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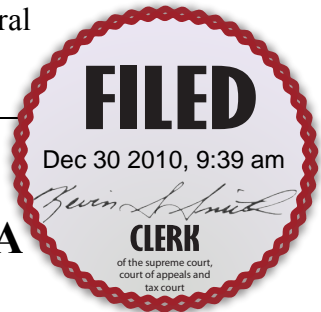
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**IN THE  
COURT OF APPEALS OF INDIANA**

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OPIE W. GLASS,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

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No. 30A01-1005-CR-247

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APPEAL FROM THE HANCOCK CIRCUIT COURT  
The Honorable Richard D. Culver, Judge  
Cause No. 30C01-0911-FC-267

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**December 30, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Opie W. Glass (“Glass”) was convicted in Hancock Circuit Court of Class C felony burglary and two counts of Class C felony theft. Glass also admitted to being an habitual offender. Glass appeals and raises two issues, which we restate as:

I. Whether the State presented insufficient evidence to support his convictions; and

II. Whether his convictions violate Indiana’s prohibition against double jeopardy.

We affirm.

### **Facts and Procedural History**

On November 11, 2009, Glass and his girlfriend, Teri Wildman (“Wildman”) decided to break into a business in Greenfield, Indiana in order to obtain money to buy crack cocaine. At approximately 2:00 a.m., Glass and Wildman drove to Wal-Mart, where they stole two flashlights for use in committing the burglary. The two then proceeded to the combined retail location of the Heavenly Scent Candle Company and Martin Military Surplus store (“the Store”), where Wildman had been employed previously. Wildman used a key she had retained from her employment at the Store to open the door, but Glass became concerned that an alarm may have been activated, so the two returned to their car and drove to a nearby parking lot. After waiting for about forty-five minutes, the pair returned to the Store and saw that no police had arrived. The two then entered the Store, and Wildman stood watch as Glass filled a duffle bag with numerous items, including a laptop computer, pocket knives, and a credit card. Glass and Wildman then placed the items in their car and left.

On November 30, 2009, the State charged Glass with Class C felony burglary and two counts of Class D felony theft. The State also filed an information alleging that Glass was an habitual offender. Following a jury trial in which Wildman testified for the State, Glass was found guilty as charged. Glass also admitted to the habitual offender allegation. Glass now appeals.

### **I. Sufficiency**

Glass first argues that the State presented insufficient evidence to support his burglary and theft convictions. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Atteberry v. State, 911 N.E.2d 601, 609 (Ind. Ct. App. 2009). Instead, we consider only the evidence supporting the conviction and the reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, then the verdict will not be disturbed. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008).

To establish that Glass committed Class C felony burglary, the State was required to prove that Glass broke and entered the Store with intent to commit a felony therein. Ind. Code § 35-43-2-1 (2004). To establish that Glass committed Class D felony theft, the State was required to prove that Glass “knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use[.]” Ind. Code § 35-43-4-2 (2004).

On appeal, Glass contends that the State did not meet its burdens because Wildman's testimony was incredibly dubious. Specifically, Glass argues that Wildman's testimony was inherently improbable for the following reasons: (1) Wildman was addicted to crack cocaine; (2) Wildman's criminal history; (3) Wildman was charged with burglary and theft as a result of the same incidents; (4) Wildman, not Glass, possessed a key to the Store; (5) Wildman's familiarity with the Store's layout; (6) Wildman was in possession of the credit card stolen from Heavenly Scent when she was arrested; and (7) a Wal-Mart surveillance video did not depict Glass stealing anything. We disagree.

The incredible dubiousity rule applies only in very narrow circumstances. See Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). Appellate courts may apply the rule to judge the credibility of a witness. Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007).

The rule is expressed as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id. (quoting Love, 761 N.E.2d at 810).

Here, the State presented sufficient evidence for the jury to convict Glass, and the incredible dubiousity rule does not apply. First, there is nothing so incredibly dubious or inherently improbable about Wildman's testimony that no reasonable person could

believe it. Wildman testified that she and Glass went to Wal-Mart, where they each stole a flashlight before proceeding to the Store. When they arrived at the Store, Wildman and Glass used Wildman's key to break in and steal multiple items. There is nothing equivocal or inherently improbable about this testimony.

Second, Wildman's testimony was corroborated by other evidence. Wildman testified that she and Glass drove to Wal-Mart, where they each stole a flashlight. Wal-Mart surveillance videos show both Glass and Wildman at Wal-Mart on the night in question. Additionally, Wildman testified that after she and Glass burglarized the Store, they used the stolen credit card to purchase a DVD player and a fifty-dollar gift card from Kroger. Kroger surveillance videos depict Glass and Wildman at Kroger at the relevant time. Thus, Wildman's testimony was not "wholly uncorroborated." Fajardo, 859 N.E.2d at 1208.

Glass also does not point out any inconsistencies in Wildman's testimony. Rather, he simply argues that Wildman's testimony should not be believed because she was not a credible witness. Glass's argument is simply a request for this court to reweigh the evidence and judge the credibility of witnesses, which we will not do. The State presented sufficient evidence to support Glass's convictions.

## **II. Double Jeopardy**

Glass next claims that his convictions for burglary of the Store and theft of items from Heavenly Scent violate Indiana's double jeopardy clause. Two or more offenses are the "same offense" in violation of Article 1, 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. Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999).

Here, Glass challenges his convictions under the actual evidence test, which “prohibits multiple convictions if there is ‘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.’” Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (quoting Richardson, 717 N.E.2d at 53). The defendant must show that the evidentiary facts establishing the elements of one offense also establish all of the elements of a second offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). Thus, under the actual evidence test, Indiana’s 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.” Id. This test requires the court to “identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury’s perspective[.]” Id. at 832.

Here, to convict Glass of Class C felony burglary, the State had to establish that Glass: (1) broke and entered the Store, (2) with intent to commit the felony of theft therein. Ind. Code § 35-43-2-1 (2004); Appellant’s App. p. 6. To convict Glass of Class D felony theft, the State had to establish that Glass: (1) knowingly or intentionally

exerted unauthorized control over the property of Chuck and Carolyn Martin, the owners of the Store, (2) with intent to deprive Chuck and Carolyn Martin of any part of its value or use. Ind. Code § 35-43-4-2 (2004); Appellant's App. p. 7.

Glass claims that the State presented evidence that Glass took multiple items from the Store, and that this evidence was used to support both the burglary and theft convictions. Specifically, Glass contends that "[t]he State used to same evidence to support all of the elements of the theft charge that it used to support some of the elements of the burglary charge." Appellant's Br. at 10. Thus, Glass appears to argue that there is a reasonable possibility that the jury used the same evidence that Glass took items from the Store to establish the intent element of burglary and all of the elements of theft.

But the evidence that Glass took items from the Store was not the only evidence presented to establish the intent element of burglary. Wildman testified that after learning that Wildman possessed a key to the Store, Glass repeatedly asked her to use the key to help him break into the Store in order to get money to buy crack cocaine. Wildman testified further that on the night of the burglary, she and Glass broke and entered the Store for the purpose of stealing money and items to trade for crack cocaine.

Under the actual evidence test, a "reasonable possibility" that the jury relied on the same facts to reach two convictions "requires substantially more than a logical possibility." Lee v. State, 892 N.E.2d 1231, 1236 (Ind. 2008). Instead, the existence of a reasonable possibility "turns on a practical assessment of whether the jury may have latched on to exactly the same facts for both convictions." Id. Here, the jury was

presented with detailed and distinct testimony supporting the intent element of burglary beyond the evidence presented to establish theft. Under these facts and circumstances, we cannot conclude that Glass has satisfied his burden of establishing a reasonable possibility that the jury used the same evidence to reach his burglary and theft convictions. See Vestal v. State, 773 N.E.2d 805, 807 (Ind. 2002) (convictions for burglary and theft did not violate double jeopardy clause where evidence that defendant removed cash and liquor from store established theft, and evidence that defendant discussed desire to get money, drove to liquor store late at night, and used a crowbar to break and enter store established burglary). We therefore conclude that Glass's convictions do not violate Indiana's double jeopardy prohibition under the actual evidence test.

### **Conclusion**

The State presented sufficient evidence to support Glass's convictions, and those convictions do not violate Indiana's constitutional prohibition against double jeopardy.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.