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IN THE
COURT OF APPEALS OF INDIANA

CYNTHIA CARLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0810-CR-606
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0605-FD-091517

June 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Cynthia Carley ("Carley") was convicted in Marion Superior Court of Class D felony theft. Carley appeals and argues that the evidence is insufficient to support her conviction. Concluding that the State failed to present evidence that Carley stole the items alleged in the charging information, we reverse and remand with instructions to vacate Carley's theft conviction.

Facts and Procedural History

On May 20, 2006, Carley was at a Menards store in Indianapolis. As she was loading items into her vehicle with the assistance of Roy Sims, she was approached by loss prevention officer John Furman ("Furman"). Furman was investigating a possible theft from the Menards's garden center. Carley could not produce a receipt for the items in her vehicle, and she was asked to load the items into her cart and return to the store.

Inside the store, the cashiers were asked if they had "cashed out" Carley. The bar codes on the items were checked to see if the items were still in stock or had been paid for. The store's managers also checked Carley's credit cards to see if they had been used at Menards. Eventually, the store contacted the Indianapolis Metropolitan Police Department, who took over the investigation.

Carley was charged with Class D felony theft, and more specifically, with exerting unauthorized control over bags of mulch and plants. Appellant's App. p. 25. A bench trial was held on July 28, 2008. Carley was convicted as charged. On September 8, 2008, Carley was ordered to serve 1095 days in the Department of Correction with 545 days executed and 550 suspended to probation. Carley now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Carley argues that the evidence is insufficient to support her Class D felony theft conviction. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. 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.

To establish that Carley committed Class D felony theft, the State was required to prove that Carley knowingly or intentionally exerted unauthorized control over Menards's property, with the intent to deprive Menards of any part of its value or use. See Ind. Code § 35-43-4-2 (2004). In its charging information, the State specifically alleged that Carley exerted unauthorized control over bags of mulch and plants. Appellant's App. p. 25.

At trial, Furman could not recall the items Carley loaded into her vehicle even after the State attempted to refresh Furman's recollection with the probable cause affidavit. Tr. pp. 18-19. Furman could only testify to the types of items sold in the garden center. The State concedes that there is an "absence of direct trial evidence or [an] inference establishing beyond a reasonable doubt that the stolen property in [Carley's] possession was mulch and plants[.]" Br. of Appellee at 8.

The record is devoid of evidence establishing beyond a reasonable doubt that Carley exerted unauthorized control over bags of mulch and plants. For this reason, we

conclude that the State failed to present sufficient evidence to support Carley's conviction for Class D felony theft.

Reversed and remanded with instructions to vacate Carley's Class D felony theft conviction.

RILEY, J., and KIRSCH, J., concur.