



**FILED**

Oct 20 2010, 9:34 am

*Kevin L. Smith*

**CLERK**  
of the supreme court,  
court of appeals and  
tax court

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**BRIAN REITZ**  
Deputy Attorney General  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

)

)

)

)

)

)

)

)

)

)

APPEAL FROM THE WHITE SUPERIOR COURT  
The Honorable Robert B. Mrzlack, Judge  
Cause No. 91D01-0905-FD-80

**October 20, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Mark A. Rode appeals his conviction for Class D felony theft. Rode contends there is insufficient evidence to support his conviction. Concluding that the evidence is sufficient, we affirm.

## **Facts and Procedural History**

Rode began working at Monticello Assisted Living and Healthcare (“the Center”) on March 4, 2009, as its New Energy Wellness coordinator. His duties were to assess whether people could exercise safely, monitor their exercise, and generate weekly reports.

Brenda Buehler was the director of marketing and admissions. She had her own office in the building, and she would allow Rode to use her computer to generate his weekly reports.

Buehler was in charge of a community bingo. In early March, Buehler bought five Walmart gift cards worth ten dollars each. She gave away one gift card as a prize during community bingo. She kept one gift card to give away at another activity. She put the last three gift cards in her unlocked desk drawer.

On March 11, Buehler found Rode in her office. When she told Rode that she needed to use her computer, he left. Buehler noticed that many of the items on her desk had been moved and that her “browser [had been] completely erased.” Tr. p. 19.

The next afternoon, Buehler walked into her office and once more found that items on her desk had been moved and that her “browser was erased again.” *Id.* Buehler asked

the receptionist, whose desk was right outside her office, whether anyone had been in her office that day. The receptionist indicated that Rode had been in her office.

Buehler spoke with Rode and demanded that he stop moving items around on her desk. When she noticed that Rode seemed extremely agitated, upset, and nervous, she suspected something was wrong. She opened her desk drawer and discovered that the three remaining gift cards were gone.

It was determined that Rode had used the three gift cards on March 11 at a Walmart store in Brownsburg. He was terminated on March 25.

The State charged Rode with Class D felony theft. Ind. Code § 35-43-4-2(a). Rode was tried to the bench. The parties stipulated that Rode possessed and used the three gift cards on March 11.

Rode testified that on March 11, Harold Dean Howell tried out the equipment at the New Energy Wellness facility to determine whether he wanted to rejoin. To thank Rode for staying to help him, Rode further claimed, Howell gave him three Walmart gift cards he won while playing bingo.

The executive director of the Center testified that her March 2009 records indicated that Howell used the New Energy Wellness facility only on the 4th, 6th, and 16th. Howell testified that he did not give Rode any Walmart gift cards and that he did not even know what they looked like.

The trial court found Rode guilty and sentenced him to one and a half years, with one year suspended. Rode now appeals.

### **Discussion and Decision**

Rode contends that the evidence is insufficient to support his theft conviction.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or judge the credibility of the witnesses. *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). We consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

To convict Rode of theft as charged here, the State had to prove that he knowingly or intentionally exerted unauthorized control over the gift cards of the Center with the intent to deprive the Center of any part of their value or use. *See* Appellant's App. p. 5; I.C. § 35-43-4-2(a).

The mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. *Fortson v. State*, 919 N.E.2d 1136, 1143 (Ind. 2010). Rather, such possession is to be considered along with the other evidence in a case, such as how recent or distant in time the possession was from the moment the item was stolen and the circumstances of the possession. *Id.* The fact of possession and all the surrounding evidence about the possession must be assessed to determine whether any rational factfinder could find the defendant guilty beyond a reasonable doubt. *Id.*

The evidence most favorable to the judgment reveals that Buehler placed three gift cards in an unlocked desk drawer in her office in early March. Rode was in Buehler's office on March 11. When Buehler confronted Rode the next day about items on her desk being moved, Rode was extremely agitated, upset, and nervous. Rode had used these same gift cards on March 11.

Despite this clear evidence, Rode argues that other people had access to Buehler's desk and that Howell gave him the gift cards on March 11. However, Howell was not at the Center on March 11 and denied giving Rode the gift cards.

To the extent that witnesses offered conflicting accounts of the details, it was within the province of the factfinder to decide whom to believe and which details were important. In short, Rode asks us to reweigh the evidence and reassess witness credibility, which we may not do. The evidence is thus sufficient to sustain Rode's conviction.

Affirmed.

MAY, J., and ROBB, J., concur.