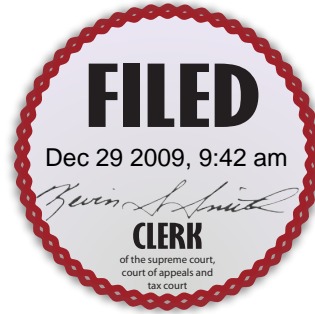


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HERMAN RUSSELL,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A04-0902-CR-97

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
Cause No. 49F18-0807-FD-173429

December 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Herman Russell appeals his conviction of theft¹ as a Class D felony following a bench trial. Russell raises four issues, one of which we find dispositive and restate as: whether the State’s evidence of “unauthorized control” was sufficient to sustain Russell’s theft conviction.

We reverse.²

FACTS AND PROCEDURAL HISTORY

In July 2008, Brooke Downs (“Downs”) worked as a co-manager of an Indianapolis-area Kroger grocery store. As co-manager, Downs’s responsibilities included, “[m]aking sure that the registers are taken care of, making sure that people are paying for their purchases, . . . like walking the store making sure things are secure.” *Tr.* at 11. On July 22, 2008, Downs was standing in the vestibule of Kroger’s entryway and saw a man, later identified as Russell, exit the store and enter the vestibule carrying a stack of DVDs. The vestibule was beyond all points of purchase, and Downs asked Russell to stop and show a receipt of purchase for the DVDs. In response, Russell “shouldered [Downs] and ran out the door.” *Id.* at 12. Hearing Downs’s call for help, an employee outside the store grabbed Russell and pushed him to the ground, causing Russell to drop the DVDs. Officer Tracy Dobbs of the Indianapolis Metropolitan Police Department responded to Kroger’s report of “a shoplifter who was resisting.” *Id.* at 22. At the scene, Officer Dobbs handcuffed Russell to secure the situation, asked about the

¹ See Ind. Code § 35-43-4-2.

² We held oral argument in this case on December 9, 2009. We commend counsel for their excellent advocacy.

nature of the problem, and after hearing Downs's version of the events, placed Russell under arrest. A subsequent search of Russell's person did not produce a receipt for the DVDs.

The State charged Russell with Class D felony theft. The trial court found Russell guilty as charged, and he now appeals.

DISCUSSION AND DECISION

Russell contends that the State failed to present sufficient evidence to support his theft conviction. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Rogers v. State*, 902 N.E.2d 871, 874-75 (Ind. Ct. App. 2009). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." *Id.* "To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We, therefore, "affirm the conviction unless 'no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.'" *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)). "It is therefore not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Id.* (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Id.*

To convict Russell of theft, the State was required to demonstrate that he: (1) knowingly or intentionally; (2) exerted unauthorized control; (3) over the property of

another person; (4) with intent to deprive the other person of any part of its value or use. *See* Ind. Code § 35-43-4-2(a). To “exert control over property” means, in part, to obtain, take, possess, or carry the property. Ind. Code § 35-43-4-1(a). A person’s control over property of another is “unauthorized” if it is “without the other person’s consent.” Ind. Code § 35-43-4-1(b)(1).

Russell contends that there was insufficient evidence that he exerted unauthorized control over the property of another, that is, the property of Kroger. Specifically, he contends that regardless of any inferences that may be drawn from his failure to produce a receipt, the State failed to prove that the DVDs were Kroger’s property. *Appellant’s Br.* at 9. We agree. While the evidence presented at trial revealed that Russell had a stack of DVDs in his hands as he left Kroger, the record before us is silent as to whether Kroger was the owner of the DVDs.

At trial, the State offered Downs’s testimony regarding Russell’s activities in Kroger on the day in question. Downs had neither seen these activities in person nor had she viewed the surveillance tape contemporaneously with the event. Instead, Downs’s testimony was based on having seen the store’s surveillance tape after the event had happened. The surveillance tape was not made available to the trial court. On Russell’s motion, the trial court suppressed Downs’s testimony on finding that, in the absence of the actual surveillance tape, Downs’s testimony was hearsay.

Without Downs’s testimony, the record before us contains no evidence that the DVDs were Kroger’s property. There was no testimony from a cashier or loss prevention officer to show that the DVDs came from Kroger. The State did not offer Kroger’s

inventory records, cash register tapes, or evidence of the DVDs' barcode identification. There was no testimony from any Kroger employee regarding the manner in which the store packaged its DVDs, and no one testified as to having seen Russell take the DVDs off the shelf or hide them while walking around the store. The DVDs themselves were not offered into evidence or identified as belonging to Kroger. No evidence direct or inferential supported the fact that Kroger was missing DVDs from its store. Finding that the State failed to prove that Russell exercised control *over the property of another*, there was insufficient evidence to support his theft conviction.

Reversed.

NAJAM, J., and BARNES, J., concur.