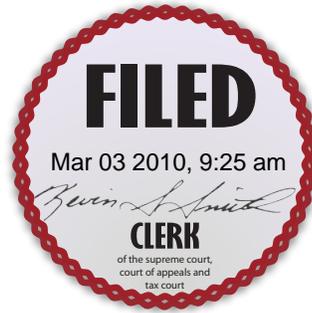


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DWIGHT SARGENT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0907-CR-396
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Stanley Kroh, Judge  
Cause No. 49G04-0903-FC--31147

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**March 3, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Dwight Sargent (“Sargent”) was convicted in Marion Superior Court of Class C felony auto theft. Sargent appeals and presents two issues, which we restate as: (1) whether the evidence is sufficient to support his conviction as a Class C felony, and (2) whether the trial court erred in refusing to give the jury an instruction proffered by Sargent.

We affirm.

### **Facts and Procedural History**

Tracy Ladd (“Ladd”) and Rod Thompson (“Thompson”) worked together in an office building in Indianapolis. Ladd’s office was two doors down from Thompson’s office. On March 3, 2009, Ladd observed a man in the building, which caught her attention because most of her co-workers were on their lunch break. The man, later identified as Sargent, was walking slowly back and forth and appeared to be talking on a cell phone. Sargent looked into Ladd’s office a few times and made direct eye contact with her. Sargent continued his behavior for several minutes, which made Ladd feel uncomfortable. Ladd eventually decided to approach Sargent and ask if he needed help with something, but by the time she got to the hallway, Sargent had left. A few minutes later, Thompson, who had been away at a meeting, returned to his office and discovered that his car keys had been taken from his desk and that someone had stolen his 2006 Honda Accord from the parking lot. Thompson reported the theft of his car to the police.

Six days later, on March 10, 2009, IMPD Officer Steven Gorgievski (“Gorgievski”) was in his police car and ran a routine license plate check on the vehicle in front of him. The license plate check indicated that the vehicle in front of him was

Thompson's stolen Honda Accord. Gorgievski then pulled the Accord over and found Sargent driving the car. Gorgievski informed Sargent that the car had been reported stolen and arrested Sargent.

The next day, IMPD Detective Andrew Moloy ("Moloy") showed Ladd a photographic lineup. Ladd immediately identified the photo of Sargent as the man she had seen in the hallway prior to the theft of Thompson's car. That same day, the State charged Sargent with Class D felony auto theft and Class C felony auto theft.<sup>1</sup> A jury trial was held on May 28, 2009. At the conclusion of the first phase of the trial, the jury found Sargent guilty of Class D felony auto theft. At the next phase of the trial, the State presented evidence that Sargent had a prior conviction for auto theft. The jury then found Sargent guilty of Class C felony auto theft. At a sentencing hearing held on June 16, 2009, the trial court "merged" the two convictions and sentenced Sargent to seven years. Sargent now appeals.

### **Sufficiency of the Evidence**

On appeal, Sargent first claims that the evidence is insufficient to support his conviction for auto theft as a Class C felony. Sargent does not claim that the evidence was insufficient to convict him of Class D felony auto theft. Instead, Sargent argues that the State failed to prove that he had a prior conviction for auto theft or receiving stolen auto parts, which prior conviction would act to elevate the instant offense to a Class C felony. See I.C. § 35-43-4-2.5(b).

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<sup>1</sup> Auto theft is generally a Class D felony, but the offense is elevated to a Class C felony if the defendant has a prior conviction for auto theft or receiving stolen auto parts. Ind. Code § 35-43-4-2.5(b) (2004).

In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. Klaff v. State, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). We instead consider only the evidence which supports the conviction, along with any reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, we will affirm the conviction. Id.

Here, the State alleged that Sargent had a prior conviction for auto theft under cause number 49F09-9401-CF-005879. To prove this prior conviction, the State presented into evidence a police arrest report, the charging information, and the order of judgment of conviction in the prior case.

The arrest report is dated January 1, 1994, and lists “Leslie Anthony” as the defendant. Ex. Vol., p. 13. The arrest report also contains thumbprints taken of the person charged as Leslie Anthony. Id. The report further lists Leslie Anthony’s date of birth as “9/10/75.” Id. The report indicates that Anthony was arrested for theft and auto theft under the cause number “94005879.” Id.

The charging information, dated January 17, 1994, has a cause number of “49F099401CF005879.” Id. at 11. The charging information also has the name of the defendant printed as “Leslie Anthony,” but this name is crossed out and the name “Dwight Sargent” is handwritten above it. Id. The charging information lists Anthony/Sargent’s date of birth as “9-10-75,” and alleges that Anthony/Sargent committed auto theft as a Class D felony, citing Indiana Code section 35-43-4-2.5. Id.

The order of judgment of conviction has a cause number of “94-005879,” lists the defendant’s name as “Dwight Sargent,” and indicates that Sargent was born on “9-10-75.” *Id.* at 12. The judgment of conviction indicates that Sargent was convicted of auto theft as a Class D felony following a jury trial and sentenced on March 22, 1994.

The State also presented the testimony of Matthew Wiesjahn (“Wiesjahn”), a record keeper and identification processor for the IMPD. Wiesjahn testified that he is certified in fingerprint analysis and had taken Sargent’s fingerprints on the day of trial. Wiesjahn further testified that the fingerprint he had taken from Sargent on the day of trial matched the fingerprint on the arrest report. In fact, Wiesjahn testified that Sargent’s thumbprint had twenty “points of identification” in common with the thumbprint on the arrest report, whereas the threshold for a “good identification” was between seven to ten points of identification. *Tr.* p. 165.

From this evidence, the jury could reasonably conclude that “Leslie Anthony” was an alias used by Sargent and that Sargent was the individual mentioned in the arrest report, charging information, and judgment of conviction. And from these exhibits, the jury could readily find that Sargent had in fact been convicted of auto theft in 1994. Sargent’s arguments to the contrary are simply a request that we reweigh the evidence, which we will not do. *Klaff*, 884 N.E.2d at 274. The State presented sufficient evidence to support Sargent’s conviction for auto theft as a Class C felony.

## **II. Jury Instruction**

Sargent also claims that the trial court erred in refusing to give the jury the following instruction tendered by Sargent:

The unexplained possession of stolen property may be sufficient to support a conviction of theft, but the inference is permitted only where the property was recently stolen. In determining whether a theft is recent, you must consider the length of time between the theft and the possession, and whether the goods are readily salable and easily portable rather than difficult to dispose of and cumbersome. A five-day delay between the date a car was stolen and the defendant's being found in exercising control over it is sufficiently lengthy such that a defendant's mere control over a car, without additional corroborating evidence, cannot support a conviction for auto theft.

Appellant's App. p. 69.

Instructing the jury is a task within the discretion of the trial court and is reviewed only for an abuse of discretion. Bayes v. State, 791 N.E.2d 263, 264 (Ind. Ct. App. 2003), trans. denied. "This well-settled standard by which we review challenges to jury instructions affords great deference to the trial court." Id. When a party challenges the trial court's refusal of a tendered jury instruction, we perform a three-part evaluation: we first determine whether the tendered instruction is a correct statement of the law; if so, we then examine the record to determine whether there was evidence present to support the tendered instruction; lastly, we determine whether the substance of the tendered instruction was covered by another instruction or instructions. Walden v. State, 895 N.E.2d 1182, 1186 (Ind. 2008). This evaluation is performed in the context of determining whether the trial court abused its discretion in rejecting the instruction. Id. Any error in the instruction of the jury is subject to a harmless error analysis. See Bayes, 791 N.E.2d at 264.

Sargent claims that his tendered instruction was a correct statement of the law, that there was evidence in the record to support giving the instruction, and that the substance

of the instruction was not covered by other given instructions. While the State does not argue that the instruction contains a misstatement of the law, since the parties filed their briefs, our supreme court decided Fortson v. State, 919 N.E.2d 1136 (Ind. 2010).

In Fortson, the court laid out the history of the rule concerning the unexplained possession of recently stolen property: before 1970, the rule was that “the exclusive, unexplained possession of recently stolen property is a circumstance from which the fact-finder may draw an inference of guilt. It was a fact to be considered along with all the other facts and circumstances tending to show a defendant’s guilt.” 919 N.E.2d at 1141 (citations omitted). After 1970, following Bolton v. State, 254 Ind. 648, 261 N.E.2d 841 (1970), Indiana courts held that “the unexplained possession of recently stolen property *standing alone* is sufficient to sustain a verdict of guilty of theft.” Fortson, 919 N.E.2d at 1142 (emphasis added). The Fortson court explained that this newer rule had been criticized and was not approved in all jurisdictions: “As one court observed, ‘evidence of possession of stolen property, standing alone, may be as consistent with innocence as with guilt.’” Id. (quoting State v. Kelley, 119 P.3d 67, 71 (Mont. 2005)).

Persuaded by these criticisms, the Fortson court held:

[W]e return to this jurisdiction’s original moorings and as such abandon the so-called mere possession rule. That is to say, *the mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, such possession is to be considered along with the other evidence in a case, such as how recent or distant in time was the possession from the moment the item was stolen, and what are the circumstances of the possession (say possessing right next door as opposed to many miles away). In essence, the fact of possession and all the surrounding evidence about the possession must be assessed to determine whether any rational juror could find the defendant guilty beyond a reasonable doubt.*

919 N.E.2d at 1143 (emphasis added) (footnote omitted).<sup>2</sup>

Although Fortson did not deal directly with the issue of jury instruction, the court did note, “As slightly modified we agree with the following instruction endorsed by the Montana Supreme Court and encourage its use where appropriate:”

You are permitted but not required to infer from the defendant’s possession of the property of another that the defendant is guilty of theft only if in your judgment such an inference is warranted by the evidence as a whole. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you.

The possession of the property by the defendant does not shift the burden of proof which is always on the State to prove beyond a reasonable doubt every essential element of the offense with which defendant is charged.

The defendant’s possession of property belonging to another may be satisfactorily explained in the evidence independently of any testimony of the defendant personally. If [the] defendant does take the witness stand to explain his [or her] possession of the property, the weight to be attached to his [or her] explanation is exclusively for you to determine. Even if defendant’s possession of the property is unexplained, you cannot find [the defendant] guilty, if after consideration of all the evidence in the case, you have a reasonable doubt as to his [or her] guilt.

If under the evidence, defendant’s possession of the property of another is consistent with his [or her] innocence, then the jury should acquit the defendant unless [the state proves his or her guilt] beyond a reasonable doubt by other evidence in the case.

Fortson, 919 N.E.2d at 1143 n.5 (quoting State v. Kramp, 651 P.2d 614, 622 (Mont. 1982)). Thus, even if the instruction tendered by Sargent was a correct statement of law

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<sup>2</sup> The court observed that its holding was “consonant with the rule concerning a charge of receiving stolen property, namely: “Knowledge that the property is stolen may be established by circumstantial evidence; however, knowledge of the stolen character of the property may not be inferred solely from the unexplained possession of recently stolen property.” Id. (quoting Barnett v. State, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005)).

at the time of his trial, it is no longer a correct statement of the law as set forth in Fortson.<sup>3</sup>

Moreover, we agree with the State that the instruction was not applicable to the evidence presented at Sargent's trial. Sargent's tendered instruction stated, "A five-day delay between the date a car was stolen and the defendant's being found in exercising control over it is sufficiently lengthy such that a defendant's mere control over a car, without additional corroborating evidence, cannot support a conviction for auto theft." Appellant's App. p. 69. But here, Sargent was not *merely* found in control of the stolen car six days after its theft. He was also positively identified by a witness at the scene of the auto theft itself, shortly before the car was found to be missing and in a photo array after his arrest. In the case before us, there was corroborating evidence of Sargent's guilt, well beyond his unexplained possession of the vehicle. Under these facts and circumstances, the trial court did not err in rejecting Sargent's tendered instruction.

### **Conclusion**

The State presented sufficient evidence to establish that Sargent had a prior conviction for auto theft; therefore the evidence is sufficient to support his conviction for auto theft as a Class C felony. The trial court did not err in rejecting Sargent's tendered instruction regarding the unexplained possession of recently stolen property.

Affirmed.

BARNES, J., and BROWN, J., concur.

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<sup>3</sup> In this sense, we could not grant Sargent the relief he seeks even if we reversed his conviction. On remand for retrial, Sargent's tendered instruction could not be given to the jury because it is no longer a correct statement of the law.