rule that is inconsistent with the Trial Rules is deemed to be without force & effect. Here, Tr. Ct. also refused to give the protected speech instruction because D tendered the instruction at the close of evidence, which violated Allen County local rule 9. Local rule 9 is incompatible with Trial Rule 51 in that it impermissibly constrains the tender of jury instructions to submission prior to the day of trial, when Trial Rule 51 clearly allows the tender of such instructions after the close of evidence. Because a party would be unable to tailor the instructions to fit the evidence if the proposed instructions must be submitted before the close of evidence, the incompatibility of the local rule with the trial rule could leave a D in a detrimental position. Thus, Tr. Ct. erred by applying the local rule to bar the tendered instruction. Held, judgment reversed & remanded for new trial.

TITLE: U.M. v. State

INDEX NO.: K.7.a.

CITE: (4th Dist., 05-26-05), Ind. App., 827 N.E.2d 1190

SUBJECT: Disorderly conduct - shouting obscenities at police protected speech

HOLDING: Juvenile's delinquency adjudication based upon disorderly conduct violated Art. I, § 9 of the Indiana Constitution. Police responded to call about graffiti spraying & came across D & another individual in the back seat of a car. After officer instructed occupants to hold up their hands, the other individual dropped his hands & the officer instructed him once again to keep them raised. D yelled at the officer, "F___ you, he can't keep his arms up, his arms hurt" & made other observations such as "You guys are all racists; f___ the police." Ct. used the two-step analysis of Whittington v. State, 669 N.E.2d 1363 (Ind.1996): (1) whether state action has restricted a claimant's expressive activity; & (2) if so, whether the restricted activity constituted an "abuse" of the right to speak. A D can show that it is not an abuse by showing his expression to be political, to which the burden shifts to the State to show that its actions did not materially burden the claimant's opportunity to engage in political expression. To do this, State must show the expression inflicted particularized harm analogous to tortious injury. Ct. found itself "constrained" by Price v. State, 622 N.E.2d 954 (Ind.1993), where the Indiana S.Ct. found that D engaged in political speech when she screamed obscenities at a police officer in connection with the arrest of a third party. Likewise, here, the juvenile D's comments were in regard to his companion's inability to raise his arms & the appropriateness of police conduct toward his companion. Ct. "reluctantly" found insufficient evidence due to violation of the juvenile D's free speech rights. Held, judgment reversed.

RELATED CASES: Dallaly, 916 N.E.2d 945 (Ind. Ct. App 2009) (D's loud yelling obstructed and interfered with the officer's ability to function, and it necessitated the officer calling for backup; D's protests also created a traffic hazard; thus, although the D's speech was political, the State proved he abused his right of speech and conviction for disorderly conduct was constitutional); Martin, App., 908 N.E.2d 285 (Ind. Ct. App. 2009) (even if D's yelling while being detained in holding cell was political, his disturbance was more than a mere fleeting annoyance & it interfered with duties of work release facility's employees); J.D., 859 N.E.2d 341 (juvenile D was not engaged in constitutionally protected speech when her loud talking over officer at state-run guardian home interfered with officer's ability to do his job; see full review at J.3); Wells, App., 848 N.E.2d 1133 (D's tirade during traffic stop not political speech).

TITLE: Whittington v. State

INDEX NO.: K.7.a.

CITE: (8-7-96), Ind., 669 N.E.2d 1363

SUBJECT: Disorderly conduct - challenge under Indiana Constitution

HOLDING: Reviewing state constitutional challenge to Indiana's disorderly conduct statute, Ind. Code 35-45-1-3(2), requires two-step inquiry: 1) has state action restricted claimant's opportunity to engage in expressive activity? & 2) was restricted expressive activity an abuse of right to speak? Article I, Sec. 9 of Indiana Constitution states: "No law shall be passed, restraining the free interchange of thought & opinion, or restricting the right to speak, write or print, freely, on any subject whatever: but for abuse of that right, every person shall be responsible." Disorderly conduct statute makes it illegal to make unreasonable noise & continue to do so after being asked to stop. If claimant demonstrates that right to speak is implicated, he or she retains burden of proving that State could not reasonably conclude that restricted expression was an "abuse" of right to speak. One way that claimant can attempt to meet this burden is to show that his or her expressive activity was political, in which case State must show that its action has not materially burdened claimant's opportunity to engage in political expression. Price v. State, 622 N.E.2d 954 (Ind. 1993). Judging nature of expression in context, by objective standard, expression will be deemed "political" if its point is to comment on government action. If expression is ambiguous, reviewing Ct. should evaluate constitutionality of any state-imposed restriction of expression under standard rationality review. Here, D's actions in arguing & shouting when police came to apartment on domestic dispute complaint, including yelling "this is all bullshit" & "fuck this shit," did not involve political expression, because his remarks could have agitated other persons in apartment, & remarks were not directed toward arresting officer. Under rationality review, State could have believed D's outbursts constituted abuse of right to speak. Conviction for disorderly conduct in this case did not contravene right to speak, as guaranteed by Indiana Constitution, Article I, Section 9. Held, transfer granted; conviction affirmed; Sullivan, J., concurring; Dickson, J., concurring & dissenting.

RELATED CASES: McBride, 94 N.E.3d 703 (Ind. Ct. App 2018) (D's conviction for class A misdemeanor criminal trespassing did not violate right to speech under Article 1, § 9 of the Indiana Constitution because statements were not solely political and because it was reasonable the State to conclude D was abusing his right to speech), Williams, 59 N.E.3d 287 (Ind. Ct. App 2015) (D did not meet burden to establish affirmative defense to disorderly conduct because she didn't show that her statements were solely political; see full review, this section).

TITLE: Williams v. State
INDEX NO.: K.7.a.
CITE: (8/26/2016), 59 N.E.3d 287 (Ind. Ct. App 2015)
SUBJECT: D's speech was not solely political; disorderly conduct conviction affirmed
HOLDING: Because D did not demonstrate that her verbal outbursts regarding police conduct were solely political, she failed to meet her burden to establish an affirmative defense to disorderly conduct. See Ind. Const., Art. 1, § 9; see also Barnes v. State, 946 N.E.2d 572, 577 (Ind. 2011), aff'd on rehearing, superseded by statute on other grounds. Thus, the State acted rationally in impairing her speech as it interfered with police activity and disturbed her neighbors.

Six to ten police officers went to D's home to serve an arrest warrant on her brother, Robert Sanders, who lived with her. D became irate and started yelling that Sanders was not there. One officer asked to enter the home and search for Sanders; D slammed the door in his face. Police then established a perimeter around D's home. A few minutes later, D emerged from her home to escort her niece to a nearby car that was waiting to take the niece to school. The officers would not let D go back inside as they were still trying to find Sanders. D began yelling and cussing, ignored the officers' requests to be quiet, and loudly asked, "You mean to tell me you are not going to let me enter my motherf***ing house?" She also yelled that she needed to get back inside to attend to her sick mother, and when informed that she would be arrested for disorderly conduct if he didn't become quiet, she yelled that she didn't care if she went to jail. The commotion distracted one of the officers from doing his job to maintain the perimeter, and it also caused several neighbors to come out of their homes to see what was going on. D was charged and convicted of Disorderly Conduct, a Class B misdemeanor.

D did not meet her burden of proof on her affirmative defense. Some of her comments addressed matters other than police conduct. For instance, she shouted that Sanders was not in her house. She said her mother was sick and needed attention. She said she didn't care if she was arrested. Some of her comments were directed at her neighbors. Because she did not meet her burden, the State's impairment of her speech was constitutional so long as it was rational. See Whittington v. State, 669 N.E.2d 1363, 1371 (Ind. 1996). And so it was. At least one officer was diverted from his duty to help maintain the perimeter around D's home, and some neighbors were sufficiently disturbed that they came outside to see what was going on. Held, judgment affirmed.

RELATED CASES: McBride, 94 N.E.3d 703 (Ind. Ct. App 2018) (D's conviction for class A misdemeanor criminal trespassing did not violate right to speech under Article 1, § 9 of the Indiana Constitution because statements were not solely political and because it was reasonable the State to conclude D was abusing his right to speech).

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.c. Gambling (Ind. Code 35-45-5-2)

TITLE: American Legion Post #113 v. State

INDEX NO.: K.7.c.

CITE: (1st Dist., 10-31-95), Ind. App., 656 N.E.2d 1190

SUBJECT: Gambling statutes - constitutionality challenge rejected

HOLDING: Indiana's anti-gambling statutes do not violate Article I, Section 23 of Indiana Constitution or equal protection clause of Fourteenth Amendment to United States Constitution. After repeated warnings about illegality of gambling operation, D was convicted of unlawful gambling, promoting professional gambling, & professional gambling. Invoking privilege & immunities clause of Indiana Constitution, D argued that riverboat, pari-mutuel, & lottery exceptions to general prohibition against gambling create unlawful privileges to differing classes of persons to which anti-gambling statutes do not apply. Ct. disagreed & concluded that: 1) riverboat & pari-mutuel wagering exceptions allow all individuals to lawfully engage in those activities; 2) inherent distinctions between State Lottery Commission & every other organization & citizen are reasonably related to legislative classification limiting operation of lotteries to those authorized by Commission; 3) legislative classification is not arbitrary or manifestly unreasonable because Lottery Commission uniquely possesses characteristics which justify its authorization & exemption. Ct. likewise rejected Fourteenth Amendment equal protection claim & noted that lottery exception is rationally related to legitimate government purpose of maintaining tight regulatory control over gambling. Dept. of Revenue v. There to Care, Inc. (1994), App., 638 N.E.2d 871. Strict regulation of gambling under Ind. Code 35-45-5 constitutes valid exercise of police power. Posadas De Puerto Rico Ass'n v. Tourism Co. (1986), 478 U.S. 328. Held, conviction affirmed.

TITLE: Kelly v. State
INDEX NO: K.7.c.
CITE: (7/17/2014), 13 N.E.3d 902 (Ind. Ct. App 2014)
SUBJECT: Sufficient evidence for invasion of privacy
HOLDING: D violated a protective order prohibiting communication with his ex-wife and thus committed invasion of privacy, even though he communicated with his wife only indirectly by sending a text message to his daughter. See Ind. Code 35-46-1-15.1. The text message said, "contacting court next week, if you see your mom tell her I said 'rattle, rattle, rattle,'" a phrase D had used to intimidate his ex-wife when they were married. This indirect communication is sufficient to support a conviction for invasion of privacy. Held, judgment affirmed.

TITLE: Lashbrook v. State
INDEX NO.: K.7.c.
CITE: (1st Dist. 2/26/90), Ind. App., 550 N.E.2d 772
SUBJECT: Gambling - sufficiency; pyramid investment scheme
HOLDING: Evidence was sufficient to support gambling & professional gambling convictions, where D was shown to have invested in & encouraged others to invest in pyramid scheme. Ind. Code 35-45-5-2 defines gambling as "risking money or other property for gain, contingent in whole or in part upon lot, chance," etc., but not including "bona fide business transactions that are valid under the law of contracts." Evidence showed that D participated in & encouraged others to participate in "airplane" pyramid investment scheme, so-called because participants were designated as pilots, co-pilots, crew members & passengers. Each participant paid \$1500 to become passenger, & as others were induced to invest, passengers advanced to pilot status, at which point they were to receive passenger fees & leave program. It is clear that D risked money for gain, but question is whether gain was contingent in whole or in part upon lot or chance. Other jurisdictions have found pyramid schemes to constitute gambling. [Citations omitted.] Ct. App. agrees, since gain depends almost entirely on circumstances beyond participants' control, including how much activity has occurred before their entry & degree of market saturation, as well as whether other people will induce still others to invest \$1500. D's participation was sufficient to support conviction for gambling, & his activity in encouraging others to invest & in receiving their passenger fees supported conviction for professional gambling, since he accepted or offered to accept, for profit, money risked in gambling. Ind. Code 35-45-5-3. Held, convictions affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.d. Harassment (Ind. Code 35-45-2-2(a))

TITLE: A.B. v. State

INDEX NO.: K.7.d.

CITE: (05-13-08), Ind., 885 N.E.2d 1223

SUBJECT: Harassment - no evidence of D's intent

HOLDING: Evidence was insufficient to support six harassment adjudications because State failed to prove beyond a reasonable doubt that A.B. made postings and comments on MySpace.com with the intent "to harass, annoy, or alarm" her former principal "but with no intent of legitimate communication" as required by Ind. Code 35-45-2-2(a). A.B. posted a message on her friend's private MySpace.com profile about her Junior High School principal that read, in part, "hey you piece of Greencastle shit. What the fuck do you think of me [now] that you can['t] control me? Huh? Ha ha ha guess what I'll wear my fucking piercings all day long & to school & you can['t] do shit about it! Ha ha fucking ha! Stupid bastard!" Court disagreed with Court of Appeals' rationale that D's allegedly harassing messages were protected political speech. Court found no probative evidence or reasonable inferences to establish that A.B., when making her postings on her friend's private MySpace profile, had a subjective expectation that her conduct would likely come to the attention of the principal.

As to two counts relating to A.B.'s postings on her MySpace "group" page, where A.B. posted, "F**K MR. GOBERT AND GC SCHOOLS!", Court held that content of further posting presents strong evidence that A.B. intended her "group" page as a legitimate communication of her anger and criticism of the disciplinary action of principal and middle school against her friend, the creator of the private MySpace profile. Thus, it was impossible for State to have carried its burden to prove "no intent of legitimate communication" under harassment statute. Held, transfer granted, Court of Appeals' opinion at 863 N.E.2d 1212 vacated, delinquency adjudication reversed.

TITLE: Crose v. State

INDEX NO.: K.7.d.

CITE: (4th Dist., 5-30-95), Ind. App., 650 N.E.2d 1187

SUBJECT: Harassment - sufficiency

HOLDING: Evidence was sufficient to support harassment convictions. D argued that he was infatuated with complaining witnesses (CWs), & his 42 love letters & numerous telephone calls conveyed legitimate communications that were not intended to harass either CW. However, evidence at trial revealed that D persisted in undesired communication with CWs, despite their protests. Whether D's eccentricity so impaired his thinking that he did not intend to harass victims was question reserved for jury. Held, convictions affirmed.

TITLE: Haberkorn v. State

INDEX NO.: K.7.d.

CITE: (03-03-23), Ind. Ct. App., 205 N.E.3d 253

SUBJECT: Harassment conviction supported by evidence of true threats to city clerk's office staff

HOLDING: Sufficient evidence supported a conviction for Class B misdemeanor harassment.

Despite Defendant's claims of merely inelegant expressions of frustration, the Court of Appeals concluded his speech amounted to constitutionally proscribable true threats. Defendant repeatedly telephoned the Violations Bureau of the Fort Wayne Clerk's Office about the improper ticketing and towing of his vehicle. He made at least sixteen calls, and his behavior during these calls was considered alarming and "highly extraordinary" by staff. Each time he called, Defendant refused to give any information to staffers or communicate such that they could help him with his parking issue. He berated and threatened staffers with retaliation for how he believed he had been wronged. In one call, he warned that there would be "consequences" for the staffer's actions. He said, "I am going to come down there." When the staffer expressed that she felt threatened, Defendant responded, "I don't give a f**k," and then made a vague reference to her children. In another call, Defendant warned a different staffer that he could easily "find out" who she was. In another call, referring to the city clerk, Defendant shouted at a staffer, "Do you need to me to go to her house?" He also left a voicemail message for the clerk stating that he was "working on something" and said that she had better "start thinking about what [she was] doing." Defendant made several references to planning to find and confront staffers' family members.

The trial court committed no fundamental error in giving this jury instruction: The term "harassment" is defined by law as meaning conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes.

Defendant argued that this instruction defines the term "harassment" as used in Indiana Code Chapter 35-45-10 regarding the crime of stalking, so it would be irrelevant to the crime of harassment, as charged here, based upon Indiana Code Chapter 35-45-2. He further argued that the instruction failed to mention the intent necessary to find him guilty of harassment. But the Court found that, considering the instructions as a whole, the jury was repeatedly instructed that it was the State's burden to prove that Defendant acted with the specific "intent to harass, annoy, or alarm another person but with no intent of legitimate communication." The challenged instruction "simply provided some meaning and context to what type of conduct is considered to be harassing under Indiana law." Held: affirmed.

TITLE: J.T. v. State

INDEX NO.: K.7.d.

CITE: (2nd Dist.; 10-20-99), Ind. App., 718 N.E.2d 11

SUBJECT: Intimidation; harassment - insufficient evidence of communication

HOLDING: Evidence was insufficient to sustain intimidation & harassment adjudication because State failed to prove that juvenile communicated threat to another student. Communication is element of intimidation & harassment. Communication element requires that D must have known or had reason to believe that threat would reach victim. In addition, communication of threat "to another person" must occur with intent that "other person" be placed in fear for prior lawful act. Ind. Code 35-45-2-1(a). Here, D wrote message about killing another student. When she sent message to printer, librarian intercepted it. Librarian gave document to teacher, who in turn delivered it to school office. Later, after juvenile confessed to writing message, principal gave document to student who was girl juvenile discussed killing. Because there was no evidence that juvenile ever meant for student named in document to see document, juvenile never communicated threat or message. In addition, fact that juvenile knew others were going to see document was irrelevant because juvenile was not trying to place those who she knew would see document in fear for prior lawful act or harass them. Held, judgment reversed.

TITLE: Leuteritz v. State

INDEX NO.: K.7.d.

CITE: (4th Dist. 2/21/89) Ind. App., 534 N.E.2d 265

SUBJECT: Telephone harassment - sufficiency

HOLDING: Evidence was insufficient to support D's conviction for telephone harassment. D called former employer, with whom he had dispute over money. Employer's wife answered, & D asked to speak to "diaper rash face Charlie." Wife asked him not to call, & D hung up. D was charged with telephone harassment. One element of this offense is that D has no intent of legitimate communication. State argues that D had no intent of legitimate communication, because he did not explain his reason for calling to employer's wife. However, D had had no dealings with employer's wife concerning wages, & he had no reason to explain purpose of call to her. D's request to speak to former employer, although discourteously made, was legitimate communication. That D hung up after employer's wife asked him not to call does not prove that he had no intent of legitimate communication; it is mere speculation that had he been allowed to talk to employer, there would have been no such communication. Further, to give statute broad application state attempts here might raise 1st Amend. problems. See U.S. v. Darsey (E.D. Pa. 1972), 342 F. Supp. 311. Held, conviction reversed.

RELATED CASES: Burton, App., 665 N.E.2d 924 (evidence sufficient to show D's intent to harass, annoy or alarm).

TITLE: McGuire v. State
INDEX NO.: K.7.d.
CITE: (8/27/19) Ind. Ct. App., 132 N.E.3d 438
SUBJECT: Defendant's Facebook posts directed at police conduct not protected speech and sufficient to support harassment conviction
HOLDING: Ind. Code § 35-45-2-2(a)(4)(B) provides in pertinent part: "A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication . . . uses a computer network . . . or other form of electronic communication to . . . transmit an obscene message or indecent or profane words to a person . . . commits harassment, a Class B misdemeanor." Here, Defendant posted statements on Facebook and encouraged others to share her comments. The comments were directed at a police officer who was involved in a traffic stop resulting in the death of Defendant's son. The Facebook comments said, in part, "I'm comn for u so u better watch out this mother is on a rampage and ready to shoot to kill."

The Court of Appeals found these comments to be constitutionally proscribable as a "true threat" to peace, safety, and well-being and therefore not protected speech under the First Amendment. Similarly, under the Indiana Constitution, the posts could be regulated without running afoul of Article 1, Section 9 because they were not unambiguously political and posed a threat to safety. The Court found sufficient evidence that Defendant transmitted the message by posting it on Facebook, that the message was profane, and that there was no intent to engage in legitimate communication, thus supporting her conviction for Class B misdemeanor harassment. In his dissent, Judge Pyle explained he would reverse because the harassment statute is unconstitutionally overbroad. Moreover, Pyle found that no evidence was introduced to show that the speech, although crude, worrisome, and distasteful, was not a legitimate communication (protected speech) or indecent or profane words, (which are undefined) and therefore found evidence insufficient to support Defendant's conviction.

TITLE: Schnitz v. State

INDEX NO.: K.7.d.

CITE: (3d Dist. 3/11/85) Ind. App., 475 N.E.2d 59

SUBJECT: Harassment - sufficiency

HOLDING: Evidence was insufficient to sustain D's conviction on 6 counts of harassment. Here, D, twice convicted of molesting his minor daughter, wrote 6 letters to her while in jail, describing sex acts he hoped to perform with her & containing suggestive pictures from adult magazines. D stopped writing such letters when daughter's social worker asked him to stop. Daughter testified letters upset her. Testimony conflicted re whether daughter had ever asked him to stop. Ct. finds letters, while revulsive, do not demonstrate D's intent to harass, annoy or alarm. State failed to prove intent. Held, reversed & remanded for entry of acquittal. Hoffman DISSENTS, arguing evidence is sufficient & majority improperly reweighed evidence.

TITLE: Stone v. State
INDEX NO.: K.7.d.
CITE: (6/26/19) Ind. Ct. App., 128 N.E.3d 475
SUBJECT: Harassment charges over phone calls to lawmakers and state agency did not violate constitutional rights
HOLDING: Trial court did not err in denying Defendant's motion to dismiss State's harassment charges based on seven phone calls he made to Indiana lawmakers' aides and staff members at the Secretary of State's Office. Defendant argued the charges violated his free speech rights under the First Amendment and Article 1, Section 9 of the Indiana Constitution, because he claimed his speech was unambiguously political and therefore protected because it did not rise to the level of tortious behavior. Court disagreed, noting that although Defendant has a constitutional right to petition the government and to engage in political speech, "there is a question of fact whether he abused that right when he confronted numerous State employees with ad hominem verbal attacks.

Specifically, the question under the [harassment] statute is whether [Defendant's] comments were merely annoying or impolite, but with a legitimate intent to communicate, or whether his hostile verbal attacks on State employees were intended to harass, annoy, or alarm others and, as such, went beyond a legitimate inquiry, comment, or criticism of government policy or administration." Thus, a reasonable fact finder could conclude that the totality of the evidence supporting each charge demonstrates that Defendant's speech was not unambiguously political and is therefore not protected under Article 1, Section 9. Held, judgment affirmed; Baker, J., concurring in result but "respectfully disagree[s]" with Court's Indiana Constitutional analysis and concludes that a reasonable person could conclude that at least some of Defendant's speech was political and could only conclude that it was an abuse of the rights provided for by Article 1, Section 9.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.e. Intimidation (Ind. Code 35-45-2-1)

TITLE: Ajabu v. State

INDEX NO.: K.7.e.

CITE: (1st Dist., 2-28-97), Ind. App., 677 N.E.2d 1035

SUBJECT: Intimidation - evidence sufficient; threats made through media

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss indictment for intimidation. Ind. Code 35-45-2-1 states in part that intimidation requires communication of threat to another person with intent that person engage in conduct against his will or be placed in fear of retaliation for prior lawful act. Offense is Class D felony if threat is to commit forcible felony or is communicated to law enforcement officer. Ind. Code 35-45-2-1(b)(1)(A) & Ind. Code 35-45-2-1(b)(1)(B)(i). Whether intimidation has occurred is question of fact. Owens, 659 N.E.2d 466. Here, D's son & two other men were charged with murder, & county prosecutor held press conference to announce request for death penalty. Mother of two murder victims voiced support for death penalty request. Following hearing on death penalty request, D stated to television reporters that he wanted to "serve notice" that "if my son is killed for something that he did not do, then there will be other death sentences carried out." D repeated this statement several times in subsequent newspaper, radio & television interviews, though never in presence of alleged victims. D was charged with two counts of Class D felony intimidation, one alleging that he made threat meant to intimidate prosecutor in his capacity as law enforcement officer not to perform his official duties, & second count alleging threat of forcible felony against murder victims' mother, made to place her in fear of retaliation for prior lawful act of expressing support for prosecutor's decision to seek death penalty. D argued that intimidation statute requires that threat be communicated directly to victim & does not include statements to media. Ct. held that statute does not limit definition of "communication of threats" to only those made directly to or in presence of threatened party. Threats made known to victim through media can constitute intimidation. Held, conviction affirmed.

RELATED CASES: Mater of B.B., 141 N.E.3d 856 (Ind. Ct. App.), (sufficient evidence juvenile knew or had reason to know his threats against high school would be communicated to victims); Soucy, 22 N.E.3d 683 (although direct communication to intended victim is not required, communication such as to influence conduct or place a person in fear of retaliation is required; Because D's mother refused to repeat his threats, there was no further dissemination of the threats so as to influence or impact the alleged victim); Newell, 7 N.E.3d 367 (Ind. Ct. App 2014) (D communicated a threat against apartment manager when she told security guard that she "would take care of the m*****s" and that the manager was "about to get her f*****g head knocked off"); Walls, 993 N.E.2d 262 (Ind. Ct. App 2013) (there was sufficient evidence to establish that D intimidated police officer, who was informed of D's threat by a different officer).

TITLE: A.V. v. State

INDEX NO.: K.7.e.

CITE: (8/23/2022), 193 N.E.3d 1031 (Ind.Ct.App. 2022)

SUBJECT: Insufficient evidence Juvenile acted with intent to place CW in fear of retaliation for a prior lawful act - intimidation adjudication reversed

HOLDING: The juvenile court found that A.V. was a delinquent child for committing acts that would be intimidation as a Level 6 felony and criminal mischief as a Class B misdemeanor if committed by an adult. The State presented evidence that A.V. got into an argument with her sister and when her mother intervened, A.V. became "very, very angry like she was out of control," which led Mother to lock herself, along with A.V.'s daughter and sister in a bedroom. A.V. then broke the Christmas tree, made a hole in the wall, and threw eggs against Mother's car. When A.V. banged on the door and demanded to be let in to see her daughter, Mother refused and called the police. At some point before the police arrived, A.V. told Mother, "[S]ometimes I feel like I want to kill you."

The Court of Appeals noted that the intimidation statute, Ind. Code 35-45-2-1, provides that "[a] person who communicates a threat with the intent...that another person be placed in fear of retaliation for a prior lawful act" commits intimidation, which is a Level 6 felony when the threat is to commit a forcible felony. Here, the State's delinquency petition alleged that A.V. communicated a threat to commit a forcible felony against Mother with the intent to place her in fear of retaliation for the prior lawful act of "enforcing a CHINS order." However, during the hearing the State, "presented no testimony or other evidence regarding a CHINS order or the enforcement thereof." Mother instead testified A.V. made the statement after an argument stemming from A.V.'s desire to sleep while her sister was doing schoolwork and "because [A.V.] was angry." The Court of Appeals held there was insufficient evidence A.V. acted with the intent that Mother be placed in fear of retaliation for the prior lawful act of enforcing the CHINS order and reversed the true finding for intimidation. The Court of Appeals found sufficient evidence to support the true finding for criminal mischief. Held, judgment affirmed in part and reversed in part.

TITLE: Blackmon v. State

INDEX NO.: K.7.e.

CITE: (5/22/2015), 32 N.E.3d 1178 (Ind.Ct.App. 2015)

SUBJECT: Intimidation - insufficient evidence D acted with intent to place another in fear of retaliation for prior lawful act

HOLDING: To support an intimidation conviction under Ind. Code § 35-45-2-1(a)(2), the State must establish that Defendant acted with the intent to place the victim in fear of retaliation for a prior lawful act. Here, charging information alleged that complaining witness's (C.W.'s) prior lawful act was catching Defendant stealing water. C.W. was at his daughter's house when he heard running water and saw a bucket under an outside spigot, which had been locked, but the lock was removed. He confronted his daughter's neighbor because he knew she did not have running water. After the neighbor agreed to pay for the water, C.W. said he was going to call the police. Then Defendant, who was with the neighbor at the time C.W. confronted her, pulled out a knife and brandished it.

State presented no evidence that C.W. caught Defendant stealing water, nor did it present any evidence that Defendant believed he had been caught stealing water. C.W. did not testify that he believed Defendant would retaliate because he had been caught stealing water. While there may have been evidence that Defendant intended to stop C.W. from calling the police and thereby intended to make C.W. engage in conduct against his will – a crime under Indiana Code § 35-45-2-1(a)(1) – this was not how the charge was brought. State failed to present sufficient evidence to prove that Defendant intended to put C.W. in fear of retaliation for having caught him stealing water –an essential element of the crime as it was charged. State's argument to jury that C.W.'s prior lawful act was confronting Defendant about stealing water misled him in preparation of his defense, resulting in a fatal variance requiring reversal. Held, conviction reversed; Bradford, J., dissenting, believes there is no distinction between the defendant being “caught” stealing water and “confronting” Defendant about stealing it. The two actions are part of the same series of events and, as such, the same prior lawful act.

TITLE: Brewington v. State

INDEX NO.: K.7.e.

CITE: (5/1/2014), 7 N.E.3d 946 (Ind. 2014)

SUBJECT: Blogger's threats constituted intimidation, not protected speech

HOLDING: Evidence was sufficient to support D's convictions for intimidating judge who presided over his divorce case and obstruction of justice against custody evaluator. D posted numerous Internet blogs taking aim at Dearborn Circuit Judge Humphrey, Humphrey's wife, and a psychologist who served as a custody evaluator in D's case. Although many of D's blog posts about judge may have been protected free speech (e.g, calling him a "child abuser"), others constituted credible threats to the judge's safety when put in their full context, which included D's references to himself as an "accomplished pyromaniac" and his online posting of the judge's address.

Court of Appeals failed to distinguish between fear of one's reputation (which cannot be used to support convictions) and fear for one's safety, but Supreme Court concluded D's actions toward judge and custody evaluator during his years-long vendetta against them, and his behavior in and out of courtroom placed targets of his contempt in credible fear for their safety.

Although jury instructions and general verdict erroneously failed to distinguish between protected speech and unprotected speech, D affirmatively invited those errors as part of a perfectly reasonable "all or nothing" trial strategy, thus Court found neither fundamental error nor ineffective assistance of trial counsel. Held, transfer granted, Court of Appeals' opinion at 981 N.E.2d 585 summarily affirmed in part and vacated in part, intimidation and obstruction of justice convictions affirmed.

RELATED CASES: Peppers, 152 N.E.3d 678 (Ind. Ct. App. 2020) (jury could reasonably infer that D publicly posted video to YouTube and that was enough to support the required element that he knew or would have had good reason to believe the video would reach police officer).

TITLE: Casey v. State

INDEX NO.: K.7.e.

CITE: (1st Dist., 1-31-97), Ind. App., 676 N.E.2d 1069

SUBJECT: Intimidation - evidence insufficient

HOLDING: To support intimidation conviction, State must establish that D made threat to another person with intent that person be placed in fear of retaliation for prior lawful act. Ind. Code 35-45-2-1. Construing "retaliation for prior lawful act," Ct. held that legislature intended to require State to prove that victim had engaged in legal act prior to threat, & that D intended to place victim in fear of retaliation for that act. Mere proof that victim is engaged in act which is not illegal at time threat is made is not sufficient. Here, State failed to allege or prove prior lawful act which lead to threats against victim. D's threats, which consisted of his statement that "You're next bitch" & that he was going to kill her, did not demonstrate his reasons for threatening victim or indicate that he was doing so because of any specific prior act. Held, intimidation conviction reversed, battery conviction affirmed; Robertson, J., dissenting.

RELATED CASES: Lainhart, App., 916 N.E.2d 924 (a confrontation between D and the victims after the victims associated with an individual with whom the D had bad blood was sufficient to sustain an inference that the D was threatening the victims for their prior lawful conduct of associating with the individual); Ransley, App., 850 N.E.2d 443 (alleged threat was aimed at future action, & therefore did not constitute retaliation for a prior, lawful act. Further, Ct. found insufficient evidence from which jury could have reasonably concluded that D communicated a threat to CW with intent that CW be placed in fear of retaliation for the prior lawful act of arguing with D); Dennis, 736 N.E.2d 300 (fact that police lacked probable cause to arrest D did not make act unlawful for purposes of intimidation statute); Graham, App., 713 N.E.2d 309 (where D told victim that he was dead after D's initial hearing on battery charge to which victim was witness, jury could infer that D intended to retaliate for victim's participation in prosecution of battery charge).

TITLE: Causey v. State
INDEX NO.: K.7.e.
CITE: (11/20/2015), 45 N.E.3d 1239 (Ind. Ct. App 2015)
SUBJECT: Intimidation - threat aimed at future action does not constitute retaliation for prior, lawful act
HOLDING: Statements that are conditional and aimed at future, rather than past, conduct, will not support a finding that the D intended to place the victim in fear of retaliation for prior acts, which is required to support a conviction for intimidation under Ind. Code § 35-42-2-1(a)(2). C.L. v. State, 2 N.E.3d 798 (Ind. Ct. App 2014). Here, State alleged that D intended to place police officers in fear of retaliation for having responded to a disturbance at his house. While officers waited outside house for backup to arrive, D opened the door and yelled: "[G]et off my property. You don't belong on my property. If you come any closer I'll shoot." Rather than intending to place the officers in fear of retaliation for a prior lawful act, D was attempting to prevent the officers from taking future action. Thus, State presented insufficient evidence to support his Class D felony conviction under Ind. Code § 35-42-2-1(a)(2).

Court rejected State's argument that it must look to the totality of circumstances to find that D intended to harm the officers in retaliation for their investigation and presence at his residence. But State has not clearly identified what it believes D's threat to be, nor has it pointed to evidence indicating that this threat was made with the required intent. Due process requires that a penal statute clearly define the prohibited conduct so that it provides adequate and fair notice as to what precisely is proscribed. George v. NCAA, 945 N.E.2d 150, 154 (Ind. 2011). Held, conviction reversed.

RELATED CASES: Roar, 52 N.E.3d 940 (Ind. Ct. App 2016), adopted and incorporated by reference, 54 N.E.3d 1001 (disagreeing with Causey's "unreasonable" interpretation of intimidation statute, Ct. found that conditional language in threat can constitute retaliation for prior, lawful act.

TITLE: Champion v. State

INDEX NO.: K.7.e.

CITE: (12/9/2016), 65 N.E.3d 607 (Ind. Ct. App 2016)

SUBJECT: Sufficient evidence for intimidation

HOLDING: Sufficient evidence supports D's two convictions for intimidation. D had two children with Ray Griffin, J.G and R.G. Soon after R.G. was born, D's relationship with Griffin ended. D was initially awarded custody of the children, but temporary custody was awarded to Griffin in 2014. By then, Griffin had married Sabrina Hoggard, who cared for J.G. and R.G. as a stepmother would. On two occasions, D sent text messages to Hoggard, threatening to murder her in the first message and threatening to kidnap her in the second, all because D claimed Hoggard mistreated the children. The charging informations alleged the prior lawful act that D's threatening text messages were directed at was Hoggard's "having lawful custody of [D's] children."

D is incorrect that the State needed to show that Hoggard had legal custody of the children as opposed to mere lawful custody. Lawful custody simply means custody that is not unlawful and spans the spectrum from court ordered custody to de facto custodianship to informal caretaking arrangements. In re Adoption of B.C.H., 22 N.E.3d 580, 585 (Ind. 2014). By presenting evidence that Hoggard was in loco parentis to the children, the State presented sufficient evidence that Hoggard had lawful custody of the children. Held, judgment affirmed.

TITLE: Chastain v. State
INDEX NO.: K.7.e.
CITE: (8/4/2016), 58 N.E.3d 235 (Ind. Ct. App 2015)
SUBJECT: Sufficient evidence for Class C felony intimidation
HOLDING: In Class C felony intimidation prosecution, State presented sufficient evidence that D placed the victim in fear of retaliation for a prior lawful act when he pointed a gun at the victim and threatened to kill him. See Ind. Code 35-42-2-1(b)(2).

The victim heard D arguing loudly with a woman in a parking lot, and, after seeing D shove the woman, decided to intervene. The victim and D exchanged words. D then retrieved a gun from his truck, cocked and pointed it at the victim, and then several times shouted, "I'll fucking kill you."

The victim's intervention was a prior lawful act, to which D responded with the threat that he would kill the victim. Even though D did not tell the victim why he pointed a gun at him, it was reasonable to infer that D's actions were prompted by the initial lawful act of the victim interrupting D's argument with the woman. Held, judgment affirmed.

TITLE: Clara v. State
INDEX NO.: K.7.e.
CITE: (4th Dist., 01-22-09), Ind. App., 899/733
SUBJECT: Intimidation - "prior lawful act" need not be volitional
HOLDING: Tr. Ct. did not err in denying D's motion for judgment on evidence/directed verdict pertaining to Class C intimidation, which occurs when a person communicates a threat to commit a forcible felony on another person, with the intent, among other things, "that the other person be placed in fear of retaliation for a prior lawful act." Ind. Code 35-45-2-1. D argued that victim's miscarriage was erroneously designated in charging information and State's case as "act" for which victim was placed in fear of retaliation, because an "act" under the statute must be volitional.

Among other things, the noun "act" is defined as "something done or performed." *American Heritage College Dictionary* 12 (4th ed. 2002). An act, as "the thing done," can be either "intentional" or "unintentional," "volitional" or "non-volitional." Here, State alleged and proved that victim's miscarriage was "the thing done." State further showed that D's threat to commit a forcible felony was based upon the miscarriage. Held, judgment affirmed.

TITLE: C.L. v. State
INDEX NO.: K.7.e.
CITE: (1/29/2014), 2 N.E.3d 798 (Ind. Ct. App 2014)
SUBJECT: Intimidation - threats without proof of intent to retaliate insufficient
HOLDING: Court reversed C.L.'s delinquency adjudication for intimidation where evidence presented at factfinding hearing established that C.L.'s threats directed toward his grandfather were aimed at influencing future conduct, rather than placing him in fear of retaliation for identifiable prior lawful conduct as required by Ind. Code § 35-54-2-1.

Grandfather called 911 to report that he had escaped from his residence after his teenage grandson (C.L.) had held him hostage for several days because grandfather refused to give a portion of a home loan he planned to take out to C.L. to buy a car. C.L. said if he didn't get the money he would beat his grandfather and that if he got sent to jail he would kill his grandfather when he got out. But grandfather agreed on cross-examination that C.L.'s offending statements were aimed at speculative conduct that had not yet occurred. He testified he had not taken out the loan yet at the time C.L. demanded the money.

Ind. Code § 35-54-2-1 requires the threats to place grandfather in fear of retaliation for a prior lawful act, and anger without proof of intent to retaliate is not enough to satisfy the requirements of the statute. Ransley v. State, 850 N.E.2d 443 (Ind. Ct. App 2006). Majority held C.L.'s threats were conditional and targeted a future conduct. Held, judgment reversed; Najam, J., dissenting, notes that grandfather's decision to get the home loan for repairs and refusal to give C.L. any portion of the loan constitute a prior lawful act. A reasonable inference from the evidence demonstrates that C.L.'s threats were intended to place his grandfather in fear of retaliation for his prior lawful act of having decided not to surrender a portion of the loan proceeds to C.L.

RELATED CASES: Roar, 54 N.E.3d 1001 (Ind. 2016) (adopting and incorporating Ct. App. Majority holding that threats that are conditional and aimed at future rather than past conduct are sufficient to support a finding that the D intended to place the victim in fear of retaliation for prior acts); McCaskill, 3 N.E.3d 1047 (Ind. Ct. App 2014) (State failed to prove that D communicated a threat with intent that C.W. engage in conduct against her will, i.e., to leave her husband, because D never specified the reason for her threats toward C.W.).

TITLE: Daniels v. State

INDEX NO.: K.7.e

CITE: (11-29-11), 957 N.E.2d 1025 (Ind. Ct. App 2011)

SUBJECT: Sufficient evidence for intimidation where D “used” gun; no fatal variance between charging information and evidence

HOLDING: For Class C felony intimidation, State established sufficient evidence that D “used” his gun by “displaying” his gun. Here, before robbing victim, D displayed his gun by lifting his shirt to show the victim that his gun was tucked in his waistband. The charging information alleged D drew his handgun, but the State conceded there was no evidence to support this allegation. “Use” of a weapon includes “displaying” a weapon, which D did when he lifted his shirt to reveal the gun tucked in his waistband to the victim. See C.J.S. Weapons __ 37 (2001) (*citing* U.S. v. Ortiz de Jesus, 230 F.3d 1, 5 (1st Cir. 2000)). The variance between the charging information and the evidence was not fatal for two reasons. First, D was not misled by the variance in preparation of his defense. See Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997). His defense was not based on showing he did not use his gun but that he did not have the gun with him. Second, the variance was not fatal because D is protected from a second prosecution for intimidation. See Mitchem, 685 N.E.2d at 677. Because the State conceded D did not draw the gun, there is only sufficient evidence that he used the gun. A Double jeopardy principles clearly would prohibit a successive, second intimidation conviction for >using= the gun because such a conviction would require proof of the same conduct that supported his first conviction. @ See Thomas v. State, 764 N.E.2d 306, 311 (Ind. Ct. App. 2007) trans. denied. Thus, any variation between the charging information and evidence at trial for the intimidation charge was not fatal. Held, judgment affirmed.

TITLE: E.B. v. State

INDEX NO.: K.7.e.

CITE: (12/19/2017), 89 N.E.3d 1087 (Ind. Ct. App 2017)

SUBJECT: Insufficient evidence for juvenile adjudication for intimidation

HOLDING: The juvenile's adjudication for Intimidation was not supported by sufficient evidence because there was no evidence he made his threat to the intended victim with knowledge or reason to believe his statement would reach the intended victim. Assistant principal (Tanksley) disciplined the juvenile for misconduct in the cafeteria. The next month, the juvenile told several friends to wear red clothes the following Tuesday because he intended to shoot "anybody who wasn't wearing red." That evening, Em.B., the juvenile's sister, overheard the juvenile tell someone on the phone that he was going to shoot Tanksley. Em.B did not know who the juvenile was speaking to or what else was said during the conversation. The juvenile did not tell anyone else about shooting Tanksley. Em.B. told Tanksley about the juvenile's statement, but the juvenile did not direct her to do so.

A D need not speak directly with a victim to communicate a threat for purposes of Ind. Code § 35-45-2-1. For example, in Ajabu v. State, 677 N.E.2d 1035, 1043 (Ind. Ct. App. 1997), the D told reporters that a person who had supported the imposition of the death penalty against the D's son might be subjected to the death penalty herself. This statement was sufficient evidence of communicating a threat to the victim, even though she was not present when the D made the statement. Nevertheless, it remains true that to communicate a threat for purposes of Intimidation, the statement must be transmitted in such a way that the D knows or has good reason to know the statement will reach the victim. Id.

Here, there is no evidence that the juvenile made his statement with knowledge or reason to believe that his statement would reach Tanksley. Accordingly, the State failed to present sufficient evidence to support the adjudication for Intimidation. Held, judgment reversed.

TITLE: Eberle v. State

INDEX NO.: K.7.e.

CITE: (01-28-11), 942 N.E.2d 848 (Ind. Ct. App 2011)

SUBJECT: Felony intimidation conviction insufficient where D was unaware CW was law enforcement officer

HOLDING: D's intimidation conviction was improperly elevated to a Class D felony where he was not aware that complaining witness (CW) was a law enforcement officer when he committed the instant offenses. State presented no evidence that D had any prior personal knowledge of CW, not to mention her employment as county jail matron. Further, nothing about CW's position had any bearing on the crimes for which D was charged. The purpose for providing increased penalties for crimes when committed against a public official is to afford a greater degree of protection to persons who might be subjected to special risks because they are performing public duties. Masotto v. State, 907 N.E.2d 1083 (Ind. Ct. App 2009). Absent any evidence that D knew that CW was a law enforcement officer or intimidated her as she performed her public duties, the application of the felony enhancement was error. Legislature would not have intended, under these circumstances, that D's intimidation conviction be elevated to a class D felony. Held, Class D felony intimidation conviction reversed, stalking conviction affirmed.

RELATED CASES: Leonard, 73 N.E.3d 155 (but cf. Leonard v. State - State's need to prove D knowingly committed murder applied only to the prohibited conduct, not the identity of the victims.).

TITLE: Fleming v. State

INDEX NO.: K.7.e.

CITE: (9/29/2017), 85 N.E.3d 626 (Ind. Ct. App 2017)

SUBJECT: Intimidation – sufficient evidence of true threat and intent to retaliate for a prior lawful act

HOLDING: In intimidation prosecution, State presented sufficient evidence that Defendant engaged in a true threat and intended to place complaining witness (C.W.) in fear of retaliation for a prior lawful act. C.W. walked out onto his porch after he heard Defendant yelling obscenities at his wife. Just after stepping outside, Defendant asked, “what the hell do you want you old bastard?” After C.W. chose not to respond, Defendant told him that he was going to come over and “kick [C.W.’s] ass.”

A reasonable jury could conclude that Defendant’s words to C.W. represented a true threat. Newell v. State, 7 N.E.3d 367 (Ind. Ct. App 2014). Although charging information did not specify the prior lawful act, C.W. committed a distinct lawful act by coming out onto his porch when he heard his wife being insulted. It is clear from record that Defendant then reacted in response to C.W.’s actions. Held, judgment affirmed.

TITLE: Fointno v. State
INDEX NO.: K.7.e.
CITE: (1/6/86) Ind., 487 N.E.2d 140
SUBJECT: Intimidation – sufficiency
HOLDING: Evidence was sufficient to sustain D’s conviction for intimidation where D implied he would harm rape victim if she reported assault to authorities. Held, conviction affirmed.

RELATED CASES: Earlywine, App., 847 N.E.2d 1011 (statement that wife would "get it" if D were not allowed in house to see her was sufficient to support conviction for intimidation as a class A misdemeanor); Huber, App., 805 N.E.2d 887 (D's statement that "things were not going to be real pretty" could be construed by a reasonable person to mean that D meant he would physically hurt domestic violence advocate if she continued to help D's wife); Norris, App., 755 N.E.2d 190 (evidence sufficient where D went to victim's home to pick up children for visitation & communicated threats after being told to come back following day to get them & then continued to make threats after pulling gun; outcome may not have been same if there had been any evidence submitted that D was entitled to take children pursuant to Ct.-ordered visitation); Johnson, App., 717 N.E.2d 887 (threatening to hurt someone if that person does not remain silent constitutes intimidation); Croze, App., 650 N.E.2d 1187 (evidence was sufficient to sustain conviction where D communicated threat with intent that CW engage in conduct against her will); Hendrix, App., 615 N.E.2d 483 (Evidence was sufficient to support D's convictions for intimidation of police officers despite his defense of voluntary intoxication. Whether intoxication was sufficient to affect intent was matter reserved to fact finder); Slayton, App., 755 N.E.2d 232 (there was sufficient evidence that D intended to place police officer in fear for his lawful acts of transporting him to jail & processing him there).

TITLE: Gaddis v. State

INDEX NO.: K.7.e.

CITE: (2nd Dist., 5-27-97), Ind. App., 680 N.E.2d 860

SUBJECT: Intimidation - evidence insufficient; display of handgun

HOLDING: Mere display of handgun does not, in itself, communicate "threat" within meaning of intimidation statute, Ind. Code 35-45-2-1. "Threat" is defined as "an expression, by words or action, of an intention to...unlawfully injure the person threatened." Ind. Code 35-45-2-1(c)(1). Here, as vehicles traveled side-by-side on interstate, D raised his handgun to window at forty-five-degree angle for complaining witness (CW) to view. Although CW was shown profile of handgun for a few seconds, weapon was not pointed at him or his vehicle. Parties had attempted but failed to communicate through words or gestures. State misconstrued meaning of "threat" as defined by statute & failed to demonstrate that D threatened CW, because there was no evidence of intent to injure. Ct. also noted that D in this case had constitutional right to carry his properly licensed handgun under Indiana Constitution, Art. 1, § 32. Held, conviction reversed.

RELATED CASES: Johnson, 743 N.E.2d 755 (D's display of handgun while saying "don't even think about it" to another was sufficient for trier of fact to conclude that D communicated threat within meaning of intimidation statute).

TITLE: Gates v. State

INDEX NO.: K.7.e.

CITE: (7/29/2022), Ind. Ct. App., 192 N.E.3d 222

SUBJECT: Intimidation statute is not unconstitutionally vague

HOLDING: During an argument with his on and off partner about getting some clothes back from her, Defendant left her a voicemail in which he demanded the immediate return of his clothes, saying, "Bitch, I'm gonna get my shit you're gonna fucking have it or I'm going to fucking blow up your fucking car!" The State charged Defendant with Level 6 felony intimidation and the judge found him guilty at a bench trial. On appeal, Defendant challenged the constitutionality of the intimidation statute, arguing it was void for vagueness as applied to him. He argued the statute was vague because it "requires no additional evidence for a conviction other than proof [that] he made a threat. There is no line drawn between simply making a threat and making a threat 'with the intent' that the other person essentially believe that the threat is going to materialize." The Court of Appeals found the constitutional claim was waived because it was not raised in a timely motion to dismiss before trial. But even if the issue were preserved for appeal, the Court would find the statute is not unconstitutionally vague as applied. By its clear and unambiguous terms, the statute requires the State to show that the threat was made with the intent that another person be placed in fear that the threat will be carried out" thus creating a line between what is lawful (making a statement) and unlawful (making a statement with the intent to make another person afraid that it will be carried out). I.C. § 35-45-2-1. "Although we agree with Gates that the statute does not require any additional action apart from the making of the threat, the statute clearly proscribes the conduct it renders unlawful by detailing the intent when making the threat that is prohibited." Therefore, individuals of ordinary intelligence would comprehend that, in the midst of an argument, angrily informing another person that you will blow up her car to make that person afraid falls within the proscribed conduct. The Court further held that the evidence was sufficient to support the conviction because Defendant did not present any evidence regarding his intentions in making this statement but denied having said it at all. The trial court could have reasonably inferred from the circumstances and from the absence of any contrary evidence of intent that Defendant intended to make the person afraid that he would blow up her car.

TITLE: Hall v. State

INDEX NO.: K.7.e.

CITE: (2nd Dist., 11-14-05), Ind. App., 837 N.E.2d 159

SUBJECT: Intimidation - sufficiency; D drew knife while committing

HOLDING: On State's petition for rehearing, Ct. held that evidence was sufficient to support D's conviction for intimidation as a Class C felony. Ind. Code 35-42-2-1(b)(2) provides that intimidation is a Class C felony "if, while committing it, the persons draws or uses a deadly weapon." In Hall v. State, 831 N.E.2d 823 (Ind. Ct. App 2005), Ct. held that because D did not have actual possession of a deadly weapon when he threatened to kill witness, his conviction for intimidation as a Class C felony could not stand. Ct. considered State's belated argument on rehearing that because D drew a knife immediately after he threatened to kill witness, that action satisfied the "while committing" requirement of Ind. Code 35-42-2-1(b)(2). Because D drew a knife immediately after he threatened to kill witness, without any break in chain of events, Ct. concluded that the threat & the wielding of the knife were part of one continuous transaction. Davis v. State, 477 N.E.2d 889 (Ind. 1985). Held, rehearing granted, remanded with instructions to reinstate D's conviction for intimidation as a Class C felony.

RELATED CASES: Rhodes, 144 N.E.3d 787 (Ind. Ct. App. 2020) (deadly weapon enhancement affirmed where D held an AR-15 in his hand and propped it on his shoulder as he moved toward the house; it could be reasonably inferred from D's possession of the gun and his anger that he was preparing to use the weapon).

TITLE: Holloway v. State

INDEX NO.: K.7.e.

CITE: (2/18/2016), 51 N.E.3d 376 (Ind. Ct. App 2016)

SUBJECT: Intimidation - sufficient evidence of "threat" even though D not capable of inflicting injury

HOLDING: Evidence was sufficient to support D's intimidation conviction. During jail booking procedure following his arrest for operating while intoxicated, D, who was handcuffed and wearing unbuttoned pants that were falling down, stood up and approached an officer. He told the officer, "I hope you die tonight," and "I will f[*]ck you up." The officer told him to sit down. D argued his profane statement to the officer did not constitute a threat because it was brief and he was handcuffed and in jail when he said it. But D did not cite any authority for the proposition that a person must be capable of inflicting injury when the statement is made, or that it must be lengthy to constitute a threat. Held, conviction affirmed; Bailey, J., dissenting, believes there was insufficient evidence to show that a reasonable victim in the officer's position would actually fear for his safety.

TITLE: Hyde v. State

INDEX NO.: K.7.e.

CITE: (12/8/88), Ind., 531 N.E.2d 472

SUBJECT: Intimidation - elements; relevance of gun ownership

HOLDING: Evidence that D owned sawed off shotgun was properly admitted at D's trial on charge of intimidating police officer. Officer testified that he went to D's home to talk about dispute between D & neighbor, & D told him to get off his property. D said, "I'm going to blow you away," & when asked if that was threat, D repeated it. Officer told D he was under arrest & reached for handcuffs, but D went inside & locked door. Officer did not pursue D, but sent other officers to take him into custody. Evidence that D owned sawed off shotgun was admitted at trial, over D's objection & motion in limine. On appeal, D argues that this evidence was irrelevant to elements of intimidation, which are (1) communicating threat, (2) to another person, (3) with intent that that person either engage in conduct against his/her will or be placed in fear of retaliation for prior lawful conduct. Ct. App. reversed, finding that evidence was not relevant to any element of offense. However, Ind. S. Ct. grants transfer, affirming conviction. Establishment of intent to intimidate depends upon facts & circumstances. People v. McKendrick (Ill.App.3d 1985), 486 N.E.2d 1297. Facts & circumstances are also relevant to whether communication may be objectively viewed as true threat. State v. Abu Isba (Kan. 1984), 685 P.2d 856. See also Bolen 430 N.E.2d 398. Fact that officer did not pursue D into house where he had reason to believe D kept shotgun was most compelling part of intimidation. Held, evidence properly admitted. DeBruler & Dickson, JJ., DISSENT.

TITLE: J.T. v. State

INDEX NO.: K.7.e.

CITE: (2nd Dist.; 10-20-99), Ind. App., 718 N.E.2d 11

SUBJECT: Intimidation; harassment - insufficient evidence of communication

HOLDING: Evidence was insufficient to sustain intimidation & harassment adjudication because State failed to prove that juvenile communicated threat to another student. Communication is element of intimidation & harassment. Communication element requires that D must have known or had reason to believe that threat would reach victim. In addition, communication of threat "to another person" must occur with intent that "other person" be placed in fear for prior lawful act. Ind. Code 35-45-2-1(a). Here, D wrote message about killing another student. When she sent message to printer, librarian intercepted it. Librarian gave document to teacher, who in turn delivered it to school office. Later, after juvenile confessed to writing message, principal gave document to student who was girl juvenile discussed killing. Because there was no evidence that juvenile ever meant for student named in document to see document, juvenile never communicated threat or message. In addition, fact that juvenile knew others were going to see document was irrelevant because juvenile was not trying to place those who she knew would see document in fear for prior lawful act or harass them. Held, judgment reversed.

RELATED CASES: S.D., App., 847 N.E.2d 235 (distinguishing J.T., Ct. noted D's threat was made in a classroom of students & in front of another school employee with D telling everyone she did not care if the target of her threats was told).

TITLE: Laughlin v. State

INDEX NO.: K.7.e.

CITE: (4/26/2018), 101 N.E.3d 827 (Ind. Ct. App 2018)

SUBJECT: Intimidation - sufficient evidence of intent to cause evacuation and threat to commit forcible felony

HOLDING: State presented sufficient evidence to sustain D's Level 6 felony intimidation conviction, where the threat was to commit a forcible felony. D called in multiple bomb threats to a courthouse at around 5:00 p.m. on a Saturday. In one threat he asked police if they had found the bomb and told them that they had 10 minutes to respond. On appeal, D argued the State did not present sufficient evidence: (1) he intended to cause the courthouse to be evacuated because he called in the threat at a time when the courthouse would be unoccupied, and (2) he threatened to commit a forcible felony. Court disagreed and held it is reasonable for the fact finder to infer D intended for his calls to result in the police needing to evacuate the courthouse based on his repeated calls and question regarding whether police had located the device. D's statement that police had "ten minutes to respond" could be construed to mean he intended to detonate the bomb in ten minutes if police did not respond, which is a threat to use force. Finally, even if the courthouse was unoccupied, if D had detonated a bomb in the courthouse, someone either inside the courthouse or within the vicinity of the courthouse would have been in "imminent danger of bodily injury." Held, judgment affirmed.

TITLE: Matter of H.J.

INDEX NO.: K.7.e.

CITE: (4th Dist., 4-17-01), Ind. App., 746 N.E.2d 400

SUBJECT: Intimidation - evidence sufficient

HOLDING: State presented sufficient evidence to support D's intimidation conviction. D & another high school student prepared list of teachers & students they did not like, & allegedly wanted to kill. Complaining witness (CW) reported list to school officials because she was concerned for her & her brother's life. Knowing that CW had spoken to school officials about list, D made threats of physical harm to CW. D argued that her statement to CW, "We're gonna put a gun to your head," & "We'll pull the trigger & it'll only hurt for 30 seconds," were nothing more than idle communication & not a threat as defined by Indiana's Intimidation statute, Ind. Code 35-45-2-1. Ct. disagreed & held that evidence supported finding that CW viewed D's statements as true threat & not as joke or idle communication. Distinguishing Casey v. State, 676 N.E.2d 1069 (Ind. Ct. App 1997), Ct. also held that there was sufficient evidence for trier of fact to infer, beyond reasonable doubt, that D threatened CW with intent of placing her in fear of retaliation for prior lawful act of reporting list. Held, judgment affirmed.

TITLE: Montgomery v. State

INDEX NO.: K.7.e.

CITE: (4th Dist., 12-13-07), Ind. App., 878 N.E.2d 262

SUBJECT: Commissioner is "judge" under intimidation statute

HOLDING: Intimidation constitutes a Class D felony if the person to whom D's threat is communicated "is a judge or bailiff of any court." Ind. Code 35-45-2-1(b). D argued that victim in this case is a commissioner, not a judge, thus there was no evidentiary basis from which a reasonable jury could conclude that Commissioner was a judge. Term "judge" is not defined under intimidation statute, but plain & ordinary meaning of "judge" is "[a] public official appointed or elected to hear & decide legal matters in court." *Black's Law Dictionary* 857 (8th ed. 2004). Court applied clear & plain meaning of "judge" for purposes of intimidation statute & held that Commissioner is such a person. In this case, presiding judge of superior court appointed Commissioner, in part, "to hear jury trials, court trials, most everything that [was heard] in that court..." This is equivalent of hearing & deciding legal matters in court. Thus, sufficient evidence exists to support D's two Class D felony intimidation convictions. Held, judgment affirmed.

TITLE: Peterson v. State

INDEX NO.: K.7.e.

CITE: (04/29/2022), Ind. Ct. App., 187 N.E.3d 305

SUBJECT: Evidence insufficient to prove intent element of intimidation charge

HOLDING: The State failed to prove the intent element of intimidation, a Level 5 felony, beyond a reasonable doubt. The State did not present any evidence to show that Defendant's communicated threat to kill R.B. or N.P. was made with the intent that they engage in conduct against their will, i.e., refraining from calling the police for assistance. R.B. was the only witness to testify about the threat. R.B. did not testify that Defendant had threatened to kill her and N.P. with the intent that they not call the police or 911. Instead, during R.B.'s cross-examination testimony, she specified that she had not called 911 that evening because she "was worried about leaving" and "was in shock." However, the evidence was sufficient to prove a separate count of intimidation, charged as a Level 6 felony. R.B. refused to open the apartment door to Defendant and told him she would not open the door. In response, Defendant told R.B. that he would "shoot through this effing door" if she did not open the door. That was sufficient to prove a threat to commit a "forcible felony" because it involved an imminent danger of bodily injury to a human being. Held, judgment affirmed in part and reversed in part.

TITLE: Vanmatre v. State

INDEX NO.: K.7.e.

CITE: (2nd Dist.; 5-11-99), Ind. App., 714 N.E.2d 655

SUBJECT: Intimidation - insufficient evidence

HOLDING: There was insufficient evidence to sustain D's conviction for intimidation with deadly weapon. In order to prove intimidation, State must prove that D: (1) communicated threat; (2) to another person; (3) with intent that other person be placed in fear of retaliation for prior lawful act; (2) while armed with deadly weapon. State must establish that legal act occurred prior to threat & that D intended to place victim in fear of retaliation for that act. Casey v. State, 676 N.E.2d 1069, 1072 (Ind. Ct. App 1997). Here, State alleged that D threatened police officer with revolver with intent to place officer in fear of retaliation for prior lawful act of "preparing to arrest D." However, evidence supported inference that officer did not intend to arrest D before D pulled out revolver. D asked officer repeatedly if he was going to arrest him, & officer told D that he was not going to arrest him if he unlocked door to bar where D was confining woman. Thus, D could not have intended to retaliate against officer for preparing to arrest him because officer did not prepare to arrest D until after D pulled out revolver. Held, conviction reversed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.g Loan sharking/Loan brokering

TITLE: Study v. State

INDEX NO.: K.7.g.

CITE: (2nd Dist., 11-19-92), Ind. App., 602 N.E.2d 1062

SUBJECT: Loan Brokering - failure to register only one offense

HOLDING: In Ind. Code 23-2-5-16, which makes it D felony for person to do act of loan brokering without first registering with securities commissioner, prohibited conduct is failing to register in presence of attendant circumstance (loan brokering), & act is continuous, single individual offense. Therefore, D's two convictions under statute for two incidents of brokering were merged, because multiple convictions were precluded by double jeopardy. Note: Ct. also found D's multiple convictions for theft were not merged as continuous offense, even though payments obtained through fraud were installments on single specified amount.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.h. Obscene matters and performances (Ind. Code 35-49)

TITLE: Adams v. State

INDEX NO.: K.7.h.

CITE: (2nd Dist., 3-16-04), Ind. App., 804 N.E.2d 1169

SUBJECT: Exhibition & Distribution of obscene matter - evidence sufficient

HOLDING: Evidence was sufficient to support D's convictions for Exhibition of Obscene Matter & Distribution of Obscene Matter. D displayed videos of people having sex with animals to two undercover cops, whom D had developed a relationship with over the internet & phone. D then sold four videos to the undercover cops. Ct. determined that sufficient evidence existed that the materials were obscene & lacked community acceptance, noting that the fact finder alone can determine these matters without independent expert testimony as to community standards. Lewis v. State, 726 N.E.2d 836 (Ind. Ct. App 2000); Fordyce v. State, 569 N.E.2d 357 (Ind. Ct. App 1991). Ct. also rejected D's contention that the convictions could not stand based on Stanley v. Georgia, 394 U.S. 557 (1969), which held that crimes for possession of obscene material in one's own home could not constitutionally stand. D displayed the images on his computer to entice the undercover officer to purchase the videotapes. The commercial nature of his actions was more comparable to Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), where the S.Ct. determined that states legitimately may regulate commerce in obscene material & a commercial theater cannot be equated with a private home. While D's home does not qualify as a commercial theater, Ct. found that personal intimacies of home, family, marriage, motherhood, procreation & child rearing encompassed by the right of privacy did not exist here. Id. The commercial nature apparently made the home less of a home here as it related to personal intimacy, as the Ct. was not upholding the convictions simply because the video clips were shown to other people. "There may very well be occasions where consenting adults view sexually explicit films or computer images in the privacy of the home." Ct. also rejected D's double jeopardy argument, finding that the two charges had distinct elements in: (1) displaying the obscene video clips & (2) the sale of the videos. Held, judgment affirmed.

TITLE: Chapman v. State

INDEX NO.: K.7.h.

CITE: (03/23/2022), Ind. Ct. App., 186 N.E.3d 123

SUBJECT: Preliminary determination of matter "harmful to minors" affirmed -- disseminating widely circulated internet memes

HOLDING: In disseminating of matter harmful to minors' prosecution, trial court did not err in preliminarily determining that the widely circulated internet memes Defendant circulated to his 17-year-old former band student constituted matter "probably harmful to minors." On interlocutory appeal, Defendant argued that the memes, which involved jokes of a sexual nature, did not meet the standard of "probably harmful to minors" and that, if they did meet the standard, it would constitute a violation of his First Amendment rights. Majority of Court found Defendant's constitutional challenge waived and concluded that while the memes did not show any nudity or sadomasochistic abuse, "almost all, if not all" could be described or represented as sexual conduct or sexual excitement. Although Defendant argued the memes were simply humorous and do not fit the definition of "prurient," they all suggested or used explicit language to refer to sexual activities or sexual situations in crude, vulgar and degrading terms. The Majority deferred to trial court's review of memes and preliminary determination that they were patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors. Court also found the memes lacked serious literary, artistic, political, or scientific value for minors pursuant to Ind. Code § 35-49-2-2. Held, judgment affirmed; Mathias, J., concurring to note the statutory criterion in IC 35-49-2-2(3) regarding what is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for minors in 2022 are not the same as they were when the statute was written in 1983 and that "this change should be carefully considered and weighed by judges (in a preliminary determination as in this case) and juries (when deciding whether conduct charged under this statute amounts to a crime)...and by our General Assembly." Robb, J. dissenting, notes that the statute and First Amendment are entwined because matter is presumptively protected by the First Amendment unless the State can prove it is matter harmful to minors as defined in section 35-49-2-2." Thus, the dissent would not consider the constitutional analysis waived, and also disagreed with Majority's conclusion that the matter was patently offensive, noting it "wishes to pretend the influx of material regularly shared amongst modern youth has not shifted the way we should view what is suitable for minors unless and until the Legislature reconsider the statute. But I cannot ignore these sweeping cultural changes. The sexually suggestive memes at issue are almost certainly in poor taste and I do not support the sharing of them with a seventeen-year-old. Nonetheless, I cannot find this material patently offensive to prevailing standards in the adult community with respect to what is harmful to a teenager on the cusp of adulthood in 2022."

TITLE: Fordyce & Aeros Entertainment v. State
INDEX NO.: K.7.h.
CITE: (2d Dist. 03/28/91), Ind. App., 569 N.E.2d 357
SUBJECT: Obscenity statute - constitutionality
HOLDING: Indiana's obscenity statute, Ind. Code 35-49-2-1, does not violate either 1st & 9th Amend. to U.S. Const. or Art. I, 9 of Ind. Const. Ds were convicted of distributing obscene matter describing sexual conduct involving person under 16 years of age, & argued that decision of S. Ct. in Pope v. Illinois (1987), 481 U.S. 497, rendered Indiana's obscenity statute violative of U.S. Const. Indiana's statute codifies 3 part obscenity test set forth in Miller v. California (1973), 413 U.S. 15, finding matter obscene if: 1) average person, applying contemporary community standards, finds dominant theme appeals to prurient sexual interest; 2) material depicts or describes sexual conduct in patently offensive way; & 3) matter, taken as whole, lacks serious literary, artistic, political or scientific value. Decision in Pope merely clarified decision in Miller, in that first 2 prongs of Miller obscenity test refer to community standards, & third prong is subject to "reasonable person" test. Ct. noted that jury was instructed that third prong was to be judged by reasonable man standard & held that statute did not violate U.S. Const. Ct. rejected Ds' argument that free speech clause of Ind. Const. protects obscenity, & that statute criminalizing dissemination of obscenity was unconstitutional. That clause, Art. I, 9, states: "[n]o law shall be passed restraining the free interchange of thought & opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible." Ct. also rejected analogy to Oregon S. Ct.'s conclusion that similar constitutional provision prohibited conviction for dissemination of obscene materials because state did not have restrictions on such materials at time constitution was adopted, & therefore obscenity was protected speech because it was not historical exception to free speech. Although Ds argued that obscenity was never discussed as exception to free speech when Ind. Const. was drafted, Ct. noted that Ind. had regulated obscenity prior to adoption of current constitution in 1851, as had other states with similar constitutional provisions. Ct. also noted that Colorado had free speech clause similar to Indiana's & had found obscenity not to be constitutionally protected. Held, convictions affirmed, J. Sullivan concurring in part & dissenting in part, also expressing reservations about constitutionality under U.S. Const. See related issue at Fordyce, K.7.h.

RELATED CASES: Bedtelyon, 184 N.E.3d 1216 (Ind. Ct. App. 2022) (sexually suggestive anime cartoons did not meet statutory definition of obscene matter).

TITLE: Fordyce & Aeros Entertainment v. State

INDEX NO.: K.7.h.

CITE: (2d Dist. 03/28/91), Ind. App., 569 N.E.2d 357

SUBJECT: Distribution of obscene material depicting conduct of persons under 16 - sufficiency of evidence

HOLDING: Evidence was sufficient to show that characters in obscene matter were under 16, & provisions of Ind. Code 35-49-2-1 providing for enhancement of penalty if persons depicted are, or appear to be, under 16, applies to fictional as well as real persons. Ds were convicted of distributing obscene matter that depicted sexual conduct involving person under 16, Class D felony. At issue were 2 books, Incest Mommy & Dog Fun For Daughter, former describing incestuous relationship between boy & his mother, & latter describing 2 teenage girls, mother, teenage boy, & sexual experiences with dogs. It was uncontested that characters described were purely fictional, & no ages were given for them. Ct. App. held plain language of statute, "depicts or describes," in conjunction with dictionary definition of depict, requires inclusion of fictional persons within statutory definition, & because characters were human beings, books fell within statute. Ct. also found that while no specific ages were mentioned, descriptions of characters which seemed to indicate early puberty provided sufficient evidence for inference they were under 16. Held, convictions affirmed, J. Sullivan concurring in part & dissenting on another issue. **NOTE:** J. Sullivan's concurrence & dissent contains extensive discussion of additional issue relating to admissibility of comparative matter submitted to show community acceptance.

TITLE: Fultz v. State
INDEX NO.: K.7.h.
CITE: (4th Dist. 1/23/85) Ind. App., 473 N.E.2d 624
SUBJECT: Obscene performance - intent to be observed
HOLDING: Tr. Ct. did not err in denying D's motion for directed verdict. Here, 2 neighbors observed D standing in his window masturbating. D was arrested for engaging in an obscene exhibition. D contends evidence does not show he knowingly/intentionally performed act before audience. Witness testified D stood in lighted window at night facing their window, & that he believed D could see him. Because intent is mental state, trier of fact must resort to reasonable inferences based upon examination of surrounding circumstances. Shields 456 N.E.2d 1033. Inference D intentionally performed this act is permissible from record. Held, no error. Young DISSENTS.

TITLE: Isaac v. State

INDEX NO.: K.7.h.

CITE: (2d Dist. 9/22/82) Ind. App., 439 N.E.2d 1193

SUBJECT: Obscene matters - single act; separate offenses

HOLDING: Test for determining whether single act constitutes 2 offenses is whether each offense requires proof of additional fact which other does not. Elmore 382 N.E.2d 893 (quoting Brown & Blockburger). Double jeopardy prohibits 2 convictions for act of exhibiting obscene materials to 2 people simultaneously. Here, situation held similar to single larceny doctrine: single intent & design. Who object is taken from (or showed to) is of no consequence. Conclusion also supported by rule that statutes in pari materia must be considered together (Ind. Code 35-30-10.1-1, 2, 3); prosecutors not allowed to seek & obtain multiple convictions for single exhibition of obscene film. Held, judgment/ sentence on one of 2 counts of exhibiting obscene matter ordered vacated.

RELATED CASES: American Film Distributors, Inc. 471 N.E.2d 3 (Crim L 984(2,3); showing of 4 obscene films in single, continuous, uninterrupted exhibition for 1 admission price constitutes 1, not 4, offenses; held, conviction on 3 counts reversed).

TITLE: King v. State
INDEX NO.: K.7.h.
CITE: (03-02-10), 921 N.E.2d 1288 (Ind. 2010)
SUBJECT: Attempted dissemination of matter harmful to minor- officer may pose as minor
HOLDING: Overruling Gibbs v. State, 898 N.E.2d 1240 (Ind. Ct. App 2008) and Aplin v. State, 889 N.E.2d 882 (Ind. Ct. App 2008), Court held that the offense of Attempted Dissemination of Matter Harmful to Minors can be committed when a D attempts to transmit proscribed matter by the Internet to an adult police detective posing as a minor. It is no defense to a crime of attempt that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted. Ind. Code 35-41-5-1. It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. Zickefoose v. State, 388 N.E.2d 507 (Ind. 1979).

Here, acting with the culpability required for the commission of the crime of Dissemination of Matter Harmful to Minors, D took the substantial step of transmitting by the internet such proscribed matter to a person he believed was a fifteen-year-old girl. It matters not that his intended recipient was an adult; the Attempt statute makes clear that such "a misapprehension of the circumstances" is no defense. Although to be guilty of Dissemination of Matter Harmful to Minors, the recipient must be eighteen years of age, such requirement does not evidence legislative intent to foreclose application of the general Attempt statute to prosecute unsuccessful attempts to commit such Dissemination. Thus, there was sufficient evidence to support D's conviction for Attempted Dissemination, although the recipient was an adult police officer posing as a fifteen-year-old girl. Held, transfer granted, Court of Appeals' opinion summarily affirmed in all other respects and judgment of Tr. Ct. affirmed.

TITLE: Low v. State

INDEX NO.: K.7.h.

CITE: (3d Dist. 11/14/91), Ind. App., 580 N.E.2d 737

SUBJECT: Obscene performance - need for public setting

HOLDING: Conduct which involves obscene performance in private setting, does not violate obscene performance statute, Ind. Code 35-49-3-2, & Tr. Ct. erred in denying D's motion to dismiss. Carmel police rented motel rooms to conduct "sting operation" to investigate suspected prostitution. D went to room at officer's request & said she would dance for him, do "role theme play," or engage in "adult conversation." For additional money, she would do various other things, including "bed dance." Officer paid her \$100 dollars & D did bed dance, exposing her breasts while wearing G-string, small top, & thigh-high nylons. For additional \$200 she performed "finger fantasy" where she masturbated for officer while he was nude.

Ind. Code 35-49-3-2 creates class A misdemeanor for person to knowingly or intentionally engage in, participate in, manage, produce, sponsor, present, exhibit, photograph, film, or videotape any obscene performance. Performance is defined in Ind. Code 35-49-1-7 as "any play, motion picture, dance or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons." D argued that her conduct did not violate statute because of its private setting, relying on Riffel, App., 549 N.E.2d 1084, but State argued that nature of activity & fact it was performed for money, not setting, controlled. State also argued that simple exhibitionism could be obscene performance, *citing* Fultz, App., 473 N.E.2d 624. Fultz was distinguishable because it involved public acts, *i.e.*, masturbating in front of lighted window in apartment complex, & Ct. found private versus public display to be issue. Ct. also held fact acts were performed for money had no bearing on issue, because language of statute didn't support that inference & another statute dealing with prostitution, Ind. Code 35-45-4-2, could criminalize performance for money. Purpose of obscene performance statute is not to prevent performance of sexual acts for money, but to prosecute "obscene performances," regardless of payment. If statute is not narrowly construed, it could penalize similar conduct occurring between consenting married adults. Because conduct occurred in private, it was not violation of Ind. Code 35-49-3-2. Held, conviction for obscene performance reversed.

RELATED CASES: Melton, 993 N.E.2d 253 (Ind. Ct. App 2013) (where D showed minor a pornographic video and masturbated in front of her, he was criminally liable under Ind. Code § 35-49-1-7 because he committed the acts "before an audience of one or more persons."; *see* full review, this section); Sloan, App., 794 N.E.2d 1128 (where D broke into victim's home, pulled down victim's underwear, sat on couch & exposed & manipulated his penis, his actions constituted a "performance" even though not done in public).

TITLE: Melton v. State
INDEX NO.: K.7.h.
CITE: (8/21/2013), 993 N.E.2d 253 (Ind. Ct. App 2013)
SUBJECT: Evidence sufficient for dissemination of matter harmful to minors
HOLDING: Evidence was sufficient to support D's conviction for dissemination of matter harmful to minors where D showed a minor a pornographic video and masturbated in front of her. Court rejected D's argument that because D committed these acts in his private residence, he had no criminal liability under Ind. Code § 35-49-1-7. The statute requires only that a person commits the act "before an audience of one or more persons," which D did. In reaching decision, Court distinguished Low v. State, 580 N.E.2d 737 (Ind. Ct. App 1991) and Riffel v. State, 549 N.E.2d 1084 (Ind. Ct. App 1990), trans. denied. Held, judgment affirmed.

TITLE: M.S. v. State

INDEX NO.: K.7.h.

CITE: (5th Dist., 07-15-08), Ind. App., 889 N.E.2d 900

SUBJECT: Disseminating matter harmful to minors - playing DVD in moving car

HOLDING: Evidence was sufficient to sustain D's delinquency adjudication for committing act that would be disseminating matter harmful to minors as a class D felony if committed by an adult. While driving by Indiana State Fairgrounds in a sports car, D was playing a DVD containing nudity and sexual content on a fifteen-inch video screen mounted in rearview window and visible to the public. There was a front-seat passenger, and a duplicate screen, to which the DVD player was attached, was located on the console between the two front seats. To support conviction under Ind. Code 35-49-3-3(a), State needed to prove beyond a reasonable doubt that D knowingly or intentionally displayed matter that is harmful to minors in an area which minors have visual, auditory, or physical access. D argued that State failed to prove that he was responsible for playing the DVD and any minors were exposed to the DVD.

Court held that, from evidence and resulting reasonable inferences, a reasonable trier of fact could conclude that D knew that the DVD was playing on the screen in the rearview window of the car. Moreover, the area in which D was driving was a public area to which minors had both auditory and visual access to what occurred in rear window of D's vehicle. Under clear and unambiguous definition of "access," the minor need not be present; rather, minors only need ability to see or hear conduct or the ability to be present. Zitlaw v. State, 880 N.E.2d 724 (Ind. Ct. App 2008). Held, judgment affirmed.

TITLE: Porter v. State, No. 1-182A18
INDEX NO.: K.7.h.
CITE: (1st Dist. 10/5/82) Ind. App., 440 N.E.2d 690
SUBJECT: Obscene matters - scienter
HOLDING: An individual must be shown to have knowledge of contents in order to convict him/her of distributing obscene material. Hamling v. US, (1974) 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590; Hagood, App., 395 N.E.2d 315; Ind. Code 35-30-10.1-2. Scienter can be proved by circumstantial evidence. Hagood. Here, D leased premises under pretense of selling cameras & video equipment. D did not manage store but he was seen in store & sales clerk was seen turning money over to him. Ct. finds nature of material sold is readily apparent from covers of magazines & tapes. Held, evidence sufficient to establish scienter; conviction affirmed.

TITLE: Porter v. State

INDEX NO.: K.7.h.

CITE: (1st Dist. 10/5/82) Ind. App., 440 N.E.2d 690

SUBJECT: Obscene matters/performances - not vague

HOLDING: Ind. Code 35-30-10.1-1 is not unconstitutionally vague or overbroad. Statute employs language of Miller v. CA, (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. Here, D contends statute fails to adequately define type of activity that will subject seller to criminal liability. Ct. rejects argument, citing cases holding a criminal statute void for vagueness only if it fails to inform persons of ordinary intelligence what their conduct must be in order to subject them to criminal liability. D further contends statute is overbroad & sets forth hypothetical, legitimate behavior he believes to be precluded by statute. Ct. finds hypotheticals do not reasonably fall within purview of Ind. Code 35-30-10.1-1(d), defining sexual conduct. Held, no error in denial of motion to dismiss based on unconstitutionality of statute.

TITLE: Richards v. State

INDEX NO.: K.7.h.

CITE: (3d Dist. 4/10/84) Ind. App., 461 N.E.2d 744

SUBJECT: Obscene matters - instruction; contemporary community standards (CCS)

HOLDING: Tr. Ct. did not err in instructing jury that it should consider CCS of Allen County, IN in determining whether film "Girlfriends" (depicting lesbian encounters) appeals to prurient interest in sex. Here, D objected, arguing jurors should apply CCS of State of IN. Ct. *cites* numerous U.S.S.Ct. cases dealing with issue. Instruction to apply local standards presents reversible error only where record indicates instruction materially affected deliberations of jury in manner prejudicial to D [Citations omitted.] Record does not indicate instruction was prejudicial to D. Held, no error.

RELATED CASES: Peters, App., 449 N.E.2d 311.

TITLE: Richards v. State
INDEX NO.: K.7.h.
CITE: (3d Dist. 4/10/84) Ind. App., 461 N.E.2d 744
SUBJECT: Obscene matters - instruction; prurient interest
HOLDING: Tr. Ct. did not err in giving instruction re prurient interest (set forth in opinion), which taken as a whole, properly states law. Here, D contends instruction was prejudicial to him because it defined "prurient interest" inter alia as "an abnormal interest in sex." D was charged with distributing film "Girlfriends" which depicted lesbian encounters. Ct. finds instruction does not infer that jurors should find film appeals to prurient interest insofar as it depicts lesbian relationships. Definition of prurient interest (Roth v. US, (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498) is set forth in opinion. Held, no error.

RELATED CASES: Peters, App., 449 N.E.2d 311.

TITLE: Saliba v. State
INDEX NO.: K.7.h.
CITE: (2d Dist. 3/28/85) Ind. App., 475 N.E.2d 1181
SUBJECT: Obscene matters - public opinion poll (POP)
HOLDING: Tr. Ct. erred in excluding POP designed to determine contemporary community standards (CCS) in Marion County re depiction of sexual activities in movies & publications. Here, D employed Dr. Roderick Bell from CA to conduct poll. At trial, but out of jury's presence, Bell testified re qualifications & scientific techniques used to conduct poll. State objected & presented Dr. Brian Vargus from IN who challenged validity of poll, which was ultimately excluded. D in obscenity case is entitled to introduce relevant & appropriate expert testimony re CCS. Kaplan v. CA (1973), 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492. "Expert testimony based on POP is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise." 475 at 1185 (citation omitted). Opinion discusses requirements for relevancy & trustworthiness (including foundational (F) criteria) of survey evidence. Any objection, other than to lack of F requisites & any testimony challenging F testimony, affects weight accorded poll, not its admissibility. Held, reversed & remanded for new trial. Sullivan CONCURS, disagreeing with implication that once proponent of evidence has qualified as expert & stated poll is accurate, poll must be admitted; & pointing out that in holding poll admissible, opinion rejects Richards, App., 461 N.E.2d 744 & Sedelbauer, App., 455 N.E.2d 1159 (cards at K.7.h). TRANSFER DENIED 484 N.E.2d 1295; Givan DISSENTS with opinion.

TITLE: Sedelbauer v. State

INDEX NO.: K.7.h.

CITE: (3d Dist. 11/16/83) Ind. App., 455 N.E.2d 1159

SUBJECT: Obscene matters - expert testimony; motion in limine

HOLDING: Tr. Ct. did not deny D due process rights by refusing to allow testimony re contemporary community standards (CCS) of male homosexual community in D's trial for distributing obscene materials. Although U.S. S.Ct. has recognized that expert opinion may be used to define CCS, it has never required it. Pinkus v. US (1978), 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293; Miller v. CA (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419; Mishkin v. NY (1966), 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. Here, D proffered expert on CCS in Allen County & a sex therapist/practicing homosexual from OH to testify re prurient appeal of film to homosexuals in Allen County. Tr. Ct. refused any testimony re CCS, instead leaving determination to jury. Jury was properly instructed on prurient interest & CCS. Held, no error.

RELATED CASES: Albright, App., 501 N.E.2d 488 (CCS was outside expert's area of expertise, see card at O.7.a.1; Ct. also notes that it is "highly questionable" whether admissibility of expert opinion re CCS is proper subject for motion in limine, which prosecutor filed in this case); Richards, App., 461 N.E.2d 744.

TITLE: Sedelbauer v. State
INDEX NO.: K.7.h.
CITE: (3d Dist. 11/16/83) Ind. App., 455 N.E.2d 1159
SUBJECT: Obscene matters - instruction; prurient appeal to clearly defined deviant sexual group
HOLDING: Tr. Ct. did not err in refusing D's tendered instruction ["The Ct. instructs the jury that where a magazine is designed for a deviant group, then prurient appeal must be measured upon its impact on the average adult member of that group"] where record is devoid of evidence bearing on film's prurient appeal to male homosexuals. Ct. recognizes instruction correctly states law. Prurient appeal of material intended for clearly defined deviant sexual group may be measured by its prurient appeal to that group. Pinkus v. US, (1978) 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293; Mishkin v. NY, (1966) 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. However, Ct. finds there was no evidence in record to support giving of instruction. Held, no error.

TITLE: Sedelbauer v. State
INDEX NO.: K.7.h.
CITE: (3d Dist. 11/16/83) Ind. App., 455 N.E.2d 1159
SUBJECT: Obscene matters - jurisdiction of Ct.
HOLDING: Tr. Ct. properly assumed jurisdiction over obscenity case. Here, D contends Ct. first must determine whether material is obscene before finding a person guilty of distributing such matter. Ind. Code 35-30-10.1-1(c) defines obscene material & is specific enough to put persons on notice of what material is/is not obscene. Statute is modeled on test set forth in Miller v. CA, (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. Statute satisfies due process requirements & does not operate ex post facto in violation of U.S.Const. Art. I, 10. Held, conviction affirmed.

TITLE: State v. Thakar

INDEX NO.: K.7.h.

CITE: (10/2/2017), 82 N.E.3d 257 (Ind. 2017)

SUBJECT: Dissemination of matter harmful to minors statute not unconstitutionally vague

HOLDING: Overruling Salter v. State, 906 N.E.2d 212 (Ind. Ct. App 2009), Court held that dissemination of matter harmful to minors statute is not unconstitutionally vague or ambiguous as applied to Defendant, who electronically transmitted a picture of his erect penis to a sixteen-year-old girl in Oregon. Pointing out disparate statutory treatment, Defendant relied upon Salter in arguing that it is patently illogical that an adult man could legally show his penis to a 16-year-old through consensual activity in person, but not through photography. But there is no conflict between these two statutes because Defendant was capable of complying with both simultaneously, and inconsistent statutory treatment of minors aged 16 and 17 is a policy determination for the legislature. Whether Defendant's alleged conduct violated the dissemination statute is a matter for the jury.

The fact that General Assembly took no action in response to Salter in the past eight years and thus arguably acquiesced to that interpretation of the dissemination statute is irrelevant. The clear statutory language makes it unnecessary to resort to other statutory construction rules, such as the concept of legislative acquiescence. Held, transfer granted, Court of Appeals opinion at 71 N.E.3d 27 vacated, dismissal of charges reversed.

TITLE: State v. Virtue

INDEX NO.: K.7.h.

CITE: (2nd Dist., 11-17-95), Ind. App., 658 N.E.2d 605

SUBJECT: Distribution of obscene videotapes

HOLDING: Tr. Ct. erred in determining that State's prosecution of D for distribution of obscene videotapes violated his rights to freedom of expression under First Amendment to United States Constitution & Article I, 9 of Indiana Constitution. States have right to regulate distribution of obscene matter regardless of whether that matter is distributed to consenting adults. Paris Adult Theater I. v. Slaton (1973), 413 U.S. 49; Fordyce v. State (1991), Ind. App., 569/357. Indiana's Distribution statute, Ind. Code 35-49-3-1, may be applied to distribution of obscene videotapes notwithstanding fact that videotapes were distributed to consenting adults in separate, restricted area of store. D argued that obscenity & distribution statutes are inapplicable to videotapes at time of distribution, because they are not obscene unless & until they are viewed through use of VCR. Ct. disagreed & found obscene videotapes to be no less dangerous or less of abuse of freedom of expression than other forms of obscene material. Mere fact that some effort is required to access materials does not change point of distribution or character of obscene material, & does not place material's distribution outside of obscenity statute. Held, reversed & remanded.

TITLE: Walters v. State
INDEX NO.: K.7.h.
CITE: (7/31/86) Ind., 495 N.E.2d 734
SUBJECT: Obscene performances - definition
HOLDING: Ct. rejects D's contention that his convictions for exhibition of obscene material & displaying harmful matter to minors are duplicitous. Second count charged D with performance, & Ct. finds performance consisted of D's attempt to entice 15-year-old boy into form of sexual deviate conduct while D was dressed in his underwear & seated on couch with boy. Ct. says it "must also observe that sufficiency of evidence as to whether Walters' conduct constituted a performance as it relates to count 2 is not challenged. Held, conviction affirmed. DeBruler CONCURS IN RESULT.

TITLE: Zitlaw v. State

INDEX NO.: K.7.h.

CITE: (5th Dist., 02-14-08), Ind. App., 880 N.E.2d 724

SUBJECT: Performance harmful to minors- no requirement that minors be present

HOLDING: Tr. Ct. properly denied D's motion to dismiss. It is a Class D felony for a person to knowingly or intentionally engage in or conduct a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by the minor's parent or guardian. Ind. Code 35-49-3-3(a). Under the clear and unambiguous definition of "access," the minor need not be present. Minors only need the ability to see or hear the conduct or the ability to be present. Moreover, the phrase "unless each minor is accompanied by the minor's parent or guardian" is an affirmative defense and allows a D to show that unaccompanied minors may not have access to the place in question, such as a strip bar or an ex-rated movie house. Thus, where an unaccompanied minor has no access, there is no crime. Here, D exposed his penis to an undercover officer in a public park which is a place where minors would have the ability to see or hear D's conduct.

Further, the definition of "performance that is harmful to minors" is not unconstitutionally vague. A performance is harmful to minors if: (1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse; (2) considered as a whole, it appeals to the prurient interest in sex of minors; (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors. Ind. Code 35-49-2-2. Individuals of ordinary intelligence would comprehend the performance harmful to minors statute adequately enough to inform them of the proscribed conduct. Further, D's alleged conduct of exposing himself in a public park for the purpose of engaging in oral sex clearly falls within the conduct proscribed by the statutes. Held, judgment affirmed; Riley, J., dissenting on basis that Ind. Code 35-49-3-3(5) requires the actual presence of minors who can see, hear, or feel the performance and are unaccompanied by a parent or guardian; State's interpretation encompasses situations which the legislature did not intend to criminalize, and the words "visual, auditory, or physical" preceding "access" denotes something more than permission, liberty or ability to be present.

RELATED CASES: M.S., App., 889 N.E.2d 900 (area in which D was driving was a public area to which minors had both auditory and visual access to what occurred in rear window of D's vehicle; see full review at K.7.h).

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.i. Patronizing a prostitute

TITLE: Mobley v. State

INDEX NO.: K.7.i.

CITE: (3/30/2015), 27 N.E.3d 1191 (Ind. Ct. App 2015)

SUBJECT: Entrapment defense - police did not induce D to patronize prostitute

HOLDING: State presented sufficient evidence to prove that D knowingly agreed to pay an undercover detective \$20 to perform fellatio on him. And State rebutted D's entrapment defense by showing he was not induced by police to commit the offense. D drove slowly past undercover detective posing as a prostitute, staring at her the whole time. He then stopped his car in the middle of the street near her and asked, "How much?"--all before the detective mentioned the possibility to exchange money for "head."

Detective did not give D an explicit directive or order and did not exert a persuasive or other force over D; instead, she merely presented him with "an opportunity to commit the offense," which Ind. Code § 35-41-3-9(b) expressly declares "does not constitute entrapment." See Griesemer v. State, 26 N.E.3d 606 (Ind. 2015). Held, conviction for patronizing a prostitute affirmed.

TITLE: Young v. State

INDEX NO.: K.7.i.

CITE: (3/23/83), Ind. App., 446 N.E.2d 624

SUBJECT: Patronizing prostitute -- constitutional not to charge patronizing but charge woman with prostitution

HOLDING: D was convicted of prostitution. On appeal, she claimed that she was denied equal protection of laws of Indiana in that State did not tender D's instructions on equal protection. She claimed that because person with whom she had sex (State witness) was neither prosecuted nor granted immunity for crime of patronizing prostitute, she was denied equal protection. Ct. held that Tr. Ct. had no duty to instruct jury regarding question of constitutionality, and record did not demonstrate that prosecutorial discretion had been exercised in manner denying D equal protection. Failure to prosecute one who may be violating law does not excuse violation by another absent showing of bad faith or evil design. Highland Sales Corp., 186 N.E.2d 682. In addition, assertion that State witness committed crime and was not prosecuted does not show denial of equal protection. Held, affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.I. Professional gambling (Ind. Code 35-45-5-3)

TITLE: American Legion Post #113 v. State

INDEX NO.: K.7.I.

CITE: (1st Dist., 10-31-95), Ind. App., 656 N.E.2d 1190

SUBJECT: Gambling statutes - constitutionality challenge rejected

HOLDING: Indiana's anti-gambling statutes do not violate Article I, Section 23 of Indiana Constitution or equal protection clause of Fourteenth Amendment to United States Constitution. After repeated warnings about illegality of gambling operation, D was convicted of unlawful gambling, promoting professional gambling, & professional gambling. Invoking privilege & immunities clause of Indiana Constitution, D argued that riverboat, pari-mutuel, & lottery exceptions to general prohibition against gambling create unlawful privileges to differing classes of persons to which anti-gambling statutes do not apply. Ct. disagreed & concluded that: 1) riverboat & pari-mutuel wagering exceptions allow all individuals to lawfully engage in those activities; 2) inherent distinctions between State Lottery Commission & every other organization & citizen are reasonably related to legislative classification limiting operation of lotteries to those authorized by Commission; 3) legislative classification is not arbitrary or manifestly unreasonable because Lottery Commission uniquely possesses characteristics which justify its authorization & exemption. Ct. likewise rejected Fourteenth Amendment equal protection claim & noted that lottery exception is rationally related to legitimate government purpose of maintaining tight regulatory control over gambling. Dept. of Revenue v. There to Care, Inc. (1994), App., 638 N.E.2d 871. Strict regulation of gambling under Ind. Code 35-45-5 constitutes valid exercise of police power. Posadas De Puerto Rico Ass'n v. Tourism Co. (1986), 478 U.S. 328. Held, conviction affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.m. Promoting professional gambling (Ind. Code 35-45-5-4)

TITLE: American Legion Post #113 v. State
INDEX NO.: K.7.m.
CITE: (1st Dist., 10-31-95), Ind. App., 656 N.E.2d 1190
SUBJECT: Gambling statutes - constitutionality challenge rejected
HOLDING: Indiana's anti-gambling statutes do not violate Article I, Section 23 of Indiana Constitution or equal protection clause of Fourteenth Amendment to United States Constitution. After repeated warnings about illegality of gambling operation, D was convicted of unlawful gambling, promoting professional gambling, & professional gambling. Invoking privilege & immunities clause of Indiana Constitution, D argued that riverboat, pari-mutuel, & lottery exceptions to general prohibition against gambling create unlawful privileges to differing classes of persons to which anti-gambling statutes do not apply. Ct. disagreed & concluded that: 1) riverboat & pari-mutuel wagering exceptions allow all individuals to lawfully engage in those activities; 2) inherent distinctions between State Lottery Commission & every other organization & citizen are reasonably related to legislative classification limiting operation of lotteries to those authorized by Commission; 3) legislative classification is not arbitrary or manifestly unreasonable because Lottery Commission uniquely possesses characteristics which justify its authorization & exemption. Ct. likewise rejected Fourteenth Amendment equal protection claim & noted that lottery exception is rationally related to legitimate government purpose of maintaining tight regulatory control over gambling. Dept. of Revenue v. There to Care, Inc. (1994), App., 638 N.E.2d 871. Strict regulation of gambling under Ind. Code 35-45-5 constitutes valid exercise of police power. Posadas De Puerto Rico Ass'n v. Tourism Co. (1986), 478 U.S. 328. Held, conviction affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.n. Promoting prostitution (Ind. Code 35-45-4-4)

TITLE: Benjamin v. State

INDEX NO.: K.7.n.

CITE: (2d Dist. 6/18/87) Ind. App., 508 N.E.2d 1360

SUBJECT: Promoting prostitution distinguished from prostitution

HOLDING: Ct. rejects D's contention that "profiteering" by non-participating third person must be shown in order to distinguish promoting prostitution from simple prostitution. Here, in D's residence, D & another woman entertained vice officers, dancing for them & disrobing before being arrested. Ct. looks to Criminal Law Study Commission comments on Ind. Code 35-45-4-4 (3) & determines that statute was intended to cover conduct of keeping a place of prostitution as well as allowing a place to be used for prostitution. Statute was intended to encompass all activities which promote prostitution via having control over, & permitting use of, place where prostitution occurs. Ct. rejects D's argument that if her interpretation is not adopted "extreme & inconsistent" results could occur in penalties attached to varying acts of prostitution. Prostitution carries Class A misdemeanor liability (Ind. Code 35-45-4-2), while prostitution committed in place over which offender has control would carry Class C felony liability even for first offense. Ct. notes legislature has sole authority to attach penalties to crimes. Held, conviction affirmed.

RELATED CASES: State v. Hartman, 602 N.E.2d 1011 (Ind. 1992) (to extent prostitute in Benjamin was convicted of permitting fellow prostitute to use her home for prostitution, the holding in Benjamin is correct; to the extent the court's dicta in Benjamin suggests that a lone prostitute could be charged with a Class C felony under such circumstances, however, it is in error).

TITLE: Jones v. State
INDEX NO.: K.7.n.
CITE: (4-30-02), Ind. App., 766 N.E.2d 1258
SUBJECT: Promoting prostitution - penalty scheme constitutional
HOLDING: Penalty scheme for promoting prostitution does not violate proportionality requirement of Indiana Constitution, Art. 1, sec. 16. In challenging his five-year sentence, D noted that sentence for promoting prostitution can be up to eight times longer than conviction for prostitution itself & is therefore disproportionate. Sentence will be found not proportional when criminal penalty is not graduated & proportioned to nature of offense. Dunlop v. State, 724 N.E.2d 592 (Ind. 2000). While both promoter of prostitution & prostitute are certainly involved in same criminal enterprise, there is nothing incongruous or unfair about legislature's decision to punish two crimes differently. It seems legislature has rationally concluded that business manager of prostitution enterprise typically imposes greater harm on society than sole practitioner. State v. Hartman, 602 N.E.2d 1011 (Ind. 1992). In light of presumption of constitutionality of statutes & heavy burden on party asserting unconstitutionality, Ct. rejected D's proportionality argument. Held, judgment affirmed.

TITLE: Luginbuhl v. State

INDEX NO.: K.7.n.

CITE: (1st Dist. 5/13/87) Ind. App., 507 N.E.2d 620

SUBJECT: Promoting prostitution - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for promoting prostitution. Here, vice detective went to health spa, paid D for a massage, & inquired about possibility of her performing oral sex on him. D stated she was not interested but asked detective how much he would be willing to tip, then took money (\$65) & left room, agreeing to check with another girl. D returned with other girl who immediately began to fondle detective's genitals. D contends state failed to prove actus reus, citing LaMar 109 N.E.2d 614. Ct. distinguishes LaMar (state must show more than conduct evincing permissive disposition toward prostitution to show procurement of another person) & discusses meaning of word procure. State need only show that D was aware of high probability that she was procuring woman (Moon Doom) for detective & that she was doing so for purpose of prostitution. See Ind. Code 35-41-4-2. Held, conviction affirmed.

RELATED CASES: Dorn, App., 819 N.E.2d 516 (Ct. rejected D's arguments that tapes used to convict him were unintelligible & that based on his remarks it could not be determined whether he was suggesting a legal or illegal escort service); Jones, App., 766 N.E.2d 1258 (State presented sufficient evidence that D procured prostitution); Mure, App., 468 N.E.2d 591 (Prost 1; evidence was sufficient to sustain conviction even though persons solicited neither agreed to nor engaged in acts of prostitution; here, D knowingly encouraged 2 persons to become part of his prostitution operation).

TITLE: Luginbuhl v. State
INDEX NO.: K.7.n.
CITE: (1st Dist. 5/13/87) Ind. App., 507 N.E.2d 620
SUBJECT: Promoting prostitution - evidence of prostitute's conviction unnecessary but admissible
HOLDING: Tr. Ct. did not err by admitting evidence that woman whom D had procured for vice detective had in fact been convicted of prostitution for that incident. Evidence of crimes or misconduct by another is admissible if it directly relates to totality of circumstances surrounding D's crime. Hudak, App., 446 N.E.2d 615; Smith, App., 284 N.E.2d 522. Here, evidence of prostitute's criminal activity bears direct relationship to D's procurement of her for purposes of prostitution. Although it is not necessary that state show that an act of prostitution actually occurred, Mure, App., 468 N.E.2d 951, prostitute's act of deviate sexual conduct had a strong tendency to prove a knowing procurement had been accomplished. Fact that act actually occurred makes inference that D knowingly procured woman for purposes of prostitution more probable than it would be without that evidence. D has failed to show Tr. Ct. manifestly abused its discretion to weigh probative value of evidence against prejudice to her. Wallace 486 N.E.2d 445. Held, conviction affirmed.

TITLE: Mure v. State

INDEX NO.: K.7.n.

CITE: (3d Dist. 9/27/84) Ind. App., 468 N.E.2d 591

SUBJECT: Promoting prostitution - occurrence in IN

HOLDING: Renewal in IN of offer made in MI to work for D as prostitute satisfies requirement of Ind. Code 35-41-1-1 that either conduct or result (element of offense) occur in IN. Here, D contends conviction is contrary to law because material element did not occur in IN. D first encouraged Woods to work as prostitute at her office in MI, but renewed offer in toto to her in IN. D also encouraged confidential informant in IN to work for him as prostitute. Held, no error.

TITLE: State v. Hartman

INDEX NO.: K.7.n.

CITE: (11-13-92), Ind., 601 N.E.2d 1011

SUBJECT: Promoting prostitution requires third party

HOLDING: Lone prostitute directing someone to his or her place of business, may not be convicted on promoting prostitution under Ind. Code 35-45-4-4, reversing Ct. App. decision at 594 N.E.2d 830. D, employee of escort service, called patron & gave him directions to his home. When patron arrived, D allegedly fondled patron's genitals, & was charged under Ind. Code 35-45-4-4(5) with conducting or directing another to place for purpose of prostitution, a Class C felony. Tr. Ct. granted D's motion to dismiss for failure to plead facts constituting offense under statute, but State appealed & Ct. App. reversed. Ind. S.Ct. noted that three statutes, Ind. Code 35-45-4-2, Ind. Code 35-45-4-3, & Ind. Code 35-45-4-4, proscribe activities of prostitutes, patrons, & pimps, respectively. Although plain meaning of verb "direct" was consistent with D's actions, Ct. found interpretation was inconsistent with legislative intent. Ct. looked to comment of Criminal Law Study Commission included in proposed final draft of 1976 penal code revision, & found it specifically showed Ind. Code 35-45-4-4 was to be applied only to conduct of third party. Ct. also noted that it takes two prior convictions to raise prostitution offense to D felony, & it seemed unlikely that legislature intended to give prosecuting attorneys discretion to charge first offense as class C felony merely because prostitute invites customer to his home. Instead, it appeared that legislature rationally concluded that business manager of prostitution enterprise imposes greater harm on society than sole practitioner. Ct. also found that to extent prostitute in Benjamin App., 508 N.E.2d 1360, was convicted of permitting fellow prostitute to use her home for prostitution, upholding of her conviction under Ind. Code 35-45-4-4 was still good law, but to extent dicta suggested lone prostitute could be charged under statute, it is erroneous. Held, transfer granted & Tr. Ct. affirmed, Givan, J., dissenting.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.o. Prostitution

TITLE: Edwards v. State

INDEX NO.: K.7.o.

CITE: (2nd Dist., 2-27-04), Ind. App., 803 N.E.2d 1249

SUBJECT: Prostitution - evidence sufficient; car ride as "property"

HOLDING: Evidence was sufficient to support D's conviction for prostitution, where he agreed to perform deviate sexual conduct in exchange for a car ride across town. A person commits prostitution if he "performs or agrees to perform sexual intercourse or deviate sexual conduct for money or other property." Ind. Code 35-45-4-2. D argued that there was no evidence he agreed to perform oral sex in return for money or other property because a car ride is not "property" under prostitution statute. Although prostitution statute does not define property, Ind. Code 35-41-1-23 defines property as anything of value, which includes services & intangibles. As in Moser v. State, 433 N.E.2d 68 (Ind. Ct. App 1982), a criminal conversion case, Ct. concluded that general definition of property set out in Ind. Code 35-41-1-23 applies here. Held, judgment affirmed.

TITLE: Harwell v. State

INDEX NO.: K.7.o.

CITE: (2nd Dist., 10-07-04), Ind. App., 821 N.E.2d 381

SUBJECT: Prostitution - evidence sufficient; meaning of "agreement"

HOLDING: Evidence was sufficient to support prostitution conviction where undercover officer approached D & asked her for fellatio. Court found that agreement to perform sex for money occurred despite fact that D refused to discuss money after allegedly agreeing to perform fellatio. Officer arrested D after posing a question to D if the act would be more than \$20 & she responded "no." Court cited the Black's law dictionary definition for "agreement" & that in contract law an agreement is considered to be a meeting of the minds. Mindful that we "should not be ignorant as judges of what we know as men," Court found sufficient evidence of agreement to perform fellatio for money. It also noted that argument that specific price must be determined is not supported by the statutory language of Ind. Code 35-45-4-2, which only requires performance for money. By indicating that the sexual service would not be more expensive than \$20, D emitted an inference that a cost was involved. Held, judgment affirmed.

TITLE: Owens v. State

INDEX NO.: K.7.o.

CITE: (8/11/81), Ind. App., 424 N.E.2d 169

SUBJECT: Prostitution -- bill authorizing prosecution is legal

HOLDING: D was convicted of prostitution. She claimed on appeal that Tr. Ct. erred by not setting aside her conviction due to fact that prostitution act under which she was convicted and sentenced started life as public utilities regulation bill, and, through vagaries of committee process, ended up in present form. She argued that statute was flawed by procedural irregularities in legislative process. Ct. held that Indiana Cts. may not go behind constitutional authentication of bill. Held, judgment affirmed.

TITLE: Young v. State

INDEX NO.: K.7.o.

CITE: (3/23/83), Ind. App., 446 N.E.2d 624

SUBJECT: Patronizing prostitute -- constitutional not to charge patronizing but charge woman with prostitution

HOLDING: D was convicted of prostitution. On appeal, she claimed that she was denied equal protection of laws of Indiana in that State did not tender D's instructions on equal protection. She claimed that because person with whom she had sex (State witness) was neither prosecuted nor granted immunity for crime of patronizing prostitute, she was denied equal protection. Ct. held that Tr. Ct. had no duty to instruct jury regarding question of constitutionality, and record did not demonstrate that prosecutorial discretion had been exercised in manner denying D equal protection. Failure to prosecute one who may be violating law does not excuse violation by another absent showing of bad faith or evil design. Highland Sales Corp., 186 N.E.2d 682. In addition, assertion that State witness committed crime and was not prosecuted does not show denial of equal protection. Held, affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.p. Public indecency (Ind. Code 35-45-4-1)

TITLE: Adims v. State

INDEX NO.: K.7.p.

CITE: (3d Dist. 4/10/84) Ind. App., 461 N.E.2d 740

SUBJECT: "Public" indecency - constitutionality; sufficiency

HOLDING: Ind. Code 35-45-4-1 was held constitutional in Baysinger 397 N.E.2d 580, a case involving nude dancing in bars. One has no right to appear nude in public. If communication of ideas is involved, nudity may be constitutionally protected. Here, Ds "provide no hint of expressive content in their behavior," which was to dance nude or partially nude on an open stage, viewed by patrons who watched from private locked booths. Ds contend evidence is insufficient because nudity did not occur in "public place," citing Lasko, App., 409 N.E.2d 1124 (massage parlor; held, private locked room in which 2 consenting adults engage in promiscuous conduct is not public place). Ct. looks to activity of persons charged, who performed for numerous viewers from common dance floor in adult bookstore. Ct. does not decide whether private shows (one dancer for one patron who can communicate by telephone) constitute public indecency but notes private shows more closely parallel Lasko. Held, convictions affirmed.

RELATED CASES: Sweeney, App., 486 N.E.2d 651 (where D was seen only by officer in viewing booth, her indecent conduct was not public; held, conviction reversed); Thompson, App., 482 N.E.2d 1372 (Obscen 3; private movie viewing rooms became public place where D exposed his genitals through "glory hole" to nonconsenting person in next booth; Sullivan DISSENTS finding no public place & arguing state appears to require prosecution of men who expose themselves in public restroom for "sole & legitimate purpose of urination").

TITLE: Chubb v. State

INDEX NO.: K.7.p.

CITE: (09-08-94), Ind., 640 N.E.2d 44

SUBJECT: Evidence sufficient - public indecency (PI) conviction

HOLDING: Although public bathroom stall is not generally "public place," it was converted into such when D leaned over partition into adjoining stall, & evidence was sufficient to support D's conviction for PI, granting transfer & reversing decision at 627 N.E.2d 842. D was convicted for PI because of actions of masturbating in public restroom stall & fondling of officer's genitals in adjoining stall. Ct. accepted Ct. App.'s reasoning concerning fact partitioned restroom stall was not normally "public place," & therefore D could not have been convicted for PI based on masturbating inside stall. Ct. noted, however, that information against D described more than single act, i.e., both genital nudity & fondling another's genitals. Ct. also noted that when information conjunctively charges acts disjunctively proscribed in statute, only one of acts must be proved to sustain conviction, Booker v. State, Ind., 386 N.E.2d 1198. Therefore, Ct. concluded that when D reached across stall partition to fondle officer's genitals, conduct exceeded bounds of private area & constituted criminal conduct in public place. Ct. then disagreed with Ct. App.'s finding that officer's testimony about what happened was inherently unbelievable because it was physically impossible. Ct. noted photo exhibit demonstrated that top of stall partition was only slightly above D's armpits when he was standing flat-footed, & that jury could have reasonably found that, with effort, D could have reached over partition, put his arms around officer, & fondled his genitals. Therefore, evidence was sufficient to support conviction.

TITLE: Erhardt v. State

INDEX NO.: K.7.p.

CITE: (9/20/84) Ind., 468 N.E.2d 224

SUBJECT: Public indecency - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for public indecency where D danced nude with nipples covered by transparent tape & buttocks exposed. Ct. App. erred in reversing conviction (on 1st Amend grounds); opinion at 463 N.E.2d 1121 ordered vacated. Here, Ind. S. Ct. finds conduct is squarely within prohibitions of Ind. Code 35-45-4-1. Legislature, not Ct. App., defines what is lewd. Held, no error. Separate DISSENTS by Hunter & DeBruler argue IN statute is unconstitutional on its face, *citing* Schad v. Borough of Mount Ephraim, (1981) 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (nude dancing upon stage of theater, if not obscene, is protected against state restriction by 1st Amend).

RELATED CASES: Marshall, App. 602 N.E.2d 144 (Where evidence revealed that D requested officer to expose his penis & upon his refusal, D began tapping officer's thigh with back of his hand, eventually working his way up to tap officer's genital area, it was sufficient to support conviction for public indecency by fondling genitals in public place. "Fondle" is defined in dictionary as: "to handle tenderly, or lingeringly; treat caressingly: caress." Ct. found D's actions constituted "handling" him "lingeringly," Barteau, J., dissenting. In dissent, J. Barteau discusses various definitions of "fondle" as used in various penal statutes. This discussion may prove helpful in arguing similar issues).

TITLE: Glotzbach v. State
INDEX NO.: K.7.p.
CITE: (2-28-03), Ind. App., 783 N.E.2d 1221
SUBJECT: Public indecency - children under sixteen; meaning of "present"
HOLDING: Conviction for public indecency does not require that State prove that children under age of sixteen actually witness D's act. For children to be "present" as required by Ind. Code 35-45-4-1(b)(1), they only must be in general area in public place where perpetrator is so that there is reasonable prospect that child might be exposed to perpetrator's conduct. Although legislature did not define "present," it can be presumed that they intended word to be interpreted in its broadest sense as they did not use limiting language such as "in the view of" or "seen by." Further, contrary interpretation would bring about an absurd result because statute was intended to protect children under sixteen from mere potential that they might see individual commit act of public indecency as defined by Ind. Code 35-45-4-1. Thus, evidence demonstrated that D masturbated in public library & that children under sixteen were present in the building. Held, judgment affirmed.

TITLE: Long v. State

INDEX NO.: K.7.p.

CITE: (1st Dist., 6-12-96), Ind. App., 666 N.E.2d 1258

SUBJECT: Public indecency - "public place"

HOLDING: Tr. Ct. properly denied D's motion to dismiss public indecency charges. Establishment in which D's nudity occurred was "public place" as required by Indiana's public indecency statute, Ind. Code 35-45-4-1, because it was open to public & patrons were able to enter at will. Establishment did not have any attributes of self-government, membership participation or ownership typically associated with private clubs. Membership fee & card were insufficient to convert this public place into private club. Although private areas may exist within public establishment, D's actions did not occur in private area between two consenting adults. State has valid interest in prohibiting immoral activities, despite fact that patrons were consenting adults who wished to see D's nude dancing. Held, judgment affirmed.

TITLE: Townsend v. State
INDEX NO.: K.7.p.
CITE: (6-19-01), Ind. App., 750 N.E.2d 416
SUBJECT: Public indecency - insufficient evidence
HOLDING: Evidence was insufficient to support D's conviction for public indecency. Ind. Code 35-45-4-1 provides, in part, that a person who knowingly or intentionally appears in a public place in a state of nudity commits public indecency. Nudity is the showing of the human male or female genitals, pubic area, or buttocks with less than fully opaque covering. Here, police officer saw D standing facing wall while holding something in front of him, that his pants were unzipped & that he had been standing in a puddle of urine. Officer never saw D's penis or urine coming from his penis. Ct. concluded that this circumstantial evidence is sufficient only to draw inference that D urinated in public place, not that he has a penis or that it has been exposed. Held, judgment reversed; Mattingly-May, J., dissenting.

TITLE: Turner v. State

INDEX NO.: K.7.p.

CITE: (4th Dist., 5-9-95), Ind. App., 650 N.E.2d 705

SUBJECT: Public indecency - evidence sufficient

HOLDING: Evidence was sufficient to sustain D's conviction for Aiding, Inducing or Causing Public Indecency. Dancers at lounge owned & operated by D were arrested & charged with Public Indecency for unlawfully exposing their buttocks. In affirming conviction, Ct. found that State necessarily demonstrated that violation of Public Indecency statute in fact occurred. Following decision in Erhardt v. State, Ind., 468 N.E.2d 224, Ct. concluded that wearing G-strings violates minimum requirements of Ind. Code 35-45-4-1, which requires that buttocks not be shown with less than fully opaque covering. Ct. rejected D's argument that requiring dancers to wear more than pasties & G-strings violates U.S. S.Ct. holding in Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456. In Barnes, plurality opinion stated that in Erhardt case, "the Ind. S.Ct. did not affirmatively limit the reach of the indecency statute, but merely said that to the extent the First Amendment would require it, that statute might be unconstitutional as applied to some activities." Ct. found that present case does not involve unconstitutional application of statute, because requiring incidental increase in fabric to cover buttocks is not enlargement of restriction on public nudity "significant enough to rise to constitutional dimensions." Held, conviction affirmed, Kirsch, J., concurring in result; Riley, J., dissenting.

TITLE: Weideman v. State

INDEX NO.: K.7.p.

CITE: (1st Dist. 07-16-08), Ind. App., 890 N.E.2d 28

SUBJECT: Public nudity - vagueness challenge; insufficient evidence D intended to be seen

HOLDING: In appeal of D's public nudity conviction, he argued that the term "public place" in Ind. Code 35-45-4-1.5 is ambiguous or vague such that a reasonable person would not be apprised that he could not be nude under the cover of darkness in the front yard of his private residence. D was not in a "public place" when he was seen standing by a fence on his neighbor's property. However, statute prohibits appearing nude in a public place. Legislature did not define the term "appears," but plain and ordinary meaning is "to come forth, be visible...to come into view...to become visible." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 103 (2002). Therefore, public nudity statute prohibits knowingly or intentionally being visibly nude to persons in a public place, including being nude in your front yard or your neighbor's front yard if you are visible to a sidewalk or road. Further, statute provides notice enabling ordinary people to understand the conduct it prohibits and does not encourage arbitrary or discriminatory enforcement.

In this case, State presented insufficient evidence to prove beyond a reasonable doubt that D, whom neighbor saw nude, had an "intent to be seen by another person" to support conviction for public nudity as a class B misdemeanor. Neighbor testified that it was dark outside, and when he turned his truck lights on, D had a panicked or surprised look on his face. D immediately dropped and rolled into a nearby ditch and crawled on his hands and knees to the back of his property. D testified at trial that he did not want to be seen. Thus, Court reversed D's conviction for public nudity as a class B misdemeanor and remanded with instructions to enter conviction as a class C misdemeanor.

TITLE: Whatley v. State
INDEX NO.: K.7.p.
CITE: (5th Dist., 4-8-99), Ind. App., 708 N.E.2d 66
SUBJECT: Public indecency - cab of semi-trailer truck as "public place"
HOLDING: Cab of semi-trailer truck in which D was found was "public place" within meaning of public indecency statute, Ind. Code 35-45-4-1(a). "Public place" is any place where members of public are free to go without restraint. Long, App., 666 N.E.2d 1258. D argued that his semi was his "home on wheels," & not public place because members of public did not enter & exit or congregate within cabin of semi. Ct. found no significant difference between what constitutes public place in context of public indecency statute & what constitutes public place in context of public intoxication statute. Person driving semi-trailer truck on highway is in public place, where members of public are free to go without restraint. Atkins, App., 451 N.E.2d 55. Evidence in this case was sufficient to show that D knowingly & intentionally appeared in public place in state of nudity. Held, conviction affirmed; Sullivan, J., concurring, would hold that while traveling upon public highway inside closed vehicle, D was not visible to casual public eye & was therefore not in public place.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.q. Public intoxication (Ind. Code 71-5-1-3)

TITLE: Atkins v. State

INDEX NO.: K.7.q.

CITE: (2d Dist. 6/30/83) Ind. App., 451 N.E.2d 55

SUBJECT: Public intoxication (P.I.) - sufficiency

HOLDING: D's conviction for P.I. while a passenger in car traveling on public highway based upon officer's opinion that she was intoxicated was not error. Here, police stopped car & asked seven passengers to exit. D contends she was not in a "public place" because she was in a private car. Contention was rejected in Miles, 216 N.E.2d 847. Non-expert witness may give opinion on intoxication. New, 259 N.E.2d 696. Arresting officer testified D was unsteady on her feet & smelled of alcohol, & that in his opinion, she was intoxicated. Record reveals existence of evidence in addition to that found insufficient in Irwin, App., 383 N.E.2d 1086 (odor of alcohol, admission of recent consumption of beer insufficient evidence of P.I.). Held, conviction affirmed.

TITLE: Bridgewater v. State

INDEX NO.: K.7.q.

CITE: (1st Dist. 10/28/82), Ind. App., 441 N.E.2d 688

SUBJECT: Public intoxication (PI) - public place

HOLDING: "Public place or place of public resort" under Ind. Code 7.1-5-1-3 includes business establishments open to the public. Heichelbech 281 N.E.2d 102. Here, D cites Cornell, App., 398 N.E.2d 1333 as authority for reversal of PI conviction. D was found asleep in car (randomly selected by him) parked in bank lot. D maintained bank lot was privately owned. Cornell held person sitting in car parked in private lane 20-30 feet from public roadway was not in a "public place or place of public resort." Ct. rejected D's reliance on Cornell, finding Heichelbech (person apprehended at service station) controlling. Bank was open to members of public its lot spaces were available for lease & lot was used by public at night. Held, conviction affirmed.

RELATED CASES: Jenkins, App., 898 N.E.2d 484 (outside, unenclosed courtyard area of apartment complex is a "public place," sufficiently distinguishable from an interior common area of apartment house); Fought, App., 898 N.E.2d 447 (D was in a "public place" or "place of public resort" where police found him asleep inside a vehicle on property of a private gas station; vehicle was parked in between two gas pumps, blocking access to either pump, which impaired flow of traffic & impeded customers); Moore, App., 634 N.E.2d 825 (There could be no public intoxication conviction where D was on private property even though he had to drive on public roads to get there); Gamble, App., 591 N.E.2d 142 (evidence was sufficient to support conviction for public intoxication, even though D was in truck parked in apartment parking lot. D had consumed alcohol before arriving at lot, had consumed more alcohol in truck, & although parking lot was normally private place, apartment complex roadway was readily accessible to general public. Ct. found situation similar to that in Heichelbech 281 N.E.2d 102, where S.Ct. found that place of "public resort" could be "public place"); Martin, App., 499 N.E.2d 273 (Ct. rejects D's contention that club was not public place; here, club allowed individuals who were neither members nor guests of members to use club facilities; held, PI conviction affirmed).

TITLE: Brown v. State

INDEX NO: K.7.q.

CITE: (7/1/2014), 12 N.E.3d 952 (Ind. Ct. App 2014)

SUBJECT: Public intoxication conviction affirmed where D harassed, annoyed, or alarmed

HOLDING: Although D did not breach the peace, Court affirmed his public intoxication conviction based on the fact that he harassed, annoyed, or alarmed another person under Ind. Code § 7.1-5-1-3(a)(4). D walked out of a downtown Indianapolis bar “at a normal pace” and “ran directly into a woman who was standing in the middle of the sidewalk.” The sidewalk was “crowded with people” and the woman began yelling. A police officer noticed and determined that D, who was staggering and seemed distracted, was extremely intoxicated. Tr. Ct. found D guilty under subsection (a)(2) of the amended public intoxication statute, concluding he was in imminent danger of breaching the peace. However, breaching the peace requires either actual or threatened violence. See Price v. State, 622 N.E.2d 954, 960 n. 6 (Ind. 1993); Lemon v. State, 868 N.E.2d 1190, 1194 (Ind. Ct. App. 2007). Notwithstanding Tr. Ct.’s emphasis on the “breach of peace” element, Court sustained conviction on subsection (a)(4), which was also included in the charging information. Court acknowledged that in Morgan v. State, 4 N.E.3d 751 (2014), trans. granted, another panel declared subsection (a)(4) of the public intoxication statute unconstitutionally vague, but decision was vacated when Supreme Court granted transfer. Held, judgment affirmed.

TITLE: Christian v. State

INDEX NO.: K.7.q.

CITE: (2nd Dist., 12-05-08), Ind. App., 897 N.E.2d 503

SUBJECT: Public intoxication - insufficient evidence D in public place

HOLDING: Evidence was insufficient to support D's conviction for public intoxication, where State failed to prove that she was in a "public place" as required by Ind. Code 7.1-5-1-3. Public place does not mean only a place devoted to the use of the public, it also means a place that "is in point of fact public, as distinguished from private-- a place that is visited by many persons, and usually accessible to the neighboring public." Jones v. State, 881 N.E.2d 1095 (Ind. Ct. App 2008). A private residence, including the grounds surrounding it, is not a public place. Moore v. State, 634 N.E.2d 825 (Ind. Ct. App 1994).

Here, police officer found D attempting to unlock a vehicle in her friend's driveway/parking area between two residences that was perpendicular to a public street. State presented no evidence that the parking area was used by the public in general rather than only residences next to the area. Further, there was no evidence that members of the neighborhood were disturbed or offended by D's actions. Held, conviction reversed; Mathias, J., dissenting, concludes that officer's description of parking area, and D's admission that area is shared by at least two residences, supports Tr. Ct.'s conclusion that she was located in a public place, and majority is not permitted to reweigh evidence.

Compare: State v. Jenkins, No. 49A04-0805-CR-260 (Ind. Ct. App, 12-31-08) (outside, unenclosed courtyard area of apartment complex is a "public place," sufficiently distinguishable from an interior common area of apartment house); Fought v. State, No. 35A02-0807-CR-623 (Ind. Ct. App, 12-29-08) (D was in a "public place" or "place of public resort" where police found him asleep inside a vehicle on property of a private gas station; vehicle was parked in between two gas pumps, blocking access to either pump, which impaired flow of traffic & impeded customers from obtaining service).

TITLE: C.T. v. State

INDEX NO.: K.7.q.

CITE: (09-16-10), Ind. Ct. App, 939 N.E.2d 626

SUBJECT: Public indecency - no equal protection violation

HOLDING: Indiana's public nudity statute does not violate the Equal Protection Clause by criminalizing the public display of female, but not male, nipples. A gender-based discriminatory classification is subject to an intermediate level of scrutiny. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. A legislature is permitted legitimately to act to protect the social interest in order and morality. "[An] important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones." US. v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991).

Here, it cannot be seriously disputed that Hoosier society, in general, considers the female breast to be an erogenous zone but does not consider the male breasts to be one: public display of the former is almost certain to cause offense and unease while public display of the latter is not. The Court will not pretend that female and male breast are thought of in exactly the same way in contemporary Indiana society. Because Indiana's public nudity statute serves the important governmental objective of preserving order and morality and does not disadvantage women in any significant way, it does not run afoul of the Equal Protection Clause. Held, judgment affirmed.

TITLE: Haynes v. State
INDEX NO.: K.7.q.
CITE: (2d Dist. 12/4/90), Ind. App., 563 N.E.2d 159
SUBJECT: Public intoxication - sufficiency; public place
HOLDING: Evidence was insufficient to support D's conviction for public intoxication because it did not show that D was in a public area. D's location in public area is essential element of offense. Ind. Code 7.1-5-1-3. Here, evidence shows that when police arrived, D was intoxicated on porch of private residence, which is not public area. See State v. Culp, App., 433 N.E.2d 823. Evidence shows that D then complied with police order to move off porch, & further indicates that at some undesignated place between curb & porch, D & officer were within 2 or 3 feet of one another. However, nothing in record establishes that this undesignated place was public area. Held, conviction reversed. Buchanan, J, DISSENTS, arguing that jury could reasonably have concluded that D was in public area. See Miles 216 N.E.2d 847.

TITLE: Hollingsworth v. State
INDEX NO.: K.7.q.
CITE: (2/22/2013), 987 N.E.2d 1096 (Ind. Ct. App 2013)
SUBJECT: D waived claim regarding retroactivity of amendment to public intoxication statute
HOLDING: 2012 amendment to public intoxication (P.I.) statute narrowed the definition of P.I. to include actions that endanger the person's life or that of other people; breaches the peace or is an imminent danger of breaching the peace; or harasses, annoys or alarms another person. Ind. Code. 7.1-5-1-3. Legislature approved the amendment to the P.I. statute nearly two months before D committed her offense, and the amendment took effect the day before D's trial.

On appeal, D argued that the statutory change was remedial and that not applying it in her case was fundamental error. Applying contemporaneous objection rule, Court held that the retroactivity issue was never raised at D's trial and the argument was therefore waived. Even assuming that there exists a constitutional right to the retroactive application of remedial statutes, the mere fact that a constitutional right is implicated is insufficient to satisfy the fundamental error rule. Absher v. State, 866 N.E.2d 350 (Ind. Ct. App 2007). Held, judgment affirmed.

TITLE: Jones v. State

INDEX NO.: K.7.q.

CITE: (2nd Dist., 03-11-08), Ind. App., 881 N.E.2d 1095

SUBJECT: No public intoxication where D found in car parked on private driveway

HOLDING: State presented insufficient evidence D was in a "public place" when police found her

intoxicated, reclined in front passenger seat inside car parked in a driveway behind a vacant house.

Conviction for public intoxication may stand where the D was a passenger in a car stopped by police on a public road or where D was seen in a vehicle on a public road moments before pulling into parking lot.

Atkins v. State, 451 N.E.2d 55 (Ind. Ct. App 1983); Heichelbech v. State, 281 N.E.2d 102 (Ind. 1972).

However, conviction cannot stand where, as here, D only was observed inside a parked car on a private driveway. Moore v. State, 634 N.E.2d 825 (Ind. Ct. App 1994). Reversing D's conviction is consistent with purpose and spirit of public intoxication statute, which is to prevent people from becoming inebriated and then bothering and/or threatening the safety of other people in public places. In footnote, Court questioned wisdom of holding in Atkins, and whether it serves public policy to criminalize riding in (as opposed to driving) a private vehicle traveling on a public road. "In fact, perhaps the better policy would be to encourage persons who find themselves intoxicated to ride in a vehicle to a private place without fear of being prosecuted for a crime." Held, judgment reversed.

RELATED CASES: Matthews, 978 N.E.2d 438 (Ind. Ct. App 2012) (although D was charged with public intoxication at a private residence, there was sufficient evidence from which the jury could infer he was in public just prior to being found at the residence); Fought, App., 898 N.E.2d 447 (D was in a "public place" or "place of public resort" where police found him asleep inside a vehicle on property of a private gas station; vehicle was parked in between two gas pumps, blocking access to either pump, which impaired flow of traffic & impeded customers); Christian, App., 897 N.E.2d 503 (State failed to prove D was in a public place where officer found D in her friend's driveway attempting to unlock a vehicle, and there was no evidence that the parking area was used by public in general rather than only residences next to the area).

TITLE: Milam v. State
INDEX NO: K.7.q.
CITE: (8/11/2014), 14 N.E.3d 879 (Ind. Ct. App 2014)
SUBJECT: Public intoxication conviction reversed - argumentative passenger
HOLDING: "Consistent with the purpose and spirit of the current public intoxication statute," Court reversed D's conviction, finding that State presented no evidence to indicate that he endangered his life or the life of another or disturbed the peace. See Ind. Code 7.1-5-1-3(a). D was an intoxicated passenger in a car that police officer stopped after seeing an arm and object hanging out of the car window, followed by the sound of shattering glass. D argued with the officer and another passenger after acknowledging to the officer that he and another passenger had been drinking. D contended a bottle had been thrown from another vehicle, and the officer said D profanely told his fellow passenger to tell the truth. The officer later described D as loud, boisterous and uncooperative. He had removed D from the car and handcuffed him, contending he was interfering with his investigation. A person on a bicycle stopped to watch the incident, but there was no nexus between D's loud tone and the person stopping to watch. Tr. Ct. declined to determine who threw the bottle from the window and found that it was immaterial to its decision.

Court of Appeals noted that prior to D's arrest there is no evidence to indicate that D endangered his life or the life of another or disturbed the peace. Evidence did not show the arresting officer felt threatened by D's statements. Court concluded that prosecuting and convicting D for being intoxicated, in a pulled-over car, while arguing with the other passenger and officer does not reach the level of disturbing the peace, harassment, annoyance, or alarm, and therefore does not meet the requirements of the public intoxication statute. Held, conviction reversed.

TITLE: Morris v. State

INDEX NO.: K.7.q.

CITE: (3/7/2018), 2018 Ind. App. LEXIS 89 (Ind. Ct. App 2018)

SUBJECT: Insufficient evidence for public intoxication conviction; conviction based on speculation

HOLDING: The State failed to present sufficient evidence to support D's conviction for Class B misdemeanor public intoxication (Ind. Code § 7.1-5-1-3), where the State presented no evidence that D was under the influence of "alcohol or a controlled substance" but merely offered the arresting officer's speculative testimony that D might have been under the influence of bath salts. While bath salts sometimes do contain controlled substances, "our system of justice does not permit citizens to be convicted on a potential of illegality." See Seay v. State, 5 N.E.3d 478, 485 (Ind. Ct. App 2014); see also Upp v. State, 808 N.E.2d 706 (Ind. Ct. App 2004). Had the State qualified the testifying officer as an expert, his testimony might have been sufficient to support the conviction. However, the State elicited no testimony about the officer's training or experience regarding the effects of being under the influence of bath salts. See Stephenson v. State, 742 N.E.2d 463, 480-81 (Ind. 2001). Held, judgment reversed.

TITLE: Moore v. State

INDEX NO.: K.7.q.

CITE: (06-28-11), 949 N.E.2d 343 (Ind. 2011)

SUBJECT: Public intoxication - sleeping, intoxicated D inside car

HOLDING: Convicting D of public intoxication where she was intoxicated as a passenger in an automobile on a public highway does not violate public policy or the Indiana Constitution. A person in a vehicle stopped along a highway is in a "public place" for purposes of the public intoxication statute. Miles v. State, 247 Ind. 423, 216 N.E.2d 847 (1966). Here, D allowed a sober friend to drive her car because she had been drinking. The car was pulled over and D was arrested for public intoxication as a passenger. Court would not address whether the conviction violated spirit of public intoxication statute and policy behind its enactment, as this was a function of the Legislature, not the Judiciary. Additionally, Court found no violation of D's personal liberty rights under the Indiana Constitution. D was subject to public intoxication because of her conduct after consumption, not due to her beverage selection. Held, transfer granted, Court of Appeals' opinion at 935 N.E.2d 301 vacated, conviction affirmed. Rucker, J., dissenting, believes Miles is wrongly decided and should be revisited, and the responsible decision not to drive while intoxicated should not be criminalized.

Note: See 2012 amendment to I.C. 7.1-5-1-3 (a)(4), which requires that D "harasses, annoys, or alarms another person" while publicly intoxicated.

TITLE: Morgan v. State

INDEX NO.: K.7.q.

CITE: (12/18/2014), 22 N.E.3d 570 (Ind. 2014)

SUBJECT: Public intoxication - "annoying" to a reasonable person

HOLDING: The use of the word "annoy" in the public intoxication statute does not render the statute unconstitutionally vague, but here, the State presented insufficient evidence that D's conduct would annoy a reasonable person. It is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication caused by the person's use of alcohol or a controlled substance if the person harasses, annoys, or alarms another person. Ind. Code 7.1-5-1-3(a)(4). A criminal statute can be found unconstitutionally vague: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits or (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement. Here, at 9:25 a.m., D was sleeping on a bench at a bus shelter, and his brother was having a difficult time waking him up. When a police officer attempted to wake him up, D stated "get off of me" but eventually complied with the officer's request to leave the bus shelter. When he got up, D swayed back and forth, his eyes were glassy and he smelled of alcohol. Only after the officer was arresting D for public intoxication did D yell and make unreasonable noise.

Rather than find the public intoxication statute unconstitutionally vague because two people can disagree as to what behavior is "annoying," the Court read into the statute a reasonable person standard. Under a reasonable person standard, there was insufficient evidence that D's conduct was annoying. A sleeping individual is unlikely to annoy a reasonable person. Further, if a person - intoxicated or not - is being awoken by a stranger, this response is not surprising, nor does it indicate a level of agitation that a reasonable person would see as annoying. Thus, State failed to present sufficient evidence that D committed public intoxication. Held, transfer granted, judgment reversed and Court of Appeals' Opinion at 4 N.E.3d 751 vacated.

TITLE: Naas v. State

INDEX NO.: K.7.q.

CITE: (8/14/2013), 993 N.E.2d 1151 (Ind. Ct. App 2013)

SUBJECT: Sufficient evidence D breached peace or alarmed others for P.I. conviction

HOLDING: Sufficient evidence supported D's conviction for Class B misdemeanor Public Intoxication, Ind. Code § 7.1-5-1-3. After colliding with another car, D confronted the other driver at a gas station. D yelled at the other driver and walked aggressively toward him. The other driver backed away. This showed D breached the peace or alarmed the other driver. See id., § (a)(4). Evidence that D was unsteady, slurred his speech, and smelled of alcohol was sufficient to show he was intoxicated. Held, judgment affirmed.

TITLE: Pittman v. State
INDEX NO.: K.7.q.
CITE: (07-18-12), 971 N.E.2d 147 (Ind. Ct. App. 2012)
SUBJECT: Public Intoxication - evaluation of other possible causes
HOLDING: State presented sufficient evidence to support D's conviction for Class B misdemeanor Public Intoxication and satisfied its duties under Ind. Code § 12-23-15-2 to "evaluate" whether factors other than alcohol might have contributed to appearance that D was intoxicated, even though no tests were done on D. Evidence that D's breath smelled like alcohol, her speech was slurred, and was unsteady on her feet satisfied statute.

Ind. Code §12-23-15-2 provides: "An individual to be taken to the city lock-up or county jail shall be *evaluated* at the earliest possible time for nonalcoholic factors that may be contributing to the appearance of intoxication." Id. (Emphasis added).

The statute does not require the State to administer a chemical sobriety test or any other particular test. See Parker v. State, 530 N.E.2d 128, 131 (Ind. Ct. App. 1988). What the statute does require is "evaluation" for possible other causes of behavior indicating possible intoxication, and under *some* circumstances, this may require a blood test or physical exam. But under the circumstances here, the smell of alcohol coupled with D's other behaviors satisfied the statute. Stated differently, Ind. Code ' 12-23-15-2 did not require officers "to perform an evaluation so thorough as to eliminate all other possible causes for . . . symptoms of alcoholic intoxication D displayed. Although we can envision scenarios that would warrant further evaluation, including . . . behavior reasonably suggestive of mental illness or dementia, this was not one of them." Held, judgment affirmed.

TITLE: Pulido v. State

INDEX NO.: K.7.q.

CITE: (09/12/2019), 132 N.E.3d 475 (Ind. Ct. App. 2019)

SUBJECT: Insufficient evidence of endangerment for Public Intoxication conviction

HOLDING: It is not a crime to simply be intoxicated in public, and to sustain a public intoxication conviction based on personal endangerment, the State must show proof beyond a reasonable doubt and not by merely speculating that the person may be in some future danger. Here, Defendant was convicted of Class B misdemeanor public intoxication after an officer responded to an anonymous 9-1-1 call reporting a male subject staggering on the sidewalk adjacent to a city street. It was undisputed that Defendant was intoxicated in a public place, but there was insufficient evidence he had endangered his life. Court rejected the State's arguments that being intoxicated on the sidewalk "created a dangerous situation" and its speculation he faced a future, potential harm of walking in the street and getting struck by a car because the statute requires proof that he endangered his life. The State did not present any evidence of Defendant's past or present conduct or action that endangered his life.

TITLE: Ruiz v. State

INDEX NO.: K.7.q.

CITE: (11/29/2017), 88 N.E.3d 219 (Ind. Ct. App 2017)

SUBJECT: Public intoxication - breaching or in imminent danger of breaching the peace

HOLDING: In public intoxication prosecution, State presented sufficient evidence to support trial court's determination that Defendant was in imminent danger of breaching the peace when he was intoxicated in a public place. Amended public intoxication statute does not define the terms "breach of peace" or "imminent danger," but in context of citizens' arrests, breach of peace "includes all violations of public peace, order or decorum." Lemon v. State, 868 N.E.2d 1190, 1194 (Ind. Ct. App 2007). Here, police officers were dispatched to apartment complex three times in one day for complaints related to Defendant, a resident. Each of the callers claimed Defendant was intoxicated and was causing a disturbance on the property outside of the apartments, including yelling racial slurs. When officer responded for a third time to the apartments, Defendant was uncooperative, started yelling at residents who were pointing toward him and was admittedly "furious" and had a "little attitude" with the officer. Court agreed with trial court's determination that it was "perfectly reasonable" to believe that Defendant, who was undoubtedly intoxicated in a public place, was in imminent danger of breaching the peace or disturbing the public tranquility when officer responded for a third time to the apartments. Held, judgment affirmed.

TITLE: Stephens v. State

INDEX NO.: K.7.q.

CITE: (8/15/2013), 992 N.E.2d 935 (Ind. Ct. App 2013)

SUBJECT: Public intoxication - insufficient evidence for D who sought help

HOLDING: Evidence was insufficient to support D's conviction for public intoxication, where State failed to prove beyond a reasonable doubt that he endangered either himself or others, breached or was in imminent danger of breaching the peace, or harassed, annoyed, or alarmed another person. See Ind. Code 7.1-5-1-3(a). D got drunk at home, was assaulted by his niece's boyfriend, and left the house when the police failed to arrest the boyfriend. D walked to a public place, called the police, stated that he was drunk, and requested to be taken to jail rather than returning to the dangerous situation at home. Mere fact that he was intoxicated in a public parking lot did not amount to a violation of the public intoxication statute. He did not breach the peace, and Tr. Ct.'s conclusion that he was in imminent danger of doing so is speculative. Held, conviction reversed.

RELATED CASES: Sesay, 5 N.E.3d 478 (Ind. Ct. App 2014) (insufficient evidence for public intoxication conviction under Ind. Code § 7.1-5-1-3(a)(1), (2) where State failed to prove D endangered his life or that of another; showing that D was intoxicated in a public place - standing near a road after he was involved in a car wreck - did not show D took affirmative act that endangered himself or others); Holbert, 996 N.E.2d 396 (Ind. Ct. App 2013) (amended public intoxication statute requires that the prohibited behavior have occurred while D was in a public place; it does not say as State suggests, that it is a Class B misdemeanor to be in a public place in a state of intoxication whenever one's intoxication resulted in one of the four listed criteria in Ind. Code 7.1-5-1-3(a)).

TITLE: Street v. State
INDEX NO.: K.7.q.
CITE: (2nd Dist., 08-18-09), 911 N.E.2d 654 (Ind. Ct. App 2009)
SUBJECT: State need not prove D was *knowingly* intoxicated in a public place
HOLDING: There is no *mens rea* requirement for the offense of public intoxication. See McCaffrey v. State, 523 N.E.2d 435 (Ind. Ct. App 1988). Accordingly, the State is not required to show that D had a knowing *mens rea* to commit public intoxication because *mens rea* is not an element of the offense as defined in Ind. Code 7.1-5-1-3. Thus, the State is only required to prove that D was 1) in a public place and 2) intoxicated. Because D does not dispute that he was in a public place and intoxicated, Court affirmed his conviction. Held, judgment affirmed.

TITLE: Tin Thang v. State
INDEX NO: K.7.q.
CITE: (6/27/2014), 10 N.E.3d 1256 (Ind. 2014)
SUBJECT: Public intoxication - sufficient proof of endangerment
HOLDING: To support conviction under amended public intoxication statute, State must prove beyond a reasonable doubt that D, while in a public place, endangered either himself or others, breached or was in imminent danger of breaching the peace, or harassed, annoyed, or alarmed another person. See Ind. Code § 7.1-5-1-3(a).

Here, State presented sufficient circumstantial evidence that D endangered himself or others. When a police officer came out of the restroom at a gas station while on patrol, cashier alerted him that D may be intoxicated. D was unsteady, smelled of alcohol and had bloodshot eyes. Officer also saw a car in the parking lot that was not there before and keys in D's hands. No one else was present at the gas station.

Court drew a distinction between the element of "endangerment" in the public intoxication statute and the similar element in the Class A misdemeanor operating while intoxicated (OWI) statute. Factfinders are generally allowed to draw reasonable inferences from the evidence. But after the 2001 amendment to the OWI statute, the State is required to submit additional evidence of "endangerment" beyond mere intoxication to support a class A misdemeanor conviction. See Outlaw v. State, 929 N.E.2d 196 (Ind. 2010). The same reasoning does not apply to the amended public intoxication statute; therefore, the general rule that factfinders may draw reasonable inferences from the evidence permitted the factfinder here to infer that D endangered himself or another by driving to the gas station while he was intoxicated. Held, transfer granted, Court of Appeals' opinion at 2 N.E.3d 702 vacated, conviction affirmed; David, J., joined by Rucker, J., dissenting, believe that the legislature distinguishes between "intoxication" and "endangerment" and that there was no evidence to support an inference that D drove in a manner that endangered anyone.

RELATED CASES: Estes, 166 N.E.3d 950 (Ind. Ct. App. 2021) (walking in public road-way at 2:00 a.m. sufficient to find actual endangerment); Hinton, 52 N.E.3d 1 (Ind. Ct. App 2016) (State proved endangerment by showing D, who stood less than a dozen feet from two schools, had his bow and arrow "nocked," allowing for immediate firing because the arrow was in the string); Davis, 13 N.E.3d 500 (Ind. Ct. App 2014) (evidence that D might walk onto public street and endanger himself or others is not sufficient to prove endangerment. Danger must already be manifest).

TITLE: Williams v. State

INDEX NO.: K.7.q.

CITE: (6/19/2013), 989 N.E.2d 366 (Ind. Ct. App 2013)

SUBJECT: Public intoxication - refusing to leave street

HOLDING: Evidence was sufficient to sustain D's conviction for public intoxication. Around 2:00 a.m., the mother of one of D's friends was struck by a car while crossing the street close to a bar. While D wanted to stay by the mother until help arrived, officers repeatedly told him to leave the street. D refused. He appeared "extremely intoxicated" and "belligerent" to police officer, who further testified that D had "a very strong odor of an alcoholic beverage about his breath and person, glossy red, bloodshot eyes, slurred speech and very unsteady balance." Officers physically removed him from the street. From this evidence, reasonable trier of fact could conclude beyond a reasonable doubt that, under Ind. Code 9-13-2-86, D endangered his life or the life of another, breached the peace, or harassed, annoyed or alarmed another person. Held, judgment affirmed.

TITLE: Wright v. State

INDEX NO.: K.7.q.

CITE: (7-11-02), Ind. App., 772 N.E.2d 449

SUBJECT: Public intoxication - hotel hallway; statute held constitutional

HOLDING: Hotel hallways are public places for purposes of public intoxication statute, Ind. Code 7.1-5-1-3. D argued that hotel hallway is similar to common hallway in apartment building. Although there are similarities, there are more critical distinctions. Hotel guests are more transient & temporary, hotels service numerous members of public on daily basis, & identities of those staying at hotel constantly changes. D also challenged constitutionality of public intoxication statute by arguing that statute criminalizes all intoxication, from first sip to death by alcohol poisoning. Despite fact that statute does not provide specific definition of intoxication, it does adequately advise public of proscribed conduct, namely, appearing in public place in an intoxicated state. Thus, Ct. concluded that public intoxication statute on its face & as applied in this case was not unconstitutional. Held, judgment affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.r RICO (Racketeer influenced and corrupt organizations)/corrupt business influence (Ind. Code 35-45-6-2)

TITLE: Alvers v. State

INDEX NO.: K.7.r.

CITE: (1st Dist. 2/18/86) Ind. App., 489 N.E.2d 83

SUBJECT: RICO - definition of enterprise

HOLDING: Although D was charged under Ind. Code 35-45-6-1 before statute included corporation within definition of enterprise, Ct. finds corporations to be commonly included within broad meaning of term enterprise. Opinion contains survey of federal law interpreting term enterprise. Recognizing that criminal statutes are ordinarily interpreted narrowly, Ct. finds that presumption in favor of constitutionality outweighs overly narrow reading of statute. Held, conviction affirmed.

TITLE: Atwood v. State

INDEX NO.: K.7.r.

CITE: (6/7/21) Ind. Ct. App., 172 N.E.3d 678

SUBJECT: Repeated sales of methamphetamine to confidential informant sufficient to support level 5 felony conviction for corrupt business influence

HOLDING: Defendant repeatedly sold small amounts of methamphetamine to a confidential informant and was charged and convicted of dealing in methamphetamine and corrupt business influence as a level 5 felony. Defendant appealed his conviction for corrupt business influence, arguing that while he did not dispute that his multiple deals with the confidential informant was a pattern of racketeering activity, that nearly every drug activity involves the exchange of money or other property for drugs and that if merely obtaining money as a part of a drug transaction was sufficient under the statute nearly every drug transaction would constitute corrupt business influence. The Court of Appeals disagreed, finding the evidence sufficient and specifically noting the statute was amended in 1991 to remove the word "real," which leaves the statutory language to be "a person acquires or maintains an interest in or control of property as an enterprise" and under the unambiguous language of the statute Defendant was guilty. Vaidik, J., dissenting, noting the word "property" should not be construed to include small amounts of cash that changes hands in a garden-variety drug deal and that the RICO statute is meant for people at or near the top of the chain of command.

TITLE: Boyle v. United States
INDEX NO.: K.7.r.
CITE: (06-08-09), U.S., 07-1309, 129 U.S. 2237
SUBJECT: "Association-in- fact" RICO enterprise - can infer structure from criminal activity
HOLDING: A criminal association-in-fact enterprise under RICO, 18 U.S.C. §1962(c), may exist if it has a purpose, sufficient longevity to accomplish that purpose, and relationships among associates-- which can be inferred from the underlying acts and without a distinct structural hierarchy or chain of command. The association-in-fact enterprise must have a "structure," but it need not be, as D sought the jury to be instructed in his prosecution for bank robberies, "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." See United States v. Turkette, 452 U.S. 576 (1982) (pattern of racketeering activity may sometimes prove the existence of an enterprise). Court rejected D's argument that its construction would create a merger of the RICO § 1962(c) crime with other federal offenses, pointing out that, in relation to conspiracy, it demands "much more" than proof of a "brief" agreement. Held, Second Circuit District Court opinion at 283 Fed. Appx. 825 affirmed. Stevens, J., joined by Breyer, J., DISSENTING, notes that Congress intended RICO enterprises to refer to business-like organizations that exist apart from predicate acts committed by their associates; thus, government should be required to "adduce other evidence of the entity's 'separate' existence and 'ongoing organization.'"

TITLE: Hewell v. State

INDEX NO.: K.7.r.

CITE: (4/29/87) Ind., 507 N.E.2d 241

SUBJECT: RICO - attempt crimes as predicate offenses

HOLDING: Tr. Ct. did not err in refusing to dismiss state's 2d amended complaint charging D with 2 offenses of attempting to receive stolen property. Ind. Code 35-45-6-2 requires state to prove pattern of racketeering activity. Such pattern is established upon proof that D engaged in at least 2 instances of conduct with similar intent, result, accomplice, victim or method of commission & that instances are otherwise interrelated by distinguishing characteristics that are not isolated incidents. Ind. Code 35-45-6-1. Here, D was target of sting operation & police informer sold D pieces of jewelry that were supposedly stolen. D can be convicted of undue business influence if state proves D attempted to commit at least 2 predicate offenses. Ct. finds complaint sufficient to inform D he was being charged with attempted receipt of stolen property. In related question, Ct. also finds attempting to receive & retain stolen property is substantial step towards commission of theft. Nash, App., 433 N.E.2d 807. Held, conviction affirmed.

TITLE: Jackson v. State
INDEX NO.: K.7.r.
CITE: (3/2/2016), 50 N.E.3d 767 (Ind. 2016)
SUBJECT: No continuity requirement for pattern of racketeering activity
HOLDING: D's Class C felony conviction for Corrupt Business Influence was supported by sufficient evidence, as his involvement in three Anderson, Indiana robberies within one month constituted a "pattern of racketeering activity under the Indiana Corrupt Business Influence Act. See Ind. Code § 34-45-6-1, -2. Unlike the federal RICO Act, the Indiana statute does not contain a continuity element, but the State must prove that the incidents were "not isolated." Ind. Code § 35-45-6-1(d). The jury could have reasonably inferred that the robberies were not isolated because D "orchestrated the criminal operation and . . . the robberies' planning and coordination became increasingly sophisticated."

To the extent that Indiana cases suggest the definition of "pattern of racketeering activity" contains a continuity requirement, they are disapproved. See Kollar v. State, 556 N.E.2d 936 (Ind. Ct. App 1990), trans. denied, and disapproved on other grounds by Jackson; Waldon v. State, 829 N.E.2d 168 (Ind. Ct. App 2005), trans. denied. Held, transfer granted, Court of Appeals' opinion at 33 N.E.3d 1173 (2015) vacated, judgment affirmed.

TITLE: Kahn v. State

INDEX NO.: K.7.r.

CITE: (4th Dist. 5/29/86) Ind. App., 493 N.E.2d 790

SUBJECT: Corrupt business influence - [assorted issues]

HOLDING: In affirming individual D's convictions for securities fraud, corrupt business influence, sale of unregistered securities, & sale of securities by an unregistered agent, as well as conviction of corporate D for corrupt business influence, Ct. examines issues of venue, sufficiency of allegations of crimes constituting "pattern of racketeering activity," meaning of term "enterprise," & propriety of jury instructions. IN statute was patterned after federal statute which at time of D's offense did not include corporation within definition of enterprise. Federal statute was later amended (as was IN's statute) to include corporations. Nevertheless, Ct. finds term "group" is broad enough to encompass a corporation. Held, convictions affirmed.

TITLE: Koger v. State

INDEX NO.: K.7.r.

CITE: (1st Dist. 10/14/87) Ind. App., 513 N.E.2d 1250

SUBJECT: RICO - conspiracy

HOLDING: Conspiracy to violate IN RICO statutes must be charged under general conspiracy statutes at Ind. Code 35-41-5-2. If it is not, 2 predicate acts by D must be proved. Here, D was charged with Corrupt Business Influence under IN RICO statutes. Two predicate acts charged were: (1) conspiracy to commit burglary, & (2) conspiracy to commit theft. By exerting unauthorized control over goods, D & co-Ds burglarized a chemical plant in OH & sold the chemicals in IN. Federal RICO statutes make conspiracy to violate RICO a crime. CA7 has held that RICO conspiracy does not require one to agree to commit 2 predicate acts personally. One need only agree to violation of RICO. US v. Neapolitan (CA7 1986), 791 F.2d 489, cert. denied 107 S.Ct. 422. IN RICO statutes do not make conspiring to violate RICO a crime. D may, however, be charged with conspiring to violate RICO under general conspiracy statutes at Ind. Code 35-41-5-2. Here, D was not charged with conspiracy as such, so state must prove 2 predicate acts. D was charged with 2 conspiracies but made only 1 agreement. D's agreement to burglarize plant & sell chemicals constitutes 1 predicate act. [Citations omitted.] State cannot prove crimes not identified in indictment. Neapolitan. Here, overt act which state alleged in furtherance of conspiracy to commit theft was theft itself. Thus, indictment clearly identified that state would attempt to prove theft. Held, conviction affirmed.

TITLE: Stephens v. State
INDEX NO.: K.7.q.
CITE: (8/15/2013), 992 N.E.2d 935 (Ind. Ct. App 2013)
SUBJECT: Public intoxication - insufficient evidence for D who sought help
HOLDING: Evidence was insufficient to support D's conviction for public intoxication, where State failed to prove beyond a reasonable doubt that he endangered either himself or others, breached or was in imminent danger of breaching the peace, or harassed, annoyed, or alarmed another person. See Ind. Code 7.1-5-1-3(a). D got drunk at home, was assaulted by his niece's boyfriend, and left the house when the police failed to arrest the boyfriend. D walked to a public place, called the police, stated that he was drunk, and requested to be taken to jail rather than returning to the dangerous situation at home. Mere fact that he was intoxicated in a public parking lot did not amount to a violation of the public intoxication statute. He did not breach the peace, and Tr. Ct.'s conclusion that he was in imminent danger of doing so is speculative. Held, conviction reversed.

TITLE: Miller v. State
INDEX NO.: K.7.r.
CITE: (7/31/2013), 992 N.E.2d 791 (Ind. Ct. App 2013)
SUBJECT: Corrupt business influence - insufficient evidence of "enterprise"
HOLDING: To secure a conviction for corrupt business influence, State must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." See Ind. Code 35-45-6-2. The hallmark of an enterprise is structure. A RICO enterprise is an ongoing group of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making. United States v. Rogers, 89 F.3d 1326 (7th Cir. 1996).

Here, D and friend got together one night and burglarized two homes and stole items from a car. They then drove to two Wal-mart stores and unsuccessfully attempted to use stolen credit cards. There was no evidence of a prior history of such conduct, nor was there evidence that they planned to repeat their escapade. The events all occurred in a very brief period and there was scant evidence of a pattern of racketeering activity. Distinguishing Waldon v. State, 829 N.E.2d 168 (Ind. Ct. App 2005), Court held that State failed to establish the necessary element of an "enterprise" within the meaning of the statute. Held, corrupt business influence conviction reversed, burglary and theft convictions affirmed.

TITLE: Robinson v. State

INDEX NO.: K.7.r.

CITE: (6/30/2016), 56 N.E.3d 652 (Ind. Ct. App 2015)

SUBJECT: Two shoplifting charges did not constitute RICO violation

HOLDING: State presented insufficient evidence to support D's corrupt business influence conviction, which was predicated on two acts of shoplifting components of the same home security system within one month from the same Walmart store. D was not any kind of criminal mastermind, nor did he work for one. The crimes were isolated and sporadic, not the kind of organized criminal activity the legislature meant to be covered by Indiana's RICO statute. See Ind. Code § 35-46-6-1 et seq. The RICO statute is a powerful tool "designed to address the more sinister forms of corruption and criminal activity ...that are a greater threat to society than random theft." AGS Capital Corp. v. Prod. Action Int'l, LLC, 884 N.E.2d 294, 308 (Ind. Ct. App 2008). Not every repeat offender falls under the RICO statute. Distinguishing Jackson v. State, 50 N.E.3d 767 (Ind. 2016), which involved a D who organized others in the commission of escalating armed robberies, Court declined to apply RICO here.

"[T]he State is off-target both legally and practically by attempting to elevate a two-time shoplifter to the status of a Carlo Gambino." Held, corrupt business influence conviction reversed and remanded for imposition of judgment of conviction and sentence for two counts of Level 6 felony theft. Altice, J., concurring in part and dissenting on this issue, believes by the plain language of the statute, two acts of theft—even shoplifting— can support a RICO conviction. Moreover, the provision of the RICO Act under which D was charged does not require that he act in concert with others in any sort of criminal enterprise.

RELATED CASES: Purvis, 87 N.E.3d 1119 (Ind. Ct. App 2017) (distinguishing Robinson, Court found sufficient evidence to support RICO violation where D actively participated with a group to steal and resell at least \$800 worth of video games from the same Walmart store on at least three separate occasions in a three-week span).

TITLE: Waldon v. State

INDEX NO.: K.7.r.

CITE: (2nd Dist., 06-14-05), Ind. App., 829 N.E.2d 168

SUBJECT: Corrupt business influence - "enterprise" & "pattern of racketeering activity" shown

HOLDING: Ind. Code 35-45-6-2 states, "A person....(3) [w]ho is employed by or associated with an enterprise, & who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity commits corrupt business influence." An "enterprise" is defined as "(1) a sole proprietorship, corporation, limited liability company, partnership, business trust, or governmental entity; or 2) a union, an association, or a group, whether a legal entity or merely associated in fact." Ind. Code 35-45-6-1. "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents. Id. In this case, D asserted that there was no evidence that a distinct group existed for purpose of being an "enterprise," & that there is no evidence of a pattern of racketeering activity because there was no evidence of any future planning & offenses occurred within space of less than a month. While evidence did not reveal that an elaborate organization existed by which D & his associates would conduct their activities, enough evidence existed to conclude that D was the ringleader of a group of individuals organized to carry out burglaries & thefts. This evidence was sufficient to support a finding that D was engaged in an enterprise. D & his cohorts were apprehended before crime spree could cover a substantial period of time. Nonetheless, fact that it extended for a short time & there was no direct evidence of planning for future crimes was not fatal. Pattern which was developing showed regular, almost daily, attempts at burglary, & jury could infer that crimes were to continue into future. Held, judgment affirmed, remanded for resentencing.

RELATED CASES: Long, App., 867 N.E.2d 606 (sufficient evidence supported jury's conclusion that D engaged in a pattern of racketeering activity when he committed two acts of thefts, using an enterprise separate & distinct from D as an individual).

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.w Voyeurism

TITLE: Casady v. State

INDEX NO.: K.7.w.

CITE: (09-28-10), 934 N.E.2d 1181 (Ind. Ct. App 2010)

SUBJECT: Voyeurism - evidence sufficient; appropriate sentence

HOLDING: State presented sufficient evidence to support D's convictions for voyeurism. A person who peeps into an area where an occupant of the area can reasonably be expected to disrobe without the consent of the other person commits voyeurism. "Peep" means any looking of a clandestine, surreptitious, prying, or secretive nature. Ind. Code 35-45-4-5(a) & (c). Here, complaining witness (CW) saw D holding a video camera at waist-level, stepping in and out of arched doorway in common shower area, appearing to be "hiding" in the shadows. Moreover, videotape evidence presented at trial clearly showed D videotaping men urinating through a peephole while hiding in a restroom stall. Jury could reasonably conclude that D was looking at these men in a clandestine, surreptitious, prying, or secretive manner and did so with a camera. Whether or not the men in the restrooms where D was peeping did disrobe misses the point. A common shower area and public restroom fits within statutory definition of places where the occupants of the area reasonably can be expected to disrobe, whether or not they actually did.

Despite fact that D did not share his videos with anyone else and had no criminal history, Court could not say that his aggregate sentence of six years executed and twelve years suspended for eighteen Class D felony counts was inappropriate. Court's decision to order many, but not all, of the sentences to be served concurrently was justified by the multiple incidents and multiple victims of D's criminal, voyeuristic behavior. Held, judgment affirmed.

TITLE: Chiszar v. State

INDEX NO.: K.7.w.

CITE: (10-29-10), 936 N.E.2d 816 (Ind. Ct. App 2010)

SUBJECT: Voyeurism - sufficiency; vagueness challenge

HOLDING: D failed to show that Indiana's voyeurism statute is unconstitutionally vague as applied in this case. To prove voyeurism as charged, State was required to show that D knowingly and/or intentionally, with the use of a video camera, peeped into the undressing area of his girlfriend L.G. without her consent. The crux of the statute is consent. "Peep" means any looking of a clandestine, surreptitious, prying, or secretive nature. Ind. Code 35-45-4-5(c).

Here, evidence shows that D knew that he did not have L.G.'s consent to videotape her naked or engaging in sexual intercourse with him. While L.G. was sleeping, he videotaped himself taking her clothes off, and he initiated sexual intercourse with her. L.G. woke up at that point and realized that D was videotaping her. L.G. was upset, and when she tried to grab the video camera, D took it, denied having videotaped her and tried to prevent L.G. from getting it. That evidence supports a reasonable inference that D knew that he did not have L.G.'s consent at the time that he videotaped her, and thus that he knowingly videotaped her in a clandestine manner in an area where she was likely to disrobe. Court rejected D's argument that L.G. impliedly consented to the video taping since she was in a consensual sexual relationship with him. L.G.'s consent to engage in sex with D bears no relationship to the specific consent necessary to be videotaped in that manner. Held, judgment affirmed.

RELATED CASES: Wallace, 961 N.E.2d 529 (Ind. Ct. App 2012) (even though D could not be convicted of lesser included Class B misdemeanor voyeurism because victim necessarily consented to D seeing her naked, there was a "peeping" within meaning of voyeurism statute where D secretly recorded their sexual encounter).

TITLE: Sandleben v. State
INDEX NO.: K.7.w.
CITE: (12/11/2014), 22 N.E.3d 782 (Ind. Ct. App 2014)
SUBJECT: Public Voyeurism - evidence sufficient
HOLDING: Evidence supported D's convictions for public voyeurism. Ind. Code § 35-45-4-5(d) requires State to prove beyond a reasonable doubt that D, without consent and with intent to peep at the private area of an individual, peeped at the private area and recorded an image by means of a camera. "Private area" is defined as "the naked or undergarment clad genitals, pubic area, or buttocks of an individual."

Here, in a store, the mother of a four-year-old girl noticed D reaching under her daughter's skirt – a skirt with shorts built in -- and taking a photograph with a cell phone. Police obtained a search warrant for D's apartment and found cameras, memory cards and a computer with several hard drives. One of the memory cards had deleted videos of young girls, including the video of the girl from the store. Police found other videos on the computer, including some of young girls in a swimming pool taken with an underwater camera. The videos had also been posted to an internet forum, apparently by D. When D took the video in the pool, he focused on the girls' pubic areas and zoomed in as much as possible; the videos included images of bare skin in the girls' pubic areas when the girls moved around in the pool. This evidence was sufficient to prove intent to capture evidence of uncovered genitals.

One of the girls from the pool testified that D told her he was not filming with the camera. The other girl was nearby. The evidence was sufficient to establish the absence of consent to be photographed. D argued he only intended to film a bathing suit or the shorts portion of the skirt, neither of which is an undergarment. "But the public voyeurism statute is written in the disjunctive: it speaks of either the undergarment-clad or the naked genitals, pubic area or buttocks. And, here, D's course of conduct supports a reasonable inference that he intended to film his victims' private areas, not a pair of shorts or a bathing suit." Thus, Court agreed with Tr. Ct. that D attempted to commit public voyeurism. Held, judgment affirmed.

TITLE: Sandleben v. State

INDEX NO.: K.7.w.

CITE: (12/11/2014), 22 N.E.3d 782 (Ind. Ct. App 2014)

SUBJECT: Vagueness challenge to public voyeurism statute rejected

HOLDING: The public voyeurism statute is not unconstitutionally vague as applied. D argued that because the “private area” definition in Ind. Code § 35-45-4-5(a)(3) does not include bathing suits or skorts, he lacked sufficient notice the law prohibited his conduct. But his conduct precisely fits that prohibited by the statute, as he did not merely photograph or video someone wearing a bathing suit or skort. He instead zoomed in on pubic areas of two twelve-year-old girls while swimming and actively placed a camera up a four-year-old’s skort. A person of ordinary intelligence would recognize that such conduct is unlawful, and law enforcement did not arbitrarily enforce the public voyeurism statute against D. Held, judgment affirmed.

TITLE: Saxton v. State

INDEX NO.: K.7.w.

CITE: (6-10-03), Ind., 790 N.E.2d 98

SUBJECT: Voyeurism - evidence sufficient

HOLDING: Evidence was sufficient to sustain revocation of D's probation, based on allegation that D committed voyeurism. A person who peeps into an occupied dwelling of another person, without consent of the other person, commits voyeurism. Ind. Code 35-45-4-5(a). Here, State presented evidence that D peeped into woman's bathroom window at 5:00 a.m. & ran away when confronted by neighbor. D argued that State did not establish that his peeping was without permission, largely relying on fact that there was no direct evidence from woman offered during hearing. Given time of day & D's reaction to being discovered, Ct. held that evidence was sufficient to establish by preponderance of evidence that D violated his probation. Tr. Ct. was entitled to infer that someone caught standing on air conditioner staring into a woman's bathroom window at 5 a.m. who runs away when challenged was a person peeping without permission of target. Held, transfer granted, Ct. App.' decision at 784 N.E.2d 1022 vacated, probation revocation affirmed.

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.x. Criminal gang activity (Ind. Code 35-45-9)

TITLE: Chicago v. Morales

INDEX NO.: K.7.x.

CITE: 527 U.S. 41, 119 S. Ct. 1849 (1999)

SUBJECT: Gang activity, First Amendment

HOLDING: The Illinois Supreme Court held that the Chicago Gang Congregation Ordinance violated the Fourteenth Amendment & was invalid on its face. The U.S. Supreme Court affirmed, holding that the language of the statute was impermissibly vague.

The ordinance states: "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse & remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section." The ordinance defines "loiter" as "to remain in one place with no apparent purpose." The Court held that the ordinance "fails to give the ordinary citizen notice of what is forbidden & what is permitted." "It is difficult to imagine how any citizen ... would know if he or she had an 'apparent purpose.'" Although a citizen is not subject to arrest under the ordinance unless & until he or she disobeys an order to disperse, "[i]f the loitering is in fact harmless & innocent, the dispersal order itself is an unjustified impairment of liberty."

The ordinance also fails to provide even minimal standards to guide law enforcement. The Illinois Supreme Court interpreted the ordinance to provide "absolute discretion to police officers to determine what activities constitute loitering" & the U.S. Supreme Court is bound by the Illinois Court's construction of the statute.

Note: This case generated six separate opinions from the justices -- a plurality, three concurrences, & two dissents. The various opinions discuss at length the standards for a facial challenge to a statute on vagueness grounds.

TITLE: Dimmit v. State

INDEX NO.: K.7.x.

CITE: (1/29/2015), 25 N.E.3d 203 (Ind. Ct. App 2015)

SUBJECT: Failure to instruct on specific intent element of criminal gang activity - no fundamental error

HOLDING: In battery and criminal gang activity prosecution, Tr. Ct. did not commit fundamental error in failing to sua sponte instruct the jury on the specific intent element of the offense, which requires proof of a nexus between furthering the goals of the criminal gang and the alleged crime. G.H. v. State, 987 N.E.2d 1164 (Ind. Ct. App 2013). State provided substantial evidence which indicated a nexus between D's offenses and furthering the goals of his criminal gang. However, because D's 11-year sentence exceeded the statutory limitation for consecutive terms, Court revised sentence to 10 years. Held, judgment affirmed in part, reversed in part and remanded.

TITLE: G.R. v. State

INDEX NO.: K.7.x.

CITE: (2nd Dist., 09-23-08), Ind. App., 893 N.E.2d 774

SUBJECT: Criminal gang activity - insufficient evidence

HOLDING: Evidence was insufficient to support D's delinquency adjudication for criminal gang activity. State was required to prove that D knowingly or intentionally actively participated in a criminal gang, which on date of offense was defined as a group of at least five members that either "promotes, sponsors, or assists in; or participates in; or requires as a condition of membership or continued membership; the commission of a felony or act that would be a felony if committed by an adult or the offense of battery." Ind. Code 35-45-9-1. Insufficient evidence supported adjudication because State failed to prove that the gang "Vatos Locos" had at least five members. At denial hearing, references were made to only four specific members of the gang. Police officer's repeated references to Vatos Locos as an established criminal gang and his awareness "of the existence of the gang, their colors and mark" does not prove beyond a reasonable doubt that D was an active member in a group with five or more members. State could have easily inquired into officer's knowledge of "Vatos Locos's" membership but did not. Held, judgment reversed.

TITLE: Helton v. State

INDEX NO.: K.7.x.

CITE: (1st Dist., 12-01-93), Ind. App., 624 N.E.2d 499

SUBJECT: Constitutionality of Criminal Gang Statute

HOLDING: Criminal Gang Statute, Ind. Code 35-45-9, is not unconstitutionally vague or overbroad, does not deny equal protection & was not impermissibly applied to D's behavior. D was member of group called Imperial Gangster Disciples (IGD). Group initiation required striking initiate 40 times in head & 6 times in chest & two new initiates knew of ritual & consented to participate. D struck blows for at least one initiate. IGD members also discussed need to be aggressive with others & that anyone who missed meetings or wanted to leave group would receive beatings. D was convicted of criminal gang activity.

Ct. rejected argument statute was void for vagueness under U.S. & State Const. Ct. found statute clearly forbids knowingly & actively participating in group of five or more that participates in & requires as condition of membership, commission of battery, & that D's actions were clearly proscribed. Statute also was not vague in failing to warn D that striking consenting victim met "battery" requirement of statute. Consent is not defense to battery in certain circumstances, Jaske, 539 N.E.2d 14, & D had fair warning statute prohibited commission of batteries on anyone.

Ct. also found statute was not vague due to potential for arbitrary or discriminatory enforcement. Decision to prosecute any type of criminal activity must reside somewhere, & prosecutor's decision to charge does not determine final outcome. Ct. determined statute did not limit association at whim of police or prosecutor & concluded it gives persons of ordinary intelligence fair warning of proscribed conduct. Ct. held it could construe statute to require specific intent, without improperly rewriting statute. By reading Ind. Code 35-45-9-1 & 3 together, Ct. found that statute clearly forbids person from: (a) actively participating or being an "active" member in a group with five or more members which promotes, sponsors, assists in, or participates in the commission of a felony or an act that would be a felony if committed by an adult or a battery, & requires as a condition of membership the same criminal conduct, (b) with knowledge of the gang's illegal advocacy of felonies or batteries, and (c) with specific intent to further, facilitate, or accomplish the substantive criminal conduct, that is, the commission of a felony or an act that would be a felony if committed by an adult or a battery. Ct. concluded that when construed & applied to reach only active members with knowledge of gang's criminal advocacy & specific intent to further criminal conduct, statute does not impinge on freedom of association.

Ct. also rejected equal protection challenge to statute, based on argument that statute would be applied discriminatorily to groups prosecutor deems undesirable, mainly poor, disadvantaged youths. After examining both gang & hazing statutes, Ct. concluded that gangs, fraternities, & all groups were treated similarly under both statutes. Lastly, Ct. concluded that legislature did not intend to exempt intra-group violence from reach of statute & fact members consented to battery had no impact on liability under statute. Intra-gang criminal activity could have adverse impact on peaceful citizens & result in breach of public peace, & statute specifically addressed such activity. Ct. concluded that, as construed, statute was not constitutionally infirm. Held, conviction affirmed.

RELATED CASES: Klein, 698 N.E.2d 296 (amended criminal gang statute is not unconstitutionally vague or overbroad, nor does it allow criminalization of person's status); Jackson, App., 634 N.E.2d 532 (In accord with Helton).

TITLE: Trice v. State

INDEX NO.: K.7.x.

CITE: (2nd Dist., 4-23-98), Ind. App., 693 N.E.2d 649

SUBJECT: Criminal gang activity - nexus between illegal activity & gang required

HOLDING: Evidence was insufficient to convict D of criminal gang activity. Elements of criminal gang activity are that individual (1) is active member of group with five or more members which, promotes, sponsors, assists in, or participates in or requires as condition of membership or continued membership commission of felony or act that would be felony if committed by adult or battery, (2) has knowledge of group's criminal advocacy, & (3) has specific intent to further group's criminal goals. Ind. Code § 35-45-9-3 & 35-45-9-1. Although State presented evidence that D was member of gang, which consisted of approximately fifteen people & was involved in drug trafficking, State did not present any evidence that D had specific intent to further gang's activity when he committed battery. Rather, evidence showed that D spontaneously beat victim when victim refused to pay for alcohol which fell off victim's car. Thus, there was no nexus between D's alleged gang membership & crime committed. Held, conviction affirmed in part & reversed in part.

RELATED CASES: Robles, App., 758 N.E.2d 581 (State similarly failed to establish nexus between D's gang membership & charged crime); Kirkpatrick, 746 N.E.2d 52 (conviction reversed where State presented no evidence that D was "active" gang member; nor did State present any evidence that D had specific intent to further gang's criminal goals when he stabbed & attempted to rob victim); Robinson, App., 730 N.E.2d 185 (State presented no substantive evidence of nexus between D's alleged gang membership & crimes for which he was charged & convicted).

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.y. Stalking (Ind. Code 35-45-10)

TITLE: Buti v. State

INDEX NO.: K.7.y.

CITE: (03/21/2022), 185 N.E.3d 433 (Ind. Ct. App. 2022)

SUBJECT: Stalking conviction supported by sufficient evidence.

HOLDING: To convict Defendant of stalking, the State was required to prove beyond a reasonable doubt that he engaged in “a knowing or an intentional course of conduct involving repeated or continuing harassment of [complaining witness (C.W.)] that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually cause[d] [the victim] to feel terrorized, frightened, intimidated, or threatened.” Ind. Code § 35-45-10-1. Defendant argued on appeal that the evidence was insufficient to establish that his conduct actually caused C.W. to feel terrorized, frightened, intimidated, or threatened. He pointed to C.W.'s testimony that she felt angry as opposed to scared or terrorized, that she never felt that Defendant would actually hurt her, her daughter, or anything around her, and that she was the one who chased Defendant. The Court of Appeals determined that the jury had an obligation to consider all the evidence, not just C.W.'s testimony. It noted that an individual's state of mind may be inferred from that individual's statements and behavior. The Court held that C.W.'s demeanor and statements to police, her decisions to call 911, and her statements to dispatch were probative evidence supporting an inference that she felt terrorized, frightened, intimidated, or threatened. Held, conviction affirmed.

TITLE: C.H. v. A.R.

INDEX NO.: K.7.y.

CITE: (4/12/2017), 72 N.E.3d 996 (Ind. Ct. App 2017)

SUBJECT: Grandmother lacked standing to seek protective order for grandson

HOLDING: Tr. Ct. did not err in dismissing Grandmother's petition for protective order for lack of standing. Grandmother had a contentious relationship with Mother. One day they came to blows, and Son tried to intervene. The State charged Mother with battery, against both Grandmother and Son. Even though Mother had legal custody of Son, Grandmother took him under her care, and she sought a protective order to prevent Mother from contacting Son. The Tr. Ct. noted that under the Indiana Civil Order Protection Act, "a parent, a guardian, or another representative may file for an order of protection on behalf of a child." Ind. Code § 34-26-5-2(b). To define "representative," the Tr. Ct. looked to a medical malpractice statute, Ind. Code § 34-18-2-25; that statute defines "representative" as "the spouse, parent, guardian, trustee, attorney, or other legal agent. . . ." The Tr. Ct. did not err by relying on this statute, and it also did not err in finding that Grandmother did not satisfy the definition of "representative" and thus lacked standing to seek a protective order against Mother. Held, judgment affirmed.

TITLE: C.S. v. T.K.

INDEX NO.: K.7.y.

CITE: (1/29/2019), 118 N.E.3d 78 (Ind. Ct. App. 2019)

SUBJECT: Protective Order dismissed due to insufficient evidence

HOLDING: Under prima facie error standard of review, Court found insufficient evidence to support issuance of a protective order because evidence established only that C.S. was present at the same public places as T.K. but did not stalk her. And a single incident of harassment is insufficient to support a finding of stalking. Johnson v. State, 721 N.E.2d 327 (Ind. Ct. App. 1999).

TITLE: C.V. v. C.R.

INDEX NO.: K.7.y.

CITE: (11/22/2016), 64 N.E.3d 850 (Ind. Ct. App. 2016)

SUBJECT: Non-threatening notes insufficient evidence of "stalking" for purposes of protective order

HOLDING: The Tr. Ct. should not have issued a protective order directing C.V. to stay away from C.R. because C.R. failed to prove by preponderance of the evidence that C.V. had stalked her. See Ind. Code § 34-26-5-2(a)(2) and Ind. Code § 35-45-10-1; see also Tons v. Bley, 815 N.E.2d 508, 511 (Ind. Ct. App. 2004). C.R. worked at the Department of Veteran Affairs, where C.V. occasionally sought medical care. On four occasions over a seven-month period C.V. left handwritten notes on C.R.'s car, saying things like, "your laugh is even more than music to my ears," and "I wish you could have been mine; things would be so much . . . better for us." These notes were not sufficient to make a reasonable person feel terrorized, frightened, intimidated, or threatened. See Maurer v. Cobb-Maurer, 994 N.E.2d 753, 757 (Ind. Ct. App. 2013) and Ind. Code § 35-45-10-1. Held, judgment reversed.

TITLE: Ellis v. State

INDEX NO.: K.7.y.

CITE: (9/1/2022), Ind. Ct. App., 194 N.E.3d 1205

SUBJECT: Conduct charged as stalking was not constitutionally protected free speech

HOLDING: Ellis was arrested in 2008 for causing a disturbance during a Sunday church service, and Officer Terry Stoffel was called in to transfer Ellis to jail. Stoffel later became Huntington County sheriff. During his term as sheriff, Ellis drove by in her car and yelled obscenities at Stoffel and flipped him off. After Stoffel left the Sheriff's department and became a teacher at a local school, Ellis drove past the school daily during the lunch hour to yell and scream obscenities at Stoffel. Ellis also appeared and verbally abused Stoffel when he was working on a local property renovation. When Stoffel was elected as a Huntington County commissioner, Ellis sent hateful content direct toward Stoffel to a local detective, drove up next to his car at a shopping center parking lot to make gun hand gestures toward him, and followed him to the courthouse while he was inside with a sign in the back of her car saying "F— Terry Stoffel." Ellis was charged with Level 6 felony stalking and one count of Level 6 felony intimidation. Ellis said she was angry that Stoffel transported her to jail rather than a doctor's office in 2008. She also said she was also mad that Stoffel did not take seriously a complaint she made to him in the 1990s about a tanning salon employee rubbing a dirty towel in her face. The trial court denied Ellis's motion for change of venue and instead brought in more jurors than normal because of Stoffel's public status. The trial court also denied Ellis's preliminary instruction regarding the State's duty to prove Ellis was not merely engaged in activity protected by the First Amendment. A jury convicted Ellis on both charges. The Court of Appeals held that denying Ellis's motion for change of venue was not an abuse of discretion because she accepted the jury without exhausting her peremptory challenges. The Court also noted that every juror who admitted to knowing Stoffel was removed from the panel. The Court found no error in the refusal to give the tendered preliminary instruction on the First Amendment, finding it was incoherent and would have confused jurors. The Court rejected Ellis's claim that her conduct was protected under the First Amendment, finding: Ellis's behavior went far beyond distasteful criticism of a public official. She engaged in a targeted campaign of harassment and threats against Stoffel. While, in isolation, a post threatening to smack someone in the face with a can of Twisted Tea or mimicking a gun with one's hand may not cause a reasonable person to fear for the person's safety, when that behavior is combined with frequent, animated yelling, cursing, and honking directed at the victim at locations throughout town and combined with public insults targeting the victim by name, it constitutes an unprotected true threat. The conduct was not protected under Article 1, Section 9 of the Indiana Constitution because it was not unambiguously political speech. Held: convictions affirmed.

TITLE: Falls v. State

INDEX NO.: K.7.y.

CITE: (2020), Ind., 131 N.E.3d 1288

SUBJECT: Stalking charge may be supported by conduct that is continuous in nature, even if it is a single episode

HOLDING: The Indiana Supreme Court granted transfer on a stalking case to clarify the terms “repeated or continuing” and to reaffirm that a charge of stalking may be supported by conduct that is purely continuous in nature. Here, Defendant followed the victim in his car for more than two hours as she attempted to evade him. Although this conduct was not “repeated,” it was still “continuous.” In a Per Curiam opinion, the court affirmed the conviction and held a charge of stalking may be supported by conduct that is purely continuous, even if it is a single episode.

TITLE: Hendricks v. State

INDEX NO.: K.7.y.

CITE: (4th Dist., 4-26-95), Ind. App., 649 N.E.2d 1050

SUBJECT: Stalking - evidence insufficient

HOLDING: Evidence was insufficient to support conviction of stalking as Class A misdemeanor. D was convicted under Ind. Code 35-45-10-5(b)(2), which elevates offense to class A misdemeanor if protective order or other judicial order under Ind. Code 31-1-11.5 has been issued to protect same victim. Protective orders issued under that section apply to party to dissolution action. Here, protective order was sought & obtained under Ind. Code 34-4-5.1, so conviction as class A misdemeanor could not be sustained. Held, invasion of privacy convictions affirmed, stalking conviction reversed & remanded to enter conviction as class B misdemeanor.

Note: Statute was amended effective 7/1/96 to include protective orders issued under Ind. Code 34-4- 5.1.

TITLE: Johnson v. State

INDEX NO.: K.7.y.

CITE: (3/27/95), Ind. App., 648 N.E.2d 666

SUBJECT: Stalking -- knowing or intentional harassment

HOLDING: Person who stalks another person commits stalking, class B misdemeanor. Stalking involves knowing or intentional course of conduct. Conduct must involve repeated or continuing harassment of another person. Harassment means conduct directed toward victim that includes, but is not limited to, repeated or continuing impermissible contact that would cause reasonable person to suffer emotional distress and that actually causes victim to suffer emotional distress. Conduct must be such that it would cause reasonable persons to feel terrorized, frightened, intimidated, or threatened and actually cause victim to feel terrorized, frightened, intimidated, or threatened. Here, Ct. held that D's actions caused victim to suffer emotional distress in that he repeatedly and continually pursued victim in attempt to locate her, and did so knowingly or intentionally, in order to get her to go back with him to Ohio. In addition, he hid his identity and disturbed operation of shelter in attempt to determine where she was living. His actions made her virtual prisoner inside shelter. Reasonable person could suffer emotional distress under circumstances presented. Further, evidence is sufficient to support determination that D engaged in impermissible, indirect and direct contact with victim. Held, conviction affirmed.

RELATED CASES: Pittman, 45 N.E.3d 805 (Ind. Ct. App. 2015) (general attempt statute is not void for vagueness as applied to D's case, where, following multiple phone calls where he threatened to kill his girlfriend, D traveled to the doctor's office where she was located while armed with a handgun for the specific purpose to scare her); Nicholson, 948 N.E.2d 820 (Ind. Ct. App. 2011) (but see Nicholson, this section; Ct. disagrees with Johnson to the extent it holds there are no parameters on the period of time during which the conduct must occur to be "repeated or continuing"; although Legislature could have put definitive time limitations in the statute and did not, "we believe the time frame in which the conduct occurred is inherent in the inquiry whether the harassment was "repeated or continuing").

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RELATED CASES: Nicholson, 948 N.E.2d 820 (Ind. Ct. App. 2011) (but see Nicholson, this section; Ct. disagrees with Johnson to the extent it holds there are no parameters on the period of time during which the conduct must occur to be "repeated or continuing"; although Legislature could have put definitive time limitations in the statute and did not, "we believe the time frame in which the conduct occurred is inherent in the inquiry whether the harassment was "repeated or continuing").

TITLE: Johnson v. State

INDEX NO.: K.7.y.

CITE: (1st Dist., 3-27-95), Ind. App., 648 N.E.2d 666

SUBJECT: Constitutionality of Stalking statutes

HOLDING: Indiana's stalking statutes, Ind. Code 35-45-10 (Secs. 1-5), are not unconstitutionally void for vagueness. Stalking requires knowing or intentional course of conduct involving repeated or continuing harassment of another person. Harassment includes conduct which causes emotional distress to both victim & reasonable person. Fact that State must prove D himself entertained specific intent militates against determination that statutes are vague. Kinney, App., 404 N.E.2d 49. Further, that State must prove engagement in repeated or continuing course of conduct militates against arbitrary enforcement. Statutes contain standards which indicate where line is to be drawn between trivial & substantial things so that erratic arrests for trivial acts & omissions will not occur. Here, evidence was sufficient to support conviction, where D specifically & repeatedly directed his conduct toward victim & his actions actually caused her to suffer emotional distress. D's conduct crossed bounds of statutorily or constitutionally protected activity. Held, conviction affirmed.

RELATED CASES: Johnson, App., 721 N.E.2d 327 (elevation of stalking conviction from class D felony to class C felony based on prior charge did not relieve State of its burden of proof, did not deprive D of his right to trial by jury, and did not violate equal protection).

TITLE: Johnson, Jr. v. State
INDEX NO.: K.7.y.
CITE: (4th Dist.; 12-29-99), Ind. App., 721 N.E.2d 327
SUBJECT: Stalking - sufficient evidence; repeated behavior & feeling terrorized
HOLDING: Stalk means "knowing or intentional course of conduct involving repeated or continuing harassment of another person that would cause reasonable person to feel terrorized, frightened, intimidated, or threatened & that actually causes victim to feel terrorized, frightened, intimidated, or threatened . . ." Ind. Code 35-45-10-1. Repeat means "to make, do, or perform Again." Webster's Ninth New Collegiate Dictionary (1985). Thus, "repeated" means more than once. Here, on August 4, 1998, at 1:00 a.m., D came to victim's house & started knocking on window & door. Eventually, D left but returned at 3:00 a.m. to again start knocking on window & calling victim's name. Again, D left, but only to return at 6:00 a.m. to bang on window & door for third time. Victim called police. Although conduct occurred in one night, there was sufficient evidence that D's conduct was repeated harassment of victim.

There was also sufficient evidence that victim felt terrorized, frightened, intimidated or threatened. Here, D was charged with two counts of stalking, first taking place between August 1997 & January 1998 & second taking place on August 4, 1998. Victim testified that, at time of first stalking, D threatened to kill her & she knew that eventually D was going to carry it out. Victim also testified that she was angry, tired & depressed as result of D's second stalking. Although victim did not testify that she was frightened during second stalking, fact reasonably could have been inferred from her testimony about her fear during first stalking. D's long course of bad behavior towards victim had direct impact on feelings she might have had at time D committed acts comprising second charge of stalking. Moreover, fact that D was acquitted of first stalking charge did not preclude Ct. from considering fear surrounding first stalking. Held, conviction affirmed.

RELATED CASES: Simms, App., 791 N.E.2d 225(State carried its burden of proving essential elements of stalking as class B felony, & it was reasonable for jury to infer that victim felt terrorized, frightened, intimidated & threatened by D's actions).

TITLE: K.Y. v. State

INDEX NO.: K.7.y.

CITE: (08-04-21), Ind. Ct. App., 175 N.E.3d 820

SUBJECT: Teen who forwarded cartoon meme from gaming platform to other teens on social media found delinquent for felony intimidation when court finds message threatening.

HOLDING: Trial court found 13-year-old K.Y. to be a delinquent and entered a true finding for felony intimidation for sending a meme through her friend's social media account to other teens that included a cartoon character from an online gaming platform. The meme was a cartoon of a baby holding two guns. K.Y. added the language, "consider this a fucking warning all of you don't come to school on Monday." K.Y. and the kids she sent it to were all attending school remotely. K.Y. testified she meant it as a joke, The Court of Appeals found the necessary intent to create fear could be inferred because the teen was aware of the nation's history of school shootings and that contrary to her testimony, sending the meme was more than a juvenile antic intended as a joke.

TITLE: Landis v. State

INDEX NO.: K.7.y.

CITE: (4th Dist., 3-17-98), Ind. App., 693 N.E.2d 570

SUBJECT: Stalking- enhancement based on prior conviction with same victim

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss. Offense of stalking is Class B felony if person has unrelated conviction for offense under this section against same victim or victims. Ind. Code 35-45-10-5(c)(2). Here, D claimed that he did not fall within this statute because, when he was convicted of his first stalking offense, stalking was Class B misdemeanor & not Class D felony as it is classified by revised statute. However, "under this section" refers to section five of Ind. Code 35-45-10. Although it contained different wording making stalking Class B misdemeanor instead of Class D felony, section five existed at time of D's first conviction. Thus, D's prior conviction of stalking properly served as predicate offense for purposes of elevating his second charge to Class B felony. Held, conviction reversed on other grounds.

RELATED CASES: Landis, 704 N.E.2d 113 (Ct. App. correctly held that when State seeks enhanced penalty based on prior conviction for stalking, D is entitled to bifurcated proceeding in which proof of prior conviction is submitted to jury only after it has rendered guilty verdict on present offense; however, State may present evidence of prior acts that are probative of crime of stalking, subject to Ind. Rules of Evidence, but evidence of any former convictions should be admitted only in "sentencing hearing" contemplated by Ind. Code 35-38-1-2(c)).

TITLE: Nicholson v. State
INDEX NO.: K.7.y.
CITE: (03-21-12), 963 N.E.2d 1096 (Ind. 2012)
SUBJECT: Stalking - break in course of conduct

HOLDING: A lag in time between harassing calls in 2006 and a subsequent single call in 2008 did not foreclose D's conviction for stalking, particularly because much of the break in time between calls was due to D's incarceration. Stalking is defined as "a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened." Ind. Code 35-45-10-1. There is no statutorily determinate time frame required for a stalking conviction. Stalking could occur over a matter of minutes or years. The key is for the trier of fact to determine what the course of conduct was and if it involved repeated and continuing harassment.

Here, in 2006, D made over 100 phone calls to the victim and her daughters, each time breathing heavily and making sounds as if he were masturbating. He would talk about masturbating and ejaculating in and on them. Once the victim's husband would get on the phone, D would hang up. D went to jail for voyeurism when he was caught in the victim's yard. When released from prison in 2008, he made another call. Based on the 2008 call and the 2006 calls, the State charged stalking. Based on these circumstances, there was sufficient evidence that D engaged in a knowing course of conduct involving repeated or continuing harassment of the victim. The interruption in the calls was due to D's incarceration. Had D not been incarcerated between 2006 and 2008, the court's analysis may have been different. Thus, there is sufficient evidence to support D's conviction for stalking. Held, transfer granted, Court of Appeals' opinion at 948 N.E.2d 820 vacated, judgment affirmed; Sullivan, J., dissenting, believes that Court of Appeals' opinion was correct.

TITLE: Peckinpaugh v. State

INDEX NO.: K.7.y.

CITE: (2nd Dist., 3-13-01), Ind. App., 743 N.E.2d 1248

SUBJECT: Multiple stalking convictions - double jeopardy

HOLDING: D's two convictions for stalking same victim did not violate constitutional double jeopardy principles. D argued that offense of stalking contemplates series of acts, & that double jeopardy prevents State from dividing larger series of acts into multiple smaller series for purpose of obtaining multiple convictions. Ct. disagreed & held that D may be convicted of separate counts of stalking same victim if respective series of incidents upon which charges are based can be divided into distinct & separate series. Here, D harassed victim for period of months, culminating in break-in of her residence. After charges were filed & D was ordered to stay away from victim & refrain from contacting her, he violated terms of that order & began once again to contact victim & to violate restrictive physical boundaries he was ordered to observe. Ct. was satisfied that, in light of evidence presented at trial & State's comments during opening & closing argument, there was no reasonable possibility that two stalking convictions were based upon same factual evidence. Held, convictions affirmed, remanded in part on other grounds.

TITLE: Pittman v. State

INDEX NO.: K.7.y.

CITE: (11/5/2015), 45 N.E.3d 805 (Ind. Ct. App. 2015)

SUBJECT: Stalking can be prosecuted as "attempt" crime

HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion to dismiss attempted stalking charge. Although Ind. Code § 35-45-10-1 clearly requires that, for the commission of the completed offense, the D's conduct actually causes the victim to feel terrorized, frightened, intimidated, or threatened, this fact does not manifest a legislative intent to foreclose application of the general attempt statute to prosecute unsuccessful attempts to commit stalking.

Court also held that Indiana's general attempt statute is not void for vagueness as applied to D's case. On these facts, which include that, following multiple phone calls where he threatened to kill his girlfriend, D traveled to the doctor's office where she was located while armed with a handgun for the specific purpose "to scare his girlfriend," the statute for attempted stalking is not void for vagueness. State presented sufficient evidence to prove D committed attempted stalking beyond a reasonable doubt.

Finally, Court rejected D's proportionality challenge to his six-year sentence. Such a sentencing range and the sentence imposed for attempted stalking do not "shock public sentiment" or "violate the judgment of a reasonable people." Thus, D's sentence does not violate Art. 1, Sec. 16 of the Ind. Constitution. Held, judgment affirmed.

TITLE: Sandleben v. State

INDEX NO.: K.7.y.

CITE: (3/17/2015), 29 N.E.3d 126 (Ind. Ct. App 2015)

SUBJECT: Stalking - repeated following and taping another constitutes impermissible contact

HOLDING: The State presented sufficient evidence to convict D of stalking. In order to convict a person of stalking, the State must prove multiple elements, including repeated or continuing harassment of the victim. Ind. Code 35-45-10-1. Harassment is defined as conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity. Ind. Code 35-45-10-2. Impermissible contact includes knowingly or intentionally following or pursuing the victim. Ind. Code 35-45-10-3. Here, D was charged with stalking a thirteen-year-old girl. In August 2012, he had followed the girl around a Target store in which she was shopping with her parents. He videotaped her. In May 2013, D followed the same girl around a Michaels store in which she was again shopping with her parents. He again videotaped her. D's actions made the girl feel "nervous and scared." These acts of following the girl constituted impermissible contact and harassment. Following and surreptitiously videotaping a thirteen-year-old girl is not a constitutionally protected expression of speech. Thus, there was sufficient evidence to support D's conviction for stalking. Held, judgment affirmed.

TITLE: Smith v. State

INDEX NO.: K.7.y.

CITE: (5th Dist., 2-4-04), Ind. App., 802 N.E.2d 948

SUBJECT: Stalking - sufficiency

HOLDING: Ct. affirmed D's convictions of stalking, intimidation & criminal recklessness. In issue of first impression, Ct. determined that conviction for stalking can stand on basis of telephone calls alone, which would amount to "impermissible contact" under stalking statute, Ind. Code 35-45-10-5. The consensus among other jurisdictions supported Ct.'s finding. Ct. rejected D's argument that only one of seven phone messages could be considered threatening, which would not meet the "course of conduct" language for stalking. Ct. found that the "course of conduct" the State must prove need not involve multiple threats, but rather repeated or continued "harassment." Ind. Code 35-45-10-1. Held, judgment affirmed.

TITLE: Vanhorn v. State

INDEX NO.: K.7.y.

CITE: (1st Dist., 07-15-08), Ind. App., 889 N.E.2d 908

SUBJECT: Stalking - evidence insufficient; repeated presence on public street

HOLDING: Evidence was insufficient to support D's stalking conviction, where D parked near complaining witness's (CW's) house on four separate occasions and looked at D's house through binoculars on two of those occasions. D made no physical contact with CW, made no telephone calls, left no notes, or at any time stepped onto CW's property. To support a conviction for stalking, State must prove D knowingly or intentionally engaged in a course of conduct involving repeated or continuing harassment ...that would cause a reasonable person to feel terrorized, frightened, intimidated or threatened and actually caused victim to feel terrorized, frightened, intimidated or threatened. Ind. Code 35-45-10-1. "'Harassment means conduct directed toward a victim that includes...repeated or continuing impermissible contact...." "Contact" is not limited to physical contact, but in this case, Court concluded that Ds' conduct was not "impermissible." Unlike D in Waldon v. State, 684 N.E.2d 206 (Ind. Ct. App 1997), D had no notice of the impermissibility of his conduct. The freedom to park on a city street is generally outside an individual homeowner's authority to permit or deny. Statutorily or constitutionally protected conduct is specifically exempted from definition of harassment. Ind. Code 35-45-10-2. When a D's conduct in a public place where D has a lawful right to be, and that conduct alone, is alleged to constitute harassment, the accused's due process rights (i.e., notice and opportunity to be heard) must be safeguarded. No protective order was sought in this case, and nothing occurred that would remotely indicate to D that his conduct was impermissible. Held, conviction reversed. Bradford, J., dissenting, believes that the jury system is an adequate safeguard for preventing unfair convictions for lawful activity and that requiring proof of "impermissibility" to satisfy harassment component adds an element of proof which crime of stalking does not contain.

TITLE: Waldon v. State

INDEX NO.: K.7.y.

CITE: (8-5-97), 5th Dist., Ind.App, 684 N.E.2d 206

SUBJECT: Stalking - evidence sufficient

HOLDING: To support conviction for stalking, State must prove D's conduct would cause reasonable person to feel terrorized, frightened, intimidated or threatened & actually caused victim to feel terrorized, frightened, intimidated or threatened. Ind. Code § 35-45-10-1. Testimony of victim is sufficient to sustain conviction. Here, victim testified that she saw D many times near her work & such encounters made her feel "fearful," "upset," & "alarmed." Ct. concluded that victim's testimony was sufficient to show that D's acts would cause reasonable person to feel terrorized, frightened, intimidated or threatened & actually caused victim to feel terrorized, frightened, intimidated or threatened. Held, conviction affirmed; Barteau, J., dissenting on basis that State failed to prove intent to harass victim, & noting that six sightings of ex-husband in public places during one-year period do not constitute harassment.

RELATED CASES: Garza, App., 736 N.E.2d 323 (evidence sufficient; jury could have properly inferred that CW was reasonable to feel terrorized, frightened, intimidated or threatened).

K. CRIMES

K.7. Offenses against public health, order and decency

K.7.z Invasion of privacy (IC 35-46-1-15.1)

TITLE: Blair v. State
INDEX NO.: K.7.z.
CITE: (10/14/2016), 62 N.E.3d 424 (Ind. Ct. App. 2016)
SUBJECT: Invasion of privacy - evidence sufficient
HOLDING: State presented sufficient evidence to sustain D's convictions for invasion of privacy and criminal trespass.

D and his wife lived in a home that had been deeded to each of them by D's father. After an incident of domestic violence, wife initiated divorce proceedings and Tr. Ct. issued an *ex parte* order of protection against D, barring him from harassing, annoying, telephoning, contacting or directly or indirectly communicating with wife for the next two years. He was also ordered to stay away from wife's residence, school and job. When the divorce was finalized, wife was awarded the home, which was deeded to her two months later. However, wife moved out of the home at some point, claiming she left for "the safety of (her) life," and left behind some personal property. When she routinely returned to the home to check her mail, she noticed that her personal property was missing and in a subsequent visit found that the locks had been changed. Her son and D were inside and refused to let her in. When she attempted to return a week later, she once again could not enter the home and found that some of the doors had been padlocked. Wife called the police, who kicked down the door and arrested D after they found him inside.

On appeal of his convictions, D argued that the evidence was insufficient to establish that he knowingly violated the protective order because he believed he was the home's owner and had a right to be there at the time of his arrest. He pointed to his own testimony claiming he never received a copy of the divorce papers or the quit-claim deed that deeded the home to his ex-wife. But Court noted that D had been given notice of the protective order and that his behavior leading up to his arrest could lead a reasonable fact-finder to believe that he knowingly violated that order. Fact-finder was not required to believe D's testimony that he never received divorce decree and that he believed he owned the home. Held, judgment affirmed.

TITLE: Boultinghouse v. State

INDEX NO.: K.7.z.

CITE: (3/6/2019), 120 N.E.3d 586 (Ind. Ct. App. 2019)

SUBJECT: Invasion of privacy conviction did not infringe upon fundamental right to maintain an intimate relationship

HOLDING: D claimed the invasion of privacy statute was unconstitutional as applied to him because it infringed upon his constitutional right to maintain intimate relationships. The Court rejected D's argument, holding it was essentially a collateral attack on the validity of the protective order, which he had not challenged previously. Assuming *arguendo* that D's relationship implicates a federal and state fundamental right, that the relationship itself is not an element of invasion of privacy offense, thus the statute does not directly or indirectly interfere with D's right to maintain an intimate relationship. The statute is constitutional because it provides "a rational means for the State to enforce its legitimate government interest in securing compliance with court orders entered to protect the victims of domestic or family violence." There was sufficient evidence to support D's conviction. Held, judgment affirmed; Pyle, J., concurring in result with opinion, believes D waived constitutional claim, but if issue is not waived, it should be subject to strict scrutiny analysis. D does not prevail because the State's interest in preventing domestic violence is narrowly tailored to meet the government's objective without violating D's fundamental rights.

TITLE: C.H. v. A.R.

INDEX NO.: K.7.z.

CITE: (4/12/2017), 72 N.E.3d 996 (Ind. Ct. App 2017)

SUBJECT: Grandmother lacked standing to seek protective order for grandson

HOLDING: Tr. Ct. did not err in dismissing Grandmother's petition for protective order for lack of standing. Grandmother had a contentious relationship with Mother. One day they came to blows, and Son tried to intervene. The State charged Mother with battery, against both Grandmother and Son. Even though Mother had legal custody of Son, Grandmother took him under her care, and she sought a protective order to prevent Mother from contacting Son. The Tr. Ct. noted that under the Indiana Civil Order Protection Act, "a parent, a guardian, or another representative may file for an order of protection on behalf of a child." Ind. Code § 34-26-5-2(b). To define "representative," the Tr. Ct. looked to a medical malpractice statute, Ind. Code § 34-18-2-25; that statute defines "representative" as "the spouse, parent, guardian, trustee, attorney, or other legal agent. . . ." The Tr. Ct. did not err by relying on this statute, and it also did not err in finding that Grandmother did not satisfy the definition of "representative" and thus lacked standing to seek a protective order against Mother. Held, judgment affirmed.

TITLE: Chavers v. State

INDEX NO.: K.7.z.

CITE: (7/16/2013), 991 N.E.2d 148 (Ind. Ct. App. 2013)

SUBJECT: Invasion of privacy - mistake of fact defense rejected

HOLDING: State presented sufficient evidence to support D's conviction for Class A misdemeanor invasion of privacy for knowingly violating a no-contact order. D argued there was no knowing violation, but rather a mistake of fact negating his culpability in that he relied on the complaining witness's (C.W.'s) statement that she had the protective order vacated. Police officer testified she believed that both C.W. and D thought there was no protection order in effect. Mistake of fact defense has three parts: 1) mistake must be honest and reasonable, 2) be about matter of fact, and 3) negate culpability required for offense. Potter v. State, 684 N.E.2d 1127 (Ind. 1997). State must disprove defense beyond reasonable doubt.

Court concluded that even if D's mistake was honest, it is not clear that his mistake was reasonable. D did not ask to see C.W.'s documentation and instead relied on her assertion even though he had been informed by his probation officer that day that the no-contact order was still in effect. In the face of such conflicting information, a reasonable person would attempt to verify the validity of the order by looking at the dismissal papers personally or contacting the clerk of the issuing court. Held, conviction affirmed; Baker, J., dissenting, believes that D did not knowingly violate the order of protection, noting the confusion police officer and C.W. had between the orders from two different courts. "[A]n average person could be easily mistaken regarding the exact superior court number where he or she needed to go to get a no contact vacated, especially in a county as large as Marion."

TITLE: Dixon v. State

INDEX NO.: K.7.z.

CITE: (2nd Dist., 07-12-07), Ind. App., 869 N.E.2d 516

SUBJECT: Invasion of privacy - sufficiency; consent to D's presence in home

HOLDING: State presented sufficient evidence to sustain D's conviction for invasion of privacy. A person who knowingly or intentionally violates a protective order commits invasion of privacy as a Class A misdemeanor. Ind. Code 35-46-1-15.1(1). D argued that only evidence that he knew of protective order was hearsay testimony of police officer regarding D's wife's claims that she gave D the order. However, regardless of whether wife actually gave D a copy of the order, officer explicitly gave D oral notice of the order &, in particular, the provision that ordered D to stay away from wife's residence. D's return to wife's home just hours later indicates that he knowingly or intentionally violated the protective order.

D *cited* Model Penal Code for proposition that consent of victim to the conduct charged is a defense if such consent negates an element of the offense or precludes that infliction of harm or evil sought to be prevented by the law defining the offense. Even if wife had invited D to the residence, D would still have been in violation of State's protective order against him, because Ind. Code 34-26-5-11 provides that "if a respondent is excluded from residence of a petitioner or ordered to stay away from a petitioner, an invitation by the petitioner to do so does not waive or nullify an order for protection." The protective order is between D & the State, not D & wife, & Ct. will not consider whether the petitioner knowingly ignored the order. Held, conviction affirmed.

TITLE: Hatchett v. State

INDEX NO.: K.7.z.

CITE: (5/28/2015), 33 N.E.3d 1125 (Ind. Ct. App 2015)

SUBJECT: Jury instruction on invasion of privacy upheld

HOLDING: Tr. Ct. did not abuse its discretion in instructing jury that “[w]hen determining whether a party committed the act of invasion of privacy, we do not consider whether [the victim] knowingly ignored the protective order but, rather, whether the D knowing[ly] violated the protective order.” D argued that instruction was an incorrect statement of law because he never contended at trial that the victim consented to the contact. However, the issue of consent was brought up by several potential jurors during jury selection. In addition, during cross examination of victim, D implied she had consented to his telephone call from jail, because the phone number he dialed was a different number than what she had when the two were together. Thus, instruction was a proper clarification of the law. Even assuming instruction was improper, it did not prejudice D’s substantial rights because there was sufficient evidence to convict him of the crime.

However, sua sponte, Court concluded that convictions on two counts of invasion of privacy based on same telephone call violated the Indiana Double Jeopardy Clause. Held, judgment affirmed in part, reversed and remanded with instructions to vacate one of D’s convictions.

TITLE: Jordan v. State

INDEX NO.: K.7.z.

CITE: (6/13/2017), 77 N.E.3d 1271 (Ind. Ct. App. 2017)

SUBJECT: Invasion of privacy conviction affirmed despite Defendant having to communicate about parenting time issues

HOLDING: State presented sufficient evidence to support Defendant's invasion of privacy conviction. A police officer told Defendant that complaining witness (C.W.) had obtained a protective order against him and that he would receive it in the mail. Nonetheless, Defendant called C.W. and left her a four-minute voicemail message in which he offered her a "one time only deal" to renegotiate parenting time and custody exchange terms. But he also told her to "take some time and be a grownup," telling her that if she did not agree, it was going to be "one nasty battle" and that the judge was going to "hear everything."

Although protective order permitted Defendant to contact C.W. regarding parenting time issues, evidence supported finding that Defendant's voicemail exceeded the scope of what was necessary to communicate with C.W. about parenting time. Defendant used aggressive words, including ad hominem attacks on C.W., in the course of asking her to renegotiate the parenting time agreement. Court also rejected Defendant's argument that he did not have actual knowledge of the protective order because the officer did not inform him of each of its specific terms. Oral notice need not include notice of every specific action prohibited by the protective order. Smith v. State, 999 N.E.2d 914 (Ind. Ct. App. 2013). Held, judgment affirmed.

TITLE: Joslyn v. State
INDEX NO.: K.7.z.
CITE: (02-16-11), 942 N.E.2d 809 (Ind. 2011)
SUBJECT: Invasion of privacy - sufficient notice of order despite improper service
HOLDING: D's admission to receiving notice of protective order is sufficient to prove D knowingly violated the order even though the protective order was not properly served. Statutes defining the crimes of stalking and invasion of privacy do not require actual service of a protective order for a conviction. Invasion of privacy does require "knowingly or intentionally violat[ing]" an order, and the stalking statute requires the "person has been given actual notice of the order." Ind. Code 35-46-1-15.1; Ind. Code 35-45-10-59b)(2).

Here, D was charged with stalking and invasion of privacy. A deputy served D with a copy of the protective order by leaving a copy attached to the door of his residence. However, the deputy did not indicate on the return of service form that a copy of the order was also mailed to D as required by Indiana Trial Rule 4.1. But D admitted to the police and at trial that he received and knew of the protective order. D's admission of the receipt is sufficient to sustain his conviction where there was also evidence that he violated the order. The purpose of the Indiana Civil Protection Order Act is to promote the protection and safety of all victims of domestic violence and prevent future incidents. It would run contrary to this purpose if the Court were to embrace D's contention that a D does not violate the criminal code because of some defect in the civil process even where the court had in fact issued a protective order and the D in fact knew it had done so. Held, transfer granted, memorandum Court of Appeals' opinion vacated, judgment affirmed.

RELATED CASES: Smith, 999 N.E.2d 914 (Ind. Ct. App. 2013) (detective's oral service of protective order over the phone was sufficient to prove D knew of the order when he violated it; the fact that ex-girlfriend responded to D's text did not reasonably leave D with impression that order had been dismissed); Tharp, 942 N.E.2d 814 (Ind. 2011) (although notice can be sufficient to prove knowledge when it comes from someone other than an agent of the State if it includes adequate indication of the order's terms, mixed messages from D's girlfriend as to whether or not there was an active protective order were oral notice of the type that was insufficient for a conviction).

TITLE: Luke v. State

INDEX NO.: K.7.z.

CITE: (2/24/2016), 51 N.E.3d 401 (Ind. Ct. App 2016)

SUBJECT: Invasion of privacy -- sufficient evidence of "contact"

HOLDING: State presented sufficient evidence of "contact" to support D's invasion of privacy convictions, where he engaged in behavior designed to harass and intimidate the victims. In so holding, Court distinguished Hunter v. State, 883 N.E.2d 1161 (Ind. 2008) and VanHorn v. State, 889 N.E.2d 908 (Ind. Ct. App 2008).

D had a long history of public indecency, stalking and invasion of privacy charges over two years. He repeatedly stood on his property outside the pharmacy where the victims worked and stared at them as they entered the pharmacy and refused to come inside when told he needed to stop.

Court also found no abuse of discretion in instructing the jury on the definition of harassment, because D's no-contact order specifically instructed him that "contact" included acts of harassment. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Maurer v. State

INDEX NO.: K.7.z.

CITE: (9/19/2013), 994 N.E.2d 753 (Ind. Ct. App 2013)

SUBJECT: Evidence insufficient to issue protective order

HOLDING: Evidence was insufficient to issue protective order. Neither party testified. Their attorneys summarized the "evidence" for the Tr. Ct. and when asked if what the attorneys said was true, both parties said "yes." Petitioner's attorney placed one email into evidence, telling the court – without testimony – that it was one of many emails Respondent had sent. The record contained no evidence of domestic of family violence or threats. Evidence that Respondent contacted the Petitioner repeatedly, without more, does not mean the contact constituted stalking. Petitioner's bare assertions were “more akin to argument ... than testimonial evidence.” Held, judgment reversed.

TITLE: Norwood v. State
INDEX NO.: K.7.z.
CITE: (12-15-10), Ind. Ct. App., 938 N.E.2d 1209
SUBJECT: Invasion of privacy - expired protective order

HOLDING: Evidence was insufficient to sustain D's conviction for invasion of privacy. To convict D of invasion of privacy as a class A misdemeanor, the State was required to prove that D knowingly violated a protective order to prevent domestic or family violence issued under Ind. Code 35-26-5.

Here, on August 15, 2008, the court issued an ex parte order for protection for the mother of D's child under Ind. Code 34-26-5-9(b), which expired on August 15, 2010. A hearing was subsequently held, and the court issued a protective order for the mother of D's child on October 9, 2008, which expired on October 9, 2009. Eventually, the State charged D with invasion of privacy based on events occurring on December 6, 2009. Both protective orders were admitted into evidence. The allegations in the charging information relate to and focused on the October 9, 2008 protective order in that the information refers to a protective order and not an ex parte protective order. Moreover, the October 9, 2009 order superseded the earlier ex parte order issued on August 15, 2008. Because the October 9, 2008 protective order expired on October 9, 2009, before the date of the alleged violation on December 26, 2009, the evidence is insufficient. Held, judgment reversed.

TITLE: Phipps v. State

INDEX NO.: K.7.z.

CITE: (2/16/2018), 90 N.E.3d 1190 (Ind. 2018)

SUBJECT: Invasion of privacy conviction and maximum sentence affirmed

HOLDING In invasion of privacy prosecution, State presented sufficient evidence to prove D intentionally or knowingly violated a protective order. D's relationship with her pastor, K.G., became contentious after K.G. publicly disclosed things D told him in confidence and allegedly inappropriately hugged her twice. Things got so bad that K.G. sought and received a protective order against D. Knowing the order was in place, D wrote an email to three church elders threatening to "go public" with her story unless K.G. resigned, retired or apologized. To convict D, the State was required to prove, in part, that D knowingly or intentionally violated an ex parte protective order by contacting K.G. Although D did not directly communicate with K.G., one of the church elders shared the email with K.G. after he learned about the email and requested to see it. Court held there was sufficient circumstantial evidence for the jury to conclude D intended the contents of her email to be communicated indirectly to K.G.

Court also found no abuse of discretion in considering D's criminal history as an aggravating circumstance when sentencing her. The transcript reveals Tr. Ct. did not count D's previous convictions against her, but instead found her continual harassment of K.G. to be the aggravator. The maximum two-and-one-half-year sentence was not inappropriate, given fact that D "deliberately defied the protective order in place since 2009" and continued reoffending, even when Tr. Ct. showed her leniency in the face of her initial convictions. Held, transfer granted, Court of Appeals' opinion at 77 N.E.3d 180 vacated, conviction affirmed.

TITLE: S.H. v. D.W.

INDEX NO.: K.7.z.

CITE: (01-31-20), 139 N.E.3d 214 (Ind. 2020)

SUBJECT: Evidence insufficient to support extension of protective order

HOLDING: Evidence that respondent violated a protective order may alone justify extending the order's duration beyond the presumptive two-year period contemplated by the Indiana Civil Protection Order Act. But without evidence of new conduct by respondent, whether in the form of "follow-up act" or express threat, the Act does not permit the reissuance, renewal, or extension of the protective order. Here, after a single episode of physical violence with no follow-up act, there was insufficient evidence respondent posed a present, credible threat to petitioner to support trial court's entry of another two-year protective order. Goff, J., joined by Massa, J., dissenting, believes that by requiring new evidence of an act or threat to justify extending protective order, the Majority opinion unnecessarily weakens the Act's protection and puts the petitioner at risk of further harm.

TITLE: Tharp v. State

INDEX NO.: K.7.z.

CITE: (2nd Dist., 02-18-10), 922 N.E.2d 641 (Ind. Ct. App. 2010)

SUBJECT: Invasion of privacy - no evidence D knowingly or intentionally violated protective order

HOLDING: Court reversed invasion of privacy conviction because State did not prove Defendant knowingly or intentionally violated protective order. See Ind. Code § 35-46-1-15.1. State failed to prove Defendant knew he was the subject of an active protective order barring contact with Lisa Pitzer. He dated Pitzer at various times and has a daughter with her. County sheriff unsuccessfully tried to serve the protective order at Defendant's mother's house; Defendant had lived there but had already moved. Only evidence protective order was served on Defendant B arresting officer's testimony that "communication control operator" told him protective order was properly served is insufficient to prove proper service. Officer's testimony is also inadmissible hearsay. The fact that Pitzer told Defendant about protective order a couple of times (she also told Defendant she thought protective order was lifted) was not significant because an agent of State must serve notice of protective order. Subject of a protective order should not have to rely on information about order from lay person who is not knowledgeable about status of legal proceeding. Further, a person cannot be put on "inquiry notice" of protective order, which would require person to inquire about potential protective orders from one or multiple courts in multiple counties. This would undermine the importance of service. Held, conviction reversed.

TITLE: Thomas v. State

INDEX NO.: K.7.z.

CITE: (11-08-10), 936 N.E.2d 339 (Ind. Ct. App 2010)

SUBJECT: Invasion of privacy - statements made in court

HOLDING: Where D communicated with the victim at the end of a hearing on a protective order, Tr. Ct. should have instituted direct contempt proceedings rather than convicted D of invasion of privacy. "A person who knowingly or intentionally violates: (1) a protective order; [or] (2) an ex parte protective order Y commits invasion of privacy, a Class A misdemeanor." Ind. Code 35-46-1-15.1.

Here, an ex parte order for protection was issued against D, prohibiting her "from harassing, annoying, telephoning, contacting or directly or indirectly communicating with [the victim]." At the end of a hearing on the order and at which both parties were present, D looked at the victim and stated, "Stop calling me faggot." D was immediately arrested and was eventually charged with Invasion of Privacy for violating the order. D argued that there was insufficient evidence that D knew he was violating the protective order because the courtroom is a neutral zone where some terms of the protective order are naturally suspended for purposes of conducting judicial proceedings. The State argued that D would have had no reason to believe, after a further order of protection was issued, that she could then directly speak to the victim in court or otherwise. Without addressing whether the evidence was sufficient to support the invasion of privacy conviction, Court of Appeals held that the institution of direct contempt proceedings would have been the more appropriate response to D's statement to the victim in the courtroom. Held, judgment reversed and remanded with instructions to vacate D's conviction for invasion of privacy as a class A misdemeanor and, at Tr. Ct.'s option, to resume direct contempt proceedings; Bradford, J., dissenting on basis that although direct contempt proceedings would have been the more efficient and preferred remedy, nothing in the statute precludes the State from choosing to file the invasion of privacy charges.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

TITLE: A.M. v. State

INDEX NO.: K.8.

CITE: (11/20/2012), 981 N.E.2d 91 (Ind. Ct. App 2012)

SUBJECT: Identity of drug - test required to prove marijuana rather than spice

HOLDING: The State failed to present sufficient evidence that A.M. committed Possession of Paraphernalia, an offense that would have been a class A misdemeanor if committed by an adult. A person who possesses a raw material, an instrument, a device or other object that the person intends to use for: (1) introducing into the person's body a controlled substance; . . . in violation of this chapter commits . . . possessing paraphernalia. Ind. Code 35-48-4-8.3(a). Here, A.M. admitted that a pipe he possessed at school was used to smoke drugs out of, and he last smoked spice out of it. He admitted that spice is like weed but has a different flavor. However, because the State's petition for delinquency alleged that the controlled substance that A.M. intended to smoke in the pipe was marijuana, the State was required to prove beyond a reasonable doubt that A.M. in fact intended to use the pipe to smoke marijuana and not some other controlled substance. At trial, an officer admitted that the pipe could be used for smoking spice or marijuana, and that the two smell "pretty close to the same thing." Although the officer thought the residue smelled more like marijuana, he admitted that you "would have to look at the chemical makeup between the two" and he "could be wrong." The Court found no relevant cases, and the State has directed it to none, where proof beyond a reasonable doubt of a substance's identity was adequately founded solely on a person's sense of smell. And even if a conclusive identification of a controlled substance were possible on smell alone, the evidence presented here would not suffice. There is no evidence in the record that the State sought to have the pipe tested for the presence of drugs. If the State wishes to forego this step, which is routine in drug cases, it must be prepared to face the consequences. Thus, there is no evidence of a probative value that A.M. used the pipe to smoke marijuana, as charged. Held, judgment reversed.

TITLE: Kaur v. State

INDEX NO: K.8.

CITE: (5/6/2013), 987 N.E.2d 164 (Ind. Ct. App 2013)

SUBJECT: Facts preclude D from claiming Synthetic Drug Law is unconstitutional delegation of legislative authority

HOLDING: In interlocutory appeal, Court did not address merits of D's argument about delegation of legislative authority because facts of D's conviction don't implicate delegation of legislative authority or the Distribution of Powers Clause, found at Ind. Const. Art. III, § 1.

The Synthetic Drug Law empowers the Indiana Board of Pharmacy ("the Board") to declare new compounds illegal substances by emergency rule. However, the legislature, not the Board, passed the law prohibiting dealing and possession of AM-2201, the offense D has been charged with. Held, judgment affirmed.

RELATED CASES: Tiplick, 43 N.E.3d 1259 (Ind. 2015) (Indiana's synthetic and look-alike drug laws do not unconstitutionally delegate legislative authority; see full review at J.12); Elvers, 22 N.E.3d 824 (Ind. Ct. App 2014) (statute is not unconstitutionally vague despite use of technical terms; see full review at K.8.a).

TITLE: Tiplick v. State
INDEX NO.: K.8.
CITE: (10/7/2015), 43 N.E.3d 1259 (Ind. 2015)
SUBJECT: Indiana's synthetic/look-alike drug statutes are not unconstitutionally vague
HOLDING: Indiana's synthetic and look-alike drug laws are neither unconstitutionally vague nor an unconstitutional delegation of legislative authority. D was charged with Class D felony possessing, selling, and dealing in the chemical compound designated XLR11, and dealing and conspiracy to commit dealing in look-alike substances. Three distinct statutes in effect at the time of D's offense listed over 60 specific chemical compounds under the definition of synthetic drug, and included eleven sections regarding compounds "structurally derived" from other chemicals. Further, it included "[a]ny compound determined to be a synthetic drug by rule adopted" by the Pharmacy Board. XLR11 is not listed in the statutes, but rather declared a "synthetic substance" by the Pharmacy Board Emergency Rule. Court held that this statutory scheme is not too complex and provides adequate notice to people of ordinary intelligence as to the prohibited conduct.

Addressing a matter of first impression, Court also held that the legislature's decision to delegate to the Indiana Pharmacy Board the authority to add, via emergency rule, new synthetic drugs to the list of prohibited substances under Ind. Code § 35-31.5-2-321 is not an unconstitutional delegation of the legislature's authority. In so holding, the Court sought guidance from other state courts and Touby v. United States, 500 U.S. 160 (1991); see also Burk v. State, 257 Ind. 407, 275 N.E.2d 1 (1971) (Pharmacy Board's authority to determine whether additional substances met the definition of a "narcotic drug" under the state's Uniform Narcotic Drug Act was appropriate even though criminal penalties would result).

Finally, Court held that the counts of the information related to one of the alleged substances (XLR11) should have been dismissed for failure to specifically reference the emergency rule naming that particular substance to be a synthetic drug. The State remains free to re-file an amended information with proper reference to the emergency rule. Held, transfer granted, Court of Appeals' opinion at 25 N.E.3d 190 vacated, denial of motion to dismiss affirmed in part, reversed in part and remanded for further proceedings.

RELATED CASES: Armes, 191 N.E.3d 942 (Ind. Ct. App. 2022) (The emergency rule promulgated by the Indiana Board of Pharmacy purporting to add MDMA to Schedule I, fails to provide adequate information for a person of ordinary intelligence to determine whether he or she is dealing a substance that contains MDMA, and therefore, it is unconstitutionally vague).

K. CRIMES
K.8. Drugs (Ind. Code 35-48)
K.8.a. Dealing

TITLE: Armes v. State
INDEX NO.: K.8.a.
CITE: (7/8/2022), Ind. Ct. App., 191 N.E.3d 942
SUBJECT: Charges for dealing a synthetic drug declared illegal by emergency rule dismissed on constitutional vagueness grounds
HOLDING: This is an interlocutory appeal from the denial of the defendants' motions to dismiss. Effective November 2020, the Board of Pharmacy adopted an emergency rule to add a drug compound identified as MDMB-4en-PINACA (MDMB) to the list of Schedule I controlled substances. In January 2021, three defendants were charged with various crimes involving MDMB. They filed motions to dismiss, arguing that the charges failed to state an offense because MDMB was not found under Schedule I and was not otherwise declared to be a Schedule I substance. They further argued that the statutory scheme defining controlled substances was unconstitutionally vague as applied to them.

The Court of Appeals rejected the defendants' first argument. Synthetic drugs listed under IC 35-31.5-2-321 also explicitly include any compound determined to be a synthetic drug by Emergency Rule under IC 25-26-13-4.1. Although MDMB was not explicitly named under either statute at the time the defendants committed the offenses, the Board is authorized to add substances to Schedule I because Schedule I includes substances adopted under Section 4.1. Therefore, the Emergency Rule effectively made MDMB a controlled substance. As such, the defendants were not entitled to dismissal of the charges on the basis that the informations fail to state an offense. But the Court agreed with the defendants' second argument that the Emergency Rule is unconstitutionally vague as applied to them. The Court determined that the Emergency Rule fails to provide adequate information for a person of ordinary intelligence to determine whether they are dealing in a substance that contains MDMB. Unlike the emergency rule at issue in Tiplick v. State, 43 N.E.3d 1259 (Ind. 2015), the Emergency Rule here does not explicitly identify the listed substances as synthetic drugs. An even greater problem is that the Emergency Rule does not provide the chemical composition of MDMB. Thus, there is no official designation of what constitutes MDMB. Accordingly, the Emergency Rule fails to provide the notice required by due process under the federal constitution and the trial court erred in denying the motion to dismiss the charging informations. As a final matter, the Court noted that the defendants were likely correct in arguing that the vagueness analysis under the Indiana Constitution requires higher scrutiny than the federal constitution. This is based partly on Article 4, Section 20, which states, "Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms," and the comments from the delegate who proposed it. But the Court did not ultimately resolve the question, having already found the Emergency Rule unconstitutionally vague under the Fifth Amendment.

RELATED CASES: Armes, 191 N.E.3d (Ind. Ct. App. 2022) (On rehearing, Ct. affirms prior decision reversing the filing of charges involving MDMB as a schedule I controlled substance as unconstitutionally vague).

TITLE: Bell v. State

INDEX NO.: K.8.a.

CITE: (1st Dist., 03-7-08), Ind. App., 881 N.E.2d 1080

SUBJECT: 1,000-foot enhancement - statutory entrapment defense

HOLDING: D proved beyond a reasonable doubt that he was within 1,000 feet of a park at the request of an agent of law enforcement. It is a defense to dealing that the person charged was within one thousand feet of a public park at the request or suggestion of an agent of a law enforcement officer. Ind. Code 35-48-4-16(c). An affirmative defense negates no element to the crime. First, D must produce evidence raising the defense. Second, State must negate at least one element of the defense beyond a reasonable doubt. Moon v. State, 823 N.E.2d 710, 716 (Ind. Ct. App 2005). Here, D was involved in three controlled buys which proceeded in essentially the same manner. At the direction of the police, the informant would call D and ask if D could take him to the store, after which D would arrive at the informant's house across the street from a park and provide the informant cocaine. The fact that D knew where the informant lived and that he was not "tricked" into engaging in a drug deal near a park are irrelevant. Thus, D has established that he was within 1,000 feet of a public park only at the request or suggestion of an agent of a law enforcement officer and that the State has failed to negate one of the elements of this defense beyond a reasonable doubt.

Although D's prior criminal history is sufficient to sustain the maximum sentences, the three sentences for the drug deals cannot run consecutively. See Beno v. State, 581 N.E.2d 922 (Ind. 1991). Held, judgment affirmed in part, reversed in part, and remanded with instructions to: (1) amend abstract of judgment by reducing three counts of Class A felony dealing to Class B felonies; and (2) sentence D to twenty years for each of the three Class B felony dealings and three years for the Class D felony possession, all to run concurrently.

RELATED CASES: Atwood, 905 N.E.2d 479 (Ind. Ct. App 2009) (even assuming that jury instruction on defenses to 1,000-foot enhancement was defective because it did not inform the jury that State must negate at least one element of defense beyond a reasonable doubt, instructions as a whole properly informed the jury of State's burden of proof and D failed to demonstrate that his substantial rights were prejudiced)

TITLE: Bemis v. State

INDEX NO.: K.8.a.

CITE: (4th Dist., 6-22-95), Ind. App., 652 N.E.2d 89

SUBJECT: Possession & sale of Psilocybin & Psilocyn - vagueness challenge

HOLDING: Statutes within Ind.'s Controlled Substances Act prohibiting possession & sale of psilocyn & psilocybin mushrooms are not unconstitutionally vague, either on their face or as applied to D. Ct. rejected D's arguments that: 1) Ind. Code 35-48-2-4(d)(20) & (21) fails to adequately inform him of conduct it proscribes in violation of due process, & 2) express exclusion of food from definition of "drug" in Ind. Code 35-48-1-16 coupled with fact that Ind. Code 35-48-2-4 fails to mention mushrooms, renders statute constitutionally void for vagueness with regard to psilocybin mushrooms. At trial, State introduced sufficient evidence from which jury could infer D's knowledge of presence of Psilocyn in mushrooms he possessed. Because Ind. statutes include scienter as element of offense, there is no danger that person would be convicted for innocently possessing psilocyn mushrooms. Held, convictions for possession & dealing in schedule I controlled substance affirmed, conviction for possession as lesser included offense vacated, Chezem, J., dissenting. **Note:** Ct. raised validity of dual convictions for possession sua sponte, triggering dissenting opinion as to majority's vacation of the possession convictions.

TITLE: Buelna v. State

INDEX NO.: K.8.a.

CITE: (11/13/2014), 20 N.E.3d 137 (Ind. 2014)

SUBJECT: Weight of "adulterated" meth is weight of final yield, not weight of intermediate mixture

HOLDING: In determining whether D had manufactured the requisite 3 grams of "adulterated" methamphetamine for class A felony manufacturing (Ind. Code 35-48-4-1.1(b), and where officers had seized 13 grams of a precursor mixture that D was still cooking, the weight of the adulterated methamphetamine is the weight of the final product, not the weight of the intermediate mixture. In analogous situations, the Court has held that statutory references to adulterated drugs means the total weight of the delivered product. See Lawhorn v. State, 452 N.E.2d 915, 917 (Ind. 1983) (adulterated cocaine); Tobias v. State, 479 N.E.2d 479 N.E.2d 508, 511 (Ind. 1985) (prescription narcotic in pill form); and Woodson v. State, 501 N.E.2d 409, 411 (Ind. 1986) (adulterated heroin). Requiring the State to prove that the final product weighed at least 3 grams is also in accord with the Rule of Lenity, as the statute's failure to define "adulterated" makes it ambiguous. See Adams v. State, 960 N.E.2d 793, 798 (Ind. 2012).

The weight of the intermediate mixture is probative of whether D was eligible for the 3-gram weight enhancement only if the State had presented evidence that established how much of the finished drug the intermediate mixture would have yielded if D had finished cooking the batch. While sufficient evidence of the yield need not have come from an expert under Evidence Rule 702, it needed to come from a skilled witness under Evidence Rule 701.

Here, the State presented no evidence to establish what the final yield would have been if D had finished cooking the methamphetamine, let alone prove that it would have been at least 3 grams. However, because independent testimony established that D successfully manufactured 6 grams of methamphetamine, there was sufficient evidence to support his conviction for class A felony manufacturing methamphetamine. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment affirmed.

TITLE: Bush v. State

INDEX NO.: K.8.a.

CITE: (8-12-02), Ind. App., 772 N.E.2d 1020

SUBJECT: Possessing precursors with intent to manufacture methamphetamine (meth)- lesser included offense (LIO) of dealing where no evidence manufacturing occurred

HOLDING: Where there is no direct evidence that D had succeeded in completing manufacturing process for "batch" of meth, conviction for possessing precursors with intent to manufacture meth is LIO of dealing in Schedule II controlled substance. Ind. Code 35-48-4-2(a)(1) provides that person is guilty of dealing in Schedule II controlled substance if he knowingly or intentionally manufactures meth. In Iddings, App., 772 N.E.2d 1006, Ct. held that D's conviction for possessing precursors of meth was not included within conviction for manufacturing meth because evidence recovered by police revealed that two independent offenses had been committed: (1) D had already completed manufacturing some meth, & (2) he possessed precursors with intent to make more of drug. Here, however, conviction for manufacturing meth was based exclusively on possession of precursors of that drug in circumstances suggesting that he was in process of manufacturing it. In contrast to Iddings, there was no direct evidence recovered that D had already succeeded in completing "batch" of drug. It was impossible to fairly state that manufacturing & possession of precursors offenses were clearly independent of each other, as was case in Iddings. Held, conviction for dealing in Schedule II controlled substance affirmed, conviction for possessing reagents or precursors reversed.

RELATED CASES: Harrison, 32 N.E.3d 240 (Ind. Ct. App 2015) (Ct. vacated convictions for possession of ammonia/precursors because they constitute lesser-included offenses of manufacturing meth; as in Bush, it is impossible to fairly state that the manufacturing and possession of precursors offenses are clearly independent of each other); Micheau, App., 893 N.E.2d 1053 (where State used evidence of precursors to support Attempted Dealing conviction and evidence of methamphetamine to support Dealing conviction, there was no double jeopardy violation); Robertson, App., 877 N.E.2d 507 (vacating D's conviction for possession of precursors with intent to manufacture, which was necessarily included in conviction for dealing in methamphetamine); Moore, App., 869 N.E.2d 489 (although evidence showed that D had not yet produced pure methamphetamine, testimony by police officer reflects that methamphetamine was extracted from the substance found in pitcher that D threw out car window); Scott, App., 803 N.E.2d 1231 (methamphetamine had been created in the past on the property & other materials found in D's possession indicated he intended to make more; this supported an inference that two independent offenses occurred); Wilhelmus, App. 824 N.E.2d 405; Floyd, App., 791 N.E.2d 206 (as in Iddings, evidence supported conclusion that two independent offenses were committed for which D could be separately punished); Dawson, App., 786 N.E.2d 742 (once an individual crushes up pills in order to separate ephedrine from pill binders, manufacturing process has begun; see full review, this section).

TITLE: Charley v. State

INDEX NO.: K.8.a.

CITE: (3rd Dist., 5-31-95), Ind. App., 651 N.E.2d 300

SUBJECT: Possession within 1000 feet of school - measurement device

HOLDING: Evidence regarding measurement taken to determine whether D possessed cocaine within 1000 feet of school property was properly admitted. Police used Measure Master measuring wheel to determine distance of D's cocaine possession from school. Police officer testified that measurement device was working properly, & that he reset device to zero prior to measuring distance of 802 feet. Another officer testified regarding accuracy & reliability of measuring wheel. Ct. rejected argument that device used by police to measure distance should be subject to same foundational requirements necessary for admission of results taken from breathalyzer tests, & that expert testimony should be required to lay necessary foundation. This evidence is not scientifically complex, & there are no statutory requirements regarding method of measurement or operation of measurement device. To allow admission of distance as evidence, State is only required to show that measuring device was accurate & was operated correctly. Held, judgment affirmed.

RELATED CASES: Seeley, 936 N.E.2d 863 (Ind. Ct. App. 2010) (testimony of county surveyor regarding distance between D's property and school's property was sufficient for jury to find the property was school property). Sparkman, App., 722 N.E.2d 1259 (park ranger's testimony was sufficient to lay adequate foundation for admission of distance of D's possession of cocaine from public park); Reed, App., 720 N.E.2d 431 (surveyor's line of sight technique did not make statute unconstitutionally vague, & Tr. Ct. did not err by instructing jury on this technique).

TITLE: Cherry v. State

INDEX NO.: K.8.a.

CITE: (07-27-12), 971 N.E.2d 726 (Ind. Ct. App 2012)

SUBJECT: Aiding/inducing dealing in heroin - sufficiency of circumstantial evidence

HOLDING: State presented sufficient evidence to support D's conviction for Class B felony aiding, inducing, or causing dealing in heroin. D told a detective at scene of arrest that he was supplying heroin to co-D who was with D that night. Police also recovered a syringe from D's pants pocket. During trial, the State's first witness testified that the balloons swallowed by co-D during the drug bust contained heroin, and a laboratory report was entered into evidence. However, the report was later withdrawn after Tr. Ct. found that State failed to establish a sufficient chain of custody for the heroin. Co-D testified that he swallowed two balloons of tar heroin in his possession, and D testified that all five persons in vehicle were "hardcore junkies." While it is true that neither the substance nor direct evidence of the substance's identity was admitted at trial, State is not required to introduce the subject contraband to obtain a conviction for dealing or possession. Helton v. State, 907 N.E.2d 1020 (Ind. 2009). The identity and quantity of a controlled substance and D's possession of or dealing in narcotics may all be established by circumstantial evidence. Id. Jury was entitled to find from evidence presented in this case that D had obtained the heroin from co-D and that co-D intended to deal it. Held, judgment affirmed; Vaidik, J., dissenting on grounds that the evidence was insufficient to prove the substance in the balloons co-D swallowed was actually heroin.

TITLE: Cockrell v. State

INDEX NO.: K.8.a.

CITE: (3rd Dist., 3-12-01), Ind. App., 743 N.E.2d 799

SUBJECT: Conspiracy to deal cocaine - insufficient evidence; erroneous admission of hearsay statements

HOLDING: Evidence was insufficient to support D's conviction of conspiracy to deal in cocaine. Tr. Ct. improperly admitted hearsay evidence at trial, & without this evidence, there was insufficient evidence indicating that D agreed with third party to deal in cocaine. Statement by co-conspirator of party during course & in furtherance of conspiracy is not hearsay. Ind.Evidence Rule 801(d)(2)(E). However, for statement to be admissible under this rule, State must demonstrate both that conspiracy existed between declarant & party against whom statement is offered, & that statement was made during course of & in furtherance of conspiracy. Barber v. State, 715 N.E.2d 848 (Ind. 1999). There must be independent evidence of conspiracy, ie., evidence other than statement itself. Id. Relationship & association with co-conspirator, standing alone, is insufficient to establish conspiracy. Porter v. State, 715 N.E.2d 868 (Ind. 1999). Here, alleged co- conspirator's statement did not demonstrate pre-arrangement between him & D, & did not establish that D agreed with him to sell cocaine. After making statement, co-conspirator was never seen with D & there was no evidence that the two ever had any contact with each other. Without evidence that D agreed with alleged co-conspirator, no conspiracy was established, & Tr. Ct. abused its discretion when it allowed co-conspirator's statements into evidence under Ind.Evidence Rule 801(d)(2)(E). Held, conspiracy conviction reversed, remanded for resentencing.

TITLE: Covey v. State

INDEX NO.: K.8.a.

CITE: (06-24-10), 929 N.E.2d 813 (Ind. Ct. App 2010)

SUBJECT: Possession/dealing within 1000 feet of "family housing project"

HOLDING: Sufficient evidence supported D's convictions for class A felony dealing in methamphetamine (Ind. Code 35-48-4-1.1) and class B felony possession of methamphetamine (Ind. Code 35-48-4-6.1), as State proved beyond a reasonable doubt that D was within 1,000 feet of a "family housing complex" when he dealt methamphetamine to a confidential informant ("CI") at a building that contained her apartment. A family housing complex is a "building or series of buildings . . . that is operated as an apartment complex." Ind. Code 35-41-1-10.5. Criminal statutes do not define "apartment complex," but CI's testimony that her dwelling was located at "Greenfield Village Apartments," which consisted of 50 - 75 buildings, supported inference that CI lived in an apartment complex and, thus, a "family housing complex."

The State was not required to rebut D's defense under Ind. Code 35-48-4-16(b) that he was only briefly within 1000 feet of a family housing complex. Even though D did not bear the burden of proving these mitigators, he did carry the burden to place the mitigator at issue where the State's evidence had not done so. Harrison v. State, 901 N.E.2d 635, 642 (Ind. Ct. App. 2009). D failed to place the mitigator at issue. His closing argument did not claim he was within 1000 feet of apartment only briefly. Further, D did not tender an instruction raising the mitigator, and he did not object to lack of such an instruction. Tr. Ct.'s failure to *sua sponte* instruct the jury on the mitigator was not fundamental error because Harrison clearly puts the burden on D to raise the issue. Here, D improperly tried to shift burden to the Tr. Ct. Held, judgment affirmed.

TITLE: Davis v. State

INDEX NO.: K.8.a.

CITE: (5th Dist., 04-09-07), Ind. App., 863 N.E.2d 1218

SUBJECT: Dealing in cocaine - evidence sufficient

HOLDING: Evidence was sufficient to sustain D's conviction for dealing in cocaine. To convict D of dealing in cocaine as a class B felony, State needed to prove that: 1) D knowingly or intentionally, 2) possessed; 3) with intent to deliver: 4) cocaine. Here, police officers were involved in a controlled drug buy in front of D's home after receiving several calls regarding possible drug activity. D talked with Boyd & Heath in front of residence. Boyd & confidential informant (CI) walked a short distance away from the other two but were still in the same area. CI exchanged buy money with Boyd for 0.8 grams of cocaine. D was in front of the house just before police gave "go signal." When police arrived at house & exited their vehicles, Boyd & Heath were in front of house & Boyd ran to backyard. Boyd threw five baggies of crack cocaine over fence. When officer ran to backyard, he found D leaning over with his hands inside a wishing well. Officer discovered a "freshly placed," clear knotted plastic baggy that contained twelve smaller baggies that each contained cocaine, weighing 1.69 grams. A twenty-dollar bill & a ten-dollar bill were found on ground in front of the house & buy money was recovered from Boyd's front pocket. Under circumstances, Court concluded that State presented sufficient evidence for Tr. Ct. to conclude that D had the intent to deliver. In so holding Court cited Stokes v. State, 801 N.E.2d 1263 (Ind. Ct. App 2004), & distinguished Johnson v. State, 594 N.E.2d 817 (Ind. Ct. App 1992), noting that there was no testimony that D frequently used drugs or that twelve bags were consistent with personal use. Held, conviction affirmed.

TITLE: Dawson v. State

INDEX NO.: K.8.a.

CITE: (1st Dist., 4-16-03), Ind. App., 786 N.E.2d 742

SUBJECT: Dealing in controlled substance - manufacturing methamphetamine; possession of crushed up pills

HOLDING: Evidence was sufficient to support D's conviction for manufacturing methamphetamine. "Manufacture" is the "production, preparation...or processing of a controlled substance...by extraction from substances of natural origin..." Ind. Code 35-48-1-18. Dealing by manufacturing statute, Ind. Code 35-48-4-2, does not require that manufacturing process be completed or that there be actual product before someone can be found to have manufactured a controlled substance. Bush v. State, 772 N.E.2d 1020 (Ind. Ct. App 2002). Here, jury was presented with evidence that a bag containing white powder which tested positive for ephedrine was found in car in which D was passenger. D argued that having crushed up pills does not equate to start of manufacturing process. Ct. disagreed & held that once an individual crushes up pills in order to separate ephedrine from pill binders, manufacturing process has begun. State police sergeant testified at trial that first step in manufacturing of methamphetamine is extraction of ephedrine from tablets which contain those substances. He noted that it is standard practice for individuals to crush up pills which contain ephedrine before soaking them in denatured alcohol so that ephedrine can be extracted from pill binders. Crushing of pills into powder form indicates that not only did D possess precursor ephedrine, but that he also began extraction process. This sufficiently meets definition of manufacturing in order to support conviction for dealing in methamphetamine by knowingly manufacturing it. Held, conviction affirmed.

RELATED CASES: Montgomery, 22 N.E.3d 768 (Ind. Ct. App 2014) (even though D had not finished making methamphetamine, evidence was sufficient to support his dealing conviction; for 2 months D bought a box of pseudoephedrine every 10 days; when he was arrested he possessed a smoking HCL generator, lye, sulfuric acid, and 2 open instant cold packs containing ammonium nitrate); Vanzyll, 978 N.E. 2d 511 (Ind. Ct. App 2012) (evidence of an active methamphetamine lab is not required to prove manufacturing as that term is defined by Ind. Code 35-38-1-18); Robertson, App., 877 N.E.2d 507; Ikemire, App., 852 N.E.2d 640; Hill, App., 825 N.E.2d 432 (evidence was sufficient to support D's conviction for manufacturing methamphetamine regardless of fact no finished meth was found on premises); Traylor, App., 817 N.E.2d 611 (evidence sufficient that D was manufacturing meth where process of making meth had begun but not yet completed).

TITLE: Doty v. State

INDEX NO.: K.8.a.

CITE: (1st Dist., 6-22-00), Ind. App., 730 N.E.2d 175

SUBJECT: Dealing in cocaine within thousand feet of school - insufficient evidence

HOLDING: Evidence was insufficient to establish that D dealt cocaine within 1000 feet of school property. State's evidence revealed that distance from school to edge of D's residence was 987 feet. However, cocaine transaction took place inside D's residence. Appropriate points of measurement needed to determine whether D's delivery of cocaine to informant to place "in, on, or within one thousand (1000) feet" of school property are: 1) specific site of cocaine delivery, & 2) edge of school property. Ct. rejected State's argument that it may be inferred from case law that State needed only to establish distance from D's residence, as opposed to location of cocaine sale, to school property. There was no evidence in record that police officer's measurement of 987 feet contained site of cocaine delivery, thus State failed to present sufficient evidence from which jury could find beyond reasonable doubt that D dealt cocaine within 1,000 feet of school property. Held, conviction for class A felony reversed & remanded with instructions to enter judgment & sentence on lesser included offense of dealing in cocaine as class B felony.

TITLE: Elvers v. State
INDEX NO.: K.8.a.
CITE: (12/17/2014), 22 N.E.3d 824 (Ind. Ct. App 2014)
SUBJECT: Dealing in synthetic drug - vagueness challenge to statute rejected
HOLDING: Indiana's Synthetic Drug Law, Ind Code § 35-48-4-10 (2011), Ind Code § 35-41-1-26.3(6),(8) (now codified at Ind. Code § 35-31.5-2-321(1)(F),(H)), is not unconstitutionally vague even though it uses scientific terminology to identify the prohibited substances. Ind. Constitution article 4, § 20 instructs General Assembly to avoid use of "technical terms" in statutes to the extent that it is "practicable."

Here, D owned a retail smoke shop where he sold a variety of products commonly known as "spice" and "bath salts." But beginning July 1, 2011, substances containing JWH-122 and JWH-250, which are often found in spice, were banned under law from being sold. An undercover police officer bought several items from D's shop that turned out to contain those chemicals. D finally removed them from his store after March 15, 2012, when an amendment to the Synthetic Drug Law went into effect.

In upholding D's two Class D felony convictions and rejecting his constitutional challenge to the Synthetic Drug Law, Court noted he could have taken measures to ensure he was not selling merchandise with the banned drugs in them. Charging information adequately specified with what D was charged. Court also found that the Synthetic Drug Law's weight enhancement was not unconstitutionally applied in this case because it is well established that the total weight of a final, deliverable drug product--and not just the pure component thereof--may be used to support a weight enhancement. State presented sufficient evidence to show D intended to deliver the drugs. Held, judgment affirmed in part and reversed in part on other grounds (i.e., two of the charges should have been merged).

Note: For the third time, Court chastised the deputy attorney general who handled the case for disregarding Court's request that attorneys refrain from smoking when handling appellate record and again submitting a "foul" smelling record.

TITLE: Everroad v. State
INDEX NO.: K.8.a.
CITE: (1st Dist. 04/15/91), Ind. App., 570 N.E.2d 38
SUBJECT: Dealing in drugs - multiple convictions
HOLDING: Even though more than one controlled substance is involved, Ds could not be convicted & sentenced for separate crimes where only single statutory provision is violated. Ds were sentenced to consecutive sentences on 5 counts, dealing in cocaine (I), dealing in marijuana (II), dealing in hashish (III), & 2 counts of dealing in schedule I substance (IV & V). Cocaine count was violation of Ind. Code 35-48-4-1(2), marijuana & hashish counts were both violations of Ind. Code 35-48-4-10(2), & 2 schedule I substance counts were both violations of Ind. Code 35-48-4-2(2). Ct. App. found that convictions all stemmed from possession of several controlled substances at same place & time, &, relying on Duncan 412 N.E.2d 770, held that Ds could be sentenced on only 3 counts, 1 for each statutory violation. Held, remanded for resentencing with instructions to vacate judgment & sentence on either Count II or III & either Count IV or V.

TITLE: Griffin v. State
INDEX NO.: K.8.a.
CITE: 925 N.E.2d 344 (Ind. 2010)
SUBJECT: 1,000-foot enhancement - definition of "briefly"; State failed to rebut statutory defense

HOLDING: In prosecution for Class B felony Possession of Cocaine, State failed to rebut beyond reasonable doubt D's statutory defense that he was within 1000 feet of school only "briefly." Possession of Cocaine is enhanced to Class B felony if State proves person committed the offense within 1,000 feet of school property, a public park, a family housing complex, or youth program center. Ind. Code 35-48-4-6(b)(2). However, enhancement to Class B felony is precluded if both (a) D was in, on, or within the proscribed area only "briefly" and (b) no member of designated class of young people was within the designated area at time of offense. Ind. Code 35-48-4-16(b).

Here, officer saw D push his moped for five minutes at 2:15 a.m. in middle of street, which was next to fence surrounding an elementary school. Because of increased frequency of moped thefts, officer approached D to check moped VIN. While waiting for information on VIN and moving moped off street, officer noticed underneath moped a plastic bag containing 0.77 grams of cocaine. During cross examination, officer affirmatively said he saw no children at or near school property. State presented no evidence regarding proximity of public park, family housing complex, or youth center.

State bears burden to rebut statutory defense in Ind. Code 35-48-4-16(b) because defense is not an affirmative defense but a mitigating factor that reduces culpability. Harrison v. State, 901 N.E.2d 635, 642 (Ind. Ct. App. 2009), *trans. denied.*; Adkins v. State, 887 N.E.2d 934, 938 (Ind. 2008). For purposes of statutory defense in Ind. Code 35-48-4-16(b)), "briefly" is "a period no longer than necessary for a D's intrusion into the proscribed zone principally for conduct unrelated to unlawful drug activities [here, pushing a moped], provided that D's activities related to charged offense [here, possession of cocaine] are not visible."

State failed to rebut D's defense beyond a reasonable doubt. It failed to prove D's proximity to school was not brief i.e., it failed to prove D's presence within 1000 feet of school lasted longer than necessary to push moped down the street. State also failed to prove that: a) there was a person under age eighteen and at least three years younger than D within 1000 feet of school and b) if children had been present, cocaine would have been visible to them. Held, transfer granted, Court of Appeals' opinion at 905 N.E.2d 521 vacated, conviction reversed and remanded for entry as conviction for class D felony Possession of Cocaine and resentencing.

RELATED CASES: Aslinger, 2 N.E.3d 84 (Ind. Ct. App 2014) (D's proposed instruction on defense to dealing in methamphetamine properly denied, as statutory defense does not apply to manufacture or dealing); Harris, 981 N.E.2d 610 (Ind. Ct. App 2013) (State rebutted defense that children were not present within 1000 feet of where D possessed cocaine, even though officer testified no children were present when he arrested D, other witnesses testified that children resided in nearby housing complex); Seeley, 936 N.E. 2d 863 (Ind. Ct. App. 2010) (when D lives in the proscribed zone and he has turned his home into a place where controlled substances may be illegally purchased, he cannot be in the proscribed zone only "briefly"; such conduct does not minimally increase the risk to children nearby; rather, it greatly increases the risk); Gallagher, 925 N.E.2d 350 (Ind. 2010) (affirming conviction for Class A felony dealing in controlled substance where State adequately rebutted defense that: 1) D was only

“briefly” within 1000 feet of a school, and 2) he was within 1000 feet of school only because law enforcement suggested location for drug transaction. Sale occurred in D's car within 230 feet of school for as little as thirteen and one half minutes, but during that time, he was principally engaged in illegal conduct, clearly visible to anyone present; moreover, informant testified that D chose the location).

TITLE: Haley v. State

INDEX NO.: K.8.a.

CITE: (3rd Dist., 10-17-00), Ind. App., 736 N.E.2d 1250

SUBJECT: Taking judicial notice of school - no denial of right to confrontation

HOLDING: In prosecution for dealing controlled substance within 1,000 feet of school property, Tr. Ct. did not deny D his right to confrontation under Indiana Constitution when it took judicial notice that Howe Military Institution in LaGrange County is school. At close of evidence, Tr. Ct. instructed jury that it had taken judicial notice that Howe is school within meaning of statute, but jury was not required to accept fact as conclusive. Indiana Evidence Rule 201(a) provides: "[a] judicially-noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within territorial jurisdiction of Tr. Ct., or (2) capable of accurate & ready determination by resort to sources whose accuracy cannot reasonably be questioned." When Ct. takes judicial notice, a party is entitled, upon timely request, to opportunity to be heard as to propriety of taking judicial notice. Ind. Evidence Rule 201(e).

Certain firmly established evidence rules are not consistent with constitutional right to meet witnesses face to face. Although judicially noticed facts are contradictory to right of confrontation, they are admissible so long as requirements of Indiana Rule of Evidence 201 are met. By satisfying requirements of this evidence rule, reliability of judicially noticed facts is safeguarded, & thus, their admission does not violate constitutional right of confrontation. Here, D did not argue that requirements of Rule 201 were not met. Fact that Howe is private school is generally known within LaGrange County. Before taking judicial notice of this fact, Tr. Ct. held hearing to provide D with opportunity to be heard on matter. D could have offered evidence at hearing or at trial to contest that Howe is school within meaning of law. Since evidence was admissible under I.R.E. 201, it was sufficiently reliable & therefore, D's constitutional right of confrontation was not violated. Held, judgment affirmed.

TITLE: Halferty v. State
INDEX NO.: K.8.a.
CITE: (07-09-10), 930 N.E.2d 1149 (Ind. Ct. App 2010)
SUBJECT: Dealing in methamphetamine - insufficient evidence
HOLDING: Court *sua sponte* found class A felony conviction for dealing in methamphetamine (Ind. Code § 35-48-4-1.1) was not supported by sufficient evidence that D had at least three grams of

methamphetamine in his apartment. Proof of three grams of methamphetamine may be shown with both finished methamphetamine and methamphetamine in process of being manufactured. Traylor v. State, 817 N.E.2d 611, 619 (Ind. Ct. App. 2009). Officer's testimony that "in general" the conversion rate of cooking mixture of ephedrine/pseudoephedrine into methamphetamine is "usually right around 70, 80 percent" did not prove beyond a reasonable doubt that if cooked, the 4.61 grams of ephedrine/pseudoephedrine mixture plus the .4 grams of methamphetamine would combine to at least three grams of methamphetamine, especially because officer admitted that many variables, including who cooked the ephedrine/pseudoephedrine mixture, could result in a conversion ratio of less than 50%. Court raised issue *sua sponte* because conviction lacking sufficient evidence constitutes fundamental error. See Miller v. State, 616 N.E.2d 750, 751 n.3 (Ind. Ct. App. 1993).

However, because Tr. Ct. instructed jury on class B felony dealing methamphetamine as a lesser included offense of class A version of offense and because Court found evidence sufficient to support class B version of offense, Court remanded matter to Tr. Ct. and instructed it to enter conviction for class B felony dealing methamphetamine and revise D's sentence accordingly. Held, conviction for class A felony dealing methamphetamine reversed and matter remanded for entry of conviction for class B felony dealing methamphetamine and revision of D's sentence.

RELATED CASES: Harmon, 971 N.E.2d 1149 (Ind. Ct. App 2012) (assuming without deciding that liquid methamphetamine base constitutes completed methamphetamine, State presented insufficient evidence of the weight of the liquid; rather than weigh the liquid, a Trooper conducted an in-court demonstration in which he compared a vial of liquid taken from each container to a sugar packet which weighed 2 grams and determined that their weight was approximately the same; this "human scale" approach was insufficient to prove enhancement; Vaidik, J., concurring on basis that liquid methamphetamine base does not constitute methamphetamine and weight of methamphetamine that would be produced if manufacturing were complete can be established by a expert using a conversion ratio based on the amount of ephedrine or pseudoephedrine present); Fancil, 966 N.E.2d 700 (Ind. Ct. App 2012) (police officer's opinion that a person "could" make over three grams of methamphetamine from fifteen grams of pseudoephedrine was insufficient to prove D did not make that much methamphetamine); Hundley, 951 N.E.2d 575 (Ind. Ct. App 2011) (unlike in Halferty, no conversion from precursors was necessary because the pill dough/adulterated drug contained finalized methamphetamine).

TITLE: Hall v. State
INDEX NO.: K.8.a.
CITE: (12/5/2019), Ind. Ct. App., 137 N.E.3d 279
SUBJECT: Insufficient evidence of the enhancing circumstance that D "manufactured" heroin
HOLDING: Defendant was convicted of Level 4 felony aiding the dealing of a narcotic drug, a charge that was elevated from a Level 5 felony based on the enhancing circumstance that she "manufactured" heroin. To support the enhancement, the State relied on the testimony of an undercover law enforcement officer regarding the common practices of drug dealers in southern Indiana to show that her accomplice packaged the drug by placing it in smaller baggies.

The Court of Appeals reversed, finding the undercover agent's testimony was too speculative to prove beyond a reasonable doubt that Defendant packaged the drug sold. Even if the agent's testimony was sufficient to show that Defendant's accomplice packaged the heroin, there was no evidence he did so in Defendant's presence or that she had any knowledge of it. The court declined to address Defendant's argument that the manufacturing statute is unconstitutionally vague and overbroad. Held, Level 4 felony conviction reversed and remanded with instructions to reduce Defendant's conviction to a Level 5 felony dealing of a narcotic drug.

TITLE: Halsema v. State

INDEX NO.: K.8.a.

CITE: (03-09-05), Ind., 823 N.E.2d 668

SUBJECT: Class A felony possession of methamphetamine - weight of drugs

HOLDING: In order to prove the element of weight of drugs or controlled substances, State must either offer evidence of its actual, measured weight or demonstrate that the quantity of drugs or controlled substances is so large as to permit a reasonable inference that the element of weight has been established. Here, despite State witness's testimony about seeing a "chunk of methamphetamine about the size of a charcoal," State presented insufficient evidence to prove that methamphetamine seized from Ds' house weighed at least three grams. There was no reference point to determine whether methamphetamine seized from house was similar in size, weight or density to individually packaged methamphetamine seized from Ds' vehicle. It was not clear exactly what role the witness's testimony played in State's theory of case, but record was clear that in comparison to drugs found in car, the amount of drugs found at residence was not "significant."

State argued that jurors were able to examine bag seized from dresser drawer & use their common sense & experience to determine whether methamphetamine was at least three grams. However, State introduced no evidence of weight, which Ct. concluded is not a matter of general knowledge & experience that jurors possess. Following North Carolina v. Mitchell, 442 S.E.2d 24, 28 (N.C. 1994), Ct. held that "the jury may not find the existence of a fact based solely on its in-Ct. observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record." Record in this case did not support view that quantity of methamphetamine seized from dresser drawer was so large that jury could infer that it weighed at least three grams. Held, transfer granted, convictions for possession of methamphetamine as Class A felonies reversed, remainder of Ct. App.' opinion at 783 N.E.2d 1199 summarily affirmed. In Frank Halsema's case, cause remanded with instructions to impose sentence as a Class B felony; in Richie Halsema's case, remanded with instructions to vacate conviction, as witness did not have authority to consent to bureau she used & shared with D (see below); Shepard, C.J. & Dickson, J, dissenting on consent issue.

RELATED CASES: Koenig, 933 N.E.2d 1271 (Ind. 2010) (allowing lab report showing methadone in deceased victim's blood admitted through coroner rather than analyst was constitutional error, but harmless beyond a reasonable doubt); Boggs, 928 N.E.2d 855 (Ind. Ct. App 2010) (testimony of police officers experienced with drugs was sufficient to show identity of drugs & fact D possessed pseudoephedrine, anhydrous ammonia, marijuana and methamphetamine.

TITLE: Harrison v. State

INDEX NO.: K.8.a.

CITE: (4th Dist., 02-26-09), 901 N.E.2d 635 (Ind. Ct. App. 2009)

SUBJECT: Insufficient evidence to support 1000-foot enhancement

HOLDING: In possession/dealing in cocaine prosecution, State failed to present sufficient evidence to support the 1000-foot enhancement. For an offense that requires proof of delivery, financing the delivery or possession of cocaine, a narcotic drug, methamphetamine, or controlled substance within 1000 feet of school, park, family housing complex or youth center, the person charged may assert the defense that: (1) the person was briefly within 1000 feet of the school, park, family housing complex or youth program center; and (2) no person under eighteen years of age at least three years junior to the person was within 1000 feet of the school, park, family housing complex, or youth program center at the time of the offense. Ind. Code 35-48-4-16(b). This constitutes a mitigating factor that reduces culpability, and therefore the D does not have the burden of proof but only the burden of placing the issue in question where State's evidence has not done so. Once at issue, State must rebut the defense by proving beyond a reasonable doubt either that the D was within 1000 feet of a public park more than "briefly" or persons under the age of eighteen at least three years junior to the D were within 1000 feet of the public park (because both factors are required to effectuate the mitigation).

Here, D met with an undercover police officer near Wheeler Mission in Indianapolis, and then walked with the undercover officer to a point 703 feet from University Park where he delivered cocaine. D requested and Tr. Ct. gave an instruction on the statutory mitigator to the 1000-foot enhancement. This evidence placed the statutory mitigating factors at issue, and thus State had the burden of proving beyond a reasonable doubt either that D was within 1000 feet for more than a brief time or that there were children within 1000 feet of University Park. The State failed to show how far the Wheeler Mission was from the cocaine delivery, occurring 703 feet from University Park. Also, the cocaine delivery occurred on a windy, rainy evening in mid-March when it was highly unlikely children would be present. In fact, State presented no evidence that children were present. Thus, State failed to carry its burden. Held, judgment reversed in part and remanded with instructions to enter judgment of conviction for class B felony dealing in cocaine and for resentencing and vacate the judgment of conviction for possession of cocaine based on double jeopardy principles.

RELATED CASES: Griffin, 922 N.E.2d 1255 (citing Harrison, Ct. held that State bears burden to rebut statutory defense in Ind. Code 35-48-4-16(b) because defense is not an affirmative defense but a mitigating factor that reduces culpability).

TITLE: Hatcher v. State

INDEX NO.: K.8.a.

CITE: (1-31-02), Ind. App., 762 N.E.2d 170

SUBJECT: Manufacturing methamphetamine - State does not have to show manufactured for use by another

HOLDING: Ind. Code 35-48-4-2(a)(1), dealing in Schedule II controlled substance if person knowingly or intentionally manufactures methamphetamine, does not require State to prove that D manufactured it for use by another. "Manufacture" as defined by Ind. Code 35-48-1-18 does not include preparation or compounding of controlled substance by individual for his own use. Whether legislature intended to create exception for individuals who manufacture methamphetamine for their own use is matter of statutory construction. In 1999, legislature enacted Ind. Code 35-48-4-14.5, possession of chemical reagents or precursors with intent to manufacture, which allows individuals to be found guilty of class D felony if found in possession of two or more of reagents used to manufacture methamphetamine. Legislature could not have intended to enact statute allowing one to be subjected to criminal liability for possession of ingredients, but to be excluded from liability if ingredients were used to manufacture finished product. Further, legislature subsequently amended statutory definition of "manufacture" to delete exclusion for those who prepare for their own use. Held, judgment affirmed. Sullivan, J., concurring, disagreed with majority's analysis but concluded that amount of methamphetamine warranted conclusion that drug was being manufactured for distribution, not D's own use.

RELATED CASES: Murray, App., 798 N.E.2d 895 (although "personal use" language was incorrect statement of law to extent it resurrected personal use exception, instructions as a whole adequately informed jury of law); Poe, App., 775 N.E.2d 681 (Tr. Ct. abused its discretion when it refused D's tendered instruction that contained accurate definition of manufacturing according to statute in effect at time of alleged offenses); Bradley, App., 765 N.E.2d 204 (Ct. agreed with Judge Sullivan's concurring opinion in Hatcher, wherein he concluded that given clear language of then-existing statute, a person could be convicted of crime of possession of chemical reagents with intent to manufacture methamphetamine only if State proved that intent to manufacture methamphetamine was not for his personal use).

TITLE: Hudson v. State
INDEX NO.: K.8.a.
CITE: (4th Dist. 4/26/84) Ind. App., 462 N.E.2d 1077
SUBJECT: Dealing - sufficiency; controlled drug buy
HOLDING: Evidence of dealing was sufficient where police did thorough pat down of informant before and after purchases and provided undercover police automobile as transportation for informant to meet D and purchase drugs. Here, D contends police should have strip searched (including body cavity check) informant and searched undercover police car. Adequacy of controls in police buys goes to weight & credibility of evidence rather than to burden of proof. Uncorroborated testimony of informant-buyer is sufficient to convict, despite any arguable inadequacies in controls of buys. See Hudgins, 443 N.E.2d 830; Haynes, 431 N.E.2d 83. Held, conviction affirmed.

RELATED CASES: Bowman, 51 N.E.3d 1174 (Ind. 2016) (evidence sufficient despite fact D cogently raised an "alarming specter" that informant framed D and procedural irregularities accompanying the controlled buy allowed it to happen); Maish, 916 N.E.2d 918 (Ind. Ct. App 2009) (uncorroborated testimony of buyer was sufficient to convict despite fact officers did not witness exchange, did not properly search buyer, & did not, at all possible times, keep buyer under surveillance).

TITLE: Hundley v. State
INDEX NO.: K.8.a.
CITE: (07-14-11), 951 N.E.2d 575 (Ind. Ct. App 2011)
SUBJECT: Dealing in methamphetamine in excess of three grams - evidence sufficient
HOLDING: Ind. Code 35-48-4-1.1 proscribes the "manufacture" or financing of the manufacture of "methamphetamine, pure or adulterated," and offense is a Class A felony if the "amount of the drug involved weighs three (3) grams or more." Court construed "adulterated" to mean "impure," regardless of whether the impurities are the result of the manufacturing process or are subsequently introduced into a pure substance. See also Traylor v. State, 817 N.E.2d 611 (Ind. Ct. App 2004); Norwood v. State, 670 N.E.2d 32 (Ind. Ct. App 1996).

Here, officers found a mass of pill dough in the methamphetamine lab in D's locked truck. The pill dough was a mixture of methamphetamine in its final form and the by-products of manufacturing the methamphetamine. A 7.13-gram sample of that mass tested positive for the presence of methamphetamine, and Court held that the weight of the pill dough that was created in the process of manufacturing methamphetamine should be considered as a whole in determining the weight element of the offense. Where, as here, the intermediate step is so near the end of the manufacturing process that the final product is present in the chemical compound, that substance qualifies as an "adulterated drug" for purposes of Indiana's manufacturing statutes. Held, conviction affirmed.

TITLE: Hyche v. State

INDEX NO.: K.8.a.

CITE: (09-23-10), 934 N.E.2d 1176 (Ind. Ct. App 2010)

SUBJECT: Dealing - insufficient evidence where D was purchaser

HOLDING: D, who was attempting to purchase ecstasy, did not fall within the legislature's definition of a person who has committed dealing and therefore could be guilty of felony murder. To find a D guilty of felony murder, the State must prove that the D attempted to commit or committed dealing in a schedule I substance. A person who knowingly or intentionally delivers or finances the delivery of a controlled substance commits dealing. Here, a third party put D, who was wanting to purchase ecstasy, in touch with Rollins. When Rollins and a companion arrived at the designated location for the drug deal, shots were fired into Rollins car, killing his companion and wounding Rollins. D was acquitted of murder but found guilty of felony murder and dealing. State argued D delivered the drugs by calling another to arrange the drug transaction or financed the delivery of drugs by attempting to purchase the ecstasy. The fact that D called another person to request drugs no more makes him a dealer in ecstasy than it would make a customer who calls the florist a dealer in flowers. Because the record is devoid of any evidence that D was acting on the distribution side, he cannot be said to have organized the delivery of ecstasy under the statute. Because D acted merely as a purchaser and not as a creditor or an investor, he could no more be deemed to be financing the delivery of ecstasy than a grocery shopper could be deemed to be financing the supermarket's inventory. Finally, the State argues that D aided in dealing ecstasy. However, D and Rollins were not companions. To find that D's offer to purchase the drug somehow amounts to organizing, financing, or even inducing its delivery, defies logic and cannot reasonably reflect the intent of the General Assembly in enacting these statutes. Thus, the evidence is insufficient to support D's convictions for dealing and felony murder. Held, judgment reversed.

TITLE: Jones v. State

INDEX NO.: K.8.a.

CITE: (07-07-10), 2010 Ind. App. LEXIS 1206 (Ind. Ct. App 2010)

SUBJECT: Incorrect instruction on definition of "family housing complex" - ex post facto

HOLDING: D's conviction for dealing in cocaine as a class A felony was reduced to a class B felony because the jury was incorrectly instructed regarding the statutory definition of "family housing complex" that was not in effect at the time of the offense. Prior to July 1, 2006, when D committed his offense at Greentree Apartments, "family housing project" was defined as a building or series of buildings: 1) "owned by a governmental unit or political subdivision, 2) that contained at least twelve dwelling units, and 3) where children are domiciled or are likely to be domiciled." The amendment to Ind. Code 35-38-1-10.5 broadened the kinds of places that qualify as a family housing project to include buildings or series of buildings: "2) that are operated as hotels or motels; 3) that are operated as an apartment complex, or 4) that contain subsidized housing.

D was convicted pursuant to 3) above, i.e., a series of buildings operating as an apartment complex. However, there was no evidence establishing that Greentree was owned by a governmental unit or political subdivision, which was an element required to establish Greentree was a "family housing complex" as it was defined at time of offense. Thus, evidence was not sufficient to prove Greentree was a family housing complex on day in question and jury could not have so found. Accordingly, because Tr. Ct. erroneously instructed jury, D's dealing conviction was enhanced via a statute that, after the acts were committed, changed the elements of the crime of which he was charged. This violates the prohibition against ex post facto laws and therefore constitutes fundamental error. Held, class A felony dealing in cocaine conviction reduced to dealing as class B felony.

TITLE: Lothamer v. State

INDEX NO.: K.8.a.

CITE: (9/30/2015), 44 N.E.3d 819 (Ind. Ct. App 2015)

SUBJECT: Sufficient evidence D acted in concert to manufacture methamphetamine

HOLDING: State presented sufficient evidence that D knowingly or intentionally aided an acquaintance in making methamphetamine in the home D shared with his girlfriend.

D and girlfriend allowed Willie Jensen to make meth in their home. D provided pseudoephedrine and other items to Jensen to use to make the drug and also installed hooks so blankets could be hung to keep the odors in the bathroom while Jensen cooked the methamphetamine. D can be guilty of dealing in methamphetamine by manufacturing even though the person does not actually “cook” the product. See, e.g., Fowler v. State, 900 N.E.2d 770 (Ind. Ct. App 2009). Evidence in this case shows that D was not merely present at the scene, but acted in concert with Jensen to manufacture methamphetamine, and it supports a reasonable inference that he knowingly and intentionally aided Jensen in the manufacture of meth. Held, judgment affirmed.

TITLE: Lovell v. State

INDEX NO.: K.8.a.

CITE: (5th Dist., 8-12-04), Ind. App., 813 N.E.2d 393

SUBJECT: Manufacturing methamphetamine - proving that D was not a "practitioner"

HOLDING: Tr. Ct. properly denied D's motion for judgment on evidence with respect to count of dealing in methamphetamine by manufacturing. The term "manufacture" does not include preparation, compounding, packaging or labeling of a controlled substance "by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice," or "by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis & not for sale" Ind. Code 35-48-1-18(1)(A) & (B). D argued that State had burden to prove that she was not a "practitioner" as defined in statute. State presented specific evidence of methamphetamine manufacture in several rooms of D's residence, in her car, & strewn throughout her yard. It was reasonable for jury to conclude that location & type of this evidence was inconsistent with possibility that a "practitioner" had been working out of D's residence. Further, D's behavior in attempting to leave her residence undetected after officers had knocked on her door is not consistent with behavior of a "practitioner" acting within confines of law. Held, judgment affirmed.

TITLE: McAlpin v. State

INDEX NO.: K.8.a.

CITE: (8/14/2017), 80 N.E.3d 157 (Ind. 2017)

SUBJECT: Dealing in methamphetamine - drug-free zone enhancement

HOLDING: While it may have been "a close factual call," sufficient evidence allowed the jury to conclude that a minor was "reasonably expected" to be present when D dealt and possessed methamphetamine within 500 feet of a public park. Thus, Court affirmed his enhanced convictions under Ind. Code § 35-48-1-16.5, -4-1, -4-1.1 (2014). D argued that because schools were in session and there was no playground equipment or benches at Bicentennial Park in Madison, Indiana – only open fields, an amphitheater and public restrooms – children were not "reasonably expected" to be at the park while D was manufacturing meth. But analysis of the objective, fact-sensitive “reasonably expected” standard is best left to the jury that heard all of the evidence in the case. Considering the circumstantial evidence available to the jury — including that Bicentennial Park is surrounded by homes and offers amenities such as an amphitheater and open fields where children can run and play — the jury could reasonably infer that children were “reasonably expected” to be present at the park while D manufactured meth. Held, transfer granted, Court of Appeals' opinion at 72 N.E.3d 940 vacated, judgment affirmed.

TITLE: McKinley v. State
INDEX NO.: K.8.a.
CITE: (10/6/2015), 45 N.E.3d 25 (Ind. Ct. App 2015)
SUBJECT: Jury instruction on mens rea for possession with intent to deliver was not fundamental error

HOLDING: Tr. Ct. did not commit fundamental error in instructing the jury as to the requisite mental state for the offense of possession of cocaine with intent to deliver. Jury was instructed that in order to convict D, it would have to find he knowingly possessed the cocaine with the intent to deliver. However, Tr. Ct. did not define "intent to deliver." D argued that by including the word "knowingly" as an element of the offense, the jury was permitted to convict him on the dealing charge without finding a specific intent to deliver. D failed to object to the instruction and failed to show fundamental error because the instructions as a whole sufficiently informed the jury of the requirement of intent to deliver. Intent to deliver was the central issue at trial. Although defining "intent to deliver" may have been preferable, terms in common use that can be understood by a person of ordinary intelligence do not always need to be defined. Held, judgment affirmed.

Note: Following reasoning in Louallen v. State, 778 N.E.2d 794 (Ind. 2002), Court rejected D's argument that specific intent is required with respect to every element of possession of cocaine with intent to deliver (i.e., possession, delivery, weight, and intent that the substance was actually cocaine).

TITLE: Polk v. State
INDEX NO.: K.8.a.
CITE: (7-23-97), Ind., 683 N.E.2d 567
SUBJECT: Enhancement for possession within 1000 feet of school - moving vehicle
HOLDING: School-zone sentencing enhancement was properly applied to D's possession convictions as matter of statutory construction, where D was passenger in moving vehicle that was stopped by police for traffic violation within 1000-foot zone. Ct. rejected D's argument that enhancement as applied in this case did not advance statute's underlying objective of protecting school children from effects of drugs, & that enhancement should apply only to cases of drug possession or distribution near school property. Application of statute under facts of this case did not violate D's right to due process or equal protection under Fourteenth Amendment to United States Constitution. Goal of drug-free school zone is legitimate legislative objective, & enhancement provides clear notice of prohibited conduct & is rationally related to protecting welfare of children. Held, convictions & sentence affirmed; Sullivan, J., concurring.

TITLE: Prigeon v. State

INDEX NO.: K.8.a.

CITE: (2d Dist. 04/15/91), Ind. App., 569 N.E.2d 722

SUBJECT: Dealing in marijuana in or on school property (Ind. Code 35-48-4-10(b)(2)(B))

HOLDING: Conviction for dealing in marijuana "in or on school property" as Class C felony was improper because college dormitory room is not "school property" within meaning of Ind. Code 35-48-4-10(b)(2) (B). D sold marijuana to police officer from his dormitory room at Ball State University on 2 occasions. Prior to trial he filed motion to dismiss on ground sales did not occur on "school property." His motion was denied & he was convicted on 2 counts as Class C felonies. Ct. App. found that this was case of first impression & looked to decisions from other states as well as Indiana law dealing with statutory construction & definitions of school property. Ct. noted importance of strictly construing criminal statutes defining offenses to avoid creation of penalties by construction, & found that colleges & universities had been excluded from "common usage" of term "school" in Lawrence v. Cain (1969), 144 Ind. App. 210, 245 N.E.2d 663, as well as in cases from Idaho & Ohio. Other language in statute providing for enhancement included "school bus," & "school children," & these have been defined as applying to levels through high school. Ct. concluded that legislature's intent was to protect children, & that including colleges & universities within marijuana statute was overly broad interpretation of legislative intent. Held, conviction reversed & remanded with instructions to sentence as Class A misdemeanor.

TITLE: Reynolds/Herr v. State

INDEX NO.: K.8.a.

CITE: (4th Dist. 12/11/91), Ind. App., 582 N.E.2d 833

SUBJECT: Constitutionality of elevation of drug possession or dealing near school property

HOLDING: Enhancement of drug offenses under Ind. Code 35-48-4-1 & 35-48-4-6 due to proximity to school property of delivery and/or possession is not violation of equal protection of law, & statutes are not over-broad nor under-inclusive. D's convictions for possession & dealing of cocaine were enhanced because transaction took place within 1,000 feet of school. Constitutionality of provisions was case of first impression, but similar federal statute, 21 U.S.C. 845(a) has been upheld. In upholding federal statute, Circuit Ct. noted that classification for higher punishment did not involve "suspect class" or fundamental right (or even legally protected activity), & that it rationally effectuated purpose of creating "drug-free zone" around schools, lessening risk that they would become available to school children, US v. Holland (D.C. Cir., 1987), 810 F.2d 1215. Holland Ct. also determined issues of over-breadth & under-inclusiveness adversely to D. Ct. adopted reasoning of Holland, finding Indiana legislature's intent to be same as Congress', & that increased penalties for drug offenders who commit offenses near school property is rationally related to that intent, Pridgeon, App., 569 N.E.2d 722.

RELATED CASES: Schnitz, App., 650 N.E.2d 717; Bailey, App., 603 N.E.2d 1376 (State established that community center was school property. No error to instruct that school property is "property owned or rented by a school corporation," even though statute defines it as "building or other structure owned or rented by a school corporation.")

TITLE: Richard v. State

INDEX NO.: K.8.a.

CITE: (10/8/2014), 19 N.E.3d 284 (Ind. Ct. App 2014)

SUBJECT: State failed to prove existence of family housing complex at time of crime

HOLDING: Court reversed D's Class A felony conviction for dealing cocaine within 1,000 feet of a family housing complex because State failed to prove the complex qualified as family housing under the law at the time of the offense. State proved that Garden Estates Housing Complex qualified as a family housing complex under the statute at the time of D's trial, but did not prove beyond a reasonable doubt that such was true at the time D committed the offense, which occurred more than one year earlier. The fact that a family housing complex existed at the time of the offense is an essential element of the charge.

As to second count of dealing in cocaine within 1,000 feet of a public park, State presented sufficient evidence from a Michigan City Sanitary District employee that the park was owned by a political subdivision, as is required by Ind. Code § 35-41-1-23.7, at the time the offense was committed. Held, judgment affirmed in part, reversed in part and remanded with instructions to enter conviction as a Class B felony and resentence D accordingly.

TITLE: Simmons v. State

INDEX NO.: K.8.a.

CITE: (2nd Dist., 6-3-05), Ind. App., 828 N.E.2d 449

SUBJECT: Weight of separate cocaine sales can enhance conspiracy conviction

HOLDING: Ct. held that two separate sales of cocaine to the same individual could be aggregated to enhance a conspiracy to deal in cocaine from a Class B to a Class A felony. Although criminal statutes are to be strictly construed against the State, Ct. need not interpret statute because it was only asked to review the sufficiency of the evidence. Further, Ct. found sufficient evidence of an agreement to deal in cocaine to support the convictions against both Ds. Ct. distinguished Washington v. State, 807 N.E.2d 793 (Ind. Ct. App2004), where State only proved that D was involved in one of five buys. The evidence here demonstrates an intelligent & deliberate agreement to deal in three or more grams of cocaine. These buys occurred very close in time in one location. This is not a situation where the State attempted to link several independent buys to justify the enhancement. Ct. also found no problem with inconsistent verdicts as one D was acquitted of dealing in cocaine but convicted of conspiracy to deal. The second D was only charged with conspiracy & “there must be two verdicts before any question of fatally inconsistent verdicts exists.” Green v. State, 808 N.E.2d 137 (Ind. Ct. App2004). Ct. distinguished Owsley v. State, 769 N.E.2d 181 (Ind. Ct. App2002), where Ct. reversed D's possession conviction by asking if he did not possess cocaine on that date, how could he have provided cocaine to [the seller]?@ Here, State was not required to establish that the D who had a viable claim of inconsistent verdicts actually sold the cocaine. The jury was free to believe some portions of the evidence as it related to conspiracy but disagree as to others that would establish dealing. Held, judgment affirmed.

TITLE: Smalley v. State

INDEX NO.: K.8.a.

CITE: (3rd Dist., 8-8-00), Ind. App., 732 N.E.2d 1231

SUBJECT: Dealing in cocaine - sufficiency of circumstantial evidence

HOLDING: Evidence was sufficient to support D's conviction for dealing in cocaine, despite fact that State chemist did not test cocaine residue from bag handed directly to undercover detective by D. Identity of drug can be proven by circumstantial evidence, which no longer requires opinion testimony by one experienced with drug. Clifton, 499 N.E.2d 256 (Ind. 1986). Here, circumstantial evidence provided clear support for finding that substance D handed to officer was in fact crack cocaine: 1) D testified that he was drug addict & that substance was cocaine; 2) detective, who had been involved in hundreds of drug investigations, believed material that D smoked was crack cocaine; 3) substance that D smoked appeared to be identical to substance that third party obtained; 4) third party obtained both first & second bags from same source within span of few minutes; & 5) under chemical analysis, white chunky substance in second bag was determined to be cocaine. While any one of these facts standing alone may not have been sufficient evidence that substance in first bag handed to detective was crack cocaine, in totality they support such conclusion beyond reasonable doubt. Thus, evidence was sufficient to support conviction for dealing cocaine, regardless of whether jury chose to find D guilty based on his direct transfer of package of cocaine to detective or on his organization of third party's transfer of cocaine to detective. Held, conviction affirmed.

RELATED CASES: Jones, App., 807 N.E.2d 58 (circumstantial evidence was sufficient to identify cocaine & opinion testimony by someone sufficiently experienced with the drug could accomplish this identification).

TITLE: State v. Morgan

INDEX NO.: K.8.a.

CITE: (8/16/2016), 60 N.E.3d 1121 (Ind. Ct. App 2015)

SUBJECT: Erroneous grant of motion to dismiss drug charges - nurse issuing invalid prescriptions

HOLDING: Tr. Ct. abused its discretion in granting D's motion to dismiss charges of corrupt business influence, conspiracy and aiding dealing in schedule III controlled substances against her. D worked as a registered nurse at a drug addiction recovery clinic, allegedly participating with clinic physician in the ongoing delivery of invalid prescriptions for Suboxone. She successfully sought dismissal of charges against her in Tr. Ct. on basis that it was impossible for her to have known, as a non-physician, whether her actions were outside the usual course of professional medical practice.

Court of Appeals disagreed, holding that the question is one of fact for the jury, not appropriately addressed in a motion to dismiss. D cited no authority for the proposition that a non-physician can never know whether certain conduct is outside the usual course of professional medical practice. Court also rejected D's claim that the criminal statutes in question are void for vagueness as applied to her. A person of ordinary intelligence would easily understand that agreeing with or assisting a physician to distribute prescriptions for controlled substances that the person knows to be invalid is proscribed conduct. Held, judgment reversed and remanded with instructions to reinstate criminal charges against D.

TITLE: Stokes v. State

INDEX NO.: K.8.a.

CITE: (2nd Dist., 1-22-04), Ind. App., 801 N.E.2d 1263

SUBJECT: Conspiracy/Dealing in cocaine - sufficiency

HOLDING: Evidence was sufficient to support D's convictions for dealing in cocaine & conspiracy to commit dealing in cocaine. Videotape surveillance showed D going into residence with different people & reaching into windowsill where cocaine was later recovered. Surveillance also showed one woman putting something in her bra after having been with D. The woman's vehicle was later stopped & cocaine was found in her bra. Circumstantial evidence of intent to deliver was sufficient to support conviction. Sufficient evidence also existed to establish that D possessed the cocaine.

Conspiracy to commit dealing in cocaine was sufficiently proven pursuant to Ind. Code 35-41-5-2. Surveillance showed D & co-D sitting together on a porch all day only leaving to meet individuals who approached them. Ct. specifically noted an instance where co-D accompanied person into property, who left carrying something. Co-D was observed twisting a plastic baggie into a knot & shortly thereafter handing something to D who was then seen counting money. Held, judgment affirmed.

TITLE: Vasquez v. State

INDEX NO.: K.8.a.

CITE: (2-2-01), Ind., 741 N.E.2d 1214

SUBJECT: Glue sniffing - evidence sufficient; identification of substance based solely on officer's experience

HOLDING: Lay opinion testimony of police officers was sufficient to support D's conviction for glue sniffing. Conviction requires that State prove that "[a] person who, with intent to cause a condition of intoxication...ingests or inhales the fumes of...a substance that contains: (A) toluene...." Ind. Code 35-46-6-2. Here, when officers found D, his balance & speech was impaired, & he was non-responsive to officers' questions. They also found clear liquid substance in bottle with rag soaked in substance nearby. Both officers testified that they believed substance to be toluene based solely on their previous experience with smell & appearance of substance. However, they testified that they had no special training & were not experts in identification by smell. On appeal, D argued that State did not prove either that substance was toluene or that D inhaled with intent to cause intoxication. Ct. disagreed, noting that identity of drug can be proven by circumstantial evidence, including opinion of someone sufficiently experienced with drug. Clifton v. State, 499 N.E.2d 256 (Ind. 1986). Fact that police officers found items commonly used in glue sniffing & that D was noticeably impaired when they arrived supported inference of D's intent to become intoxicated. Held, transfer granted, opinion of Ct. App. at 735 N.E.2d 1207 vacated, conviction affirmed.

RELATED CASES: Clark, 6 N.E.3d 992 (Ind. Ct. App 2014) (no error in allowing detectives to testify as to their opinion the substance recovered from D's pocket was marijuana and detectives' testimony was sufficient to establish it was marijuana; see full review at O.7.a); Upp, App., 808 N.E.2d 706 (evidence was sufficient to support inference that bag into which D was breathing contained glue, & evidence supported conclusion that D was impaired, where arresting officer testified that D had dazed expression about him & it appeared that he was unaware of what was going on, that his pupils were constricted, that D's legs were shaking, & that he had mucus coming from his nose); Boggs, 928 N.E.2d 825 (Ind. Ct. App 2010) (testimony of police officers could establish the identity and quantity of substances at trial because the officers were sufficiently experienced with methamphetamine and the substances involved in the manufacturing of the drug).

TITLE: Walker v. State

INDEX NO.: K.8.a.

CITE: (6-25-96), Ind., 668 N.E.2d 243

SUBJECT: Dealing cocaine within 1,000 feet of school - knowledge of school not required

HOLDING: Conviction for dealing in cocaine within 1,000 feet of school property does not require proof that D knew he was within that radius when crime was committed. Ind. Code 35-48-4-1 contains strict liability enhancement & does not require separate proof of scienter for element which legislature has not specifically required proof of knowledge. Held, Tr. Ct. affirmed; DeBruler & Sullivan, JJ., dissenting.

RELATED CASES: Prewitt, App., 761 N.E.2d 862 (D was properly charged with attempted possession of cocaine as Class B felony for being within 1,000 feet of family housing complex when offense occurred); Williford, App., 571 N.E.2d 310; Steelman, App., 602 N.E.2d 152 (no need for school to be visible from transaction site, & "line of sight" measurement appropriate); Bailey, App., 603 N.E.2d 1376.

TITLE: Wallace v. State

INDEX NO.: K.8.a.

CITE: (10/20/86) Ind., 498 N.E.2d 961

SUBJECT: Drug dealing - accomplice liability

HOLDING: Ct. rejects D's contention that his involvement in drug transaction was too minor to warrant conviction because he merely introduced drug buyer to drug seller. Trier of fact may infer participation from several factors considered together: presence, failure to oppose crime, companionship with principal, & conduct before, during & after offense which tends to show complicity. Hudak 446 N.E.2d 615. Here, Ct. finds drug purchases at issue would not have occurred without D. Police contacted D only after he suggested they call him next time they needed drugs. D gave original estimate for cost of "trees" (barbiturates), which was close to figure paid & introduced officers to seller & accompanied them to location where seller obtained drugs. Held, conviction affirmed.

RELATED CASES: Schnitz, App. 650 N.E.2d 717 (State presented sufficient evidence to show that D intentionally or knowingly aided P to commit offense of dealing cocaine).

TITLE: Washington v. State
INDEX NO.: K.8.a.
CITE: (4th Dist., 5-07-04), Ind. App., 807 N.E.2d 793
SUBJECT: Conspiracy to deal cocaine - insufficient evidence
HOLDING: Conviction for conspiracy to deal cocaine as a Class A felony could not stand where evidence directly linked D to only one of five sales of cocaine. Informant made five purchases of cocaine from co-D which totaled more than 3 grams of cocaine. D delivered one of those purchases & did not appeal his dealing conviction for that transaction. State, however, had gained conviction on theory that he could be held responsible for the entire weight of the drugs & all five transactions through a conspiracy charge. Ct. found it "untenable ... that evidence [D] agreed to deal cocaine on one occasion leads to the inevitable & reasonable inference that he was party to an agreement to do so on the four other occasions." Evidence of a mere relationship or association is not sufficient to sustain a conspiracy conviction. Williams v. State, 409 N.E.2d 571, 573 (Ind. 1980), & State must show that "an intelligent & deliberate agreement" existed between the parties. Frias v. State, 547 N.E.2d 809, 811 (Ind. 1989). Held, judgment reversed, vacated, & remanded for resentencing.

TITLE: Watson v. State

INDEX NO.: K.8.a.

CITE: (4th Dist., 12-30-05), Ind. App., 839 N.E.2d 1291

SUBJECT: Insufficient evidence of dealing where confidential informant (CI) not searched before buy

HOLDING: Ct. reversed conviction for Class A felony dealing in cocaine where police officers failed to search CI prior to controlled buy. Pursuant to Ind. Code 35-48-1-11, State had to show D possessed the cocaine before the buy & transferred it to the CI. The CI did not testify at trial & this fact, combined with the failure to search led to the reversal. Several cases were cited for describing a controlled buy as consisting of searching the person who is to act as the buyer prior to sending him to complete the buy. This establishes that the person making the purchase for the police does not possess contraband prior to the transaction. Ct. was not swayed by fact that police found the buy money on D after the transaction. Ct. emphasized that had the CI testified & the buy money was discovered on D, the jury would have had a reasonable basis for believing D had the cocaine before the buy. See Toney v. State, 715 N.E.2d 367 (Ind.1999). With neither present here, however, the jury was left to speculate as to whether D or the CI initially had the cocaine. Held, judgment reversed.

RELATED CASES: Maish, 916 N.E.2d 918 (Ind. Ct. App 2009) (unlike informant in Watson, buyer testified at trial and was not a confidential informant; inference made by jury that D transferred cocaine to buyer was not unreasonable); Ross, 908 N.E.2d 626 (Ind. Ct. App 2009) (distinguishing Watson, Ct. held that, despite the CI not testifying at trial, evidence was sufficient to support D's convictions for dealing in cocaine because CI was under constant surveillance & he did not possess any cocaine prior to meeting with D).

TITLE: Wattley v. State

INDEX NO.: K.8.a.

CITE: (3rd Dist., 12-29-99), Ind. App., 721 N.E.2d 353

SUBJECT: Dealing in cocaine - insufficient evidence of weight

HOLDING: Where D is charged with drug offense that is determined by weight of substance involved, State must prove that scale used to weigh substance was tested before & after its use. Robinson, App., 634 N.E.2d 1367. In dealing in cocaine prosecution, lab report showing that cocaine weighed 3.95 grams was admitted over D's hearsay objection for limited purpose of showing that substance was cocaine. However, State did not produce any evidence as to whether electronic scale had been tested either before or after drugs were weighed. Because no evidence as to accuracy of scale used to weigh cocaine was admitted into evidence, State failed to produce sufficient evidence to prove that cocaine weighed three grams or more. Held, remanded with instructions to reduce D's conviction from Class A felony to Class B felony.

RELATED CASES: Espinoza, App., 859 N.E.2d 375 (when lab report containing weights of marijuana was admitted during detective's testimony, D did not mention a foundation objection; D did not mention the accuracy of the scales until he moved for a directed verdict. Ct. concluded that D's objection was untimely & not sufficiently specific to alert Tr. Ct. to his objection regarding accuracy of scales); Willingham, App., 794 N.E.2d 1110 (State presented sufficient evidence to show that scales used to weigh cocaine were calibrated both before & after weighing cocaine); Guadian, App., 743 N.E.2d 1251 (D had burden to object to lack of proper foundation for scale's accuracy, which is foundational evidence, not element of crime).

TITLE: Whatley v. State
INDEX NO.: K.8.a.
CITE: (06-08-10), Ind., 928 N.E.2d 202, *habeas relief granted* 833 F.3d 762 (7th Cir. 2016)
SUBJECT: 1,000-foot drug enhancement - church is a youth program center
HOLDING: A church with an active youth program is a "youth program center" for purpose of the 1,000-foot enhancement. The offense of possession of cocaine over three grams is increased from a Class C felony to a Class A felony if D is within 1,000 feet of school property, a public park, a family housing complex or a youth program center. Ind. Code § 35-48-4-6. A "youth program center" is defined as: "(1) A building or structure that on a regular basis provides recreational, vocational, academic, social, or other programs or services for persons less than eighteen (18) years of age[;] (2) [t]he real property on which the building or structure described in subdivision (1) is located." Ind. Code 35-41-1-29.

Here, D was arrested inside his home with 3.2459 grams of cocaine. His home was 795 feet from a church, which regularly held youth programs. However, there was no sign or indication from the outside of the church as to the youth programs. Regardless, the only relevant considerations were whether there were programs provided on a regular basis for persons less than eighteen years old. A jury could properly find that the church was a youth program center because it provided a building or structure that on a regular basis offered recreational, social, or other programs or services for persons less than 18 years of age. Moreover, Court rejected D's argument that the definition of youth program center was unconstitutionally vague as applied to him. D could have objectively discovered church=s status as a youth program center by observing young people entering and exiting the church on a regular basis or by "contact[ing] [the church] to inquire whether programs were offered for youth on a regular basis." Held, transfer granted, Court of Appeals' opinion at 906 N.E.2d 259 vacated, judgment affirmed; Boehm and Rucker, JJ., dissenting on basis that a youth program center should be construed to those structures identifiable from their appearance as likely to house youth programs.

RELATED CASES: Whatley, 833 F.3d 762 (7th Cir. 2016) (habeas relief granted; statutory definition of "youth program center" was unconstitutionally vague); Abbott, 950 N.E.2d 357 (Ind. Ct. App 2011) *sum. aff'd*, 961 N.E.2d 1016 (it did not matter that church had only recently started to house a private school and there was no sign indicated that there was a school on church's property; all that matters is that an objective observer could discern that there was a school by observing children coming and leaving the church's property or by contacting the church and asking if it hosted a school).

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.a.1. Delivery (Ind. Code 35-48-4)

TITLE: Hamdi v. State

INDEX NO.: K.8.a.1.

CITE: (12/19/2022) Ind. Ct. App., 200 N.E.3d 956

SUBJECT: 2500 THC vape cartridges sufficient to enhance dealing in hash oil conviction

HOLDING: State presented sufficient evidence to support conviction for Level 5 felony dealing in hash oil, which requires weight of at least 300 grams, where Defendant delivered 2500 THC vape cartridges. To test the vape cartridges, the State sent seven different colored boxes from among the bulk packages to a lab in Mississippi for testing. Each of the samples tested positive for THC with a range of 24.3 percent THC to 30.5 percent THC per 1000 mg vial. Defendant first argued there was no measured weight for the vape pens and no testimony that the each pen truly contained one gram of liquid and that the representations on the packaging that the product was THC were not trustworthy. The Court of Appeals concluded that because 2500 pens were seized of one gram each and only 300 grams were required to elevate, the evidence was sufficient, and the jury was free to consider the credibility of the representation on the packaging of a marijuana leaf to indicate the items contained marijuana. Additionally, while only seven cartridges were tested and they each contained different levels of THC, they were homogenous in that they all contained THC, therefore the evidence was sufficient to support the elevated charges.

TITLE: Hurst v. State

INDEX NO.: K.8.a.1.

CITE: (4th Dist. 6/6/84) Ind. App., 464 N.E.2d 19

SUBJECT: Delivery - one transaction; 2 offenses

HOLDING: Where D sold 20 hits of LSD to one undercover officer & 10 hits to another at the same time/place, D was properly convicted of 2 counts of delivery. Lash 433 N.E.2d 764 (robbery of store & 2 employees = 3 convictions). Here, Ct. notes that determination of number of offenses focuses on definition of particular crime involved. Ct. distinguishes Duncan 412 N.E.2d 770, holding "dealing" in Ind. Code 35-24.1-4.1-2 is single sales transaction & sale involving several controlled substances is only one offense). Ind. Code 35-48-4-2 (evolved from Ind. Code 35-24.1-4.1-2) still includes term "dealing" & Ct. decides involvement of 2 buyers creates more than one transaction & thereby multiplies offenses. Each buyer is different principal making individual purchase. More than a "single intent & design" is involved. (Citations omitted.) Held, affirmed.

TITLE: Cline v. State

INDEX NO.: K.8.a.1.

CITE: (1st Dist., 01-25-07), Ind. App., 860 N.E.2d 647

SUBJECT: Dealing in marijuana - evidence sufficient where D "delivered" to passenger

HOLDING: Evidence was sufficient to prove D's intentional or knowing delivery of marijuana to passenger in his vehicle. "Delivery" means: 1) an actual or constructive transfer from one person to another of a controlled substance, whether or not there is an agency relationship. Ind. Code 35-48-1-11. Delivery does not require intent to relinquish control or possession of the controlled substance to another individual. Here, before police officer approached vehicle during traffic stop, D handed 25 grams of marijuana over to passenger & told him to hide it. Passenger then placed the marijuana underneath the passenger side floor mat. Although there was no evidence to suggest that D intended to relinquish permanent possession or control of marijuana to passenger, this is not what Ind. Code 35-48-1-11 requires. Moreover, passenger had the capability to maintain control over the marijuana after D handed it to him. Accordingly, evidence was sufficient to establish that D knowingly or intentionally delivered marijuana to passenger.

In so holding, Ct. acknowledged that evidence did not reasonably support an inference that D possessed the marijuana with intent to deliver to another in a sale, barter or gift transaction, because: 1) D possessed an amount of marijuana that was not inconsistent with personal use; & 2) it was packaged in a single bag & D had paraphernalia in his possession used to smoke marijuana. Nevertheless, evidence established that D knowingly or intentionally "delivered" marijuana to passenger within the statutory definition contained in Ind. Code 35-48-1-11. Held, conviction affirmed.

TITLE: Laird v. State

INDEX NO.: K.8.a.1.

CITE: (10/3/85) Ind., 483 N.E.2d 68

SUBJECT: Dealing - constructive transfer

HOLDING: Evidence was sufficient to sustain D's conviction for dealing where D gave bag containing drugs to girlfriend & directed her to give it to third party; later all 3 of them packaged the pills for sale. This was constructive transfer. Radford 468 N.E.2d 219 (D took \$ from informant & gave it to third party who gave drugs to informant). See US v. Walker (CA7 1974), 503 F.2d 1014 (D negotiated drug transaction & made daughter hand drugs to buyer). Held, conviction affirmed.

RELATED CASES: Reinhardt, App, 881 N.E.2d 15 (it is of no moment that D did not know identity of ultimate recipient of cocaine); Culbertson, App., 792 N.E.2d 573 (evidence was sufficient to support dealing in methamphetamine conviction, where D organized or supervised transfer of drugs); Cockrell, App., 743 N.E.2d 799 (state failed to establish constructive transfer of cocaine within 1000 feet of school).

TITLE: Tobias v. State
INDEX NO.: K.8.a.1.
CITE: (6/18/85) Ind., 479 N.E.2d 508
SUBJECT: Dealing - pharmacist
HOLDING: Ct. rejects D's contention that he could not be charged, tried & convicted of crime of dealing pursuant to Ind. Code 35-48-4-1 because he was a registered pharmacist. Ct. finds Ind. Code 35-48-4-14 implies separate crime involving violation of rules governing regulation of pharmacists who dispense drugs. Ind. Code 35-48-4-1 does not prohibit charging pharmacists with dealing. Held, no error.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.a.2. Possession with intent to deliver (Ind. Code 35-48-4)

TITLE: Barnett v. State

INDEX NO.: K.8.a.2.

CITE: (1st Dist. 09/26/91), Ind. App., 579 N.E.2d 84

SUBJECT: Possession of Class III controlled substance - codeine

HOLDING: D was convicted of multiple drug offenses which were merged into one count of possession of Schedule III controlled substance with intent to deliver. D questioned sufficiency of evidence. At issue were number of acetaminophen with codeine tablets. Ct. noted that Ind. Code 35-48-2-8 provides definition of narcotic drugs, which includes "any material, compound, mixture, or preparation containing....", & then goes on to describe various ways in which codeine can be included. The statute excepts certain mixtures containing other active medicinal ingredients that do not have stimulant or depressant effect. At trial, Ind. State Police chemist testified as to identity of pills & stated that codeine was controlled substance. Ct. disagreed with chemist's blanket classification of codeine as Schedule III controlled substance, because it is not statutorily classified as such in all cases. If acetaminophen is "active medicinal ingredient not having a stimulant or depressant effect on the central nervous system," & if there is no potential for abuse of the tablets, they may be excepted from Schedule III, Ind. Code 35-48-2-10(f). Ct. then held that before tablets at issue would fall within prohibited provisions, State must provide additional extrinsic evidence regarding quantity of codeine by weight & chemical properties of compound. Because such extrinsic testimony was missing, & because judicial notice of chemists' classification of tablets was improper, State failed to prove essential element of offense. Held, conviction for possession with intent to deliver Class III controlled substance reversed, & merger of counts set aside.

TITLE: Caruthers v. State

INDEX NO.: K.8.a.2.

CITE: (8-24-98), Ind., 698 N.E.2d 765

SUBJECT: Possession of cocaine with intent to deliver - insufficient evidence

HOLDING: Evidence was insufficient to prove that D possessed or constructively possessed cocaine with intent to deliver. Acting upon tip from confidential informant, police obtained search warrant to search D's mother's house. D was residing elsewhere at time but received mail at his mother's house & kept few items in discreet small area in house. Police found cocaine in home, but none of cocaine found was present in area where D kept his personal items. State's witness testified that she had called D at his mother's house about drug purchases on several occasions prior to day of police search, but D never personally delivered any drugs to witness. Relying on doctrine of constructive possession, State argued that evidence showed that D had intent & ability to maintain dominion over drugs found in house. However, State showed neither that D stayed in area in which items were found, nor could they place any other identifying marks of D such as fingerprints or other of D's specific possessions with drugs seized. Police did not find any items on D or in his car which showed his intent to maintain control over drugs in house. Held, conviction reversed; Selby, J., dissenting without opinion.

RELATED CASES: Hardister, 849 N.E.2d 563 (State failed to establish D's constructive possession of weapons recovered from basement & living room of house, but his efforts to dispose of cocaine demonstrate his dominion over it & support finding of constructive possession of cocaine); Gee, 810 N.E.2d 338 (evidence insufficient to show D was in constructive possession of drugs found in house he shared with relative; cannot draw inference that D knows of presence of drugs when contraband is found in plain view on premises that are not possessed exclusively by D & D is nowhere around).

TITLE: Dolkey v. State

INDEX NO.: K.8.a.2.

CITE: (7-6-01), Ind. App., 750 N.E.2d 460

SUBJECT: Possession of reagents/precursors with intent to deliver methamphetamine - failure to show rubbing alcohol is organic solvent

HOLDING: Where State does not show that rubbing alcohol is organic solvent but is merely used to extract ephedrine from pseudoephedrine tablets, then State has failed to prove an essential element of offense of possession of controlled substance with intent to deliver. Organic solvents are enumerated in Ind. Code 35-48-4-14.5 (b)(2) as a chemical reagent or precursor. However, rubbing alcohol is not specifically enumerated & must be established at trial. Judicial notice cannot be used on appeal to fill such gap when no evidence was presented at trial to show that rubbing alcohol is organic solvent, nor was judicial notice requested at trial. Held, conviction reversed.

RELATED CASES: Reemer, 835 N.E.2d 1005 (State proved that tablets found in D's possession contained one of statutory drug precursors identified in Ind. Code 35-48-4-14.5)

TITLE: Isom v. State

INDEX NO.: K.8.a.2.

CITE: (2d Dist. 03/03/92), Ind. App., 589 N.E.2d 245

SUBJECT: Dealing cocaine - insufficiency of evidence

HOLDING: Where D possessed only 0.88 grams of cocaine, even though contained in 10 baggies, evidence was insufficient to support conviction for possession of cocaine with intent to deliver, Ind. Code 35-48-4-1(a)(2)(C). D was originally stopped for traffic violation & outstanding warrants, & search of car revealed total of 0.88 grams of cocaine in 10 plastic baggies, .38 caliber handgun, & glass smoking pipe. Possession of large amount of controlled substance is circumstantial evidence of intent to deliver, & inference is stronger with greater amount in possession. Ct. found in this case that glass pipe looked like it had been used a lot, & that all evidence together was insufficient to support inference that D possessed cocaine with intent to deliver, rather than for personal use. Held, judgment reversed with instruction to enter conviction for possession of less than 3 grams & sentence accordingly, Hoffman, J., dissenting on this issue.

RELATED CASES: Johnson, App., 594 N.E.2d 817 (where D possessed 1.76 grams of cocaine packaged in small packets, & was known as frequent drug user, & no other circumstantial evidence of dealing was found, evidence was insufficient to support conviction for possession of cocaine with intent to deliver. Fact cocaine was packaged for sale, supported inference it had been purchased by D, as much as prepared for sale by him, & given D's own drug use, amount of cocaine supported personal consumption, rather than sale).

TITLE: Mason v. State

INDEX NO.: K.8.a.2.

CITE: (1/18/89), Ind., 532 N.E.2d 1169

SUBJECT: Possession with intent to deliver - circumstantial evidence

HOLDING: Circumstantial evidence of possession with intent to distribute, in form of testimony re: amount possessed & evidence regarding whether D is user, is sufficient if it generates reasonable inference that amount was excessive for personal use, & D was not a user. Circumstantial evidence need not exclude every reasonable hypothesis of innocence. Montego 517 N.E.2d 74. Probative value of possession of large amount of narcotics, in showing intent to distribute, increases with increase in amount found in D's possession. Id. Amount of heroin found in D's possession, slightly over three grams with approximate street value of \$375, was about 5 times daily intake of heavy user, according to police detective. D lacked swollen hands characteristic of all heroin users, & track marks found in needle users. Also, confidential informant told police D was dealer [no discussion of whether that tip was in evidence before jury.] Since amount was more consistent with what dealer would carry on his person, & amount was large in view of fact D was inferably not user, conviction of possession with intent to distribute was supported by evidence. Affirmed.

TITLE: Romack v. State

INDEX NO.: K.8.a.2.

CITE: (4th Dist. 3/31/83) Ind. App., 446 N.E.2d 1346

SUBJECT: Dealing - possession with intent to deliver

HOLDING: Intent to deliver methaqualone may be inferred from quantity in D's possession (200 tablets), sale of marijuana to police informer & small quantity (15 or 16 tablets) of methaqualone in D's shirt pocket. Here, state failed to produce evidence that D either sold or offered to sell methaqualone. Illegal possession of large quantities of narcotics does not create a presumption of intent to deliver but may support an inference of intent. See Gray 231 N.E.2d 793; Thompson, App., 400 N.E.2d 1151; Stayton, App., 400 N.E.2d 784. Ct. finds marijuana sale to informer indicated D was in business of selling controlled substances. Small amount of tablets in shirt pocket indicated intent to separate tablets for sale from those for personal use. Ct. notes state failed to introduce expert testimony as to quantity & personal use, thus importance of quantity was attenuated because of absence of such testimony. Had quantity been less in this case than it was, omission of expert testimony might have proven fatal. Held, evidence sufficient to support conviction.

RELATED CASES: Hazzard, 642 N.E.2d 1368 (where D possessed approximately 25 grams of cocaine in various forms, & had handgun & nearly \$6000 in cash at time of arrest, jury could reasonably infer beyond reasonable doubt that D intended to deliver cocaine); Chandler 581 N.E.2d 1233 (instruction stating "[p]ossession of a large amount of narcotics is circumstantial evidence of intent to deliver ...," was erroneous, as that is standard of review. See full review at D.9.g.2.h); Meiher 461 N.E.2d 115 (quantity plus prior sale).

TITLE: Warthan v. State
INDEX NO.: K.8.a.2.
CITE: (10/13/82) Ind., 440 N.E.2d 657
SUBJECT: Possession - proof
HOLDING: Testimony of undercover agent that D told undercover agent he possessed LSD on green blotter paper as agreed & patted case (agent observed green paper protruding from case) where sale did not occur & agent did not obtain sample for testing is insufficient to establish possession element dealing in LSD. Cases have held that even though contraband is not recovered, possession may be proved by circumstantial evidence. Pettit 281 N.E.2d 807, Slettvet 280 N.E.2d 806; Locklayer 317 N.E.2d 868. D's extrajudicial admissions, alone, are not circumstantial evidence. Corpus delicti must be established by clear probative proof independent of admissions. Walker 233 N.E.2d 483. Held, conviction on dealing count reversed.

TITLE: Wilburn v. State

INDEX NO.: K.8.a.2.

CITE: (12/27/82) Ind., 442 N.E.2d 1098

SUBJECT: Possession with intent to deliver - insufficient evidence

HOLDING: Ind. Code 35-48-4-10 provides that a person who possesses with intent to deliver marijuana commits dealing in marijuana. Proof of both possession & possession with intent to deliver is necessary for conviction. Here, D rented U-Haul trailer & with 2 others harvested 300 pounds of marijuana which was split 3 ways. Police raided residence & seized 2/3 of the harvest partially bagged & ready for sale. D was not present during raid. Ct. finds neither evidence nor any reasonable inference drawn from it constitutes evidence of probative value to support intent to deliver element. State makes no argument as to what evidence or reasonable inferences demonstrate requisite intent. Held, evidence insufficient to support dealing conviction; possession conviction affirmed.

RELATED CASES: O'Grady, App., 481 N.E.2d 115 (Drugs 118; possession of 26 \$10 bindles of herione, standing alone, was insufficient evidence to support conviction for possession with intent to deliver; such quantity could be depleted by heavy user in one day, citing Pettigrew 332 N.E.2d 795; Ct. refuses to reduce conviction to possession where charging information tracked wording in possession with intent to deliver statute).

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.a.13. Possession with intent to deliver (Ind. Code 35-48-4)

TITLE: Simmons v. State

INDEX NO.: K.8.a.13.

CITE: (5th Dist. 02/10/92), Ind. App., 585 N.E.2d 1341

SUBJECT: Dealing in controlled substance - basis of liability

HOLDING: Ind. Code 35-48-4-3, dealing in Schedule IV controlled substance, actually contains 2 separate & distinct offenses, & evidence of violation of one is insufficient to show violation of other. Statute provides that person may commit crime by either delivering controlled substance (Ind. Code 35-48-4-3(a)(1)(C)) or possessing controlled substance with intent to deliver (Ind. Code 35-48-4-3(a)(2)). In controlled buy, informant purchased drugs from D on 2 occasions. On second occasion, transaction was interrupted by police before drugs were handed to informant. D was charged with 2 counts of dealing by delivery of controlled substance. State conceded that there was no delivery on second controlled buy but argued that because it proved possession with intent to deliver, evidence was sufficient to support conviction. Ct. rejected this argument because D was specifically charged with dealing by delivery. Different bases of liability in statute actually create 2 distinct offenses, & elements of proof are different. Kelly 535 N.E.2d 140; Addis, App., 404 N.E.2d 59; Jordan 502 N.E.2d 910; Walden, App., 538 N.E.2d 288; Gamblin, App., 568 N.E.2d 1040. Ct. noted that if State had charged under broader definition of "Dealing," rather than specifying specific manner of dealing, its decision would have been different. Because D was entitled to be advised of nature & cause of accusation, & because he was not charged with dealing by possession with intent to deliver, evidence was insufficient to support conviction on count based on interrupted transfer. Held, conviction on second count reversed.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.b. Possession (Ind. Code 35-48-4)

TITLE: Adams v. State

INDEX NO.: K.8.b.

CITE: (02-12-12), 960 N.E.2d 793 (Ind.)

SUBJECT: Driver's license properly suspended where passenger "used" vehicle to transport marijuana

HOLDING: Because the evidence demonstrated that D, as vehicle passenger, made more than incidental use of vehicle to transport 24 grams of marijuana, Tr. Ct. correctly suspended D's driver's license and, indeed, was required to do so under Ind. Code 35-48-4-15(a) (requiring motor vehicle to be "used in the commission of . . . [an] offense to suspend a driver's license").

The statute is silent as to *who* must use the vehicle for the statute to apply. The license suspension statute's requirement that a D uses a vehicle in the commission of an offense does not require that a D own or drive the vehicle when he commits the offense. Cf. Smith v. United States, 552 U.S. 74 (2007). "'To use' means, among other things, 'to put into action or service; avail oneself of; employ' and 'to carry out a purpose or action by means of; utilize.' Merriam Webster's Collegiate Dictionary 1378 (11th ed. 2004)."

D "used" the vehicle by possessing 24 grams of raw marijuana in a jar on the floorboard in front of his seat. "[T]his is not a situation in which a D merely happened to possess a small bag of marijuana in his pocket without making any direct use of the vehicle to do so." Held, transfer granted, Court of Appeals' opinion at 946 N.E.2d 30 vacated but summarily affirmed on sufficiency issue, judgment affirmed.

TITLE: Baker v. State
INDEX NO.: K.8.b.
CITE: (04/10/2023), 208 N.E.3d 626 (Ind. Ct. App. 2023)
SUBJECT: Defendant voluntarily committed felony possession of methamphetamine in a penal facility when she chose not to heed a state trooper's warnings about possessing drugs while being transported to jail, and trooper had reasonable suspicion to ask for her identity during a traffic stop that led to the charge

HOLDING: Defendant was a passenger in a pickup truck pulled over by the Indiana State Police because the driver wasn't wearing a seatbelt. After discovering the passenger had a warrant, the trooper arrested her and told her she would be transported to the county jail. The trooper also told Defendant she would face an additional charge for trafficking if she had anything on her person. Defendant said she didn't. While being searched at the jail, the intake officer discovered a small bag containing meth and the State charged Defendant with Level 5 felony possession of meth at a penal facility. Defendant filed a motion to suppress evidence of the meth seized from her at the jail, asserting that based on the Indiana Seatbelt Enforcement Act (ISEA), the Trooper was not authorized to ask Defendant to identify herself during the traffic stop. On appeal of her conviction, Defendant argued she wasn't required to identify herself under the ISEA and, therefore, the trial court abused its discretion by admitting the meth found in her pocket. She also argued the State didn't prove she committed Level 5 felony possession of meth at a penal facility because it didn't present evidence that she was at the jail voluntarily. The Court of Appeals affirmed, finding that when the driver told the Trooper the vehicle was not properly registered, it gave the Trooper reasonable suspicion to request identification from Defendant. In an issue of first impression, the Court held that because Defendant was warned by the Trooper that any felony possession of an illegal substance would be enhanced if she possessed it in the jail and she chose to ignore that warning, she knowingly and intentionally possessed the illegal drug in the penal facility.

TITLE: Brent v. State

INDEX NO.: K.8.b.

CITE: (11-07-11), 957 N.E.2d 648 (Ind. Ct. App. 2011)

SUBJECT: Constructive possession - marijuana found outside car during stop

HOLDING: There was insufficient evidence that passenger in car possessed marijuana found on the street near where the car temporarily stopped. Actual possession occurs when a person has direct physical control over the items. A D can also be found to have constructively possessed an item if the State presents sufficient evidence that the D had the intent and capability to maintain dominion and control over the contraband. Here, the police were investigating a report of a possible drug deal involving a person leaning into the driver's side of a car when the police stopped the car in which D was a passenger. The driver of the car slowly continued driving forward, momentarily stopped very close to a parked car, and then continued driving slowly forward until eventually stopping. The driver also threw out the window what an officer believed could have been a marijuana cigarette. Once approaching the car, the police smelled "fresh" marijuana, "as if they were just smoking recently." The police also found a bag of marijuana lying on the ground near where the passenger would have been sitting when the car momentarily stopped near the parked car. No marijuana was found in the car or on either the driver or the passenger. Because officers did not find marijuana on D or see him hold or discard the marijuana from the vehicle, there is insufficient evidence of actual possession. Moreover, while the driver attempted to flee and stopped his car in a suspicious position, as the passenger, D had no control over these actions and they cannot be attributed to him. Likewise, the smell of marijuana was only associated with the car and not D personally. Finally, the fact that the driver momentarily stopped the vehicle so that the passenger was sitting (inside the car) in the same spot where the officer later found the marijuana outside the car would not lead a fact-finder to reasonably infer D's constructive possession of the marijuana. Thus, the State failed to prove beyond a reasonable doubt that D constructively possessed the marijuana. Held, conviction reversed; Bradford, J., dissenting on basis there is sufficient evidence D actually possessed the marijuana; the Tr. Ct. is entitled to find D dropped the marijuana out of the window, especially when there are no plausible alternative explanations for the marijuana presence where it was found.

RELATED CASES: Smith, 113 N.E.3d 1266 (Ind. Ct. App. 2018) (gun found on the ground near D's car sufficient to support constructive possession); Houston, 997 N.E.2d 407 (Ind. Ct. App. 2013) (State failed to prove that D had constructive possession of cocaine found inside car, shoved between the passenger seat and the center console, where D was driving the car but was not the car owner, there were three other people present in the car including the owner, and there were no other circumstances that showed that D had any knowledge of the presence of the cocaine).

TITLE: Baker v. State

INDEX NO.: K.8.b.

CITE: (04-11-12), 967 N.E.2d 1037 (Ind. Ct. App. 2012)

SUBJECT: Insufficient evidence of "school property" to support enhancement

HOLDING: State failed to prove that an early training center located near D's home constituted school property for purposes of enhancing his drug possession charges. During trial, police officer who responded to report of a chemical odor coming from D's apartment testified that the apartment was approximately 600 feet from the Early Training Center. He said the ETC offered continuing education classes for students who wanted to get their high school diplomas. State did not point to any evidence presented at trial that showed the ETC was a building or other structure owned or rented by a school corporation or other entity described under IND. CODE. 35-41-1-24.7, nor was there evidence that any of the students enrolled in the program were school-age children and not adults or college-age individuals. College and university property does not fall under the term "school property" as used under IND. CODE. 35-41-1-24.7 to support enhanced convictions. Pridgeon v. State, 569 N.E.2d 722 (Ind. Ct. App. 1991). Court rejected State's arguments as to waiver, judicial notice, and fact that D's apartment building may have constituted a family housing project. Held, Class B felony possession of methamphetamine and Class C felony possession of controlled substance within 1,000 feet of school reduced to Class D felonies.

TITLE: Beeler v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 5-07-04), Ind. App., 807 N.E.2d 789

SUBJECT: Possession of cocaine - circumstantial evidence sufficient; residue on scales

HOLDING: Cocaine residue on scale found in D's pocket during pat-down search was sufficient to sustain conviction for possession of cocaine as a Class D felony. State chemist rinsed scale with methanol to conclude residue was cocaine. The parties stipulated that because of chemist's test, another test that is not generally done could not now be done to determine the amount of cocaine. On appeal, D argued that a conviction should not be allowed to stand based on the microscopic quantity that was not measured here. Relying on Brown v. State, 177 Ind. App. 607, 380 N.E.2d 609 (1978) & Cooper v. State, 171 Ind. App. 350, 357 N.E.2d 260 (1976), Ct. concluded that "any identifiable amount of an illegal drug is sufficient to convict a D for possession" rejecting the holdings of minority of jurisdictions that require a useable amount. However, Ct. noted that State must still prove D knowingly & intentionally possessed drug, which Ct. determined State did here through circumstantial evidence. Held, judgment affirmed.

TITLE: Carnes v. State

INDEX NO.: K.8.b.

CITE: (2d Dist. 7/23/85) Ind. App., 480 N.E.2d 581

SUBJECT: Possession - constructive

HOLDING: Constructive possession (CP) by D's wife proven where D directed police to large container of marijuana in refrigerator & by both D & wife proven where police found pills & marijuana under tray resting on table in Ds' bedroom. CP is capability & intent to maintain control & dominion over contraband. Thomas 291 N.E.2d 557. CP may be proved by circumstantial evidence. Corrao, App., 290 N.E.2d 484. Possessory interest in premises where contraband is found is adequate to show capability. Exclusive control of premises supports inference of intent. Watt, App., 412 N.E.2d 90. If possession is not exclusive, Cts. look to additional circumstances to find knowledge of presence of substance & its character, such as: (1) incriminating statements by D; (2) attempted flight or furtive gestures; (3) manufacturing setting; (4) proximity of D to drugs; (5) drugs in plain view; (6) location of contraband in close proximity to items owned by D; (7) nature of place where contraband is found [see p. 586 for citations/case synopses.] Ct. finds it highly unlikely that large container of marijuana in kitchen refrigerator would go unnoticed. See Durman, App., 319 N.E.2d 151. Drugs in bedroom were in Ds' "private place" & there is no indication they tried to conceal them from one another, only from their children & casual visitors. Held, conviction affirmed.

RELATED CASES: Wilkerson, App., 918 N.E.2d 458 (State proved by preponderance of evidence that D constructively possessed cocaine found in shoe box in bedroom closet of house where he lived); Monroe, App., 899 N.E.2d 688 (D constructively possessed gun found in refrigerator at home he shared with another); Gee, 810 N.E.2d 338 (unlike a refrigerator, nothing in human experience tells us that anyone in particular, as a matter of course, is in and out of laundry room cabinets); CP FOUND: Holmes, App., 785 N.E.2d 658 (State presented sufficient evidence to show that D had constructive possession of marijuana despite fact that evidence was insufficient to show his intent to maintain dominion & control over it, because there was additional evidence of D's flight); Halsema, App., 783 N.E.2d 1199, sum. aff'd 823 N.E.2d 668 (sufficient evidence that D constructively possessed marijuana & paraphernalia found in vehicle); Person, App., 764 N.E.2d 743 (contraband being in plain view & in close proximity to other items associated with D are two additional circumstances by which CP may be proven where D's control over premises in which contraband is found is non-exclusive); Emry, App., 753 N.E.2d 19 (because evidence at trial showed that D had exclusive control over vehicle, it was proper for jury to infer that D had intent & capability to exert dominion & control over marijuana); Goliday, 708 N.E.2d 4 (D's exclusive possession of vehicle at time of stop was sufficient to raise reasonable inference of intent to maintain dominion & control over drugs found in trunk); Ferguson, 485 N.E.2d 888 (4th Dist. opinion, finding no CP, at 481 N.E.2d 161 vacated); Lewis, App., 482 N.E.2d 487; Young 478 N.E.2d 50; Davenport 464 N.E.2d 1302; Snyder, App., 460 N.E.2d 522; Robinson, App., 454 N.E.2d 873.

TITLE: Chandler v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 10-20-04), Ind. App., 816 N.E.2d 464

SUBJECT: Constructive possession not shown

HOLDING: Ct. reversed convictions for possession of marijuana & maintaining a common nuisance, where State did not prove D's constructive possession of marijuana by his exclusive possession of the premises or by additional circumstances indicating he knew the marijuana was present. State did not show D's control of a residence searched pursuant to a warrant was exclusive, as the house belonged to his aunt. The address of the residence was listed on a registration & title for a vehicle belonging to D & on mail to him, but there was no testimony as to the presence of D's clothes, personal belongings, or anything other than these papers. Further, circumstantial evidence did not exist to show D knew of the drug's presence. D made no incriminating statements, he did not flee, & evidence did not reflect the house was a manufacturing setting. The proximity of D to the contraband did not suggest control & dominion, nor was it in plain view or in close proximity to D's belongings.

However, Ct. upheld D's conviction for possession of cocaine within 1,000 feet of a school. The cocaine was found on D's person after his vehicle was stopped. Although not within 1,000 feet from a school when stopped, the police had followed D from his residence which was within 1,000 feet of a school. The Ct. found sufficient evidence existed to prove D possessed the cocaine when he left his residence & to hold otherwise would invade the province of the jury. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Lee, 956 N.E.2d 758 (Ind. Ct. App 2011) (State failed to provide evidence of “additional circumstances” to prove that D constructively possessed cocaine found in closed kitchen drawer).

TITLE: Crittendon v. State

INDEX NO.: K.8.b.

CITE: (8/8/2018), 106 N.E.3d 1100 (Ind. Ct. App. 2018)

SUBJECT: D's admission to consuming heroin following overdose sufficient for possession conviction

HOLDING: State presented sufficient evidence to support D's conviction for Level 6 felony possession of a narcotic drug that D admitted consuming, despite State's failure to introduce the heroin into evidence. The State is not required to introduce the subject contraband to obtain a conviction for dealing or possession, and the identity of a controlled substance may be established through witness testimony and circumstantial evidence. Smart v. State, 40 N.E.3d 963 (Ind. Ct. App. 2015). Following Smart and distinguishing State v. Vorm, 570 N.E.2d 109 (Ind. Ct. App. 1991), Court found evidence sufficient to support conviction where D admitted using heroin shortly before waking up to medics, and he showed clear signs of a heroin overdose. D's public policy argument against equating consumption with possession because it discourages people from seeking medical assistance should be made to the General Assembly. Held, judgment affirmed.

TITLE: Dixon v. State
INDEX NO.: K.8.b.
CITE: 953 So.2d 1108 (Miss. 2007)
SUBJECT: Constructive possession - can't add amounts found on two Ds
HOLDING: Mississippi Supreme Court held that amounts of crack cocaine that police officers found separately on the persons of two Ds riding together in a car should not have been aggregated for purposes of determining how much each possessed with intent to distribute. Under the circumstances, including the fact that the size of the rocks possessed by each differed considerably, Ds cannot be deemed to have constructively possessed all the crack.

TITLE: Fedij v. State

INDEX NO.: K.8.b.

CITE: 186 N.E.3d 696 (Ind. Ct. App. 2022) 04/11/2022

SUBJECT: Writings and symbols on packaging of unregulated and illegal products such as edibles are hearsay and inadmissible under market reports exception

HOLDING: In possession of marijuana and paraphernalia prosecution, trial court erre in admitting into evidence packaging of edibles to prove the truth of the matter asserted on those packages, i.e., that the products within those packages contained levels of THC that would be illegal in Indiana. The State sought admission under the market reports hearsay exception, Ind. Evidence Rule 803(17), arguing the products were regulated somewhere, somehow, and so the packaging statements were reliable. The Court of Appeals found the market reports hearsay exception inapplicable because there are no Indiana or federal regulations for labeling of illegal products and so there was no basis to conclude that the packages contained sufficient indicia of reliability for the trustworthiness of their representation as to the THC level. Court also agreed with Defendant that the State presented no evidence that any of the seized substances had a percent concentration of THC that was more than 0.3%, which would make the item illegal to possess under the statute. At trial, the testimony was that plant material was consistent with both marijuana and hemp. If the State seeks to obtain a conviction under the statute for possession of marijuana, it is the State's burden to prove the proscribed substance in Defendant's possession was in fact an illegal substance. Here, the State failed to do so, and the Court reversed Defendant's conviction.

TITLE: Hayes v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 11-15-07), Ind. App., 876 N.E.2d 373

SUBJECT: Possession of cocaine - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for possession of cocaine. Police officer testified that he observed D reach down & place his closed fist completely inside an eighteen-inch-high trash bin & then remove his empty hand. As officer approached bin, D crossed street & entered a church lot with a "no trespassing" sign. When officer ordered D to stop, D looked at officer & then took off running. Flight may be considered by the factfinder in determining a D's guilt. Dill v. State, 741 N.E.2d 1230 (Ind. 2001). After apprehending D following a chase of a "couple of blocks," officer immediately went back to trash bin & recovered cocaine from the front part of the bin where he had seen D put his hand. A reasonable factfinder could infer from these facts & circumstances that D actually possessed the cocaine despite officer's absence from the scene. Held, judgment affirmed.

TITLE: Johnson v. State

INDEX NO.: K.8.b.

CITE: (2nd Dist., 12-29-95), Ind. App., 659 N.E.2d 242

SUBJECT: Drug possession & dealing - double jeopardy

HOLDING: Where charging information & record made no distinction between quantity of cocaine D was charged with dealing & that which he was charged with possessing, D could not be convicted for both dealing & possessing cocaine. Separate convictions for dealing & possession based upon single sale of narcotics are sustainable if State makes clear that only quantity sold forms basis of dealing charge, while only quantity retained after sale forms basis of possession charge. Collins v. State (1988), Ind., 520 N.E.2d 1258; Morgan v. State, 648 N.E.2d 1164, incorp. by ref. 675 N.E.2d 1067. Here, State did not separate dealing & possession charges adequately to sustain separate convictions. Further, record indicated that State did not intend to make factual distinction between charges. Held, remanded with instructions to vacate possession conviction.

RELATED CASES: Caron, App., 824 N.E.2d 745 (convictions for 2 counts of dealing in meth violated DJ under Ind. Const.); Carroll, App., 740 N.E.2d 1225 (DJ violation under Ind. Const. when State chose to charge dealing & possession offenses broadly & its closing argument was no more specific); Castillo, App., 734 N.E.2d 299 (where possession of cocaine was based on cocaine found during execution of search warrant & dealing cocaine was based on deal that occurred earlier in same day, convictions for both did not violate double jeopardy); Quick, 660 N.E.2d 598 (D could not be convicted of both dealing & possession absent distinction in charging document as to which drugs D was accused of dealing & which he was accused of possessing); Townsend, App., 673 N.E.2d 503 (error to convict D separately for distributing & possession of substance represented to be controlled substance); Quick, App., 660 N.E.2d 598.

TITLE: Livermore v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 11-6-02), Ind. App., 777 N.E.2d 1154

SUBJECT: Possessing precursors with intent to manufacture methamphetamine (meth) - evidence insufficient

HOLDING: Evidence was insufficient to support D's conviction for possession of chemical reagents or precursors with intent to manufacture meth. Under Ind. Code 38-48-4-14.5(c)(2), State was required to prove that D possessed two or more chemical reagents or precursors with intent to manufacture meth. Initially, State charged D with possession of anhydrous ammonia & starting fluid; at trial, State moved to amend charging information, replacing "starting fluid" with ether. However, there was no evidence presented at trial that D possessed ether. At most, State established that D possessed four empty cans of starting fluid. Only evidence suggesting presence of ether was police officer's testimony that he could smell odor of ammonia & starting fluid or ether as he stood near D's truck. Absent any evidence that D possessed receptacles containing ether or ether-containing substance, testimony regarding odor of ether was insufficient to prove possession of ether. Held, conviction for possession of precursors reversed, conviction for dealing in meth affirmed.

RELATED CASES: Richardson, App., 856 N.E.2d 1222 (State proved D's constructive possession of anhydrous ammonia); Lovell, App., 813 N.E.2d 393 (State failed to prove that D possessed two chemical reagents or precursors, as it failed to prove that residue found at bottom of hydrochloric generator was in fact hydrochloric acid); West, App., 805 N.E.2d 909 (Ct. rejected D's reliance on Livermore, that since no liquid discharged from the extinguisher, evidence of vapors contained in the extinguisher was insufficient to support conviction; no cloud would have formed if extinguisher did not contain liquid).

TITLE: Loudermilk v. State

INDEX NO.: K.8.b.

CITE: (1st Dist. 6/2/88) Ind. App., 523 N.E.2d 769

SUBJECT: Possession - holding bag of marijuana for 7 seconds insufficient

HOLDING: Evidence was insufficient to support D's conviction for possession of marijuana. Actual possession is shown where there is intent & capability to maintain dominion & control over marijuana. Wilburn, 442 N.E.2d 1098. Here, D was among a group of 4 people, 1 of whom got a leather case out of a car & took from it a plastic bag. Bag was passed to D, who held it for about 7 seconds & passed it on. Bag was later found to contain marijuana. Evidence did not show that D owned leather case or car from which it was taken, nor that he was person who took it from car. This did not demonstrate that D had marijuana under his control or had intent to exclude others from such control. Without more, evidence is insufficient to support conviction for possession.

TITLE: Manigault v. State

INDEX NO.: K.8.b.

CITE: (2nd Dist., 02-22-08), Ind. App., 881 N.E.2d 679

SUBJECT: 1,000-foot enhancement to drug possession constitutional

HOLDING: Tr. Ct. did not err by denying D's Motion to Dismiss his class B felony cocaine possession charge. A class D felony possession is enhanced to a class B felony if it occurs within 1,000 feet of: school property; a public park; a family housing complex; or a youth program center. Ind. Code 35-48-4-6(b). This statute is not unconstitutionally vague because its language unambiguously puts any person of ordinary intelligence on notice that possessing cocaine "within one thousand feet" of any school property, public park, family housing complex or youth program is a class B felony. The statute is not disproportionate even if there are few, if any, locations within Marion County that are not either within or accessed by passing within one of the forbidden areas. The class B felony still requires State to charge and prove an additional element than the class D felony. The statute does not violate the Privileges and Immunities Clause of the Indiana Constitution and the Equal Protections Clause of the U.S. Constitution because the violent and dangerous criminal milieu created by dealing and possession is a sufficient rationale to distinguish between the class D and B felonies. Further, the fact that a greater proportion of Ds in Marion County than in other counties may be subjected to the enhancement does not invalidate the enhancement. Held, judgment affirmed.

RELATED CASES: Robinson, App., 888 N.E.2d 1267 (agreeing with Manigault and rejecting D's constitutional challenges to statute).

TITLE: McClendon v. State

INDEX NO.: K.8.b.

CITE: (3rd Dist., 10-15-96), Ind. App., 671 N.E.2d 486

SUBJECT: Possession of cocaine - evidence sufficient

HOLDING: Evidence supported jury's conclusion that D had possession of cocaine. Driver of car testified that cocaine D dropped in street belonged to driver. Driver also testified that when he saw police, he handed cocaine to D & told D to get rid of it. On appeal, D argued that driver's testimony should have been interpreted by jury to establish defense that D did not have time to terminate his possession, pursuant to Ind. Code 35-41-2-1. Ct. held that it is no defense for D to assert that he possessed cocaine only to hide it from police & it was not "really" his cocaine. Ind. Code 35-41-2-1 does not provide defense for those who knowingly possess illicit drugs in order to aid someone else's illegal drug sales or use. Rather, Ind. Code 35-41-2-1 provides defense for those unwittingly duped into possession of illegal drugs because such drugs have been planted on their person or hidden on their property without their knowledge. Held, conviction affirmed.

TITLE: Mohamed v. State

INDEX NO.: K.8.b3.

CITE: (4th Dist., 03-8-06), Ind. App., 843 N.E.2d 553

SUBJECT: Insufficient evidence cathinone substantially similar to meth cathinone

HOLDING: Evidence was insufficient to sustain D's conviction for possession of a controlled substance analog. D was a passenger in a vehicle where police found in plain view two large boxes containing khat, which the officer testified from his training had a similar effect to marijuana & cocaine. Ind. Code 35-48-1-9.3(a) defines a "controlled substance analog" as a substance: (1) that has a chemical structure substantially similar to that of a controlled substance included in schedule I or II & that has; or (2) that a person represents or intends to have; a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than of a controlled substance included in schedule I or II. Cathinone, which is present in khat, is not included as a schedule I or II substance, but meth cathinone is listed as a schedule I substance. See Ind. Code 35-48-2-4(f). A Marion County Crime Lab chemist testified that the molecular structure of the two was substantially similar & are both stimulants. The chemist could not testify to the effect the two compounds would have on an individual or whether one would affect an individually more severely than the other. He testified an expert in toxicology or pharmacology would have a better background to testify to this. Ct. noted "penal statutes must be strictly construed against the State." Sunday v. State, 720 N.E.2d 716 (Ind.1999). Ct. noted that as Ind. Code 35-48-1-9.3(a) is written, State had to both prove a substantial chemical structure & that the analog had a substantially similar or greater affect on the central nervous system. The expert's unequivocal testimony here established no knowledge of the comparative effects. Held, conviction reversed.

TITLE: Moore v. State

INDEX NO.: K.8.b.

CITE: (4th Dist., 07-20-94), Ind. App., 637 N.E.2d 816

SUBJECT: Constructive possession of drugs shown

HOLDING: Where evidence showed D was more of owner/passenger in car, rather than mere backseat passenger, it was not improper to impute constructive possession of cocaine in glove compartment to him. Although D relied on Corrao v. State, App., 290 N.E.2d 484, for proposition that possession of contraband in car can be imputed to driver, but not passenger; Ct. noted that it was only two backseat passengers who were excluded from constructive possession, & that passenger/owner of car was also subject to constructive possession. Here D testified car belonged to his brother & that he (D) had not checked glove compartment & did not know of cocaine when he took car. Co-D, however, testified that D had been driving car until short time before it was stopped, & that D had had car fixed for brother & they were test driving it. There was also testimony that D's brother gave D permission to use car & have it fixed, so there was sufficient evidence to support inference D had custody & control over car. Because trier of fact is best determiner of credibility of witnesses, Ct. found no need to overturn its decision. Held, conviction affirmed.

RELATED CASES: Grubbs, 132 N.E.3d 451 (Ind. Ct. App. 2019) (it was reasonable to infer D knew about the drugs and contraband found inside the purse she had been holding on her lap); Parks, 113 N.E.3d 269 (Ind. Ct. App. 2018) (State presented sufficient evidence D constructively possessed gun and drugs found in a bag behind driver's seat of truck in which he was riding); Johnson, 59 N.E.3d 1071 (Ind. Ct. App. 2015) (State presented sufficient evidence to show D constructively possessed heroin found in his friend's mother's car he had been driving); Williams, App., 658 N.E.2d 598 (evidence sufficient to sustain inference that D constructively possessed cocaine); Woods, App., 640 N.E.2d 1089 (constructive possession properly imputed to driver of vehicle); Harper, 968 N.E.2d 843 (Ind. Ct. App. 2012) (on rehearing of opinion at 963 N.E.2d 653 (below), Ct. held that although D did not have exclusive possession of either the vehicle or motel room, D had the requisite intent to maintain dominion and control of the contraband and thus had constructive possession of it); Harper, 963 N.E.2d 653 (Ind. Ct. App. 2012) (D's possessory interest in purse and motel room was sufficient to establish his constructive possession of contraband); Gray, 957 N.E.2d 171 (Ind. 2011) (constructive possession shown where police found marijuana underneath coffee table in D's home even though two teenage boys were sitting near the table; D's son testified that he threw the marijuana under the table when police arrived, but Tr. Ct. was entitled to discredit son's testimony based on officer's testimony that son was not present when they arrived); Griffin, 945 N.E.2d 781 (Ind. Ct. App. 2011) (passenger constructively possessed a burnt marijuana blunt in the center console, behind the car's stick shift and halfway between the driver and passenger seats and where there was a strong odor of marijuana coming from car); Adams, 946 N.E.2d 630 (Ind. Ct. App. 2011) *sum. aff'd*, 960 N.E.2d 793 (Ind. 2012) (sufficient evidence that passenger constructively possessed marijuana where the marijuana was in the passenger's plain view and officer smelled raw marijuana in car).

TITLE: Moore v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 05-18-93), Ind. App., 613 N.E.2d 849

SUBJECT: Insufficient evidence of constructive possession

HOLDING: Where D was present where drugs were found, but did not have exclusive possession of premises, evidence was insufficient to support constructive possession of drugs. In response to tip that narcotics were being sold out of apartment, police sent informant to make cocaine buy. Later police executed search warrant & found some cocaine in plain view & pouch containing more cocaine. Drug paraphernalia was found in back room, & more cocaine & keys to apartment were found outside. Several people were present & D was lying on couch approximately four feet from tables where drugs were found. He appeared to be intoxicated & disoriented, but had no drugs, money, or paraphernalia on his person.

To prove constructive possession by accused who is present where contraband is found, there must be proof of additional elements of intent & capability to maintain dominion & control over substance. Perry (1981), App., 418 N.E.2d 1214. D must be able to reduce substance to personal possession or direct its disposition or use. Mere presence on premises where drugs are found is not sufficient proof person possesses drugs if he is not in exclusive possession of premises, because one could just as easily be present innocently as guiltily.

It appeared that another had lived in apartment, & that he did not know D until joint arrest during raid. State showed D was present, had knowledge of drugs, was intoxicated & disoriented, & exercised possessory interest in premises when police arrived, but failed to prove he had necessary capability to maintain control over seized contraband. Held, convictions vacated, Barteau, J., dissenting.

RELATED CASES: Grim, App., 797 N.E.2d 825 (while D was in close proximity to case containing methamphetamine & box containing precursors, such evidence alone does not prove that D knew of presence of methamphetamine, & thus, he could not have been in constructive possession of it); Matthews, App., 792 N.E.2d 934 (distinguishing Moore, Ct. held that D's proximity to contraband in plain view in house where D was visiting his cousin in partially vacant house was sufficient to support conviction); Godar, App., 643 N.E.2d 12 (although D owned vehicle & was driving at time of stop, State failed to prove knowledge of presence of drug); Ewing & Kline at Z.2.b.5 (constructive possession adequately shown).

TITLE: Page v. State

INDEX NO.: K.8.b.

CITE: (8-06-21), Ind. Ct. App., 173 N.E.3d 723

SUBJECT: Expired prescription did not support possession of narcotic drug conviction

HOLDING: Evidence was insufficient to support Defendant's conviction for possession of a narcotic drug, where she established by a preponderance of the evidence that she possessed a validly issued prescription for the oxycodone found in her vehicle during traffic stop. Defendant obtained prescriptions to address her chronic back pain in 2017 and 2018, but trial court found her guilty after concluding that the prescriptions weren't valid at the time of her 2019 traffic stop. The Indiana Court of Appeals disagreed with trial court's determination that a validly issued prescription becomes invalid for purposes of Ind. Code § 35-48-4-6 upon a person's failure to take the medicine as prescribed. There is nothing in the statute from which to infer that a prescription is no longer valid once the prescribed period of use elapses. "The effect of the trial court's determination is that every person who retains, that is, possesses, a prescription of a controlled substance for any time after the proscribed number of days commits a possession offense. We do not believe the legislature intended such a harsh result." The "valid prescription" requirement is intended to assure the prescription was not obtained by fraud, misrepresentation, or deceit. Schuller v. State, 625 N.E.2d 1243 (Ind. Ct. App. 1993). There was no evidence of such here, nor evidence Defendant obtained the prescriptions from anyone other than a practitioner in the scope of the practitioner's professional practice. Held, Level 6 felony possession of narcotic conviction reversed, possession of marijuana conviction affirmed.

TITLE: Prewitt v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 1-14-02), Ind. App., 761 N.E.2d 862

SUBJECT: Enhancement for attempted possession of cocaine in family housing complex

HOLDING: D was properly charged with attempted possession of cocaine as Class B felony for being within 1,000 feet of family housing complex when offense occurred. Ind. Code 35-41-5-1 provides that a person attempts to commit crime when, acting with culpability required for commission of crime, he engages in conduct that constitutes a substantial step toward commission of crime. Attempt statute applies only to specific intent crimes. Goolsby v. State, 517 N.E.2d 54 (Ind. 1987). D argued it was improper to enhance attempt based upon location alone, noting that enhancement provisions of possession of cocaine statute punish only act & disregard intent completely. However, D was not charged with & convicted of innocent conduct, i.e., attempting to be within 1,000 feet of family housing project. Rather, he was charged with attempting to knowingly or intentionally possess cocaine, in violation of Ind. Code 35-48-4-6, which requires specific intent to possess cocaine. That the attempt occurred within legislatively- declared "drug-free zone" is fact which only serves to elevate seriousness of crime & penalty. Assuming State otherwise proves required culpability for substantive crime, conviction can be sustained for attempt to commit enhanced crime. Held, judgment affirmed.

TITLE: Redden v. State

INDEX NO.: K.8.b.

CITE: (4th Dist., 07-12-06), Ind. App., 850 N.E.2d 451

SUBJECT: Dumping controlled substance waste - evidence sufficient; empty cans

HOLDING: A person who dumps...or otherwise disposes of waste, knowing that the waste was produced from the illegal manufacture of a controlled substance or an immediate precursor; commits dumping controlled waste, a Class D felony. Ind. Code 35-48-4-4.1(a)(2). D argued that empty cans & chemicals they may have contained could have initiated manufacturing process but were not *produced by* the manufacturing process & do not constitute "waste." Common & ordinary meaning of word "waste" includes garbage or trash. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1447 (1981). Thus, a person who dumps garbage produced from illegal manufacture of methamphetamine commits dumping controlled substance waste pursuant to statute. Here, State presented evidence that, outside of D's residence, officers found a backhoe next to a hole that contained empty containers of denatured alcohol, camp fuel, xylene, & naphtha. Each of the cans were labeled as chemicals used in manufacture of methamphetamine, & methamphetamine & everything needed to manufacture methamphetamine was found inside house. Held, convictions affirmed.

TITLE: Reynolds/Herr v. State

INDEX NO.: K.8.b.

CITE: (4th Dist. 12/11/91), Ind. App., 582 N.E.2d 833

SUBJECT: Drug possession & dealing-corpus delicti & double jeopardy

HOLDING: Where there was no evidence other than D's extra-judicial admission that second pouch of material was cocaine, convictions for both dealing in cocaine & possession of cocaine could not stand. When police informant asked D if she had cocaine for sale, she removed one plastic baggie & exchanged it with informant for \$200. While D was removing this baggie, informant observed another in her purse & asked her how much was there. D replied that there was one gram, but that it was not for sale. Possession of cocaine is necessarily included offense of dealing in cocaine, Frierson, App., 572 N.E.2d 536, but conviction on both charges is possible if D sells some of the drugs & retains others in his possession, Collins, Ind., 520 N.E.2d 1258. State must produce evidence independent of extra-judicial confession which establishes corpus delicti, or confession will not be admitted. When D is charged with possession of controlled substance, his extra-judicial statement identifying substance, standing alone, is insufficient to show substance was contraband, Warthan, Ind., 440 N.E.2d 657. If someone experienced with drug is to testify adequately about substance's identity, person must have sufficient contact with substance to make identification. Apart from D's extra-judicial admission, only other evidence that second baggie contained cocaine came from informant. He never handled the second baggie & did not even testify that he saw it. If second baggie was one relied on for possession count, evidence was insufficient to support conviction, & if baggie sold was basis of possession count, conviction was barred by double jeopardy. Held, remanded for vacation of conviction for possession of cocaine, Conover, J., dissenting.

TITLE: Schuller v. State

INDEX NO.: K.8.b.

CITE: (2nd Dist., 12-14-93), Ind. App., 625 N.E.2d 1243

SUBJECT: Valid prescription to possess drugs not shown

HOLDING: Because prescription obtained by fraud, deception, or misrepresentation is not "valid prescription," D's conviction for possession of schedule III narcotic was proper. Doctor testified that D called him, said she had been patient previously, & that she had appointment scheduled for foot injury that was causing lot of pain. She then asked for specific pain medication, & doctor phoned in one day supply. D picked prescription up after presenting medicaid card with her name on it. Next day, doctor found D was not former patient & did not have appointment & called police. Ind. Code 35-48-4-7 provides that existence of valid prescription for drug is defense to illegal possession, & D bears burden of proving exception to offense, Burgin, App., 431 N.E.2d 864. D argued she had valid prescription. "Valid prescription" has been variously defined as "one lawfully procured from a physician in the course of the treatment of a patient's illness," & one "issued by a licensed practitioner, acting in good faith & in accord with accepted medical standards." Ct. accepted reasoning from other jurisdictions that if prescription is obtained by fraud, etc., it is not valid, & found here D obtained prescription by fraudulent representations to doctor. Therefore, conviction was affirmed.

NOTE: Ind. Code 16-42-20-6 provides that the State need not allege the absence of a valid prescription in prosecutions under Ind. Code 35-48.

TITLE: Skeens v. State

INDEX NO.: K.8.b.

CITE: (7/5/2022), 191 N.E.3d 916 (Ind. Ct. App. 2022)

SUBJECT: Possession of methamphetamine conviction and sentence affirmed

HOLDING: After a traffic stop led to the discovery of methamphetamine where he had been sitting, Defendant was convicted of possession of methamphetamine and found to be a habitual offender. The trial court sentenced him to a term of eight and a half years in the Department of Correction. The Court of Appeals found sufficient evidence to support his conviction and that the evidence showed Defendant had both actual and constructive possession of the drugs. Defendant had direct physical control over the meth "because he was sitting on the tin container when Officer Bechtold removed him from the vehicle." Defendant's furtive gestures as the officer approached, having his hand in his pants and fidgeting, and his close proximity to the contraband permitted the reasonable inference he knew of the nature and presence of the meth and was sufficient to establish constructive possession.

The Court also rejected the argument the trial court abused its discretion in sentencing "when it did not find any one of three purported mitigating circumstances," noting that the first two had not been presented to the trial court and the third argument does not explain how "the purported hardship was significant or why the court was required to give it any weight." Finally, the Court found the sentence was not inappropriate in light of the nature of the offense because Defendant was uncooperative with law enforcement, appeared to actively conceal the contraband during the traffic stop, and paraphernalia and large amounts of cash were also found in the vehicle. Nor was the sentence inappropriate in light of his character with his significant criminal history. Held, affirmed.

TITLE: Smart v. State

INDEX NO.: K.8.b.

CITE: (8/4/2015), 40 N.E.3d 963 (Ind. Ct. App. 2015)

SUBJECT: Possession of methamphetamine established by circumstantial evidence

HOLDING: State presented sufficient evidence to support D's conviction for Class D felony possession of methamphetamine, despite State's failure to prove identity of substance found in syringes. The State is not required to introduce the subject contraband to obtain a conviction for dealing or possession, and the identity of a controlled substance may be established through witness testimony and circumstantial evidence. Helton v. State, 907 N.E.2d 1020 (Ind. 2009).

Here, even without considering the positive field test for methamphetamine, D and other witnesses all admitted to injecting methamphetamine on the evening in question. D also had fresh track marks and was exhibiting symptoms of methamphetamine use. This was sufficient to sustain D's conviction. Held, judgment affirmed in part, conviction for Class D felony unlawful possession of syringe reversed (see below).

TITLE: Smith v. State

INDEX NO.: K.8.b.

CITE: (5th Dist., 4-30-03), Ind. App., 787 N.E.2d 458

SUBJECT: Maintaining common nuisance/possession of marijuana - no exclusive/constructive possession shown

HOLDING: Where State did not prove D had constructive possession of marijuana by exclusive possession of premises or by additional circumstances indicating he knew marijuana was present, convictions for maintaining common nuisance & possession of marijuana could not stand. To prove possession of marijuana, State had to show D's possession was knowing or intentional. To prove D maintained common nuisance, State must prove D knowingly or intentionally maintained place used one or more times for unlawfully keeping marijuana or drug paraphernalia. There were at least two other people present in residence when search warrant was executed & only evidence that it was D's house came from witness who had originally given police tip that drugs were present. There was no other evidence presented regarding whether anyone else lived in house or whether D owned or rented it. Held, convictions reversed.

TITLE: Solomon v. State

INDEX NO.: K.8.b.

CITE: (1/31/2019), 119 N.E.3d 173 (Ind. Ct. App. 2019)

SUBJECT: Marijuana conviction did not violate D's constitutional rights to liberty and the pursuit of happiness

HOLDING: Article 1, Section 1 of the Indiana Constitution establishes the right to liberty and the pursuit of happiness, but this constitutional provision does not protect the right to smoke marijuana. D argued that criminalizing the mere possession of a single marijuana blunt by an adult who is not driving or otherwise impacting others violates Article 1, § 1 of the Indiana Constitution and that his conviction should be vacated. Court rejected D's constitutional challenge to Ind. Code § 35-48-4-11 as applied to the facts of his case, noting that possession of marijuana is a criminal offense as defined by the legislature.

TITLE: State v. Prater

INDEX NO.: K.8.b.

CITE: (03-12-10), 922 N.E.2d 746 (Ind. Ct. App. 2010)

SUBJECT: Possession with intent to manufacture - D must be personally involved with manufacturing

HOLDING: Tr. Ct. properly granted D's motion to correct error, which claimed evidence for possession of anhydrous ammonia with intent to manufacture methamphetamine (Indiana Code Section 35-48-4-14.5 (C) was insufficient because State presented no evidence D intended to personally manufacture methamphetamine. Statute provides, "A person who possesses anhydrous ammonia . . . with the intent to manufacture methamphetamine . . . commits a Class D felony." Thus, plain language of statute required State to prove D intended to personally use anhydrous ammonia to manufacture methamphetamine. Statute does not criminalize mere possession of anhydrous ammonia. State presented no evidence D personally intended to manufacture methamphetamine. Evidence showed only that D and accomplice stole anhydrous ammonia with intent to sell it to third party some time in future, but they had no specific purchaser in mind. They assumed third party would use anhydrous ammonia to manufacture methamphetamine. Held, judgment affirmed; Bradford, J., dissenting on basis that "[m]aking methamphetamine is a multi-step, multi-ingredient process, often involving multiple parties, and I cannot conclude that a person whose task is to collect ammonia to make methamphetamine is somehow immunized from criminal liability if he does not personally involve himself in the manufacturing process."

RELATED CASES: Gifford, 995 N.E.2d 1083 (Ind. Ct. App. 2013) (although D bought pseudoephedrine and lithium batteries, State's failure to show D "personally intended to manufacture methamphetamine" required reversal of conviction for D felony possession of chemicals/reagents with intent to manufacture a controlled substance).

TITLE: State v. Vorm

INDEX NO.: K.8.b.

CITE: (4th Dist. 04/25/91), Ind. App., 570 N.E.2d 109

SUBJECT: Possession of cocaine - sufficiency of evidence

HOLDING: Presence of cocaine metabolites in D's urine is insufficient to support conviction for possession of cocaine. D was on work release & was charged with possession of cocaine after random urine sample tested positive for cocaine. State presented test results as evidence of D's possession & at close of State's case, D moved for, & was granted, judgment on evidence on ground that State failed to prove he knowingly & intentionally possessed cocaine. State appealed, contending that presence of metabolized cocaine yielded reasonable inference that cocaine had been voluntarily & knowingly possessed by D, & that because D had exclusive control over his own body & items ingested, there was sufficient circumstantial evidence of exclusive control of premises to establish constructive possession. Ct. noted that in Smith, Ind. App., 316 N.E.2d 841, evidence showing person had prohibited drug in his system was considered circumstantial evidence tending to show he was in possession of drug prior to taking it. Ct. looked to other jurisdictions which required corroborating evidence before such circumstantial evidence of possession could support conviction, however, & found that circumstantial evidence alone did not constitute required prima facie evidence of possession to defeat judgment on evidence. Ct. also agreed with Minnesota Ct. App. which held that once substances were assimilated into person's system, power to exercise requisite dominion & control to establish possession no longer exists. Lewis, (1986), Minn. App., 394 N.W.2d 212. Held, Tr. Ct. affirmed.

TITLE: Stringer v. State

INDEX NO.: K.8.b.

CITE: (5th Dist.; 09-08-06), Ind. App., 853 N.E.2d 543

SUBJECT: Possession of controlled substances - instruction on defense to 1,000 feet of park enhancement

HOLDING: Tr. Ct. did not abuse its discretion in refusing to instruct jury that it was a defense to the 1,000 feet enhancement if D: (1) was only briefly in, on, or within 1,000 feet of a public park, & (2) the absence of any person under the age of eighteen years & at least three years younger than the D in, on, or within 1,000 feet of the public park at the time of the offense. Ind. Code 35-48-4-16(b)(1). Although Ind. Code 35-48-4-16(b)(1) does provide this defense to the 1,000 feet enhancement, D failed to present any direct evidence that no one was in the park at the time of the incident & that the D was only in or near the park for a brief time. Thus, D's theory did not support the giving of the instruction. Held, judgment reversed & remanded for new trial.

TITLE: Sutton v. State

INDEX NO.: K.8.b.

CITE: (05-07-21), Ind. Ct. App., 167 N.E.3d 800

SUBJECT: Insufficient evidence to support conviction for possession of narcotic drug where Defendant possessed stimulant

HOLDING: Because the drug Lisdexamfetamine found in Defendant's backpack is a stimulant and not a narcotic drug listed in Indiana Code § 35-48-2-6(b), evidence was insufficient to prove that Defendant knowingly or intentionally possessed a narcotic drug. Although Lisdexamfetamine is not included in Indiana Code § 35-48-2-6(b), which identifies narcotics that qualify as controlled substances, it is listed under Ind. Code § 35-48-2-6(d), which identifies stimulants that qualify as controlled substances. Defendant raised this as a defense at trial, thereby alerting the State and the trial court to the problem; however, neither the trial court nor the State moved to amend the charging information at that time or enter judgment of conviction for the lesser offense of possession of a controlled substance, which was the crime actually committed by Defendant. Held, conviction vacated.

TITLE: Tapely v. State

INDEX NO.: K.8.b.

CITE: (1st Dist., 05-13-08), Ind. App., 886 N.E.2d 62

SUBJECT: Possession of precursors - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction of Class D felony possession of two or more precursors with intent to manufacture methamphetamine. The house where D was found contained substantial evidence of multiple prior episodes of manufacturing meth but did not contain a sufficient amount of any precursor to produce meth. Court held that statute defining crime, Ind. Code 35-48-4-14.5(e), does not require possession of a minimum amount of each precursor. D relied on homeowner's testimony that manufacturing process had been moved to another location and that D refused to join them to suggest that he did not have intent to manufacture methamphetamine. However, D knew that homeowner and his brother were preparing ingredients for manufacturing meth on evening he was arrested. D helped light incense to cover the smell of ether, and later claimed he did not notice a smell of ether. As he was only person in house when police arrived, D presumably flickered the lights off and on in response to honks from passing car. Court held that a combination of all this conduct permits a reasonable person to infer D intended to be part of manufacturing process, even if process had been moved elsewhere. Held, conviction affirmed.

TITLE: Washington v. State

INDEX NO.: K.8.b.

CITE: (12/09/2021) 178 N.E.3d 1275 (Ind. Ct. App. 2021)

SUBJECT: Trial court abused its discretion when it admitted evidence from Drugs.com to identify pills

HOLDING: Defendant was charged with Possession of a schedule II controlled substance as a class A misdemeanor after an officer recovered pills from his possession. The State did not conduct chemical tests on the pills to identify them, but instead relied on the officer's testimony he matched the appearance of the pills to an image of hydrocodone he found on a website called Drugs.com and an exhibit which was a printout from that website. The Court of Appeals found that, on this issue of first impression for Indiana's courts, using that website to identify the pills was not necessary and that the State did not show that Drugs.com is a reliable source for drug identification. The Court held that the market reports exception to hearsay under Evidence Rule 803(17) does not apply to allow the admission of evidence from Drugs.com that was used to convict Defendant. The trial court abused its discretion when it admitted the evidence and since the State presented no other evidence to show the pills were a controlled substance, Defendant's conviction was reversed. Held, reversed.

TITLE: Whitney v. State

INDEX NO.: K.8.b.

CITE: (2nd Dist., 4-7-00), Ind. App., 726 N.E.2d 823

SUBJECT: Proving constructive possession of hidden drugs

HOLDING: Evidence was sufficient to support conviction for possession of cocaine which was hidden in secret compartment of vehicle D had borrowed from another. D argued that he lacked necessary intent & ability to maintain dominion & control over cocaine. Constructive possession is established when person had: 1) intent to maintain dominion & control over contraband, & 2) ability to maintain dominion & control over contraband. Lampkins, 685 N.E.2d 698. Here, D's exclusive possession of car, along with evidence of his marijuana use, established his intent & ability to control cocaine. D was driver & sole occupant of vehicle when officer stopped him, which is sufficient to show his ability to control cocaine.

However, in cases where drugs are hidden, knowledge of their presence & intent to control them cannot be inferred solely from D's control over vehicle in which they are hidden. United States v. Resio-Trejo, 45 F.3d 907 (5th Cir. 1995). Additional evidence of guilty knowledge is necessary to establish intent where narcotics are found in hidden compartment. In this case, officer noticed marijuana cigarette on floor of driver's compartment & smelled odor of marijuana. Marijuana & cocaine were found in secret compartment of car, & panel behind which drugs were hidden was popped open on one side. Based on this evidence, trier of fact could reasonably infer that D knew drugs were in vehicle. Held, judgment affirmed.

RELATED CASES: Austin, 980 N.E. 2d 429 (Ind. Ct. App. 2012) (jury was not instructed that D's knowledge of drugs in hidden compartment could be inferred solely from his control of vehicle; as Tr. Ct.'s instruction could not have permitted jury to find that the "mere presence" of drugs was enough to show D's constructive possession, the jury was not, as D asserts, "left to speculate that his control over the Rolls-Royce and Mercedes Benz made him guilty").

TITLE: Wilburn v. State

INDEX NO.: K.8.b.

CITE: (12/27/82) Ind., 442 N.E.2d 1098

SUBJECT: Possession - sufficiency

HOLDING: Actual possession is demonstrated where D is shown to have intent & capability of maintaining dominion & control over contraband in question. Henry, 379 N.E.2d 132. It is not required that accused's actual possession exist at time police discover contraband (no need to catch D red-handed). Pryor, 296 N.E.2d 125 (witnesses testified D smoked marijuana with them on 9/27/71; D arrested on 10/5/71 for sale of narcotics to undercover officer; evidence held sufficient to sustain possession conviction). Here, witnesses testified D rented U-Haul trailer & with 2 others harvested 300 pounds of marijuana. The harvest was split 3 ways. Warrant in hand, police searched residence & found 2/3's of the marijuana, bagged & ready for sale. D was not present during raid; D's share was not found. Ct. finds evidence most favorable to state shows D exercised intent & capability of maintaining dominion & control over marijuana when he harvested it & helped transport it. Held, evidence sufficient to support conviction for possession of marijuana.

RELATED CASES: Womack, App., 738 N.E.2d 320 (where D threw something down while being chased by police & police later discovered marijuana in proximity of throw, there was sufficient evidence that D possessed marijuana); Marshall, App., 493 N.E.2d 1317 (Drugs 112; retrieval of brown paper bag from bushes in generally littered area & abrupt abandonment of it upon seeing police is sufficient evidence to sustain possession conviction).

TITLE: Young v. State

INDEX NO.: K.8.b.

CITE: (2d Dist. 01/16/91), Ind. App., 564 N.E.2d 968

SUBJECT: Possession, multiple packages

HOLDING: D could be convicted on only one count of possession of cocaine where, although there were 2 separate packages possessed, possession of both packages was simultaneous. Evidence presented showed that when D was stopped, he had 1 gram of cocaine on his person, & subsequently 8 grams were found in spray can in his car. He was charged with Dealing in Cocaine, Class A felony & Possession of Cocaine, Class D felony. D was found guilty of the lesser included Possession of 3 grams or more of Cocaine as Class C Felony on count I, & on count II, guilty as charged. Ct. App. held that although packages of cocaine were discovered at different times, his original possession of both packages was simultaneous, & therefore constituted single act of possession. Held, vacated conviction as to Count II, D Felony possession, affirmed on other issues. **NOTE:** Ct. did not address whether packages could be aggregated for purpose of determining whether over 3 grams was possessed, as it was not necessary in this case.

RELATED CASES: Donnegan, App., 809 N.E.2d 966 (despite fact that cocaine was found at different times & places, D simultaneously possessed cocaine on his person & inside safe in his residence); Campbell, App., 734 N.E.2d 248 (convictions for two counts of possession at D's house & on his person violated double jeopardy).

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.c. Common nuisance (Ind. Code 35-48-4-13)

TITLE: Bass v. State

INDEX NO.: K.8.c.

CITE: (4th Dist. 9/10/87) Ind. App., 512 N.E.2d 460

SUBJECT: Visiting common nuisance - sufficiency

HOLDING: Evidence was insufficient to sustain D's convictions for visiting a common nuisance (Ind. Code 35-48-4-13(a)). State must prove beyond reasonable doubt that D knew building, structure, vehicle, or other place which D visited was used for unlawful use of controlled substance. Here, police testified they found bong, pill box with .08 grams of hashish, & scissors containing partially smoked marijuana cigarette. State argues that display of paraphernalia, amount of hashish on table, & burnt residue of marijuana were sufficient to give D knowledge that controlled substances were unlawfully used at residence they were visiting. Existence of paraphernalia which is associated solely with use of controlled substances may be probative of whether controlled substance was used in building, but it is not conclusive evidence of D's knowledge of such use even if paraphernalia was in plain view. State must prove beyond reasonable doubt that D knew that place D visited was used on more than one occasion for unlawful use of controlled substance. Wells, App., 351 N.E.2d 43. [Note: Statute now states: "one (1) one or more times"]. State argues fact that bong, pill bottle, & scissors were in plain view supports inference that controlled substances were repeatedly used. However, since such evidence does not conclusively establish knowledge of use, it cannot establish knowledge of repeated use. Held, evidence is insufficient to support conviction.

RELATED CASES: Zuniga, App., 816 N.E.2d 197 (based upon strong smell of marijuana, D knew that residence was being used for unlawful use of controlled substance; however, State failed to show residence was used more than once for unlawful use of controlled substance).

TITLE: Braster v. State
INDEX NO.: K.8.c.
CITE: (3d Dist. 07/28/92), Ind. App., 596 N.E.2d 278
SUBJECT: Visiting common nuisance - insufficient evidence
HOLDING: Where only evidence to support conviction for visiting common nuisance was that drug paraphernalia was found in lower level of home & that D was in kitchen located in lower level, it was insufficient to show D knew that residence was used for unlawful use of controlled substances, as required for conviction under Ind. Code 35-48-4-13(a). Evidence showed only that paraphernalia was in plain view of officers, not in plain view of D, & there was no evidence it was found in room where D was. Ct. found evidence here even less than that found insufficient in Bass, App., 517 N.E.2d 1238, & refused to assume from evidence that D knew controlled substances were being used.

TITLE: Gaynor v. State
INDEX NO.: K.8.c.
CITE: (1st Dist., 10-07-09), Ind. App., 914 N.E.2d 815 (Ind. Ct. App 2009)
SUBJECT: Maintaining common nuisance - D must exert control over premises
HOLDING: State presented insufficient evidence to support D's conviction for maintaining a common nuisance, because there was no evidence D had any control over premises alleged in charging information. In so holding, Court disagreed with conclusion in Ross v. State, 908 N.E.2d 626 (Ind. Ct. App 2009), that the State need prove only control of the contraband and not control of the premises. Although "maintenance" does not mean legal ownership, D must exert control over premises. Jones v. State, 807 N.E.2d 58 (Ind. Ct. App 2004). Held, maintaining common nuisance conviction reversed, manufacturing methamphetamine conviction affirmed.

TITLE: Hale v. State

INDEX NO.: K.8.c.

CITE: (2nd Dist., 3-27-03), Ind. App., 785 N.E.2d 641

SUBJECT: Visiting common nuisance; sufficiency - residence used more than once for unlawful use of controlled substance

HOLDING: In prosecution for visiting common nuisance, State did not present sufficient evidence to show that place visited was used on more than one occasion for unlawful use of controlled substance. Officers went to a probationer's residence, whereupon they saw D & two other individuals sitting around coffee table through screen door. After entering the residence they saw open shoebox containing marijuana on coffee table. While evidence was sufficient to show that D knew residence was used for unlawful use of controlled substance, it was insufficient to show that residence was common nuisance. Because State presented evidence of presence of marijuana & it was within plain view of D, court could not say D did not have knowledge that residence was being used for unlawful use of controlled substance. However, State presented no evidence that residence was used on more than one occasion for unlawful use of controlled substance, which is required to prove residence was common nuisance. State argued that 1998 amendment to Ind. Code 35-48-4-13(b), maintaining common nuisance, which added language "one or more times" constituted legislative determination that State need not prove element for subsection (a), visiting common nuisance. Court disagreed, noting that amendment was made to subsection (b) only & court cannot infer that legislature intended to make same amendment to subsection (a). Held, conviction reversed.

RELATED CASES: Traylor, App., 817 N.E.2d 611 (it was reasonable for jury to infer that residence was used more than once for consumption of methamphetamine); Zuniga, App., 816 N.E.2d 197 (State failed to prove beyond a reasonable doubt that residence D visited had been used on more than one occasion for the unlawful use of a controlled substance).

TITLE: Holmes v. State

INDEX NO.: K.8.c.

CITE: (5th Dist. 12/30/91), Ind. App., 583 N.E.2d 180

SUBJECT: Maintaining common nuisance - insufficient evidence

HOLDING: Presence of large volume of drug paraphernalia & guns in D's house, fact that D's close relatives sold drugs from her home, & fact that she was present in home at time of drug sale, were all insufficient to show necessary "knowledge of selling" requirement under Ind. Code 35-48-4-13(b) (2) to support conviction for maintaining common nuisance. During "controlled drug buy", officers followed suspected seller to home of D & her husband. After approximately 10 minutes, seller returned to his home & sold cocaine to informant. After arrest, seller told police he had dealt with D's husband to get cocaine, & that transaction took place in front room of D's house in presence of only himself & D's husband & brother. When police entered D's home, they saw her coming out of bedroom. Search produced assorted drug paraphernalia, small amount of marijuana, total of 23 guns, but no cocaine. D was asked if she knew where any more cocaine was hidden, & she responded that she knew they used it, did not know where they kept it, & that when they used it, she went into bedroom. Ct. held that evidence of drug paraphernalia that was seized was not probative on issue of whether D knew cocaine was being sold from her house on night in question, Sayre, App., 471 N.E.2d 708; Bass, App., 512 N.E.2d 460, rehearing granted in part, App., 517 N.E.2d 1238, trans. denied. Held, conviction reversed.

RELATED CASES: Evans, App., 627 N.E.2d 832 (Where evidence showed only that on one occasion D used his car to pick up cocaine that he sold to passenger, it was insufficient to support conviction for maintaining common nuisance); Plowman, App., 604 N.E.2d 1219 (multiple sales needed to support single conviction & so multiple convictions for each sale precluded).

TITLE: Hook v. State

INDEX NO.: K.8.c.

CITE: (9-25-02), Ind. App., 775 N.E.2d 1125

SUBJECT: Maintaining common nuisance - requires showing that more than one person unlawfully used controlled substance

HOLDING: Evidence was insufficient to support D's conviction for maintaining common nuisance because there was no competent evidence to show that more than one person was using marijuana in her home. Ind. Code 35-48-4-13(b)(1) states that person who knowingly or intentionally maintains building, structure, vehicle, or other place that is used one or more times by persons to unlawfully use controlled substances commits maintaining common nuisance. The word "persons" is plural form of noun "person" & means more than one person & nothing within statute suggests different meaning. At D's trial, evidence presented showed only that one person unlawfully used marijuana inside D's home. Held, conviction reversed.

TITLE: Leatherman v. State
INDEX NO.: K.8.c.
CITE: (5/9/2018), 101 N.E.3d 879 (Ind. Ct. App 2018)
SUBJECT: Maintaining common nuisance - insufficient evidence
HOLDING: Ind. Code § 35-45-1-5 “evinces a conscious desire” by the Legislature that the statute “not be applied to isolated instances of prohibited activity.” Thus, the legislature intended by removal of the “one or more times” language to restore the prior common law and statutory requirement that a common nuisance is one in which continuous or recurrent prohibited activity takes place. See Ind. Code § 35-45-1(a) and (c). Here, because the State failed to provide evidence that the vehicle Defendant drove had been used on multiple occasions for the delivery of a controlled substance, the State failed to provide sufficient evidence to support his conviction of maintaining a common nuisance. Held, judgement affirmed in part and reversed in part.

RELATED CASES: Dowell, 155 N.E.3d 1284 (Ind. Ct. App. 2020) (where State presented only evidence of one drug transaction involving D's car, that single instance of use is not sufficient to prove D committed Level 6 felony maintaining a common nuisance; while text messages suggested that D participated in multiple drug transactions, it is not clear from those messages what vehicle, if any, she was driving to complete those transactions).

TITLE: Lovitt v. State

INDEX NO.: K.8.c.

CITE: (5th Dist., 11-04-09), (Ind. App. 2009) 915 N.E.2d 1040

SUBJECT: Maintaining common nuisance - no evidence D "kept" marijuana in his vehicle

HOLDING: Maintaining a common nuisance statute, Ind. Code 35-48-4-13(b)(2)(B), is intended to apply to an offender who uses his or her vehicle to facilitate manufacture, sale, delivery or finance delivery of a controlled substance, not to an offender who has personal use quantities of controlled substances on his or her person or even lose in the vehicle. To hold otherwise would make every drug arrest after a traffic stop subject to an additional charge of maintaining a common nuisance.

Here, State argued that it proved that D maintained a common nuisance by using his vehicle to keep marijuana, even though the marijuana was in D's pocket. Court concluded that the plain meaning of the word "keeping" in context of Ind. Code 35-48-4-13(b) implies that controlled substance must be contained within the vehicle itself or that the vehicle was used to store the controlled substance for further manufacturing, sale, delivery or financing the delivery of that or another controlled substance. Marijuana was located inside vehicle only by virtue of fact that D was driving the vehicle. Thus, State failed to present evidence that D used his vehicle "for unlawfully...keeping" marijuana. Held, judgment affirmed in part, reversed in part and remanded.

TITLE: Sayre v. State

INDEX NO.: K.8.c.

CITE: (3d Dist. 12/5/84) Ind. App., 471 N.E.2d 708

SUBJECT: Common nuisance - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for maintaining a common nuisance (Ind. Code 35-48-4-13(b)). Here, Ct. rejects D's argument that she cannot be held criminally liable for controlled substances kept by her tenants, because she had no knowledge of/intent to keep these substances. (D was acquitted of possession of drugs.) Issue is whether D maintained building with knowledge/intent that it was being used for unlawfully keeping controlled substances. Held, conviction affirmed.

RELATED CASES: Jones, App., 807 N.E.2d 58 (D could "maintain" a common nuisance despite fact that he never signed the rental lease & had no legal obligation to the property).

TITLE: Sayre v. State
INDEX NO.: K.8.c.
CITE: (3d Dist. 12/5/84) Ind. App., 471 N.E.2d 708
SUBJECT: Common nuisance - admissibility of drug paraphernalia
HOLDING: Tr. Ct. erred in admitting items of drug paraphernalia under count charging D with maintaining a common nuisance (Ind. Code 35-48-4-13(b)); however, reversal is not required because D fails to show prejudice. Possession of paraphernalia associated solely with use of controlled substances is not probative on issue of whether D kept controlled substances in building (maintained common nuisance). Here, Ct. finds evidence that drugs were kept in house was properly admitted & violation of statute was properly shown. Ct. distinguishes Cox, App., 422 N.E.2d 357 (witness testified to receiving threats not to testify against D). Where D's conviction is not dependent on credibility of witnesses, admission of object has no prejudicial impact on jury. Held, no error.

TITLE: Smith v. State

INDEX NO.: K.8.c.

CITE: (5th Dist., 4-30-03), Ind. App., 787 N.E.2d 458

SUBJECT: Maintaining common nuisance/possession of marijuana - no exclusive/constructive possession shown

HOLDING: Where State did not prove D had constructive possession of marijuana by exclusive possession of premises or by additional circumstances indicating he knew marijuana was present, convictions for maintaining common nuisance & possession of marijuana could not stand. To prove possession of marijuana, State had to show D's possession was knowing or intentional. To prove D maintained common nuisance, State must prove D knowingly or intentionally maintained place used one or more times for unlawfully keeping marijuana or drug paraphernalia. There were at least two other people present in residence when search warrant was executed & only evidence that it was D's house came from witness who had originally given police tip that drugs were present. There was no other evidence presented regarding whether anyone else lived in house or whether D owned or rented it. Held, convictions reversed.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.d. Paraphernalia (Ind. Code 35-48-4-81 et seq)

TITLE: Avant v. State

INDEX NO.: K.8.d.

CITE: (11-20-02), Ind. App., 779 N.E.2d 538

SUBJECT: Reckless possession of paraphernalia - statute constitutional; penalties proportionate

HOLDING: Ind. Code 35-48-4-8.3(c), reckless possession of paraphernalia, does not violate Indiana's constitutional prohibition on disproportional penalties. D's argument focused on classification of two similar but different offenses defined in statute. Under subsection (a) of statute, a person who possesses raw material, instrument, device, or other object that person intends to use in violation of chapter commits Class A infraction for possessing paraphernalia. D contrasted that provision with subsection (c), which states that person who recklessly possesses raw material, instrument, device, or other object that is to be used in violation of this chapter commits reckless possession of paraphernalia, a Class A misdemeanor. D argued that offense defined in subsection (a) is more serious offense because mental element allegedly reflects higher culpability (intentionally vs. recklessly) but is classified as lesser offense than that in subsection (c).

Issue is whether legislature intended "person recklessly possesses" to describe offender's mens rea or manner in which offender possessed paraphernalia. Subsection (a) provides that it is criminal offense to possess object that person intends to use for taking drugs. Subsection (c), on other hand, criminalizes possession of object that is to be used primarily for taking drugs. Thus, person would violate subsection (a) by possessing object intended to be used in taking drugs, regardless of whether object would be innocuous in different context. Person's intent, not intrinsic nature of object, is critical element. On other hand, possession of, for example, crack pipe would constitute violation of subsection (c), regardless of whether person harbored intent to use it to make drugs. Thus, difference between subsections (a) & (c) is that subsection (a) focuses on possessor's intent to use, whereas subsection (c) focuses on nature of object itself. Further, character of possession described in subsection (a) is possession with intent to use. Character of possession proscribed in subsection (c) depends upon meaning of "recklessly," which is not mere possession. Bocko, App., 769 N.E.2d 658. Obtaining a conviction under subsection (c) requires more than mere showing of possession such as would be sufficient to obtain conviction under subsection (a). Interpretation adopted is that under both subsection (a) & (c), D must knowingly possess object, but to be convicted under subsection (c), D must also possess object in reckless manner. Therefore, subsection (a) is lesser-included offense of subsection (c), & classification & punishment of offense set out in subsection (c) as greater offense does not violate Indiana constitution. Held, denial of motion to dismiss affirmed.

RELATED CASES: Hevenor, App., 784 N.E.2d 937 (because Ind. Code 35-48-4-8.5(a) is a strict-liability offense & does not require proof of culpable mental state, whereas misdemeanor conviction under statute requires proof of at least reckless culpability, Ct. found that there is no support for D's assertion that punishment under Ind. Code 35-48-4-8.5 is disproportionate).

TITLE: Berkhardt v. State
INDEX NO.: K.8.d.
CITE: (8/10/2017), 82 N.E.3d 313 (Ind. Ct. App 2017)
SUBJECT: Mere possession of syringe insufficient to prove element of intent to inject illegal drugs
HOLDING: State failed to prove beyond a reasonable doubt that D possessed syringes with the specific intent to violate the Legend Drug Act or to commit a controlled substance offense as required by Ind. Code § 16-42-19-18. While on patrol, police officers saw a woman walk to the side of a closed liquor store and begin speaking with a man, later identified as D. The officers approached D and the woman and asked for identification, but the card D provided did not match his appearance, height or weight, so he was arrested for failure to identify. Police found syringes and marijuana incident to D's arrest. It is well settled that the intent element cannot be inferred from unexplained possession of syringe. See, e.g., Sluder v. State, 997 N.E.2d 1178 (Ind. Ct. App 2013). Thus, by arguing the absence of evidence of a medical use for the syringes and possession in a non-medical setting, the State improperly attempted to shift the burden to D to explain his possession of the syringes. Court found insufficient evidence D and the woman attempted to conceal themselves from police. In so holding, Court rejected the State's argument that D and the woman were planning to complete an illegal transaction as "mere speculation," as there was no evidence whether the two knew each other previously or why she approached D who was already sitting on the pavement on side of liquor store. D's use of false name and identification card when police approached him, even if relevant, did not constitute circumstantial evidence of intent. Perkins v. State, 57 N.E.3d 861 (Ind. Ct. App 2016). Finally, Court concluded that D's mere possession of a small amount of marijuana cannot satisfy the intent element because a syringe cannot be used to introduce marijuana into the body. "In sum, there is no direct or indirect evidence establishing Berkhardt's intent to use the syringes to inject illegal drugs. No reasonable factfinder could have found Berkhardt guilty beyond a reasonable doubt based on this record." Held, Level 6 felony unlawful possession of a syringe reversed and remanded to correct erroneous sentencing order that recorded a Class A instead of Class B misdemeanor conviction for Possession of Marijuana.

NOTE: The legislature amended the statute in 2015 to add the subsection addressing intent to commit a controlled substance offense. Add same note at end of Smart, K.8.d.

TITLE: Bocko v. State

INDEX NO.: K.8.d.

CITE: (1st Dist., 6-11-02), Ind. App., 769 N.E.2d 658

SUBJECT: Reckless possession of paraphernalia - evidence insufficient

HOLDING: Evidence was insufficient to support D's conviction of reckless possession of paraphernalia. When D was arrested & searched, police found a straw & plastic bag in his pocket. Both straw & bag were coated with cocaine. Person commits reckless possession of paraphernalia under Ind. Code 35-48-4-8.3 if he recklessly possesses a raw material, instrument, device, or other object that is to be used primarily for: 1) introducing into a person's body a controlled substance; 2) testing strength, effectiveness, or purity of a controlled substance; or 3) enhancing effect of controlled substance. A person engages in conduct "recklessly" if he does so in plain, conscious, & unjustifiable disregard of harm that might result & disregard involves substantial deviation from acceptable standards of conduct. Ind. Code 35-41-2-2(c).

Here, evidence demonstrated only that D possessed the straw. Ct. rejected State's argument that recklessness can be inferred from evidence that straw was found in D's pocket. An inference is not reasonable when it rests on no more than speculation or conjecture. Bass v. State, 512 N.E.2d 460 (Ind. Ct. App 1987). Ct. could not infer from fact that D had a straw in his pocket that: 1) D cut straw himself; 2) that he did so for purpose of ingesting cocaine; 3) that a cut straw carried in one's pocket will be used to ingest cocaine; & 4) D used straw for that purpose. There was insufficient evidence that D's possession of straw was "reckless." Held, conviction reversed.

TITLE: Bookwalter v. State
INDEX NO.: K.8.d.
CITE: (12/9/2014), 22 N.E.3d 735 (Ind. Ct. App 2014)
SUBJECT: Intent to inject heroin is not covered by Legend Drug Act's definition of possession of a syringe

HOLDING: There was insufficient evidence to support D's conviction for possession of a syringe, because evidence showed he intended to inject heroin as opposed to a legend drug. To convict D of possession of syringe as charged, State was required to prove beyond a reasonable doubt that D possessed, with intent to violate Chapter 16-42-19 of the Indiana Code ("the Legend Drug Act"), a hypodermic syringe or needle or an instrument adapted for the use of a legend drug by injection in a human being. Ind. Code § 16-42-19-18. Applying rule of lenity, Court held that the Legend Drug Act "is at best ambiguous" as to whether possession of a syringe to inject heroin, a scheduled narcotic, is a criminal act under this statute. Thus, possession of a syringe without a valid prescription for a legend drug, insulin or anabolic steroids, with intent to inject a non-legend drug, is insufficient to violate Ind. Code § 16-42-19-18. Given the Act's ambiguity, Court must construe the statute in favor of D to conclude that intent to inject heroin is not fairly covered by the Legend Drug Act's definition of possession of a syringe. Held, judgment affirmed in part, reversed in part and remanded.

RELATED CASES: Smart, 40 N.E.3d 963 (Ind. Ct. App 2015) (State failed to produce any evidence that methamphetamine which D admitted to injecting was covered by the Legend Drug Act, even though "methamphetamine hydrochloride" is a legend drug under the Act). **NOTE:** The legislature amended the statute in 2015 to add the subsection addressing intent to commit a controlled substance offense.

NOTE: The legislature amended the statute in 2015 to add that a person cannot possess a syringe with intent to inject a controlled substance.

TITLE: Granger v. State
INDEX NO.: K.8.d.
CITE: (10/31/2018), 113 N.E.3d 773 (Ind. Ct. App 2018)
SUBJECT: Marijuana grinder insufficient to support conviction for paraphernalia possession
HOLDING: State presented insufficient evidence to support D's conviction for class C misdemeanor possession of paraphernalia based upon his possession of a marijuana grinder. "Paraphernalia," as used in Ind. Code § 35-48-4-8.3(b)(1), does not apply to an instrument or device that merely prepares a substance for introduction into the body by another means. "Introduce" is defined in relevant part as "to put or insert into." There was no evidence that the marijuana grinder could itself be used to introduce marijuana into D's body.

Court also rejected State's alternative argument that D could have been validly convicted instead of possessing a device that could "enhance[e] the effect of a controlled substance," which is a different category of paraphernalia under Ind. Code § 35-48-4-8.3(b)(3). The Court held that the State could not seek conviction for an offense it had not alleged D committed; and in any event, the prosecution failed to present any evidence that use of a grinder would "enhance" marijuana's effects. Held, judgment reversed.

TITLE: Harrison v. State

INDEX NO.: K.8.d.

CITE: (4th Dist. 10/2/84) Ind. App., 469 N.E.2d 22

SUBJECT: Paraphernalia - sufficiency

HOLDING: Evidence was insufficient to sustain conviction for possession of paraphernalia (intended to use to enhance effect of controlled substance). Ind. Code 35-48-4-8.3(a)(3). Here, state introduced pipe with residue (not identified), 2 sets of scales & cigarette papers, but did not introduce testimony re how such items would enhance effect of marijuana. State had to prove: (1) D possessed items; (2) items were adapted for enhancing effect of marijuana; (3) D intended to so use items. See Bradley, App., 287 N.E.2d 759. Enhance means to increase/augment effect of controlled substances on human body. [Citations omitted.] Mere entry into evidence of items was insufficient to establish use to enhance effect of marijuana (D also convicted of possession of marijuana, which he did not appeal). Held, reversed.

RELATED CASES: Sluder, 997 N.E.2d 1178 (Ind. Ct. App 2013) (insufficient evidence for possession of paraphernalia with intent to ingest controlled substance where State's only evidence was that D possessed paraphernalia (a syringe) without even circumstantial evidence of intent); Atkinson, App., 810 N.E.2d 1190 (State failed to present evidence that D used rolling papers to test "the strength, effectiveness, or purity of a controlled substance" as charged under Ind. Code 35-48-4-8.3(c)(2); this admission & the rolling papers provided the State with the "beginnings" of a possession offense for using an instrument to introduce a controlled substance into a person's body under Ind. Code 35-48-4-8.3(c)(1), but that was not how D was charged).

TITLE: Knutson v. State
INDEX NO.: K.8.d.
CITE: (5/31/2018), 103 N.E.3d 700 (Ind. Ct. App 2018)
SUBJECT: Unlawful possession of syringe cannot be elevated to a Level 5 felony based on prior conviction
HOLDING: Indiana Code chapter 16-42-19 sets forth several criminal offenses, most of which concern the possession, use, and sale of legend drugs. With the exception of unlawful possession of a syringe, which is a Level 6 felony pursuant to Ind. Code § 16-42-19-18, none of the sections in chapter 19 sets forth the offense level for a violation. The general offense-level statute, Ind. Code § 16-42-19-27, allows for a Level 6 felony to be enhanced to a Level 5 felony based on a prior conviction. But this statute does not apply to the syringe-possession statute because it begins with "[u]nless otherwise specified," and the syringe-possession statute "otherwise specifies" that unlawful possession of a syringe is a Level 6 felony. Considering the 2015 amendments to these statutes and the comprehensive revisions to our criminal code, the Legislature did not intend for the general offense-level statute to apply to unlawful possession of a syringe. Held, denial of D's motion to dismiss reversed.

TITLE: McConnell v. State

INDEX NO.: K.8.d.

CITE: (1st Dist. 6/28/89), Ind. App., 540 N.E.2d 100

SUBJECT: Possession of paraphernalia - sufficiency; intent

HOLDING: Evidence of presence of marijuana is sufficient to support element of intent to use instrument in connection with marijuana. D was found in possession of small silver pipe similar to pipe in which marijuana is commonly smoked & was convicted of possession of paraphernalia. State must prove beyond reasonable doubt intent to use instrument in connection with illegal drugs. Eskridge 281 N.E.2d 490. Intent may be inferred from circumstantial evidence, such as from evidence of previous convictions for drug use, VonHauger 266 N.E.2d 197, or other evidence of drug use, such as needle tracks. Eskridge, *supra*. However, evidence of intent may not be inferred merely from proof that instruments possessed are normally used or adapted for use with illegal drugs. See Taylor 267 N.E.2d 383. Here, only evidence of intent was identification of residue in pipe. Officer testified that amount was too small to conduct positive identification, but that residue was consistent with other residue which he had positively determined to be marijuana. Where neither drugs themselves nor expert testimony based on chemical analysis is placed into evidence, there must be testimony of someone sufficiently experienced with drug indicating its identity. Slettvet 280 N.E.2d 806. Officer here was qualified as expert experienced in drug testing & familiar with marijuana. Officer's testimony was sufficient evidence from which jury could infer that substance was marijuana & that D intended to use pipe in connection with marijuana. Shields, J., CONCURS with holding that evidence of possession of marijuana would be sufficient to support intent element, but DISSENTS as to holding that evidence here was sufficient.

RELATED CASES: Perkins, 57 N.E.3d 861 (Ind. Ct. App 2016) (sufficient evidence supported D's conviction for possession of paraphernalia, where D's possession of 2 syringes and a bottle cap that contained heroin residue proved intent to introduce controlled substance into his body); Sluder, 997 N.E.2d 1178 (Ind. Ct. App 2013) (insufficient evidence for possession of paraphernalia with intent to ingest controlled substance where State's only evidence was that D possessed paraphernalia (a syringe) without even circumstantial evidence of intent).

TITLE: Smart v. State
INDEX NO.: K.8.d.
CITE: (8/4/2015), 40 N.E.3d 963 (Ind. Ct. App 2015)
SUBJECT: Intent to inject methamphetamine is not covered by Legend Drug Act's definition of possession of a syringe
HOLDING: State failed to present sufficient evidence to support D's conviction for Class D felony unlawful possession of a syringe, because it is unclear whether methamphetamine is a legend drug governed by Ind. Code § 16-42-19-18. Pursuant to Bookwalter v. State, 22 N.E.3d 735 (Ind. Ct. App 2014), State was required to demonstrate that methamphetamine, which D admitted to injecting, was covered by the Legend Drug Act. "Methamphetamine hydrochloride" is a legend drug, but State failed to produce any evidence that methamphetamine that D admitted to injecting is the same substance as methamphetamine hydrochloride. Despite fact Tr. Ct. took judicial notice under Evid.R. 201(a) that methamphetamine is a legend drug, Court of Appeals concluded that State failed to present evidence that D possessed a syringe with the intent to violate the Legend Drug Act as defined in Ind. Code 16-42-19-18. As in Bookwalter, Court applied the rule of lenity and construed the ambiguous statute in favor of D. Held, judgment affirmed in part and reversed in part.

NOTE: The legislature amended the statute in 2015 to add that a person cannot possess a syringe with intent to inject a controlled substance.

TITLE: Vertner v. State

INDEX NO.: K.8.d.

CITE: (2nd Dist., 8-20-03), Ind. App., 793 N.E.2d 1148

SUBJECT: Reckless possession of paraphernalia - evidence insufficient

HOLDING: Evidence was insufficient to support D's conviction of reckless possession of paraphernalia. Person commits reckless possession of paraphernalia under Ind. Code 35-48-4-8.3(c) if he recklessly possesses a raw material, instrument, device, or other object that is to be used primarily for: 1) introducing into a person's body a controlled substance; 2) testing strength, effectiveness, or purity of a controlled substance; or 3) enhancing effect of controlled substance. A person engages in conduct "recklessly" if he does so in plain, conscious, & unjustifiable disregard of harm that might result & disregard involves substantial deviation from acceptable standards of conduct. Ind. Code 35-41-2-2(c). Here, police officers discovered crack pipe in D's pocket when they searched him. D admitted at trial that pipe was his, that he had used it that evening to smoke crack cocaine, & that he intended to use it in future to smoke crack cocaine. While this was ample evidence to support charge of Class A infraction of possession of paraphernalia, there was no evidence that character of D's possession was "reckless." There was no evidence in record of harm that might result from D's possession of pipe in his pocket, that his possession of pipe showed disregard of harm that might result from having pipe in his pocket, or that having pipe in his pocket involved substantial deviation from acceptable standards of conduct. Held, conviction reversed, resisting law enforcement convictions affirmed; Brook, C.J., concurring, disagreed with holding in Avant v. State, 779 N.E.2d 538 (Ind. Ct. App 2003), & noted that it is difficult to imagine a set of facts that would satisfy elements of reckless possession of paraphernalia.

RELATED CASES: Helms, 926 N.E.2d 511 (Ind. Ct. App 2010) (finding no evidence of harm where officer discovered glass pipe allegedly used to smoke cocaine tucked behind driver's door handle of D's vehicle); Bean, App., 818 N.E.2d 148 (as in Vertner, Ct. found the record devoid of the harm which might result from possessing the paraphernalia).

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.e. Schedule classification (Ind. Code 35-48-2-4 et seq)

TITLE: Hudgins v. State

INDEX NO.: K.8.e.

CITE: (1/19/83) Ind., 443 N.E.2d 830

SUBJECT: Schedule classification - proof of controlled substance

HOLDING: State need not prove substance is a controlled substance when it appears on statutory schedule classification. Mendez 367 N.E.2d 1081; Ralston, App., 412 N.E.2d 239 (phenmetrazine). Here, D contends evidence insufficient to sustain conviction because state did not prove heroin is a controlled substance. Tr. Ct. properly instructed jury that delivery of controlled substance is Class B felony & that heroin is a schedule I controlled substance. Held, evidence sufficient to support conviction.

RELATED CASES: Sherelis 498 N.E.2d 973 (Drugs 106; general definition of cocaine, as used in Ind. Code 35-48-1-1, applies to "cocaine (9041)," listed as Schedule II controlled substance under Ind. Code 35-48-2-6; Ind. Code 35-48-2-2 limits purpose of DEA number placed in brackets after word "cocaine" in Schedule II & does not refer to material element of crime). K.8.f. Computation of aggregate weight

TITLE: Parrish v. State
INDEX NO.: K.8.e.
CITE: (3/30/21) Ind. Ct. App., 166 N.E.3d 953
SUBJECT: Statutory listed factors to support criminal-organization enhancement are not mandatory or exclusive and factfinder can find sufficient evidence to support enhancement absent the listed factors.
HOLDING Convictions of Level 2 felony robbery and three counts of Level 3 felony criminal confinement, habitual offender enhancement and enhancement of committing a felony while a member of a criminal organization and resulting 52-year sentence, affirmed.

A CVS was robbed by two men and during the robbery employees were ordered to lay face down on the floor. Two men were apprehended shortly after the robbery. Police later received information that a third man was involved, and a review of police dash camera video showed three men fleeing the CVS. Further investigation indicated that Defendant knew one robber arrested at the scene and had been with that person shortly before the robbery and driving that person's mother's car.

Defendant was charged as an accomplice to Level 2 felony robbery, three counts of Level 3 felony confinement, habitual offender and enhancement of being a member of a criminal organization. The Court of Appeals upheld the convictions under an accomplice liability theory stating that even though Defendant had not entered the store he had knowingly or intentionally aided the two men in the robbery.

The criminal-organization statute enhances penal consequences for committing one or more felony offenses in connection with a criminal organization. A criminal organization is defined as a formal or informal group with at least three members that assists in or participates in the commission of a felony. The Court of Appeals found sufficient evidence to support the criminal-organization enhancement relying on the plain meaning of the word "member." The Court stated that even though the statute is intended to apply to gang related activity, and that the criminal organization enhancement statute lists ten factors which may be used as evidence that a person was a member of a criminal organization and that none of the factors apply, those factors are not mandatory nor exclusive. Court of Appeals was bound by the decision of the trier of fact because the legislature has provided that an informal group of people who assist or participate in a felony is a criminal organization. The Court of Appeals finds it "concerning" that such a harsh sentencing enhancement can be imposed on a defendant with none of the statutory factors present, but that is a concern for the legislature not the court. Court of Appeals finds criminal-organization enhancement was based upon attendant circumstances and not a double jeopardy violation and sentence not inappropriate.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.f.1. Dealing

TITLE: Adams v. State

INDEX NO.: K.8.f.1.

CITE: (05-24-12), 968 N.E.2d 281 (Ind. Ct. App 2012)

SUBJECT: Adulterated marijuana may support sentence enhancement

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss Class D felony dealing and possession of marijuana charges, because definition of marijuana is not unconstitutionally vague. D argued that the enhancement of her charges from Class A misdemeanors to felonies violated her right to due process because the Indiana Code does not clearly state which parts of a marijuana plant are excluded from the legal definition of marijuana. Specifically, her charges were enhanced by the weight of marijuana being over thirty grams when the marijuana being weighed included stalks, and the statute does not define "mature stalks." However, the issue of identifying and defining "mature stalks" is irrelevant for determining whether D dealt or possessed at least thirty grams of marijuana because it is clear that a sentence enhancement for these offenses may be supported by an adulterated form of marijuana, which includes mature stalks and "other vegetable material" not included within the definition of marijuana. Allison v. State, 527 N.E.2d 234 (Ind. Ct. App 1988); see also Lawhorn v. State, 452 N.E.2d 915 (Ind. 1983) (total amount of substance delivered, including non-narcotic substances which have been mixed into the drug, is the statutory meaning as well as the usage and meaning common in drug trafficking). The legislature intended a sentence enhancement to apply to possession or dealing of more than thirty grams of adulterated marijuana as well as possession/dealing more than thirty grams of pure marijuana. Held, judgment affirmed.

RELATED CASES: Burst, App., 499 N.E.2d 1140, trans. denied (finding that non-narcotic substances are to be included in computation of weight. Ct. noted that since Romack was decided, Ind. S.Ct. has interpreted similar statute, Ind. Code 35-48-4-1, to include adulterants when computing penalty to be assessed; Tobias, 479 N.E.2d 508, & Lawhorn, 452 N.E.2d 915).

TITLE: Burton v. State

INDEX NO.: K.8.f.1.

CITE: (4th Dist. 04/29/92), Ind. App., 590 N.E.2d 1129

SUBJECT: Sufficiency of evidence - weight of cocaine

HOLDING: Evidence that cocaine weighed 3.03 grams was sufficient to sustain conviction for dealing in cocaine as Class A felony, because any question as to reliability of scale used to weigh cocaine went solely to weight & credibility of testimony. At D's trial, chemist who tested cocaine testified that it weighed 3.03 grams, but that 0.03 grams was very small amount, & it was possible that scale was off by weight of several grains of cocaine since it was last calibrated. Ct. rejected D's sufficiency argument by finding that accuracy of scale is to be determined by trier of fact, & Ct. had made this determination against D. On appeal, Ct. would not reweigh evidence. In reaching decision, Ct. relied on Olson (1983), Ga.App., 303 S.E.2d 309, where Ct. ruled similarly in marijuana case. Held, conviction affirmed.

RELATED CASES: Wattley, App., 721 N.E.2d 353 (because no evidence as to accuracy of scale used to weigh cocaine was admitted into evidence, State failed to produce sufficient evidence to prove that cocaine weighed three grams or more).

TITLE: Lawhorn v. State

INDEX NO.: K.8.f.1.

CITE: (8/29/83) Ind., 452 N.E.2d 915

SUBJECT: Aggregate weight - dealing in cocaine

HOLDING: Aggregate weight of substance (6.617 g.), of which only 2.3 g. was pure cocaine, was properly considered in determining that D was guilty of Class A (amount 3 g. or more) felony. Here, Ds contend Ind. Code 35-48-4-1 intends enhanced punishment only when pure cocaine equals 3 g. or more. Ds also argue if amount does include adulterated substance, then statute is unconstitutional because it would unequally penalize sellers of identical amounts of pure cocaine depending upon whether it was mixed with other substances in order to exceed 3 g. Ct. rejects both arguments, *citing Hall* 403 N.E.2d 1382. Held, conviction affirmed.

RELATED CASES: Woodford, 752 N.E.2d 1278 (evidence that D dealt over 3 grams of cocaine sufficient even though only two of nine individually-wrapped rocks tested positive for cocaine; it was undisputed that total weight of all rocks was 3.21 grams & that two rocks tested were cocaine); Norwood, App., 670 N.E.2d 32 (to extent water contributed to weight of cocaine, it was adulterating substance & thus properly considered in total weight of substance; thus LIO instruction properly rejected); Tobias 479 N.E.2d 508 (Drugs 66; case affirms Lawhorn; DISSENT by Prentice argues that Hall should be overruled because penal statutes must be strictly & narrowly construed; purpose of statute is to deter dealing in narcotic drugs, not adulterants).

TITLE: Lycan v. State

INDEX NO.: K.8.f.1.

CITE: (2nd Dist., 9-25-96), Ind. App., 671 N.E.2d 447

SUBJECT: Aggregate weight - dealing in marijuana

HOLDING: External water weight, not shown to have been included for purposes of trafficking marijuana, is not to be included in aggregate weight of delivered drug for purposes of determining offense enhancement for dealing in marijuana. However, enhancement may stand where State can show that weight of material properly included is sufficient to support enhancement. Romack v. State, 446 N.E.2d 1346 (Ind. Ct. App 1983). In this case, State failed to produce sufficient evidence that amount of marijuana possessed by D excluding external water weight exceeded ten pounds. Held, possession with intent to deliver ten or more pounds of marijuana as Class C felony vacated with instructions to enter conviction for possession with intent to deliver more than 30 grams of marijuana as Class D felony.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.f.2. Possession

TITLE: Hutcherson v. State

INDEX NO.: K.8.f.2.

CITE: (4/20/79), Ind., 389 N.E.2d 270

SUBJECT: Possession of drugs -- computation of aggregate weight

HOLDING: D was convicted of possession of over ten grams of heroin. D appealed and claimed that Ind. Code 35-24.1-4.1-6, possession statute, must be construed as referring to narcotics in pure form rather than in combination with other substances. Ct. of Appeals agreed and held that State was required to prove that D possessed more than ten grams of pure heroin, rather than more than ten grams of mixture containing heroin. Held, petition to transfer denied; Pivarnik, J., dissenting.

RELATED CASES: Halsema, 823 N.E.2d 668 (in order to prove the element of weight of drugs or controlled substances, State must either offer evidence of its actual, measured weight or demonstrate that the quantity of drugs or controlled substances is so large as to permit a reasonable inference that the element of weight has been established; see full review at K.8.a).

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.g Legend Drugs

TITLE: Porod v. State

INDEX NO.: K.8.g.

CITE: (3rd Dist., 12-27-07), Ind. App., 878 N.E.2d 415

SUBJECT: Legend drugs - reference to statute sufficient evidence

HOLDING: State presented sufficient evidence that Ritalin is a legend drug. A legend drug "is a drug that is subject to 21 U.S.C. 353(b)(1); or listed in the Prescription Drug Product List . . ." Ind. Code 16-18-2-199. A statute may adopt a part or all of another law or statute, state or federal, by a specific reference to the section sought to be incorporated. & the effect of the incorporation by reference is the same as if the law or statute or the part thereof adopted had been written into the adopting statute. State v. Doane, 262 Ind. 75, 311 N.E.2d 803 (1974). Here, State presented testimony that the publication including the drug product list referred to in Ind. Code 16-18-2-199 is commonly known as the "Orange Book" & includes Ritalin. State did not present or ask the judge to take judicial notice of the Orange Book. While not a statute, the Orange Book is promulgated by a federal agency. Indiana's statute incorporates by reference 21 U.S.C. 353(b)(1), which incorporates the Orange Book. Thus, Tr. Ct. need only refer to the statutory definition to determine that Ritalin is a legend drug & State need not put the Orange Book or 21 U.S. 353(b)(1) into evidence. Held, judgment affirmed.

TITLE: State v. Sturman

INDEX NO.: K.8.g.

CITE: (7/14/2016), (Ind. Ct. App 2015)

SUBJECT: Legend drug statute not void for vagueness

HOLDING: In an issue of first impression, the Court held that the “legitimate medical purpose” restriction for legend drug prescriptions is not void for vagueness because it enables ordinary people to understanding what conduct is prohibited. See Morgan v. State, 22 N.E.3d 570, 573 (Ind. 2014). D prescribed massive amounts of pain killers to D.E.H., who died from “pharmacologic intoxication.” D was charged under Ind. Code § 16-42-19-20, which provides: “[a] practitioner may not knowingly issue an invalid prescription or drug order for a legend drug[]” and “[a] prescription or drug order for a legend drug is not valid unless the prescription or drug order is issued for a legitimate medical purpose” (Emphasis added). The phrase is not vague because it requires physicians to prescribe legend drugs in accordance with commonly recognized standards of the medical field. Where state and federal laws do not specifically regulate prescribing practices, physicians are expected to look to learned treatises to determine standards. Practitioners also define appropriate standards of care based on their experience. Because the statute plainly informs physicians that they must look to the accepted standards of care, the statute provides sufficient notice of the prohibited conduct. Held, judgment affirmed.

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.h. Look alike controlled substances (Ind. Code 35-48-4-46)

TITLE: Conner v. State

INDEX NO.: K.8.h.

CITE: (12-30-93), Ind., 626 N.E.2d 803

SUBJECT: Distributing non-controlled substance sentence disproportional

HOLDING: D's 6-year sentence for distribution of non-controlled substance represented to be controlled, was disproportionate to sentence for distribution of real marijuana, & violated Art. I, 16 of Ind. Const.; reversing decision at 613 N.E.2d 484 on this issue. D sold informant 16 baggies (145.4 grams) of what he represented to be marijuana, but no controlled substances were found in baggies. He was convicted of distribution of substance represented to be controlled substance, Ind. Code 35-48-4-4.6, class C felony. Ind. Code 35-48-2-4(d)(14) provides that marijuana is schedule I drug, but legislature specifically exempted it from statutory scheme covering schedule I drugs, Ind. Code 35-48-4-2(a)(1) & (2). Unlike all other schedule I drugs, dealing 30 grams or less of marijuana is only misdemeanor, & legislature has explicitly indicated marijuana offenses should be punished less severely than those involving other drugs. Usually dealing in actual substance is punished more harshly than dealing in "fake" substance, but where marijuana is involved, this is not case. While dealing in marijuana is at most D felony, distributing substance represented to be marijuana is C felony. D's sentence was twice as long as maximum penalty he would have received had he dealt in actual marijuana. Art. I, 16 of Ind. Constitution requires that all penalties be proportioned to nature of offense, & State's ability to punish for criminal behavior has limits. While Ct. can't set aside penalty established by legislature simply because it thinks it's too severe, it is still necessary to review sentences for constitutionality as applied. Ct. found in light of lesser penalties for marijuana offenses, application of Ind. Code 35-48-4-4.6 to D violated requirement for proportionality of sentence to nature of offense. Held, remanded with instructions to resentence up to maximum of 3 years, Givan, J., dissenting.

TITLE: Conner v. State

INDEX NO.: K.8.h.

CITE: (1st Dist., 05-20-93), Ind. App., 613 N.E.2d 484

SUBJECT: Look-alike substance statute defect does not require reversal

HOLDING: While Ind. Code 35-48-4-4.6(a), prohibiting distribution of non-controlled substance represented to be controlled substance, does contain defect, defect is hypertechnical & does not affect validity of statute. "Distribute" is defined in Ind. Code 35-48-1-14 as "to deliver a controlled substance, & "delivery" is defined in Ind. Code 35-48-1-11(1) as "actual or constructive transfer from one (1) person to another of a controlled substance." Therefore, Ind. Code 35-48-4-4.6 & these statutes are inconsistent because Ind. Code 35-48-4-4.6(a) requires proof of distribution of non-controlled substance & distribution is defined as transfer of controlled substance. Ct. found, however, that while statutes must be strictly construed against State, in this case purpose of statute was clear & D's construction of statute would render it "ineffective, nugatory, or absurd." Statutory scheme was clearly intended to prohibit distribution of noncontrolled substances represented to be controlled substances & does not require proof of distribution of controlled substance. Ct. determined that D's conduct was fairly covered by statutory prohibition & upheld his conviction, Baker, J., dissenting. On transfer, Conner at 626 N.E.2d 803, Ind. S.Ct. found D's sentence disproportional (see separate card) but did not reverse on this issue. In footnote, Ct. mentioned other issue of prosecution for "distribution," rather than lower felony class "dealing," & noted it appeared that "distributing" provisions were intended to apply to larger, commercial operations. Ct. declined, however, to find error in charging D under distribution provision rather than dealing provision.

TITLE: Riley v. State
INDEX NO.: K.8.h.
CITE: (5-11-99), Ind., 711 N.E.2d 489
SUBJECT: Dealing in purported controlled substance - evidence sufficient
HOLDING: Evidence was sufficient to support conviction for dealing in substance represented to be controlled substance. To secure conviction on this charge, State is required to prove beyond reasonable doubt that D knowingly or intentionally delivered or financed delivery of substance that, while not controlled substance or prescription drug, was expressly or impliedly represented to be controlled substance. Ind. Code 35-48-4-4.5(a)(1). Here, undercover police officer heard D say that he was selling "bogeyman," a substance that resembles but is not cocaine. D neither told officer that he was selling him cocaine nor informed him that "bogeyman" did not contain controlled substance. Rather, D informed officer that substance could be resold as cocaine & that officer could make nine times money he paid for it. Ct. rejected D's argument that evidence was insufficient because D did not represent substance to be cocaine & officer who bought it knew that it was not cocaine. D expressly represented that substance could be resold as cocaine for profit. Further, D packaged substance in manner uniquely used for illegal distribution of controlled substances. Actual knowledge of purchaser is not element of charged offense. Held, judgment affirmed; Sullivan, J., & Shepard, C.J., dissenting.

TITLE: Smith v. State
INDEX NO.: K.8.h.
CITE: (4th Dist. 02/17/92), Ind. App., 586 N.E.2d 890
SUBJECT: Dealing in substance represented to be controlled - sufficiency of evidence
HOLDING: Evidence was sufficient to support conviction for dealing in substance represented to be controlled substance, even though D did not directly transfer substance to buyer. Undercover officer initially met with D's accomplice & after some inquiry, arranged to buy cocaine. When D returned to car with accomplice, he asked officer what he wanted "to do," & response was "an eight-ball." D then told accomplice that he would deal with him, but not with officer. D & accomplice stepped back & D handed package to accomplice, which was transferred to officer. Officer testified that after transfer to him, he heard D ask accomplice how the money would be split & accomplice responded that D would get \$200 & accomplice would get \$20 for setting up deal. After exchange, other officers converged & arrested D, who said, "You all set me up, you want the other guy, not me." D then said bag contained only flour & aspirin, & testing confirmed this. Ct. found D implicitly represented material to be controlled substance, & distinguished situation from that in Pryor 296 N.E.2d 125, because D's role in transaction was much greater than that of mere bystander. Ct. also found that D could have been convicted because he acted in concert with accomplice, i.e., accomplice liability. Held, conviction affirmed.

TITLE: Townsend v. State
INDEX NO.: K.8.h.
CITE: (3rd Dist., 11-21-96), Ind. App., 673 N.E.2d 503
SUBJECT: Distributing & possessing counterfeit substance - double jeopardy
HOLDING: D could not be convicted & sentenced separately for distributing & possession of substance represented to be controlled substance. As in Johnson v. State, 659 N.E.2d 242 (Ind. Ct. App 1995), charging information made no distinction between counterfeit cocaine that D was accused of possessing & counterfeit cocaine D was accused of distributing. Separate convictions for dealing & possession based upon single sale of narcotics are sustainable if State makes clear that only quantity retained after sale forms basis of possession charge, & only quantity sold forms basis of dealing charge. Collins v. State, 520 N.E.2d 1258 (Ind. 1988). Ct. rejected State's argument that State provided clear distinction by introducing some evidence of possible possession aside from quantity sold. Held, remanded with instructions to vacate possession conviction.

TITLE: Whitaker v. State

INDEX NO.: K.8.h.

CITE: (3/2/2018), (Ind. Ct. App 2018)

SUBJECT: Sufficient evidence D knowingly or intentionally possessed synthetic drug lookalike substance

HOLDING: State presented sufficient evidence to show that the substance D knowingly or intentionally possessed was a synthetic drug lookalike substance as defined under Indiana Code § 35-31.5-2-321.5, even though there was no scientific testing of the substance. Police officers that testified at trial had significant experience dealing with synthetic marijuana, otherwise known as "spice." They testified that the substance's appearance and smell was consistent with spice and that some of it was packaged in a ripped baggie. Neither D nor his attorney during closing argument disputed that the substance was spice. The identity of a controlled substance may be established by circumstantial evidence, and the State is not required to introduce the subject contraband to obtain a conviction for dealing or possession. Helton v. State, 907 N.E.2d 1020, 1024 (Ind. 2009); Boggs v. State, 928 N.E.2d 855 (Ind. Ct. App 2010).

Court also rejected D's argument that the statutes defining and criminalizing possession of a synthetic drug lookalike substance are unconstitutionally vague. The issue in this case was whether the drugs belonged to D or the driver of the car in which the drugs were found. D's argument that the statutes do not give sufficient notice of what constitutes a synthetic drug lookalike was not relevant to the inquiry, so the statutes are not void for vagueness in his case. Held, judgment affirmed.

RELATED CASES: Neal, 131 N.E.3d 654 (Ind. Ct. App. 2019) (in light of the shape, color, size, and overall unit appearance of the pills, and the manner in which they were packaged as set forth in the record and shown in the exhibits, a reasonable finder of fact could determine that the pills constituted a lookalike substance; further, given the number of pills and their packaging, numerous empty baggies, and scale, the finder of fact could reasonably infer that D possessed the substance with intent to distribute).

K. CRIMES

K.8. Drugs (Ind. Code 35-48)

K.8.k. Controlled substance excise tax (Ind. Code 6-7-3)

TITLE: Bryant v. State

INDEX NO.: K.8.k.

CITE: (12-27-95), Ind., 660 N.E.2d 290

SUBJECT: Controlled substance excise tax (CSET) - double jeopardy (DJ)

HOLDING: Assessment of Ind.'s CSET & its 100% penalty against D was punishment & thus a jeopardy attachment, barring subsequent criminal drug prosecution. After arresting D, police contacted Indiana Department of Revenue. Department assessed tax, met with D & demanded payment. Because D did not immediately pay CSET, Department served him with "Record of Jeopardy Findings & Jeopardy Assessment Notice & Demand," which required payment of CSET plus 100% penalty for nonpayment. State next charged D with failure to pay CSET & other criminal drug-related charges. After D was convicted on all criminal charges, he appealed criminal penalty on DJ grounds.

Ct. first held that as in Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct 1937, Ind.'s CSET has punitive characteristics that subject it to constraints of DJ Clause. Under "same elements" analysis for DJ, CSET's civil & criminal sanctions are punishments for same offense. Ct. reviewed Ind. Code 6-7-3-11(a) & (b) and, with exception of mens rea requirement, found no distinction between criminal penalty for nonpayment & civil penalty & assessment. Here, jeopardy first attached when Dept. of Revenue served D with its Jeopardy Assessment, which was judgment against D for CSET & 100% nonpayment penalty. When jury was sworn in D's criminal trial for nonpayment of CSET, second jeopardy attached & barred criminal conviction for nonpayment. D's convictions for growing & possessing marijuana were also subsequent jeopardies barred by DJ Clause. Held, transfer granted, convictions for failure to pay CSET, growing & cultivating marijuana vacated, conviction for maintaining common nuisance affirmed; DeBruler, J., concurring & dissenting; Sullivan, J., dissenting.

Note: See also Collins & Whitt, this section.

RELATED CASES: Garcia, App., 686 N.E.2d 883 (convictions for dealing & possession of marijuana which occurred after CSET assessment violated DJ); Mohler, 694 N.E.2d 1129 (does not apply retroactively to cases on collateral review).

TITLE: Collins v. State

INDEX NO.: K.8.k.

CITE: (12-27-95), Ind., 659 N.E.2d 509

SUBJECT: Dealing drugs & failure to pay drug tax - double jeopardy

HOLDING: Convictions for both dealing in drugs & failing to pay Indiana's Controlled Substances Excise Tax (CSET), imposed in same proceeding, violate double jeopardy. Double Jeopardy Clause protects against multiple punishments imposed in single proceeding for same offense. North Carolina v. Pearce (1969), 395 U.S. 711. State also violates double jeopardy when it punishes D for greater offense & lesser included offense. If lesser included offense requires no proof beyond that required for greater offense, two are "same offense" for purposes of double jeopardy. Here, D's convictions were two punishments for same offense. State charged D with each offense by alleging same res, i.e., delivery of cocaine & failure to pay CSET on cocaine. Only unique fact required to be proven by either offense is Ind. Code 6-7-3-11(b)'s prerequisite that D not have timely paid CSET. State was not required to prove this fact to convict D of dealing cocaine under Ind. Code 35-48-4-1. Because each element of offense of dealing cocaine is encompassed by elements of failing to pay CSET, two statutes cannot be said to punish different offenses. Rather, delivery offense is lesser-included offense of CSET's criminal penalty. Bryant, Ind., 660 N.E.2d 290. Held, transfer granted, CSET conviction vacated & conviction for delivery of cocaine affirmed; Ct. App. decision at 645 N.E.2d 1089 summarily affirmed in part; DeBruler, J., concurring in result. **Note:** Citing Exc Parte Lange (1873), 18 Wall. 163, Ct. vacated conviction on greater offense & affirmed conviction on lesser-included offense because D had already begun serving his sentence for lesser-included offense of delivery of cocaine. Moreover, State would have chosen to prosecute delivery offense as class B felony instead of CSET offense, a class D felony, had it known of CSET's criminal sanction punished "same offense." See also Bryant & Whitt, this section.

TITLE: Copeland v. State

INDEX NO.: K.8.k.

CITE: (2nd Dist., 1-22-98), Ind. App., 693 N.E.2d 568

SUBJECT: Voluntary payment of controlled substance excise tax (CSET) - no jeopardy

HOLDING: Although D was liable for CSET at moment he possessed controlled substance, his voluntary payment of CSET, absent jeopardy assessment by Department of Revenue, did not bar subsequent prosecution for conspiracy to deal in cocaine. CSET is punishment & thus jeopardy for double jeopardy purposes which attaches at moment of assessment. Bryant, 660 N.E.2d 290. Constitutional prohibition on double jeopardy is not against being twice punished but is against twice being placed in jeopardy. Here, Department of Revenue issued neither oral nor written assessment of CSET to D. Thus, because tax was never formally assessed, no jeopardy ever attached & subsequent prosecution did not offend double jeopardy principles. Held, denial of motion to dismiss conspiracy charge affirmed.

TITLE: State v. Mohler

INDEX NO.: K.8.k.

CITE: (5-6-98), Ind., 694 N.E.2d 1129

SUBJECT: Double jeopardy - controlled substance excise tax (CSET); no retroactive application

HOLDING: Rule announced in Bryant, 660 N.E.2d 290, does not apply retroactively to cases on collateral review. In Bryant, Ct. held that because CSET constitutes criminal punishment, Double Jeopardy Clause bars criminal prosecution for underlying drug offense after tax has been assessed. New rules of criminal procedure do not apply to cases which have become final before new rule was announced, unless new rule: 1) places certain kinds of primary, private individual conduct beyond power of criminal lawmaking authority to proscribe, or prohibits certain category of punishment for class of Ds due to their status or offense; & 2) is watershed rule of criminal procedure central to accurate determination of innocence or guilt. Daniels, 561 N.E.2d 487; Teague v. Lane, 109 S.Ct. 1061 (1989). Ct. held that D was not entitled to retroactive benefit of Bryant rule because rule does not immunize primary conduct from overall, or any specific, criminal punishment. Drug possession & dealing offenses for which D was convicted remained illegal after Bryant. Further, Bryant rule does not define specific class of Ds by their status or offense as required by Penry v. Lynaugh, 492 U.S. 302 (1989), but rather by punishment they received. If specific class of Ds under Penry is defined as all those receiving newly proscribed punishment, then all those receiving newly proscribed punishment are entitled to benefit of new rule. This circular approach allows exception to swallow general rule, resulting in retroactive application of almost every new rule. Both finality & efficient administration of justice -- the rationale for nonretroactivity -- would be undermined if not destroyed. Neither new rules enforcing Double Jeopardy Clause, without more, nor new rule enunciated in Bryant at issue here, fall within Penry exception. Held, transfer granted, Ct. of Appeals' opinion at 679 N.E.2d 170 vacated, & petition for post-conviction relief denied.

TITLE: Whitt v. State
INDEX NO.: K.8.k.
CITE: (12-27-95), Ind., 659 N.E.2d 512
SUBJECT: Drug tax & possession of cocaine within 1000 feet of school - no double jeopardy
HOLDING: Convictions for possession of cocaine within 1000 feet of school & failure to pay controlled substance excise tax (CSET) did not violate double jeopardy. Under "same elements" test, each offense contained element which other did not. Ind. Code 35-48-4-6 required State to prove D possessed cocaine within 1000 feet of school property, while Ind. Code 6-7-3-11(b) required State to prove D possessed cocaine without having paid CSET. D was not prosecuted for "same offense" in violation of Double Jeopardy Clause. Collins v. State (1995), Ind., 659 N.E.2d 509. Held, Tr. Ct. affirmed, decision of Ct. App. at 645 N.E.2d 677 vacated with respect to D's conviction for possession of cocaine within 1000 feet of school. Note: See Bryant & Collins, this section.

K. CRIMES

K.8. Drugs

K.8.I. Other

TITLE: Slone v. State

INDEX NO.: K.8.I.

CITE: (3rd Dist., 09-09-09), 912 N.E.2d 875 (Ind. Ct. App 2009)

SUBJECT: Purchase of drugs containing more than three grams of pseudoephedrine - insufficient evidence

HOLDING: D waived her argument that Ind. Code 35-48-4-14.7, which prohibits purchase of drugs containing more than three grams of ephedrine, pseudoephedrine, or both within one week is unconstitutionally vague. However, although D stipulated to fact that she purchased drugs containing more than three grams of pseudoephedrine within one week, State failed to present evidence sufficient to prove beyond a reasonable doubt that she knowingly violated Ind. Code 35-48-4-14.7(d). State presented evidence to prove that D was aware that she had purchased two twenty-count packages of drugs containing pseudoephedrine within one week, and that she had taken those drugs at a rate more quickly than the recommended dosage for one person. But State presented no evidence that proved D was aware of a high probability that two packages of drugs contained more than three grams of ephedrine, pseudoephedrine, or both. State did not enter into evidence either of the packages of drugs which D purchased, so Court could not review what information regarding the contents those drugs was contained on the packaging or how such information was displayed on the packaging. Held, judgment reversed.

TITLE: Vasquez v. State

INDEX NO.: K.8.l.

CITE: (2-2-01), Ind., 741 N.E.2d 1214

SUBJECT: Glue sniffing - evidence sufficient; identification of substance based solely on officer's experience

HOLDING: Lay opinion testimony of police officers was sufficient to support D's conviction for glue sniffing. Conviction requires that State prove that "[a] person who, with intent to cause a condition of intoxication...ingests or inhales the fumes of...a substance that contains: (A) toluene...." Ind. Code 35-46-6-2. Here, when officers found D, his balance & speech was impaired, & he was non-responsive to officers' questions. They also found clear liquid substance in bottle with rag soaked in substance nearby. Both officers testified that they believed substance to be toluene based solely on their previous experience with smell & appearance of substance. However, they testified that they had no special training & were not experts in identification by smell. On appeal, D argued that State did not prove either that substance was toluene or that D inhaled with intent to cause intoxication. Ct. disagreed, noting that identity of drug can be proven by circumstantial evidence, including opinion of someone sufficiently experienced with drug. Clifton v. State, 499 N.E.2d 256 (Ind. 1986). Fact that police officers found items commonly used in glue sniffing & that D was noticeably impaired when they arrived supported inference of D's intent to become intoxicated. Held, transfer granted, opinion of Ct. App. at 735 N.E.2d 1207 vacated, conviction affirmed.

RELATED CASES: Clark, 6 N.E.3d 992 (Ind. Ct. App 2014) (no error in allowing detectives to testify as to their opinion the substance recovered from D's pocket was marijuana and detectives' testimony was sufficient to establish it was marijuana; see full review at O.7.a); Upp, App., 808 N.E.2d 706 (evidence was sufficient to support inference that bag into which D was breathing contained glue, & evidence supported conclusion that D was impaired, where arresting officer testified that D had dazed expression about him & it appeared that he was unaware of what was going on, that his pupils were constricted, that D's legs were shaking, & that he had mucus coming from his nose); Boggs, 928 N.E.2d 825 (Ind. Ct. App 2010) (testimony of police officers could establish the identity and quantity of substances at trial because the officers were sufficiently experienced with methamphetamine and the substances involved in the manufacturing of the drug.).

K. CRIMES

K.9. Motor vehicles

K.9.a. Driving while intoxicated (Ind. Code 9-30) (prior conviction used to enhance, see E.8.d.2)

TITLE: Albaugh v. State

INDEX NO.: K.9.a.

CITE: (12-17-99), Ind., 721 N.E.2d 1233

SUBJECT: Driving while intoxicated - entrapment

HOLDING: State failed to prove beyond reasonable doubt that officer did not cause D to drive his truck while intoxicated. In order to rebut D's entrapment defense, State may prove either that D's prohibited conduct was not product of police efforts or that D was predisposed to engage in such conduct. McGowan, 674 N.E.2d 174. Here, D's truck broke down about one-quarter of mile down road from his home. Due to snowy & cold conditions, D walked home & he & his girlfriend decided to leave truck on side of road until morning. D & his girlfriend spent rest of evening drinking. At about 1:30 a.m., officers came to D's home & repeatedly ordered him to move his truck because it was safety hazard on road. Police followed D to his truck although they did not help him get it started. When D started driving home, he ran truck into corn field. At this point, police suspected D was intoxicated & took him to station for breathalyzer, which he failed. Because D & his girlfriend were settled in for evening & had decided not to move truck until following morning, D was not predisposed that evening to drive his vehicle while intoxicated. In addition, evidence was insufficient to establish beyond reasonable doubt that D's conduct in driving while intoxicated was not product of officer using persuasion or other means likely to cause D to engage in conduct. Held, Ct. App.' memorandum opinion vacated & conviction reversed; Dickson, J., dissenting on basis that D had choice among various means by which to have vehicle moved.

TITLE: Allman v. State
INDEX NO.: K.9.a.
CITE: (4th Dist.; 5-17-00), Ind. App., 728 N.E.2d 230
SUBJECT: Operating with .01 BAC - failure to prove time between driving & test
HOLDING: Where D's BAC was just over legal limit & State did not provide testimony relating BAC to time of accident, there was insufficient evidence to convict D of operating with .10 BAC. In order to prove operating with .10 BAC, State must show BAC at time of alleged violation by means of extrapolation or chemical test administered at time of violation. Jury is permitted to find that D's BAC is at least .10 at time of alleged violation if test is administered within three hours of violation & results of test reveal BAC of .10. Platt, 589 N.E.2d 222.

Here, only evidence State offered to prove that test was administered within three hours of alleged violation was testimony that officers were called to scene of accident at around 10:00 p.m. & test was administered at 12:28 a.m. D's BAC at 12:28 a.m. was .104. Because State could not prove that test was administered within three hours, State could not rely on presumption that D's BAC at time of violation was at least .10. Without presumption, fact that D's BAC was slightly over .10 approximately two and one half to three hours after violation did not support inference that she was operating vehicle with BAC of .10. Held, conviction *reversed*.

RELATED CASES: Jackson, 67 N.E.3d 1166 (Ind. Ct. App 2017) (even though no direct evidence established when D crashed her car while driving drunk, reasonable inferences showed D's blood was drawn within 3 hours of accident, allowing trial court to presume D's alcohol concentration equivalent at time of accident was the same as when her blood was drawn; see full review, this section); Mannix, 2016 Ind. App. LEXIS 83 (Ind. Ct. App 2016) (fact that a blood draw was administered more than three hours after an accident does not render it inadmissible; rather, it deprives the State of the rebuttable presumption that the driver's BAC at the time of the test was the same at the time of the accident; see full review at O.12.a)

TITLE: Awbrey v. State

INDEX NO.: K.9.a.

CITE: (7/6/2022), Ind. Ct. App., 191 N.E.3d 925

SUBJECT: OVWI conviction reversed where State failed to show evidence of impairment

HOLDING: Pursuant to the plain language of Ind. Code § 9-30-5-2, the level of an intoxicant in the defendant's blood, standing alone, is insufficient to establish impairment. Here, Defendant was pulled over for driving with a suspended license at about 5:00 p.m. Defendant admitted to police that he had smoked methamphetamine earlier in the day prior to work., early in the morning. Defendant was transported to a hospital where he consented to a blood draw. Defendant was charged under IC 9-13-2-86, which requires evidence of intoxication and impairment. (Defendant was not charged under IC 9-30-5-2, OVWI with a controlled substance or metabolite in his blood.) The police officer testified he did not see any impairment and Defendant passed the HGN field sobriety test. The assistant director of the State toxicology lab testified she would "expect" impairment based upon the level of methamphetamine in Defendant's blood. The director testified in general terms about how methamphetamines can impair operation of a vehicle. A jury found Defendant guilty, but the Court of Appeals reversed, finding insufficient evidence of impairment.

TITLE: Baran v. State

INDEX NO.: K.9.a.

CITE: (09-01-94), Ind., 639 N.E.2d 642

SUBJECT: Breath test sufficient to show percentage of alcohol in blood

HOLDING: Printout of Intoxilyzer 5000, showing reading of .11, was sufficient to support conviction for Operating with Blood Alcohol level (BAC) .10% or more, granting transfer & reversing decision at 622 N.E.2d 1326. Ct. rejected argument that because Ind. Code 9-11-2-1(a) requires evidence of BAC, additional evidence of breath alcohol to blood alcohol conversion process of Intoxilyzer was required, as was evidence that test result number was actually percentage by weight of alcohol in blood. Tr. Ct. was entitled to take judicial notice that Intoxilyzer automatically performs required conversion. Conversion not necessary to establish BAC because Intoxilyzer expressed results by required BAC. Daum v. State, App., 625 N.E.2d 1296. Pursuant to IAC 1.1-2-1(e)(2), breath test machines are tested for accuracy using known ethanol-water or ethanol- gas solution, measured as percent of weight by volume. Because equipment must measure BAC as percentage of alcohol by weight in blood to be properly certified, Tr. Ct. was entitled to take judicial notice of fact printout expressed result as percentage by weight in blood.

Because it was bench trial & Tr. Ct. was required by statute to take judicial notice concerning breath test machine, Tr. Ct.'s failure to notify parties it would take judicial notice was not reversible error. If trial is to jury in criminal case, Tr. Ct. must "expressly take judicial notice of effect of the Administrative Code's standards & regulations for selection & certification of breath test equipment & chemicals; & instruct the jury `that it may, but is not required to, accept as conclusive any fact judicially noticed.'" I.R.E 201(g). Held, transfer granted, Ct. App. decision vacated, & conviction for BAC > .10% affirmed.

RELATED CASES: Sturgis, App., 654 N.E.2d 1150 (failure to instruct jury about effect of Tr. Ct.'s taking judicial notice of administrative regulations was harmless error); Berry, App., 720 N.E.2d 1206; Godar, App., 643 N.E.2d 12 (conviction for operating with BAC >.10% reversed & remanded where Tr. Ct. failed to take judicial notice of effect of breath test regulations & instruct jury accordingly).

TITLE: Black v. State
INDEX NO.: K.9.a.
CITE: (3rd Dist., 10-04-93), Ind. App., 621 N.E.2d 368
SUBJECT: Evidence of driving with blood alcohol >.10% (BAC .10) insufficient
HOLDING: Where Intoxilyzer 5000 gave reading of .10% BAC, & testimony was elicited that machine would round up to .10% from slightly lower actual reading, evidence was insufficient to support conviction for BAC >.10 under limited circumstances where no evidence was presented to refute this testimony. Although in State v. Lamelle, 340A.2d 49, court found rounding-off of .001% did not prejudice D where reading was .15%, here reading was only .10%, & so it could actually have been less than .10%. In footnote, Ct. noted that courts have demanded showing that D's BAC would have been at or above statutory minimum at crucial time. Held, conviction reversed.

TITLE: Blinn v. State

INDEX NO.: K.9.a.

CITE: (5th Dist., 2-18-97), Ind. App., 677 N.E.2d 51

SUBJECT: Operating while intoxicated (OWI) - blood serum alcohol content

HOLDING: In OWI prosecution, Tr. Ct. did not err in admitting evidence of D's serum alcohol content (SAC) rather than his whole blood alcohol content (BAC) as proof of intoxication. Evidence is generally admissible in criminal proceeding if it is relevant to issue being tried, even though its tendency to prove material fact may be slight. Smith, App., 502 N.E.2d 122. Even if evidence is only marginally relevant, it is within sound discretion of Ct. to determine its admissibility. Martinez, 549 N.E.2d 1026.

Here, D was charged under Ind. Code 9-30-5-2, which requires no specific BAC for OWI conviction. "Intoxicated" is defined as being under influence of alcohol, controlled substance, other drug or combination thereof so that there is impaired condition of thought & action & loss of normal control of person's faculties to extent that person is endangered. Ind. Code 9-13-2-86. Ct. found that conversion of SAC to BAC is not required for evidence of serum count to be relevant to issue of intoxication, despite medical evidence showing that levels of alcohol in serum may show alcohol content 18 to 20% higher than content that would be reflected by BAC test. Mehidal v. State, 623 N.E.2d 428 (Ind. Ct. App 1993).

Ct. further found that expert testimony conflicting with Indiana law regarding conversion of SAC to BAC was admissible because: 1) no specific alcohol content was required for conviction, & 2) conflicts as to how alcohol content is measured can be resolved by trier of fact following presentation of evidence & cross-examination of experts. Evidence was sufficient to show that D was "impaired," where D rear-ended another driver at intersection, police testified that D had slurred speech & alcohol on breath during interview at hospital, & test showed that D had SAC of 0.292 percent per deciliter. Held, conviction affirmed; Sullivan, J., dissenting.

RELATED CASES: Pickens, App., 751 N.E.2d 331 (admission of blood serum results without explanation of conversion factor & without testimony regarding what whole blood alcohol content would be after conversion was harmless error).

TITLE: BMV v. Hargrave

INDEX NO.: K.9.a.

CITE: (2/2/2016), 51 N.E.3d 255 (Ind. Ct. App 2016)

SUBJECT: OWI diversion not available for CDL holders

HOLDING: D, a commercial driver's license holder who pled guilty to two OWI charges, could not participate in a diversion program that would allow eventual dismissal of his charges, because Indiana has adopted federal law that bars diversion for CDL holders.

Police found D slumped over in his pick-up truck, reeking of alcohol. He was charged with two counts of OWI. The BMV suspended his license, and D surrendered his CDL. Upon D's guilty plea, the trial court referred D to diversion. The BMV intervened and filed a Motion to Correct Error, arguing that federal law, adopted by Indiana, bars diversion for people, like D, who hold CDLs. The trial court denied the Motion to Correct Error.

49 C.F.R. § 384.225(b) and (d) requires states to post all convictions under state or local traffic laws on the Commercial Drivers' License Information System ("CDLIS"). To that end, 49 C.F.R. § 384.226 provides that "[t]he State must not mask, defer imposition of judgment, or allow [a person] to enter into a diversion program that would prevent a . . . CLD holder's conviction . . . from appearing on the CDLIS driver record"

Allowing D to surrender his CDL, avoid conviction by completing a diversion program, and then return to driving professionally with no record of his offenses is "precisely what the anti-masking law is designed to prevent." Thus, "[w]e agree with the State that . . . a reasonable interpretation of the federal regulation" is that "a person who holds a CDL license at the time he commits a traffic violation may not participate in a diversion program or have judgment deferred on that conviction." Held, judgment reversed.

TITLE: Brown v. State

INDEX NO.: K.9.a.

CITE: (5th Dist., 3-8-01), Ind. App., 744 N.E.2d 989

SUBJECT: Operating vehicle with controlled substance in body - accident resulting in fatality or serious bodily injury; equal protection, vagueness & unreasonable search claims

HOLDING: Ind. Code 9-30-7-3, which provides that law enforcement officer may offer chemical test to any person whom officer has reason to believe operated vehicle that was involved in fatal accident or accident involving serious bodily injury, was constitutionally applied to D; thus search in form of blood draw was reasonable. Although D did not cause accident resulting in fatality, fact he drove vehicle involved in fatal accident established his consent to chemical test under Ind. Code 9-30-7-3. Griswold v. State, 725 N.E.2d 416 (Ind. Ct. App 2000). There is no requirement that probable cause of intoxication be shown before driver can be asked to submit to chemical test under this statute. Blood draw screening for each & every legislatively proscribed substance was not overly broad because Ind. Code 9-30-7-3(b) places no restriction on number of tests that may be administered.

Ct. also rejected D's equal protection & vagueness challenges to Ind. Code 9-30-5-1(b), operating vehicle while having controlled substance in body. D argued that this statute singles out drivers with low levels of metabolites for punishment even though these drivers are not impaired. State has legitimate purpose in providing for safe roadways & challenged statute is rationally related to achieving that stated purpose. D's vagueness challenge to Ind. Code 9-30-5-1(b), as applied to metabolites of marijuana, was premised on concern that marijuana can be involuntarily ingested by exposure to second-hand marijuana smoke. Thus, person has no way of knowing if he is in violation of statute. Ct. disagreed, noting that statutes adequately & unambiguously inform persons of ordinary intelligence of proscribed conduct. Concern of statute is not how metabolite entered blood, but rather whether metabolite is present. Held, conviction affirmed.

RELATED CASES: Bennett, App., 801 N.E.2d 170 (rejecting D's claim that term "body" as used in statute is unconstitutionally vague; legislature clearly intended to broaden scope of statute by sanctioning use of urine screens to show metabolites in the body).

TITLE: Bunting v. State
INDEX NO.: K.9.a.
CITE: (5th Dist. 6-29-00), Ind. App., 731 N.E.2d 31
SUBJECT: Operating while intoxicated (OWI) causing serious bodily injury - insufficient evidence
HOLDING: State failed to present sufficient evidence to sustain D's conviction of OWI causing serious bodily injury, where proof of causation was based entirely on speculation that D's lights were off until just prior to impact. Under Ind. Code 9-30-5-4(a), State was required to prove: 1) that D operated motor vehicle with at least .10% of alcohol by weight in grams of 210 liters of breath or while intoxicated, & 2) that her act of doing so resulted in serious bodily injury to another person. State bears burden of proving causation, but it need not establish causal link between D's alcohol consumption & fact that serious bodily injury resulted from her driving. Micinski, 487 N.E.2d 150.

Here, it was undisputed that D had right-of-way & that victim pulled in front of her on highway. Relying solely on testimony of witness who stated that she did not see D's lights in her peripheral vision until just prior to accident, State argued that D was driving without her lights until moments before accident. Ct. held that evidence did not support State's theory. Witness's testimony proved only that from her position behind victim's vehicle she did not see D's lights, not that D's lights were not working. All evidence supported conclusion that lights & automatic ambient light-sensing system in D's minivan were working properly. On this record, Ct. concluded as matter of law that there was insufficient evidence of probative value to establish that D's lights were not operating until just before accident. Held, conviction reversed & remanded with instructions to enter conviction & sentence for lesser-included offense of OWI.

TITLE: Carter v. State

INDEX NO.: K.9.a.

CITE: (2nd Dist.; 8-24-00), Ind. App., 734 N.E.2d 600

SUBJECT: Driving while intoxicated - breath test relevant & admissible under hearsay exception

HOLDING: Tr. Ct. did not err in admitting results of D's breath test which expressed that D had .17 grams of alcohol in 210 liters of his breath. Breath test printouts are hearsay. Mullins, 646 N.E.2d 40, 48 (Ind. 1995). However, evidence of blood alcohol content is admissible under statutory exception to hearsay. Ind. Code 9-30-6-15. Here, Ct. reads Sales, 723 N.E.2d 416 (Ind. 2000), to stand for proposition that regardless of imperfections in language of Ind. Code 9-30-5-1(a), legislature was trying to validate use of breath tests, without requiring other evidence proving blood alcohol content, in prosecutions. Thus, although Ind. Code 9-30-6-15 states that amount by weight of alcohol that was in blood of person charged with offense is admissible, breath alcohol content is also admissible as exception to hearsay. In addition, breath test results, without conversion to blood alcohol concentration, are neither irrelevant nor fail to conform with state toxicology guidelines. Held, judgment affirmed.

RELATED CAESE: Priest, 181 N.E.3d 1046 (Ind. Ct. App. 2022) (a bald statement in a traffic citation regarding B.A.C. level is inadmissible hearsay; see full review at O.12.b).

TITLE: Clark v. State

INDEX NO.: K.9.a.

CITE: (5th Dist., 03-30-93), Ind. App., 611 N.E.2d 181

SUBJECT: Evidence insufficient to support Operating While Intoxicated (OWI)

HOLDING: Where D was found asleep in driver's seat, but leaning toward passenger door; in car with engine running, lights on, & transmission in park; & car was in parking spot in apartment complex, but with front end partially in roadway; evidence was insufficient to show D "operated" vehicle while intoxicated. In reaching conclusion, Ct. looked to number of previous OWI decisions. It is not sufficient for conviction to show D merely started engine, & there must be some evidence he "operated" vehicle, Mordacq, App., 585 N.E.2d 22. Where Ds have been found asleep with engine running & cars are parked in parking lots, evidence has been found insufficient, Id.; Corl, App., 544 N.E.2d 211; Heigel, App., 538 N.E.2d 265, trans. denied. Where Ds have been asleep in cars sitting in traffic lane or travel portion of road, Traxler, App., 538 N.E.2d 268; Rose, App., 345 N.E.2d 257, or where car had been driven into snowbank on median of highway, Garland, App., 452 N.E.2d 1021, however, evidence of operating has been held sufficient. Ct. rejected State's argument that because front of car was protruding into roadway, case was controlled by Traxler, Rose & Garland, finding facts closer to Mordacq, etc. Ct. found car was parked in space, however inartfully, & that there was no evidence from which to infer operation. Held, conviction reversed, Sharpnack, C.J., dissenting. **NOTE:** Both in opinion & dissent, other decisions are discussed at length, & opinion has good summary of case law on operating.

RELATED CASES: Jackson, 67 N.E.3d 1166 (Ind. Ct. App 2017) (even though no direct evidence established when D crashed her car while driving drunk, reasonable inferences showed D's blood was drawn within 3 hours of accident, allowing trial court to presume D's alcohol concentration equivalent at time of accident was the same as when her blood was drawn; see full review, this section).

TITLE: Combs v. State
INDEX NO.: K.9.a.
CITE: (1st Dist., 11-05-08), Ind. App., 895 N.E.2d 1252
SUBJECT: OWI - foundation for admission of blood test results
HOLDING: In OWI prosecution, Tr. Ct. abused its discretion in admitting blood test results where State failed to lay a proper foundation that the medical technologist who drew the blood was acting under the direction of or under a protocol prepared by a physician. Blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by a "physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." Ind. Code 9-30-6-6(a).

Here, after D refused a chemical test, the officer obtained a warrant for a blood draw. A medical technologist who drew D's blood testified about the circumstances surrounding the blood draw. However, the technologist did not testify that a physician prepared or approved the protocol she followed or that she acted under the direction of a physician when drawing D's blood sample. To accept the State's position that the medical technologist's testimony regarding the circumstances surrounding the blood draw laid a proper foundation for the admission of the blood test results would be to ignore the clear language of Ind. Code 9-30-6-6(a).

However, Tr. Ct.'s error in admitting the blood test results of .084 BAC was harmless. Even without the test results, D admitted he had consumed several beers, the officer smelled the odor of alcohol on D's breath and saw two empty beer cans in the car, D's speech was slurred and his eyes were bloodshot, D fumbled with his wallet and failed several field sobriety tests. Thus, the evidence otherwise amply supports the jury's finding that D operated his vehicle while intoxicated and the test results likely had no impact on the jury's verdict. Held, judgment affirmed.

RELATED CASES: Martin, 154 N.E.3d 850 (Ind. Ct. App. 2020) (nurse's testimony that she was trained in legal blood draws, that her hospital had a protocol for legal blood draws, that a physician approved that protocol, and that she followed that protocol was sufficient for Tr.Ct. to find that the State laid the proper foundation for the blood draw evidence); Kolish, 949 N.E.2d 856 (Ind. Ct. App 2011) (agreeing with Boston that 2010 amendment to statute applies retroactively without violating ex post facto); Boston, 947 N.E.2d 436 (Ind. Ct. App. 2011) (Tr. Ct. properly retroactively applied amendment to IND. CODE 9-30-6-6 setting forth the evidentiary foundation for results of a blood draw; the amendment eliminated the "certified phlebotomist" language and added subsection (j) which exempts bodily substance sample taken at a licensed hospital from the requirements); Brown, 911 N.E.2d 668 (Ind. Ct. App 2009) (although D consented to blood draw, state failed to lay proper foundation for admission of results; certified lab technician did not follow protocol developed by physician but rather method she learned in school, and a certified lab technician is not a medical professional listed in Ind. Code 9-30-6-6(j) who can draw blood at the request of a law enforcement officer); Hunter, App., 898 N.E.2d 455 (inadequacy of foundation is even more pronounced because State failed to present any evidence that nurse was "a person trained in obtaining bodily samples"; existence of search warrant directing hospital personnel to obtain a bodily substance sample should not trump &/or negate statutory requirements for obtaining blood samples).

TITLE: Cooper v. State

INDEX NO.: K.9.a.

CITE: (2-4-02), Ind. App., 761 N.E.2d 900

SUBJECT: Admissibility of horizontal gaze nystagmus (HGN) results - proper foundation

HOLDING: HGN results are admissible in Indiana & proper foundation for such evidence should consist of describing officer's education & experience in administering test & showing that procedure was properly administered. Although it has not been expressly held that HGN results are admissible in Indiana, procedure is no newcomer to scene in field sobriety testing. Ct. relied on State v. Superior Ct., 718 P.2d 171 (Ariz. 1986), & State v. Baue, 607 N.W.2d 191 (Neb. 2000), for support that use of HGN is widely accepted. Cases *cited* seventeen other state Ct. jurisdictions that approved HGN & 29 articles & papers dealing with subject. Results of properly administered HGN test are admissible to show impairment which may be caused by alcohol &, when accompanied by other evidence, will be sufficient to establish probable cause to believe person may be intoxicated. HGN test measures involuntary jerking of eyeball when focused on specific object. By observing: (1) inability of each eye to track movement smoothly, (2) pronounced nystagmus at maximum deviation, & (3) onset of nystagmus at angle less than 45 degrees in relation to center point, officer can estimate whether driver's blood alcohol content exceeds legal limit of .10 percent. Admission of results in this case was proper because officer testified to necessary foundation. Held, judgment affirmed.

RELATED CASES: Brown, App., 915 N.E.2d 996 (on rehearing from 911 N.E.2d 668, Ct. clarified proper procedure for administering HGN set forth in the National Highway Traffic Safety Administration manual); Hinds, App., 906 N.E.2d 877 (officer's failure to check for all three clues in both eyes, twice, starting with the left eye as taught by NHTSA did not render the HGN test and its results inadmissible); O'Banion, App., 789 N.E.2d 516 (Ct. disagreed with D's premise that covering one eye is a mandatory procedure for a valid HGN test. Thrust of Cooper is to provide that proper HGN procedure is for tester to move an object in a certain fashion in front of driver & watch driver's eyeball to detect involuntary jerking. This was done here).

TITLE: Curtis v. State

INDEX NO.: K.9.a.

CITE: (11-19-10), 937 N.E.2d 868 (Ind. Ct. App 2010)

SUBJECT: Operating while intoxicated (OWI) - proof of impairment

HOLDING: On appeal of his class C misdemeanor OWI conviction, D argued that evidence in this case established only an impairment of action, and Ind. Code 9-13-2-86 requires an evidentiary showing of impaired conditions of a person's thought, and action and loss of normal control of a person's faculties. Court disagreed and held that even though the statute uses the word "and" when saying a driver's actions, thoughts, and normal control of faculties must be impaired, the State is not required to prove all three were impaired in order to obtain an OWI conviction. Although it is Court's policy to regard "and" and "or" as used in statutes as being strictly of a conjunctive and disjunctive nature, appellate courts are "at liberty to make minor substitutions of words where necessary to give vitality to the legislative intent." See, e.g., Prewitt v. State, 878 N.E.2d 184 (Ind. 2007). The purpose of Ind. Code 9-30-5-2 is public safety and a person who is unable to control his physical movements poses a considerable danger to others when driving, even though he may be able to carry on a lucid conversation or count backward from twenty to one. Impairment of any of the three abilities necessary for the safe operation of a vehicle renders the operation of a vehicle dangerous. Thus, a person's unfitness to operate a vehicle, i.e., his impairment, is to be determined by considering his capability as a whole, not component by component, such that impairment of any of the three abilities necessary for the safe operation of a vehicle equals impairment within the meaning of Ind. Code 9-30-5-2. Held, conviction affirmed.

TITLE: Custer v. State

INDEX NO.: K.9.a.

CITE: (3rd Dist., 06-30-94), Ind. App., 637 N.E.2d 187

SUBJECT: Operating while Intoxicated (OWI) - Definition of "operating"

HOLDING: Evidence was sufficient to support conviction for OWI, although D was found asleep in driver's seat, parked on side of highway. Where D is found sleeping in motionless car with engine running, there must be some circumstantial evidence to show he operated vehicle, Hiegel, App., 538 N.E.2d 265, trans. denied, & whether person "operated" car is question of fact. Sufficiency of evidence of operation must be analyzed both at time Ds are discovered & before they are discovered, Mordacq, App., 585 N.E.2d 22. After reviewing number of cases where Ds were & were not found to be "operating" for purposes of OWI conviction, Ct. reviewed facts in this case. D was found parked along-side of highway, place reserved for emergencies, not normal parking; & officer came upon D after getting radio report that car matching its description had been observed driving wrong way on highway. Ct. found even if it assumed evidence was insufficient to show operation at time of discovery, evidence was sufficient to show D had been driving just prior to discovery. Although witness testified that she had actually been driving car & had left on foot after having argument with D, Ct. noted Tr. Ct. was best judge of credibility of witnesses. Held, evidence sufficient to support conviction.

RELATED CASES: Toan, App., 691 N.E.2d 477 (D being found asleep with engine running parked on side of four-lane highway is sufficient evidence to show D operated vehicle).

TITLE: Datzek v. State

INDEX NO.: K.9.a.

CITE: (1st Dist., 12-14-05), Ind. App., 838 N.E.2d 1149

SUBJECT: Blood draw - least intrusive means of chemical testing not required

HOLDING: In operating a vehicle with a BAC greater than .08% prosecution, Ct. rejected D's claim that evidence from blood draw should have been excluded because it was not the least intrusive means of chemical testing available. Indiana's implied consent statute, Ind. Code 9-30-6-2, notes that an officer "may offer a person more than one (1) chemical test" & "[a] person must submit to each chemical test offered by a law enforcement officer". (Ct.'s emphasis). Chemical test is defined under Ind. Code 9-13-2-22 as an analysis of a person's blood, breath, urine, or other bodily substance. Thus, Indiana's implied consent law does not provide that officers must use the "least intrusive" chemical test but allows a wide range of tests & individuals must submit to more than one test if offered. Furthermore, in order to offer a chemical test under the implied consent law, an officer must already have probable cause of intoxication. See Ind. Code 9-30-6-2(a). Thus, the "least intrusive" language of Wilson v. State, 745 N.E.2d 789 (Ind.2001), a case involving an invalid Terry stop, does not apply. The question under the Fourth Amendment is not whether the choice of the chemical test was the least intrusive but whether it was reasonable, & Ct. found the time involved & nature of testing was not unreasonable in this case. Held, judgment affirmed.

RELATED CASES: Gilbert, 997 N.E.2d 414 (Ind. Ct. App. 2013) (where probable cause was already established, police were not required to perform FST before detaining D).

TITLE: Flanagan v. State

INDEX NO.: K.9.a.

CITE: (2nd Dist., 08-23-05), Ind. App., 832 N.E.2d 1139

SUBJECT: State failed to prove driving "while" intoxicated

HOLDING: Ct. reversed conviction for operating a vehicle while intoxicated, where State did not prove when D consumed alcoholic beverages & thus failed to prove he drove "while" intoxicated. Officer spotted D's broken-down vehicle & two men on side of road but did not immediately stop to assist because he was transporting a prisoner. Officer returned after transporting prisoner but did not know how long vehicle had been disabled prior to his first seeing it. D admitted he had drunk alcohol & also that he drove & officer found empty beer cans in vehicle. D's blood alcohol level tested at .22 two hours after the officer first saw the broken-down vehicle. Ct. distinguished case from Weida v. State, App., 693 N.E.2d 598 , where D's truck was found in a ditch & evidence established D had been drinking in a bar before the accident; an officer responded to the scene within five to seven minutes of the accident being reported; & the truck was not in the ditch when the officer drove by an hour earlier. In contrast to Weida, there was no evidence here as to when D consumed alcohol & this is critical as D could have consumed the alcohol after his vehicle broke down. Held, judgment reversed.

RELATED CASES: McCray, App., 850 N.E.2d 998 (distinguishing Flanagan, App., 832 N.E.2d 1139, Ct. held that State presented sufficient evidence to convict D of operating while intoxicated, where there was a reasonably defined time period in which the drinking, intoxication & driving occurred); Robinson, App., 835 N.E.2d 518 (evidence insufficient where there was no testimony as to length of time between when the accident happened & when officers found D. D owned semi & admitted driving it, but there was no evidence that he had been drinking or was intoxicated at time that he drove it).

TITLE: Frensemeier v. State

INDEX NO.: K.9.a.

CITE: (4th Dist., 06-09-06), Ind. App., 849 N.E.2d 157

SUBJECT: Admission of blood test results -- probable cause

HOLDING: Schmerber v. California, 384 U.S. 757 (1966), requires probable cause that a driver's blood will contain evidence of alcohol or illegal substance impairment before a law enforcement officer may order it to be drawn & tested, in the absence of the person's consent. Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App 2003). Objectively observed clear indications of intoxication include dilated pupils, bloodshot eyes, glassy eyes, & the odor of alcohol on the person's breath. Datzek v. State, 838 N.E.2d 1149 (Ind. Ct. App 2005). Noticing odor of alcohol on driver's breath during course of an accident investigation can be sufficient to supply probable cause. Hannoy; Clark v. State, 372 N.E.2d 185 (Ind. Ct. App 1978).

Here, evidence showed that when officer ordered blood draw, he knew that D had been involved in automobile accident, that his breath smelled of alcohol, & that his eyes were bloodshot. In addition, D admitted that he had been drinking & might have fallen asleep at wheel, & officer noticed his manual dexterity was slow. Although Ct. cannot say that occurrence of traffic accident coupled only with an odor of alcohol will rise to level of probable cause in all instances that would justify warrantless blood testing of a D, additional factors suggesting D's intoxication in this case were sufficient to demonstrate that officer had probable cause to order blood draw. Following Schmerber, Ct. held that record supported a finding of exigent circumstances for blood draw because obtaining a warrant would have resulted in loss of evidence of intoxication. Held, denial of motion to suppress affirmed; Sullivan, J., dissenting, noted that officer testified that D's speech was clear, that there were no facts or circumstances that suggested D was drunk, & that he did not come away with thought that D was intoxicated.

RELATED CASES: Copas, App., 891 N.E.2d 663 (evidence that the D was found outside of a car involved in a wreck, the bottles of alcohol in and around the car and the smell of alcohol from the car was sufficient probable cause that the D operated the vehicle while intoxicated despite the other person found in the car).

TITLE: Gatewood v. State

INDEX NO.: K.9.a.

CITE: (4th Dist., 02-11-10), 921 N.E.2d 45 (Ind. Ct. App 2010)

SUBJECT: No proof D was intoxicated at time he drove

HOLDING: Court reversed conviction for operating while intoxicated where State did not prove D was impaired at time he drove his moped one hour earlier. Even though State produced evidence D was heavily intoxicated (.286 BAC) when he was found at 9:00 p.m. sleeping by his moped in hospital parking lot, State presented no evidence D was impaired when he drove his moped to the hospital one hour earlier at 8:00 p.m. Jury could not reasonably infer D was intoxicated while driving from officer's testimony suggesting a 150-pound man would need to drink twenty beers in one hour to reach .286 BAC. D drank a pint of vodka, not beer, and officer was unable to extrapolate from his testimony the volume of vodka D needed to consume in one hour to reach .286 BAC. Inference of intoxication while driving was also inappropriate because D was unobserved between 8:00 p.m. and 9:00, as he had entered hospital to visit his mother. Reversal of D's OWI conviction and habitual substance offender enhancement made it unnecessary for Court to address State's cross appeal claim that Tr. Ct. should not have suspended D's habitual offender enhancement. Held, Class D felony OWI conviction and habitual substance offender enhancement reversed.

TITLE: Green v. State

INDEX NO.: K.9.a.

CITE: (4th Dist., 8-26-98), Ind. App., 698 N.E.2d 832

SUBJECT: Operating vehicle with blood alcohol >.10% - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for operating vehicle with at least blood alcohol count of .10%. Breathalyzer results, coupled with indications that D consumed alcohol & failed field sobriety tests, established prima facie case for State. D's expert witness questioned accuracy of chemical test result & testified that he believed D's blood alcohol count to be in range of .06% to .08%. Witness also opined that Intoxilizer 5000 produces estimate that is based on many variables & that these variables prevent test result from being "conclusive." Tr. Ct. determined either that D's rebuttal witness was not credible or that his testimony was insufficient to overcome State's evidence, or both. Accordingly, State was not required to rebut D's rebuttal witness. Walton, 398 N.E.2d 667. Held, conviction affirmed.

TITLE: Guy v. State

INDEX NO.: K.9.a.

CITE: (4th Dist., 03-2-05), Ind., 823 N.E.2d 274

SUBJECT: Breath test - foreign substance in mouth; tongue stud

HOLDING: Tongue stud inserted in a person's mouth more than twenty minutes before breath test did not render results of test inadmissible under 260 IAC 1.1-4-8(1). This regulation specifies that prior to a toxicology test, "[t]he person to be tested must have had nothing to eat or drink, *must not have put any foreign substance* in his or her mouth or respiratory tract, & must not smoke within twenty (20) minutes prior to the time the breath sample is taken." Ct. App. interpreted the regulation to require that the person to be tested must not have had any foreign substance in his mouth prior to testing & that a tongue stud is a foreign substance.

Highlighting the word "put" as it relates to foreign substances in the regulation, the Indiana S.Ct. found the intent of the administrative regulation was that it was to apply to objects placed in the mouth within 20 minutes of testing & not objects already there. Language cited in State v. Albright, 632 N.E.2d 725 (Ind. 1994), that a "subject may not have had any foreign substance in his mouth" during this time did not involve the primary issue of that case & involved no discussion of the meaning of "put." Thus, it has no precedential value in this case.

D argued that if "put" means "put," the regulation produces an absurdity in that it would allow admission of breath test results despite a person putting anything in her mouth more than twenty minutes prior to the test. However, D submitted no scientific evidence that the foreign substance in the mouth is what affects the reliability of the test. Further, the science in the public domain supports the opposite conclusion. The concern with foreign substances is the potential for it to absorb & retain alcohol in the mouth & nothing was presented here to show the tongue stud affected reliability in this way. The State could be obliged to defend the validity of the regulation if such studies or expert testimony were submitted into evidence. Held, transfer granted, Ct. App.' opinion at 805 N.E.2d 835 vacated, judgment affirmed; Boehm, J., concurring in result.

RELATED CASES: Keys, App., 811 N.E.2d 961 (exposure to second-hand smoke did not equate to smoking, & at trial D did not argue that it was a foreign substance. D could have but failed to challenge evidence on reliability grounds by presenting expert testimony that showed that exposure to second-hand smoke renders a chemical breath test unreliable).

TITLE: Hall v. State
INDEX NO.: K.9.a.
CITE: (2d Dist. 10/11/90), Ind. App., 560 N.E.2d 561
SUBJECT: Driving with .10% BAC - presumption based on later test
HOLDING: Instruction that jury "shall presume" that D had .10% BAC at time of operating vehicle, because he tested at least .10 within 3 hours after arrest, created mandatory presumption & impermissibly shifted burden of proof (BOP) to D. Instruction given parallels Ind. Code 9-11-4-15(b), which was challenged in Chilcutt, App., 544 N.E.2d 856. In Chilcutt, Ct. held statute to be constitutional, because presumption is subject to rebuttal and there is rational connection between fact proved (.10 within 3 hours of arrest) and ultimate fact presumed (.10 at time of operating). Presumptions in criminal statutes are never considered conclusive and do not affect BOD, although they may impose burden of going forward to rebut presumption. Cts. have also long held that burden may be placed on D to establish facts which would mitigate culpability for offense. Chilcutt, *supra*. Statute does not create conclusive presumption or shift BOD to D. However, its language does appear to create mandatory, rather than permissive, presumption. Accordingly, although instruction faithfully tracks language of statute, it was subject to interpretation by jury that if D did not rebut or attempt to rebut presumption, jury was compelled to find presumed fact (.10 BAC at time of operating). U.S.S.Ct. has repudiated mandatory & mandatory rebuttable presumptions. Francis v. Franklin (1984), 471 U.S. 307, 105 S.Ct. 1965. Instruction which embraces this statute must clearly advise jury that presumption is only permissive. Instruction given here did not do so. Held, reversed & remanded.

RELATED CASES: Pattison, 54 N.E.3d 621 (Ind. 2016) (mandatory rebuttable jury instruction on OWI presumption did not improperly shift burden of proof; see full review at O.3); Johnson, App., 879 N.E.2d 649 (three-hour presumption was constitutional despite D's argument that the presumed fact lacked a strong logical nexus with the known fact); Jarrell, App., 852 N.E.2d 1022 (presumption set forth in Ind. Code 9-30-6-15(b) that a person has a BAC equivalent to at least .08 grams at time of driving if person tested at least .08 grams within three hours of driving applies to trials on Class A misdemeanor operating with .15 BAC).

TITLE: Hannoy v. State

INDEX NO.: K.9.a.

CITE: (5th Dist., 6-10-03), Ind. App., 789 N.E.2d 977

SUBJECT: Erroneous admission of blood test results

HOLDING: In operating motor vehicle with blood alcohol content of .10 percent or greater causing death prosecution, Tr. Ct. erroneously admitted into evidence results of blood test that indicated D was intoxicated obtained after police ordered D's blood to be drawn without probable cause & without requesting his consent. Under Ind. Code 9-30-6-7, police officer shall offer a chemical test to any driver whom officer has probable cause to believe was involved in accident resulting in serious bodily injury or death. At time of D's accident, Marion County Sheriff's Department had standard policy assuming that in any motor vehicle accident resulting in serious bodily injury or death, implied consent provisions of Ind. Code 9-30-7 automatically authorized obtaining blood of driver of each involved vehicle for testing purposes, by force if necessary. This policy applied regardless of whether consent from driver was actually sought & obtained & whether there was probable cause that blood would uncover evidence of alcohol or illegal substance consumption. There is no evidence that officer in this case "offered" a chemical test to D; he simply requested medical personnel to perform blood draw. Hence, there was no compliance with implied consent law itself.

Ct. rejected State's argument that policy was constitutional under "special needs" exception to usual probable cause prerequisite for government search under Fourth Amendment, because this exception does not apply to law enforcement-related searches. Further, U.S. S.Ct. did not, & does not, intend to expand special needs exception to warrantless, suspicionless, nonconsensual drawing of a person's blood by law enforcement as part of a criminal investigation, & Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) controls. Ind. Code 9-30-7 is constitutional precisely because it does not require a driver to submit to a chemical test. Griswold v. State, 725 N.E.2d 416 (Ind. Ct. App 2001). Ct. also held that State failed to meet its burden that D gave his actual, knowing, & voluntary consent to drawing & testing of his blood for law enforcement purposes. Held, convictions reversed & remanded for new trial.

NOTE: Ct. also held that blood alcohol test results from sample obtained & tested by hospital for its own diagnostic purposes & later released to law enforcement may be admitted at trial.

RELATED CASES: Eichhorst, App., 879 N.E.2d 1144 (Tr. Ct. erred in suppressing medical records, including blood alcohol test results, where doctor ordered tests for purpose of treatment); Wiggins, App., 817 N.E.2d 652 (nothing in the record showed any tests being done for purposes of diagnosis or treatment that resulted in evidence of culpability); Hannoy, App., 793 N.E.2d 1109 (on rehearing, Ct. would not consider State's new argument that "inevitable discovery" doctrine should apply to admit first blood tests into evidence, because it should have raised argument in its original brief. As to D's petition for rehearing, Ct. reiterated that it believes there is a clear & substantial difference between allowing police to force person to submit to having his or her blood withdrawn to look for evidence of a crime, & police receiving blood test results after the fact pursuant to Ind. Code 9-30-6-6(a)

TITLE: Harts v. State
INDEX NO.: K.9.a.
CITE: (3d Dist. 11/10/82), Ind. App., 441 N.E.2d 714
SUBJECT: DWI - charging instrument; location
HOLDING: Exact location of person driving while intoxicated is not essential element that must be included in charging instrument. Souerdike, 102 N.E.2d 367; Hicks, (1926) 197 Ind. 294. Here, D contends information charging DWI was fatally insufficient because it failed to state location of offense charged. D further contends state illegally amended information to reflect location following hearing to suspend D's license. Ct. finds D's failure to specify error in MCE waives error, but points out since location is not essential, D's argument is meritless. Held, no error in license suspension for failure to submit to breathalyzer.

TITLE: Harts v. State

INDEX NO.: K.9.a.

CITE: (3d Dist. 11/10/82), Ind. App., 441 N.E.2d 714

SUBJECT: DWI - probable cause to stop car

HOLDING: Test: Whether facts known at time police officer stopped car were sufficient to warrant person of reasonable caution in belief that an investigation was appropriate. Luckett 284 N.E.2d 738. Officer has duty to stop & investigate when he/she perceives situation which poses possible hazards to motor vehicle traffic. Miles, 216 N.E.2d 847; cf. Collett, App., 338 N.E.2d 286. Here, Ct. finds D's erratic driving warranted police investigation. Held, no error.

RELATED CASES: Platt, App., 589 N.E.2d 222 (reasonable suspicion for OWI stop found, see full card at Z.7.a); Moody, 448 N.E.2d 660 (see card at Z.4.d); State v. Johnson, App., 503 N.E.2d 431 (Autos 144.1(1); in order to stop vehicle, officer must observe traffic offense [exception is roadblocks]; here, D was speeding; held, suppression of BAC test reversed; cause remanded for new trial).

TITLE: Herbert v. State

INDEX NO.: K.9.a.

CITE: (1st Dist. 10/23/85) Ind. App., 484 N.E.2d 68

SUBJECT: DWI - alternative tests

HOLDING: Arresting officer did not deny D his rights by refusing to transport him to hospital for alternative chemical test. Ind. Code 9-11-4-2 provides that "officer may offer person more than one chemical test." D has no right to more than one test. Statute does not require officer transport D to place of D's choosing for test. Here, officer gave D alcohol-sensor test at scene & field sobriety & breathalyzer test at jail. Officer advised D orally & in writing of right to have fluid samples taken for independent chemical testing. Officer gave D opportunity to make phone calls on this point but advised him he would not be transported by police for such tests. Ct. finds statute clear. Held, no error.

TITLE: Hiegel v. State

INDEX NO.: K.9.a.

CITE: (3d Dist. 5/22/89), Ind. App., 538 N.E.2d 265

SUBJECT: DWI - sufficiency; operating

HOLDING: Evidence was insufficient to support finding that D was operating vehicle while intoxicated. Ct. App. has ruled that operation on public highway is not necessary. State v. Carter, App., 424 N.E.2d 158. In prior cases where conviction was upheld, location of vehicle & other circumstances supported inference that D had in fact driven vehicle. See, e.g., Bowlin, App., 330 N.E.2d 353; Rose, App., 345 N.E.2d 257. Here, D was found asleep behind wheel of car in tavern parking lot, with motor running, heater on, lights off, & transmission in park. Ct. App. has held that to operate does not mean merely to "exert control over a vehicle," but "to cause to function usually by direct personal effort." Johnson, App., 518 N.E.2d 1127 (quoting Webster's 3d New International Dictionary). In Wells v. Commonwealth (Ky. App. 1986), 709 S.W.2d 847, KY Ct. App. applied similar statute to similar facts & reversed conviction. Ct. considered following factors: 1) whether person in vehicle was awake; 2) whether motor was running; 3) location of vehicle & circumstances bearing on how it arrived there; & 4) intent of person in vehicle. Ind. Ct. App. rules that merely starting engine is not sufficient evidence of operation. Held, conviction reversed.

RELATED CASES: Henderson v. State 108 N.E.3d 407 (Ind. Ct. App 2018), (in prosecution for OWI, trial court's instruction on "operate" adequately conveyed that to operate a vehicle is to "expend some effort," even though the instruction did not use those words; see full review at D.9.g.2.c), Crawley, App., 920 N.E.2d 808 (State presented sufficient circumstantial evidence to prove beyond reasonable doubt that D operated vehicle even though no one saw her operate vehicle found in back yard pool; see full review at K.9.c.2); Parks, App., 752 N.E.2d 63 (fact that car was moving in reverse with engine running & D in driver's seat was sufficient); Corl, App., 544 N.E.2d 211 (D was found asleep behind steering wheel; lights on & engine running; D admitted drinking & falling asleep waiting for car to warm up; held, insufficient).

TITLE: Husk v. State
INDEX NO.: K.9.a.
CITE: (1st Dist. 4/9/85) Ind. App., 476 N.E.2d 149
SUBJECT: DWI - intoxilyzer constitutes chemical test
HOLDING: Ct. rejects D's contention that Department of Toxicology's failure to promulgate separate regulations for intoxilyzer requires suppression of test results. Intoxilyzer test is a breathalyzer test & constitutes a chemical test even though no chemicals are required. Ind. Code 9-4-4.5-2. Held, no error.

TITLE: Jackson v. State
INDEX NO.: K.9.a.
CITE: (1/18/2017), 67 N.E.3d 1166 (Ind. Ct. App 2017)
SUBJECT: Reasonable to infer blood was drawn within 3 hours of accident
HOLDING: Even though no direct evidence established when Defendant crashed her car while driving drunk, the reasonable inferences established that Defendant's blood was drawn within three hours of the accident, thus allowing the trial court to presume Defendant's alcohol concentration equivalent ("ACE") at the time of the accident was the same as when her blood was drawn.

At 1:10 a.m. on January 19, 2016, police officers were dispatched to an accident, where Defendant had crashed her Buick into a mobile home. Defendant was outside her car, but the passenger remained inside, complaining that she could not feel her extremities. The residents of the home were unharmed. Defendant, who smelled of alcohol, refused to take a breath test, so officers obtained a warrant. Her blood was drawn at 3:14 a.m. Her ACE was .183, so she was charged with operating a motor vehicle with an ACE of at least .15. See Ind. Code § 9-30-5-1(b). She was convicted in a bench trial.

A blood alcohol test must occur within three hours after law enforcement has probable cause to believe a person committed an offense under IC 9-30-5. Ind. Code § 9-30-6-2(c). If the test is timely, the trier of fact may presume that a person's ACE at the time of an accident was the same as it was at the time of testing. Ind. Code § 9-30-6-15(b). Thus, for the presumption to apply here, the accident must have occurred no earlier than 12:14 a.m.; however, the State presented no direct evidence about when the accident occurred. Nonetheless, the most reasonable inference is that the accident occurred within the requisite time period, and most likely, just a few minutes before police received the 1:10 a.m. dispatch. See *Dorsett v. State*, 921 N.E.2d 529, 531 (Ind. Ct. App 2010); Cf. *Mordacq v. State*, 585 N.E.2d 22, 23 (Ind. Ct. App 1992) and *Allman v. State*, 728 N.E.2d 230 (Ind. Ct. App. 2000).

This is so because it is undisputed that Defendant had been driving the car at the time of the accident. While it is true that she had already exited the car when police arrived, the passenger remained seated in the car. "It defies all notions of reasonableness to hypothesize—given the presence of the homeowners, the severity of the damage done to their trailer and [Defendant's] vehicle, and the potentially serious injuries of Jackson's passenger—that nearly an hour would have passed between the time of the accident and the summoning of the police." Held, judgment affirmed.

TITLE: Lehman v. State

INDEX NO.: K.9.a.

CITE: (02-13-23), Ind. Ct. App., 203 N.E.3d 1097

SUBJECT: Driving 5 mph over speed limit satisfies endangerment element of DWI, even without swerving or other evidence of unsafe operation

HOLDING: Officer noticed Defendant smelled of alcohol and had bloodshot, watery eyes after he stopped his motorcycle for a light restriction violation. Defendant admitted he had been drinking, denied using illegal drugs but twice failed the horizontal gaze nystagmus test. Defendant consented to a blood test, which later revealed that his blood alcohol level was below the legal limit but tested positive for methamphetamine and amphetamine. After a bench trial, Defendant was convicted of operating while intoxicated endangering a person and operating with a Schedule I or II controlled substance or its metabolite in the blood. On appeal, the Court of Appeals found sufficient evidence Defendant violated the statutory prohibition against the display of non-white or non-amber lights on his motorcycle in violation of Ind. Code § 9-21-7-10, thus the traffic stop was justified. The Court also found sufficient evidence of endangerment based on officer's testimony Defendant was driving 5 miles per hour above the posted speed limit. Vaidik, J., concurring in part and dissenting in part, would not find that "traveling six or seven miles per hour over the speed limit, without swerving or other unsafe operation, increases the danger of intoxicated driving to such an extent that it justifies the jump from a Class C misdemeanor to a Class A misdemeanor."

TITLE: Marks v. State
INDEX NO.: K.9.a.
CITE: (4th Dist., 04-18-07), Ind. App., 864 N.E.2d 408
SUBJECT: OWI- instruction setting forth evidence establishing impairment improper
HOLDING: Tr. Ct. committed harmless error by instructing the jury, over D's objection, as to seven evidentiary facts that can establish impairment. An instruction that unnecessarily emphasizes certain evidence & invites the jury to violate its obligation to consider all the evidence is erroneous. Ludy v. State, 784 N.E.2d 459 (Ind. 2001). Further, instructions should not be confusing or misleading. Here, the jury was instructed, "[e]vidence of the following can establish impairment: (1) the consumption of significant amounts of alcohol; (2) impaired attention & reflexes; (3) watery or bloodshot eyes; (4) the odor of alcoholic beverages of the breath; (5) unsteady balance; (6) failure to field sobriety tests; (7) slurred speech." This instruction emphasized certain evidence & was confusing & misleading. There was evidence in this case, such as D's loss of bladder control that could be evidence of impairment but was not listed in the instruction. On the other hand, there were factors listed in the instruction that the State failed to prove. Although the factors had been listed in prior appellate opinions, the instruction was improper. However, the giving of the instruction was harmless error. Held, judgment affirmed; Sullivan, J., concurring on basis that the list of factors should not even be considered by appellate courts in a sufficiency review, thus disapproving of Ackerman v. State, 774 N.E.2d 970 (Ind. Ct. App 2002), Pickens v. State, 751 N.E.2d 331 (Ind. Ct. App 2001), & Ballinger v. State, 717 N.E.2d 939 (Ind. Ct. App 1999).

TITLE: Micinski v. State

INDEX NO.: K.9.a.

CITE: (1/6/86) Ind., 487 N.E.2d 150

SUBJECT: DWI - resulting in injury; sufficiency

HOLDING: Evidence was sufficient to sustain conviction for DWI resulting in serious bodily injury (SBI). Here, D contends state must prove act of DWI caused injury, *citing Higginbotham*, App., 427 N.E.2d 896. Ct. finds Ind. Code 9-4-1-54(b)(2) does not indicate legislature intended to require state prove causal link between driver's intoxication & fact injury resulted from his/her driving. It is driver's acts, not speculation re whether driver could have stopped if sober, that is important. To extent Higginbotham suggests otherwise, it is overruled. Ct. discusses evidence & finds it sufficient to sustain finding that D drove while intoxicated & caused accident resulting in SBI. Held, Ct. App. opinion at 479 N.E.2d 632 finding insufficient evidence vacated & Tr. Ct. affirmed.

RELATED CASES: Rowe, App., 867 N.E.2d 262; Abney, 766 N.E.2d 1175 (to sustain a conviction for OWI causing death, State must prove D's operating a motor vehicle while intoxicated was a "substantial cause" of resulting death, not a mere "contributing cause"; see full review at K.9.b); Ballinger, App., 717 N.E.2d 939 (D argued that relieving State of burden of proving that D's impairment caused accident violates due process; however, Ct. resolved issue without addressing constitutionality of statute).

TITLE: Moore v. State

INDEX NO.: K.9.a.

CITE: (1st Dist., 12-27-94), Ind. App., 645 N.E.2d 6

SUBJECT: Operating vehicle with controlled substance in blood - urine test insufficient

HOLDING: Results of urine test showing presence of marijuana in D's urine was insufficient to sustain conviction for operating vehicle with controlled substance in blood. At trial, D testified that he had smoked marijuana 3 days prior to arrest. Because no blood test was given to D, State instead offered results of urine test, arguing on appeal that presence of marijuana metabolites in urine constitutes evidence from which jury could infer that same metabolites were present in D's blood. Clear & unambiguous language of Ind. Code 9-30-5-1(b) requires State to present evidence of controlled substance in blood at time D operated vehicle. Here, State presented no evidence supporting inference that if marijuana is in one's urine, it is also in one's blood. Although detectable in D's urine, marijuana may no longer have been in his blood at time of arrest. Held, conviction reversed.

NOTE: Legislature amended statutes in 1997 and 2000 to sanction use of urine screen to show metabolites in the "body".

RELATED CASES: Rhoades, 675 N.E.2d 698 (in dicta, Ct. noted Ind. Code 9-30-5-1(b) does not absolutely require blood test or any particular means to show violation of that section); Estes, App., 656 N.E.2d 528; Hoornaert, App., 652 N.E.2d 874 (evidence was insufficient to support conviction for operating vehicle with controlled substance in blood. Although D exhibited signs of impairment & consciousness of guilt at time of arrest & refused urinalysis, Ct. declined to infer that he had marijuana in his blood; State presented no evidence of D's blood content).

TITLE: Mordacq v. State

INDEX NO.: K.9.a.

CITE: (5th Dist. 01/21/92), Ind. App., 585 N.E.2d 22

SUBJECT: Operating vehicle with blood alcohol content .10% or above (10% BAC) - insufficiency of evidence

HOLDING: Where D was parked in car with engine running & testified that she had driven there at least 2 hours earlier, evidence of BAC of .10% approximately 20 minutes later was insufficient to support conviction of .10%BAC. There was no evidence D was stopped in travel portion of road & officer consistently used word "parked" to describe car. Therefore Ct. found D was not "operating" vehicle within meaning of Ind. Code 9-30-5-1, finding decision consistent with Heigel, App., 544 N.E.2d 211, trans. denied. Ct. also found D's admission that she had driven car some hours before, could not support conviction. Ct. interpreted time allowed for BAC testing referred to in Ind. Code 9-30-6-15(a)(2) & Ind. Code 9-30-6-2, "within three (3) hours after the law enforcement officer had probable cause to believe the person committed an offense under Ind. Code 9-30-5," & found period begins not from moment officer has probable cause, but from moment at which vehicle was operated. Aside from D's admission, there was no evidence as to when she drove to parked location. Although there was some possibility D drove car within 3 hours of testing, Ct. found it was unreasonable to infer from admitted operation at least 2 hours previously, that operation occurred within 3-hour period. Therefore, presumption of Ind. Code 9-30-6-15(b) did not arise, & because States's proof rested entirely on that presumption, it was insufficient to support conviction. Held, conviction reversed.

RELATED CASES: Jackson, 67 N.E.3d 1166 (Ind. Ct. App 2017) (even though no direct evidence established when D crashed her car while driving drunk, reasonable inferences showed D's blood was drawn within 3 hours of accident, allowing trial court to presume D's alcohol concentration equivalent at time of accident was the same as when her blood was drawn; see full review, this section).

TITLE: Mullins v. State

INDEX NO.: K.9.a.

CITE: (1-4-95), Ind., 646 N.E.2d 40

SUBJECT: Blood alcohol content (BAC) evidence sufficient

HOLDING: Evidence was sufficient to support conviction for operating with BAC > .10%, granting transfer & vacating Ct. App. decision at 629 N.E.2d 886. Where BAC Datamaster recorded "Breath Analysis" of .20, Tr. Ct. was entitled to take judicial notice that printout expressed test result as percentage of alcohol by weight in blood. Following Baran v. State, Ind., 639 N.E.2d 646, Ct. held that State need not present any evidence concerning approved procedures for administering breath tests. Administrative Code prescribes those procedures, & they should be judicially noticed. Here, State laid sufficient foundation demonstrating that arresting officer followed approved procedures. Ct. then addressed introduction into evidence of breath-test results in general. Ind. Code 9-30-6-15(a) creates hearsay exception for breath-test results shown by printout. Before prosecution has any responsibility to establish foundation for admission of breath-test results, defense has continuing duty to object, stating what part of required foundation the prosecution has failed to establish, Boarman v. State, Ind., 509 N.E.2d 177. Ct. also held that breath-test machine used to test D had been properly approved by department of toxicology, & that State laid sufficient statutory prima facie evidence that machine was working properly on date test was administered. Held, transfer granted, conviction affirmed.

RELATED CASES: Priest, 181 N.E.3d 1046 (Ind. Ct. App. 2022) (a bald statement in a traffic citation regarding B.A.C. level is inadmissible hearsay; see full review at O.12.b).

TITLE: Napier v. State

INDEX NO.: K.9.a.

CITE: (1st Dist., 1-06-05), Ind. App., 820 N.E.2d 144

SUBJECT: Erroneous admission of breath test results - evidentiary foundation in light of Crawford

HOLDING: State's failure to present live testimony at trial from officer who conducted breath tests violated Confrontation Clause in light of Crawford v. Washington, 124 S.Ct. 1354 (2004). However, admission of breath test instrument certification documents did not violate Crawford. State offered the DataMaster "evidence ticket" into evidence displaying the breath test results, absent any witness to present the exhibit. This precluded D from conducting any cross-examination of the breath test operator's qualifications & attacking the purported results of his breath test. Ct. distinguished this case from others where an officer was present to testify.

Ct. rejected D's challenge that to Ind. Code 9-30-6-5, which permits the introduction of certificates of the director of the Department of Toxicology regarding inspection & compliance with relevant regulations of breath tests. D also challenged this process under Crawford. Prior to Crawford, the Indiana S.Ct. had upheld the process despite confrontation challenge in Platt v. State, 589 N.E.2d 222 (Ind.1992). Ct. avoided issue of whether these compliance certificates should be considered "testimonial" or "non-testimonial" evidence which was an important factor in Crawford as to whether confrontation rights applied, by stating: "We do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against [D]." Even though the machine inspector & the Director of Toxicology who provided certification did not testify, the certification information "does not pertain to the issue of guilt." The Ct. found the information contained in the certificates was not the concern of the Crawford Ct. & to hold otherwise would create the unreasonable alternative of having a toxicologist in every Ct. daily to testify about such information. Held, conviction reversed.

RELATED CASES: Napier, App., 827 N.E.2d 565 (on rehearing, Ct. ordered reinstatement of D's conviction because parties had stipulated to officer's proper certification to perform breath tests).

TITLE: Nichols v. State

INDEX NO.: K.9.a.

CITE: (1st Dist., 2-27-03), Ind. App., 783 N.E.2d 1210

SUBJECT: Operating vehicle while intoxicated - no showing that D had intent to "operate"

HOLDING: Evidence was insufficient to show that D operated vehicle for purposes of operating vehicle while intoxicated conviction. D became lost while driving to girlfriend's house. While waiting for her to pick him up, he drank until he passed out in a car dealership parking lot. Officer woke him up & ordered him out of car, at which point the car rolled backward & D had to get back in car & apply brakes to stop it. These facts do not support determination that D actually operated vehicle. Although D was asleep when officer approached car, he was awake when car rolled backwards & when he applied brake. Car's motor was running, but only to keep him warm in cold weather. He was parked in parking lot & intended to remain there until his girlfriend picked him up. Finally, & most importantly, when D applied brake, he intended to stop car from rolling & did not intend to operate it. Hiegel v. State, 538 N.E.2d 265 (Ind. Ct. App. 1989). Considering these factors, there was insufficient evidence to convict D of operating vehicle while intoxicated. Held, judgment reversed.

TITLE: Nivens v. State

INDEX NO.: K.9.a.

CITE: (2nd Dist., 08-22-05), Ind. App., 832 N.E.2d 1134

SUBJECT: BAC Datamaster adequately tested for accuracy

HOLDING: Tr. Ct. properly denied D's motion to suppress the results of his chemical breath test.

The Indiana State Department of Toxicology certified the accuracy of the BAC Datamaster used in the test. On interlocutory appeal, D asserted that the accuracy tests for the machine did not comply with Department of Toxicology's own regulations, making the results inadmissible pursuant to Ind. Code 9-30-6-5(d). Title 250, sec. 1.1-2-1(e)(3) of the Ind. Admin. Code provides that, "For the purpose of inspecting the breath test equipment, the analytical result shall be expressed to the third decimal place." Four tests were conducted on the machine at issue with two taking results to the fourth decimal & two to the second decimal. Ct. found that ISDT's interpretation of administrative regulation was reasonable. While section (e)(1) & (2) of the same regulation infer that one or more tests must be conducted by using plural terms, section (e)(3) states, "the analytical result shall be expressed to the third decimal place." Ct.'s emphasis. Ct. also noted section 1.1-2-1 does not specify number of tests needed to determine the accuracy of machine prior to certification. Thus, Ct. concluded only two tests under ISDT regulations are necessary to properly certify a machine. Since two tests were expressed to the fourth decimal place & did not deviate more than minus eight percent from the known alcohol content of an ethanol water solution (sec. 1.1-2-1(e)(2)), these two tests satisfied the requirements of Title 260, sec. 1.1-2-1(e) of the IAC. Held, judgment affirmed.

TITLE: Oller v. State

INDEX NO.: K.9.a.

CITE: (3d Dist. 10/31/84) Ind. App., 469 N.E.2d 1227

SUBJECT: DWI - enhancement to Class D felony

HOLDING: D's conviction for Class D felony DWI is reversed & Tr. Ct. is directed to resentence D for Class A misdemeanor where evidence of priors was insufficient. Here, state introduced certified photocopies of preprinted fee book entry which stated only that D was charged with DWI & was "Guilty" (Exhibits 5 & 6). Spaces for judge's signature & other information were blank. State also introduced computer printout of D's driving record obtained from & certified by BMV. Certified copy of driving record attested as public record by Commissioner of BMV is admissible but is not adequate to prove prior convictions because entries are ambiguous/confusing (show only arrests, not convictions). Cunningham, App., 438 N.E.2d 308; Warner, App., 406 N.E.2d 971. Ct. finds exhibits 5 & 6 failed to establish prior convictions. In opinion denying state's petition for rehearing (472 N.E.2d 610), Ct. rejects state's argument that under Ind. Code 9-11-4-14(b)(1), certified copy of driving record is prima facie evidence of prior DWIs: "as a matter of law, such printouts, admitted into evidence in this cause, cannot be evidence of a conviction notwithstanding Ind. Code 9-11-4-14(b)(1)." Held, Class D felony reversed, DWI conviction affirmed.

RELATED CASES: Dillon, 993 N.E.2d 240 (Ind. Ct. App 2013) (Tr. Ct. should have dismissed felony enhancement for misdemeanor OWI charge because at time of charge, D did not have OWI conviction within previous five years, if only because State inadvertently dismissed previous 2009 OWI conviction); Jennings, App., 503 N.E.2d 906 (Autos 332, 354, 355(6); evidence of BMV record plus D's probation officer's testimony that D had pled guilty to earlier DWI was sufficient evidence of prior DWI conviction; Hoffman DISSENTS, arguing enhancement based solely on BMV abstract & hearsay testimony allows "substantial room for error in criminal sanctions" & that only Ct. records should be used); Finney, App., 491 N.E.2d 1029 (Autos 316; Crim L 163; Class C misdemeanor BAC .10 can be enhanced to Class D felony upon proof of priors).

TITLE: Outlaw v. State

INDEX NO.: K.9.a.

CITE: (06-24-10), 929 N.E.2d 196 (Ind. 2010)

SUBJECT: Operating while intoxicated (OWI) - proof of endangerment required

HOLDING: Court of Appeals properly vacated D's conviction under Indiana Code 9-30-5-2(b) for operating a vehicle while intoxicated in manner that endangers a person because State presented no evidence that D operated his vehicle in a dangerous manner. Outlaw v. State, 918 N.E.2d 379 (Ind. Ct. App. 2009). Evidence of intoxication, standing alone, is not sufficient to prove endangerment. Held, transfer granted, Court of Appeals' opinion at 918 N.E.2d 379 adopted and incorporated by reference pursuant to Indiana Appellate Rule 58(A)(1).

RELATED CASES: Burnett, 74 N.E.3d 1221 (Ind. Ct. App 2017) (Ct. reversed Class A misdemeanor operating while intoxicated conviction where there was no evidence in record that D drove in a manner that endangered a person when she started driving after accident), Staten, 946 N.E.2d 80 (Ind. Ct. App. 2011) (conviction affirmed where evidence showed D could have endangered someone, even though he was driving on a deserted access road in a small town in middle of night; Crone, J., dissenting, believes statute requires State to show actual endangerment); Temperly, 933 N.E.2d 558 (Ind. Ct. App 2010) (although D's BAC was .244, he was involved in an accident in which he was not the cause; because no evidence other than D's intoxication was presented to suggest that he operated his vehicle in a manner that endangered himself or another person, there was insufficient evidence to support D's conviction for OWI as a Class A misdemeanor).

TITLE: Parks v. State
INDEX NO: K.9.a.
CITE: (6-20-01), Ind. App., 752 N.E.2d 63
SUBJECT: Operating while intoxicated - evidence sufficient
HOLDING: Evidence was sufficient to support D's conviction for operating vehicle with privileges forfeited for life and operating while intoxicated. Applying factors set forth in Hiegel v. State, 538 N.E.2d 265 (Ind. Ct. App 1989), Court concluded that D was in actual, physical control of vehicle. D was awake and sitting in driver's seat of car with engine running in parking lot. Police officer witnessed car moving in reverse six to ten feet out of parking space with its backup lights on. This was sufficient evidence that D intended to move car from its location in parking lot. Held, judgment affirmed.

TITLE: Pier v. State

INDEX NO.: K.9.a.

CITE: (3d Dist. 3/22/83) Ind. App., 446 N.E.2d 985

SUBJECT: DUI - prior convictions; ameliorative effect

HOLDING: Where legislature amended escalation provision after D committed offense (amendment became effective before D was sentenced), D is not entitled to be sentenced under amended statute. Here, D was charged with DUI under statute that made offense a Class D felony if D had any prior DUI convictions. Legislature amended statute to provide that only DUI convictions after 6/30/78 should be considered. D had 2 prior DUI convictions, both before 6/30/78. Held, no error. DISSENT by Staton views amendment as ameliorative in effect, thus statute as amended should have been applied.

TITLE: Rembusch v. State

INDEX NO.: K.9.a.

CITE: (2nd Dist., 11-8-05), Ind. App., 836 N.E.2d 979

SUBJECT: BAC inspection certificate not implicated by Crawford

HOLDING: Ct. reiterated its holding in Napier, App., 820 N.E.2d 144 *modified on rehearing* 827 N.E.2d 565, that certificates of inspection & compliance of breath instruments are not testimonial in nature, & thus, do not violate D's confrontation rights under Crawford v. Washington. The certificates serve an administrative function & are prepared in a routine manner rather than for the purpose of an individual case. Further, Ct. does not believe such documents belong to the class of testimonial evidence contemplated by Crawford. Ct. also rejected D's challenge to sufficiency of evidence because the date listed on the certification of inspection was later than when a breath test was administered to D. Thus, D argued no evidence existed to show the machine was ever inspected before the test. Although D framed issue under sufficiency grounds, it was "apparent" to Ct. "that he is actually contending that the State failed to lay a proper foundation for the admission of the breath test instrument certification under Ind. Code 9-30-6-5 (C)." Consequently, Ct. found that issue was waived for failure to issue contemporaneous objection to certificate's admissibility, as such a rule promotes a fair trial by precluding a party from sitting idly by & only crying foul when a ruling goes against him. Ct. also rejected argument that the breath test ticket was improperly admitted at trial as hearsay evidence. In Sales, 723 N.E.2d 41, it was recognized that our legislature was attempting to validate the use of breath tests in prosecutions with Ind. Code 9-30-6-15(a). Moreover, the provisions of Ind. Code 9-30-6-15 provide that analysis of a person's breath is an acceptable method of measuring the amount of alcohol in a person's blood & the statute mentions breath analysis as an admissible method of proving BAC without mentioning the need for an expert. Ct. also rejected argument that State was not entitled to the statutory presumption that an individual who tests .15% or more within three hours of operating a vehicle was .15% at time vehicle was operated. In examining Ind. Code 9-30-6-15(b), Ct. found statute clearly applies to situations where test results indicate a BAC of at least .08% & D's .18% certainly fits within this provision. Ct. would not reweigh the sufficiency of the evidence as to a public intoxication conviction. Held, judgment affirmed.

RELATED CASES: Ramirez, 928 N.E.2d 214 (Ind. Ct. App 2010) (after Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), Ct. reaffirmed position that certificates verifying routine inspection of breath test instruments are nontestimonial); Johnson, App., 879 N.E.2d 649 (State's use of certificate of Datamaster did not make certificate testimonial); Jarrell, App., 852 N.E.2d 1022 (certificate of inspection of breath test machine are no-testimonial & not governed by Crawford).

TITLE: Sales v. State

INDEX NO.: K.9.a.

CITE: (2-7-00), Ind., 723 N.E.2d 416

SUBJECT: Driving while intoxicated - legislative error not fatal

HOLDING: Because it is clear that legislature intended term "percent" in Ind. Code 9-30-5-1(a) to mean strength of solution of alcohol dissolved in blood rather than its ordinary meaning, prosecutions may proceed upon proof of operating vehicle with .10 grams of alcohol in 210 liters of breath. From July 1, 1997 to November 19, 1999, Ind. Code 9-30-5-1(a) made it Class C misdemeanor for person to operate vehicle "with at least ten-hundredths percent of alcohol by weight in grams in two hundred ten liters of person's breath." Ordinarily, percent means relationship between two numbers when both numbers are expressed in same unit of measurement. When different units of measure are attached to two numbers, arithmetic relationship of numbers can become nonsensical if "percent" means what it means in ordinary usage. Applying ordinary meaning to "percent," Ind. Code 9-30-5-1(a) is ambiguous because it uses percent to define relationship between grams & liters. However, laboratory technicians use term "percent" as shorthand method of referring to strength of solution of liquid or solid dissolved in liquid. This other meaning of percent has been used in context of blood or breath testing in drunk driving statutes. Because legislature's intent behind amendment was to prohibit operating vehicle with specified level of alcohol in breath as well as in blood & not to change required alcohol level, Ind. Code 9-30-5-1(a) applies to laboratory rather than ordinary meaning of percent. Thus, although claim of resort to common sense is often mask for lack of principled rules of decision, in this case S.Ct. thinks it appropriate. Held, judgment reversed & Ct. App.' decisions at 714 N.E.2d 1121 &, on rehearing, at 715 N.E.2d 1009 vacated.

TITLE: Schlesinger v. State

INDEX NO.: K.9.a.

CITE: (5th Dist., 7-19-04), Ind. App., 811 N.E.2d 964

SUBJECT: Erroneous admission of blood test results

HOLDING: D's conviction for operating vehicle with BAC of over .08% & less than .15%, was reversed, where police did not have probable cause to order hospital personnel to draw blood from D & blood draw was not done for normal medical reasons. After a traffic accident, D admitted to officer that he consumed a few alcoholic drinks an hour before driving but passed field sobriety tests prior to being interrupted by emergency medical personnel. While being treated for relatively minor injuries, hospital personnel drew blood (Hospital sample) & the deputy requested an additional vial drawn for his use (State sample). Police must have either: (1) a warrant, (2) probable cause, or (3) consent to obtain a blood sample. Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App.2003). In finding the absence of probable cause, Ct. found it dispositive that D passed field sobriety tests & that the deputy did not indicate on a hospital form that probable cause existed. D's signing a general consent to treatment form did not equal consent to have blood drawn. Ct. found no evidence in the record that the BAC test was performed for medical reasons (an alternate means to obtain such tests in Hannoy) where the hospital treated D for cuts & a dislocated finger. While D at trial requested admission of the State sample after the Hospital sample had been admitted over objection, the Ct. did not find harmless error here. D requested admission of the State sample for tactical reasons after the Hospital sample was erroneously admitted in that the State sample showed a slightly lower BAC (.10% compared to .13%). Held, judgment reversed.

RELATED CASES: Wiggins, App., 817 N.E.2d 652 (Tr. Ct. erred in denying D's motion to suppress the results of his urine toxicology test, where his difficulties in answering officer's questions were not significant enough to find probable cause).

TITLE: Sharber v. State

INDEX NO.: K.9.a.

CITE: (4th Dist., 5-29-01), Ind. App., 750 N.E.2d 796

SUBJECT: Results of portable breath test inadmissible - offered by D

HOLDING: Tr. Ct. did not err in preventing D from cross-examining police officer as to results of portable breath test that had been administered following his arrest. Result of test revealed that D had blood alcohol content of .099 percent. Foundational requirements for admission of breath alcohol test results include showing that test was administered by operator certified by State Department of Toxicology, equipment used in test was inspected & approved by Department, & operator used techniques approved by Department. Ind. Code 9-30-6-5; Hornback v. State, 693 N.E.2d 81 (Ind. Ct. App 1998). Breath test results are generally inadmissible for benefit of either party if Department has not approved some aspect of test. Mullins v. State, 646 N.E.2d 40 (Ind. 1995). Here, D presented no evidence demonstrating that portable breath test satisfied requirements of Ind. Code 9-30-6-5. Moreover, he did not establish any of foundational requirements for admission of those results. Held, judgment affirmed.

RELATED CASES: Curley, App., 777 N.E.2d 58 (no error in excluding results of passengers' PBTs, as they were irrelevant to show whether D was intoxicated & D as not prevented from questioning passengers).

TITLE: Shepler v. State

INDEX NO.: K.9.a.

CITE: (11-20-01), Ind. App., 758 N.E.2d 966

SUBJECT: Operating vehicle with controlled substance in body is not unconstitutional offense

HOLDING: Ind. Code 9-30-5-1, operating vehicle with schedule I or II substance or its metabolite in body, does not violate 1) Equal Protection clause of United States Constitution; 2) substantive due process under U.S. Constitution; 3) Privileges & Immunities clause of Indiana Constitution; or 4) Eighth Amendment to U.S. Constitution. D argued that statute is unconstitutional because it does not quantify level of controlled substance necessary to cause impairment. Because there is no accepted agreement as to quantity of controlled substance needed to cause impairment & because it was reasonable for legislature to differentiate between alcohol & controlled substances & to prohibit driving with any controlled substance in body, statute does not violate Equal Protection clause. Because legislature did not act arbitrarily in deciding that any person who operates vehicle with any level of controlled substance in body is endangering others & should be subject to criminal charges, statute does not violate substantive due process. Further, Privileges & Immunities clause is not violated because disparate treatment between two classes of people (meaning those using alcohol & those using controlled substances) is reasonably related to inherent characteristics that distinguish unequally treated classes, mainly that there is no accepted agreement as to amount of controlled substances necessary to cause impairment. Lastly, Eighth Amendment is not violated because D's drug use, by itself, did not provide basis for prosecution. Rather, State also had to prove that D operated vehicle with drugs in body. Held, judgment affirmed.

RELATED CASES: Hucker, 4 N.E.3d 797 (Ind. Ct. App 2014) (fact that statute treats as identical a number of controlled substances that have varying effects on the human body is better placed before General Assembly, not Court of Appeals); Bennett, App., 801 N.E.2d 170.

TITLE: Simmons v. State

INDEX NO.: K.9.a.

CITE: (8-6-02), Ind. App., 773 N.E.2d 823

SUBJECT: Operating While Intoxicated (OWI) - suspendability; interplay between Ind. Code 35-50-2-2 & Ind. Code 9-30-5-15

HOLDING: Tr. Ct. did not err in ordering D to serve six months of sentence for OWI as Class D felony in secure detention. D contended that statutory requirement that person convicted of OWI with at least two prior OWI convictions must serve at least six months imprisonment, enacted in 1996, was repealed by 1999 statutory enactment stating that upon third OWI, Tr. Ct. shall order that person be imprisoned for at least ten days. In 1996, Legislature amended general suspension statute, Ind. Code 35-50-2-2, by adding subsection (b)(4)(Q), which states that Ct. may only suspend part of sentence that is in excess of minimum sentence for OWI with two prior OWI convictions. In 1999, Legislature rewrote Ind. Code 9-30-5-15 & added in addition to any criminal penalty imposed for offense under chapter, Ct. shall order person imprisoned for at least ten days if person has two prior OWI convictions. Ct. held that 1999 statute is "gap-filler" & operates to require minimum term of imprisonment in situations where general suspension statute is inapplicable, which could occur if person has been convicted of OWI more than twice, but not as felony. Further, 1999 statute states that it is "in addition to" not "instead of," which indicates that statute is to be construed in conjunction with general statutory criminal sentencing scheme, which includes general suspendability statute. Held, judgment affirmed.

RELATED CASES: Woodward, App., 798 N.E.2d 260 ("prior unrelated convictions" as used in general suspension statute does not impose a sequential requirement concerning dates of commission & conviction relative to predicate offenses, except that those convictions must be entered before judgment was entered on current offense).

TITLE: Slate v. State

INDEX NO.: K.9.a.

CITE: (2nd Dist., 11-13-03), Ind. App., 798 N.E.2d 510

SUBJECT: Operating while intoxicated (OWI) - jury instruction; claim of inconsistent verdicts

HOLDING: In OWI prosecution, Tr. Ct. did not err in giving following instruction to jury over D's objection: Endangerment means that [D's] condition or manner of operating the vehicle could have endangered any person, including the public, the police, or [D]. Thus, proof that [D's] condition rendered operation of the vehicle unsafe is sufficient to establish endangerment.

D argued that this instruction was erroneous because: 1) it created a per se finding of endangerment based on the condition of driver without consideration of how the vehicle was actually operated; & 2) instruction was an incorrect interpretation of law because it was based upon precedent prior to the 2001 amendment of Ind. Code 9-30-5-2. Prior to 2001, Ind. Code 9-30-5-2 made it a Class A misdemeanor to operate a vehicle while intoxicated. After this time, that offense was changed to a Class C misdemeanor unless the vehicle was operated "in a manner that endangers a person," which elevated the offense to a Class A misdemeanor. Prior to 2001, Ind. Code 9-13-2-86 defined "intoxicated" as being under the influence of alcohol "so that there is an impaired condition of thought & action & the loss of normal control of a person's faculties to an extent that endangers a person." The legislature removed the endangerment portion of the statute in 2001. Ct. rejected D's contention that because endangerment was removed from definition of intoxication, D's condition could no longer be used to prove endangerment. Instruction was appropriate in this case because D was charged under Class A misdemeanor portion of OWI statute, which includes endangerment. Further, Ct. found no evidence that legislature's amendments were directed at altering the means of proving endangerment.

Ct. also found that D's acquittal of public intoxication was not inconsistent with his conviction for OWI as a Class A misdemeanor. Although both offenses require a showing of intoxication, Ct. upheld the jury verdicts because different definitions of "intoxicated" were given in jury instructions for each charge. The public intoxication instruction noted that a "significant" loss of normal physical & mental faculties was necessary for conviction rather than simply a loss as indicated in the OWI instruction. Considering these definitions, jury could conceivably find that D was impaired but not significantly so as under the second definition. It was also possible & reasonable for jury to associate different definitions of "intoxication" for each charged offense. Held, judgment affirmed.

RELATED CASES: Staley, App., 895 N.E.2d 1245 (as in Slate, Ct. found no error in instructing jury on definition of endangerment pursuant to pre-2001 statutory definition, because D was charged with Class A misdemeanor, not newly created Class C misdemeanor)

TITLE: Smith v. State

INDEX NO.: K.9.a.

CITE: (6-13-01), Ind. App., 751 N.E.2d 280

SUBJECT: Police officer's training & experience - foundation for field sobriety test results.

HOLDING: Tr. Ct. did not abuse its discretion when it admitted police officer's testimony regarding field sobriety tests. D argued that State failed to demonstrate scientific basis for proposition that field sobriety test results are reliable indicators of intoxication. Ct. concluded that investigating officer's training & experience is only evidentiary foundation required for admission of field sobriety tests. Tests at issue do not involve any complex scientific process or principles. Results are reported as officer's observations about D's ability to perform simple tasks. Held, judgment affirmed.

RELATED CASES: Hinds, App., 906 N.E.2d 877 (unstandardized and uncertified field sobriety tests, such as the finger-to-nose and backwards count test-are admissible).

TITLE: Smith v. State

INDEX NO.: K.9.a.

CITE: (9-28-01), Ind. App., 755 N.E.2d 1150

SUBJECT: Blood alcohol content - milliliters of blood vs. liters of breath harmless error

HOLDING: It was harmless error for State to fail to explain that blood alcohol content can be expressed either in liters of breath or milliliters of blood where instruction referred to .10% of alcohol by weight in grams in 100 milliliters of blood being prima facie evidence of intoxication. D argued that there was no evidence to support this instruction because State's only evidence pertaining to blood alcohol content was given in terms of 210 liters of breath, not 100 milliliters of blood. Errors in giving or refusing of instructions are harmless where conviction is clearly sustained by evidence & jury could not properly have found otherwise. Here, there was evidence that D had admitted to consuming alcohol, car was found in ditch, breath smelled of alcohol, eyes were bloodshot, & he had failed several field sobriety tests. Held, rehearing granted, conviction affirmed.

TITLE: Schrefler v. State
INDEX NO.: K.9.a.
CITE: (3rd Dist., 1-18-96), Ind. App., 660 N.E.2d 585
SUBJECT: DUI & administrative license suspension - no double jeopardy
HOLDING: Administrative suspension of driving privileges does not bar subsequent criminal prosecution for operating vehicle while intoxicated. *Citing United States v. Halper* (1989), 490 U.S. 435, D argued that administrative suspensions of his license pursuant to Ind. Code 9-30-6-9(b) constituted multiple punishments for same conduct at issue in his criminal prosecutions, thereby violating double jeopardy. Ct. held that administrative suspension of driving privileges upon finding of probable cause that D operated vehicle while intoxicated does not serve goals of punishment. Instead, administrative suspension scheme bears rational relationship to legitimate remedial governmental purpose of promoting highway safety. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673. Because administrative suspensions of driving privileges serves legitimate, non-punitive governmental purpose, double jeopardy does not prohibit implementation of criminal proceedings based on same conduct. Held, denial of motion to dismiss affirmed.

TITLE: Sering v. State

INDEX NO.: K.9.a.

CITE: (2d Dist. 1/30/86) Ind. App., 488 N.E.2d 369

SUBJECT: DWI - .10 is lesser included offense (LIO) of DWI

HOLDING: Tr. Ct. erred in entering convictions & sentences for both operating a vehicle while intoxicated & operating a vehicle with blood alcohol content (BAC) of .10%. Lengthy opinion finds 2 offenses contain different elements (impairment vs. specific BAC); therefore, offenses are not "same offense" under Blockburger analysis. However, Ct. finds BAC .10% is LIO of DWI because it presents lesser risk of harm, as evidenced by penalties (BAC .10% = Class C misdemeanor; DWI = Class A misdemeanor). See Ind. Code 35-41-1-16(3) (LIO statute). Disparity is explained by fact intoxicated driver has demonstrated inability to operate auto in prudent manner, whereas some drivers with BAC .10% may not manifest impaired condition/loss of control to extent others are endangered. Held, remanded with instructions to vacate BAC .10% conviction/sentence. Buchanan DISSENTS, contending Ind. Code 35-41-1-16(3) requires 2 offenses differ only in respect that less serious harm/risk of harm exist. Buchanan argues 2 statutes differ as to elements, as well.

RELATED CASES: Stutz, 970 N.E.2d 263 (Ind. Ct. App 2012) (Sering does not apply, given the 2000 and 2001 amendments to the applicable statutes which show legislative intent that class A misdemeanor operating with a BAC of at least .15 percent constitutes a greater risk than driving while intoxicated as a class C misdemeanor); Finney, App., 491 N.E.2d 1029 (Autos 316; constitutionality of BAC .10% statute upheld); Collins, App., 491 N.E.2d 1020 (BAC .10% is LIO of DWI; Ct. reverses DWI Class A misdemeanor where D was also convicted of DWI Class D felony for same incident).

TITLE: Smith v. State
INDEX NO.: K.9.a.
CITE: (4-29-97), Ind., 681 N.E.2d 687
SUBJECT: OWI jury instruction - no fundamental error
HOLDING: S.Ct. granted transfer of divided Ct. App.' opinion in Smith v. State, 674 N.E.2d 217 (Ind. Ct. App 1996), which held that following instructions impermissibly shifted burden of proof to D & constituted fundamental error: Evidence that there was ten-hundredths percent (.10%) or more, by weight of alcohol in [Smith's] blood constitutes prima facie evidence that he was intoxicated.

You are instructed that prima facie evidence is evidence which is sufficient to prove a fact standing alone, until contradicted or overcome by evidence to the contrary.

D did not object to these instructions at trial. S.Ct. agreed with Judge Staton's dissenting opinion, which characterized any error in instructions as "innocuous." Moreover, Tr. Ct. did not err in instructing jury that it could relate results of D's blood alcohol test back to time he operated vehicle if jury found test was given within three hours of that time. Ind. Code 9-30-6-2, 15. Held, transfer granted & Tr. Ct. affirmed.

TITLE: Smith v. State
INDEX NO.: K.9.a.
CITE: (3d Dist. 5/9/84) Ind. App., 462 N.E.2d 1333
SUBJECT: DWI - sufficiency - intoxication
HOLDING: Evidence was sufficient to support DWI conviction where D, stopped for taillight malfunction, smelled of alcohol, staggered & later refused to take breathalyzer. Refusal to take breathalyzer may be used as evidence of guilt without violating privilege against self-incrimination or due process fundamental fairness. SD v. Neville (1983), U.S., 103 S.Ct. 916, 74 L.Ed.2d 748 (card at K.9.e). Held, affirmed.

RELATED CASES: Jellison, App., 656 N.E.2d 532; Kremer, App., 643 N.E.2d 357 (circumstantial evidence sufficient to establish prima facie case of intoxication); Warner, App., 497 N.E.2d 259; Sering, App., 488 N.E.2d 369; Smith, App., 502 N.E.2d 122 (although proof of .10 BAC is prima facie evidence of intoxication, conviction for DWI cannot be won simply by demonstrating that D was driving with BAC of .10); Hughes, App., 481 N.E.2d 135 (Crim L 741(1); whether evidence is sufficient to overcome prima facie evidence of intoxication was up to trier of fact; here, D contends breathalyzer test of .115 should not be conclusive but merely corroborating & presented evidence that he was not driving erratically except for speed, passed dexterity test, was cooperative, & not belligerent; held, conviction affirmed); Groves, App., 479 N.E.2d 626 (evidence of DWI held sufficient); Brunes, App., 475 N.E.2d 356 (evidence sufficient where D, standing in crowd near car in ditch, stated he was driver, smelled of alcohol, & failed field sobriety tests); Zimmerman, App., 469 N.E.2d 11; Smith 547 N.E.2d 845 (evidence sufficient where D had .23 BAC over 3 hours after being seen driving recklessly).

TITLE: State v. Geise

INDEX NO.: K.9.a.

CITE: (2d Dist. 07/21/92), Ind. App., 596 N.E.2d 244

SUBJECT: Operating while intoxicated (OWI) - no previous conviction

HOLDING: Tr. Ct. did not err in dismissing charge of OWI with previous conviction, because before most recent amendment of Ind. Code 9-13-2-130, prior convictions under Ind. Code 9-11-2 (now Ind. Code 9-30-5) were not included in definition of "previous conviction," & uncodified savings clause did not work to correct error. D was charged with OWI with previous conviction under Ind. Code 9-30-5 (effective 7-1-91) on August 21, 1991. In August 1991, Ind. Code 9-13-2-130 (which replaced Ind. Code 9-11-1-6.5) defined previous conviction as conviction:

- (1) in Indiana of:
 - (A) an alcohol related or drug related crime under Acts 1939, c.48, s.52, as amended, or Ind. Code 9-4-1-54 (repealed on September 1, 1983); or (B) a crime under Ind. Code 9-30-4-1 through Ind. Code 9-30-4-9; or
- (2) in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of a crime described in Ind. Code 9-30-4-1 through Ind. Code 9-30-4-9.

Ind. Code 9-13-2-130 contained 2 errors on its face; it referred to Ind. Code 9-30-4, rather than proper Ind. Code 9-30-5, & it did not include conviction under Ind. Code 9-11-2 as previous conviction. Errors were corrected in 1992 Ind. Acts Pub. L. No. 1-1992, but legislation was not effective until February 21, 1992. Because of errors, D could not be convicted of OWI with previous conviction as D felony, because his previous conviction occurred under Ind. Code 9-11-2. Savings clause related to recodification of Ind. Code 9-11-2 into 9-30-5, provided in part that act did not affect any: "(1) rights or liabilities accrued; (2) penalties incurred; (3) violations committed; or before the effective date of this act." Ct. found that under Ind. Code 9-11-2-3, having previous conviction of OWI was not liability until subsequent violation of Ind. Code 9-11-2 was committed, & that because D did not commit another violation of Ind. Code 9-11-2, fact he had previous conviction could not be considered liability. Therefore savings clause did not work to support charge of OWI with previous conviction. Ct. refused to supply omitted portion of Ind. Code 9-13-2-130, a previous conviction under Ind. Code 9-11-2, due to requirement of strict construction of penal statutes. Such statutes cannot be construed to include anything beyond letter of law, even if construction is within spirit of statute, & cannot be enlarged by implication or intendment, Keihn 542 N.E.2d 963, Squibb 84 N.E. 969, Cleveland, C., C. & St. L.Ry. Co. 61 N.E. 669, Gore, App., 456 N.E.2d 1030. Held, dismissal of count of OWI with previous conviction affirmed.

RELATED CASES: Schenk, App., 895 N.E.2d 1271 (rejecting D's reliance on Geise and holding D's 1988 OWI conviction constituted a "prior conviction" for purposes of determining that six months of his sentence was non-suspendable under Ind. Code 35-50-2-2(b)(4)(R); see full review at E.5.f).

TITLE: State v. Hunter
INDEX NO.: K.9.a.
CITE: 898 N.E.2d 455 (Ind. Ct. App. 2008)
SUBJECT: Operating while intoxicated - inadequate foundation for admission of blood test results
HOLDING: In prosecution for operating while intoxicated, Tr. Ct. did not err in excluding report of blood test results because State failed to establish the requisite foundation as to the drawing of D's blood. Blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by a "physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." Ind. Code 9-30-6-6(a).

Here, unlike in Shepherd v. State, 690 N.E.2d 318 (Ind. Ct. App 1997), there is no evidence that nurse who drew two vials of D's blood was acting under the direction of or under a protocol prepared by a physician. The foundational requirement of Ind. Code 9-30-6-6 cannot be ignored. See Combs v. State, 895 N.E.2d 1252 (Ind. Ct. App 2008). Moreover, inadequacy of foundation is even more pronounced because State failed to present any evidence that the nurse was "a person trained in obtaining bodily samples." Existence of search warrant directing hospital personnel to obtain a bodily substance sample should not trump and/or negate the legislature's statutory requirements outlining prescribed protocol for obtaining such samples. Held, judgment affirmed.

TITLE: State v. Isaacs

INDEX NO.: K.9.a.

CITE: (1st Dist., 9-3-03), Ind. App., 794 N.E.2d 1120

SUBJECT: Operating vehicle with controlled substance in body - motion to dismiss

HOLDING: Tr. Ct. erred in granting D's motion to dismiss two counts of operating vehicle while intoxicated (OWI), but properly granted motion to dismiss one count of operating with schedule I or II controlled substance in his body. Purpose of Ind. Code 35-34-1-8, which governs dismissal of charging informations, is to establish facts that determine whether, as matter of law, an offense has properly been charged against D. State v. King, 502 N.E.2d 1366 (Ind. Ct. App 1987). Here, D was not entitled to dismissal of charging information for operating with schedule I or II controlled substance in his body on basis that he purportedly had valid prescription for controlled substances, as that is statutory factual defense to charges. Nevertheless, Tr. Ct. properly granted motion to dismiss that count because facts recited in information failed to state a crime. D operated vehicle with Schedule IV controlled substances in his body, namely, Diazepam & Nordiazepam. Operating vehicle with a schedule III, IV, or V controlled substance in one's body is not a crime per se.

As to two counts of OWI, Tr. Ct. erred in granting D's motion to dismiss. "Intoxicated" is defined as operating under influence of any controlled substance. Ind. Code 9-13-2-86. Because "controlled substance" is not limited to schedule I or II controlled substances under statute, facts recited in information clearly stated a crime. Held, judgment affirmed in part, reversed in part, & remanded.

TITLE: State v. Johnson

INDEX NO.: K.9.a.

CITE: (1st Dist. 1/29/87) Ind. App., 503 N.E.2d 431

SUBJECT: DWI - alco-sensor results can establish probable cause

HOLDING: Tr. Ct. erred in not admitting alco-sensor test results (.15%) at suppression hearing to establish probable cause. Results of alco-sensor tests are inadmissible at trial because test is not approved of Department of Toxicology. At suppression hearing, probable cause can be established by evidence which would not be admissible at trial. Layman, App., 407 N.E.2d 259. Ct. finds no difference in officer's use of alco-sensor test than in use of manual dexterity tests. Here, D later took breathalyzer test & registered .115% BAC. Held, judgment suppressing results of breathalyzer test reversed; cause remanded for trial. Robertson DISSENTS, arguing officer did not have probable cause to even offer also-sensor test, having stopped D for speeding. Officer noticed "moderate odor of alcohol emanating from" D. Taking of D's breath sample, without probable cause to arrest him for DWI, cannot be justified on basis of D's actual implied consent to tests. Dissent contains excellent discussion of law on this issue.

TITLE: State v. Keith

INDEX NO.: K.9.a.

CITE: (2d Dist. 9/11/85) Ind. App., 482 N.E.2d 751

SUBJECT: Misdemeanor DWI is lesser included offense (LIO) of felony DWI causing serious bodily injury

HOLDING: Tr. Ct did not err in granting D's motion to dismiss felony DWI charges. Here, D was charged with misdemeanor DWI. State moved to dismiss charge, but Tr. Ct. erroneously denied motion. [Ind. Code 35-34-1-13 requires dismissal upon motion.] Tr. Ct. accepted D's guilty plea to misdemeanor charges but later granted state's second motion to dismiss those charges. State then charged D with felony offense of operating a motor vehicle while intoxicated. Ct. finds felony offense requires proof of element of serious bodily injury not required by misdemeanor offense. However, proof of felony satisfies each element of misdemeanor. Therefore, misdemeanor is lesser included offense of felony & the 2 are same for double jeopardy purposes. State v. Redmon, 425 N.E.2d 634. See also Hopper, 475 N.E.2d 20. Ct. finds jeopardy attached when Tr. Ct. accepted D's guilty plea; therefore, D could not later be charged with felony offense. Held, dismissal affirmed. Sullivan CONCURS IN RESULT without opinion. On rehearing State v. Keith, App., 507 N.E.2d 245 (dismissal *affirmed*).

TITLE: State v. Krohn

INDEX NO.: K.9.a.

CITE: (1st Dist. 4/12/88) Ind. App., 521 N.E.2d 374

SUBJECT: Driving while intoxicated (DWI) - elements; endangerment

HOLDING: Tr. Ct. erred in requiring state to prove danger to another person as element of DWI.

"Intoxicated" is defined at Ind. Code 9-11-1-7 as being under influence of alcohol &/or other drugs "such that there is an impaired condition of thought & action & the loss of normal control of a person's faculties to such an extent as to endanger any person." Endangerment portion of definition does form element of offense & indicates level of impairment & extent of loss of faculties that must be shown to establish intoxication. However, endangerment of one other than D is not required. Tr. Ct.'s interpretation would prevent police from acting until intoxicated driver endangers another person. This is contrary to policies & purposes of state's drunk driving laws. Held, although Tr. Ct. erred, acquittal stands.

RELATED CASES: Shaw, App., 595 N.E.2d 743 ("Endangerment" portion of OWI does not require that person other than D be within same area as D, only that D's condition or driving manner could have endangered any person, including public, police or driver. Proof that D's condition renders driving unsafe is sufficient to establish endangerment.)

TITLE: State v. Loveless

INDEX NO.: K.9.a.

CITE: (2nd Dist., 2-3-99), Ind. App., 705 N.E.2d 223

SUBJECT: Motorized bicycle is "motor vehicle" for purposes of operating while intoxicated (OWI) statutes

HOLDING: Tr. Ct. erred in granting D's petition for post-conviction relief (PCR) & vacating his OWI conviction. D's guilty plea was based on his operation of self-propelled, gasoline- powered motorized bicycle while intoxicated. Ct. held that motorized bicycle, or moped, is motor vehicle for purposes of OWI statute, Ind. Code 9-30-5, because it has not been specifically excluded from definition of "motor vehicle" for purposes of that statute. There was adequate factual basis for D's guilty plea. Held, judgment reversed Garrard, J., concurring.

RELATED CASES: Laker, 937 N.E.2d 1259 (Ind. Ct. App 2010) (tractor is a vehicle for purposes of OWI).

TITLE: State v. Manuwal

INDEX NO.: K.9.a.

CITE: (04-08-09), 904 N.E.2d 657 (Ind. 2009)

SUBJECT: OWI - includes driving on private property

HOLDING: Ind. Code 9-30-5-1(b) and 9-30-5-2 apply when a motorist is driving on public or private property, including property owned by the motorist. Ind. Code 9-30-5-1 makes it a Class A misdemeanor to operate a vehicle with 0.15 grams of alcohol per 100 milliliters of blood or 210 liters of the person's breath. Ind. Code 9-30-5-2 makes it a Class C misdemeanor to operate a vehicle while intoxicated. Neither statute expressly limits its application to public highways nor designates application to private property in any way. Although the definitions for "vehicle" and "operator" refer to a highway, which in turn, refers to "every publicly maintained way when any part of the way is open to the use of the public for purpose of vehicular travel," neither Ind. Code 9-30-5-1 nor 2 include the words "operator" or "highway." Moreover, the Legislature made clear "it is not a defense in an action under [Chapter 5] that the accused person was operating a vehicle in a place other than on a highway." Ind. Code 9-30-5-9. Here, the prosecutor had discretion to charge D with OWI for operating his all terrain vehicle on his private property. Thus, Tr. Ct. erred in granting D's motion to suppress. Held, transfer granted, Tr. Ct.'s order granting D's motion to suppress reversed and Court of Appeals' opinion at 876 N.E.2d 1142 vacated.

TITLE: State v. Molnar

INDEX NO.: K.9.a.

CITE: (3rd Dist., 2-13-04), Ind. App., 803 N.E.2d 261

SUBJECT: Breath test - foreign substance in mouth; tobacco residue

HOLDING: Tr. Ct. erroneously granted D's motion to suppress results from breath test. D's motion to suppress breath test results was based on premise that test was not properly administered because he had chewing tobacco residue in his mouth at time of test. After D removed tobacco from his mouth, arresting officer asked him if he had any foreign substance in his mouth, to which D replied that he did not. It was undisputed that D did not place any foreign substance in his mouth within twenty minutes of test. 260 IAC 1.1-4-8 provides that person to be tested "must have had nothing to eat or drink, must not have put any foreign substance in his or her mouth or respiratory tract, & must not smoke within twenty minutes to time a breath sample is taken." Reason for twenty-minute rule is to prevent a foreign substance from affecting breath test results.

The word "put" is not defined in regulation, & must be given its plain & ordinary meaning, which is "to place in a specified location." By using word "put" in regulation, Department of Toxicology prohibited placement of a foreign substance in subject's mouth prior to test. Regulation makes no provision for residue remaining from matter removed from subject's mouth before twenty-minute period begins & does not invalidate breath test results due to residue remaining in subject's mouth. It was improper for Tr. Ct. to expand upon plain language of regulation to affect such a result. State satisfied its burden to show that test was properly administered, & D failed to present sufficient evidence that tobacco residue, if any in fact remained by time test was administered, affected outcome of test in such a way as to call in to question propriety of test's administration. Held, judgment reversed.

Note: D would not be precluded from presenting evidence at trial that a test result was actually skewed by residue remaining in his or her mouth. Here, no such evidence was presented.

RELATED CASES: Fields, App., 807 N.E.2d 106 (Ct. disagreed with Molnar, to extent it held that 260 IAC 1.1-4-8(1) only requires that a person not place any foreign substance in his mouth within the 20 minute deprivation period; person cannot have any substance in his mouth during that period -- whether placed there or not); Fields, 811 N.E.2d 978 (on rehearing, Ct. clarified earlier opinion and noted that deputy followed the proper procedure by having the tobacco removed from D's mouth).

TITLE: State v. Page
INDEX NO.: K.9.a.
CITE: (1st Dist. 1/10/85) Ind. App., 472 N.E.2d 1271
SUBJECT: DWI - pre-1983 statute; administration of breathalyzer
HOLDING: Tr. Ct. erred in granting D's MCE upon finding procedures (for administering breathalyzer test) had not been properly promulgated under the Indiana Administrative Code. Here, D was charged with DWI on 6/28/83. Ct. resolves issues by finding prior statute (Ind. Code 9-4-4.5-6) & rule (260 IAC 1-3-1) govern. Legislature did not intend methods developed by Director of Department of Toxicology to have force of law. Thus, operators were not required to follow "approved methods," but failure to do so could result in inadmissibility of test results. Ct. notes 1983 change in DWI law requires methods be promulgated under Ind. Code 4-22-2. [See VanAllen v. State, App., 467 N.E.2d 1210 (card at V.1) on applicability of old rules under new statute]. Held, reversed.

TITLE: State v. Rans

INDEX NO.: K.9.a.

CITE: (3rd Dist., 11-28-00), Ind. App., 739 N.E.2d 164

SUBJECT: Enhanced operating while intoxicated (OWI) conviction - erroneous use of prior out-of-state conviction based on more broadly defined offense

HOLDING: D's previous misdemeanor conviction in Michigan of driving vehicle while visibly impaired (DWVI) did not constitute a "previous conviction of operating while intoxicated" as required by Ind. Code § 9-30-5-3 to support OWI as Class D felony. "Previous conviction of operating while intoxicated" includes previous conviction in any other jurisdiction in which elements of crime for which conviction was entered are substantially similar to elements of crime described in Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-9. Here, D pled guilty to OWI as Class A misdemeanor under Ind. Code § 9-30-5-2, which requires evidence that D lost ability to drive normally to such extent that it was unsafe or endangered any person. Blinn, 677 N.E.2d 51 (Ind. Ct. App 1997). In contrast, Michigan's DWVI statute is more broadly defined crime, requiring proof that D merely operated vehicle "with less ability than would an ordinary, careful & prudent driver [,]" i.e., that there was simply reduction in ability to drive normally. Definition of OWI under Ind. Code § 9-30-5-2 cannot reasonably be interpreted to include any visible alcohol-related impairment without regard to whether that impairment exposes others to harm or danger. Accordingly, because Michigan's DWVI statute encompasses broader range of prohibited conduct, it is not substantially similar to Ind. Code § 9-30-5-2 & did not constitute prior conviction of OWI under Ind. Code § 9-30-5-3. To hold otherwise would extend application of this statute to encompass convictions for conduct requiring lower degree of intoxication than do Indiana's existing alcohol-related driving statutes & would be contrary to well-settled rule that penal statutes be strictly construed against State to avoid enlarging them beyond fair meaning of their language. State v. Sheldon, App., 692 N.E.2d 947. Thus, Tr. Ct. did not err when it acquitted D of OWI as Class D felony. Held, judgment affirmed Sullivan, J., concurring.

RELATED CASES: Bazan, 45 N.E.3d 856 (Ind. Ct. App. 2015) (Tr. Ct. properly dismissed D's two Level 6 felony charges for OWI with prior conviction because D's New York conviction was not substantially similar to Indiana's C misdemeanor OWI offense (IC § 9-30-5-2(a)) because the Indiana statute requires a greater showing of impairment than does the New York statute); Akins, App., 795 N.E.2d 1093

TITLE: State v. Rumble

INDEX NO.: K.9.a.

CITE: (5th Cir.; 2-9-00), Ind. App., 723 N.E.2d 941

SUBJECT: OWI - DOT not required to independently test & certify simulator solutions

HOLDING: Tr. Ct. erred in suppressing results of D's BAC DataMaster test because simulator solution used to calibrate machine does not have to be independently tested & certified by Department of Toxicology. Chemical breath tests are not admissible in evidence if: . . . (3) chemicals used in test, if any, . . . have not been approved in accordance with rules adopted under subsection (a). Ind. Code 9-30-6-5(d)(3). Ind. Code 9-30-6-5(a) requires Department of Toxicology to promulgate rules governing inspection & certification of breath test equipment. When possible, every word is to be given effect & no part of statute is to be construed so as to be meaningless, if it can be reconciled with rest of statute. Hensley, App., 716 N.E.2d 7. Here, because chemicals are always used in calibrating breath test machine, but only sometimes used in administering actual breath test itself, construing Ind. Code 9-30-6-5(d)(3) to include solution chemicals used to calibrate machines would render "if any" in that provision superfluous. Only construction of Ind. Code 9-30-6-5(d)(3) which gives meaning to "if any" is to conclude that "chemicals" means only chemicals used in administering breath test. Thus, because Ind. Code 9-30-6-5(d)(3) does not refer to simulator solution used to test & calibrate BAC DataMaster, Ind. Code 9-30-6-5(a), which governs approval & certification of chemicals used in BAC breath test, is not applicable. Held, grant of suppression reversed.

TITLE: State v. Traver

INDEX NO.: K.9.a.

CITE: (11-23-11), 957 N.E.2d 672 (Ind. Ct. App 2011)

SUBJECT: OWI - 5-year enhancement period begins from previous conviction, not occurrence

HOLDING: Tr. Ct. abused its discretion by finding that the five-year period in Ind. Code 9-30-5-3, enhancing an OWI to a class D felony, begins to run on the date of the commission of the previous OWI, not the conviction of it. A person who operates a vehicle while intoxicated commits a Class D felony if "the person has a previous conviction of OWI that occurred within the five (5) years immediately preceding the occurrence of the violation." Ind. Code 9-30-5-3.

Here, D was charged with operating with a .15 BAC. Tr. Ct. dismissed the charge because it believed Ind. Code 9-30-5-3 should be read from occurrence to occurrence, rather than conviction to occurrence. D argued that to read it otherwise would create an unjust or illegal result because it would allegedly punish a D for not resolving his case within a short period of time of the occurrence. However, Court of Appeals rejected the argument, finding that the language of the statute is unambiguous and that there is no authority for the proposition that unfairness is a valid reason to ignore the plain language of a statute in favor of an interpretation not supported by the language. Thus, in order for an OWI to be enhanced to a Class D felony, the State is required to prove that the D has a previous OWI conviction and that the conviction falls within the five-year period immediately preceding the commission of the instant offense. Tr. Ct. erroneously dismissed the Class D felony OWI charge. Held, judgment reversed.

See also: State v. Eichorst, 957 N.E. 2d 1010 (Ind. Ct. App 11-23-11) ("it is the previous conviction that is subject to the five-year limit, not the act that gave rise to the conviction"); State v. Wilson, 958 N.E. 2d 1 (Ind. Ct. App 11-23-11) (General Assembly's conceded focus on prior date of conviction in IND. CODE 9-30-5-4 and 5 is compelling evidence that it intended the focus in section 3 to be on the prior date of conviction as well).

TITLE: Stutz v. State

INDEX NO.: K.9.a.

CITE: (07-05-12), 970 N.E.2d 263 (Ind. Ct. App 2012)

SUBJECT: Operating vehicle with .15 BAC is not lesser included offense of OWI

HOLDING: Class A misdemeanor operating a vehicle with a BAC of at least .15 percent is not a lesser included offense of class C misdemeanor operating while intoxicated. The 2000 and 2001 amendments to the applicable statutes show that legislature has determined that class A misdemeanor operating with a BAC of at least .15 percent constitutes a greater risk than driving while intoxicated as a class C misdemeanor. Thus, Sering v. State, 488 N.E.2d 369 (Ind. Ct. App 1986), which applied previous version of statute and found that operating with a BAC of .10% was a lesser-included offense of operating while intoxicated, does not apply. Held, judgment affirmed and remanded with instructions to merge class C misdemeanor operating while intoxicated conviction with conviction for class A misdemeanor operating with BAC of at least .15 percent.

RELATED CASES: Watson, 972 N.E.2d 378 (Ind. Ct. App 2012) 12 (OWI with at least a .08 BAC is a lesser included offense of OWI w/ at least a .15 BAC).

TITLE: Thompson v. State

INDEX NO.: K.9.a.

CITE: (4th Dist., 2-13-95), Ind. App., 646 N.E.2d 687

SUBJECT: Driving with .10% BAC - rebuttable presumption

HOLDING: Presumption created by evidence that D was driving with .10% BAC at time of arrest does not disappear from case upon introduction of contradictory evidence. Arresting officer testified as to results of BAC test within 3-hour time limit of Ind. Code 9-30-6-2(c). A rebuttable, permissive presumption that D was driving with .10% BAC at time of arrest arose, pursuant to Ind. Code 9-30-6-15(b). On cross-examination, officer admitted that he did not know what D's BAC was at time of arrest, conceding that it could have been under .10%. Tr. Ct. properly instructed jury that BAC presumption was rebuttable, that jury was free to accept or reject presumption, even if no rebuttal evidence was introduced. Evidence was sufficient to sustain D's conviction. Held, conviction affirmed.

RELATED CASES: Disbro, App., 791 N.E.2d 794 (Tr. Ct. did not err in giving jury presumptive instruction based on Ind. Code 9-30-6-15(b) & Ind. Code 9-30-6-2, relating D's blood alcohol content level at time his chemical test was performed to his BAC level at time of his driving; instruction properly informed jury that presumption was rebuttable); Weida, App., 693 N.E.2d 598 (intoxication at time D operated vehicle was properly presumed); Finney, App., 686 N.E.2d 133 (evidence was sufficient to support conviction for operating vehicle with at least .10% BAC. D's expert witness failed to rebut presumption that her BAC was at least .10% at time she operated her vehicle. BAC test was administered within 3 hours of time D was operating vehicle).

TITLE: West v. State
INDEX NO.: K.9.a
CITE: (12/24/2014), 22 N.E.3d 872 (Ind. Ct. App 2014)
SUBJECT: Operating while intoxicated (OWI) conviction affirmed - D parked at courthouse
HOLDING: In OWI prosecution, State presented sufficient evidence to to prove that D "operated" vehicle in which she was found. In 2013, Legislature amended Ind. Code § 9-13-2-117.5 to define "operate" as "to navigate or otherwise be in actual physical control of a vehicle."

Here, a driver saw D drinking beer behind the wheel of her car while parked outside the Montgomery County Courthouse on July 1, 2013. He called 911 and an officer was dispatched, pulling up to block D's running car. The officer asked D what she was doing, and she replied, "I'm trying to pull out, you were in my way." Although car was not in motion when discovered, D told officer that she had come to the courthouse that day. It is not unreasonable to infer that D drove the car. There were several empty beer cans in the car and several opened and partially full ones. D was highly intoxicated, showing a portable test result of .28 and a subsequent test result at the jail of .23. A finder of fact could reasonably infer from this evidence that D was about to drive away in an intoxicated condition when officer blocked her car. See Traxler v. State, 538 N.E.2d 268 (Ind. Ct. App 1989). Held, judgment affirmed, but remanded with instructions to vacate rather than merge conviction for operating with BAC of .15 or more.

TITLE: Winters v. State

INDEX NO.: K.9.a.

CITE: (09/05/2019), 132 N.E.3d 46 (Ind. Ct. App 2019)

SUBJECT: Sleeping in driver's seat of a running car partly in lane of travel is "operating" a motor vehicle

HOLDING: A police officer responded to a request for a welfare check and found Defendant asleep in a running vehicle that was parked halfway in a residential driveway and halfway in the roadway. The officer arrived at 5:15 a.m. and a chemical blood test was performed at 7:11 a.m., which indicated a whole blood ethyl alcohol concentration in the range of .107% to .128%. Defendant was convicted of operating a vehicle with an ACE of .08 or more as a class C misdemeanor. The Court of Appeals noted the fact-sensitive nature of the case and held that the trial court could have reasonably concluded Defendant was operating his vehicle when the officer found him alone in the driver seat of the running vehicle, halfway in the road obstructing traffic and halfway in a driveway at 5:15 a.m. The State was therefore able to rely on the statutory presumption under Indiana Code § 9-30-6-15 that the blood test results were admissible because the chemical test was timely conducted within the three-hour time period after the officer had probable cause to believe Defendant had committed an offense.

TITLE: Wray v. State

INDEX NO.: K.9.a.

CITE: (1st Dist., 5-14-01), Ind. App., 751 N.E.2d 679

SUBJECT: Breath alcohol tests - police training; erroneous admission of certification letter

HOLDING: Tr. Ct. abused its discretion in admitting into evidence a letter from department of toxicology indicating D's arresting officer was certified by department of toxicology to operate breath test instruments. Ind. Code 9-30-6-5(a) provides that the department of toxicology shall adopt rules concerning standards & regulations for the selection, training, & certification of breath test operators. Subsection (d) of statute provides that results of chemical tests that involve analysis of person's breath are not admissible if test operator has not been approved in accordance with rules adopted under Ind. Code 9-30-6-5(a). At trial, D objected to admission of department of toxicology's recertification letter on basis that it was hearsay & did not fall within public records hearsay exception because letter lacked trustworthiness. Letter stated that officer was certified breath test operator "[p]ursuant to authority granted by Ind. Code 9-30-6-5, & regulations promulgated thereto, 260 IAC 1.1..." However, officer unequivocally testified that he had not received training in four of five areas that regulations require breath test operators to receive: pharmacology of alcohol, theory & care of breath test equipment, legal aspects of breath testing, & interpretation of test results.

Legislature delegated responsibility for setting standards for training of breath test operators to department of toxicology, & in promulgating Section 1.1-1-2 of Title 260 of Indiana Administrative Code, department set forth training that it believes breath test operators should receive before they can be considered certified &, therefore, before results of tests that they administer may be admitted into evidence. Ct. will not second-guess these training rules & whether training in all five of specified areas are truly required in order for breath test operator to reliably administer test. In order to give effect to requirements of Ind. Code 9-30-6-5, Ct. must hold that where, as here, there is uncontradicted evidence that a "certified" breath test operator was in fact not trained in accordance with department of toxicology's regulations regarding training, a breath test operator certificate that indicates otherwise is not admissible under statute. Held, conviction reversed.

RELATED CASES: Lloyd, App., 800 N.E.2d 196 (Tr. Ct. abused its discretion in refusing to admit breath tests & the testifying officer's certification into evidence; administrative rule *cited* in Wray on which Tr. Ct. relied was amended to require only 12 hours of certification training).

K. CRIMES

K.9. Motor vehicles

K.9.b. Driving while intoxicated resulting in death (Ind. Code 9-30-5-5, formerly 9-11-2-5)

TITLE: Abney v. State

INDEX NO.: K.9.b.

CITE: (2nd Dist., 12-12-06), Ind. App., 858 N.E.2d 226

SUBJECT: Operating vehicle while intoxicated (OWI) causing death - evidence sufficient

HOLDING: State presented sufficient evidence to establish that D caused the death of a bicyclist that he hit with his automobile, which he was operating while intoxicated. Conviction for OWI causing death requires proof that D's operation of a motor vehicle while intoxicated was a "substantial cause" & not merely a "contributing cause" of the resulting death. Spaulding v. State, 815 N.E.2d 1039 (Ind. Ct. App 2004). Here, D argued that some other unidentified vehicle hit & killed victim before victim was thrown onto D's vehicle. Ct. noted absence of evidence to indicate that any other vehicles were in the subject location at the time of the accident. State's certified accident investigator & reconstructionist testified that D's vehicle was the first & only vehicle to strike victim & that there were no other vehicles involved. State's pathologist determined that victim's cause of death was a broken neck, which would be an injury consistent with a rear strike to a bicyclist by a vehicle. He also testified that he believed victim's broken neck injury would have occurred on initial impact with a car, and that injuries did not suggest that victim's body was hit by more than one car.

D's accident reconstructionist testified that, contrary to State's theory, the physical evidence was not consistent with a rider being positioned on a bicycle & being struck from behind. Rather, he believed that the evidence was "not inconsistent" with the idea that another vehicle struck victim from behind, elevated him into the air, & landed on hood of D's car. This expert conceded, however, that he could not present a scenario or otherwise specifically explain how the accident could have happened in this manner. Ct. concluded that D's claim, & even the opinion of his own expert, relies on considerable speculation. Evidence was sufficient for jury to determine beyond a reasonable doubt that D's operation of a motor vehicle while intoxicated caused victim's death. Held, judgment affirmed.

TITLE: Abney v. State
INDEX NO.: K.9.b.
CITE: (4-26-02), Ind., 766 N.E.2d 1175
SUBJECT: Operating Vehicle While Intoxicated (OWI) Causing Death - State must show proximate, substantial cause
HOLDING: To sustain a conviction under Ind. Code 9-30-5-5, OWI causing death, State must prove D's operating a motor vehicle while intoxicated was a "substantial cause" of resulting death, not a mere "contributing cause." Analysis of Ind. Code 9-30-5-5 should focus on driver's acts. If driver's conduct caused injury, he commits crime; if someone else's conduct caused injury, he is not guilty. Micinski v. State, 487 N.E.2d 150 (Ind. 1986).

Here, D tendered proposed jury instruction that stated: "If you find that the D's conduct caused the accident that produced the death of the victim, the State has proven the element of 'causation.' However, if you find that someone else's conduct caused the accident, you should find the D not guilty...." Focus of D's trial was whether or not he caused D's death, & evidence showed that it was possible another vehicle had struck victim first & thrown victim into D's car. Tr. Ct. erred in instructing jury that they could find D guilty if D was contributing cause, a lesser standard. Ct. agreed with Ct. App. that D was prejudiced by erroneous instruction. Held, transfer granted, convictions reversed & remanded for new trial.

TITLE: Bowman v. State

INDEX NO.: K.9.b.

CITE: (3d Dist. 12/19/90), Ind. App., 564 N.E.2d 309

SUBJECT: DUI resulting in death - causation

HOLDING: Tr. Ct. did not err in refusing to give D's instruction that jury should find D not guilty of DUI resulting in death if it found that his passenger's failure to wear seatbelt was direct cause of her death. On appeal, D argues that evidence supported giving of causation instruction. D points to physician's testimony that victim would not have sustained any serious injury from accident had she been wearing seatbelt, as well as to evidence that he sustained no injuries. Criminal act must be both actual cause & legal or proximate cause of injury. 1 LaFave & Scott, Substantive Criminal Law 392. D's action is actual cause if it is substantial factor in bringing about result. Id. Legal or proximate cause is distinct concept, concerning D's responsibility for results. D is not held responsible for consequences which are unforeseeable, or which are not natural & probable consequence of D's actions. Outlaw 484 N.E.2d 10. Where an action of victim, third party, or non-human source affects chain of causation, such intervening action was not foreseeable, it becomes superseding cause absolving D of criminal liability. LaFave, supra, 406-07; Concer v. Hull Lift Truck, Inc. 435 N.E.2d 10. D argues that victim's failure to wear seatbelt was superseding cause. However, it is clearly foreseeable that automobile passenger might fail to wear seatbelt, & here evidence showed that D was aware that victim was not wearing seatbelt & asked her to do so, which she refused. Conviction reversed on transfer on other evidentiary grounds, Bowman 577 N.E.2d 569, see card at O.12.b.

TITLE: Drossos v. State

INDEX NO.: K.9.b.

CITE: (4th Dist. 11/16/82) Ind. App., 442 N.E.2d 1

SUBJECT: DWI resulting in death/reckless homicide - one death, one conviction

HOLDING: D may not be convicted of both reckless homicide (Ind. Code 35-42-1-5) & operating a vehicle while intoxicated resulting in death of another person (Ind. Code 9-4-1-54) for the death of the same person. Carter, App., 424 N.E.2d 1047. Here, D was convicted on 3 counts of reckless homicide & 3 counts of DWI resulting in death. Three persons were killed. Held, 3 counts under Ind. Code 9-4-1-54 affirmed, but case remanded to Tr. Ct. to vacate conviction on 3 counts of reckless homicide.

RELATED CASES: Scott, 986 N.E.2d 292 (Ind. Ct. App 2013) (trial counsel's failure to inform D of the correct maximum sentence of 23 rather than 30 years for operating a vehicle with a BAC of at least .18 causing death and resisting law enforcement causing death rendered his guilty plea unintelligent; see full review at Y.4.b.2); Marshall, App., 563 N.E.2d 1341 (DJ bars conviction for both reckless homicide & driving with .10 BAC resulting in death based upon death of single victim).

TITLE: Duncan v. State

INDEX NO.: K.9.b.

CITE: (2nd Dist., 12-02-03), Ind. App., 799 N.E.2d 538

SUBJECT: Erroneous denial of motion to suppress blood test results; no "clear indication" of intoxication

HOLDING: In prosecution for operating motor vehicle causing death, Tr. Ct. erred in denying D's motion to suppress results of an alcohol blood test taken without his consent. Police may draw a person's blood without his consent if: 1) there is probable cause to believe that the person has operated a vehicle while intoxicated; 2) the dissipation of alcohol in the blood creates exigent circumstances under which there is no time to secure a search warrant; 3) the test chosen to measure the person's blood alcohol concentration is a reasonable one; & 4) test is performed in a reasonable manner. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In addition, interests of human dignity & privacy protected by Fourth Amendment forbid police from making any such intrusions on mere chance that desired evidence might be obtained. In absence of *clear* indication that in fact such evidence will be found, these fundamental human interests require police officers to suffer risk that such evidence may disappear unless there is an immediate search. Id.; Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App 2003).

Here, record did not contain "a clear indication" that D was intoxicated at time of fatal accident, thereby supplying police with probable cause necessary to compel D to submit to drawing of his blood. Officer testified that he determined that due to D's speech & mannerisms that he was intoxicated. Officer also indicated in affidavit for probable cause that his sole basis for believing D was intoxicated was that he saw alcohol beverage containers in view at scene of accident. Under Ind. Code 9-30-7-3, police officer shall offer a chemical test to any driver whom officer has probable cause to believe was involved in accident resulting in serious bodily injury or death. However, nothing in this statute authorizes an officer to forcibly take a blood sample if actual consent to a chemical test is not obtained. Id. Held, denial of motion to suppress reversed.

RELATED CASES: Abney, App., 811 N.E.2d 415, adopted at 821 N.E.2d 375 (police had probable cause & properly took D's blood sample without his consent; blood draw here complied with Ind. Code 9-30-6-6(g) & was done in a reasonable manner).

TITLE: Jaramillo v. State

INDEX NO.: K.9.b.

CITE: (3rd Dist., 2-11-04), Ind. App., 803 N.E.2d 243, vacated on other grounds, 823 N.E.2d 1187

SUBJECT: Operating while intoxicated (OWI) causing death - insufficient evidence for enhancement; retrial

HOLDING: Evidence was insufficient to support enhancement of D's OWI conviction from a class C felony to a class B felony, because State failed to present sufficient evidence to prove existence of alleged prior OWI conviction. In second phase of bifurcated trial, jury was asked to determine whether D was guilty of certain previous offenses, including a 1998 OWI conviction. State argued that police officer's testimony, probable cause affidavit, charging information & order from guilty plea hearing provided sufficient circumstantial evidence that D was convicted of OWI offense in 1998. Ct. disagreed, noting that proof that a guilty plea was entered & taken under advisement is insufficient proof that a conviction resulted therefrom. State v. Daniels, 680 N.E.2d 829 (Ind. 1997). Thus, acceptance of D's signed guilty plea agreement form, without more, was not adequate to prove that a judgment of conviction was subsequently entered in that cause. Because alleged 1998 OWI conviction was also used to support habitual substance offender (HSO) finding, failure of proof regarding 1998 conviction vitiated HSO determination. Ct. also concluded that, despite recent U.S. S.Ct. rulings, federal double jeopardy principles do not bar retrial of HSO & class B felony enhancements. Monge v. California, 524 U.S. 721 (1998). Held, HSO determination reversed, OWI conviction as class B felony reversed & remanded with instructions to enter judgment of conviction for OWI causing death as class C felony.

TITLE: Minix v. State
INDEX NO.: K.9.b.
CITE: (5th Dist.; 4-11-00), Ind. App., 726 N.E.2d 848
SUBJECT: Driving while intoxicated resulting in death - sufficiency of evidence
HOLDING: There was sufficient evidence that D was intoxicated. Intoxicated means under influence of alcohol so that there is impaired condition of thought & action & loss of normal control of person's faculties to extent that endangers person. Ind. Code 9-13-2-86 (1993). Here, D took curve at fifty-five m.p.h where speed limit was thirty m.p.h. D's car left driving surface before he lost control & there was no ice on road. Paramedic detected odor of alcohol & observed D's mannerisms were exaggerated. Lastly, D's BAC taken one and one half hours after accident was .128%. Thus, relying on Boyd, App., 519 N.E.2d 182, & Geyer, App., 531 N.E.2d 235, Ct. held that jury could have reasonably inferred that D was intoxicated. Held, judgment affirmed & remanded with instruction on other grounds; Sullivan, J., dissenting on basis that D's BAC & wreck were insufficient to prove intoxication.

TITLE: Rippy v. State

INDEX NO.: K.9.b.

CITE: (2d Dist. 6/4/86) Ind. App., 493 N.E.2d 477

SUBJECT: DWI resulting in death - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction where evidence of DWI was clear & also led one to conclude that Rippy's act of driving resulted in victim's death when she was struck by D's car. Here, victim (whose blood alcohol content (BAC) was .145%) was crossing road when witnesses said she was struck by D's car. D's BAC was .15%. D took stand & admitted to drinking but denied he had struck victim. D presented testimony of accident reconstruction expert who, based on evidence collected by other individuals, concluded that D's car had not hit victim. Ct. construes causation standard for resulting-in-death statute, which parallels language of statute addressed in Micinski 487 N.E.2d 150 [card at K.9.a]: if driver's conduct caused injury, then driver committed crime. As noted in Micinski, nothing in statute indicates General Assembly intended to require prosecution prove causal link between driver's intoxication & fact that injury resulted from DWI. Held, conviction affirmed.

RELATED CASES: Abney, 766 N.E.2d 1175 (to sustain a conviction for OWI causing death, State must prove D's operating a motor vehicle while intoxicated was a "substantial cause" of resulting death, not a mere "contributing cause"; see full review this section).

TITLE: Rouse v. State

INDEX NO.: K.9.b.

CITE: (1st Dist. 7/25/88), Ind. App., 525 N.E.2d 278

SUBJECT: BAC resulting in death (BAC death) not included in DWI resulting in death (DWI death) fundamental error)

HOLDING: D's convictions for BAC death were fundamental error, because this offense was not included in charged offense DWI death. D was charged with 2 counts of DWI death. At close of all evidence, Tr. Ct. instructed jury that BAC death was lesser included offense, & D did not object. D was convicted of 2 counts of BAC death. On appeal, D argues that BAC death was not an included offense, & that he received no notice that he would be convicted of this offense. Such denial of due process D argues, is fundamental error. An offense is included in charged offense if it: (1) is established by proof of same or less than all elements of charged offense; (2) is attempt to commit charged or included offense; or (3) differs from charged offense only because of less serious harm or risk of harm. Ind. Code 35-41-1-16. In Sering, App., 488 N.E.2d 369, Ct. App. held that simple BAC offense, Class C misdemeanor, is included in DWI, Class A misdemeanor. While first 2 subsections above did not apply, Ct. held lesser classification indicated that legislature determined risk of harm was lesser. Here, however, both offenses result in death, & both are Class C Felonies. It is also possible that offense may be "factually" included if factual allegations in charging instrument set out elements of uncharged offense. Charging information here did not state that D's BAC was at least .10%. Consequently, BAC death was not included, & D received no notice that he could be convicted of it. Held, denial of due process was fundamental error. Remanded with instructions to vacate BAC death convictions.

TITLE: Rowe v. State

INDEX NO.: K.9.b.

CITE: (5th Dist., 05-31-07), Ind. App., 867 N.E.2d 262

SUBJECT: Operating with controlled substance in blood causing death - constitutional challenge

HOLDING: Ind. Code 9-30-5-5(b)(2), operating vehicle with controlled substance or its metabolite in a person's blood causing death, does not violate principle that all criminal Ds are to be treated fairly & equally under Article 1, Section 23 of Indiana Constitution. D argued that increased punishment for persons operating a vehicle with a schedule I or II controlled substance in their blood who are at least twenty-one years old is not reasonably related to any inherent characteristics which distinguish them from a person under twenty-one. Ct. concluded that D failed to rebut the presumption of constitutionality & agreed with State that a person over twenty-one years of age should be held to a higher standard when it comes to operating a motor vehicle under the circumstances contemplated under the statute. Held, judgment affirmed.

TITLE: Simmons v. State
INDEX NO.: K.9.b.
CITE: (10-31-11), 962 N.E.2d 86 (Ind. Ct. App. 2011)
SUBJECT: Enhancing OWI conviction is not ex post facto violation
HOLDING: The enhancement of D's OWI conviction to a C felony because of prior conviction for OWI causing death did not violate the prohibition on ex post facto laws.

Here, D was convicted in 1998 of class C felony OWI causing death. In 2008, Ind. Code § 9-30-5-3 was amended to provide that OWI is elevated to a class C felony if the person has a previous conviction for OWI causing death or serious bodily injury. See Ind. Code § 9-30-5-3(b).

There is no ex post facto violation because D is not being re-punished for his prior crime nor has the penalty for his prior crime been increased. "He is simply being punished as a recidivist based upon his most recent act of OWI." This is similar to Funk v. State, 427 N.E.2d 1081 (Ind. 1981), which ruled that general habitual offender statute was not an unconstitutional ex post facto law. In Funk, as here, the habitual offender statute did not increase penalties for prior crimes but for future crimes. "That prior crimes are involved in a habitual offender prosecution does not change the fact that the penalty is imposed only for the last crime committed." Id. This is different from Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009), which ruled that requiring Wallace to register as a sex offender for an offense that occurred before the Sex Offender Registry Act was enacted violated the ex post facto prohibition. This was so because the additional punishment of registration was imposed on him based solely on his prior conviction, where here, D's current crime was enhanced based on his recidivism. Held, judgment affirmed.

TITLE: State v. Bisard

INDEX NO: K.9.b.

CITE: (09-12-12), 973 N.E.2d 1229 (Ind. Ct. App 2012)

SUBJECT: OWI - violation of blood draw statute does not require suppression

HOLDING: Tr. Ct. abused its discretion by granting D's Motion to Suppress blood test results. Ind. Code 9-30-6-6 (j) tells us that blood may be drawn at a licensed hospital or by certain people if not at a licensed hospital. To the extent that someone else draws blood, the evidence must show that the person is properly trained and performed the draw in a medically acceptable manner.

Here, D, an on-duty police officer, was involved in an accident that killed one motorcyclist and seriously injured two others. A medical assistant at the Methodist Occupational Health Center drew his blood at the request of an officer and in front of D's attorney. The medical assistant had been trained to obtain bodily substance samples and performed blood draws every day in her position. The procedure she followed complied with the available protocols for drawing blood which were approved by a physician. D makes no credible suggestion that any deviation compromised the reliability of the samples. However, the medical assistant was not on the list of people under Ind. Code 9-30-6-6(j) who can draw blood when not working at a licensed hospital. That the General Assembly has explicitly barred evidence in breath tests where certain processes are not followed but has not done so in blood tests is an important sign of its intent about how courts should examine the admissibility of blood tests. Compare Ind. Code 9-30-6-5 ("results of chemical tests that involve an analysis of a person's breath are not admissible" if certain requirements are not met) with Ind. Code 9-30-6-6(c)(bodily substances "samples, test results, and testimony may be admitted in a proceeding in accordance with the applicable rules of evidence."). Where the Code does not direct exclusion, Court must decide admissibility with reference to the Code and the Rules of Evidence. Thus, the legislature's specific reference to applying the rules of evidence and the implied consent statutes' global purpose to acquire evidence of blood alcohol content rather than to exclude evidence, means that, standing alone, the fact that the drawer is not on the list in subsection (j) does not compel suppression. Held, judgment reversed and remanded.

TITLE: Vetor v. State

INDEX NO.: K.9.b.

CITE: (4th Dist., 12-19-97), Ind. App., 688 N.E.2d 1327

SUBJECT: Breath test refusal - advisement inadequate

HOLDING: D was not properly "offered" breath test because arresting police officer did not comply with Ind. Code 9-30-6-7(a), which mandates that officer shall advise person that refusal of test will result in suspension of driving privileges. At hearing on D's petition for judicial review of his license suspension, D testified that he was asked to submit to breath test but was never told that his refusal of test would result in suspension of his driver's license. Moreover, although officer testified that he informed D of implied consent law at least five times & read to D from his implied consent card at least four times, officer never testified to substance of his advisements to D. Ct. could not assume that officer informed D of consequence of his refusal to submit to breath test as required by statute. Thus, D met his burden of proof, & based upon improper offer to submit to breath test, D did not refuse to submit to test. Held, finding of refusal & license suspension vacated; remanded with instructions to order Bureau of Motor Vehicles to reinstate D's driving privileges.

K. CRIMES

K.9. Motor vehicles

K.9.c. Driving while suspended

TITLE: Annis v. State

INDEX NO.: K.9.c.

CITE: (3rd Dist., 12-09-09), 917 N.E.2d 722 (Ind. Ct. App 2009)

SUBJECT: Operating vehicle with suspended license - motor scooter

HOLDING: For purposes of Ind. Code 9-30-10, a motor vehicle is a vehicle that is self propelled but the definition does not include a motorized bicycle. Ind. Code 9-13-2-105(d). A motorized bicycle is defined as a vehicle with two or three wheels that is propelled by an internal combustion engine or a battery powered motor, and if powered by an internal combustion engine, has the following: 1) an engine rating of not more than two horsepower and a cylinder capacity not exceeding fifty cubic centimeters; 2) an automatic transmission; 3) a maximum design speed of not more than twenty-five miles per hour on a flat surface.

Here, on appeal of his conviction for operating a vehicle with a suspended license, D argued that his scooter qualified as a motorized bicycle rather than a motorized vehicle. Officer observed D traveling on his scooter at forty-one miles per hour uphill. Upon inspection, officer observed a displacement number of 149 CC stamped into the vehicle frame of the scooter near the model number and VIN. Based on this evidence, the scooter was a self-propelled vehicle that was capable of exceeding twenty-five miles per hour on an uphill surface, let alone a flat surface, and had a cylinder capacity greater than fifty cubic centimeters. Held, judgment affirmed.

RELATED CASES: Lock, 971 N.E.2d 71 (Ind. 2012)(evidence that D was clocked by radar going 43 MPH on a flat, dry surface was sufficient to prove that the vehicle's maximum design speed exceeded the 25 MPH permitted by the statutory exception; see full review, this section); Baird, 955 N.E.2d 845 (Ind. Ct. App 2011) (Ct. affirmed D's traffic infraction convictions because the three-wheeled "moped-motorcycle" she was driving was a "motorcycle," and therefore constituted a "motor vehicle" pursuant to Ind. Code 9-13-2-105).

TITLE: Bass v. State

INDEX NO.: K.9.c.

CITE: (2nd Dist., 10-14-03), Ind. App., 797 N.E.2d 303

SUBJECT: Driving while suspended - evidence insufficient; hearsay testimony that D was driving

HOLDING: Evidence was insufficient to support D's convictions for Driving While Suspended & Failure to Stop After an Accident Resulting in Non-Vehicle Damage. Evidence was insufficient to conclude that D was driving vehicle that hit a fire hydrant on private property when the vehicle was found stopped with D & others outside after another accident. D's girlfriend informed investigating officer that D was driving vehicle when it hit the fire hydrant. Girlfriend was not present at trial, but Tr. Ct. nevertheless allowed officer to testify about statements she had made to him during investigation. D objected to officer's statement as hearsay. Ct. questioned whether girlfriend was actually an "unavailable witness," because record was not clear as to whether she actually was served with a subpoena. Ct. ultimately reversed conviction because even if girlfriend were unavailable, hearsay evidence was not admissible under any exception under Ind. Evidence Rule 804(b), & State offered no exception at trial. Held, judgment reversed.

TITLE: Geljack v. State

INDEX NO.: K.9.c.

CITE: (3rd Dist., 10-4-96), Ind. App., 671 N.E.2d 163

SUBJECT: Driving while suspended - affirmative defense of emergency

HOLDING: Ind. Code 9-30-10-18, which excuses offense of driving while suspended, does not unconstitutionally impose upon D burden of establishing affirmative defense of emergency. Statute excuses offense where D shows by preponderance of evidence that operation of motor vehicle is necessary to save life or limb in extreme emergency. It is unconstitutional to place burden of persuasion for affirmative defense on D when proving defense requires D to negate element of crime. Fowler v. State, 526 N.E.2d 1181 (Ind. 1988). In this case, proving existence of emergency does not negate any of elements of driving while suspended. Rather, emergency defense is one which mitigates culpability, & does not involve shifting proof of element. Ward v. State, 438 N.E.2d 750 (Ind. 1982). Held, conviction affirmed.

TITLE: Hollingsworth v. State

INDEX NO.: K.9.c.

CITE: (2nd Dist.; 10-13-99), Ind. App., 717 N.E.2d 610

SUBJECT: Driving while suspended - effect of recodification

HOLDING: Tr. Ct. did not err in denying D's motion to withdraw his guilty plea to operating motor vehicle while license is suspended. Although current driving while suspended statute, Ind. Code 9-30-10-16, requires that D's license be suspended pursuant to either Ind. Code 9-30-10 or Ind. Code 9-12-3, fact that D's license was suspended under Ind. Code 9-12-2 (repealed) did not invalidate D's guilty plea. Because as part of plea agreement D admitted that his driving privileges were suspended under Ind. Code 9-12-2 (repealed) & that he had been adjudicated habitual traffic offender, D understood that he could be convicted of violation of Ind. Code 9-30-10-16 although his license was suspended under repealed statute & not under Ind. Code 9-12-3. Moreover, unmodified savings clause in 1993 enactment permits prosecutions under Ind. Code 9-30-10-16 based on convictions under repealed statute. Held, judgment affirmed.

TITLE: King v. State
INDEX NO.: K.9.c.
CITE: (8/13/20), 153 N.E.3d 324 (Ind. Ct. App. 2020)
SUBJECT: Insufficient evidence D's license was still suspended at time of traffic stop
HOLDING: After pulling Defendant over at 11:30 a.m. on October 24, 2018, trooper ran driver's license through the dispatch database and received a report that Defendant's driver's license was suspended for failure to pay child support. At trial, the State presented a certified copy of Defendant's driving record which indicated a license suspension effective on "8/30/2018" with an expiration date of "10/24/2018," the date of Defendant's late morning traffic stop. Relying on the BMV's manual (which was not sufficiently instructive), Vogel v. State es rel Laud, 107 Ind. 374, 8 N.E. 164 (1886), the general rule for computation of days in various legal contexts, and the persuasive guidance of an out-of-state case, the Court held that Defendant's license suspension ended at midnight of October 24. As a result, the Court found insufficient evidence that Defendant's driver's license was suspended when he was pulled over at 11:30 a.m. on October 24 and reversed his conviction for class A misdemeanor driving while suspended.

TITLE: Lock v. State

INDEX NO.: K.9.c.

CITE: (07-26-12), 971 N.E.2d 71 (Ind. 2012)

SUBJECT: Operating while HTV - motorized bicycle exception; "maximum design speed"

HOLDING: Statutory scheme for driving while license suspended is not unconstitutionally vague, and evidence supported D's conviction for Class D felony operating motor vehicle as an habitual traffic violator. To obtain a conviction, State must prove that D operated a motor vehicle, and motorized bicycles are exempt from provisions of statutes regarding operation of motor vehicle while suspended. A motorized bicycle is defined as a vehicle with two or three wheels that is propelled by an internal combustion engine or a battery powered motor, and if powered by an internal combustion engine, has the following: 1) an engine rating of not more than two horsepower and a cylinder capacity not exceeding fifty cubic centimeters; 2) an automatic transmission; and 3) a maximum design speed of not more than twenty-five miles per hour (MPH) on a flat surface. Ind. Code 9-13-2-109.

D, who was seen operating a Yamaha Zuma, argued that the "maximum design speed" of the vehicle meant the maximum speed the vehicle was designed to go by the manufacturer. Court disagreed, finding instead that Ind. Code 9-13-2-109 looks initially to the original manufacturer's maximum design speed, but also encompasses any subsequent modifications or redesigns. An ordinary person would interpret the statutory definition of "motorized bicycle" to exclude any devices having a highest possible speed--as conceived of, planned or devised--of more than 25 MPH.

Evidence that D was clocked by radar going 43 MPH on a flat, dry surface was sufficient to prove that the vehicle's maximum design speed exceeded the 25 MPH permitted by the statutory exception. Held, transfer granted, Court of Appeals' opinion at 952 N.E.2d 280 vacated, conviction affirmed. Rucker, J., dissenting, believes "maximum design speed" is the maximum speed at which the manufacturer designed the vehicle to travel, that actual speed D was traveling has no relevance to this question, and State failed to prove that Zuma D was operating was not a motorized bicycle.

TITLE: Spaulding v. State

INDEX NO.: K.9.c.

CITE: (5th Dist., 10-13-04), Ind. App., 815 N.E.2d 1039

SUBJECT: Driving while suspended resulting in death - no need to show negligent driving

HOLDING: In an issue of first impression, Ct. held that State does not need to show evidence of negligent driving to convict D of driving while suspended resulting in death, a Class C felony. D relied on Abney v. State, 766 N.E.2d 1175 (Ind. 2002), an OWI causing death case, for proposition that State must prove that his driving conduct was the proximate cause of the death. Abney held that a conviction for OWI causing death required proof that D's operation of vehicle while intoxicated was a "substantial cause" of the resulting death, not a mere "contributing" cause. D's "conduct," under Abney & Micinski, 487 N.E.2d 150 (Ind.1986), means the driver's act of operating the vehicle, not any particular way in which the driver operates the vehicle. Here, if D had not been driving on that day, he would not have killed the victim. The facts & evidence support the conclusion that D was the substantial, & only, cause of the victim's death. Held, conviction affirmed.

RELATED CASES: Rowe, App., 867 N.E.2d 262 (test is not whether presence of metabolite in D's blood caused the accident, but whether she had metabolite in her blood when she operated vehicle & caused victim's death).

TITLE: State v. Geraldts

INDEX NO.: K.9.c.

CITE: (10-24-11), 956 N.E.2d 141 (Ind. Ct. App 2011)

SUBJECT: Driving While Suspended - Enforceability of an erroneously written statute

HOLDING: Tr. Ct. abused its discretion by granting D's motion to dismiss. The primary goal in construing statutes is to determine and give effect to the intent of the legislature. The Court presumes that the legislature intended for the language to be applied logically and consistent with the underlying goals and policies of the statute. Here, D was charged with Driving While Suspended, as a Class A misdemeanor. Based upon D's motion, Tr. Ct. dismissed the charge because of a mistake in the statute. Ind. Code. 9-24-18-15 makes it a Class A misdemeanor to knowingly or intentionally drive while suspended "if less than ten years have elapsed between the date a judgment was entered against the person for a prior unrelated violation of this subsection or IC 9-1-4-52 and the date the violation described in subdivision (1) was committed." Thus, a person can be convicted of a Class A misdemeanor if less than ten years separates the commission of the prior offense and the judgment for that offense. Because the date of commission of the offense and the date of judgment for the offense will almost always be within ten years, the statute read literally- makes every prior unrelated judgment an enhancing offense. The legislature surely did not intend this result. Court refuses to rely excessively on the legislature's erroneous use of "subdivision (1)," which was merely an oversight that carried over from the old statute. Because a reading of the DWS statute alerts drivers that operating a motor vehicle while suspended can be punished more severely if a judgment was entered against the person for a prior unrelated violation within the past ten years, the statute is enforceable as written, and D falls within the proscribed conduct. Held, judgment reversed and remanded.

TITLE: Stewart v. State

INDEX NO.: K.9.c.

CITE: (12-30-99), Ind., 721 N.E.2d 876

SUBJECT: Habitual traffic violator/ Driving while suspended - required mens rea

HOLDING: To obtain convictions for driving while suspended or after being adjudicated habitual violator, State need prove: (1) act of driving; (2) license suspension or HTV adjudication; & (3) that D knew or should have known that he was suspended. While defects in administrative process may warrant relief under administrative law, it is not province of criminal proceedings to correct such errors. Therefore, Ct. disapproved of Griffin, App., 654 N.E.2d 911, & Pebbley, App., 686 N.E.2d 168 , both holding that HTV or driving while suspended conviction will be invalid if notice of suspension fails to include procedures for seeking judicial review. Here, Bureau sent D to his last known address notice of HTV adjudication in 1993. Despite fact that notice failed to mention procedures for judicial review, it still provided constructive knowledge that D's license was suspended. Thus, D reasonably should have known that he was not to drive when he was caught driving in 1995. Held, Ct. App.' decision vacated & judgment of Tr. Ct. affirmed.

RELATED CASES: Jackson, 889 N.E.2d 819 (State does not have to prove that the D knew that the reason his license was suspended was due to his HTV status); Hammond, 761 N.E.2d 812 (recent legislative amendment adding word "validly" to modify "suspended" in Ind. Code 9-30-10-16 did not nullify holding in Stewart); Quarles, App., 763 N.E.2d 1020 (D knew or should have known that he was HTV due to several notices that BMV sent to him); Nasser, App., 727 N.E.2d 1105 (D's knowledge of suspension was properly inferred from BMV's records that demonstrated notice was sent although actual letter was not put into evidence).

TITLE: Timmons v. State

INDEX NO.: K.9.c.

CITE: (4th Dist.; 2-7-00), Ind. App., 723 N.E.2d 916, rev'd on reh'g on unrelated issue at 734 N.E.2d 1084

SUBJECT: Driving while suspended - ambiguity between A misdemeanor & D felony

HOLDING: Although Driving While Suspended statute, Ind. Code 9-24-18-5, is ambiguous as to whether Driving While Suspended is Class A misdemeanor or Class D felony when suspension was due to conviction, statute is not void. It is cardinal rule of criminal justice that penal statutes are to be construed against State & ambiguities therein are to be resolved in favor of accused. Pennington, 426 N.E.2d 408. Here, Driving While Suspended statute, Ind. Code 9-24-18-5, is ambiguous because its subsections (b) & (d) create two different penalties for similar conduct of driving while license is suspended due to conviction. Ct. resolved conflict between two subsections by holding that when State establishes D knowingly operated motor vehicle with license suspended as result of previous felony or misdemeanor conviction, D may be convicted of nothing greater than Class A misdemeanor under subsection (b). However, D may be convicted of Class D felony under subsection (d) if State alleges in information & proves at trial that D's conduct rose to level of intentional. Because information did not allege that D intentionally drove while suspended, D's D felony conviction for Driving While Suspended must be vacated. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Upshaw, 934 N.E.2d 178 (Ind. Ct. App 2010) (because D had a prior infraction, and not misdemeanor conviction, for driving while suspended, he cannot be convicted of the Class A misdemeanor; his conviction was reduced to an infraction).

K. CRIMES

K.9. Motor vehicles

K.9.c.1. (Ind. Code 9-24-18-5, formerly 9-1-4-52 and 525)

TITLE: Grogan v. State

INDEX NO.: K.9.c.1.

CITE: (1st Dist. 8/29/85) Ind. App., 482 N.E.2d 300

SUBJECT: Driving while suspended (DWS) - constitutionality

HOLDING: Ct. interprets Ind. Code 9-1-4-52.5, which places burden of proof on D to show by preponderance of evidence that he/she had been issued driving license/permit valid at time of alleged crime, to operate only after state has made prima facie case & then requiring D to rebut state's evidence or stand convicted. Here, Tr. Ct. instructed jury re Ind. Code 9-1-4-52.5, but gave no other instruction concerning burden of proof on charge of DWS license. Instruction unconstitutionally shifted burden of proof away from state, requiring D to prove his innocence. State must prove all elements of offense. State does not have burden of negating all affirmative defenses which excuse or exempt D's conduct. [Citations omitted.] Held, conviction of DWS reversed & remanded for proceedings consistent with opinion.

TITLE: Jones v. State,
INDEX NO.: K.9.c.1.
CITE: (3d Dist. 9/10/85) Ind. App., 482 N.E.2d 746
SUBJECT: Driving while suspended (DWS) - sufficiency
HOLDING: Evidence was insufficient to sustain conviction for DWS. Here, only record before Tr. Ct. indicates suspension on 6/14/82 that terminated on 12/14/82 & suspension on 8/18/82 which was "closed" on 6/12/84. Entry of "current status - suspended" was made 1½ months after arrest for DWS. Ct. finds it cannot be inferred beyond a reasonable doubt that D's license was suspended on day he was arrested. Held, conviction reversed; D ordered discharged.

RELATED CASES: Billingsley, 960 N.E.2d 882 (Ind. Ct. App 2012) (although BMV Record did not list the code section under which D's prior DWS was issued, the fact that Record designates the prior DWS as an infraction proves beyond a reasonable doubt it was under I.C 9-24-19-1 as required by the statute for the class A misdemeanor); Robles, App., 705 N.E.2d 183 (evidence was insufficient to support DWS conviction because D demonstrated by preponderance of evidence that his driver's license was valid when he was charged with DWS); Jennings, App., 503 N.E.2d 906 (D's driving record shows his license was suspended as of day immediately following his arrest; Ct. finds inference more reasonable than in Jones that D's license was suspended on day of arrest; D also told officer he did not have a license; held, DWS conviction affirmed; Hoffman DISSENTS arguing temporal lapse of 1 day or 1½ months makes no difference when evidence reflects status of license after arrest; D's statement to officer is "susceptible of several interpretations," including that he did not have license with him or that he had not paid reinstatement fee, either of which would constitute driving without a valid license, a Class C infraction, rather than DWS).

TITLE: Magee v. State

INDEX NO.: K.9.c.1.

CITE: (3d Dist. 5/23/88) Ind. App., 523 N.E.2d 432

SUBJECT: Driving while suspended (DWS) - sufficiency; foreign license

HOLDING: Possession of valid MI driver's license does not foreclose conviction for DWS. D's IN license had been suspended 3 years before his arrest for DWS. At time of arrest, D had valid MI license, & D argues that this license permitted him to drive in IN despite suspension. D cites Ind. Code 9-1-4-27(3), which provides that nonresidents with valid license from home state may drive in IN. D further cites Churchill, App., 388 N.E.2d 586, which held that driver with valid CO license could drive in IN while IN license was suspended. However, Churchill relied on earlier version of DWS statute, Ind. Code 9-1-4-52, which applied only to drivers whose license to drive had been suspended. Unless a driver's privilege to drive had been suspended or revoked, according to Churchill, a valid foreign license would permit them to drive in IN. Since Churchill was decided, however, Ind. Code 9-1-4-52 has been amended to extend to drivers whose license or privilege to drive in IN has been suspended. The amended statute would thus apply to D despite his valid foreign license. Held, conviction affirmed.

TITLE: Nasser v. State

INDEX NO.: K.9.c.1.

CITE: (4th Dist.; 5-11-00), Ind. App., 727 N.E.2d 1105

SUBJECT: Driving while suspended - bifurcated proceedings

HOLDING: D's right to due process was not violated when Tr. Ct. did not conduct bifurcated proceeding with respect to driving while suspended charge. D is entitled to bifurcated proceeding whether evidence of prior conviction will be presented to jury to enhance instant offense. Landis, 704 N.E.2d 113; Ind. Code 35-38-1-2(c). Here, D was charged with driving while suspended, which was enhanced to Class A misdemeanor based on fact that D had Class A infraction driving while suspended within past ten years. Because D's charge was enhanced due to prior infraction rather than criminal offense & because D did not object at trial, D's due process rights were not violated. Held, conviction affirmed.

Note: In fn 2, Ct. leaves for another day issue of whether D would have been entitled to bifurcated trial if he would have requested such or objected at trial. Because bifurcation has nothing to do with whether enhancement is based on infraction or criminal offense but rather whether jury will consider prior act as evidence that D acted in conformity therewith, D, D, who properly preserves issue, should be entitled to bifurcation.

TITLE: State v. Dyson
INDEX NO.: K.9.c.1.
CITE: (2d Dist. 2/1/88) Ind. App., 518 N.E.2d 812
SUBJECT: Driving while suspended (DWS) - failure to pay reinstatement fee
HOLDING: Tr. Ct. properly dismissed DWS charge against D who was arrested after his one-year period of suspension had ended. At time of arrest, D had failed to pay \$10 reinstatement fee. However, suspension did not include term that end of suspension depended upon payment of reinstatement fee. When one-year term expired, suspension was no longer in effect. See State v. Martin, App., 484 N.E.2d 1309 (card at K.9.c.1). When arrested, D may have been subject to prosecution for driving without valid license. See Jones, App., 482 N.E.2d 746. However, charge of DWS was properly dismissed. Held, affirmed. Buchanan, J., DISSENTS, *citing Baldock*, App., 379 N.E.2d 539.

TITLE: State v. Keihn

INDEX NO.: K.9.c.1.

CITE: (8/10/89), Ind., 542 N.E.2d 963

SUBJECT: Driving while suspended (DWS) - knowledge required

HOLDING: To obtain conviction for DWS, state must prove knowledge of suspension, which may be inferred from proof that notice was mailed to last known address. Tr. Ct. acquitted D because state did not prove mailing of notice. State appealed & Ct. App. reversed. State v. Keihn, App., 530 N.E.2d 747. See also Grogan, App., 482 N.E.2d 300; Sewell, App., 452 N.E.2d 1018. Ind. S. Ct. grants transfer in part to address conflict between above cases & Burdine, App., 510 N.E.2d 1385 (card at K.9.c.1), which held that state must prove that D knew or reasonably could have known of suspension to obtain conviction for driving after being adjudged habitual traffic offender. Severity of punishment & inability to avoid prohibited conduct absent knowledge of suspension strongly support requirement that knowledge must be shown. Proof that BMV mailed notice of suspension to D's last known address would support inference that D knew of suspension. To extent Sewell, Grogan, & Roberts, 2 App., 395 N.E.2d 802, are inconsistent, they are overruled. Here, because D had actual knowledge of suspension, state's failure to prove that mailing of notice did not require acquittal. However, double jeopardy bars state from retrying D. Givan, J., CON CURS IN RESULT.

RELATED CASES: Coats, App., 697 N.E.2d 1261 (refusal to instruct jury that knowledge of license suspension is required was error, but was harmless where State still proved knowledge); Fields, 679 N.E.2d 898 (required culpable mental state is that driver "knew or reasonably could have known" that license was suspended); Collins, 567 N.E.2d 798 (certification of mailing is official records exception to hearsay. See Collins, at O.9.c.5 for full text); Chambers, App., 547 N.E.2d 301 (typed addendum to BMV record showing that notice was mailed is inadmissible hearsay, & copy of letter is insufficient to show mailing).

TITLE: State v. Martin

INDEX NO.: K.9.c.1.

CITE: (4th Dist. 11/14/85) Ind. App., 484 N.E.2d 1309

SUBJECT: Driving while suspended (DWS) - due process

HOLDING: D's acquittal of DWS was proper. Here, D had been convicted of DWI & his license was suspended for 90 days. D showed proof of financial responsibility (POFL) by purchasing high-risk auto insurance. Commissioner (C) of BMV issued D restricted license. D's insurance lapsed after 6 months & C suspended D's license without notice. After an accident, D was prosecuted for DWS. Tr. Ct. held C had no authority to suspend D's restricted license once it had been issued to him. Ct. construes Ind. Code 9-11-4-12(b) & Ind. Code 9-2-1-3(c) together & finds legislature intended to give C authority to suspend licenses C had issued if issuees fail to maintain POFL. However, although C had authority to suspend license, C violated D's due process rights by not providing notice & opportunity for hearing. Bell v. Burson (1971), 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (notice & hearing required before termination becomes effective). D had important interest in his restricted license. Because C's administrative suspension was void, it could not become basis for valid charge of DWS. Held, acquittal affirmed. **NOTE:** Ct. discusses other procedural issues re DWS.

K. CRIMES

K.9. Motor vehicles

K.9.c.2. Habitual traffic offender (Ind. Code 9-30-10-16, formerly 9-12-3-1)

TITLE: Ashcraft v. State

INDEX NO.: K.9.c.2.

CITE: (10-5-99), Ind., 716 N.E.2d 1278

SUBJECT: Operating while suspended - proof of mailing notice of habitual traffic violator (HTV) status

HOLDING: Proof of mailing notice of HTV status is necessary to sustain conviction of driving while HTV. Fields, 679 N.E.2d 898. However, Ct. App. erroneously interpreted Fields to require proof of mail notice to sustain any conviction for driving with suspended license whether D was HTV or not. Proof of actual mail notice is not required in all circumstances. Actual mail notice was necessary in Fields precisely because Fields was HTV &, under HTV statute, State must establish actual mail notice as evidentiary prerequisite.

In this case, D's probation on non-traffic conviction was revoked for offense of driving while license suspended. Issue was whether, under preponderance of evidence standard, Tr. Ct. could conclude that D knew he was driving while suspended. When sheriff stopped D, he already knew that D's license had been suspended. Further, D's statement to officer suggested that D knew his license had been suspended. Ct. concluded that this evidence met preponderance standard necessary to revoke D's probation. Held, transfer granted, Ct. App.' opinion at 706 N.E.2d 168 vacated, probation revocation affirmed.

TITLE: Austin v. State

INDEX NO.: K.9.c.2.

CITE: (2nd Dist., 10-29-98), Ind. App., 700 N.E.2d 1191

SUBJECT: Operating motor vehicle after license suspended for life - evidence sufficient to show forfeiture of driving privileges

HOLDING: State presented sufficient evidence to prove beyond reasonable doubt that D's driver's license had been forfeited for life. D conceded that State proved that he had previously been convicted of operating motor vehicle after license forfeited for life under Ind. Code 9-30-10-17, but argued that did not eliminate State's obligation to prove forfeiture of his license for life under predecessor statute, Ind. Code 9-12-3-1, in instant case. Ct. disagreed, noting that valid Class C felony conviction of operating while privileges are forfeited for life is relevant & probative evidence of existence of material fact, i.e., life forfeiture of driving privileges. Stanek, App., 587 N.E.2d 736. Here, State introduced plea agreement & abstract of judgment from his 1995 conviction for operating vehicle while license suspended for life. This was sufficient evidence to support conviction. Held, conviction affirmed.

TITLE: Bishop v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 08-15-94), Ind. App., 638 N.E.2d 1278

SUBJECT: Driving while suspended (DWS) as HTV - insufficient notice of suspension

HOLDING: Where State produced no evidence as to content of notice of suspension sent to D who had been adjudged Habitual Traffic Violator (HTV), evidence was insufficient to support conviction for DWS as HTV. Ct. noted there are 3 elements of DWS as HTV: 1) operating motor vehicle, 2) while suspended, & 3) showing that D knew of suspension. Although D conceded some kind of notice was sent to him, Ct. agreed with his contention that there was no evidence as to content of notice & whether he was informed he could challenge BMV determination.

Evidence presented was computer print-out of D's driving record that showed his license status was HTV; BMV mailed notice of that status to his last known address; & effective date of his HTV status. State also identified D's date of birth & social security number but copy of notice sent was not presented. Ind. Code 9-30-10-5 requires that notices of suspension must inform person that his/her driving privileges will be suspended in 30 days because he/she is HTV, & that he/she may be entitled to relief or seek judicial review of suspension. Proof of mailing of notice is evidentiary predicate to proving suspension is valid, & Ct. found it logically follows that proof of content of notice is also evidentiary prerequisite. Because evidentiary prerequisite did not appear in record, Ct. found State failed to establish element of valid suspension, & therefore evidence was insufficient to support conviction for DWS as HTV. Held, reversed.

RELATED CASES: Stewart, 721 N.E.2d 876, see card, this section (despite fact that notice failed to mention procedures for judicial review, it still provided constructive knowledge that D's license was suspended); Ford, App., 711 N.E.2d 86 (advisement of judicial review is not required to prove D's license was suspended for life); Etter, App., 710 N.E.2d 939 (adequate factual basis existed for D's guilty plea to operating while HTO, despite fact that D had not been informed of his right to seek judicial review of his license suspension); Coats, App., 697 N.E.2d 1261 (advisement of judicial review is not required when D's license is suspended under Ind. Code 9-24-18-5, which does not make D habitual traffic offender); Thomas, App., 691 N.E.2d 1352 (sufficient notice of suspension when D informed of right to judicial review in additional correspondence 15 months prior to arrest); Brown, 677 N.E.2d 517 (conviction reversed where State failed to present any evidence that BMV mailed notice of suspension).

TITLE: Brown v. State

INDEX NO.: K.9.c.2.

CITE: (3-18-97), Ind., 677 N.E.2d 517

SUBJECT: Operating while habitual traffic offender (HTO) - insufficient proof of mailing suspension notice

HOLDING: Before Bureau of Motor Vehicles (BMV) may suspend driver's license as HTO, it must mail notice of suspension of driver's license to driver's last known address. Ind. Code 9-30-10-5. Law requires that licensed driver immediately report to BMV any change of address, Ind. Code 9-24-13-4(1), & BMV may properly rely on address given it by driver. BMV has no obligation to search through its files & surmise, based on papers therein, that driver has new address. Rather, driver is required to provide it with updated address. If driver has not, BMV may assume address last given is correct address to which to send notice. Holmes v. Randolph, 610 N.E.2d 839 (Ind. 1993). Although BMV may mail suspension notice to last address reported by driver, trial record must disclose proof of mailing notice. Proof of mailing is evidentiary prerequisite to establishing that suspension is valid. Collins v. State, 567 N.E.2d 798 (Ind. 1991). If there is no valid suspension, then driver cannot lawfully be convicted of operating while HTO. Because record in this case contained no evidence to prove that BMV actually mailed notice of suspension to D, Ct. reversed conviction. Held, transfer granted, conviction reversed.

RELATED CASES: Fennell, App., 698 N.E.2d 823 (because D did not object to HTO packet based on State's failure to establish proper foundation for its admissibility, i.e., proof of mailing, he has waived consideration of issue on appeal); Johnson, App., 698 N.E.2d 821 (D's claim of insufficient proof of mailing preserved by proper objection); Stewart, App., 705 N.E.2d 580 (Ct. disagreed with holdings in Fennell & Johnson, which concluded that proof of mailing is foundational requirement that is waived absent specific objection at time suspension evidence is offered by State).

TITLE: Burdine v. State
INDEX NO.: K.9.c.2.
CITE: (1st Dist. 7/30/87), Ind. App., 510 N.E.2d 1385
SUBJECT: Driving after being adjudged habitual traffic offender (HTO) - knowledge required
HOLDING: Ind. Code 9-12-3-1 requires showing that D knew or reasonably could have known that driving privileges had been suspended as result of D having been adjudged HTO. Tr. Ct. committed reversible error by instructing jury that failure of BMV to actually notify person he/she is HTO is not a defense. Here, Ct. traces legislative history of statute. Despite fact mens rea does not appear on face of statute, Ct. uses principles of statutory construction to read Ind. Code 9-12-3-1 to require that state show either that D had actual knowledge that he had been adjudged HTO or that notice of impending suspension had been mailed by commissioner of BMV to D's last known address as provided by Ind. Code 9-12-2-1. In present case, state proved only that D was driving on date alleged & that HTO adjudication had been made 4 months earlier. Held, conviction reversed.

NOTE: See also State v. Keihn, 542 N.E.2d 963 (card at K.9.c.1), *citing* Burdine as correctly reasoned & holding knowledge as element of driving while suspended pursuant to Ind. Code 9-1-4-52.

RELATED CASES: Fields, 679 N.E.2d 898 (required culpable mental state is that driver "knew or reasonably could have known" that license was suspended); Bates, App., 650 N.E.2d 754 (trier of fact reasonably inferred that D had actual knowledge of lifetime forfeiture of his driving privileges); Chambers, App., 547 N.E.2d 301 (typed addendum to BMV record showing that notice was mailed is inadmissible hearsay, & copy of letter is insufficient to show mailing); State v. Swayk, App., 531 N.E.2d 515 (although knowledge of suspension is in fact element offense, charging information need not allege it, but may simply track statute).

TITLE: Cain v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 04-04-06), Ind. App., 844 N.E.2d 1063

SUBJECT: Driving to prevent drunk driving not "extreme emergency" per se

HOLDING: Ct. declined to expand statutory "extreme emergency" defense for driving while suspended to include a situation where D drove in order to prevent an intoxicated person from continuing to drive. Under Ind. Code 9-30-10-18, it is a defense that driving while a habitual traffic violator "was necessary to save life or limb in an extreme emergency." D had attended the funeral of the daughter of the vehicle's owner earlier in the day. After the funeral, the owner drank up to 18 beers in a five-hour period & another passenger drank a lesser amount. The vehicle's owner testified he had to leave New Castle that night because he had to work the next day in Indianapolis. Near the end of the trip back, he testified he could not concentrate on driving & asked D to drive because he knew & trusted him more than the other passenger. Police stopped D for speeding, discovered the license suspension, & heard the circumstances under which D drove. While the circumstances here were tragic, sufficient evidence existed to rebut that D drove in an extreme emergency situation as was necessary to save life & limb. Other options existed to avoid the continued driving by the vehicle's owner & the owner's only reason to drive to Indianapolis was not compelling enough to overturn the jury's determination. A different trier of fact might well have found the evidence of "emergency" compelling, but such conclusion was not mandated. Held, judgment affirmed.

TITLE: Crawley v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 02-09-10), 920 N.E.2d 808 (Ind. App. 2010)

SUBJECT: Sufficient evidence D operated motor vehicle

HOLDING: Sufficient evidence supported D's conviction for operating motor vehicle after driving privileges suspended for life, even though no one saw D operate vehicle found in Donald Jones' back yard pool. Lack of eyewitness testimony was "of no moment" because State presented sufficient circumstantial evidence to prove beyond reasonable doubt that D operated vehicle. Jones found D in his back yard; she was alone, soaking wet, and seriously impaired. Several times she referred to the motor vehicle as "my car," including her statement, "I think my car's in your pool." She initially lied about who she was with but eventually admitted to being alone. Jones found a purse next to his backyard Jacuzzi, which contained identification card belonging to D. D tried to evade contact with police.

Court rejected several of D's arguments as inappropriate requests to reweigh evidence, including her claims that: a) her statement that she was alone was unreliable because she was heavily intoxicated and b) Tr. Ct. should not have discredited D's friend's testimony that on same day, D was at her house with an unidentified man for a few drinks and left with the man around 5:00 or 5:15 a.m., near the time Jones found D in his back yard. Held, judgment affirmed; Riley, J., dissenting, said majority "makes light" of no eyewitness testimony. Cases finding sufficient evidence of operating a vehicle usually involve witnesses who see person in driver's seat of car the person allegedly operated. See e.g., Parks v. State, 752 N.E.2d 63 (Ind. Ct. App. 2001); Heigel v. State, 538 N.E.2d 265 (Ind. Ct. App. 1989); Clark v. State, 611 N.E.2d 181 (Ind. Ct. App. 1993). Clark held that finding a D asleep with the engine running in parked vehicle was insufficient to prove beyond reasonable doubt that Clark operated vehicle. Id. Evidence here establishes probability that D operated the vehicle, but probability is less than beyond a reasonable doubt.

TITLE: Cruite v. State

INDEX NO.: K.9.c.2.

CITE: (11-1-94), Ind., 641 N.E.2d 1264

SUBJECT: Proving knowledge of HTO status

HOLDING: Evidence was sufficient to prove D was operating vehicle while habitual traffic offender (HTO). At trial, State introduced computer printout of D's Official Driving Record from Bureau of Motor Vehicles (BMV). Record indicated that suspension notices had been mailed to D at various addresses. On appeal, D asserted that State failed to prove he had noticed his license was suspended at time of arrest, as required by State v. Keihn, Ind., 542 N.E.2d 963. Ct. App. reversed, concluding that printout of D's Official Driving Record did not constitute "certification" of mailing & could not by itself sustain conclusion that D knew his license was suspended.

S. Ct. disagreed with Ct. App. & held that record by itself satisfied State's burden of proving knowledge of suspension. Following Collins v. State, 567 N.E.2d 798, Ct. noted that proof of mailing notice of suspension is permissible evidence from which knowledge of suspension may be inferred. Here, D's Official Driving Record sufficiently evidenced proof of mailing. Ct. also noted that BMV's certification of mailing fell within official records exception to hearsay rule & was properly admissible over D's objection. Held, transfer granted & Tr. Ct. affirmed.

RELATED CASES: Stewart, 721 N.E.2d 876, see card, this section (despite fact that notice failed to mention procedures for judicial review, it still provided constructive knowledge that D's license was suspended); Collins, 583 N.E.2d 761 (testimony of records supervisor from BMV was sufficient to infer that D knew he had been found to be HTO and that his license had been suspended); Morphew, App., 672 N.E.2d 461 (based on evidence of BMV's routine practice of mailing notices, jury could have reasonably concluded that BMV mailed notice of suspension to D in conformity therewith).

TITLE: Cruz v. State

INDEX NO.: K.9.c.2.

CITE: (12/31/2012), 980 N.E.2d 915 (Ind. Ct. App. 2012)

SUBJECT: HTV - knowledge of suspension; last known address

HOLDING: There was insufficient evidence that D knew that he was suspended. Service by the Bureau of notice of the suspension or restriction of a person's driving privileges: in compliance with section 5 of this chapter; and by first class mail to the person at the last address shown for the person in the bureau's records; establishes a rebuttable presumption that the person knows that the person's driving privileges are suspended or restricted. Ind. Code 9-30-10-16(b). Here, D, who had never received a license, was suspended as a HTV. The notice of HTV suspension was sent to 3518 Steer Street. Subsequently, D was stopped for speeding and charged with Driving after Being Suspended as HTV. At trial, a BMV representative testified that when a D has never self-reported an address to the BMV because he has never obtained a license, the BMV uses court records to determine the last known address. Although the BMV's practice of using court records is generally acceptable, here the State failed to show that the BMV actually used the court records. All of the court records submitted into evidence show different addresses than the one used by the BMV. Given the complete lack of evidence regarding how the BMV determined that notice should be mailed to 3518 Steer Street, the State failed to establish the statutory presumption that D had knowledge of a suspension. Nor does the record contain direct evidence that D knew he was suspended. The fact that D knew he was not supposed to be driving without a license is not the equivalent of knowing he was suspended. Although D's conduct is clearly blameworthy, the State failed to prove that the D knew he was suspended. Held, judgment reversed.

TITLE: Dean v. State
INDEX NO.: K.9.c.2.
CITE: (2nd Dist., 11-20-95), Ind. App., 657 N.E.2d 742
SUBJECT: Driving while habitual traffic offender (HTO) - sufficient suspension notice
HOLDING: Notice requirements of Ind. Code 9-30-10-5 do not provide precise language which must be included in notice of suspension. Here, notice of suspension mailed to D provided that administrative review was available in event of clerical error. D argued that notice mailed to him was inadequate to constitute valid suspension for being HTO because: 1) notice did not state that he was entitled to relief under Ind. Code 9-30-10-6; & 2) term "clerical error" is not equivalent of term "material error." Ct. held that content of notice adequately advised D of possibility of administrative review procedure if he believed suspension was erroneous. Held, conviction affirmed.

TITLE: Donaldson v. State

INDEX NO.: K.9.c.2.

CITE: (3rd Dist., 04-13-09), 904 N.E.2d 294 (Ind. Ct. App. 2009)

SUBJECT: HTV - rebuttable presumption of knowledge

HOLDING: The presumption of knowledge of suspension from evidence that BMV mailed notice of suspension to the D's last known address is constitutional and was not sufficiently rebutted in this case. "Service by the bureau of notice of suspension or restrictions of a person's driving privileges . . . by first class mail to the person at the last address shown for the person in the bureau's records; establishes a rebuttable presumption that the person knows that the person's driving privileges are suspended or restricted." Ind. Code 9-30-10-16(b).

Here, in September of 2007, D received two notices of suspensions, including a five-year habitual violator suspension. Subsequently, D received from the BMV a "Notice of Reinstatement" which stated that due to a recent update to his record, his driving privileges were reinstated. In March 2008, D was stopped for speeding and arrested for driving as a habitual traffic violator. The presumption that D had knowledge he was suspended is constitutional because there is a rational connection between service to a D and his knowledge. Moreover, the law presumes that the presumption is a permissible, and not mandatory, one. Although Court can see how one who is not versed in the law may be misled by such a presumption to believe that the burden of proof has been lifted from the State, we presume that Tr. Ct. knows and follows the applicable law, and here the case was tried to the Tr. Ct. Moreover, Tr. Ct. clearly accepted this presumption and found that the Notice of Reinstatement received by D did not rebut the presumption because D presented no evidence that he had attempted to contact the BMV to determine the status of his driving privileges. Because this Court will not reweigh the evidence, D's conviction is supported with sufficient evidence. Held, judgment affirmed.

NOTE: Arguably, in a jury trial, the jury must properly be instructed as the presumption is permissible rather than mandatory as suggested in statute. See, e.g., Hall v. State, 560 N.E.2d 561 (Ind. Ct. App. 1990).

TITLE: Fields v. State

INDEX NO.: K.9.c.2.

CITE: (2nd Dist., 5-13-97), Ind., 679 N.E.2d 898

SUBJECT: Operating while habitual traffic offender (HTO) - evidence sufficient; required culpability

HOLDING: Evidence was sufficient to support conviction for operating while HTO, where Bureau of Motor Vehicles (BMV) followed proper procedure to validly suspend D's license, & D knew or reasonably could have known of license suspension. Before BMV may suspend driver's license as HTO, it must mail notice of suspension to driver's last known address. Brown, 677 N.E.2d 517; Ind. Code 9-30-10-5. Here, BMV made every effort to notify D of license suspension by mailing notice to two addresses listed in D's official driving record. Regardless of where D actually lived, he failed to keep BMV informed of his current address, as required by Ind. Code 9-24-13- 4(1). D's driving record contained proof that notice of suspension was mailed to both addresses. This was sufficient evidence upon which judge could find that BMV met requirement of mailing notice to last known address.

Ct. also held that record contained sufficient evidence to show element that D knew or reasonably could have known of suspension of his license as HTO. Proof of mailing of license suspension as HTO to driver's last known address suffices, but does not raise presumption, to show that driver knew or reasonably could have known. Keihn, 542 N.E.2d 963; Collins, 567 N.E.2d 798. Ct. *clarified* that required culpable mental state to convict for operating while suspended is that driver "knew or reasonably could have known" of suspension. Held, transfer granted, conviction affirmed.

TITLE: Gentry v. State

INDEX NO.: K.9.c.2.

CITE: (1st Dist. 5/31/88) Ind. App., 526 N.E.2d 1187

SUBJECT: Driving after being adjudged habitual traffic offender (HTO) - underlying convictions vacated

HOLDING: Vacation of prior convictions upon which HTO finding is based does not invalidate conviction for driving while adjudged to be HTO. Because of D's driving record, Bureau of Motor Vehicles (BMV) adjudged D HTO & suspended his license for 5 years. Subsequently, D pled guilty to driving while adjudged HTO, & received lifetime suspension. D then filed PCR petitions challenging several underlying convictions, & while petitions were pending, D was arrested in 2 other counties for driving while adjudged HTO. Eventually, 7 underlying convictions were vacated, & D's initial conviction for driving while adjudged HTO was vacated effective back to date of conviction. D unsuccessfully sought to dismiss 2 remaining counts of driving while adjudged HTO, & appeals denial. D argues that vacation of underlying convictions & of driving while adjudged HTO conviction removes foundation for 2 remaining counts. However, Ct. App. finds that driving while adjudged HTO is wholly separate & distinct offense. Essence of offense is driving after adjudication & suspension, in direct contravention of it. State has legitimate interest in protecting other motorists from those adjudged HTO, & in enforcing suspension with criminal sanctions. [ME & GA citations omitted.] Held, judgment affirmed.

RELATED CASES: Starks, 816 N.E.2d 32 (fact that the underlying offense is later challenged or set aside does not mean the HTV adjudication is invalid; see full review this section).

TITLE: Groce & Desantis v. State

INDEX NO.: K.9.c.2.

CITE: (10-29-02), Ind., 778 N.E.2d 785

SUBJECT: Habitual traffic violator (HTV) - suspension notice; judicial review

HOLDING: Bureau of Motor Vehicle's (BMV's) failure to refer to judicial review opportunities in Ds' initial HTV suspension notice did not invalidate their license suspensions. Rather, it was sufficient that judicial review opportunities were outlined in a subsequent letter clarifying that Ds were entitled to seek judicial review of their suspensions. An incomplete or untimely license suspension notice does not warrant automatic reversal of a suspension. State v. Hammond, 761 N.E.2d 812 (Ind. 2002). Rather, appropriate remedy continues to be a belated opportunity to challenge HTV suspension on the merits. Id. Thus, failure to outline opportunity for judicial review in initial suspension notice does not void subsequent classification as HTV or any subsequent convictions for driving while suspended as HTV. Held, transfer granted, Ct. App.' opinion at 757 N.E.2d 694 vacated, judgment affirmed.

TITLE: Guidry v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 4-28-95), Ind. App., 650 N.E.2d 63

SUBJECT: Operating while HTV - proof of driving on public roadway not required

HOLDING: Evidence was sufficient to convict D of operating motor vehicle while driving privileges suspended as class D felony. D operated his vehicle on road located within private apartment complex & argued on appeal that Ind. Code 9-30-10-16 requires State to show that motor vehicle was operated on public highway. Ct. rejected D's interpretation & noted that absence of limiting language of statute reveals legislature's recognition that danger to public is equally as great on private property used by public as it is on public highways. Huey v. State, App., 503 N.E.2d 623. Language of Ind. Code 9-30-10-16 is not unconstitutionally vague. Statute unequivocally prohibits operation of vehicle by person whose license has been suspended. Individual reading statute would understand it to proscribe operation of vehicle on private roadway used by general public. Held, conviction affirmed.

RELATED CASES: Pruitt, 934 N.E.2d 767 (Ind. Ct. App. 2010) (Tr. Ct. did not err in denying D's motion to suppress, even though the basis for the traffic stop (failure to activate headlights) occurred in private parking lot & owner of business did not have contract with city to regulate traffic in parking lot pursuant to Ind. Code 9-21-18-4). Boyles, App., 800 N.E.2d 616 (under plain, unambiguous language of Ind. Code 9-30-10-16, State is not required to prove that D operated his motor vehicle on a public highway).

TITLE: Hall v. State
INDEX NO.: K.9.c.2.
CITE: (11-30-10), 937 N.E.2d 911 (Ind. Ct. App. 2010)
SUBJECT: Mens rea instruction for operating as HTV - fundamental error
HOLDING: Instruction was fundamentally erroneous as it instructed jury that D could be found guilty of operating a vehicle as an habitual offender (Ind. Code 9-30-10-16(a)(1)) if D knew or should have known that his driving privileges were suspended.

The State must prove beyond a reasonable doubt that “the person *knows* that the person’s driving privileges are suspended.” Ind. Code 9-30-10-16(a)(1) (emphasis added). Fundamental error may occur where jury is instructed that it may convict [a person] based on a lesser *mens rea* than provided in a statute. See Metcalf v. State, 715 N.E.2d 1236, 1237 (Ind. 1999); Wilson v. State, 644 N.E.2d 555, 557 (Ind. 1994). Error in a *mens rea* instruction is not fundamental error where either: 1) the instructions as a whole sufficiently inform the jury of required *mens rea* or 2) D’s *mens rea* was not a central issue at trial. See Ramsey v. State, 723 N.E.2d 869, 872-73 (Ind. 2000); Yerden v. State, 682 N.E.2d 1283, 1286 (Ind. 1997).

Here, D claimed he did not receive notice of his license suspension. The other instructions did not sufficiently inform jury of the required *mens rea*. “Moreover, *mens rea* was the central issue of [D’s] trial. D did not dispute that he was an HTV or that he was driving when he was stopped. He only disputed that he knew of his suspension.” Held, judgment reversed and remanded for a new trial.

TITLE: Hampton v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 6-17-97), Ind. App., 681 N.E.2d 250

SUBJECT: Operating while privileges forfeited for life - sufficient proof of operating

HOLDING: State presented sufficient evidence to support conviction for operating vehicle while license suspended for life. D argued that State introduced insufficient evidence to prove that he "operated" vehicle in which he was found. Record showed that, when D was found asleep behind wheel, engine of vehicle was running, in gear, & lights were on. Vehicle was not moving because it was stopped or stuck by rock in yard & was partially in roadway. In these circumstances, D's vehicle was not parked, but was being operated at time of its discovery by police. Held, conviction affirmed.

RELATED CASE: Henderson v. State, 108 N.E.3d 407 (Ind. Ct. App. 2018) (in prosecution for OWI, trial court's instruction on "operate" adequately conveyed that to operate a vehicle is to "expend some effort," even though the instruction did not use those words; see full review at D.9.g.2, this section).

TITLE: Hendrickson v. State

INDEX NO.: K.9.c.2.

CITE: (3rd Dist., 1-30-96), Ind. App., 660 N.E.2d 1068

SUBJECT: Guilty plea to operating moped as HTO - sufficient factual basis

HOLDING: Adequate factual basis was established for D's guilty plea to operating motor vehicle while suspended as habitual traffic offender (HTO). D, who was riding his moped at time of stop & arrest, was charged with operating while intoxicated & operating while HTO. To support guilty plea to operating while HTO, D admitted events underlying charge & also acknowledged truth of allegations contained in charging information. D admitted that he was operating motor vehicle to trial & p-c Ct. & admitted to p-c Ct. that his moped was self-propelled. Because moped is motorized & self-propelled, it can be construed as motor vehicle under Ind. Code 9-13-2-105(a). Chapman v. State, (1995), Ind. App., 650 N.E.2d 764. Relying on statutory requirements for operation of motorized bicycle, D argued that there was insufficient factual basis for his guilty plea because there is no requirement that person have valid Ind. driver's license to legally drive moped. Ind. Code 9-21-11-12(2) provides that motorized bicycle may be operated by person who has obtained identification card, permit, operator's license, chauffeur's license or public passenger chauffeur's license. To obtain identification card, one must be resident of Ind. & be at least 14 years of age. Ind. Code 9-24-16-1. D had obtained identification card & argued that he could therefore drive moped even though his driving privileges were suspended for life. Ct. disagreed & concluded that legislature did not intend to allow someone with identification card to drive moped even when that person has been convicted of being HTO, with driving privileges suspended for life. D's guilty plea was made knowingly, intelligently & voluntarily, & he was not denied effective assistance of counsel. Held, p-c Ct. affirmed.

RELATED CASES: Laker, 937 N.E.2d 1259 (Ind. Ct. App. 2010) (tractor is not a vehicle for purposes of driving while suspended).

TITLE: Heying v. State

INDEX NO.: K.9.c.2.

CITE: (3d Dist. 11/30/87) Ind. App., 515 N.E.2d 1125

SUBJECT: Driving after being adjudged habitual traffic offender (HTO) - vagueness of statute

HOLDING: Ind. Code 9-12-3-1, making it a felony to operate a motor vehicle after being adjudged HTO is not unconstitutionally vague. D argues that statute failed to inform him that he was prohibited from operating a motor vehicle in Ind. even with valid driver's license from another state. If statute had simply prohibited driving after revocation of license, it would have given no notice re conviction for driving with out-of-state license. Churchill, App., 388 N.E.2d 586. However, in dicta in Churchill, the Ct. noted that where a statute prohibits driving after revocation of one's right to drive, one could be convicted for driving with out-of-state license. Ind. Code 9-12-3-1, under which D was convicted, prohibited "operating a motor vehicle" while a Ct. order "prohibiting operation remains in effect." Furthermore, statute under which D was adjudged HTO operated to revoke not only D's driver's license, but also his right to operate a motor vehicle in Ind. Statutes clearly informed D he was prohibited from operating motor vehicle in Ind. while Ct. order revoking that right was in effect. Held, Ind. Code 9-12-3-1 is not unconstitutionally vague.

RELATED CASES: Guidry, App., 650 N.E.2d 63 (see separate card; this section).

TITLE: Heying v. State

INDEX NO.: K.9.c.2.

CITE: (3d Dist. 11/30/87) Ind., 515 N.E.2d 1125

SUBJECT: Driving after being adjudged habitual traffic offender (HTO) - right to travel

HOLDING: Ind. Code 9-4-13-14, which provides that one convicted for driving after being adjudged HTO is prohibited from operating a motor vehicle in IN for life, does not burden a fundamental right & is rationally related to a legitimate state interest. D argues that fundamental right to travel is burdened. Therefore, D argues state must show that statute promoted compelling state interest & employed least restrictive means available. In case involving temporary pre-conviction suspension of driver's license, Ind. S. Ct. has held that fundamental right to travel does not imply fundamental right to operate motor vehicle. Ruge, 467 N.E.2d 673. Ct's. from other jurisdictions have reached same conclusion in cases involving denial, temporary suspension, or permanent revocation of driver's license. [Citations omitted.] Because right to operate motor vehicle is not fundamental, state must show only legitimate rather than compelling interest. Highway safety is purpose of statute, Owens, App., 382 N.E.2d 1312, & highway safety is in fact compelling interest. Ruge. Denying right to operate motor vehicle to those who consistently refuse to obey traffic laws is rationally related to highway safety. Held, Ind. Code 9-4-13-14 is constitutional.

TITLE: Hill v. State

INDEX NO: K.9.c.2.

CITE: (6/20/2014), 15 N.E.3d 589 (Ind. Ct. App. 2014)

SUBJECT: Same conviction that supported initial HTV determination can be used to support further HTV suspensions

HOLDING: Ind. Code § 9-30-10-4(b) provides that an individual who has accumulated three qualifying convictions, not arising out of the same incident, within a given ten-year period may be determined to be an habitual traffic violator (HTV). The statute does not prohibit the Indiana BMV from using a conviction that supported an initial HTV determination to also support a second HTV determination. Thus, a person such as D who has the status of an HTV and incurs an additional conviction properly faces further suspension of driving privileges. Held, petition for judicial review of HTV determination reversed.

TITLE: Indiana Bureau Motor Vehicles v. McNeil

INDEX NO.: K.9.c.2.

CITE: (08-05-2010), 931 N.E.2d 897 (Ind. Ct. App. 2010)

SUBJECT: Erroneous reinstatement of driver's license

HOLDING: Tr. Ct. erred in reinstating D's driving privileges because it erroneously concluded that two-year statute of limitations in Ind. Code § 34-11-2-4(3) for actions for forfeiture of penalty given by statute applied to BMV determination about a person's status as habitual traffic violator (HTV). Tr. Ct. erroneously accepted D's argument that two-year statute of limitations applied because notice provision for HTV suspension of driving privileges is contained in Article 30 (General Penalty Provisions) of Title 9 (Motor Vehicles). However, [t]he ten-year suspension for a violation of the Habitual Traffic Offenders Act is a protective device, not a punitive one. Owens v. State ex rel. VanNatta, 178 Ind. App. 406, 413, 382 N.E.2d 1312, 1317 (1978).

The primary reason to suspend an HTV's license is "to remove from the highway those drivers who have proven themselves . . . unfit to drive, and who pose a substantial threat to the safety of others" and "not to impose punishment." Id.; 382 N.E.2d at 1316. Thus, even though Article 30 is entitled General Penalty Provisions, the determination of HTV status and suspension of driving privileges is not an action for a forfeiture of penalty given by statute, and the two-year statute of limitations under Ind. Code § 34-11-2-4 does not apply. Held, judgment reversed

TITLE: Johnson v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist. 2/10/88), Ind. App., 518 N.E.2d 1127

SUBJECT: Driving while suspended (DWS) - operating motor vehicle

HOLDING: D who was merely found in drivers' seat of inoperable car was not "operating" motor vehicle within meaning of Ind. Code 9-12-3-1. Here, police officer found D sitting in drivers' seat of car parked off roadway. D explained that car was disabled & demonstrated that it would not start. D was arrested for operating motor vehicle while driving privileges were suspended. At trial, D testified he had not been driving car, but was waiting for friend to return with tow. Two witnesses corroborated D's testimony. D appeals conviction, arguing he was not "operating" motor vehicle. State argues "operate" means merely to exert control over vehicle. However, words & phrases in statute should be given plain meaning. State argues D operated car by demonstrating that it would not start. State cites 4 cases in which Ds found in cars that were stopped or were on private property. [Citations omitted.] In each of those cases, however, car was operable & running at time of D's arrest. Other jurisdictions have held car must be operable at time D is arrested. [Citations omitted.] To extend Ind. Code 9-12-3-1 to include facts of present controversy would enlarge definition of "operating" beyond its reasonable meaning. See State v. McGraw, 480 N.E.2d 552. Held, conviction reversed.

RELATED CASE: Henderson v. State, 108 N.E.3d 407 (Ind. Ct. App 2018) (in prosecution for OWI, trial court's instruction on "operate" adequately conveyed that to operate a vehicle is to "expend some effort," even though the instruction did not use those words; see full review at D.9.g.2).

TITLE: Jones v. State

INDEX NO.: K.9.c.2.

CITE: (5th Dist., 11-24-92), Ind. App., 603 N.E.2d 888

SUBJECT: Operating after finding Habitual Traffic Offender (HTO) - Insufficient factual basis

HOLDING: Where only evidence that D had been previously found HTO was his statement that he knew Tr. Ct. had so found & ordered him not to drive, it was insufficient to provide factual basis for guilty plea to operating after finding of HTO status. In 1981, BMV filed civil complaint & asked Ct. to adjudge D HTO. Hearing was held, & Ct. ordered D not to drive for 10 years but record of hearing was not part of record on appeal. When State later charged D with operating vehicle while HTO, he moved to dismiss because Tr. Cts. previous finding & order had not been reduced to written & signed judgment properly entered. When Tr. Ct. denied motion, D entered plea to one of charges. In 1990, he filed for PCR, arguing that factual basis for plea was deficient because effective judgment had never been entered on underlying HTO.

Although Ct. expressed grave misgivings as to whether conviction could stand where judgment was not entered on underlying HTO charge at time of charge of operating after finding of HTO, it did not have to reach issue, because plea hearing was otherwise fatally flawed. Factual basis for plea clearly required proving that D had been adjudged HTO, & to establish prior judgment or conviction, prior evidence alone is not sufficient. Unless State can show Ct. records are unavailable, they must be produced, Mogle, App., 471 N.E.2d 1146. Ct. found same rule should apply to guilty pleas, & here only evidence of D's HTO status was his own testimony about prior Ct. proceedings. State made no effort to produce records or show they were unavailable. Therefore, factual basis for plea was not established & plea should have been vacated. Held, denial of PCR relief reversed.

RELATED CASES: Cooper, 935 N.E.2d 146 (Ind. 2010) (rejecting D's argument that the factual basis supporting his plea to driving while HTV was inadequate because the witness who testified at the plea hearing did not specifically state that the events took place in Marion County or that they occurred in 1999; both the year and county were read to D at outset of hearing and officer testified he observed D at a readily recognizable address in Indianapolis and D acknowledged these statements); Wilson, App., 707 N.E.2d 318 (D's admission that his license was suspended for 10 years & that it had been suspended prior to his having operated vehicle did not establish that he knew of suspension on day he was driving; however, in addition to providing lack of factual basis, D must also prove that he was prejudiced by this error. See Eiland at C.2.b); Gumm, App., 655 N.E.2d 610 (sufficient factual basis to support plea to operating as HTO).

TITLE: Leslie v. State
INDEX NO.: K.9.c.2.
CITE: (9-28-01), Ind. App., 755 N.E.2d 1147
SUBJECT: Habitual traffic violator - lifetime forfeiture runs immediately, not consecutively
HOLDING: Lifetime driving forfeitures are excluded by implication from 140 Indiana Administrative Code 1-4.5-10(b)(3), which states that unless judge orders otherwise all driving suspensions should run consecutively. D was convicted of driving with lifetime forfeiture & argued that lifetime forfeiture could not have taken effect until other suspensions had run. Administrative rule must be interpreted logically with habitual traffic violator statute, Ind. Code 9-30-10-17, so as not to bring about unjust or absurd results. Riley v. State, 711 N.E.2d 489 (Ind. 1999). Here, D's driving privileges had been suspended twenty-one times which clearly indicates that he was unable to obey traffic laws & was hazard to life & property. It would directly contravene the purpose of habitual traffic violator statute to postpone lifetime forfeiture until other suspensions had run. Further, administrative code is silent to forfeitures, but specifically mentions suspensions, which by implication means forfeitures were to be excluded. Held, judgment affirmed.

TITLE: McKeown v. State

INDEX NO.: K.9.c.2.

CITE: (3rd Dist., 10-29-92), Ind. App., 601 N.E.2d 462; overruled on other grounds 679 N.E.2d 898

SUBJECT: Reversal of previous convictions doesn't preclude conviction for Operating While Habitual Traffic Offender (OHTO)

HOLDING: Reversal of D's previous convictions for Operating While Suspended (OWS) because they were uncounseled did not preclude D's conviction for OHTO. Uncounseled convictions may be used for some purposes, Lewis v. U. S. (1980), 445 U.S. 55, 100 S. Ct. 915, 63 L.Ed.2d 198, & OHTO is distinct offense of driving after determination of HTO status. If D drives after adjudication, regardless of whether convictions underlying adjudication are later stricken, he is flaunting law, Gentry (1988), App., 526 N.E.2d 1187.

Ct. adopted reasoning of Gentry & Lewis, noting that focus of statute is mere fact of conviction, to prevent potentially dangerous people from driving on roadways. Over year after D was arrested for OHTO, two of previous convictions for OWS were reversed on appeal because of lack of knowing & voluntary waiver of right to counsel. Ct. found present conviction was not punishment for earlier offenses, but instead stemmed from operating vehicle in direct contravention of classification as HTO. Held, conviction affirmed.

RELATED CASES: Kessler, 615 N.E.2d 90 (In dissent to denial of transfer of case dealing with effect of vacation of one of convictions leading to suspension of driving privileges pursuant to HTV statute, Justice DeBruler disagreed with principle set forth in Gentry & McKeown that subsequent vacation of conviction leading to suspension makes no difference because it's act of driving while suspended that counts, whether suspension was proper or not.).

TITLE: Mogle v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist. 12/6/84) Ind. App., 471 N.E.2d 1146

SUBJECT: Habitual traffic offender (HTO) - sufficiency

HOLDING: Evidence was insufficient to prove D was operating vehicle while HTO where state failed to connect D to judgment & docket sheet. Here, officer testified he stopped D for speeding & detected an odor of alcohol. Officer later received printout from BMV indicating D's license suspended following adjudication of HTO. Printout was not introduced into evidence thus officer's testimony was parol evidence. See Morgan, 440 N.E.2d 1087 (habitual conviction based solely on parol evidence reversed). Prosecution entered certified copy of HTO judgment, which Ct. finds did not exhibit particular characteristics of D. Ct. finds mere document relating to conviction of one with same name as D is insufficient. Duncan, 409 N.E.2d 597. Held, conviction for operating vehicle while an HTO reversed. Conover DISSENTS. From totality of oral testimony & documentary evidence, jury could infer D was same person earlier convicted of HTO.

RELATED CASES: Pierce, App., 737 N.E.2d 1211 (language of Ind. Code 9-30-3-15, which took effect after Mogle was decided, evinces legislative intent to permit State to prove prior convictions by means of BMV records without need for production of court records).

TITLE: Orndorff v. Indiana BMV

INDEX NO.: K.9.c.2.

CITE: (12/28/2012), 982 N.E.2d 312 (Ind. Ct. App. 2012)

SUBJECT: License suspension - laches; public interest in reducing poverty

HOLDING: From 2002 to 2004, Petitioner received 17 driving convictions and had her driving privileges suspended 18 times. In 2008, she moved with her two children to Bloomington, obtained a valid driver's license and got a job as a personal care attendant. Four years later, the BMV discovered Petitioner qualified as a habitual traffic violator and sent her a notice that her driving privileges would be suspended for 10 years, effective May 29, 2012. Petitioner filed a complaint against the BMV alleging that the equitable doctrine of laches prevented the agency from suspending her driving privileges and requesting an injunction to stop the suspension. Tr. Ct. noted that Petitioner will suffer adverse effects that threaten the public interest if her driving privileges are suspended, i.e., that she will lose her job and her family will be thrust into poverty. However, it concluded that the adverse effect that will be suffered by Petitioner's family does not appear to constitute the sort of public threat that should prevent the BMV from suspending her driving privileges. Court disagreed, concluding that the public has a real and tangible interest in reducing poverty and that since 2008, Petitioner has not incurred any driving convictions. Based on particular circumstances of this case, suspending Petitioner's driving privileges presents a threat to the public interest and no public interest will be served by suspending her driving privileges. Petitioner has a reasonable likelihood of prevailing at trial on her claim of laches. Held, denial of request for preliminary injunction reversed and remanded for further proceedings.

TITLE: Pierce v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 11-14-00), Ind. App., 737 N.E.2d 1211

SUBJECT: Operating while driving privileges forfeited for life - proof of prior conviction

HOLDING: In cases where a D is charged with operating vehicle after license forfeited for life, a Class C felony under Ind. Code 9-30-10-17, proof of prior conviction of being habitual traffic violator with license suspended for life, together with proof that D was driving vehicle, is sufficient to sustain conviction. Prior conviction may be proven by BMV records pursuant to Ind. Code 9-30-3-15, provided State properly ties BMV record to D. Requiring State to introduce additional evidence of D's prior conviction would make Ind. Code 9-30-3-15 a nullity. Should information in BMV record be incorrect, it is up to D to rebut prima facie evidence provided by BMV record of conviction.

Here, as evidence that D's driving privileges had been forfeited for life when officer stopped him, State introduced D's redacted BMV driving record and also elicited testimony from officer with respect to D's identification. BMV record reflected that D had been convicted in 1997 of being habitual traffic offender, and his license had been suspended for life. Prior conviction supported reasonable inference that D had actual knowledge of lifetime forfeiture of his driving privileges. Bates, App., 650 N.E.2d 754. Name, date of birth, and social security number D gave to officer were same as those set forth in BMV record. This was sufficient, absent rebuttal evidence from D, to support conviction. Held, conviction affirmed.

RELATED CASES: Burton, 64 N.E.3d 1244 (Ind. Ct. App. 2016) (D forfeited driving privileges for life because he operated motor vehicle while his driving privileges were suspended; argument that forfeiture shouldn't apply because it was repealed after he committed his offense but before sentencing was unavailing because normally the law in effect when person commits a crime determines their sentence; D failed to argue how exceptions such as doctrine of amelioration should apply); Brock, 955 N.E.2d 195 (Ind. 2011) (resolving split within court of appeals, IN Sup. Ct. held that Operating after a Lifetime Suspension is a strict liability offense and approved Pierce and Ford v. State, 711 N.E.2d 86 (Ind. Ct. App. 1999)).

TITLE: Porter v. State

INDEX NO.: K.9.c.2.

CITE: (4/4/2013), 985 N.E.2d 348 (Ind. Ct. App. 2013)

SUBJECT: Operating as a HTV for life - no license suspension

HOLDING: The Tr. Ct. exceeded statutorily prescribed limits when it suspended D's driving privileges for life. A person who is convicted of Operating a Motor Vehicle as a HTV forfeits the privilege of operating a motor vehicle for life. Ind. Code 9-30-10-16. However, if the judgment is entered as a Class A misdemeanor, the court may order a period of suspension, thus removing the lifetime suspension. Ind. Code 9-30-10-17, which makes it a Class C felony to Operate a Vehicle after a Lifetime Suspension, is silent on imposition of an additional suspension upon conviction. Here, after D was convicted of, but before he was sentenced for, Operating a Vehicle after a Lifetime Suspension as a Class C felony, his prior conviction for Class D felony Operating as an HTV was converted to a Class A misdemeanor. As such, his lifetime license suspension was vacated. Thus, the Tr. Ct. ordered a new lifetime suspension for the Class C felony conviction, despite no statutory authorization in Ind. Code 9-30-10-17. Mindful that penal statutes should be construed strictly against the State, that ambiguities should be resolved in favor of the accused, and that the judicial function is to apply the laws as enacted by the legislature, the Court concluded that the Tr. Ct. exceeded statutory authority and improperly suspended D's driving privileges for life for Operating a Vehicle after a Lifetime Suspension. Held, judgment affirmed, in part, and reversed, in part.

TITLE: Pruitt v. State

INDEX NO.: K.9.c.2.

CITE: (10-04-10), 934 N.E.2d 767 (Ind. Ct. App. 2010)

SUBJECT: Operating while HTV - Terry stop in private parking lot

HOLDING: Tr. Ct. did not err in denying D's motion to suppress, even though the basis for the traffic stop-- failure to activate headlights-- occurred in the private parking lot of a Martinsville pub. D was eventually charged with operating a vehicle after driving privileges had been forfeited for life. Ind. Code 9-30-10-17. Ind. Code 9-21-18-4 provides, "A unit and the owner or lessee of a shopping center or private business property located within the unit may contract to empower the unit to regulate by ordinance the parking of vehicles and the traffic at the shopping center or private business property, subject to approval by the fiscal body of the unit by ordinance."

Here, there was no evidence the pub had contracted with the City of Martinsville to regulate traffic in its private parking lot. Nonetheless, Court did not read the statute "...to bar law enforcement officers from investigating violations on private property such as shopping centers in the absence of a contractual agreement with each and every such property." Furthermore, Ind. Code 9-30-10-17 does not explicitly limit its application to persons operating motor vehicles on public roads. Cf. Guidry v. State, 650 N.E.2d 63, 66 (Ind. Ct. App. 1995). The legislature's choice to not limit the statute to public roads indicates that the danger to the public from habitual traffic offenders is as great on a private parking lot as it is on public highways. Held, denial of motion to suppress affirmed.

TITLE: Rudolph v. State

INDEX NO.: K.9.c.2.

CITE: (2d Dist. 01/15/91), Ind. App., 565 N.E.2d 338

SUBJECT: Guilty plea - factual basis for driving while license forfeited for life

HOLDING: Prior forfeiture of driving privileges for life under Ind. Code 9-4-13-14 (since repealed) does not provide factual basis to support guilty plea to driving after driving privileges are suspended for life under Ind. Code 9-12-3-2. D entered guilty plea to operating a motor vehicle after driving privileges are forfeited for life, Class C felony, & forgery, Class C felony. D later filed for post-conviction relief (PCR) on ground that entry of guilty plea was not knowing, intelligent & voluntary because factual basis for plea was not proper, & PCR Ct. denied petition. It was uncontested that in 1983 D's driving privileges were forfeited for life under Ind. Code 9-4-13-14, which was repealed in 1984. In 1986, D pled guilty to "operating motor vehicle while privileges are forfeited for life under Ind. Code 9-12-3-1" & to forgery. Ind. Code 9-12-3-2 provides that "[a] person who operates a motor vehicle after his driving privileges are forfeited for life under section 1 [Ind. Code 9-12-3-1 (1988)] of this chapter commits a Class C felony." Ct. App. found that legislature could have provided that forfeiture under repealed statute would suffice for conviction under Ind. Code 9-12-3-2, but instead restricted it to forfeiture under Ind. Code 9-12-3-1, & therefore no factual basis for D's plea existed, & conviction could not stand. Ct. also found that voluntariness of plea to forgery count was suspect because it was part of plea agreement with invalid plea to operating count, & D was entitled to withdraw that plea as well, if he chose. Held, judgment reversed & remanded for further proceedings consistent with opinion.

TITLE: Shrum v. State

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 5-9-96), Ind. App., 664 N.E.2d 1180

SUBJECT: Operating while driver's license forfeited for life - no extreme emergency

HOLDING: Tr. Ct. did not err in failing to find that extreme emergency existed which made it necessary for D to operate motor vehicle after his license had been forfeited for life. Under Ind. Code 9-30-10-18, it is defense that driving while HTO was necessary to save life or limb in extreme emergency. Here, Ct. found that circumstances with which D was faced did not rise to ordinary meaning of "extreme emergency." D presented evidence that after being picked up, driver stated that he felt shaky & queer & asked D to drive him to nearest place to eat. Driver was diabetic & did not tell D that his condition constituted emergency or that his life was in danger. D decided to drive to nearby convenience store & was stopped by police officer for muffler violation. Neither man told police officer that passenger was experiencing health problem & neither requested assistance for that reason. Ct. also noted that D had opportunity to assist his friend without violating law, as he could have walked to nearby restaurant to obtain sugary foods. Evidence was sufficient to support Tr. Ct.'s finding that D failed to prove that operation of car was necessary to save life or limb in extreme emergency. Held, conviction affirmed.

RELATED CASES: Moore, App., 702 N.E.2d 762 (D failed to prove by preponderance of evidence that his operation of motor vehicle while his license was suspended was necessitated by extreme emergency); Geljack, App., 671 N.E.2d 163 (Ind. Code 9-30-10-18 does not unconstitutionally impose upon D burden of establishing affirmative defense of emergency).

TITLE: Stanek v. State

INDEX NO.: K.9.c.2.

CITE: (11-17-92), Ind., 603 N.E.2d 152

SUBJECT: No Habitual Offender (HO) enhancement of operating after suspended for life as Habitual Traffic Violator (life HTV)

HOLDING: Enhancement of offense of life HTV under Ind. Code 9-12-3-2 (now found in Ind. Code 9-30-10) by HO finding, was precluded because life HTV was itself HO statute. D was convicted of life HTV, class C felony, & was found to be HO. He received 4-year sentence on life HTV, enhanced by 20 years for HO status.

Ct. noted that Ind. Code 9-12-3 (now Ind. Code 9-30-10) was entitled “Habitual Violators of Traffic Laws,” & structure of statute first provides for suspension for up to 10 years for being HTV, then makes it class D felony to drive while suspended for that reason, & calls for forfeiture of privileges for life. Statute then makes operating while life HTV, class C felony. Legislature's intent was to make Art. 12 (now 10), HO statute, because it provides increasingly serious penalties for violations of HTV laws, ranging from administrative suspension to class C felony conviction. Ct. acknowledged that Ind. Code 35-50-2-8 allows State to seek HO enhancement for “any felony,” but held conviction under Art. 12 (now 10) could not be subject to further enhancement under HO statute, because Art. 12 is discreet, separate, independent HO statute. Held, transfer granted, Ct. App. decision at 587 N.E.2d 736 reversed, conviction affirmed, but HO determination reversed & remanded for resentencing, Givan, J., dissenting. Note: Principles of this decision might apply with equal force to any other arguably “habitual offender,” i.e., progressive punishment statutes.

RELATED CASES: Tuell, 118 N.E.3d 33 (Ind. Ct. App. 2019) (plain language of I.C. 35-50-2-8(e) explicitly authorizes level 5 felony to operating a motor vehicle after lifetime license forfeiture to be enhanced again under habitual offender statute; see full review at K.9.c.3); Howard, App., 818 N.E.2d 469 (Class D felony operating while HTV & D's habitual substance offender determination did not constitute an impermissible double enhancement); Parrett, App., 800 N.E.2d 620 (though part of a plea agreement, Tr. Ct. imposed an illegal sentence on D when it enhanced his sentence for operating vehicle after driving privileges are forfeited for life under HO statute); Wood, App., 734 N.E.2d 296 (D may not be subjected to enhanced sentence under general HO statute as result of his conviction for operating vehicle after lifetime suspension); Haymaker, 667 N.E.2d 1113 (HTV conviction can be used as predictive offense to support HO enhancement); Freeman, 658 N.E.2d 68 (State may not enhance OWI conviction under both class D felony OWI statute & also under HSO statute); Long, App., 645 N.E.2d 1114 (Stanek rule is not to be applied retroactively to vitiate guilty pleas upon collateral review).

TITLE: State v. Drubert

INDEX NO.: K.9.c.2.

CITE: (5th Dist., 11-10-97), Ind. App., 686 N.E.2d 918

SUBJECT: Habitual traffic violator ("HTV") - moped does not constitute motor vehicle

HOLDING: Tr. Ct. properly dismissed operating while HTV charge against D because moped does not constitute motor vehicle which HTV is prohibited from operating. Penal statute is to be strictly construed against State, & any ambiguity must be resolved against imposing penalty. When construing statute, Ct. presumes that legislature intends its enactments to be applied in logical manner, consistent with underlying policies & goals of statute. Here, HTV is prohibited from operating motor vehicle while his operator's driving privileges are suspended. Ind. Code § 9-30-10-16. To operate moped, one does not need license but only identification card, which is also used as identification by people who do not have licenses. Ind. Code §§ 9-24-16-11.4, 11.6. Thus, legislature could not have intended, under statute prohibiting operation of motor vehicle while person's driving privileges are suspended, to criminalize D's activity of driving moped, for which driving privileges are not required. Held, judgment affirmed.

RELATED CASES: Boyles, App., 800 N.E.2d 616 (D's admissions that he operated dirt bike on private property constituted sufficient factual basis to support D's guilty plea).

TITLE: State v. Hammond

INDEX NO.: K.9.c.2.

CITE: (1-28-02), Ind., 761 N.E.2d 812

SUBJECT: Guilty plea to driving while habitual traffic violator (HTV) - defective suspension notice

HOLDING: Tr. Ct. erred in finding that D's guilty plea to driving while HTV lacked factual basis because notice sent to her was defective. Because D admitted to driving when she knew her license was suspended as HTV, a sufficient factual basis supported her guilty plea. Essence of HTV offense is act of driving after being so determined; focus is not on reliability or non-reliability of underlying determination, but on mere fact of determination. Stewart v. State, 721 N.E.2d 876 (Ind. 1999). For purposes of a driving while suspended charge, Ct. looks to D's status as of date of that charge, not any later date on which underlying suspension may be challenged or set aside. Id.

Recent legislative amendment adding word "validly" to modify "suspended" in Ind. Code 9-30-10-16 did not nullify holding in Stewart. Ct. rejected D's argument that this amendment shows legislature's intent that any notice deficiency in underlying suspension automatically invalidates conviction for operating while suspended. Validity of license suspension depends on merits of adjudication, so an untimely or incomplete suspension notice does not justify automatic reversal of suspension. If no challenge to license suspension has occurred as of date driver is charged with driving while suspended, suspension is valid at the critical time, & subsequent conviction stands. Id. Circuit Ct. thus erred when it vacated D's suspension based solely on inadequate notice, & post-conviction Ct. erred when it determined that D's guilty plea was unsupported. Proper remedy for BMV's failure to explain D's right of challenge is to allow D belated opportunity to challenge her HTV suspension on merits. Were she successful at that, she might then petition for post-conviction relief in Ct. where she pled to driving while HTV. Held, transfer granted, Ct. App.' opinion at 737 N.E.2d 425 vacated, grant of post-conviction relief reversed.

RELATED CASES: Bryant, 4 N.E.3d 808 (Ind. Ct. App 2014) (even where D proved that one of the convictions listed as an underlying offense was actually dismissed, the suspension must be considered valid because D did not challenge the conviction through the BMV or judicial review; Tr. Ct. abused its discretion by granting D's motion to dismiss operating as a HTV charge).

TITLE: State v. Jackson

INDEX NO.: K.9.c.2.

CITE: (05-13-08), Ind., 889 N.E.2d 819

SUBJECT: HTV - State need not prove knowledge of HTV status

HOLDING: Tr. Ct. improperly acquitted D of Operating a Vehicle After Being Adjudged a Habitual Traffic Violator (HTV). In order to convict a D of driving while HTV, State must prove that the suspended driver operated a vehicle while knowing that his license was suspended, but need not prove that the person knew that his license was suspended because of a habitual traffic violator determination. See Ind. Code 9-30-10-16(a)(1). Proper service by the BMV of the suspension establishes a rebuttable presumption that the person knows that the person's driving privileges are suspended or restricted. Ind. Code 9-30-10-16(b). Here, D admitted to police that he knew his license was suspended. Because there was evidence of direct knowledge of the license suspension, Court did not address whether D's moving was sufficient to rebut the statutory presumption of knowledge based on the BMV notice. Thus, there was sufficient evidence to support conviction for Operating a Vehicle After Being Adjudged a HTV. Held, transfer granted, Court of Appeals' opinion at 864 N.E.2d 431 reversed. Tr. Ct.'s judgment of acquittal remains unaffected due to State's limited remedy on appeal. Rucker and Sullivan, JJ., dissenting on basis that the structure of the statute is such that a driver must be put on notice of the greater risk of becoming a convicted felon.

RELATED CASES: Spivey, 922 N.E.2d 91 (Ind. Ct. App. 2010) (D's testimony that he had not received notice and his driving record showing the Tr. Ct. approved his request for a new license within two weeks of the instant offense was insufficient to overcome presumption).

TITLE: State v. McGill

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 10-28-93), Ind. App., 622 N.E.2d 239

SUBJECT: Defect in Habitual Traffic Violator (HTV) statute not fatal

HOLDING: Although literal reading of Ind. Code 9-30-10-16 & 17 reveals defect, uncodified savings clause, P.L. 2-1991, 111, is adequate to remedy defect. Ds were charged with operating vehicle after their licenses were forfeited for life as HTVs under Ind. Code 9-30-1-17, effective July 1, 1991, & had been forfeited previously under Article 12, repealed on July 1, 1991. Tr. Ct. found Ds could not be convicted under Ind. Code 9-30-10-17, because statute required that privileges be suspended under Ind. Code 9-30-10-16 & did not mention suspensions under Art. 12. Although literal reading of statute would preclude Ds' convictions under Ind. Code 9-30-10-17, Ct. found uncodified savings clause was adequate to allow prosecution under circumstances. Sec. (a) of savings clause states purpose of act is to be recodification & restatement of laws & where act "repeals & replaces a provision in the same form or in a restated form, the substantive operation & effect of that provision continues uninterrupted." Ct. found Ind. Code 9-12-3-1 & 9-30-10-16 to be restatements of each other, as are Ind. Code 9-12-3-2 & 9-30-10-17. Ct. also found Sec. (c) of savings clause expressly addresses statutes that refer to repealed & replaced statutes by stating references in repealed & replaced statutes "shall be treated . . . as a reference to the new provision." Ct. distinguished State v. Geise, App., 596 N.E.2d 244 (dealing with similar defect in D felony OWI statute) where savings clause was found insufficient to remedy defect. Anomaly present in Geise was not present here because defect did not deal with specific definition of term or specific listing of applicable prior statutes from which one was omitted. **Note:** Legislature attempted to correct defect in 1993 by including specific references to prior statutes but cited to Ind. Code 9-12-3 rather than Ind. Code 9-12-2, dealing with suspensions, so there may be new problem to argue.

TITLE: State v. Oney
INDEX NO.: K.9.c.2.
CITE: (8/28/2013), 993 N.E.2d 157 (Ind. 2013)
SUBJECT: Driving while habitual traffic violator (HTV) - underlying offense vacated because of "material error"

HOLDING: Although a D who pleads guilty to driving while suspended as a HTV may not later challenge the plea contending that an underlying offense has been set aside on grounds of procedural error, a D may be entitled to relief where an underlying offense has been set aside on grounds of material error.

Here, D pleaded guilty in 2002 to driving while HTV, a Class D felony. His designation as a HTV arose from his three operating a vehicle while intoxicated convictions. Eight years after his guilty plea, D and State filed an Agreed Entry of Post-Conviction relief from his 1989 OWI conviction, based on impropriety of the trial judge and violation of his right to counsel.

Supreme Court agreed that judge's acceptance of the 1989 plea was a material error, *i.e.*, there was sufficient evidence before post-conviction court judge to conclude that D did not commit the 1989 OWI offense. While D initially maintained his innocence, he accepted the plea after repeatedly being urged by the judge to do so. Thus, Tr. Ct. properly set aside D's 2002 guilty plea and conviction as voidable on the basis the underlying offense was vacated. See Ind. Code 35-35-1-4(5) (providing for withdrawal of guilty plea when necessary to correct a manifest injustice, which includes instances whenever the plea and judgment of conviction are voidable).

In so holding, Court disapproved of Hoaks v. State, 832 N.E.2d 1061 (Ind. Ct. App 2005) to the extent it held that the possibility of relief is "forever foreclosed" where, as here, the underlying offense in a D's HTV adjudication was material error. Held, transfer granted, Court of Appeals' opinion at 974 N.E.2d 1054 vacated, judgment affirmed.

TITLE: State v. Starks

INDEX NO: K.9.c.2.

CITE: (4th Dist., 10-19-04), Ind., 816 N.E.2d 32

SUBJECT: Driving while habitual traffic violator (HTV) - removal of underlying offense

HOLDING: A D who pleads guilty to driving while suspended as a habitual traffic violator may not later challenge the plea on grounds that the underlying offense is invalid. Here, D had successfully set aside an underlying conviction to the HTV determination & moved to set aside HTV suspension because without underlying conviction, he would not have been HTV eligible. Ct. held that the essence of the HTV offense is the act of driving after having been determined an HTV & having notice of such. Ct. noted that State v. Hammond, 761 N.E.2d 812 (Ind.2002), makes this clear & D & Ct. App. misconstrued a portion of that decision to infer that D could seek post-conviction relief after getting an underlying conviction set aside. Fact that the underlying offense is later challenged or set aside does not mean the HTV adjudication is invalid. Only if the underlying offense was not committed, for example, by proving that the BMV erroneously included the D as the same person as the offender in the subsequent Ct., is the error "material" & thus challengeable through PCR. Held, transfer granted, Ct. App.' opinion at 787 N.E.2d 885 vacated, grant of post-conviction relief reversed.

RELATED CASES: Oney, 993 N.E.2d 157 (Ind. 2013) ("Starks cannot be read as standing for the proposition that the possibility of relief is forever foreclosed...[i]f the person successfully demonstrates that a material error has occurred then the person is afforded the opportunity to pursue post-conviction relief"; see full review, this section); Cooper, App., 918 N.E.2d 355 (D showed that: 1) a material error occurred when the BMV originally determined that he was an HTV; 2) BMV later corrected this error and removed the incorrect HTV determination from D's driving record; and 3) D was not validly determined to be an HTV in the first place; this is precisely the type of circumstances contemplated in Starks that justifies PCR).

TITLE: State v. Vankirk

INDEX NO.: K.9.c.2.

CITE: (10-05-11), 955 N.E.2d 765 (Ind. Ct. App. 2011)

SUBJECT: AMS allows modification of lifetime driving forfeiture to suspension

HOLDING: Addressing a reserved question of law, Court held that Tr. Ct. did not err in finding that modification of D's sentence for operating a motor vehicle while habitual traffic offender from a D felony to an A misdemeanor pursuant to AMS meant that D's driving privileges were no longer suspended for life.

In 2005, D pled guilty to operating a motor vehicle while a habitual traffic violator, a class D felony. The State agreed to alternative misdemeanor sentencing ("AMS") under Ind. Code § 35-38-1-1.5 if D successfully completed his probation. Once D completed probation, Tr. Ct. modified the judgment to a class A misdemeanor. However, it did not address the prior forfeiture of D's driving privileges. In January 2009, D was stopped for a moving violation. The State charged him with operating a motor vehicle while privileges are forfeited for life. After a bench trial, Tr. Ct. found that forfeiture of a driving license is not proper for class A misdemeanors. Thus, it found that when D was stopped for the moving violation, he was not driving after his driving privileges had been suspended for life. It found, as a matter of law, that because D was sentenced to a class A misdemeanor, "his driving privileges could only have been suspended and not forfeited."

Both Indiana Code § 9-30-10-16 and Indiana Code § 35-38-1-1.5(e) address suspension of driving privileges, but only 9-30-10-16 also addresses forfeiture of driving privileges. Thus, AMS sentence modification does not prohibit modifying a D's driving privileges from forfeiture to suspension. However, neither Ind. Code § 9-30-10-16 nor Ind. Code § 35-38-1-1.5 prevents a Tr. Ct. from ordering additional suspension of driving privileges upon conversion of a class D felony conviction to a class A misdemeanor conviction. "We therefore remind Tr.Ct's and parties to plea agreements that any order or plea agreement regarding future alternative sentencing should specify an additional period, if any, of suspension of the convicted person's driving privileges upon the entry of a judgment for conviction of a class A misdemeanor for an offense under Indiana Code section 9-30-10-16(a)." Held, judgment affirmed.

TITLE: State v. Weyer

INDEX NO.: K.9.c.2.

CITE: (4th Dist., 7-20-05), Ind. App., 831 N.E.2d 175

SUBJECT: Operating while habitual traffic violator (HTV) - all terrain vehicle

HOLDING: Tr. Ct. erred in dismissing charge of operating a motor vehicle while HTV. An all terrain vehicle (ATV) is a motor vehicle for purposes of the HTV statute. D argued that an ATV is not included in the HTV statute because a license is not required to operate an ATV & they are forbidden from public roads. The HTV statute prohibits a person with a valid suspension from operating a motor vehicle. Ind. Code 9-30-10-16. A motor vehicle is a vehicle that is self-propelled (Ind. Code 9-13-2-105(a)) & here the ATV was clearly self-propelled as it was traveling 80 miles per hour on a roadway. Further, the definition of "off-road vehicle" does not limit ATVs from use on roads. Ind. Code 14-16-1-3. To the limited extent in which an individual may operate a motor vehicle on a public highway, street, or right-of-way, he or she must have valid motor vehicle driver's license. Ind. Code 14-16-1-20(c)). Baker, J. concurring to note that there may be circumstances where a self-propelled vehicle -- other than a motorized bicycle -- may not qualify as a motor vehicle subject to the HTV statute. Baker added the legislature specifically exempted certain vehicles from the definition of "off-road vehicle" such as construction vehicles, golf carts, snowmobiles, & registered aircrafts & watercraft. Whether these vehicles violate HTV is a question for the future. Held, judgment reversed.

TITLE: Thomas v. Indiana BMV
INDEX NO.: K.9.c.2.
CITE: 979 N.E. 2d 169 (Ind. Ct. App 2012)
SUBJECT: License suspension - laches

HOLDING: Tr. Ct. did not err in concluding that Bureau of Motor Vehicles' (BMV's) notice regarding his status as a habitual traffic violator (HTV) was timely. D was convicted of three qualifying offenses for a HTV suspension within ten years. Three and a half years after the third offense, the BMV notified D that his driving privileges would be suspended because he was a HTV. In Indiana Bureau of Motor Vehicles v. McNeil, 931 N.E.2d 897 (Ind. Ct. App 2010).

Court held that two-year statute of limitations in Ind. Code 34-11-2-4 does not apply to HTV determinations. Further, the general ten-year statute of limitations in Ind. Code 34-11-1-2 applies when the legislature has not provided another one. Ind. Spine Group v. Pilot Travel Ctrs., LLC, 959 N.E.2d 789 (Ind. 2011). Here, statute of limitations began to run when D received his third conviction which qualified him as a HTV, and not from the time he received his first conviction.

Court also rejected D's argument that suspension of D's driving privileges should be barred by the equitable defense of laches. D argued the suspension would result in extreme unfairness because in the years since his last qualifying conviction, he has "altered his behavior to effectively render himself a safe driver." Court was unconvinced by D's self-serving statement, concluding it falls far short of demonstrating that the public interest would be threatened by the BMV's delay in the ten-year HTV suspension. Held, judgment affirmed.

TITLE: Vasquez v. State

INDEX NO.: K.9.c.2.

CITE: (3rd Dist., 10-23-98), Ind. App., 700 N.E.2d 1157

SUBJECT: Valid license suspension - ascertaining language literacy not required

HOLDING: In decision affirming D's conviction for operating motor vehicle after suspension as habitual traffic violator, Ct. declined to require Bureau of Motor Vehicles (BMV) to determine whether its drivers are literate, & if so, in what language. D argued that because notice of license suspension was in English, instead of his primary language, Spanish, he did not have knowledge that his driving privileges were suspended, & that therefore his suspension was invalid. Ct. noted that Indiana requires by statute that driver's license examination include test of ability to read & understand highway signs. Ind. Code 9-24-10-4(a)(1)(B). Issuance of driver's license to individual who does not understand highway warnings or direction signs written in English language is prohibited. Ind. Code 9-24-2-3(a)(4). In this case, BMV clearly satisfied statutory & case law requirements for notice. License suspension is valid where notice of suspension is provided in English to person who cannot read English. Held, judgment affirmed.

TITLE: Wheeler v. State

INDEX NO.: K.9.c.2.

CITE: (2/28/2018), 95 N.E.3d 149 (Ind. Ct. App 2017)

SUBJECT: Amendment to HVSO charge did not prejudice D

HOLDING: Tr. Ct. did not abuse its discretion by letting the State, on the last day of trial, amend its charge that D was a habitual vehicular substance offender (“HVSO”) by removing one of the three predicate convictions the State had originally cited. The amendment did not prejudice D.

Two officers were investigating a single-vehicle accident in Washington County. One of the officers was accompanied by a teenager who was riding along with the officer. A tow truck had arrived on the scene. While intoxicated, D crashed his truck into the police car and tow truck. D’s truck also struck one of the officers in the legs and flying debris struck the teenager. The State alleged, *inter alia*, that D operated his truck with a BAC of at least .15% and that he was an HVSO. In support of the latter, the State cited three convictions, including a 2006 Floyd County conviction for OWI as a Class A misdemeanor. At the end of trial, the State asked the court to remove the 2006 Floyd County conviction from the HVSO charge. The Tr. Ct. granted the request, leaving only two offenses as predicate convictions. D was convicted of the OWI charge and was adjudicated as an HVSO.

D claimed that removing the 2006 Floyd County conviction from the HVSO charge “eviscerated” his defense because the offense “had been modified such that it no longer qualified as a prior unrelated vehicular offense.” However, this argument relies on the mistaken assumption that three prior unrelated convictions are needed to adjudicate someone as an HVSO; the statute only requires two, as long as one of the convictions was entered within ten years of the date of the instant offense, which the State did, in fact, prove here. See Ind. Code § 9-30-15.5-2(a). Held, judgment affirmed.

TITLE: Wooden v. State

INDEX NO.: K.9.c.2.

CITE: (10-30-01), 4th Dist., Ind. App. 757 N.E.2d 212

SUBJECT: Instruction on elements of operating while privileges forfeited for life - no fundamental error

HOLDING: On appeal of his conviction for operating vehicle while privileges forfeited for life, D failed to show that jury instruction on elements of offense constituted fundamental error. Instruction given to jury provided that "elements of this offense are that D must be: 1) A person who 2) operates a motor vehicle 3) after the person's driving privileges are forfeited for life. D argued that instruction was erroneous because it did not inform jury that additional element of offense was that he knew or should have known that his driving privileges were forfeited. Whether or not D's knowledge of forfeiture of his driving privileges is actually element of offense, trial Ct.'s instructions did not mislead jury concerning law of case & knowledge requirement. Jury was also instructed that "knowledge, which is an essential element to be proved herein, may be inferred from the facts & circumstances as shown by the evidence." Held, conviction affirmed.

K. CRIMES

K.9. Motor vehicles

K.9.c.3. Operating vehicle after lifetime suspension (IC 9-30-10-17)

TITLE: Pillow v. State

INDEX NO.: K.9.c.3.

CITE: (4/24/2013), 986 N.E.2d 343 (Ind. Ct. App. 2013)

SUBJECT: Inaction by BMV does not nullify D's conviction for operating while driving privileges forfeited for life

HOLDING: Court affirmed D's conviction for Class C felony operating motor vehicle after driving privileges are forfeited for life, even though neither his BMV driving record nor the 2010 judgment convicting him of a Class D felony driving as habitual traffic offender indicated his driving privileges were forfeited for life. A person who is convicted of Class D felony operating as HTV forfeits the privilege of operating a motor vehicle for life. The State was not obliged to prove D knew of his lifetime forfeiture. Knowledge of a lifetime forfeiture is not an element of Ind. Code 9-30-10-17, so proof of knowledge is not necessary to sustain a conviction for the Class C felony. Brock v. State, 955 N.E.2d 195 (Ind. 2011).

Nor was D's conviction improper due to the BMV's failure to update D's driving record to reflect his lifetime suspended license at the time of his offense. D's lifetime suspension was imposed by Ind. Code 9-30-10-16(c), and Court declined his invitation to hold the BMV's inaction nullifies that statutory requirement. Held, judgment affirmed.

TITLE: Tuell v. State

INDEX NO.: K.9.c.3.

CITE: (1/15/2019), 118 N.E.3d 33 (Ind. Ct. App. 2019)

SUBJECT: No double enhancement -- Habitual offender and Level 5 felony operating a motor vehicle after lifetime license forfeiture

HOLDING: Because D qualified under statute to be charged for a level 5 operating a motor vehicle after forfeiture of license for life, his status under that statute as well as his eligibility to be charged under the habitual offender statute was not an impermissible double enhancement. The plain language of the habitual offender statute (IND. CODE 35-50-2-8(e)) explicitly authorizes such a double enhancement.

K. CRIMES

K.9. Motor vehicles

K.9.d. Implied consent/refusal (Ind. Code 9-30-6-1 and 3, formerly 9-11-4-1 and 3(b))

TITLE: Brown v. State

INDEX NO.: K.9.d.

CITE: (5th Dist., 9-16-02), Ind. App., 774 N.E.2d 1001

SUBJECT: Police may obtain search warrant following refusal to submit to chemical test

HOLDING: Indiana's implied consent law, Ind. Code 9-30-6-1 et seq., does not preclude a law enforcement officer from obtaining a search warrant to obtain a sample of a person's blood once a chemical test has been refused. D argued that use of search warrant is precluded because it is not specifically provided for in Ind. Code 9-30-6-7(b), which sets forth what arresting officer is required to do in event a driver refuses to submit to chemical test. Prohibiting use of search warrant once driver has refused to consent to chemical test would be inconsistent with implied consent law's underlying goal of protecting public from threat posed by presence of drunk drivers on highways. Justice v. State, 552 N.E.2d 844 (Ind. Ct. App 1990). Ct. concluded that legislature did not intend provisions of implied consent law to act either individually or collectively to prevent law enforcement officer from obtaining blood sample pursuant to search warrant. Held, judgment affirmed.

TITLE: Burnell v. State

INDEX NO.: K.9.d.

CITE: (8/23/2016), 56 N.E.3d 1146 (Ind. 2015)

SUBJECT: Equivoal response to implied consent advisement constituted refusal

HOLDING: A refusal to submit to a chemical test occurs when the conduct of the motorist is such that a reasonable person in the officer's position would be justified in believing the motorist was capable of refusal and manifested an unwillingness to submit to the test. Here, after failing field sobriety tests, D never assented to a police officer's request to submit to a chemical test. Officer informed D that refusing the test would result in suspension of her license for two years because she had a prior recent drunken driving conviction. After not getting a clear answer, the officer said to D, "Okay, so I need an answer. Are you willing to take the test or not?" She replied, "Well, I mean if I take it, I'm going to jail," then said, "Well, if I refuse, I'm going to jail either way. So yeah, I guess I gotta take it." But then D stepped away from the officer twice and told him not to touch her, prompting officers to grab and handcuff her, deeming her behavior a refusal to submit to the test. D never verbally refused to take a chemical test and her behavior was not as defiant as in other cases. However, even without saying "no" or "I refuse," a refusal nonetheless may be established on the basis of conduct alone if the motorist has clearly been asked to take a test. In short, a physical failure to cooperate can amount to a refusal. The record here shows D clearly heard and understood the officer's opportunity to take a chemical test. She thus was capable of refusal. Based upon this evidence, Tr. Ct. did not abuse its discretion in concluding that a reasonable person in the officer's position would believe that D manifested an unwillingness to submit to the chemical test. Held, transfer granted, Court of Appeals' opinion at 44 N.E.3d 771 vacated, denial of judicial review of administrative driver's license suspension affirmed.

TITLE: Dalton v. State

INDEX NO.: K.9.d.

CITE: (5th Dist., 7-16-02), Ind. Ct. App., 773 N.E.2d 332

SUBJECT: Probable cause for second chemical test - operating under influence of controlled substance

HOLDING: Tr. Ct. did not err in denying D's petition for reinstatement of his driver's license, which was suspended for refusal to take second chemical test. Evidence showed that D crashed his car, then fled scene. He smelled of alcohol, had bloodshot eyes, slurred speech, & had abusive attitude toward police officer. D fumbled with items in his pocket & dropped them when asked for identification. He failed three field sobriety tests & portable breath test. Officer administered breathalyzer test because D did not want to go to hospital for chemical test. Test results revealed alcohol concentration equivalent (ACE) to .06%.

Ct. concluded that even though D's ACE was only .06%, this did not eliminate probable cause that he was operating his vehicle under influence of controlled substance. Officer was trained drug recognition expert & did not believe .06% ACE result was consistent with his observations of D's condition & behavior. Because D was abusive & refused to cooperate, officer was unable to carry out drug recognition examination. Officer then offered D additional chemical test to which D refused.

Ct. held that totality of circumstances herein, even after breathalyzer results, provided sufficient evidence that D may have operated his vehicle while under influence of some type of controlled substance; thus, because officer had probable cause to offer second test, D's refusal to submit to that test constituted violation of Indiana's Implied Consent Law, Ind. Code 9-30-6-2. D offered following arguments to justify his refusal of offered chemical test, which Ct. rejected: 1) he tested negative on vertical gaze nystagmus test, designed to determine whether suspect is under influence of certain categories of drugs; 2) officer did not allow D to consult with attorney before deciding whether or not to submit to test; 3) officer misled D as to number of tests he was required to take; & 4) offered blood or urine test was an illusory request because officer could not lawfully administer those tests. Held, judgment affirmed; Sullivan, J., concurring, disagreed with majority's view that because D "may have" operated vehicle while under influence, such speculative conclusion provides requisite probable cause. Rather, officer must have had reasonable cause to believe that D probably in fact did so, as in this case.

TITLE: Diehlman v. State

INDEX NO.: K.9.d.

CITE: (4th Dist. 6/19/89), Ind. App., 539 N.E.2d 507

SUBJECT: Implied consent - refusal; civil review not binding in DWI prosecution

HOLDING: Tr. Ct. did not err in refusing to give D's tendered instruction that jury must accept as law of case that D did not willfully refuse to take breath test. D was charged with DWI. His license had been suspended following failure to provide sufficient breath sample for breath test, pursuant to Ind. Code 9-11-4-9. D had obtained judicial review of this suspension, pursuant to Ind. Code 9-11-4-10, which resulted in finding that he had not willfully refused to consent to breath test. D argues that that determination became law of case as to that issue. State counters that review proceeding had no effect on criminal prosecution, & that instruction would invade province of jury. Ind. Code 9-11-4-10 establishes civil proceeding for review of suspension, with burden of proof on D. Determinations of civil Ct., when offered to prove underlying facts of civil matter, are not admissible as evidence in criminal proceeding. Lasher v. Gerlach 23 N.E.2d 296. Since civil determination is not admissible as evidence, it cannot be law of case. Thus, D's tendered instruction would invade province of jury, by mandating evidentiary conclusion. Held, conviction affirmed.

TITLE: Griswold v. State
INDEX NO.: K.9.d.
CITE: (1st Dist.; 2-18-00), Ind. App., 725 N.E.2d 416
SUBJECT: Implied consent laws - not unreasonable search & seizure
HOLDING: Implied consent laws do not violate Fourth Amendment of United States Constitution & Article 1, § 11 of Indiana Constitution. Person who operates vehicle impliedly consents to submit to chemical test as condition of operating vehicle in Indiana. Ind. Code 9-30-7-2. Law enforcement officer may offer chemical test to any person who officer has reason to believe operated vehicle that was involved in fatal accident or accident involving serious bodily injury. Ind. Code 9-30-7-3. Such person must submit to chemical test offered by law enforcement officer in order to comply with State's implied consent law. Ind. Code 9-30-7-2. Person who refused to submit to chemical test offered under this chapter commits Class C infraction, & Ct. may suspend person's driving privileges for period of not more than one year. Ind. Code 9-30-7-5. Here, D claimed implied consent laws resulted in unreasonable search & seizure because laws eliminated constitutional requirement of probable cause. However, laws do not require that person involved in accident submit to chemical test but merely provide that officer may offer chemical test. Although D could be sanctioned for refusal to submit to chemical test, D retained option to refuse. Because implied consent laws do not require search or seizure, they do not violate right to be free from unreasonable searches & seizures. Thus, Tr. Ct.'s denial of motion to suppress affirmed.

RELATED CASES: Cochran, App., 771 N.E.2d 104 (rejecting D's argument that warrantless chemical test is per se unreasonable absent exigent circumstances & that Ind. Code 9-30-6-2 can pass constitutional muster only if its application is restrained by requirements of Ind. Code 9-30-6-6(g), which provides mechanism to compel reluctant physician to draw blood sample); Brown, App., 744 N.E.2d 989 (blood draw screening for each & every legislatively proscribed substance was not overly broad because Ind. Code 9-30-7-3(b) places no restriction on number of tests that may be administered).

TITLE: Ham v. State
INDEX NO.: K.9.d.
CITE: (05-03-05), Ind., 826 N.E.2d 640
SUBJECT: Implied consent jury instruction - refusal as evidence of intoxication
HOLDING: Tr. Ct. erred in giving final jury instruction indicating that D's refusal to submit to a chemical test may be considered as evidence of intoxication. Ind. Code 9-30-6-3 only says that a refusal is admissible into evidence, not that it is evidence of intoxication. Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of case have long been disapproved. Ludy v. State, 784 N.E.2d 459 (Ind. 2003). Whether a D's refusal to submit a chemical test is evidence of intoxication or merely that the D refused to take the test is for lawyers to argue & the jury to decide. An instruction from the bench one way or the other misleads the jury by unnecessarily emphasizing one evidentiary fact. In so holding, Ct. disapproved of contrary holdings in Luckhart v. State, 780 N.E.2d 1165 (Ind. Ct. App 2003) & Hurt v. State, 553 N.E.2d 1243 (Ind. Ct. App 1990). While instruction was erroneous, error was harmless in light of evidence State produced of D's guilt. Held, transfer granted, Ct. App.' opinion at 810 N.E.2d 1150 vacated, judgment affirmed.

TITLE: Harts v. State

INDEX NO.: K.9.d.

CITE: (3d Dist. 11/10/82) Ind. App., 441 N.E.2d 714

SUBJECT: Implied consent - probable cause (P.C.) to request test

HOLDING: Citizen may be asked to take breathalyzer test when "reasonable grounds" (facts & circumstances known to officer would warrant belief by prudent officer that DWI had been committed) exist for such a request. Bowlin, App., 330 N.E.2d 353. See Ind. Code 9-4-4.5-4(a)(1) for factors which may be considered when determining whether P.C. exists to request citizen to submit to breathalyzer. Here, D was observed driving erratically; became argumentative & belligerent upon being questioned & had alcohol on his breath. Ct. finds P.C. existed to request D to submit to breathalyzer, *citing* Clark, App., 372 N.E.2d 185; Davis, App., 367 N.E.2d 1163. Held, no error in one-year license suspension for refusal to submit to breathalyzer.

RELATED CASES: State v. Johnson, App., 503 N.E.2d 431 (DISSENT by Robertson contends taking of breath sample, without probable cause to arrest D, cannot be justified on basis of D's actual or implied consent to such tests; dissent contains excellent discussion of law).

TITLE: Harts v. State
INDEX NO.: K.9.d.
CITE: (3d Dist. 11/10/82) Ind. App., 441 N.E.2d 714
SUBJECT: Refusal to take breathalyzer - form
HOLDING: Language of Ind. Code 9-4-4.5-3(d) concerning form to be signed by person refusing to take breathalyzer is directive. Bowlin, App., 330 N.E.2d 353 (holding statutory language concerning taking of license of citizen refusing to take breathalyzer & delivery of license to judge is directive). Here, D contends state failed to prove that form signed by D indicating his refusal to submit to breathalyzer was supplied by the commissioner of motor vehicles (as stated in Ind. Code 9-4-4.5-3(d)). Ct. construes language of statute as directive, but comments that issue would be "more troubling" absent such clear evidence of D's refusal to submit to test (testimony of 2 police officers & a videotape). Held, no error in one-year license suspension for refusal to submit to breathalyzer.

TITLE: Hassfurther v. State

INDEX NO: K.9.d.

CITE: (5/24/2013), 988 N.E.2d 811 (Ind. Ct. App 2013)

SUBJECT: Chemical breath test refusal - probable cause to offer test

HOLDING: Tr. Ct. properly denied D's petition for judicial review of his refusal to take a chemical test for intoxication. Evidence established that police officer responded to a dispatch of a possible drunk driver who was operating a Toyota Tundra with an emblem of a fox on the back of a vehicle. Concerned citizen identified herself to the dispatcher, described the truck and driver, and reported that she followed the vehicle to a Shell Mart and observed the driver walk inside. When officer arrived at the store, he corroborated citizen's information and observed that D's speech was slurred, he smelled strongly of alcohol, and had bloodshot eyes. Officer's observations of vehicle and D's demeanor at store, as well as D's admissions that he was the driver of the Toyota Tundra and "had been drinking the night before," were sufficient to establish that officer had probable cause to believe that D was operating a vehicle while intoxicated. Hence, there was also probable cause for officer to offer D a chemical test for intoxication. Held, judgment affirmed.

Note: Court also concluded D failed to show that he was not adequately informed about a two-year rather than one-year license suspension due to his prior DUI conviction if he refused a chemical test. Although there is no express statutory requirement that law enforcement officials must inform a D that a refusal will result in a two-year suspension if he or she has a prior conviction for operating a vehicle while intoxicated, Court suggested that it "may well be the better practice for police departments to include the two-year suspension provision on the implied consent card."

TITLE: Hurley v. State

INDEX NO.: K.9.d.

CITE: (5/31/2017), 75 N.E.3d 1074 (Ind. 2017)

SUBJECT: Evidence did not support BAC refusal

HOLDING: Tr. Ct. erred by denying Defendant's motion to vacate her refusal of a breath test. A person does not refuse a chemical test if the officer failed to comply with the rules for conducting it. Without the officer's strict compliance, the defendant cannot refuse the test – and any suspension of driving privileges premised on refusing the test cannot stand. Unless a person clearly manifests an unwillingness to submit to a chemical breath test, Title 260, Section 2-4-2 of the Indiana Administrative Code requires a law enforcement officer to administer a second test if the first returns an "insufficient sample" message. A person can manifest an unwillingness to submit to the breath test in varying ways, including verbally refusing to submit, by pretending to blow, or by repeatedly blocking the machine's mouthpiece with his or her lip.

Here, Defendant submitted to a portable breath test and field sobriety tests at the scene and she agreed to take a certified breath test. She blew three times into the certified breath test, but the machine printed a ticket stating "insufficient sample." The officer determined that her failure to provide a sufficient sample was a refusal, and he did not offer her a second test. But there was no evidence that Defendant ever manifested an unwillingness to submit to the breath test. The officer said she was "completely cooperative throughout the process." As such, the record does not support the conclusion Defendant refused and, pursuant to the Indiana Administrative Code, the officer should have offered her a second test. Held, transfer granted, Court of Appeals' opinion at 56 N.E.3d 127 vacated and judgment reversed and remanded with instructions to direct the BMV to vacate its suspension of Defendant's license and reinstate driving privileges.

TITLE: Johnson v. State

INDEX NO.: K.9.d.

CITE: (3d Dist. 6/23/83) Ind. App., 450 N.E.2d 123

SUBJECT: Consent to breathalyzer - voluntariness

HOLDING: Tr. Ct. did not err in admitting results of breathalyzer test over D's objection that his consent to test was not made voluntarily. Here, D was stopped for erratic driving. Officer smelled alcohol & asked D to take field sobriety test. D consented. Officer then asked D to accompany him to station for breathalyzer test. D consented. D contends officer coerced him to take test by advising him of possible penalty for refusing to take test. Ct. finds officer made no promises or threats; he did not use or threaten physical force or trick D into consenting to test. Knowledge of possible penalty for refusal to submit to test is not so inherently coercive as to negate consent. Held, no abuse of discretion.

TITLE: Jacks v. State

INDEX NO.: K.9.d.

CITE: (5th Dist., 09-06-06), Ind. App., 853 N.E.2d 520

SUBJECT: Implied consent advisement - use of refusal against D

HOLDING: In operating while intoxicated prosecution, D was not entitled to receive an advisement warning him that evidence of his refusal could be admitted in a criminal prosecution against him. Plain & unequivocal language of Ind. Code 9-30-6-7 states that a person only need be advised that refusing to submit to a chemical test will result in suspension of his or her driving privileges. Furthermore, text of Ind. Code 9-30-6-3(b) does not provide any requirement that a suspected driver be advised that his refusal can be admitted into evidence in a criminal prosecution. Suspects have no constitutional right to refuse a test designed to produce physical evidence in form of a breath sample. Davis v. State, 174 Ind. App. 433, 367 N.E.2d 1163 (Ind. Ct. App 1977). For this reason, content of statutory advisements regarding consequences of such a refusal will not, in most instances, be dispositive or of constitutional magnitude. Implied consent advisement adequately advised D of the consequences of refusing to submit to a chemical test. Evidence of his refusal was properly admitted at trial. Held, judgment affirmed.

TITLE: L.W. v. State
INDEX NO.: K.9.d.
CITE: (11/23/2022), Ind. Ct. App., 199 N.E.3d 1225
SUBJECT: Suppression of blood draw results for juvenile who was not afforded meaningful consultation

HOLDING: In this interlocutory appeal, L.W. appealed the denial of her motion to suppress the results of a blood draw taken after she was a driver involved in a fatal accident. L.W. moved to suppress the blood draw and resulting evidence because she was seventeen years old and the officer who took her for the blood draw and obtained her consent did not allow for her to have meaningful consultation with her mother who showed up at the scene of the accident.

A blood draw is a search under both the Fourth Amendment and Indiana Constitution Art. 1, Sec. 11. A warrantless search is per se unreasonable under both constitutions unless there is a valid exception to the warrant requirement. One exception is consent, and under I.C. 9-30-7-2, drivers involved in crashes involving serious injury or death impliedly consent to a blood draw. However, a driver may refuse consent in that circumstance, and if they do so, the State must have probable cause to proceed over the driver's objection. Here, L.W. consented after being read an implied consent warning, but she was not given a chance to discuss that decision with her mother prior to the blood draw.

I.C. 31-32-5-1, the juvenile waiver-of-rights statute, requires that a child be given an opportunity to speak privately with a custodial parent before waiving any rights (unless the child waives his or her rights with the assistance of an attorney), and I.C. 31-32-5-2 provides that the protections of the juvenile waiver-of-rights statute can only be waived after being notified of that protection, in the presence of the juvenile's parent, and the juvenile knowingly and voluntarily waives that right. Here, because L.W.'s mom was present on the scene, it would have taken 10 seconds for the police to notify L.W. and mom of the right to meaningful consultation, but it did not happen.

Exigent circumstances could also justify a warrantless blood draw. However, here there was no probable cause to believe that L.W. was intoxicated. To the contrary, the police openly stated that no one was accusing L.W. of being intoxicated before the draw, and noted no signs typically used to show possible impairment, so exigent circumstances were not present that could otherwise justify a warrantless blood draw. "Absent a valid consent or exigent circumstances, the State's warrantless draw of L.W.'s blood violated her Fourth Amendment rights."

The State contended that harmless error could be applied, but the Court of Appeals noted that harmless error is a standard that is applied after a trial in which error has occurred, not prior to trial. Thus, the Court reversed the denial of the motion to suppress and remanded for further proceedings.

TITLE: Parker v. State

INDEX NO.: K.9.d.

CITE: (2d Dist., 11/10/88), Ind. App., 530 N.E.2d 128

SUBJECT: Implied consent - no right to revoke refusal

HOLDING: Neither due process nor implied consent statutes require that D be given chemical sobriety test following refusals to take such test. Officer who stopped D for DUI testified that he offered D chemical sobriety test. Following D's refusal, officer informed him that refusal would result in suspension of D's driving privileges. D refused again. Later at lockup, D requested to take chemical test, & officer refused to provide it. D argues that this denial violated his due process rights & his statutory rights under implied consent statute. Right to due process does not include right to be given chemical sobriety test in all circumstances. Annot., 95 A.L.R.3d 710 (1979). To hold otherwise would be to transform due process right into power to compel state to gather exculpatory evidence. Id. Other states have so held. [Citations omitted]. Purpose of implied consent statute was to add weapon to fight against drunk driving. [Citations omitted]. Ind. Code 9-11-4-2 requires officer with probable cause to believe person has committed offense of DUI to offer chemical test. Ind. Code 9-11-4-7(a) requires officer to inform person who refuses test of consequences of refusal, & Ind. Code 9-11-4-7(b)(1) requires officer to take person's drivers license if he/she refuses after this advisement. Officer here adhered to these procedures. Statute does not require officer to provide test if earlier refusals are subsequently retracted. D points to Ind. Code 16-13-6.1-1, which requires that any person taken to lockup or jail be evaluated at earliest possible time for non-alcoholic factors which may be contributing to appearance of intoxication. However, this does not require state to provide chemical sobriety test. Held, conviction affirmed.

TITLE: Pedigo v. State

INDEX NO.: K.9.d.

CITE: (4/13/20), Ind. Ct. App., 146 N.E.3d 1002

SUBJECT: Implied consent statute in cases of serious injury or death authorizes blood draw without probable cause.

HOLDING: Addressing a matter of first impression, Court held that Ind. Code § 9-30-7-3 permits a law enforcement officer to offer a subsequent chemical test to a person who the officer has reason to believe operated a vehicle that was involved in a fatal accident or an accident involving serious bodily injury when the officer has first administered a portable breath test that produces negative results, even if the officer does not have probable cause to believe the person is under the influence of a controlled substance or another drug. Nothing in the statute prohibits an officer from offering more than one test following an accident resulting in death or serious bodily injury. Evidence of the blood draw in this case was properly admitted because the phlebotomist followed a protocol approved by a pathologist in compliance with the statute.

TITLE: Reynolds v. State

INDEX NO.: K.9.d.

CITE: (5th Dist., 8-27-98), Ind. App., 698 N.E.2d 390

SUBJECT: Judicial review of breath test refusal - burden of proof; due process

HOLDING: Ind. Code § 9-30-6-10(f), which requires D to show by preponderance of evidence that Tr. Ct.'s suspension of his license was erroneous, does not violate Due Process Clause of United States Constitution or Due Course of Law provision of Indiana Constitution. D argued that statute improperly places burden of proof on licensee to show that he did not refuse to submit to chemical breath test, which creates risk of erroneously depriving that person of his license. In rejecting claim that State should bear burden of showing that licensee refused breath test, Ct. noted that: 1) police officers are not likely to misrepresent whether licensee has refused to submit to chemical test; 2) at time licensee is before Ct. on his petition for judicial review of license suspension, State has met its initial burden of showing that licensee has refused through probable cause affidavit; & 3) during hearing, licensee has ability to present evidence & cross examine arresting officer and/or breath test operator. Thus, placing burden of going forward with evidence at judicial hearing does not create substantial risk of erroneously depriving individual of his license. Held, judgment affirmed.

Note: Ct. also rejected claim that Indiana & U.S. Constitutions guarantee D jury trial on his refusal to submit to chemical breath test.

TITLE: Roberts v. State

INDEX NO.: K.9.d.

CITE: (1st Dist. 2/14/85) Ind. App., 474 N.E.2d 144

SUBJECT: Implied consent/refusal - sufficiency

HOLDING: Tr. Ct. properly determined D refused chemical test for intoxication offered by police. Ind. Code 9-11-4-1 et seq. Here, D's truck was struck by car crossing center line & landed on its side. Police smelled alcohol on D's breath, pulled him from truck & asked him to take breathalyzer test. D refused. Officer informed D refusal would result in suspension of driving privileges. D refused again. Officer submitted probable cause affidavit to prosecutor who filed it together with information charging DWI. County Ct. found probable cause & refusal. BMV suspended D's license for one year. D petitioned for prompt judicial hearing to determine refusal, which resulted in finding of refusal. D contends head injuries received in accident caused dizziness & he had no recollection of being offered/refusing test. Officers testified D was coherent/did not complain of dizziness/refused medical treatment. D argues due process requires knowing refusal. Ct. notes prior statutes did require knowing refusal, but provision was repealed. Ct. *cites* IL & OH cases finding "knowing" refusal would nullify effect of statute (make highways safer by removing drunk drivers). Driver may not avoid consequences of refusal to submit to test for intoxication by arguing intoxication rendered him/her incapable of refusing. [Citations omitted.] Mens rea is not necessary in civil matters absent statutory requirement. Proceedings under implied consent law (civil statute) are civil in nature. Held, no error.

RELATED CASES: Ruge v. Kovach, 467 N.E.2d 673 (implied consent law constitutional).

TITLE: State v. Bonvie

INDEX NO.: K.9.d.

CITE: 936 A.2d 1291 (2007)

SUBJECT: OWI: Good faith consent can nullify earlier refusal

HOLDING: Vermont Supreme Court held a suspected drunken driver's good-faith consent to take a breathalyzer test after initially refusing to can negate the refusal if test is taken within the window required by the implied-consent statute and certain other conditions are met. Under the state's implied consent statute, a motorist's refusal to take the test results in an automatic license suspension and is admissible as evidence of guilt in a criminal proceeding. Court also listed a number of factors that should be considered when a suspect agrees to take a breath test after an initial refusal. These include: (1) when consent was given, i.e., within a "reasonable time" or within 30 minutes of attempting to contact an attorney; (2) whether the test taken after delayed consent would still be accurate; (3) the availability of the testing equipment when consent was given; (4) whether processing was completed when consent was given, such that the State suffered substantial inconvenience or added expense; and (5) whether the individual was in police custody and under observation during the time between the initial refusal and the consent.

TITLE: State v. Huber

INDEX NO: K.9.d.

CITE: (3d Dist. 7/3/89), Ind. App., 540 N.E.2d 140

SUBJECT: Implied consent - advisement; sufficiency

HOLDING: Officer's advisement to D that license "may" be suspended if he refused to take breathalyzer test was not adequate. D was stopped for speeding & given advisement above. After D refused to submit to breathalyzer test, his drivers license was suspended. At hearing on suspension, Tr. Ct. found that advisement had not been adequate, & state appeals. On appeal, state argues that Tr. Ct. erroneously based decision on finding that D's refusal was not knowing. Because Tr. Ct. made no such finding, issue is restated as whether advisement was adequate. Indiana's Implied Consent Law provides for license suspension if individual refuses to submit to breathalyzer test after having been advised that refusal will result in suspension of driving privileges. Although statute does not impose mens rea requirement, it does require that refusal follow advisement of consequences. Roberts 474 N.E.2d 144. Other jurisdictions which have considered this issue have ruled that language used by officer must adequately convey to driver strong likelihood that adverse result will follow refusal. [Citations omitted.] Here, advisement that license "may" be suspended was inadequate to advise driver of consequences. Held, Tr. Ct's judgment affirmed.

RELATED CASES: McAnalley, 134 N.E.3d 488 (Ind. Ct. App. 2019) (Tr. Ct. erred by instructing the jury on the specific nature of D's prior felony and admitting evidence of the specific prior felony, when D had offered to stipulate to his status as a person who could not lawfully possess a firearm); Hassfurther, 988 N.E.2d 811 (Ind. Ct. App 2013) D failed to show that he was not adequately informed about a two-year rather than one-year license suspension due to his prior conviction if he refused a chemical test; although there is no express statutory requirement that law enforcement officials must inform a D that a refusal will result in a two-year suspension if he or she has a prior conviction for operating a vehicle while intoxicated, Court suggested that it "may well be the better practice for police departments to include the two-year suspension provision on the implied consent card"); Ray, App., 886 N.E.2d 43 (when read together, the implied consent statutes do not require that D again be advised of the consequences of refusing a chemical test for intoxication after that individual has refused to submit to such a test).

TITLE: State v. Schulze

INDEX NO: K.9.d.

CITE: (8/26/2014), 16 N.E.3d 441 (Ind. Ct. App 2014)

SUBJECT: Tr. Ct. erred in reinstating driving privileges

HOLDING: Tr. Ct. erred in reinstating D's driving privileges on basis that officer who offered the implied consent chemical test, which D refused, was not qualified to give the test. Ind. Code 9-30-6 does not require that the arresting officer be trained on DataMaster machine before informing a driver of the implied consent law and determining whether the arrestee is willing to submit to a chemical test. The arresting officer's offer for the chemical test was not "illusory" because the officer could have found another officer at the jail who was qualified to give the test, or he could have transported D to a hospital or other facility for the test. Held, judgment affirmed.

TITLE: Steward v. State

INDEX NO: K.9.d.

CITE: (5th Dist., 08-18-94), Ind. App., 638 N.E.2d 1292

SUBJECT: No "refusal" of chemical test where not properly offered

HOLDING: Where D was taken to police station & no proper personnel were present to take urine test from him, he did not "refuse" to take chemical test for intoxication, because it could not be properly "offered." D was stopped because of defective headlight, & officer observed part of burned marijuana cigarette on floor of car, & that D moved slowly & had red & glassy eyes. D was not given any field sobriety tests or breathalyzer but was arrested for possession of marijuana & taken to jail. At jail he was asked to give a urine sample to test for drugs but was unable to provide one within required three hours. He was then charged with driving while intoxicated based on refusal to submit to chemical test pursuant to implied consent law.

Ct. first noted that Tr. Ct.'s finding of refusal to submit to chemical test is appealable final judgment, & that review of decision is limited to whether evidence is sufficient to support finding of probable cause to stop driver & refusal to submit to chemical test. Although State argued that issue of whether "qualified person" offered test was outside scope of review, Ct. found it was, because test cannot be "refused" unless it is "offered." Zakhi, App., 560 N.E.2d 683, Gibbs, App., 444 N.E.2d 893. Ct. then noted that Ind. Code 9-30-6-6 provides that urine sample may be obtained by physician, nurse, emergency medical technician, or paramedic, & that samples be obtained in medically accepted manner. In instant case these requirements were not followed, & therefore Ct. found there was no proper "offer" of test, as required by Implied Consent law, Ind. Code 9-30-6-2, & D could not have refused test. Held, reversed.

RELATED CASES: Schulze, 16 N.E.3d 441 (Ind. Ct. App 2014) (even though officer who offered implied consent for chemical test wasn't qualified to give the test, Tr. Ct. erred in reinstating D's driving privileges; offer of test was not "illusory" as officer could have found another officer to administer test had D not refused to take test; see full review, this section); Monjar, App., 876 N.E.2d 792 (when officer offers to take D to hospital for blood draw, but D refuses, such an offer is valid & not an illusory request).

TITLE: Thacker v. State
INDEX NO.: K.9.d.
CITE: (4th Dist. 11/10/82) Ind. App., 441 N.E.2d 708
SUBJECT: Implied consent/refusal - sufficiency
HOLDING: Recalcitrant behavior which physically impedes or threatens to impede administration of breathalyzer test constitutes refusal. Here, D gave 2 verbal consents but because of his extreme violence (kicking police officers, refusing to leave squad car), officers did not attempt to administer test, deeming his conduct a refusal. Ct. relies on cases where feigned attempts to perform test or equivocation evidenced by requesting an attorney were held refusals: Jaremczuk, App., 380 N.E.2d 615 (D puffed out cheeks & pretended to blow into mouthpiece); Hatch, App., 378 N.E.2d 949 (D failed to blow into mouthpiece with sufficient force to fill sample capsule); Steward, App., 436 N.E.2d 859 & Davis, App., 367 N.E.2d 1163 (Ds wanted to consult attorneys before taking test). In Davis, Ct. relied on Swenumson v. IA Dept. of Public Safety, (1973) Iowa, 210 N.W.2d 660: "anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so." Held, license suspension affirmed.

TITLE: Todd v. State

INDEX NO.: K.9.d.

CITE: (3d Dist. 01/29/91), Ind. App., 566 N.E.2d 67

SUBJECT: Breath test refusal - adequacy of advisement

HOLDING: Telling D that refusal to submit to chemical breath test may result in license suspension for one year is not sufficient to support knowing refusal under the Implied Consent Law. Upon arrest officer only advised D that his license may be suspended for one year for refusal of chemical test. D then refused to take test & was convicted under Ind. Code 9-11-4-7. Ct. App. found statutory language was unequivocal, & failure to inform that refusal will result in suspension (prior to effective date of Ind. Code 9-11-3-1.5) was not sufficient to support finding of refusal. Held, conviction for refusal of test vacated, affirmed on other issues.

TITLE: Upchurch v. State
INDEX NO.: K.9.d.
CITE: (1st Dist., 12-30-05), Ind. App., 839 N.E.2d 1218
SUBJECT: BAC evidence ticket stating "INVALID" is not a refusal
HOLDING: Tr. Ct. erred in denying D's verified petition for judicial finding of no refusal in operating while intoxicated case. D twice submitted to BAC tests with the evidence ticket stating "SUBJECT SAMPLE INVALID" on both occasions. D informed administering officer that she suffered from asthma & officer replied anyone could take test, even someone with emphysema. The officer did not offer D an alternative chemical test, but rather found that D refused to take the test & arrested her. Ct. found that officer failed to comply with Title 260, section 1.1-4-8 of the Indiana Administrative Code, which states that if "SUBJECT SAMPLE INVALID" is printed on the evidence ticket of a second breath test, a testing officer should *obtain an alternate chemical test for ethanol or perform the breath test on another evidentiary breath test instrument. (Ct.'s emphasis)*. An evidence ticket with "SUBJECT SAMPLE INVALID" on it does not permit an officer to enter the test as a refusal, only when "SUBJECT SAMPLE, INCOMPLETE" is printed may the officer do so. Held Tr. Ct.'s denial of D's petition for judicial finding of no refusal reversed; Barnes, J., dissenting without opinion.

[Ed **note:** Based on its ruling, Ct. did not address D's argument that mouthpiece from first breath test was foreign object requiring officer to wait 20 minutes prior to testing D again. But in footnote, Ct. noted "support" for D's position in instructions of IAC.]

TITLE: Zimmerman v. State

INDEX NO.: K.9.d.

CITE: (4th Dist. 10/2/84) Ind. App., 469 N.E.2d 11

SUBJECT: Implied consent

HOLDING: Even if D had been unable to voluntarily consent to taking of blood sample, D impliedly consented under Ind. Code 9-4-4.5-1 [now Ind. Code 9-11-4-1]. Statute provides that any person who drives automobile on public highways of IN shall be deemed to have given implied consent to submit to chemical test for intoxication when asked to do so by law enforcement officer. Chemical tests include blood tests. Pollard, App., 439 N.E.2d 177; Shultz 417 N.E.2d 1127. Here, Ct. finds evidence of voluntary consent. Held, no error in denial of motion to suppress.

K. CRIMES

K.9. Motor vehicles

K.9.e. Reckless driving (Ind. Code 9-21-8-52, formerly 9-4-1-561)

TITLE: Crussel v. State

INDEX NO.: K.9.e.

CITE: (3/26/2015), 29 N.E.3d 746 (Ind. Ct. App. 2015)

SUBJECT: Reckless Driving – Endangerment

HOLDING: Where evidence showed that D drove 91 mph in a 55-mph zone, after dark in a rural area with a few houses and three crossroads, evidence was sufficient to support his conviction for reckless driving. D conceded that he drove recklessly at a high rate of speed, but argued that this was not sufficient to prove reckless driving. The State argued that high speed alone may support a conviction for reckless driving, *citing Taylor v. State*, 457 N.E.2d 594 (Ind. Ct. App. 1983); while D argued that it does not, *citing Jackson v. State*, 576 N.E. 607 (Ind. Ct. App. 1991). The Court of Appeals wrote that neither case controls its analysis, focusing instead on the language of the reckless driving statute. The statute required that the state prove that D "recklessly ... drove at such an unreasonably high rate of speed ... under the circumstances as to ... endanger the safety or property of others." Ind. Code 9-21-8-52(a)(1)(A).

Here, D conceded that he drove recklessly at an unreasonably high rate of speed. The state presented evidence that the incident occurred at 10:30 p.m. on a rural road that was straight, with some hills, and with a few houses and three crossroads. D put on evidence that it was dry with no fog, that he could see clearly, that he had lived in the area for 13 years, and that his car was in working condition. The Tr. Ct. weighed the evidence and made a reasonable finding that D's driving had endangered the safety or property of others. The Court of Appeals will not reweigh. Held, judgment affirmed.

TITLE: Jerden v. State
INDEX NO.: K.9.e.
CITE: (6/19/2015), 37 N.E.3d 494 (Ind. Ct. App 2015)
SUBJECT: Error in informing BMV about merged convictions
HOLDING: Tr. Ct. erred in informing BMV that D was found guilty of four reckless driving related charges, where it merged two of the verdicts and thus entered judgments of conviction on only two verdicts.

D was charged with 1) Class B misdemeanor reckless driving; 2) Class A misdemeanor reckless driving; 3) Class C infraction, passing in no-passing zone; and 4) Class C infraction, speeding. The jury found him guilty on all four counts. The Tr. Ct. merged the infractions into the misdemeanors, yet the SR-16 form it sent to the BMV showed D was found guilty of all four counts.

Ind. Code 9-30-13-0.5 directs a Tr. Ct. to forward to the BMV a certified abstract of the record of conviction. The BMV's website shows that it follows this statute, stating that the form is used to inform the BMV that a driver "has been convicted of a citation." Ind. Bureau Motor Vehicles, Suspension, Reinstatement and Insurance Forms, IN.GOV, <http://www.in.gov/bmv>. (Emphasis added). A guilty verdict and a judgment of conviction are not the same thing. Haddix v. State, 827 N.E.2d 1160, 1165 (Ind. Ct. App 2005), trans. denied. Thus, because the statute refers only to convictions, the Tr. Ct. erred in notifying the BMV about the guilty verdicts that did not result in convictions.

Note: The SR-16 form itself is problematic because it does not track the statute, as it directs Tr. Ct.s to also notify the BMV of charges disposed as "dismissed," "not guilty," "nolle prosequi [sic], "vacated," and "deferred." The Court recommended that the BMV update the SR-16 form to avoid confusion. Held, judgment reversed and remanded for Tr. Ct. to correct its notice to the BMV.

TITLE: State v. Goodrich
INDEX NO.: K.9.e.
CITE: (3d Dist. 10/16/86) Ind. App., 498 N.E.2d 9940
SUBJECT: Reckless driving - sufficiency
HOLDING: Ct. finds state failed to prove D acted in reckless manner where evidence established only that vehicle D was driving crossed center line into lanes of oncoming traffic & ended up in yard on opposite side of road, killing a child walking in that yard. Crossing of center line into oncoming traffic lanes is not sufficient to establish reckless conduct. DeVaney 288 N.E.2d 732; State v. Kelsey, App., 325 N.E.2d 218. Having found state failed to establish any evidence on element of recklessness, Ct. finds judgment on evidence was properly granted. Held, judgment on evidence for D affirmed. ON TRANSFER: 504 N.E.2d 1023 (Ind. S. Ct. affirms 3d Dist. opinion; furthermore, Ct. notes where Tr. judge grants judgment to D, even if judge errs in applying law, this acts as acquittal barring second trial, *citing* Smalis v. PA (1986), 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116).

K. CRIMES

K.9. Motor vehicles

K.9.f. Leaving scene of accident (Ind. Code 9-26-1-1 et seq & 9-26-8, formerly 9-4-1-40)

TITLE: Allen v. State

INDEX NO.: K.9.f.

CITE: (2nd Dist., 03-28-06), Ind. App., 844 N.E.2d 534

SUBJECT: Knowledge of property damage sufficient to prove leaving accident scene

HOLDING: Evidence was sufficient for jury to find D guilty of leaving the scene of an accident. D challenged sufficiency because he did not have knowledge of damage to another vehicle under Ind. Code 9-26-1-2. D testified that he stopped after rear-ending another individual's vehicle. The other individual told him there was no damage to her vehicle. The other individual did not testify & D argued this left his claim that he did not know the other person's vehicle was damaged was uncontroverted. Ct. noted it could find no cases discussing whether the State is required to prove the D had actual knowledge of property damage in order to gain a conviction. However, Ct. analogized situation to that in Micinski v. State, 487 N.E.2d 150 (Ind.1986), which involved leaving the scene of an accident involving personal injury. In Micinski, Ct. noted that "the jury may infer that a D knew than an accident occurred or that people were injured from an examination of the circumstances of the event. Where conditions were such that the driver should have known that an accident occurred or should have reasonably anticipated that the accident resulted in injury to a person, the requisite proof of knowledge is present."

Here, Ct. found that circumstantial evidence presented to the jury allowed them to determine D should have reasonably anticipated that the accident resulted in damage. The evidence demonstrated the other individual wrote down D's license number & immediately drove to a police station to report the collision. An officer examined her vehicle & observed fresh scuff marks across the rear bumper & the sides had buckled. D admitted getting out of his vehicle & inspecting his own vehicle, which should have made the damage to the other vehicle apparent. These facts are inconsistent with D's testimony that there was no damage to the other person's vehicle. Held, conviction affirmed.

RELATED CASES: Hudson, 20 N.E.3d 900 (Ind. Ct. App 2014) (circumstantial evidence sufficiently established D should have known he struck and injured pedestrian, where pedestrian's head violently struck hood of D's truck, pedestrian's umbrella was lying on road, D swerved to release object his truck was pushing, attempted quick repairs to front of his truck, and later lied to police about his presence at scene of the accident).

TITLE: Armstrong v. State

INDEX NO.: K.9.f.

CITE: (06-15-06), Ind., 848 N.E.2d 1088

SUBJECT: Failure to stop after accident -- striking injured or deceased party not required

HOLDING: A driver of a vehicle who leaves the scene of an accident resulting in injury or death may be held criminally responsible even if the driver's vehicle did not strike the injured or deceased party. Disagreeing with Ct.'s analysis in Honeycutt v. State, 760 N.E.2d 648 (Ind. Ct. App 2001), Ct. held that a driver's duties set out under Failure to Return to Scene of Accident Resulting in Death statute, Ind. Code 9-26-1-1, are triggered regardless of whether the driver's vehicle struck anyone or anything, so long as driver's vehicle was involved in an accident.

On retroactivity question, Ct. noted that central question to be asked in deciding whether retroactive application of a judicial decision violates due process is whether the D had fair warning that his conduct was criminal at the time he engaged in it. Rogers v. Tennessee, 532 U.S. 451 (2001). Honeycutt was wrongly decided, & this is first opportunity Indiana S.Ct. had to address issue. Based on wording of Ind. Code 9-26-1-1 along with Ct.'s assessment of statute's predecessor, D had fair warning that his conduct--failing to stop after an accident resulting in death--was criminal. That Cts. have rendered decisions later deemed erroneous by higher authority does not entitle criminal Ds to the benefits of those mistakes. United States v. Burnom, 27 F.3d 283 (7th Cir. 1994). Due Process Clause of Fifth Amendment, made applicable to states by the Fourteenth Amendment, did not bar D's prosecution for this offense. Held, transfer granted, Ct. App.' opinion at 818 N.E.2d 93 vacated, judgment affirmed.

See also: Nelson v. State, 848 N.E.2d 1095 (granting transfer & reversing Ct. App.' opinion at 840 N.E.2d 890).

TITLE: State v. Gradison

INDEX NO.: K.9.f.

CITE: (11-30-01), Ind. App., 758 N.E.2d 1008

SUBJECT: Mens rea - failure to stop at accident scene

HOLDING: Proper mens rea required for conviction under Ind. Code 9-26-1-8, failure to stop & remain at scene of accident resulting in personal injury is that D should have known that accident occurred or should have reasonably anticipated that accident resulted in injury. State does not have to show actual knowledge of injury, as such requirement would make it virtually impossible to prove case of hit & run & would reward callous people who refuse to stop & investigate. Micinski v. State, 487 N.E.2d 150. Here, evidence showed that D was driving car when he collided with victims who were riding on scooter. Jury could have reasonably inferred that driver who engineered collision between automobile & scooter should have known or at least should have reasonably anticipated that accident he caused had resulted in some personal injury, even if driver did not knock scooter down or produce more obviously catastrophic damage. Therefore, Tr. Ct.'s judgment on evidence in favor of D was improper & case should have been submitted to jury. Tr. Ct.'s judgment that evidence was legally insufficient to support guilty verdict, even though erroneous, acts as acquittal for double jeopardy purposes & retrial would violate D's rights. Held, judgment reversed.

RELATED CASES: Barton, 936 N.E. 2d 842 (Ind. Ct. App. 2010)(Tr. Ct. properly rejected D's claimed that the State is precluded, as a matter of law, from proceeding against D since it has already been determined that another person caused the death of the victim; there is no requirement that D's vehicle be the one that actually killed victim as long as D should have known he was involved in an accident with injury).

TITLE: Loyd v. State

INDEX NO.: K.9.f.

CITE: (2nd. Dist., 5-8-03), Ind. App., 787 N.E.2d 953

SUBJECT: Leaving scene of accident - sufficiency

HOLDING: Evidence was sufficient to support D's conviction for failure of driver to fulfill duties following accident involving death, Class C felony, Ind. Code 9-26-1-1. Here, D struck & killed a jogger & then fled scene. To convict D, State was required to prove that D failed to immediately stop vehicle at or as close to accident scene involving death as possible. Moreover, State was required to show that D failed to remain at scene to provide name, license, & registration; to determine if injured person needed assistance; & to provide report of accident to police. Specifically, D argued that there was no direct evidence that identified D as operator of vehicle when victim was struck. Circumstantial evidence alone may sustain verdict if evidence supports reasonable inference of guilt. Maul v. State, 731 N.E.2d 438 (Ind. 2000). Anonymous informant reported that D was driver who struck jogger on Michigan Road & that car was covered with tarp & located behind residence at Kessler Boulevard. Police confirmed tipster's information by going to reported location & observing that front end of car was damaged around headlight assembly & window was caved in. Subsequent examination of car showed that paint chips taken from victim & impounded vehicle exhibited same microscopic & physical characteristics. Additionally, parts recovered at scene were also matched to car. Further, D stated to police that his route from work was on Michigan Road & that on the day in question he had worked & had been drunk. State presented sufficient evidence to support D's conviction. Held, judgment affirmed.

TITLE: Micinski v. State

INDEX NO.: K.9.f.

CITE: (1/6/86) Ind., 487 N.E.2d 150

SUBJECT: Leaving scene of accident

HOLDING: Tr. Ct. erred in refusing to give D's tendered instruction (set forth in opinion) which required state to prove D had knowledge that there was an injury accident. Here, D was accused of hitting 2 Notre Dame students who were walking on the road on a foggy night. Students had no recall of accident (they had been drinking & suffered permanent brain damage from accident). D remembered he'd been drinking & had driven in area on night accident occurred but did not recall any accident. Nine months after accident, tip led police to talk with D, who gave them permission to examine his car. Pieces matching damaged grill had been found at scene & paint on victims' clothes matched paint on D's car. Ct. acknowledges lack of clear IN case law on issue of proof of knowledge but finds Runyon, 38 N.E.2d 235 supports giving of instruction. However, state need not prove actual knowledge. Jury may infer D knew accident occurred/people were injured from circumstances of event. During deliberations, jury asked Tr. judge if D had to make willful decision to leave scene to be found guilty & if he did not know of accident, could flight be willful? Ct. finds question demonstrates jury confusion on element of crime. Held, conviction reversed. Givan, joined by Pivarnik, DISSENTS, arguing tendered instruction was incomplete & misleading. Knowledge is determined from surrounding facts. **[NOTE: Opinion vacates Micinski, App., 479 N.E.2d 632.]**

RELATED CASES: Hudson, 20 N.E.3d 900 (Ind. Ct. App 2014) (circumstantial evidence sufficiently established D should have known he struck and injured pedestrian, where pedestrian's head violently struck hood of D's truck, pedestrian's umbrella was lying on road, D swerved to release object his truck was pushing, attempted quick repairs to front of his truck, and later lied to police about his presence at scene of the accident); Barrett, App., 634 N.E.2d 835 (Conviction for Failure to Stop After Accident Resulting in Damage to Vehicle was improper because statute does not apply to single car accidents); McFadin, App., 494 N.E.2d 983 (fact D was driving truck 1« hours after hit & run accident in which 2 children were injured was insufficient evidence to sustain conviction; state failed to connect D to crime - witnesses were not asked if D was driver or looked like driver).

TITLE: Wood v. State

INDEX NO.: K.9.f.

CITE: (12/31/2013), 999 N.E.2d 1054 (Ind. App. 2013)

SUBJECT: Leaving the scene of a boating accident - sufficiency

HOLDING: Where D left scene of boating accident while calling 911, and remained at marina as instructed by 911 dispatcher, evidence was sufficient to convict him of leaving the scene of a boating accident in violation of Ind. Code 14-15-4-4. Specifically, the state proved that the D did not stop his boat "immediately and as close as possible to the scene of the accident," Ind. Code 14-15-4-1, and did not "return to the scene of the accident and remain there" until he gave the other boat owner information to identify himself, the boat, and the boat's owner and provided "reasonable assistance to each person injured...."

K. CRIMES

K.9. Motor vehicles

K.9.h. Other

TITLE: Abuelhawa v. United States

INDEX NO.: K.9.h.

CITE: 129 S.Ct. 2102 (05-26-09)

SUBJECT: Using cell phone doesn't convert misdemeanor drug buy into felony

HOLDING: 21 U.S.C. ' 843(b), which makes it a felony "to use any communication facility...[in] facilitating the commission of" certain drug offenses, does not apply to using a telephone or cell phone to arrange a misdemeanor purchase of illegal drugs for personal use. Stopping with the plain meaning of "facilitate" here would ignore the rule that because statutes are not read as a collection of isolated phrases, "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." Dolan v. Postal Service, 546 U. S. 481 (2006). Here it does not. Given that Congress plainly intended to punish trafficking in drugs more harshly than purchasing them for personal use, treating the use of a phone to buy a misdemeanor amount as facilitating the felony sale "would for practical purposes substantially skew the congressional calibration of respective buyer-seller penalties." Held, Fourth Circuit Court of Appeals' opinion at 523 F.3d 415 reversed and remanded.

TITLE: Anthony v. State
INDEX NO.: K.9.h.
CITE: (5/31/2018), 103 N.E.3d 696 (Ind. Ct. App 2018)
SUBJECT: Insufficient evidence of material on D's car windows that obstructed his view
HOLDING: The State failed to present sufficient evidence that D violated Ind. Code § 9-19-19-3, even though the items stacked inside his car may have obstructed his view, because the statute requires the State to prove there was nontransparent material “upon” the windows, that is, fixed to or resting upon the windows: “(b) A person may not drive a motor vehicle with a sign, poster, sunscreening material, or other nontransparent material upon the front windshield, side wings, or side or rear windows of the vehicle that obstructs the driver’s clear view of the highway or an intersecting highway.” Ind. Code § 9-19-19-3(d). Lacking this evidence, the judgment must be reversed.

TITLE: Byrd v. State
INDEX NO.: K.9.h.
CITE: (3/26/2014), 6 N.E.3d 464 (Ind. Ct. App 2014)
SUBJECT: Failure of proof for speeding infraction
HOLDING: Court of Appeals reversed civil infraction for Speeding by driving 54 m.p.h. in a 30 m.p.h. zone because there was a failure of proof.

Despite State's allegations, proof at trial showed that D was driving in a 45 mph zone, not a 30 mph zone. Arresting officer also testified he was not sure exactly where he stopped D. D was entitled under Ind. Code § 9-21-8-53(a), to "specific allegations of his speed and location and the applicable prima facie or fixed speed applicable within the district or at the location. He was entitled to have those elements established by a preponderance of the evidence." The State alleged only that D violated Indiana Code section 9-21-5-2 by driving 54 miles per hour in a 30 miles per hour zone. The evidence did not establish the violation as alleged. Held, judgment reversed.

TITLE: Carson v. State
INDEX NO.: K.9.h.
CITE: (3d Dist. 11/29/83) Ind. App., 459 N.E.2d 734
SUBJECT: Infractions - speeding; sufficiency
HOLDING: Evidence was sufficient to sustain D's conviction for speeding (infraction) where 2 witnesses estimated D was exceeding the posted limit by 10 miles per hour. Here, Fowler police chief & Fowler street superintendent saw D speeding, gave chase in street dept. pickup, but D did not stop. D was stopped at gunpoint by police roadblock on open highway traveling at 55 (posted speed). Lay opinion of speed is generally admissible. See Perry 266 N.E.2d 4; (other citations omitted). Burden of proof in infraction cases is a preponderance of evidence. Held, no error.

TITLE: Coleman v. State

INDEX NO.: K.9.h.

CITE: (1/19/2016), 49 N.E.3d 1043 (Ind. Ct. App. 2016)

SUBJECT: No notice of reduced speed limit

HOLDING: In concluding D exceeded the altered speed limit, trial court erred in finding that the altered speed limit was in effect because there were no signs notifying motorists of the altered limit.

D was driving northbound on Leesville Road, a thoroughfare with the statewide default speed limit of 55 mph, but which Lawrence County reduced to 35 mph. There were no signs in the northbound lanes alerting drivers to the reduced speed limit; the southbound lanes contained an illegally placed sign that notified drivers about the change.

Altered speeds are “effective at all times . . . when appropriate signs giving notice of the altered limit are erected on the street or highway.” Ind Code § 9-21-5-6(c). Because there were no signs, the altered speed limit was not effective for the northbound lanes, and the default speed limit of 55 mph was in effect, meaning D, who was clocked at 46 mph, did not commit the civil infraction of speeding. Whether D had actual knowledge of the altered speed limit was irrelevant. Held, judgment reversed.

TITLE: Davis v. State

INDEX NO.: K.9.h.

CITE: (4/19/2017), 74 N.E.3d1215 (Ind. Ct. App 2017)

SUBJECT: Traffic ticket signatures do not have to take specific form

HOLDING: Tr. Ct. did not err in denying motion to dismiss traffic infraction summons and complaint, which did not bear signature of police officer who stopped Davis for speeding. The ticket, summons and complaint issued to Davis had the police officer's name, badge number and policy agency electronically printed on them. On appeal, Davis acknowledged that an electronic signature can be a valid signature, but argued that it should be formatted in a way that is different from the rest of the text. While Ind. Code § 9-30-3-6 requires traffic infraction summons and complaint to include a variety of information including the officer's signature, it does not specify what form the signature should take. An original, personally-signed signature is not required under the statute. Held, judgment affirmed.

TITLE: Dora v. State

INDEX NO.: K.9.h.

CITE: (1st Dist., 10-18-00), Ind. App., 736 N.E.2d 1254

SUBJECT: Unsafe start - squealing & spinning tires; evidence insufficient

HOLDING: Evidence was insufficient to support D's conviction for performing unsafe start in violation of Ind. Code 9-21-8-3, a class C infraction. When D initiated right-hand turn, officer observed him over-accelerate vehicle he was driving, causing tires on his car to spin & squeal for approximately three to four seconds. Ind. Code 9-21-8-3 provides that person may not start vehicle that is stopped, standing, or parked until movement can be made with reasonable safety. There was no evidence that D's commencement of right-hand turn constituted threat or danger to himself or anyone else. Nor did State provide any evidence that D started his vehicle before movement could be made with reasonable safety. Fact that D spun & squealed his tires does not ipso facto mean that his conduct violated "reasonable safety" mandate, which is essence of statutory prohibition. Held, judgment against D reversed.

RELATED CASES: Beasey, App., 823 N.E.2d 759 (distinguishing Dora, Ct. held that State presented sufficient evidence that D's start was unsafe thus creating a danger to himself or others, viz., D's car fishtailed as he over accelerated on wet pavement & he was not in control of vehicle).

TITLE: Ford v. State

INDEX NO.: K.9.h.

CITE: (2nd Dist., 5-23-95), Ind. App., 650 N.E.2d 737

SUBJECT: Speeding - sufficiency of uniform traffic citation

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss speeding citation. D challenged sufficiency of uniform traffic citation & its adequacy as complaint & summons, claiming that lack of attorney's actual signature, address, & telephone number, lack of Clerk's seal, & lack of return of summons were fatal in his case because such are strictly required by various trial rules. Ct. did not find inconsistency between adherence to trial rules & forms set out in Ind. Code 9-30-3-6, which satisfy requirements regarding information, complaint, & summons. Ct. also held that prosecutor's mechanically stamped signature complies with attestation requirement reflected in model form. Held, judgment affirmed, Robertson, J., concurring.

RELATED CASES: Hamill, App., 757 N.E.2d 162 (none of technical defects D alleged – missing check marks, form of hearing date, missing deputy's signature, or absence of his signature on "promise to appear" line – violated purpose of uniform traffic information summons statute; strict compliance with Ind. Code 9-30-3-6(b) is not required).

TITLE: Gagne v. State

INDEX NO.: K.9.h.

CITE: (07-26-11), 952 N.E.2d 289 (Ind. Ct. App 2011)

SUBJECT: Illegal U-Turn - "No U-Turn" sign requirement

HOLDING: Ind. Code 9-21-8-19 prohibits U-turns by non-emergency or non-maintenance vehicles on freeways or interstate highways under any circumstances. This restriction applies to special crossovers, which are created for emergency and maintenance vehicles, and there is no exception for areas created by third parties, such as the dirt and gravel storage space constructed by paving company that D used to make illegal U-turn. Statute's requirement that "no U-turn" signs be posted applies to special crossovers that are built for emergency and maintenance vehicles only. Any space that is not created for emergency or maintenance vehicles is not subject to this sign-posting requirement. Evidence was sufficient to support jury's verdict that D violated the U-Turn statute despite fact that "No-U-Turn" sign had not been posted near entry to median. Held, judgment affirmed.

TITLE: Gaines v. State

INDEX NO: K.9.h.

CITE: (09-12-12), 973 N.E.2d 1239 (Ind. Ct. App 2012)

SUBJECT: Window tint infraction statute not void for vagueness; lawful search

HOLDING: IND. CODE 9-19-19-4, which establishes a window tint infraction when the vehicle's occupants "cannot be easily identified or recognized," is not void for vagueness. D argued that the statute is unconstitutionally vague because it does not state if identification of race, gender and number of passengers is sufficient or if window tinting must be such that every feature of every person can be seen. However, the statute does delineate a scientifically objective measurement for compliance, thereby precluding any arbitrariness or discriminatory enforcement by police officers. Moreover, the statute as applied in this case did not invite overly broad discretion by police. One of the officers who stopped vehicle in which D was a passenger testified he couldn't see through the windshield into the car. He clarified that he could not tell how many people were inside the car until the window was rolled down. Thus, traffic stop based on illegally tinted windows was lawful.

Court also held that probable cause existed for search of D, a back-seat passenger, because odor of marijuana emanated from the vehicle when officers opened up the passenger door and it was reasonable for officers to believe that D was attempting to destroy contraband based on their observation of D chewing on something in his mouth. Distinguishing Conwell v. State, 714 N.E.2d 764 (Ind. Ct. App 1999), Court concluded that officer did not use unreasonable force by ordering D to spit out contraband under the threat of being tazed. No physical force was used, there was no risk to D's physical safety and there was no intrusion on D's bodily integrity by uttering the threat. Held, judgment affirmed.

TITLE: Hammond v. State

INDEX NO.: K.9.h.

CITE: (1st Dist., 12-18-96), Ind. App., 675 N.E.2d 353

SUBJECT: Unlawful arrest for failure to show proof of financial responsibility

HOLDING: Under 1994 amendment to Ind. Code 9-25-8-2, Indiana law no longer requires motorist to prove financial responsibility for operation of motor vehicle. Current version of statute requires only that operator have financial responsibility in effect. Thus, D's arrest for failing to provide police with proof of auto insurance, a non-chargeable offense, was unlawful, & evidence obtained from her purse pursuant to custodial arrest for non-existent offense was inadmissible. Held, denial of motion to suppress reversed & remanded.

RELATED CASES: Rosenbaum, 930 N.E.2d 72 (Ind. Ct. App 2010) (Hammond does not stand for the proposition that a police officer cannot ask a motorist for proof of financial responsibility).

TITLE: Hobson v. State

INDEX NO.: K.9.h.

CITE: (3d Dist. 10/28/85) Ind. App., 484 N.E.2d 601

SUBJECT: Selling motor vehicles on Sunday

HOLDING: Ind. Code 24-4-6-1, which prohibits people from engaging in business of selling motor vehicles on Sunday, is constitutional. Here, D was RV dealer, open for business on Sunday. He contends RVs are not motor vehicles. "Motor vehicles" is defined at Ind. Code 9-1-1-2(b) & includes every self-propelled vehicle, with some exceptions inapplicable to RVs. Predecessor statute was held constitutional in Tinder v. Clarke Auto, Inc., 149 N.E.2d 808. Held, conviction affirmed.

TITLE: Hurt v. State

INDEX NO.: K.9.h.

CITE: (03-25-11), 946 N.E.2d 44 (Ind. Ct. App 2011)

SUBJECT: Reckless disregard of traffic control device within highway workzone causing death - evidence sufficient

HOLDING: State presented sufficient evidence to support D's conviction for Class C felony reckless disregard of a traffic control device within a highway workzone resulting in death. Unlike reckless homicide, which requires plain, conscious, unjustifiable disregard of fact that his driving could lead to someone's death, State only had to prove that D recklessly disregarded a traffic control device or devices, and that the disregard was a proximate cause of victim's death.

The fact that there was construction work being done on I-164, which required closure of right driving lane, was well-advertised by numerous signs well in advance of actual worksite. Weather conditions were ideal, and D had already driven through that stretch of I-164 on several occasions on day of accident. Victim's arrow board truck was deliberately placed by an INDOT supervisor so that it would be clearly visible for a considerable distance, but D made no attempt to merge into left lane even though truck driver behind D had done so and observed no reason why D could not have done so. Rather, D drove straight into back of victim's truck, causing victim's death, and there is no indication that he made any attempt to brake before doing so. All of this evidence put together was sufficient for a reasonable jury to conclude that D recklessly disregarded multiple traffic control devices and most crucially, the traffic control device attached to back of victim's truck. D's allegation that INDOT was contributorily negligent is no defense to a criminal prosecution, and whether the signage was adequate to warn D of the upcoming workzone was a question of fact for jury to consider. Held, conviction affirmed.

TITLE: Maraman v. City of Carmel

INDEX NO.: K.9.h.

CITE: (12/11/2015), 43 N.E.3d 680 (Ind. Ct. App 2015)

SUBJECT: Speeding ticket dismissed because of invalid city ordinance

HOLDING: Indiana's Home Rule Act (Ind. Code 36-1-3) renders a Carmel city ordinance regarding traffic regulations void because it merely is a duplicate of already existing state law. D was pulled over and cited for driving 30 miles per hour (mph) when the speed limit was 20 mph because it was a construction zone. D moved to dismiss the speeding ticket because Carmel City Ordinance 8-2 simply incorporates by reference the portion of Indiana Code defining motor vehicle infractions.

Carmel's wholesale adoption of chapters of the Indiana Code resulted in its ordinance being nothing more than a "duplicate" of already existing State law. While Carmel may incorporate material by reference, it may not incorporate in a way that duplicates or conflicts with statutes that create statewide traffic infractions. If a city wishes to establish local speed limits, it may do so in accordance with Ind. Code §§ 9-21-5-3(1), 9-21-5-6, and 9-21-1-3(a)(11), which gives the city the authority to adopt ordinances altering speed limits within the city; however, it is nevertheless prohibited from simply duplicating state-imposed speed limits as Carmel City Code § 8-2 attempts to do. Held, judgment reversed.

TITLE: Owen v. State

INDEX NO.: K.9.h.

CITE: (5th Dist., 9-30-03), Ind. App., 796 N.E.2d 775

SUBJECT: Seatbelt law - statutory construction; sport utility vehicle (SUV) registered as truck

HOLDING: Tr. Ct. erred in finding that SUV registered as a truck was not a truck under Ind. Code 9-13-2-123. If determined to be a truck, driver would be exempt from infraction offense for not wearing seatbelt during operation. Ct. considered whether vehicle was "designed for transportation of property," but also noted fact that State (BMV) benefits monetarily when vehicle is registered as a truck rather than as a car. If an SUV owner has paid the fee for a truck plate, then by law he drives a truck. Legislature is proper body to address State's concern that individuals may "opt out" of Indiana's seatbelt law. Held, judgment reversed. Brook, C.J., dissenting, argued that statute should give effect to intent of legislature, i.e., to foster public safety. Dissenting opinion rejected State's contention that all SUVs should not be considered trucks, but Cts. should make objective determination of how vehicle is used. SUV in this case was not used primarily to transport property, but rather people.

RELATED CASES: Kelver, App., 808 N.E.2d 154 (Ind. Code 9-19-10-2, which mandates seatbelt usage by front seat occupants of passenger motor vehicles, but exempts trucks, does not violate equal privileges & immunities clause of Indiana Constitution or D's right to substantive due process).

TITLE: Rosenbaum v. State

INDEX NO.: K.9.h.

CITE: (07-20-10), 930 N.E.2d 72 (Ind. Ct. App 2010)

SUBJECT: Operating without proof of financial responsibility - strict liability

HOLDING: A person who knowingly operates a motor vehicle on a public highway in Indiana commits a Class A infraction unless financial responsibility is in effect with respect to the motor vehicle under Ind. Code 9-25-4-4. D argued that evidence was insufficient to prove that he knowingly operated a vehicle without financial responsibility in effect because he was borrowing the car at the time and thought that the owner had insurance. Court held that because there is strict liability for the financial responsibility element, it does not matter that D did not know that the insurance had lapsed on the borrowed vehicle he was driving. The *mens rea* "knowingly" applies only to the elements of "operates" or "permits the operation of" a motor vehicle on a public highway. The legislature enacted the Financial Responsibility Act to ensure that all drivers have insurance in effect on their vehicles. To require a driver to "know" that insurance was not in effect before he could be convicted of this Class A infraction would leave a gap in the law, would not accomplish this important legislative purpose, and would lead to absurd results.

Court also rejected D's argument that the police officer had no legal right to ask for proof of financial responsibility. Hammond v. State, 675 N.E.2d 353 (Ind. Ct. App 1996), does not stand for the proposition that a police officer cannot ask a motorist for proof of financial responsibility. Instead, Hammond held that a motorist cannot be arrested for or found guilty of operating a vehicle without financial responsibility when the vehicle is, in fact, insured at the time. Held, judgment affirmed.

TITLE: Ryan v. State

INDEX NO.: K.9.h.

CITE: (3d Dist. 6/19/89), Ind. App., 539 N.E.2d 983

SUBJECT: Failure to yield to emergency vehicle

HOLDING: In prosecution for failure to yield to emergency vehicle, Tr. Ct. did not err in excluding testimony that emergency vehicle was being operated in unreasonable manner. D argues on appeal that such evidence is relevant, citing Ind. Code 9-4-1-85(c) & Ind. Code 9-4-1-25, which define general duty of operator of emergency vehicle to drive with due regard for safety of all persons using highway. This duty of care is relevant in civil actions based on negligence. However, neither statute creates defense to criminal prosecution for failure to yield to emergency vehicle. Cf. Plaspohl 157 N.E.2d 579 (contributory negligence not available as defense in criminal prosecutions). Held, Tr. Ct. properly excluded evidence re operation of emergency vehicle.

TITLE: Sering v. State
INDEX NO.: K.9.h.
CITE: (2d Dist. 1/30/86) Ind. App., 488 N.E.2d 369
SUBJECT: Infractions - charging information
HOLDING: Citation of repealed statute in complaint did not require reversal of conviction for driving across center line. Complaint & summons used in infractions need only specify conduct & do not require citation of particular statute allegedly violated. Thus, incorrect citation was superfluous. Held, no error.

TITLE: State ex rel. v. Allen Superior Ct.

INDEX NO.: K.9.h.

CITE: (10-2-98), Ind., 699 N.E.2d 1134

SUBJECT: Deferral of traffic infraction - non-compliance with statutory guidelines

HOLDING: Tr. Ct. properly declined to dismiss traffic infraction complaint on joint motion of parties, who had entered into stipulation of dismissal, where terms of stipulation did not comply with requirements of Ind. Code 34-4-32-1, which applies to deferrals of such complaints. City program for resolving traffic infraction complaints violated requirements of statute in at least three ways: 1) city lacked authority to require payments directly to city conditional to dismissal; 2) diversion agreement did not call for dismissal with prejudice; & 3) agreement was not filed with Ct. City may dismiss traffic infraction cases outright, or may elect to prosecute these cases, but if it wishes to impose conditions precedent to dismissal, it must abide by requirements of Ind. Code 34-4- 32-1. Held, petition for writ of mandate & prohibition denied.

TITLE: State v. Derossett

INDEX NO.: K.9.h.

CITE: (1st Dist., 6-29-99), Ind. App., 714 N.E.2d 205

SUBJECT: Statutory length limitation for semitrailer units

HOLDING: Ind. Code 9-20-13-2(a)(1) provides that maximum length of semitrailer unit operating in truck-tractor-semitrailer combination is 53 feet. Statute does not mention semitrailer's load as consideration in determining length of semitrailer. In addition, subsection (a)(3) of statute provides that maximum overall length limit is not imposed on truck-tractor-semitrailer combination. If there is no overall length limit on truck-tractor-semitrailer, foot length limitation in Ind. Code 9-20-13-2(a)(1) could only apply to semitrailer itself. Thus, 53-foot length limitation in statute applies only to semitrailer unit, not to both unit & load. Held, judgment affirmed.

TITLE: State v. Hardman

INDEX NO.: K.9.h.

CITE: (4th Dist. 8/15/89), Ind. App., 542 N.E.2d 230

SUBJECT: Infractions - state's amendment without notice to D

HOLDING: Tr. Ct. properly dismissed speeding sua sponte after state added notarization on day of trial, showing incorrect date. D was charged with driving while suspended, driving while intoxicated, refusing breath test, & was also issued speeding ticket. Speeding ticket was not reformulated into long-form information, nor was it notarized, because someone other than arresting officer gave it to clerk. Ticket was notarized on day of trial but showed date one month earlier. After prosecutor mentioned that ticket was notarized, D responded that it hadn't been earlier. Tr. Ct. then inquired as to when ticket was notarized. When prosecutor read off date, Tr. Ct. indicated he thought that was wrong & prosecutor agreed. Tr. Ct. sua sponte dismissed speeding charge. Speeding is Class C infraction, & action is civil in nature. Ind. Code 9-4-1-127.1(b); Ind. Code 34-4-32-1(c)(1). Tr. Ct. may sua sponte dismiss civil action for failure to comply with trial rules. TR 41 (E). Both parties were questioned & allowed to respond, fulfilling requirement of hearing. To prevail on appeal, state must prove that it complied with trial rules. Ticket here served as civil complaint. To change it, state was required to move to amend, with leave of Ct. or by written consent of adverse party. TR 15(A). Instead, state had ticket notarized without notice to either Tr. Ct. or D. Held, Tr. Ct.'s sua sponte dismissal was proper.

TITLE: State v. Hurst
INDEX NO.: K.9.h.
CITE: (10-30-97), Ind., 688 N.E.2d 402, overruled in part on other grounds, 810 N.E.2d 1064
SUBJECT: Double jeopardy claim - prosecution after conviction for infraction
HOLDING: Failure to yield right-of-way infraction judgment entered against D did not bar subsequent prosecution for reckless homicide. Proceedings for violation of failure to yield right-of-way statute are civil, & imposition of \$7.00 fine for infraction did not constitute "punishment" under Double Jeopardy Clause. Therefore, D was not placed in jeopardy & subsequent criminal prosecution did not violate double jeopardy prohibition against second prosecution for same offense after conviction. However, because D was not brought to trial within one-year time period required by CR 4(C), he was entitled to discharge (see review at B.5.c.4). Held, transfer granted, Ct. App.'s decision at 674 N.E.2d 622 vacated; remanded to Tr. Ct. to discharge D.

TITLE: Washington v. State
INDEX NO.: K.9.h.
CITE: (2d Dist. 01/24/91), Ind. App., 565 N.E.2d 382
SUBJECT: Sufficiency of evidence - operating without proof of financial responsibility
HOLDING: State did not meet burden of proving D operated vehicle without proof of financial responsibility where evidence submitted showed only that D had no insurance, because Ind. Code 9-2-1-16 provides alternative ways to prove financial responsibility. On appeal of conviction for leaving scene of accident & operating without proof of financial responsibility D argued that evidence he told officer he had no insurance was insufficient to support conviction for operating without proof of financial responsibility. Ct. App. found that because there were alternative statutory means for proving such responsibility, & it wasn't shown that D didn't have such alternative means, evidence was insufficient to support conviction. Held, conviction for leaving scene of accident affirmed & conviction for operating without proof of financial responsibility reversed.

Note: Under 1994 amendment to Ind. Code 9-25-8-2, Indiana law no longer requires motorist to prove financial responsibility for operation of motor vehicle.

K. CRIMES

K.9. Motor vehicles

K.9.i. Hardship license (Ind. Code 9-24-15)

TITLE: Cozmanoff v. State

INDEX NO.: K.9.i.

CITE: (10-22-19), Ind. Ct. App., 134 N.E.3d 513

SUBJECT: Denial of petition for Specialized Driving Privileges following reckless homicide conviction affirmed

HOLDING: Following Defendant's 2012 conviction for reckless homicide involving an automobile, trial court denied properly denied his petition for Specialized Driving Privileges in 2019. Defendant was not eligible for restricted driving privileges prior to January 1, 2015, due to his conviction and pursuant to Ind. Code § 9-30-16-2(c), he is not eligible for specialized driving privileges under Ind. Code § 9-30-16-3 because his offense included the element of causing the death of another person and the offense involved the operation of a motor vehicle. Also, although now repealed, Ind. Code § 9-30-13-4 provided that the court “shall recommend the suspension” of the person's driving privileges whereas Ind. Code § 9-30-16-2(c) provides the court “shall order” that the person’s privileges be suspended. Since the trial court suspended Defendant's driving privileges, the Court of Appeals was not persuaded he should now be eligible for specialized driving privileges via Ind. Code § 9-30-16-4, which relates to individuals whose driving privileges were suspended by administrative action and not by court order.

TITLE: Gressel v. State
INDEX NO.: K.9.i.
CITE: (1st Dist., 7-18-95), Ind. App., 653 N.E.2d 139
SUBJECT: Restricted license violation - reinstatement of lifetime suspension erroneous
HOLDING: Where sentence for violating terms of restricted license was facially defective, Tr. Ct. erred in denying D's motion to correct erroneous sentence. D pled guilty to violating terms of restricted license, a Class C misdemeanor, in violation of Ind. Code 9-30-4-8(b). Tr. Ct. ordered bureau of motor vehicles to reinstate lifetime suspension of D's driving privileges, although statute does not provide for any additional penalties other than standard penalties for Class C misdemeanor. Ct. found sentence facially defective because it violated express statutory authority at time it was pronounced. Poore v. State, (1993), Ind. App., 613 N.E.2d 478. Held, reversed & remanded to vacate portion of D's sentence which ordered license suspension.

TITLE: IBMV v. Douglass

INDEX NO.: K.9.i.

CITE: (10-23-19), Ind. Ct. App., 134 N.E.3d 598

SUBJECT: BMV may pursue suspension of driving privileges of a person who is no longer a resident of Indiana

HOLDING: After Defendant moved to California, surrendered his Indiana license and obtained a California driver's license, the Indiana BMV sent a letter to Defendant's last known Indiana address, notifying him that his driving privileges were being suspended for ten years. As a result, three years later, California sent him a letter stating unless he received clearance from Indiana BMV, his California license would be suspended. Defendant then filed for administrative review in Indiana of his license suspension. At his judicial review he prevailed and Indiana BMV was ordered to vacate the order suspending Defendant's driving privileges. The BMV appealed and the Court of Appeals determined that the Indiana BMV had a right to pursue a suspension of Defendant's driving privileges even though he was no longer a resident of Indiana. Held, judgment reversed.

TITLE: Ind. Bureau of Motor Vehicles

INDEX NO.: K.9.i

CITE: (12-12-19), 138 N.E.3d 303 (Ind. Ct. App 2019)

SUBJECT: Specialized driving permits may not exceed 2.5 years

HOLDING: Indiana trial courts may not grant specialized driving privileges (SDP) to motorists whose licenses have been suspended without also limiting those privileges to no more than two-and-a-half years. Court agreed with the BMV's "logical and reasonable" interpretation that Indiana Code § 9-30-16, et seq., places a two-and-a-half-year limit on the duration of any court-issued specialized driving privileges. Here, trial court erroneously granted SDP "until further court order" for McClung, who was subject to two lifetime license suspensions for driving as a habitual traffic offender, as well as an active 10-year ban. Allowing SDP from administrative suspensions to be granted for unlimited durations "would be permitting the functional reversal of valid, lifetime suspensions that have been deemed necessary by the BMV, the administrative agency charged with enforcing the statute."

TITLE: Jones v. State

INDEX NO.: K.9.i.

CITE: (10/26/2016), 62 N.E.3d 1205 (Ind. Ct. App 2016)

SUBJECT: No abuse of discretion in denying petition for specialized driving privileges

HOLDING: Tr. Ct. did not abuse its discretion in denying D's petition for specialized driving privileges because it cited legitimate concerns about enforcement and public safety. In 2009, D pled guilty to two OWI offenses, including class D felony operating a motor vehicle after being suspended as a habitual traffic violator. Pursuant to the agreement, the Tr. Ct., inter alia, suspended D's license for life. In 2010, D moved to Mississippi, where he began working for a roofing company. He seeks a promotion, which would require a driver's license and regular travel between Mississippi and Louisiana, but he cannot get a Mississippi driver's license until his Indiana driving privileges are restored. Thus, he filed a petition for specialized driving privileges. See Ind. Code § 9-30-16-3 (stay of suspension and granting specialized driving privilege) and Ind. Code § 9-30-10-14.1 (petition to rescind lifetime suspension and reinstate driving privileges).

The Tr. Ct. appropriately found that it would be impossible to monitor whether D was following the stipulations for a permit, such as using an ignition interlock device with photo or video capability. It also cited genuine safety concerns. D is a habitual traffic violator with 27 traffic-related convictions since 1997 and two OWI convictions in 2004 and 2009. Held, judgment affirmed.

TITLE: Orange v. Ind. BMV

INDEX NO.: K.9.i.

CITE: (1/30/2018), 92 N.E.3d 1152 (Ind. Ct. App 2018)

SUBJECT: No right to hearing on petitions for specialized driving privileges

HOLDING: Addressing a matter of first impression, Court held that Tr. Ct.s are not required to conduct a hearing on petitions for specialized driving privileges (SDP) where claims lack merit. In 2015, the Legislature repealed language in Ind. Code § 9-24-15-4 that required the prosecuting attorney to "appear in person or by deputy and be heard by the court" in SDP cases. Although a Tr. Ct. is not required to hold a hearing under the statute, it may still err if it fails to grant a petitioner's request for a hearing when the petition raises claims of possible merit. Here, Tr. Ct. properly exercised its discretion in summarily denying Orange's petition for SDP, as he was adjudicated a habitual traffic violator multiple times and had 27 different suspensions with an "indefinite" eligibility date. Held, judgment affirmed

TITLE: State v. Reinhart
INDEX NO.: K.9.i.
CITE: (12/5/2018), 112 N.E.3d 705 (Ind. 2018)
SUBJECT: Trial court in county of D's residence properly granted specialized driving privileges (SDP) after lifetime suspension resulting from convictions in different county

HOLDING: Although only Tr. Ct.s may impose criminal judgments, the required forfeiture of a defendant's driver's license is a collateral consequence of a guilty plea and conviction rather than a punishment. Indiana's SDP statute, which offers relief from license suspensions, establishes venue requirements rather than conferring a Tr. Ct.'s jurisdiction. If a person's driving privileges were administratively--as opposed to judicially--suspended, the petitioner must file the petition for specialized driving privileges (SDP) in the county in which he resides. Ind. Code § 9-30-16-4. Absent a conviction modification, a nondiscretionary lifetime license forfeiture constitutes an administrative suspension. But a conviction modification from a Level 6 felony to a Class A misdemeanor results in a court-ordered suspension.

In this case, the Adams County Tr. Ct. properly granted a petition for SDP filed in Reinhart's county of residence after his privileges had been suspended for life as a result of his driving while HTV conviction in Noble County. Held, transfer granted, Court of Appeals opinion at 93 N.E.3d 801 vacated, judgment affirmed.

K. CRIMES

K.10. Weapons/firearms/explosives

TITLE: Crawford v. State
INDEX NO.: K.10.
CITE: (9-26-01), Ind., 755 N.E.2d 565
SUBJECT: Firearm enhancement does not apply to attempted murder
HOLDING: Ind. Code 35-50-2-11 allows trial Ct. to enhance sentence by five years if D used firearm in commission of offense. An offense is defined as a felony under Ind. Code 35-42 that resulted in death or serious bodily injury. Here, State charged that D knowingly or intentionally used a firearm in commission of attempted murder. However, no part of Chapter 42 defines crime of attempted murder. Because attempted murder is not "an offense" as statute defines that term, an enhancement may not be attached to it. Held, judgment affirmed as to conviction & reversed as to enhancement.

TITLE: McDonald v. City of Chicago, Ill.

INDEX NO.: K.10.

CITE: (06-28-10), U.S., 130 S.Ct. 3020

SUBJECT: Second Amendment right to bear arms applies to States

HOLDING: The Second Amendment right of citizens to keep and bear firearms for self-defense that it recognized in District of Columbia v. Heller, 128 S.Ct. 2783 (2008), applies fully to the states. Self-defense, the central component of the Second Amendment, makes the right to bear arms fundamental. However, state regulations of firearms like those listed in Heller are still legitimate. The Due Process Clause of the Fourteenth Amendment effectively "incorporates" the Second Amendment--protecting it from infringement by state and local laws. Held, Seventh Circuit Court of Appeals' opinion at 567 F.3d 856 *reversed*. Thomas, J., CONCURRING, believes the Privileges and Immunities Clause should be the method of incorporation. Stevens, J., DISSENTING, argued that substantive due process does not include right to possess firearms for self-defense. Breyer, J., joined by Ginsburg and Sotomayor, DISSENTING, arguing that the Fourteenth Amendment does not incorporate the Second Amendment.

RELATED CASES: Caetano, 136 S.Ct. 1027 (U.S. 2016) (Massachusetts statute outlawing all stun guns violated 2nd Amendment).

TITLE: New York State Rifle and Pistol Association v. Bruen
INDEX NO.: K.10.
CITE: (6/23/2022), 142 S.Ct. 2111 (SCOTUS 2013)
SUBJECT: U.S. Supreme Court states nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of “bear” naturally encompasses public carry.
HOLDING: New York’s proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

To determine whether a firearm regulation is consistent with the Second Amendment, Heller and McDonald point toward at least two relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified. Because “individual self-defense is ‘the central component’ of the Second Amendment right,” these two metrics are ‘central’ considerations when engaging in an analogical inquiry. McDonald, 561 U. S., at 767 (*quoting* Heller, 554 U. S., at 599).

To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to “longstanding” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” to determine whether modern regulations are constitutionally permissible. That said, respondents’ attempt to characterize New York’s proper-cause requirement as a “sensitive-place” law lacks merit because there is no historical basis for New York to effectively declare the island of Manhattan a “sensitive place” simply because it is crowded and protected generally by the New York City Police Department.

It is undisputed that petitioners—two ordinary, law-abiding, adult citizens—are part of “the people” whom the Second Amendment protects. See Heller, 554 U. S., at 580. And no party disputes that handguns are weapons “in common use” today for self-defense. *See id.*, at 627. The plain text of the Second Amendment protects petitioner’s proposed course of conduct—carrying handguns publicly for self-defense. Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of “bear” naturally encompasses public carry. Moreover, the Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation,” *id.*, at 592, and confrontation can surely take place outside the home.

TITLE: Trice v. State

INDEX NO.: K.10.

CITE: (11/13/2018), 114 N.E.3d 496 (Ind. Ct. App 2018)

SUBJECT: Expired firearm permit is not "misuse" of firearm

HOLDING: D's conviction of carrying a handgun without a license does not amount to a conviction of misuse of a firearm. Thus, Tr. Ct. erred by ordering the destruction of D's handgun, despite his expired permit. The phrase "misuse of a firearm" has not been legislatively defined in Indiana for purposes of Ind. Code section § 35-47-3-2(b), which punishes those convicted of misusing firearms by authorizing destruction of their firearms. Considering the dictionary definition of "misuse," Court noted the word is defined as "incorrect or improper use," "an occasion when something is used in an unsuitable way or in a way that was not intended" or "the act of using something wrongly or in a dishonest way."

Here, D's handgun was in the console of his vehicle, and officer became aware of its existence when D answered affirmatively and honestly the officer's inquiry as to whether he had any weapons in the vehicle. However, although D possessed the handgun, he did not use it. Therefore, the definitions of the term "misuse" can best be applied here to mean that a conviction for the misuse of a firearm must involve some use of the firearm that is incorrect, improper, or unsuitable. D did not use the handgun; rather, he merely possessed it. Thus, it defies logic and relevant precedent to say that he misused the handgun. Held, order to destroy D's handgun reversed; Crone, J., dissenting, argued that carrying a handgun without a license is a misuse, just as driving a motor vehicle without a license is misuse of the vehicle.

K. CRIMES

K.10. Weapons/firearms/explosives

K.10.a. Handguns (Ind. Code 35-47)

TITLE: Abbott v. United States

INDEX NO.: K.10.a.

CITE: (11-15-10), 562 U.S. 8, 131 S.Ct. 18

SUBJECT: Broad application of mandatory minimum enhancement for firearm crimes

HOLDING: A D is subject to a mandatory, consecutive sentence for 18 U.S.C. § 924(c), which prohibits using, carrying, or possessing a deadly weapon in connection with "any crime of violence or drug trafficking crime," and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction. The enhancement provision requires an additional five-year sentence "except" to the extent a greater mandatory minimum sentence is required by "any other provision of law." Court held that this exception applies only to statutes covering the same kind of conduct as the enhancement provision and not to cases in which the D is also convicted of a different kind of crime that has its own minimum sentence of more than five years. D who faced a 10-year drug mandatory minimum argued that the "except" clause means that the enhancements in § 924(c) do not apply to him because the statute setting out the mandatory minimum for the drug crime qualifies as "any other provision of law." Court disagreed, noting the broad language in the "except" clause, added in 1998, was intended to create a "safety valve" just in case a future Congress forgot about § 924(c)(1)(a) when it was imposing additional mandatory minimum sentences for the same type of conduct. The bill's "primary objective" was "to expand § 924(c)'s coverage to reach firearm possession," following the Court's decision in Bailey v. United States, 516 U.S. 137 (1995).

Ds' interpretation would have lowered the mandatory minimum for Section 924(c) violations in a number of situations, resulting in "sentencing anomalies." Congress's intent to create only a very narrow exception is clear enough that resorting to the rule on lenity is not necessary. "We doubt that Congress meant a prefatory clause, added in a bill dubbed 'An Act [t]o throttle criminal use of guns,' to effect a departure so great from §924(c)'s longstanding thrust, i.e., its insistence that sentencing judges impose additional punishment for §924(c) violations." Held, Third Circuit Court of Appeals' opinion at 574 F.3d 203 affirmed; Kagan, J., took no part in the consideration or decision of these cases.

TITLE: Abramski v. United States

INDEX NO.: K.10.a.

CITE: (6/22/2014), 134 S.Ct. 2259 (2014)

SUBJECT: Federal gun law bars "straw" gun purchases

HOLDING: By stating on a federal gun purchase form that he was buying a Glock 19 pistol for himself, D violated 18 U. S. C. §922(a)(6), because he had actually agreed earlier to buy the gun for his uncle. Thus, by acting as a "straw purchaser" and lying about the identity of the "true buyer," D lied about a "fact material to the lawfulness of the sale of a gun." See *id.* Not criminalizing straw purchases would make it difficult to keep guns away from those who are not allowed to own or possess them. In dissent, Justice Scalia claimed the lie was not material because it was not illegal for either the D or his uncle to own the gun. Kagan, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.; Scalia, J., dissenting, joined by Roberts, C.J., and Thomas and Alito, JJ. Held, cert. granted and Fourth Circuit opinion at 706 F.3d 307 affirmed.

TITLE: B.R. v. State

INDEX NO.: K.10.a.

CITE: (1/28/2021), 161 N.E.3d 1225 (Ind. Ct. App 2021)

SUBJECT: Juvenile adjudication for carrying a handgun without a license reversed for insufficient evidence

HOLDING: State failed to prove that juvenile Respondent constructively possessed a handgun without a license. Respondent was driving an intoxicated friend home in a vehicle belonging to the friend's parent when he was pulled over for failing to properly signal a turn and to fully stop at a stop sign. A police officer commenced a search of the vehicle based on the smell of marijuana he detected. The officer removed an intact piece of the dashboard to the left of the steering wheel and discovered a handgun concealed behind it. The Court of Appeals found that because Respondent was seated close to the hidden compartment and could have reduced the gun to his possession, the State presented evidence of his capability to maintain dominion and control over the handgun. However, the State failed to provide any "additional circumstances" to determine beyond a reasonable doubt that Respondent knew of the concealed handgun. Accordingly, the evidence was insufficient to sustain Respondent's delinquency adjudication. Held, judgment reversed.

TITLE: Ericksen v. State

INDEX NO.: K.10.a.

CITE: (1/18/2017), 68 N.E.3d 597 (Ind. Ct. App 2017)

SUBJECT: Constructive possession sufficient to sustain conviction for carrying a handgun without a license

HOLDING: Constructive possession of a handgun is sufficient to sustain a conviction for carrying a handgun without a license even though "carrying" is an element of Ind. Code § 35-47-2-1 rather than possession. Henderson v. State, 715 N.E.2d 833 (Ind. 1999). Here, an undercover officer arranged to purchase a handgun from Defendant, and police officers stopped a vehicle in which he was a back-seat passenger. The handgun was recovered from underneath the driver's seat directly in front of where Defendant was seated, easily within his reach. Defendant had displayed the handgun during his meeting with the undercover officer and made furtive movements during the traffic stop. Based on the totality of circumstances, State presented sufficient evidence that Defendant constructively possessed the handgun while seated in the vehicle. Court also held that a jury instruction defining the offense as carrying a handgun in "any vehicle" was not erroneous where the charging Information alleged in "defendant's vehicle." Defendant argued the instruction erroneously broadened the factual allegations and that he prepared his defense based on the charging information. Court concluded that recitation of verbatim statutory elements did not serve as a basis to mislead the jury. Held, judgment affirmed.

TITLE: Estep v. State

INDEX NO.: K.10.a.

CITE: (2nd Dist., 9-29-99), Ind. App., 716 N.E.2d 986

SUBJECT: License required to carry pistol-gripped shotgun

HOLDING: In appeal of conviction for carrying handgun without license, D argued that pistol-gripped shotgun which he admitted owning is not handgun. Handgun is defined in Ind. Code 35-47-1-6 as any firearm: 1) designed or adapted so as to be aimed & fired from one hand, regardless of barrel length; or 2) any firearm with: A) a barrel less than sixteen inches in length; or an overall length of less than twenty-six inches. State did not present evidence on length of firearm at issue, & D argued that gun he possessed is not designed or adapted to be fired from one hand. Ct. concluded that although shotgun with normal stock is meant to be fired from shoulder & is not handgun, absence of stock & addition of pistol grip is adaptation of gun that allows it to be fired from one hand. Accordingly, license is required to carry pistol-gripped shotgun. Evidence was sufficient to support D's conviction. Held, conviction affirmed.

TITLE: Henderson v. State

INDEX NO.: K.10.a.

CITE: (9-1-99), Ind., 715 N.E.2d 833

SUBJECT: Carrying unlicensed handgun - insufficient evidence: driver had permit

HOLDING: Evidence was insufficient to convict D of carrying handgun without license. When constructive possession is asserted, State must demonstrate D's knowledge of contraband. This knowledge may be inferred from either exclusive dominion & control over premise containing contraband or, if control is non-exclusive, evidence of additional circumstances pointing to D's knowledge of presence of contraband. Woods, 471 N.E.2d 691. Here, when car in which D was passenger was pulled over, police found gun on transmission hump in middle of car & another gun underneath passenger's seat. Driver of car had permit for both guns. Although it can be inferred that D knew gun was underneath his seat & could have picked it up, driver owned gun, had permit for it & was likewise within reach of gun. After extensive review of Indiana case law on constructive possession of handguns in vehicles, Ct. concluded that, without evidence of any movement or action to suggest D exercised dominion over gun, D could not be found guilty of possessing gun. Held, transfer granted, conviction reversed.

RELATED CASES: Calvert, 930 N.E.2d 633 (Ind. Ct. App 2010) (two people can simultaneously constructively possess the same gun in the same car); Jones, App., 881 N.E.2d 1095 (insufficient evidence of constructive possession of handgun where only additional facts showing dominion & control rested on plain view & D's proximity).

TITLE: J.R. v. State

INDEX NO.: K.10.a.

CITE: (6/25/2018), 100 N.E.3d 256 (Ind. 2018)

SUBJECT: Where parties agreed juvenile adjudications violated double jeopardy, vacating adjudication on another ground was inappropriate

HOLDING: On transfer, the Indiana Supreme Court ruled that where the parties agreed that the juvenile's adjudications violated the double jeopardy, the Court of Appeals should have vacated one of the adjudications on that ground, not on a ground that the parties had not briefed. J.R. was adjudicated delinquent for both dangerous possession of a firearm by a juvenile (Ind. Code § 35-47-10-5(a)) and carrying a handgun without a license ("CHWOL") (Ind. Code § 35-47-2-1(a)). In the original opinion, the Court of Appeals, sua sponte, ruled that it was impossible, as a matter of law, for a juvenile to commit CHWO since a juvenile is not eligible to get a license to carry a handgun. In its rehearing petition, the State contended this was error, arguing the statute enacted a blanket prohibition on carrying an unlicensed handgun, regardless of the reason the gun was not licensed. In its rehearing decision, the Court of Appeals affirmed its earlier decision and rationale. It also observed that the two statutes pertained to the same subject, and because the statute governing a juvenile's dangerous possession of a firearm was the more specific statute, it and it alone applied to the juvenile. See Sanders v. State, 466 N.E.2d 424, 428 (Ind. 1984) (where two statutes address the same topic, one generally and the other more specifically, the two statutes should be harmonized but if the statutes irreconcilably conflict, the more specific statute shall apply).

In granting transfer, the Supreme Court offered no analysis; it merely noted that the parties agreed there was a double jeopardy violation, and that the Court of Appeals should have vacated the CHWOL adjudication on that ground ("As the parties agree on disposition of the double jeopardy issue, we remand to the juvenile court to vacate the delinquency adjudication for CHWOL, and we affirm the delinquency adjudication for dangerous possession of a firearm."). See also J.G. v. State, 93 N.E.3d 1112, 1125 (Ind. Ct. App 2018) (affirming delinquency adjudication for dangerous possession of a firearm and remanding to vacate adjudication for CHWOL where juvenile argued, and State conceded, the CHWOL adjudication should be vacated on double jeopardy grounds). Held, transfer granted, Court of Appeals ruling on suppression issue summarily affirmed, remaining part of Court of Appeals opinion vacated, and remanded.

TITLE: J.S. v. State

INDEX NO.: K.10.a.

CITE: (11/19/2018), 114 N.E.3d 518 (Ind. Ct. App 2018)

SUBJECT: Sufficient evidence to support true finding for dangerous possession of firearm

HOLDING: State presented sufficient evidence to support juvenile court's finding beyond a reasonable doubt that when J.S. fled from vehicle, he knowingly and actually possessed the black firearm recovered along the route he took when he fled. At trial, officer testified he found the firearm shortly after seeing J.S. clutching a black object while running from investigatory stop, and he suspected the object was a firearm. Held, delinquency adjudication for dangerous possession of firearm and resisting law enforcement affirmed. May, J., concurring in result with opinion, noted trial counsel's failure to impeach officer with discrepancies in his iterations of events, specifically the lack of information regarding something he believed to be a gun in J.S.'s hand when he fled from passenger side of the vehicle.

TITLE: K.F. v. State
INDEX NO.: K.10.a.
CITE: (01-20-12), 961 N.E.2d 501 (Ind. Ct. App 2012)
SUBJECT: Insufficient evidence of constructive possession of handgun
HOLDING: State presented insufficient evidence to support the true finding that K.F. committed an act that would be carrying a handgun without a license if she were an adult. The State was required to establish that K.F. carried a handgun on her person without a license. To satisfy these elements, the State must prove that D had either actual or constrictive possession of the handgun. Constructive possession occurs when the D has the intent and capability to maintain dominion and control over the item.

Here, there was circumstantial evidence supporting K.F.'s true findings for burglary of her Mother's home and theft of her Mother's property. Many items, including Christmas presents, televisions, game systems and guns, were taken from Mother's home. However, there was no evidence K.F. had actual possession of the guns or had knowledge of the presence of the guns in order to satisfy the intent element of constructive possession. The fact that one can infer K.F. was in the house at the time burglary and that guns were taken is not sufficient evidence that she possessed the guns. Held, judgment affirmed in part and reversed in part.

TITLE: Klopfenstein v. State

INDEX NO.: K.10.a.

CITE: (2d Dist. 9/21/82) Ind. App., 439 N.E.2d 1181

SUBJECT: Handguns - carrying handgun in vehicle; proof

HOLDING: To prove offense of carrying handgun in vehicle (Ind. Code 35-23-4.1-3), state must offer evidence that handgun was found in vehicle & that D had control of either weapon or vehicle with knowledge of weapon's presence. Knowledge can be inferred from fact gun was found in place under dominion & control of D. In addition, evidence must indicate intention to convey or transport weapon from one place to another. Here, D was driver of vehicle in which 2 handguns were found. Gun found directly beneath driver's seat held sufficient to establish knowledge. Held, conviction affirmed.

RELATED CASES: Parks, 113 N.E.3d 269 (Ind. Ct. App 2018) (State presented sufficient evidence D constructively possessed gun and drugs found in a bag behind driver's seat of truck in which he was riding); Deshazier, App., 877 N.E.2d 200 (though not deciding whether sitting on contraband establishes actual possession, evidence was sufficient to support conviction for carrying handgun without a license based on theory that D carried handgun in vehicle, or that he constructively possessed handgun while seated in vehicle); Thurman, App., 793 N.E.2d 318 (evidence sufficient where D testified that he knew there was a gun in the car he was driving but that it was not his); Winters, App., 719 N.E.2d 1279 (despite fact that officers recovered handgun from underneath mattress in motel room, D's proximity to gun when it was found & his admission that he owned gun supported conclusion that D constructively possessed handgun); Hill, App., 688 N.E.2d 1280 (same evidence which may have established constructive possession may also have supported inference that either or both Ds were armed or that they had knowledge of presence & nature of handgun); Ferrell, App., 656 N.E.2d 839 (evidence supported finding that D carried unlicensed handgun in vehicle); Taylor 482 N.E.2d 259 (Ct. App. erred in reversing D's conviction for insufficient evidence; Ct. finds D had constructive possession, distinguishing Frasier 312 N.E.2d 177; held, decision at 474 N.E.2d 136 vacated); Woods 471 N.E.2d 691 (evidence is sufficient to sustain conviction for possession of handgun where handgun was found concealed between dashboard & frame of car owned & driven by D; Ct. rejects D's contention that gun belonged to regular borrower of car, finding evidence of additional circumstances pointing to D's knowledge of presence of contraband).

TITLE: Lewis v. State

INDEX NO.: K.10.a.

CITE: (3d Dist. 10/24/85) Ind. App., 484 N.E.2d 77

SUBJECT: Handguns - constitutionality of statute

HOLDING: Carrying Handgun Without License statute, Ind. Code 35-47-2-24, does not violate right to keep & bear arms. Ind.Const. Art. 1 §32; see Matthews, 148 N.E.2d 334. Requiring D to prove he/she has license or is exempt from license requirement is not unconstitutional because such proof is not element of offense. Elliott, App., 435 N.E.2d 302 (handgun case under earlier statute). Here, D objected to instructions contending they shifted burden of proof to him. Held, no error.

RELATED CASES: Dozier, App., 709 N.E.2d 27 (statutes are in interest of public safety & provide reasonable regulation for use of handguns).

TITLE: McAnalley v. State

INDEX NO.: K.10.a.

CITE: (11/6/87) Ind., 514 N.E.2d 831

SUBJECT: Handguns - carrying; locomotion

HOLDING: Conviction for carrying handgun on or about one's person does not require proof that weapon was conveyed or transported from one place to another. Evidence showed D was seen throwing something into corner of tavern, & handgun was found in corner. D argues state did not prove he "carried" the weapon, because there was no evidence he transported it. Conviction for carrying handgun in a vehicle requires proof of intent to convey or transport it. Cox, 297 N.E.2d 920. When interpreting words of criminal statutes, Ct. must consider both legislative intent & probable perceived common meaning. See R. Dickerson, *The Interpretation & Application of Statutes*, 34-38 (1975). Resort to dictionary is inconclusive. However, Ct. can discern no reasonable basis for condoning unlicensed possession of handgun while imposing criminal sanctions for same conduct if coupled with locomotion. Legislature could not have intended such distinction. Held, proof of locomotion not required.

TITLE: McKeller v. State

INDEX NO.: K.10.a.

CITE: (4th Dist., 09-20-93), Ind. App., 620 N.E.2d 744

SUBJECT: State has no burden to prove lack of exemption

HOLDING: Fact State did not prove gun was not made before January 1, 1899, did not render evidence to support conviction for possession of handgun with obliterated serial number insufficient, because date of manufacture is exemption to prohibited conduct, not element of offense. D was convicted of possession under Ind. Code 35-47-2-18(2), & Ind. Code 35-47-2-19 states chapter does not apply to any firearms made before January 1, 1899. Ct. found that State was not required to prove manufacture after that date as element of offense, because Ind. Code 35-47-2-24(a) provides in part that in enforcement of any provisions of chapter, "it is not necessary to negate any exemption specified under this chapter,..." Ct. also noted that in dealing with offense of carrying handgun without license, it has been held that State doesn't have burden of proving D has license or is exempt from statutory requirements, Lewis, App., 484 N.E.2d 77, *reh. denied*. Ct. then found that when applying meaning of Section 24(a) to Section 19, Section 19 is exemption under chapter that State is not required to negate. Additionally, section under which D was charged, Ind. Code 35-47-2-18, does not include proof of date of manufacture as element of offense, & if legislature intended to make this element, it would have included Section 19 as part of Ind. Code 35-47-2-18. Therefore, evidence was sufficient to support D's conviction.

TITLE: Nichols v. State

INDEX NO.: K.10.a.

CITE: (2nd Dist., 8-20-97), Ind. App., 683 N.E.2d 1358

SUBJECT: Carrying handgun without a license - intent

HOLDING: D possessed criminal intent sufficient to support her conviction of carrying handgun without license. Intent requirement for carrying unlicensed handgun is that D voluntarily engaged in conduct of having on her person unlicensed handgun. McAnalley v. State, 514 N.E.2d 831 (Ind. 1987). It is defense to claim of voluntary possession if D was unaware of possession for time sufficient for her to terminate her possession or if D was compelled by threat of imminent serious bodily injury to herself or another person. Here, when being pulled over, driver of car asked D to hold gun, & D knowingly accepted gun by tucking gun in her waistband. D had sufficient time to terminate possession but did not do so because she was in fear of driver. Fear of driver does not directly rebut claim of voluntary possession but indicates duress. Duress is established only if person was compelled by threat of imminent serious bodily injury to herself or another person. Ind. Code 35-41-3-8. However, D did not argue defense of duress, & evidence at trial was clearly insufficient to establish duress. Held, conviction affirmed; Staton, J., concurs in result.

TITLE: Parker v. State

INDEX NO.: K.10.a.

CITE: (1st Dist., 8-31-01), Ind. App., 754 N.E.2d 614

SUBJECT: Constitutionality of firearm enhancement statute

HOLDING: Tr. Ct. did not err in enhancing D's 40-year sentence for Class A felony robbery an additional five years pursuant to Ind. Code 35-50-2-11(b)(1). Statute provides for five-year sentence enhancement based on D's use of handgun in commission of felony that results in death or serious bodily injury. D argued that he was denied due process when Tr. Ct. enhanced his sentence for use of handgun during course of robbery, & that sentencing statute is unconstitutional. Other than fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury & proved beyond reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). There is distinction between facts that constitute elements of crime, which must be charged & proven beyond reasonable doubt, & mere "sentencing factors," which need not be charged or supported by jury verdict. Jones v. United States, 526 U.S. 227 (2000). Application of Indiana statute under which D's sentence was enhanced did not offend due process under Jones & Apprendi standard. Charge that D used handgun during robbery was submitted to jury, & to reach its verdict jury must have determined beyond reasonable doubt that State proved he did. Held, no error.

TITLE: Person v. State

INDEX NO.: K.10.a.

CITE: (4th Dist., 2-20-96), Ind. App., 661 N.E.2d 587

SUBJECT: Dangerous possession of handgun - constitutionality

HOLDING: Mandatory 5-day executed sentence imposed upon children convicted of dangerous possession of handgun is not disproportionate penalty, not vindictive justice, & not denial of equal protection of laws under Ind. Constitution. Under Ind. Code 35-47-10-8, child who is convicted of dangerous possession of handgun must serve 5 days in jail, while adult charged with carrying handgun without license may receive completely suspended sentence. Ct. held that legislature may determine that children who dangerously possess handguns should serve mandatory 5-day jail term & noted that children convicted of this offense will not necessarily be sentenced more harshly than adults convicted of carrying handgun without license. Special classification of children under Ind. Code 35-47-10 is reasonably related to subject-matter & purpose of legislation, which is to discourage & deter children from possessing handguns. Held, conviction & sentence affirmed.

RELATED CASES: Gall, App., 811 N.E.2d 969 (fact that D may have been able to rebut presumption of waiver to adult Ct. if he were only charged with attempted murder & not dangerous possession of handgun does not constitute "disparate treatment" under Art. 1, Sec. 23).

TITLE: Randolph v. State

INDEX NO.: K.10.a.

CITE: (2nd Dist., 6-3-98), Ind. App., 695 N.E.2d 615

SUBJECT: Carrying handgun without license - statutory defense

HOLDING: Evidence was sufficient to support D's conviction for carrying handgun without license. If possession of property constitutes any part of prohibited conduct, it is defense that person who possessed property was not aware of his possession for time sufficient for him to have terminated his possession. Ind. Code § 35-41-2-1(b). Here, although D claimed that he did not own handgun & was simply returning it to owner, D was aware he possessed handgun. Moreover, reasonable inference that D was not attempting to return handgun to its owner but was instead threatening to use it on occupants of another car can be drawn from fact that D pointed gun & yelled at occupants of other car. Thus, because there was sufficient evidence that D was not attempting to return handgun, Ind. Code § 35-41-2-1(b) did not apply. Held, conviction affirmed.

TITLE: Rehaif v. State

INDEX NO.: K.10.a.

CITE: (12/21/2020), Ind. Ct. App., 161 N.E.3d 371

SUBJECT: Felons-in-possession must know they are felons

HOLDING: In a prosecution under 18 U. S. C. §922(g) and §924(a)(2), which criminalizes possession of firearms by a person falling into any of nine enumerated status categories, the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. Requiring a higher showing of culpability helps “separate those who understand the wrongful nature of their act from those who do not.” Here, an undocumented immigrant was charged with being in possession of a firearm, so prosecutors must prove not only that he knew he possessed a firearm or ammunition, but also that he knew his immigration status made him ineligible to have the prohibited item. Held, judgment reversed for hearing on whether Defendant actually knew he was out of immigration status. Alito, J., joined by Thomas, J., DISSENTING, protested that the Court's decision will lead to a flood of challenges by people currently incarcerated under Section 922(g), most of them in the felon-in-possession category.

TITLE: Robertson v. State

INDEX NO.: K.10.a.

CITE: (3-27-02), Ind., 765 N.E.2d 138

SUBJECT: Carrying handgun without license - area outside of apartment

HOLDING: Evidence was sufficient to support conviction for carrying handgun without license, where D possessed weapon in common hall outside door to his apartment. Ind. Code 35-47-2-1 permits individual to carry handgun without license in his dwelling, on his property or fixed place of business. "Dwelling" is defined as "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." Ind. Code 35-41-1-10. D argued that his place of arrest fits within statutory definition of dwelling & noted that common areas such as enclosed hallways & stairways of an apartment house have been held not to be public places. Observing that people treat area immediately outside apartment as their curtilage, Ct. App. concluded that such area was part of the person's dwelling. Supreme Ct. disagreed & held that doctrine of curtilage is not applicable here. In Ind. Code 35-41-3-2(b) & (c), which protects person from criminal liability when force is used to protect their dwelling or curtilage, the concept of curtilage is treated as separate & distinct from dwelling. In statute proscribing carrying handgun without license, however, a person's dwelling is designated as an exception without also including curtilage. Legislature cannot have intended to permit carrying of unlicensed handguns in all apartment common areas that person may claim as part of their place of lodging. To foster application of statute in fair, consistent, & predictable manner, consistent with legislative intent, Ct. held that "dwelling" does not include common areas serving a person's apartment. Held, transfer granted, Ct. App.' opinion at 740 N.E.2d 574 vacated, conviction affirmed; Rucker, J., dissenting.

TITLE: Seel v. State

INDEX NO.: K.10.a.

CITE: (2nd Dist.; 11-28-00), Ind. App., 739 N.E.2d 170

SUBJECT: Handguns – Mere possession is not carrying

HOLDING: State improperly refused to return D's firearms that were illegally seized as part of his arrest for Possession of Marijuana. Following final disposition of cause at trial level or any other final disposition, [seized] property which may be lawfully possessed shall be returned to its rightful owner, if known. Ind. Code 35-33-5-5(C)(1). Person needs license to carry handgun in vehicle or on or about his person or in place other than his dwelling, property or fixed place of business. Ind. Code 35-47-2-1. Here, while arresting D for marijuana possession, police seized four handguns & assault rifle found inside vehicle located in storage facility rented by D & his mother. D did not have license to possess guns. Ultimately, criminal case & forfeiture were dismissed because guns were illegally seized. However, Tr. Ct. granted State's motion to destroy guns because D could not "legally" possess them without license. Because Ind. Code 35-47-2-1 speaks specifically of carrying rather than possessing handgun, fact that weapons were found in D's vehicle in rented storage facility is, as matter of law, insufficient to support inference that D at one time carried or will carry weapons on his person or in vehicle. Moreover, because State failed to present any evidence that D was drug abuser according to Ind. Code 35-47-1-4, D is not barred from possessing handguns under 18 U.S.C. § 921-22, which makes it illegal for State to return firearms to persons who are reasonably known to be unlawful users of controlled substance. Thus, at close of D's forfeiture proceeding, he was entitled to return of his guns that he lawfully possessed. Held, order destroying guns reversed.

TITLE: State v. Gibbs

INDEX NO.: K.10.a.

CITE: (2-20-02), Ind. App., 769 N.E.2d 594

SUBJECT: Inoperable handgun can serve as basis for charge

HOLDING: Possession of inoperable handgun may serve as basis for charge of carrying handgun without license. Juvenile D was charged based on inoperable antique handgun found in trunk of car at school. Tr. Ct. granted D's motion to dismiss, concluding that device was clearly not operable & could not be considered firearm within meaning of criminal statute. Ind. Code 35-47-1-5 defines firearm as any weapon that is capable of or designed to or that may readily be converted to expel projectile by means of explosion. In Manley v. State, 656 N.E.2d 277 (Ind. Ct. App. 1995), Ct. held that according to plain terms of statute, State is not required to prove handgun is operable to obtain conviction, rather it is sufficient for State to establish that handgun was designed to expel projectile by means of explosion. Further, mere sight of gun is sufficient to provoke fearful response from average citizen, who is very unlikely to wait to determine weapon's operability before reacting in panicked or violent manner. McLaughlin v. State, 476 U.S. 16 (1986). Held, judgment reversed.

RELATED CASES: Staten, App., 844 N.E.2d 186 (disassembled gun is a "firearm;" see full review, this section).

TITLE: State v. Moss-Dwyer

INDEX NO.: K.10.a.

CITE: (10-23-97), Ind., 686 N.E.2d 109

SUBJECT: Proportionality claim - false information & handgun licenses

HOLDING: Legislature did not violate constitutional requirement of proportionality by punishing submitting false application for handgun license as Class C felony while punishing carrying handgun without permit as Class A misdemeanor. Article I, Section 16, of Ind. Constitution requires all penalties to be proportioned to nature of offense. Statute is unconstitutional only for penalties so disproportionate to nature of offense as to amount to clear constitutional infirmity sufficient to overcome presumption of constitutionality afforded to legislative decisions about penalties. Steelman, App., 602 N.E.2d 152. In Conner, 626 N.E.2d 803, Ct. held that more severe punishment for dealing in fake substance than for dealing in marijuana violated proportionality requirement, because legislature exhibited pattern of punishing marijuana offenses more leniently than other drug offenses. Here, legislature has shown pattern of punishing crimes involving misinforming or deceiving public officials harshly. In light of presumption of constitutionality of statutes & heavy burden on party asserting unconstitutionality, handgun permit penalty scheme does not violate proportionality requirement of Ind. Constitution. Held, judgment reversed.

TITLE: State v. Shelton

INDEX NO.: K.10.a.

CITE: (2nd Dist., 3-23-98), Ind. App., 692 N.E.2d 947

SUBJECT: Handguns - selling handgun to minor; strict liability

HOLDING: Legislature intended for sale of handgun to minor to be strict liability offense. While it is presumed that legislature intended to include culpable mental state in criminal statute, presumption may be overcome if consideration of following facts decisively indicate that no such mental state was intended: 1) legislative history, title or context of criminal statute; 2) similar or related statutes; 3) severity of punishment; 4) danger to public of prohibited conduct; 5) D's opportunity to ascertain operative facts & avoid prohibited conduct; 6) prosecutor's difficulty in proving D's mental state; & 7) number of expected prosecutions Keihn, 542 N.E.2d 963. Here, statute criminalizing sale of handgun to minor does not explicitly state culpable mental state required; however, other statutes which ban sale of certain items to minors do explicitly set forth required mental state. In addition, D has opportunity to ascertain age of person to whom he intends to sell handgun to avoid prohibited conduct & it is generally difficult to prove D's mental state. Although severity of punishment & expected number of prosecutions militate against imposition of strict liability, fact that youths with handguns present great danger both to our youth & general public weighs heavily in favor of conclusion that legislature intended to make sale or transfer of handgun to minor strict liability offense. Thus, Tr. Ct. erred when it instructed jury that State was required to prove that D knowingly or intentionally sold handgun to person under-age of eighteen. Held, judgment reversed on reserved question of law.

TITLE: Staten v. State

INDEX NO.: K.10.a.

CITE: (5th Dist., 03-22-06), Ind. App., 844 N.E.2d 186

SUBJECT: Carrying handgun without license - disassembled gun is a firearm

HOLDING: A handgun is defined under Ind. Code 35-47-1-6 as any firearm capable of being fired with one hand or having certain measurements. Ind. Code 35-47-1-5 defines a "firearm" as "any weapon that is capable of or designed to or that may readily be converted to expel a projectile by means of an explosion." (Ct.'s emphasis). Statute clearly contemplates that some conversion, such as reorganization or assembly, of parts may be required. Thus, statute includes in the definition of "firearm" a disassembled gun. Here, although Derringer found in D's purse was disassembled, the pieces, upon reassembly, could readily have been "converted to expel a projectile by means of an explosion." Video evidence at trial showed two police officers readily assembled the handgun & fired it in a matter of seconds. Like the handgun in Manley v. State, 656 N.E.2d 277 (Ind. Ct. App 1995), fact that handgun was not immediately capable of firing was irrelevant under Ind. Code 35-47-1-5. Held, conviction for carrying handgun without license affirmed.

TITLE: Tormoehlen v. State

INDEX NO.: K.10.a.

CITE: (2nd Dist., 05-30-06), Ind. App., 848 N.E.2d 326

SUBJECT: Carrying handgun without license - obtaining license after date of charged offense

HOLDING: Motion to dismiss charge of carrying a handgun without a license pursuant to Ind. Code 35-47-2-1 was properly denied where D subsequently received a valid license after his citation. D had moved for dismissal prior to trial, which was denied, while the Tr. Ct. granted the State's motion in limine keeping D from telling the jury of the subsequent granting of a license. Ind. Code 35-47-2-24(b) states that when a person arrested or charged under Ind. Code 35-47-2-1 "presents a valid license to the prosecuting attorney" any prosecution shall be dismissed "immediately." D argued this section applied to any "valid license" & not that the license must have been valid at the time of the offense. While penal statutes conventionally are to be strictly construed against the State, "we presume that the legislature intends for us to apply language in a logical manner consistent with the statute's underlying policy & goals." B.K.C. v. State, 781 N.E.2d 1157 (Ind. Ct. App2003). D pointed to the offense of not having a driver's license in your immediate possession as an example of the legislature providing the specific language the Ct. read into the present statute. Under Ind. Code 9-24-13-2, the charge is to be dismissed if a license "that was valid at the time of the person's apprehension" is presented within five days. The legislature may have thought the language for carrying a handgun would encourage people charged with carrying an unlicensed handgun with obtaining a license. Although finding this a "cogent argument," Ct. was unable to say that the legislature intended such a result, noting similar facts in Wilson v. State, 727 N.E.2d 775 (Ind. Ct. App2000), *affirmed on relevant grounds* 745 N.E.2d 789 (Ind.2001).

D also challenged the giving of a jury instruction defining the carrying a handgun without a license crime which added a paragraph to D's submitted instruction that if the State proved each of the elements the D should be found guilty. D contended that while the sentence was part of the second edition of the Indiana Pattern Jury Instructions it was omitted from the third edition, & therefore, was an incorrect statement of the law. Although the preferred practice is to use the pattern jury instructions, the pattern instructions may be supplemented where necessary to eliminate an ambiguity. Gravens v. State, 836 N.E.2d 490 (Ind. Ct. App2005).

Ct. also disagreed with D's contention that the "guilty" paragraph placed before the affirmative defense diminished the affirmative defense, as jury instructions must be considered as a whole & in reference to each other. Ct. also found that sufficient evidence existed to overcome D's affirmative defense. The gun had been in D's unlocked glove compartment prior to an accident that police investigated. The magazine was under the spare tire in the trunk area. Ind. Code 35-47-2-2(11) states that Ind. Code 35-47-2-1 "does not apply to . . . any person while carrying a handgun unloaded & in a secure wrapper from the place of purchase to his dwelling or fixed place of business, or to a place of repair or back to his dwelling or fixed place of business, or in moving from one dwelling or business to another." Here, the handgun was within easy reach in the unlocked glove compartment of D's vehicle. Neither the officer nor D were able to say definitively that the gun required the magazine to be in place in order to fire the gun, or, in other words, a bullet could have been in the chamber despite the removal of the magazine. Held, judgment affirmed.

RELATED CASES: Wilson, 88 N.E.3d 209 (Ind. Ct. App 2017) (sufficient evidence that D acted knowingly or intentionally when he carried a handgun without a license where license D produced for officer had expired).

TITLE: United States v. Davis
INDEX NO.: K.10.a.
CITE: (06/24/19), U.S. 2019, 139 S. Ct. 2319
SUBJECT: Enhancement for firearm cases during "crime of violence" unconstitutionally vague
HOLDING: Title 18 U. S. C. § 924(c)(3)(B), which provides enhanced penalties for using a firearm during a "crime of violence," is unconstitutionally vague. The statute imposes longer sentences on criminal defendants who possess or use a firearm in a crime that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But even the government admits that this language, provides no reliable way to determine which offenses qualify as crimes of violence. And "in our constitutional order, a vague law is no law at all" because it violates the core constitutional requirement that all federal statutes "give ordinary people fair warning about what the law demands of them." Held, judgment reversed. Kavanaugh, J., joined by Thomas, Alito, JJ., and Roberts, C.J. (in part), DISSENTING, noting a "decision to strike down a 33-year-old, often-prosecuted federal criminal law because it is all of a sudden unconstitutionally vague is an extraordinary event, and noting that "The Court usually reads statutes with a presumption of rationality and a presumption of constitutionality."

TITLE: Wagerman v. State

INDEX NO.: K.10.a.

CITE: (1st Dist. 08/05/92), Ind. App., 597 N.E.2d 13

SUBJECT: Possession of handgun with altered serial number - knowledge of alteration required

HOLDING: Knowledge of serial number's alteration is element of crime of possession of handgun with altered serial number. D, who had license to carry handgun, was with others when fight ensued & officers accosted them. When they were leaving van into which they had climbed, 2 handguns were thrust upon D, one into his trousers & one into his hands. Within several seconds of transfer of gun, D was searched by officers who discovered both gun D was legally carrying & 2 others he had been handed, which had altered serial numbers. No evidence of D's knowledge that serial numbers were altered was presented at trial.

Ind. Code 35-37-2-18 does not contain specific mens rea requirement. Factors used to determine whether criminal intent is element of crime without specified intent are: 1) legislative history, title or context of statute; 2) similar or related statutes; 3) severity of punishment; 4) danger of prohibited conduct; 5) D's opportunity to determine necessary facts to avoid prohibited act; 6) prosecutor's difficulty in proving mental state; & 7) number of expected prosecutions under statute (greater numbers indicates no mental state required). With presumption that criminal intent is generally necessary element, Ct. found that consideration of factors did not decisively indicate that legislature intended to exclude intent as element of crime, Robertson, J., dissenting.

NOTE: In footnote Ct. noted that analysis & holding discussed applies with full force to other prohibitions of Ind. Code 35-47-2-18.

RELATED CASES: Cole, 69 N.E.3d 552 (Ind. Ct. App 2017); Robles, App., 758 N.E.2d 581 (evidence was sufficient to convict D for possession of altered handgun where D had time & opportunity to apprise himself of lack of serial number & avoid continued possession).

TITLE: Walker v. State
INDEX NO.: K.10.a.
CITE: (5th Dist., 02-28-94), Ind. App., 631 N.E.2d 1
SUBJECT: Possession of handgun - Insufficient evidence

HOLDING: Where D was merely passenger in car where handgun was found, evidence was insufficient to support conviction for carrying handgun without license. When officers stopped car, D was sitting in front passenger seat. After both he & driver denied having any weapons, officer shined flashlight in car & saw rear seat had been pulled away, exposing inside of trunk. In trunk was nine-millimeter handgun. Both men were arrested & charged with carrying handgun without license.

Situation was similar to that in Cole, App., 588 N.E.2d 1316, where D was passenger in car where handgun was found on driver's side of back seat floorboard, & evidence was insufficient to sustain conviction. Constructive possession of handgun is not sufficient to sustain conviction for carrying handgun without license. Ind. Code 35-47-2-1 prohibits person from carrying handgun in any vehicle or on his person, without license. While possession can be actual or constructive, statute speaks of carrying, not possessing handgun. To sustain conviction for carrying unlicensed handgun in car, State must prove unlicensed gun was found in car, that D had control of car with knowledge of weapon's presence, & that D intended to convey or transport handgun, Cole, *supra*. To sustain conviction for carrying handgun on or about person, State must prove D had gun on his or her person. Here, D was charged alternatively, but there was no evidence he had control over car, & there was also insufficient evidence to show he had handgun on his person. Handgun was found behind rear seat in trunk, & mere evidence D was passenger in front seat was insufficient to support inference that he at one time had gun on his person.

RELATED CASES: Henderson, 715 N.E.2d 83 (Ind. 1999) (constructive possession of handgun is sufficient to sustain a conviction for carrying a handgun without a license even though statute speaks in terms of carrying a handgun and does not speak in terms of possessing a handgun; see full review, this section); Jones, 924 N.E.2d 672 (Ind. Ct. App 2010) (insufficient evidence of constructive possession of handgun found under the front portion of the driver's seat; D was mechanic test driving car; because Jones did not exclusively possess customer's car for a long time, it was inappropriate to impute intent to possess gun based only on D's exclusive possession of the car); E.D., App., 905 N.E.2d 505 (evidence was insufficient to prove that D, one of four passengers in car, constructively possessed handgun found in pocket behind driver's seat); Grim, App., 797 N.E.2d 825 (D's close proximity to handguns in addition to fact that one of handguns was plainly visible when passenger door was open & that there were bullets & ammunition in plain view, is sufficient evidence of constructive possession); D.C.C., App., 695 N.E.2d 1015 (there was no circumstantial evidence which pointed to D's knowledge of presence of weapon, so constructive possession of gun could not be inferred); Hill, App., 688 N.E.2d 1280 (State presented evidence which supported inference that Ds either constructively possessed, actually possessed, or knew of presence & nature of handgun); Ferrell, App., 656 N.E.2d 839 (evidence supported finding that D carried unlicensed handgun in vehicle).

TITLE: Wallace v. State

INDEX NO.: K.10.a.

CITE: (2nd Dist., 2-1-00), Ind. App., 722 N.E.2d 910

SUBJECT: Carrying unlicensed handgun in vehicle - constructive possession shown

HOLDING: Evidence was sufficient to support D's conviction for carrying handgun without license.

D was one of four occupants in car from which shots had been fired at home. When car was stopped, officer observed D handing something to another back-seat passenger. That passenger then opened door & threw several objects out of car. Police later found three handguns & one shotgun near car. Ct. concluded that this evidence supported inference that, at time car was stopped, D had intent & capability to maintain control over any & all of guns that had been thrown from car. Held, conviction affirmed; Sullivan, J., dissenting on basis that facts were not inconsistent with D's possession of shotgun rather than one of three handguns & there was no evidence connecting him to one of handguns other than his presence in vehicle.

RELATED CASES: Deshazier, App., 877 N.E.2d 200 (though not deciding whether sitting on contraband establishes actual possession, evidence was sufficient to support conviction for carrying handgun without a license based on theory that D carried handgun in vehicle, or that he constructively possessed handgun while seated in vehicle)

TITLE: Webster v. State

INDEX NO.: K.10.a.

CITE: (12/7/2016), 64 N.E.3d 919 (Ind. Ct. App 2016)

SUBJECT: Location where D is carrying handgun is essential element of offense

HOLDING: The State has the burden of proof that a person charged with carrying a handgun without a license is not on his own property, residence, or fixed place of business. Being in a place where it is legal to possess a handgun without a license is not an affirmative defense or an exception to the statute; not being in such a place is an element of the offense. Armstrong v. State, 742 N.E.2d 972 (Ind. Ct. App 2001). The statute does not shift the burden of proof to the defendant.

Here, Tr. Ct. clearly erred in denying D's Trial Rule 41(B) motion for involuntary dismissal because the State failed to prove that the address where the handgun was found was not D's dwelling, property or fixed place of business. Held, conviction reversed.

K. CRIMES

K.10. Weapons/firearms/explosives

K.10.b. Explosives (Ind. Code 35-47-5-8 to 10; Ind. Code 35-47-6) (see, also arson, K.4.a)

TITLE: A.H. v. State

INDEX NO.: K.10.b.

CITE: (4th Dist., 9-4-03), Ind. App., 794 N.E.2d 1147

SUBJECT: Possession of destructive device - evidence insufficient

HOLDING: Evidence was insufficient to support juvenile Ct.'s finding that D possessed a destructive device, a class C felony if committed by adult under Ind. Code 35-47.5-5-2. Term "destructive device" does not include a "device that is neither designed nor redesigned for use as a weapon." D & his friends retrieved a two-liter bottle & other necessary items, assembled bottle by placing aluminum foil & toilet bowl cleaner inside it, screwed on cap rendering it capable of causing explosion, & then placed it inside hole in which it exploded. Evidence was clear that boys did not intend that bottle be used against another person or an animal. There is no evidence from which juvenile Ct. could have concluded that bottle was designed to be used against a person or animal, as required by statute. However, bottle qualified as an overpressure device because it was a container filled with chemicals that generate an expanding gas. Knowing & intentional use of an overpressure device is a Class A misdemeanor under Ind. Code 35-47.5-5-9, & D could be found to have used an overpressure device as a factually included offense. Held, remanded to vacate true finding of possession of destructive device & to enter a true finding for use of overpressure device.

TITLE: Austill v. State

INDEX NO.: K.10.b.

CITE: (1st Dist., 3-20-01), Ind. App., 745 N.E.2d 859

SUBJECT: Denial of motion to dismiss possession of bomb charge affirmed

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss charge of possessing a bomb. D's motion alleged that facts stated in information failed to state offense under Ind. Code 35-47-5-8(2), which prohibits person from possessing bomb loaded with either explosives or dangerous gases. Noting that he was not in possession of all components necessary to constitute explosive device, namely gunpowder or dynamite, D argued that, as matter of law, a push button type, battery operated switch, connected by two wires or two electric blasting caps does not constitute a bomb. After reviewing common understanding & definition of "bomb" & "detonator," Ct. rejected D's argument, concluding that a "blasting cap" is explosive device, carrying explosive charge, containing small quantity of some explosive, designed to release destructive force & used to detonate another explosive. Moreover, State Police Supplemental Case Report noted that blasting caps contain explosive material & can cause serious bodily injury from fragmentation of metal cap. Thus, blasting caps, together with two connector wires & battery detonating switch, was sufficient evidence to charge D with possession of bomb. Held, judgment affirmed.

TITLE: Satterfield v. State
INDEX NO.: K.10.b.
CITE: (1st Dist. 9/20/84) Ind. App., 468 N.E.2d 571
SUBJECT: Possession of bomb - sufficiency
HOLDING: Evidence was insufficient to sustain D's conviction for possession of 2 bombs where bombs were found in desk drawer in den of home occupied by D & his wife & state offered no proof of knowledge or personal possession. Ind. Code 35-23-3-1 does not specify knowledge or intent, but Ct. finds knowledge is an implied element. Gregory 291 N.E.2d 67; Malich, (1929) 201 Ind. 587 (possession of intoxicating liquors; knowledge is element despite statute's silence). Knowledge can't be inferred from non-exclusive possession/control of premises. Some additional evidentiary link is required. [Citations omitted.] Ct. discusses meaning of "possess." Williams 253 N.E.2d 242. Held, reversed; Tr. Ct. directed to discharge D.

TITLE: Smithhart v. State

INDEX NO.: K.10.b.

CITE: (1st Dist. 05/11/92), Ind. App., 591 N.E.2d 149

SUBJECT: Possession of fireworks not lesser-included offense (LIO) of possession of bomb

HOLDING: In prosecution for possession or ownership of bomb, it was not error for Tr. Ct. to refuse D's request for LIO instruction on possession of fireworks. Ind. Code 35-47-5-8 provides that anyone who possesses bomb loaded with either explosives or dangerous gases, commits C felony, but does not define bomb. Possession of fireworks is Class A misdemeanor, & fireworks are classified in general as "any composition or device designed for purpose of producing visible or audible effect by combustion, deflagration, or detonation," Ind. Code 22-11-14-2. Although bomb is not defined, general understanding is that it is explosive weapon designed to release destructive material or force. Ct. found that although bomb may also produce visible or audible effect, like fireworks, its primary purpose is destructive. Fireworks can be destructive, but their primary purpose is not destructive. Because of their different purposes, 2 items are distinguishable, & therefore all of statutory elements of possession of firework are not included in possession of bomb, & neither is LIO of other.

K. CRIMES

K.10. Weapons/firearms/explosives

K.10.c. Pointing a firearm (Ind. Code 35-47-4-3)

TITLE: Brown v. State

INDEX NO.: K.10.c.

CITE: (5th Dist., 7-2-03), Ind. App., 790 N.E.2d 1061

SUBJECT: Pointing firearm - no need to prove firearm was loaded to obtain D felony conviction

HOLDING: Evidence was sufficient to sustain D's pointing a firearm convictions as class D felonies, even though State presented no evidence or inferences from evidence that gun was loaded. Ind. Code 35-47-4-3 provides that a person who knowingly or intentionally points a firearm at another person commits a Class D felony. However, offense is a Class A misdemeanor if firearm was not loaded. Statutory language indicates a clear intent that State is not required to prove that a firearm was loaded in order to obtain a conviction for pointing a firearm as a class D felony. Baseline offense is class D felony &, if affirmatively proven that firearm was not loaded, offense is reduced to a class A misdemeanor. Held, convictions affirmed; Sullivan, J., concurring in part & dissenting in part on other grounds.

Note: Majority also held that, by waving a firearm at individuals in confined space of automobile, D put each occupant at risk of injury; thus, multiple convictions were supportable.

TITLE: VanMatre v. State

INDEX NO.: K.10.c.

CITE: (2nd Dist.; 5-11-99), Ind. App., 714 N.E.2d 655

SUBJECT: Attempted pointing firearm - sufficient evidence; intent

HOLDING: Evidence was sufficient to support conviction for attempted pointing firearm, where D intended to point firearm at officer. In order to sustain conviction, evidence must demonstrate that D knowingly or intentionally engaged in conduct which constituted substantial step toward commission of crime of pointing firearm. Intent is mental function; therefore, absent admission, trier of fact must resort to reasonable inferences based upon examination of surrounding circumstances to determine whether, from person's conduct & natural consequences thereof, showing or inference of intent to commit that conduct exists. Isom v. State, 589 N.E.2d 245, 247 (Ind. Ct. App 1992). Here, officers responded to concerns about safety of employee, who was locked in alone with D in liquor store where she worked. When D unlocked door to allow officers inside store, D pulled revolver from his waistband & began to raise it in direction of one officer. Based upon D's conduct, natural consequences thereof & circumstances at hand, fact finder could reasonably have inferred that D knowingly or intentionally acted to point revolver at officer. Held, conviction affirmed.

K. CRIMES

K.10. Weapons/firearms/explosives

K.10.d. Possession of firearm by a serious violent felon (IC 35-47-4-5)

TITLE: Abdullah v. State

INDEX NO.: K.10.d.

CITE: (5th Dist.; 05-25-06), Ind. App., 847 N.E.2d 1031

SUBJECT: Unsigned abstract insufficient to prove statuses of serious violent felon & habitual offender

HOLDING: Where a certified, but unsigned, abstract of judgment is the only evidence before the Ct. introduced to show that an offender has a prior conviction for purposes of proving his statuses as a serious violent felon & as an habitual offender, the evidence is insufficient to prove the D was a serious violent felon or an habitual offender. Indiana Trial Rule 58 requires that an abstract of judgment include a judicial signature in order to be considered a final record of a Tr. Ct.'s ruling. Here, in order to establish D's status as both a serious violent felon & habitual offender, State submitted certified copies of an abstract of judgment, charging documents, probable cause affidavits & arrest records to prove that D had been convicted of robbery in 1993. The abstract of judgment was the only document which suggested the D was convicted of robbery, & not just charged with robbery. Although certified, the abstract was not signed by the judge. Thus, there was insufficient evidence to support D's conviction of unlawful possession of a firearm as a serious violent felon & his habitual offender enhancement. Held, conviction reversed.

TITLE: Berberena v. State

INDEX NO.: K.10.d.

CITE: (10/30/2017), 86 N.E.3d 199 (Ind. Ct. App 2017)

SUBJECT: Possession of firearm as a SVF - Illinois aggravated battery statute not substantially similar to Indiana's statute

HOLDING: In prosecution for possession of a firearm by a serious violent felon (SVF), trial court erred when it determined that an Illinois statute for aggravated battery used to establish the SVF charge was "substantially similar" to Indiana's statute pursuant to Ind. Code § 35-47-4-5(a)(1). An out-of-state statute is not substantially similar to an Indiana statute where the out-of-state statute is broader than the Indiana statute. State v. Hancock, 65 N.E.3d 585 (Ind. 2016). In Illinois, it is possible to be convicted of aggravated battery whenever the battery results in any harm greater than "bodily harm." However, in Indiana, a battery that results in harm greater than "bodily injury" could be any number of offenses ranging from Level 1 felonies to Level 6 felonies, not all of which qualify as serious violent felonies under Ind. Code § 35-47-4-5(b). For example, an Indiana battery that results in "moderate bodily injury" as a Level 6 felony would be premised on a harm greater than "bodily injury" and would not qualify as a SVF. In Illinois, a battery that results in that same degree of harm would satisfy the "great bodily injury" requirement for Illinois's offense of aggravated battery. Thus, the Illinois statute has a broader injury element and is more inclusive than Indiana's. Following Supreme Court's analysis in Hancock, the two statutes are not substantially similar for purposes of Ind. Code § 35-47-4-5. Held, conviction reversed.

RELATED CASES: Tavake, 131 N.E.3d 696 (Ind. Ct. App. 2019) (California crime for which D had been convicted was substantially similar to Indiana to qualify as prior conviction under Indiana's SVF statute).

TITLE: Bowens v. State

INDEX NO.: K.10.d.

CITE: (12/9/2014), 24 N.E.3d 426 (Ind. Ct. App 2014)

SUBJECT: Serious violent felon (SVF) stipulation relieved State of presenting evidence of prior conviction

HOLDING: State presented sufficient evidence to support D's conviction for unlawful possession of a firearm by a serious violent felon (SVF). D did not dispute State's charge that he was convicted of class C battery in 1995, but argued that State failed to present evidence of that conviction to the jury and thus failed to prove his SVF status beyond a reasonable doubt. Tr. Ct. chose to remove all references to the SVF label during trial in order to avoid prejudice after D's counsel filed a motion to bifurcate the proceedings. See Dugan v. State, 860 N.E.2d 1288 (Ind. Ct. App 2007). Because D stipulated that he was "a person barred from possessing a firearm under Indiana Code 35-47-4-5" and State relied on the stipulation as an admission of SVF status (and introduced a booking report about the predicate battery offense), Court held the evidence was sufficient. Held, judgment affirmed.

TITLE: Bradshaw v. State

INDEX NO.: K.10.d.

CITE: (2nd Dist., 11-22-04), Ind. App., 818 N.E.2d 59

SUBJECT: Unlawful possession of firearm by serious violent felon (SVF) - evidence sufficient

HOLDING: On appeal of D's conviction for unlawful possession of firearm by SVF, D claimed that State failed to show beyond reasonable doubt that he had a previous conviction for dealing in cocaine that served as the basis for enhanced firearm charge. D entered a plea of guilty to dealing in cocaine on March 12, 2003, & was charged with SVF offense on July 28, 2003. Fact that D was not sentenced for dealing offense until September 19, 2003 is irrelevant with regard to SVF offense. Under Ind. Code 35-47-4-5(a)(1)(A), a person who has been convicted of committing a serious violent felony in Indiana is a "serious violent felon." Statute does not define a SVF as an individual who has been sentenced for committing a serious violent felony, & had legislature intended to exclude Ds who have been convicted of-- but not sentenced for-- committing a serious violent felony, it would have drafted statute accordingly. State proved beyond a reasonable doubt that: 1) D had been convicted of dealing in cocaine, a serious violent felony; & 2) thereafter, knowingly or intentionally constructively possessed firearm found directly beneath seat that D occupied when vehicle stop occurred. Held, judgment affirmed.

TITLE: Harmon v. State
INDEX NO.: K.10.d.
CITE: (3rd Dist.; 06-26-06), Ind. App., 849 N.E.2d 726
SUBJECT: Self-defense -- applies to possession of firearm by serious violent felon (SVF) cases
HOLDING: Tr. Ct. abused its discretion by excluding self-defense evidence in trial for unlawful possession of a firearm by SVF. Indiana's prohibition against felon possessing a firearm was not intended to affect his or her right to use a firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist. Thus, if a firearm was taken by a felon from a location which was lawful rather than the felon carrying the firearm prior to felon's fear for safety, the felon may present evidence of self-defense if warranted by evidence.

Here, D was charged with Attempted Voluntary Manslaughter, Criminal Recklessness, Disorderly Conduct & Unlawful Possession of a Firearm by SVF. The SVF charge was bifurcated from the other charges. During trial on the Attempted Voluntary Manslaughter, Criminal Recklessness, & Disorderly Conduct charges, D testified that, in middle of a heated altercation between, on one hand, he & his fiancée & on the other, his neighbors & landlord, he broke into a locked gun case to obtain a handgun of his fiancée, with whom he lived. D testified he took possession of the firearm because he was outnumbered & saw his neighbor approaching his house with a gun & did not know his neighbor's intentions. D fired one shot in the air & dropped firearm. Jury acquitted D on Attempted Voluntary Manslaughter & Criminal Recklessness & found him guilty of Disorderly Conduct. These circumstances should have permitted D to have presented the same self-defense evidence during trial on Serious Violent felon. Despite fact jury obviously believed D acted in self-defense based on his testimony, there is sufficient evidence that D was felon in possession of firearm, & thus, double jeopardy does not bar re-trial on SVF in Possession of Firearm charge. Held, conviction reversed & remanded for trial on SVF in possession of firearm.

TITLE: Hines v. State

INDEX NO.: K.10.d.

CITE: (1-21-04), Ind., 801 N.E.2d 634

SUBJECT: Bifurcated trial - Unlawful Possession of Firearm by Serious Violent Felon

HOLDING: Ct. granted transfer to adopt & incorporate by reference the opinion of the Ct. App. in Hines v. State, 794 N.E.2d 469 (Ind. Ct. App 2003), agreeing that D's request for a bifurcated trial on charges of robbery & unlawful possession of a firearm by a serious violent felon (SVF) should have been granted. Specifically, Ct. agreed that the prejudice arising from evidence of prior felony convictions needed to sustain the unlawful possession of firearm by SVF charge substantially outweighed its probative value for the robbery charge. Specifically, the S.Ct. highlighted two portions of the Ct. App.' decision: 1) Spearman v. State, 744 N.E.2d 545 (Ind. Ct. App 2001), involved the denial of a bifurcated trial when tried solely for the crime of unlawful possession of a firearm by a SVF, & (2) The Ct. App. properly analyzed the effect of D's offer to stipulate to the serious violent felon charge if found guilty of the robbery. Ct. noted that "while it is generally true that the State is entitled to prove its case by evidence of its own choice ... the United States S.Ct. has determined that this general rule has virtually no applicability where" the issue is a D's legal status independent of the criminal behavior later charged against him. Old Chief v. United States, 519 U.S. 172, 186-187 (1997). Held, transfer granted, D's convictions reversed & Ct. App.' opinion adopted & incorporated by reference.

RELATED CASES: Gray, App., 841 N.E.2d 1210 (appellate counsel ineffective for not arguing SVF bifurcation issue; see full review at Y.4.c); Causey, App., 808 N.E.2d 139 (Ct. found no 6th Amend. violation of D's right to a fair & impartial jury nor a due process violation where D was tried before same jury on the same day for firearm possession charge after his acquittal on robbery charge; D agreed to these proceedings & invited the error by stipulating to the bifurcation proceedings prior to trial).

TITLE: Hollingsworth v. State
INDEX NO.: K.10.d.
CITE: (2nd Dist., 04-24-09), 907 N.E.2d 1026 (Ind. Ct. App 2009)
SUBJECT: Arkansas second-degree domestic battery used as predicate conviction for SVF charge
HOLDING: In unlawful possession of firearm by serious violent felon (SVF) prosecution, Tr. Ct. properly found as a matter of law that an Arkansas statute was substantially similar to Indiana's felony battery statute for purposes of the SVF charge. To qualify as a SVF, D must have been convicted of a serious violent felony in Indiana or in "any jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of a serious violent felony. Ind. Code 35-47-4-5(a)(1)(A)-(B). D had previously been convicted of second-degree domestic battery in Arkansas. Court compared Arkansas statute and Indiana's Class C felony battery statute, noting that despite use of different terminology for the requisite mens rea, "purposely" in Arkansas and "intentionally" in Indiana have substantially the same meaning: they both require that the person have the "conscious objective" to engage in that particular conduct or effect a particular result. "Recklessly" in Arkansas and "knowingly" in Indiana both require that the person act with the knowledge that he is engaging in the conduct or that the result will occur. Court found little difference between requiring that the actor be aware of a high probability that he is engaging in conduct and requiring the actor to disregard a substantial risk that the result will occur. Both standards require similar degrees of mental culpability. Regardless of which subsection of the Arkansas statute D violated (i.e., "purposely" or "recklessly" causing physical injury), offense was substantially similar to Indiana's felony battery offense. Held, judgment affirmed.

RELATED CASES: McCoy, 153 N.E.3d 546 (Ind. Ct. App. 2020) (09/10/2020) (though not perfectly congruent, D's out-of-state robbery conviction was substantially similar to the serious violent felony of robbery in Indiana and could be relied upon to support his conviction).

TITLE: Pace v. State
INDEX NO.: K.10.d.
CITE: (2-5-2013), 981 N.E.2d 1253 (Ind. Ct. App 2013)
SUBJECT: IAC of trial counsel - failure to bifurcate SVF and dealing charges
HOLDING: Defendant was denied effective assistance of counsel by his trial counsel's failure to move to bifurcate Defendant's SVF in Possession of a Firearm charge from his Dealing in Amphetamine charge. A claim of IAC of trial counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. It is well established that trial strategy is not subject to attack through IAC claims, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness.

Here, Defendant was charged with being a SVF in possession of a firearm and dealing in amphetamine based on constructive possession of a gun and drugs found in a car in which he was a passenger. Defendant's trial attorney never requested the trial court to bifurcate the SVF charge from the amphetamine charge despite the fact he was entitled to such bifurcation under Hines v. State, 794 N.E.2d 469 (Ind. Ct. App 2003), adopted on transfer by, 801 N.E.2d 634 (Ind. 2004). Thus, the jury heard that Defendant had been previously charged with three counts of Dealing in Cocaine, of which he was convicted of one. Despite trial counsel's testimony that he did not move to bifurcate because he thought one trial would be better than two, trial counsel's decision not to request bifurcation based on Hines, *supra*, was unreasonable. Further, given the highly prejudicial nature of the prior dealing charges and conviction in the instant dealing case, the failure to bifurcate undermined the confidence in the outcome and prejudiced Defendant. As such, the post-conviction court clearly erred when it denied Defendant's petition for post-conviction relief. Held, judgment reversed and remanded.

TITLE: Payne v. State

INDEX NO.: K.10.d.

CITE: (2/28/2018), 2018 Ind. App. LEXIS 78 (Ind. Ct. App 2018)

SUBJECT: Serious violent felon (SVF) - certified records matching D's name and birth date
insufficient to prove identity

HOLDING: State presented insufficient evidence to support D's conviction for unlawfully possessing a firearm as a serious violent felon. At trial, the State introduced a certified record of a prior robbery conviction for "Kahil Jalon Payne," which was the same name listed in this case, and the robbery D's birth date matched the birth date listed in D's records for the instant cause. This certified record was insufficient to prove that D was the same person who had committed the robbery because the matching name and birth date were not sufficient to prove his identity. Livingston v. State, 537 N.E.2d 75 (Ind. Ct. App 1989). Although the plea agreement in robbery case and signed advisement of rights form in instant case both contained D's signature, the signature within the plea agreement had not been authenticated as belonging to D. Although the robbery case records were self-authenticating, this did not relieve the State of its burden of authenticating that the signature in the robbery records belonged to D. See Evid. R. 901(a). Held, judgment affirmed in part, reversed in part and remanded with instructions to vacate SVF conviction and enter judgment of conviction on Class A misdemeanor carrying handgun without a license; Kirsch, J., dissenting.

TITLE: Pickett v. State

INDEX NO.: K.10.d.

CITE: (8/30/2017), 83 N.E.3d 717 (Ind. Ct. App 2017)

SUBJECT: Denial of motion to bifurcate reversed

HOLDING: On Interlocutory review, the Court of Appeals ruled the Tr. Ct. abused its discretion in denying D's motion to bifurcate his charge for possession of a firearm by a serious violent felon charge ("SVF") from his other six charges. The State's proposed changes to the language of the SVF charge and SVF jury instruction would not decrease the prejudice D would suffer from the State introducing evidence about the conviction that qualifies him for the SVF charge, a prior conviction for escape.

D was charged with seven counts, including murder and the SVF charge. In denying D's request to bifurcate, the Tr. Ct. adopted the State's proposal: remove the words "serious violent felon" from both the charging instrument and the jury instruction and replace them with a citation to the SVF statute, Ind. Code § 35-47-4-5. These changes would supposedly inoculate D from prejudice from the State introducing evidence about the escape conviction while the jury would be hearing evidence regarding D's alleged guilt on the non-SVF charges. The State's proposed changes will not reduce the risk of prejudice to D. The jury would still know about the escape conviction as it considers D's guilt on the non-SVF charges, which would allow the jury to draw an inference of guilt based on facts unrelated to the non-SVF charges. See Spearman v. State, 744 N.E.2d 545, 547 (Ind. Ct. App 2001). Further, the escape conviction has no relevance under the Evidence Rule 404(b) exceptions for proof of motive, intent, or identify. Held, judgment reversed and remanded for proceedings consistent with Court's opinion.

TITLE: Ray v. State
INDEX NO.: K.10.d.
CITE: (5th Dist., 05-10-06), Ind. App., 846 N.E.2d 1064
SUBJECT: Serious violent felon (SVF) - erroneous instruction; offer to stipulate
HOLDING: In unlawful possession of firearm by SVF prosecution, Tr. Ct. abused its discretion when it instructed jury that D had a prior robbery conviction. Although D offered to stipulate that he had "previously been convicted of a felony enumerated under Indiana Code 35-47-4-5" & tendered jury instructions utilizing that same language (set forth in opinion), Tr. Ct. determined it was necessary to instruct jury that D had a prior robbery conviction. However, "proving status without telling exactly why that status was imposed leaves no gap in the story of a D's subsequent criminality, & its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach." Old Chief v. United States, 519 U.S 172, 191 (1997).

Here, given potentially prejudicial effect of informing jury of D's prior robbery conviction, Tr. Ct. abused its discretion in instructing jury. See Spearman v. State, 744 N.E.2d 545 (Ind. Ct. App 2001) (Darden, J., dissenting) ("...*any* evidence of a previous conviction that does not bear upon the accused's guilt in the new proceeding is unnecessary & may taint the proceeding"). However, error in Tr. Ct.'s instructions was harmless, as references to D's prior robbery conviction were limited at trial & Tr. Ct. did not allow State to use label "serious violent felon" in trial. Held, judgment affirmed.

TITLE: Reece v. State

INDEX NO.: K.10.d.

CITE: (12/22/2021), Ind. Ct. App., 181 N.E.3d 1006

SUBJECT: Charge of unlawful possession of a firearm by serious violent felon not unconstitutionally vague as applied

HOLDING: Defendant was charged and convicted of unlawful possession of a firearm by a serious violent felon. He challenged a 2020 amendment to IC 35-37-4-5 by filing a motion to dismiss, arguing the statute as amended, removing specific language regarding attempt and conspiracies, and placing that language in IC 1-1-2-4, failed to provide notice that attempts and conspiracies can serve as predicate serious violent felonies. Defendant argued the amended statute failed to give fair warning and lacked the sufficient definiteness due process requires. The Court of Appeals declined to find the statute unconstitutionally vague as applied, distinguishing *Healthscript, Inc., v. State*, 770 N.E.2d 810 (Ind. 2002), which found the statute under which Healthscript was charged was too vague to meet the requirements of due process because the penal statute cross-referenced Indiana Code Art 12-15 which included 50 pages and 280 sections. Here, unlike Healthscript, to understand the prohibited conduct a person would only need review IC 35-47-4-5 and IC 1-1-2-4. The Court of Appeals applied principles of interpreting statutes with the primary goal in mind to fulfill the legislature's intent to find the statute was not unconstitutionally vague as applied.

TITLE: Rhone v. State

INDEX NO.: K.10.d.

CITE: (3rd Dist., 05-2-05), Ind. App., 825 N.E.2d 1277

SUBJECT: SVF conviction reversed; use of hearsay evidence to establish prior conviction

HOLDING: Ct. vacated D's conviction for serious violent felon in possession of a firearm, because only evidence presented by State to establish that D was a serious violent felon was inadmissible hearsay. At trial, the only evidence State presented to show that a previous conviction for reckless homicide involved a handgun rather a vehicle was a probable cause affidavit for the previous conviction & the primary investigating officer of the previous homicide. However, the officer testified she had no personal knowledge of the facts included in the affidavit & gained those from other officers involved in the investigation. Ct. rejected State's argument that the PC affidavit was admissible under the Public Records & Reports hearsay exception, as IRE 803(8) specifically excludes investigative reports by police from the exception. Ct. rejected State's contention without citation that affidavit was not an investigative report. Relying on three- part test in Ealy v. State, 685 N.E.2d 1047 (Ind.1997), Ct. determined the affidavit addressed a materially contested issue in the case that included factual findings & was prepared for advocacy purposes. Ct. also cited Shepard v. U.S., 125 S.Ct. 1254 (2005), which held that a Tr. Ct. may not look to police reports to determine if the prior conviction may be used to enhance a sentence under the Armed Career Criminal Act. The State could have established that D's previous conviction qualified as a SVF by calling an officer with personal knowledge to testify that the conviction involved something other than a vehicle or by offering into evidence the transcript of the guilty plea hearing if it showed the reckless homicide was committed by means other than a vehicle. However, Ct. determined double jeopardy did not attach with their reversal here as reversal was not solely decided on insufficiency grounds. "A reversal based solely on evidentiary insufficiency has fundamentally different implication [for DJ] than a reversal based on such ordinary 'trial errors' as the 'incorrect receipt or rejection of evidence.'" Lockhart v. Nelson, 488 U.S. 33 (1988). Here, if Tr. Ct. had properly sustained D's hearsay objection, the State would have been put on notice that it needed to present other evidence.

Ct. also held that Tr. Ct. erred in failing to instruct the jury that only reckless homicide *committed by means other than a vehicle* could support his conviction. However, Tr. Ct. did not err in excluding D's instruction that would infer that the State needed to prove D knew he was a SVF to gain a conviction. Ind. Code 35-47-4-5(c) does not require proof of such knowledge, but only knowing & intentional possession of a firearm after having been convicted of a SVF. Held, judgment reversed without prejudice for double jeopardy purposes; Kirsch, concurring as to the analysis of the instructions & dissenting in that he did not believe the PC affidavit & the officer's testimony were offered to prove the truth of the matter asserted pursuant to IRE 801(c), but rather were offered only to prove what was at issue in the reckless homicide proceeding.

TITLE: Scott v. State

INDEX NO.: K.10.d

CITE: (03-25-10), 924 N.E.2d 169 (Ind. Ct. App 2010)

SUBJECT: SVF- *nolo contendere* plea evidence of prior conviction

HOLDING: In issue of first impression, Court found no abuse of discretion in admitting evidence of D's Florida *nolo contendere* plea as proof he was convicted of offense that qualifies him as serious violent felon under Ind. Code 35-47-4-5(a). Plea of *nolo contendere* may be admitted under Indiana Evidence Rule 803(8) as public record proving fact of conviction, even though Indiana Evidence Rule 803(22) does not allow admission of evidence of a final judgment entered upon a plea of *nolo contendere* 'to prove any fact essential to sustain the judgment.'" Rule 803(22) is designed to prevent *nolo contendere* conviction from being used in subsequent proceeding to prove actual guilt of prior offense but "does not prevent the admission under Evidence Rule 803(8) of a *nolo contendere* as a public record proving the fact of the conviction." See United States v. Adedoyin, 369 F.3d 337, 343-45 (3rd Cir. 2004), cert. denied, 543 U.S. 915. Thus, Tr. Ct. did not abuse discretion by admitting D's *nolo contendere* plea to a Florida murder charge as proof that he was convicted of offense qualifying him as serious violent felony. Held, judgment affirmed.

TITLE: Spearman v. State
INDEX NO.: K.10.d.
CITE: (4th Dist., 3-6-01), Ind. Ct. App, 744 N.E.2d 545
SUBJECT: Serious violent felon - element of prior felony cannot be bifurcated
HOLDING: In prosecution for unlawful possession of firearm by serious violent felon, Tr. Ct. did not violate D's rights to due process when it denied D's motion to bifurcate portions of proceedings. D moved for bifurcated proceedings so that jury would not be told of his prior criminal confinement conviction before it determined whether he was in possession of firearm. Legislature has prohibited those convicted of serious violent felony from knowingly or intentionally possessing firearm. Ind. Code 35-47-4-5. Legal status of offender is essential element of this crime, & act -- possession -- is illegal only if performed by one occupying that status. Thus, bifurcation is not possible because jury cannot determine if D committed illegal act without hearing evidence of D's legal status or prior crimes. This is very different situation from one in which act itself is illegal without regard to status of offender, from one where level of illegal act is elevated based upon offender's status, & from one where punishment for illegal act is enhanced based upon offender's status.

Federal Cts. have addressed balance between evidence that is both probative & prejudicial by encouraging proof of prior felony element through redacted record, testimony by clerk, stipulation, D's affidavit or other similar technique whereby jury is informed only of fact of prior felony conviction, but not of nature or substance of conviction. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Tr. Ct. in exercising its discretion under Ind. Evidence Rules 403 & 611 can mitigate prejudicial effect of evidence of prior conviction by excluding evidence regarding underlying facts of prior felony & limiting prosecutorial references thereto. Here, probative value of evidence was essential to proceeding & any prejudice to D was minimized by allowing him to stipulate to fact that he was convicted of underlying felony. Held, judgment affirmed; Darden, J., dissenting, believes bifurcation is only way to preserve D's presumption of innocence & ability to present defense. **Note:** Ct. expressed concern with prejudice that may arise in jury trial when D is identified & repeatedly referred to as "serious violent felon." Ct. urged Tr. Ct.'s to be attentive to this potential for prejudice & to exercise their discretion in crafting instructions & referring to prior felony in ways which minimize potential for such prejudice.

RELATED CASES: Dugan, App., 860 N.E.2d 1288 (Tr. Ct. did not abuse its discretion in refusing to bifurcate trial where only charge was SVF in possession of firearm; however, Ct. implicitly suggests that parties & judges refer to statute cite rather than to "serious violent felon" when D stipulates to his prior conviction); Imel, App., 830 N.E.2d 913 (Ct. rejected claim of ineffective assistance of appellate counsel for failing to raise issues surrounding Tr. Ct. & prosecutor's references to D as a serious violent felon during his jury trial for Unlawful Possession of a Firearm by SVF); Bayes, App., 779 N.E.2d 77 (Tr. Ct. did not commit fundamental error by referring to D as SVF in prosecution for offense of unlawful possession of firearm by SVF; see full review at O.4.c.3); Person, App., 764 N.E.2d 743 (D stipulated to his prior burglary conviction & State did not introduce evidence of underlying facts of prior conviction.; further, D was not referred to as a "serious violent felon" during trial).

TITLE: Teer v. State

INDEX NO.: K.10.d.

CITE: (1st Dist.; 11-9-00), Ind. App., 738 N.E.2d 283

SUBJECT: Firearms - constitutionality of Serious Violent Felon statute

HOLDING: Tr. Ct. properly denied D's Motion to Dismiss based on unconstitutionality of Ind. Code 35-47-4-5. Ind. Code 35-47-4-5 makes it Class B felony for those listed as "serious violent felons" to possess firearm, regardless of whether gun is found in home. Here, D contends that Ind. Code 35-47-4-5 violates prohibition of ex post facto laws in both Indiana & U.S. Constitutions, equal privileges & immunities clause of Indiana Constitution, admonishment that penal code be founded on principles of reformation & not vindictive justice in Indiana Constitution, substantive due process under both Indiana & U.S. Constitutions, & proportionality requirement under Indiana Constitution.

Analogizing to habitual offender statute, Ct. held that Ind. Code 35-47-4-5 was not ex post facto law, despite fact that there was no time limit on predicate felony, because D is being punished for act occurring after date of enactment, possessing gun as serious violent felon. Although list of serious violent felonies in Ind. Code 35-47-4-5 includes offenses that may not have involved violence or firearms, such as drug dealing, & excludes offenses that always involve firearms, such as pointing firearm, statute does not violate equal privileges & immunities clause because offenses listed "often involve violence." Similarly, serious violent felon statute does not violate substantive due process because it was reasonable for legislature to deny gun ownership to class of people who have demonstrated ability to commit serious violent felonies.

Moreover, D's challenge to statute under Article I, Section 18 of Indiana Constitution (vindictive justice) also fails because Ct. interpreted Ratliff v. Cohen, 693 N.E.2d 530 (Ind. 1998), to require challenge to be to more than one statute. Because D only challenged one statute, Ct. refused to address claim. Lastly, punishment as Class B felony under Ind. Code 35-47-4-5 is not unconstitutionally disproportionate to severity of crime under Indiana & U.S. Constitutions because such punishment does not shock public sentiment. Thus, serious violent felon statute is constitutional. Held, judgment affirmed.

NOTE: Ct. failed to address argument that punishment as Class B felony for simple possession of gun in home is disproportionate compared to punishment as Class D felony for crimes that involve guns & violence, such as criminal recklessness & pointing firearm.

RELATED CASES: Baker, App., 747 N.E.2d 633 (statute does not unconstitutionally criminalize D's status as serious violent felon & does not violate right to bear arms or equal protection); Conrad, App., 747 N.E.2d 575 (statute does not violate right to bear arms provision of Ind. Const., nor does it punish D based on his or her "status" as serious violent felon in contravention of 8th Amend.).

TITLE: Williams v. State

INDEX NO.: K.10.d.

CITE: (5th Dist., 09-21-05), Ind. App., 834 N.E.2d 225

SUBJECT: Serious violent felon - bifurcation; jury instruction

HOLDING: In its preliminary instructions in trial for possession of firearm by serious violent felon, Tr. Ct. properly instructed jury as follows: The D is charged with Illegal Possession of a Firearm. The trial of charge will be in two (2) stages. In the first stage, there will be a trial on the issue of whether the D knowingly or intentionally possessed the firearm as charged. If you find beyond a reasonable doubt that the D knowingly or intentionally possessed the firearm as charged, there will be a second stage of the trial. In the second stage, there will be a trial of the issue of whether the D committed a crime by possessing a firearm.

Ct. rejected D's argument that this instruction implied that a second phase of trial was inevitable. Instruction clearly stated that there would be a second phase of trial if, & only if, jury first concluded beyond a reasonable doubt that D had knowingly or intentionally possessed a firearm.

Ct. approved of Tr. Ct. having bifurcated trial so as to avoid any labeling of D as a "serious violent felon" until after jury decided whether he had in fact possessed firearm. With bifurcation, however, comes difficulty of explaining to jury why the D is facing trial for merely possessing a firearm. Tr. Ct. here struck proper balance between advising jury that D had been charged with a firearm-related crime & avoiding identifying D as a "serious violent felon" from the outset of trial. Although current precedent does not require Tr. Cts. to bifurcate SVF trials, bifurcation procedure serves the ends of justice in such trials. Ct. urged Indiana trial judges to use this procedure in SVF cases. Held, judgment affirmed in part & reversed in part on other grounds.

RELATED CASES: DePriest, 113 N.E.3d 286 (Ind. Ct. App 2018) (noting that Williams court's reasoning in upholding a substantively identical instruction and advocating bifurcation in SVF cases was endorsed by Indiana Supreme Court in Russell v. State, 997 N.E.2d 351 (Ind. 2013)).

TITLE: Woodward v. State

INDEX NO.: K.9.d.

CITE: (5/2/22) Ind. Ct. App., 187 N.E.3d 311

SUBJECT: Insufficient evidence of identity for prior felony in SVF conviction

HOLDING: In Defendant's trial for serious violent felon in possession of a firearm, the State submitted documents showing a person with his name was convicted of dealing in a controlled substance in 2008 but did not introduce evidence of his social security number or any other evidence linking him to the previous conviction. The Court of Appeals concluded, "based on the limited evidence of the identity of the prior offender, [] there is insufficient evidence to find the identification element of the crime of illegal possession of a firearm by a serious violent felon to have been proven beyond a reasonable doubt. We are hesitant to reverse a jury finding on the basis of sufficiency of evidence. Nevertheless, our precedent is clear. See Davis v. State, 493 N.E.2d 167, 169 (Ind. 1986) (reversing jury's habitual offender determination on the basis that the State failed to provide sufficient evidence)."

The Court also found no abuse of discretion in admitting a lab report discovered to the defense just five days before trial and that the State presented sufficient evidence for the jury to conclude Defendant constructively possessed methamphetamine located in the ceiling of his tattoo shop.

RELATED CASES: Richey, 210 N.E.3d 329 (Ind. Ct. App. 2023) (sufficient identification evidence, including recorded jail call, supported jury's finding that D had committed an SVF-qualifying offense).

K. CRIMES

K.10. Weapons/firearms/explosives

K.10.e. Other (Ind. Code 35-47)

TITLE: A.W. v. State

INDEX NO.: K.10.e.

CITE: (7/29/2022), Ind. Ct. App., 192 N.E.3d 227

SUBJECT: Sufficient evidence D possessed machine gun - double jeopardy

HOLDING: The State presented sufficient evidence that A.W. knowingly or intentionally possessed a machine gun. After recovering a handgun A.W. threw while fleeing, police discovered the handgun had been modified with an after-market device known as a “Glock Switch,” which caused it to fire repeatedly with one pull of the trigger. On appeal, A.W. did not dispute that he possessed the gun, but rather argued that the State did not prove that he knew the gun had been modified to operate as a machine gun. The Court held that possession of the contraband supports an inference that the person in possession knows of the forbidden character.

A.W. also argued that his adjudications for possession of a machine gun, that would be a level 5 felony had he been an adult, and dangerous possession of a firearm, that would be a Class A misdemeanor had he been an adult, violated the prohibition of double jeopardy under Article 1, Section 14 of the Indiana Constitution. The majority agreed, holding that dangerous possession of a firearm is not an inherently included offense in the greater offense of possession of a machine gun because dangerous possession requires the actor to be a child, which is not a material element of the latter offense. However, the two offenses were factually included with each other in the State’s evidence. “The bottom line is that A.W. was found culpable twice for possession of the same weapon at the same time where possession of that weapon was the means used to commit both crimes. Accordingly, we hold that these two true findings violation Indiana’s prohibition against double jeopardy[.]”

TITLE: Adkins v. State

INDEX NO.: K.10.e.

CITE: (06-04-08), Ind., 887 N.E.2d 934

SUBJECT: Pointing a firearm - State's burden to prove gun was unloaded when at issue

HOLDING: In pointing a firearm prosecution, Tr. Ct. committed harmless error by instructing the jury that D had the burden to prove that his gun was unloaded. A person who knowingly or intentionally points a firearm at another person commits a Class D felony. However, the offense is a Class A misdemeanor if the firearm was not loaded. Ind. Code 35-47-4-3(b). A gun being unloaded is a mitigating factor that reduces a D's culpability from a felony to a misdemeanor, not an affirmative defense. Thus, a D charged with Class D Felony Pointing a Firearm must place the fact of the gun having been unloaded at issue if the State's evidence has not done so. Once at issue, the State must then prove beyond a reasonable doubt that the firearm was loaded.

Here, Tr. Ct. erroneously instructed the jury that "if the State proved [all] of the elements of pointing a firearm, but the D proved by a preponderance of the evidence that the firearm was unloaded, then, and only then, may you find the D guilty of pointing an unloaded firearm." However, D did not place the question of whether his gun was unloaded at issue, thus the State had no obligation to prove that it was loaded. In fact, there is ample evidence from which to conclude the gun was loaded since multiple witnesses testified that they heard gunshots after D had pointed the gun at the victim and had went outside. Held, transfer granted, Court of Appeals' opinion at 870 N.E.2d 465 summarily affirmed on other issues, judgment affirmed.

NOTE: Be aware that Indiana Pattern Jury Instruction - Criminal § 7.61 (3ed. 2006) improperly switches the burden to the D.

RELATED CASES: Scott, 924 N.E.2d 169 (Ind. Ct. App 2010) (Tr. Ct. abused its discretion in refusing to instruct jury it could find D guilty of misdemeanor pointing a firearm instead of class D felony version of offense if it found derringer he pointed at officer was unloaded; the misdemeanor is at issue unless the evidence is totally lacking with regard to whether the weapon is loaded or unloaded).

TITLE: Brook v. State

INDEX NO.: K.10.e.

CITE: (2d Dist. 5/26/83) Ind. App., 448 N.E.2d 1249)

SUBJECT: Weapons - dealing in sawed-off shotguns; sufficiency

HOLDING: Evidence that D possessed a sawed-off shotgun was sufficient to sustain conviction under Ind. Code 35-23-9.1-2 (a) which provides: "A person who . . . possesses any sawed-off shotgun commits dealing in sawed-off shotguns, a Class D felony." Here, D's girlfriend gave police permission to search her apartment. Police found a 12-gauge shotgun modified to have a 15 7/8" barrel length & an overall length of 29 inches. Ct. rejects D's contention that "possession" as used in statute implies possession with intent to deliver. Held, conviction affirmed.

TITLE: Kribs v. State

INDEX NO.: K.10.e.

CITE: (5th Dist., 12-14-09), (Ind. App. 2009) 917 NE.2d 1249

SUBJECT: Entering controlled area of airport with weapon - insufficient evidence

HOLDING: State failed to prove beyond a reasonable doubt that Defendant knowingly or intentionally entered a controlled area of an airport with a weapon or explosive, in violation of Ind. Code 35-47-6-1.3. Following bench trial that resulted in Defendant's conviction, trial court stated that it believed Defendant "didn't remember" that he had the handgun in his possession when he entered the security checkpoint of the airport and that there was no "malicious intent" involved. Mere forgetfulness does not satisfy knowledge or intent requirement set out by Ind. Code 35-47-6-1.3. Held, conviction reversed.

TITLE: Lacy v. State

INDEX NO.: K.10.e.

CITE: (4th Dist., 03-24-09), 903 N.E.2d 486 (Ind. Ct. App. 2009)

SUBJECT: Constitutionality of statutory ban on switchblades

HOLDING: Ind. Code 35-47-5-2, which defines the crime of possession of a knife with an automatic opening blade, is neither unconstitutional on its face nor as applied to D. Under statute, it is a Class B misdemeanor "for a person to manufacture, possess, display, offer, sell, lend, give away, or purchase any knife with a blade that: 1) opens automatically; or 2) may be propelled; by hand pressure applied to a button, device containing gas, spring, or other device in the handle of a knife." D argued that statute violates her constitutional right to bear arms under Article 1, Section 32 of Indiana Constitution, which provides that the "people shall have the right to bear arms, for defense of themselves and the State." Citing other courts and legislatures that have recognized the danger of switchblades, Court held that statute is a valid exercise of police power, rationally calculated to advance the public good.

Even assuming that the core value embodied by Section 32, i.e., the right to bear arms for self defense, is implicated here, Court concluded that Ind. Code 35-47-5-2 does not materially burden it. Statute does not completely ban a class of weapons, i.e. knives, but only knives that open automatically or may be propelled by hand pressure applied to a button, device containing a spring, or other device in the handle of the knife. Disagreeing with State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984), Court concluded that switchblades are primarily used by criminals, are not substantially similar to a regular knife or jackknife and are not typically possessed by law-abiding citizens. Held, conviction affirmed.

TITLE: Newson v. State

INDEX NO.: K.10.e.

CITE: (2nd Dist., 4-4-03), Ind. App., 785 N.E.2d 1115

SUBJECT: Possession of firearm on school property - affirmative defense

HOLDING: D failed to establish affirmative defense for his possession of firearm on school property. Ind. Code 35-47-9-1(3) provides that person who commits Class D felony for possession of firearm on school property is not subject to conviction if person may legally possess firearm & possesses firearm in motor vehicle that is being operated by person to transport another person to or from school or school function. D did not deny that he possessed handgun on school property but points to testimony that he drove friend to his job at school to establish affirmative defense. Issue was whether D possessed firearm in motor vehicle "that was being operated" to transport another person to school. Record clearly indicated that D was not operating vehicle as it was parked when firearm was spotted inside of it. Held, judgment affirmed.

TITLE: Mason v. State

INDEX NO.: K.10.e.

CITE: (02-24-11), 944 N.E.2d 68 (Ind. Ct. App 2011)

SUBJECT: Unlawful use of body armor - evidence sufficient

HOLDING: In an issue of first impression, State proved D Used body armor because it proved D expected the body armor to afford reasonable protection during the commission of a felony opposed to merely wearing the body armor while committing a felony. Thus, there was sufficient evidence to support D's conviction for class D felony Unlawful Use of Body Armor, Ind. Code § 35-47-5-3. The only case addressing convictions for Unlawful Use of Body Armor is Haggard v. State, 771 N.E.2d 668 (Ind. Ct. App. 2002), but Haggard did not explain what constitutes "use" of body armor. Webster's II New College Dictionary defines "use" as "[t]o bring or put into service or action;" or, alternatively, to put to some purpose." "In the context of unlawful use of body armor, this definition of use' favors our interpretation that a D must knowingly or intentionally' use body armor as protection in the course of a felony; it is not sufficient to show that a D merely wears body armor while committing a felony. See Ind. Code § 35-47-5-13(b). Merely wearing body armor would not put it into service or action' or 'put [it] to some purpose.' See Webster's II New College Dictionary 1215 (2001)."

Here, circumstantial evidence established that D knowingly or intentionally used body armor to protect himself while he committed a felony. D tried to resist arrest by driving toward one officer at a high rate of speed. The natural result was that the officers used force to prevent his escape, which they did by shooting at D's car. It is likely that his body armor did protect him against such force. Evidence also showed that one of the tases of D was ineffective because of the body armor. Held, judgment affirmed.

TITLE: State v. Windy City Fireworks

INDEX NO.: K.10.e.

CITE: (02-03-93), Ind., 608 N.E.2d 699

SUBJECT: Illegal sale of fireworks

HOLDING: Indiana S.Ct. granted transfer & adopted Ct. of Appeals decision at 600 N.E.2d 555, holding that asking purchasers of illegal fireworks to sign statement that they were nonresidents who would immediately get fireworks out of state, does nothing to render sale legal. Changes in fireworks statutes, Ind. Code 22-11-14-1 to 10, since decision in Hill, 488 N.E.2d 709, created no loopholes which would allow such statements to make sale legal, Krahulik, J., dissenting.

TITLE: Stewart v. State

INDEX NO.: K.10.e.

CITE: (4th Dist, 05-25-07), Ind. App., 866 N.E.2d 858

SUBJECT: Dangerous possession of firearm by a child - insufficient evidence of D's age

HOLDING: For purposes of dangerous possession of firearm by a child statute, a "child" is defined as a person who is less than eighteen years of age. Ind. Code 35-47-10-3. Where Legislature has chosen to include age of D as an element of a crime, Due Process Clause of Fourteenth Amendment requires State to prove the D's age beyond a reasonable doubt. Staton v. State, 853 N.E.2d 470 (Ind. 2006). Here, the only possible evidence regarding D's age that State presented at trial was testimony of eyewitness-victim who stated that on date of offense she was seventeen years old & that at one point she had had one class with D in high school. Witness did not state that she was in the same grade as D, nor did she state what grade she thought D was in or how old he might be. It also appears from her testimony that D was no longer attending school because she spoke in past tense, saying, "he went to school with me." Distinguishing Staton, Ct. concluded that no witness even ventured a guess as to D's age. Held, judgment affirmed in part, reversed in part, & remanded.

See also: Rowe, App., 867 N.E.2d 262 (jury's observation, exhibit introduced at trial listing D's birth date & D's daughter's testimony could be used to infer D's age even though no direct evidence of D's age was presented).

TITLE: York v. State

INDEX NO.: K.10.e.

CITE: (05-08-23), Ind. Ct. App., 210 N.E.3d 307

SUBJECT: Handgun with attached switch device is a machine gun under possession of a machine gun statute and statute is not unconstitutionally vague

HOLDING: A handgun equipped with a switch device may constitute the offense of possession of a machine gun if the gun shoots or can be readily restored to shoot; automatically more than one shot, without manual reloading, by a single function of the trigger as defined by Ind. Code § 35-31.5-2-190. Here, while executing a search warrant for firearms, police officers found a 9 mm-caliber Glock 19 pistol with a loaded magazine holding 22 rounds of live ammunition under a mattress. One of the detectives noticed the gun had a switch installed, which converts the semi-automatic pistol to fire in a fully automatic mode. As a result, Defendant was charged with one count of Level 5 felony possession of a machine gun and one count of Class B misdemeanor possession of marijuana. Defendant filed a motion to dismiss, arguing at a hearing that the pistol would only fire semi-automatically with the switch removed and would not be a machine gun under Indiana law. The trial court denied the motion to dismiss, and Defendant moved to certify the court's order for interlocutory appeal. On appeal, Defendant argued the facts alleged do not constitute the offense of possession of a machine gun, and that Indiana's machine gun statute is unconstitutionally vague. The Court of Appeals disagreed with both arguments. Defendant argued his pistol is a handgun under Indiana law, the switch is classified as a firearms accessory and that the Legislature did not intend for the definition to include devices that have been adapted or converted by accessories. *Citing* Ind. Code § 35-31.5-2-190, the Court of Appeals noted the gun can shoot "automatically more than one (1) shot, without manual reloading, by a single function of the trigger." Defendant also argued the language of the machine gun statute is vague and permitted arbitrary enforcement and because it doesn't state that using accessories to make a gun a machine gun is prohibited. But the Court of Appeals disagreed, stating that the focus of the machine gun statute is on what the gun can do, not on how or when it is made.

K. CRIMES

K.11. Miscellaneous

TITLE: Scruggs v. State

INDEX NO.: K.11.

CITE: (03/26/2008), 883 N.E.2d 189 (Ind. Ct. App. 2008)

SUBJECT: Neglect of dependent - leaving seven-year-old home alone insufficient evidence

HOLDING: State presented insufficient evidence that D knowingly placed her seven-year-old in a dangerous situation by leaving him home alone. A person having care of a dependent who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health commits neglect of a dependent. The knowing mens rea requires a subjective awareness of a high probability that a dependent has been placed in a dangerous situation, not just any probability. Gross v. State, 817 N.E.2d 306 (Ind. Ct. App. 2004). The child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child. Id. Here, D knowingly left her sick seven-year-old home alone for up to approximately three hours. At some point during the three hours, the child either walked to his Uncle's house or was picked up by his Uncle. D testified that the child was responsible enough to be left alone for a short time and knew not to mess with the stove or open the door. Although D may have demonstrated bad judgment, State did not prove beyond a reasonable doubt that she had a subjective awareness of a high probability that she had placed her child in a dangerous situation. Court refuses to establish a per se rule that merely leaving a seven-year-old child home alone for any period of time constitutes neglect. Held, judgment reversed.

RELATED CASES Becklehimer, 190 N.E.3d 975 (Ind. Ct. App. 2022) (leaving a 13-year-old child home alone for the weekend does not, without more, constitute neglect of a dependent).

TITLE: State v. Katz

INDEX NO.: K.11.

CITE: (1/19/2022), 179 N.E.3d 431 (Ind. 2022)

SUBJECT: Constitutional challenge to nonconsensual distribution of intimate image statute rejected

HOLDING: The State properly charged Defendant with the nonconsensual distribution of an "intimate image," a Class A misdemeanor pursuant to Ind. Code § 35-45-4-8, after Defendant—without the knowledge of his then-girlfriend—captured cell phone video of her performing oral sex on him and then sent it to another person through Snapchat, a social media platform. An "image" under the statute is defined as a photograph, digital image or video that depicts sexual intercourse, other sexual conduct or the exhibition of the uncovered buttocks, genitals, or female breast. The law also makes it a crime for someone to distribute such an image with intent to harm, harass, intimidate, threaten, or coerce the other person. Additionally, the statute makes it a crime to post the image without the consent of a person depicted in that image, even if that person initially agreed to partake in the image. The trial court granted Defendant's pre-trial motion to dismiss, finding the statute violated free speech under the state and federal constitutions. On direct appeal, the Indiana Supreme Court reversed and remanded, first holding that the State sufficiently alleged an offense even though the complaining witness (C.W.) was not identifiable in the video, which did not show C.W.'s face or Defendant's penis. Next, the Court rejected Defendant's claim that the statute is overbroad and unconstitutional under Article 1, Section 9 of the Indiana Constitution, which protects videos as a medium under the right to speak and free interchange clauses. Although criminal prosecution under the statute is a direct and substantial burden on Defendant's expressive activity, which triggers Article 1, Section 9, his restricted activity constituted an "abuse" of the right to express himself, thus the statute and prosecution are constitutional. Although the statutory restriction is content-based and subject to strict scrutiny, the Court held it was not unconstitutional under the First Amendment. The statute passes strict scrutiny because it is narrowly tailored to serve the State's compelling interest in protecting citizens from the unique and significant harms from the nonconsensual distribution of pornography. And even assuming the Court needed to conduct an overbreadth analysis, the statute is not overbroad. Held, reversed, and remanded for further proceedings.

K. CRIMES

K.11. Miscellaneous

K.11.b. Animals (Ind. Code 15-5-17 and Ind. Code 35-46-3)

TITLE: A.J.R. v. State

INDEX NO.: K.11.b.

CITE: (1/23/2014), 3 N.E.3d 1000 (Ind. Ct. App 2014)

SUBJECT: Insufficient evidence of cruelty to animals

HOLDING: State did not present sufficient evidence to show Juvenile (A.J.R.) committed animal cruelty - Ind. Code § 35-46-3-12(c) - where it failed to prove A.J.R. either tortured or mutilated cows he shot with a high-powered semi-automatic rifle.

The evidence did not show A.J.R. mutilated the cows because it did not establish he irreparably damaged the cows' body parts or rendered any parts of their bodies useless. See Ind. Code §35-46-3-12(c). Such injuries include serious permanent disfigurement, impairment of a body part or organ, or a fracture. See id., (A)-(D). The gunshot wounds did not rise to this level.

The State failed to prove A.J.R. tortured the cows because it did not demonstrate he acted with the requisite *mens rea*: knowingly inflicting extreme physical pain or injury with the intent to increase or prolong pain. See Ind. Code § 35-46-3-12(c)(5) and Ind. Code § 35-46-3-0.5(5). By shooting the cows with the high-powered rifle, one in the head, the most reasonable inference is that A.J.R. intended to kill the cows instantly, not increase or prolong pain. Held, judgment reversed.

TITLE: Boss v. State
INDEX NO.: K.11.b.
CITE: (03-30-12), 964 N.E.2d 931 (Ind. Ct. App 2012)
SUBJECT: Failure to restrain/harboring non-immunized dogs - evidence sufficient
HOLDING: State presented sufficient evidence to support D's convictions for failing to restrain her dogs and harboring non-immunized dogs. Ind. Code 15-20-1-4 provides that the owner of a dog commits a Class A misdemeanor if the owner recklessly, knowingly or intentionally fails to take reasonable steps to restrain dog and it results in serious bodily injury. Plain and ordinary meaning of "restraint" and "restrained" import active control and prevention of conduct rather than mere containment. Plesha v. Edmonds ex rel. Edmonds, 717 N.E.2d 981 (Ind. Ct. App 1999). Accordingly, statute requires owner of a dog to take practical and sensible steps to control his or her dog to prevent the dog from going onto the property of another. Here, evidence shows that D kept two of three dogs in a fenced area. Animal control officer, however, testified that the fence had obvious gaps through which the dogs could escape. The evidence further shows that D kept the third dog in her unfenced backyard, with only a loose collar through which his head easily slipped. Given the evidence, Tr. Ct. could reasonably infer that D failed to take reasonable steps to restrain the dogs.

Moreover, State presented evidence that D cared for the dogs and that she did not have proof that they had been vaccinated. From this evidence, Tr. Ct. could infer that D was aware of a high probability that the dogs had not been immunized in violation of Ind. Code 35-46-3-1. Court agreed with D's assertion that she was subjected to double jeopardy when her convictions for harboring a non-immunized dog were elevated to a Class B misdemeanor on the same type of bodily injury that elevated her convictions for failure to restrain a dog to a Class A misdemeanor. Held, judgment affirmed in part, reversed in part and remanded with instructions to enter harboring non-immunized dog convictions as Class C infractions.

TITLE: Boushehry v. State

INDEX NO.: K.11.b.

CITE: (2nd Dist., 3-16-95), Ind. App., 648 N.E.2d 1174

SUBJECT: Cruelty to animals - sufficiency challenge

HOLDING: Evidence supported D's guilt of only one of two counts of cruelty to an animal. Ind. Code 35-46-3-12(a)(1) prohibits "knowingly or intentionally tortur[ing], beat[ing] or mutilat[ing] a vertebrate animal." Act of shooting goose that died instantly was not enough alone to establish cruelty to animal by either torture or mutilation. However, act of slitting throat of second goose that continued to live after it was shot constituted a "mutilation" in its plain, or ordinary & usual, sense. Where, as here, D's unlawful act causes animal's suffering, he should not escape penal consequences by claiming that killing animal was necessary to prevent continued suffering. Held, one conviction reversed & other affirmed, Hoffman, J., dissenting.

Note 1: Double jeopardy prohibited D's convictions & sentences under both subsection (1) & (2) of Ind. Code 14-2-3-8, Ind.'s Fish & Wildlife Act. Subsection (1), which proscribes "taking or possession...[of] any migratory birds," merged as necessarily included with subsection (2), proscribing same conduct during closed season without first procuring license.

Note 2: Ct. unanimously agreed in footnote that this case represents "an egregious example of overcharging."

RELATED CASES: Miller, 952 N.E.2d 292 (Ind. Ct. App 2011) (failure to comply with Ind. Code 35-46-3-6(e) and (f), which require state veterinarian or designee to conduct investigation and make recommendation regarding confiscation of animals, did not affect the validity of D's convictions); Baxter, App., 891 N.E.2d 110 (fact that eight horses in D's care were neglected because of malnourishment does not mean four dead horses were too, especially since Animal Control did not seize all the living horses in D's care; thus D's convictions for neglecting the four dead horses could only be based on pure speculation & must be reversed).

TITLE: Elisea v. State

INDEX NO.: K.11.b.

CITE: (10-22-02), Ind. App., 777 N.E.2d 46

SUBJECT: Animal cruelty & practicing veterinary medicine without license - sufficient evidence

HOLDING: Evidence was sufficient to convict D of animal cruelty & practicing veterinary medicine without license. D, in exchange for money, cut the ears off of several pit bull puppies. He used pair of scissors to do "ear cropping procedure" & no anesthetic. Pursuant to Ind. Code 35-46- 3-12(a), State had to prove that D knowingly or intentionally tortured, beat, or mutilated vertebrate animal resulting in serious injury or death to animal. D argued that State failed to rebut his defense that he engaged in reasonable & recognized act of handling puppies. However, an actual veterinarian testified that both acute & chronic pain occurred due to lack of anesthesia & failure to suture the cuts. Pursuant to Ind. Code 15-5-1.1-34(1), State must prove that D knowingly practiced veterinary medicine without license. D argued that State failed to establish that ear cropping constituted practice limited strictly to field of veterinary medicine. However, veterinarian testified that act of cutting puppies' ears was surgical procedure & explained how it should occur under proper conditions. Further, D accepted money for his services. There was sufficient evidence to convict D of both animal cruelty & practicing veterinary medicine without license. Held, judgment affirmed.

TITLE: Hall v. State
INDEX NO.: K.11.b.
CITE: (4th Dist., 7-10-03), Ind. App., 791 N.E.2d 257
SUBJECT: Cruelty to animal - sufficiency; shooting multiple times & mutilation
HOLDING: Evidence was sufficient to support Ds' convictions for cruelty to an animal. Police officer observed one D pointing rifle on ground & shooting approximately twenty times. Second D fired a shotgun twice, once at a short distance away & once at very close range. Officer drove up to Ds & discovered that they had been shooting at a cat, which had been hit numerous times & was dead. Ind. Code 35-46-3-12(a) provides that "a person who knowingly or intentionally tortures, beats, or mutilates a vertebrate animal commits cruelty to an animal, a Class A misdemeanor." *Citing Boushehry v. State*, 648 N.E.2d 1174 (Ind. Ct. App 1995), Ds argued that act of shooting cat which died instantly was insufficient to support conviction for cruelty to an animal, & that there was insufficient evidence that they mutilated cat as charged.

Webster's Dictionary defines "mutilate" as "to cut off or permanently destroy a limb or essential part of ..." & "to cut up or alter radically so as to make imperfect." Distinguishing *Boushehry*, Ct. noted that cat in this case did not die instantly but was shot numerous times. Although there was no direct evidence on precisely how many times cat was struck, testimonial & photographic evidence reveals that cat was struck multiple times. Although firing multiple shots will not necessarily constitute mutilation, a reasonable jury could conclude from evidence in this case that cat was mutilated, i.e., altered radically so as to be made imperfect. Held, convictions affirmed; Baker, J., dissenting.

TITLE: Johnson v. State

INDEX NO.: K.11.b.

CITE: (5/7/2014), 9 N.E.3d 186 (Ind. Ct. App 2014)

SUBJECT: Possession of animals for fighting contest - evidence sufficient

HOLDING: State presented sufficient evidence to support D's convictions on 14 counts of possession of animals for fighting contest, Ind. Code § 35-46-3-8. Animal shelter officials went to an abandoned trailer on reports of dogs barking from inside. The shelter's superintendent called police after observing animals chained up in deplorable conditions. After obtaining a warrant, police discovered a total of 25 animals on the property, often stacked in dog cages crammed inside the mobile home. The animals had injuries consistent with dog fighting, and officers found paraphernalia often used in dog fighting training, such as weighted collars, medicine and treadmills.

Relying upon Clemons v. State, 987 N.E.2d 92 (Ind. Ct. App. 2013), Court held that past fighting combined with the paraphernalia was sufficient to uphold the convictions. Court rejected D's arguments that the evidence was not indicative of future fighting, that the dogs were injured other ways, and that he maintained the dogs for other purposes.

Court also rejected D's Indiana double jeopardy challenge to his convictions under the actual evidence test set forth in Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Based on testimony of the State's expert, there is evidence that each of the 14 dogs was possessed for the purpose of fighting against the dog of a different handler. Thus, D's contention that the jury relied on the same facts to support each conviction was unfounded. Held, judgment affirmed.

TITLE: Knox v. State
INDEX NO: K.11.b.
CITE: (7/16/2014), 13 N.E.3d 899 (Ind. Ct. App 2014)
SUBJECT: Sufficient evidence of torturing vertebrate animal
HOLDING: D's admission that he violently kicked a cat, knocked its tooth out, and then joked about how far the tooth flew provided sufficient evidence for his conviction for Torturing or Mutilating a Vertebrate Animal under Ind. Code 35-46-3-12(c). Further, the evidence did not support his affirmative defense that he was trying to ward off the cat as it tried to attack him. See Ind. Code 35-46-3-12(e)(1)(A), (B). Held, judgment affirmed.

TITLE: Lee v. State

INDEX NO.: K.11.b.

CITE: (08-31-12), 973 N.E.2d 1207 (Ind. Ct. App 2012)

SUBJECT: Attendance at animal fighting contest statute not unconstitutionally vague

HOLDING: D failed to carry her "heavy burden" of proving that Ind. Code. 35-46-3-10, which criminalizes attendance at dog fights, is unconstitutionally vague. Police received a tip from a confidential informant about a dog fight occurring at an Indianapolis residence. D was in the garage where the fight was occurring but told police she was just there to pick up her pit bull, which was in her car in the driveway. She argued that the word "attends" in Ind. Code. 35-46-3-10 is unconstitutionally vague because it fails to inform an ordinary person of what conduct is prohibited and statute authorizes and encourages arbitrary enforcement. Statute provides that "a person who knowingly or intentionally attends a fighting contest involving animals commits cruelty to an animal, a Class A misdemeanor." An "animal fighting contest" is a conflict between two or more animals, does not include a conflict that is accidental or unorganized, and "animal" does not include a human being.

D argued that the statute could lead to someone being arrested if they watched a dog fight on the Internet, a simulation of a fight for a movie, watched a friend feed a mouse to a pet snake, or attend a circus and watch a man box with a kangaroo or wrestle a bear. However, statute makes clear that the scenarios D proposed would not fall under the statute. Court reserved for another day the question of whether a person who pays to watch an animal fight live on the Internet can be said to be attending an animal fighting contest. Held, judgment affirmed.

TITLE: Price v. State

INDEX NO.: K.11.b.

CITE: (4th Dist., 08-21-09), 911 N.E.2d 716 (Ind. Ct. App 2009)

SUBJECT: Animal cruelty statute not unconstitutionally vague

HOLDING: Ind. Code 35-46-3-12(b) provides that "[a] person who knowingly or intentionally beats a vertebrate animal commits cruelty to an animal, a Class A misdemeanor." In addition, subsection (e) states that "[i]t is a defense to a prosecution under this section that the accused person...engaged in a reasonable and recognized act of training, handling, or disciplining the vertebrate animal." D argued that the statute's exemption of "reasonable" training and discipline renders the statute unconstitutionally vague because the term can have various meanings depending on who interprets it. Here, D admitted to grabbing his dog by the back of the neck to immobilize him. D then repeatedly struck the dog with a belt several times with enough force to make the dog scream loudly every time he was struck. Court could not say a person of ordinary intelligence would not be aware that these actions violate Ind. Code 35-46-3-12(b). Furthermore, a person of ordinary intelligence would know that these actions are not "reasonable" acts of discipline or training, which are exempt from purview of statute. Thus, statute is not unconstitutionally vague as applied to D. Held, judgment affirmed.

RELATED CASES: Tooley v. State, 911 N.E.2d 721 (Ind. Ct. App 2009) (rejecting argument that terms "unnecessarily" and "cruelly" in statute defining "beat" are highly subjective terms that invite "arbitrary arrests and prosecutions" and fail to provide notice as to what conduct is prohibited).

TITLE: Stubbers v. State

INDEX NO.: K.11.b.

CITE: (06/15/2022), 190 N.E.3d 424 (Ind. Ct. App. 2022)

SUBJECT: Sufficient evidence to support conviction for mutilating a vertebrate animal - justification defense rejected

HOLDING: State presented sufficient evidence to support Defendant's conviction for two counts of torturing or mutilating a vertebrate animal by hitting and shooting his dog. The evidence favorable to the jury's verdict reveals that Defendant's 180-pound dog, Cooper, was a gentle dog that neighbors described as a "gentle giant" who gave "slobbery kisses." Even after suffering the severe injuries inflicted by Defendant, Cooper did not act aggressively toward the police, the animal control officer, or veterinary staff. The jury was not required to believe Defendant's claim that Cooper aggressively bit him and injured Defendant or that Cooper bit him at all. Although Defendant presented medical evidence that there was severe swelling of the muscle in his arm, the jury was not required to credit the testimony of Defendant's medical expert who admitted that his injuries could have been caused by overuse. The jury could reasonably reject Defendant's claim that Cooper was acting in a vicious, aggressive manner and could instead conclude that Cooper did not pose a threat to Defendant or others to justify Defendant beating Cooper's head with a hammer. Defendant also argued that his intent was not to mutilate or torture his dog, but to put him down. Distinguishing A.J.R. v. State, 3 N.E.3d 1000 (Ind. Ct. App. 2014), Court disagreed and held that Stubbers did not randomly shoot at a group of animals at a distance, but instead shot his own dog at a close range, destroying the animal's eye. The State presented evidence sufficient to support the jury's conclusion that Defendant knowingly or intentionally mutilated Cooper by shooting him at close range, thereby destroying the animal's eye.

TITLE: T.J. v. State

INDEX NO.: K.11.b.

CITE: (07-21-10), 932 N.E.2d 192 (Ind. Ct. App. 2010)

SUBJECT: Staging or Promoting Animal Fight - Sufficiency

HOLDING: Where evidence showed that witnesses saw juvenile standing in another's yard, watching a large dog attack the homeowner's small dog, and shouting "Get 'em, get 'em," evidence was sufficient to support juvenile adjudication for knowingly or intentionally promoting or staging an animal fighting contest, under Ind. Code 35-46-3-9. Home-owner's dog died of its wounds, and her husband testified that when he went toward the house where the juvenile ran, people on the porch laughed and snickered. Juvenile asked the Court of Appeals to construe the statute and define the terms, "staging" and "promoting." However, he did not argue that the terms are ambiguous. Court looks to Fuller v. State, 674 N.E.2d 576 (Ind. Ct. App. 1996), considering sufficiency of the evidence to support these elements. In Fuller, police responding to a report of dog fighting observed D carrying dog to back of house, and when they walked to the back of the house, they saw two men holding two wounded pitbulls by the legs. D told police that his dog must have broken its chain and gotten into fight, but the chain was intact and quite heavy, as were other chains in the yard. This circumstantial evidence was found sufficient to support conviction. Here, witnesses actually saw the juvenile standing over the dogs and heard them encouraging the larger dog to attack the smaller one. The homeowner testified that her gate had been closed, indicating the juvenile opened the gate to put the two dogs together. Held, delinquency adjudication affirmed.

RELATED CASES: Clemons, 987 N.E.2d 92 (Ind. Ct. App 2013) (evidence that D groomed roosters for cockfighting, along with evidence of cockfighting paraphernalia and instructional videos, was sufficient to prove beyond a reasonable doubt that D possessed an animal for purposes of an animal fight).

K. CRIMES

K.11. Miscellaneous

K.11.c. Bigamy

TITLE: Burden v. State

INDEX NO.: K.11.c.

CITE: (1/25/2018), 92 N.E.3d 671 (Ind. Ct. App 2018)

SUBJECT: Insufficient evidence for neglect of dependent

HOLDING: The State's evidence that D left his putative biological child with the child's mother at the scene of a car accident was not sufficient to support D's conviction for neglect of a dependent as a Level 6 felony. See Ind. Code § 35-46-1-4(a)(1). D lived with his girlfriend Christina and her two young children, B.E. and K.E.; Christina believed D was K.E.'s father. One day, D, Christina and the two children, were passengers in D's sister's ("Tiffany") car. Tiffany began showing off, increasing her speed to more than 100 m.p.h. She lost control of the car, which veered into a cornfield, rolled several times, and came to rest on its roof. Christina and the children were thrown from the car. Once he extricated himself from the car, D repeatedly and frantically asked Christina where K.E. was. Each time, she assured D that K.E. was with her and that K.E. was fine. Also, D was not trained in first aid, and Christina would never let D car for K.E. Because D's cell phone was not working, her persuaded an onlooker to drive D to D's home so he could call for help. After leaving the scene, D did not, in fact, call for help. Some evidence suggested that D left the scene because he had an outstanding warrant. This evidence did not establish a "high probability" that D placed K.E. in a dangerous situation. See Scruggs v. State, 883 N.E.2d 189, 191 (Ind. Ct. App 2008). Held, judgment reversed.

TITLE: Green v. State

INDEX NO.: K.11.c.

CITE: (11/10/53), Ind., 115 N.E.2d 211

SUBJECT: Bigamy -- cohabitation is not necessary

HOLDING: Statute defining bigamy states that "Whoever, being married, marries again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no legal presumption of death having arisen, is guilty of bigamy, . . .". Ind. Code 35-46-1-2. Here, D was convicted of bigamy. D claimed on appeal that crimes attempted to be charged by affidavit (bigamy and cohabitation with second wife) were committed in Florida, and that under Indiana Constitution as well as criminal statutes, no crime was charged as committed in Indiana. Ct. held that crime of bigamy is committed when bigamous ceremonial marriage is consummated and cohabitation is not necessary to constitute crime of bigamy. However, states cannot impose their laws upon those outside of limits of its sovereign power. Here, D entered into bigamous marriage in Florida and resided with second wife in Indiana and was not therefore subject to prosecution in Indiana for bigamy under statute defining offense of bigamy and limiting offense to act of contracting bigamous marriage within State of Indiana. Held, conviction reversed.

K. CRIMES

K.11. Miscellaneous

K.11.e Miscellaneous – Contributing to delinquency (Ind. Code 35-46-1-8)

TITLE: Rush v. State

INDEX NO.: K.11.e

CITE: (2nd Dist., 02-19-08), Ind. App., 881 N.E.2d 46

SUBJECT: Contributing to delinquency of minor - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for contributing to delinquency of a minor, which requires State to prove that she knowingly or intentionally encouraged, aided, induced, or caused a person "less than eighteen years of age to commit an act of delinquency." Ind. Code 35-46-1-8. Evidence showed that there were approximately twenty-five people at D's house visiting her seventeen-year-old daughter. When some of the guests brought alcohol into the house through front door, D was in living room. D admitted to police that she had seen beer cans in the house and that she talked to an underage individual and her daughter after they had been drinking in basement. Although evidence may not have established that D actually supplied the juveniles with alcohol, Tr. Ct. could have reasonably inferred that D knew that the minors were drinking in her basement when considering amount of alcohol that was in the house and number of individuals who were coming and going from residence. Moreover, it was reasonable for Tr. Ct. to conclude that D aided the minors in permitting them to consume alcohol in her home. Held, judgment affirmed.

TITLE: Temple v. State

INDEX NO.: K.11.e.

CITE: (09-20-11), 954 N.E.2d513 (Ind. Ct. App. 2011)

SUBJECT: Evidence sufficient to show D induced minor to leave home

HOLDING: Even though State did not prove that A.H. actually left her home for sexual liaison with D, where charge stated that D “induced” A.H. to leave her home (Ind. Code § 31-37-2-2), evidence was sufficient to support D’s conviction for class A misdemeanor contributing to the delinquency of a minor, Ind. Code § 35-46-1-8(a). As used in the statute, “induces” includes the “act of or process of enticing or persuading another person to take a certain course of action,” see Black’s Law Dictionary 790 (8th ed. 2004). The other person need not complete the course of action. Thus, there was sufficient evidence to prove that D induced A.H. to leave her home even though her parents prevented her from leaving the house. For the same reasons, there was no fatal variance between the charging information and the evidence adduced at trial.

Here, A.H., who was fifteen years old at the time, exchanged several text messages with D, her twenty-six-year-old neighbor, to arrange a sexual rendezvous as soon as A.H. could sneak out of her house. However, when A.H. tried to leave the house, her parents discovered her plan and prevented her from ever leaving the house. Held, judgment affirmed.

K. CRIMES

K.11. Miscellaneous

K.11.f. Discrimination in jury selection (IC 35-46-2-2)

TITLE: Love v. State
INDEX NO.: K.11.f.
CITE: (9/8/2016), 61 N.E.3d 290 (Ind. Ct. App 2015)
SUBJECT: Insufficient evidence - video undisputedly contradicts officer testimony
HOLDING: The State failed to present sufficient evidence to convict D of resisting law enforcement and mistreatment of a law enforcement animal, both class A misdemeanors - even though officers testified that D did resist - because video evidence undisputedly and unambiguously contradicted the officers' testimony.

Police officers stopped D for running a stop light and disregarding a stop sign. A police video showed D exited his vehicle and within five seconds raised his hands, placed himself on all fours and within another ten seconds laid face down on the ground. The video also showed that soon after, the officers and D scuffled as the officers tased D and deployed a police dog against him. At trial, several officers testified they took these actions because D was "completely uncooperative." D agreed the scuffle occurred but claimed the violence was "gratuitously initiated by the police" after he already surrendered and that he was merely protecting himself from the officers and the dog.

The act of reviewing video evidence does not constitute impermissible appellate reweighing; such evidence is a necessary part of the record, just like any other type of evidence. Cf. Robinson v. State, 5 N.E.3d 362, 366 (Ind. 2014). However, where a fact-finder determines that an officer's observations are superior to that of a video camera, it may give more weight to the officer's testimony. Id. at 367 (case involving reasonable suspicion to stop vehicle). But where, as here, video evidence unambiguously and undisputedly contradicts the officers' testimony that D was uncooperative, total deference to the fact finder is not required. See State v. Houghton, 384 S.W.3d 441, 446 (Tex. App. 2012). Further, the scuffle that occurred is not a basis for either conviction as the police-initiated violence was not objectively reasonable. See Graham v. Connor, 109 S. Ct. 1865, 1872 (1989). Held, judgment reversed; Pyle, J., dissenting, believes that the majority reweighed the evidence.

K. CRIMES

K.11. Miscellaneous

K.11.g Exploitation of a dependent or an endangered adult

TITLE: A.H. v. State

INDEX NO.: K.11.g.

CITE: (07-19-10), 949 N.E.2d 358 (Ind. Ct. App. 2010)

SUBJECT: Exploitation of endangered adult - insufficient evidence

HOLDING: Court reversed A.H.'s delinquency adjudication for what would be class A misdemeanor exploitation of an endangered adult (Ind. ' Code 35-46-1-12), because State failed to prove beyond a reasonable doubt that A.H.'s use of property of blind, illiterate mentally retarded man, Robert Barnhart, was unauthorized. Barnhart's IQ is 54, and he has difficulty with numbers.

A.H. asked Barnhart to loan her \$750 so she could bail her husband out of jail. A.H. filled out the top part of the check, and Barnhart signed the check. A.H. gave the check to Charlie Mathews, who gave her \$750. After A.H. paid her husband's bail, she borrowed money to pay Mathews \$750, and Mathews returned the \$750.00 check to her. The \$750 was never taken out of Barnhart's account. A.H. later approached Barnhart about a \$100 loan; again, she filled out the top part of the check, and Barnhart signed the check. Later, A.H. paid Barnhart \$25.00 of the \$100. Though Barnhart may have diminished capacity and juvenile prevailed against him, Barnhart agreed to loan funds to A.H., who had begun to repay the only outstanding loan. Held, delinquency adjudication reversed.

TITLE: Edwards v. State

INDEX NO.: K.11.g.

CITE: (2nd Dist., 7-7-00), Ind. App., 730 N.E.2d 1286

SUBJECT: Exploitation of endangered adult - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for exploitation of endangered adult.

Record revealed: 1) that D convinced elderly victim to sign warranty deed giving him her home; 2) that victim did not know that she had signed papers giving D her home; 3) that victim believed that she still owned home after she signed document; 4) that victim did not receive any proceeds from sale of home, & 5) that victim was required to pay rent to remain in home after D sold home & retained proceeds. Ct. concluded that this evidence showed that D recklessly, knowingly, or intentionally deprived victim of her property for his own advantage, in violation of Ind. Code 35-46-1-12. Moreover, jury did not render inconsistent verdicts by finding D guilty of exploitation & not guilty of theft. Held, judgment affirmed.

K. CRIMES

K.11. Miscellaneous

K.11.h Failure to remit sales tax/file income tax return

TITLE: Kibbey v. State

INDEX NO.: K.11.h.

CITE: (2nd Dist.; 8-22-00), Ind. App., 733 N.E.2d 991

SUBJECT: Failure to remit sales taxes - notice only required in civil cases

HOLDING: Tr. Ct. properly denied D's motion to dismiss failure to remit sales taxes charges based on Department of Revenue's failure to provide notice of nonpayment before initiating criminal proceedings. "If department reasonably believes that person has not reported proper amount of tax due, department shall make proposed assessment of amount of unpaid tax on basis of best information available to department. . . . Department shall send person notice of proposed assessment through United States mail." Ind. Code 6-8.1-5-1(a). "Notice shall state that person has sixty days from date notice is mailed to pay assessment or to file written protest." Ind. Code 6-8.1-5-1(c). Here, Ds never registered with Department of Revenue & never received notice of amount of unpaid taxes. However, such notice is only required where dispute arises regarding tax payments & their amount. It does not contemplate intentional nonpayment. Person who intentionally does not pay taxes is already cognizant of criminal act & need not be notified. Held, judgment affirmed in part & reversed in part.

K. CRIMES

K.11. Miscellaneous

K.11.i. Hazardous waste (Ind. Code 13-7-13-3 and 4)

TITLE: DeHart v. State
INDEX NO.: K.11.i.
CITE: (3d Dist. 11/26/84) Ind. App., 471 N.E.2d 312
SUBJECT: Disposal/storage of hazardous waste without permit
HOLDING: Prosecution & conviction of D under 1980 statute present-ed no ex post facto or statute of limitations problems. Even though D ceased placing waste materials at site in 1977, his failure to request either a permit or variance under Ind. Code 35-41-1-2 constituted a continuing offense. Where continuing duty to do some act exists, statute of limitations does not apply where some portion of offense is within period of limitations. D's continued storage of materials after 1980 amendments to statute gave rise to duty to apply for permit/variance for preexisting sites. D was convicted of storing materials without permit, rather than of placing hazardous waste on sites (an act which was complete in 1977). Ct. cites similar IL case, People v. Jones, (Ill. App. 1946) 69 N.E.2d 522. Held, conviction affirmed.

TITLE: Elliott v. State
INDEX NO.: K.11.i.
CITE: (2nd Dist., 1-30-98), Ind. App., 690 N.E.2d 774
SUBJECT: Violation of Indiana's Environmental Management Act - sufficient evidence
HOLDING: Evidence was sufficient to support D's conviction for violation of Indiana's Environmental Management Act, by illegally offering to sell seven vehicles with damaged or missing emission control devices. Person who intentionally knowingly or recklessly violates air pollution control laws commits Class D felony. Ind. Code § 13-7-13-3(a) (repealed & replaced by Ind. Code § 13-30-6-1). No person shall offer for sale motor vehicle with knowledge that vehicle has been subject to tampering. Knowledge of tampering shall be imputed to any person engaged in business of repairing, servicing, selling, leasing or trading motor vehicles. Ind. Admin. Code tit. 326, r. 13-2.1-3(a)(1) (1992). Administrative agency may adopt rules & regulations to enable it to put into effect purposes of law, but it may not by its rules & regulations add to or detract from law as enacted. Johnson County Farm Bureau Co-op Ass'n v. Indiana Dep't of State Revenue, 568 N.E.2d 578 (Ind.Tax 1991), *Aff'd*, 585 N.E.2d 1336 (Ind. 1992).

Here, seven of fifty-two cars which D displayed in used car lot were in violation of Indiana's air pollution control laws. Although D was not bound by price on windshield of cars, D was offering for sale cars because each car had sticker displaying model year & price & buyer's guide providing warranty information. Ct. noted that 326 IAC 13-2.1-3(a)(1), which imputes knowledge of tampering to D, is invalid because it detracts from Ind. Code § 13-7-13-3(a)'s requirement that D knowingly or recklessly violate air pollution control laws. However, State still proved D at least recklessly violated statute because D had received notice of previous violations & attended educational meeting advising D of steps he needed to take to avoid future violations. Because D could not claim on appeal that he was unaware of laws & of his responsibilities, there was sufficient evidence of D's culpability. Held, judgement affirmed.

TITLE: State v. Money

INDEX NO.: K.11.i.

CITE: (5th Dist., 6-16-95), Ind. App., 651 N.E.2d 344

SUBJECT: Illegal open burning - sufficiency of charging information

HOLDING: Tr. Ct. erred in dismissing charge of illegal open burning against D. In his motion to dismiss, D argued that he could not be charged with illegal open burning because waste alleged to have been present on his property did not fall within applicable statutory definition of "solid waste" found in Ind. Code 13-7-1-22. Statute defines "solid waste" as: ...any garbage, refuse, sludge from a waste treatment plant...water supply treatment plant...air pollution control facility, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations or from community activities. Ind. Code 13-7-1-22. State stipulated to fact that debris on D's land was of type commonly generated from personal residential use. Tr. Ct. erroneously construed definition of "solid waste" as being modified in whole by phrase "resulting from industrial, commercial, mining, or agricultural operations or from community activities." In construing plain language of statute, Ct. held that residential trash is included within scope of definition of "solid waste." Charging information alleged sufficient facts to constitute offense of illegal open burning under Ind. Code 13-7-4-1. Held, reversed & remanded.

K. CRIMES
K.11. Miscellaneous
K.11.j. Neglect of dependent (Ind. Code 35-46-1-4)

TITLE: Armour v. State
INDEX NO.: K.11.j.
CITE: (7/3/85), Ind., 479 N.E.2d 1294
SUBJECT: Neglect of dependent - "knowing" is subjective standard; sufficiency
HOLDING: As used in child neglect statute, a person acts "knowingly" if he/she is subjectively aware of high probability that he/she has placed dependent in dangerous situation. Opinion resolves conflict as to meaning of term knowingly in child neglect statutes. See Ware, App., 441 N.E.2d 20 & Smith, App., 408 N.E.2d 614. "Knowingly" is defined in Ind. Code 35-41-2-2. Here, Ct. finds evidence supports jury's conclusion that D knowingly endangered health/life of his 3-month old son by not seeking timely medical care. Doctors determined that baby had subdural hematoma caused by trauma to its head. Its symptoms were such that a person of normal intelligence would have realized the baby was not healthy. Held, conviction for neglect of dependent affirmed.

RELATED CASES: Dexter, 945 N.E.2d 220 (Ind. Ct. App 2011) (evidence that D tossed wet toddler into the air over a bathtub and had been previously warned about the danger of tossing the child into the air was sufficient to show that D was subjectively aware of a high probability that he placed the child in a dangerous situation); Howard 481 N.E.2d 1315 (Infants 20; evidence was sufficient to sustain conviction where D left 2 small children in bathtub & where extremely hot water caused serious injury to one of them; medical experts concluded injuries were purposefully inflicted); Caldwell, App., 497 N.E.2d 610 (D knew of her mother's propensity for violence to young children; child died while in D's mother's care; held, conviction affirmed); Davis, App., 476 N.E.2d 127 (Parent & C 17(2,6); evidence was insufficient to sustain conviction where D (father) was at work when baby was born & abandoned); Ware, App., 441 N.E.2d 20 (where D allowed her boyfriend to continue to live in her apartment after his sexual attack on her 7-year-old daughter for approximately 3 months following the incident, evidence was sufficient to uphold child neglect conviction).

TITLE: Bean v. State

INDEX NO.: K.11.j.

CITE: (3/19/84) Ind., 460 N.E.2d 936

SUBJECT: Neglect of dependent - dependency relationship; sufficiency

HOLDING: D's conviction for neglect of dependent was proper where D, though neither parent nor guardian, exercised care, custody & control over mentally disabled adult. Ind. Code 35-46-1-4; Ind. Code 35-46-1-1 (dependent defined). Evidence at trial showed D kicked dependent (M.A.) so hard D limped next day, confined M.A. in furnace closet for extended periods, forced her to do physical labor she was unable to perform & withheld food. Here, D contends legal relationship is required. His wife, not he, was M.A.'s legal guardian. D also contends he could not be convicted of both involuntary manslaughter & neglect, *citing* Smith, App., 408 N.E.2d 614. In Smith, neglect & death occurred on same day. In present case, D & wife committed scores of acts of neglect continually over 3 years. Held, conviction affirmed.

RELATED CASES: Thames, App., 653 N.E.2d 517 (D's conviction for ND was proper where D should have been subjectively aware of high probability that he placed girlfriend's five-year-old child in dangerous situation by leaving her at home alone).

TITLE: Dunn v. State

INDEX NO.: K.11.j.

CITE: (2/2/23) Ind. Ct. App., 202 N.E.3d 1158

SUBJECT: Sufficient evidence to convict child's grandmother's boyfriend of neglect of a dependent

HOLDING: Defendant was convicted of neglect of a dependent for failing to seek medical treatment for his girlfriend's two-month-old grandson after noticing the child had signs of a possible head injury. The Court of Appeals found no error in trial court's exclusion of evidence of prior neglect by the child's mother. The evidence was irrelevant and inadmissible because the child's mother was not with the child at the time of the alleged neglect. The Court also rejected Defendant's sufficiency challenge to his conviction, finding the State presented sufficient evidence he was aware the child needed medical treatment but failed to provide that treatment. Defendant reported his concerns that the child's "head look[ed] off," "felt crunchy," and looked "swollen" to his girlfriend. In addition, the child "was screaming bloody murder." A hospital physician testified that she would expect the caretaker to recognize that the child was in pain based on his screaming. Based on the screaming and the apparent head injuries, the jury could have reasonably concluded that Defendant recognized that the child needed immediate medical treatment. Even though Defendant's girlfriend was an LPN and explained away his concerns about the child's head, the Court reasoned that "[c]hildren would not be adequately protected if a neglectful caregiver could rely on the medical opinion of a fellow caregiver, the latter of whom may have an interest in disguising, trivializing, or explaining away the child's injuries and/or needs." And although Defendant was not the "primary" caregiver to the child that weekend, he still was a caregiver with a duty to seek medical treatment and had agreed to watch the child by himself. In a footnote, the Court said Defendant waived his argument regarding the defense to neglect of a dependent in IC 35-46-1-4(c) by raising it for the first time in his reply brief. Held: judgment affirmed.

TITLE: Eukers v. State

INDEX NO.: K.11.j.

CITE: (2nd Dist.; 5-15-00), Ind. App., 728 N.E.2d 219

SUBJECT: Educational neglect - no violation of separation of powers

HOLDING: Delegation of authority by legislature to local school corporations to establish attendance policies, violation of which may constitute criminal offense, is not unconstitutional delegation of legislative function. "[I]n carrying out school purpose of each school corporation, its governing body acting on its behalf shall have following powers: . . .To prepare, make, enforce, amend & / or repeal rules, regulations & procedures for government & management of schools . . ." Ind. Code 20-5-2-2(17). Person who knowingly fails, neglects, or refuses to send his child to public school for full term commits Class B misdemeanor. Ind. Code 20-8.1-3-34; Ind. Code 20-8.1- 3-37. Here, school's policy was that after ten absences, student needed doctor's note & continued unexcused absences may result in formal referral for educational neglect. Between September of 1997 & January of 1998, D's child accumulated twenty-three absences. Because statutorily triggering event for possible criminal prosecution is one unexcused absence, not violation of particular school's attendance policy, violation of school's attendance policy does not per se subject parent to criminal liability. Thus, delegation of authority to school districts to establish attendance policies is not unconstitutional because prosecutor is vested with sole discretion by legislature in deciding whether to prosecute parent & this discretion operates independently of school's attendance policy. Held, conviction affirmed.

TITLE: Fisher v. State

INDEX NO.: K.11.j.

CITE: (1st Dist. 1/16/90), Ind. App., 548 N.E.2d 1177

SUBJECT: Neglect of dependent - sufficiency - failure to stop abuse by parent

HOLDING: Evidence was insufficient to support D's conviction for neglect of dependent where D failed to keep girlfriend from abusing her child. Evidence showed that D's girlfriend & her 1-year-old son moved in with D & his 2-year-old son for several weeks, returned to her husband for one weekend, then moved back in with D. D told girlfriend that she could stay for only 2 weeks, & arranged for them to move to YWCA at end of that time. Before girlfriend & son moved out, son died, & autopsy revealed multiple bruises of various ages covering his body, extensive injury to his back, including burn in shape of steam iron, cut lip, extensive internal injuries caused in part by 9 broken ribs, & hemorrhaging & swelling of his brain. Evidence did not show that D was responsible for any of these injuries. D was convicted of failure to report child abuse & neglect of dependent. On appeal, D challenges sufficiency of evidence to support neglect conviction. D's provision of food & diapers, ordinary household duties, & occasional care for victim was sufficient to show that D had voluntarily assumed care of him. However, while mother's treatment of victim constituted "dangerous situation," D did not place him in that situation. Indeed, mother & victim had legal relationship which was created when victim was born, not when D opened his home to them. D did not have authority to separate victim from mother. Cf. Wilson, App., 525/619 (mother convicted of neglect for failure to remove child from abusing boyfriend). D's only course of action would have been to report abuse, & D's failure to do so constituted separate offense of failure to report child abuse, for which he was rightly convicted. Held, conviction reversed.

RELATED CASES: Lay, 933 N.E.2d 36 (Ind. Ct. App 2010) (fact that D could hear his mother "spanking" while he was playing a video game in the living room and the children were in their bedrooms with the doors closed is circumstantial evidence of the fact that mother used excessive force in punishing the child; fact D was nearby and took no action is sufficient to support D's conviction for neglect of a dependent).

TITLE: Fout v. State

INDEX NO.: K.11.j.

CITE: (5th Dist., 08-18-93), Ind. App., 619 N.E.2d 311

SUBJECT: Neglect of Dependent (ND) - insufficient evidence

HOLDING: Where daughter died from strep septicemia contracted in utero, evidence of D's subjective knowledge of peril she was placing baby in was insufficient to support conviction for ND. D & husband took home delivery classes, & five weeks before delivery date, D's water broke. She called class nurse for advice & was told to go to doctor because it was now high risk pregnancy. D did not see doctor for 5 days, & doctor determined that some amniotic fluid remained that could host bacterial infection & took cultures for identification of bacteria. D was informed of possibility of infection. Baby was born 6 days later but would not breast feed. No medical attention was sought, & baby died within 24 hours of birth. Cause of death was subarachnoid hemorrhage due to bacterial infection & D & her husband were both convicted of ND. To prove ND State must show D had care of dependent & knowingly or intentionally placed dependent in situation that endangered life by failing to obtain proper medical care which resulted in serious bodily injury. D must be subjectively aware of high probability that she placed dependent in dangerous situation, Hill, App., 535 N.E.2d 153. Here evidence showed child was dependent, that D was aware before child was born that pregnancy was high risk, & that doctor recommended D have sonogram, which she did not do. Evidence also included temperature chart that appeared in two forms. One version noted: "Day Dr. Davis called & I.D. the bacteria as strep...", & other version omitted this entry. If jury saw either version, it was redacted copy. Ct. found absent redacted portion of chart, there was no evidence doctor ever informed D of infection or that she was aware of its confirmed presence. Although baby showed some signs of being unwell, Ct. found no evidence that D knew signs indicated she had serious problem. Although opposite determination was made in husband's appeal, Fout, App., 575 N.E.2d 340, discrepancy was explained by differences in record developed in two cases. In husband's case there was evidence that doctor informed D & husband of presence of infection & accompanying danger. Held, reversed & acquittal directed.

TITLE: Gross v. State

INDEX NO.: K.11.j.

CITE: (5th & 1st Dist., 11-12-04), Ind. App., 817 N.E.2d 306

SUBJECT: Neglect of dependent - evidence insufficient; "hostage" game

HOLDING: In a consolidated appeal, convictions for felony neglect of a dependent were reversed against two roommates who played a game called "hostage" with the children in their care. The game involved tying the children, ages 3 to 13, up with a light construction tape & the kids trying to free themselves. If they couldn't free themselves or wanted to stop, the adults removed the tape, but one child was accidentally nicked by a knife while being freed. All the kids apparently enjoyed the game & played wilfully.

Indiana S.Ct. has cautioned against reading the neglect of dependent statute too broadly. State v. Downey, 476 N.E.2d 121 (Ind.1985). It seems clear that to be an "actual & appreciable" danger for the purposes of the neglect statute, the child must be exposed to some risk of physical or mental harm substantially beyond the normal risks of bumps, bruises or even worse that accompany the activities of the average child. Although the so-called "hostage" game struck Ct. as somewhat bizarre & not something many child development experts would condone, insufficient evidence existed that it exposed the children to a substantial, actual, & appreciable risk of mental or physical harm. Held, convictions reversed.

TITLE: Hall v. State
INDEX NO.: K.11.j.
CITE: (3d Dist. 9/26/85) Ind. App., 482 N.E.2d 1185, affirmed in part, reversed in part on other grounds, Hall v. State, 493 N.E.2d 433 (Ind. 1986)
SUBJECT: Neglect of dependent - religious belief defense
HOLDING: Evidence was sufficient to sustain Ds' conviction for neglect where one-year-old son died of treatable illnesses; verdict indicates jury disbelieved Ds' testimony that they "trust[ed] Jesus Christ for our healing & for the healing of our family." When D raises defense that, in legitimate practice of religious beliefs, he/she provided treatment by spiritual means through prayer, in lieu of medical care, D must shoulder burden of proving defense. Defense establishes facts in mitigation of culpability. It does not negate an element of offense. See Patterson v. NY (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281; Ward 438 N.E.2d 750; Davis, App., 481 N.E.2d 434. Tr. Ct. erred in instructing jury that state bore burden of disproving Ds' defense beyond a reasonable doubt. Held, convictions affirmed. Garrard DISSENTS, arguing both convictions cannot stand, citing Howard 481 N.E.2d 1315.

TITLE: Hampton v. State
INDEX NO.: K.11.j.
CITE: (9-13-01), Ind. App., 754 N.E.2d 1037
SUBJECT: Educational neglect - evidence sufficient
HOLDING: Where D failed to take children to school that custodial parent had registered them in, evidence was sufficient to support educational neglect charge. Ind. Code 35-46-1-4(a) states that person having care of dependent, whether assumed or voluntarily or because of legal obligation, who knowingly or intentionally deprives dependent of education as required by law commits neglect of dependent. Although D contended that he was home schooling the children, education required by law was public school chosen by custodial parent. Custodial parent has right to make educational decisions for child. Neudecker v. Neudecker, 577 N.E.2d 960 (Ind. 1991). Held, judgment affirmed.

TITLE: Harris v. State

INDEX NO.: K.11.j.

CITE: (02-23-21), Ind. Ct. App., 163 N.E.3d 938

SUBJECT: Neglect resulting in death conviction and maximum sentence affirmed

HOLDING: State presented sufficient evidence to support Defendant's conviction for Level 1 felony neglect of a dependent resulting in death. Last month, the Indiana Supreme Court affirmed the murder/LWOP conviction for Defendant's boyfriend, Dylan Tate. Two months before Tate beat the toddler (H.H.) to death, Defendant twice took H.H. to the emergency room because of swelling injuries to his head and face. At the end of December 2017, H.H.'s primary care provider suspected that H.H. was the victim of child abuse and referred him to the Riley Hospital emergency room, which has a Team to investigate such abuse. The ER physician clearly told Defendant that H.H., who had two black eyes, an internal ear injury, and a broken leg, was being abused. The physician was so concerned about H.H.'s injuries that she wanted him admitted to the hospital that day. In addition, Defendant knew that Tate was volatile. Tate kicked her out of the house in January 2018 because, as Defendant told [a relative], "he was still angry over the broken leg incident." But a few weeks later, Defendant had moved back in with Tate and wanted H.H. to return home. Defendant also knew that Tate was both taking and selling drugs and had, as she told a detective, "been getting angrier and angrier" around the time that he brutally beat H.H. This evidence established that Defendant knowingly placed H.H. in a dangerous situation and was sufficient to support her conviction. The Court found that, by itself, Defendant's abuse of her position of trust with H.H. was a sufficient aggravating factor to support her 40-year sentence. The Court likewise rejected Defendant's claim that her maximum sentence was inappropriate, finding that "her violation of her position of trust with her 18-month-old son reflects very poorly on her character."

TITLE: Harrison v. State

INDEX NO.: K.11.j.

CITE: (2nd Dist., 12-22-94), Ind. App., 644 N.E.2d 888

SUBJECT: Neglect of dependent - sufficiency of evidence

HOLDING: Evidence was sufficient to support convictions for Neglect of Dependent. D took two girls to nursing home to visit person whom D knew had propensities to solicit & engage in criminal deviate behavior. D testified that she left room to buy drink & stopped to talk with patients on her way back to room. When she returned, D witnessed girls performing fellatio on patient & ordered them to stop. Jury acquitted D on two counts of vicarious sexual gratification but found her guilty on two counts of neglect. D gave signed statement to detective concerning prior incidents & her knowledge of patient's sexual propensities. Jury could have reasonably found that D knowingly placed girls in situation that threatened their life or health. Ct. also concluded that neglect statute applies to psychological, mental & emotional injuries which are inflicted upon children by deviate conduct. Held, convictions affirmed.

TITLE: Hartbarger v. State,

INDEX NO.: K.11.j.

CITE: (2d Dist. 6/4/90), Ind. App., 555 N.E.2d 485

SUBJECT: Neglect of dependent - sufficiency; confinement

HOLDING: Keeping 16-year-old son locked in his bedroom at night for 2 weeks does not, as matter of law, constitute cruel confinement so as to support conviction for neglect of dependent. Ds pled guilty to one count of neglect, with above factual basis, & on PCR, Ds contend that factual basis was inadequate. Cruelly confining a dependent may constitute neglect, under Ind. Code 35-46-1-4(a)(2). Art. 46 does not define confinement. However, for purposes of offenses of criminal confinement & kidnapping, confinement is defined as substantial interference with liberty. Ind. Code 35-42-3-1. Ct. App. concludes that cruel confinement requires (1) substantial interference with liberty (2) which rises to level of being cruel. "Cruelly" means "so as to cause pain or hurt." Webster's 3d New International Dictionary 546 (1976). While all punishment in some sense causes pain or hurt, not all punishment is cruel. [Citation omitted.] Because subsection (l) of neglect statute covers situations which endanger dependent's life or health, cruel confinement subsection is reasonably interpreted to require confinement which is likely to result in pain & yet does not necessarily endanger life or health. Whether confinement is cruel is to be determined by objective standard, based upon nature or extent of punishment, nature of child's offense, age of child, etc. Ct. is mindful of purpose of neglect statute, which is protection of children, & is mindful also of potentially conflicting right of parents to discipline their children. Conduct set out in factual basis here does not support conclusion that 2-week confinement was cruel under standards outlined above. Held, PCR denial reversed.

RELATED CASES: Demontigney & Wolfe, App., 593 N.E.2d 1270 (liability for "cruelly confining" dependent under Ind. Code 35-46-1-4(a)(2) is not unconstitutionally vague, & under definition of "cruelly" in Hartbarger, people of ordinary intelligence would recognize illegality of Ds' conduct; tethering boy to his bed by chain padlocked to ankle preventing him from getting to bathroom or playing with toys.)

TITLE: Herron v. State

INDEX NO.: K.11.j.

CITE: (3rd Dist., 6-7-00), Ind. App., 729 N.E.2d 1008

SUBJECT: Neglect of dependent - unborn child

HOLDING: Unborn child is not included in Indiana's criminal statutory definition of "dependent" under neglect of dependent statute, Ind. Code 35-46-1-4. State charged D with neglect of dependent based on her ingestion of cocaine while she was pregnant. "Dependent" is defined as "an unemancipated person who is under eighteen years of age," or "a person of any age who is mentally or physically disabled." Ind. Code 35-46-1-1. Where legislature has previously sought to criminalize conduct affecting unborn children, it has done so specifically. See, e.g., Ind. Code 35-42-1-6 (feticide); Ind. Code 35-42-1-1 (knowing & intentional killing of fetus that has attained viability). When definition of "dependent" is considered in light of these statutes, this definition cannot be fairly read to include unborn. Plain language of neglect of dependent statute contemplates only acts that place one who is dependent at time of conduct at issue in dangerous situation - not acts that place future dependent in dangerous situation. Held, denial of motion to dismiss reversed.

RELATED CASES: Patel, 60 N.E.3d 1041 (Ind. Ct. App 2015) (fact D deliberately induced premature delivery of her baby with no medical supervision or help available for her child cannot be considered under Herron; see full review, this section).

TITLE: Hill v. State

INDEX NO.: K.11.j.

CITE: (2d Dist. 3/13/89), Ind. App., 535 N.E.2d 153

SUBJECT: Neglect of dependent - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for neglect of dependent, Class B felony. D was charged with placing dependent in her care in situation which may have endangered his life or health by failing to obtain medical treatment for him, resulting in his death. Mother of 3-year-old left him with D while she recovered from strep throat. D testified that day before child died, she bathed him & noticed bruises on his chest, buttocks, & arms. D's husband told her that he had hit child in stomach hard enough to make him cry earlier in day. That evening when child fell from porch & complained of stomachache, D tried to call child's mother, then dismissed his complaints. Early next morning D saw child run into wall & called child's mother, who called ambulance immediately upon her arrival. Child died in hospital emergency room. Treating physician testified that child died from peritonitis, resulting from torn bowel 24 to 72 hours earlier. Doctor testified that average layperson would recognize that child with peritonitis needs medical attention. Person knowingly commits neglect of dependent when subjectively aware of high probability that he/she placed dependent in dangerous situation. Ware, App., 441 N.E.2d 20. Mental state can be inferred from circumstances, including expert testimony re likely symptoms. McMichael, App., 471 N.E.2d 726. See also Perkins, App., 392 N.E.2d 490; Wilson, App., 525 N.E.2d 619. Totality of circumstances, including expert testimony & fact that D attempted to call child's mother, indicates D had knowledge she was placing child in danger by failing to obtain medical care. Held, conviction affirmed.

TITLE: Kellogg v. State

INDEX NO.: K.11.j.

CITE: (1st Dist., 06-30-94), Ind. App., 636 N.E.2d 1262

SUBJECT: Neglect of Dependent (ND) - Definition of "dependent" & endangerment knowledge

HOLDING: Proof that child in car operated by intoxicated D was his daughter was not necessary to sustain conviction for ND, & sufficient knowledge that D endangered her by driving while intoxicated was shown. When police followed D's car, officer observed child approximately 4 years old moving around in back of car. D was subsequently arrested & convicted of OWI. Proof child was D's daughter was not necessary, because Ind. Code 35-46-1-4(a)(1) requires only that person have care of dependent, whether voluntarily assumed or due to legal obligation. State need only prove D either assumed care of unemancipated person under 18 or had person in his care under legal obligation. Assuming care of dependent is sufficient & fact child was in car was sufficient to support inference she was under D's care. Evidence was also sufficient to show D knowingly endangered dependent. Ct. rejected argument that State did not present direct evidence that D admitted he knew he was impaired & chose to drive anyway. D was travelling at high rate of speed & driving erratically, with jerking, sudden movements. Car also swerved off right side of roadway & crossed center line, & when officer activated lights D pulled off roadway erratically into steep incline of ditch. D admitted he consumed 4 to 5 beers during day, failed field sobriety tests, & had BAC of .18%. "Knowingly" implies D knew what he was doing & proceeded to commit crime charged. To convict for ND, proof of subjective awareness child was placed in danger requires inferential reasoning to determine D's mental state. Because of D's actual knowledge he had consumed substantial amount of alcohol & that his child was in car, jury could have reasonably inferred he had actual knowledge dangerous situation existed.

TITLE: Kerlin v. State

INDEX NO.: K.11.j.

CITE: (1st Dist. 06/12/91), Ind. App., 573 N.E.2d 445

SUBJECT: Neglect of dependent - physician's acts

HOLDING: It was not error to deny D's motion to dismiss charges of neglect of dependent against him, as statute as applied to physician is not unconstitutionally vague or overbroad, & the indictments were sufficient. D was medical director of nursing home who treated 2 patients there. He filed motion to dismiss 2 indictments which was denied. Ct. found statute not vague because no person of ordinary intelligence would have trouble determining that failure to give necessary or proper medical care is proscribed by statute. Ct. rejected D's argument that statute was overbroad as applied to medical profession because it would result in health care professionals being reluctant to care for nursing home residents, by finding such arguments should be addressed to legislature & weren't sufficient to overcome presumption of constitutionality. Ct. also found indictments were sufficient to advise D of charges against him because they tracked the statutory language & contained date & place of offense & victim's name. D's arguments that victims were not his "dependents" & that he did not "place" them in dangerous positions, are questions of fact for trial. Held, denial of motion to dismiss affirmed, J. Baker dissenting. **NOTE:** In dissent, J. Baker deals with issue of jurisdiction of trial & appellate Ct. not discussed above, & also attacks the sufficiency of the indictments & whether criminal liability should be imposed in this case, giving considerable consideration to factual issues involved.

TITLE: Krueger v. State

INDEX NO.: K.11.j.

CITE: (7/21/2016), 56 N.E.3d 1240 (Ind. Ct. App 2015)

SUBJECT: Neglect of dependent - factitious disorder by proxy

HOLDING: Affirming D's conviction for Class B felony neglect of a dependent, Court found State presented sufficient evidence to show that D knowingly or intentionally placed her infant son (A.G.) in a situation that endangered his life or health and resulted in serious bodily injury. Three months after A.G. was born, he began suffering from episodes in which he would suddenly make a choking noise, turn blue, become stiff and lose consciousness. Evidence showed that A.G.'s father and several members of his family suffered from primary pulmonary hypertension, a medical condition that can cause similar symptoms. Doctors originally diagnosed A.G. with the same disorder and implanted a pacemaker, and there was expert testimony that the A.G.'s episodes were consistent with that medical condition. No one had actually seen D harm A.G., and some of his episodes occurred when in the care of other people. But another physician who performed extensive testing on A.G. determined that his episodes were not consistent with the diagnosis of mild primary pulmonary hypertension. Pediatric forensic medicine team at the hospital ruled out every reasonable medical cause for A.G.'s episodes. Department of Child Services (DCS) took custody of A.G., giving D supervised visitations. The State's theory, supported by expert testimony, was that D was secretly triggering the baby's episodes by pressing on his body, in a case of "factitious disorder by proxy" (formerly known as "Munchausen Syndrome by proxy"). This involves a caretaker exaggerating or causing medical symptoms in a dependent to gain attention, validation, or some other perceived benefit.

On appeal of her conviction, D pointed to differing expert opinions presented at trial and argued that the case against her was based on "surmise and conjecture." However, resolving conflicting witnesses' testimony was the jury's responsibility, and Court refused to reweigh the evidence or the credibility of witnesses. Held, judgment affirmed.

TITLE: Lomax v. State

INDEX NO.: K.11.j.

CITE: (1st Dist. 7/15/87) Ind. App., 510 N.E.2d 215

SUBJECT: Neglect of a dependent - sufficiency

HOLDING: Evidence was sufficient to sustain D's conviction for neglect of a dependent (her adult son). Here, D contends state failed to show that she "placed" son in her home or restrained him in any way & failed to show how long son had been in those conditions. Here, police received report of windows being broken at home in Bloomington. When officer arrived, he observed several windows broken from the inside & could see man with long beard inside house, clad only in T-shirt. Officer assumed man inside was intruder & radioed for help. Officers entered home & found man cowering on bed, unable to answer questions. Police saw feces on bed & stains which they believed to be urine. Feces were smeared on wall by bed & man had excrement on his legs. House smelled strongly of waste & room was teeming with flies. Garbage & trash had accumulated throughout house, leaving only a path through which officers could walk. Evidence introduced at trial showed that son was mentally disabled & that D had sole responsibility for his care. Testimony at trial described conditions in home as constituting health hazard. Statute does not require confinement or neglect over certain length of time. Held, conviction affirmed.

TITLE: Lush v. State

INDEX NO: K.11.j.

CITE: (1st Dist., 2-25-03), Ind. App., 783 N.E.2d 1191

SUBJECT: Neglect of dependent - 15-minute delay in seeking medical care

HOLDING: Evidence was sufficient to support D's conviction for neglect of dependent. After inflicting life-threatening injuries on two-year-old victim while she was in his exclusive care, D picked up his wife from work prior to taking victim to hospital. Neglect of dependent is class B felony if deprivation of medical care results in serious bodily injury. Ind. Code 35-46-1-4(b). D argued that fifteen-minute delay in taking victim to hospital is not same as "deprivation" for purposes of neglect of dependent statute. Since D was aware of severity of victim's injuries, he was in position to understand the urgency of situation & that medical attention was needed. Indiana has adopted reasonable parent standard in cases involving neglect of dependent for failing to timely obtain medical care. White v. State, 547 N.E.2d 831 (Ind. 1989). Here, question of whether D's actions were reasonable was question for jury, & it was entirely plausible for jury to find that reasonable parent would not have driven past hospital to pick up child's mother before taking an unconscious but breathing child back to hospital. Moreover, there was sufficient evidence from which jury could conclude that delay in seeking treatment caused victim serious bodily injury, despite fact that medical personnel were not able to quantify physical damage sustained by victim due to fifteen-minute delay in seeking care. Held, convictions affirmed.

RELATED CASES: McConnel, 974 N.E.2d 543 (Ind. Ct. App 2012) (reasonable trier of fact could have concluded that D knowingly deprived victim of necessary support and that the deprivation resulted in victim's death); Wright, 818 N.E.2d 540 (there was sufficient evidence to conclude that it was obvious & apparent to any reasonable layperson & to D that twins were in dire need of medical care; D's argument that he did not seek help because he did not have medical insurance is "irrelevant, unpersuasive, & chilling").

TITLE: Marksberry v. State

INDEX NO.: K.11.j.

CITE: (03/28/2022) Ind. Ct. App., 185 N.E.3d 437

SUBJECT: Neglect of dependent resulting in death -- awareness of a high probability infant placed in a dangerous situation

HOLDING: Mother left infant with baby's father knowing the father had harmed the baby in the past, was an active heroin user, had thoughts of suicide and of harming the child. Court of Appeals finds that leaving a child with a caretaker with a history of significant drug use, and who has previously injured the child, clearly meets the requirement of a high probability that the child was exposed to actual and appreciable danger and is sufficient to sustain the mens rea element of knowingly leaving child in a situation that endangers child's life or health. Held, neglect of a dependent resulting in death conviction affirmed.

TITLE: McCullough v. State

INDEX NO.: K.11.j.

CITE: (3rd Dist., 02-17-93) Ind. App., 608 N.E.2d 1009

SUBJECT: Child neglect instruction - "actual & appreciable" danger

HOLDING: Following instruction given in trial for child neglect was erroneous because it failed to indicate that danger child was placed in must be "actual & appreciable." The State does not have to prove that the D intended to cause harm to the dependent; the State must only prove that the D placed the victim in a situation that might have endangered the life & health of the victim. Neglect statute must be construed to apply only to situations where dependent is exposed to actual & appreciable danger, as "may endanger" has been ruled to be unduly vague, State, 476 N.E.2d 121, Wilson, App., 525 N.E.2d 619. Merely repeating language from Ind. Code 35-46-1-4(a)(1), without any additional instruction, would allow conviction on less definite degree of proof needed to avoid unconstitutional vagueness, White, 547 N.E.2d 831. Tr. Ct. gave no other instruction to remedy defect, & jury requested clarification of instruction but apparently received none. Ct. also noted instruction allowed for conviction if D's actions might have endangered life & health of child, & that State actually had burden of proving child's life or health was placed in actual, appreciable danger. Held, reversed & remanded for retrial.

TITLE: McGowan v. State

INDEX NO.: K.11.j.

CITE: (12/13/2017), 89 N.E.3d 424 (Ind. Ct. App 2017)

SUBJECT: Neglect - D voluntarily assumed care of boyfriend's children

HOLDING: Distinguishing Fisher v. State, 548 N.E.2d 1177 (Ind. Ct. App 1990), Court affirmed Defendant's convictions for Class C felony neglect, finding that State presented sufficient evidence that Defendant voluntarily assumed the care of her boyfriend's three children and placed them in a dangerous situation. Defendant and her boyfriend were involved in manufacturing and selling drugs around boyfriend's children. On appeal, Defendant argued that her convictions were based on insufficient evidence because the children were not her own, she had no custodial rights to them, and had no authority to separate them from their father. *Citing Fisher*, Defendant argued that, while she could have notified authorities so that child welfare could have intervened, that failure is insufficient to establish that she knowingly placed the children in a dangerous situation. But record reveals that Defendant did not merely fail to report boyfriend's activities. She allowed persons purchasing drugs into house, took children to, and sometimes into, trap houses and exchanged cocaine or pills for money while transporting the children to or from school. Thus, her own actions placed the children in a dangerous situation. Held, convictions affirmed.

TITLE: Muehe v. State
INDEX NO.: K.11.j.
CITE: (4th Dist., 2-17-95), Ind. App., 646 N.E.2d 980
SUBJECT: Neglect of dependent - failing to prevent sexual abuse
HOLDING: Evidence was sufficient to support conviction for neglect of dependent where D failed to take steps to cause her husband to cease having sexual intercourse with child. Husband had previously been convicted of fondling daughter & gave written statement to police that he informed D about his sexual relationship with their child. Husband continued to have sexual relations with daughter after D was made aware of situation. State proved corpus delicti sufficient to justify admission into evidence of D's written statement to police. D's knowledge or subjective awareness of husband's abuse could be inferred from circumstances. D had statutory & parental duty to protect child from husband's sexual advances. Failure to remove child or to prevent husband from spending time alone with child placed child in situation that endangered her life or health. Held, conviction affirmed, Darden, J., dissenting.

TITLE: Patel v. State

INDEX NO.: K.11.j.

CITE: (7/22/2016), 60 N.E.3d 1041 (Ind. Ct. App 2015)

SUBJECT: Neglect of dependent - failure to prove D's failure to provide medical care resulted in baby's death

HOLDING: In prosecution for Class A felony neglect of dependent resulting in death, State failed to prove beyond a reasonable doubt that D's baby would not have died but for her failure to provide medical care immediately after its birth. D purchased abortion-inducing drugs online from a Hong Kong pharmacy and used the drugs to terminate her pregnancy at home. She delivered a baby believed to be approximately 25 to 30 weeks, then put the baby in a bag, drove to a dumpster behind her work, and disposed of the baby. She then went to the hospital, where doctors determined she had been farther along than she claimed and called police. Court concluded that the State presented sufficient evidence for the jury to find D was subjectively aware that her baby was born alive and that she knowingly endangered the baby by not providing any medical care. However, State failed to prove even by a preponderance of evidence that D's failure to provide medical care resulted in the baby's death. D's conduct before birth of child cannot be considered, and expert testimony establishing the possibility of survival with earlier treatment falls short of satisfying the State's burden. Held, judgment reversed and remanded with instructions to enter conviction and sentence for Class D felony neglect of a dependent.

TITLE: Pierson v. State
INDEX NO.: K.11.j.
CITE: (4/4/2017), 73 N.E.3d 737 (Ind. Ct. App 2017)
SUBJECT: Sufficient evidence for Neglect of Dependent despite intellectual disabilities
HOLDING: The State presented sufficient evidence that Defendant's intellectual disability did not prevent him from forming the requisite intent to knowingly and voluntarily commit Neglect of a Dependent Resulting in Death, a Class A felony. See Ind. Code § 35-46-1-4(a)(1).

Defendant and Amy Hockett had their fourth child, K.H., in October of 2011. When discharged from the hospital, K.H. weighed just under eight pounds. On February 5, 2012, Defendant and Hockett called the police because K.H. was not breathing. Emergency responders found Defendant holding the dead K.H. There were urine-soaked diapers around the home, which were also covered in feces. At death, K.H. weighed only six pounds, two ounces, his body having wasted "away to practically nothing" from malnourishment.

At trial, experts testified Defendant was intellectually disabled based on his IQ score of 67 and his inability to respond to basic abstract questioning. Defendant's disability imposed moderate limits on his capacity to maintain concentration, keep a routine, or carry out basic life activities. One expert testified that someone like Defendant might not notice his own medical needs, let alone the medical needs of someone else. However, experts testified Defendant would be capable of performing some basic life tasks, like feeding a child. For instance, even though Defendant had difficulty with even the most basic arithmetic, he understood the proper ratio of dried formula to water: one scoop of formula for every two ounces of water, two scoops for four ounces, and three scoops for six ounces. Several witnesses also testified that Defendant was able to provide basic care for the children, including changing them, playing with them, and feeding them. Defendant was convicted and was sentenced to 37 years.

"This case is a tragedy. . . . When a parent is intellectually disabled and struggles with the basics of taking care of himself, let alone his children, it feels less than perfectly just to send him away to prison for failing to do what he may be barely capable of doing. Of course, it would also be unjust to the child-victims of those who neglect their dependents if our justice system made an exception for parents in difficult circumstances, as those children likely require the most protection." (Emphasis added).

While some evidence suggested Defendant was incapable of understanding the harm that failure to feed K.H. was inflicting, other evidence suggested the contrary. Because of the conflicting evidence, the standard of review required the Court to affirm the jury's verdict. Held, judgment affirmed.

TITLE: Ricketts v. State

INDEX NO.: K.11.j.

CITE: (2d Dist. 08/31/92), Ind. App., 598 N.E.2d 597

SUBJECT: Neglect of dependent - definition of necessary support

HOLDING: Evidence that children were malnourished was insufficient to support conviction for neglect of dependent, because “necessary support” is properly defined as “essential, indispensable or absolutely required food, clothing, shelter & medical care without which the dependent's life or health is at risk or endangered.” “Support” is defined in Ind. Code 35-46-1-1, to include food, clothing, shelter, or medical care, but “necessary” is not statutorily defined. “Necessary” is adjective expressing degree which may range from mere convenience to that which is indispensable. Ct. looked to dictionary to determine whether legislature intended phrase as used in Ind. Code 35-46-1-4 to refer to quantity & quality of support that is essential & indispensable to human existence, or to that which is convenient to human life, or somewhere in between, & found dictionary supported first definition, essential, indispensable, or absolutely required. Therefore, Ct. determined that definition established degree of deprivation of support necessary to support conviction under Ind. Code 35-46-1-4.

Looking at evidence presented, Ct. found that even assuming evidence was sufficient to support finding children suffered from malnutrition, that in itself was not enough to support conviction. Because evidence of malnutrition did not show it reached level that endangered or placed dependent's health or life at risk, it was insufficient to support conviction for neglect of dependent. Applying proper, subjective, standard to “knowing” conduct, evidence was also insufficient to show that D's conduct was knowing, as alleged in information, Garrad, J., dissenting.

RELATED CASES: Trammell, App., 751 N.E.2d 283 (evidence sufficient; D was subjectively aware of high probability that she placed her child in situation that endangered his health by not feeding him properly & by not seeking medical attention for his malnutrition & dehydration).

TITLE: Rinker v. State

INDEX NO.: K.11.j.

CITE: (2d Dist. 01/15/91), Ind. App., 565 N.E.2d 344

SUBJECT: Knowing or intentional element of child neglect

HOLDING: Evidence that D continually neglected to provide adequate nutrition & reasonably clean living conditions, despite being given counseling, instruction & hands-on guidance, was sufficient to satisfy "knowingly or intentionally" element of offense. Evidence indicated that on several occasions visiting caseworkers found child malnourished, unresponsive, etc., but D did not seek all medical care as instructed, even after child's hospitalization. On appeal, D argued that State failed to show she "knowingly or intentionally" engaged in conduct placing child in dangerous situation, as required by Ind. Code 35-46-1-4, because there was evidence that she earlier kept various welfare appointments where child was clean & well-dressed, that she demonstrated love & affection for child, that inattention to child was due to need to care for other children, & that failure to seek medical attention was due to lack of baby sitters & belief that she didn't have valid Medicaid card. Although Ct. App. noted that conduct here was not as egregious as that present in most convictions, necessary culpability requirement was satisfied by her continual neglect when she had received prior counseling, instruction & hands-on guidance with respect to child-care. Held, conviction affirmed.

TITLE: Sample v. State

INDEX NO.: K.11.j.

CITE: (1st Dist., 10-29-92), Ind. App. 601 N.E.2d 457

SUBJECT: Neglect of Dependent - Sufficiency of evidence

HOLDING: Where D waited several days before taking child to hospital after she hit her head & head became swollen, evidence was sufficient to support conviction for neglect of dependant. D testified that child hit her head when she rolled off couch in her "punkin" seat. She retrieved baby immediately & admitted she saw mark & bump on child's head, which husband placed ice on. Two days later, child was taken to D's sister, who noticed baby crying in pain with swollen skull. Sister told D there was something seriously wrong with child, & D took child to emergency room. Child had skull fracture, & doctor testified that head was quite obviously swollen, & that swelling would be obvious to lay person. Doctors also testified that skull appeared to have been swollen for sometime & that swelling would have likely started within hour of injury. On cross-exam, D admitted that she told investigating officer that she knew bump looked kind of funny & that it had been swelling day by day. Ct. found evidence was sufficient to show D was aware of high probability that in failing to obtain prompt medical treatment, she was placing child in situation which endangered life & health. Held, conviction affirmed.

RELATED CASES: Taylor, App., 644 N.E.2d 612 (evidence supports separate convictions of two counts of ND where child's injuries resulted from D's intentional conduct, & D failed to obtain medical treatment for those injuries).

TITLE: Scruggs v. State

INDEX NO.: K.11.j.

CITE: (2nd Dist., 03-26-08), Ind. App., 883 N.E.2d 189

SUBJECT: Neglect of dependent - leaving seven-year-old home alone insufficient evidence

HOLDING: State presented insufficient evidence that D knowingly placed her seven-year-old in a dangerous situation by leaving him home alone. A person having care of a dependent who knowingly or intentionally places the dependent in a situation that endangers the dependent's life or health commits neglect of a dependent. The knowing mens rea requires a subjective awareness of a high probability that a dependent has been placed in a dangerous situation, not just any probability. Gross v. State, 817 N.E.2d 306 (Ind. Ct. App 2004). The child must be exposed to some risk of physical or mental harm that goes substantially beyond the normal risk of bumps, bruises, or even worse that accompany the activities of the average child. Id. Here, D knowingly left her sick seven-year-old home alone for up to approximately three hours. At some point during the three hours, the child either walked to his Uncle's house or was picked up by his Uncle. D testified that the child was responsible enough to be left alone for a short time and knew not to mess with the stove or open the door. Although D may have demonstrated bad judgment, State did not prove beyond a reasonable doubt that she had a subjective awareness of a high probability that she had placed her child in a dangerous situation. Court refuses to establish a per se rule that merely leaving a seven-year-old child home alone for any period of time constitutes neglect. Held, judgment reversed.

TITLE: State v. Downey

INDEX NO.: K.11.j.

CITE: (4/11/85) Ind., 476 N.E.2d 121

SUBJECT: Neglect of dependent - constitutionality; sufficiency

HOLDING: Statute providing that placing a dependent in a situation that "may endanger" dependent's life & health is unconstitutional (broad & vague), but Ct. saves statute by narrowly construing it to exclude word "may." Thus, statute applies only to situations that endanger dependent's life & health. Ind. Code 35-46-1-4(a)(1). Placement itself must expose dependent to danger which is actual & appreciable. Ct. notes even with this construction, statute presents residual vagueness. However, when considered with other concepts of neglect, care, custody, control, dependent, places, life & health & in conjunction with social problem dealt with, Ct. finds minimal due process notice requirements are met. Here, Tr. Ct. (Allen County) dismissed indictments charging neglect of dependent, agreeing with Ds that statute was unconstitutionally vague. Held, reversed & remanded.

RELATED CASES: Dayton, App., 501 N.E.2d 482 (Infants 20; evidence was insufficient to sustain conviction where child was not placed in actual, appreciable danger by D's failure to obtain medical treatment for her); Davis, App., 476 N.E.2d 127 (Infants 132; Parent & C 17(1,2); statute is not vague where individuals of ordinary intelligence would reasonably understand statute to proscribe leaving newborn infant by roadside in paper sack).

TITLE: State v. Springer

INDEX NO.: K.11.j.

CITE: (3d Dist. 01/21/92), Ind. App., 585 N.E.2d 27

SUBJECT: Neglect of Dependant statute applies to health care providers & is not unconstitutional

HOLDING: Neglect of Dependent statute, Ind. Code 35-46-1-4, applies to health care providers, & is not unconstitution- ally vague or overbroad when so applied. D was administrator of nursing home where resident was found to have conjunctivitis, tremors, matted eyes, & maggots under his toenail. D was indicted for neglect of dependent, but Tr. Ct. granted D's motion to dismiss indictment on ground statute was enacted to protect children, & that indictment was void for vagueness. State appealed & Ct. App. found plain & ordinary meaning of statute encompassed adults as well as children. Ct. also found fact that victim had no legal dependency relationship did not mean as matter of law that he could not be D's dependent, Bean 460 N.E.2d 936, & that this was question of fact for jury, Kerlin, App., 573 N.E.2d 445, trans. pending. Fact that other statutes are specifically directed to protecting adults in health care facilities was unpersuasive. Ct. also found statute was not unconstitutionally vague or overbroad as applied to D, Kerlin, supra, even though D's role did not involve direct medical services, as in Kerlin. Held, dismissal of indictment reversed.

TITLE: Taylor v. State

INDEX NO.: K.11.j.

CITE: (3/25/2015), 28 N.E.3d 304 (Ind. Ct. App 2015)

SUBJECT: Insufficient evidence for neglect of dependent

HOLDING: Court reversed D's conviction for class A felony neglect of a dependent child resulting in death because of insufficient evidence. D left her son, J.N., with her boyfriend, Ryan Worline, while she was at work. While she was gone, Worline beat J.N. and fractured his skull. When D returned from work around 10:00 p.m., she checked on J.N., who was lying in his crib and was not breathing. J.N. died around midnight. At trial, the State presented no evidence that D inflicted an injury, was present when injury was inflicted, heard the infliction of injury, or saw manifestations of an injury necessitating medical care. See Fout v. State, 619 N.E.2d 311, 313 (Ind. Ct. App 1993). The Court acknowledged that although reasonable inferences may be drawn from evidence, "it is the State's burden to present evidence on each element . . . from which those inferences may be drawn. Ultimately, a criminal conviction absent proof beyond a reasonable doubt on each element of the charged crime amounts to fundamental error." See In re Winship, 397 U.S. 358, 361 (1970). The Court concluded, "The inference-stacking without establishment of a predicate fact, which the prosecution invited and the State deems sufficient to withstand appeal, is not constitutionally adequate." See Brown v. State, 36 N.E.2d 759, 760 (Ind. 1941). The State's new theory by the end of the trial – that D allowed Worline access to J.N. and simply "did nothing to stop [Worline]" is not the offense for which she was charged, and no conviction can be made to stand on that theory. Held, judgment reversed.

TITLE: Villangrana v. State

INDEX NO.: K.11.j.

CITE: (08-24-11), 954 N.E.2d 466 (Ind. Ct. App 2011)

SUBJECT: Neglect of a dependent - negligent conduct insufficient

HOLDING: Although D's inattentiveness toward his two-year-old daughter was negligent, negligence does not satisfy the requisite mens rea under Indiana's child neglect statute, which requires that the D knowingly or intentionally place the dependent in a situation that endangers the dependent's life or health. Ind. Code 35-46-1-4(a)(1). Here, father (D) was watching television when mother told him that she was leaving to run errands and that he needed to watch their daughter. D was under the mistaken belief that the daughter was upstairs with his aunt, and she managed to get outside through a back door that had been left open. D realized that his daughter had gone outside and located her within twenty minutes, but not before a neighbor found the child and called police. Court held that State presented insufficient evidence to show that D acted "knowingly" and, therefore, presented insufficient evidence to sustain his class D felony neglect of a dependent conviction. Held, conviction reversed.

TITLE: White v. State

INDEX NO.: K.11.j.

CITE: (12/15/89), Ind., 547 N.E.2d 831

SUBJECT: Neglect of dependent - exposure to parents' drug use

HOLDING: Knowing exposure of dependent to environment of illegal drug use poses actual & appreciable danger to dependent such as to support conviction for neglect of dependent. Evidence showed that D's 10-year-old daughter had repeatedly observed D smoking marijuana, had seen him mash up white powder & inject it, & had been offered marijuana by D on 1 or 2 occasions. Victim & friends had also found marijuana & intravenous drug paraphernalia in home on various occasions. On appeal, D argues that evidence does not show that health & life of his daughter were "actually & appreciably endangered," as required by State v. Downey, 476 N.E.2d 121. State presented expert testimony that such drug use endangers child by causing parent to neglect child's physical well-being. In addition, state argues on appeal that such drugs are illegal because of their harmful effects & consequences, so that knowing exposure to them per se endangered daughter's life or health. Neglect has been defined as omission of steps usually taken in "ordinary experience of mankind." Eaglen 231 N.E.2d 147. Since it is within ordinary experience to observe that children adopt parents' behavior, exposing child to parents' harmful behavior poses actual & appreciable danger to child. Held, conviction affirmed. DeBruler & Shepard, JJ., DISSENT, arguing that there was no evidence that D failed to provide for daughter in any way, or that substances used, including marijuana, were harmful.

RELATED CASES: Cleasant, App., 779 N.E.2d 1260 (exposure to illegal drug use is analogous to exposure to dealing in illegal drug, & thus, holding in White is extended to circumstances of drug deal. Dangers inherent in drug dealing are much worse than those associated with drug use alone).

TITLE: Williams v. State

INDEX NO.: K.11.j.

CITE: (3rd Dist., 6-15-05), Ind. App., 829 N.E.2d 198

SUBJECT: Neglect of dependent - evidence sufficient

HOLDING: Evidence was sufficient to convict D of five counts of neglect of a dependent for punishing her grandson by having him kneel on a broom handle with his hands holding weighted objects for up to two hours or to hold a cloth against a wall with his head for that length of time. Actual physical injury is not required to support conviction for neglect of a dependent. Rather, mental harm that goes substantially beyond the normal risk of bruises is sufficient. Ct. found no distinction between the psychological harm arising from deviate sexual conduct in Harrison v. State, 644 N.E.2d 888 (Ind. Ct. App1994) & here. Instruction taken from language of Harrison did not misstate the law & D waived issue of whether it was improper to emphasize that particular evidentiary fact by not raising it in her initial briefs but rather in a notice of additional authorities. Although D's son testified the Muncie Juvenile Correctional Facility used the same punishments on him, Ct. did not find the punishments reasonable here. "The practices of the [juvenile facility] actually support" the convictions rather than suggest D's methods were reasonable as the witness's testimony suggested he only did them for 20 to 30 minutes rather than the "much longer periods" here. "Because the punishments ... grow progressively more painful over time, it is not difficult to understand why twenty minutes ... can constitute reasonable corporal punishment whereas two hours constitutes extreme & criminal conduct capable of causing psychological damage." Held, judgment affirmed.

K. CRIMES

K.11. Miscellaneous

K.11.k. Nonsupport

TITLE: State v. Stamm

INDEX NO.: K.11.k.

CITE: 664 S.E.2d 161 (2008)

SUBJECT: Child support: Affirmative defense of inability to pay shifts burden to accused

HOLDING: West Virginia Supreme Court held a state law that makes it a crime to persistently fail to pay child support obligation if one can reasonably do so, but that provides an affirmative defense if a D can prove he is unable to pay, unconstitutionally shifts the burden of proof on an element of the offense to the accused. Court found it could salvage the rest of the statute by severing the affirmative-defense provision. Court noted the State always bears the burden of proving every element of a crime beyond a reasonable doubt. And while a D can be required to prove any affirmative defense he may choose to assert, the State may not place the onus on him to disprove any material element of its case. The statute criminalizing the failure to pay child support makes one's reasonable ability to pay both an element of the offense and an affirmative defense, with the Court in its ruling finding support in Lowery v. State, 692 S.W.2d 86 (Tex.Crim.App. 1985). Court found the reasoning of the Texas court compelling and declared that the affirmative defense provision of its law "unconstitutionally shifts to a D the burden of disproving an element of the offense" and thereby violates the due process guarantees of the 14th Amendment and its state constitutional counterpart.

K. CRIMES

K.11. Miscellaneous

K.11.k.1. Dependent child (Ind. Code 35-46-1-5)

TITLE: Cooper v. State

INDEX NO.: K.11.k.1.

CITE: (2nd Dist., 12-31-01), Ind. App., 760 N.E.2d 660

SUBJECT: Nonsupport - constitutionality; burden of proving inability to pay

HOLDING: Indiana's nonsupport statute, Ind. Code 35-46-1-5, unambiguously informed D that criminal penalties could attach to his failure to support his children, & prosecutors have broad discretion in seeking those penalties. Thus, statute is not unconstitutionally vague. Boss v. State, 702 N.E.2d 782 (Ind. Ct. App 1998). Following Boss, Ct. rejected D's argument that nonsupport statute is unconstitutionally vague because it does not specify at what point failure to provide support becomes a crime, & that statute should indicate where line is drawn between trivial & substantial infractions.

Ct. also rejected D's argument that his burden of proving defense of inability to pay child support violated his due process rights. Due to his incarceration, D was unable to pay about \$8,000 in support during his periods of incarceration, & about \$3,800 of support arrearage accrued during periods of time he was not incarcerated. D was chargeable for class C felony nonsupport for amount due & owing at time of underlying act, regardless of whether some of that arrearage accrued while he was incarcerated. Land, App., 688 N.E.2d 1307. D's burden of proving defense of inability to pay did not violate his due process rights, despite fact that defense required him to offer evidence of his prior incarcerations. Held, conviction affirmed.

RELATED CASES: Culbertson, 929 N.E.2d 900 (Ind. Ct. App 2010) (despite D's eight years of incarceration, D failed to prove he was unable to pay any child support; even abating support during the periods of incarceration, D failed to prove that he would owe less than \$15,000 which is required for Class C felony nonsupport); Clark, 902 N.E.2d 813 (incarceration may constitute a substantial change in circumstances justifying modification of an existing child support obligation); Becker, 902 N.E.2d 818 (such a modification may not take effect on a date earlier than the date on which the petition to modify is filed); Lambert, 861 N.E.2d 1176 (although incarceration does not relieve parents of their child support obligations, it is error for Tr. Ct. to impute pre-incarceration income to a person while incarcerated); Paternity of E.C., App., 896 N.E.2d 923 (rationale in Lambert applies equally to a request for modification of a child support order based on changed circumstances due to incarceration); Dishmon, App., 770 N.E.2d 855 (evidence sufficient to support class C felony nonsupport even though D had been imprisoned for five years).

TITLE: Davis v. State

INDEX NO.: K.11.k.1.

CITE: (3d Dist. 8/15/85) Ind. App., 481 N.E.2d 434

SUBJECT: Nonsupport - child

HOLDING: Ct. rejects D's numerous attacks upon his conviction. (1) Ct. rejects D's contention that ability to pay is element of offense. Inability to pay is affirmative defense; therefore, it is not constitutionally impermissible to require D to bear burden of proving inability to pay. Ward 438 N.E.2d 750. (2) Ind.Const. Art 1, §22 (no imprisonment for debt) does not preclude placing burden of proof on D to demonstrate inability to pay. State v. Reuter (Neb. 1984), 343 N.W.2d 907 (support of child bears no resemblance to debt). (3) Tendered instruction stating that carelessness in managing income does not prove intentional or knowing conduct was correct statement of law but properly refused where Tr. Ct.'s instruction specifically defined intentional/knowing conduct. Held, no error.

RELATED CASES: Cooper, App., 760 N.E.2d 660 (burden of proving defense of inability to pay does not violate due process; see full review, this section); Blatchford, App., 673 N.E.2d 781 (State does not have burden to prove that D's failure to pay support was voluntary or purposeful; D's inability to pay support is affirmative defense, & does not negate element of intent not to pay); Shuttleworth, App., 469 N.E.2d 1210 (Parent & C 17(6); although D's obligation to pay & some arrearages occurred before present statute was effective (7/1/78), present statute creates continuing violation, thus its intentional & knowing standard, rather than willful nonsupport standard of previous statute, applies).

TITLE: Geans v. State

INDEX NO.: K.11.k.1.

CITE: (5th Dist., 11-9-93), 623 N.E.2d 435 Ind. App.

SUBJECT: Multiple convictions for nonsupport double jeopardy (DJ)

HOLDING: Where there are multiple children D fails to support, there are multiple victims & separate crimes are committed. Therefore, it does not violate DJ for D to be convicted & sentenced on separate counts of nonsupport for each child. D had three children & was ordered to pay support of approximately \$200/week in support for all three. Ind. Code 35-46-1-5 says "person who knowingly or intentionally fails to provide support to his dependent child commits nonsupport of a child...." Test to determine whether separate sentences can be imposed on multiple counts is whether charged offenses are same, not whether they arose from same criminal act or course of conduct, Henderson, 534 N.E.2d 1105. Held, convictions affirmed. Note: In addressing sufficiency of evidence issue, Ct. noted that "support" in context of divorce proceeding is different from support in nonsupport criminal case. While in divorce it is strictly matter of money amount, in criminal case it means food, clothing, shelter, or medical care. Even if money payment is not made, Ds can still escape criminal liability if they make significant contribution to dependent's support.

RELATED CASES: Sanjari, 961 N.E.2d 1005 (Ind. 2012) (statute permits a separate class D felony conviction for nonsupport of each dependent child, but only one such offense may be enhanced to a class C felony where the unpaid support for one or more of such children is \$15,000 or more; see full review, this section).

TITLE: Gustman v. State

INDEX NO.: K.11.k.1.

CITE: (1st. Dist., 1-17-96), Ind. App., 660 N.E.2d 353

SUBJECT: Criminal nonsupport - sufficiency

HOLDING: Record of D's guilty plea contained adequate factual basis for criminal nonsupport conviction. D made only token amounts of child support payments over period of many years. Record did not support any inference that D provided child with any meaningful amount of food, clothing, shelter, or medical care so as to relieve him of criminal liability for nonsupport. Geans v. State (1993), Ind. App., 623 N.E.2d 435. D admitted that he had committed crime of criminal nonsupport, & that he refused to support his daughter, at least in part, out of bitterness. D's sentence was appropriately enhanced due to particular circumstances of crime. Ct. rejected D's argument that, by receiving enhanced sentence for failure to pay support, D received criminal sanction for matter punishable by civil contempt. Held, conviction affirmed.

RELATED CASES: Grimes, App., 693 N.E.2d 1361 (evidence was sufficient to support conviction where D was delinquent over 50% of his support obligation; while noting absence of any concrete standards defining what constitutes "minimal" or "token" support, Ct. could not say, as matter of law, that D's support arrearage was de minimis so as to avoid criminal liability).

TITLE: Harley v. State

INDEX NO.: K.11.k.1.

CITE: (07-29-11), 952 N.E.2d 301 (Ind. Ct. App. 2011)

SUBJECT: Counsel ineffective for not advising D about valid defense to non-support charge

HOLDING: Trial counsel was ineffective where, in advising D about whether to plead guilty to class C felony non-support of a dependent child, she failed to tell him he had a valid defense because his only source of income was Supplemental Security Income ("SSI"). D has a history of schizophrenia dating back to 1974 when he was fourteen, so he has not been able to maintain a regular job, and his sole source of income has been SSI. SSI is specifically excluded from a parent's income for calculating a child support obligation under Indiana Child Support Guideline 3.A.1. "Because [D] pled guilty as a result of his trial counsel's deficient performance, we are no longer confident that, when presented with a legal theory and statutory defense, the fact-finder would reach the same result." Held, denial of post-conviction relief and remanded for new trial.

TITLE: Long v. State
INDEX NO.: K.11.k.1.
CITE: (2nd Dist., 9-8-99), Ind. App., 716 N.E.2d 51
SUBJECT: Nonsupport - sufficiency when to credit tax interception payments
HOLDING: Evidence was sufficient to convict D of nonsupport of dependent child, as Class C felony. State intervened in support collection process by filing Notice to Intercept Tax Refund with IRS, authorizing IRS to withhold any tax refund due D & to forward refund to County Clerk to satisfy D's child support arrearage. D argued that at time money was withheld from his wages by tax intercept order, he was constructively paying toward his support arrearage, & therefore, he was entitled to credit toward his support arrearage at time his taxes were withheld by his employer rather than when tax interception payment was received by County Clerk. Ct. noted that tax interception payment could not have affected D's support arrearage during time period relevant to charge & this appeal. Evidence revealed that county does not credit payments toward support arrearage until money is actually received. Ct. concluded that evidence was sufficient to show that D knowingly or intentionally failed to provide support for dependent child & amount of unpaid support due & owing during charged time period was at least \$10,000 because D could not receive credit for his support payment until payment was received by county. Held, conviction affirmed.

TITLE: State v. Moore
INDEX NO.: K.11.k.1.
CITE: (2nd Dist., 12-9-97), Ind. App., 688 N.E.2d 917
SUBJECT: Ambiguity in felony nonsupport statute
HOLDING: Tr. Ct. properly dismissed three counts of felony nonsupport against D, finding Ind. Code 35-46-1-5(a) to be ambiguous. Statute elevates offense to Class C felony if amount of unpaid support owed to "the person's dependent child" is at least \$10,000. State argued that imposition of Class C felony is warranted if individual owes at least \$10,000 in child support, & that this calculation is not to be made in reference to any one child, but for all individual's children. However, language of Ind. Code 35-46-1-5(a) does not support State's construction. Statute makes only one reference to whom support is owed: "the person's dependent child." Since legislature declined to mention term "children" with regard to Class C felony, it is not appropriate to incorporate word here. Because record did not indicate that D owed more than \$10,000 in child support with respect to any individual child, Tr. Ct. did not err in dismissing charges. Held, judgment affirmed.

Note: The 2001 amendment to Ind. Code 35-46-1-5(a) appears to have been an attempt to adopt State's argument in Moore, since the amended statute allows State to prosecute a Class C felony if it can show that the "total amount of unpaid support that is due and owing for one (1) or more children" is at least \$15,000. However, it is now unclear whether the current version of the statute permits prosecution of multiple Class C felonies for multiple, unsupported dependents, even if the per-dependent arrearage is at least \$15,000. See, e.g., Porter v. State, 935 N.E.2d 1228 (Ind. Ct. App 2010) (State could seek only one Class C felony but multiple Class D felony convictions for multiple, unsupported dependents).

TITLE: Porter v. State

INDEX NO.: K.11.k.1.

CITE: (10-27-10), 935 N.E.2d 1228 (Ind. Ct. App 2010)

SUBJECT: Class C felony nonsupport - double jeopardy; same arrearage cannot support two elevated offenses

HOLDING: Child support arrearage under class D felony convictions cannot be added to subsequent arrearage to achieve the \$15,000 needed to elevate nonsupport of a dependant to a class C felony. See Sanguenetti v. State, 917 N.E.2d 1287 (Ind. Ct. App 2009). Here, D's two convictions for Class C felony nonsupport violated Indiana double jeopardy principles because State used same evidence from his prior Class D felony convictions to support the convictions in the instant case. Class C enhancement status was based upon child support arrearage of \$54,889, an amount that included \$35,497 arrearage underlying D's 2005 convictions. As such, the State proceeded against D twice for the same criminal transgression. Court concluded that error was harmless because D had accumulated an arrearage of over \$20,000 in addition to the improperly included \$35,497 arrearage.

However, enhancement of both nonsupport offenses to Class C felony status based on the same \$20,000 arrearage violated Indiana's common law double jeopardy tradition that prohibits multiple enhancements based upon a single act. Holloway v. State, 773 N.E.2d 315 (Ind. Ct. App 2002). The \$20,000 child support arrearage sustaining both enhancements in this case is not separate and distinct to each child. Rather, it involves the same injurious conduct to the same children in the same household. Held, one Class C felony nonsupport conviction affirmed, second conviction reduced to a Class D felony for which the sentence shall be a term of one and one-half years, to be served consecutive to sentence for Class C felony.

TITLE: Sanjari v. State

INDEX NO.: K.11.k.1.

CITE: (02-16-12), 961 N.E.2d 1005 (Ind. 2012)

SUBJECT: Nonsupport enhancement not based on number of children

HOLDING: Ind. Code 35-46-1 permits a separate class D felony conviction for nonsupport of each dependent child, but only one such offense may be enhanced to a class C felony where the unpaid support for one or more of such children is \$15,000 or more. State charged D with two counts of class C felony nonsupport, one pertaining to each child, but only one "in gross" child support order existed. Court rejected State's argument that the statute allows for enhancement of every \$15,000 in nonsupport arrears, which would potentially punish parent for four Class C felonies if he had four children and owed \$60,000. Indiana double jeopardy protection applies to situations in which enhancement is imposed for the very same behavior or harm as another crime for which the D has been convicted and punished. Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring). Moreover, the statutory basis for class C felony nonsupport conviction requires that the aggregate or "total" amount of unpaid support for all of the D's dependent children, whether one or more, equal or exceed \$15,000. Held, transfer granted, Court of Appeals' opinion at 942 N.E.2d 134 vacated, remanded for entry of one class C felony nonsupport and one class D felony nonsupport conviction.

TITLE: State v. Taylor

INDEX NO.: K.11.k.1.

CITE: (3rd Dist., 12-27-93), Ind. App., 625 N.E.2d 1334

SUBJECT: Nonsupport - Jurisdiction over foreign orders

HOLDING: Ind. has jurisdiction to charge Ds with nonsupport of children residing in Ind., even if Ds have no other contacts with State & support orders were entered in other jurisdictions. D was married & had two children in Michigan (MI) & was ordered to pay child support in MI. Ex-wife & children eventually moved to Ind., but D remained in MI & never visited children in Ind. He failed to pay child support & was charged with nonsupport of child, pursuant to Ind. Code 35-46-1-5(a). He responded to charges by appearing in Ct. & filing motion to dismiss on ground Ind. lacked jurisdiction to prosecute him. Tr. Ct. granted motion, finding that although nonsupport was omission to perform duty in violation of Ind. law, there was no jurisdiction over D because he was nonresident, had no contacts with Ind., & acts of nonsupport occurred in MI. State appealed dismissal. Ind. law imposes duty to support dependent children, irrespective of location of child or parent, Miami Coal Co. v. Peskir, App., 139 N.E. 684, State v. Leed, 186 N.E.2d 5. Ct. found general criminal jurisdiction statute, Ind. Code 35-41-1-1 applied here, & concluded it provided for proper jurisdiction. Ind. Code 35-41-1-1(a)(5) provides that person may be convicted under Ind. law if offense is based on omission to perform duty imposed by Ind. law with respect to domicile, residence, or relationship to person, thing, or transaction in Ind. Because support is duty to be performed in county where child resides, nonsupport is omission occurring in that county, Gilmour, 104 N.E.2d 127. Therefore, D's nonsupport occurred in Ind. & Ind. had jurisdiction to prosecute D for nonsupport even though no Ind. Ct. issued support order, & he was nonresident who never resided in Ind. Held, reversed & remanded for trial on merits.

TITLE: Turner v. State

INDEX NO.: K.11.k.1.

CITE: (2nd Dist., 08-03-07), Ind. App., 870 N.E.2d 1083

SUBJECT: Nonsupport - doctrine of amelioration

HOLDING: Generally, Ds must be sentenced under the statute in effect at the time the D committed the offense. Jacobs v. State, 835 N.E.2d 485 (Ind. 2005). However, doctrine of amelioration allows a D, who is sentenced after the effective date of a statute that provides for more lenient sentencing, to take advantage of the more lenient statute rather than be sentenced under the more harsh statute that was in effect when the D was charged or convicted. Hellums v. State, 758 N.E.2d 1027 (Ind. Ct. App 2001). Doctrine is appropriately applied only if legislature intended that statute as amended apply to all persons to whom such application would be possible & constitutional. Id.

Here, when State filed charges, for a D to be charged with Class C felony nonsupport under Ind. Code 35-46-1-5(a), he must have been in arrears more than \$10,000 for one child. However, within eight months of the charge being filed, & well before D was sentenced in 2006, amended nonsupport statute permitted a D to be charged with a Class D felony unless he was in arrears of more than \$15,000 for one or more children. In one respect, amended statute is more lenient in that a parent must owe a greater amount of unpaid child support for one child to trigger classification as a Class C felony. However, amendment cannot be said to be truly ameliorative under all circumstances, because a D who owes back-support to more than one child must now have accumulated only a total of \$15,000 in arrearages rather than \$10,000 for each child. D was entitled to take advantage of more lenient sentencing available under new statute because: 1) new statute contains no savings clause to exclude doctrine of amelioration from applying; 2) statute has ameliorative effect in D's case; 3) full intent of legislature cannot be determined, thus Ct. errs on side of giving D the advantage; & 4) D was charged less than one year before new statute took effect & was convicted after new statute's effective date. Tr. Ct. erred in sentencing D for nonsupport as a Class C felony. Held, judgment reversed & remanded.

K. CRIMES

K.11. Miscellaneous

K.11.k.2. Parent

TITLE: Davis v. State

INDEX NO.: K.11.k.2.

CITE: (9/24/68), Ind., 240 N.E.2d 54

SUBJECT: Nonsupport of parent -- gainful employment is not proof of being financially able

HOLDING: Burns' Ind. Stat. Ann. Section 10-1410 stated that "if any person being of full age and being financially able has neglected, or shall hereafter, without reasonable cause, neglect to maintain and support his or her parent, or parents" would be found guilty of nonsupport of parent. Here, D was convicted of failure to support his mother. D contended on appeal that evidence was insufficient to support conviction. He claimed, specifically, that there was no proof that he was financially able to support his parents. Ct. held that mere proof that D was "gainfully employed" failed to establish that he was "financially able" to support his mother. Held, conviction reversed and new trial granted.

Note: Now, pertinent statute is Ind. Code 35-46-1-7. This statute states that it is defense that accused person was unable to provide support; however, it does mention being financially able.

K. CRIMES

K.11. Miscellaneous

K.11.k.3. Spouse

TITLE: Parrish v. State
INDEX NO.: K.11.k.3.
CITE: (2/1/84), Ind. App., 459 N.E.2d 391
SUBJECT: Nonsupport of spouse -- photographs showing injuries are admissible
HOLDING: D was convicted of nonsupport of spouse. D argued that autopsy photographs and others showing postmortem injuries were inflammatory in nature and that unfair prejudice outweighed their probative value. Ct. held that photographs were relevant to charge of neglect in that they established unsanitary conditions and existence of rodents in area in which victim was confined, were used to identify victim, depicted evidence of lack of medical attention and tended to show that force used to keep victim confined may have been excessive. Held, conviction affirmed.

K. CRIMES

K.11. Miscellaneous

K.11.m. Unlawful sale of alcohol

TITLE: Brewer v. State

INDEX NO.: K.11.m.

CITE: (12-15-10), Ind. Ct. App, 938 N.E.2d 806

SUBJECT: Selling alcohol without a permit - sufficient evidence

HOLDING: State presented sufficient evidence to support D's conviction for sale of alcoholic beverages without a permit as a Class B misdemeanor. It is unlawful for a person, except as otherwise permitted by this title, to possess alcoholic beverage for purpose of sale. Ind. Code 7.1-5-1-8.

Here, an undercover police officer entered the 38th Street Men Club and was served, for the price of six dollars, a cranberry juice and vodka drink. The officer identified D, who was the president of the Club, as the person who served him the drink. The Club also had a pricing list for alcoholic beverages posted which the State introduced into evidence. Because D did not have a permit to sell alcohol, the evidence showed he committed a class B misdemeanor. Held, judgment affirmed.

K. CRIMES

K.11. Miscellaneous

K.11.m. Sale of alcohol

K.11.m.2 Sale to minors

TITLE: State v. Jasinowski
INDEX NO.: K.11.m.2.
CITE: (3d Dist. 9/12/88), Ind. App., 527 N.E.2d 1147
SUBJECT: Sale of alcohol to minor - entrapment defense available
HOLDING: Entrapment defense is available as defense to violation of Ind. Code 7.1-5-7-8, selling alcohol to minor. State argues entrapment is not available, since offense does not require specific intent. In Baird, 446 N.E.2d 342, Ind. S. Ct. reversed conviction for sale of alcohol to minor because state failed to rebut entrapment defense. Baird necessarily included ruling that entrapment defense was available. Here, D raised defense of entrapment & state offered no evidence of predisposition. Held, conviction reversed.

K. CRIMES

K.11. Miscellaneous

K.11.o. Sale of tobacco to certain minors (IC 35-46-1-10)

TITLE: Cox v. State

INDEX NO.: K.11.o.

CITE: (10/9/2014), 19 N.E.3d 287 (Ind. Ct. App 2014)

SUBJECT: Operating an unlicensed daycare - sufficient evidence

HOLDING: Tr. Ct. presented sufficient evidence that D operated a "child care home" without a license, which also served as the basis for her involuntary manslaughter conviction. A child care home means a residential structure in which at least six (6) children (not including the children for whom the provider is a parent, stepparent, guardian, custodian, or other relative or any child who is at least fourteen years of age and does not require child care) at any time receive child care from a provider: . . . (2) for regular compensation...." Ind. Code §12-7-2-28.6.

Here, a baby, C.T., died in D's care when a crib collapsed on him. At that time, there were nine children in her home, but D argued that the State failed to prove those nine children were unrelated to her. However, D testified that "she had four families that were full time, three that were part time." In all, D had ten kids but not necessarily at the same time. Also, a FSSA worker found six unrelated children at D's home during several visits just months prior to the accident. C.T. and his sibling, L.T., were not relatives. Thus, it was reasonable for the jury to infer that the seven other children found in D's home - in addition to the unrelated C.T. and L.T. - were also unrelated to D. Further, although the testimony established that four children were cared for in exchange for regular compensation, evidence of D's website that sets forth her fee structure was sufficient evidence to establish that she watched all the children for compensation. Thus, the evidence was sufficient to support D's convictions for Operating a Child Care Home Without a License and Involuntary Manslaughter. Held, judgment affirmed.

TITLE: Doe v. Prosecutor, Marion County

INDEX NO.: K.11.o.

CITE: (1/23/2013), 705 F.3d 694 (7th Cir. 2013)

SUBJECT: Statute prohibiting sex offenders from using social networking websites
unconstitutional - facially overbroad

HOLDING: Ind. Code. 35-42-4-12, which prohibits registered sex offenders from using social networking websites, instant messaging services or chat programs that "the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program," is unconstitutional. Though content neutral, the statute is not narrowly tailored to serve the State's legitimate interest in protecting children from harmful online communications. It broadly prohibits substantial protected speech rather than specifically targeting the evil of improper communications to minors.

Court noted that Indiana continues to possess existing alternative tools to combat sexual predators and precisely target illicit communications (e.g., child solicitation and inappropriate communication with child statutes). "The penal system offers speech-restrictive alternatives to imprisonment. Regulations that do not implicate the First Amendment are reviewed only for a rational basis. The Constitution even permits civil commitment under certain conditions. But laws that implicate the First Amendment require narrow tailoring. Subsequent Indiana statutes may well meet this requirement, but the blanket ban on social media in this case regrettably does not." Held, judgment reversed and remanded with instructions to enter permanent injunction.

Note: Court noted this opinion should not be read to affect district court's latitude in fashioning terms of supervised release, 18 U.S.C. § 3583(a) or States from implementing similar solutions.

RELATED CASES: Harris, 985 N.E.2d 767 (Ind. Ct. App 2013) (following Doe and reversing D's conviction for sex offender internet offense because statute violates First Amendment; see full review at K.3.e.12).

TITLE: Harris v. State
INDEX NO.: K.11.o.
CITE: (3/27/2013), 985 N.E.2d 767 (Ind. Ct. App 2013)
SUBJECT: Conviction for sex offender internet offense reversed; email & social networking registration requirements upheld
HOLDING: Ind. Code 11-8-8-8(a)(7), which requires disclosure of email addresses, instant messaging and chat room user names that the sex offender registrant uses or intends to use, does not impose a burden on registrant's First Amendment freedom to speak anonymously and does not contravene his right to free expression as guaranteed by Article 1, Section 9 of the Indiana Constitution. This registration requirement does not restrict D's ability to use email, nor does it limit his use of social networking websites, instant messaging or chat room platforms.

However, Ind. Code 35-42-4-12, which prohibits registered sex offenders from using social networking websites, instant messaging services or chat programs that the offender knows allows a person who is less than eighteen years of age to access or use the web site or program, is unconstitutional as applied to D, who is a sexually violent predator. Though content neutral, the statute is not narrowly tailored to serve the State's legitimate interest in protecting children from harmful online communications. And the State already criminalized illicit expression with minors under child solicitation and inappropriate communication with child statutes. See Doe v. Marion County Prosecutor, 2013 WL 238735 (7th Cir. Jan. 23, 2013). State failed to show that the social networking medium possess qualities allowing Court to conclude that the substantive evil contemplated by Ind. Code 35-42-4-12 is created by the medium itself, which would justify a complete ban on expression. Held, D's sex offender internet offense reversed, failure to register as sex offender conviction affirmed. Crone, J. concurring in result with separate opinion to note that in Doe, Seventh Circuit found Ind. Code 35-42-4-12 unconstitutional on its face and protections of Indiana Constitution Article 1, Section 9 "are at least equal to if not greater than those of the First Amendment."

TITLE: Keller v. State

INDEX NO.: K.11.o.

CITE: (4/4/2013), 987 N.E.2d 1099 (Ind. Ct. App 2013)

SUBJECT: Insufficient evidence for A misdemeanor failure to report a dead body

HOLDING: State failed to present sufficient evidence for D's conviction of failure to report a dead body, class A misdemeanor under Ind. Code 35-49-19-3. In Spring of 2010, D approached 79-year-old Robert Collier about selling his farm equipment for scrap. Collier initially denied D's request but later agreed. In late August of 2010, while at Collier's property, D found Collier's dead body. About six weeks later, police found Collier, who was "massively decomposed [and] mummified." The State alleged D's duty to report was triggered because Collier "died by violence." The forensic pathologist concluded there was "no anatomic cause of death in this massively decomposed, mummified individual." The State's response that the pathologist also observed that her findings were "consistent with homicide by undetermined means" is not evidence that it would have been apparent to D when he found Collier's decomposed body that Collier died by violence.

K. CRIMES

K.11. Miscellaneous

K.11.p. Others

TITLE: Alvies v. State

INDEX NO.: K.11.p.

CITE: (4th Dist., 11-05-08), Ind. App., 895 N.E.2d 1237

SUBJECT: Panhandling - sufficient evidence

HOLDING: Evidence was sufficient to support D's panhandling conviction. Panhandling is the soliciting of an individual on a street or in another public place by requesting an immediate donation of money or something else of value. Ind. Code 35-45-17-1. Panhandling is a Class C misdemeanor only under certain circumstances, such as when the panhandler blocks the path of the individual being solicited. Ind. Code 35-45-17-2. Thus, rather than ban all panhandling, the statute is restricted to only those circumstances when panhandling can be considered especially unwanted or bothersome.

Here, D approached an undercover officer downtown Indianapolis and asked if he could help him out by giving him "seven or eight dollars so he could get a room at the Atlas Hotel." After the undercover officer said he did not carry any money on him, D continued to follow the officer, stepping in front of him several times. The immediacy element of the definition of panhandling is satisfied when the panhandler demands money at the moment he solicits the individual, instead of asking for a promise of a future donation. The immediacy element does not require the panhandler to refer to urgent situation. Thus, State presented sufficient evidence to support the panhandling conviction. Held, judgment affirmed.

TITLE: C.S. v. State
INDEX NO.: K.11.p.
CITE: (08-17-11), 953 N.E.2d 1144 (Ind. Ct. App 2011)
SUBJECT: Compulsory school attendance law - insufficient evidence
HOLDING: State presented insufficient evidence to support C.S.'s adjudication as a delinquent child for violating compulsory attendance law. A juvenile may be adjudicated delinquent for a status offense only if the child committed a proscribed delinquent act and court finds that the child is in need of care, treatment, or rehabilitation. Ind. Code 31-37-2-1.

Here, during fall of 2010, C.S. without excuse was absent for one full school day, missed at least part of five additional class periods, and was tardy twelve times. C.S.'s mother was cooperative with the school when told about his attendance issues and took disciplinary actions at home. Thereafter, C.S. was no longer absent or tardy. Without more, there is insufficient evidence that C.S. is in need of care, treatment, or rehabilitation, a required element in order to be adjudicated as a delinquent in violation of the attendance law. Held, judgment reversed.

TITLE: Flores-Figueroa v. United States

INDEX NO.: K.11.p.

CITE: 129 S.Ct. 1886 (05-04-09)

SUBJECT: Federal aggravated identity theft requires knowledge of actual victim

HOLDING: A D who used a phony means of identification during the commission of certain crimes may not be convicted under the federal aggravated identity theft statute without proof that he knew the ID belonged to an actual person. 18 U.S.C. ' 1028A imposes a mandatory additional two-year prison term for Ds who knowingly transfer, possess, or use "a means of identification of another person" without lawful authority in committing certain offenses. Court could not find indications in Congress's statements of its purpose or in practical problems of enforcement sufficient to overcome ordinary meaning of words that it wrote. Court unanimously held that statutes reference to "knowingly" plainly applies to both "a means of identification" and "of another person." Court need not look any further than the ordinary meaning of the provision's language. Scalia, J., joined by Thomas, J., CONCURRING, said majority's analysis should have stopped with statutory text. Alito, J., CONCURRING, was concerned that majority opinion will be "cited for the proposition that the mens rea of a federal criminal statute nearly always applies to every element of the offense," which may not be the case in other contexts.

TITLE: Graham v. State
INDEX NO.: K.11.p.
CITE: (1st Dist. 7/31/85), Ind. App., 480 N.E.2d 981
SUBJECT: Unlawful practice of medicine
HOLDING: Tr. Ct. did not err in overruling Ds' (members of Seventh Day Adventists) motion to dismiss. Ind. Code 25-22.5-1-1.1(a) clearly defines what constitutes unlawful practice of medicine & is not unconstitutionally vague. State v. Horn (Ariz. App. 1966), 422 P.2d 172 (similarly worded statute held not unconstitutionally vague). Ct. also finds evidence sufficient to uphold convictions for unlawful practice of medicine & rejects D's claim that her license status as registered nurse prohibited conviction. Evidence showed she performed tasks that required physician's supervision. Held, conviction affirmed.

TITLE: Hill v. State

INDEX NO.: K.11.p.

CITE: (2/13/86) Ind., 488 N.E.2d 709

SUBJECT: Illegal sale of fireworks

HOLDING: Requiring out-of-state customers to sign statement that they plan to immediately ship all IN illegal fireworks out of state/acquire necessary permits does not comply with Ind. Code 22-11-14-4. Legislature intended to prohibit direct sales of certain fireworks. Wholesaler, dealer or jobber can sell crates of illegal fireworks & ship them to another state. Statute does not allow fireworks sellers to hand customers a bag of cherry bombs after they sign a form. Held, conviction affirmed.

RELATED CASES: State v. King, App., 502 N.E.2d 1366 (Explos 5; informations adequately charged crime of unlawfully selling fireworks; Tr. Ct. erred in granting D's motion to dismiss premised upon argument that probable cause affidavit established defense to crime).

TITLE: Lebo v. State

INDEX NO.: K.11.p.

CITE: (11/16/2012), 977 N.E. 2d 1031 (Ind. Ct. App 2012)

SUBJECT: Motion to dismiss - failure to state a crime

HOLDING: Tr. Ct. did not abuse its discretion by denying D's motion to dismiss for failure to state a crime. A person has a duty to report to the authorities when he or she has a reason to believe that a child is a victim of child abuse or neglect. Here, the D, a highschool varsity volleyball coach, was charged with failure to report child abuse or neglect. D saw the junior varsity volley ball coach leaning up against between the legs of a teenage volleyball player, and having his arm around the player while sharing food with her on a bus ride. The D documented these observations and her discomfort with them in the junior varsity coach's file, but did not report such to the authorities. The failure to report statute does not require that an individual have actual knowledge of child abuse or neglect. Rather, a duty to report is imposed on an individual who merely has "reason to believe" the child is a victim. Therefore, the conduct allegedly observed by the D need not satisfy the elements of sexual misconduct with a minor or those of child seduction, and supports the charges of failure to report. Held, judgment affirmed; Baker, J., concurring, in part, and dissenting, in part, on basis that the duty to report does not attach merely because a person feels uncomfortable about another's behavior.

RELATED CASES: Gilliland, 979 N.E. 2d 1049 (Ind. Ct. App 2012) (Tr. Ct. properly denied D=s motion to dismiss failure to report child abuse charge brought against an athletic director who had knowledge that a jr. varsity volleyball coach had given foot rubs and rubbed lotion on a volleyball player=s back; knowledge of sexual relationship between the coach and the volleyball player was not required to trigger his duty to report child abuse or neglect as touching with intent to arouse sexual desires can be the basis for either sexual misconduct with a minor or child seduction).

TITLE: Murphy v. State

INDEX NO.: K.11.p.

CITE: (5th Dist., 11-22-05), Ind. App., 837 N.E.2d 591

SUBJECT: No standing to constitutionally challenge unlawful receipt of voting ballot

HOLDING: On interlocutory appeal, Ct. found D did not have standing for a constitutional vagueness and/or overbreadth challenge to Ind. Code 3-14-2-16, which prohibits the unauthorized receipt from a voter of a ballot. The prohibited act constitutes a Class D felony. Here, D went to a citizen's house with the citizen signing a form to receive an absentee ballot. D returned to collect the ballot, with the citizen giving it to her in a sealed envelope & she dropped it in the mail for the citizen. While holding that the situation implicated First Amendment rights, Ct. found as in Wells v. State, 351 N.E.2d 43 (Ind. 1976), that D "is clearly within the ambit of those subject to regulation." D accepted a ballot from a voter & was not within one of the listed categories of persons authorized to do so. Ct. also rejected D's insufficiency claim based on fact that she never received an actual ballot but rather merely delivered a sealed envelope to a mailbox. D noted that penal statutes are to be strictly construed against the State & the criminalization of such actions could cause a mail carrier to be in violation of the statute. Ct. agreed with State that reading statute as interpreted by D would lead to "absurd result" where possession of prohibited item would be allowed simply because it is in a container. See Castillo v. State, 734 N.E.2d 299 (Ind. Ct. App2000) (possession of cocaine upheld when police observed someone throw cocaine out window even though cocaine was in package). While noting it would not address hypothetical situations which could demonstrate vagueness, Ct. noted with "concern" examples forwarded by D where postal carriers, nurses taking a ballot from a patient or a Good Samaritan picking a letter off the street could be criminally prosecuted under the statute. Held, judgment affirmed.

TITLE: Patterson v. State

INDEX NO.: K.11.p.

CITE: (12/14/2012), 979 N.E. 2d 1066 (Ind. Ct. App 2012)

SUBJECT: Protected person not criminally liable for aiding, inducing or causing another to violate no-contact order

HOLDING: A protected person who is the subject of a no-contact order cannot be criminally liable for aiding, inducing, or causing another person to violate that order. Ind. Code 35-46-1-15.1(5) states that a person who knowingly or intentionally violates a no contact order issued as a condition of pretrial release commits invasion of privacy. Here, D obtained a no-contact order against her fiance following an incident of domestic battery. Twice afterward, D was found with her fiance and was arrested for violating the no-contat order. In a case of first impression, Court held that Indiana's statutory scheme does not criminalize a protected person's actions that invite or acquiesce in a violation of the no-contact order by the subject. The Legislature has determined that where a protected person invites the subject of a protective order to violate the terms of the order, such is irrelevant to the subject's guilt. Held, denial of motion to dismiss charges of aiding, inducing or causing invasion of privacy reversed; Pyle, J., dissenting, believes the plain language of the statute permits prosecution of a protected person who deliberately helps another disobey a court order for protection.

TITLE: Scalpelli v. State

INDEX NO.: K.11.p.

CITE: (4th Dist., 05-26-05), Ind. App., 827 N.E.2d 1193

SUBJECT: Disturbing cemetery - evidence sufficient; mens rea

HOLDING: In a case of first impression, Ct. affirmed D's conviction for Disturbing a Cemetery Without a Permit pursuant to Ind. Code 14-21-1-26.5. Statute was first enacted in 2000 & violation is a Class D felony if the State proves an individual: (1) recklessly, knowingly, or intentionally; (2) disturbed the ground, buried human remains, or grave markers; (3) within one hundred feet of a burial ground or cemetery; (4) for the purpose of erecting, altering, or repairing any structure; (5) without having a development plan approved by the Department of Natural Resources (DNR).

Here, D purchased a property to build a home on that included an old cemetery. He obtained proper building permits but did not submit or obtain a development plan from the DNR as to the cemetery. During construction, D placed dirt over grave sites & temporarily removed all eight gravestones from the cemetery making a map to relocate them. The foundation of his house was about 89 feet from cemetery with a septic system much closer. Ct. rejected D's argument that the *mens rea* attaches not only to the "disturbing the ground" language but to his knowledge that he did not have a development plan, analogizing the situation to the notice requirements of driving with a suspended license. Ct. found that the statute more closely resembles the carrying a handgun without a license statute that contains no notice requirement. See Ind. Code 35-47-2-1. Unlike Ind. Code 9-30-10-16 (driving while suspended), the legislature placed no onus on the DNR or any other agency to notify D of the development plan requirement. D's arguments of "good faith" & meaning no harm by mapping the cemetery for relocation also rejected, as "ignorance of the law is no excuse." Held, judgment affirmed.

TITLE: Schath v. State

INDEX NO.: K.11.p.

CITE: (1/28/2014), 2 N.E.2d 136 (Ind. Ct. App 2014)

SUBJECT: Chasing wildlife on private property - insufficient evidence

HOLDING: Evidence was insufficient to sustain D's conviction for Class C misdemeanor chasing wildlife on private property without consent of landowner, Ind. Code § 14-22-10-1. D was raccoon hunting with the permission of a property owner when his dog wandered onto another property where he did not have permission to hunt. D put his gun down and retrieved the dog, which had cornered a raccoon in a drainage pipe. While Court does not reweigh the credibility of witnesses or the evidence on appeal, in this case no such "reweighing" is necessary because all of the evidence in the record indicates that D entered the property for the sole purpose of retrieving his dog, not for the purpose of chasing a raccoon. Held, conviction reversed.

TITLE: Smith v. State
INDEX NO.: K.11.p.
CITE: (3/27/2014), 8 N.E.3d 668 (Ind. 2014)
SUBJECT: Principal's conviction for failure to report child abuse upheld
HOLDING: State presented sufficient evidence to support school principal's conviction for failure to immediately report child abuse or neglect. Ind. Code 31-33-5-1 requires "an individual who has reason to believe that a child is a victim of child abuse or neglect" to immediately make an oral report to the Department of Child Services (DCS) or local law enforcement agency.

Here, 16 year-old high school student C.W. reported to school officials that she had been raped in a bathroom by S.M., another 16 year-old student. D and other school leaders investigated C.W.'s claim before alerting police or the DCS because C.W. had previously faked a seizure and they did not want to ruin S.W.'s reputation. To get consent for medical treatment, the school immediately called C.W.'s guardian Youth Opportunity Center (YOC), where C.W. had been placed years earlier by DCS. D believed that by contacting YOC, DCS would also be notified. C.W. was taken to a hospital and evidence showed sexual contact. D called DCS approximately four hours after learning about the incident and told the agency he wasn't sure he was reporting abuse, as he and the other administrators involved did not believe the incident constituted child abuse since it involved teenagers.

Court held that the statute's requirement that notification must be made "immediately" under Ind. Code 31-33-5-1 is not unconstitutionally vague, and D's four-hour delay in reporting the incident was not considered "immediately" as the statute requires. Moreover, D's phone call to the YOC where the student lived as a ward of DCS did not fulfill the statutory requirement of a "report" to DCS.

At heart of D's appeal was whether he knew the alleged rape constituted child abuse, which would require him to immediately contact DCS or law enforcement. Rape is a "predicate offense" to child abuse with no age qualifications. D's ignorance of that aspect of the law is not a defense because he had an obligation to understand the scope of his duty to report. An alternative interpretation "would remove all incentives" from professionals "to understand the scope of their statutory duty," "chill reporting of child abuse and neglect," "tacitly encourage administrators and other professionals to simply not read the statutes in full," and "reward systemic ignorance in entire school districts and corporations."

Also, evidence showed D had reason to believe C.W. was a victim of child abuse by virtue of her rape allegation, and had "reason to believe" student was a child in need of services. This student had already been determined to be a CHINS and was a ward of DCS. The necessity for care, treatment or rehabilitation did not need to arise as a result of the current incident. (The "reason to believe child was in need of services" requirement has been deleted in the amended version of the statute that went into effect July 1, 2012). Held, transfer granted, Court of Appeals' opinion at 982 N.E.2d 348 vacated, conviction affirmed; Rucker, J., joined by Dickson, C.J., dissenting, would construe the statute to require reporting an event D had reason to believe was child abuse, and State failed to show D had reason to believe the alleged rape in this case was child abuse.

TITLE: Sparks v. State
INDEX NO.: K.11.p.
CITE: (6/25/2015), 37 N.E.3d 536 (Ind. Ct. App 2015)
SUBJECT: Insufficient evidence for D felony Contracting
HOLDING: The State failed to present sufficient evidence to prove D committed Class D felony Contracting under Ind. Code § 4-32.2-5-2 and Ind. Code § 4-32.2-8-4(b); see also Ind. Code § 4-32.2-2-24.

D offered to help the Warsaw Veterans of Foreign Wars (“VFW”) get a license from the Indiana Gaming Commission to host charity gaming events. D became a member of the VFW in July of 2009, and the VFW voted to let him conduct poker games. Three months after he became a member, the VFW filed an application with the Gaming Commission to host an “Annual Charity Gaming Night.” The application listed D as the “principal operator” and, even though D had been a VFW member for only three months, it listed him as a two-year member of VFW because an operator was required to be a VFW member for at least one year. For this and other actions, the State charged D with, inter alia, Class D felony Contracting.

To obtain a conviction, the State was required to show D did not meet the qualifications to be an operator as specified in Ind. Code § 4-32.2-5, and that he had contracted with a “qualified organization.” A qualified organization refers to, inter alia, “[a] bona fide religious, educational, senior citizens, veterans, or civic organization operating in Indiana that: operates without profit to the organization's members; is exempt from taxation under Section 501 of the Internal Revenue Code” Ind. Code § 4-32.2-8-4(b).

The State failed to present sufficient evidence as it presented no evidence that the VFW operates without a profit and that it is exempt from taxation under § 501 of the Internal Revenue Code. Held, judgment reversed.

TITLE: Szpunar v. State

INDEX NO.: K.11.p.

CITE: (4th Dist., 2-27-03), Ind. App., 783 N.E.2d 1213

SUBJECT: Constitutionality of unlawful sale of security statute

HOLDING: Ind. Code 23-2-1-3, which prohibits sale of unregistered security, is not unconstitutionally vague. Statute provides that it is unlawful for any person to offer or sell any security in Indiana unless: 1) it is registered under this chapter; 2) the security or transaction is exempted under section 2 of this chapter; or 3) it is a federal covered security. Although term "security" is defined in Ind. Code 23-2-1-1(k), this definition is not comprehensive & is subject to interpretation. D argued that statute does not specifically define the term "security," & that application of statute in this case is void for vagueness because it fails to give person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute, & because it encourages arbitrary & erratic arrests & convictions.

In this case, jury had to make determination of whether telephone services agreement was a security. State argued that telephone services agreement was an investment contract, which is included in definition of "security" under Ind. Code 23-2-1-1(k). Although "investment contract" is not statutorily defined, Cts. have set forth several tests to determine whether an instrument is an investment contract. Rejecting D's constitutional challenge to statute, Ct. held that individual of ordinary intelligence would understand that it is unlawful to sell an unregistered security. Individual's lack of comprehension of whether a particular instrument or document falls under definition of security does not render statute void for vagueness in this case because jury was given sufficient information to determine whether telephone services agreement was an investment contract & therefore a security.

RELATED CASES: West, 942 N.E.2d 862 (Ind. Ct. App 2011) (Court rejected argument that statutory definition of "security" is unconstitutionally vague as applied to D because the term "investment contract" is undefined).

TITLE: Williams v. State

INDEX NO.: K.11.p

CITE: (10/30/2017), 86 N.E.3d 428 (Ind. Ct. App 2017)

SUBJECT: Sufficient evidence that D failed to warn person at risk that he carried communicable disease

HOLDING: The State presented sufficient evidence to support Williams' conviction for failing to warn a person at risk that he was a carrier of a dangerous communicable disease. See Ind. Code § 35-45-21-3(b) and Ind. Code § 16-41-7-1. Williams was diagnosed with AIDS in 2004. He was twice informed of his duty to warn: first, when he was diagnosed, as memorialized by his "Confidential Case Report," and, second, in 2010, when he signed a "Duty to Warn" form during a meeting with a care coordinator from the Indiana Department of Health. In 2014, Williams began a sexual relationships with R.B.; he never told her he was an AIDS carrier. In 2015, Williams was diagnosed with Kaposi's sarcoma, a skin cancer connected to advanced HIV infection. In 2016, R.B. found the discharge papers related to Williams' cancer treatment, and by reviewing them, learned that Williams has AIDS. R.B. immediately visited a hospital and tested positive for HIV. The State proved Williams knew about his duty to warn; he was advised of this duty both during his initial diagnosis and during his 2010 meeting with a care coordinator from the Indiana Department of Health. The State also proved that the "Stanley Williams" identified in Exhibit 1 was the same Stanley Williams who was put on trial. R.B. testified that she had been in a sexual relationship with Williams and that she had discovered the discharge papers mentioning his AIDS condition in Williams' own home. Held, judgment affirmed.

TITLE: Wood v. State

INDEX NO.: K.11.p.

CITE: (12/31/2013), 999 N.E.2d 1054 (Ind. App. 2013)

SUBJECT: Leaving the scene of a boating accident - sufficiency

HOLDING: Where D left scene of boating accident while calling 911, and remained at marina as instructed by 911 dispatcher, evidence was sufficient to convict him of leaving the scene of a boating accident in violation of Ind. Code 14-15-4-4. Specifically, the state proved that the D did not stop his boat "immediately and as close as possible to the scene of the accident," Ind. Code 14-15-4-1, and did not "return to the scene of the accident and remain there" until he gave the other boat owner information to identify himself, the boat, and the boat's owner and provided "reasonable assistance to each person injured...."

K. CRIMES

K.11. Miscellaneous

K.11.n Illegal possession, consumption or transportation of alcohol by minor

TITLE: State v. Comerford

INDEX NO.: K.11.n.

CITE: (3d Dist. 11/7/85) Ind. App., 484 N.E.2d 993

SUBJECT: Illegal consumption of alcohol (by minor)

HOLDING: Tr. Ct. erred in acquitting D of illegal consumption of alcohol. Here, D consumed alcohol at his mother's home & was stopped at roadblock where officers determined D had consumed alcohol. At trial, D argued Ind. Code 7.1-5-7-7 only prohibits consumption of alcohol by minor when not in presence of parent. State contends acquittal was contrary to law. Ct. finds presence of parent language modifies only subsection (3) re transporting alcohol on public highway. Held, state prevails in appeal, but double jeopardy bars retrial. Ind. Code 35-41-4-3; State v. White, App., 454 N.E.2d 87.

TITLE: Turner v. State

INDEX NO.: K.11.n.

CITE: (5th Dist., 5-3-01), Ind. App., 749 N.E.2d 1205

SUBJECT: Illegal consumption of alcoholic beverage by minor - evidence sufficient

HOLDING: Evidence was sufficient to support D's conviction for illegal consumption of alcoholic beverage by minor, even though State failed to present evidence that D consumed beverage that contained at least .5% alcohol by volume. To support conviction, State was required to prove that D, while under age twenty-one, knowingly consumed beverage containing at least .5% alcohol by volume. Ind. Code 7.1-5-7-7(a); Ind. Code 7.1-1-3-5 (defining alcoholic beverage). Although chemical analysis of alleged alcoholic beverage is best way to establish its identity, circumstantial evidence tending to show that beverage contains more than .5% alcohol by volume may be sufficient. Vasquez v. State, 741 N.E.2d 1214 (Ind. 2001); Smalley v. State, 732 N.E.2d 1231 (Ind. Ct. App 2000). Here, there was sufficient circumstantial evidence establishing that beverage D drank was alcoholic beverage. First, there was overwhelming evidence that D was in state of intoxication. D admitted that he had consumed four beers. In addition, portable breath test D was given revealed positive result. Trier of fact was permitted to consider obvious effects of four beers D admitted he consumed. While any of these factors alone might not have supported verdict, when considered together they provide sufficient evidence that beer D consumed contained at least .5% alcohol by volume. Under different set of facts where chemical analysis is not performed when beverage is available for testing, State risks forfeiting prosecution upon appeal. Held, judgment affirmed.

K. CRIMES

K.12. Lesser included offense generally (Ind. Code 35-41-1-16) (see, also substantive offense; instructions, see, also D.9.g.2.e)

TITLE: Aguilar v. State

INDEX NO.: K.12.

CITE: (5th Dist., 7-9-04), Ind. App., 811 N.E.2d 476, sum. aff'd at 827 N.E.2d 31

SUBJECT: Refusal to give lesser included offense (LIO) instruction - no error

HOLDING: Tr. Ct. did not abuse its discretion in refusing D's tendered jury instruction on voluntary manslaughter as LIO of murder. Tr. Ct. refused his instruction on basis that: 1) no serious evidentiary dispute existed regarding presence of sudden heat; 2) D had a sufficient cooling off period; & 3) evidence showed premeditation. To establish that he acted in sudden heat, D must show sufficient provocation to engender passion. Culver v. State, 727 N.E.2d 1062 (Ind. 2000). D claimed his arguments & altercations with victim, several hours before her murder, were sufficient provocation to engender passion. However, D returned to victim's apartment after their altercation in bar, retrieved knife from her kitchen, donned latex gloves, hid in her bathroom, waited several hours for her return, & stabbed her to death. This evidence does not support inference that D acted under sudden heat. Horan v. State, 682 N.E.2d 502 (Ind. 1997). Held, judgment affirmed.

RELATED CASES: Suprenant, 925 N.E.2d 1280 (Ind. Ct. App 2010) (discovery of alleged infidelity & victim's gathering of her belongings to move out of house does not go so far beyond "mere words" as to constitute "sudden heat" justifying a voluntary manslaughter instruction; furthermore, record shows that impetus to kill did not "suddenly" arise in response to a contemporaneous event).

TITLE: Chinda v. State

INDEX NO.: K.12.

CITE: (8-27-01), Ind. App., 754 N.E.2d 981

SUBJECT: Lesser included offense - neglect of dependant is inherently included in attempted murder charge

HOLDING: Neglect of dependant is inherently included offense of attempted murder where charging information is sufficient to establish elements for neglect. A lesser offense is inherently included if it may be established by proof of less than all the material elements defining the greater offense, or if the only distinguishing feature is a lesser degree of culpability. Downey v. State, 726 N.E.2d 794 (Ind. Ct. App. 2000). Here, State demonstrated at trial, & set forth in the charging information, that D's actions of placing her newborn baby in a dumpster subjected the baby to a dangerous life-threatening situation in accordance with neglect of a dependant statute. Further, when D left the scene, it was reasonable for Tr. Ct. to infer that she abandoned the baby & deprived him of the support he required. Thus, the information charging D with attempted murder & setting forth its elements sufficiently informed D of the need to defend against the inherently included offense. Held, conviction affirmed.

RELATED CASES: Ocelotl-Toxqui, App., 793 N.E.2d 271 (in bench trial for child molesting, D had fair notice that he was required to defend against included offense of attempted child molesting. Thus, D's right to due process was not violated when Tr. Ct. found him guilty of attempted child molesting after he was charged with only the completed act).

TITLE: Galindo v. State
INDEX NO.: K.12.
CITE: (11/15/2016), 62 N.E.3d 1285 (Ind. Ct. App 2016)
SUBJECT: Within discretion to deny instruction on involuntary manslaughter
HOLDING: There was no abuse of discretion in denying D's instruction on involuntary manslaughter because there was no serious evidentiary dispute about his intent to kill victim. After having sex with victim, D kicked or stomped her head multiple times with tremendous force, which mangled her face so badly that CPR was impossible, and strangled her for at least ninety seconds. "Choking someone for a minimum of forty-five seconds clearly evinces an intent to kill or, at the very least, an awareness of a high probability that death would result." Erlewein v. State, 775 N.E.2d 712, 715 (Ind. Ct. App. 2002), *trans. denied*. The force of the battery also clearly establishes the intent to kill. These factors along with D's refusal to seek medical treatment for victim and failure to contact police after learning of her death clearly establishes that there was no serious evidentiary dispute about his intent to kill victim. Held, judgment affirmed.

TITLE: Garrett v. State

INDEX NO.: K.12.

CITE: (2nd Dist., 9-28-01), Ind. App., 756 N.E.2d 523

SUBJECT: Lesser included offense instruction over D's objection - no error

HOLDING: In murder prosecution, trial Ct. did not err in giving the State's tendered instruction on lesser included offense of reckless homicide over D's objection. State presented evidence that, as D was playing with her two-year-old son, she was frustrated & put her arm around his neck & choked him. This evidence, if believed, would allow trier of fact to conclude that D acted in plain, conscious, & unjustifiable disregard of harm that might result, & that such disregard involved substantial deviation from acceptable standards of conduct. Therefore, there was serious evidentiary dispute as to whether D knowingly or intentionally killed her son, as alleged in charging information, or whether she did so recklessly. Ct. rejected D's argument that her choice to present defense of accidental drowning forbade trial Ct. from instructing jury regarding any lesser included offenses. D is not precluded from lesser included offense instruction by interposing a defense inconsistent with commission of crime covered by instruction. Young v. State, 699 N.E.2d 252 (Ind. 1998). Even where D offers defense which would absolve her of any liability, Cts. must use test set forth in Wright v. State, 658 N.E.2d 563 (Ind. 1995), to determine whether it is appropriate to instruct jury regarding lesser included offenses. Held, no error.

Note: In footnote, Ct. acknowledged fact that case law seems to frequently preclude D from obtaining lesser included offense instruction when under same or similar set of facts the State would be entitled to such instruction. Ct. called upon S.Ct. to consider & resolve this anomaly.

TITLE: Garrett v. State

INDEX NO.: K.12.

CITE: (03-07-12), 964 N.E.2d 855 (Ind. Ct. App 2012)

SUBJECT: Refusal to give lesser included offense (LIO) instruction - reversible error

HOLDING: In methamphetamine dealing prosecution, Tr. Ct. erred in refusing to instruct jury on LIO of possession of methamphetamine. Police stopped a car in which D was a passenger. When police searched D, they found two bundles of cash totaling \$4,500, and in her purse they discovered a gun, two scales, small plastic baggies and material to cut methamphetamine and increase its volume. D first told police the drugs and weapons were hers, but at trial testified that the driver was the dealer, not her, and that he'd been physically abusive and had threatened to hurt her and her children if she did not tell police the drugs and weapons were hers. D requested a jury instruction on possession of methamphetamine as a LIO of dealing but did not submit a written instruction with the request for Tr. Ct. to review.

Court of Appeals declined the State's invitation to deprive D of her appeal on waiver grounds because record shows Tr. Ct. understood the request for the LIO instruction and was able to consider it fully. Although failure to tender an instruction generally results in waiver of the issue for review, purpose of waiver rule is not served by applying it in this case.

Addressing the merits, Court found LIO instruction should have been given because there was a serious evidentiary dispute about whether D merely possessed methamphetamine or also intended to deliver it. If there is a serious evidentiary dispute about the element(s) distinguishing the greater from LIO, Tr. Ct. commits reversible error if it does not give the requested LIO instruction. Wright v. State, 658 N.E.2d 563 (Ind. 1995). State incorrectly contended that the greater weight of evidence supporting one conclusion precluded determination that there could be an evidentiary dispute. The jury was not required to believe D's version of events, but it was for jury to decide whether the lesser offense was committed and not the greater. Porter v. State, 671 N.E.2d 152 (Ind. Ct. App 1996). Held, conviction reversed and remanded for new trial.

See also: Griffin v. State, 963 N.E.2d 685 (Ind. Ct. App 2012) (no abuse of discretion in finding no serious evidentiary dispute re: existence of reckless behavior, thus reckless homicide instruction was properly refused).

TITLE: Hack v. State

INDEX NO.: K.12.

CITE: (1st Dist. 7/14/82) Ind. App., 437 N.E.2d 486

SUBJECT: Lesser included offense - is criminal trespass lesser included of burglary?

HOLDING: Tr. Ct. did not err in refusing D's tendered instruction that criminal trespass was lesser included of burglary. Ct. uses 2-step methodology enunciated in Roddy, App., 394 N.E.2d 1098 & applied in Goodpaster 402 N.E.2d 1239 for determining what constitutes lesser included offense. (1) An offense is inherently included if elements of lesser offense are necessarily committed during commission of charged offense. (2) An offense is possibly included if elements of lesser are alleged in charging instrument (facts alleged correlate with elements of lesser offense). After comparing Ind. Code 35-43-2-1 (burglary) with Ind. Code 35-43-2-2 (criminal trespass), Ct. holds latter is not "inherently" lesser included of former. After examining factual allegations of charging instrument, Ct. holds it is clear state intended to prosecute burglary to exclusion of any lesser included offenses, as shown by exclusion of elements of criminal trespass, thus, latter is not "possibly" lesser included of former. See also Jones 438 N.E.2d 972; Lawrence 375 N.E.2d 208. Held, no error.

TITLE: Jones v. State

INDEX NO.: K.12.

CITE: (03-19-12), 966 N.E.2d 1256 (Ind. 2012)

SUBJECT: State may foreclose instruction on factually lesser included offense

HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion by refusing D's tendered instructions on reckless homicide and involuntary manslaughter. Evidence showed that D, who outweighed the victim by about fifty pounds, pushed victim to floor, punched him in chest twice to "get the wind out of him," placed his hands on victim's neck in an effort "to render him unconscious," applied his body as pressure weight until victim was unconscious and let go only when blood and air bubbles were expressed through victim's mouth. Expert testimony indicated victim would have lost consciousness after ten to fifteen seconds, but he would have died only after an additional period of oxygen deprivation, up to two minutes. Upon observing victim's nonresponsive state, D did not summon help or attempt to revive victim but rather took his money and vehicle and fled. At trial, D's theory of defense was self-defense, but on appeal he argued that jury, if properly instructed, could have found that he intended only to batter victim, who died during commission of battery, or that he recklessly killed victim, but did not do so knowingly.

As in Horan v. State, 682 N.E.2d 502 (Ind. 1997) and Lyttle v. State, 709 N.E.2d 1 (Ind. 1999), Court held that D could not have engaged in this protracted conduct without an awareness that his actions could result in victim's death. Thus, there was no error in finding no serious evidentiary dispute and reckless homicide instruction was properly refused.

Moreover, involuntary manslaughter was not a factually included lesser offense of murder because D was charged with knowingly killing the victim. Although the State cannot foreclose through its drafting of the charging information an instruction on an inherently lesser included offense, it may foreclose an instruction on a factually included offense. The State did precisely that in this case by omitting from D's charging information any reference to a battery. Held, transfer granted, Court of Appeals' opinion at 948 N.E.2d 1197 adopted, judgment affirmed.

TITLE: Lechner v. State

INDEX NO.: K.12.

CITE: (2d Dist. 9/27/82) Ind. App., 439 N.E.2d 1203

SUBJECT: Lesser included offense - attempted child molesting

HOLDING: Fondling (Ind. Code 35-42-4-3(d)) is not a lesser included offense of attempted child molesting (Ind. Code 35-42-4-3(c)). Here, D was charged with attempted child molesting. Tr. Ct. ruled that state had failed to prove attempted child molesting but proceeded with bench trial on theory state presented prima facie case of child molesting under (d), fondling. Ct. finds subsection (d) is not lesser included offense under either Ind. Code 35-41-1-2(a) [matching of elements test] or Ind. Code 35-41-1-2(d) [less harm, risk of harm or lesser kind of culpability]. Ct. rejects argument offense is "possibly" included. Here, charge did not allege facts to put D on notice that he should prepare to defend fondling charge. Held, conviction reversed. State may properly charge D with & seek conviction for fondling.

TITLE: Mahla v. State

INDEX NO.: K.12.

CITE: (8/20/86) Ind., 496 N.E.2d 568

SUBJECT: Lesser "related" offenses - not law in IN

HOLDING: Lesser "related" offense doctrine holds that if evidence demonstrates D may have committed lesser offense in course of acts that lead to greater charge, even if such offense is not inherently included in greater charge or in factual allegations of charging instrument, if D requests, trier of fact should be given opportunity to consider "related" offense. Ct. notes doctrine has been recognized by the CA S.Ct., the 9th Cir., & the U.S. Ct. App. for the District of Columbia. The Ct. is aware of no IN cases applying doctrine, which "clearly goes beyond" principles of "inherently" & "factually" included offenses now well-established by IN case law. Nonetheless, Ct. finds that even Cts. which have considered doctrine have held that "related" offenses should not be submitted to jury if unsupported by evidence. Ct. finds instruction unsupported by evidence introduced at trial. Held, conviction affirmed.

TITLE: Norris v. State

INDEX NO.: K.12.

CITE: (01-31-11), Ind. App., 943 N.E. 2d 362

SUBJECT: Involuntary manslaughter instruction foreclosed by charging information

HOLDING: Tr. Ct. did not err in refusing to instruct jury on involuntary manslaughter as a lesser included offense of murder. The D's intent--the intent to kill or the intent to batter--distinguishes murder from involuntary manslaughter. Wilson v. State, 765 N.E.2d 1265 (Ind. 2002). It is undisputed that involuntary manslaughter is not an inherently lesser included offense of murder. It may, however, be factually included if the charging information alleges that a battery accomplished the killing. Ketcham v. State, 780 N.E.2d 1171 (Ind. Ct. App 2003). Here, charging information alleged only a knowing or intentional killing and contained no reference to a battery that could have been a basis for an involuntary manslaughter instruction. Contrary to D's assertion that the State's drafting of the information lacked detail, the State was within its discretion to draft the information in a manner that foreclosed the opportunity for D to seek a conviction on a lesser offense. Wright v. State, 658 N.E.2d 563 (Ind. 1995); Jones v. State, 438 N.E.2d 972 (Ind. 1982). Thus, Tr. Ct. properly rejected D's involuntary manslaughter instruction. Held, judgment affirmed.

TITLE: Tawney v. State

INDEX NO.: K.12.

CITE: (9/2/82) Ind., 439 N.E.2d 582

SUBJECT: Lesser included offenses - Blockburger

HOLDING: In applying Blockburger test, Ct. should look to manner in which offenses are charged & not merely to statutory definitions of offenses. Blockburger [v. US], (1932) 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306] test was recently reaffirmed & further developed in Brown v. OH, (1977) 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187. Test: offense is not lesser included if each requires proof that the other does not, despite existence of substantial overlap in proof offered to establish crimes. See Elmore 382 N.E.2d 893. Here, D charged with & convicted of robbery & battery. Ct. sets forth charges & finds battery Class C charge is actually the force element of robbery Class A charge. Held, battery conviction vacated.

TITLE: Wright v. State

INDEX NO.: K.12.

CITE: (11-17-95), Ind., 658 N.E.2d 563

SUBJECT: Lesser included offense (LIO) instruction - when to give

HOLDING: Decision sets out following analysis that Tr. Cts. should use when called upon by either party to give jury instruction on LIO of crime charged: 1) compare statute defining crime charged with statute defining alleged LIO. If LIO is inherently included in crime charged, proceed to step three below. Wording of charging instrument never forecloses or precludes instruction on inherently LIO. Aschliman, 589 N.E.2d 1160. 2) If alleged LIO is not inherently included in crime charged, compare statute defining alleged LIO with charging instrument. If charging instrument alleges that means used to commit crime charged include all elements of alleged LIO, then alleged LIO is factually included in crime charged; proceed to step three below. Tr. Ct. should not give requested instruction on alleged LIO if it is neither inherently nor factually included in crime charged. Straub, 567 N.E.2d 87. 3) If alleged LIO is either inherently or factually included in crime charged, consider evidence presented in case by both parties. If there is serious evidentiary dispute about element(s) distinguishing greater from lesser offense, & jury could conclude that lesser offense was committed but not greater, it is reversible error to not give LIO instruction when requested. Tr. Ct. should not give LIO instruction if evidence does not support it, & D must object to instruction to preserve issue for appeal.

Here, although information charging D with murder closely tracked language of murder statute, Ct. App. erred in reversing reckless homicide conviction. Because reckless homicide is inherently included offense of murder, information charging Murder cannot be drafted so as to preclude Reckless Homicide instruction. Aschliman, *supra*. If evidence warrants it, requested instruction on reckless homicide should always be given in case where murder has been charged. D in this case waived any objection to reinstruction of jury when Tr. Ct. offered to declare mistrial & D made tactical decision to decline offer & accept verdict. Held, transfer granted, Ct. App. decision at 643 N.E.2d 417 vacated & conviction affirmed; DeBruler, J., concurring. Note: Ct. explicitly overruled or disapproved of several cases which suggest that prosecutors may foreclose instruction on either inherently or factually included offense by drafting charging instrument to track statutory language defining crime charged.

RELATED CASES: Larkin, 173 N.E.3d 662 (Ind. 2021) (prosecution can request a jury instruction on a LIO so long as the charging documents provide adequate notice and the record at trial reveals a serious evidentiary dispute); Young, 30 N.E.3d 719 (Ind. 2015) (even though elements of attempted aggravated battery are inherently included in murder, charging Ds only with murder by shooting deprived them of due process right to fair notice to also defend against lesser, completely different offense of attempted aggravated battery by beating); Johnson, 959 N.E.2d 334 (Ind. Ct. App. 2011) (In class A felony neglect of a dependent prosecution, Tr. Ct. did not abuse its discretion in refusing to instruct jury on lesser included offenses of class C and D felony neglect of a dependent. There was no serious dispute about the degree of harm to the dependent); Morris, App., 921 N.E.2d 40 (failure to instruct jury on LIO of conversion required reversal because there was a serious evidentiary dispute about whether D intended to deprive a store of the use of its merchandise; see full review at K.4.h or K.4.r); Danner, App., 900 N.E.2d 9 (in Class A felony possession of cocaine prosecution, Tr. Ct. did not abuse its discretion in refusing D's tendered jury instruction on class C felony possession of cocaine as a LIO, because there was no serious evidentiary dispute regarding whether D possessed cocaine within 1,000 feet of school property); Watts, 885 N.E.2d 1228 (it is reversible error for Tr. Ct. to instruct jury on voluntary

manslaughter in absence of evidence of sudden heat; see full review, this section); White, App., 849 N.E.2d 735 (criminal recklessness was not factually included in crime of attempted murder because charging information for attempted murder included no element of reckless behavior); Clark, App., 834 N.E.2d 153 (in murder prosecution, Tr. Ct. erred in failing to instruct jury on lesser included offense of voluntary manslaughter where evidence demonstrated a serious evidentiary dispute regarding the mitigating factor of sudden heat); Waibel, App., 808 N.E.2d 750 ((no error in refusing D's tendered instructions on intimidation, battery & auto theft as LIO of robbery & carjacking); Simmons, App., 793 N.E.2d 321 (Class C Felony Battery, Ind. Code 35-42-2-1(a)(3), is an inherently included offense of Aggravated Battery under Ind. Code 35-42-2-1.5, & it was not fundamental error to so instruct the jury); Hamilton, App., 783 N.E.2d 1266 (Tr. Ct. did not err in refusing to give D's tendered jury instruction on criminal recklessness as LIO of murder, even though it instructed jury on reckless homicide as LIO); Higgins, App., 783 N.E.2d 1180 (criminal trespass is not inherently included in offense of residential entry, but may be factually included lesser offense of burglary or residential entry); Ketcham, App., 780 N.E.2d 1171; Erlewein, App., 775 N.E.2d 712 (in murder prosecution, Tr. Ct. properly refused to instruct jury on involuntary manslaughter because there was no serious evidentiary dispute regarding element distinguishing involuntary manslaughter from murder); Edwards, App., 773 N.E.2d 360 (because jury could have concluded that D committed battery upon victim but did not commit crime of attempted murder, Tr. Ct. erred in refusing to give his tendered LIO instruction on battery); Ellis, 736 N.E.2d 731 (although intent was at issue through involuntary intoxication defense, Tr. Ct. did not err by refusing to give reckless homicide and criminal recklessness instructions in murder prosecution); Craig, App., 737 N.E.2d 442 (where jury could have found D acted recklessly & with disregard for consequences of shooting at van, D was entitled to criminal recklessness instruction although charged with attempted murder); Tucker, App., 725 N.E.2d 894 (in battery prosecution, despite victim's testimony that bruise on her arm did not hurt, there was no serious evidentiary dispute as to whether victim suffered bodily injury); Robertson, App., 699 N.E.2d 697 (Wright rule should not be applied retroactively); Stringer, App., 690 N.E.2d 788 (Tr. Ct. did not err in convicting D of class C felony battery, as factually included offense of attempted murder); Mauricio, App., 683 N.E.2d 1329 (no error in failing to give LIO instruction of involuntary manslaughter in murder prosecution because there was no serious evidentiary dispute re intent); Walker, App., 678 N.E.2d 402 (where D was charged with rape & criminal deviate conduct as class A felonies, no error in giving LIO instructions for offenses as class B felonies); Sledge, App., 677 N.E.2d 82 (in prosecution for dealing cocaine, Tr. Ct. did not err in refusing D's instructions on LIOs of possession of cocaine, maintaining common nuisance, & visiting common nuisance); Porter, App., 671 N.E.2d 152 (in attempted murder prosecution, Tr. Ct. properly instructed jury on lesser factually included offense of battery with deadly weapon); Brown, App., 659 N.E.2d 652 (Tr. Ct. erred in refusing lesser included offense instructions on reckless homicide & involuntary manslaughter); Meriweather, App., 659 N.E.2d 133 (although charging information closely tracked attempted murder statute, Tr. Ct. did not err in convicting D of attempted aggravated battery); Taylor, App., 659 N.E.2d 535 (in prosecution for attempted rape, Tr. Ct. correctly refused to give D's requested instruction on resisting law enforcement).

TITLE: Young v. State

INDEX NO.: K.12.

CITE: (1st Dist., 05-09-06), Ind. App., 846 N.E.2d 1060

SUBJECT: Refusal to give lesser included offense instruction - reversible error

HOLDING: Tr. Ct. abused its discretion when it failed to instruct jury on Class A Misdemeanor criminal trespass as a factually lesser included offense of residential entry. Although residential entry charge did not explicitly allege that D entered another person's apartment without a contractual interest in the property or consent, the charge did allege that D "did knowingly break or enter the dwelling of another." Thus, criminal trespass is a factually included lesser offense of residential entry. Higgins v. State, 783 N.E.2d 1180 (Ind. Ct. App 2003). Distinguishing Higgins, Ct. concluded that a serious evidentiary dispute existed over whether D broke & entered victim's apartment or merely entered it. After listening to victim's testimony, a reasonable jury could have found that the attic access in victim's closet ceiling was either open or closed prior to D's entry into his apartment. Reversal is required if Tr. Ct. wrongly concludes that no serious evidentiary dispute exists & refuses to give an instruction on a lesser included offense. Champlain v. State, 681 N.E.2d 696 (Ind. 1997). Held, conviction reversed & remanded for retrial.

K. CRIMES

K.12. Lesser included offense generally (Ind. Code 35-41-1-16) (see, also substantive offense; instructions, see, also D.9.g.2.e)

TITLE: Aguilar v. State

INDEX NO.: K.12.

CITE: (5th Dist., 7-9-04), Ind. App., 811 N.E.2d 476, sum. aff'd at 827 N.E.2d 31

SUBJECT: Refusal to give lesser included offense (LIO) instruction - no error

HOLDING: Tr. Ct. did not abuse its discretion in refusing D's tendered jury instruction on voluntary manslaughter as LIO of murder. Tr. Ct. refused his instruction on basis that: 1) no serious evidentiary dispute existed regarding presence of sudden heat; 2) D had a sufficient cooling off period; & 3) evidence showed premeditation. To establish that he acted in sudden heat, D must show sufficient provocation to engender passion. Culver v. State, 727 N.E.2d 1062 (Ind. 2000). D claimed his arguments & altercations with victim, several hours before her murder, were sufficient provocation to engender passion. However, D returned to victim's apartment after their altercation in bar, retrieved knife from her kitchen, donned latex gloves, hid in her bathroom, waited several hours for her return, & stabbed her to death. This evidence does not support inference that D acted under sudden heat. Horan v. State, 682 N.E.2d 502 (Ind. 1997). Held, judgment affirmed.

RELATED CASES: Suprenant, 925 N.E.2d 1280 (Ind. Ct. App 2010) (discovery of alleged infidelity & victim's gathering of her belongings to move out of house does not go so far beyond "mere words" as to constitute "sudden heat" justifying a voluntary manslaughter instruction; furthermore, record shows that impetus to kill did not "suddenly" arise in response to a contemporaneous event).

TITLE: Chinda v. State

INDEX NO.: K.12.

CITE: (8-27-01), Ind. App., 754 N.E.2d 981

SUBJECT: Lesser included offense - neglect of dependant is inherently included in attempted murder charge

HOLDING: Neglect of dependant is inherently included offense of attempted murder where charging information is sufficient to establish elements for neglect. A lesser offense is inherently included if it may be established by proof of less than all the material elements defining the greater offense, or if the only distinguishing feature is a lesser degree of culpability. Downey v. State, 726 N.E.2d 794 (Ind. Ct. App. 2000). Here, State demonstrated at trial, & set forth in the charging information, that D's actions of placing her newborn baby in a dumpster subjected the baby to a dangerous life-threatening situation in accordance with neglect of a dependant statute. Further, when D left the scene, it was reasonable for Tr. Ct. to infer that she abandoned the baby & deprived him of the support he required. Thus, the information charging D with attempted murder & setting forth its elements sufficiently informed D of the need to defend against the inherently included offense. Held, conviction affirmed.

RELATED CASES: Ocelotl-Toxqui, App., 793 N.E.2d 271 (in bench trial for child molesting, D had fair notice that he was required to defend against included offense of attempted child molesting. Thus, D's right to due process was not violated when Tr. Ct. found him guilty of attempted child molesting after he was charged with only the completed act).

TITLE: Galindo v. State
INDEX NO.: K.12.
CITE: (11/15/2016), 62 N.E.3d 1285 (Ind. Ct. App 2016)
SUBJECT: Within discretion to deny instruction on involuntary manslaughter
HOLDING: There was no abuse of discretion in denying D's instruction on involuntary manslaughter because there was no serious evidentiary dispute about his intent to kill victim. After having sex with victim, D kicked or stomped her head multiple times with tremendous force, which mangled her face so badly that CPR was impossible, and strangled her for at least ninety seconds. "Choking someone for a minimum of forty-five seconds clearly evinces an intent to kill or, at the very least, an awareness of a high probability that death would result." Erlewein v. State, 775 N.E.2d 712, 715 (Ind. Ct. App. 2002), *trans. denied*. The force of the battery also clearly establishes the intent to kill. These factors along with D's refusal to seek medical treatment for victim and failure to contact police after learning of her death clearly establishes that there was no serious evidentiary dispute about his intent to kill victim. Held, judgment affirmed.

TITLE: Garrett v. State

INDEX NO.: K.12.

CITE: (2nd Dist., 9-28-01), Ind. App., 756 N.E.2d 523

SUBJECT: Lesser included offense instruction over D's objection - no error

HOLDING: In murder prosecution, trial Ct. did not err in giving the State's tendered instruction on lesser included offense of reckless homicide over D's objection. State presented evidence that, as D was playing with her two-year-old son, she was frustrated & put her arm around his neck & choked him. This evidence, if believed, would allow trier of fact to conclude that D acted in plain, conscious, & unjustifiable disregard of harm that might result, & that such disregard involved substantial deviation from acceptable standards of conduct. Therefore, there was serious evidentiary dispute as to whether D knowingly or intentionally killed her son, as alleged in charging information, or whether she did so recklessly. Ct. rejected D's argument that her choice to present defense of accidental drowning forbade trial Ct. from instructing jury regarding any lesser included offenses. D is not precluded from lesser included offense instruction by interposing a defense inconsistent with commission of crime covered by instruction. Young v. State, 699 N.E.2d 252 (Ind. 1998). Even where D offers defense which would absolve her of any liability, Cts. must use test set forth in Wright v. State, 658 N.E.2d 563 (Ind. 1995), to determine whether it is appropriate to instruct jury regarding lesser included offenses. Held, no error.

Note: In footnote, Ct. acknowledged fact that case law seems to frequently preclude D from obtaining lesser included offense instruction when under same or similar set of facts the State would be entitled to such instruction. Ct. called upon S.Ct. to consider & resolve this anomaly.

TITLE: Garrett v. State

INDEX NO.: K.12.

CITE: (03-07-12), 964 N.E.2d 855 (Ind. Ct. App 2012)

SUBJECT: Refusal to give lesser included offense (LIO) instruction - reversible error

HOLDING: In methamphetamine dealing prosecution, Tr. Ct. erred in refusing to instruct jury on LIO of possession of methamphetamine. Police stopped a car in which D was a passenger. When police searched D, they found two bundles of cash totaling \$4,500, and in her purse they discovered a gun, two scales, small plastic baggies and material to cut methamphetamine and increase its volume. D first told police the drugs and weapons were hers, but at trial testified that the driver was the dealer, not her, and that he'd been physically abusive and had threatened to hurt her and her children if she did not tell police the drugs and weapons were hers. D requested a jury instruction on possession of methamphetamine as a LIO of dealing but did not submit a written instruction with the request for Tr. Ct. to review.

Court of Appeals declined the State's invitation to deprive D of her appeal on waiver grounds because record shows Tr. Ct. understood the request for the LIO instruction and was able to consider it fully. Although failure to tender an instruction generally results in waiver of the issue for review, purpose of waiver rule is not served by applying it in this case.

Addressing the merits, Court found LIO instruction should have been given because there was a serious evidentiary dispute about whether D merely possessed methamphetamine or also intended to deliver it. If there is a serious evidentiary dispute about the element(s) distinguishing the greater from LIO, Tr. Ct. commits reversible error if it does not give the requested LIO instruction. Wright v. State, 658 N.E.2d 563 (Ind. 1995). State incorrectly contended that the greater weight of evidence supporting one conclusion precluded determination that there could be an evidentiary dispute. The jury was not required to believe D's version of events, but it was for jury to decide whether the lesser offense was committed and not the greater. Porter v. State, 671 N.E.2d 152 (Ind. Ct. App 1996). Held, conviction reversed and remanded for new trial.

See also: Griffin v. State, 963 N.E.2d 685 (Ind. Ct. App 2012) (no abuse of discretion in finding no serious evidentiary dispute re: existence of reckless behavior, thus reckless homicide instruction was properly refused).

TITLE: Hack v. State

INDEX NO.: K.12.

CITE: (1st Dist. 7/14/82) Ind. App., 437 N.E.2d 486

SUBJECT: Lesser included offense - is criminal trespass lesser included of burglary?

HOLDING: Tr. Ct. did not err in refusing D's tendered instruction that criminal trespass was lesser included of burglary. Ct. uses 2-step methodology enunciated in Roddy, App., 394 N.E.2d 1098 & applied in Goodpaster 402 N.E.2d 1239 for determining what constitutes lesser included offense. (1) An offense is inherently included if elements of lesser offense are necessarily committed during commission of charged offense. (2) An offense is possibly included if elements of lesser are alleged in charging instrument (facts alleged correlate with elements of lesser offense). After comparing Ind. Code 35-43-2-1 (burglary) with Ind. Code 35-43-2-2 (criminal trespass), Ct. holds latter is not "inherently" lesser included of former. After examining factual allegations of charging instrument, Ct. holds it is clear state intended to prosecute burglary to exclusion of any lesser included offenses, as shown by exclusion of elements of criminal trespass, thus, latter is not "possibly" lesser included of former. See also Jones 438 N.E.2d 972; Lawrence 375 N.E.2d 208. Held, no error.

TITLE: Jones v. State

INDEX NO.: K.12.

CITE: (03-19-12), 966 N.E.2d 1256 (Ind. 2012)

SUBJECT: State may foreclose instruction on factually lesser included offense

HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion by refusing D's tendered instructions on reckless homicide and involuntary manslaughter. Evidence showed that D, who outweighed the victim by about fifty pounds, pushed victim to floor, punched him in chest twice to "get the wind out of him," placed his hands on victim's neck in an effort "to render him unconscious," applied his body as pressure weight until victim was unconscious and let go only when blood and air bubbles were expressed through victim's mouth. Expert testimony indicated victim would have lost consciousness after ten to fifteen seconds, but he would have died only after an additional period of oxygen deprivation, up to two minutes. Upon observing victim's nonresponsive state, D did not summon help or attempt to revive victim but rather took his money and vehicle and fled. At trial, D's theory of defense was self-defense, but on appeal he argued that jury, if properly instructed, could have found that he intended only to batter victim, who died during commission of battery, or that he recklessly killed victim, but did not do so knowingly.

As in Horan v. State, 682 N.E.2d 502 (Ind. 1997) and Lyttle v. State, 709 N.E.2d 1 (Ind. 1999), Court held that D could not have engaged in this protracted conduct without an awareness that his actions could result in victim's death. Thus, there was no error in finding no serious evidentiary dispute and reckless homicide instruction was properly refused.

Moreover, involuntary manslaughter was not a factually included lesser offense of murder because D was charged with knowingly killing the victim. Although the State cannot foreclose through its drafting of the charging information an instruction on an inherently lesser included offense, it may foreclose an instruction on a factually included offense. The State did precisely that in this case by omitting from D's charging information any reference to a battery. Held, transfer granted, Court of Appeals' opinion at 948 N.E.2d 1197 adopted, judgment affirmed.

TITLE: Lechner v. State

INDEX NO.: K.12.

CITE: (2d Dist. 9/27/82) Ind. App., 439 N.E.2d 1203

SUBJECT: Lesser included offense - attempted child molesting

HOLDING: Fondling (Ind. Code 35-42-4-3(d)) is not a lesser included offense of attempted child molesting (Ind. Code 35-42-4-3(c)). Here, D was charged with attempted child molesting. Tr. Ct. ruled that state had failed to prove attempted child molesting but proceeded with bench trial on theory state presented prima facie case of child molesting under (d), fondling. Ct. finds subsection (d) is not lesser included offense under either Ind. Code 35-41-1-2(a) [matching of elements test] or Ind. Code 35-41-1-2(d) [less harm, risk of harm or lesser kind of culpability]. Ct. rejects argument offense is "possibly" included. Here, charge did not allege facts to put D on notice that he should prepare to defend fondling charge. Held, conviction reversed. State may properly charge D with & seek conviction for fondling.

TITLE: Mahla v. State

INDEX NO.: K.12.

CITE: (8/20/86) Ind., 496 N.E.2d 568

SUBJECT: Lesser "related" offenses - not law in IN

HOLDING: Lesser "related" offense doctrine holds that if evidence demonstrates D may have committed lesser offense in course of acts that lead to greater charge, even if such offense is not inherently included in greater charge or in factual allegations of charging instrument, if D requests, trier of fact should be given opportunity to consider "related" offense. Ct. notes doctrine has been recognized by the CA S.Ct., the 9th Cir., & the U.S. Ct. App. for the District of Columbia. The Ct. is aware of no IN cases applying doctrine, which "clearly goes beyond" principles of "inherently" & "factually" included offenses now well-established by IN case law. Nonetheless, Ct. finds that even Cts. which have considered doctrine have held that "related" offenses should not be submitted to jury if unsupported by evidence. Ct. finds instruction unsupported by evidence introduced at trial. Held, conviction affirmed.

TITLE: Norris v. State

INDEX NO.: K.12.

CITE: (01-31-11), Ind. App., 943 N.E. 2d 362

SUBJECT: Involuntary manslaughter instruction foreclosed by charging information

HOLDING: Tr. Ct. did not err in refusing to instruct jury on involuntary manslaughter as a lesser included offense of murder. The D's intent--the intent to kill or the intent to batter--distinguishes murder from involuntary manslaughter. Wilson v. State, 765 N.E.2d 1265 (Ind. 2002). It is undisputed that involuntary manslaughter is not an inherently lesser included offense of murder. It may, however, be factually included if the charging information alleges that a battery accomplished the killing. Ketcham v. State, 780 N.E.2d 1171 (Ind. Ct. App 2003). Here, charging information alleged only a knowing or intentional killing and contained no reference to a battery that could have been a basis for an involuntary manslaughter instruction. Contrary to D's assertion that the State's drafting of the information lacked detail, the State was within its discretion to draft the information in a manner that foreclosed the opportunity for D to seek a conviction on a lesser offense. Wright v. State, 658 N.E.2d 563 (Ind. 1995); Jones v. State, 438 N.E.2d 972 (Ind. 1982). Thus, Tr. Ct. properly rejected D's involuntary manslaughter instruction. Held, judgment affirmed.

TITLE: Tawney v. State

INDEX NO.: K.12.

CITE: (9/2/82) Ind., 439 N.E.2d 582

SUBJECT: Lesser included offenses - Blockburger

HOLDING: In applying Blockburger test, Ct. should look to manner in which offenses are charged & not merely to statutory definitions of offenses. Blockburger [v. US], (1932) 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306] test was recently reaffirmed & further developed in Brown v. OH, (1977) 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187. Test: offense is not lesser included if each requires proof that the other does not, despite existence of substantial overlap in proof offered to establish crimes. See Elmore 382 N.E.2d 893. Here, D charged with & convicted of robbery & battery. Ct. sets forth charges & finds battery Class C charge is actually the force element of robbery Class A charge. Held, battery conviction vacated.

TITLE: Wright v. State

INDEX NO.: K.12.

CITE: (11-17-95), Ind., 658 N.E.2d 563

SUBJECT: Lesser included offense (LIO) instruction - when to give

HOLDING: Decision sets out following analysis that Tr. Cts. should use when called upon by either party to give jury instruction on LIO of crime charged: 1) compare statute defining crime charged with statute defining alleged LIO. If LIO is inherently included in crime charged, proceed to step three below. Wording of charging instrument never forecloses or precludes instruction on inherently LIO. Aschliman, 589 N.E.2d 1160. 2) If alleged LIO is not inherently included in crime charged, compare statute defining alleged LIO with charging instrument. If charging instrument alleges that means used to commit crime charged include all elements of alleged LIO, then alleged LIO is factually included in crime charged; proceed to step three below. Tr. Ct. should not give requested instruction on alleged LIO if it is neither inherently nor factually included in crime charged. Straub, 567 N.E.2d 87. 3) If alleged LIO is either inherently or factually included in crime charged, consider evidence presented in case by both parties. If there is serious evidentiary dispute about element(s) distinguishing greater from lesser offense, & jury could conclude that lesser offense was committed but not greater, it is reversible error to not give LIO instruction when requested. Tr. Ct. should not give LIO instruction if evidence does not support it, & D must object to instruction to preserve issue for appeal.

Here, although information charging D with murder closely tracked language of murder statute, Ct. App. erred in reversing reckless homicide conviction. Because reckless homicide is inherently included offense of murder, information charging Murder cannot be drafted so as to preclude Reckless Homicide instruction. Aschliman, *supra*. If evidence warrants it, requested instruction on reckless homicide should always be given in case where murder has been charged. D in this case waived any objection to reinstruction of jury when Tr. Ct. offered to declare mistrial & D made tactical decision to decline offer & accept verdict. Held, transfer granted, Ct. App. decision at 643 N.E.2d 417 vacated & conviction affirmed; DeBruler, J., concurring. Note: Ct. explicitly overruled or disapproved of several cases which suggest that prosecutors may foreclose instruction on either inherently or factually included offense by drafting charging instrument to track statutory language defining crime charged.

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