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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**CHARLES E. STEWART, JR.**  
Appellate Public Defender  
Crown Point, Indiana

**STEVE CARTER**  
Attorney General of Indiana

**ELLEN H. MEILAENDER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL SZAREK, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
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STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 45A03-0712-CR-594

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas Stefaniak, Jr., Judge  
Cause No. 45G04-0701-MR-2

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**September 17, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Michael Szarek appeals his convictions for two counts of Murder,<sup>1</sup> a felony. He presents the following restated issue for review: Did the trial court improperly admit various evidence found pursuant to several warrantless searches or seizures?

We affirm.

Szarek was the son of Barbara Mutuska and the stepson of Michael Mutuska. The Mutuskas, who had been married for many years, lived in a trailer home in the Sheffield Trailer Court in Hammond, Indiana. At some point, Szarek developed a particularly bad relationship with Michael and was not allowed in the trailer when Michael was home. Beginning sometime in 2005, Szarek became angry with his mother because he believed she had misappropriated and gambled away approximately \$25,000 of his money while he was in prison.<sup>2</sup> Though he continued to see his mother, Szarek apparently still held a grudge against her and often mentioned to others that she was out spending his money.

Szarek became friends with one of the Mutuskas' neighbors, Lisa Michnik, and often had coffee with her in her trailer. In 2006, around Thanksgiving, Szarek came to Michnik's trailer and told her he was angry with his mother because she was poor and could not pay him back, despite the fact she had a "big life policy". *Trial Transcript* at 345. Thereafter, on Christmas day, Szarek delivered a present from his mother to Michnik. When Michnik said she could not accept it, Szarek informed her it might be the last present she ever received from Barbara. He also said his parents would be going out of town soon.

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<sup>1</sup> Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1<sup>st</sup> Regular Sess.).

<sup>2</sup> He initiated a civil lawsuit against her in November 2005; Barbara denied that she owed her son any money.

On the morning of January 4, 2007, Barbara picked up Szarek in her Cadillac from Virginia Underhill's home.<sup>3</sup> This was the last time Underhill saw Barbara alive. That day, Michael also failed to show up for work. The Mutuskas were not seen or heard from after that day. They did not pay their rent, which was considered late after January 5. Their friends and Michael's supervisor began to worry when no one answered the phone at the Mutuskas' residence. On January 11, the fifth day of Michael's unexplained absences from work, his supervisor called the police and asked that a welfare check be performed. An officer went to the residence that afternoon and found that the mailbox was empty. He knocked on the door and no one answered.

During this period of time, neighbors observed Szarek going in and out of the trailer, walking the Mutuskas' dog, getting the couple's mail, and using Barbara's Cadillac. Specifically, neighbors reported seeing him at the residence on January 4, 5, 8, and 12, as well as January 9 and 10 or 10 and 11. When Michnik saw him outside the trailer on the night of the 4<sup>th</sup>, Szarek was "unsociable." *Id.* at 349. Another neighbor, Jeanne Serrano, saw him the next day putting a garbage bag into the trunk of his mother's car. When she looked again a few minutes later, the car was gone.

On January 5, Szarek went to For What It Is Worth, a pawnshop in Illinois, and sold two rings, a pair of earrings, and two gold fingernails. These items all belonged to Barbara. She had been known to always wear the gold fingernails on her index fingers, and the rings were a new wedding set that she had just received from Michael as a Christmas gift. Szarek

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<sup>3</sup> Underhill was a long-time friend of both Barbara and Szarek and Szarek often stayed with her, though he

returned to the pawnshop with additional items on the 8<sup>th</sup> and 9<sup>th</sup>. On the 8<sup>th</sup>, he sold a tool that he said belonged to his father who had died. Szarek drove to the store in his mother's Cadillac and sold another tool the following day.

On January 9, Szarek returned to Underhill's home for the first time in five days. She noticed that his left eye was swollen and bruised. When she said she had been trying to reach Barbara for days, Szarek indicated they were out of town gambling and spending his money.

On January 12, Michnik saw Szarek checking the Mutuskas' mail. Serrano also saw Szarek outside the trailer and stopped him to ask about his parents, whom she had not seen in about a week. He explained that his parents were in Kentucky. When Serrano informed him that an officer had been out the previous day at the request of Michael's employer, he "got a real funny look on his face." *Id.* at 310. After this conversation, Szarek drove away in his mother's car. It was "out of the ordinary" for Barbara to let Szarek use her car. *Id.* at 949.

That same day, the manager of the trailer park called Patrick Feeser, Barbara's other son who was listed as the emergency contact, due to the concerns of neighbors and Michael's employer. A longtime family friend also called Feeser out of concern because Barbara had not been heard from in a week, which was unusual. Feeser drove into town and met two officers at his parents' trailer that afternoon. He unlocked the door with his key and went in, followed by the officers. Officer Mark Kruse immediately smelled the strong odor of a dead body. There were actually two dead bodies in states of moderate to advanced decomposition. Michael's body was lying on a couch covered by a blanket, and Barbara's was on the floor

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did not have a key.

covered by a blanket. Feeser and the officers immediately exited the trailer and the officers called detectives and the coroner to the scene. Feeser noticed his mother's Cadillac was missing and filed a stolen vehicle report on the scene. For various reasons, Feeser suspected Szarek as the killer and, therefore, Szarek was listed as the suspect on the stolen vehicle report.

Michael suffered devastating injuries to his head, including blunt force injuries, chopping injuries that penetrated his skull and brain, and stabbing injuries. There were three distinct patterns of injury, indicating the use of more than one weapon or a weapon with more than one surface (such as a claw hammer). He also had injuries to his leg, abdomen, chest, shoulder, forearms, and hands. Michael had clearly tried to fight off his attacker. Though also the victim of a brutal attack, Barbara had received fewer injuries. Her death was caused by blunt force injuries to the back of her head. She also had a broken collarbone, broken ribs, and chopping injuries to her eye and temple.

The temperature in the trailer was cold because the thermostat was turned all the way down, presumably to slow the decomposition of the bodies. There were no signs of forced entry. There was blood spatter on the walls, cabinets, and ceiling. Bowls of fragrant white powder were found inside the trailer on either side of the door, and there was powder sprinkled on or near the bodies.

While the police were investigating the scene, Szarek had returned to Underhill's home, where he had stayed the previous three nights. At the time, Underhill was packing and in the process of moving to another residence. About 1:00 a.m. on January 13, a detective

called Underhill's home and left a message, indicating something had happened to the Mutuskas. Underhill listened to the message and then told Szarek to call the detective. Szarek refused, saying he would in the morning. Underhill then called the detective and learned Szarek was suspected of killing his parents. Underhill denied that Szarek was at her home. She spoke with Szarek, and he said he had not killed anyone. As Szarek was getting dressed, he heard a car door and said, "They're here." *Id.* at 924. Szarek, who was on parole for murder in Illinois, quickly left the residence and indicated to Underhill that this might be the last time she ever saw him. He left without taking two garbage bags that he had previously brought into her home. Underhill put Szarek's smelly bags out on her exposed porch with her other trash and later that day gave them to investigators. She told investigators that she did not believe Szarek was coming back to get the bags (which contained, among other things, clothes and shoes) and she did not want them in her home.

In the early morning hours of January 13, Szarek was driving Barbara's Cadillac in Illinois when he careened out of control and hit a pole. He was the only occupant in the car. Although he was taken to the hospital, Szarek was immediately arrested and shackled to the hospital bed with an officer on guard. Szarek's clothing was eventually removed at the hospital and seized by police. Upon searching Barbara's car, police seized a wallet, gloves, rope, hat, clothing, knife, and handcuffs.

Szarek's DNA was found on the inside of a pair of shoes recovered by police from Underhill, which indicated he was the wearer of the shoes. Michael's DNA and possible blood was found on the outside of these shoes. The jacket removed from Szarek upon his

arrest at the hospital had apparent impact splatter that tested presumptively positive for blood. The jacket appeared to have been laundered, but Michael's DNA was still present.

On January 14, 2007, the State charged Szarek with two counts of murder. Prior to trial, he filed motions to suppress any evidence recovered from the trailer, the hospital, Underhill's residence, and Barbara's car. Following a bifurcated pretrial hearing, the trial court denied the motions to suppress on September 27. On October 19, 2007, a jury found Szarek guilty as charged. The trial court subsequently sentenced him to consecutive terms of sixty-five years in prison. Szarek now appeals his convictions. We will provide additional facts below as needed.

Before reaching the merits of this appeal, we are compelled to address several deficiencies in Szarek's appellate brief. Initially, we observe that he provides us with no standard of review, as required by Ind. Appellate Rule 46(8)(b). Moreover, App. R. 46(8)(d) provides, "[i]f the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected". Not only has Szarek entirely failed to direct us to the relevant portions of the over 1000-page trial transcript, he does not even tell us precisely what evidence was improperly admitted at trial.<sup>4</sup>

In fact, his argument section does not have even one citation to the transcript or appendix. *See* App. R. 46(8)(a) (requiring cogent reasoning supported by citations to authorities and the appendix or parts of the record relied upon). These glaring omissions are likely the result of

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<sup>4</sup> We remind counsel that even if evidence is improperly admitted, we will not reverse if the admission merely constituted harmless error. *See Turner v. State*, 878 N.E.2d 286, 294 (Ind. Ct. App. 2007) ("an error is harmless if the probable impact of the evidence upon the jury is sufficiently minor so as not to affect a party's

his counsel's nearly wholesale adoption of the brief pretrial memorandum filed by Szarek's trial counsel in support of the various motions to suppress.<sup>5</sup> The argument section of Szarek's appellate brief reflects no independent analysis or research<sup>6</sup> performed by appellate counsel. This is not proper appellate advocacy. Despite the failings of appellate counsel and the lack of cogent argument in many respects, we will address the merits of this appeal.

As set forth above, Szarek generally claims that evidence from several warrantless searches and seizures was improperly admitted at trial. The standard used to review rulings on the admissibility of evidence is effectively the same whether the challenge is made by a pretrial motion to suppress or by a trial objection. *Burkes v. State*, 842 N.E.2d 426 (Ind. Ct. App. 2006), *trans. denied*. We review for abuse of discretion and, therefore, reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997). We will not reweigh the evidence, and we consider the conflicting evidence most favorable to the trial court's ruling. *Burkes v. State*, 842 N.E.2d 426. We will, however, also consider any uncontradicted evidence to the contrary. *Id.* We will affirm the decision if it is supported by substantial evidence of probative value. *Id.*

Szarek initially challenges the search conducted at the Mutuskas' trailer following the

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substantial rights"), *trans. denied*. Without knowing what evidence was admitted from the searches and seizures, it is impossible to gauge the impact upon the jury.

<sup>5</sup> At the conclusion of the suppression hearing, the trial court took the matter under advisement and directed each party to file a memorandum. The court explained, "it doesn't have to be elegant, just a brief memo with case law". *Suppression Hearing Transcript* at 186.

<sup>6</sup> For example, the pretrial memorandum contains an incorrect citation to *Chimel v. California*. It cites to 95 U.S. 752 (1969), while the correct cite is 395 U.S. 752 (1969). The appellate brief makes this same citation error, which indicates appellate counsel did not even check the citations being used.



discovery of their bodies. Our review of the record, however, reveals that Szarek did not object to the admission of this evidence at trial. Therefore, the issue is waived on appeal. *See Turner v. State*, 878 N.E.2d at 293 (“a party’s failure to present a contemporaneous objection at trial precludes appellate review of the claim”). Waiver notwithstanding, we observe Szarek has failed to establish that he has standing to challenge the search of his parents’ home. *See Lander v. State*, 762 N.E.2d 1208, 1211 (Ind. 2002)(“the defendant has the initial burden of establishing that he had a reasonable expectation of privacy” in the premises searched). As noted by the trial court, at the time of the search, Szarek was an Illinois parolee whose presence in Indiana violated the conditions of his parole. Further, it is undisputed that his residence was in Calumet City, Illinois. Szarek, however, baldly claims he was an overnight guest in the trailer because he “was there on a regular basis in the 4-5 days preceding the discovery of his parents’ bodies.” *Appellant’s Brief* at 6. The evidence indeed establishes that on several occasions Szarek was inside the trailer with the decomposing bodies of his parents. To say that this made him an overnight guest with a legitimate expectation of privacy, however, is simply astounding.

Similarly, Szarek had no reasonable expectation of privacy in his mother’s Cadillac. The evidence establishes that Barbara did not typically allow Szarek to drive her car. Around the time of Barbara’s murder, however, he began using the car rather freely. Moreover, upon the discovery of the bodies, Feeser immediately reported his mother’s missing car stolen. Soon thereafter, Szarek crashed the car and was arrested. As found by the trial court, Szarek

had no reasonable expectation of privacy in a vehicle he stole from his dead mother.<sup>7</sup>

Szarek next challenges the warrantless seizure of his clothing while he was at the hospital. The basis of his challenge is not at all clear, and his “argument” seems to establish that the seizure was valid. A well-established exception to the warrant requirement is the search incident to arrest. *See, e.g., Gibson v. State*, 733 N.E.2d 945 (Ind. Ct. App. 2000). Pursuant to this exception, an arresting officer may conduct a warrantless search of the arrestee’s person and the area within his immediate control. *Id.* Further, an officer may seize and examine for evidence the clothing worn by the accused at the time of his arrest. *U.S. v. Edwards*, 415 U.S. 800, 806 (1974) (“it is difficult to perceive what is unreasonable about the police’s examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest”). In the instant case, Szarek was placed under arrest at the hospital and police subsequently seized the clothing he was wearing at the time. We find no error in the admission of said evidence at trial.

Finally, Szarek challenges the admission of evidence seized from Underhill’s residence. The State responds that he waived this issue by not raising a timely objection to this evidence at trial. Szarek objected to the admission of a pair of shoes recovered from Underhill’s residence during the testimony of the State’s last witness, Detective David Carter, who testified to finalize the chain of custody for evidence that had been conditionally admitted without any suppression objection. At the time of Szarek’s objection, the State’s

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<sup>7</sup> Even if Szarek had standing, the search was valid pursuant to the automobile exception to the warrant requirement, as the police had probable cause to believe the car contained evidence of a crime. *See Myers v. State*, 839 N.E.2d 1146 (Ind. 2005).

DNA expert had already addressed the relevance of the shoes, including the DNA and blood found on them. Thus, while Szarek eventually objected to the admission of one item (shoes) found in the bags recovered from Underhill, his objection was certainly not timely.

Even if Szarek had timely objected to the admission of the shoes, his claim of error would fail. We observe that Underhill consented to the seizure of the garbage bags and their contents. Consent by a third party is a well-established exception to the warrant requirement. *See Peel v. State*, 868 N.E.2d 569, 575 (Ind. Ct. App. 2007) (“valid consent to search may be given by the person whose property is to be searched or a third party who has common authority or an adequate relationship to the premises to be searched”). Our Supreme Court has observed that persons sharing a premises may retain areas or objects within their exclusive control that are not subject to search based on consent of one of the co-occupants. *Lee v. State*, 849 N.E.2d 602 (Ind. 2006). “A co-occupant may deny joint access over an object by keeping it in a place devoted to the owner’s exclusive use or where the object is one over which only one person normally exercises control and authority or which ‘normally hold[s] highly personal items.’” *Peel v. State*, 868 N.E.2d at 576 (quoting *Lee v. State*, 849 N.E.2d at 608). In the instant case, after spending a few nights at Underhill’s home, Szarek left two smelly garbage bags in the common areas of her home and indicated, as he hurriedly departed, that she might never see him again. Thereafter, Underhill placed the bags outside on her porch with her other trash because she was moving and wanted nothing to do with them. Under the circumstances, Underhill had authority to consent to the seizure of the abandoned garbage bags, which contained Szarek’s shoes. Szarek has failed to establish an

abuse of discretion in the admission of any evidence at trial.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur