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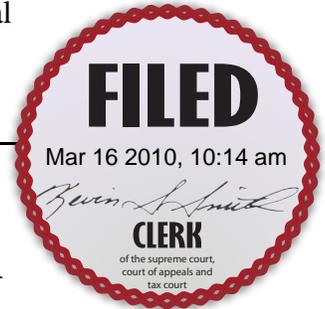
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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEVIN SIMMONS, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 71A04-0909-CR-515

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable Ronald W. Chamblee, Jr., Judge  
Cause No. 71D08-0812-FD-1311

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**March 16, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Kevin Simmons appeals his conviction for theft<sup>1</sup> as a Class D felony contending that there was insufficient evidence to support his conviction.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The evidence most favorable to Simmons's conviction is as follows. During the afternoon of December 18, 2008, Cheryl Rempala stepped outside her South Bend office to smoke a cigarette, leaving her cell phone in her purse, which was under her desk. When she returned to the office ten minutes later, Rempala noticed that her purse was missing. She reported the missing purse to the South Bend Police Department and alerted her co-workers of her loss.

Later that same day, Rempala learned from her boss that the cell phone had been found. Rempala called her phone, and a man, later identified as Simmons, answered. Simmons said that he had found the cell phone downtown and asked if Rempala wanted it back. Rempala responded in the affirmative and asked Simmons if he could meet her downtown. Simmons told Rempala that he was no longer downtown, and would have to call her back in ten minutes. *Tr.* at 11.

Ten minutes later, Rempala received a call from Simmons who asked her whether she still wanted her phone. When Rempala stated that she did, Simmons replied that it was going to cost her. Simmons suggested, and Rempala agreed, that she would pay Simmons \$30.00

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<sup>1</sup> See Ind. Code § 35-43-4-2.

for the cell phone. Rempala suggested a location for the two to meet, but Simmons rejected it and said that he would call back in ten minutes to set a meeting site.

Ten minutes later, Simmons called Rempala and told her to meet him at a location on Chapin Street. When Rempala stated that she could reach the meeting place in approximately ten minutes, Rempala stated, “[W]ell, that’s all the time you’ve got so you need to be there in ten minutes.” *Id.* at 12.

Following this third conversation, Rempala’s “gut instinct told [her] to call the police back and let them know what was going on.” *Id.* The police determined that an undercover detective, Detective Timothy Huff, should accompany Rempala to meet with Simmons. A short time later, Rempala picked up Detective Huff and drove him to the designated meeting site. At trial, Rempala testified that, before approaching Simmons, she suspected he might be the man she spoke with because he looked guilty, was looking all over the place, and kept looking back at her car. *Id.* at 14. Rempala approached Simmons and asked if he was the one who called her about her phone. Simmons answered, “[Y]eah I got your phone, you got the money.” *Id.* When Rempala said that the money was in her car, Simmons instructed her to get it.

Rempala returned to the car and told Detective Huff that she did not have the \$30.00 to pay Simmons. Detective Huff exited the car, and the two walked toward Simmons. Seeing Detective Huff, Simmons said, “I ain’t got no business with you, I got business with the lady.” *Id.* at 15. Rempala assured Simmons that Detective Huff was her husband who had brought money to pay for the cell phone. Detective Huff then reached for his wallet and

asked Simmons to show him the phone. After Simmons showed Rempala her phone, Detective Huff showed Simmons his badge and placed him under arrest.

Detective Huff gave Simmons his *Miranda* warnings, and asked Simmons where he got the cell phone. Simmons said he could not remember exactly where he found the phone, but stated that he found the phone between “LaSalle and Jefferson on Hill Street”; an area covering a three-block-radius. *Id.* at 30. Detective Huff, bluffing, informed Simmons that the business from which the purse was stolen had video surveillance. He also told Simmons that the tape showed him going inside the business that day, and asked Simmons if there was any reason for that. Simmons said, “[H]e has been in the business before and he has gone in there . . . to use the bathroom and to warm up.” *Id.* Following a trial, at which the above evidence was presented, a jury convicted Simmons of theft as a Class D felony. Simmons now appeals.

## **DISCUSSION AND DECISION**

Simmons asserts that the evidence presented by the State was insufficient to establish that he knowingly or intentionally exerted unauthorized control over Rempala’s cell phone. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Govan v. State*, 913 N.E.2d 237, 241 (Ind. Ct. App. 2009), *trans. denied*. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven

beyond a reasonable doubt. *Id.* It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* “A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt.” *Tapely v. State*, 886 N.E.2d 61, 63 (Ind. Ct. App. 2008), *trans. denied* (citing *Richardson v. State*, 856 N.E.2d 1222, 1227 (Ind. Ct. App. 2006), *trans. denied* (2007)).

Indiana Code section 35-43-4-2(a) provides, in pertinent part:

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

Thus, in order to convict Simmons for theft, the State was required to prove that he knowingly or intentionally exerted unauthorized control over Rempala’s cell phone, with the intent to deprive her of the value or use.

Simmons contends that, while there is no dispute that he exerted control over Rempala’s cell phone, the evidence presented at trial is consistent with his explanation to the police that he found the phone. He asserts that, although he asked Rempala for \$30.00 as payment to return the cell phone, she was free to decline. Simmons contends that, once she agreed to pay \$30.00 for the return of the phone, however, he was entitled to keep it until the parties made the exchange.

At trial, the jury learned that Simmons had been in the building from which the purse was stolen, was in possession of the cell phone soon after it was stolen, was evasive about

where he found the phone, seemed “squirrelly” in the plan for returning the phone, and requested that Rempala pay \$30.00 for the return of the phone. *Tr.* at 22. At the meeting site, Simmons did not show Rempala the phone, but asked her if she had the money. When Rempala returned with Detective Huff, posing as her husband, Simmons said, “I ain’t got no business with you, I got business with the lady.” *Id.* at 15. Through cross-examination of the State’s witnesses, the jury also heard Simmons’s version of events; that no one saw him in the building, that he found the phone, and that he asked for, but did not demand, money for the return of the phone.

After reviewing the evidence, the jury found that Simmons knowingly or intentionally exerted unauthorized control over Rempala’s property, with intent to deprive her of its use or value. By requesting that his theft conviction be overturned because the evidence proves he found Rempala’s cell phone lying on the ground, Simmons is asking this court to reweigh the evidence. This is an invitation we must decline. *Taylor v. State*, 879 N.E.2d 1198, 1202 (Ind. Ct. App. 2008). Accordingly, we find there was sufficient evidence to convict Simmons of theft.

Affirmed.

DARDEN, J., and MAY, J., concur.