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IN THE
COURT OF APPEALS OF INDIANA

ALICIA STELZEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-234
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
The Honorable Steven Rubick, Commissioner
Cause No. 49G22-0810-FC-236178

October 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Alicia Stelzel appeals her convictions for Class C felony forgery and two counts of Class D felony theft. Stelzel argues that her convictions violate the double jeopardy protections guaranteed by Article 1, Section 14 of the Indiana Constitution. We find that Stelzel's forgery conviction and one of her theft convictions fail the double jeopardy "actual evidence" test. We therefore reverse in part and remand with instructions to vacate the appropriate theft conviction.

Facts and Procedural History

Alicia Stelzel was a dancer at Patty's Showclub in Indianapolis. Her stage name was "LiLi," but she was also known as "Jennifer" around the club. Stelzel lived at a Motel 6 on the west side of town. One of her neighbors at the motel was Melanie Williams.

In August 2008 Williams stole a blank check from a friend of hers named Monica Mead. Williams approached Stelzel on the evening of August 22nd and asked for help cashing it. Stelzel was getting ready to go to work at the time, and Williams asked if they might be able to cash the check at Patty's. Stelzel was not sure but agreed to find out.

Williams accompanied Stelzel to the club that night. Williams sat at the bar and held onto the check while Stelzel danced. At the end of her shift, Stelzel asked bartender Michelle Raines if she could cash a check. Raines said yes. Stelzel asked Williams for the check, and Williams handed it to Stelzel. Stelzel in turn gave the check to Raines. The check was for $550 and was made out to "Jennifer Davis." Raines withdrew $550 from the register and gave the money to Stelzel.

Mead soon discovered an unusual pending payment in her online bank statement. She confirmed that a check was missing from her checkbook and ultimately notified authorities. Law enforcement apprehended Stelzel, who was charged with one count of Class C felony forgery and two counts of Class D felony theft. The State's charging information read as follows:

> COUNT I
>
> Alicia Stelzel and Melanie Williams, on or about August 22, 2008, did, with intent to defraud, utter[1] to Michelle Raines a written [instrument][2] in such a manner that said instrument purported to have been made by another person, namely: Monica Mead;
>
> COUNT II
>
> Alicia Stelzel and Melanie Williams, on or about August 22, 2008, did knowingly exert unauthorized control over the property, that is: United States currency, of Patty's Showclub and/or Michelle Raines, with intent to deprive Patty's Showclub and/or Michelle Raines of any part of the value or use of said property;
>
> COUNT III
>
> Alicia Stelzel and Melanie Williams, on or about August 22, 2008, did knowingly exert unauthorized control over the property, that is: check number 156, of Monica Mead, with intent to deprive Monica Mead of any part of the value or use of said property . . . .

Appellant's App. p. 18-19.

Stelzel was tried to the bench and found guilty as charged. She was sentenced to four years with two years suspended to probation for forgery and concurrent terms of one and one-half years for each count of theft. She now appeals.

Discussion and Decision

[1] "'Utter' means to issue, authenticate, transfer, publish, deliver, sell, transmit, present, or use." Ind. Code § 35-41-1-27 (2004).

[2] The actual information included a photocopy of the stolen check.

Stelzel's sole contention is that her forgery and theft convictions violate the Double Jeopardy Clause of the Indiana Constitution. Whether convictions violate double jeopardy is a question of law which we review *de novo*. *Grabarczyk v. State*, 772 N.E.2d 428, 432 (Ind. Ct. App. 2002).

Article 1, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are the "same offense" under Article 1, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). Stelzel contends that her convictions fail the actual evidence test.

Under the actual evidence test, the evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* at 1234. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a 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. *Id.* Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the fact-finder's perspective. *Id.*

The elements of forgery are defined at Indiana Code section 35-43-5-2(b):

> A person who, with intent to defraud, makes, utters, or possesses a written instrument in such a manner that it purports to have been made:

> (1) by another person;
> (2) at another time;
> (3) with different provisions; or
> (4) by authority of one who did not give authority;
> commits forgery, a Class C felony.

The elements of theft are set forth at Indiana Code section 35-43-4-2(a):

> A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

In this case, Stelzel's presentation of the fraudulent check to Raines established the essential elements of her forgery conviction. But her presentation of the check to Raines was also the only evidentiary fact sustaining her conviction for the theft of Mead's check. We therefore find a reasonable possibility that the fact-finder used the same evidence to convict Stelzel of both forgery and the theft of the check. Accordingly, the convictions fail the actual evidence test and violate double jeopardy. *See Trotter v. State*, 733 N.E.2d 527, 533-34 (Ind. Ct. App. 2000) (finding double jeopardy violation, where presentation of credit card to sales clerk established essential elements of both theft and attempted fraud), *reh'g denied*, *trans. denied*; *cf. Benberry v. State*, 742 N.E.2d 532, 537-38 (Ind. Ct. App. 2001) (finding no double jeopardy violation, where presentation of credit cards to sales clerks sustained forgery conviction, but evidence of earlier acquisition of credit cards sustained theft conviction).

Where two convictions violate double jeopardy, "we vacate the conviction with the less severe penal consequences." *Richardson v. State*, 717 N.E.2d 32, 55 (Ind. 1999). Stelzel's Class D felony theft conviction carried less severe penal consequences than the

Class C felony forgery conviction, so we remand to vacate Stelzel's conviction on Count III for the theft of Mead's check.

We note that the remaining convictions do not present any double jeopardy problems. The evidence sustaining Stelzel's forgery conviction was that she presented the fraudulent check to Raines; the evidence sustaining Stelzel's other theft conviction was that she received $550 in cash from Raines and/or Patty's Showclub. Each of these convictions was thus established by separate evidentiary facts, and they do not violate the double jeopardy actual evidence test. *Cf. Williams v. State*, 892 N.E.2d 666, 668-69 (Ind. Ct. App. 2008) (holding that convictions for forgery and attempted theft of bank's money violated double jeopardy, because the only overt act supporting attempted theft conviction was the presentation of forged check at the bank), *trans. denied.*

The judgment is affirmed in part, reversed in part, and remanded to the trial court to vacate Stelzel's conviction on Count III.

BAILEY, J., and BRADFORD, J., concur.