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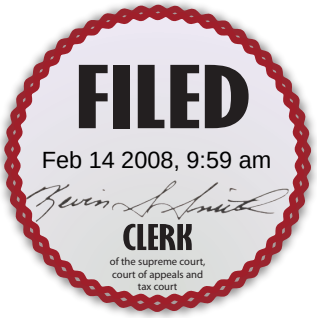

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IN THE
COURT OF APPEALS OF INDIANA

VIRGIL POWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-0706-CR-304
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0606-FC-72

February 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Virgil Powell Jr. appeals his conviction for auto theft as a class C felony.[1] Powell raises one issue, which we revise and restate as whether the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of conversion as a class A misdemeanor.[2] We affirm.

The relevant facts follow. Anthony Logan, the owner of NA Logan, Inc., an industrial painting contracting firm, hired Nick Head, a contractor, to demolish scrap metal at his business. Powell was Head's employee and worked at Logan's business. Head and Powell completed their work approximately three months before June 12, 2006.

On the evening of June 12, 2006, Jamie Fowler, who knew Powell for ten years, noticed a pickup truck pull in behind her and follow her into her driveway. Powell exited the truck and began arguing with Head, Fowler's neighbor. Powell then left in the pickup truck.

Later that evening, Robert Dyke noticed Powell in the pickup truck in front of him "swerving all over the road." Transcript at 66. Dyke lost sight of the pickup truck for a few seconds due to a bend in the road, and then saw the pickup truck in a ditch. Dyke stopped his vehicle and asked Powell if he needed any help. Powell, who was stumbling and slurring his words, told Dyke, "do not call the cops, call my dad. He'll take care of

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[1] Ind. Code § 35-43-4-2.5 (2004).

[2] Ind. Code § 35-43-4-3 (Supp. 2005).

this." Id. at 73. Dyke knocked on the door of a nearby home and asked the resident to call the police. Shortly thereafter, the truck caught fire, and Powell left the scene.

Lake County Sheriff Patrolman John Breitweiser arrived at the scene. A white female approached Patrolman Breitweiser and said "oh, my God, that's Virgil Powell's truck. I just saw him a half hour ago. He left my house, he was talking to my mom." Id. at 92. The witness also stated that she and her mother had asked Powell if the truck belonged to him, and Powell said that the truck belonged to his boss. Patrolman Breitweiser received a description of Powell from witnesses and advised dispatch so that other police officers could look for Powell. Lake County Police Corporal Troy Johnson located Powell riding a "youth bike" about three blocks from the scene of the accident. Id. at 113.

Patrolman Breitweiser ran the plate and found that the registered owner was Logan's business. The police called Logan, who went to his business and discovered that his pickup truck with a corporate logo on the side was missing and the chain that locked his fence surrounding the yard was cut with bolt cutters. Logan had last seen the truck that same day and had locked the gate that night. Logan had not given anyone permission to use his truck that evening.

The State charged Powell with auto theft as a class C felony and alleged an enhancement because Powell had previously been convicted of auto theft as a class D

felony.[3] Powell requested an instruction on conversion. The trial court found that there was no serious evidentiary dispute and did not give the instruction on conversion. After a jury trial, the jury found Powell guilty of auto theft as a class D felony. Powell then admitted that he had a prior conviction for auto theft, and the trial court enhanced Powell's auto theft conviction from a class D felony to a class C felony. The trial court sentenced Powell to seven years in the Indiana Department of Correction.

The sole issue is whether the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of conversion as a class A misdemeanor. To determine whether instructions on lesser included offenses should be given, the trial court must engage in a three-step analysis. Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995). This analysis contains three steps: (1) a determination of whether the lesser included offense is inherently included in the crime charged; if not, (2) a determination of whether the lesser included offense is factually included in the crime charged; and, if either, (3) a determination of whether a serious evidentiary dispute existed whereby the jury could conclude the lesser offense was committed but not the greater. Id. at 566-567.

In Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998), the Indiana Supreme Court set forth our standard of review as follows:

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[3] The charging information states that Powell was charged with auto theft as a class C felony and that he had previously been convicted of auto theft as a class D felony. However, the trial court stated that Powell was charged with auto theft as a class D felony and the final instruction indicated that the State charged Powell with auto theft as a class D felony.

> For convenience we will term a finding as to the existence or absence of a substantial evidentiary dispute, a Wright finding. Where such a finding is made we review the trial court's rejection of a tendered instruction for an abuse of discretion. Champlain v. State, 681 N.E.2d 696, 700 (Ind. 1997). This finding need be no more than a statement on the record that reflects that the trial court has considered the evidence and determined that no serious evidentiary dispute exists. See McEwen v. State, 695 N.E.2d 79 (Ind. 1998). Its purpose is to establish that the lack of a serious evidentiary dispute and not some other reason is the basis of the trial court's rejection of the tendered instruction. However, if the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo. Champlain, 681 N.E.2d at 700.

Conversion is an inherently lesser-included offense of auto theft. Shouse v. State, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006), trans. denied. The only element distinguishing auto theft from conversion is whether Powell acted with intent to deprive Logan of the truck's use or value. Compare Ind. Code § 35-43-4-2.5 with Ind. Code § 35-43-4-3.[4]

Here, the trial court found that there was no serious evidentiary dispute. Accordingly, we review the trial court's ruling for abuse of discretion. Powell argues that "there was an evidentiary dispute as to whether [Powell] acted with intent to deprive the victim of the truck's value or use or whether he merely joy-rided in the truck for a short period of time before abandoning the truck." Appellant's Brief at 6. In order for a

[4] Ind. Code § 35-43-4-2.5 governs auto theft and provides that "[a] person who knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the owner of . . . the vehicle's value or use . . . commits auto theft, a Class D felony." Ind. Code § 35-43-4-3 governs conversion and provides that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor."

serious evidentiary dispute to exist, the evidence adduced at trial must enable the jury to conclude that the lesser offense was committed but the greater offense was not committed. Chanley v. State, 583 N.E.2d 126, 130 (Ind. 1991).

The record reveals that Powell completed his work at Logan's business approximately three months before June 12, 2006. Logan had last seen the truck that same day, had locked the gate that night, and had not given anyone permission to use his truck. Powell drove Logan's pickup truck, was swerving all over the road, and drove the pickup truck into a ditch. Shortly thereafter the truck caught fire. Powell only abandoned the truck after driving it into the ditch. Corporal Johnson located Powell riding a "youth bike" about three blocks from the scene of the accident. Transcript at 113. After the police notified Logan, Logan discovered that the chain that locked his fence at his business was cut with bolt cutters. There was no evidence that Powell intended to return the vehicle. Thus, we cannot say that the trial court abused its discretion by finding that there was no serious evidentiary dispute. Accordingly, the trial court did not err by refusing to instruct the jury on the lesser included offense of conversion as a class A misdemeanor. See, e.g., Chanley, 583 N.E.2d at 130 (holding that there was no serious evidentiary dispute when defendant pointed to no evidence of any intent on his part to return the vehicle, other than the fact that he abandoned it not far from the place from where he had taken it and although it was true that he did not drive the car much distance, that is because the car became stuck in the snow).

For the foregoing reasons, we affirm Powell's conviction for auto theft as a class C felony.

Affirmed.

BARNES, J. and VAIDIK, J. concur