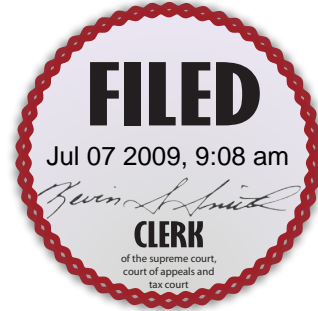


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**JAMES A. EDGAR**  
J. Edgar Law Offices, Prof. Corp.  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana  
  
**MARJORIE LAWYER-SMITH**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

ANTHONY WHITLEY, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 49A02-0811-CR-1030  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Lisa Borges, Judge  
Cause No. 49F15-0801-FD-003830

---

**July 7, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Anthony Whitley (“Whitley”) was convicted of Class D felony theft following a bench trial before Marion Superior Court. The trial court sentenced Whitley to a term of one year with two days executed and the remainder suspended to probation. Whitley appeals and argues that the evidence was not sufficient to support his conviction for Class D felony theft and that the trial court improperly shifted the burden of proof from the State to the defendant. We affirm.

### **Facts and Procedural History**

Early in the morning on December 8, 2007, the victim and two friends entered a White Castle. While there they sat together and talked with a group of males while they waited for their food. The victim took off her coat, wrapped it around her purse then set the bundle on her seat. When the victim’s order was ready, she went to the counter and returned with the food. The group of males that had been standing next to the victim and her friends left while the victim and her friends ate.

When the victim and her friends left the restaurant, the victim noticed that her purse was missing. After searching her car and the restaurant, she called her credit card company to cancel the missing cards. When she cancelled her credit card, she learned that it had already been used that morning to pay a cell phone bill. The victim confirmed that the purchase was unauthorized. However, the credit card company could not trace the payment because the card had been cancelled while the payment was pending. The victim then filed a police report.

Almost one month later, on January 5, 2008, Indianapolis Metropolitan Police Officer Anthony Carter (“Officer Carter”) was dispatched to a single car accident. Whitley, the driver of the car, said that his knee hurt. Another officer, Officer Christopher Wilburn (“Officer Wilburn”), requested an ambulance.

As the two officers and Whitley awaited the ambulance, Officer Carter noticed a number of personal items strewn about outside of the car. He picked up the items and put them in the car. As he did so, he noticed a driver’s license between the driver’s seat and the driver’s side door. He then found credit cards in the driver’s side door panel and a social security card on the floor between the door and the seat. None of the items were in Whitley’s name, and all of the items were those of the victim.

Officer Carter then checked on his computer and learned that the items were reported stolen. Officer Carter told Officer Wilburn and Officer Wilburn asked Whitley who the items belonged to. Whitley replied that they belonged to a friend. Registration records showed that Whitley and his grandmother owned the car but Whitley was the sole driver. Whitley was arrested.

The State charged Whitley with Class D felony theft. Following a bench trial on September 2, 2008, the trial court found Whitley guilty as charged. On October 14, 2008, Whitley was sentenced to one year with two days executed and the remainder suspended to probation. Whitley now appeals.

### **I. Sufficiency of the Evidence**

Whitley argues that the evidence was insufficient to support his conviction for Class D felony theft, specifically, that the State had failed to show that Whitley

knowingly had possession of the victim's possessions. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict 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.

Under Indiana Code section 35-43-4-2(a) (2004), “[a] person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.”

Whitley contends that the evidence was insufficient to support his conviction; specifically that he knowingly or intentionally possessed the victim's possessions. The evidence in this case does not support actual possession yet does support constructive possession. Constructive possession is established by showing that the defendant has the intent and capability to maintain dominion and control over the contraband. Godar v. State, 643 N.E.2d 12, 14 (Ind. Ct. App. 1994), trans. denied. Essentially, in cases where the accused has exclusive possession of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of contraband and was capable of controlling it. Moore v. State, 613 N.E.2d 849, 853 (Ind. Ct. App. 1993).

This case differs from a run of the mill theft or burglary. In this case, the victim's possessions were found in Whitley's vehicle nearly a month after being reported missing. While the mere unexplained exclusive possession of recently stolen property will sustain a conviction of theft and burglary, any considerable length of time that has passed since the time of the theft to the time of the arrest requires that some showing be made that the defendant has had exclusive possession of the property during that period of time. Gibson v. State, 533 N.E.2d 187, 188 (Ind. Ct. App. 1989); 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 goods 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.

Here, Whitley's possession of the vehicle containing the items was exclusive. Whitley testified that he and his grandmother were co-owners of the vehicle, that

other people had access to the vehicle, and that only he drove the vehicle. Tr. p. 45-46. Also, the credit cards, driver's license, and social security card were all found either in the door panel next to the driver's seat or on the floor by the driver's feet, well within arm's length and within plain view of the driver. Additionally, Whitley initially stated that the items belonged to a "friend." At trial, the victim was unable to identify Whitley, bringing into question Whitley's claim that the items belonged to a "friend."

The trial court apparently chose not to believe Whitley's statement and its inference that someone else put the victim's possessions in Whitley's vehicle without his knowledge. We do not reweigh the evidence or judge the credibility of the evidence. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). The evidence presented at trial was sufficient to support Whitley's conviction for Class D felony theft.

## **II. Burden of Proof**

Whitley also argues that the trial court impermissibly shifted the burden of proof from the State to the defendant. The State generally bears the burden of proving every element of an offense and that shifting that burden to the defendant may not be done. Arthur v. State, 86 N.E.2d 698, 700 (Ind. 1949). Whitley points to one statement that the trial court made that "I just think that because [the items are] found in a place that he has exclusive control over that it would be unusual for them to be there absent some explanation for that when your client said they belonged to a friend of his." Tr. p. 53.

Generally, a contemporaneous objection is required to preserve an issue for appeal. Rembusch v. State, 836 N.E.2d 979, 982 (Ind. Ct. App. 2005) trans. denied. Whitley failed to object to the trial court's statement contemporaneously despite the opportunity to do so. We therefore deem the issue waived for lack of a timely objection.

Waiver notwithstanding, the trial court did not shift the burden of proof from the State to the defendant. The trial court's statement was made after all of the evidence had been introduced by State and Whitley and during the final argument by Whitley. Rather than shifting the burden of proof from the State to Whitley, the trial court was simply providing a basis for his decision. As this was a bench trial and not a jury trial, "[t]he assumption is that the trial court, as factfinder correctly applies and follows the law." Bordenkecher v. State, 562 N.E.2d 49, 51 (Ind. Ct. App. 1990), trans. denied. The trial court did not improperly shift the burden of proof to Whitley.

### **Conclusion**

The evidence was sufficient to support Whitley's conviction for Class D felony theft. Additionally, the trial court did not improperly shift the burden of proof to Whitley.

Affirmed.

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