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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CURTIS LEE MOORE, DOC #301998,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-1842

Opinion filed May 27, 2020.

Appeal from the Circuit Court for Hendry County; James D. Sloan, Judge.

Howard L. Dimmig, II, Public Defender, and Karen M. Kinney, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Donna S. Koch, Assistant Attorney General, Tampa, for Appellee.

SALARIO, Judge.

Curtis Moore appeals from his convictions and sentences for felony grand theft of a motor vehicle and misdemeanor possession of paraphernalia with intent to use. The alleged stolen property was Mr. Moore's friend's truck, and the alleged paraphernalia was a glass pipe used to smoke crack cocaine. We reverse the

conviction and sentence on the grand theft charge because the trial court erroneously gave an instruction on the inference of knowledge arising from possession of recently stolen property. We affirm the conviction for possession of paraphernalia and write to explain why, as to the paraphernalia count, the evidence was sufficient to establish that Mr. Moore in fact intended to use the glass crack pipe to smoke crack. Mr. Moore was also convicted of felony driving with license suspended or revoked (third offense) but raises no appellate issue with that charge, which we affirm without comment.

I.

The facts of this case center on allegations that Mr. Moore took a truck from an old school chum at gunpoint. On the night in question, the victim and Mr. Moore encountered each other at a local hangout. The victim arrived in his truck. He had been drinking alcohol before he arrived, and he continued to drink while there. Late in the evening, the two men decided to leave together—with Mr. Moore driving the victim's truck. The pair drove around more or less aimlessly for over an hour, eventually going to the neighborhood where the victim's fiancée lived. What happened next is what led to the charges against Mr. Moore and was disputed at the trial.

According to the victim, when the men arrived at the fiancée's house early in the morning, Mr. Moore pulled a gun from a bag he had been carrying, pointed it at the victim, and ordered him out of the truck. When the victim complied, Mr. Moore drove away. The victim then walked to his fiancée's home and called the police.

Based on the information provided by the victim, the police found Mr. Moore, who was still driving the truck, and conducted a traffic stop. Mr. Moore was driving on a suspended license and was ordered out of the truck for arrest. What was identified at trial as a glass crack pipe was found in his pocket. A handgun was found

under the driver's seat. Mr. Moore was charged with robbery with a firearm, felony driving on a suspended license, and possession of paraphernalia with intent to use.

The case proceeded to a jury trial. Mr. Moore did not contest the State's evidence on the suspended license and paraphernalia charges. Instead, he focused on the robbery with a firearm charge, which carried the most severe potential sentence. Mr. Moore defended against that charge on the theory that the victim agreed to his driving the truck because the victim was drunk. Mr. Moore argued that he did not take the truck from the victim but merely dropped him off at his fiancée's house and that the gun found under the driver's seat was the victim's, not Mr. Moore's. The defense moved for a judgment of acquittal solely on the robbery charge, which the trial court denied.

Mr. Moore's strategy of focusing on the more severe robbery charge largely worked. As to the robbery with a firearm count, the jury returned a guilty verdict only of grand theft of a motor vehicle—the lowest lesser included offense upon which it was instructed and one carrying a far less severe potential sentence. Compare § 812.014(2)(c)(6), Fla. Stat. (2016) (identifying grand theft of a motor vehicle as a third-degree felony), with § 812.13(2)(a) (identifying robbery with a firearm as a first-degree felony punishable by life). The jury also convicted Mr. Moore of driving on a suspended license and possession of paraphernalia. The trial court imposed concurrent forty-eight-month sentences on the grand theft and driving on a suspended license counts and a concurrent 364-day sentence on the paraphernalia count.

II.

Mr. Moore's principal argument in this timely appeal deals with the jury instructions on the lesser included grand theft offense of which he was convicted. He asserts that the trial court committed fundamental error when it gave a standard

instruction that proof of the unexplained possession of recently stolen property gives rise to an inference that the person in possession knew or should have known that the property had been stolen.[1] See Fla. Std. Jury Instr. (Crim.) 14.1.

The standard instruction the trial court gave is based upon and worded identically to section 812.022(2), which provides in relevant part that "proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen." As the text of this statute makes clear, there are two evidentiary predicates to the inference of knowledge the statute creates: (1) that the property at issue was in fact recently stolen and (2) that the defendant was in fact in possession of the property. See A.L. v. State, 275 So. 3d 819, 822-23 (Fla. 2d DCA 2019); Bronson v. State, 926 So. 2d 480, 483 (Fla. 2d DCA 2006). Mr. Moore argues that the first predicate element was very much in dispute in this case and, for that reason, that giving the instruction was likely to mislead the jury into believing that the truck was stolen, effectively nullifying his defense that he took it with the victim's consent.

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[1]Left to our own devices, we would have applied an abuse-of-discretion standard of review. See Burnette v. State, 901 So. 2d 925, 928 (Fla. 2d DCA 2005) ("The giving . . . of a proposed jury instruction is reviewed . . . under an abuse of discretion standard." (citing McKenzie v. State, 830 So. 2d 234, 236 (Fla. 4th DCA 2002))); Bozeman v. State, 931 So. 2d 1006, 1008 (Fla. 4th DCA 2006) (reviewing a trial court's decision to give the standard instruction on the inference of knowledge for abuse of discretion (citing Lewis v. State, 693 So. 2d 1055, 1058 (Fla. 4th DCA 1997))). Mr. Moore's comments at the charge conference were facially ambiguous. But the trial court apparently understood them (possibly based on a previous conversation with defense counsel) to be an objection, stating: "I think that applies. In this particular case they indicated that he was stopped within an hour after it was reported as stolen, so I think that instruction is to remain." Regardless, in this instance, the difference in our standard of review does not affect the outcome.

Mr. Moore's argument is well taken. In Consalvo v. State, 697 So. 2d 805, 815 (Fla. 1996), the supreme court explained that the standard instruction the trial court gave "applies only where the property is undisputedly stolen and the question is who stole it." (Emphasis added.) In reaching that conclusion, the court relied on the Fourth District's decision in Jones v. State, 495 So. 2d 856 (Fla. 4th DCA 1986), which is instructive here. In Jones, the defendant was charged with grand theft of a car, which he had taken from a used car dealer. Id. at 857. The defendant claimed that he had taken the car pursuant to a purchase agreement and had even left his old truck with the dealer as part of the purchase price. Id. The State, in contrast, contended that the dealer had only agreed to allow the defendant to test-drive the car and that no purchase agreement had been finalized. Id. The trial court gave the standard instruction on the inference of knowledge arising from possession of stolen property, and the jury convicted. Id.

The Fourth District held that it was improper to give the instruction because "[t]he only issue at trial was whether Jones intended to steal the car or took it innocently, in other words, whether the car was stolen." Id. In such a case, giving the instruction risks misleading the jury into accepting as a settled fact that which is disputed—namely whether the property (in Jones, the car) was really stolen.

> The challenged jury instruction, however, states as a fact that the property was stolen and establishes the presumption that the person in possession was the thief. Such an instruction serves no purpose in a case such as this. "[W]here there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken . . . the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from . . . the testimony." Curington v. State, 80 Fla. 494, 86 So. 344, 345 (1920). Under the instruction, before the jury could make the presumption, it would have to

> find that the property was stolen. If the jury found that the car was stolen, however, it would find Jones guilty and the case would be resolved. In other words, there would then be no need for the presumption. The presumption applies in a different type of case, that is, where the property is undisputably stolen and the question is who stole it. The only possible effect of the instruction here was to allow the jury to presume Jones was guilty because he was in possession of the car.

Id. (alterations in original) (emphasis added); see also Horvath v. State, 217 So. 3d 1045, 1046-48 (Fla. 4th DCA 2017) (reversing convictions for dealing in stolen property based on the trial court's decision to give the instruction on the inference of knowledge where the issue at trial was whether the property had been lent to the defendant or whether it had been stolen).

The idea that an instruction on the inference of knowledge is appropriate in cases where there is a question as to who stole the property, and not in cases where the question is whether the property was stolen at all, makes sense. After all, what section 812.022(2) does is to allow the State "to show by inference the accused's knowledge of the stolen nature of the property and the accused's intent, which are essential elements of the offense of theft." Boone v. State, 711 So. 2d 594, 596 (Fla. 1st DCA 1998). But knowledge and intent are generally not issues when there is no dispute about who took the property and the question is whether they took it by stealing it or, instead, by some innocent means. In such a case, if the jury finds that the property is stolen, it will generally follow that the defendant knew it was stolen and intended to steal it. And if the jury finds that the property was not stolen, questions of knowledge and intent are not at all likely to be material. In a case where the dispute is over whether the property was stolen at all, an instruction that "proof of possession of property recently stolen" gives rise to an inference of knowledge that is substantially

likely to mislead a jury into thinking that the key disputed question of whether the property has been stolen has been proved.[2] See Jones, 495 So. 2d at 857; cf. Consalvo, 697 So. 2d at 815 (holding that the danger of misleading the jury is not present where all of the trial evidence showed that the property was stolen and there was thus no issue as to whether it was taken innocently).

This logic applies fully here. There was no question in this case that Mr. Moore took the victim's truck. The only question was whether he took it by stealing it, as the victim testified, or with the victim's consent, as Mr. Moore argued. As in cases like Jones and Horvath, telling the jury that "proof of possession of property recently stolen" permitted them to infer that Mr. Moore knew it was stolen was substantially likely to mislead the jury into thinking that the trial court had determined the truck to have been stolen. On the facts of this case, giving the instruction on the inference arising from possession of recently stolen property was fundamental error because it negated Mr. Moore's defense to the charge—namely, that he had possession of the truck with the victim's consent. See Grant v. State, 266 So. 3d 203, 205 (Fla. 4th DCA 2019) ("Fundamental error is error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. An erroneous instruction constitutes fundamental error if it negates the defendant's sole defense." (quoting Gregory v. State, 141 So. 3d 651, 654 (Fla. 4th DCA 2014))). Accordingly, we must reverse the conviction and sentence for grand theft and remand for a new trial on that count.

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[2]We acknowledge the possibility that there might be a case in which identity and whether the property was stolen are both at issue and express no opinion on whether the standard instruction should be given—either as-is or in some modified form—in such a case.

III.

Mr. Moore raises two issues concerning his conviction for possession of paraphernalia that relate to the element of his intent to use the pipe found in his pocket. We find no basis to reverse in either issue but write to address Mr. Moore's argument that the evidence was not sufficient to demonstrate that he intended to use the paraphernalia at issue—what was described as a glass crack pipe—to ingest a controlled substance. Taken as true, the State's evidence showed that Mr. Moore was found in the wee hours of the morning driving a stolen truck on a suspended license with a handgun under the driver's seat and with what everyone agreed was a crack pipe, the sole or predominant purpose of which is smoking crack, in his pocket. Under the applicable legal standards, that was enough to get the State to a jury.

To explain why, we begin with the text of the statutes that create the offense of possession of paraphernalia with intent to use. Section 893.147(1)(b), Florida Statutes (2016), makes it a first-degree misdemeanor "to possess with intent to use[] drug paraphernalia" "[t]o inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." The term "drug paraphernalia" is defined in section 893.145(12) to include "[o]bjects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing controlled substances . . . into the human body." Section 893.145(12) includes some specific items in this definition, such as pipes, bongs, cocaine spoons, chillers, tanks, balloons, and duct tape. To aid in determining whether an item is drug paraphernalia, section 893.146 identifies thirteen nonexclusive factors, which include things like the proximity of the object to controlled substances, descriptive materials accompanying the object, and the existence of legitimate uses for the object. To prove possession with intent to use, then, the State is

required to introduce sufficient evidence showing both that the defendant possessed an item meeting the statutory definition of paraphernalia and that he or she did so with the intent to ingest a controlled substance. See Fla. Std. Jury Instr. (Crim.) 25.14.

Mr. Moore does not dispute that the glass pipe found in his pocket meets the statutory definition of paraphernalia or that he was in actual possession of it. He contends only that the evidence was insufficient to prove that he intended to use it to ingest a controlled substance. In making this argument, Mr. Moore "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the [State] that a jury might fairly and reasonably infer from the evidence."[3] Yudin v. State, 117 So. 3d 457, 459 (Fla. 2d DCA 2013) (quoting Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974)). The question for us is whether, "viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). And it is important in this case to remember that questions of intent are especially suited for jury determinations because intent is rarely proved with direct evidence and "reasonable men may differ in determining intent when taking into consideration the surrounding circumstances." State v. Tovar, 110 So. 3d 33, 36 (Fla. 2d DCA 2013) (quoting State v. Herron, 70 So. 3d 705, 706 (Fla. 4th DCA 2011)).

[3]Mr. Moore did not preserve his issue with the sufficiency of the evidence by making a motion for judgment of acquittal in the trial court. Thus, we may reverse only if the matter rises to the level of fundamental error. See Monroe v. State, 191 So. 3d 395, 401 (Fla. 2016). Legal insufficiency in a criminal case is fundamental error where the evidence is insufficient to establish that a crime was committed at all. Id. Here, if the evidence is insufficient to prove possession of paraphernalia with intent to use, there is no other crime the evidence establishes.

In this case, the State's evidence, if believed, showed that Mr. Moore was driving a stolen truck on a suspended license and that a handgun was found in the truck and a glass pipe was found on his person when he was arrested.[4] The deputy who arrested Mr. Moore testified that (1) the glass pipe was a crack pipe, that (2) the pipe was used for the purpose of smoking crack cocaine, and that (3) he knew these things based on his training and experience as a law enforcement officer. The deputy did not testify either on direct or cross that the pipe had any purpose other than drug use. And perhaps as a part of Mr. Moore's largely successful defense strategy to throw everything at the substantially more serious robbery charge, the defense all but conceded the paraphernalia charge, telling the jury in closing "was that crack pipe, was that pipe in his pocket. Yes, absolutely true."[5] This is thus a case where there was no indication in the evidence and no argument that the pipe had any use other than the one the State's evidence proved—smoking crack cocaine.

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[4]We recognize that we have reversed Mr. Moore's conviction on the grand theft count because the trial court gave the jury an instruction that essentially assumed that the truck was stolen. But when we talk about the sufficiency of the evidence, as explained in the text, we are talking about what the State's evidence would have allowed a reasonable jury to take as established. And the evidence here would have permitted the jury to conclude that Mr. Moore stole the truck.

[5]We have considered whether this amounted to a waiver of any objection to the sufficiency of the State's evidence supporting the possession charge on appeal. At least in the jury-instruction context, the cases seem to require an express concession that an element is not in dispute to waive a fundamental error. See, e.g., Griffin v. State, 160 So. 3d 63, 68 (Fla. 2015) ("It defies logic to conclude that expressly disputing the identity of the perpetrator and remaining silent on the remaining elements of the crime would concede all the elements but identity."), receded from on other grounds in Knight v. State, 286 So. 3d 147, 153-54 (Fla. 2019); Beharry v. State, 168 So. 3d 263, 264 (Fla. 5th DCA 2015) ("Unknowing acquiescence to the instruction does not constitute invited error or a waiver of fundamental error."). Here, there was no express concession on the element of intent. Because we affirm on the grounds stated in the text, we need not address whether an express concession is required in this context.

That said, as Mr. Moore correctly observes, there was no evidence of any drug residue in or on the pipe, nor were any drugs found in the truck or on Mr. Moore himself. For that reason, he argues that the evidence was insufficient to permit the jury to infer that he intended to use the glass pipe to smoke crack. And, as Mr. Moore points out, there are in fact cases holding that the possession of a pipe that can be used to ingest controlled substances—without evidence of drug residue or other evidence directly connecting the device to the use of drugs—is insufficient to prove a defendant's intent to use the pipe for that purpose. See M.M. v. State, 152 So. 3d 121, 123-24 (Fla. 3d DCA 2014); Goodroe v. State, 812 So. 2d 586, 588 (Fla. 4th DCA 2002); Waters v. State, 694 So. 2d 148, 149 (Fla. 1st DCA 1997); Nixon v. State, 680 So. 2d 506, 507 (Fla. 1st DCA 1996). Here, however, the evidence concerning the characteristics of the pipe taken together with the evidence of the circumstances in which Mr. Moore was found with it were, taking all inferences from those facts in favor of the State, sufficient to permit the jury to determine that he intended to use the pipe to smoke crack.

In assessing whether an item of paraphernalia was intended to be used to ingest controlled substances, the characteristics of the item itself may or may not say something important. On the one hand, many items with ample legitimate uses can get caught up in the statutory definition of paraphernalia. Take a balloon or duct tape, for example. Those items might be used with controlled substances, which is presumably why they are specifically listed in section 893.145(12). But they are also very frequently used to celebrate birthdays (balloons) or to hold all sorts of things together (duct tape). If all the jury has to go on to determine intent is the item itself, the evidence is obviously insufficient. Why? Because nothing in the evidence permits the jury to separate the illicit uses of the item from its legitimate uses so as to conclude beyond a reasonable

doubt that the defendant intended to use the item for an illicit use. Something else—evidence of drug residue or proximity to drugs, for example—would be necessary to connect the dots between the item falling within the definition of paraphernalia and the defendant having an intent to use the item with controlled substances. See, e.g., Chandler v. State, 185 So. 3d 1286, 1287-88 (Fla. 5th DCA 2016) (holding that "officers' testimony that drug users commonly use rolled-up [dollar] bills to inhale narcotics" was insufficient to prove intent to use that item to ingest drugs); Frazier v. State, 608 So. 2d 530, 531 (Fla. 5th DCA 1992) (holding the same with respect to a triple-beam scale because "a triple beam scale is a legitimate subject of private ownership"); cf. Subuh v. State, 732 So. 2d 40, 43-44 (Fla. 2d DCA 1999) (holding that evidence was insufficient to prove the knowledge element of a charge for delivery of paraphernalia where "there are many lawful uses for glass tubing" and the defendant did not own the store or ordinarily work in the area where the glass tube was sold).

The same conclusion would not necessarily follow, however, if we were dealing with an item of paraphernalia that the evidence shows to have as its sole or predominant purpose the ingestion of controlled substances. Take a cocaine spoon, which is specifically listed in section 893.145(12), as an example. Is it possible someone might use a cocaine spoon as a decoration or to eat food? We guess. But if we have the item itself and competent testimony explaining its purpose, do we really need residue or proximity to cocaine to say beyond a reasonable doubt that a person in possession of a cocaine spoon never intended to use it for one of those hypothetical legitimate purposes? No. Inhaling cocaine is the cocaine spoon's raison d'être. We routinely tell juries that "[a] reasonable doubt is not a mere possible doubt, a

speculative, imaginary or forced doubt." Fla. Std. Jury Instr. (Crim.) 3.7. And on the evidence just described, that is all those possible legitimate explanations are.

Our court has previously used this kind of analysis to determine whether the presence of drug residue on an item is sufficient to sustain a conviction for possession of the drug. Where an item in a defendant's possession is commonly used for legitimate purposes, a trace amount of an illegal drug on the item is deemed insufficient to support a conviction for possession of the drug itself because it does not show a conscious, substantial possession of the drug as distinguished from an involuntary or superficial one. See, e.g., Davis v. State, 784 So. 2d 1225, 1225-26 (Fla. 2d DCA 2001) (holding that presence of cocaine residue on a box cutter was insufficient to sustain a conviction for possession of cocaine because "the box cutter . . . is an object commonly used for legitimate purposes"). But where the item is one that has as its purpose the ingestion of drugs, it becomes reasonable to infer from the defendant's possession of that item with drug residue on it that the item was used to ingest drugs and that the defendant therefore deliberately possessed the drugs the residue of which was found in the item. See Andrews v. State, 787 So. 2d 54, 55 (Fla. 2d DCA 2001) (affirming conviction for possession of cocaine where residue was found in a "glass pipe . . . described as one 'commonly used for smoking street level narcotics' "); see also Holloman v. State, 211 So. 3d 150, 151 (Fla. 4th DCA 2017) (affirming conviction where defendant was in possession of "an implement which is usable only for the obviously knowing use of the drug" (quoting Jones v. State, 589 So. 2d 1001, 1002 (Fla. 3d DCA 1991))). The question of whether the evidence is sufficient to prove a defendant possessed drugs is a different question from that with which we are presented here. But the underlying point is basically the same: When an object is shown by the evidence

to have an exclusive or predominant use, that purpose is highly probative evidence that the item is intended to be used for that purpose.

Now consider the glass pipe in this case. The jury was presented with competent testimony that unequivocally identified the pipe as a crack pipe that was used for the purpose of smoking crack cocaine. There was nothing in the testimony to suggest that the pipe had any legitimate use, much less a legitimate use that was anything more than theoretical. Cf. Conyers v. State, 164 So. 3d 73, 75-77 (Fla. 2d DCA 2015) (noting, in the context of determining probable cause to search, that "[t]he defendant suggests no common explanation for carrying such a glass tube . . . except for its role as a drug delivery system, and this court has not discovered any alternative common explanation"). The jury was presented with the pipe, which it could observe for itself and consider whether it was reasonable to think Mr. Moore planned to use it to smoke tobacco or for some other legal purpose, all in light of the circumstances under which he was found in possession of the item. Given the evidence about the paraphernalia in this case—direct evidence that its sole or predominant purpose was to smoke crack cocaine—and the evidence of the circumstances in which Mr. Moore was found with it, a rational jury could determine that Mr. Moore intended to use the pipe in accord with its obvious illicit purpose.

As Mr. Moore points out, other courts assessing the sufficiency of the State's proof that a defendant intended to use a pipe or similar item to ingest controlled substances have reached a different outcome. But those cases are inapplicable on their facts because they do not involve evidence that the item of paraphernalia at issue had an exclusively or predominantly illicit use or, alternatively, say nothing about the circumstances under which the defendant was found with the item. In the Third

District's opinion in M.M., the defendant was charged with possession of paraphernalia on the theory that he intended to use a pipe to smoke marijuana. 152 So. 3d at 123. The item of paraphernalia was described only as a pipe—not as a pipe intrinsically tied to illicit uses—and the testifying officer acknowledged that it could be used to smoke tobacco, id., which suggests that the item did not have as its exclusive or predominant use smoking controlled substances. Similarly, in the First District's decision in Waters, the defendant was found with "a small piece of metal" that an expert said was of a type "commonly used to smoke controlled substances." 694 So. 2d at 149. A small piece of metal could have any number of functions and saying that it is commonly used for an illicit purpose is not the same as saying that that is its exclusive or predominant use. In the Fourth District's decision in Goodroe, the item of paraphernalia was just a plastic bottle with a hole burned into one side. 812 So. 2d at 587. And in the First District's three-paragraph decision in Nixon, neither the "homemade crack pipe" at issue nor the circumstances under which the defendant was found in possession of it were described in any way. See 680 So. 2d at 507. Thus, although these cases contain language supporting Mr. Moore's argument, they are distinguishable on their facts.[6]

Ultimately, Mr. Moore's argument loses sight of the ultimate question when the sufficiency of the evidence is at issue in favor of a formalistic rule that at least a "miniscule quantity of drug residue," id., or something like it is required in every case.

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[6]Although Mr. Moore does not cite it, in a one-paragraph opinion in R.C. v. State, 245 So. 3d 1001, 1002 (Fla. 2d DCA 2018), we noted the fact that the item of paraphernalia tested negative for residue in determining that the evidence was insufficient. But our opinion said nothing about what the item of paraphernalia was, what, if anything, the evidence said about its characteristics, and what the other evidence at trial was. It is not controlling here. See Interest of B.F., 283 So. 3d 990, 993 n.4 (Fla. 2d DCA 2019).

Such a rule ignores both the settled principles governing evidentiary sufficiency—that we take all facts and all reasonable inferences from those facts in the State's favor, for example—and the fact that intent is a classic jury question. When we assess the sufficiency of the State's evidence of intent in a case like this, the question is whether, taking into consideration all of the State's evidence, a rational juror could conclude beyond a reasonable doubt that the defendant intended to use the item to ingest controlled substances. As we have shown, a rational juror could do so here.

IV.

For the forgoing reasons, we affirm Mr. Moore's convictions for driving while license suspended or revoked and possession of paraphernalia. We reverse Mr. Moore's conviction and sentence for grand theft of a motor vehicle and remand the case to the trial court for a new trial or such other proceedings as are consistent with this opinion. Depending on the results on remand for the vehicular theft count, the trial court may need to adjust Mr. Moore's criminal punishment code scoresheet, which could affect the sentences for driving with a suspended or revoked license and possession of paraphernalia. The trial court may make such adjustments to the scoresheet and sentences as are necessary in light of the proceedings on remand.

Affirmed in part; reversed in part; remanded.

KHOUZAM, C.J., Concurs specially.
ROTHSTEIN-YOUAKIM, J., Concurs in result only.

KHOUZAM, C.J., Concurring specially.

I concur with the majority and write to emphasize that, considering the totality of the facts of this specific case in the light most favorable to the State, there was sufficient evidence to create a jury question on whether Mr. Moore intended to use the pipe to ingest a controlled substance. Mr. Moore was found driving a truck by himself in the early hours of the morning with a glass pipe in his pocket. There was no dispute that the pipe was a crack pipe: a deputy identified the pipe as a type used to smoke crack cocaine, and defense counsel acknowledged during closing argument that it was a "crack pipe" that was found in Mr. Moore's pocket. There was no suggestion or implication whatsoever—neither from the parties nor the context in which it was found—that the pipe might have any legitimate use, much less that Mr. Moore possessed it for a lawful purpose. The jury had the opportunity to observe the pipe and consider its characteristics. Under these narrow circumstances, it was appropriate for the question of Mr. Moore's intent to go to the jury.