IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs January 24, 2023 at Knoxville

STATE OF TENNESSEE v. KENTAVIS ANTWON JONES

Appeal from the Circuit Court for Madison County
No. 20-344B Donald H. Allen, Judge

No. W2022-00046-CCA-R3-CD

The defendant, Kentavis Antwon Jones, appeals his Madison County Circuit Court jury convictions of possession of cocaine with intent to sell or deliver, possession of marijuana with intent to sell or deliver, possession of a firearm by a convicted felon, possession of a firearm during the commission of a dangerous felony, theft, driving on a revoked license, and violation of the window tint law, arguing that the evidence was insufficient to support his convictions. The defendant also raises the issue of merger, arguing that the trial court properly merged his convictions. Because the trial court erred by merging certain firearm convictions and because the judgments contain clerical errors, we reverse the improper mergers and remand the case for the entry of corrected judgments. We affirm the trial court's judgments in all other respects.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed in Part; Reversed and Remanded in Part.

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR., and KYLE A. HIXSON, JJ., joined.

J. Colin Morris, Jackson, Tennessee for the appellant, Kentavis Antwon Jones.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Bradley F. Champine, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Madison County Grand Jury charged the defendant[1] with one count each of possession of .5 grams or more of cocaine with intent to sell; possession of .5 grams or

[1] The indictment also charged co-defendant Marcus Hurt, Jr.

more of cocaine with intent to deliver; possession of "not less than one-half ounce (14.75 grams)" of marijuana with intent to sell; possession of "not less than one-half ounce (14.75 grams)" of marijuana with intent to deliver; possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of cocaine with intent to sell); possession of a firearm with the intent to go armed during the commission of a dangerous felony (possession of cocaine with intent to deliver); possession of a firearm with the intent to go armed during the commission of a dangerous felony (possession of marijuana with intent to sell); possession of a firearm with the intent to go armed during the commission of a dangerous felony (possession of marijuana with intent to deliver); possession of drug paraphernalia; theft of property valued at $1,000 or less; possession of a firearm after having been convicted of aggravated assault; possession of a firearm after having been convicted of reckless endangerment with a dangerous weapon; possession of a firearm during the commission of a dangerous felony (possession of .5 grams or more of cocaine with intent to sell) after having been convicted of a felony involving the possession or employment of a firearm during the commission of or attempt to commit a dangerous felony; possession of a firearm during the commission of a dangerous felony (possession of .5 grams or more of cocaine with intent to deliver) after having been convicted of a felony involving the possession or employment of a firearm during the commission of or attempt to commit a dangerous felony; possession of a firearm during the commission of a dangerous felony (possession of marijuana with intent to sell) after having been convicted of a felony involving the possession or employment of a firearm during the commission of or attempt to commit a dangerous felony; possession of a firearm during the commission of a dangerous felony (possession marijuana with intent to deliver) after having been convicted of a felony involving the possession or employment of a firearm during the commission of or attempt to commit a dangerous felony; driving on a canceled, suspended, or revoked license; and violation of the window tint law.

The defendant and co-defendant were tried together, and the court bifurcated the proceeding to address separately the counts of the indictment charging the defendant with possession of a firearm during the commission of a dangerous felony after having been previously convicted of a felony involving the possession or employment of a firearm during the commission of a dangerous felony (Counts 14 through 17 of the indictment). The trial court renumbered the charges so as not to confuse the jury, making the charge of driving on a canceled, suspended, or revoked license Count 14, the charge of violation of the window tint law Count 15, and the bifurcated charges Counts 16 through 19. For the sake of consistency with the transcripts, we will refer to the counts as renumbered by the trial court; however, we note that the judgment forms must be corrected to reflect the counts as enumerated in the indictment.

During the July 2021 trial, Jackson Police Department ("JPD") Officer Joshua Keller testified that on October 12, 2019 at approximately 10:00 p.m., he

encountered the defendant and co-defendant on Berry Street in Jackson when he effectuated a traffic stop for "suspicion of a window tint violation." The vehicle pulled over, and when Officer Keller got out of his vehicle he "aligned my spotlight on the back glass of the window," which "wasn't tinted," and saw the defendant, who had been driving the vehicle, "swap seats with [the co-defendant]." When the officer approached the passenger's side of the vehicle, the co-defendant was in the driver's seat and the defendant was in the passenger's seat. He asked the defendant to exit the vehicle, and the defendant complied. At that point, Officer Keller saw "the little marijuana cylinder in the floorboard of the passenger seat." When the co-defendant exited the vehicle, Officer Keller "observed a marijuana grinder under his right leg." He detained both men and seized "[a]pproximately $680 in small denominations" from the defendant's person. Inside the cannister found in the floor of the passenger seat, Officer Keller "located three plastic bags of marijuana." The three bags weighed approximately 7.9 grams, 69.1 grams, and 2.5 grams respectively for a total weight of "[a]pproximately 80 grams" including the weight of the bags. Inside the cannister, Officer Keller also found "a small bag of cocaine that weighed about 3.3 grams." Using a field test, he determined the substance to be cocaine. He recovered a loaded firearm from "under the passenger seat of the vehicle" and a digital scale from the passenger side of the vehicle.

Officer Keller said that the approximate value of marijuana at that time was $10 to $20 per gram and estimated that the value of the marijuana recovered from the vehicle was $950 to $1,000. He estimated that the amount of cocaine he recovered had a street value of approximately $200. Based on the quantity of drugs, the fact that the marijuana was in three different bags, the amount of cash on the defendant's person, and the presence of the marijuana grinder and digital scale, Officer Keller determined that the drugs were intended to be sold and were not for personal use. He also said that the presence of the firearm in the vehicle "tells me that the individuals were participating in illegal activity and they needed a way to protect themselves."

Officer Keller checked the firearm's serial number and determined that it had been reported stolen. He also determined that the defendant had "multiple prior . . . felony convictions" that prohibited him from legally possessing a firearm. Certified copies of judgments that identified the defendant as having been convicted of two counts of aggravated assault and one count of reckless endangerment with a deadly weapon were exhibited to the officer's testimony. Officer Keller also determined that the defendant's driver's license was revoked, and a certified copy of the defendant's driving history was exhibited to his testimony. Officer Keller said that he used "an Enforcer 2 tint meter," which he described as "just a tint meter manufactured to go over the window and it shines a laser through the window to the other side of the meter and it indicates how much light is being let through," and determined that the light transmittance on the defendant's windows "[w]as 24 percent," which was lower than the permissible 35 percent.

During cross-examination by the co-defendant, Officer Keller acknowledged that a marijuana grinder and a digital scale could be used by both a buyer and seller of a drug.

During cross-examination by the defendant, Officer Keller said that the cocaine was found inside the same cannister as the marijuana on the passenger side of the vehicle. He said that he inferred that the defendant and the co-defendant possessed the drugs for the purpose of selling or distributing them "based on the totality of the circumstances." He reiterated that "[i]n my experience," one ounce of marijuana is most commonly associated with resell. He acknowledged that only the marijuana grinder was found on the driver's side of the vehicle and that the defendant was the person driving the vehicle until the two men switched seats after being pulled over.

James Canada testified that on July 4, 2019, a Smith & Wesson .9-millimeter firearm was stolen from his vehicle while parked at his home in Medina. He said that the next morning when he got into his vehicle he "noticed that there was things strewn about in my vehicle. The console was opened up and my firearm was missing." He said that he never gave anyone permission to take the firearm. He reported the theft to the Madison County Sheriff's Department. Mr. Canada identified the firearm recovered from the defendant's vehicle as the same one stolen from his vehicle based on the serial number.

Tennessee Bureau of Investigation ("TBI") Special Agent Carter Depew testified as an expert in drug identification and forensic chemistry. Through testing, she determined that the substances recovered in this case included 2.97 grams of cocaine and 54.16 grams of marijuana.

JPD Investigator Robert Pomeroy testified as an expert on street-level drug trafficking. He said that on October 12, 2019, he arrived at the scene after the defendant and the co-defendant were in custody to assist Officer Keller with processing the narcotics and money. He said that "street level marijuana around here is typically bought and sold in grams or quarter ounces or lower" and sells for "10 to 20 dollars a gram." He said that marijuana users will typically "buy a gram, [two] grams or [three] grams at a time and that will get them by for a couple of days" and that "typical users do not go out and buy ounces or two ounces at a time." He noted that the packaging of marijuana by dealers "is all over the place really," saying that he had seen it "served in small plastic baggies that are tied off," folded "up in a piece of paper," and handed out in "nuggets" but said that it was common to see dealers package marijuana as seen in this case, by keeping the supply in a bag and packaging smaller amounts in smaller bags for sale. He said that drug deals are cash-based and are "typically done in smaller denominations" because "drug dealers don't give change" and that the money found on the defendant in this case was consistent with drug dealing activities. He said that drug dealers commonly use digital scales to measure

their product for sale and use a marijuana grinder to grind the product into "a finer form where it's easier to roll" into "blunts or joints or whatever."

Investigator Pomeroy said that a typical cocaine user would use "maybe a tenth or two tenths of a gram" per "hit." Cocaine is "sold in hits or in a gram at the most. People don't typically buy a whole lot of cocaine because it's pretty expensive." Three grams of cocaine would be enough for "[a]t least 30 hits." He said that marijuana is a "depressant" and cocaine "is an upper," and that typical users would not "ride around with both of those at the same time not in that amount."

Investigator Pomeroy said that drug dealers almost always carried firearms as "a way to protect themselves," noting that "[d]rug dealers are very well known for robbing each other." He said that to determine whether someone is dealing drugs, "I look at the amount of narcotics they have," whether "they have more than one type of narcotic," whether "they have packaging material," whether "they have materials to weigh" the product, whether they have a firearm or "a way to protect all of the product they have," and "the amount of money they have on them." He said that in his opinion, the defendant and co-defendant intended to sell the marijuana and cocaine.

JPD Investigator Ashley Roberts testified that in a recorded telephone call placed from the jail by the defendant on October 13, 2019, the defendant said that if the co-defendant "claims the handgun," the co-defendant would face only a misdemeanor conviction and that the co-defendant could "take the strap and I'll take the dope." The defendant also said, "I can paper up a little something." Investigator Roberts explained that "strap" referred to "the handgun," and that "paper up" referred to paying "somebody to take a charge for them."

The State rested. After a *Momon* colloquy, both the defendant and the co-defendant elected not to testify and put on no proof.

On this evidence, the jury convicted the defendant of all offenses as charged.[2]

In the bifurcated proceeding to address the remaining four firearm charges against the defendant, Officer Keller identified a judgment of the defendant's prior conviction of employing a firearm during the commission of a dangerous felony, and the document was exhibited to the officer's testimony.

The State rested and the defendant did not put on any proof. The jury found

[2] The jury found the co-defendant guilty of the lesser included offenses of simple possession in Counts 1 through 4 and possession of drug paraphernalia in Count 9 and aquitted him of the remaining charges.

the defendant guilty as charged of four counts of possessing a firearm during the commission of a dangerous felony after having been previously convicted of possessing or employing a firearm during the commission of a dangerous felony.

During the sentencing hearing, the trial court merged Counts 1 and 2; Counts 3 and 4; Counts 5, 6, 7, 8, 16, 17, 18, and 19 (possession of firearm during commission of dangerous felony); and Counts 12 and 13 (possession of a weapon by a convicted felon). The trial court aligned the sentences in Counts 1, 2, 3, 4, 9, 10, 14, and 15 concurrently and the sentences for the firearm-related convictions in Counts 5, 6, 7, 8, 12, 13, 16, 17, 18, and 19 concurrently to each other and consecutively to the other counts for a total effective sentence of 31 years' incarceration. The court also ordered the sentences in this case to be served consecutively to the sentences in two prior cases. Based on the transcript of the sentencing hearing, we understand the trial court's intention regarding merger and sentences to be as follows:

Count[3]	**Conviction**	**Sentence**	**Merger**
Count 1	Possession of .5 grams or more of cocaine with intent to sell	16 years	
Count 2	Possession of .5 grams or more of cocaine with intent to deliver		Merge w/ Ct. 1
Count 3	Possession of not less than one-half ounce (14.75 grams) of marijuana with intent to sell	4 years; concurrent w/ Ct. 1	
Count 4	Possession of not less than one-half ounce (14.75 grams) of marijuana with intent to deliver		Merge w/ Ct. 3
Count 5	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of cocaine with intent to sell)	8 years; consecutive to Ct. 1	
Count 6	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of cocaine with intent to deliver)	8 years; consecutive to Ct. 1	Merge w/ Ct. 5
Count 7	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of	8 years; consecutive to Ct. 1	Merge w/ Ct. 5

[3] These numbers correspond to the renumbered counts, consistent with the numbers used by the court at trial and sentencing. Count 11 of the indictment charged the co-defendant only.

	marijuana with intent to sell)		
Count 8	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of marijuana with intent to deliver)	8 years; consecutive to Ct. 1	Merge w/ Ct. 5
Count 9	Possession of drug paraphernalia	11 months, 29 days; concurrent w/ Ct. 1	
Count 10	Theft of property valued at $1,000 or less from James Canada	11 months, 29 days; concurrent w/ Ct. 1	
Count 12	Possession of a firearm after having been convicted of a felony crime of violence or a felony involving the use of a deadly weapon (aggravated assault in Madison Co. case #13-304)	15 years; consecutive to Ct. 1 and concurrent w/ Ct. 5	
Count 13	Possession of a firearm after having been convicted of a felony crime of violence or a felony involving the use of a deadly weapon (reckless endangerment in Madison Co. case #13-304)		Merge w/ Ct. 12
Count 14	Driving on a canceled, suspended, or revoked license	6 months; concurrent w/ Count 1	
Count 15	Violation of the window tint law	$50 fine	
Count 16	Possession of a firearm during the commission of a dangerous felony (possession of cocaine with intent to sell) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony	15 years; consecutive to Count 1	Merge w/ Count 5
Count 17	Possession of a firearm during the commission of a dangerous felony (possession of cocaine with intent to deliver) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony	15 years; consecutive w/ Ct. 1	Merge w/ Ct 5 and Ct. 16
Count 18	Possession of a firearm during the	15 years;	Merge w/ Ct. 5

	commission of a dangerous felony (possession of marijuana with intent to sell) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony	consecutive w/ Ct. 1	and Ct. 16
Count 19	Possession of a firearm during the commission of a dangerous felony (possession of marijuana with intent to deliver) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony	15 years; consecutive w/ Ct. 1	Merge w/ Ct. 5 and Ct. 16

Following a timely but unsuccessful motion for a new trial, the defendant filed a timely notice of appeal. In this appeal, the defendant argues that the evidence is insufficient to support the conviction. The defendant also raised the issue of merger but argued that the trial court properly merged the appropriate convictions. The State challenges the merging of certain firearm offenses.

I. Sufficiency

The defendant challenges the sufficiency of the evidence for all convictions other than those for possession of drug paraphernalia and violation of the window tint law. As to the drug convictions, the defendant argues that he possessed the drugs for personal use and that his "verdict should have been the same as his Co-Defendant's." As to the convictions for possession of a firearm with the intent to go armed during the commission of a dangerous felony, he argues that "the jury should have found him guilty of misdemeanors" in the underlying drug charges. As to the theft conviction, the defendant argues that the State failed to prove the elements of the offense. As to the convictions for possession of a firearm after having previously been convicted of a prior felony, the defendant asserts that the State failed to prove that he was in constructive or actual possession of the firearm. As to the conviction for driving on a canceled, suspended, or revoked license, the defendant argues that he was not driving the vehicle and that the jury should not have believed the officer's testimony that he saw the defendant and co-defendant switch seats.

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—in the light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

It is well-established that consistent verdicts between co-defendants in a joint trial "is not required, so long as 'the evidence establishes guilt of the offense upon which the conviction was returned.'" *State v. Quincy Davis*, No. W2000-01399-CCA-R3-CD, 2001 WL 912787, at *2 (Tenn. Crim. App., Jackson, Aug. 10, 2001) (quoting *Wiggins v. State*, 498 S.W.2d 92, 94 (Tenn. 1973)); *see also Harris v. Rivera*, 454 U.S. 339, 345 (1981) ("Inconsistency in a verdict is not sufficient reason for setting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one defendant and also with respect to verdicts that treat codefendants in a joint trial inconsistently." (citations omitted)). That the co-defendant was convicted of lesser offenses than the defendant has no bearing on whether the evidence sufficiently supports the defendant's convictions.

As relevant to this case, "It is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to . . . deliver or sell the controlled substance." T.C.A. § 39-17-417(a)(4). Cocaine is a Schedule II controlled substance, *Id.* § 39-17-408(b)(4), and marijuana is a Schedule VI controlled substance, *Id.* § 39-17-415(a)(1). The term "possession" embraces both actual and constructive possession. *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). For a person to "constructively possess" a drug, that person must have "the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or through others." *Id.* (quoting *State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981)). Additionally, "it may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." T.C.A. § 39-17-419.

As to the firearm offenses, "[a] person commits an offense who unlawfully possesses a firearm . . . and . . . [h]as been convicted of a felony crime of violence, an attempt to commit a felony crime of violence, or a felony involving use of a deadly weapon." *Id.* § 39-17-1307(b)(1)(A). A crime of violence includes, among other things,

aggravated assault. *Id.* § 39-17-1301(3). Moreover, "[i]t is an offense to possess a firearm . . . with the intent to go armed during the commission of or attempt to commit a dangerous felony." *Id.* 39-17-1324(a). "A felony involving . . . possession with intent to sell, manufacture or deliver a controlled substance" constitutes a "[d]angerous felony." *Id.* § 39-17-1324(i)(1)(L). A person convicted of possessing a firearm with the intent to go armed during the commission of a dangerous felony "who has a prior conviction under this section shall be sentenced to incarceration with the department of correction for not less than fifteen (15) years" and "shall serve one hundred percent (100%) of the sentence imposed." *Id.* § 39-17-1324(j). As with drugs, possession of a firearm "may be actual or constructive." *Key v. State*, 563 S.W.2d 184, 188 (Tenn. 1978). "Constructive . . . possession may occur only where the personally unarmed participant has the power and ability to exercise control over the firearm." *Id.*

"A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103. Theft of property is "[a] Class A misdemeanor if the value of the property . . . obtained is one thousand dollars ($1,000) or less." *Id.* § 39-14-105(a)(1). The jury may infer from the defendant's possession of recently stolen property that he had "knowledge that the property was stolen." *State v. James*, 315 S.W.3d 440, 451 (Tenn. 2010); *see also State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995) ("Possession of recently stolen goods gives rise to an inference that the possessor has stolen them." (citing *Bush v. State*, 541 S.W.2d 391, 394 (Tenn. 1976)). "Whether property may be considered as 'recently' stolen depends upon the nature of the property and all of the facts and circumstances shown by the evidence in the case." *State v. Anderson*, 738 S.W.2d 200, 202 (Tenn. Crim. App. 1987) (citing *Bush*, 541 S.W.2d at 397 n. 5); *see also* 89 A.L.R.3d 1202, § 3 (identifying cases in which courts have held "that a defendant's possession of a stolen gun after time lapses of" up to "[three] years from the date of the theft was 'recent' within the meaning of the rule allowing an inference of guilt from the defendant's possession of recently stolen property.")

As to the defendant's driving conviction, it is an offense for a person to drive a motor vehicle on a public roadway "at a time when the person's privilege to do so is cancelled, suspended, or revoked." T.C.A. § 55-50-504(a)(1).

In our view, the evidence adduced at trial sufficiently supports each of the defendant's convictions. As stated above, the jury was not required to render consistent verdicts between the defendant and co-defendant. The evidence taken in the light most favorable to the State showed that the defendant was driving the vehicle when Officer Keller effectuated a traffic stop and that the defendant's driver's license was revoked at the time. The defendant and co-defendant switched seats to where the defendant was in the passenger's seat when Officer Keller approached. That the defendant believes that Officer

Keller's testimony was inaccurate and that the jury should not have believed the officer when he said that he saw the defendant and co-defendant switch seats is immaterial. The jury resolved any issues of credibility as was their prerogative. This evidence sufficiently supports the defendant's conviction of driving on a revoked license.

The evidence further established that a container with 2.96 grams of cocaine and 54.16 grams of marijuana was discovered in the floor of the passenger's seat. From this evidence, the jury was free to infer that the defendant constructively possessed the drugs. *See State v. Gonzalo Moran Garcia*, No. M2000-01760-CCA-R3-CD, 2002 WL 242358, at *35 (Tenn. Crim. App., Nashville, Feb. 20, 2002) ("[A] defendant's ownership *or control over* a vehicle in which the contraband is secreted will support a finding of constructive possession and, hence, knowing possession." (citations omitted)). Moreover, Detective Pomeroy's testimony established that the quantity of drugs was more than what was commonly carried by a typical user and that the quantity of drugs, the presence of a digital scale, marijuana grinder, and firearm, the packaging of the marijuana, and the defendant's having a sum of cash in small denominations indicated that the drugs were intended for sale or distribution. This evidence sufficiently supports the defendant's drug-related convictions.

The evidence also established that a loaded Smith & Wesson .9-millimeter handgun was found under the passenger's seat of the vehicle. This is sufficient to support a finding that the defendant constructively possessed the firearm. *See State v. Buddy Wayne Mooney*, No. W2019-01309-CCA-R3-CD, 2020 WL 2765847, at *4 (Tenn. Crim. App., Jackson, May 27, 2020) (evidence sufficient to support constructive possession when firearm was found inside a bag under the passenger's seat of a vehicle and defendant was seated in the driver's seat). As stated above, the evidence supports the jury's conclusion that the defendant possessed the drugs with intent to sell or deliver, a dangerous felony. *See* T.C.A. § 39-17-1324(i)(1)(L). Additional evidence established that the defendant had prior convictions for aggravated assault, Class E felony reckless endangerment, and employment of a firearm during the commission of a dangerous felony. Reckless endangerment is a Class E felony when "committed with a deadly weapon." T.C.A. § 39-17-1301(b)(2). This evidence sufficiently supports the defendant's firearms convictions.

Finally, the evidence established that the firearm recovered in this case was the same one stolen from Mr. Canada three months prior. The jury was free to conclude that the firearm was recently stolen and to infer from the defendant's constructive possession of it that he either stole the firearm or knew that he possessed it without the owner's consent to do so. Thus, the evidence sufficiently supports the defendant's conviction for theft of property.

II. Merger

The defendant raised the issue of merger in his brief but argues that the trial court did not err in merging his convictions. The State contends that the trial court erred by merging Counts 7 and 8 into Count 5 and notes clerical errors on the judgment forms. During the sentencing hearing, the trial court noted that Counts 5 through 8 "are going to be merged into the greater charges which are the convictions in Counts 16, 17 and 18 and 19" to form a single conviction.

"It is well settled in Tennessee that, under certain circumstances, two convictions or dual guilty verdicts must merge into a single conviction to avoid double jeopardy implications." *State v. Berry*, 503 S.W.3d 360, 362 (Tenn. 2015). "Whether multiple convictions violate double jeopardy is a mixed question of law and fact that we review de novo with no presumption of correctness." *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014) (citing *State v. Thompson*, 285 S.W.3d 840, 846 (Tenn. 2009)).

Both the federal and state constitutions protect an accused from being "twice put in jeopardy of life or limb" for "the same offence." U.S. Const. amend. V; Tenn. Const. art. 1, sec. 10. The state and federal provisions, which are quite similar in verbiage, have been given identical interpretations. *See State v. Waterhouse*, 8 Tenn. (1 Mart. & Yer.) 278, 284 (1827) ("[W]e did not feel ourselves warranted in giving [the double jeopardy provision of the state constitution] a construction different from that given to the constitution of the United States, by the tribunal possessing the power, (and of pre-eminent qualifications) to fix the construction of that instrument."). The United States Supreme Court has observed of the double jeopardy clause:

> Our cases have recognized that the Clause embodies two vitally important interests. The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." The second interest is the preservation of "the finality of judgments."

Yeager v. United States, 557 U.S. 110, 117-18 (2009) (citations omitted). To these ends, our state supreme court has observed that the Double Jeopardy Clause provides "three separate protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense." *State v. Watkins*,

362 S.W.3d 530, 541 (Tenn. 2012).

At issue here is the third category, "protection against multiple punishments for the same offense." *Id.* "[I]n single prosecution cases, the double jeopardy prohibition against multiple punishments functions to prevent prosecutors and courts from exceeding the punishment legislatively authorized." *Id.* at 542. Claims of this type "ordinarily fall into one of two categories, frequently referred to as 'unit-of-prosecution' and 'multiple description' claims." *Id.* at 543.

"When addressing unit-of-prosecution claims, courts must determine 'what the legislature intended to be a single unit of conduct for purposes of a single conviction and punishment.'" *Watkins*, 362 S.W.3d at 543 (citations omitted). To determine the appropriate unit of prosecution, "we first examine the statute in question to determine if the statutory unit of prosecution has been expressly identified." *State v. Smith*, 436 S.W.3d 751, 768 (Tenn. 2014) (citations omitted). "If the unit of prosecution is clear from the statute, there is no need to review the history of the statute and other legislative history." *State v. Hogg*, 448 S.W.3d 877, 886 (Tenn. 2014). If the unit of prosecution is not clear from the plain language of the statute, "we review the history of the statute. Finally, we perform a factual analysis as to the unit of prosecution." *Smith*, 436 S.W.3d at 768 (citation omitted). A reviewing court must "apply the 'rule of lenity' when resolving unit-of-prosecution claims, meaning that any ambiguity in defining the unit of conduct for prosecution is resolved against the conclusion that the legislature intended to authorize multiple units of prosecution." *Watkins*, 362 S.W.3d at 543 (citations omitted).

Our supreme court has determined the unit of prosecution applicable to Code section 39-17-1324(b) "to be each act of employing a firearm during the commission of or attempt to commit a dangerous felony." *State v. Harbison*, 539 S.W.3d 149, 168-69 (Tenn. 2018) ("Nothing in the language of the statute indicates that the legislature intended to limit the unit of prosecution to the number of firearms employed by a defendant."). Stated differently, "the General Assembly has authorized a separate employing a firearm charge for each dangerous felony committed." *Id.*

Because, here, the defendant committed two dangerous felonies—possession of cocaine with intent to sell or deliver and possession of marijuana with intent to sell or deliver—while possessing the firearm, his dual convictions of possessing a firearm during the commission of a dangerous felony in Counts 5 and 7 do not violate the principles of double jeopardy. Consequently, the trial court erred by merging Count 7 into Count 5 and the corresponding sentence enhancements of Count 18 into Count 16.[4] Counts 5 and 7

[4] The trial court properly merged Count 6 into Count 5, Count 8 into Count 7, Count 17 into Count 16, and Count 19 into Count 18.

should merge into the greater offenses in Counts 16 and 18 respectively for a total of two convictions of possessing a firearm during the commission of a dangerous felony.

Because the trial court imposed sentences for the improperly merged counts and said that the sentences for all firearms convictions were to be served concurrently to each other and consecutively to the remaining counts, a new sentencing hearing is not necessary.

As the State also points out, the judgment forms erroneously identify the counts according to the renumbered charges at trial rather than as enumerated in the indictment. The judgment forms "must correctly reflect the charges as presented in the indictment and the disposition for each indicted offense." *State v. Marvin Dewayne Bullock*, No. E2021-00661-CCA-R3-CD, 2022 WL 3012460, at *4 (Tenn. Crim. App., Knoxville, July 29, 2022). Upon remand, the trial court should correct the clerical errors in the judgment forms to reflect the counts as enumerated in the indictment. *See* Tenn. R. Crim. P. 36 ("[T]he court may at any time correct clerical mistakes in judgments . . . .").

Upon correcting the improperly merged counts and the erroneously numbered counts to correspond with the counts as charged in the indictment, the corrected judgment forms should reflect the following convictions and sentences:

Count[5]	**Conviction**	**Sentence**	**Merger**
Count 1	Possession of .5 grams or more of cocaine with intent to sell	16 years	
Count 2	Possession of .5 grams or more of cocaine with intent to deliver		Merge w/ Ct. 1
Count 3	Possession of not less than one-half ounce (14.75 grams) of marijuana with intent to sell	4 years; concurrent w/ Ct. 1	
Count 4	Possession of not less than one-half ounce (14.75 grams) of marijuana with intent to deliver		Merge w/ Ct. 3
Count 5	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of cocaine with intent to sell)	8 years (subsumed into Ct. 14)	Merge w/ Ct. 14
Count 6	Possession of a firearm with intent to go armed during the commission of a		Merge w/ Ct. 5

[5] The Counts here reflect the proper numbering consistent with the indictment.

	dangerous felony (possession of cocaine with intent to deliver)		
Count 7	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of marijuana with intent to sell)	8 years (subsumed into Ct. 16)	Merge w/ Ct. 16
Count 8	Possession of a firearm with intent to go armed during the commission of a dangerous felony (possession of marijuana with intent to deliver)		Merge w/ Ct. 7
Count 9	Possession of drug paraphernalia	11 months, 29 days; concurrent w/ Ct. 1	
Count 10	Theft of property valued at $1,000 or less from James Canada	11 months, 29 days; concurrent w/ Ct. 1	
Count 12	Possession of a firearm after having been convicted of a felony crime of violence or a felony involving the use of a deadly weapon (aggravated assault in Madison Co. case #13-304)	15 years; consecutive to Ct. 1	
Count 13	Possession of a firearm after having been convicted of a felony crime of violence or a felony involving the use of a deadly weapon (reckless endangerment w/ a deadly weapon in Madison Co. case #13-304)		Merge w/ Ct. 12
Count 14	Possession of a firearm during the commission of a dangerous felony (possession of cocaine with intent to sell) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony	15 years; consecutive to Ct. 1 and concurrent w/ Ct. 12	
Count 15	Possession of a firearm during the commission of a dangerous felony (possession of cocaine with intent to deliver) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony		Merge w/ Ct. 14

Count 16	Possession of a firearm during the commission of a dangerous felony (possession of marijuana with intent to sell) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony	15 years; consecutive to Ct. 1 and concurrent w/ Cts. 12 and 14	
Count 17	Possession of a firearm during the commission of a dangerous felony (possession of marijuana with intent to deliver) after having been previously convicted of a felony involving the employment of a firearm during the commission of a dangerous felony		Merge w/ Ct. 16
Count 18	Driving on a canceled, suspended, or revoked license	6 months; concurrent w/ Ct. 1	
Count 19	Violation of the window tint law	$50 fine	

Conclusion

Accordingly, the judgment of the trial court is affirmed as to the sufficiency of the evidence and reversed as to the merging of Counts 7 and 5 and Counts 18 and 16. We remand the case to the trial court for the entry of corrected judgments reflecting proper merger and enumerating the counts as charged in the indictment.

_____

JAMES CURWOOD WITT, JR., PRESIDING JUDGE