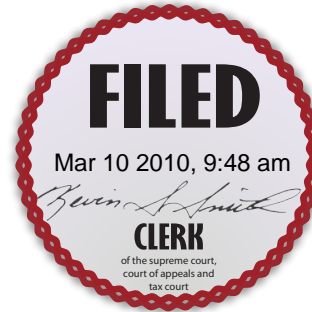


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

GARY L. GRINER
Mishawaka, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EUGENE J. KING,)
)
Appellant-Defendant,)
)
vs.) No. 71A03-0910-CR-478
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0804-FD-302

MARCH 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Eugene J. King appeals his convictions of theft, a Class D felony, and battery, a Class A misdemeanor. We affirm.

ISSUES

King raises two issues for our review, which we restate as:

- I. Whether the trial court erred in denying King's motion for continuance.
- II. Whether the State presented sufficient evidence to support King's convictions.

FACTS AND PROCEDURAL HISTORY

On the afternoon of January 15, 2008, David Voelkert drove his bucket truck to a Mishawaka strip mall to have lunch with his family at a mall restaurant. After the family finished lunch, Angela, Voelkert's wife, went into a nearby store while Voelkert sat with their children in the family van parked close to Voelkert's truck. As Voelkert sat in the van, he noticed someone "doing something to" Voelkert's truck.

Voelkert exited the van and went to his truck, where he found his door open and King standing there with Voelkert's nail gun and an inverter in his hands. Voelkert grabbed the nail gun out of King's hands, put the nail gun in his truck, and instructed Angela, who had exited the store, to call the police. King struck Voelkert and ran to his own vehicle. Voelkert followed King's vehicle and obtained King's license plate number.

King was arrested and charged with theft of the inverter, which was never recovered. King was also charged with battery for striking and injuring Voelkert. After a bench trial, King was found guilty on both charges. He now appeals.

DISCUSSION AND DECISION

I. MOTION FOR CONTINUANCE

On the day of trial, King orally requested a continuance because he was displeased with his court-appointed attorney's pretrial preparation and contact with King. King cites *McCraney v. State*, 388 N.E.2d 283, 283-84 (Ind. Ct. App. 1979) for the proposition that a defendant must be allowed representation of counsel. He also cites *Barham v. State*, 641 N.E.2d 79, 82 (Ind. Ct. App. 1994) for the twin propositions that right to counsel is an essential component of the Sixth Amendment and that the right to counsel of choice is a question of fundamental fairness. He quotes *Barham* for the proposition that "[a] conviction attained when a court unreasonably or arbitrarily interferes with an accused's right to retain counsel of choice ... cannot stand, irrespective of whether the defendant has been prejudiced." *Id.* Denial of a motion for continuance will be reviewed for an abuse of discretion. *McCraney*, 388 N.E.2d at 283.

Barham controls when an accused expresses his lack of faith in current counsel and the accused has substitute counsel that is ready to enter an immediate appearance. In the present case, King appeared on the day of trial with his hired counsel and informed the court that he did not believe that counsel had sufficiently conferred with him. King did not present substitute counsel that was ready to enter an immediate appearance;

indeed, he wanted the continuance to attempt to find new counsel. *Barham* does not require the grant of a motion for continuance under the circumstances of the present case. *See Washington v. State*, 902 N.E.2d 280 (Ind. Ct. App. 2009), *trans. denied*; *Gilliam v. State*, 650 N.E.2d 45 (Ind. Ct. App. 1995). Accordingly, the trial court did not abuse its discretion in denying the continuance.

II. SUFFICIENCY OF THE EVIDENCE

King contends that the State failed to submit sufficient evidence to support his convictions. Our standard of review for sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences drawn therefrom. *Id.* at 269-70. The conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Id.* at 270.

The crux of King's argument is that Voelkert was not a believable witness. Voelkert testified that King knowingly or intentionally exerted unauthorized control over Voelkert's inverter with an intent to deprive Voelkert of its use or value. Voelkert also testified that King knowingly struck Voelkert as he tried to regain his property. The investigating officer, Road Patrol Officer Martin DeGeyter, testified that Voelkert received an injury from the striking. The combination of Voelkert's and Officer DeGeyter's testimonies established both theft (as defined by Ind. Code § 35-43-4-2) and

battery (as defined by Ind. Code § 35-42-2-1). We will not usurp the authority of the trier of fact by reweighing the evidence or assessing Voelker's credibility.

Affirmed.

BARNES, J., and VAIDIK, J., concur.