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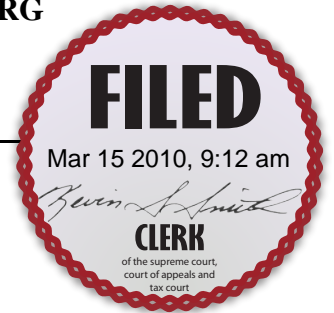
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**IN THE
COURT OF APPEALS OF INDIANA**

KRISTY KAY OGLESBY,
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A05-0910-CR-580

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Kelli E. Fink, Magistrate
Cause No. 82C01-0904-FD-339

March 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kristy Kay Oglesby appeals her conviction for Failure to Return to Lawful Detention,¹ a class D felony. Specifically, Oglesby maintains that she was misled in the preparation and maintenance of her defense because a fatal variance existed between the proof that was presented at trial and the allegations that the State set forth in the charging information. Moreover, Oglesby contends that the variance subjects her to double jeopardy in future criminal proceedings. Thus, Oglesby maintains that the evidence was insufficient to support her conviction. Concluding that no fatal variance existed between the charging information and the evidence adduced at trial, and finding the evidence sufficient to support Oglesby's conviction, we affirm the judgment of the trial court.

FACTS

Oglesby was convicted of assisting a criminal and dealing in a look-alike substance and began serving consecutive sentences for those offenses in a work release program on February 2, 2009. On February 14, 2009, Vanderburgh County Community Corrections (Community Corrections) gave Oglesby permission to go to the hospital and obtain treatment for her liver disease. Later that day, Oglesby was admitted to the Deaconess Gateway Hospital (Gateway) in Evansville. She was subsequently transferred to Indiana University Medical Center (IU Med Center) in Indianapolis on February 16. The Director of Community Corrections contacted the trial court "and asked that . . . Oglesby's sentence be stayed until her necessary medical condition was taken care of." Tr. p. 8.

¹ Ind. Code § 35-44-3-5(c).

Oglesby underwent treatment at IU Med Center, and representatives from Community Corrections instructed her to return to the work release facility upon her release. Although Oglesby was released from IU Med Center on February 21, she drove to her mother's house in Newburgh. Oglesby remained ill and returned to the Deaconess Emergency Department for further treatment on February 24.

In the meantime, the trial court issued an arrest warrant for Oglesby on February 23 because she failed to return to the detention facility. Community Corrections personnel left numerous messages on Oglesby's cell phone and home phone informing her of the arrest warrant and requesting that she return to the facility. However, Oglesby never responded to those requests and did not return to the work release center until April 2.

Oglesby was arrested, and on April 3, 2009, the State charged her with failure to return to lawful detention. The State's information provided that Oglesby, "on or about February 14, 2009, . . . did, while in the lawful detention of the . . . Work Release Residential Program, intentionally fail to return to said lawful detention following temporary leave granted for a limited time period. . . ." Appellant's App. p. 47 (emphasis added).

At a bench trial that commenced on July 17, 2009, Oglesby presented evidence that she had been treated at various hospitals on February 24, March 7, 12, and 20, maintaining that she was too ill to report to work release. Oglesby also argued that the charging information, which alleged that she failed to return to the facility "on or about February 14," was fatally misleading and denied her due process of law. Tr. p. 56, 57. In finding Oglesby guilty as charged, the trial court stated

She was allowed to go on medical leave on February 14th, 2009. I do believe she was in Deaconess Hospital February 14th and February 15th and then transferred to IU February 16th and February 21. While the . . . State's charging document does indicate on or about February 14, 2009, I do believe that that indicates on or about February 14, 2009 and does include the dates directly in the month of February. Once she was returned from IU she indicated that she was sick and stayed at her mother's, and there was some question as to who made phone calls to who, and who told who on whether she should be back or not, but I find that she was only granted temporary leave for medical purposes, and that really no one had to call her to come back, she had to come back on her own. If she was not in the hospital she should have come back to the Vanderburgh County complex and I have no indication that she went to the complex anytime up until, I believe early April is when she actually returned to the complex.

Appellant's App. p. 36-37 (emphasis added).

On August 26, 2009, the trial court sentenced Oglesby to eighteen months of incarceration, which was ordered to run consecutively to the sentences imposed in two other cause numbers. Oglesby now appeals.

DISCUSSION AND DECISION

I. Variance

In addressing Oglesby's contention that her conviction must be reversed because a fatal variance allegedly existed between the evidence that was presented at trial and the allegations in the charging information, we initially observe that the information must allege the elements of the crime such that the accused is sufficiently apprised of the nature of the charges against him so that he may anticipate the proof and prepare a defense in advance of trial. Ind. Code § 35-34-1-2; Smith v. State, 465 N.E.2d 702, 704 (Ind. 1984).

A variance has been defined as an "essential difference" between the charging

information and the proof adduced at trial. Rust v. State, 726 N.E.2d 337, 340 (Ind. Ct. App. 2000). However, not all variances are fatal because “Indiana law ‘now permits variances in the pleading of descriptive averments which are not material—in the sense of misleading the defendant—or essential to the offense charged.’” McCullough v. State, 672 N.E.2d 445, 448 (Ind. Ct. App. 1996) (quoting Wilson v. State, 164 Ind.App. 665, 671, 330 N.E.2d 356, 360 (1975)).

The test to determine whether a variance between the proof at trial and a charging information or indictment is fatal is as follows:

- (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 [a] future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997).

In this case, the undisputed evidence shows that on February 14, 2009, Community Corrections granted Oglesby permission to obtain medical treatment at the hospital. Tr. p. 7. Oglesby was given authorization to leave her work release commitment and was told to return upon her release from the hospital. Id. Although Oglesby was admitted to Gateway in Evansville on February 14, she was transferred to the IU Med Center in Indianapolis the next day. Id. at 8. After Oglesby was released from IU Med Center on February 21, she drove herself to her mother’s house in Newburgh. Id. at 17. The permission that Community Corrections gave Oglesby encompassed all of the dates from February 14 until she was

discharged from IU Med Center on February 21.

In light of these circumstances, we fail to see how Oglesby could have misunderstood the nature of the charge because the permission given on February 14 extended through February 21 when she was discharged—a fact of which she was well aware. Even though the charging information should have alleged that Oglesby committed the offense “on or about February 21,” she was aware of the nature of the charges against her. Indeed, Oglesby presented a defense of “necessity” at trial that she could not return to work release when she was discharged because she was still too ill. *Id.* at 17, 42, 54. Moreover, she offered evidence establishing that she was seen at another Evansville area hospital on March 7, 12, and 20. *Id.* at 18, 19. In presenting that evidence, it is apparent that Oglesby was aware that her absence from February 21, 2009—when she was discharged from the hospital in Indianapolis—until April 2, 2009, when she was arrested, was the interval during which she had failed to return to lawful detention. Thus, because Oglesby attempted to excuse her failure to return to work release for the entire interval from her discharge until her arrest, she cannot successfully contend that she was misled by the language of the charging information.

We also note that because Oglesby was excused from work release from February 14 until February 21, the State would not be able to retry her for her failure to return after that permission expired. More specifically, Oglesby’s failure to return to work release ripened on February 21 when her permitted absence expired and extended until her arrest on April 2 because her failure to return was a continuing offense. If Oglesby had been charged with failure to return to lawful detention for some other date falling within that period, the State

would necessarily have been required to establish that she had been given permission to leave on February 14, that it expired on February 21, and that her failure to return occurred after this expiration of her authorized absence. Therefore, a subsequent prosecution would necessarily rely on the same evidence as the prosecution in this case, and the State would be precluded from trying Oglesby a second time for that unauthorized absence from work release. See Allen v. State, 720 N.E.2d 707, 713 (Ind. 1999) (holding that a variance is fatal in light of double jeopardy concerns when the evidence establishes that the defendant remains subject to the likelihood of another prosecution for the same event, on the same facts and evidence).

For these reasons, we reject Oglesby's argument that there was a fatal variance between the charging information and the proof that was presented at trial. Thus, we decline to set aside Oglesby's conviction on this basis.

II. Sufficiency of the Evidence

Having found that the variance is not fatal, we must still determine if the evidence is sufficient to support Oglesby's conviction. Winn v. State, 748 N.E.2d 352, 357 (Ind. 2001). In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment, and neither reweighing the evidence nor assessing the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000). In this case, the State was required to prove that Oglesby "knowingly or intentionally fail[ed] to return to lawful

detention following temporary leave granted for a specified purpose or limited period. . . .”
I.C. § 35-44-3-5(C).

As discussed above, the evidence demonstrated that Community Corrections personnel permitted Oglesby to leave the work release program and obtain treatment for her liver disease at the hospital. Tr. p. 7. Oglesby was also instructed to return to the work release facility upon discharge from the hospital. Although Oglesby was transferred to IU Med Center on February 16 and released on February 21, she did not return to the facility. Id. at 7-8. Instead, Oglesby drove directly to her mother’s residence in Newburgh. Id. at 16.

The evidence also demonstrated that Oglesby ignored repeated requests from Community Corrections personnel requesting that she return to the facility and informing her that a warrant had been issued for her arrest. Id. at 9, 49. Because Oglesby failed to report to work release upon her discharge from IU Med Center as she had been instructed to do, we conclude that the evidence was sufficient to support the conviction.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.