



## STATEMENT OF THE CASE

Tara L. Huffman appeals her convictions following a jury trial for possession of cocaine,<sup>1</sup> fraud,<sup>2</sup> and theft<sup>3</sup> as class D felonies.

We affirm.

### ISSUES

1. Whether Huffman's fraud and theft convictions violate Indiana's Double Jeopardy Clause because the same evidence was used to establish the essential elements of both offenses.
2. Whether sufficient evidence supports Huffman's convictions.

### FACTS

The facts most favorable to the judgment are that beginning at approximately 1:00 p.m. on March 20, 2007 into the evening hours, Huffman, her nephew, Ronnie Underwood Jr. ("Ronnie"), and his girlfriend consumed large quantities of alcohol at Ronnie's house. Later that evening, Toni Underwood, who was Huffman's sister and Ronnie's mother, telephoned to say that her boyfriend, Dean Hughes, "was beating her up." (Tr. 250).

Huffman, Ronnie, and Turner drove to Hughes' residence to pick up Toni. Shortly after they arrived, Ronnie and Hughes fought. The fight ended with Hughes lying prostrate, unconscious or possibly dead, on the floor in front of his recliner chair.

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<sup>1</sup> Ind. Code § 35-48-4-6.

<sup>2</sup> I.C. § 35-43-5-4(1).

<sup>3</sup> I.C. § 35-43-4-2(a).

Afterwards, Huffman removed Hughes' wallet from his back pocket. Then she, Ronnie, Toni, and Turner left Hughes' house and returned to Ronnie's house to drink more alcohol. At approximately 4:00 a.m., Huffman telephoned her son, Jay. She told him that Hughes had beaten Toni, that Ronnie had fought Hughes, and that she thought Ronnie might have killed Hughes. She asked Jay to go and check on Hughes. Shortly thereafter, at approximately 4:02 a.m., Huffman withdrew \$300.00 from Hughes' account using an ATM machine located at the Notre Dame Federal Credit Union.

At approximately 8:00 a.m., Jay went to Hughes' house, where he found an unresponsive Hughes lying on the floor in front of the recliner; Jay called 9-1-1. During the ensuing police investigation, officers could not find Hughes' wallet in his house. Jay accompanied officers to the homicide unit's headquarters, where he told them about Huffman's telephone call. Huffman and Ronnie were then summoned to headquarters. At approximately 11:00 a.m., Sergeant David Wells of the St. Joseph County Metro Homicide Unit interviewed Huffman, who was subsequently taken into custody.

In the late evening of March 21, 2007, police obtained a search warrant for Huffman's apartment. When they arrived at her residence, officers met her roommate and two other individuals, who were temporarily living there. The three individuals directed the officers to Huffman's bedroom. When the police searched the bedroom, they found Huffman's personal items, including a purse containing three of her State-issued identification cards in it. During the search, police lifted Huffman's mattress and found .23 grams of crack cocaine, \$120.00 in cash, and an envelope that bore Toni's

handwriting. One side of the envelope read, “Ronnie, don’t forget what [Hughes] did to me. And then when he hit you, all hell broke loose about his money from the ATM. He gave you \$150.00, you owe him. Mom ♥’s you.” (Tr. 191). The other side of the envelope stated, “Call me at Iron Craft, 272-0866, Toni-Mom[.]” (Tr. 192-93). Hughes’ wallet and ATM card were never recovered.

On March 24, 2007, the State charged Huffman with possession of cocaine, fraud, and theft, as class D felonies. The trial court conducted a jury trial on August 18-19, 2009. During the State’s case-in-chief, Ronnie testified that he was serving a prison sentence for aggravated battery causing Hughes’ death. He also testified that after the fight, Hughes lay prostrate on the floor. His in-court testimony was consistent with his prior deposition<sup>4</sup> testimony that after the fight, “Tara grabbed [Hughes’ wallet] from the back pocket from his jeans” as he lay on the floor unconscious or dying on the floor. (Tr. 114).

Huffman testified that on prior occasions, Hughes had given her the pin number for his ATM card and allowed her to withdraw money from his bank account. She also testified that after the fight, Hughes was alert and seated in his recliner. She testified further that even though Hughes was “in a bad mood” and “thought our whole family was using him,” she asked him to lend her some money; and although “he was mad at that point, . . . he still gave [the ATM card] to [her].” (Tr. 252). In addition, she testified that

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<sup>4</sup> Ronnie provided the above-quoted deposition testimony on March 11, 2008.

after she withdrew \$300.00, she returned to Hughes' house and found Hughes alert and seated in the recliner, as she returned the ATM card to him.

At the close of the evidence, the jury returned guilty verdicts on all three counts. On October 1, 2009, the trial court imposed three eighteen-month executed sentences to be served concurrently in the Department of Correction. Huffman now appeals.

### DECISION

Huffman argues that her fraud and theft convictions violate Indiana's prohibition against double jeopardy. She also argues that the State failed to present sufficient evidence to sustain her convictions. We disagree.

#### 1. Double Jeopardy

Huffman argues that her convictions for theft and fraud in this case violate Indiana's Double Jeopardy Clause because "the same evidence was used to convict her of both charges." Huffman's Br. at 11. We cannot agree.

We employ the following two-part test when we analyze double jeopardy claims:

[T]wo or more criminal offenses violate our double jeopardy clause if with respect to either the statutory elements of the charged offenses or the actual evidence used to convict, the essential elements of one challenged offense establish the essential elements of the other offense. Under the actual evidence test, the evidence presented at trial is examined to determine whether each offense was proven by separate and distinct facts. To prove a claim under the actual evidence test, the defendant must demonstrate a "reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense."

*Trotter v. State*, 733 N.E.2d 527, 533 (Ind. Ct. App. 2000) (citing *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999)) (internal citations omitted). The *Richardson* test is not violated, however, where proof of the defendant's convictions is supported by proof of at least one unique evidentiary fact not required for any other conviction. *Rawson v. State*, 865 N.E.2d 1049, 1054-55 (Ind. Ct. App. 2007). Such is the case here.

Huffman's fraud and theft convictions involve separate victims. Her fraud conviction is supported by evidence that she defrauded Notre Dame Federal Credit Union by using, without consent, an ATM card that was issued to Hughes and obtaining \$300.00. On the other hand, the facts supporting her theft conviction reveal that she removed Hughes' ATM card from his person, while he lay unconscious or dead on the floor, obviously unable to authorize her use of the card.

Our Supreme Court has consistently held that where convictions arise from a situation that involved separate victims, no double jeopardy violation exists because evidence of separate victims satisfies the requirement that each conviction requires proof of at least one unique evidentiary fact. *Id.* at 1055. We find the Court's analysis in *Bald v. State*, 766 N.E.2d 1170, 1172 (Ind. 2002) to be especially instructive. Therein, the Court affirmed the defendant's convictions for three murders and arson, stating,

The evidentiary facts used to establish felony murder established some, but not all, of the elements of the arson offense. To find Bald guilty of class A felony arson, the jury was required to find Brewer was injured as a result of arson. In finding Bald guilty of each felony murder, the jury was required to find evidence of a separate victim's death. Thus, each conviction required proof of at least one unique evidentiary fact.

Accordingly, Bald's convictions do not violate the *Richardson* . . . actual evidence test.

*Rawson*, 865 N.E.2d at 1055 (quoting *Bald*, 766 N.E.2d at 1172)). See also *Whaley v. State*, 843 N.E.2d 1, 5 (Ind. Ct. App. 2006) (holding that even though defendant's actions involved a single incident of resisting, his two convictions for resisting law enforcement did not violate double jeopardy because he injured two people by his resistance).

Here, even though both offenses arose from Huffman's unauthorized use of Hughes' ATM card without consent or authorization, her convictions of theft and fraud do not violate the *Richardson* test because each of the convictions was supported by proof of at least one unique evidentiary fact -- the identity of the respective victim -- that was not required for any other conviction. See *Rawson*, 865 N.E.2d at 1055. Thus, we conclude that Huffman's convictions for fraud and theft do not violate double jeopardy.

## 2. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, we will consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We will neither assess witness credibility nor reweigh the evidence; rather, we will affirm unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

### a. *Possession of Cocaine*<sup>5</sup>

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<sup>5</sup> In order to prove that Huffman committed possession of cocaine as a class D felony, the State must show that a person knowingly or intentionally possessed the drug. Ind. Code § 35-48-4-6(a).

Huffman was not present when the cocaine was recovered from her bedroom and, therefore, was not found to be in actual possession<sup>6</sup> of the contraband at the time. As a result, the State necessarily prosecuted this action under a theory of constructive possession, but that the State failed to present sufficient evidence thereunder to prove her guilt beyond a reasonable doubt.

Constructive possession occurs when someone has the (1) capability to maintain dominion and control and (2) the intent to maintain dominion and control over the contraband. *Collins v. State*, 822 N.E.2d 214, 222 (Ind. Ct. App. 2005). To prove the “capability” element of constructive possession, that the defendant had the capability to maintain dominion and control over the contraband, the State must demonstrate that the defendant is able to reduce the controlled substance to her personal possession. *Armour v. State*, 762 N.E.2d 208, 216 (Ind. Ct. App. 2002). Proof of a possessory interest in the premises in which the illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question, regardless of whether possession of the premises is exclusive or not. *Id.*; *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). “In essence, the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises.” *Abney v. State*, 822 N.E.2d 260, 264 (Ind. Ct. App. 2005).

Here, regarding Huffman’s capability to maintain dominion and control over the cocaine, the State presented evidence that the cocaine was found in Huffman’s bedroom.

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<sup>6</sup> Actual possession of contraband occurs when a person has direct physical control over the item. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004).

On the witness stand, she responded affirmatively when asked whether “the whole [two-bedroom] apartment was actually [hers], but she w[as] letting the other two people stay[.]” (Tr. 273). Therefore, we conclude that there was sufficient evidence that Huffman had a possessory interest in the premises to show that she had the capability to maintain dominion and control over the contraband; however, our analysis does not end here.

To prove the “intent” element of constructive possession, the State must demonstrate the defendant’s knowledge of the presence of the cocaine. *Armour*, 762 N.E.2d at 216. Where the accused has exclusive possession of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of contraband and was capable of controlling it. *Collins*, 822 N.E.2d at 222. However, where, as here, possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it. *Id.*

Additional circumstances which may support such an inference include (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) location of the contraband in a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) location of the contraband in plain view; and (6) the mingling of the contraband with other items owned by the defendant. *Id.*

The above-cited list of “additional circumstances” is not an exhaustive list, however; and it is well-settled that “other factors” which tend to increase the probability

that the defendant was aware of the contraband may also be considered. *Gee*, 810 N.E.2d at 343.

[Specifically,] the State is required to show that whatever factor or set of factors it relies upon in support of the intent prong of constructive possession, those factors or set of factors must demonstrate the probability that the defendant was aware of the presence of the contraband and its illegal character.

*Id.* In its brief, the State argues that the fact that the contraband was located in Huffman's bedroom constitutes a circumstance from which a rational jury could infer that Huffman had knowledge of the presence of the contraband and had the ability to control it.

Our Supreme Court has previously held that “[t]he place where the contraband is found’ has been identified as an additional circumstance from which a trier of fact could conclude that the defendant had the requisite intent in a non-exclusive constructive possession case.” *Id.* at 344. Common sense dictates that ownership of property found in an individual's bedroom is reasonably imputed to the person who occupies that room on a daily basis. Here, the State asserts, and we agree, that a reasonable inference may be drawn from the fact that the contraband was hidden under Huffman's mattress, that she had deliberately concealed it there. Such could create a reasonable inference that Huffman had sufficient knowledge of the location of the contraband and had the ability to control it for purposes of the intent prong of the constructive possession analysis.

In the same vein, the State posits that the cocaine was “hidden under [Huffman's] mattress precisely because she was sharing [her] apartment and did not want [her co-

occupants] to know that she kept cash and drugs in her room.” State’s Br. at 9. Huffman counters that the cocaine was placed under her mattress by other people who had access to her bedroom. We find the State’s position to be persuasive.

b. *Fraud and Theft*

Next, Huffman argues that the State failed to present substantial evidence of probative value to prove beyond a reasonable doubt that committed fraud and/or theft. In order to convict Huffman of class D felony fraud, the State was required to prove that she, with the intent to defraud Notre Dame Federal Credit Union obtained \$300.00 in U.S. currency by using an ATM card that was issued to Hughes without Hughes’ consent. I.C. § 35-43-5-4(1).

The evidence presented at trial was as follows: Ronnie testified in court and in a prior deposition that after the fight, as Hughes lay dead or unconscious on the floor, that Huffman removed Hughes’ wallet from his pocket. Cindy Curtis, the fraud investigation manager for Hughes’ bank, testified that \$300.00 was withdrawn from Hughes’ account at 4:02 a.m. In her testimony, Huffman admitted that she had made the \$300.00 withdrawal from Hughes’ account at 4:02 a.m., but maintained that an alert and conscious Hughes had authorized her to do so after the fight. We conclude that the State presented sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that Huffman committed fraud. We regard Huffman’s contention that Hughes authorized her withdrawal of the funds as an invitation that we reweigh the evidence and assess the credibility of the witnesses, which will not do. *See id.* *See also Yowler v. State*, 894

N.E.2d 1000, 1002 (Ind. Ct. App. 2008) (It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses.).

In order to prove that Huffman committed class D felony theft, the State was required to prove that she knowingly or intentionally exerted unauthorized control over Hughes' ATM card by possessing it with the intent to deprive Hughes of any part of the use or value of the property. I.C. § 35-43-4-2(a).

At trial, the State presented Ronnie's testimony that Huffman removed Hughes' wallet from his person as Hughes lay unresponsive after the fight; and that Huffman subsequently used the ATM card to withdraw \$300.00 from Hughes' bank account. Huffman testified that Hughes gave her permission to use his card. The issue of credibility between Ronnie and Huffman's testimony is for the jury to decide. *See Yowler*, 894 N.E.2d at 1002. We conclude that the State presented sufficient evidence from which a rational jury could choose to believe Ronnie and find, beyond a reasonable doubt, that Huffman committed theft. Again, we regard Huffman's contention that Hughes authorized the withdrawal as an invitation to us to reweigh the evidence, which we will not do. *See Drane*, 867 N.E.2d at 146.

Affirmed.

BAKER, C.J., and CRONE, J., concur.