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**IN THE
COURT OF APPEALS OF INDIANA**

SHIRLEY WALKER,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0608-CR-621
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0508-FC-145284

June 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Shirley Walker appeals her convictions after a bench trial of forgery as a Class C felony,¹ attempted theft as a Class D felony,² and theft as a Class D felony.³ Because Walker has not established a reasonable possibility the fact-finder used the same evidence to establish the essential elements of two or more offenses, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 30, 2004, Patricia Dugan returned home to discover someone had broken into her house. She did not report the incident to the police because she believed only a few DVDs had been taken and children might be responsible.

The next morning, Walker entered a downtown branch of Indiana Members Credit Union, where Dugan had a checking account. Walker presented teller Roth a check, No. 4152, made out to Walker and drawn on Dugan's account, for \$200. After verifying Walker's identification and obtaining a thumbprint from her, Roth cashed the check and gave Walker \$200.

Approximately 35 minutes later, Walker entered an eastside branch of the credit union and attempted to cash a second check, No. 4155, made out to Walker and drawn on Dugan's account, for \$400. Teller Schriver became suspicious. When she was unable to verify the signature on the check was Dugan's, she called Dugan to ask if she had authorized the check. While Schriver was verifying the check, Walker left the credit union.

¹ Ind. Code § 35-43-5-2(b).

² Ind. Code § 35-43-4-2(a); Ind. Code § 35-41-5-1.

³ Ind. Code § 35-43-4-2(a).

After being notified by her credit union of the suspicious activity, Dugan discovered a book of checks (Nos. 4151 through 4176) was missing from her house and reported it to the police. In August 2005, Walker was charged with forgery, attempted theft, and theft. She was found guilty after a bench trial in June 2006. The court sentenced Walker to four years with two years suspended for forgery, one-and-one-half years for attempted theft, and one-and-one-half years for theft, and ordered the sentences served concurrently.

DISCUSSION AND DECISION

Article I, Section 14 of the Indiana Constitution provides: “No person shall be put in jeopardy twice for the same offense.” Our Indiana Supreme Court analyzed the double jeopardy protections afforded under this clause in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), and concluded:

[T]wo or more offenses are the “same offense” in violation of Article I, Section 14 of the Indiana Constitution, 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.

Id. at 49 (emphases original).⁴

Under the actual evidence test, “the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts.” *Id.* at 53. To succeed under this test, Walker must demonstrate “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential

⁴ Walker does not argue her convictions violate the statutory elements test.

elements of one offense may also have been used to establish the essential elements of a second challenged offense.” *Id.* Under the *Richardson* actual evidence test, “the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.” *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). To determine whether the same facts were used, we consider the evidence, charging information, and arguments of counsel. *Goldsberry v. State*, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

The charging information read as follows:

COUNT I

Shirley Walker, on or about August 31, 2004, did, with intent to defraud, utter to Deborah Roth [a teller at the credit union] a written instrument that is: check number 4152, said instrument being of the following form: [copy of check attached] [in such a manner that said instrument purported to have been made by another person, namely: Patricia Dugan.]⁵

COUNT II

Shirley Walker, on or about August 31, 2004, did attempt to commit the crime of Theft, which is to knowingly or intentionally exert unauthorized control over the property, that is: United States currency, of Indiana Members Credit Union, with the intent to deprive Indiana Members Credit Union of any part of the value or use of said property, by engaging in conduct, that is: presented a forged check to be cashed, which conduct constituted a substantial step toward commission of said crime of Theft;

COUNT III

Shirley Walker, on or about August 31, 2004, did knowingly exert unauthorized control over the property, that is: checks, of Patricia Dugan, with intent to deprive Patricia Dugan of any part of the value or use of said property;

⁵ In the copy of the charging information included in the appendix, the attached check obscures a portion of Count I. The trial court read Count I to Walker at an aborted plea hearing and it is in the transcript of this hearing that this bracketed language is found. (*See Tr.* at 5-6.)

all of which is contrary to statute and against the peace and dignity of the State of Indiana.

(App. at 22-23) (footnote added).

During closing arguments, the State summarized the evidence for Count III by stating: “Count No. III is covered by Count I and II.” (Tr. at 114.) The trial court stated:

The Court also finds the defendant guilty of Count III, Theft, a Class D Felony, for having possession of these two checks when – and the Court believes that there’s – the evidence is sufficient that her intent was totally to defraud. I’m sorry, totally to deprive the true owner of any part of the value or use of said property with the two checks.

(*Id.* at 117.)

Dugan testified a book of checks was missing from her home, she had not authorized Walker to cash any checks on her account, and the handwriting on the checks was not hers. Walker stipulated she presented check No. 4152 to Roth in the downtown branch and received \$200 in cash. Schriver testified Walker presented check No. 4155 to her at the eastside branch, the signature on the check did not match Dugan’s signature on file with the credit union, Schriver did not give Walker the money, and Walker left while Schriver was verifying the check. Time-stamped photographs indicated Walker presented the first check at 9:54 a.m. and the second check at 10:28 a.m.

Although the evidence overlaps, the proof offered by the State does not violate the actual evidence test under *Richardson*. The forgery count was established by Walker’s stipulation and the attempt to cash two unauthorized checks within 35 minutes of each other. The attempted theft was established by Schriver’s testimony regarding the transaction and Dugan’s testimony the handwriting was not hers. The theft charge was

based on Walker's stipulation she presented check number 4152 to Roth to be cashed, Schriver's testimony Walker presented check number 4155 to Schriver to be cashed, and Dugan's testimony she had not authorized Walker to have or cash the checks.

The evidentiary facts establishing the essential elements of forgery do not establish all of the essential elements of theft or attempted theft. The evidentiary facts of attempted theft do not establish all the essential elements of theft or forgery. The evidentiary facts of theft do not establish all of the essential elements of forgery or attempted theft. Walker was not subjected to Double Jeopardy and, accordingly, we affirm.

Affirmed.

SHARPBACK, J., and BAILEY, J., concur.