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IN THE  
COURT OF APPEALS OF INDIANA

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State of Indiana,  
*Appellant-Plaintiff,*

v.

Tobias N. Smith,  
*Appellee-Defendant.*

December 7, 2021

Court of Appeals Case No.  
21A-CR-1475

Appeal from the Vigo Superior  
Court

The Honorable Michael J. Lewis,  
Judge

Trial Court Cause No.  
84D06-2010-F4-3656

**Bailey, Judge.**

## Case Summary

- [1] Pursuant to Indiana Code Section 35-38-4-2(1), the State of Indiana appeals the dismissal of an Information charging Tobias Smith (“Smith”) with Burglary, as a Level 4 felony,<sup>1</sup> Kidnapping, as a Level 5 felony,<sup>2</sup> and Criminal Confinement, as a Level 5 felony,<sup>3</sup> due to a perceived lack of sufficient evidence. The State presents the sole issue of whether the trial court abused its discretion by misapplying the law in dismissing the Information. We reverse and remand.

## Facts and Procedural History

- [2] On October 26, 2020, Lauren Stamper (“Stamper”) called the Vigo County Sheriff’s Department to request a welfare check regarding her sister, A.B. Stamper reported that A.B. had ended an abusive relationship with Smith and was staying with Stamper; however, that evening A.B. had returned to her own house to retrieve property. When Stamper was unable to contact A.B. at a prearranged time, she became concerned because she believed that Smith had previously battered A.B. and confined her in a vehicle for many hours. She drove by the martial arts studio where A.B. was scheduled to take a class and observed that A.B.’s vehicle was not present.

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<sup>1</sup> Ind. Code § 35-43-2-1.

<sup>2</sup> I.C. § 35-42-3-2.

<sup>3</sup> I.C. § 35-42-3-3.

- [3] When responding officers arrived at A.B.'s residence, they found an open garage door. They also observed that the door to the side yard was ajar, leaving A.B.'s dogs with a potential escape route. Inside the house, there was a broken container with liquid on the floor of the living room. Officers tried to reach A.B. and Smith by cell phone but received no response. A.B.'s phone went directly to voice mail.
- [4] Officers requested pinging data with respect to Smith's cell phone and learned that his phone was in movement near New Goshen, Indiana, before coming to a stop. Officers had been advised that Smith's parents lived in La Porte, Indiana, and they requested that the LaPorte County Sheriff's Department conduct a welfare check as to A.B. at Smith's parents' home.
- [5] LaPorte County Sheriff's Deputy Kesling found A.B. in the living room of Smith's parents' home. A.B. stated that she was "okay" but when she was asked if she "wanted to be there," she shook her head and responded "no." (App. Vol. II, pg. 12.) Once A.B. was removed from the residence, she became very emotional. She relayed some history of domestic violence and expressed her fear of Smith. She speculated that Smith had made a key to her home and was getting inside without her knowledge. A.B. initially indicated that she had been forced to go to La Porte, but when she could not receive assurances that Smith would escape criminal prosecution, A.B. stated: "I don't want him to get into trouble so I'll say I went willingly." (*Id.* at 13.)

- [6] Deputy Kesling asked that Smith unlock his vehicle so that A.B. could have her cell phone. It was discovered in the driver's side compartment, where it would have been out of reach of a passenger. It was turned off. A.B. was given a courtesy transport to the LaPorte County Sheriff's Department. While she was there, she sent text messages to her aunt indicating that Smith had taken her from her home against her will.
- [7] At Smith's initial hearing on the burglary, kidnapping, and criminal confinement charges, A.B. testified that she had given Smith a key to her residence. She further testified that she had lied to her aunt, misled her sister, and let matters get out of hand because of her family's dislike of Smith. She denied being afraid of Smith. At the conclusion of the hearing, the trial court released Smith on his own recognizance.
- [8] On May 10, 2021, Smith filed a motion to dismiss the Information in its entirety, "because there is insufficient evidence to prove that the Defendant committed the alleged offenses." (*Id.* at 31.) On June 3, 2021, the trial court conducted a hearing on the motion to dismiss. Again, A.B. testified and denied that Smith broke into her residence or removed her against her will. Smith then argued that the trial court had factfinding discretion because it was able to observe the demeanor of A.B., the sole alleged victim, and that the Information should be dismissed in the interests of judicial economy. The State argued that statutory grounds for dismissal did not include alleged insufficiency of evidence. The trial court took the matter under advisement.

[9] On June 17, 2021, the trial court entered an order dismissing the Information, in relevant part stating: “the Court being duly advised does now find as a matter of law that this cause of action against the Defendant, Tobias Nolan Smith, shall be dismissed with prejudice.” Appealed Order at 1. The State now appeals.

## Discussion and Decision

[10] Indiana Code section 35-38-4-2(1) provides that the State may seek review of “an order granting a motion to dismiss one or more counts of an indictment or information.” On appeal, we will review a trial court’s grant of a motion to dismiss an Information for an abuse of discretion. *State v. Davis*, 898 N.E.2d 281, 285 (Ind. 2008). A trial court abuses its discretion where the decision is clearly against the logic and effect of the facts and circumstances before the trial court, or the trial court has misinterpreted or misapplied the law. *Gil v. State*, 988 N.E.2d 1231, 1234 (Ind. Ct. App. 2013). The State contends that a trial court cannot dismiss an Information when it is convinced, based upon its own resolution of factual matters, that insufficient evidence exists for a conviction. Moreover, according to the State, a dismissal with prejudice is inconsistent with potential development of additional evidence. Smith contends that scrutiny of witness testimony is an appropriate function of the trial court, and dismissal with prejudice is authorized by statute.

[11] It appears that, here, the trial court dismissed the information pursuant to Indiana Code Section 35-34-1-4(a)(11), which provides:

The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds: ...

(11) Any other ground that is a basis for dismissal as a matter of law.

The dismissal was premised upon the trial court's conclusion that the State could not prove its case because of A.B.'s apparent intent to provide exculpatory testimony at trial. However, "[a] pretrial motion to dismiss directed to the insufficiency of the evidence is improper, and a trial court errs when it grants such a motion." *State v. Helton*, 837 N.E.2d 1040, 1041 (Ind. Ct. App. 2005).

[12] As a general rule, facts alleged in an Information are to be taken as true when the trial court entertains a motion to dismiss. *State v. C.G.*, 949 N.E.2d 848, 850 (Ind. Ct. App. 2011), *trans. denied*. But Indiana Code Section 35-34-1-8 grants the trial court some discretion in determining predicate facts:

A motion to dismiss an indictment or information under section 4 of this chapter shall be in writing. The prosecutor must be given reasonable notice of a motion to dismiss. If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts. The sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant discloses the sources of the information and the grounds for the belief. If the motion is expressly or impliedly based upon the existence of any question of law, the motion shall be accompanied by a memorandum stating specifically the legal

question in issue. The defendant may also submit documentary evidence tending to support the allegations of the motion.

[13] Examining the foregoing statutory provision, a panel of this Court concluded: “It is apparent that our legislature has granted our trial courts a certain level of discretion to determine factual issues when considering motions to dismiss informations.” *State v. Fettig*, 884 N.E.2d 341, 345 (Ind. Ct. App. 2008). We do not disagree with this assessment. That said, however, trial court discretion does not extend to usurping the function of the jury. *See Helton*, 837 N.E.2d at 1042 (finding that even where there is an alleged “total absence of evidence” following victim recantation, such is not a basis for dismissal of an Information); *see also State v. C.G.*, 949 N.E.2d 848, 851 (Ind. Ct. App. 2011) (observing that an alleged victim’s decision to recant does not necessarily prevent a trial), *trans. denied*.

[14] Finally, we observe that there is not a total absence of evidence of criminality here. Officers performing a wellness check discovered an alleged domestic violence victim three hours away from her unlocked home with unsecured animals on the premises and broken glass in the living room. A.B. was emotional and provided conflicting accounts of how she came to be at the home of her former boyfriend’s parents. Her cell phone had been turned off and placed out of her reach; when officers retrieved the phone from a locked vehicle, A.B. used the phone to text her aunt and accuse Smith of current and historic domestic violence. The trial court misapplied the law in dismissing,

with prejudice, the Information charging Smith with Burglary, Kidnapping, and Criminal Confinement.

## Conclusion

[15] We reverse the dismissal of the Information and remand with instructions to the trial court to reinstate the charges against Smith.

[16] Reversed and remanded.

Mathias, J., and Altice, J., concur