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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHERRILL ESSETT, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-1005-CR-481  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Annie Christ-Garcia, Judge  
The Honorable Marie L. Kern, Master Commissioner  
Cause No. 49F24-0808-FD-192231

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**April 12, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Sherrill Essett (“Essett”) was convicted after a jury trial of theft<sup>1</sup> as a Class D felony and was sentenced to 545 days with two days executed and the remaining time suspended. She appeals, raising the following restated issue: whether the evidence presented was sufficient to support Essett’s conviction for theft as a Class D felony, particularly, whether sufficient evidence was presented to prove that Essett “knowingly exerted unauthorized control” over the property at issue.

We reverse.

### **FACTS AND PROCEDURAL HISTORY<sup>2</sup>**

In August 2008, Essett was working as a clerical assistant at the Indiana Department of Child Services (“DCS”) in Marion County and had been employed there for several years. In her position, she worked in a division of DCS with approximately eleven case managers. DCS regularly purchased bus passes to be distributed by the case managers to DCS clients. Larry Miller (“Miller”) was the official DCS custodian for these bus passes, which meant that he kept track of the inventory of bus passes and that any employees wishing to obtain bus passes must go to him. On August 1, 2008, at approximately 7:00 to 7:30 a.m., Essett contacted Miller to request two boxes of bus passes. Each box contained 1,000 bus passes. Miller, believing that Essett was authorized to request and possess the bus passes, gave her two boxes and marked the transaction in his logbook, listing Essett as receiving such amount.

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

<sup>2</sup> Oral argument was heard on this case on February 22, 2011 in Indianapolis. We commend counsel on the quality of their written and oral advocacy.

Essett, who had chronic medical problems, began to feel ill later that morning. She called her supervisor, Nancy Speer (“Speer”), and left a message saying she was going home because she was not feeling well. Essett then left work for the day. A few hours later, a secretary learned that Essett had received two boxes of bus passes and reported this to Speer, who reported the information to Taren Duncan (“Duncan”), the then-Deputy Director of DCS. Duncan received the report that Essett “had come in that morning and picked up two boxes of bus tickets, and then she had left the building.” *Tr.* at 234. Duncan investigated the matter and learned that Essett had received the two boxes. Duncan decided to call the police and report the incident. She and an employee from Human Resources then called Essett to inquire about the bus passes. Essett told Duncan that she had given the bus passes away. *Id.* at 236. Duncan asked whether Essett could retrieve them, and Essett responded that she could not as she was on her way to the hospital. *Id.* Essett also informed Duncan that she was no longer employed by DCS and would bring in her letter of resignation at a later time. *Id.*

No search was done of Essett’s workspace to ascertain if the bus passes could be located there. An officer from the Indianapolis Metropolitan Police Department (“IMPD”) responded to the dispatch of the incident. Through his discussions with DCS employees, the officer learned that Essett had been in possession of the bus passes and that they had not been found. Based on his investigation, the officer found that there was probable cause to arrest Essett. On August 20, 2008, the State charged Essett with theft as a Class D felony.

A jury trial was held on March 24, 2010. At trial, Julia Kent (“Kent”), a secretary at DCS, testified that only secretaries were permitted to obtain bus passes. *Id.* at 80. Speer testified that office policy dictated that “normally secretaries” were the ones who were allowed to obtain the bus passes and that she had never given Essett authority to pick up bus passes. *Id.* at 110-11. Miller testified that either “a secretary or chief clerical person” was designated to pick up the bus passes from him for distribution to each division. *Id.* at 41. Duncan testified that some clerks were authorized to retrieve bus passes, that a “clerical person” from each division retrieved the bus passes, and that she considered both secretaries and clerks to be “clerical staff.” *Id.* at 238, 241, 248. During her testimony, Essett stated that she believed she was fully authorized to obtain the bus passes from Miller and that she had never been told that she was not authorized to do so. *Id.* at 270. Essett further testified that, once she obtained the bus passes, she proceeded to distribute them to her case managers in her normal manner, which was to make copies of the request forms and place the copies along with the requested bus passes in sealed envelopes on the case managers’ respective desks. *Id.* at 271-72. No case managers were called to testify as to whether they received any bus passes on that day. Essett stated that she left the remainder of the passes in her desk, and there was no testimony that she was seen leaving with any bus passes. *Id.* at 273. At the conclusion of the jury trial, Essett was found guilty of theft as a Class D felony. She was sentenced to 545 days with two days executed and 543 days suspended. Essett now appeals.

## DISCUSSION AND DECISION

Our standard of review for sufficiency claims is well-settled. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Parahams v. State*, 908 N.E.2d 689, 691 (Ind. Ct. App. 2009) (citing *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003)). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.* If there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Yowler v. State*, 894 N.E.2d 1000, 1002 (Ind. Ct. App. 2008).

Essett argues that her conviction for theft as a Class D felony was not supported by sufficient evidence. She specifically contends that the State failed to prove that she “exerted unauthorized control” over the bus passes because it was not proven that the bus passes were actually missing from the DCS premises or that her control over the property was objectively “unauthorized.” Essett further claims that the State did not prove that she “knowingly” exerted unauthorized control because she believed that she was authorized to obtain bus passes.

In order to convict Essett of theft as a Class D felony, the State was required to prove that she knowingly or intentionally exerted unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use. Ind.

Code § 35-43-4-2(a). “Person” means a human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity. I.C. § 35-41-1-22(a). “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so,” and “[a] person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” I.C. § 35-41-2-2(a), (b).

In construing this statute, the trier of fact must determine a defendant’s intent from a consideration of the reasonable inferences based on the surrounding circumstances, including the defendant’s conduct and the natural consequences that might be expected from that conduct. *Kendall v. State*, 790 N.E.2d 122, 132 (Ind. Ct. App. 2003), *trans. denied*. The defendant’s mental state, therefore, must be determined from a consideration of the circumstantial evidence and the facts of each case. *Wilson v. State*, 835 N.E.2d 1044, 1049 (Ind. Ct. App. 2005), *trans. denied*. Additionally, “a person’s control over the property of another person is ‘unauthorized’ if it is exerted: (1) without the other person’s consent.” I.C. § 35-43-4-1(b).

In the instant case, the evidence presented showed that, on the morning of August 1, 2008, Essett “hollered” across the office to Miller and requested two boxes of bus passes. *Tr.* at 44. Believing Essett was authorized to obtain bus passes, Miller gave her the requested boxes, and marked the transaction in his log book, listing Essett as the recipient of 2,000 bus passes. Shortly after Essett obtained the bus passes, she left work because she felt ill. No one observed Essett taking the passes out of the office, and no one at DCS searched for the bus passes.

As of the day of this incident, DCS had no written policy regarding the distribution of bus passes, and there was no written list of authorized employees. Essett testified that she believed she was fully authorized to obtain the bus passes from Miller and that she had never been told that she was not authorized to do so. *Id.* at 270. Speer testified that office policy dictated that “normally secretaries” were the ones who were allowed to obtain the bus passes, that she had never given Essett authority to pick up bus passes, and that a division manager would have been the one to give such authorization. *Id.* at 110-11. Speer also testified that she did not remember instructing her staff that clerks were not allowed to request bus passes and did not know if a written policy on the subject existed. *Id.* at 119. Miller testified that he believed that either “a secretary or chief clerical person” was designated to pick up the bus passes from him for distribution to each division. *Id.* at 41. Duncan testified that some clerks were authorized to retrieve bus passes, that a “clerical person” from each division retrieved the bus passes, and that she considered both secretaries and clerks to be “clerical staff.” *Id.* at 238, 241, 248.

Although Kent testified that only secretaries were permitted to obtain bus passes and Speer testified that office policy dictated that “normally secretaries” were allowed to obtain bus passes, no evidence was presented to show that there was a written policy stating who was authorized to obtain bus passes. *Id.* at 110-11. No one testified that Essett was ever made aware of any office policy that only secretaries were authorized to obtain bus passes. Further, the witnesses’ testimony did not make it clear that only secretaries were authorized to request the passes; in fact, some witnesses testified that “normally secretaries” were authorized to obtain the bus passes for each division, while

others testified that either a secretary or clerical person was authorized to obtain them. *Id.* The evidence showed that Essett believed that she was authorized to obtain bus passes and had not been informed to the contrary and that Miller believed that Essett was authorized when he gave the bus passes to her. Further, the evidence demonstrated that Essett did not attempt to hide her request for the bus passes, and it was never shown that the bus passes were ever taken out of the office or used for any unauthorized purpose as they were never searched for or found. We do not believe that a jury could reasonably infer from the evidence presented that Essett knowingly or intentionally exerted unauthorized control over the bus passes. We, therefore, conclude that the evidence presented at trial was not sufficient to support her conviction for theft.

Reversed.

CRONE, J., and BRADFORD, J., concur.