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ATTORNEY FOR APPELLANT:

KENT D. ZEPICK
Fishers, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

L.F.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0904-JV-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0810-JD-3091

October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

L.F. appeals his adjudication as a delinquent child. He first asserts the State failed to present sufficient evidence that he committed Class D felony auto theft. Second, he claims he was subjected to double jeopardy because the true findings of unlawful entry of an automobile and criminal trespass rely on the same evidence. We vacate the finding that L.F. committed unlawful entry of a motor vehicle and affirm in all other respects.

STATEMENT OF THE FACTS

Around 10 p.m. on August 9, 2008, security officer Debra Drane arrived to patrol the Bill Estes Chevrolet used car lot. As she entered the lot, she saw two teenage African-American males run out "from the back direction where the alley is." (Tr. at 3.) She stopped the boys, one of whom was L.F., and asked them what they were doing. They claimed to be looking at cars, but she did not believe them because they were on foot and appeared too young to drive. She told them to leave the premises and watched them walk across the street to a McDonald's.

Drane then drove to the back of the building, where she noticed the back door was open. She contacted another security officer, who was on break at the McDonald's where the boys had gone, and asked him to locate the two teens she had seen. Using Drane's description, the officer found L.F. and his friend, and he asked them if they had just been at the car lot. The boys admitted they had been there looking at cars, and the officer collected their identifying information.

The car lot's financial officer arrived to inspect the building with Drane. They found a window on the back door had been shattered from the outside with a stick or a

post. They locked and closed the door. The next morning, employees determined five vehicles were missing. One of the stolen vehicles, a 2003 Mercury Mountaineer with a Vehicle Identification Number ending in 05815, had been parked inside the building because keys to it had disappeared from Bill Estes Chevrolet just over a month earlier.

Approximately seven weeks later, on October 3, 2008, police stopped the Mountaineer because it had an expired temporary license plate. L.F. was driving the Mountaineer, and he had never received a driver's license. The keys were in the ignition.

The State alleged L.F. was a delinquent child for committing four acts that would be crimes if committed by an adult: Class D felony auto theft under Ind. Code § 35-43-4-2.5; Class A misdemeanor criminal trespass under Ind. Code § 35-43-2-2; Class B misdemeanor unlawful entry of a motor vehicle under Ind. Code § 35-43-4-2.7; and Class C misdemeanor driving without a license under Ind. Code § 9-24-18-1. The court found the evidence supported true findings for all those allegations, determined L.F. was a delinquent child, and placed him on probation with special conditions.

DISCUSSION AND DECISION

1. Sufficiency

L.F. challenges whether the evidence proves he committed auto theft. "The State must prove beyond a reasonable doubt that the juvenile committed the charged offense." *M.Q.M. v. State*, 840 N.E.2d 441, 444 (Ind. Ct. App. 2006) (quoting *K.D. v. State*, 754 N.E.2d 36, 38 (Ind. Ct. App. 2001)). We affirm if substantive evidence of probative value establishes every material element of the offense. *Id.* We consider only the facts

favorable to the judgment, along with the favorable inferences therefrom. *Id.* We may not reweigh the evidence or reassess the credibility of the witnesses. *Id.*

As charged in this case, auto theft occurs when a person "knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the owner of . . . the vehicle's value or use." Ind. Code § 35-43-4-2.5(b)(1); *see also* (Appellant's App. at 13). L.F. asserts his true finding cannot stand because, "when there is a significant gap between the date of the theft and the arrest of a defendant, the State must present evidence showing that the defendant exclusively possessed the stolen item to sustain a conviction for theft." (Appellant's Br. at 6) (citing *Shelby v. State*, 875 N.E.2d 381, 384 (Ind. Ct. App. 2007), *trans. denied* 891 N.E.2d 35 (Ind. 2008)).

> The mere unexplained exclusive possession of recently stolen property will sustain a conviction of theft and burglary. *Gibson* [*v. State*, 533 N.E.2d 187, 188 (Ind. Ct. App. 1989)]. However, where any considerable length of time has elapsed from the time of the theft to the time of the arrest there must be some showing that the defendant has had the exclusive possession of the property during that period of time. *Muse* [*v. State*, 419 N.E.2d 1302, 1304 (Ind. 1981)]; *Ward v. State*, 260 Ind. 217, 219, 294 N.E.2d 796, 797 (1973). In cases where the defendant is found to be in possession of property which has not been recently stolen, and there has been no showing of exclusive possession of the property during the relevant time frame, this court may also consider additional evidence tending to support the defendant's conviction. *See Gibson*, 533 N.E.2d 187, 189-90. Both exclusive possession of stolen items and knowledge that they were stolen may be proven by circumstantial evidence. *Muse*, 419 N.E.2d at 1303-04. To determine whether property was recently stolen, we must examine the length of time between the theft and possession as well as circumstances such as the defendant's familiarity or proximity to the property at the time of the theft and the character of the goods. *Gibson*, 533 N.E.2d at 188-89.

Shelby, 875 N.E.2d at 385.

The Mountaineer was stolen between 10 p.m. on August 9, 2008, and 8 a.m. on August 10, 2008. L.F. was pulled over in the Mountaineer on October 3, 2008. Thus, Mountaineer had not been "recently" stolen when L.F. was found in possession of it. *See id*. at 386 (fifteen day delay between theft and possession "would not be characterized as recent").

However, there was circumstantial evidence L.F. exclusively possessed the vehicle from the time it was stolen. When Security Officer Drane arrived at the car lot around 10 p.m., L.F. and his friend "ran from the back direction where the alley is." (Tr. at 3.) Upon further questioning at McDonald's by the other officer, the boys lied about whether they had been in the back of the building, claiming instead they had just been "in the front of the lot, near a blue tank." (*Id.* at 12.) The back of the building is where Drane found the broken window and open door. The Mountaineer was stolen within eight hours of when L.F. lied about where he had been on the car lot. These facts are sufficient to tie L.F. to the theft of the car from the lot. *See Shank v. State*, 154 Ind. App. 147, 153, 289 N.E.2d 315, 318 (Ind. Ct. App. 1972) (although police found defendant in the car twenty days after it was stolen, evidence was sufficient that defendant committed theft because defendant was seen standing next to the car within twenty-four hours of its theft), *reh'g denied*.

2. Double Jeopardy

Article I, Section 14 of the Indiana Constitution provides: "No person shall be put in jeopardy twice for the same offense." Under that clause, two or more offenses are "the same offense" if "with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999).

L.F. asserts a violation under the actual evidence test.

> Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53.

> The test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

The two findings at issue are unlawful entry of an automobile and criminal trespass, which were charged as:

> Count 2 Criminal Trespass, Class A Misdemeanor
>
> I.C. 35-43-2-2
>
> On or about the 3rd day of October, 2008, said child did knowingly or intentionally interfere with the possession or use of the property of Bill Estes Chevrolet, by having entered one of the dealership's vehicles without permission.
>
> Count 3 Unlawful Entry of Motor Vehicle, Class B Misdemeanor
>
> I.C. 35-43-4-2.7
>
> On or about the 3rd day of October 2008, said child did knowingly or intentionally enter a motor vehicle knowing that the person does not have the permission of an owner Bill Estes Chevrolet, a lessee, or an authorized operator of the motor vehicle; a 2003 Mercury Mountaineer; and does not have a contractual interest in the motor vehicle.

(Appellant's App. at 13.)

The State admits: "The only evidence of either of these crimes is that L.F. was the sole occupant of the stolen vehicle when it was stopped [on October 3rd], and that he did not have permission to be in the vehicle." (Appellee's Br. at 13.) Accordingly, those two findings violate the actual evidence test of our State double jeopardy provision. We direct the trial court to vacate the finding that L.F. committed an act that would be Class B misdemeanor unlawful entry of a motor vehicle.

Affirmed in part and vacated in part.

CRONE, J., and BROWN, J., concur.