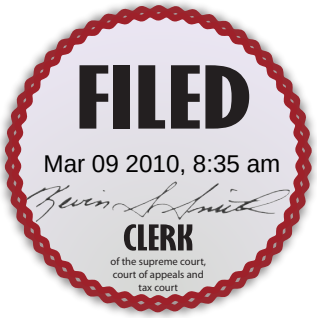

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IN THE
COURT OF APPEALS OF INDIANA

DARREN MCDUFFY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0908-CR-805
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0904-FD-38964

March 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Darren McDuffy appeals his conviction for theft as a class D felony.[1] McDuffy raises one issue, which we restate as whether the evidence is sufficient to sustain his conviction. We affirm.

The facts most favorable to McDuffy's conviction follow. In the early morning hours on April 10, 2009, Indianapolis Police Officer Robert Hatch was in his marked police vehicle "sitting dark in a hiding spot at the rear of the business" of a CVS drugstore located at the intersection of Kentucky Avenue and Olender Drive where there had been previous robberies. Transcript at 17. McDuffy visited the CVS, but he did not purchase any alcohol. At approximately 4:10 a.m., Officer Hatch observed a vehicle driven by McDuffy exit the CVS parking lot "in very much of a hurry to get out . . . ." Id. at 19. Officer Hatch's attention was drawn to McDuffy's vehicle because of the speed of the vehicle and the fact that McDuffy failed to stop before exiting the parking lot and entering the southbound lane of Olender Drive. Officer Hatch then exited the CVS parking lot and followed McDuffy's vehicle driving southbound.

Officer Hatch observed McDuffy's vehicle make a right turn onto Mooresville Road without signaling, and Officer Hatch activated the emergency lights of his police vehicle and initiated a traffic stop. McDuffy pulled his vehicle off of Mooresville Road and into a driveway, and Officer Hatch started to get out of his police vehicle. However, rather than "just pulling in and stopping," McDuffy, "on three separate occasions, act[ed]

[1] Ind. Code § 35-43-4-2 (2004) (subsequently amended by Pub. L. No. 158-2009, § 8 (eff. July 1, 2009)).

as if he was going to stop . . . , [but] began rolling forward again." Id. at 24. Each time McDuffy "failed to actually stop," he made "furtive movements" inside his vehicle, which the Officer described as "where the person or occupants of the vehicle are specifically reaching towards an area." Id. Officer Hatch exited his police vehicle, approached McDuffy's vehicle on foot, and verbally ordered McDuffy "to stop his vehicle and immediately place his hands on the steering wheel." Id. at 25.

After approaching McDuffy's vehicle, Officer Hatch noticed various items on the passenger seat and the passenger-side floorboard, including "an open box of aluminum foil as well as balled up pieces of aluminum foil, a bottle of alcohol with a security cap on it and aluminum foil around the top of it." Id. at 26-27. Officer Hatch asked McDuffy for his license and registration, and McDuffy stated that he did not have a license. Officer Hatch then asked McDuffy to step out of his vehicle and placed him in handcuffs for safety reasons. Officer Hatch opened the passenger side door of McDuffy's vehicle and "observed more plainly everything that was inside the passenger side compartment . . . ." Id. at 27. From his training and police experience, which included shoplifting investigation training, Officer Hatch knew that wrapping "aluminum foil around security caps and anti-theft devices are a means to defeat security devices located in the stores." Id. After confirming that nothing was hidden under the items on the seat, Officer Hatch read McDuffy his Miranda rights.

Officer Hatch then asked McDuffy if he had taken the bottles of alcohol from the CVS. Initially, McDuffy denied doing so. Officer Hatch told McDuffy that this was not

the first time that he had apprehended a shoplifter and asked McDuffy why the security caps, which would have been taken off at the cash register at the store, were still on the bottles of alcohol. Officer Hatch then asked McDuffy again if he had stolen the alcohol and stated "basically that you and I both know that you did." Id. at 29. McDuffy's head dropped and he nodded in the affirmative.

That same night, when an officer visited the CVS drugstore, the night clerk inspected the liquor shelf and noticed that "[t]here was a difference of what we should have had, we were missing some." Id. at 57. The night clerk's duties included examining the store shelves "to look for anything damaged or stolen throughout the store" and performing periodic "counts on the items in the store" to determine whether items may have been stolen. Id. at 51, 53. The brand of the two bottles of alcohol that the officer showed the clerk was the same brand that was missing from the store. The black security caps were put on all bottles of liquor at CVS, except for certain bottles kept behind the counter, and bottles of wine.

On April 10, 2009, the State charged McDuffy with: (1) Count I, theft as a class D felony; and (2) Count II, driving while suspended as a class A misdemeanor. During the jury trial, Officer Hatch testified regarding the arrest of McDuffy and that he "did recognize those caps as ones that CVS also uses." Id. at 29. The night clerk testified that the two bottles that the officer showed her belonged to CVS. The jury found McDuffy guilty on both counts. The trial court sentenced McDuffy to an aggregate term of three years for the theft conviction, with one and one-half years executed and one and one-half

years suspended, and one year for the driving while suspended conviction, to run concurrently with the sentence for theft.

The sole issue is whether the evidence is sufficient to sustain McDuffy's conviction for theft as a class D felony.[2] When reviewing the 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 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.

"The question . . . is whether the inferences supporting the judgment were reasonable, not whether there were other 'more reasonable' inferences that could have been made." Brink v. State, 837 N.E.2d 192, 197 (Ind. Ct. App. 2005) (quoting Thompson v. State, 804 N.E.2d 1146, 1150 (Ind. 2004)), trans. denied. "Reaching alternative inferences such as this is a function of the trier of fact, not this Court. We cannot reverse the conviction merely because this inference is a plausible one that might have been drawn from the evidence." Id. Indeed, the Indiana Supreme Court has stated:

> Triers of fact determine not only the facts presented to them and their credibility, but any reasonable inferences from facts established either by direct or circumstantial evidence. It is not necessary that the court find the circumstantial evidence excludes every reasonable hypothesis of innocence.

[2] McDuffy does not appeal his conviction for driving while suspended as a class A misdemeanor.

> It need only be demonstrated that inferences may reasonably be drawn which support the finding of guilt.

Thompson, 804 N.E.2d at 1150 (quoting Metzler v. State, 540 N.E.2d 606, 610 (Ind. 1989)). A theft conviction may be sustained by circumstantial evidence. See Miller v. State, 563 N.E.2d 578, 581 (Ind. 1990), reh'g denied; see also Duren v. State, 720 N.E.2d 1198, 1201 (Ind. Ct. App. 1999) (citing Ward v. State, 439 N.E.2d 156, 159 (Ind. 1982)), trans. denied.

The offense of theft is governed by Ind. Code § 35-43-4-2, which provides that "[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." Thus, to convict McDuffy of theft as a class D felony, the State needed to prove that McDuffy knowingly exerted unauthorized control over alcohol of CVS with an intent to deprive CVS of any part of its value or use.

McDuffy argues that the State "failed to prove beyond a reasonable doubt that the two bottles of alcohol belonged to CVS." Appellant's Brief at 6. Specifically, McDuffy argues that the CVS clerk who testified during trial "did not explain . . . how she determined the store was missing any of its inventory," but that the store clerk did testify that "she [was] not the person who conducts inventory or records the inventory in the store's computer . . . ." Id. at 6-7. McDuffy further argues that the CVS clerk's testimony that "the goods were from the store was not based on personal knowledge, but rather, it appears, based on a comparison between the stock on the shelf and some record of inventory, either in the store computer or printed." Id. at 7. We conclude that

McDuffy merely asks that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. See Jones, 783 N.E.2d at 1139. While the jury could have made different inferences from the evidence, we cannot say that the inference made by the jury here under these circumstances—that McDuffy knowingly exerted unauthorized control over CVS's property consisting of two bottles of alcohol—was unreasonable.

Based upon our review of the record, we conclude that evidence of probative value existed from which the jury could have found beyond a reasonable doubt that McDuffy committed theft as a class D felony. See Bennett v. State, 871 N.E.2d 316, 323 (Ind. Ct. App. 2007) (observing that the defendant merely asked this court to reweigh the evidence and judge the credibility of the witnesses, which we could not do, and concluding that evidence was sufficient to support the defendant's conviction for theft as a class D felony where no witness observed the defendant take items but items previously seen in a vehicle were missing from the vehicle after the vehicle was recovered from the defendant), opinion adopted by 878 N.E.2d 836 (Ind. 2008).

For the foregoing reasons, we affirm McDuffy's conviction for theft as a class D felony.

Affirmed.

MATHIAS, J., and BARNES, J., concur.