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**IN THE
COURT OF APPEALS OF INDIANA**

LEROY SMITH,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0612-CR-1111
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0608-FC-164123

November 20, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Leroy Smith (Smith), appeals his convictions for Count I, auto theft, a Class C felony, Ind. Code § 35-43-4-2.5, Count II, resisting law enforcement, a Class D felony, I.C. § 35-44-3-3, and Count IV, criminal trespass, a Class A misdemeanor, I.C. § 35-43-2-2.

We vacate in part, affirm in part, and remand for resentencing.

ISSUES

Smith raises four issues on appeal, which we consolidate and restate as the following two issues:

- (1) Whether the State presented sufficient evidence beyond a reasonable doubt to sustain Smith's convictions for auto theft and resisting law enforcement as a Class D felony;
and
- (2) Whether the trial court accepted Smith's guilty plea for criminal trespass without a sufficient factual basis.

FACTS AND PROCEDURAL HISTORY

Neil Spicer (Spicer) owned a red 1998 Ford Escort, which he was in the process of selling to Casey Griffith (Griffith). On August 27, 2006, Griffith went to Spicer's store where Spicer gave Griffith the keys to the vehicle. Griffith left with the car. The next time Spicer saw the vehicle was August 30, 2006, as he was driving southbound on Interstate 65. Spicer believed the vehicle had been reported stolen so he called 9-1-1 to alert the authorities

he had located the vehicle. Spicer continued to follow the vehicle, which was later determined to be driven by Smith, continuously updating the police to their location.

Eventually, Officer Brandon Shirey (Officer Shirey), dressed in his police uniform and driving a fully marked police vehicle, located Spicer and Smith, activated his lights and sirens, and fell in line behind Spicer. As soon as possible, Spicer moved out of Officer Shirey's way, allowing the officer to pass him and pursue Smith. Smith attempted to turn into an alley, but was unsuccessful. Upon coming to an abrupt stop, Smith exited the vehicle, ran down the alley and around a corner. Once Officer Shirey's vehicle came to a complete stop, he exited his vehicle and yelled at Smith, instructing him to stop. Smith was around the corner by the time Office Shirey reached the Escort. Officer Shirey noticed loose bullets on the front seat of the Escort and decided at that point not to pursue Smith any further, as he may have been armed. Instead, Officer Shirey radioed in a description of Smith and the direction he was heading. Before the police apprehended Smith, he entered a home without the occupant's consent. In a later search of the Escort's trunk, clothing, two cellular phones, Smith's social security card and identification card were found.

On August 31, 2006, the State filed an Information charging Smith with Count I, auto theft, a Class D felony, I.C. §. 35-43-4-2.5; Count II, resisting law enforcement, a Class D felony, I.C. § 35-44-3-3; Count III, resisting law enforcement, a Class A misdemeanor, I.C. § 35-44-3-3; and Count IV, criminal trespass, a Class A misdemeanor, I.C. § 35-43-2-2. On October 4, 2006, Smith waived his right to a trial by jury and the State also filed an additional Information adding Part II to Count I, enhancing it to a Class C felony due to

Smith's previous conviction for an auto offense. On October 18, 2006, the State again amended the charging Information adding a habitual offender violation. A bench trial was conducted October 19, 2006, during which Smith pled guilty to Count IV, criminal trespass. At the close of evidence, the trial court found Smith guilty of all remaining Counts. The second phase of the trial, Part II of Count I, was then held. The trial court determined Smith had a prior conviction for auto theft and found him guilty of the elevated offense, auto theft as a Class C felony. Due to his two prior convictions, one for auto theft and one for carrying a handgun without a license, the trial court also adjudicated Smith an habitual offender.

On November 9, 2006, the trial court sentenced Smith to six years on Count I, auto theft, a Class C felony, enhancing the sentence by nine years for the habitual offender adjudication; two years on Count II, resisting law enforcement, a Class D felony; and one year on Count IV, criminal trespass, a Class A misdemeanor.¹ All sentences were ordered to be served concurrently for an aggregate sentence of fifteen years.

Smith now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Smith argues the evidence presented by the State at trial was insufficient to support his convictions for auto theft and resisting law enforcement. Specifically, he claims the State failed to prove beyond a reasonable doubt that (1) he exerted unauthorized control over the

vehicle, and (2) he knowingly or intentionally fled from Officer Shirey using a vehicle.

A. *Standard of Review*

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *White v. State*, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.* A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *Id.*

B. *Auto Theft*

Smith first contends the State failed to prove beyond a reasonable doubt that he exerted unauthorized control over the vehicle. Conversely, the State maintains that Smith never explained his possession of the vehicle and thus his possession was circumstantially proven to be unauthorized. We do not agree with the State's characterization of circumstantial evidence, nor do we find there was sufficient evidence to support a conviction for auto theft.

To successfully prove auto theft in the instant case, the State was required to provide evidence that Smith "knowingly or intentionally exert[ed] unauthorized control over the motor vehicle of another person, with intent to deprive the owner of: (1) the vehicle's value

¹ The trial court did not sentence Smith for Count III, resisting law enforcement, a Class A misdemeanor, due

or use; or (2) a component part (as defined in [I.C. §] 9-13-2-34) of the vehicle [T]he offense is a Class C felony if the person has a prior conviction of an offense under this subsection or subsection (c).”² I.C. § 35-43-4-2.5(b). “A theft conviction may be sustained by circumstantial evidence.” *J.B. v. State*, 748 N.E.2d 914, 916 (Ind. Ct. App. 2001).

Generally, the unexplained possession of recently stolen property is sufficient to infer actual theft. *Buntin v. State*, 838 N.E.2d 1187, 1190 (Ind. Ct. App. 2005) (citing *Brown v. State*, 827 N.E.2d 149, 153 (Ind. Ct. App. 2005), *reh’g denied, trans. denied*). Whether property was recently stolen is determined by examination of “not only the length of time between the theft and the possession,” but also circumstances such as the defendant’s familiarity or proximity to the property at the time of the theft, as well as the character of the goods. *Buntin*, 838 N.E.2d at 1190 (quoting *Allen v. State*, 743 N.E.2d 1222, 1230 (Ind. Ct. App. 2001)). Where the length of time between the theft and the possession is short, that fact itself makes the possession recent. *Buntin*, 838 N.E.2d at 1190.

In *Kidd v. State*, 530 N.E.2d 287 (Ind. 1988), *reh’g denied*, our supreme court determined that evidence of items stolen more than twenty-four hours prior to their recovery was not sufficient to support a conviction, even when combined with a false explanation for the possession of the goods. The supreme court reasoned that if burglary was sufficiently proven by possession, along with a false explanation of possession, then evidence supporting the crime of possession of stolen property would necessarily and inevitably equate to a

to double jeopardy concerns.

² Smith had a prior auto theft conviction.

conviction for burglary. *Id.* at 288. Essentially, we believe the supreme court was cautioning us to not confuse possession crimes with actual crimes. *See Buntin*, 838 N.E.2d at 1190.

Similarly, in *Gibson v. State*, 533 N.E.2d 187, 190 (Ind. Ct. App. 1989), this court determined that the defendant's unexplained possession of a vehicle two days after it was stolen was insufficient to sustain a conviction for auto theft by itself. Particularly, we noted that the greater the lapse in time between the theft and the possession, the greater the need for a showing of other circumstances to support the determination the theft was "recent." *Id.* at 189. However, we affirmed Gibson's conviction because we found corroborating evidence to support the conclusion that Gibson committed the theft. First, the steering column was damaged in a manner that would permit the car to be started with a sharp instrument and Gibson was stopped with a screwdriver in his back pocket. *Id.* Second, police watched the vehicle for forty-five minutes when Gibson got into the vehicle and drove away. *Id.* Third, he had no identification, no keys, and refused to identify himself to the police upon being stopped. *Id.* Lastly, Gibson denied having been in the car. *Id.*

In *Buntin and Trotter v. State*, 838 N.E.2d 553 (Ind. Ct. App. 2005), the defendant was not found in possession of the vehicle until five days after it had been stolen. Additionally, there was no corroborating evidence to support the conclusion that the vehicle was recently stolen; therefore, in both *Buntin* and *Trotter*, the defendant's convictions for auto theft were reversed. *See Buntin*, 838 N.E.2d at 1191; *see also Trotter*, 838 N.E.2d at 558.

Similar to *Buntin* and *Trotter*, in the case before us, Smith was found in possession of the vehicle three days after the vehicle was reported stolen. Additionally, Smith had the keys

to the vehicle, there were no signs of forced entry, *i.e.*, broken windows or a broken steering column, and Smith had personal belongings in the vehicle. Therefore, despite the State's showing that Smith exerted control over a stolen vehicle, the facts do not support the conclusion that the vehicle was recently stolen or the inference therefrom that Smith committed actual theft of the vehicle. *See Butin*, 838 N.E.2d at 1191.

The trial court, however, reasoning that Spicer had possessory interest in the vehicle at the time it was stolen, concluded Smith exerted unauthorized control over the vehicle. We disagree. Possessory interest is defined as “[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.” *Black’s Law Dictionary* 1185 (7th ed. 1999). The record makes clear Spicer turned over the keys of the vehicle to Griffith on August 27, 2006, and Griffith drove away in the vehicle. Thus, Spicer lost his possessory interest in the vehicle as of that moment. Thus, we find Spicer did not have a possessory interest in the vehicle when it was reported stolen, or when Smith was found in its possession. Accordingly, we reverse the judgment of the trial court, vacate Smith’s conviction for auto theft, and remand to the trial court for resentencing.

C. Resisting Law Enforcement as a Class D Felony

Next, Smith argues the State failed to present sufficient evidence he resisted law enforcement. Specifically, Smith claims the State did not prove beyond a reasonable doubt he was aware police were pursuing him, or that he used a vehicle to flee the police.

To prove resisting law enforcement in the instant case, the State was required to establish beyond a reasonable doubt Smith (1) knowingly or intentionally, (2) fled from

Officer Shirey after Officer Shirey identified himself and ordered him to stop, and (3) used a vehicle in fleeing. I.C. § 35-44-3-3(a)(3).

Smith argues he did not know Officer Shirey was pursuing him. Officer Shirey testified he first saw Smith when he failed to stop at a stop sign. Officer Shirey then activated his lights and sirens and began pursuing Smith. Spicer's vehicle was in between Officer Shirey's vehicle and Smith's vehicle. As soon as Spicer was able to get out of the way, Officer Shirey passed Spicer and attempted to catch Smith. At a high rate of speed, Smith tried to turn down an alley, but was unable to negotiate the turn and crashed into a steel pole that stood approximately two feet from the ground. As Officer Shirey brought his vehicle to a stop, Smith exited his vehicle and fled on foot down the alley. As soon as Officer Shirey exited his vehicle, he yelled after Smith to stop and began pursuing him on foot. Smith turned a corner by the time Officer Shirey reached Smith's vehicle. At that time, Officer Shirey noticed loose bullets on Smith's driver's side seat and decided not to follow Smith around the corner.

We find there is evidence Smith used a vehicle in the commission of this offense. Ultimately, Smith's argument is an invitation for us to reweigh the evidence presented at trial; an invitation we decline because we do not reweigh evidence in a sufficiency challenge on appeal. *See White*, 846 N.E.2d at 1030. As a result, Smith's sufficiency argument fails.

II. *Criminal Trespass*

Lastly, Smith argues the trial court erroneously accept his guilty plea for criminal trespass. Particularly, he asserts that the State failed to make an adequate factual basis after he pled guilty to criminal trespass. We disagree.

To prove criminal trespass the State was required to prove Smith (1) knowingly or intentionally, (2) interfered with the use of possession of the real property of another person, (3) without their consent. I.C. § 35-43-2-2. The record in the instant case reveals Smith stipulated going into a house in which he did not have a possessory interest without the consent of the home's occupants. Thus, contrary to Smith's contentions, we find sufficient evidence provided through a sufficient factual basis that Smith committed criminal trespass.

CONCLUSION

Based on the foregoing, we conclude the State (1) presented sufficient evidence to sustain Smith's convictions for resisting law enforcement; and (2) provided a sufficient factual basis to convict Smith of criminal trespass. However, the State did not present sufficient evidence to sustain Smith's conviction for auto theft.

Vacated in part, affirmed in part, and remanded with instructions.

BAKER, C.J., and SHARPNACK, J., concur.