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**IN THE
COURT OF APPEALS OF INDIANA**

FAIRY K. WANN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 56A03-0605-CR-225

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel J. Molter, Judge
Cause No. 56D01-0309-FC-33

January 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Following a jury trial, Fairy K. Wann (“Wann”) was convicted of seven counts of theft¹ as Class D felonies, one count of corrupt business influence/racketeering (“racketeering”),² a Class C felony, and one count of professional gambling,³ a Class D felony. She raises two issues, which we consolidate and restate as: whether a variance existed between the charging information and the evidence presented at trial, and, if so, whether it was fatal to the theft and the racketeering convictions.

We affirm.

FACTS AND PROCEDURAL HISTORY

Wann is married to Charles “Capp” Wann, who at all relevant times was the chief of the Lincoln Township Volunteer Fire Department (“LTVFD”) in Thayer, Indiana, which is located in Newton County. Wann was a trusted member of the community and an integral part of the maintenance and operation of the LTVFD. Her involvement was extensive, ranging from small chores at the station to collecting revenue paid to the LTVFD for such things as fundraisers, insurance claims, and rental fees.

For many years, Wann operated the LTVFD’s weekly Friday night bingo games. She was the cashier for the events, collecting cash and checks from bingo players. The LTVFD maintained a designated checking account at DeMotte State Bank, called Special B Account, into which all monies received from bingo patrons were to be deposited according to state law. From 1992 through 1999, the LTVFD possessed a license to operate the bingo game.

¹ See IC 35-43-4-2(a).

² See IC 35-45-6-2.

³ See IC 35-45-5-3(a).

Although the license expired and was not renewed after 1999, the weekly bingo games continued, and Wann continued to manage and operate the events for several more years.

In October 2002, Glen Rabanus, a representative of the Criminal Gaming Division of the Indiana Department of Revenue, went to the LTVFD on a Friday night to investigate a tip concerning unlawful bingo gaming being operated on the premises. He observed bingo games in process, persons paying Wann and another cashier to play, as well as “pull tab” tickets being sold to patrons. Wann told patrons and others at the facility not to speak to Rabanus. Although Wann confirmed that there was no license for the bingo, Rabanus did not expressly close down the event at that time.

Meanwhile, also in October 2002, a DeMotte State Bank employee made a Suspicious Activity Report (“Report”) to the State Board of Accounts after she noticed that LTVFD monies were being deposited into the Wann’s personal and business accounts, also held with Demotte State Bank, rather than into the LTVFD accounts. The Report was eventually referred to the Indiana State Police, and Detective Chris Schramm was assigned to investigate it in December 2002.

Initially, in September 2003, the State charged Wann with twenty-seven counts of Class D felony theft, five counts of Class C felony racketeering, and one count of Class D felony professional gambling. On January 26, 2003, at the beginning of Wann’s jury trial, the State filed an amended charging information, reducing the number of theft charges to twelve and the number of racketeering charges to two, in addition to the one count of professional gambling.

After the State rested, Wann moved for judgment on the evidence, arguing that a material variance existed between the charging information and the evidence at trial because a number of checks that Wann was alleged to have deposited in DeMotte State Bank's Newton County branch office were actually deposited in other branch offices located in Jasper and Lake Counties. The trial court denied the motion. Wann proceeded to present her case-in-chief. During jury deliberations, Wann moved to dismiss the charges for the same reasons offered in support of her motion for judgment on the evidence. Again, the trial court denied the motion.

The jury convicted Wann of seven counts of theft, one count of racketeering, and one count of professional gambling. Wann now appeals her theft convictions and her conviction for racketeering.

DISCUSSION AND DECISION

Wann asks us to reverse her convictions, arguing that a fatal variance existed between the charges raised against her and the evidence. A variance is an essential difference between proof and pleading. *Wessling v. State*, 798 N.E.2d 929, 937 (Ind. Ct. App. 2003). Not all variances between allegations in the charging information and the evidence at trial are fatal. *Id.* The following test is used to determine whether a variance between proof at trial and a charging information is fatal:

- (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby;
- (2) will the defendant be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Id. (quoting *Mitchem v. State*, 685 N.E.2d 671, 677 (Ind. 1997)). To award relief on the basis of a variance between allegations in the charge and the evidence at trial, the variance must be such as to either have misled the defendant in the preparation and maintenance of his defense with resulting harm or prejudice or leave the defendant vulnerable to double jeopardy in a future criminal proceeding covering the same event, facts, and evidence. *Winn v. State*, 748 N.E.2d 352, 356 (Ind. 2001).

Wann claims that a variance existed between the charging information and the evidence at trial regarding the thefts, and more precisely, regarding in what county the thefts occurred. She asserts that the variance was material and requires her theft convictions to be reversed, and because the racketeering conviction relies on those theft convictions, it likewise should be reversed. Although we agree with Wann that a variance existed, we find that it was not fatal to her convictions.

Counts 1-6 and Counts 8-13 of the amended charging information charged Wann with theft. To convict Wann of theft, the State was required to prove that Wann knowingly or intentionally exerted unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use. IC 35-43-4-2(a). The prior section, IC 35-43-4-1, defines “unauthorized” and explains that a person’s control is unauthorized in a number of ways, including if it is exerted (1) without the other person’s consent; (2) in a manner or to an extent other than that to which the other person has consented; (3) by failing to correct a false impression that the person knows is influencing the other person, if the person stands in a relationship of special trust to the other person; or (4) by promising performance that the person knows will not be performed.

Here, each of the theft charges was similar in form and language, alleging that Wann, in Newton County, Indiana, exerted unauthorized control by depositing checks intended for LTVFD into her business or personal bank accounts, thereby depriving LTVFD of the particular check's value or use. *Appellant's App.* at 137-43. The crux of Wann's argument is that, pursuant to the precise language of the charging information, her "unauthorized control" was the specific act of depositing the checks *in Newton County*, and because the trial evidence showed that the deposits alleged in Counts 1-4, 6, 8, 9, 10, 12, and 13 took place in either Jasper or Lake Counties, not in Newton County, the charges do not match the evidence presented at trial. *Appellant's Br.* at 10. She claims that because of this variance, she was misled and unable to prepare or present her defense, requiring us to reverse her theft convictions,⁴ as well as the related racketeering conviction.⁵ We disagree.

As an initial matter, we observe that Wann does not claim that she did not take the checks intended for LTVFD or that she did not deposit them into her own accounts for her own use; nor does she claim that anyone approved her use of the monies. Indeed, she concedes that she deposited the checks into her accounts from branch offices located in counties other than Newton County. *See id.* at 9. In this case, Wann's claim that she was misled by the variance is general in nature, and she does not explain or elaborate in what way she was prejudiced or identify how it affected her ability to present her defense. Her claim that she was unable to prepare her defense is further weakened by the fact that the State

⁴ Wann was convicted of theft as alleged in Counts 2, 3, 9, 10, 11, 12, and 13.

⁵ Wann does not argue that she is vulnerable to double jeopardy because of the variance, the other prong of the test for determining whether a variance is fatal; therefore we do not address that aspect of the material variance test.

presented quite specific factual allegations in the charging information, advising Wann of the charges levied against her. For instance, the State included in each count the date of the theft, the victim's name, the intended purpose for which the check was written (i.e., whether to play bingo, pay rental fees, issue an insurance claim check, etc.), and, in some instances, the amount of the check(s) that Wann deposited. The State also filed a probable cause affidavit that, by Wann's own admission, contained "in great detail" assertions that she had deposited funds in her personal and business accounts. *Id.* at 3.

Under these circumstances, we find that the charging information fully informed Wann of each of the material elements of the charges brought against her, and she knew that she was charged with taking the checks of bingo patrons and others that should have been deposited into LTVFD's account. Wann failed to prove that she was misled or otherwise prejudiced, and whether she made the deposit to her account from Newton County or some branch office in another county is not material or fatal to the theft convictions. *See Wessling*, 798 N.E.2d at 937-38 (although trial testimony did not conform to allegation in charging information that blow to right eye caused victim's death, that variance was not fatal where charging information fully informed defendant that he was charged with committing a battery causing death, and defendant failed to prove his was misled).

Wann also seeks reversal of her racketeering conviction under Count 14 of the charging information, which alleged a pattern of racketeering based upon the thefts as alleged in Counts 8-13. Because none of the thefts alleged in Counts 8-13 occurred in Newton County, Wann maintains that the racketeering conviction cannot stand, again because of the

purportedly fatal variance. However, we have already determined that the theft convictions are valid, despite the existence of the variance; thus, the racketeering conviction based upon some of those convictions is likewise valid.

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.